

PETITION FOR EXECUTIVE CLEMENCY

OF

CARLTON JEROME POPE

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Carlton Pope is scheduled to be executed on Tuesday, August 19, 1997 for the robbery and capital murder of Cynthia Gray. The execution should not take place. Instead, the Governor should grant clemency and commute Mr. Pope's death sentence to a sentence of life imprisonment.

The power of executive clemency provides the last opportunity to look behind the errors of counsel and to judge the appropriateness of the death penalty under all the relevant circumstances, unhampered by evidentiary or procedural rules. By contrast, the judicial system is limited in its ability to review the morality of the death penalty in individual cases. Instead, it must consider particular legal issues and adhere to procedural rules that may prevent it -- as in this case -- from considering the facts of individual cases. The Governor's power is not so limited. When deciding whether to grant clemency, the Governor can and should review all the relevant factors to ensure that the death penalty is reserved for only the most heinous of crimes and the truly reprehensible criminals. There can be little doubt after such a review that the just punishment for Carlton Pope does not include death.

First, there is a serious question whether Mr. Pope is guilty of robbery, which was the predicate to a finding of capital murder. Mr. Pope was convicted based on testimony that the prosecution knew or should have known at the time was false. He was convicted because the prosecution made this false testimony the centerpiece of its robbery case, and because Mr. Pope's own counsel failed to realize that the testimony was

false. The result was that the jury had a fundamental misunderstanding of what happened on the evening of January 12, 1986 -- a misunderstanding that would have been avoided if either the prosecutor or defense counsel had functioned as they should have.

As explained below, the prosecutor should have realized that the testimony upon which she based her case of robbery was conclusively disproved by the physical evidence in her possession -- a simple checkbook. Similarly, Mr. Pope's court-appointed defense counsel should have taken the time to examine that evidence and to investigate and uncover other false testimony. But none of the lawyers in this case did his or her job, and the jury was therefore prevented from doing its job of determining guilt or innocence on the basis of the real evidence in the case.

No one should be put to death when there has never been an adjudication of guilt based on the real evidence in the case. No one's life should be taken based on what everyone now concedes was a misunderstanding of the facts -- and what everyone should have recognized at the time of trial was a misunderstanding. No death sentence should be carried out when the lawyers for both sides -- the prosecution and the defense -- have failed so completely to discharge their duty to present the jury with the facts that bear upon guilt or innocence.

There is a serious question of guilt in this case, and it has never been addressed based on the actual evidence. If clemency is not granted, Carlton Pope will be executed not because the truth is that he is guilty of capital murder, but

because the truth was never presented to the jury. It is no exaggeration to say that he will be executed based on a lie -- or, if not a deliberate lie, a conceded untruth. That would offend the most basic notions of justice and morality.

The Commonwealth has a duty in any criminal case to ensure that the evidence is presented fairly and honestly, and that the arguments advanced in support of the prosecution reflect the evidence in its possession. That most basic of duties is of special importance when the most basic of rights -- the right to life itself -- is at stake. In this case, the Commonwealth's prosecution was tainted by unfairness and carelessness, and any execution that takes place will be equally tainted. As the Chief Executive of the Commonwealth, the Governor has a duty to ensure that the administration of justice is untainted, that thoroughness and fairness are observed in all criminal cases, and that the highest standards of thoroughness and fairness are observed when a defendant's life is at stake. The Commonwealth will have unclean hands if this sentence of death is carried out, and the Governor should stop the execution for this reason alone.

Second, the planned execution of Carlton Pope should be halted because the sentence is wholly disproportionate to the acts with which he was charged. As a matter of basic fairness, the death sentence should not be imposed on individuals, such as Mr. Pope, whose actions are no different from the conduct of others who have received lesser sentences. The disproportionate character of Mr. Pope's death sentence appears in even starker

relief when one realizes that, due to the negligence of Mr. Pope's trial counsel, the jury was unable to perform its task of conducting an individualized evaluation of Mr. Pope. Trial counsel presented almost no mitigating evidence to the jury and wholly failed to give the jury a feeling for the character of the man whose life they held in their hands.

