

APPLICATION FOR EXECUTIVE CLEMENCY

in the matter of

TIMOTHY DALE BUNCH

vs.

THE COMMONWEALTH OF VIRGINIA

addressed to

The Honorable Lawrence Douglas Wilder

Governor of the Commonwealth of Virginia
State Capitol
Richmond, Virginia

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On Behalf of Timothy Dale Bunch

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Timothy Dale Bunch, by and through his undersigned counsel, respectfully requests that the Governor, pursuant to Article V, Section 12 of the Constitution of Virginia and Va. Code Sections 53.1-229 et seq., consider this request for commutation of his sentence of death by execution, presently scheduled for Thursday, December 10, 1992, and commute his sentence of death to one of life imprisonment.

CLEMENCY PETITION OF TIMOTHY DALE BUNCH

I. INTRODUCTION

Timothy Dale Bunch is scheduled to die in the electric chair this year on December 10, 1992 -- International Human Rights Day. This Application presents the compelling reasons why Governor Lawrence Douglas Wilder should exercise the authority granted to him by the people of Virginia and commute Bunch's sentence of death by electrocution to a sentence of life imprisonment. A grant of clemency would be fair and just, and the exercise of the clemency power in this case would be consistent with the purposes and history of Virginia's clemency statute. A life sentence would amply fulfill all of the purposes of sentencing: to punish the offender, achieve retribution, deter others, and protect the citizens of the Commonwealth.

It should be noted at the outset that there is no claim of innocence in this case. Bunch does not deny that he committed a crime. Nor does he attempt to minimize the seriousness and senselessness of the death of Su Cha Thomas on January 31, 1982. Rather, Bunch seeks to demonstrate through this petition that in his case, there are both overwhelming factual and legal circumstances warranting a grant of clemency.

Bunch will establish in this Application that Virginia's death penalty statute was not designed to reach cases like his. Before the Commonwealth may put a man to

death, the law requires the presence of aggravating factors -- either future dangerousness or a particular level of vileness in the commission of the offense. The trial court ruled and the prosecution conceded at trial that it had no basis to argue that Bunch had been or would be dangerous, and the circumstances surrounding Bunch's crime do not rise to the level of vileness required under the statute or demanded in practice. The incident did not involve physical or psychological torture, multiple victims, sexual abuse or prolonged suffering by the decedent. This Application contains a review of cases decided in Virginia over the last decade, in which vileness was a basis for the imposition of the death penalty. The comparison of those cases with the facts here starkly demonstrates the gross unfairness of execution in this case. This Application also contains a review of cases in which the death penalty was sought but in which a life sentence was given instead. Those cases demonstrate that Bunch's death sentence is inappropriate and disproportionate to those sentences received by defendants who committed more heinous crimes.

Additionally, Virginia law specifies that not all murders are to be punished by death, and it assigns that ultimate sanction only to first degree, premeditated murder, or felony murder, i.e., murder committed during the course of the commission of a felony. Bunch was not charged with premeditated murder, and his crime was not motivated by an

intent to commit the felony of robbery. Rather, the theft was an afterthought, a half-hearted effort to disguise the nature of what had taken place, and in light of that fact, the theft should not supply the sole grounds for execution.

There are also a number of personal factors which mitigate in favor of a grant of mercy in Bunch's case. This Application will detail the physical and emotional abuse Tim Bunch suffered at the hands of his father, Victor, and the severe stress and despondence which clouded his reason at the time he committed the crime. When the abused child grew into an awkward and unhappy young man, he found love only once, and his wife left him shortly before the events in this case. Bunch had no prior criminal record, no history of violence, and as this Application will demonstrate, he is simply not the hardened criminal for whom the death penalty was enacted. He has taken positive steps toward rehabilitation during the past ten years on death row, and we will urge the Governor to consider those facts as well. Due to the inexperience of Bunch's trial counsel, most of these facts were never presented to the jury that sentenced Timothy Dale Bunch to death in 1982.

The Governor should take special note of the fact that the family of the decedent, Su Cha Thomas, is staunchly opposed to Bunch's execution. Those who suffered the anguish and pain of losing a loved one have come together to consider the

matter, and it is their firm belief that Tim Bunch deserves forgiveness and that the loss of one life is enough.

Clemency also is warranted in this case to prevent an execution premised upon the violation of a citizen's constitutional rights. Bunch's conviction and death sentence rested almost exclusively on a confession that was obtained in violation of his Fifth Amendment right against self-incrimination. Bunch requested the assistance of counsel while he was being interrogated in Japan, and despite the fact that he made the request to a seasoned police officer and an Assistant Commonwealth's attorney, that request was never granted. Later, after a grueling 36-hour trip home, and in violation of clear Supreme Court precedent handed down before Bunch's arrest, the police officer reopened the questioning, and an exhausted, guilt ridden and uncounseled Bunch incriminated himself. The officer's initiation of further questioning violated the rule of Edwards v. Arizona, 451 U.S. 477 (1981), a rule which was designed to protect the Fifth Amendment rights of an accused.

What the prosecution has argued is that the Edwards rule was not entirely clear or palatable to the lower state courts when it was handed down, and that the Supreme Court was required to repeat the Edwards holding several times before the states were bound to follow it. The prosecution identified a later Supreme Court case, where the Edwards rule was simply repeated, and two judges of the Fourth Circuit agreed that

since that case followed Bunch's conviction, it should not be applied retroactively to him.

Bunch strongly submits that this retroactivity argument was created out the whole cloth, and that the concerns raised when new laws are applied to old cases have no application to his case. In his appeals, Bunch sought the benefit of Edwards -- a legal rule handed down well before his arrest -- and he submits that the Fourth Circuit majority strained to deny someone convicted of murder the protection of the Constitution, and thus produced an unjust result. In a highly unusual and strongly worded dissent, one of the three Fourth Circuit judges who heard the case agreed. That judge and several constitutional scholars in Virginia and elsewhere have maintained that Bunch's confession should never have been admitted in evidence, and their views will be presented in support of this Application.

We believe that it is precisely this kind of injustice -- where the courts have been unable or unwilling to safeguard basic constitutional rights -- that the executive power to grant clemency was designed to redress. Indeed, when the Department of Justice was asked what would become of death row prisoners who have meritorious claims, but whose rights have been curtailed by the courts, it responded that state governors retain the authority to commute unconstitutional sentences.

For all of these reasons, set forth in detail below, Bunch prays that the Governor grant clemency in this case and commute his sentence to one of life imprisonment.

II. THE HISTORICAL PURPOSE OF CLEMENCY WARRANTS THIS GOVERNOR'S EXERCISE OF IT ON BUNCH'S BEHALF

As Governor of Virginia, Governor Wilder has been asked to grant clemency to eleven individuals. Of those eleven requests for clemency, the Governor has granted only two -- those of Joseph M. Giarratano and Herbert Russell Bassette -- both of whom claimed innocence. While the Governor's commutation of Giarratano's and Bassette's death sentences ensured a just result for men who claimed that they committed no crimes, it is important to emphasize that it was not legally required that the Governor be persuaded of the Applicant's innocence before he could act. The clemency statute imbues the Governor with granting power to grant mercy to those who, like Timothy Dale Bunch, are guilty, but strongly deserving of mercy.

If courts were perfect, governors would never be asked to grant clemency, for there would be no injustices, there would be no unfair trials, and there would be no mistakes. But as is evidenced by the egregious constitutional violation in this case, courts are not perfect in every respect. They can convict the innocent and acquit the guilty; they condemn those undeserving of death and spare those perhaps deserving. When the Framers of Virginia's constitution gave the Governor the

power of clemency, they clearly intended that he stand guard against errors of any sort that resulted in injustice.

The executive power to spare prisoners from the death penalty is deeply rooted in our criminal law. From the earliest times in our country, prisoners sentenced to death have sought clemency from select officials of the government. See United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833). The most basic reason why clemency has historically existed is society's time-honored judgment that review outside of the courts is necessary to correct and adjust sentences. As the United States Supreme Court found in 1925:

Executive clemency exists to afford relief from the undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of the circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential to popular governments, . . . to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

Ex parte Grossman, 267 U.S. 87, 120-121 (1925).

In exercising the review power in a capital case, it is absolutely critical that the executive have at his disposal accurate information not only about the crime, but also about the character of the defendant. Chief Justice Warren Burger underscored this point while writing for the Court in the landmark decision, Lockett v. Ohio, 438 U.S. 586, 605 (1978):

Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases. A variety of flexible techniques -- probation, parole, work-furloughs, to name a few -- and various post-conviction remedies, may be available to modify an initial sentence of confinement in non-capital cases. The unavailability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

There are no official standards for the determination of when a governor should grant clemency. Recent experience suggests that only a claim of actual innocence -- or at least the presentation of evidence creating the gravest doubts as to guilt -- will provide an adequate basis for clemency. However, in Virginia clemency has historically been granted to those guilty of crimes. From 1900 through 1988, Virginia governors granted clemency to 91 men and women. Only in 11 of these cases did claims of innocence form the basis for clemency. There is a long standing history of Virginia governors granting clemency in cases where innocence is not claimed. Hence, it is not surprising that 80 of 91 commutations of the death penalty have spared persons whose guilt was unquestioned.

Even in the post-Furman era, governors and pardon boards across the nation have granted clemency to persons whose

guilt was unquestioned. Of the 70 commutations reported by Professor Michael L. Radelet in 1992 in Clemencies in Post-Furman Capital Cases, Exh. 1, well over half were granted for reasons other than possible innocence. We urge Governor Wilder to recognize that even in cases like this one, where the prisoner's guilt is not questioned, there can exist overwhelming reasons why clemency should be granted.

III. TIMOTHY DALE BUNCH: A PERSON DESERVING OF LIFE

Timothy Dale Bunch is 33 years old. He has spent the last ten years of his life on death row in Mecklenburg State Correctional Center. The offense occurred when he was but 22 years old.

To understand Bunch, one must look to his origins and family life.

A. Bunch Before The Tragedy -- Confused And Stress-Filled Years

Tim was born in Bloomington, Indiana on April 11, 1959 to Victor and Annabelle Bunch. He is the oldest of three children, including Loutenia ("Tina") Bunch, age 30, and Anita Bunch, age 28. His father, Victor, was an Indiana State Policeman when Bunch was growing up. Victor Bunch was also an alcoholic, who abused his wife and was physically violent with others. Bunch's father has been arrested and convicted of

driving under the influence of intoxicants and possession of illegal drugs.

Victor Bunch, who had an avid interest in firearms, often went hunting and frequently cleaned guns at home in Bunch's presence. His father's interest in firearms is likely the source of Bunch's own fascination with guns and weapons. Unfortunately, guns were not merely a hobby for Victor Bunch; they were simply another method by which he abused and intimidated his wife and children.

