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DANVILLE, DEATH, AND DISCRIMINATION

PETITION FOR CLEMENCY
FOR JOHNNY WATKINS, JR.

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DANVILLE, DEATH, AND DISCRIMINATION

I. INTRODUCTION

For over one hundred years, the death penalty has been a tool of racism in Virginia. Black people have been sentenced to death far more often than white people, and they have been sentenced to death for crimes for which white people have not faced death. In the Sixties and Seventies, the civil rights movement made America look at the odious way in which racism permeated its systems of justice. In response, our government — each and every branch of it — accepted its responsibility to stand guard against the insinuation of prejudice and partiality into the administration of justice.

Now Danville seeks to have carried out the death sentences of Johnny Watkins, Jr., a black man. The process by which those sentences were procured was shot through with the impermissible factor of race. Two separate juries, from which the prosecutor had struck every qualified black person, sentenced Mr. Watkins to death. Significantly, both victims were white. Indeed, virtually everyone involved in the case other than Mr. Watkins — the judge, the jury, the prosecutor, the police investigators, even the court clerk — was white. This was no isolated occurrence: since 1977, Danville capital prosecutions reflect an unmistakable underrepresentation of black people as anything but defendants. Indeed, Danville's post-*Furman* pattern of capital punishment is indistinguishable from Danville's antebellum, Reconstruction, and Jim Crow pattern. That pattern is one of racism. Whether this pattern is overt or subconscious, it must be

repudiated. Accordingly, Mr. Watkins petitions the Governor to commute his death sentences to life imprisonment.

II. The Crime

Johnny Watkins, Jr., was convicted in 1984 of the capital murders and robberies of two convenience store workers, Betty Barker and Carl Buchanan, in separate incidents in the City of Danville. One of the victims was shot three times, the other four. At the time, Mr. Watkins was 22 years of age and had no significant criminal record. Two separate, all-white juries sentenced Mr. Watkins to death. He also received sentences of life imprisonment on the two robberies.

III. Race Played An Important And Impermissible Factor In Johnny Watkins' Case

The evidence that race is a factor in Danville capital prosecutions is historic, extensive, and irrefutable. For the past 100 years, race surely has been the best predictor of who gets the death penalty in both Virginia and Danville. Danville has a long history of racial strife, extreme among Virginia cities, which lasted well into the Nineteen Seventies. The widespread perception among black Americans that systems of justice treat them more harshly than whites is held by black citizens in Danville just as elsewhere.

More to the point, capital prosecutions in Danville unmistakably display a pattern of racism. In the post-*Furman* era, Danville has sentenced more men to death than any other jurisdiction in Virginia; every one of those men is black. In all but one case, their victims were white. But in Danville, black capital defendants are not judged or sentenced by juries with anything resembling a representative number of black persons

on them. Black citizens are underrepresented in the venires from which Danville chooses its juries, black citizens are stricken from those juries by the prosecution in excessive numbers, and black citizens often are completely absent from the petit juries that result. In a city whose population is over 30% black, black citizens have been shut out of any role in the administration of capital justice. In short, Jim Crow's tool remains in the hands of white people in Danville.

A. Racism In Capital Punishment And Criminal Justice In Virginia

1. Racism In Administration Of Capital Punishment

Virginia's record in capital punishment from 1908-1962[1] is one of unadulterated racism. Virginia executed 236 prisoners in that time.[2] Of these, 201 were black, an astounding 85%. The first person Virginia electrocuted was black, the last person Virginia electrocuted before *Furman* was black, and virtually all the ones in-between were black. During this period, Virginia executed 57 black men for crimes less than murder, including **attempted** rape and robbery. No white man was executed for a crime less than murder during this time. Virginia executed one woman — predictably, she was black. (Exhibit 1, Electrocutions Performed at the Virginia State Penitentiary.)

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[1]The Commonwealth began using the electric chair in 1908. Before that, executions were performed by county and city sheriffs. Questions about the constitutionality of capital punishment proliferated in the Sixties. Many of those questions concerned obvious racial discrimination in the administration of capital punishment. Partly in response to these questions, Virginia stopped executing prisoners in 1962.

[2]Joseph Robinson, a black man, hung himself hours before his scheduled execution. He is not included in these numbers.

Danville's record is similarly egregious. Danville incorporated as a city in 1890. Since that time, Danville has sentenced fourteen people to death. Between 1890 and 1962, Danville executed seven black men and one black women:

DEFENDANT	RACE	EXECUTED	CRIME
Margaret Hashley	Black	1/22/1892	Murder, domestic
James Lyles	Black	1/22/1892	Murder, domestic
Sylvester Griffin	Black	12/28/1900	Murder
Arthur Wilton	Black	2/06/1903	Murder
Will Jones	Black	10/09/1903	Murder
George Woods	Black	5/22/1914	Murder, domestic
Nelson Cross	Black	4/15/1946	Murder
Buford Morton	Black	10/17/1947	Rape of a white woman

(Exh. 2, Excerpts From Files of Watt Espy.) Post-*Furman*, of course, Danville proposes to continue this pattern with the six black men (seven sentences) now on death row.