The evidence that should have been presented in mitigation is substantial. Mr. Pope has labored almost his entire life under the strain of severe mental deficiencies, physical and mental abuse, and alcoholism, all of which was kept from the jury. His prison record shows that he poses no threat to prison staff or other inmates. For these and other reasons, Mr. Pope does not deserve to die even if he is guilty of the offense as charged.

I. Mr. Pope's Capital Murder Conviction was Based on Concededly False Testimony that was Conclusively Disproved by Evidence in the Prosecutor's Possession.

This is a case in which the jury never had the chance to render a decision based on the real evidence. The testimony of the prosecution's key witness about the critical facts was false and no effort was made to correct the record. To the contrary, the prosecutor made the false testimony the centerpiece of her closing argument -- notwithstanding the fact that she had physical evidence in her possession that proved conclusively that the testimony was false. Mr. Pope's trial counsel made a minimal effort to defend the case and failed to dispute the evidence offered by the prosecutor. As a result of what can at best be

regarded as carelessness by the prosecution and defense counsel, the jury was deprived of the opportunity to judge Carlton Pope on the true facts.

When the true facts are considered, a serious question emerges whether any taking of property took place at all. Even if a taking occurred, moreover, it is now clear that Mr. Pope is innocent of robbery and, therefore, capital murder. And even if there remains some question about his guilt, it is not for the Governor to resolve that question against Mr. Pope when the jury never had the opportunity to consider the true evidence that was in the prosecutor's possession all along. At the very least, the Governor should acknowledge that the Commonwealth failed in its duty to present this case fairly to the jury, and that it would be unjust under those circumstances for the Commonwealth to proceed to take Mr. Pope's life.

On the night of January 12, 1986, Cynthia Gray and Marcie Kirchheimer left a party and drove to Nick's Pool Hall, a known location for purchasing drugs in Portsmouth, Virginia, to look for James "Blood" Taylor, a known drug dealer with whom Marcie once had lived. "Blood" was not there, but Cynthia and Marcie picked up a stranger, whom Marcie subsequently identified as Mr. Pope, and gave him a ride. The evidence at trial indicated that, when they dropped the stranger off, he pulled a gun, demanded money, and immediately fired a single shot that killed Cynthia. Marcie and the stranger struggled until the man broke free, fired a second shot that wounded Marcie, and fled.

Marcie later testified that Cynthia had had a purse with her, but no purse was ever recovered.

Mr. Pope was charged with the robbery of Cynthia's purse and the capital murder of Cynthia in the commission of a robbery, as well as other related offenses. The robbery charge was the heart of the capital case, for without proof of that charge, Mr. Pope could not be eligible for capital murder and the death penalty.^{1/}

The robbery case was extremely weak. No purse was ever recovered, and the only evidence that it was ever in the car that evening came from Marcie Kirchheimer, the sole eyewitness. Marcie, however, admitted that she had not seen Mr. Pope take her sister's purse. JA 77, 107.^{2/} That admission is significant for two reasons: first, because it undermines the inference that a purse was taken at all; and second, because to prove robbery the prosecution had to convince the jury that a purse was taken after Mr. Pope displayed violence or intimidation. See *Mason v. Commonwealth*, 105 S.E.2d 149, 150 (Va. 1958); see also *Pritchard*

^{1/} At the time, Virginia Code § 18.2-31(d) provided that only a willful, premeditated murder during the course of a robbery, not a mere attempted robbery or larceny, was capital murder.

^{2/} Mr. Pope has submitted with this Petition a copy of the Joint Appendix filed in the Fourth Circuit, which contains the relevant prior unpublished orders and decisions as well as relevant excerpts from the trial transcript and depositions, and exhibits thereto. These materials are cited in the form, "JA _____."

v. *Commonwealth*, 303 S.E.2d 911, 912-13 (Va. 1983).^{3/} If a purse was taken before any violence or threat of violence, then the taking was a larceny and there could be no finding of capital murder. On the crucial factual issue that made Mr. Pope eligible for the death penalty, the prosecution had simply no evidence about when the purse was taken, if it was taken at all.