In addition to the physical abuse of his wife, Victor Bunch terrorized his children, sometimes threatening to shoot them with one of the many guns he kept around the house. Among the many memories of the abuse they suffered at their father's hands, Tina Bunch recalls one night when Victor arrived home late, drunk. He ran through the house brandishing a revolver and ordered his wife and three children out of the house. He commanded them, at gunpoint, to lay down on the ground in the backyard, and threatened to kill them all. Neighbors also recall seeing the many holes Victor punched in the walls of the Bunch family home.

It was on nights like these that friends would intervene and protect Bunch and his family from Victor Bunch. These frequent outbursts of violence by Victor Bunch are still vividly recalled by those who witnessed them, including his fellow law enforcement officers, Indiana State Troopers. They recognize that Bunch's present situation is directly connected

to the treatment he experienced at the hand of his abusive and alcoholic father. In fact, Victor Bunch's alcoholism was so acute that it ultimately led to his dismissal from the Indiana State Police.

Bunch's mother often sought his protection when fleeing from the aggressive advances of Victor Bunch. Bunch, a mere child, felt helpless to protect his mother, and confused by the violent behavior of his father, whom he looked up to, and whose love and approval he constantly sought, in vain.

_____ recalls an instance when Tim was in his room putting together a model toy. The model caught fire and at that instant, Tim's father came home. Anita recalls that Victor repeatedly hit Tim so viciously that it could hardly be considered a spanking -- it was a beating. The beating was so violent that it caused Tim's mother to become terribly upset.

It was common knowledge among many who knew the Bunchs well that Victor had little use for his children -- particularly Tim. The Bunchs' friends and neighbors recall that Victor never had time for Tim, who was always shoved aside by his father. Tim's _____ also observed that Victor rarely spent time with Tim and therefore never developed a meaningful relationship with his only son.

Victor Bunch's abusive behavior was not limited to overt violence, but included emotional abuse as well. For example, Bunch suffered from enuresis (bed wetting) until the

age of 12. In an attempt to punish him, Victor Bunch would rub Tim's face in the soiled sheets.

As a result of the continued physical abuse that Annabelle Bunch received at the hand of her husband, Victor, Tim's parents divorced when he was 12 years old. Remarkably, at the time of the divorce, Bunch requested to live with his father -- still seeking his love and acceptance. However, once again, Victor Bunch rejected Tim's plea for fatherly love and affection. Bunch felt lost without any adult male -- even an abusive one like Victor -- in his home life. In Bunch's words, Annabelle "just couldn't teach me the masculine types of things I needed to know." Annabelle remarried when Bunch was 15 years old. Unfortunately, Bunch never developed the father-son relationship with his stepfather, Lawrence Claghorn, that he so desperately sought and needed. While Victor Bunch is presently married, his 2 subsequent marriages after he was married to Annabelle also ended in divorce. The divorces can be largely attributed to the physical and mental abuse that he also imposed on his subsequent wives.

In order to escape from his father's abuse, Bunch developed an active fantasy world as a child. Working with clay models that he created, Bunch would pretend that he was a commando or mercenary and play army by molding forts and soldiers with clay. Bunch recalls that playing "war" was his way of escaping the reality of his home life.

Bunch's fascination as a child with war and combat may also have been an attempt to emulate the only male adults who paid Bunch any positive attention, his uncles Johnny and Michael Bunch. Johnny was a United States Marine and a Vietnam veteran. Michael was in the United States Army. It was Johnny who inspired and encouraged Bunch to join the Marines at age 18.

Bunch's performance throughout grade school was unremarkable. However, despite his troubled home life, his teachers and schoolmates recall that he was well-liked, nice and would never harm anyone. Beginning at age 14, when he entered junior high school, Bunch, disappointed in and hurt by the real world, began to use marijuana to escape. The drug use continued throughout junior and senior high school. Not surprisingly, shortly after Bunch's parents divorced, Bunch also began to exhibit symptoms of psychological and social problems, to the point that his mother referred him to the counselor's office at the junior high school. Bunch's mother described him as having "a constant desire to be the center of attention." His mother attributed his problems to not only marijuana use but also the abuse and neglect by his father. Bunch never received the adult attention he desperately needed.

In addition to the lack of stability and physical and mental abuse, Bunch suffered from severe acne from the time he was a teenager, and on and off throughout his adult life. In

fact, Bunch attributes his extremely low self-esteem -- a factor which contributed to his conduct in late 1981 and January 1982 -- to his discomfort with his physical unattractiveness.

When Bunch entered high school, he met his future wife Teresa. In Teresa, Bunch found stability and a sense of security that was absent during his childhood and early teenage years. When Tim was a senior and Teresa was a junior in high school, Teresa became pregnant with their son, Timothy Dale Bunch, Jr. Bunch acted responsibly and married Teresa, and, seeking some structure in his life, joined the Marines at the urging of his uncle Johnny Bunch. Significantly, realizing that drugs had no place in the United States Marines, Bunch stopped using drugs when he entered the service.

Despite the unfortunate circumstances of his childhood and their impact on his personality, Bunch had no adult or juvenile criminal record. Most significantly, at no time prior to the crime did Bunch ever exhibit violent behavior -- he never raised a hand to anyone.

B. The Circumstances Leading Up To The Tragedy -- A Sequence Of Setbacks And Disappointments

As a Marine, Bunch was stationed with his wife and child in Quantico, Virginia. Initially, the marriage went smoothly. Bunch worked to provide and care for his family. In Quantico, however, Teresa, a native of Indiana, felt separated

from her support system and uprooted from her family. Bunch's work as a Marine often required him to be away from the home, and in his absence, Teresa suffered from depression and loneliness. Although he had remained drug free for a period of over two years, in the Spring of 1981 Bunch again began to smoke marijuana heavily, and use LSD. Teresa's loneliness and Bunch's drug use strained the couple's relationship, and Teresa eventually began a relationship another man to whom she had been introduced by her friend and neighbor, _____.

Teresa's frustrations with Tim reached a boiling point in the Spring of 1981, when Bunch was caught by a military policeman who found two marijuana "roaches" in his possession. The Marines offered Bunch two options: disciplinary action or cooperation with their investigation of a number of major drug dealers within the service. Although the proposed disciplinary action was not severe and would not have required Bunch's discharge from the service, Bunch chose to cooperate with the investigation and assist the Marines in expunging the dealers from their ranks. Bunch saw his "bust" as an opportunity to get his life back on track and become drug free and as a means to begin to win Teresa's affections back. In the end, however, it made no difference to Teresa.

Bunch began conducting undercover work in Virginia, at the Basic School in Quantico, to learn more about the drug dealers' operations, all in preparation for their eventual court martial. In July of 1981, Teresa, alienated from Bunch,

took their son back home to Indiana, ostensibly for a visit. Shortly thereafter, Teresa wrote Bunch informing him that their marriage was over and that she would not be returning to Virginia. Bunch was devastated. At a loss for what to do and uncertain of his future, Bunch turned to the only remaining area of his life which provided any stability -- the service. He reenlisted in the Marines in the fall of 1981 and was transferred to the Marine base in Iwakuni, Japan. Prior to being transferred to Iwakuni, Bunch went to the Screening Board to request to be assigned to Drill Instructor School after his tour in Iwakuni.

It was Bunch's involvement as an agent for the Marines' investigation which eventually brought him back to the United States; in November, 1981, Bunch was sent to Virginia to testify in court martial proceedings against _____. During this period, Bunch was not housed at the Marine base. Instead, the Marines provided him with a generous stipend to stay in motels. Bunch's supervisors directed him not to stay in one place for more than a few days, and to register under various assumed names. The purpose of these orders was to ensure his safety -- the Marines were concerned that associates of the drug dealers against whom Bunch was providing testimony would threaten Bunch and other witnesses in an effort to silence them.

These concerns were well founded. On at least one occasion in January 1982, several individuals threatened Bunch

with physical harm. Bunch was spotted by a friend of one of the defendant drug dealers and chased by car through the streets of Prince William County. Ducking, dodging and maneuvering, Bunch succeeded in escaping unharmed. However, as a result of these threats, Bunch wrote to his mother in Indiana and asked her to send him a gun for protection.

While the unconventional housing arrangements may have provided safety, they did not offer Bunch the structure and supervision he had joined the Marines to attain. One evening in 1981, during his return to Virginia, Bunch went out with his friend, _____, to a local hotel bar. _____ introduced Bunch to Su Cha Thomas, a Korean woman who had been married to, and was divorced from, a captain in the United States Army. Mrs. Thomas was forty years old, the same age as Bunch's mother, Annabelle Claghorn.

Over the course of the evening, Mrs. Thomas learned that Bunch was living in motel rooms and receiving a per diem from the Marines. She suggested to Bunch that instead of spending this money on motels, he move into her house in Dale City and pay her the per diem instead. Bunch agreed to do so; he paid Mrs. Thomas one month's rent up front and moved in the next day after he met her. Within a weeks' time, however, Mrs. Thomas decided that Bunch was too messy and she asked him to leave.

After leaving from Mrs. Thomas' house, Bunch returned to living in motels, but was not happy with the situation,

which made him feel rootless. Thus, Bunch moved into an apartment with Robert and Brenda Alderman, a couple whom he had befriended in 1979 when he had been living in Quantico with Teresa and their child. The Aldermans already had one roommate, a state liquor store employee named Lyn Rider. Bunch felt that moving in with the Aldermans and Rider would provide him with more stability and comfort than he had staying in different motels every few nights.

Bunch continued to see Mrs. Thomas casually. Although Bunch courted her and made some effort to create personal intimacy between them, buying gifts for her and taking her out to dinner, Mrs. Thomas nevertheless kept Bunch at a distance. She told Bunch that she did not want to introduce him to her friends because she was embarrassed about the age difference -- she was 18 years older than he. Just before Christmas, 1981, Bunch and Mrs. Thomas had an argument during a telephone conversation, in which she ridiculed him for his youth and naivete, and wondered out loud why she was wasting her time with him. Bunch hung up on her and did not see Mrs. Thomas again until after the New Year. Although Bunch remained in love with his estranged wife, the rejection by Mrs. Thomas cut deeply nevertheless. Bunch was again alone.

It was around this same time, in December of 1981, that Bunch's uncle Johnny was killed in an automobile accident. The loss of his uncle hurled Bunch deeper into depression -- Bunch's last source of stability and security

perished with Johnny Bunch. Johnny Bunch's death only months before Bunch's crime most certainly contributed to Bunch's disturbed state of mind in the winter of 1981.

In December, 1981, Bunch traveled home to Indiana to attend his uncle's funeral, to spend Christmas with his family in Madison, and to seek a reconciliation with his wife, Teresa. Bunch soon realized, however, that the prospects of getting back together with his wife were poor -- Teresa was not interested. Bunch was desperate and lonely, and his desire to save his marriage became an obsession. His mother was so concerned about his behavior that she suggested he seek psychiatric help.

Annabelle Claghorn's observations of her son were well founded -- it was during this period that Bunch, in his frustration, hurt, and anger at his rejection, began fantasizing about killing Teresa and those whom he perceived had a hand in the deterioration of his marriage.

