

UNDESERVING OF DEATH

**FUNDAMENTAL FLAWS IN
FITZGERALD'S TRIAL**

**CLEMENCY PETITION OF
EDWARD BENTON FITZGERALD**

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LIST OF EXHIBITS

I. INNOCENCE OF DEATH

This clemency petition concerns a case of innocence. Not innocence of the crime, however, but innocence of the penalty, innocence of death. In a non-capital case, innocence refers only to the question whether the defendant did the acts charged. But in a capital case, the defendant faces two equally important trials, one to determine whether he did the acts charged, and one to determine whether he ought to die for having done them. The second determination must be made only if the first determination goes against the defendant, but acquittal -- a finding of innocence -- is possible in either trial. Just as a defendant *convicted* of the acts charged might be innocent of those charges, a defendant *condemned* for the acts charged might be "innocent" of the condemnation. He ought not to die.

This clemency petition also concerns a fundamentally unfair trial. Trials are adversary proceedings that depend on vigorous opposition to achieve a fair and reliable result. If a defendant's lawyer failed to put on readily available evidence of the defendant's innocence -- or worse, admitted the defendant's guilt to the jury notwithstanding such evidence -- reasonable people would agree that regardless of the outcome, the trial was unfair, the result unreliable, and the question of innocence unresolved. The verdict in a sentencing trial, whether life or death, is judged by the same standards of fairness. And the failure of the defendant's lawyer to put on readily available evidence of the defendant's innocence of the penalty and that lawyer's affirmative admission to the jury of the defendant's guilt of the penalty is no less objectionable and violative of common notions of fundamental fairness. Shockingly, that is exactly what happened in Edward Benton Fitzgerald's case. Consequently Fitzgerald's trial provided no reliable answer to the question

whether Fitzgerald should live or die. Such a contravention of the principles of justice on which our system of justice is based presents a compelling question of innocence -- innocence of the death penalty.

A. The Historical And Logical Nature Of Clemency

If courts were perfect, governors never would be asked to grant clemency, for there would be no injustices, there would be no unfair trials, there would be no mistakes. But courts, which are no more than collections of fallible human beings, are not perfect in any respect. Whether trial or appellate, courts make mistakes of every kind. They 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 our governor the power of clemency, they can only have intended that our governor stand guard against errors of any sort that resulted in injustice.

No official standards determine when the governor should grant clemency. Recent history in Virginia indicates, however, that only actual innocence of the crime -- or at least the gravest doubts as to guilt -- will provide an adequate basis for clemency. There are at least three reasons why this should not be the case. First, those innocent of the crime of which they have been convicted seek justice, not mercy, when they ask for clemency. Strictly speaking, clemency concerns mercy. Logic therefore prescribes that clemency should be available for those guilty of crimes as well as those innocent.

Historically it has been available to those guilty of crimes. From 1900 through 1988, Virginia's governors granted clemency to 91 men and women. In no more than 11 of these cases could it be said that the basis for clemency was doubt as to whether the condemned

man committed the crime. Innocent persons rarely should be convicted of capital crimes, so it is by no means surprising that 80 of 91 commutations have spared persons as to whose guilt there was no question. This simply reflects the fact that our courts make mistakes other than convicting those who have committed no crime.

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 *Clemencies In Post-Furman Capital Cases*, well over half were for reasons other than innocence of the crime. Prominent among those reasons were rehabilitation of the condemned, disparity in sentencing between the condemned and his co-defendants, simple mercy, or post-conviction changes in the law that placed the fairness of the condemned man's sentence in doubt.

In short, clemency ought to be, has been, and is now extended in cases where injustice has invaded the sentencing trial as well as in cases where the guilt trial went awry. This is as it should be. Bifurcation of a capital case into two distinct trials of innocence underscores the critical importance of the sentencing trial. That trial in fact is the defendant's likely last chance at survival. Unfortunately, Fitzgerald's attorneys failed to see or respond to that inescapable fact, scuttling Fitzgerald's chance for a fair trial.

B. The Importance Of The Sentencing Trial

The decisions of the United States Supreme Court repeatedly have emphasized the "fundamental" role of counsel to a fair trial. *See, e.g., United States v. Cronin*, 466 U.S. 648 (1984); *Argersinger v. Hamlin*, 407 U.S. 24, 31 (1972); *Gideon v. Wainwright*, 372 U.S. 335, 343-44 (1963). Competent counsel is the means by which other rights of the

person on trial are secured. *Cronic*, 466 U.S. at 653; *see also United States v. Ash*, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities"). Thus one pillar of our system of criminal justice is the presumption that counsel will act as an accused's forceful and undivided advocate. *Anders v. California*, 386 U.S. 738 (1967). The right to counsel, of course, incorporates the right to the effective assistance of counsel. *Strickland v. Washington*, 446 U.S. 668 (1984).

