DEATH BY DEFAULT

THE UNREPRESENTED DEFENDANT

PETITION FOR CLEMENCY BY JOE LOUIS WISE, SR.

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A. INTRODUCTION

On November 9, 1984, Joe Louis Wise, Sr., alone and unrepresented in all but appearance, faced the jury that would decide whether he lived or died. Joe, a young black man, was facing death for a crime he committed when he was 21 years old. He was borderline mentally retarded and had dropped out of school in the ninth grade, after being held back at least once. Joe had been raised in wretched poverty, never consistently living in a house with indoor plumbing until he made the upward move into a public housing project at age twelve. Moreover, Joe had been raised by corrupt and cruel parents who beat him horribly, threatened to put him in foster homes, introduced him to sex, drugs, gambling, and crime, and in short provided him with the worst possible upbringing. None of these facts were known to the jury.

Though practically alone, Joe did not face the jury without the semblance of representation. Standing next to him was William Bryant Claiborne, whom the Mecklenburg County court had appointed to be Joe's lawyer. Claiborne was unprepared and unqualified to represent Joe in the fight for his life. The 28 year-old Claiborne was just over two years out of law school, had never tried a murder case, had never tried a jury trial, had never received any capital defense training, had not consulted with any experienced capital defender, and

had undertaken little or no investigation of Joe's life. When his, and Joe's, turn came to present evidence that would convince the jury that Joe should receive a sentence of life imprisonment rather than death, Claiborne offered absolutely nothing, because he had looked for nothing.

Between Joe and the death penalty stood the power of Claiborne's persuasion. Here is what he said:

> MR. CLAIBORNE: May it please the Court and ladies and gentlemen of the jury. I'm not going to keep you any more than one or two minutes because you know what evidence you convicted the defendant with.
>
> The last instruction which the Court gave you says that mitigating circumstances are facts or circumstances which though not justifying or excusing the offense, may properly be considered in determining whether to impose a sentence of death.
>
> All I can say is that you have been here for the last four days, this is day number five. You know the evidence as you considered it in all phases of the trial. You know the evidence which you considered and convicted him of the use of a firearm, you know the evidence you considered and convicted him of grand larceny, you know the evidence you considered and convicted him of armed robbery and you know the evidence you used in convicting him of capital murder.
>
> It's not our decision now, as the prosecutor said. It's not the people's out here decision. But the decision is yours. You are the sole determiners of the facts in this case. You know what went on. You heard that, every bit of evidence.
>
> All I ask is that you examine yourself and that you make a determination after an examination of yourselves. What more else is there to say? We don't say, have to say any more because you know. And I believe that after you look at this, at the circumstances, you will find that I don't have to go over the mitigating facts for in terms of the evidence presented because you know.
>
> But after you look at it, after you look at it, you would have to make your decision. And I ask that you spare this man. You know the facts. Nobody else has to say anything.

> We sat up here and we went through it all. Just think about it and examine yourselves. Thank you.

Excerpt, Transcript of Trial on November 9, 1984, pp. 1602-04 (Tab 1). These 22 sentences are all Claiborne said to the jury that had just convicted Joe and was about to determine his fate. The jury returned in 42 minutes with a verdict of death.

Joe's next set of attorneys challenged in state habeas corpus the effectiveness of Claiborne's performance, which one expert has called "the least competent representation . . . in preparing for and presenting a case in mitigation" he has ever seen. Yet again, Joe's lawyers defaulted on their duty to him, failing to properly present his case and then neglecting to file the notice of appeal that would have preserved his claims for review in federal court. The consequence of these attorneys' mistakes was that no jury and no court, state or federal, ever considered Joe's compelling case in mitigation.

This petition for executive clemency details and explains why Claiborne did and said no more than this, what Claiborne could have done and said, and why no court has required that Joe Wise have even the one chance our Constitution guarantees capital defendants to demonstrate that he does not deserve his death sentence. Because Joe has been abandoned at every step by his appointed lawyers, Joe's case constitutes a complete failure of our system of justice. Accordingly, we petition the Governor to commute Joe's death sentence to life imprisonment.

B. THE CRIME[1]

On December 1, 1983, William Ricketson left his house shortly before dark to get a haircut and do some hunting; he had a rifle and shotgun in the cab of his truck. He was known to have $12.00 on him when he departed. He got a haircut for $4.00 and bought a drink and a snack. He was drinking; the autopsy report shows that he was intoxicated. Eventually, though no one knows how or why, he ended up at Joe Wise's residence. Around 8:30 p.m., Joe shot him with a .25 caliber pistol, beat him over the head with a rifle, breaking the stock, put him in a wastewater-filled hole, and shot him in the chest with a shotgun. The official cause of death was drowning.

