

"Without truth, there can be no justice."

Governor Allen's Commission on
Parole Abolition and Sentencing Reform

— August 24, 1994

**Petition For Executive Clemency
On Behalf of Joseph Roger O'Dell**

Robert S. Smith
Debo P. Adegbile
Paul H. Schoeman

Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019-6064
(212) 373-3000

The people of the Commonwealth of Virginia have entrusted their government with the power to charge a man with murder, obtain his conviction, sentence him to death, and carry out his execution. With this power comes a duty to ensure that the highest standards of truth and justice govern every stage of the proceedings. If Joseph O'Dell is executed on July 23, that duty will have been violated and the result will be a miscarriage of justice.

The Governor, through his Counsel, has already indicated that he does not consider Mr. O'Dell's guilt an open question. In a letter dated July 15, 1997, Mr. O'Dell's counsel has urged the Governor to reconsider this conclusion.^{1/} If the Governor has any questions about the evidence against Mr. O'Dell or about Mr. O'Dell's continuing efforts to prove his innocence, counsel for Mr. O'Dell or Mr. O'Dell himself would be grateful for the opportunity to answer them. Nonetheless, this appeal for clemency will not address Mr. O'Dell's innocence. Instead, it will focus on the undisputed dishonesty and unfairness that infected Mr. O'Dell's sentencing hearing and resulted in his death sentence.

Governor Allen, more than anyone else in Virginia, has sought to rid the Commonwealth of its dishonest sentencing practices. The "truth-in-sentencing" reforms that Governor Allen championed ensure that no one will ever be sentenced to death during this administration by a jury kept ignorant -- as Mr. O'Dell's jury was kept ignorant -- of the truth about its sentencing choices. In the words of Governor

^{1/} The letter from the Governor's Counsel and Mr. O'Dell's counsel's response are annexed as Exhibit A. In addition, a thorough discussion of the factual errors contained in the Fourth Circuit Court of Appeals' opinion will be provided under separate cover.

Allen's Truth-in-Sentencing Commission, "Without truth, there can be no Justice."
(Report of Governor Allen's Commission on Parole Abolition and Sentencing Reform,
Aug. 24, 1994, at 25) By granting clemency to Joseph O'Dell, the Governor will
make sure that a man is not *executed* during this administration under a sentence of
death imposed by a jury that never knew the truth.

**I. Governor Allen's Answer to Crime --
Virginia's Commitment to Truth-in-Sentencing**

The jury system is an integral part of criminal justice in Virginia, but
that institution must be protected. As Governor Allen has emphasized, under
Virginia's old system the greatest threat to the jury system's integrity was the practice
of keeping juries ignorant of the truth about sentencing.

I want to make one point. We have jury sentencing in Virginia. It's a
time-honored tradition. I'm firmly in support of it. Jurors should be
involved in it. You know, it's one way -- it's a question of whether
you trust people or not. *The people, first of all, want honesty. The
system we now have is a dishonest system.*

Larry King Live, Transcript, August 24, 1994. It simply cannot be the case that
Virginia itself -- in the era of Governor Allen's initiatives for honesty and integrity in
government -- is free to circumvent its responsibility to be honest with jurors in a
death penalty case.

Championed by Governor Allen, the people of the Commonwealth of
Virginia have established truth-in-sentencing as the Commonwealth's first principle of
crime control and public safety. In 1993, gubernatorial candidate Allen made truth-
in-sentencing the focal point of his campaign with a call for a new "honesty" and
"integrity" in the criminal justice system. Focusing on the rise in violent crime,

candidate Allen and then-Attorney General Gilmore declared that freedom from violence and fear of crime is the most basic right of every citizen.

