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**BEFORE THE GOVERNOR OF TEXAS  
AND THE TEXAS BOARD OF PARDONS AND PAROLES**

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**In Re**

**BILLY DWAYNE WHITE,**

**Petitioner.**

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**PETITION FOR CLEMENCY  
AND REQUEST FOR REPRIEVE**

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### Introduction

In 1988, a public opinion poll in Texas revealed that 73% of the persons polled said that capital punishment should not be used "in cases where the person is mentally retarded." Dyer and Claassen, The Texas Poll, November 15, 1988.<sup>1</sup> Billy Dwayne White has mental retardation and is scheduled to be executed between midnight and dawn on April 23, 1992. Most Texans would reject his execution. Without the intervention of Governor Richards and the Texas Board of Pardons and Paroles, however, Mr. White will likely be put to death.

Some may say that the results of the Texas Poll mean nothing. Opposition to the death penalty for people with mental retardation, they say, is based upon an inaccurate understanding of retardation, for most people think of severely retarded persons when they imagine a person with mental retardation, and people who are severely retarded are too disabled to commit murder or to be tried if they do kill.

Billy White's case is palpable proof that the instincts of Texans are not misguided. He has mild mental retardation, not severe mental retardation, but even mild mental retardation is a severe disability. As Professor Ruth Luckasson, one of the leading mental retardation specialists

<sup>1</sup>Press summaries of the polled are provided herewith as Appendix A.

in the country, has noted in her report about Mr. White, "[h]is mental retardation affects every dimension of his life." Appendix B, at 1. In Mr. White's case, the effect of mental retardation has even intruded, insidiously, into the fundamental fairness of the process by which he was convicted and sentenced to death.

Though Mr. White has had mental retardation all his life, first documented when he was eight years old by the public school system of Houston, that fact, which "affect[ed] every dimension of his life," was not known to his lawyer, the prosecutor, the judge, or the jury at his capital trial in 1977. As we will demonstrate, it surely affected his responsibility for the crime, for it shaped him into a person who could commit the crime described by Alge Spinks, the eyewitness and surviving spouse of the victim, Martha Laura Spinks. It also affected his ability to defend himself, for it prevented him from divulging, remembering, or even recognizing crucial facts related to his degree of culpability. Finally, while Mr. White's trial lawyer and habeas corpus lawyers share considerable responsibility for not investigating facts crucial to Mr. White's defense, including his mental retardation, his disability has even played some role in his lawyers' inadequate representation, for one of the survival skills of persons with mild mental retardation is the ability to "pass," to appear to be of

average ability to those with whom the person has casual contact. Thus, though his lawyers' failure to discover his mental retardation cannot be excused, Mr. White's lawyers were vulnerable to ignoring his disability if they did not conduct a thorough investigation of his life.

As we give texture and detail to the ways in which mental retardation has affected every dimension of Billy White's life and capital case, the reasons for granting clemency will emerge with crystal clarity. He is less culpable than non-retarded persons for the crime that led to his death sentence.

His trial was a profoundly inadequate and unreliable vehicle for arriving at the determination that he should be put to death. And he is a gentle, compassionate, trustworthy, remorseful man, who can safely and productively live in prison.

#### REASONS FOR GRANTING CLEMENCY

##### A. Mr. White Has Mental Retardation

Mental retardation contains three elements: (1) significantly subaverage general intellectual functioning (IQ of 70-75 or lower), (2) existing concurrently with impairments in adaptive behavior, and (3) manifested during the developmental period (before one's eighteenth birthday). Appendix B, at 2. Examination of Mr. White and his life history has revealed the presence of all three elements.

On April 15, 1992, psychologist Windel Dickerson, from Bryan, conducted a battery of psychological tests with Mr. White. He determined that Mr. White's full scale IQ is 66. Appendix C, at 2 (report of Windel Dickerson, Ph.D.). Finding that IQ score consistent with a public school measure of Mr. White's IQ as 69 in 1966, and with Mr. White's school history, Dr. Dickerson found that Mr. White has had "significantly subaverage general intellectual functioning" "during the developmental period." Appendix C. Following a detailed review of Mr. White's school records, Texas Youth Council records, and Department of Corrections records, Professor Luckasson agreed with Dr. Dickerson's assessment that Mr. White had an IQ below 70, which was manifested long before his eighteenth birthday. Appendix B, at 2-6.

Professor Luckasson also conducted the assessment of the final element of mental retardation, "impairments in adaptive behavior." To examine this element, Professor Luckasson obtained and reviewed data with respect to the nine areas of adaptive behavior that are deemed most important by mental retardation professionals: communication, self-care, home living, social skills, community use, self-direction, health and safety, functional academics and leisure and work. She found that Mr. White's behavior was impaired in nearly all these areas:

The school, in addition to scores indicating mental

retardation, documented problems in Billy's relationships with his peers and some teachers. (It appears that a number of teachers and principals took a special interest in this young boy, and attempted to provide him extra care and attention.) Family and friends who knew Billy through his life uniformly report that he had cognitive difficulties, needed a great deal of help, and could not do many things. Not surprisingly, family and friends use caring euphemisms such as "kind of slow" to describe his disabilities, and quickly mention certain positive characteristics such as generosity, when discussing the many things he could not do. His aunt Eva Hale reported that she "knew Billy was slow and not up to par in reading, writing, or spelling, but [she] didn't talk about it to other people." The stigma of intellectual impairment is so strong that many families are reluctant to name mental retardation in plain terms or readily admit, even to themselves, that a family member has the impairment.