Just prior to New Years, Bunch returned to Virginia alone. He continued his cooperation with the court martial effort against military drug dealers. Based on Bunch's testimony, the defendants whom he had investigated were convicted of drug charges and expelled from the Marines. Nevertheless, this was not a personal victory for Bunch, who had hoped that his role in the court martial would prove to Teresa that he had changed.

With his wife and son back in Indiana and his hopes of reconciliation dashed, Bunch's loneliness became despondence. Bunch barely saw Mrs. Thomas during this time; they had parted on bad terms and she was away on vacation when he returned to town. On Saturday night, January 30, 1982, Bunch went to Georgetown, having heard it was a good place to meet people, hoping to meet a woman. He went to a number of bars and restaurants, but was unable to meet anyone. Feeling depressed and desperate, Bunch went to Fourteenth Street in Washington, and attempted to engage the services of a prostitute. Even that effort to seek female company ended up in rejection; Bunch was simply robbed of \$300. He finally returned to Virginia at around 4:00 a.m., parked his car in the parking lot at the Springfield Mall, and fell asleep.

Bunch awoke at about 9:00 a.m. on Sunday, January 31. In his despair, he called Mrs. Thomas and woke her up. At this time, his wife's refusal to reconcile with him combined with the prostitute's rejection and mistreatment of him the prior night, as Bunch has explained, caused him to experience difficulty in distinguishing between Teresa, Thomas and the prostitutes. Mrs. Thomas told him she wanted to get some more sleep and to call her later. When he called her back an hour later, she told Bunch to come to her house. When he arrived, they had sexual relations. Shortly thereafter, Mrs. Thomas asked Bunch to leave, saying that she had a blind date later

that day. Mrs. Thomas told Bunch that he could return after her date left.

Bunch went to the Alderman's house, slept a bit, and then called Mrs. Thomas early in the afternoon. She told him to call back later because her date was still there. At about 6:00 p.m., Bunch drove to Mrs. Thomas' house. Seeing no car in the driveway, he assumed that her date had left and knocked on the door. She was alone.

Mrs. Thomas invited Bunch in, offered him a glass of wine and informed him that she wished to go out to dinner. Bunch drank both a glass of wine as well as a glass of Bacardi rum. Bunch had no money -- having been robbed early that morning -- but was ashamed to admit this, particularly in light of their argument in late December in which Mrs. Thomas had ridiculed Bunch for his immaturity. He drank a few more glasses of wine and rum and attempted to postpone the moment he would have to admit that he had no money and again be subject to Mrs. Thomas' taunts for his immaturity and ineptitude. He became drunk and continued to search for excuses to postpone their departure. First, Bunch suggested that Mrs. Thomas change into a dress he had bought for her in December. She did so, but then decided she didn't like the dress and changed her clothes again. At a loss for other delays, Bunch next suggested a game of hide-and-seek. He hid and Mrs. Thomas searched for him. She found him in a downstairs bathroom and

impatiently told him she wanted to go already. Mrs. Thomas walked toward the front door with Bunch behind her.

Bunch was in anguish; his mind was racing. He could not admit to Mrs. Thomas that he did not have any money, yet to go with her would force him to do just that. With Mrs. Thomas' back to him, Bunch took out his gun, thinking he would go into the bathroom and shoot himself. When Mrs. Thomas turned around to see what was keeping him, Bunch panicked -- he was afraid she would see the gun. In that split second the gun went off and Mrs. Thomas fell. Bunch had shot her in the side of the head.

Bunch was so out of touch with reality at this point that he actually believed that Mrs. Thomas would get up. Unable to accept what he had done, he retreated into a fantasy world, imagining that he was a spy in search of secret documents, and began searching Mrs. Thomas' house aimlessly. He returned to Mrs. Thomas, still clinging to the fantasy that she would simply get up and be fine. When Mrs. Thomas did not get up, Bunch checked her pulse. Finding none, he realized that this was not a fantasy: he had killed her.

Bunch panicked. Propelled by his panic and fear, Bunch did two things which, although he did not realize it at the time, ultimately ensured that he would face the death penalty. First, Bunch attempted to make Mrs. Thomas' death appear to be a suicide, by hanging her. Second, he took a few items of her jewelry -- leaving other valuable pieces behind --

to make her death look like part of a robbery.*/ The fact that his actions are completely inconsistent is no surprise considering Bunch's lost and panicked state of mind.

Other oddly inconsistent conduct would follow. For example, Bunch went to the trouble of wiping his fingerprints from the surfaces he touched that night. Yet he chose to sell the watch he took from Mrs. Thomas' home to an Arlington pawnbroker, rather than disposing of it in a more secretive manner. The pawnbroker was required to fill out a report form for the police for every purchase; Bunch used his own name as he watched the pawnbroker complete the form, and he signed it himself. Completely out of touch with reality and in denial of what he had done, Bunch simply pretended that the night of Sunday, January 31, 1982 had never happened. Two days later, on Tuesday, February 2, 1982, Bunch was sent back to Japan.

C. The Confession

Shortly after his return to Japan, Bunch became a suspect in Mrs. Thomas's death. Virginia authorities travelled to Iwakuni where Bunch was serving as a Marine Corps sergeant, to interview him. The Virginia authorities who interviewed him in Japan were Donald L. Cahill, Criminal Investigator for the

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Mrs. Thomas' former husband testified at Tim Bunch's trial that there were several additional pieces of more valuable jewelry present in the house which Tim did not remove. Tim's motive for killing Mrs. Thomas was not robbery.

Prince William County Police Department, and William D. Hamblen, Assistant Commonwealth's Attorney for Prince William County. During the interview, Bunch expressed his desire for a lawyer on at least 12 occasions. However, Messrs. Cahill and Hamblen continued to interrogate him. Eventually, Bunch made a number of incriminating statements.

During the forty-eight hours he was in custody in Japan, Bunch was never given the opportunity to consult with an attorney -- Cahill and Hamblen simply ignored his requests. Based on the fact that he had incriminated himself, Bunch was transported from Japan to Quantico, Virginia in the custody of military personnel. The journey from Japan took thirty-six hours during which Bunch got little or no sleep. Bunch arrived in Quantico, and was processed for delivery to Prince William County authorities.

At Quantico, Bunch was placed in the custody of a Marine Corps civil attorney, Major Donald R. Jillisky, for a period of between two and five minutes. Jillisky's role was to inform Bunch that he would be transferred to civilian authorities. Major Jillisky specifically emphasized to Bunch that he was not his attorney. Indeed the trial court ultimately found that the conference did not satisfy Bunch's constitutional right to counsel.

Despite his repeated requests, Bunch had still not been given access to a lawyer during the forty-eight hours since he had been taken into custody in Japan. Undeterred by

Bunch's requests, Officer Cahill, who had been present when Bunch repeatedly requested a lawyer in Japan and would later attempt to testify Bunch had only made one vague request for counsel (testimony which the trial court soundly rejected), again began questioning Bunch. While the two were en route to the Prince William County Substation, Cahill asked Bunch "if he felt he was ready to sit down and go over the case." Exhausted, and believing that his request for a lawyer would continue to be ignored, Bunch finally relented and made a full confession. Bunch's confession was admitted into evidence at his trial and provided the basis for the imposition of the death penalty.

D. Bunch Today

Despite the fact that Timothy Dale Bunch has lived the past 10 years in the confines of his cell on Death Row, Bunch continues to be an active contributor to the lives of others around him, both on Death Row and in the outside world. Tim is a very settled, thoughtful and reserved person. He is considered an authority figure and a voice of reason among the members of his cell block or "pod" on Death Row, and has been described as a big brother to others who have not been there as long. When there are fights or disagreements between Death Row inmates or there is a particular inmate in distress, Bunch often intervenes and negotiates a settlement or simply lends an ear. One example of Bunch's active and positive

intervention with his fellow inmates is his formal attempt to end a fellow inmate's hunger strike.

Conventional wisdom recognizes that one attribute shared by those who commit crimes is that they lack a sense of belonging to a community. This was certainly true of Bunch ten years ago, after he lost his wife and child, and his uncle, was at risk of losing his job in the Marines, and was living in a different motel every few days. Over the past ten years, Bunch has grown spiritually; while Bunch was raised as a Catholic, he has become an active member of the local Society of Friends in Virginia. Although he is scheduled to die in December, Bunch is nevertheless working toward becoming a full registered member in the community as a Friend. Tim regularly contributes to the Friends' monthly newsletters, sharing his experiences as an inmate on death row, his perspective of the death penalty, and spreading his inner strength and spirituality with those in need of uplifting. Many of its members describe Bunch as a source of spiritual strength and reason. He is well-loved. For one couple in particular, the _____, Bunch has been a veritable fountain of strength. When Mrs. Lietzke was diagnosed and treated for cancer, Bunch did all he could to assist and encourage the couple through their ordeal. They have described Bunch's role as "life saving." Bunch has, from Death Row, made tri-monthly contributions to the Friends' newsletter, primarily writing essays about life on Death Row and the being a Friend.

Bunch's prison record is, with the exception of a few minor indiscretions, exemplary.*/ He is not only cooperative and respectful to his fellow inmates, but also to the prison guards, who describe him as a respectful and fun person.

Tim's reputation for goodness and consideration has also been recognized internationally. Colonel (Ret.) Walter C. Ranitz is a former Chief German Army Liaison Officer who was stationed in Fort Lee, Virginia from 1982-1987. He received a Certificate of Recognition from former Governor Baliles for his prison activities in 1987. Col. Ranitz has known Tim since 1989. As a result of his extensive contact and communication with Tim over the past three years, Col. Ranitz recognizes that Tim is not an aggressive person by nature and never will be a threat to society. He notes in his letter to the Governor that Tim is an honest, reliable, moral and sensitive person who strongly believes in God. Significantly, Col. Ranitz states that:

During my numerous visits to prisons and penitentiaries all over the U.S., I saw hundreds of killers who have brutally murdered one or even more persons and had prior criminal histories, but they were "only" serving life or multiple life sentences with the chance to get paroled one day. I would never even sit together at the same table with most of these guys but I would do and have done already with Timothy D. Bunch.

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It should also be noted that after extensive meetings with Marine officials, Tim received a general, not dishonorable, discharge from the Marines.

As Col. Ranitz and many others have recognized, Tim is a threat to no one.

Several psychiatrists and psychologists have evaluated Bunch over the past ten years. Although these doctors have observed Tim independently, one common thread runs through their conclusions: Bunch is not a threat to society nor does he have the personality typical of a criminal. Rather, these doctors describe Bunch as calm and not a threat to his own life or to the lives of his fellow Death Row inmates. C.I. Elliott, M.D., noted in May of 1985 that "certainly [Bunch] is not psychotic and certainly he does not present a typical carrier of a prison personality." The following month, Dr. Elliott reiterated that Bunch ". . . certainly [] doesn't fit into the category of a traditional criminal or anti-social personality." Again, in November of that same year, Dr. Elliott noted ". . . Mr. Bunch primarily does not possess a criminal personality . . ." In August of the following year, Dr. Mainfort examined Tim. In his report, he noted, "He certainly does not appear to be significantly psychotic or to have significant potential for long term significant psychotic illness." Dr. Mainfort's report recognized that Bunch presented no threat of future dangerousness.