After the 1993 election, Governor Allen immediately established a Commission on Parole Abolition and Sentencing Reform co-chaired by William P. Barr, former U.S. Attorney General, and Richard Cullen, former U.S. Attorney for the Eastern District of Virginia.^{2/} Beginning with the premise that three out of four violent crimes in Virginia are committed by persons with prior criminal records, the Governor charged the Commission with the task of developing a proposal to replace parole with a system that deters crime by making punishment certain and predictable -- replacing dishonesty and confusion with truth. Thus, Governor Allen's criminal justice reform was based on the principle that the people will be adequately protected if violent criminals are kept behind bars. From the outset, Governor Allen challenged the Commission to keep in mind the guiding principle "that the truth in sentencing system we adopt must be worthy of the name." (Comm. Report at ii)

Governor Allen's Commission embraced its mission, concluding that "[i]n the absence of truth-in-sentencing, a full measure of justice is simply unattainable." (Comm. Report at 29) The Commission explained that "without truth, there can be no justice" because "*the promise of a community judgment about proper*

^{2/} Truth-in-sentencing reform in Virginia was a broad based initiative. The Commission itself was composed of crime victims, law enforcement professionals, judges and prosecutors, business and civic leaders, and benefitted from the direct participation of Governor Allen, then-Attorney General Gilmore, prominent members of the General Assembly in both political parties, and the citizens of Virginia. The vote in favor of truth-in-sentencing was 89-7 in the House and 34-4 in the Senate. *Parole Abolition Passes; Get On With It*, Virginian-Pilot & Ledger Star, Oct. 5, 1994, at A14.

punishment is merely an illusion if those acting on behalf of the community do not know what the sentence they impose actually will mean in terms of time served in prison." (Comm. Report at 25; emphasis added)

In its August 23, 1994 report, Governor Allen's Commission characterized its plan as follows: "[o]nly truly fundamental reform, including the abolition of parole and the adoption of a truth-in-sentencing system, will empower the people of Virginia -- juries and judges -- to impose and enforce community judgments about punishment tailored to fit the crime committed." (Comm. Report at i) Thus, Governor Allen's plan for "fundamental reform" in Virginia rests on two simple, equally important and related precepts. First, that abolishing or dramatically limiting parole is the surest way to protect the people of Virginia from the rise in crime in general and violent crime in particular. Second, that the criminal justice system must be reformed to replace the systemic "dishonesty" about the likelihood of parole with truth-in-sentencing that provides juries and judges with true information about the actual effect of their sentencing pronouncements.

We submit that the Commonwealth's tactics in the sentencing hearing of Joseph O'Dell were dishonest and flagrantly violated the two precepts on which truth-in-sentencing, championed by Governor Allen, is founded. Respectfully, we request that the Governor exercise his power of last resort and in so doing grant Joseph O'Dell clemency, preserving the integrity of Virginia's capital sentencing system and ensuring that Virginia's promise of truth-in-sentencing is "worthy of its name."

II. Truth-in-Sentencing Is Based on Providing Juries with the Truth About Parole Eligibility

Before Virginia's new truth-in-sentencing system, criminals typically served only a fraction of their sentences. Although juries and judges imposed punishments which they deemed appropriate, their judgments were routinely undermined by a system of early release rules. For example, the typical first-degree murderer in Virginia was sentenced to approximately thirty-five years but served only ten. (Comm. Report at 3) The system of so-called "good-time" credit provisions allowed the average inmate 300 days off his sentence for every 365 days actually served. Together these rules combined to create what was widely perceived by the public as a system of revolving door justice, because sentences did not mean what they said and "sentencing juries and judges [were] in the dark." (Comm. Report at 8) Accordingly, before this administration's truth-in-sentencing reforms, Virginia jurors -- such as those who sentenced Joseph O'Dell to die -- harbored deep and well-founded suspicions about the ability of Virginia's criminal justice system to keep dangerous criminals off the streets.

The Governor's Commission recognized that the climate of distrust and "atmosphere of confusion" undermined the public's confidence in the criminal justice system. As the Commission's report found:

[a]s the news media has focused on the rise of crime rates and the inadequacy of the current system to cope with it, public awareness of the softness of our punishment scheme has increased.

(Comm. Report at 27)

This misleading system has a negative impact on all concerned. Early release will prevent judges and juries from pronouncing a community

judgment about the proper punishment for illegal conduct. The result is unwarranted disparities in the length of incarceration and the loss of public confidence in the administration of justice.