Billy's intellectual impairments interfered with his ability to work. Several family members reported that if one told Billy exactly what to do and took him to the place where it was to be done, Billy could do some work. If he were left on his own, and not specifically guided, he could not do it. His Aunt Nina Cooper stated that "[h]e couldn't even write well enough to fill out a job application."

Billy himself also reports many problems with adaptive behavior. For example, although he claims to know how to drive, he admits he would never go to try to get a drivers' license because he knew he couldn't pass the test. It seems likely that Billy mistakenly overestimates his driving ability. Rockeeler Scott explained that her father got him a job as a dump truck driver and her brother attempted to teach Billy how to do the job. Billy could not remember to operate the clutch correctly so he was fired. (It appears that he was also fired from his only other job. Hired as a kitchen worker, he was fired when he couldn't learn to operate a dishwasher.) During the few months when Billy had the job as a dump truck driver, Oscar Domino Jr. picked him up for work every day in

order to assure that he would get to work. Rockeeler Scott stated that "he really tried to hold a job, but he just couldn't."

Mr. Domino also accompanied Billy for daily living activities such as shopping. Mr. Domino would read clothing sizes and tags for Billy so that he could make purchases.

Many family members described Billy's communication impairments. They reported that things had to be repeated over and over for Billy to understand. They also described attempting to use different words to explain things, trying to get Billy to understand. Coreida Baines explained that Billy couldn't read and couldn't keep a job because "he wouldn't know what he was doing". She also stated that "everybody loved Billy" and that he "tried to cover up things he couldn't do."

Many family members observed that Billy always tries to be with other people. Alone, there are too many things that he can't do, but if others are nearby he can get someone to help. This appears to be a strong technique for Billy to cope with his mental limitations--getting others to help with the many things he cannot figure out. He has continued this technique in prison, getting smarter inmates to write things for him, for example.

Appendix B, at 6-8.

On the basis of all the available data, therefore, there is no doubt that Mr. White has mental retardation and that he has had it from at least the age of eight, and probably from birth. Appendices B and C.

B. How Mental Retardation Has Affected Mr. White's Life

To understand why Billy White's execution would be such an affront to human decency, one must understand, in everyday terms, how mental retardation has impaired Billy's ability to function. The observations of those who have known Billy over

the years bring into sharp focus the constrictive boundaries which mental retardation drew around Billy's life.

People with mental retardation are often highly dependent on other people to help them function in their daily lives. Appendix B, at 8. As Professor Luckasson noted, "Billy's dependence on more intelligent people for assistance is a pattern that runs through his life." Id. It is the most all-encompassing, pervasive, and constant pattern in his life.

Billy's early and primary dependence was in relation to his mother. Numerous people have observed what Billy's brother Larry White has observed: "[Billy] was always up under her when we were small. When the rest of us wanted to go outside and play, Billy would want to stay inside with momma." Appendix D (affidavit of Larry White). See also Appendix E (affidavit of Eva Hale); Appendix F (affidavit of Lennie Bell White). The reason for Billy's primary dependence on his mother became painfully apparent when she died in 1966, when Billy was eight years old. Appendix E. As a childhood friend, Janet Porter, has explained,

What I remember most about Billy was that he would say things all the time about how much he missed his mother. He would say that he wished she was alive to watch over him and keep him out of trouble.

Appendix G. See also Appendix H (affidavit of Coreida Baines); Appendix E.

Billy's need for guidance was only one of several reasons



he was so dependent on other people. Because of his retardation, he often just could not think of things to do with himself. He needed others with him to activate him and move him in any direction. Even as a child this was readily apparent:

[Billy] was a follower and would just go along with what the other kids wanted to do. He was the kind of kid that didn't put up any fuss. When the others came up with an idea or wanted to do something, Billy would always agree.

Appendix E. See also Appendix I (affidavit of Nina Cooper) ("he played mostly with his cousins, and he would go along with whatever they wanted to do").

His dependence also grew out of his need for acceptance and protection by more able people. Because of his mental retardation, Billy was often picked on, victimized, and singled out for humiliation. As his brother Larry has explained,

When we were growing up, Billy was always slower than the other kids. I remember kids would jump on him and tease him. They would call him "dumb" and "stupid." These words really upset him and he would get confused when they started asking him a whole bunch of questions.

Appendix D. Other kids "used to take his lunch money and clothes." Appendix J (affidavit of Henry Wyatt). Sometimes even teachers would subject him to public ridicule for his disabilities. See Appendix K (affidavit of Josetta Weathersby) (recounting a teacher's ridicule for Billy's

inability to read).