More recently, to determine the causes of his aberrant behavior leading to his commission of the crime, Bunch's history has been evaluated by Dr. Robert Hart, Ph.D, Associate Professor of Psychiatry, Neurology and Neurosurgery, Diplomate

in Clinical Neuropsychology, ABCN-ABPD at the Medical College of Virginia. Dr. Hart found that at the time of the offense, Tim exhibited "magical thinking" of the type seen in patients with schizotypal personality disorder or traits. More importantly, in his judgment, Bunch was under considerable emotional distress at the time of the offense. Dr. Hart found it relevant that because of the marijuana offense, Bunch had lost a job opportunity and had an uncomfortable lifestyle necessitating movement from motel to motel under an assumed name; that Bunch was uncomfortable with his involvement in a court martial of another Marine and reported being threatened by other Marines because of his undercover work; that the separation from his wife was also an important source of stress; and that all the available information points to the notion that rejection is a central issue for Bunch. Dr. Hart also found it important that Bunch had experienced rejection from his parents (especially his father), his wife, prostitutes, and lastly the victim, Mrs. Thomas. Bunch's sensitivity to rejection, in Dr. Hart's opinion, is an important factor pertaining to his state of mind at the time of the offense. Although he was not delusional, the presence of magical thinking relating to reconciliation with his wife was also an important factor pertaining to Bunch's state of mind at the time of the offense.

Similarly, Dr. Randy J. Thomas, Ph.D, Director, Medical College of Virginia Forensic Evaluation Program, and

Dr. John Kasper, M.D., Co-Director, Medical College of Virginia Forensic Evaluation Program, have both reviewed Bunch's history and found that Bunch was an individual with a tenuous hold on reality who was vulnerable to deterioration and loss of contact with reality when under intense stress. Drs. Thomas and Kasper found that during the time in question, Tim was attempting to cope with two significant losses, the anxiety of testifying against a drug dealer in a military trial, and the experience of exploitation and humiliation by two female prostitutes. The question of whether Bunch was presented with more psychological challenges than he had internal resources to handle, Drs. Thomas and Kasper surmised, is one which merits attention when considering mitigation.

In addition to Bunch's spiritual growth, his active participation in a community through the Society of Friends, and the enormous mental healing that has occurred over the past ten years, Bunch has developed the positive personality traits that were absent ten years ago. As _____ attests, Bunch always tried to bring levity into their frightening childhood, instinctively trying to counteract the violence that was omnipresent. In an effort to bring light to the oppressive, depressing atmosphere on Death Row and throughout Mecklenburg, Bunch has become the prison disc jockey. He takes musical requests from the inmates at Mecklenburg and on an antiquated "boom box," creates personalized cassette tapes for them depending upon their

particular taste. Through this activity, Bunch has created a positive role for himself in the prison community. He brings music into his fellow inmates' lives.

Tim Bunch does the same for friends and family outside of Mecklenburg. It is not unusual for people who know Tim to receive a new tape every week. While most of Tim's tapes are musical, he also uses his tapes as a means to share substantive information with his friends and family members. For example, Tim has taken a strong interest in Attention Deficit Disorder (ADD), a form of severe hyperactivity. Knowing that _____ son suffers from ADD, Tim taped a special "program," discussing his knowledge of ADD. Tim is constantly in search of ways that he can help others.

Finally, over the past ten years, Bunch has worked hard to heal the community which is his family. Despite the fact that Bunch's father, Victor, brought him much pain throughout his life, Bunch has sought out and forged a new, positive relationship with his father. In fact, he is encouraging his step-brother, Jamie Claghorn, to develop a relationship with his father in an effort to assure that, unlike him, those two have the opportunity to experience a healthy father-son relationship. Bunch also maintains contact with Timmy, his now thirteen year old son, who never really knew him. Bunch has mixed feelings about becoming closer with his son -- although he values their relationship, he also wants to spare Timmy the pain of losing a loved one. Despite the

fact that Timmy never knew his father growing up, he hopes the Governor will grant clemency so that they might continue to develop their relationship. Bunch speaks frequently with his sisters and his mother, all of whom live in Indiana; they visit him whenever they can, money permitting.

Timothy Bunch is deeply remorseful about the tragedy of taking the life of Su Cha Thomas; he did not plan it for even a moment and after his panicked attempt to undo what he had done failed, he cooperated fully with investigators, accepting full responsibility for his acts. In light of the unfortunate circumstances that led to the commission of the crime and the fact that despite his past and his present situation, Bunch has dedicated himself to improving the lives of others, he is deserving of mercy. By requesting clemency, he does not seek to be pardoned for the offense or to avoid punishment; his life of imprisonment will serve as a daily reminder and a lifelong sanction for his actions. He asks only that the executioner's hand be stayed, and his personal history and the facts of the case strongly suggest that his is not the case the death penalty statute was fashioned to address.

IV. THE DEATH PENALTY WAS NOT DESIGNED TO ADDRESS CASES SUCH AS BUNCH'S

A. Bunch's Crime Did Not Rise To The Level Of Vileness Required By The Statute

After the Supreme Court's landmark decision in Furman v. Georgia,^{*/} Virginia enacted a new death penalty statute which specified two aggravating circumstances that would clearly distinguish capital murder from the majority of others for which the death penalty is not imposed. Under the Virginia statute, the death penalty may only be imposed if the defendant is likely to be a danger to the community in the future, or if the commission of the crime is "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim."^{**/} In Bunch's case, the jury was not permitted to consider the aggravating circumstance of future dangerousness, because Bunch had no prior criminal record and the prosecution presented no evidence whatsoever that Bunch would be a danger to anyone in the future. Thus, the only aggravating circumstance that the jury was allowed to consider was whether Bunch's conduct in committing the offense was vile. There was no evidence of

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408 U.S. 238 (1972).

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Va. Code Ann. § 19.2-264-4(C) (1938).

torture in this case. The jury's decision was based on either a finding of depravity of mind or aggravated battery.*/

Bunch submits that the facts of his case do not fit either description; an unplanned shooting of a single victim does not rise to the level of aggravated battery, and Tim's depressed, confused, and panicked state of mind was not depraved in the sense meant by the drafters of the Virginia statute. A comparison of Bunch's case to others where the death penalty was imposed demonstrates that he should not fall into that category. The following is a summary of the facts from 13 death penalty cases decided by the Virginia Supreme Court under the "vileness" standard:**/

- In Boggs v. Commonwealth, 331 S.E.2d 407, 421 (Va. 1985), vileness (aggravated battery) was proven by evidence that: (1) the defendant, a 27-year-old male, struck the victim, an 87-year-old widow, six times on the head with a metal bar; (2) the defendant ransacked the victim's home, searching for valuables; (3) when the defendant heard the victim still breathing, he repeatedly stabbed her with a long kitchen knife; and (4) the victim died when the knife sliced the front wall of her heart.

- In Fitzgerald v. Commonwealth, 292 S.E.2d 798, 813 (Va. 1982), vileness (torture, depravity of mind, and aggravated battery) was proven where the defendant systematically tortured his victim by raping

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The jury did not even specify which circumstance it relied upon, but the Supreme Court of Virginia upheld the jury's verdict that there was sufficient evidence to support either.

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Va. Code Ann. § 19.2-264.2 (1983).

her, then slashing and stabbing her 184 times with a machete and a knife.

- In Clozza v. Commonwealth, 321 S.E.2d 273, 282 (Va. 1984), vileness and future dangerousness were shown where the defendant, a 27-year-old male, raped and sexually assaulted the victim, a 13-year-old female, continuously over a two-hour period, and the victim died as a result of shock from loss of blood and from inhaling blood into her windpipe.

- In Whitley v. Commonwealth, 286 S.E.2d 162, 169-70 (Va. 1982), vileness (aggravated battery) was proven by evidence that the male defendant: (1) choked his defenseless victim, a 63-year-old widow, with his bare hands; (2) strangled the victim with a rope; and (3) cut her throat with a knife.

- In Waye v. Commonwealth, 251 S.E.2d 202, 205-06 (Va. 1979), vileness (depravity of mind) was proven by evidence that the defendant, a 22-year-old male: (1) raped his 61-year-old victim; (2) bit off one of the victim's nipples; (3) battered her face beyond recognition; (4) stabbed her 42 times; and (5) poured Clorox bleach over her body in an attempt to cover up the evidence.

- In Jones v. Commonwealth, 323 S.E.2d 554, 565-66 (Va. 1984), vileness (aggravated battery and depravity of mind) was proven by evidence that the defendant: (1) shot one of his victims at close range in the face; (2) tied the hands of a second 78-year-old victim behind her back; (3) stuffed a sock down her throat; (4) taped her mouth shut; (5) forced her into a closet; (6) shot her point-blank in the face; (7) doused her body with gasoline; and (8) lit her on fire, causing her to die from smoke inhalation.

- In Payne v. Commonwealth, 357 S.E.2d 500, 507 (Va. 1987), vileness (depravity of mind) was proven by evidence that the defendant, a prison inmate: (1) carried out a carefully conceived plan; (2) locked his victim, a fellow inmate, in a small area; (3) doused the area with a volatile fluid;

and (4) set the victim on fire, causing extensive burns to the victim's body.

- In Mason v. Commonwealth, 254 S.E.2d 116, 121 (Va. 1979), vileness (aggravated battery and torture) and future dangerousness were proven by evidence that the defendant: (1) raped his 71-year-old female victim; (2) struck her in the head with an ax; (3) shoved the ax handle into her rectum; (4) drove a nail through her wrist; and (5) burned her alive.
- In Quintana v. Commonwealth, 295 S.E.2d 643, 654 (Va. 1982), vileness (depravity of mind and aggravated battery) and future dangerousness were proven where the defendant, a 28-year-old male: (1) attacked his victim, a 78 year-old female, with a hammer; (2) inflicted over a dozen cuts and bruises on her head and neck; and (3) fractured her skull in 11 places.
- In Smith v. Commonwealth, 248 S.E.2d 135 (Va. 1978), the defendant was found guilty under both the vileness and future dangerousness tests. The evidence showed that the defendant: (1) forcibly raped his female victim; (2) choked her until her body went limp; (3) dragged her body into the James River, holding her head under the water until she stopped moving, and (4) stabbed her in the back several times.
- In Briley v. Commonwealth, 273 S.E.2d 57, 66 (Va. 1980), vileness (torture, depravity of mind, and aggravated battery) and future dangerousness were proven by evidence that three defendants: (1) broke into the victims' home; (2) bound and gagged the three occupants; (3) raped the female victim three times while her husband and son were forced to watch; (4) ransacked the house; and (5) afterwards shot each of the victims in the head.
- In Coleman v. Commonwealth, 307 S.E.2d 864 (Va. 1983), vileness and future dangerousness proven where the defendant, after raping his female victim, slashed her throat, and then stabbed her twice in the chest.