Before Danville became a city, it was part of Pittsylvania County. From 1837-1890, Pittsylvania County executed 16 people. Fourteen of them were black.[3] Both of the white men, Walter Hamilton Yates (1882) and William Bennett (1838), were convicted of the murder of white men. (Exh. 2.) But if Pittsylvania on rare occasions executed white people, Danville never has sentenced to death **any** white person. In

[3]Four of these, Nat (owner Mahan), Jordan (owner Ogburn), Robin (owner Adams), and David (owner Stratton) were slaves. Under the Commonwealth's law at the time, a slave owner was entitled to monetary compensation when his property, i.e., his slave, was executed. These values were not always recorded, but slave Robin was valued at $340 and slave David at $650.

sum, Danville has displayed an unmitigated record of racism in the administration of capital punishment that appears unabated.

2. Racism In Danville

Danville's record of racism in the administration of capital punishment is not out of place with its overall history. Danville was a center of strength for the Ku Klux Klan in the early part of this century. (Exh. 3, Chalmers, D., *Hooded Americanism: The First Century Of The Ku Klux Klan, 1865-1965*, Doubleday, 1965). Even in modern times, the history of Danville demonstrates that it remains entrenched in its racist past. Although it did not receive the publicity that was generated in Alabama and Mississippi, the resistance of Danville's white leaders to civil rights for black citizens was comparably intense and violent.

The nature of the Danville struggle was related by former Southern Christian Leadership Conference Executive Director Wyatt T. Walker in a February 10, 1991 interview in the *Danville Register & Bee*:

> . . . when I was in Danville, Danville was as bad as Birmingham, though not in size. The police here were brutal. And your city fathers . . . city council, they were intransigent as any place I've ever been. I really think Danville is one of the worst cities I've ever been in, you know, of that era, with the single exception, I think, of Shreveport, La.
>
> I know of no city where they arrested the leadership for . . . what was the charge? . . . Treason, charged us with treason. It was a 19th century statute they used on us.
>
> * * *
>
> My guess is that racism is still very deep and pervasive — not with as much intentionality as there was in 1963 — but it's here . . . .

(Exh. 4, "Civil Rights Leader Takes Time To Reflect," *Danville Register & Bee*, February 10, 1991.)

Outrageous conduct by Danville officials included an instance when the police actually broke down the doors of black churches in order to arrest civil rights leaders. (Exh. 5, T. Branch, *Parting The Waters*, Simon & Schuster, New York, 1988.) In another incident, on June 10, 1963, the City fathers set a violent trap for civil rights activities. They first deputized employees of the public works department and armed them with brand new baseball bats and clubs. They then directed demonstrators into a dead end alley, where they ordered them to disburse. Of course, the demonstrators could obey that order only by moving towards the armed workers, who proceeded to beat them and attack them with fire hoses.[4] (Exh. 6, 1963 Newspaper Articles.) The mayor announced that "We will hose down the demonstrators and fill every available stockade." (Exh. 5.)

Danville also battled the civil rights movement by prosecuting demonstrators under seldom-used Virginia Code section 18.1-422, which was originally aimed against the Klan and made it a crime to incite one race to violence against the other. Prosecutions also proceeded under a broad injunction criminalizing peaceful demonstration. Hundreds of demonstrators were thus prosecuted and convicted. The trials were so unfair that the Justice Department took the unusual step of supporting removal of these cases to the federal court and filed a brief that concluded that the presiding judge in Danville was biased and had decided cases before he even heard the evidence. (Exh. 6.) Even into the 1970s, these convictions, which were intended specifically to punish persons peacefully working for basic racial equality, were being defended in the Supreme Court of Virginia by the current Commonwealth's Attorney for

[4]A song was written about this incident. (Exh. 7, M. King, *Freedom Song*, Wm. Morris, New York, 1972.)

the City of Danville, William H. Fuller, III. Indeed, in 1983, the city fathers who had so vigorously resisted the efforts of black citizens to obtain their civil rights were as unreconstructed as they had been in 1963. (Exh. 8, *Danville Sunday Register*, January 16, 1983.)

The point of this history is not that every person in Danville is racist; they are not. But against this background, Danville's unmistakable pattern in capital prosecution admits of no explanation other than systemic racism.

3. Racism In Administration Of Criminal Justice

Recent events in Los Angeles have brought home to the nation the almost universal feeling among black Americans that our systems of justice treat them more harshly. The *USA Today* not long ago ran a series setting forth some disturbing statistics on racial disparities in prosecution of drug offenders. (Exh. 9, *USA Today*, Excerpts, July 23-27, 1993.) Even the staid *Wall Street Journal* published an article about the perception among middle class black citizens that the criminal justice system is unfair. Most pertinent to this case is the statement in that article by Mark Mauer, assistant director of the Sentencing Project, a Washington-based research group. Noting that black drug offenders receive sentences 49% longer than comparable white offenders, Mr. Mauer said, "I don't think there is a conspiracy, but if there were a conspiracy the results would be very similar to what we see now." (Exh. 10, *Wall Street Journal*, August 10, 1993.)

