QUES. CLEMENCY

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March 2, 1999

DRAFT

BY HAND DELIVERY

The Honorable James S. Gilmore, III
Governor of the Commonwealth of Virginia
State Capital
3rd Floor
Richmond, Virginia 23219

Re: George Adrian Quesinberry, Jr. - EXECUTION DATE MARCH 9, 1999

Dear Governor Gilmore:

Please accept this petition for clemency on behalf of George Adrian Quesinberry, Jr., a Virginia inmate under a sentence of death.

I. Facts of the Crime

Mr. Quesinberry was convicted of capital murder and sentenced to death by a Chesterfield County jury in 1990. The homicide occurred in Chesterfield on the premises of Tri-City Electric, an electrical parts wholesale supplier. The victim was Tri-City's owner, Thomas L. Haynes. Throughout the evening and early morning before the shooting Mr. Quesinberry and his friend, Eric Hinkle, had been drinking heavily. They broke into Tri-City sometime after 5:00 a.m. to steal petty cash. Mr. Haynes confronted them shortly before 6:00 a.m. and demanded to know what they were doing. Mr. Quesinberry panicked, grabbed a gun Mr. Hinkle was holding, and shot and killed Mr. Haynes.

surprise
shared him down

After the shooting, Mr. Quesinberry was devastated by what he had done. See Exhibit A (Affidavit of George A. Quesinberry, Jr.), ¶ 13, and Exhibit B (Affidavit of Eric Hinkle), ¶ 5. None of Mr. Quesinberry's family or friends, including Mr. Hinkle, had ever seen Mr. Quesinberry hurt or even threaten anyone before. See Exhibit B, ¶ 2; Exhibit C (Affidavit of Dwight Cox); Exhibit D (Affidavit of Lana David), ¶ 7; Exhibit E (Affidavit of Rhonda Ortolano), ¶ 15; Exhibit F (Affidavit of Joyce Harrell), ¶ 3; and Exhibit G (letter from Lana Rowe). Mr. Quesinberry was so upset that he contemplated committing suicide, but did not do so because he had been taught that suicide was an unforgivable sin. Mr. Quesinberry, expecting his arrest, did not attempt to flee or avoid his apprehension, showed the police where he had left the gun, gave a full confession and urged Mr. Hinkle to be truthful with authorities.

II. History of Mr. Quesinberry's Case

Mr. Quesinberry's conviction and sentencing for a capital crime was based on the statutory predicate of murder committed during a robbery. No one claimed that Mr. Quesinberry and Mr. Hinkle had any intention of committing an armed robbery of Mr. Haynes when they broke into Tri-City, and nothing was taken from Mr. Haynes' person. The Commonwealth's case was that, because Mr. Quesinberry and Mr. Hinkle had not physically removed the petty cash and other small items of property from the Tri-City building prior to their discovery, the entry by Mr. Haynes transformed the situation into a robbery and the murder was committed for the purpose of escape.

At trial, Mr. Quesinberry's attorneys argued that Mr. Quesinberry's crime was not robbery but, rather, a burglary followed by a murder. They lost this argument with the judge and with the jury. Other than this legal defense, trial counsel simply failed to prepare for the guilt and sentencing stages of this capital trial. They were unprepared to permit Mr. Quesinberry to testify on his own behalf, nor was he in a condition to do so because of his attorneys' inability to understand or communicate their client's mental state. Despite the information given to them by Mr. Quesinberry and his family, they had not investigated Mr. Quesinberry's medical history, his educational and personal development, his extensive history of physical and mental abuse, or his mental and emotional condition on the morning of the Tri-City break-in, with the result that they had virtually no mitigating evidence to present to the jury during the sentencing phase.

Most importantly, trial counsel failed to employ the assistance of mental health experts to assist in his defense even though Mr. Quesinberry was entitled to this assistance as a matter of statutory right. Had trial counsel done so (as current counsel has done), Mr. Quesinberry would have been afforded with a compelling defense as demonstrated by the attached affidavits of Dr. Robert Hart and Dr. Mary Beth Williams, Ph.D. (Exhibits H and I, respectively). From their testimony, the jury would have learned that Mr. Quesinberry suffers from neurological and psychological dysfunctions that inhibit his perception, his memory, and his ability to openly express remorse. The jury would have understood that Mr. Quesinberry's fear when he was unexpectedly confronted by Mr. Haynes triggered an extreme response traceable to Mr. Quesinberry's traumatic experiences of violence and his psychological dysfunctions, and moreover that Mr. Quesinberry's dysfunctions are treatable with counseling. Even with the dearth of evidence presented at sentencing the jury still deliberated over seven (7) hours over two days before returning its recommendation for a sentence of death.