(Comm. Report at 3)

To address this threat to public safety and crisis in public confidence, and to right the wrongs of the old revolving door justice system, Governor Allen brought truth-in-sentencing to Virginia and abolished discretionary and mandatory parole as of January 1, 1995. All offenses committed after that date are punishable under the new system in which every inmate must serve at least 85% of his sentence. The old "good-time" credit provisions were eliminated. (Comm. Report at 3) These reforms were made based on the Commission's ultimate conclusion that "[l]onger incarceration of those who commit violent acts against their fellow citizens is the most immediate and the most effective means of preventing crime." (Comm. Report at 7)

In the context of this case, the Governor should exercise his authority to ensure that Virginia's truth-in-sentencing system -- lauded as a national model -- does not fall short of its stated goal of bringing honesty to the sentencing process by permitting prosecutors to deceive juries in order to obtain a death sentence.

All proponents of the death penalty assume the serious moral responsibility of ensuring that the sanction is only applied in cases that are free from the taint of unfairness. In 1996, Virginia executed more people than any other state in America. Frank Green, *Virginia Deaths Set Record This Year*, Richmond Times-Dispatch, Dec. 18, 1996, at A18. Accordingly, Virginia has a responsibility to be especially vigilant in preserving truth and fairness in death cases. A community judgment that capital punishment is available in certain situations does not grant

license to obtain a death sentence through unfair and deceptive means. If even one person is executed after a proceeding tainted by unfairness, the legitimacy of the death penalty and the criminal justice system itself is undermined.

**III. At Joseph O'Dell's Sentencing Hearing,
the Jury Never Knew the Truth**

Although Joseph O'Dell's death sentence has been debated ardently in the courts, "it is undisputed that the conduct of the sentencing hearing that led to the imposition of his death penalty violated the Due Process Clause of the Fourteenth Amendment." *O'Dell v. Netherland*, 1997 U.S. Lexis 3862, at *31 (Jun. 19, 1997) (Stevens, J., joined by Souter, Ginsburg and Breyer, JJ., dissenting). This was not a mere "technical" violation. On the contrary, what happened in O'Dell's case was the worst kind of "untruth-in-sentencing," which undercut both the basic fairness of the proceedings and the reliability of the jury's verdict.

At Mr. O'Dell's sentencing hearing, the prosecution's strategy was to exploit and encourage the jury's misunderstanding of Virginia law. Knowing that jurors were unlikely to be aware of the sentencing law that would have made a life sentence for Joseph O'Dell mean *life without possibility of parole*, the prosecution seized on the widespread assumptions about revolving door justice and frightened the jury with the threat that, unless executed, Mr. O'Dell would someday be let loose in the streets and neighborhoods of Virginia. Using images that elicit the most visceral reactions, the prosecution described Mr. O'Dell as a "night stalker because he is comfortable at night when under the cloak of darkness and in weather conditions that are fitting to him, he can take advantage of opportunity and prey on defenseless

women." Subsequent interviews with the jurors revealed that this tactic worked to perfection. During the sentencing deliberations the jurors' principal concern was the possibility that Mr. O'Dell would be paroled, perhaps in as little as seven years.

(Affidavit of John P. Coffey, annexed as Exhibit B.)

The prosecution's empty threat would have been exposed -- and the prosecution's credibility would have disintegrated -- had the jury been told the truth about Mr. O'Dell's parole ineligibility. Unfortunately, each time that Mr. O'Dell tried to tell the jury the truth about its sentencing alternatives, the prosecution objected and the trial judge sustained the objection. At the sentencing hearing which was held in 1986, and ever since, Joseph O'Dell and his attorneys have protested the unfairness of this one-sided gag rule that prevented the jury from learning the truth about the options before it. Joseph O'Dell's complaints about the unfairness of the prosecution's tactics were not empty posturing. Today, the rule against this type of prosecutorial manipulation and deception is a fundamental tenet of due process of law under the Constitution of the United States and under Virginia's truth-in-sentencing laws.