- In Justus v. Commonwealth, 283 S.E.2d 905 (Va. 1983), vileness was proven where the defendant first raped his victim, who was eight months pregnant, then shot her twice in the face and once in the back of the head.

Neither Bunch nor his counsel seek to minimize in any way the serious and senseless loss of life in this case. But the Virginia law is clear: not every murder is to be punished with a death sentence. The incident involving Mrs. Thomas included no sexual assault, no physical or psychological torture or abuse, and no prolonged suffering by the victim. The vileness standard seeks to identify the cold-blooded, vicious killer, and the scared, rejected and lonely Timothy Bunch simply does not meet that description.

Conversely and most importantly, a comparison of Bunch's case to others involving markedly more heinous crimes where the death sentence was not imposed further demonstrates that the death sentence is not an appropriate punishment in Bunch's case:

- In Athey v. Commonwealth, Rec. No. 780965 (1978), Mrs. Ruby Diane Powell, age 29, and her son, David Powell, age 6, were found murdered in Hanover County, Virginia. David Powell's hands and feet were bound, his throat was cut, and he was stabbed several times in the back. Ruby Diane Powell was raped several times, stabbed in her chest and her throat was slashed. The defendant was charged with rape, robbery, murder and capital murder. The defendant was sentenced to life imprisonment.
- In Robinson v. Commonwealth, Rec. No. 841744 (1984), 231 Va. 142 (1986), the

defendant was charged with capital murder in connection with a robbery. The defendant went to the residence of his landlady and announced that he had come to pay the rent. Upon entering her dwelling, he began rummaging through her desk in search of money when she left the room. Mr. Karl Von Lewinski, a tenant of Ms. Elliott, entered the room and asked the defendant what he was doing. At that point, the defendant grabbed a pair of scissors from the desk, and lunged for Von Lewinski, stabbing him repeatedly in the neck and chest area. When Ms. Elliott entered the room and asked what was wrong, the defendant attacked Ms. Elliott, stabbing her repeatedly in the chest area, puncturing her aorta. The defendant then ransacked the house and stole cash and merchandise. The defendant was sentenced to life imprisonment.

• In Harward v. Commonwealth, Rec. No. 840550 (1985), 229 Va. 363 (1985); 5 Va. App. 468 (1988), Harward was convicted of capital murder during the commission of a rape. Harward broke into the home of Jesse and Teresa Perron while the couple was asleep in bed. The defendant beat Mr. Perron on the head with a crowbar and pinned Teresa Perron to the floor while he continued to hit her husband with the crowbar as Mr. Perron lay gasping for breath and moaning. The defendant then stripped Mrs. Perron, raped her, and forced her to commit oral and anal sodomy while on the floor next to the bed. The defendant then forced Mrs. Perron downstairs where she got him a soft drink from the refrigerator and gave him a cigarette. The assailant then sexually assaulted her again, and bit her on the thighs and calves of her legs. Prior to his departure from the Perron residence, the defendant robbed the house, and wrapped Mrs. Perron in a sleeping bag and told her that he would kill her if the police were called. Mr. Perron died from his wounds from the crowbar. The defendant was sentenced to life imprisonment.

• In Commonwealth v. Horne, Rec. No. 841331 (1984), 230 Va. 572 (1986), Sylvester Horne was indicted for the capital

murder and rape of Pearl Mae Alexander in early 1984. The defendant raped his victim and murdered her by strangling her with a pair of blue jeans that were found around her neck. The victim's body, which was smeared with feces and blood stains when discovered, was left in a public park. The defendant was sentenced to life imprisonment.

• In Keil v. Commonwealth, Rec. No. 800994 (1980), 222 Va. 99 (1981), the defendant was charged with the capital murder of 16 year old Sonja Elsa Dorey during the commission of or subsequent to a rape. Keil raped Ms. Dorey, and strangled her, leaving her dead body to rot in a marshy area near Newport News. The defendant was sentenced to life imprisonment.

• In Richardson v. Commonwealth, Rec. No. 840108 (1985), the defendant was charged with capital murder for the shooting death of a Sheriff's Deputy in Augusta County, Virginia. The defendant murdered the Deputy Sheriff when he was being transported by the Deputy from Harrisonburg to the Augusta County Jail. When the Deputy pulled over to speak with two women down the highway, the defendant took the Deputy's weapon, pressed his foot against the Deputy's neck, pinned him to the inside of his car door and shot him. The defendant was sentenced to life imprisonment.

• In Davis v. Commonwealth, Rec. No. 831871 (1984), the defendant was charged with capital murder in connection with a burglary and robbery of a married couple. The defendant entered the victims' home with companions for the purpose of committing a robbery. After taking money and merchandise, the defendant and his companions turned the lights out. As soon as the lights were out, the defendant shot and killed the husband, and then shot the wife in the chest. The defendant was sentenced to life imprisonment.

• In Freeman v. Commonwealth, Rec. No. 830290 (1984), Freeman was charged with

capital murder, abduction with attempt to defile, robbery and rape, of Mrs. Gloria Mae Scales, a married 36-year old woman who was working alone at a 7-11 convenience store. The defendant entered the store and robbed Mrs. Scales at knife point, forced her to leave the store and placed her in the back seat of the car the defendant and his accomplices were driving. Once in the car, one of the defendant's accomplices raped Mrs. Scales on their way to the North Anna River. Once there, one of the accomplices again raped her while the defendant sodomized her. The defendant then also raped her and then stabbed her 17 times. There were also nine cutting wounds, which were distributed over the top of Scales' scalp, the back of her neck, the nape of her neck, her chest, the back and both hands. Mrs. Scales bled to death internally as the result of the deep stab wounds in her chest and abdomen. The defendant was sentenced to life imprisonment.

• In Undercoffer v. Commonwealth, Rec. No. 811743 (1978), Undercoffer was charged with capital murder, rape and arson. Undercoffer broke into his nine year old cousin, Lydia Blake's, home where she lay sick in bed. While Undercoffer was inside the house, Lydia awoke, discovered his presence, and fled. Undercoffer chased and caught her outside the house, where he choked her in an attempt to kill her. The defendant carried her limp body back into the house and raped her. During the course of the rape, Lydia revived and Undercoffer strangled her again with a stocking. He then poured gasoline over her body and set fire to the room. As he left the house, Undercoffer heard the girl crying and struggling to open the bedroom door. To ensure her death, he returned to the door and tied it shut. The defendant was sentenced to life imprisonment.

• In Loving v. Commonwealth, Rec. No. 781792 (1978), Mrs. Louise Eggleston, a 90-year old philanthropist and active church worker, was found in her apartment, nude and raped, her body covered with bruises. She had been strangled to death with a woman's

stocking. The Commonwealth indicted Loving for capital murder, robbery and rape. The defendant was sentenced to life imprisonment.

• In Miltier v. Commonwealth, Rec. No. 790063 (1979), the defendant was charged with the capital murder of Mrs. Muriel Hatchell during the commission of a premeditated robbery. After his girlfriend had illicitly gained entrance to the Hatchell household, she pulled a gun on the victim and the two began wrestling for control of the gun. The defendant and another individual then entered the house, beat Mrs. Hatchell severely, and knocked five teeth out of her mouth. She was then tied and taken to the bedroom where they continued their efforts to get her to tell them where she had money hidden in the house. After her husband came home, they beat him as well. When demanding to know where more money was, Mrs. Hatchell could only moan. After some 50 more minutes in the house and more beatings of Mrs. Hatchell by the defendant and his compatriots, they left. By the time help arrived, Mrs. Hatchell was dead. The defendant was sentenced to life imprisonment.

The above cases starkly demonstrate that Bunch's death sentence is inappropriate and disproportionate to those sentences received by defendants who committed more heinous crimes. Bunch's case did not involve multiple victims, or stabbing, burning, beating, rape, sodomy or mayhem. The egregious facts of these cases, when compared with the facts of Bunch's case, demonstrate starkly why capital punishment is simply not warranted here. If the above defendants, who committed far more heinous and vicious crimes, were nevertheless deserving of life, surely Bunch is as well.

B. The Theft Here Was A Panicked Afterthought, Not A Premeditated Act

The Virginia sentencing scheme specifies that only certain offenses can be punished by death: premeditated murder and felony murder, which includes the willful, deliberate and premeditated killing of any person in the commission of a robbery when armed with a deadly weapon. Va. Code. Ann. § 18.2-31. The sole basis for charging Bunch with capital murder was the prosecution's position that he committed a murder during the commission of a robbery. See Branch v. Commonwealth, 225 Va. 91, 300 S.E.2d 757, 759 (1983). Bunch did not form the intent -- a key element of robbery -- to steal from Mrs. Thomas until some time after the murder had been committed. In fact, a few hours after shooting Mrs. Thomas, Bunch decided to disguise the scene to make it appear as if a robbery had occurred. To that end, just prior to leaving, he ransacked the house and took a few articles of jewelry, a stapler, and some liquor. Significantly, Bunch left behind a number of more valuable articles of jewelry.

Where the evidence demonstrates that the killing and the unlawful taking are two separate acts, it is insufficient as a matter of law to establish a robbery.^{*/} Bunch had no intent to rob Mrs. Thomas prior to the murder, and he took some of her jewelry and other possessions only in a feeble, panicked

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Branch v. Commonwealth, 225 Va. 91, 300 S.E.2d 758 (1983).

attempt to cover up the murder.* / Even if the Governor concludes that the theft here was legally sufficient to establish the technical elements of murder committed during the course of a robbery, the Governor has the power to exercise the clemency power in recognition of the fact that this case does not resemble and should not be treated like the case for which capital punishment was intended.

VI. TIMOTHY BUNCH WOULD NOT HAVE BEEN SENTENCED TO DEATH BUT FOR THE INADEQUATE PERFORMANCE OF HIS TRIAL COUNSEL

A. The Paramount Importance Of The Sentencing Proceeding In Capital Cases

Trial counsel's role in a capital sentencing proceeding is identical to counsel's role during the guilt phase of trial, i.e., to ensure that the adversarial process works to produce a just result. Strickland v. Washington, 446 U.S. 668 (1984). One of an attorney's principal duties in a capital case is "to make a reasonable investigation or to make a reasonable decision that makes particular investigations

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This case simply did not involve a premeditated killing in commission of a robbery, and Bunch should never have been charged with a capital crime. See also People v. Green, 27 Cal. 3d 1, 164 Cal. Rptr. 1, 609 P.2d 468 (1980) (rule is settled that when force used against victim results in death, intent to rob does not support a conviction of felony murder); People v. Hardy, 33 Cal. 2d 52, 198 P.2d 865 (1948) (intent to steal victim's car, formed after killing, is insufficient to justify conviction of first degree murder based on theory that murder was committed during robbery).

unnecessary." Id. In a capital case, investigation of, preparation for, and presentation of the mitigation case at the sentencing trial is in many instances a much more critical task than is preparing for the guilt-or-innocence trial. Guilt is frequently a foregone conclusion. Whether the accused lives or dies, however, is not.