Black citizens in Danville have the same perception. A respected Danville community leader and former councilman has testified that black citizens of Danville

hold the view that Danville's criminal justice system discriminates against blacks. (Exh. 11, Excerpt from Trial Transcript, Commonwealth v. R. Watkins.) As we show below, the death penalty in Danville provides graphic evidence that this view is well founded. And, if there is no conspiracy, the results are the same as if there were one.

B. How Race Played A Role In Danville

1. Race Of Defendants And Victims As A Factor In Danville Prosecutions

There can be little doubt that the death penalty process in the United States is heavily influenced by the issue of race. In a famous Georgia study, researchers determined that a black defendant who killed a white victim was **22** times more likely to receive the death penalty than a black defendant who killed a black victim, and 7 times more likely to receive the death penalty than whites who kill blacks. *McCleskey v. Kemp*, 481 U.S. 279, 326-27 (1987).[5] While there is no comparable Virginia study, the Commonwealth's history, and Danville's history in particular, certainly do not suggest that a contrary result would be found here.

Of the 236 persons executed in Virginia between 1908 and 1962, 201, or 85%, were black. No white person was executed for any crime less than murder, while 57 black men died for the crimes of rape, robbery, **attempted** rape, and **attempted** robbery. Newport News executed Linwood Bunch for rape in 1961. (Exh. 1.) As recently as 1963, Thomas Wansley, a black man, was sentenced to death for the rape of two white

[5]The so-called "Baldus" study at issue in *McCleskey* accounted for 230 non-race based variables and involved 2,000 capital cases.

woman in the City of Lynchburg.[6] Since 1982, when Virginia resumed executions, 12 of the 22 persons executed in Virginia,[7] or 55%, have been black, a figure that would climb to nearly 57% with the execution of Mr. Watkins. Virginia is less than 30% black.

Danville's record in this respect is stark. So far as we can tell, from 1977-1985, seven defendants have faced or could have faced charges of capital murder. All five black defendants have been charged with capital murder and have been sentenced to death by the juries that tried them.[8] One white defendant, Kent Evans, committed a convenience store robbery-murder. He was charged with first degree murder and robbery and sentenced to life plus 20 years. The other white defendant, Christopher Walthall, nearly decapitated his victim with a broken bottle and robbed him. Walthall was sentenced to two life terms in accordance with an agreement between the defense and the prosecutor. During this time, the prosecutor never asked for death against a white defendant; he always asked for death against black defendants. Since 1986, two more black men have gotten the death penalty. Significantly, six of the seven death sentences imposed on black men in Danville involved white victims.[9] Danville's results are in perfect accord with the Georgia study demonstrating that the race of defendant and victim powerfully predicts who gets the death penalty and who does not.

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[6]Wansley's conviction was overturned by the Virginia Supreme Court. He was retried and sentenced to life in prison. Wansley's case became a matter of extraordinary public concern because of the racism that had infected his case. Wansley v. Commonwealth of Virginia, 210 Va. 462 (1970).

[7]Wayne DeLong, a white man convicted of killing a black police officer in Richmond, killed himself just over one month before his scheduled execution. He is not included in these numbers.

[8]Robert McClark's death sentence was commuted to life imprisonment by the judge.

[9]Since McClark's sentence was commuted, it is not included in these figures. McClark's two victims were both black.

2. Underrepresentation Of Blacks On Danville Venires And Juries

a. In Qualified Venires

The portion of Danville's population that is black has exceeded 30% since 1980. Today it is 37%. (Exh. 12, Population Figures and Census Data.) On average then, qualified venires — that is, venires from which have been excluded persons who are biased or who cannot follow the law — in Danville should, on average, contain at least 30% black citizens. A qualified venire consists of 20 persons, so on average six or more prospective jurors should be black.

This has not happened even once; every qualified venire in every capital case tried in Danville since 1980 has seriously underrepresented black citizens. There have been six such venires, or 120 prospective jurors. Given the percentage of blacks in Danville's population, 36 or more of those prospective jurors should have been black. The actual number is little more than one-third of that: fifteen.

DEFENDANT	CONVICTION DATE	BLACKS IN VENIRE
Robert McClark	5/17/84	3
Johnny Watkins I	7/13/84	1
Johnny Watkins II	9/28/84	2
Terry Williams	9/30/86	5
Ronald Watkins	9/28/88	1
Calvin Swann	7/07/93	3
TOTAL		15

same venire of 35.

L. Gott help (2); Fuller (1)

Fuller / Gerry 2

R. Smitherman; trial att in transcript. called L. Gott.

On the whole, the representation of blacks in qualified venires has been just over 12%, not over 30% as expected. In one case, that of Terry Williams, the actual percentage has approached the expected percentage — 25% v. 30%. But in the other five cases, the number of black persons in the qualified venires has been at least 50% lower than expected. In the cases of Johnny Watkins II and Ronald Watkins, the number of black persons in the qualified venire has been over 80% lower than expected. This is not a coincidence. Whether overtly or subconsciously, Danville's system of selecting and qualifying prospective jurors results in disturbing underrepresentation of black citizens in capital juries.[10]

b. During Peremptory Strikes

Once a qualified venire is obtained, both prosecution and defense have an opportunity to remove jurors with peremptory strikes. Each side receives four strikes. These strikes may be exercised for any reason *except one*: they may not be used to remove prospective jurors on account of race. The record in the Danville capital murder trials indicates clearly that the prosecutor is striking black jurors in excessive numbers.