The fundamental due process principle raised by Joseph O'Dell was embraced by the United States Court in *Simmons v. South Carolina*, 512 U.S. 154 (1994). In 1994, before Mr. O'Dell's case finally reached the Court, the Court heard an appeal from another condemned inmate, Jonathan Dale Simmons. Mr. Simmons, who was convicted of capital murder in South Carolina, was sentenced to death after a hearing that was indistinguishable from Mr. O'Dell's hearing. In *Simmons*, the Supreme Court ruled, 7-2, that the gag rule violated principles of "elemental due

process." 512 U.S. 154, 175. At the heart of the Court's decision in *Simmons* was the simple idea that a jury charged with deciding whether a person will be sentenced to life or death should know the meaning of a life sentence. When "life" means life without possibility of parole, a jury must understand that fact in order to determine whether a life sentence is the appropriate punishment. Where a death sentence is meted out by a jury kept ignorant of the true fact, the sentence "should be vacated as having been arbitrarily or discriminatorily and wantonly and freakishly imposed." 512 U.S. at 172-73 (Souter, J., joined by Stevens, J., concurring) (internal quotation marks omitted). Even the two dissenting Justices agreed that this idea "is undoubtedly reasonable as a matter of public policy." *Simmons*, 512 U.S. at 185 (Scalia, J., joined by Thomas J., dissenting).

Three months later, a federal district court judge presiding over Mr. O'Dell's petition for a writ of habeas corpus ruled that Mr. O'Dell was entitled to what *Simmons* received: a new sentencing hearing. To reach this result, the judge determined that the "wrong" visited upon Mr. O'Dell by his prosecutor was the same as the "wrong" committed against *Simmons* and that the "remedy" should be the same for both men. Since that opinion was rendered, *no court* has disputed that the constitutional violation was the same. Nonetheless, by a 7-6 vote, the Court of Appeals for the Fourth Circuit reversed the district court and held that federal courts do not have the power to grant Mr. O'Dell the remedy that he seeks. In what has been called "one of the most unjust rulings of the term," a 5-4 majority of United States Supreme Court agreed. *Death Outside the Constitution*, N.Y. Times, July 1, 1997, at A20.

The *only* reason why the Supreme Court did not remedy the denial of due process for Mr. O'Dell is the date of Mr. O'Dell's sentencing hearing. The question the Commonwealth now faces is whether, "despite the admittedly unfair hearing, [O'Dell] should be put to death because his trial was conducted before *Simmons* was decided." 1997 U.S. Lexis 3862, at *33. Had O'Dell been sentenced to death after 1994, the Supreme Court -- indeed, any court -- would have applied *Simmons* to invalidate O'Dell's sentence and require a new and fair sentencing hearing free from the taint of the grave misimpression the prosecution communicated to the sentencing jury. Instead, a bare majority of the Supreme Court upheld the ruling of a bare majority of the Fourth Circuit that the limitations on the federal habeas corpus procedure rendered the federal courts powerless to remedy the manifest injustice.

As a consequence of the Supreme Court's deference to the sovereignty of the States, the power to provide a fair sentencing proceeding to Joe O'Dell belongs only to the Governor. Unlike the Justices of the United States Supreme Court or the judges in the lower courts, the Governor is not encumbered by technical rules of retroactivity and has the unrestricted power to invalidate an "admittedly unfair" death sentence that was obtained in the courts of the Commonwealth without due process of law.

This is a case where the Governor should exercise his power, not merely because the Commonwealth's tactics resulted in a denial of due process, but because the prosecution deceived the jury and rendered its death verdict unreliable. At Mr. O'Dell's sentencing hearing the prosecution did more than simply object to Joseph O'Dell's attempts to inform the jury of his parole ineligibility. The

prosecution affirmatively sought to arouse the jurors' fears about the revolving door justice system by highlighting each of Mr. O'Dell's prior releases on parole, making repeated references to the fact that Mr. O'Dell was on parole at the time of Helen Schartner's death, and giving the jury the false impression that, unless Mr. O'Dell was sentenced to death, he might be paroled to commit new crimes. When Mr. O'Dell took the stand, the prosecution used or elicited the words "parole" and "release" seventeen times. Then, in closing, the prosecution hammered home its theme:

Isn't it interesting that he is only able to be *outside of the prison system* for a matter of months to a year and a half before something has happened again?

....

Ladies and gentlemen, I do not ask you to do an easy thing; but I state to you that this man, Joseph Roger O'Dell, has forfeited all right to life within this society as any kind of *free human being*.

....

[Y]ou may still sentence him to life in prison, but I ask you ladies and gentlemen in a system, in a society that believes in its criminal justice system and its government, *what does this mean?*

....