Trial counsel's role in a capital sentencing proceeding is comparable to counsel's role at trial, i.e., to ensure that the adversarial process works to produce a just result. *Strickland v. Washington, supra*. 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 unnecessary." *Strickland*, 466 U.S. at 668; *see also Darden v. Wainwright*, 478 U.S. 1036 (1986) (counsel not ineffective where he engaged in extensive pre-trial preparation and investigation for the penalty phase of defendant's trial). In a capital case, investigation of, preparation for, and presentation of the mitigation case at the sentencing trial is in many cases 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.

The United States Supreme Court's decisions have stressed the paramount importance of providing the sentencer with the fullest information possible concerning the defendant's life and characteristics. *Lockett v. Ohio*, 438 U.S. 586 (1978); *see also Jurek v. Texas*, 428 U.S. 262, 276 (1976) (sentencer must have before it all possible relevant information about the individual defendant whose fate it must determine). The reasoning behind this Eighth Amendment principle is self-evident. 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." *Id.* at 605. In a capital sentencing proceeding before a jury, "the jury is called upon to make a highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'" *Turner v. Murray*, 476 U.S. 28 (1986) (quoting *Caldwell v. Mississippi*, 472 U.S. 320 (1985)). 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 of 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. ___, 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. 104 (1982); *Lockett v. Ohio*, 438 U.S. 586 (1978). "Because the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant," *California v. Brown*, 479 U.S. 538, 542 (1987) (O'Connor, J., concurring), evidence of a defendant's mental debilities 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.^{1/}

In recognition of these principles, and against the backdrop of the Sixth Amendment guarantee of the effective assistance of counsel, courts have carefully scrutinized trial counsel's investigation, development, and presentation of mitigating evidence in capital cases. For example, in *Curry v. Zant*, ___ Ga. ___, 371 S.E.2d 647 (1988), the Georgia Supreme Court determined that trial counsel's failure to obtain an independent psychiatric evaluation of his client constituted ineffective assistance of counsel. At trial, Curry pled guilty to capital murder and was sentenced to death. Two psychologists testified at Curry's state habeas evidentiary hearing that he did not have the ability to waive his constitutional rights (thus making the plea unacceptable), and that he was either incapable of distinguishing right from wrong or incapable of controlling the impulse to commit wrongful acts. The court

^{1/} *See* Virginia Code § 19.2-264.4(B)(ii)(iii)(vi) (defendant was under the influence 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).

recognized that trial counsel was personally dedicated to Curry, but nevertheless determined that the failure to meaningfully explore expert mental health assistance was unacceptable.

The court stated:

Conscientious counsel is not necessarily effective counsel. The failure to obtain a second opinion, which might have been the basis for a successful defense of not guilty by reason of insanity and would certainly have provided crucial evidence in mitigation, so prejudiced the defense that the plea of guilty and the sentence of death must be set aside.

Id., 371 S.E.2d at 640; *see also Wilson v. State*, 771 P.2d 583 (Nev. 1989).

Similarly, in *Stephens v. Kemp*, 846 F.2d 642 (11th Cir. 1988), a panel of the United States Court of Appeals for the Eleventh Circuit found trial counsel to be constitutionally ineffective for failing to investigate, present, and argue to the jury at the sentencing trial evidence of defendant's mental history and condition. Although counsel had learned from the defendant's sister that the defendant had spent a brief time in a mental hospital four to six months before the offense occurred, counsel failed to make any additional inquiries after a state psychiatrist filed a report indicating that the defendant was not mentally ill. The Court of Appeals concluded:

Although trial counsel was aware well in advance of trial that appellant had spent at least a brief period of time in a mental hospital shortly before the shooting, and that for some reason a psychiatric evaluation had already been ordered, he completely ignored the possible ramifications of those facts as regards the sentencing proceeding. This omission denied appellant reasonably competent representation at the penalty phase.