An individualized decision is essential in capital cases in order to insure that each defendant is treated with that degree of respect due the uniqueness of the individual. It is essential, therefore, that the sentencer consider "those compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The sentencing body's failure to consider mitigating evidence creates the risk that the death penalty will be imposed in spite of factors that may call for a less severe penalty. Id.; see also Skipper v. South Carolina, 476 U.S. 1 (1986) (State's exclusion of evidence regarding adjustment to prison violated Eighth Amendment); Eddings v. Oklahoma, 455 U.S. 104 (1982) (sentencers' failure to consider evidence to turbulent family history violated Eighth Amendment).

Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and

character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (concurring opinion).

In Tison v. Arizona, 481 U.S. 137, 107 S.Ct. 1676 (1987), the Court stated that a "critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." 107 S.Ct. at 1687. The Court has continually recognized the importance of the defendant's mental state when determining the severity of the punishment. See, e.g., Enmund v. Florida, 458 U.S. 782 (1982); Lockett v. Ohio, 438 U.S. 538, 542 (1987) (O'Connor, J., concurring). Evidence of a defendant's mental disabilities is an important, relevant and compelling mitigating circumstance which must be adequately explored by defense counsel. This emphasis is also reflected in the Virginia capital sentencing scheme: several of the statutory mitigating circumstances relate to the defendant's mental state at the time of the offense.*

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See Virginia Code § 19.2-264(B)(ii)(iii) (defendant was under the influences of extreme mental or emotional disturbance; capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired).

The paramount importance of the sentencing trial cannot be questioned. And in this case, the failure of the sentencing trial to meet the goals outlined above is blatantly evident, and is the root cause of Bunch's sentence to death as opposed to life imprisonment.

B. The Jury Never Heard Important Mitigating Evidence Which Would Have Persuaded Them Not To Impose The Death Sentence

Bunch was represented at trial by court-appointed attorneys Richard H. Boatwright and Lloyd D. Hinrichs. Although Boatwright had some criminal defense experience, this was not only his first capital case, it was his first murder trial. The same was true for Hinrichs, who had graduated from law school only a year before he was appointed to represent Bunch; Hinrichs had no criminal law experience at all.^{*/} All decisions affecting the case were made jointly.^{**/} Boatwright and Hinrichs divided the trial responsibilities, with Boatwright assuming responsibility for the sentencing phase. Hinrichs, due to previous military experience, was supposed to assume responsibility for investigating Bunch's military background.^{***/} Bunch's trial counsel fully expected the case

^{*/}

See Exh. 30 at 801-802, 820.

^{**/}

See Exh. 30 at 721.

^{***/}

See Exh. 30 at 837.

to reach the capital sentencing phase if Bunch's confession was not suppressed^{*/}, and these expectations were fulfilled.

Despite this knowledge, Bunch's trial counsel failed to contact a single potential witness to provide mitigating evidence for the sentencing phase, other than Bunch's mother, who was under the influence of prescription drugs at the time that she testified.

There were several persons who were available and would have provided critical evidence demonstrating that Bunch had no previous legal violations, that he was suffering extreme emotional distress at the time of the offense due to the disintegration of his marriage, that he was capable of rehabilitation, and, most importantly, that he was a person deserving of life.

As shown by the following summaries, as well as the attached affidavits, had Bunch's trial counsel conducted even a modest investigation, a wide variety of mitigating evidence could have been revealed which would have compelled the jury to spare his life:

- Dr. Showalter, a psychiatrist who evaluated Tim Bunch for a potential insanity defense and for mitigating evidence, but did not testify during the sentencing phase, would have told the jury that as a result of the intense domestic violence to which Bunch was subjected, he had a very chaotic and stressful early life; that Tim's relationship with his wife Teresa was the only significant inter-personal relationship

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See Exh. 30 at 761.

that he had ever developed and when that relationship was threatened, Tim experienced overt signs of depressive neurosis characterized by a loss of self-esteem; that the non-existence of a prior criminal record indicates Tim's significant ability to control his behavior; that in the days leading up to the crime, Tim was under extreme pressure; that there was nothing inherent in Tim's personality to suggest that Tim might be prone to be highly violent; that Tim demonstrated a capability for rehabilitation and self-insight; and that Tim had a genuine desire to clean up the mess of his life. The jury never heard these facts.

- Bunch's sisters, Tina, and Anita, would have told the jury that they were very close as children; that Tim had numerous friends at school; that they could not recall Tim ever being in a fight with anyone; that Tim was never a violent or aggressive person; that Tim's father often drank and physically abused their mother; that Tim's father had absolutely no use for him; that Tim's father regularly terrorized the family with loaded guns; that their parents separated in 1972; that Bunch was emotionally distraught by the separation from his wife and spent much of his Christmas 1981 leave attempting a reconciliation; that Bunch avoided physically violent confrontations; that they never saw him in a fight; and that their stepfather tried unsuccessfully to take the place of Bunch's real father. The jury never heard these facts.

- Michael Scroggins, Tim's former brother-in-law, with whom Tim and Teresa lived when they were first married, could have told the jury that Bunch thought a lot of his grandmother and uncle; that Bunch would run errands for his grandmother and give her money when needed; that Bunch was a good and hard worker and got along with everyone; that Bunch was not violent or aggressive; that Bunch was disturbed by the lack of a relationship with his father; that Bunch tried to reconcile with his wife; that Bunch had a lot of friends, was easy to get along with, and was kind and considerate;

and that Bunch had Scroggins' trust. The jury never heard these facts.

• Bunch's uncle, Michael Bunch, who has recently passed away, would have told the jury that Bunch's father (Michael Bunch's brother) had a drinking problem; that he and Bunch spent lots of time together camping and going metal-detecting or just running around together; that Bunch wished his father would do things with him; that Bunch was careful, intelligent, easy to get along with and friendly; that Bunch felt very close to Michael's brother Johnny and was very upset when Johnny died late in 1981; that Bunch was deeply affected by his great-grandmother's death in 1980, and his 1981 separation from his wife; and that he never saw Bunch get out of control or behave in a violent manner. The jury never heard these facts.

• Richard T. Shipley and George True, close friends of the Bunch family and former colleagues of Tim's father, Victor, would have told the jury that Tim was a quiet, non-confrontational young man; that he was never aggressive or violent; and that Victor was an acute alcoholic who did not have a lot of consideration for his family and was very obnoxious and argumentative with them. The jury never heard these facts.

• Edith Steppe and Nina J. Wright, close friends of the Bunch family, would have told the jury that Tim's father, Victor, was very abusive to Annabelle and never had time for little Tim; that Tim was always shoved aside by his father; that Tim was well-liked by everyone in the community; that Tim never got into any trouble and was never violent or aggressive; that they have seen Victor hit Annabelle; that Victor has held a gun to Annabelle's head many, many times; and that Victor was a very sick person. The jury never heard these facts.

• Beverly Jean Strong and Nancy Sharon Larimore, close friends of Tim's mother, would have told the jury that Tim was a nice boy; that Victor was abusive to Annabelle; that they never saw any mischief out of Tim;

and that they have seen the holes that Tim's father punched in the walls when he was drunk and angry. The jury never heard these facts.

- Florence A. Bunch, Bunch's grandmother, who has recently passed away, would have provided mitigating evidence that Bunch's father was not around Bunch much during his childhood; that Bunch's father took to drinking and became aggressive towards Bunch; that Bunch was a thoughtful and considerate boy who would do chores and run errands for his grandmother; that Bunch never fought and was not violent; that Bunch was very upset that he and his wife separated, and that he wanted a reconciliation; that Bunch loved his son and was very good to him; and that Bunch flew to his son's bedside when his son was gravely ill. The jury never heard these facts.

- William Bunch, Tim's uncle, would have told the jury that Tim was always a good kid; that he was very passive and never got into any fights; that he got along well with other children; that Victor, Tim's father was an alcoholic and showed emotion to no one; that Victor was a cold person; and that Victor didn't have much time for Tim when he was a child. The jury never heard these facts.

- James Gavin, Tim's high school English teacher would have told the jury that Tim was a very likable and pleasant person; that Tim was always smiling and outgoing; that he was very good about completing his homework and often participated in class discussions; that Tim was personable and polite; that he was never thought of as either violent or aggressive; and that there were many people who would have had favorable things to say about Tim. The jury never heard these facts.

- James and Pidge Ludwig would have told the jury that they were friends of Tim's parents and had known Tim since he was a little boy; that Tim was well-behaved and got along well with others; and that Tim would turn the other cheek before he would

strike back. The jury never heard these facts.

- Joella Rae Grubb and Lenna Fultz, Tim's aunts, would have told the jury that Tim never gave his mother any problems; that Tim's father was an alcoholic; that no one really cared for Victor because of his derogatory and abusive attitude. The jury never heard these facts.

- Oscar and Norma Louise Bear and Carolyn Sue Peak, close friends of the Bunch family, would have told the jury that they have known Tim since he was in junior high school; that Tim was always a nice child; that he was never aggressive or violent; that Tim was a well-mannered, easy-going boy who at one time worked for Mr. Bear; and that Tim had a lot of resentment bottled up inside from his childhood. The jury never heard these facts.

- Bruce Eppley, Andrew Demaree, Mickey Waller, Richard Troy Smith, and Benjamin Bear, friends of Tim's from junior and senior high school, would have told the jury that they have known Tim since grade school and that Tim was not a fighter but a person who stayed out of trouble; that Tim was easy going and compassionate; that Tim was the kind of person you could depend on to help out; that Tim did not have a happy family life; that Tim's father drank a lot; and that Tim was never violent towards anyone. The jury never heard these facts.

- Teresa Anderson, Bunch's ex-wife, would have told the jury that Bunch's father was an alcoholic who was cruel to Bunch; that Bunch was never in any fights; that Bunch became very upset and angry at any mention by her of divorce or separation; that even though they argued, Bunch never hit her or acted violently towards her; and that Bunch tried for months to reconcile with her after their separation. The jury never heard these facts.

- Bunch's superiors in the Marines, Captain Adkins, Captain Thomas Crowley, Sergeant Marler, and Sergeant Ware would

have told the jury that they did not recall any disciplinary problems or other incidents of violence involving Bunch; that Bunch matured during the period that they worked together; that Bunch did a good job in the Marine Corps even though from time to time, Bunch was concerned or upset about family problems; that Bunch showed outstanding initiative as a recruit; and that Bunch always did his job very well and was a good worker. Bunch's military records also disclose his education while in the Marine Corps, his awards, including two Good Conduct medals, and a record of promotions over a short period of time. The jury never heard these facts.