As shown above, after qualification, 15 of 120 prospective jurors were black. The prosecutor had a total of 24 strikes, so that he could remove one-fifth of the prospective jurors. Distributed randomly, you would expect that the prosecutor's strikes would

[10]One reason for this may be that Danville, until very recently, selected prospective jurors only from voter registration lists. Given the historic difficulty black citizens have had registering to vote, the percentage of black persons on voter registration rolls understates the black population. See, e.g., Thornburg v. Gingles, 478 U.S. 30 (1986).

remove one-fifth of the black jurors, that is, three jurors. In fact, the prosecutor removed nine, or **60%**, of the available black jurors. Here is the distribution of his strikes:

DEFENDANT	STRIKES BY FULLER	STRIKES BY DEFENSE
Robert McClark	2	0
Johnny Watkins I	1	0
Johnny Watkins II	2	0
Terry Williams	2	0
Ronald Watkins	0	0
Calvin Swann	2	1
TOTAL	9	1

In three cases, both of Mr. Watkins' and Calvin Swann's, the prosecutor used his strikes to remove all remaining prospective black jurors, thereby obtaining an all-white jury. Interestingly, in the one case where the prosecutor did not strike a black juror, Ronald Watkins' case, defense counsel had already filed a motion to quash the venire for not being a fair cross section of the community. Though he struck no black jurors, the prosecutor nonetheless revealed his race consciousness by offering, in response to the defense motion and the fact that prospective jurors qualified with only one black person, "pack" the remaining two spots with whatever black jurors remained in the hall. Since deliberately installing jurors on account of race is as offensive to the Constitution as deliberately excluding them, defense counsel would have no part of this offer. (Exh. 13, Excerpt From Trial Transcript of Commonwealth v. R. Watkins.) The result was a jury with eleven white members and one black member.

c. In Petit Juries

As a result of the process described above, the six black defendants in Danville faced juries that in no way resembled the Danville community. Three of those juries contained no black citizens, two contained only one black citizen, and one jury contained three black citizens. In the one jury that came close to fairly representing the community (Williams), the prosecutor still had used two of his strikes to exclude black jurors.

DEFENDANT	NUMBER OF BLACK JURORS	PERCENTAGE OF BLACK JURORS
Robert McClark	1/12	8.5%
Johnny Watkins I	0/12	0.0%
Johnny Watkins II	0/12	0.0%
Terry Williams	3/12	25.0%
Ronald Watkins	1/12	8.5%
Calvin Swann	0/12	0.0%
TOTAL	5/72	6.9%

Given that Danville's population is over 30% black, the absolute disparity between expected black representation on petit juries and actual representation is over 23. Amazingly, the number of black persons on petit juries in Danville's capital cases is over 75% lower than would be expected given Danville's black population. This, too, is no coincidence.

3. Danville's Recent History Of Excluding Black Citizens From Jury Service

It should come as no surprise that Danville is excluding blacks from jury service, because Danville has been doing so for virtually all its history. Of course, it goes without saying that Danville excluded black citizens from jury duty through most of the Jim Crow era. But Danville's recent history is little better. On at least three occasions, federal courts have found as a fact that Danville was systematically excluding blacks from jury service.

In *Peyton v. Peyton*, 303 F. Supp. 796 (W.D.Va. 1969), Judge Dalton ruled that Danville was discriminating on the basis of race in the selection of jurors. In *Hairston v. Cox*, 361 F. Supp. 1180 (W.D.Va. 1973), Judge Turk concluded that Danville had engaged in "systematic exclusion of blacks from jury duty." And again in 1973, the federal court ruled that Danville was deliberately putting one token black person on grand juries in Danville. *Fuller v. Cox*, 356 F. Supp. 1185 (W.D.Va. 1973). (Exh. 14, Opinions in Three Federal Cases.)

Danville's history, then, is one of both tokenism and outright exclusion. And as demonstrated above, both traditions survive to this day in Danville's capital prosecutions.

C. Conclusion

Officials in Danville may respond to this evidence by denying that they discriminated on account of race or by saying that they excluded a prospective black juror for this reason or that. But the question is not one of being or saying; it is one of doing. The facts are that for 100 years, for 30 years, for 10 years, and even today, what Danville is doing is excluding black citizens from its system of justice in capital

prosecutions. What Danville is doing is procuring death sentences against black defendants by means of a racially discriminatory system. What Danville is doing is intolerable.