Joe drove to his father's North Carolina residence in Ricketson's truck. The next day, heading toward South Carolina, he was arrested on Interstate 95 near Dunn, North Carolina. Joe waived extradition and was returned to Mecklenburg on Monday, December 5, 1983. Though the usual procedure was to appoint lawyers for indigent defendants on the first court day after arrest, no one was appointed to represent Joe until December 12, 1983. William Bryant Claiborne was appointed that day. By that time, Joe had given the police five separate, inconsistent statements.

After Claiborne was appointed, Joe gave additional statements and a deposition and asked for a polygraph test. Not once in any of the interrogations or in the deposition did the police or prosecution seek from Joe any admissible evidence that he had robbed Ricketson or taken any money from him. The prosecution conditioned the polygraph on a stipulation of its admissibility at trial, to which Claiborne and Joe agreed. Notwithstanding these unusual

[1]Facts set forth in this section are derived from the transcript and record of the trial of Joe Louis Wise.

and favorable conditions for interrogation, the prosecution elected not to ask Joe whether he took any money from Ricketson, even though without proof of robbery, the prosecution could not seek a death sentence. The polygraph indicated that Joe killed Ricketson.

The defense case during Joe's guilt trial consisted of seven witnesses. Six of the defense witnesses had testified for the prosecution, and they repeated and expanded on their prosecution testimony when called by the defense. Following Joe's conviction in the guilt trial, neither Claiborne nor the prosecution offered any evidence in the sentencing trial. Thus, arguments began immediately. The prosecution's argument covered ten pages of transcript. Claiborne compressed the case for Joe's life into the "one or two minutes" required to speak the 22 sentences of his closing argument. Generally, Claiborne's argument centered on the theme that the jury knew what evidence it *convicted* Joe on. Two of the 22 sentences alluded to mitigating evidence and suggested, curiously, that the jury knew what the mitigating evidence was, though Claiborne had not called a single witness during the sentencing trial. The jury returned its death verdict in less than 45 minutes. Excerpt, Transcript of Trial, November 9, 1984, p. 1605-06.

C. THE UNREPRESENTED CAPITAL DEFENDANT

> *"While a criminal trial is not a game in which the participants are expected to enter the ring with a near match in skills, neither is it a sacrifice of unarmed prisoners to gladiators."*

United States v. Cronic, 466 U.S. 648, 656-57 (1984) (quoting Judge Wyzanski in *United States ex. rel. Williams v. Twomey*, 510 F.2d 634, 640 (7th Cir. 1975)). Because of the inexperience, lack of zeal, and other derelictions of his trial and state habeas attorneys – deficiencies matched in no other capital case tried in Virginia in the post-*Furman* era – barely a moment passed in Joe Wise's trial when his trial had true adversarial character. Joe's trial attorney entered the ring without the skills necessary to properly defend a personal injury suit, much less a capital case, and his state habeas attorneys forfeited Joe's opportunity to demonstrate the egregious absence of any true advocate for Joe at trial. In essence, Joe Wise was an unrepresented defendant sacrificed to the ineptitude and apathy of his lawyers. The sacrifice began with the appointment of his trial counsel.

1. Appointment Of A Neophyte

William Bryant Claiborne graduated from University of Virginia Law School in 1981 and returned to his native Halifax to establish a solo practice. Transcript of State Habeas Hearing on April 28 (Hab. Tr.), 1988, p. 11 (Tab 2). Claiborne had not tried a single jury trial – civil or criminal – before he was appointed to represent Joe. Hab. Tr. 16. Before his appointment he handled only two felonies, the most serious charge being rape. Those were resolved before trial or tried to the bench. Hab. Tr. 14. Based on such experience, no defendant in his right mind would have chosen Claiborne to represent him in a trial for his life. Indeed, no corporation would have hired Claiborne to defend its financial assets before

a jury except in a case of little consequence. But in this case of great consequence, Joe did not get to choose his own trial lawyer. Like every indigent defendant, Joe could only rely on the Mecklenburg court to ensure that his appointed lawyer had adequate experience and expertise.

There was no shortage of experienced trial lawyers in Mecklenburg County. But for whatever reasons, the court did not choose a Mecklenburg attorney. Instead, the court looked toward Halifax County and chose Claiborne. At that time, courts usually appointed two attorneys to represent capital defendants. Table 1, *Experience Levels of Lawyers Representing Death Row Inmates* (Tab 3). Indeed, of the 30 trials resulting in death sentences that took place between 1975 and 1985, in fewer than eight did the trial court appoint only one lawyer. Table 1, *Experience Levels*. The Mecklenburg court opted not to follow this practice, despite Claiborne's inexperience. The court appointed 28-year-old Claiborne, and left him on his own.