That Boatwright and Hinrichs failed to fulfill their duty to investigate and thus rendered objectively unreasonable assistance is abundantly clear from the record. Boatwright and Hinrichs failed to conduct an independent investigation of family members and other witnesses whose names could have been easily elicited from Bunch and his parents. Some of these witnesses could also have been discovered through an examination of the social history and military records, which trial counsel apparently ignored.

It is reasonable to conclude that the jury would have been influenced by the mitigating evidence it did not hear. The Governor has before him this extensive mitigating evidence. Although it is too late for the jury to reconsider its verdict, it is not too late for the Governor to consider this critical evidence and act upon it by commuting Bunch's sentence.

V. BUNCH'S CONFESSION WAS OBTAINED IN VIOLATION OF HIS CONSTITUTIONAL RIGHTS

In this case, Tim Bunch's confession was the centerpiece of the trial. There were no eyewitnesses, and Bunch was not tied to the scene by forensic evidence. Since Bunch admitted his guilt, his confession played a central role in the sentencing phase of the trial. At the time he was questioned by police, Bunch was overcome by remorse, and he completely unburdened himself, providing intimate details about the commission of the crime that would have been completely unavailable to the government otherwise. Indeed, Bunch testified at his trial that he was so overcome by his guilty conscience when he confessed that he intentionally painted a particularly unpleasant picture of his act in the hope of ensuring that he would receive serious punishment. The government conceded at trial that it could not argue that Bunch posed a future danger to the citizens of Virginia or elsewhere, so it asked the jury to impose the death sentence solely on the other ground available under the statute -- vileness. Thus, Bunch's embroidered confession became the crucial evidence supporting the death sentence, as the prosecution used Bunch's own embellishments to establish that the act was sufficiently vile to fall under the terms of the statute. Indeed, neither of the government's two witnesses presented at sentencing offered any evidence addressing the issue of vileness.

A. Background -- Edwards v. Arizona

Bunch argued at trial and maintains here that his confession was obtained in violation of Edwards v. Arizona, 451 U.S. 477 (1981). In the Supreme Court held:

[W]hen an accused has invoked his right to have counsel present during custodial interrogation, a valid waiver of that right cannot be established by showing only that he responded to further police-initiated custodial interrogation even if he has been advised of his rights. We further hold that an accused, such as Edwards, having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police.

Edwards, 451 U.S. at 484-45.

Accordingly, consistent with Edwards, once it is established that the accused was taken into custody and invoked his right to counsel, courts must undertake a two-step inquiry to determine whether the accused subsequently waived that right. First, the accused must be found to have initiated later conversations with the police, and second, it must be clear from the totality of circumstances that the accused knowingly, voluntarily, and intelligently waived his right to counsel. The two inquiries are distinct. Thus, an accused who has not reinitiated interrogation cannot be found to have

waived his right to counsel.^{*/} As the following discussion will demonstrate, the trial court did not afford Timothy Bunch the benefit of the rule in Edwards and thus, his confession was admitted in violation of the Fifth Amendment. Since the confession was the most important piece of government evidence at sentencing, and since the sentencing presentation by Bunch's counsel was so deficient, this constitutional error left the jury with practically nothing but an improperly obtained confession upon which to base its decision to impose the death penalty.

B. Statement Of Relevant Facts

The facts surrounding Bunch's confession are as follows: Shortly after Bunch became a suspect in Ms. Thomas's death, Virginia authorities^{**/} travelled to Japan, where Bunch was serving as a sergeant in the United States Marine Corps. During the interview, Bunch requested counsel. Despite Bunch's repeated request for counsel, the investigators continued to question him.

At the hearing on Bunch's motion to suppress statements made in Japan, Bunch testified that he repeatedly

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See Smith v. Illinois, 469 U.S. 91 (1984) (setting forth two-step process).

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The Virginia authorities who interviewed Bunch in Japan were Donald L. Cahill, Criminal Investigator for the Prince William County Police Department, and Assistant Commonwealth Attorney for Prince William County, William D. Hamblen.

requested counsel. The Virginia authorities stated under oath that Bunch mentioned on only one occasion that "he might want to talk to an attorney." The trial court specifically rejected the sworn statements of the Virginia authorities and found unconditionally that Bunch had requested counsel:

I have no question in my mind somewhere along the interview he [Bunch] indicated the feeling that he should have an attorney present, and at that point red flags should fly up everywhere. The whole machine should go tilt particularly, with an attorney, a Commonwealth attorney sitting in there.

The trial court ruled that the continued questioning of Bunch after his assertion of his right to counsel required the suppression of all statements made by Bunch in Japan. Bunch v. Commonwealth, 304 S.E.2d 271, 274-275 (Va. 1983).

Bunch was transported from Japan to Quantico, Virginia in the custody of military personnel. Bunch was not given the opportunity to consult with an attorney during his the forty-eight hours he was in custody in Japan. After a thirty-six hour journey from Japan, Bunch arrived at Quantico, Virginia and was processed for delivery to Prince William County authorities. At Quantico, Bunch had a two to five minute meeting with Major Donald Jillisky, a Marine Corps civil lawyer. The purpose of the meeting was to inform Bunch of his transfer to civilian authorities. Jillisky specifically informed Bunch that he was not his attorney, and the trial court found that the conference did not satisfy Bunch's right to counsel.

Despite the fact that Bunch had yet to confer with a lawyer, Officer Cahill, who had been with Bunch when he asserted his right to counsel in Japan, reopened the questioning while the two were en route to the Prince William County Substation. He "asked Bunch if he felt he was ready to sit down and go over the case." Bunch v. Commonwealth, 304 S.E.2d at 275. Bunch exhausted, frightened, and resigned to the fact that no lawyer would be forthcoming, succumbed to the pressure and responded, giving a full confession. Since this statement was the product of unlawful conduct by the police, Bunch submits that the sentence based upon it should not stand, particularly since the jury did not have the opportunity to balance the confession against the extensive mitigating evidence set forth above.

At his 1982 trial, during the hearing on the motion to suppress the statements made in Virginia, Bunch's trial counsel argued that the Supreme Court's decision in Edwards required that the statements be suppressed. However, the trial court failed to employ the two-step inquiry mandated by Edwards; the court never asked whether it was Bunch or the police who initiated the conversation in which Bunch confessed. The trial court simply found that under the totality of circumstances, Bunch waived his previously invoked right to counsel. See Exh. 30 at 126-161. The Virginia Supreme Court later upheld the trial court's ruling.

Bunch filed a petition for a writ of habeas corpus in the federal courts, citing the Edwards rule. Despite the fact that Edwards was decided well before Bunch's conviction became final, the Fourth Circuit majority held that reversal of Bunch's case on habeas review would violate the "new rule" doctrine of Teague v. Lane, 489 U.S. 188 (1989) and Butler v. McKellar, 110 S. Ct. 1212 (1990). Id. The court strained to apply the new rule doctrine to Bunch's case by reasoning that while Edwards seems clear today, the "holding was not universally clear to state courts" at the time, and that the Virginia Supreme Court's opinion "must be considered a reasonable application of that case [Edwards]." Bunch v. Thompson, 949 F.2d at 1361. The Court traced the history of the Edwards decision and noted that the Supreme Court recited the Edwards rule in Wyrick v. Fields, 459 U.S. 42 (1982), in Oregon v. Bradshaw, 462 U.S. 1039 (1983), and in Solem v. Stumes, 465 U.S. 638 (1984). The two-judge majority implied that it needed a third repetition -- the Supreme Court's decision again in Solem v. Stumes -- to establish the clarity of Edwards, and it deemed what was merely a reiteration of the Edwards rule in Solem to be a "new rule". It then declined to apply that rule retroactively to Bunch's case. Bunch, supra, 949 F.2d at 1360.

1. Judge Sprouse's dissent.

It is noteworthy that prior to Bunch's case, no Fourth Circuit judge had ever felt compelled to register a dissent in a death penalty case. In his dissent, Judge Sprouse soundly rejected the majority's approach:

It is the majority's view that not until Solem was Edwards clarified as establishing "a bright-line rule that before a suspect can waive his invoked right to counsel he must be the party to initiate subsequent communication."

In my view, the bright-line rule was clearly announced in Edwards. Solem did not alter or modify the Edwards rule. Since the parameters of the waiver of counsel requirements were established in Edwards, consideration of Teague's retroactivity principle is simply misplaced.

Id. at 1368.

Judge Sprouse recited the plain language of Edwards and traced the history of the decisions which followed, including Oregon v. Bradshaw, 462 U.S. 1039 (1983) in which "eight members of the Supreme Court restated that the waiver ruling in Edwards was absolute." Bunch, supra, 949 F.2d at 1368. While the majority insisted that the Virginia Supreme Court, prior to Solem, could have reasonably interpreted Edwards to permit Officer Cahill's reinterrogation of Bunch, Judge Sprouse maintained:

Not even in the most generous recognition of comity . . . could we suggest that a state court's interpretation of a United States Supreme Court decision on federal constitutional law is reasonable when the United States Supreme Court has reached a contrary conclusion.

. . . [I]f the majority of the Supreme Court holds the Edwards opinion to be clear -- it is clear.

Id. at 1369. Finally, Judge Sprouse explained that the concerns for finality and the administration of criminal justice in state courts embodied in retroactivity rules would in fact be frustrated by the majority's approach:

The majority opinion here . . . would interpret Teague as allowing lower courts to render a clear decision of the Supreme Court unclear; the result produces the very lack of finality the majority panel here decries.

Id. at 1370.

After the Fourth Circuit's 2-1 ruling, Bunch filed a motion to have his claim reviewed by all of the judges on the Fourth Circuit panel. Bunch's rehearing motion was denied without opinion by an 8-4 vote. Bunch's petition for certiorari to the Supreme Court was also denied without opinion as was his petition for rehearing.*

The fact that one out of the only three federal appellate judges to hear the case argued vehemently that the conviction should be overturned should undermine any confidence the Governor may have that the completion of the appeals process guaranteed a just result. Judge Sprouse is certainly

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The Supreme Court has consistently held that the "denial of a writ of certiorari imports no expression of opinion upon the merits of the case." Teague, 109 S. Ct. 1060, 1067 (1989).

no liberal ideologue; he has voted to sustain death penalty convictions numerous times. Despite his studied and conservative approach to most cases, he issued a compelling call for the application of the principles of federal constitutional law to Timothy Bunch, notwithstanding the nature of the offense with which he was charged. Moreover, three other Fourth Circuit judges joined him to urge that the case be reheard; in such circumstances, where so many voices which are usually silent are calling out, the imposition of the death sentence would be a grave mistake.

2. Renowned Constitutional Scholars Agree With Judge Sprouse That Bunch Was Convicted And Sentenced In Violation Of The Edwards Decision And The United States Constitution.