The question may arise, if this pattern of discrimination is so wrong and so clear, why no courts have corrected it. Unfortunately, because of procedural technicalities, the courts have turned a deaf ear to Mr. Watkins' complaints of racism in the capital sentencing process in Danville. His trial attorneys did not raise an objection to Mr. Fuller's use of his peremptory strikes.[11] Thus, any claim of racial bias was procedurally defaulted. Although his state habeas corpus counsel attempted to raise a claim under *Batson v. Kentucky*, 476 U.S. 79 (1986), his claims were rejected, and ultimately it was ruled that *Batson* would not be applied retroactively. *Butler v. McKellar*, 494 U.S. 407 (1990). Mr. Watkins' conviction became "final" for the purposes of the nonretroactivity doctrine thirty days before *Batson* was decided.[12]

Furthermore, the jury trials of Ronald Watkins, Terry Williams, and Calvin Swann all occurred after not only Johnny Watkins' trial, but after his state habeas corpus hearing. Thus, he could not have produced this corroborative evidence of racially discriminatory jury selection in Danville capital murder trials. Mr. Watkins attempted to raise that evidence in the United States District Court in his habeas corpus

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[11]In fairness to them, Mr. Watkins' trials occurred before the Supreme Court's decision in *Batson v. Kentucky*.

[12]Certiorari was denied Mr. Watkins on March 31, 1986. *Batson* was decided on April 31, 1986.

proceeding,[13] and initially, he was granted an evidentiary hearing on that issue. However, shortly thereafter, the United States Supreme Court decided *Keeney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992) and the Attorney General moved the Court to reconsider its decision to hold an evidentiary hearing. The Court agreed with the Attorney General that *Keeney* precluded such a hearing even though the evidence Mr. Watkins sought to introduce did not exist at the time of his trial or state habeas corpus hearing. It therefore vacated its prior decision and dismissed the petition, a decision which was upheld by the Fourth Circuit.

Thus, no court has considered the merits of Mr. Watkins' complaint that the trial process which resulted in his death sentences was infected by racism, that he was sentenced to die by juries from which all black citizens had been systematically excluded in cases prosecuted by a white prosecutor, before a white judge, in a city that has as intense a history of racism as any in the Commonwealth of Virginia. It therefore falls to the Governor to consider whether, in light of all those circumstances, Johnny Watkins, Jr., a young black man, has been sentenced to death by a process tainted by racism, and if so, whether, in 1994, the Commonwealth is still so indifferent to the reality of racism that it is prepared to carry out those sentences regardless of that fact.

IV. The Performance Of Trial Counsel And The Excesses Of The Prosecutor Made Johnny Watkins' Trial Unfair

While race is the controlling characteristic of Mr. Watkins' trials, a number of other factors contributed to the result. The significance of those factors, however, must

[13]Calvin Swann's trial did not occur until after Mr. Watkins's federal petition had been dismissed. Mr. Watkins brought to the attention of the federal courts the cases of Ronald Watkins and Terry Williams.

be considered in the racial context, i.e., that Mr. Watkins was being prosecuted in a jurisdiction that has done little to shed its discriminatory heritage, by all-white juries for the killings of two white victims.

Obviously, the crimes themselves were significant factors. Two innocent persons died, for which a sentence of death could be reasonably considered. However, the facts of the crimes themselves do not fully explain the result here. Indeed, a review of Virginia's death penalty cases would reveal that the circumstances of these killings do not approach the horror of most of those cases. At the time Mr. Watkins' cases were reviewed on direct appeal by the Virginia Supreme Court, more than 50% of the robbery-predicate capital murders that were tried in the Commonwealth had resulted in sentences of life imprisonment rather than death.[14] (Exh. 15, Affidavit of Kelly Brandt with Attachments.) And, indeed, many of those life sentence cases contained facts as bad or worse than those present here. *See, e.g. Virginia v. Freeman*, Record No. 830290 (victim raped and robbed; 17 stab wounds; *Commonwealth v. Robertson*, Record No. 810303 (four shots from 30/30 at close range); *Commonwealth v. Painter*, Record No. 801644 (three blows to back of head in rapid succession while victim lying in an alley); *Strother v. Commonwealth*, Record No. 801151 (multiple stab wounds); *Commonwealth v. Blue*, Record No. 791100 (numerous blows to the head and stab wound to abdomen); *Commonwealth v. Athey*, Record No. 780965 (woman and six year old son with

[14]Nineteen of the 41 (46%) robbery predicate capital convictions that had been appealed to the Virginia Supreme Court had resulted in life sentences. Since this does not include life sentence cases not appealed to the Supreme Court, the actual number receiving only life sentences was obviously over 50% Since defendants convicted of capital murder but sentenced to life imprisonment run the risk of being sentenced to death on retrial, there is obviously a substantial disincentive to appeal such a sentence.

multiple stab wounds and throats cut; child bound); *Commonwealth v. Robinson*, Record No. 841744 (multiple stab wounds to chest with scissors, puncturing aorta); *Wilkins v. Commonwealth*, Record No. 840142 (shop owner beaten in head 12-13 times). *Id.* Thus, but for the racial aspects of this case, a death sentence was by no means a certainty. *Id.*

In fact, a fair jury, one that reflected the **entire** community and could, therefore, more likely reach a decision unfettered by racial bias, had ample reason not to sentence Mr. Watkins to death despite the nature of the crimes.