Id. at 653; *see also Middleton v. Dugger*, 849 F.2d 491 (11th Cir. 1988) (failure to conduct an investigation into petitioner's background, to uncover mitigating, psychiatric, IQ, and childhood information, and to present that information at sentencing trial of death penalty

case was ineffective assistance of counsel); *Evans v. Lewis*, 855 F.2d 631 (9th Cir. 1988) (trial counsel ineffective for failing to investigate a capital defendant's mental condition for the purposes of presenting mitigating evidence in the sentencing trial of defendant's trial.

The paramount importance of the sentencing trial cannot be questioned. And in this case, the failure of sentencing trial to meet the goals outlined above cannot reasonably be questioned.

II. DEFENSE DEFICIENCIES AT SENTENCING TRIAL

Anyone simply scratching the surface would have found and presented to the jury more information than Fitzgerald's attorneys Hunt and Burgess did twelve years ago. But Fitzgerald's attorneys did not scratch the surface. It is fair to say they did worse than nothing. No reasonable person would disagree that an attorney who admitted his client's guilt during the guilt trial had acted against, rather than for, his client's interests. Yet that is exactly what Fitzgerald's attorneys did before and during the sentencing trial. In the sentencing trial, jurors may recommend the death penalty only if they find the crime vile or the defendant likely to be dangerous in the future. Thus "guilt" in the sentencing trial consists of vileness or future dangerousness. Unethically and impermissibly Fitzgerald's attorney told the jury in no uncertain terms that Fitzgerald's crime was vile. Irrespective of whether that is true, for Fitzgerald's attorneys to say so implies to the jury that the case for the death penalty is unassailable, thereby vitiating the effect of what little mitigating evidence those attorneys offered in Fitzgerald's behalf.

Little it was. Fitzgerald's attorney called as his mitigating witnesses:

- * David Bradley, to testify that Fitzgerald was generous and hard working;
- * Brother Harry Fitzgerald, to testify that Fitzgerald's mother and family needed Fitzgerald around for help and assistance; and
- * Genny Fitzgerald, to testify that she loved and needed her son.

To this meager evidence, the defense attorneys added only Dr. Lordi's report, which detailed some of Fitzgerald's drug abuse but offered little else of substance. Hunt knew that Fitzgerald's drug use might be a mitigating factor; at Fitzgerald's sentencing by Judge Gates, Hunt argued that Fitzgerald be spared, saying that "All of the sources of evidence provided at this trial showed that Edward Fitzgerald was under the influence of drugs and alcohol to some extent that night. *I think maybe it was not exposed as to what was the extent of his intoxication.*" (Sent. Tr. 21-22) Since, as Hunt states, there was every reason to suspect that drugs played a large role in the crime, it is difficult to understand why Hunt did not attempt to show how large that role was.^{2/}

The quality of this evidence is demonstrated by the fact that the prosecution did not cross examine any of the witnesses or rebut any of the evidence.

Fitzgerald's attorney then asked the jury to give Fitzgerald a life sentence, but he referred to no mitigating factors. Indeed, the judge instructed the jury on two mitigating

^{2/} It is worth noting in this regard that Hunt and his co-counsel combined to expend less than 182 hours preparing and trying the case. The mitigation evidence that ought to have been, and could easily have been, developed, however, could not be expected simply to fall in Hunt's lap.

factors that were suggested by evidence in the guilt trial -- that the crime was committed under the influence of extreme mental or emotional disturbance or that the capacity of the defendant to comprehend the criminality of his conduct or conform his conduct to the law was significantly impaired -- but Hunt made no reference to these factors. Failing to argue for any mitigation whatever, Hunt told the jury that "we are asking for mercy, ladies and gentlemen, and that is the long and short of it." (Tr. 928) Whatever the weight or legitimacy of this plea, Hunt undermined it by acknowledging to the jury that Fitzgerald might not deserve it: "Mercy is a funny thing, ladies and gentlemen. It is given many times when it is not deserved." (Tr. 929)

In short, Fitzgerald's attorneys admitted to the jury that Fitzgerald's crime was vile, eschewed the presentation of any mitigating evidence in favor of a plea for mercy, and then thwarted the effect of their own plea by conceding that Fitzgerald might not deserve mercy. Such incompetent and unprofessional conduct hardly can be characterized as effective assistance of counsel.^{3/}

Most importantly, this presentation ignored the facts. As we show below, a strong case in mitigation could easily have been made.

^{3/} Fitzgerald's attorneys' lack of zeal was evidenced in the guilt trial as well as the sentencing trial. During closing arguments, the Commonwealth's Attorney started to cry. Fitzgerald's attorney reacted to this unprofessional display not by objecting or moving for mistrial, but by doing nothing. That Mr. Hunt's wife worked as an administrative assistant for the Commonwealth's Attorney may help explain his reluctance to confront the Commonwealth's Attorney.