The cruelties visited upon him led Billy to seek acceptance and protection from people. In response, as Henry Wyatt explains, "a bunch of us older guys became his 'protectors'." Appendix J. Larry White further observed, "Billy only began to feel good about himself when he started hanging around an older group of fellas. There was this man named Roy Charles who made Billy feel important

..." Appendix D. This man, Roy Charles Baines, explained what he and others offered Billy: "Billy looked up to me and would confide and trust in me. Sometimes Billy would be with me and just start to cry. He would say that no one loved him or cared about him." Appendix L (affidavit of Roy Charles Baines).

The influence that these other people were able to exercise upon Billy was profound. His need for them led him to do whatever they wanted him to do. See Appendix E ("[h]e liked to please people and he would try to do what they wanted"). His Aunt Nina saw Billy being pulled along by others and realized how powerful the pull was:

When Billy got older, he started following other kids off from home. It was like the people he ran with had a string on him. Once when Billy got in trouble, a policeman said to me that he was a good kid but he was easily led. You could see that right away when you watched him with other kids.

Appendix I.

Tragically, the direction into which these people led Billy was negative. Roy Charles introduced Billy to heroin and before long he was heavily involved in shooting up heroin and in taking a variety of other street and prescription drugs. See Appendix L; Appendix J. The other direction into which Billy was led was criminal activity. Gradually Billy was transformed from a meek, frightened teenager into a person who was not afraid to break into houses, steal property, and commit robberies. Henry Wyatt explained the process by which Billy's more able protectors changed him:

When Billy started hanging around us he was real scared and timid. We told him that he would have to change. We taught him how to steal. We would get him to do things that were wrong by telling him that he was a coward if he didn't, and that he could only be in our gang if he showed us that he had courage. This was like a toughening process that we put Billy through. We could persuade him to do these things because he was easily misled.

Appendix J.

The other pervasive pattern in Billy's life that is a direct consequence of his mental retardation is the tremendous difficulty he had in translating concepts into practice. As Professor Luckasson explained, "[o]ne of the most dramatic aspects of mental retardation is the limited ability to generalize what is 'learned' at the conceptual level into day to day activities and decisions." Appendix B, at 9. It is this limitation that also had pervasive effects in Billy's daily life. It was manifested in three ways.

First, Billy had great difficulty in carrying out verbal instructions. No one could successfully tell Billy what to do in any particular situation. He had to be shown what to do. Appendix E; Appendix F.

Second, even showing Billy what to do would frequently fail if the more able person failed to exercise constant supervision. As his Aunt Nina explained,

Billy would try hard to do the things he was asked to do, but if someone didn't stay right there and tell him how to do it, he might do it wrong. For example, if I asked him to dig a wide ditch for the garden and left him alone, I could expect him to dig it deep instead of wide. In order to be sure Billy did things right, you just had to show him everything.

Appendix I. This limitation affected almost everything Billy did, causing him to lose the only two jobs he had. See Appendix M (affidavit of Rockeeler Scott) (describing Billy's inability to learn how to shift the gears of a dump truck despite direct supervision and his inability to learn how to operate a dishwashing machine despite direct supervision). Moreover, it caused people like Henry Wyatt to limit Billy's role in criminal episodes to avoid any unwanted turns of events:

I also watched out for Billy. I knew he was slow so I never trusted giving him a pistol because I knew that he could have had an accident with it.

Appendix I.

While Billy White's life has been severely circumscribed

by his mental retardation, he remains a complex human being like any other human being. As Professor Luckasson has cautioned, there is "[a] risk in attempting to describe the disabilities and their impact on [Mr. White's] life that [one] might inadvertently stereotype him as a mentally retarded person, rather than fully describe his uniqueness as a complex person who has mental retardation. Mental retardation is a serious disability, and it affects every dimension of Billy's life. He has, however, other attributes and characteristics that make him Billy White." Appendix B, at 10.

To all who know Billy White, his most striking characteristics beyond mental retardation are his sweetness of spirit, his kindness, and his generosity. He is remembered as a father who "loved [his son] Kevin Charles to death" and "would take him riding with him in his car, and would take him to the park." Appendix M. Coreida Baines remembers Billy "as a sweet person who was easy to get along with..." Appendix H.

His unstinting generosity was, however, what singled him out from most other people. His friend Oscar Domino explained:

Billy was the kind of person who would give you the last cent he had if you needed it or even if you just asked for it. There was nothing you could ask for that Billy wouldn't give you.

Appendix N (affidavit of Oscar Domino). Even though Billy obtained much of his money from stealing others' property, he "would use the money that he got to help his family, which was

very poor. He was always very generous and kind, and he still is today." Appendix K. And finally, Billy's grandmother, Lennie Bell White, spoke for many when she said,

I am praying for Billy's life to be spared because he has always had a good heart. When other kids had nothing, Billy would always share with them the little bit he had.

Appendix F.

C. How Mr. White's Mental Retardation was Related to the Crime

1. The State's evidence at the guilt phase of the trial

On August 23, 1976, at approximately 6:00 p.m., Martha Laura Spinks was killed by a single shot from a .38 caliber gun in the office of the furniture store owned and operated by her and her husband, Alge Spinks. Ms. Spinks was shot during the course of an incident involving Billy White.