In fact, all the evidence now available (but not presented to the jury) strongly suggests that no purse was taken at all. But even if a purse was taken, the evidence now available conclusively demonstrates that the purse could not have been taken as part of a robbery. The claim that any purse was taken at all rested on very slim evidence: Marcie's testimony that her sister had a purse in the car earlier in the evening. Not only did Marcie not see Mr. Pope take the purse, but her trial testimony established that it would have been impossible for Mr. Pope to have taken it after displaying the gun -- the first time any force or threat of force was displayed.

^{3/} On Mr. Pope's direct appeal, the Virginia Supreme Court ruled that a taking could support a capital murder charge so long as the violence and taking were part of the same criminal enterprise. *Pope v. Commonwealth*, 360 S.E.2d 352, 359 (Va. 1987) (attached as Appendix A). Mr. Pope has challenged this ruling in the courts as a change in the law of robbery and a violation of due process. But regardless of whether his constitutional rights were violated, there is no dispute that Mr. Pope's was the first case in the history of the Commonwealth to find a robbery where the taking was completed before any violence took place, or in which a court applied the same criminal enterprise rule to turn a larceny-murder into capital murder. It is unfair and inconsistent with elemental rule-of-law principles to try a man under one view of the law and then affirm his conviction under another view.

Marcie testified that Mr. Pope did not display the gun or demand money until he got completely out of the car on Marcie's side. JA 102-03. From that point, Mr. Pope had no chance to take the purse because "[a]bout two seconds" after he displayed the gun, he shot Cynthia, JA 104, and Marcie immediately reached up and began struggling with him, JA 105. Marcie admitted she had both of Mr. Pope's hands in hers during the struggle. JA 105-07. Marcie also admitted that Mr. Pope did not then have the purse in his hands -- indeed, that "it would have been impossible for him to have a pocketbook in his hands" at that time. JA 107. The struggle ended abruptly when Mr. Pope broke free from Marcie, stepped back, shot her, and ran away. JA 107-08. Marcie's unequivocal testimony that Mr. Pope had no purse when he struggled with her and had no opportunity to take a purse thereafter, indicates that he never took the purse at all, and that any taking could only have been a larceny, not a robbery (and therefore not the predicate to capital murder).

Marcie's credibility was suspect in any event. She was a convicted prostitute with prior convictions for drug possession and was carrying two syringes in her pockets that night (although she denied looking for drugs). JA 98, 100. She had been drinking that evening and had used cocaine and marijuana that weekend. Indeed, her impairment that evening is revealed starkly by the fact that, when first interviewed by the police, she mistakenly claimed that her purse was also missing. 3/18/86 Tr. at 42. The prosecution corrected Marcie's key mistake before

trial, but defense counsel failed to appreciate its significance or to inform the jury of it.

In fact, it is now clear that Marcie's credibility problems were far worse than defense counsel ever discovered. First, there is clear evidence that Marcie's perceptions were seriously impaired that evening. Marcie drank 6-7 beers that night, JA 628-29, 696, not the mere 2-4 beers she claimed at trial, JA 74. That large amount of alcohol made her "drunk and confused," according to the investigating officer. JA 703. Second, Marcie lied about her drinking and sobriety to the jury, thereby misleading them about her ability to perceive and remember the events of that evening -- a crucial issue given her status as the sole eyewitness. Third, Marcie used heroin that weekend in addition to using cocaine and marijuana, JA 624-26, 682-83, 697, although she failed to say so on the witness stand. The prosecutor knew the true facts from Marcie herself, but did nothing to inform defense counsel of those facts or to correct the record at trial. Nor did defense counsel's meager investigation uncover these additional facts. As a consequence, the jury never heard any of this evidence calling Marcie's credibility into question.

In short, there is no substantial evidence that a purse was ever taken. The prosecution compensated for the lack of evidence of a taking, and to establish that any taking was a robbery and not a mere larceny, by stressing to the jury the location of a single piece of physical evidence -- a checkbook

introduced into evidence as Trial Exhibit 8. Marcie bolstered her testimony that Cynthia's purse was in the car that evening by testifying that Cynthia had used the checkbook introduced as Trial Exhibit 8 on the way to Portsmouth and then returned it to her purse. Marcie explained:

When we left the party, before we came to Portsmouth, we stopped by where I worked, and my sister wrote a check, which I cashed; and that's why I knew she had it, because she had taken it out and wrote the check and I took it up and cashed it, and she put the checkbook back in her purse.