In the first trial, the evidence created the portrait of a severely dysfunctional family. The evidence established that Mr. Watkins, along with his brother, was abandoned by his mother due to unemployment and ill health. Mr. Watkins was only three years old when he was brought to Virginia by her, where his elderly aunt raised him. The aunt's husband was himself ill, however, and remained in the hospital for years before dying. Mr. Watkins' aunt, therefore, raised him and his brother by herself. There was never a father figure in Mr. Watkins' life.

The jury in the first trial had the opportunity to observe for itself the extraordinary indifference of Mr. Watkins' mother to the very question of whether he lived or died. After she and Mr. Watkins' stepfather had testified, they asked to be excused, because they had to leave early to return to New York! The jury thus had a dramatic first hand demonstration of the fact that Mr. Watkins' mother, who had devoted precious little of her time to him over the years, thought it more important to return home than to see if her son was sentenced to die in the electric chair.

Several witnesses testified that Mr. Watkins was always nice, always polite, always quiet, and never caused any problems. He ushered and went to Sunday School at the church he attended. Once old enough, he worked regularly. He gave money to his aunt when he could. The only evidence of criminal conduct was two misdemeanors.

In the second trial, much the same evidence was presented, including that related to his abandonment and upbringing and to his heretofore positive character and lack of criminal background. In addition, it was established that his father had little or no contact with Mr. Watkins and provided little or no support, and that his stepfather was killed in a bar. Between trials, his mother had moved without leaving word as to her whereabouts.

Thus, a jury with any empathetic members could readily have decided not to impose death. The crimes, while providing a basis for imposition of the death penalty if the jury so chose, were not so horrifying that they mandated it. The mitigating evidence, on the other hand, demonstrated that Mr. Watkins had grown up under difficult circumstances, having been emotionally and physically abandoned by his parents. While this evidence did not compel a life sentence, it did provide a substantial basis for such a result.

What was lacking, however, was a jury that would have any interest in empathizing with the defendant and lawyers acting zealously as his advocate. Mr. Watkins' juries likely could not have related to him or his life at all. Instead, his life was judged by an all-white jury for the murders of two white citizens, in a jurisdiction that, for more than a century and a half had not hesitated to execute black men, and that

plainly applied different standards to black defendants than it did to white. All the mitigating circumstances in the world would likely have been unable to overcome the racial hurdle which Mr. Watkins faced.

In addition, a jury which reflected, at least to some degree, Johnny Watkins' community, would have been less easily influenced by the prosecutor's transparent appeals to their prejudices. In the first trial, for example, Mr. Fuller introduced a particularly graphic, close-up color photograph of the victim's body and repeatedly displayed a blood-soaked rug, which he never even introduced into evidence. The photograph, while admissible, was unnecessary, since the Commonwealth had introduced less offensive pictures of the victim and detailed expert testimony as to the nature of her wounds. "The additional photograph amounted to nothing more than sheer exploitation intended to inflame the jury's emotions against the defendant." (Exh. 16, *Brief of Appellant*, Record No. 841551, pp. 34-35.)

As defense counsel also noted in their brief to the Supreme Court, "[t]he [blood soaked] rug was immaterial and cumulative as evidence. It was produced several more times before the jury, almost as if to wave, literally, a red flag in front of them. [T]he rug was intended not as evidence, but as exploitation to arouse the jury's sentiments against the defendant." *Id.* Given the racial dynamics of this trial, achieving such arousal required precious little effort.

The argument of the prosecutor was no less inflammatory, and in some respects plainly less improper, than his manipulation of the "evidence" in these racially charged trials. In the second trial, for example, he discussed at length all the constitutional

protections Mr. Watkins had received from the Commonwealth, from the right to remain silent to the right to have the assistance of a psychiatric expert to the presumption of innocence and the requirement that guilt be proven beyond a reasonable doubt. (Exh. 17, Excerpt from Trial Transcript, Commonwealth v. Watkins.) He then contrasted these protections to the defendant's conduct, concluding that "Carl Buchanan didn't have an opportunity to prove beyond a reasonable doubt his right to live," a plain and improper invitation to the jury to ignore the defendant's right to reasonable doubt and to punish him for not providing the victim with the protections he had himself been given. (Exh. 17: 581-582) He made a very similar argument in the first trial, after discussing all the constitutional rights the defendant had been afforded, including his right to a trial: "[B]ut you know, Betty Jean Barker ... she didn't get three days to plead for her life. She didn't get three days to tell you or anybody else, how dear life was to her. She didn't even get a few seconds **to prove beyond a reasonable doubt** that she was too young to die." (Exh. 17: 381-383). While such an argument may make for good politics, it plainly has no place in the trial of any criminal case. Unfortunately, once again, Mr. Watkins' trial counsel did nothing to protect him from the improprieties in Mr. Fuller's argument.