A. The Strong Case For Mitigation

What was the mitigation that could have saved Fitzgerald from the death penalty?

Many theories are suggested by no less obvious a source than the sentencing statute, Va. Code §19.2-264(4). These include youth, extreme mental stress, and impairment by drugs and alcohol. Fitzgerald was 23, so a plea in mitigation on account of his youth was certainly not out of the question. None was made, however. Even more obvious a mitigation strategy was drug and alcohol impairment. During the guilt trial, witness after witness testified that Fitzgerald was heavily under the influence of drugs and alcohol at the time of the crime. Given that the power of this ground for mitigation is recognized even in the sentencing statute, Fitzgerald's attorneys at least ought to have explored the option. If they had done so, they would have discovered strong and persuasive evidence in Fitzgerald's favor. Abundant evidence showed that drugs and alcohol contributed substantially to the commission of the crime and suggested that Fitzgerald "went wild" or "lost it." This possibility was supported by evidence that Fitzgerald's drug and alcohol abuse extended back a decade and had been increasingly heavy in the months before the crime. Finally, Fitzgerald's attorneys could easily have discovered that his descent into drug abuse occurred in and was explained by an environment of extreme physical and psychological abuse.

1. Fitzgerald The Man

First and most importantly, Fitzgerald had no history of violent criminal conduct.^{4/}

Fitzgerald's record consists of traffic offenses and five minor disturbances of the peace that resulted in \$25 or \$50 fines. Fitzgerald was never imprisoned until November 1980. The jury was entitled, and the defense was obligated to present evidence of Fitzgerald's character as known by persons close to him.

A cursory investigation reveals a man whom his family, including his two children, friends, neighbors, men on death row, and guards describe as good, sharing, responsible, generous, and loving.^{5/} Since his conviction and incarceration on death row, Fitzgerald has emerged as a supportive and positive influence with his fellow inmates, often acting as a necessary link between the less capable inmates and prison administration.

Fitzgerald was the first man on Virginia's death row to get his G.E.D. He used his education to read, study, and learn what he could about the law. He became a student of the Chinese language, Taoism, and Zen Buddhism. These were philosophies which, combined with his Catholicism, gave him the tools and ability to help others on death row.

^{4/} On April 3, 1979, Fitzgerald awoke from his bed, donned his pants -- which contained a small pistol -- and wandered into his living room. There he found his naked wife engaged in sexual intercourse with one of his best friends. Fitzgerald emptied the pistol in the pair's direction, hitting his wife. Immediately overcome by what he had done, Fitzgerald called the police, told them what he had done, and waited for their arrival. On June 26, 1979, Fitzgerald pleaded guilty to unlawful wounding. Because of the provocation that had led to the shooting and because Fitzgerald turned himself in, he was placed on probation.

^{5/} Jimmy reports that when he was in Thailand and Vietnam Fitzgerald was the only family member who wrote him regularly. Those letters meant a lot to Jimmy.

Randy Blankenship first met Fitzgerald when they were in the 6th grade, and they remained friends through school. He reports that Fitzgerald helped him with his school work and was a very responsible person and a good friend.

Dorothy Redford, Fitzgerald's former mother-in-law and the grandmother of his children reports that Fitzgerald was a perfect gentleman and one of the nicest young men she has ever met. One way Fitzgerald showed his consideration was to take her husband's grandchildren on outings such as nature trails. Dorothy Redford reports that he stays in constant touch with his children when they are with her. He calls whenever he is allowed to and sends them letters almost daily. The letters are "good, constructive and loving letters telling them to study, behave and stay off drugs".

Fitzgerald reached out to the neediest men on death row -- the retarded, the mentally ill, and the suicidal. He persistently encouraged them to come out of their shells, understand themselves and take responsibility for their acts and their situation. As Joe Giarratano writes" ". . . Fitz (Edward) has changed and grown tremendously . . . The lessons he has learned he has tried to share with the other men on the row, and he is always taking someone under his wing to look after."

As death row grew and the pods were separated, Fitzgerald became "pod monitor" for the Virginia Coalition on Jails and Prisons. His job for the Coalition was to monitor the cases and men in his pod and alert the Coalition to any changes that could affect their appeals. Fitzgerald showed good judgment in carrying out his job, and the Coalition was able to rely on him completely.