The only witness to testify about the incident in the store was Mr. Spinks. He testified that Mr. White entered the store just before 6:00 p.m. on August 23, as the store was about to close. T. 147, 156.<sup>2</sup> After looking at several items, Mr. White decided to purchase two lamps. T. 157. Mr. White, Mr. Spinks, and Ms. Spinks gathered in the internal office of the store to complete the sale, id., and as this was taking

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<sup>2</sup>"T" refers to the transcript of the trial. The page references are to the internal numbering of Volume VI of the trial record.

place, Mr. White pulled out a gun and told the Spinks to give him their money. T. 157-58. After Mr. Spinks gave Mr. White the \$250-260 of receipts from that day, Mr. White suddenly "reached over and shot [Mr. Spinks'] wife." T. 159. Mr. Spinks was not looking at his wife when the shot was fired, and he heard nothing from her beforehand. T. 162. Mr. White thereafter ordered Mr. Spinks to lay on the floor and began to remove Ms. Spinks' watch and jewelry. T.164. He placed the gun on the floor and put his foot on it while he did this. T. 164-65. Mr. Spinks then grabbed the gun, a struggle ensued for the gun, and during the struggle Mr. Spinks was able to fire the gun twice. T. 165-66. When it would no longer fire, Mr. Spinks ran outside and hid, T. 167, and Mr. White then left the store and ran away on foot. T. 168.

Mr. White was caught shortly thereafter several blocks away with a .38 caliber gun in his waistband, T. 83-85, was brought back to the store, and was identified by Mr. Spinks, T. 170, and by a person who was across the street from the Spinks' store when this incident occurred and who saw Mr. White leave the store after gunshots were heard, T.13-16. 36.

All the remaining evidence was provided by the law enforcement officers who investigated the crime scene, the medical examiner who conducted the autopsy, and the firearms examiner who compared two bullets found in the store with bullets test-fired from Mr. White's gun. Crime scene

investigators noted the presence of a ladies watch on the floor of the office, T. 73-74, and recovered two bullets that were apparently fired during the incident. T. 111-116. One of the bullets was matched to Mr. White's gun, but the second bullet, the one thought to be the fatal bullet, was too damaged to allow comparison to Mr. White's gun. T. 126-40. Ms. Spinks was killed by a gunshot wound through the face, which passed through her body and severed her spinal cord. T. 43-44. The gun was approximately two inches from Ms. Spinks' face when the fatal shot was fired. T. 44. Death was instantaneous. T. 45.

Mr. White was taken to the emergency room of a local hospital after he was identified by Mr. Spinks. T. 101-08. He had been shot in the pelvic area during the struggle with Mr. Spinks over the gun. Id. At the hospital, cash in the amount of \$269.62 was removed from Mr. White's pocket. T. 104.

No statement was ever obtained from Mr. White by the police.

## 2. The defense case in the guilt phase

The defense put on no evidence. Through cross-examination of three state witnesses, however, the defense was able to suggest the possibility that Ms. Spinks attempted to spray, or sprayed, Mr. White with mace prior to being shot.

In the cross-examination of Officer Lynn, one of the



crime scene investigators, the defense initially raised this possible occurrence:

Q. [DEFENSE COUNSEL] Do you recall seeing anything that might have been mace or any kind of a protective device that a person might use that was under attack?

A. [OFFICER LYNN] I saw a small canister of what could have been, yes, sir.

T. 80. Defense counsel asked no other questions, but on redirect, the prosecutor clarified that the canister was found "in the body of Ms. Spinks' hand..." T.80.

Mr. Spinks was also questioned about whether his wife might have had a canister of mace and whether she might have used it against Mr. White on cross-examination:

Q. Did you or your wife keep any kind of protective devices around?

A. I did not. There was some a year or two before that I had heard about. I did not keep anything around there, not even a gun.

Q. Are you familiar with mace?

A. No, sir. I have heard of it.

Q. Do you know what it does when it's fired?

A. It's supposed to blind you for a few seconds?

Q. Do you know, does it have any peculiar odor or smell?

A. I don't know, sir.

Q. Did you know of any mace that was fired at the time of this robbery?

A. No, sir.

Q. Did you see a can of mace in your wife's hand?

A. I did not, no, sir.

T. 175-76. Mr. Spinks' carefully qualified answers to these questions plainly did not rule out the possibility that Ms. Spinks had used or attempted to use mace against Mr. White.

Finally, in the cross-examination of Mack Alford, the person who was across the street when this incident occurred and who identified Mr. White as the person who ran from the store, defense counsel elicited additional testimony relevant to the question of whether mace was used. Mr. Alford observed Mr. White in the back seat of a police car shortly after his arrest, which was within twenty minutes of the time the incident began. T. 36. When he saw Mr. White, he saw that Mr. White was crying. T.38.

In closing argument, the defense argued that the state had failed to prove that the murder was intentional, relying in part on the evidence concerning the mace. T. 10-11.<sup>3</sup> The theory was that Mr. White may have been sprayed with mace, causing the gun to discharge accidentally into Ms. Spinks' face. Id.

When both sides rested, the entire guilt-innocence evidentiary phase of the trial had consumed only one day.