JA 83-84 (emphasis added). Under further questioning, Marcie testified unequivocally that Cynthia had used the checkbook marked as Trial Exhibit 8, JA 115, and the prosecutor then elicited testimony from a detective that the checkbook had been found after the crime on the floor of the car, on the passenger side, near the door. JA 131.^{4/}

In her closing argument, the prosecutor told the jury that the location of Trial Exhibit 8 proved that Cynthia's purse had been taken and that the taking constituted a robbery. The prosecutor argued that Trial Exhibit 8 ended up on the floor of the car because it fell out of the purse during the struggle (which tended both to establish a taking and to make the taking a robbery, not a larceny):

I think the evidence shows you Cindy had that purse, and it was there; . . . I recall what Marcie says, she knows the

^{4/} Ten years later, undersigned counsel learned that the photographs that corroborated the location of the checkbook were not taken until the day after the offense, JA 576-77, 583-84 -- after numerous people had been in and out of the car and the car had been lifted at an angle and towed to the police station, JA 499.

purse was there before the defendant got in the car, and we know it was gone afterwards. . . .

Marcie said earlier that evening, . . . , she went to the gas station where Marcie worked, and Cindy went into her purse, unzipped it, whipped out the checkbook, wrote the check, Marcie believes for a hundred dollars. It is known that Cindy put it back in her purse, and they came to Portsmouth.

We know, at the end of everything out there on Bagley Street, . . . where does the checkbook end up? It's not gone. It's still in the car, but it's not where you would expect somebody to keep a checkbook.

I'm showing you a picture, Exhibit 6, now, . . . it's laying right here, by the passenger seat, right there on the floor, between the seat and the door, the same seat that Marcie was sitting in during the struggle . . . the same side the defendant would have had to have at some point passed over to grab that.

Remember what Marcie said. Cindy normally kept her purse open. . . .

Have you figured out how the checkbook ended up where it was? Are you aware there was only one possible reason that checkbook was found where it was? It didn't sprout legs and decide to go hop down there after getting tired of sitting on the console.

Once you find that particular fact as to the purse, you have a robbery of Cynthia Gray. You have a capital murder of Cynthia Gray.

JA 176-80 (emphasis added). There was only one problem with the prosecutor's ingenious argument: it was based on the false premise that Trial Exhibit 8 was used that night.

The Commonwealth now concedes that Trial Exhibit 8 was not used that evening, and that the evidence proving that fact was in the prosecutor's possession. Indeed, all the prosecutor had to do to realize the falsity of Marcie's testimony -- and of her own closing argument -- was to examine Trial Exhibit 8 itself, which showed that no check from the checkbook was written

on the night in question.^{5/} Or, the prosecutor could have compared the checkbook with the check that the Commonwealth now claims was written earlier that night -- a check that the prosecution did not make available to Mr. Pope's counsel until 1991, long after the trial. JA 425-27. That check is a preprinted permanent check (#501) from a permanent checkbook, while Trial Exhibit 8 is a temporary checkbook.

Although it appears that a check was written sometime that day, the fact that no check was written that night from Trial Exhibit 8 is critically important. The only theory of robbery presented to the jury relied not on proof that a check was written that night, but specifically on proof that Trial Exhibit 8 began the evening in Cynthia's purse and ended it on the passenger's side of the car floor as the result of a struggle over the purse. The disclosure of check 501 makes it even less likely that any of this occurred. There is simply no proof that Trial Exhibit 8 was used that night, that it was ever in a purse, or that it spilled out of a purse during the struggle -- or that a robbery ever took place.

The prosecutor in her zeal failed to consider the physical evidence that disproved Marcie's testimony about Trial Exhibit 8. Instead, she presented an elaborate closing argument built on this false testimony.

^{5/} The register lists three checks as having been written, the last one on January 1, 1986, 11 days before the shooting occurred. The fourth check is still in the checkbook and no other checks are missing.