Fitzgerald entered death row a drug addict and alcoholic. There are no programs on death row and no treatment is given for such addiction. Fitzgerald has continued to drink, and he has gotten charges when he was drinking. Nonetheless, guards and administrators speak highly of him. Chaplain Ford recently visited death row and heard that two guards became emotionally upset when Fitzgerald was taken from the row to the death house. During his visit to the row, the security chief took Chaplain Ford aside and spoke of Fitzgerald in very positive terms.

2. Fitzgerald's Abuse As A Child

Fitzgerald was born August 15, 1957, to Genny Hanratty and Harry Fitzgerald. Harry was an alcoholic who abused their children throughout their childhoods. The common

belief among Genny's ten brothers and sisters⁶ was that Harry was crazy when he was drunk. That was often; he drank every day, and Genny's sister Florence remembers that Harry sometimes carried a suitcase of liquor bottles around with him anywhere he went.

When the boys were babies, Harry would jerk them out of their cribs by the arm. He beat them with belts and punched them in the head with his fists from the time they were two years old until he died, when Fitzgerald was fifteen. Genny's sister Claire saw Harry punch the boys in the head. She never saw Harry knock Fitzgerald unconscious, though she believed Harry restrained himself around her. Sometimes Harry took their food away for no more than spite. Harry seldom talked to the children or smiled at them, and when he wanted them to stop something, he relied on a slap instead of a word. Many nights Harry's violence forced Genny to take the kids to stay with their friends Elmer and Elsie. Harry's response to this survival tactic was to accuse Genny of having an affair with Elmer.

Genny had cancer when she was pregnant with Fitzgerald⁷, and Harry wanted her to get an abortion. She would not, and after Fitzgerald was born, Harry would fight with Genny about Fitzgerald in front of him, suggesting he should have been aborted. Florence

⁶ Genny was one of eleven brothers and sisters. We have learned that the family was prone to alcoholism and manic depression. According to Michael Hanratty (son of Genny's police officer brother Eddie), four of the brothers and sisters, including perhaps Genny, were manic depressive. Michael states that in one manic episode his Aunt Irene threatened to throw her six-year old son out the window. Before he was diagnosed as manic depressive, Michael was prone to blackouts during which he was very violent. There is a suggestion that other Hanratty men were prone to the same problem. Eventually Michael was treated with haldol and thorazine, and his condition is now controlled. Fitzgerald's brother Jimmy also points to a family history of manic depression. This suggests the possibility of a strong genetic or genetic-cultural component to Fitzgerald's crime that would mitigate against the death penalty. Members of the family have expressed a willingness to release their psychiatric and medical records to us, but we do not have the time to investigate this in the manner necessary.

⁷ We have discovered that Fitzgerald's mother Genny had a mastectomy soon after Fitzgerald was born in 1957. Her sisters believe she received treatment for cancer during her pregnancy. We do not know what that treatment was, and until we do, we cannot know what the effect on Fitzgerald *in utero* might have been.

believes that Fitzgerald knew from a very young age that Harry did not want him. Harry blamed Fitzgerald for many things, and Fitzgerald came to believe that he deserved the abuse his father meted out to him.

Genny went back into the hospital for a mastectomy right after the birth, but Harry refused to take care of Fitzgerald. Fitzgerald's brother Jimmy, who was only six himself, cared for Fitzgerald and changed his diapers. Even when Fitzgerald was older, Harry gave Genny no money from his job with the railroad to take care of the kids. This forced Genny to work at a movie house, and she had to take Fitzgerald to work with her because Harry would not take care of him.

Several times before Fitzgerald was four, Genny's brother James drove down to Richmond from New York to confront Harry about the abuse. James warned Harry to stop hurting the children and Genny. Harry was afraid to hit the boys in front of James, so James never saw Harry hit Fitzgerald. Once however, he noticed a large bruise on Fitzgerald's left side. Harry claimed that three days earlier Fitzgerald had disobeyed Harry's order to go to bed, so Harry had slapped him. James did not believe a mere slap could have cause so large and lingering a bruise. James observed that Fitzgerald and his brothers were terrified of Harry. When the boys were at James's house, he played with them as much as he could, and they all wanted to sleep with him at night. Eventually Genny became afraid that James would hurt Harry, so she dropped out of touch with James.