<sup>3</sup>The transcript reference here is to the internal pagination of Volume VII of the record.

3. The penalty phase of the trial

In the penalty phase, the state presented evidence of Mr. White's participation in three prior offenses: a burglary in 1974 for which he was convicted and sentenced to probation, T. 33-34;<sup>4</sup> a shoplifting incident in May, 1976, in which Mr. White knocked down an older woman in his attempt to evade arrest, T. 49-52; and a robbery earlier in the day on August 23, 1976--the same day on which Ms. Spinks was killed--of a retail store, in which Mr. White robbed the clerk of her jewelry, her purse, and an unspecified amount of cash from the store's cash box, T. 63-68.<sup>5</sup>

The defense put on no evidence in the penalty phase.

In the closing argument, defense counsel described an execution by electrocution. T. 81-86. He also explained to the jury that he would have had no quarrel with the police had they shot and killed Mr. White when he was arrested, because he deserved it then. But since the Petitioner was not shot then, he deserved to live. T. 78-79. No mention was made of mace being sprayed by Ms. Spinks or the relationship of that

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<sup>4</sup>The transcript reference here is to the internal pagination of Volume VII of the record.

<sup>5</sup>Mr. White had not been convicted of either of the 1976 offenses at the time of his capital murder trial.

evidence to the punishment issues.

Sometime during the penalty trial, Mr. White fell asleep on counsel table and was snoring loudly, in front of the jury.

In final arguments, the prosecutor pointed to Mr. White, who was still asleep, and told the jury that such behavior demonstrated the degree of his remorse for the death of Mrs. Spinks and his respect for the criminal justice system. T. 93-94. No objection was made to these remarks. Defense counsel took no action to ameliorate the harmful effect of the conduct and the prosecutor's remarks. The jury returned affirmative answers to the two punishment issues in less than 30 minutes. See Docket Sheet, time notations, Volume I of the Record at 64.

4. The areas of defense that were available and substantial

Had Mr. White's defense lawyer undertaken a reasonable investigation of his client's life, of his client's version of what occurred, and of the evidence collected by the crime scene investigators, the trial of Mr. White would surely have taken more than the day-and-a-half that it took in October, 1977. Moreover, the evidence that could have been presented would have raised substantial questions about whether the shooting of Ms. Spinks was intentional, and even if these questions were resolved against Mr. White, whether he was culpable enough to deserve a sentence of death.

The most important evidence omitted from the trial was the evidence that Mr. White had mental retardation. Had the jury known this and come to appreciate the effects of mental retardation in Mr. White's life, it would have viewed Mr. White as less culpable even if Mr. Spinks' version of the crime was accepted without reservation.

What took place on the day of the crime was significantly the product of other people's shaping of Billy White's behavior. He was only nineteen years old when Ms. Spinks was killed. He was fundamentally dependent upon people like Henry Wyatt at that time in his life. Because of Billy's mental retardation, people like Henry Wyatt and Roy Charles Baines had been able to shape Billy in their image. He did not have the internal capabilities necessary to question them or resist their influences. Even if he could appreciate that the criminal activities they led him into were wrong, his whole life history revealed that he would have tremendous difficulty changing his behavior.

Further, the chance that Billy would accidentally kill someone in the course of an armed robbery was high. Unless Billy was closely guided, he often failed to do what he set out and intended to do. He dug ditches deeper or wider than he intended, he failed to shift gears of a dump truck as he intended, he failed to operate a dishwasher as he set out to do. Henry Wyatt knew that Billy often made mistakes in what

he did, and so when he committed a crime with Billy, he "watched out for Billy." Appendix J. And he "never trusted giving him a pistol because [Wyatt] knew that he could have had an accident with it." Id. Had the jury known Billy as Wyatt did, it too might have been convinced "that he could never have killed anyone deliberately." Id.

Had defense counsel done his job in representing Billy White, however, he would not have had only the fact of mental retardation to present to the jury for its consideration. He would have had more, much more, with which to question the accuracy of the state's case.

The defense would have learned that Jesse Meyers accompanied Billy to the Spinks' store that day. The police investigator confirmed this, and Billy told his lawyer this. See Appendix Q. Moreover, Billy told his aunt, Vivian White, this within a few hours after the incident occurred, and Ms. White knew this independently from her own contact with Jesse Meyers before and after the crime. See Appendix P (affidavit of Vivian White). Meyers was known to the police as a heroin addict and as a supplier of heroin. See Appendix O. Billy, too, was known to the police as a heroin addict. Id. Several of his friends could have confirmed the same thing. See Appendices J, K, and L.

On the day of the shooting, Josetta Weathersby saw Jesse Meyers driving Billy's car. Appendix K. Billy "was sprawled

out in the back seat asleep." Id. When she asked Meyers what was wrong with Billy, she was told that he was "real high." Id.