But Mr. Fuller's most outrageous appeal to the jury was his invocation of mandatory death penalty language from the Bible, which again went unchallenged by defense counsel:

> We're talking about the laws of the State of Virginia and the death penalty is very much a part of that law and has been for hundreds of years except for the period of time that the United States Supreme Court made some ruling that required us to change the death penalty. It's been the rule of nations for centuries and centuries, from biblical times to the present,

> because countries and people found that in some cases it is the only appropriate punishment. It is the only way to insure (sic) that a person like Johnny Watkins never kills anybody else. Not life in prison but death. It is not revenge nor is it retribution when you fix a punishment according to the laws of this State that you've already indicated you could abide by. It is not revenge when centuries of people and countries have decided that it is the only appropriate penalty in some cases. It was not revenge in Exodus Chapter 21, Verse 12 which states, "Whoever strike a man a mortal blow shall be put to death," or in Verse 14 which states, "When one man kills another after scheming to do so you shall take him from my alter and put him to death." It is the only appropriate punishment in some cases. (Exh. 17: 577-578).

Whatever ambiguity the prosecutor allowed in his reference to "in some cases" he eliminated with the Biblical passages themselves, which mandated a sentence of death for **every** murder. Of course, such a standard for assessing punishment is both contrary to the law of Virginia and to the Constitution of the United States.[15]

Nor was this a fleeting reference to such matters. Mr. Fuller made this improper argument a centerpiece of his rebuttal argument - it is how he began his argument. Of course, by including it in his rebuttal, he precluded any response from the defense. Their only opportunity to defend their client against Mr. Fuller's gross distortion of the law and outrageous appeal to the jurors to put Mr. Watkins to death because the Bible said they had to[16] was to object, and this they failed to do.[17]

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[15]*Woodson v. North Carolina*, 428 U.S. 280 (1976)

[16]Mr. Fuller also neatly blamed the United States Supreme Court for interfering with the centuries old Biblical tradition of mandatory death for murderers.

[17]The courts have never had the opportunity to address Mr. Fuller's misconduct. As noted, trial counsel failed to object, thus defaulting the obvious claim that Mr. Watkins' constitutional rights had been violated. State habeas counsel then failed to raise this as part of his claim of ineffective assistance of counsel. Therefore, when the claim was raised in federal habeas corpus, it was precluded by the state habeas default as well.

Mr. Watkins' case was plainly hampered by the quality of representation he received. In a number of significant respects, counsel simply failed to perform as his advocate. Nowhere was the lack of advocacy more evident than in the conduct of voir dire, a critical part of a capital trial.[18] When one venireman (Mr. Morrison) stated **twice** that he would automatically impose the death penalty if he found the defendant guilty of capital murder, thus making him excludable for cause, Mr. Watkins' own attorney went to great pains to rehabilitate him. Only after a third statement from Mr. Morrison that he would automatically impose death did the court excuse him, and then over the objection of defense counsel. (Exh. 17: 255, 257-258, 269-270).

Venireman George also stated that he would automatically impose the death penalty. The trial judge then went to great lengths to rehabilitate Mr. George as a potential juror by asking him leading questions: "... [W]ould you follow the instructions of the Court, or would you automatically impose the death penalty?" Having had the correct answer suggested to him by the judge (to answer "no" would require the juror to tell the judge that he would defy his authority), Mr. George, of course, then stated that he would "follow the instructions of the Court." The trial judge continued to unabashedly lead Mr. George through the correct answers. Even though this juror was unambiguously committed to the imposition of the death penalty at the beginning of voir dire, counsel for Mr. Watkins not only did not object to this improper voir dire by the

[18]Neither jurors who would automatically impose death upon a finding of guilt for capital murder, nor those who would refuse to impose death no matter the circumstances, may serve on a capital jury. Thus, the death qualification process during voir dire is intended to identify those veniremen who can not consider both options. *See, e.g., Morgan v. Illinois*, 112 S.Ct. 2222 (1992).

trial judge,[19] they did not even attempt to undermine Mr. George's sudden conversion to judicial correctness. (Exh. 17: 255-257). They then failed to strike him from the jury and Mr. George became **foreman**. Due to the incompetence of his trial counsel, therefore, Mr. Watkins was sentenced by a jury whose foreman abandoned his commitment to automatic imposition of the death penalty only because the judge told him it was the "wrong" answer.

Venireman Backels specifically stated that, although she was largely opposed to the death penalty, she would follow the court's instructions. Defense counsel, however, rather than attempting to bolster her ability to follow the court's instructions, actually attempted to prove the opposite.

> Mr. Crider: But you're saying you would ignore the instructions, and you would give life, as opposed to death ... is what you are saying?

Counsel then conceded her exclusion from the jury. (Exh. 17:472-474). Counsel's advocacy on behalf of the Commonwealth clearly represents a complete breakdown in the adversary process.

Furthermore, as noted above, counsel did nothing to protect Mr. Watkins from being judged by an all-white jury, even though they apparently recognized the problem.[20] They should have known that only one black juror had sat on the McClark

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[19]A trial judge may not suggest the "correct" answers during voir dire, since proof that a juror is impartial must emanate from the juror himself. *Bausell v. Commonwealth*, 165 Va. 669, 682-83 (1935); *McGill v. Commonwealth*, 10 Va. App. 237, 242 (1990).