When Fitzgerald was four years old, Genny packed up the kids and took them to New York. Before she left, Genny told Claire that she had to leave Harry because of what he was doing to the children. Genny told her sister Florence and brother James the same thing and

wrote her brother Eddie to tell a similar story. Genny stayed in New York for some time. Unable to reach her physically, Harry would call Genny and verbally abuse her. At one point during that time, Genny sued Harry in Bronx Family Court for support. She attached an affidavit to her petition, in which she said that Harry "was very cruel to the children, many times he struck them for no good reason. He was very mean to the older boy James. He told the children that I (the mother) was no good. . . . The children often asked me why the father kept saying I was no good." Fitzgerald's brother Jimmy remembers testifying in that case that "we'd been beaten by my father." Eventually, however, Genny moved back to Richmond on Harry's promise of better behavior, though when she got home Harry seemed not to care one way or another. Claire went with them, and when she left, Fitzgerald and his brothers begged her to take them with her.

The abuse was not confined to the children. Harry beat Genny in front of the boys, and as she stated in her affidavit, he often told them she was no good. Indeed, Jimmy believes the physical abuse was directed more at Genny than at the kids. Jimmy escaped to the military when he was seventeen and never saw his father again. Fitzgerald's brother Harry also left when he was fifteen or sixteen because of father Harry's meanness.

Fitzgerald was most affected by the abuse. Claire describes him as "scared all the time." Florence remembered him as a "very scared child" who distrusted all men and hid behind women when men were around. Fitzgerald hid even from Florence's husband, who was good to him. Between the ages of two and four, Fitzgerald would beat his head on the floor, out of fear, Claire believed. Harry tried to stop this by hitting Fitzgerald some more, but that did not work.

3. Fitzgerald's Long History Of Drug Abuse

It is no surprise that Fitzgerald sought escape in drugs, growing up under the heel of his father Harry. But the age at which he began to use drugs is shocking. Fitzgerald was twelve years old when he took his first drug, LSD, in 1969. By 1971, Fitzgerald had begun to use marijuana, and by 1972, he was drinking whiskey and scotch. Fitzgerald acquired a taste for beer by age fifteen, and he and Randy Blankenship used to go bar-hopping.

In turning to drugs, Fitzgerald was following in the footsteps of his older brothers. Fitzgerald's brother Harry almost died from an overdose when Harry was in the eighth grade. The LSD that Fitzgerald first tried was something of brother Harry's or Jimmy's that he found around the house. When Jimmy left to join the military in 1969, Fitzgerald had started using drugs and brother Harry was using them heavily.

In 1975, Fitzgerald met Bonnie Shipp, and she introduced him to cocaine, methamphetamine, and on occasions heroin. Bonnie's mother Dorothy Redford describes Fitzgerald as one of the nicest men her daughter brought home. However, a real difference arose in Fitzgerald when he took drugs, she says. When he wasn't on them, Ms. Redford calls Fitzgerald easygoing and nice.

Fitzgerald met Pat Cabbage in 1979 when she moved into the apartment upstairs from his and Bonnie's. Cabbage taught him how to inject cocaine, methamphetamine, heroin, and LSD(?). Fitzgerald thereafter preferred mainlining to other forms of ingestion. Generally he injected the cocaine or methamphetamine in combination with scotch or vodka.

Except for the school years of 1970-71 and 1972-73, Fitzgerald never was off drugs from 1969 to 1980. As a teenager in the summers of 1970 and 1971, Fitzgerald did LSD

every weekend. By the age of sixteen, Fitzgerald was a regular drinker of hard liquors.

Fitzgerald first tried methamphetamine in 1976. In the two years preceding November 1980, Fitzgerald did some drug every day.

In the months before November, Fitzgerald took LSD, which he then viewed as a safe social drug, almost every weekend. When he was working, he worked four-day weeks, and on the weekends, he and his friends did drugs constantly from Thursday through Sunday. Fitzgerald often used amphetamines to get to and through work and then alcohol to get to sleep. The lucrative construction job ended in the summer. With the money he had saved, Fitzgerald did drugs, particularly methamphetamine, seven days a week. His friend Don Henn reported that Fitzgerald would do any drugs available any time.

4. The Unusual Circumstances Surrounding The Crime

In the year leading up to November 13, 1980, Edward Benton Fitzgerald was embarked on increasingly heavy use of a variety of drugs. Fitzgerald's wife Bonnie was confined to a wheel chair as a result of a shooting incident between her and Fitzgerald, and her condition enabled her to obtain numerous prescription drugs, which she and Fitzgerald could either ingest or trade for other drugs. Among the drugs Bonnie could get was Tranxene, a tranquilizer. In Pat Cabbage, Fitzgerald had met a steady supplier of methamphetamine. Fitzgerald had known dealers in LSD, including Daniel Johnson, since he was twelve years old, and on occasion he could get cocaine, heroin, and other drugs. Fitzgerald mainlined many of these drugs, a practice he was taught by Cabbage. Marijuana was as easily obtainable as alcohol, and Fitzgerald used both in abundance.