After the shooting, the police who transported Billy to the hospital observed "that Billy kept falling asleep, or nodding out, in the car enroute to the hospital." Appendix O. Another officer observed that Billy was "sweating profusely." Both of these symptoms are consistent with heroin ingestion. See Appendix T. Coupled with Billy's observed condition earlier in the day, it is thus likely that Billy was under the influence of heroin when he entered the Spinks' store at 6:00 p.m. on August 23.<sup>6</sup>

Having been accompanied to the store by Jesse Meyers, a heroin addict and pusher, it is thus likely that Meyers had something to do with what happened in the store that day. Vulnerable to the influence and direction of people like Meyers, sent into the store by Meyers without any direct supervision--a situation too risky for Henry Wyatt to have

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<sup>6</sup>The police account of Billy falling asleep in the car on the way to the hospital, notwithstanding that he had been shot in the abdomen, is remarkably similar to the account of Billy falling asleep at his trial. It now appears that this occurred at trial for the same reason--the ingestion of drugs. According to Joretta Weathersby, "when Billy was in court on the murder charge. Rockeeler [Scott] told me that she had slipped him some pills while she was visiting him. This is what made Billy nod off at trial." Appendix K. Thus, had defense counsel bothered to investigate Billy's life, he would have learned about his drug usage and been able to explain and ameliorate Billy's falling asleep at trial.

found tolerable--and further impaired by the intake of heroin, Billy was set up for the occurrence of an unintended tragedy.

There was still more evidence that defense counsel should have discovered and presented. Long before trial, Billy told his lawyer that Ms. Spinks had sprayed him with mace. See Appendix Q. Indeed, Billy gave his Aunt Vivian this same account just hours after the incident. Appendix P. Nevertheless, defense counsel ignored this fact until trial. When a police officer confirmed the possibility, the defense was caught unprepared, never having made a specific pretrial request for information concerning the macing, the defense had no access to the actual canister recovered from Ms. Spinks' body by the police. Whether it was mace and whether it had been sprayed could have been determined by pretrial investigation, but neither fact could be determined at trial.

Another avenue of documenting whether Billy had been sprayed by mace--the emergency room records--were also unexplored by trial counsel.

Now, both pieces of evidence have been lost to scrutiny.

The canister has long since been misplaced, lost, or destroyed, and the hospital records have been destroyed. Yet Billy's contemporaneous account of what occurred, coupled with the revelation at trial that a canister of what appeared to be mace was found in Ms. Spinks' hand, seems far more than mere coincidence. However, only now has it been revealed that



Billy has consistently maintained that he was sprayed with mace by Ms. Spinks before the shooting occurred.

And finally, there is also evidence, also disclosed now for the first time, that the crucial part of the episode may not have occurred as Mr. Spinks remembered. The shooting may not have occurred before the struggle for the gun. Just hours after the incident, Billy told his Aunt Vivian that the struggle for the gun began after he was sprayed with mace by Ms. Spinks. The shooting of Ms. Spinks, he said, occurred in the course of that struggle. See Appendix P. Obviously, if that were the course of events, the shooting would not have been found to be intentional.<sup>7</sup> There is support for Billy's account of events beyond Billy's own statements.

The crime scene photographs and the findings in the autopsy raise the real possibility that Ms. Spinks herself was involved in the struggle. The photographs of the body at the crime scene reveal that Ms. Spinks' blouse was ripped and in disarray when she fell to the floor. The autopsy protocol reveals that two of Ms. Spinks' ribs were fractured. See Appendix R. Neither of these facts was noted at trial.

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<sup>7</sup>Even if the incident began as an attempted robbery, the shooting would not have been found intentional if it occurred in the course of a struggle for the gun. For this reason, the fact that Billy committed a robbery on August 23 before the incident at the Spinks' store, and that he may have intended to commit a robbery of the Spinks' store when he entered the store, would not make the shooting of Ms. Spinks an intentional murder.

Obviously, they create an inference that Ms. Spinks was not only shot during the struggle for the gun, but was actually a part of the struggle.

Further, the initial police report, containing Mr. Spinks' very first account of what occurred, is confused and mistaken in some important details. He recounts that Billy fired a second shot at Ms. Spinks--"at the back of the fallen victim's head"--after she was dead. Appendix U. On the basis of the autopsy protocol, no such shot was fired. In addition, Mr. Spinks' contradictory accounts of where the sales receipts were, and his confusion about whether the money was even taken, See Appendix U, presents a picture of a confused and disoriented man. In light of what had occurred, he had good reason to be confused. However, his state of confusion says more about what may have actually occurred than his clear and consistent testimony at trial. Again, as with all the other evidence highlighted here, there was no mention at trial of the confused character of Mr. Spinks' initial account of the crime.

For any or all of the foregoing reasons, it is manifest that Billy White's trial was a sham. Lasting little more than a day, dealing with none of the evidence about Mr. White's life and disabilities that had obvious bearing on the crime and his culpability for it, failing to explore in any meaningful way the evidence that bore directly on whether Ms.

Spinks was killed accidentally during a struggle, Mr. White's trial cannot engender confidence that reliable judgments were made about his culpability. Clemency must be available for a case like this, where the criminal justice process has failed so miserably to provide a reliable vehicle for arriving at true and just results.