Counsel for Mr. Bunch has supplied several renowned constitutional legal scholars with the court decisions and legal pleadings in this case. After their close review of the facts and the law, and the arguments on both sides, their resounding conclusion was that Edwards set down a clear rule before Bunch was convicted, and that failure to apply it in his case was a misapplication of constitutional law. Harold Krent, Assistant Professor of Law, University of Virginia School of Law, noted that "[e]xecuting one who has so clearly been convicted in contravention of constitutional commands is unseemly. The execution would place the state's imprimatur upon evasion of the constitution." Moreover, Professor Harry

W. Yackle of Boston University notes that ". . . the Fourth Circuit was flatly wrong in deciding that it could not enforce the Edwards rule here . . . In this instance, the federal courts have not protected Mr. Bunch's federal rights." As Professor Yackle highlights, the Governor's authority to commute his sentence is "the last safety valve built into this system." It is this authority that we implore the Governor to exercise.

C. An Independent And Objective Review Of The Law At The Time Bunch's Conviction Became Final Would Have Established That The Edwards Ruling Was Clear And Applicable To Bunch Case.

Bunch's conviction became final when the Supreme Court denied his petition for certiorari on direct review of his state conviction -- January 9, 1984.*/ A majority of the Supreme Court reaffirmed the clear holding of Edwards in two decisions rendered well before the date. In Wyrick v. Fields, 459 U.S. 42, 46 (1982), a case decided over one year before Bunch's conviction became final, the Court repeated its holding in Edwards:

In Edwards, this Court had held that once a suspect invokes his right to counsel, he may not be subjected to further interrogation until counsel is provided unless the suspect himself initiates dialogue with the authorities.

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See Stringer v. Black, 112 S. Ct. 1130, 1134 (1992).

In Oregon v. Bradshaw, supra, eight Justices agreed that Edwards altered the old standard for when the right to counsel had been waived and established a per se rule. Bradshaw, 462 U.S. 1039, 1054, n.2 (1983). The justices agreed that under Edwards a valid waiver of the right to counsel cannot be demonstrated if the police initiated subsequent conversations with the accused. Therefore, prior to the date on which Bunch's conviction became final, an overwhelming majority of the Supreme Court expressed its view that Edwards established a per se rule mandating suppression of police initiated interrogation.

Moreover, decisions of the Supreme Court rendered after petitioner's conviction became final reaffirmed that a majority of the Court has always regarded Edwards as being clear and unequivocal. For example, in Smith v. Illinois, 469 U.S. 91, 95 (1984), the Court remarked that "Edwards set forth a bright-line rule that all questioning must cease after an accused requests counsel." In Michigan v. Jackson, 475 U.S. 625, 634 (1985), the Court stated that "one of the characteristics of Edwards is its clear, bright-line quality."

Similarly, in Arizona v. Roberson, 486 U.S. 675, 682 (1988), the Court emphasized that the Edwards rule serves the purpose of providing "clear and unequivocal guidelines to the law enforcement profession." Most recently, in Minnick v. Mississippi, 111 S. Ct. 486, 490 (1990), the Court noted that

"the merit of the Edwards decision lies in the clarity of its command and the certainty of its application."

In order to avoid applying Edwards in Bunch's case, the two-judge majority asserted that the holding in Edwards was vague. The Supreme Court soundly rejected such an argument in its characterization of the Edwards holding in Roberson. In describing the Edwards rule, the Court stated:

Surely there is nothing ambiguous about the requirement that after a person in custody has expressed his desire to deal with the police only through counsel, he is not subject to further interrogation by the authorities until counsel has been made available to him unless the accused himself initiates further communications, exchanges or conversations with the police.

Arizona v. Roberson, 486 U.S. at 682. Thus, the decision in this case ignored the Supreme Court's directives in Edwards, Wyrick, Oregon v. Bradshaw, Roberson, Minnick, Jackson and Smith.

In addition, the Fourth Circuit's ruling is flatly inconsistent with its own prior decisions holding Edwards to be clear. See United States v. Renda, 567 F. Supp. 487, 488, aff'd, 758 F.2d 649 (4th Cir. 1985) (Edwards is a per se rule); Wilson v. Murray, 806 F.2d, 1232, 1237, (4th Cir. 1986), cert. denied, 484 U.S. 820 (1987) (Edwards constructed a prophylactic rule of considerable impermeability); accord McFadden v. Garraghty, 820 F.2d 654, 658 (4th Cir. 1987).

The McFadden case is particularly significant because there, the Fourth Circuit applied the per se rule of Edwards to

an appellant whose conviction became final nine months before Bunch's conviction became final. McFadden, 820 F.2d at 655-56. The McFadden court recognized that Edwards established a "rigid prophylactic rule . . . [i]f the accused invoked his right to counsel, courts may admit his responses only on finding that he (a) initiated further discussions with the police, and (b) knowingly and intelligently waived the right he had invoked." Id. at 658. Thus, in McFadden, the Fourth Circuit applied Edwards in the very manner urged by Bunch.

If the rule in Edwards was sufficiently clear to be applied to McFadden, it was still clear nine months later when Bunch was convicted. The uneven application of constitutional principles cannot be justified, even if the judges in Bunch's case were presented with an individual charged with murder. Fundamental principles of fairness require that similarly situated individuals be treated in a similar manner. See Teague, 109 S. Ct. at 1072.

D. The Fourth Circuit's Conclusion That the Mere Restatement Of The Edwards Rule In Solem v. Stumes Constituted A New Rule Conflicts With Supreme Court Precedent And Misapplies Settled Retroactivity Principles

Despite the clarity of the Edwards decision, the Fourth Circuit majority held that the Edwards rule was not adequately clarified until the Supreme Court repeated it in Solem v. Stumes, 465 U.S. 638 (1984). According to the two-judge majority, the reiteration of the Edwards rule in

Solem constituted a "new rule," which the Court then declined to apply to Bunch's case. Bunch submits that the two judge's heavy reliance on Solem was nothing more than a disingenuous and strained attempt to deny him the benefits of Edwards.

The Edwards holding repeated in the Solem case was applicable to Bunch because Solem did not announce any "new rule." A case announces a new rule "when it breaks new ground or imposes a new obligation on the States or the Federal Government," or if the result was not dictated by precedent existing at the time the defendant's conviction became final." Butler, 110 S. Ct. at 1216. The Supreme Court's decision in Solem did not purport to clarify Edwards. The only question posed in Solem was whether the Edwards rule should be applied retroactively, that is to convictions which became final before Edwards was announced on May 18, 1981. Such an inquiry presumes that Edwards announced a clear rule, and the Solem majority expressly recognized this fact. It noted, "Edwards established a bright-line rule to safeguard pre-existing rights." Solem, 465 U.S. at 646. Thus, Solem did not, as the two-judge majority asserted, "clarify" Edwards. Accordingly, as Judge Sprouse argued, Solem could not have established a "new rule."

Judge Sprouse's view that Solem did nothing but repeat Edwards is confirmed by the Supreme Court's opinion in Michigan v. Jackson, supra. There, the Court stated, "[i]n Solem v. Stumes, we reiterated that Edwards established a bright-line

rule to safeguard pre-existing rights . . . " 475 U.S. at 626 (emphasis added). The Supreme Court's own description of what took place in Solem, ignored by the Fourth Circuit majority, reinforces the erroneousess of the Fourth Circuit's ruling.

The Fourth Circuit's decision was also contrary to the Supreme Court's holding in Shea v. Louisiana, 470 U.S. 51, 58 (1985), where the Court instructed state courts how to apply Edwards. Shea ordered courts to apply Edwards to those defendants whose convictions became final after Edwards was decided.*/

Bunch's conviction became final after Edwards, so it applied to him. Edwards required the trial judge to ensure that it was Bunch, and not the police, who reopened communications after Bunch asked for a lawyer. In this case, the police reopened the questioning, and therefore, the trial court and Fourth Circuit erred in permitting the confession to stand. Under such circumstances, given the key role of the confession played in Bunch's sentencing, clemency should be granted.

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The Shea opinion followed Solem, and the Supreme Court could have said then that Edwards was to be applied only to those defendants whose convictions became final after Solem. The Supreme Court drew no such distinction, because it has never accorded Solem the significance crafted for it by the Fourth Circuit majority.

VII. CONCLUSION

Timothy Bunch and his counsel acknowledge that the serious nature of his crime cannot be discounted, although his actions can be explained. Bunch does not seek to be exonerated or to have his conviction overturned; he will retain the guilty verdict, and the punishment of life imprisonment will ensure that he never again savors the joys of freedom. But a grant of clemency and the commutation of the death sentence to one of life imprisonment would recognize the extraordinary circumstances that led to the commission of the crime and Bunch's genuine efforts to use his talents to be of value to others even while incarcerated. Also, a grant of clemency would reaffirm the principle that the Commonwealth cannot and will not take a life unless it is absolutely confident that the accused has been afforded that fundamental guarantee of a free society: a fair trial.

The evidence presented in this Application and exhibits presented with it establish that death by electrocution is not appropriate in this case. Timothy Bunch is a decent human being who suffered through a painful childhood and had a difficult life. He has struggled to overcome his past and make something of himself, even now. Due to the ineffectiveness and inexperience of Bunch's counsel, the sentencing jury never had the opportunity to consider the wealth of mitigating evidence now before the Governor.

The Governor should be moved to exercise his clemency power because this case is not the sort of case for which the death penalty was intended. The trial judge determined that Bunch showed no signs of future dangerousness, and when comparing Bunch's case to those where death was ordered, it is clear that the level of vileness warranting death was simply not present here. Moreover, the act was not planned or premeditated, and the theft was a mere afterthought of a confused and scared young man. This case is not at the core of what the death penalty statute was designed to address, and a grant of clemency will not undermine any purpose the statute was enacted to serve.

The family of Mrs. Thomas does not want Mr. Bunch to die. It is their deeply felt belief that life imprisonment is the appropriate punishment for Bunch's crime, and they have willingly reopened old wounds to come forward and let their views be known. Bunch urges the Governor to accord their wishes his most serious consideration.

The basis for the imposition of the death sentence was a confession extracted in violation of his constitutional rights. The Honorable James M. Sprouse of the United States Court of Appeals for the Fourth Circuit, as well as several reknowned law professors in the Commonwealth and elsewhere, have recognized that the confession was improperly admitted into evidence. Thus, while the jury was deprived of compelling mitigating evidence, it was left only to consider what the

government introduced as its evidence: a detailed statement given by an exhausted and remorseful young man in response to undue influence and unlawful questioning by the police. The Bill of Rights, the bulwark against tyranny born in Virginia, has been violated here, and the Governor alone has the power to rectify this wrong.

WHEREFORE, Timothy Dale Bunch, by and through his undersigned counsel, respectfully requests that the Governor exercise his power of clemency and commute the death sentence of Bunch to one of life imprisonment.

For the reasons stated herein and in light of the evidence and information contained in the attached Exhibits, Timothy Dale Bunch respectfully requests that Governor Lawrence Douglas Wilder, pursuant to Article V, Section 12 of the Virginia and Va. Code Sections 53.1-229 et seq., commute his sentence of death and his execution presently scheduled for Thursday, December 10, 1992 to a sentence of life imprisonment.

RESPECTFULLY SUBMITTED,

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On Behalf of
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