I put it to you ladies and gentlemen. What is right in this case is that this man has forfeited his right to live among us because all the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. *Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose.*

Contrary to the arguments of the prosecution, however, if Mr. O'Dell had been sentenced to life imprisonment rather than death, he would never have been

"outside of the prison system." Even if his life were spared, Mr. O'Dell would still have lost forever his "right to live among us" as "any kind of free human being." As the prosecution well knew, Virginia law makes it absolutely clear that "life in prison" means that Mr. O'Dell would spend every moment of every day behind bars for the rest of his life. Va. Code Ann. § 53.1-151(B1). Indeed, everyone in the courtroom except the jurors knew the truth.

IV. Truth-in-Sentencing Makes a Difference

In a powerful editorial on Joe O'Dell's case the USA Today observed that "[g]uilt aside, O'Dell's jurors should have been told that a life sentence would be close ended.... Why? Because knowing that a sentence will be served in full makes a difference ... jurors ought to know what their options are, and they ought to be confident that a life sentence means exactly that. Otherwise, neither they nor the rest of us can ever rest totally at ease." *Juries Need All The Facts*, U.S.A. Today, March 24, 1997.

As a result of the Governor's truth-in-sentencing reforms, Virginia law now *requires* trial judges to tell jurors the truth about a defendant's parole ineligibility. The results in death penalty cases tried after the law took effect on January 1, 1995, provide powerful evidence of how juries in Virginia respond when told the truth. As reported in the *Richmond Times-Dispatch* on November 24, 1996, "in the past two years, only one jury and one judge have issued a death sentence for a capital murder committed on or after January 1, 1995." During the first fifteen months of the truth-in-sentencing reforms, "all six people convicted of capital murder by juries and sentenced under the new law were given life without parole. Since

then, officials and others involved in capital cases know of only two death sentences." Frank Green, *Death Sentences Decline in Va.*, Richmond Times-Dispatch, Nov. 24, 1996, at A1.

This administration's reforms ensure that jurors will not be misled into imposing the harshest possible sentence in a misguided effort to adjust for the unpredictable effects of parole. The results from capital cases tried with the benefit of truth-in-sentencing furnish a persuasive indication that a jury given the truth about Mr. O'Dell's parole ineligibility would not have sentenced him to death.

V. The Governor Should Continue To Insist On Truth-In-Sentencing

Joe O'Dell's death sentence is the product of an "admittedly unfair" and misleading sentencing proceeding. As a result, the jury that sentenced him to death did so under the impression that death was the only choice that would keep Mr. O'Dell off their streets and away from their families. This assumption, which the prosecution cultivated, was absolutely false and the falsity was of grave significance. The distinction between a capital sentencing jury advised of a defendant's parole ineligibility and one that has been misled on this point is a distinction with a crucial difference. The effectiveness of protecting the public by incarcerating violent criminals without parole -- which is the first principle of Virginia's truth-in-sentencing law -- was firmly established long before that enactment. Thus, it was every bit as unfair for the prosecution to deprive Joseph O'Dell in 1985, as it would be today, of what the Supreme Court has

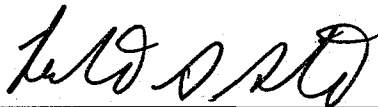
enactment. Thus, it was every bit as unfair for the prosecution to deprive Joseph O'Dell in 1985, as it would be today, of what the Supreme Court has characterized as the best argument available to rebut the claim of future dangerousness. It would be unconscionable to carry out a death sentence that has been elicited in this manner.

In future cases, Virginia law and the U.S. Constitution will ensure that this manifest unfairness never recurs. However, at this time, the only person with the power to correct the injustice that the Commonwealth visited upon O'Dell is the Governor. We respectfully request that Governor Allen exercise his power to commute Joseph O'Dell's sentence in order to save his life, preserve the integrity of the Commonwealth's capital sentencing system, and ensure that the truth-in-sentencing system is really "worthy of its name." (Comm. Report at ii)

Respectfully submitted,

Joseph Roger O'Dell, III

By Counsel:



Robert S. Smith
Debo P. Adegbile
Paul H. Schoeman

Paul, Weiss, Rifkind, Wharton & Garrison
1285 Avenue of the Americas
New York, New York 10019-6064