Mr. Quesinberry's traumatic childhood and subsequent events of his teenage years are well documented in the attached affidavits of friends and family members submitted to, but not considered by, the United States District Court. Suffice it to say that Mr. Quesinberry's life is no ordinary story of poverty and abuse. At age two, he witnessed his own mother's shooting death (ruled a suicide by rifle, but occurring in the presence of Mr. Quesinberry's abusive and alcoholic father). Abandoned by his father, he was moved from place to place to live with various relatives, one of whom raped him before he was five years old, another of whom repeatedly beat him and locked him in enclosed spaces as a form of "discipline." Before he was ten years old, he had a

crippling, but undiagnosed learning disability, and had undergone extensive psychological counseling and treatment with controlled substances. After a friend accidentally shot him with a shotgun at age fifteen, Mr. Quesinberry spent almost a year in recuperation and was never able to complete his high school education.

Such information is not simply something that could have made the jury "feel sorry" for Mr. Quesinberry. Rather, the patterns of abuse that he suffered and the resulting behavioral dysfunctions, which Dr. Hart and Dr. Williams recognized and explain cogently in their affidavits, are absolutely essential to understanding the tragic confluence of events that confronted Mr. Quesinberry in Tri-City. Had trial counsel sought this type of expert assistance, they would have understood Mr. Quesinberry and the factors that motivated his behavior, and Mr. Quesinberry would have had a more than probable chance of success at the trial stage of the proceedings. Unfortunately, as demonstrated by the clear discrepancies between the trial counsel affidavit (Exhibit J) and the two affidavits submitted by mental health professionals at the University of Virginia who were contacted but not employed by trial counsel, trial counsel simply dropped the ball regarding their only viable trial defense. See Exhibit K (Affidavit of Garry Hawk, Ph.D.), and Exhibit L (Affidavit of W. Lawrence Fitch, J.D.). In sum, Mr. Quesinberry's appointed trial lawyers simply formed no strategy for effectively rebutting the Commonwealth's portrayal of Mr. Quesinberry as a dangerous killer, when such a rebuttal was plainly available.

The errors of trial counsel were compounded by the performance of state appointed counsel at the habeas stage. State habeas counsel simply refused to investigate or advocate Mr. Quesinberry's claims of what his trial counsel should have, but did not, investigate or develop for the trial. In fact, in a clear breach of his duty of loyalty to Mr. Quesinberry, state habeas counsel informed the state habeas trial court (but not Mr. Quesinberry) that the claims had no merit, and then unilaterally decided not to include the claims in an appeal. Because of the federal courts' application of a rule of procedural default in habeas corpus proceedings, no court has ever heard, or been allowed to hear, the merits of these claims. Clemency is the sole avenue to address this fundamental failure of the judicial system to provide Mr. Quesinberry with a fair opportunity to defend and explain himself at trial.

III. Other Aspects of Mr. Quesinberry's Background and Sentencing

Unlike many death row inmates and contrary to the public's perception of capital convicts, Mr. Quesinberry does not have a prior record of violent or armed crime. He stole two purses at age eighteen, broke into a grocery store to steal food at age twenty while homeless, and, finally, he skipped out on a cab fare in Houston, Texas. At his capital trial sentencing phase, the cab fare incident was "transformed" into an attempted armed robbery. Despite defense counsel's knowledge that Mr. Quesinberry's co-defendant in Houston has passed a lie detector test and that the conduct was nothing more than a skipped cab fare, the cab driver was allowed to testify without effective cross-examination that he had been robbed at knifepoint. See Exhibit M (Affidavit of Allen C. Isbell, Esquire). This portrayal of the incident was the linchpin for the Commonwealth's Attorney to argue effectively in closing about Mr. Quesinberry's "escalating" criminal career.

Hart + Q also passed lie detector?

No truth in sentencing

Further clouding the sentencing problem was the then-current nature of Virginia law regarding parole and about informing jurors about parole eligibility. When Mr. Quesinberry was convicted in 1990, had he been given a life sentence he would not have even been eligible to receive parole until the year 2020 (at an age of fifty-nine). Under the then-existing law, he was refused a jury instruction to inform the jury of his ineligibility to receive an earlier parole. Counsel has learned from juror interviews that the true meaning of a "life sentence" was the primary concern in the jury deliberations, and that it was believed that Mr. Quesinberry's incarceration would be ***no more than twenty*** years (as opposed to ***no less than thirty***).[1] Accurate information regarding Mr. Quesinberry's mandatory incarceration under a life sentence could well have tipped the balance in Mr. Quesinberry's favor.

IV. Conclusion

This administration has often taken the position that the death penalty is appropriately reserved for the worst of the worst. In fact, as recently as December 13, 1998, you were quoted in the Richmond Times Dispatch as stating the following in defense of Virginia's imposition of the ultimate penalty:

> After all, capital punishment is restricted very narrowly to only murder . . . [that] was so heinous as to be inhuman or that there was a likelihood of it occurring again. . . . You have to meet [that] test[] before you can even impose the death penalty.