Fitzgerald was an occasional construction worker. In the months preceding November 13, he, Bonnie, and their two children were living off his earnings from his last construction job. Thus in those months Fitzgerald was using some sort of drug every day. Fitzgerald was ingesting or injecting methamphetamine 5 to 7 days a week, three times a day.

The event that landed Fitzgerald on death row began when he collected a prescription of Tranxene, 100 tablets, for Bonnie. Fitzgerald gave these to Don Henn around 6:00 p.m., retaining 15 for himself. Fitzgerald swallowed three or four immediately. Henn and Fitzgerald then obtained one and one half cases of beer from the Big Star market. They returned to Fitzgerald's house, where they met Pat Cabbage and Angelia Robinson. Danny Johnson arrived later. The group drank beers and smoked marijuana. After awhile, Cabbage, Robinson, and Henn left to get mixed drinks. Fitzgerald and Johnson continued to drink.

Dave Bradley called Fitzgerald around 10:00 p.m. to discuss whether an eviction notice Bradley had found on his door was legitimate. In the course of the discussion, the decision was made for Fitzgerald to go to the Bradleys. Trouble was anticipated. Johnson said he would drive them over, but before leaving, Johnson strapped Fitzgerald's machete around his waist. On the way over, Fitzgerald downed a few more Tranxene. Before the evening was over, he had taken all fifteen.

When they arrived at the Bradleys around 10:30, there was no trouble, so Fitzgerald and Johnson settled in and drank some more beers. Around 1:30, Dave Bradley said he

needed to get to bed because he had to work the next day. Fitzgerald and Johnson left.

Johnson still wore the machete.

In the car, Fitzgerald produced some LSD and swallowed a couple of squares. They drove to Don Henn's house with the idea of breaking in to steal some quaaludes. According to Johnson, after they broke in, Fitzgerald went upstairs while Johnson looked for quaaludes or money. Throughout the commission of the crime, Fitzgerald continued to ingest significant quantities and varieties of drugs and alcohol.

As they drove away from the scene, Fitzgerald pressed two squares of LSD on Johnson and took a few more himself. They drove to Fitzgerald's house. Johnson changed clothes and drove home. Fitzgerald went to bed.

Johnson and Fitzgerald were both arrested the next day. Fitzgerald was high when he was arrested late that evening, so arresting officer Shelton stayed at the jail until early morning to be sure that Fitzgerald was okay. Detective Shelton observed that Fitzgerald was a completely different person when high than when straight. Fitzgerald had little memory of the night's events. Johnson at first denied any knowledge, but then he changed his mind. He told the police a detailed story that placed full blame on Fitzgerald and exonerated Johnson almost completely. Fitzgerald went to trial for capital murder. Johnson reached a deal with the prosecutor for forty years.

III. DISPARATE TREATMENT OF CO-DEFENDANT

While there is no question that Fitzgerald was involved in the murder of Cubbage, there also is no question but that Daniel Johnson participated. Indeed, there is strong evidence that he is equally culpable. His car was involved, and though he claimed that

Fitzgerald was choosing their route as they drove, the crime occurred in Johnson's neck of the woods, not Fitzgerald's. Cabbage's blood was on Johnson's shoes and clothes. He admitted that he was present throughout the crime. While Johnson testified that he remained with Fitzgerald throughout the crime only because Fitzgerald threatened him, the plain truth is that he had many chances to escape, and not only did he use none of them, he permitted Fitzgerald to put a "1%'er" tattoo on his shoulder. And most damning, the last people to see Johnson and Fitzgerald before the murder testified that Johnson, not Fitzgerald, was carrying the machete.

Some years after the verdict, Fitzgerald's habeas attorney learned that Johnson had made a confession to a fellow inmate while Johnson was awaiting trial for Cabbage's murder. Michael A. O'Neill has sworn that Johnson confessed to having "chopped" Cabbage to death. O'Neill also swears that Johnson said he would beat the charge by blaming Fitzgerald for it all.^{8/}

Aside from Johnson's self-serving testimony, the evidence against Fitzgerald was no better than that against Johnson. Significantly, Judge Gates presided over both Fitzgerald's trial and Johnson's trial. Johnson's version of events, if believed, would seem to have exonerated him from a murder charge, or at least led to a lesser sentence. But Judge Gates unhesitatingly found Johnson guilty of first degree murder and just as swiftly sentenced him to forty years, the maximum sentence mentioned in the plea agreement. Thus it seems clear that Johnson was equally as culpable as Fitzgerald.