The prosecutor was not the only one who failed in her duty to search for the truth at trial. Defense counsel conducted no investigation whatsoever of the robbery charge -- even though they were on notice from the preliminary hearing that the evidence on robbery was weak, because Marcie had not seen the assailant take a purse and had been mistaken about whether her own purse was in the car. 3/18/86 Tr. at 7-9, 42, 46. Thus, after Marcie testified about the checkbook at trial, defense counsel were unprepared to counter the prosecutor's assertions. Defense counsel then compounded the impact of the false testimony about the checkbook by failing to request a jury instruction on larceny. That instruction would have forced the jury to focus on the relative timing of the alleged taking and the violence. Without that instruction, the jury never knew that the timing issue was important -- indeed, critical -- to a finding of capital murder. Instead, without the option of choosing larceny, the jury had no choice but to return a robbery verdict -- and thus a capital murder verdict -- if it found that a taking had occurred.

In sum, the prosecution pinned its robbery and capital murder case on Marcie's false testimony that the checkbook found on the floor of the car (Trial Exhibit 8) had been taken from her sister's purse and used earlier that evening. The prosecution stressed this "fact," and argued to the jury that the checkbook fell out of the purse during a struggle, thus "proving" a taking and linking the taking with the violence to prove a robbery

instead of a larceny. With the revelation that Marcie's testimony about the checkbook was false, the specific evidence relied on by the jury to find a robbery disappears.

The actual evidence is insufficient to establish that any robbery, or even a larceny, took place. At the very least it is clear that the robbery conviction was not based on the actual evidence, but on testimony that the prosecutor knew or should have known was false.^{6/} No jury ever considered the true facts. And no court has ever considered the probable impact of the true facts on the jury's verdict. By the time the truth was discovered, the courts were barred by procedural waiver rules from considering Mr. Pope's claims.

In short, the system broke down in this case. The prosecutor failed in her duty to examine the evidence in her possession and to present the evidence fairly and honestly to the jury. Defense counsel failed in their duty to investigate the facts and challenge testimony that was provably false. The jury never had a chance to consider all of the evidence that was available at the time and was forced to rely instead on testimony and arguments that were untrue. And, because of the rules of waiver, the courts have never considered the impact of all of the mistakes of counsel on both sides.

^{6/} If the prosecutor herself did not "know" that Marcie's testimony was false, it was because she failed even to examine the trial exhibit that was the linchpin of her argument. But even if that was the case, the Commonwealth cannot deny knowledge of the evidence in its possession.

Under these circumstances, clemency is appropriate.

When no jury has had the opportunity to consider the true facts, and when the true facts raise a serious and reasonable doubt as to the defendant's guilt of capital murder, justice requires that clemency be granted. And when the failure to present the true facts is the fault of the Commonwealth itself, basic notions of equity should bar the Commonwealth from carrying out the ultimate penalty of death.

More should be required of the Commonwealth in a capital case than that it outwit court-appointed defense counsel who themselves fail to engage in any meaningful investigation of the case. At the very least, commitment to the fair administration of justice requires that the Commonwealth fairly present the evidence to the jury and refrain from factual arguments that are disproved by the evidence in its possession. The Commonwealth failed in these basic duties.

The Governor is ultimately responsible for the administration of justice in the Commonwealth and for the oversight of those who prosecute crimes in the name of the Commonwealth. He is the ultimate judge of whether the Commonwealth has adhered to the standards of care and fairness that ought to be adhered to when a man's life is at stake. He has the opportunity in this case -- and, we respectfully submit, the duty -- to ensure that Carlton Pope does not die because the Commonwealth's attorney failed to understand and fairly present the evidence in her possession that bore upon Mr. Pope's guilt or innocence.

II. The Death Penalty in this Case is Arbitrary, Disproportionate, and Unwarranted.

The irrevocable penalty of death should be imposed only upon those who commit heinous crimes and only after full consideration of all the relevant mitigating and aggravating circumstances. Imposing the ultimate sanction in this case, given the true facts of Mr. Pope's life and background, would be unjust and inequitable. Neither the crime nor Mr. Pope's history and criminal record justify this most extreme sanction. Executing Mr. Pope would be especially inappropriate because the jury that sentenced him to death did not receive sufficient information to gauge his moral culpability and potential future dangerousness. Nor has any court considered all the available evidence bearing on these critical issues. Again, this failure is the direct result of court-appointed counsel's meager investigation. Imposition of the death penalty under these circumstances would offend principles of basic fairness.