D. The Billy White who was never revealed at trial is a person of Immense value who must not be put to death

As we have shown, Billy White's trial had nothing to do with who he was. Billy's jury sentenced him to death without knowing that he has mental retardation. The jury was not given an opportunity to consider the barriers in Billy's path because of his mental retardation or the struggles that were necessary to overcome them. The information presented above, which could have been presented at Billy's trial, demonstrates that had the full story of Billy's life been told to his jury, he likely would not have been sentenced to death. But, perhaps the best proof that death was not the appropriate sentence for Billy, and that his trial resulted in an incorrect and unjust sentence, is the picture of who Billy is today. That picture shows us a human being who possesses attributes which we are taught to value and which enhance the quality of life for others. These attributes were apparent to Professor Luckasson during the several hours she spent with

Billy:

Mental retardation is a serious disability, and it affects every dimension of Billy's life. He has, however, other attributes and characteristics that make him Billy White. In my opinion, his most striking characteristics beyond the mental retardation are his gentleness, kindness, and generosity of spirit. Although his ability to fully actualize that basic goodness is limited by his deficient abilities -- to understand, express, communicate and have logical understanding of cause and effect or strategic problem solving -- I believe the goodness is there. A striking example of the way his true feelings surfaced through the disability occurred as we discussed the incident during the interview. He began crying in obvious sorrow at the death of Mrs. Spinks and at the lost years of being unable to reconcile in his own mind or communicate effectively his understanding and feelings about the actions that caused her death. It is obvious, and he focused several times on the terrible picture in his mind of the victim falling dead, that her death remains of deepest trauma and regret to him.

Appendix B, at 10-11.

The prison officers and guards who are in the best position to know Billy describe him in the same way. They see Billy as a "gentle, friendly person who gets along well with everyone."

Appendix W, Exhibit A. They consistently remark that "Billy treats people with respect, and is outgoing and friendly with the officers and inmates." Id. Exhibit B. Billy has been on death row for almost fourteen years, and he is known as a person who has never caused any problems for the officers or inmates. Appendix W, Exhibits A, B, and C. One officer described Billy as "a model inmate in the prison." Id. Exhibit B.

The limited number of statements from prison officers does not do justice to the respect and fondness prison staff express for Billy White. It is more a reflection of the difficulties we have had obtaining affidavits from prison staff and the barriers erected by the prison officials when we attempted to interview guards and officers in the extremely limited time available to us. See Appendix W. Extemporaneous statements made by prison staff when talking informally about Billy are far more revealing of the depth and richness they really see in Billy's life. We recount some of those statements here although we were unable to obtain them in written form.

Billy has been described to us as the unusual kind of person "who treats everyone with that respect we all want to be shown by other people." One guard gave an example to illustrate his high opinion of Billy. He said that if you were in a large room full of prisoners and all the lights went out and you had no protection, Billy White is the kind of person who would see to it that no one harmed you.

There is a quality of simplicity and genuineness about Billy that touches the depths of your heart when you talk to him. It is a quality that is difficult to describe, but it comes through in Billy's relationships with those around him and is quickly seen by those who meet and talk with him. When you know Billy, you know that it is this quality in him that explains the tenderness and sadness in the voices of his

previous attorneys when they talk about his impending execution.

Billy is a human being whose life is worth saving, but he is also much more than that. Billy is a person who is worth knowing. He is a person who gives you special insight into that remarkable human spirit which enables a human being to overcome limitations and hardships beyond his understanding without developing bitterness or cynicism. Billy is remarkable in his warmth, his gentleness, his respectfulness, and his kindness. Billy's trial was remarkable in its failure to provide his jury with the information necessary for a fair and just response to his crime. Billy's appeals have been remarkable in their failure to reveal the injustices of Billy's trial. At this point, the Governor of the State of Texas is the only hope Billy has that fairness and justice will prevail in his case.

## Conclusion

### A. A Reprieve by the Governor Is Both Necessary and Appropriate Under the Circumstances of this Case

Traditionally, clemency is considered after a prisoner has reasonably exhausted available judicial remedies. Mr. White has diligently pursued his judicial remedies. However, his pending execution date was set at the same time the state district court denied his state habeas application and before Mr. White had been able to pursue any relief in the federal courts. Although Mr. White filed his federal habeas appeal promptly, the federal courts denied relief without staying his imminent execution. For this reason, unless Mr. White is granted a reprieve from the April 23 execution, neither the Governor nor the Board of Pardon and Paroles will have sufficient time to give his clemency petition full and fair consideration.

### B. Previous Judicial Proceedings

The Texas Court of Criminal Appeals affirmed Mr. White's conviction and sentence on September 23, 1981. White v. State, 629 S.W.2d 701 (Tex. Crim. App. 1981). The Supreme Court denied certiorari on April 19, 1982. Mr. White filed an application for habeas relief in the Texas Court of Criminal Appeals on October 30, 1984. In accordance with Texas law, the application was referred to the trial court for a resolution of factual issues. The trial court entered

findings of fact and conclusions of law on December 31, 1985.

For the next four years the case remained under consideration in the Court of Criminal Appeals which eventually denied the application in February 1990.