When all evidence is looked at — ok/jury did not have this evidence

That description simply does not fit Mr. Quesinberry or the circumstances of his crime. Of course, Mr. Quesinberry's murder of Mr. Haynes was wrong and tragic, as, indeed, all murders are wrong and tragic. The incident at Tri-City occurred not, however, from a pre-planned armed robbery, nor from hate or sociopathic behavior, but rather from fear and panic in the midst of a bungled burglary. All those who know Mr. Quesinberry agree that he does not belong on death row; his inherently passive nature and desire for friendship and acceptance are manifestations from

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[1] Counsel learned this from an April, 1996 interview with juror Claiborne Chaney, who then resided at 4772 Cochise Trail in Chesterfield, Virginia, and whose telephone number was 271-9085. Mr. Chaney says that he told his fellow jurors that a life sentence would mean that a defendant would serve no more than twenty years, and that others voiced similar understandings. He said that he wished that juries could receive accurate information about the meaning of life in prison.

Mr. Chaney was aware that he had a right not to speak to anyone about the deliberations, but was more than willing to discuss the case and his view that the jury had reached a proper determination on the evidence presented (a position which, in light of what was presented by Mr. Quesinberry's counsel, I would not contest). He thought that the trial judge and the lawyers did a good job, but that the prosecution was more prepared and that the defense did not have anything to go on after they conceded in argument on the guilt phase that Quesinberry shot Mr. Haynes.

the events of his unfortunate childhood. He is not a hardened murderer, but an inexpressive and deeply remorseful individual who, in one moment of panic, took the life of another individual. He is constantly tormented by the fact that he took another life but has not had an opportunity to express that regret to Mr. Haynes family. See Exhibit N (Handwritten letter to you from Mr. Quesinberry) and Exhibit O (Letter dated October 4, 1991, from prison authorities returning sympathy card that Mr. Quesinberry had wanted to send to Mr. Haynes' family).[2]

George Adrian Quesinberry, Jr. has never denied that he caused the death of Tommy Haynes. After he was apprehended, he freely admitted his guilt. From that moment, George Quesinberry was destined to receive a murder conviction and to be incarcerated in a Virginia prison for most, if not all, of his life. Mr. Quesinberry would be the first to agree that his actions on September 25, 1989, merit harsh and life-long punishment.

As both an experienced trial attorney and as the chief executive elected by the people of this Commonwealth, however, you will appreciate the fact that Mr. Quesinberry's undeniable guilt of first degree murder does not foreclose any consideration of the equities of this case. This petition for clemency raises a fundamental failure of the adversary process by which the facts about George Quesinberry were presented and judged *after* the events of September 25, 1989. Under a duty to make the difficult choice between first-degree and capital murder, and between imposing a sentence of life imprisonment or death, the trial jury never learned the essential facts about George Quesinberry's life before, during, and after September 25, 1989.

That the jury did not learn these facts cannot be attributed to George Quesinberry. As an uneducated, indigent defendant, he had little choice but to rely on the expertise of his trial and state habeas counsel. As the result of an ineffectual trial defense, the Commonwealth was able to portray George Quesinberry not as a petty thief who killed a prominent businessman out of fear and panic, but as a sociopathic killer. He is not a sociopathic killer. Instead, he is a man who suffered horrific physical and mental abuse throughout his childhood. Crippled by undiagnosed (though curable) psychological dysfunctions, a lack of formal education, and substance abuse, he nonetheless had never physically hurt anyone until he was confronted by Tommy Haynes at Tri-City in September, 1989.

While Mr. Quesinberry is guilty of first degree murder, he is not deserving of the death penalty for capital murder. His scheduled execution will not advance any interest of the Commonwealth or its citizens. On the contrary, the granting of clemency to Mr. Quesinberry will demonstrate that the Commonwealth and this administration is not powerless to apply rational thought to a politically charged issue; to protect the integrity and fundamental fairness of this Commonwealth's criminal justice system, when trial lawyers appointed for that very purpose have failed and refused to do so; and to correct a wrong which the courts claim they are unable to address.

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[2] Counsel has respected the privacy of Mr. Haynes' family and has not sought to communicate to them Mr. Quesinberry's remorse.

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Along with other counsel for Mr. Quesinberry, I would appreciate having an opportunity to speak with you or your designated representatives about Mr. Quesinberry's case before you make your difficult decision. I will contact your office to schedule such an appointment. In the meantime, please let me know if you have any questions and please accept my appreciation for considering this petition for clemency.

Sincerely,

A. Peter Brodell

APB:mss
Enclosures

cc: Mr. George A. Quesinberry, Jr. (w/encl. by mail)
Patrick R. Hanes, Esq. (w/o encl.)
Donald R. Lee, Jr., Esq. (w/encl. by hand-delivery)
Robert Lee, Esq. (w/encl. by hand-delivery)

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