First, according to Marcie, Mr. Pope displayed no violence until he got out of the car, demanded money, fired one shot, struggled with her, fired a second shot, and ran away. While we have no intention of minimizing this conduct, the fact remains that it falls far short of the brutality that underlies most death sentences. Compare *Beck v. Commonwealth*, 484 S.E.2d 898 (Va. 1997) (three murders, as well as rape, robbery, and mutilation of the bodies); *Mickens v. Commonwealth*, 478 S.E.2d 302 (Va. 1996) (defendant sodomized victim and then inflicted dozens of stab wounds that led to death); *Barnabei v. Common-*

wealth, 477 S.E.2d 270 (Va. 1996) (defendant raped victim and killed her with hammer blows to the head); *Goins v. Commonwealth*, 470 S.E.2d 114 (Va. 1996) (defendant killed five people and wounded two others, including the woman who was pregnant with his child); *Fitzgerald v. Commonwealth*, 455 S.E.2d 506 (Va. 1995) (defendant raped a woman and a 13 year old girl, then killed girl's father and another man); *Wilson v. Commonwealth*, 452 S.E.2d 669 (Va. 1995) (defendant abducted a woman and two girls, assaulted the girls, attempted to rape the woman and then stabbed her to death); *Eaton v. Commonwealth*, 397 S.E.2d 385, 387-89 (Va. 1990) (four murders in 24-hour period); *Giarratano v. Commonwealth*, 266 S.E.2d 94, 95 (Va. 1980 (defendant raped and sexually abused 15 year old girl before killing her); *Stamper v. Commonwealth*, 257 S.E.2d 808, 820 (Va. 1979) (execution-style murder of three people at once). A life sentence is more suited to this crime.

Second, Mr. Pope's prior criminal record falls far short of the kind of lengthy history of violent felonies that justify the death sentence. Other than petty offenses, Mr. Pope had only one prior felony conviction for malicious wounding. Although Mr. Pope was on parole at the time of the offense, the psychiatric evidence presented at trial -- and other testimony that was not presented (discussed below) -- demonstrates that Mr. Pope would not be dangerous in the future if confined to prison. JA 276. Mr. Pope's record in prison exhibits no incidents of

violence and no serious disturbances of prison order, which confirms that he is not inherently violent.

These facts pale in comparison to other cases in which the death penalty was imposed because of the defendant's potential dangerousness to society. Compare *Mickens*, 478 S.E.2d 302 (3 sodomy convictions, as well as robbery and grand larceny convictions, all in six years) *Fisher v. Commonwealth*, 374 S.E.2d 46, 53 (Va. 1988) (25 felonies, including schemes to kill others for insurance proceeds); *O'Dell v. Commonwealth*, 364 S.E.2d 491, 510 (Va. 1988) (30-year record including numerous violent felonies); *Townes v. Commonwealth*, 362 S.E.2d 650, 667 (Va. 1987) (4 robbery convictions, 1 maiming conviction, 1 escape conviction, 22 other convictions); *Williams v. Commonwealth*, 360 S.E.2d 361, 370 (Va. 1987) (record of violent felonies beginning at age 11); *Evans v. Commonwealth*, 323 S.E.2d 114, 123 (Va. 1984) (prior convictions for murder and threatening police officer and prison officials); *Peterson v. Commonwealth*, 302 S.E.2d 520, 528 (Va. 1983) (record of violent crimes from age 15); *Stamper v. Commonwealth*, 257 S.E.2d at 820 (prior convictions for armed robbery and escape, as well as serious disciplinary problems in prison).

Third, the death sentence is not appropriate here because the jury never heard substantial information relevant to determining Mr. Pope's moral culpability and potential future danger. That information -- mitigating evidence about Mr. Pope's background and mental state -- would have put Mr. Pope's conduct

(and criminal history) into perspective for the jury and would have provided them with a principled basis for determining that death was not the appropriate sanction.