[20]In their brief to the Virginia Supreme Court, trial counsel noted the racial composition of the jury, but rationalized their failure to protest in the trial court "because this Court repeatedly has rebuked such challenges." Exh. 16. That, of course, is a poor excuse for not objecting to the jury selection process.

jury only two weeks before Mr. Watkins' trial and that Mr. Fuller had struck two blacks in that case. They then faced two all-white juries themselves, knowing that Mr. Fuller had struck the only black juror in one of those cases and the only two black jurors in the other. Yet they did nothing to protest the composition of the jury, even in the second trial, and even though they knew that the issue of race would play a major factor in the trial.

In their closing arguments, counsel vouched for what a wonderful person the victim was, based upon what they had heard about him **"outside this trial** and in this trial." They told the jury that "the killing of Miss Barker was senseless, brutal, uncalled for, and running entirely against the grain of everything that you and I and perhaps all of us were brought up and raised to believe in;" that their own client had breached a "sacred trust to honor the life and property of others;" that the question "why should we give him mercy when this man probably has shown none" is a "difficult one" that he "could argue to [the jury] all night" and not know if he could convince them or even give them a satisfactory answer. They posed the question "If we take another life will that improve matters any?" Incredibly they answered the question "Arguably." Thus, not only did counsel do nothing to object to the prosecutor's excesses, but they gave the jury precious little reason not to follow the Biblical mandate that Mr. Fuller had foisted upon them. Indeed, counsel virtually admitted to the jury that even they did not believe that there was a good reason not to follow Mr. Fuller's agenda.[21] (Exh. 17:367-377, 567-570).

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[21]While one could certainly understand counsel admitting the weaknesses in his case, these counsel went far beyond any rational use of such a strategy.

Once again, the performance of counsel as to all these matters was never considered on the merits by either the Virginia or federal courts. State habeas counsel simply did not raise the issue of the prosecutor's closing arguments, the death qualification of the jury, or the performance of defense counsel in relation to such matters. As a result, when those matters were raised in federal habeas corpus, they were dismissed as defaulted.

V. JOHNNY WATKINS' BACKGROUND AND HISTORY MERIT CLEMENCY

As noted above, Johnny Watkins did not have a significant criminal history prior to these events. Furthermore, the significant difficulties of his life are apparent. It is indeed extraordinary that any mother would actually leave the capital murder of her son because she wanted to return home. Her actions demonstrate more graphically than any testimony the parental abandonment which Mr. Watkins suffered.

In addition, the evidence demonstrates that there were many good and worthwhile parts of Mr. Watkins' life. Several witnesses testified that Mr. Watkins was always nice, always polite, always quiet, and never caused any problems. He ushered and went to Sunday School at the church he attended. Once old enough, he worked regularly. He gave money to his aunt when he could. These circumstances demonstrate that Mr. Watkins, prior to these incidents, was capable of living a valuable, law-abiding life.

Since his arrest, Mr. Watkins has demonstrated his ability to live in a prison environment, even with the unique pressures of death row. He has never been found with a weapon while in prison, nor has he assaulted or threatened corrections personnel.

He has never attempted to escape. Shortly after he arrived at Mecklenburg, he had an altercation with another inmate, which did not result in any injury. And several months ago, under the pressure of an imminent execution date, he got into a fight while playing basketball. Over a ten year period, this prison record most certainly does not indicate that Mr. Watkins would be a danger to either staff or other inmates while in prison.

Mr. Watkins' other administrative charges consist of several charges of possessing homemade wine and minor infractions of the rules, such as not standing for count, although such offenses often are denoted with such lofty labels as "delaying and hindering" or "refusing a direct order." These are charges which **every** inmate on death row receives over the course of the years. The true significance of these breaches of the rules, however, can be seen from the fact that Mr. Watkins has never received more than two days in isolation for **any** offense. (He received cell restriction for the recent altercation with another inmate.) Simply put, Mr. Watkins does not represent a danger if he remains in prison.

VI. CONCLUSION

Johnny Watkins, Jr., was tried **twice** and sentenced to death by all-white juries for crimes against white persons in a city with a black population over 30%. Hardly any black citizens were called as jurors in Mr. Watkins' cases, and those few that were called were removed from the jury by the prosecutor. This image of "justice" from our governments was supposed to have been left behind decades ago, yet it persists in Danville. Just last year, another all-white jury in Danville sentenced another black man to death, continuing a long and ugly tradition. Beyond the indignity and insult inflicted

on all black citizens of Danville by the prosecutor's exclusion of them from an integral part of our democratic government, this pattern of exclusion deprived Mr. Watkins of a fair trial before a fair cross section of his community. This inequity was exacerbated by the lack of zeal and competence of Mr. Watkins' defenders and the excesses of his prosecutor.

This petition raises no question whether Mr. Watkins deserves punishment for his crimes. Instead, this petition questions whether the discriminatory manner in which Danville set the level of his punishment should be validated or repudiated. Hundreds of years of harsh and inequitable treatment of black defendants in America's courts provide the answer. Whether overt or subconscious, Danville's latter-day banishment of upright black citizens from the criminal justice process in capital murder trials should be rejected, and Johnny Watkins' death sentences should be commuted to life imprisonment.

JOHNNY WATKINS, JR.

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