In terms of Claiborne's utter lack of experience and seasoning, the court's choice was unprecedented at the time, and fortunately has not been equaled since. As Table 1 demonstrates, the "team" assigned to Joe's defense had easily the least experience of any team representing a condemned prisoner in the post-*Furman* era. Table 1, *Experience Levels*. Moreover, so far as we can determine, Claiborne is among the youngest lawyers appointed to a capital defense in any capacity, much less as lead or sole counsel. Table 1, *Experience Levels*. That the Mecklenburg court appointed as Joe's sole advocate an attorney with Claiborne's combination of inexperience and youth is both unique and disquieting.

No special insight, after all, is necessary to see that Claiborne's combination of youth and inexperience made him an unsatisfactory choice to defend Joe. Claiborne had tried no murder cases, tried no jury trials, taken no special courses for capital work, and received no special training for capital work. Hab. Tr. 16. In short, Claiborne was as green an attorney as the court possibly could have chosen. In and of itself, Claiborne's inexperience was enough to deprive Joe of any chance at a fair trial. Capital litigation is specialized, sophisticated, time-consuming, and difficult. The stakes are high, the pressures great, and the clients often difficult. Additionally, capital defense calls for fine judgments and hard decisions. An attorney just over two years out of law school with no murder trials and no jury trials of any type under his belt does not have what it takes to make good judgments and decisions; that ability comes only with time and experience. In short, capital defense is no place for a novice. Affidavit of Marie Deans, ¶ 6 (Tab 4).

Professor William S. Geimer, Director of Washington & Lee's Virginia Capital Case Clearinghouse, and Professor Richard J. Bonnie, Director of the University of Virginia's Institute of Law, Psychiatry, & Public Policy, are experts in capital litigation, and they both agree that because of his "total lack of relevant experience," Claiborne should not have accepted appointment to represent Joe. Affidavit of William S. Geimer, pp. 1-2, 4 (Tab 5); Affidavit of Richard J. Bonnie, ¶ 4 (Tab 6). Richmond's seasoned capital defender Craig S. Cooley, who was appointed in 1979 to represent Linwood Briley in three capital cases when he was just over two years out of law school, provides a useful contrast. Unlike Claiborne, Cooley had co-counsel, had tried murder trials, and had tried jury trials; still Cooley does

not believe that his experience qualified him to represent a capital defendant on his own. Affidavit of Craig S. Cooley, ¶ 3 (Tab 7).

Such an appointment would not happen today. As Professor Geimer explains:

> It is to the great credit of the Commonwealth that one in Mr. Claiborne's position would not today be permitted to represent Joe Wise or any capital defendant. Since the Virginia General Assembly enacted Va. Code Ann. §19.2-163.8(E), minimum standards for appointment of capital defense counsel have been implemented. As a consultant to the Public Defender Commission, I had a part in the drafting of those minimum standards. They are not onerous and do not in themselves insure competent representation. Nevertheless, one in Mr. Claiborne's position would not come close to meeting them.

Affidavit of William S. Geimer, pp. 2-3. As demonstrated below, Claiborne's inexperience resulted in actual harm to Joe's legal interests, leading Professor Geimer to wonder "whether Joe Wise is to be executed because the Commonwealth and the members of its legal profession came only lately to a commitment to minimal standards of representation." Affidavit of William S. Geimer, p. 3. This much is sure: the responsibility for Joe's life never should have been placed in the hands of a lawyer as inexperienced and unprepared for the job as Claiborne. Not only should the Mecklenburg courts have respected more Joe's entitlement to minimally competent counsel, Claiborne himself owed a duty both to Joe and to the court to decline the appointment.

2. Ethics Of Accepting The Case

The Code of Professional Responsibility does not presume that every lawyer is competent to handle any legal matter that might arise. Instead, the CPR recognizes that the vast landscape of modern law encompasses areas that require specific expertise, and that no

one lawyer can achieve competency in all the different areas of the law. Consequently in Disciplinary Rule 6-101 (Competence and Promptness), the CPR dictates that:

> A lawyer shall undertake representation only in matters in which:
>
> (1) The lawyer can act with competence and demonstrate the specific legal knowledge, skill, efficiency, and thoroughness in preparation employed in acceptable practice by lawyers undertaking similar matters, or
>
> (2) The lawyer has associated with another lawyer who is competent in those matters.