The jury was deprived of this information because Mr. Pope's counsel simply failed to develop the appropriate mitigating evidence. As Mr. Pope's mother later explained:

I was not told the purpose of my testimony and did not understand that Carlton's family background was important to the decision of what type of penalty he would receive. The attorneys did not ask me about Carlton's alcoholism, his problems at home and at school, or the atmosphere in our house when Carlton was growing up. They did not ask for his medical or school records. Nor did counsel ask me for names of other people who could have given information and/or testified about Carlton and his background.

Affidavit of Estelle Pope ¶ 5 (attached as Appendix D).

Counsel's failure to make any reasonable effort to develop and present mitigating evidence speaks volumes about their commitment to Mr. Pope's defense. It also severely prejudiced Mr. Pope and skewed the jury's ability to render a fair decision.

The evidence that the jury never heard related to Mr. Pope's deprived background and its effect upon him and his family. Specifically, Mr. Pope's family members would have testified about the poverty in which Mr. Pope was raised and the effect that it had on him. They also would have testified about the alcoholism of Mr. Pope's father and its devastating impact on Mr. Pope. This information is set out in detail in the affidavits found at Appendix D and JA 428-54.

Mr. Pope's father was "a cold, hard man." When sober, he "ignored the children"; when drunk, "he would become loud and

aggressive." Affidavit of Estelle Pope ¶ 14. He often "roughed up" his wife when he was drunk. Affidavit of Cynthia Pope ¶ 11 (JA 433). He was also "verbally abus[ive]," Affidavit of Estelle Pope ¶ 14, and told his children that they were worthless. Affidavit of Tilmon Pope, Jr. ¶ 9 (JA 429). The entire family was afraid of Mr. Pope's father. Affidavit of Estelle Pope ¶ 14.^{1/} Although Mr. Pope's mother tried to maintain a stable home, she resorted to harsh discipline; both she and her oldest daughter would beat the younger children, including Carlton, for doing anything "wrong." Affidavit of Cynthia Pope ¶ 9 (JA 433).

Not only was the entire family atmosphere poisoned by Mr. Pope's father, but Mr. Pope himself was subjected to abusive behavior from his father, both in public and at home. Affidavit of Estelle Pope ¶ 20. One of Mr. Pope's brothers recalls that his father would refer to Carlton as "a fool." Affidavit of Tilmon Pope, Jr. ¶ 9 (JA 429). Mr. Pope began to leave the family home when his father came home at night. Affidavit of Timothy Pope ¶ 11 (JA 438-39).

Because of his father's exploits, Mr. Pope eventually gave up a promising career in athletics -- which possibly could have provided the stability he needed. Instead, Mr. Pope began hanging around with a group of rough kids from a neighboring

^{1/} And with good reason. Mr. Pope's father sexually abused his daughter, Mary, when she was an adolescent. Affidavit of Mary Uwejevan ¶ 10 (JA 444). Two of Mr. Pope's siblings have undergone psychiatric treatment, and two of his sisters had babies when they were teenagers. Affidavits of Tilmon Pope Jr. ¶ 6 (JA 428); Timothy Pope ¶ 13 (JA 439); Cynthia Pope ¶ 17 (JA 434); Mary Uwejevan ¶¶ 11, 18 (JA 444, 446).

project. Affidavits of Estelle Pope ¶¶ 19, 25; Mary Uwejeyan ¶ 16 (JA 445); Regina Humphrey ¶ 6 (JA 454). It was at that time that Mr. Pope began drinking, using drugs, and getting into trouble. Mr. Pope's family members recognize now that he was looking for someone to admire -- someone who could stand in the place that his father had forfeited. Affidavits of Estelle Pope ¶ 27; Tilmon Pope, Jr. ¶ 11 (JA 429); Mary Uwejeyan ¶ 17 (JA 446). At the time, no one helped Mr. Pope. By his early teens, Mr. Pope was an alcoholic and in trouble for petty offenses.

Undersigned counsel had a full and complete psychological evaluation of Mr. Pope conducted by Dr. Alan Vaughn, a clinical psychologist and professor. This evaluation appears at JA 455-66. The evaluation puts this family history into context, provides further mitigating evidence that the jury never heard, and supports the conclusion that the death penalty is disproportionate here. Dr. Vaughn discovered that Mr. Pope operates only in the borderline range of intellectual functioning (with a full scale I.Q. of only 79).^{2/} His low intelligence quotient scores "suggest[] the presence of a depression, some rather serious emotional conflict and an underlying personality disorder." JA 459.