^{8/} Johnson took a polygraph test that indicates he did not cut Cabbage, but evidently that test did not exonerate Johnson from having raped or sodomized Cabbage, from having held her down, or from having urged Fitzgerald down, any of which acts would have made Johnson equally as culpable as Fitzgerald. In any event, polygraphs are not 100% reliable, and there essentially is no other evidence to exonerate Johnson.

Significantly the jury knew that Johnson might be equally culpable, but that he would not receive either the death penalty or a life sentence. Yet Fitzgerald's attorneys failed to argue to the jury the import of such disparate treatment.⁹⁷ In the post-*Furman* era, on seven occasions governors have commuted one defendant's death sentence when another defendant perhaps equally as culpable had gotten life or less.¹⁰⁷ Before 1962, Virginia's governors commuted five death sentences based on such sentencing disparities.¹¹⁷ These commutations amply manifest the power of the principal of equal punishment for equal crimes. Juries are no less susceptible to the power of this principal than governors. With so potent an argument staring them in the face, Fitzgerald's attorneys should not have neglected to argue that if Johnson would live, then so too should Fitzgerald.

IV. CONCLUSION

Fitzgerald's present attorneys began to represent him on July 2, 1992, a bare three weeks before his scheduled execution date of July 23, 1992. We were forced to take the case so late because of the unfortunate and unanticipated withdrawal of the lawyers who had

⁹⁷ Hunt hinted at this point during the guilt phase, but only as a reason to disbelieve Johnson. He never plainly argued that the state's willingness to let Johnson keep his life should incline them toward sparing Fitzgerald's.

¹⁰⁷ 1. Charles Hill, September 29, 1977, Georgia;
2. Darrell Hoy, January 9, 1980, Florida;
3. Richard Gibson, May 6, 1980, Florida;
4. Michael Salvatore, May 19, 1981, Florida;
5. Fred Davis, December 16, 1988, Georgia;
6. Beatrice Lampkins, January 10, 1991, Illinois;
7. Harold Glenn Williams, March 22, 1991, Georgia.

¹¹⁷ 1. Wilson Bryan, July 7, 1903, Governor Montague, S. Doc. 2 (1904) at 14;
2. Earl Gamble, December 20, 1918, Governor Davis, H. Doc. 6 (1920) at 59;
3. Clemen Dixon, August 29, 1934, Governor Perry, S. Doc. 9 (1936) at 3;
4. Grover Newman, March 29, 1956, Governor Stanley, S. Doc. 2 (1956) at 8; and
5. Ralph Martin, December 7, 1961, Governor Almand, S. Doc. 2 (1962) at 26.

There were no executions between March 1962 and August 1982.

agreed in April to represent Fitzgerald. At the time we took the case, next to nothing had been done to prepare a clemency petition for Fitzgerald. We can state from experience that three weeks is not one tenth of the time needed to perform the investigation and research essential if we are to present the governor with adequate information for the decision he must make. We have done our best, and notwithstanding the limited time, as discussed above, we have found significant and substantial information justifying clemency for Fitzgerald.

Fitzgerald's sentencing trial did not inform the jury in the manner necessary for them to reach an intelligent and reliable decision on whether Fitzgerald should live or die. Rather that trial concealed from them significant and substantial information. The incomplete nature of the investigation that preceded this petition opens the door to a great deal more information that would militate against so severe a punishment for Fitzgerald. The execution of Edward Fitzgerald scheduled to be carried out on July 23, 1992, consequently depends on the unreliable recommendation from a capital sentencing trial that only can be termed a failure. The examples of mitigating evidence that were available, yet never presented to the jury during the sentencing trial, are not exhaustive. They represent only those facts developed during the past two weeks. This evidence is offered for your consideration not to convince you that the jury in fact would have been persuaded -- that we can never know -- but to demonstrate the fundamental flaw in Fitzgerald's sentencing trial. Fitzgerald had a right to introduce this evidence; the jury had a right to hear it. This did not happen. The system failed. Fitzgerald should not be condemned to death because the system went awry. Commuting Fitzgerald's sentence to life imprisonment without parole will correct this injustice.