While the appeal was pending in the Court of Criminal Appeals, the Supreme Court decided Penry v. Lynaugh, 469 U.S. 309 (1989). In Penry, the Supreme Court held that Texas death penalty statute unconstitutionally prevented juries from giving mitigating effect to certain kinds of evidence about a defendant's background and character. In Penry, the jury was prevented from considering Mr. Penry's evidence of mental retardation and an abusive childhood. In March, 1990, the Fifth Circuit Court of Appeals held that the Texas death penalty statute, when applied without a special jury instruction, unconstitutionally prevented capital juries from considering youth as a mitigating factor. Graham v. Collins, 896 F.2d 893 (5th Cir. 1990) (on remand from the Supreme Court) rev'd on rehearing en banc \_\_\_ F.2d \_\_\_ (5th Cir. 1992). Under the panel decision in Graham, Mr. White's death sentence was unconstitutional because the Texas statute prevented his jury from giving mitigating effect to his youth at the time of his offense. Mr. White promptly filed his second habeas application in state court based on the Supreme Court's decision in Penry and the Fifth Circuit's decision in



Graham.<sup>8</sup> On June 4, 1990, the Fifth Circuit granted rehearing en banc in Graham. On January 3, 1992, the en banc court reversed the panel's decision in a split 7-6 decision. That decision is now before the Supreme Court on Mr. Graham's Petition for a Writ of Certiorari.

Mr. White's state habeas application remained under consideration in the state court's pending rehearing in Graham. Until the Fifth Circuit overturned the panel decision in Graham, it appeared very probable that Mr. White's death sentence would be vacated. In January 1992, less than a month after the Fifth Circuit's en banc Graham decision, the state trial court entered findings of fact and recommended that the Court of Criminal Appeals deny Mr. White relief from his death sentence. At the same time, the trial court scheduled Mr. White's execution for April 23, 1992. Although a Petition for Certiorari was yet to be considered in Graham, in February, 1992, the Court of Criminal Appeals denied Mr. White's state habeas application.

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<sup>8</sup>Mr. White's second state habeas application was filed in state court in April, 1990. Mr. White was represented by Will Gray in all of his habeas appeals.

On April 5, 1992, Mr. White, represented by Will Gray, filed his first federal habeas petition in the United States District Court for the Southern District of Texas. His habeas petition presented a challenge to his death sentence based upon Penry and the dissent in the Fifth Circuit's split decision in Graham (now pending before the Supreme Court). Mr. White also sought a stay of execution pending consideration of his federal habeas appeals. The United States District Court denied his petition on April 15, 1992 at 4:46 p.m.<sup>9</sup> Mr. White immediately gave notice of an appeal to the Fifth Circuit and sought a stay of execution pending the appeal. That appeal and Mr. White's request for a stay of execution was denied in late afternoon on April 21, 1992.

C. Clemency Investigation

The NAACP Legal Defense Fund, Inc. became concerned about this case when they learned that Mr. White, who is mentally retarded, had been sentenced to death and was facing an imminent execution without any consideration of his mental retardation. Tragically, Mr. White's mental retardation was never investigated during any of his previous appeals, despite the fact that his mental impairment is evident from his background and is documented in his elementary school records.

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<sup>9</sup>The undersigned attorneys from the NAACP Legal Defense Fund learned of the federal district court's denial of relief on April 16, 1992.

Although these school records, which were first obtained by undersigned counsel on April 14, 1992, were available throughout his appeals, they were never investigated by prior counsel.

When the United States District Court denied Mr. White's habeas petition late in the afternoon on April 15, it became apparent that his April 23 execution would probably not be stayed by the courts. On April 16, attorneys from the NAACP Legal Defense Fund (LDF) traveled to Houston in order to assist Mr. White in a request for clemency. On Friday, April 17, they began a full investigation into Mr. White's background and mental retardation. They requested and received the assistance of attorneys and staff with the Texas Resource Center. At that time, less than five working days remained before Mr. White's scheduled execution, and therefore it was too late to request a reprieve from the Board of Pardon and Parole Board. Over the next four days, which included a holiday on Good Friday, Mr. White's attorneys worked around the clock in order to present to the Board of Pardon and Paroles and the Governor a complete picture of Mr. White's background and his history of mental retardation. Their investigation has revealed a compelling case for clemency. However, there is not sufficient time for the Board of Pardon and Paroles and the Governor to fully and fairly consider his plea for clemency within the few hours left before his

execution. These circumstance not only warrant a reprieve by the Governor, they demand it.

D. Request For Relief

On behalf of Billy White, we respectfully petition the Texas Board of Pardon and Paroles for a recommendation to the Honorable Ann Richards, Governor for the State of Texas, to commute Billy White's death sentence to life and that the Board schedule a hearing to consider evidence and argument in support of this petition.

We respectfully request that the Honorable Ann Richards, Governor for the State of Texas, ask the Board of Pardons and Paroles to consider Billy White's petition for a commutation of his death sentence to life imprisonment and to grant our request for a hearing. We further petition the Governor to grant a reprieve from the April 23, 1992 execution in order that Billy White's petition for a commutation can be fully and fairly considered by her and by the Board of Pardon and Paroles.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that a true and correct copy of the foregoing was delivered to the Office of the Attorney General for the State of Texas on April 22, 1992.

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