This borderline range of functioning has a serious effect on Mr. Pope's actions. Dr. Vaughn explains that, under

^{2/} A range of 90-110 is normal, while 80-90 is considered "dull normal." Scores of 70-80 are classified as "borderline," and anything below 70 is classified as retardation. 1 Harold I. Kaplan, M.D. and Benjamin J. Sadock, M.D., Comprehensive Textbook of Psychiatry § 9.5, at 498 (5th ed. 1989).

"optimal circumstances," Mr. Pope has "the potential to function in the low to normal range(s) of intellectual functioning," but that alcoholism, substance abuse, or stress would cause him to function "within the limits of mild mental retardation." JA 459. All of these factors were present in Mr. Pope's life -- usually in combination. Dr. Vaughn also concludes that Mr. Pope suffers from a Borderline Personality Disorder, which means that he has "poor impulse control and lack[s] mature internal psychological defense systems necessary to control [his] behavior." JA 465. Mr. Pope requires "external psychological supports and structured environments," such as a stable family or prison, to control his behavior. Psychological stressors such as alcohol, fatigue or illness, by contrast, can cause him to "decompensate into an acute psychosis." JA 465.

Given these intellectual and functional problems, Mr. Pope needed a strong family to ensure his moral and emotional growth and health. That stable family was missing. Dr. Vaughn stresses that Mr. Pope's family "failed, developmentally, to provide an environment which would facilitate Carlton's maximal psychological and educational development." JA 463. Indeed, "by the age of puberty, the family was dysfunctional where his psychological needs were concerned, if not before." JA 463. The lack of strong external family support has been particularly devastating. According to Dr. Vaughn, Mr. Pope's "moral development and education have been rather seriously

compromised," with the result that he has "difficulty discerning right from wrong in a variety of social contexts." JA 460.

The facts bear out Dr. Vaughn's evaluation. As Mr. Pope's family members explain in their affidavits, when he has external support -- through the structure of prison -- and when psychological stressors such as alcohol and drugs are absent, Mr. Pope is not violent or seriously disruptive. During his prior stay in prison, Mr. Pope took advantage of the structure and support to gain educational and work training. He contributed to the prison community, so much so that a prison official testified at the sentencing hearing that Mr. Pope had been a good prisoner and had performed a useful function in prison. JA 271-72.

Simply put, we do not present these facts to excuse or minimize the conduct at issue. Rather, the complete facts about Mr. Pope's background reveal that the death penalty is not warranted here. Unfortunately, the jury never heard the complete picture and no court has been able to consider all of this evidence, because Mr. Pope's trial lawyers failed to do their job. When all the facts are considered, this case is an appropriate one for a penalty of life imprisonment.

CONCLUSION

Carlton Pope does not deserve to die. He deserved a fair shot at trial based on an accurate presentation of the evidence. And he deserved a vigorous defense, both at the guilt and sentencing phases. If he had received a trial untainted by false testimony, and if he had been given a vigorous defense, he would have been acquitted of capital murder or, at the very least, sentenced to a term of life imprisonment. If there is any doubt as to either of these potential outcomes, the doubt, we respectfully submit, should be resolved at this point in his favor -- not just because the alternative is so extreme and final, but because Mr. Pope alone is without responsibility for the inadequacies of his trial.

The inescapable fact is that an innocent man might have been convicted because the Commonwealth relied on false testimony to prove his guilt and might be put to death because his own counsel failed to present the evidence that demonstrates he does not deserve to die. The Governor alone has the power and authority at this point to recognize the inadequacies of Mr. Pope's trial, accept the Commonwealth's responsibility for those inadequacies, acknowledge the substantial doubts that exist as to Mr. Pope's guilt, and extend mercy on the issue of his sentence.

Carlton Pope and his family pray that the Governor grant executive clemency to commute his death sentence to a sentence of life imprisonment.

Respectfully submitted,

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