Revised Virginia Code of Professional Responsibility, DR 6-101(A).

Because Claiborne did not associate with other counsel, the question of whether he acted ethically and professionally in accepting Joe's case depends on whether Claiborne had the knowledge, skill, efficiency, and thoroughness in preparation required for a capital trial. As shown above, Claiborne could not have acquired these qualities through experience or training. While it might be possible for Claiborne to acquire the necessary skills in some other way than through experience or training, nothing in the record of Joe's trial or state habeas shows that he did so.

Professor Geimer, an experienced trial lawyer and expert in capital defense, has reviewed in detail Claiborne's explanation of his handling of Joe's trial. Professor Geimer concludes that "William Claiborne acted both unprofessionally and incompetently" and that "acceptance of the case by Mr. Claiborne violated DR 6-101." Affidavit of William S. Geimer, pp. 2-4. Professor Geimer notes that "four years after the trial, at the state habeas hearing on April 28, 1988, Mr. Claiborne still did not know even the basic law he should have known in 1984. His defense of his advocacy, for example, persisted in the erroneous

understanding that if the Commonwealth proved an aggravating factor the sentence was to be death and there was therefore no point in pursuing leads to evidence in mitigation." Affidavit of William S. Geimer, p. 4. If Claiborne could get wrong so basic and important an issue as this, then he lacked the appropriate qualifications, and the ethical code required that he refuse appointment as Joe's lawyer.

3. Claiborne's Failure To Seek Necessary Assistance

The inexperience of a capital defender is dangerous to the defendant, but it may not be fatal if the attorney knows he needs expert assistance and seeks it out. Indeed, if the attorney himself is not adequately qualified to handle the case, he is ethically required to associate an attorney who is qualified. DR 6-101(2); Affidavit of William S. Geimer, pp. 3-4. Claiborne chose instead to handle the case on his own. This decision was neither intelligent nor necessary.

Numerous capital trials had been held by the time of Joe's trial, creating a body of experienced defenders who could have aided Claiborne. So far as we can determine, Claiborne never contacted any of the lawyers who handled those trials for advice, though it is quite likely that any of them would have provided assistance. Affidavit of Craig S. Cooley, ¶ 10. Indeed, Craig Cooley consulted with more than ten lawyers in preparing and trying Linwood Briley's cases. Affidavit of Craig S. Cooley, ¶ 5.

Professor Bonnie had established a program on capital defense at the law school from which Claiborne had just graduated, yet Claiborne never contacted Professor Bonnie to obtain the assistance he needed. Affidavit of Richard J. Bonnie, ¶ 4. Professor Bonnie,

after noting that Claiborne should have refused the appointment in the first place, goes on to say that:

> At the very least, he should have requested the Court to appoint, as co-counsel, an attorney with relevant experience. Moreover, Mr. Claiborne made matters worse by not seeking the assistance of the resources available at the time of his representation of Joe Wise. . . . I was actively assisting other attorneys involved in death penalty cases at this time. I surely would have offered my assistance and would have put him in touch with other persons who could have assisted him.

Affidavit of Richard J. Bonnie, ¶ 4.

Marie Deans had formed the Virginia Coalition On Jails And Prisons two years before Joe's trial and had begun to compile an enviable record in the capital cases on which she assisted, but Claiborne never contacted her either:

> [I]t is imperative that less experienced lawyers seek all the help they can get. Lawyers who assume, in their first capital trial, that they know what they are doing are asking for trouble, because they don't. In a capital trial, when you ask for trouble, you generally get it.
>
> Though I was available for consultation on Joe Wise's case, his trial attorney Mr. Claiborne never contacted me to ask for my assistance. I have never turned down any lawyer who asked for my help, and if Mr. Claiborne had asked me I would have helped him in any way that I could. I understand that Mr. Claiborne never asked any experienced capital trial lawyer or resource organization for any assistance whatever.

Affidavit of Marie Deans, ¶¶ 10-11. Contact with either Ms. Deans or Professor Bonnie would have protected Claiborne from many of the fundamental errors he committed.

One of Claiborne's errors was in failing to request appointment of an investigator. Claiborne decided not to do so because, he said at the state habeas hearing, Joe gave him no reason to do so. Hab. Tr. 24. This conclusion reflects a basic misunderstanding both of the nature of a sentencing trial and of the defender's role. First, the case in mitigation does not

present itself, fully formed, to the defense lawyer; he has to go out and find it. By deciding not to use an investigator, Claiborne ensured that no case in mitigation would be prepared. After all, a lawyer new to the bar and receiving as his fee the pittance that the Commonwealth paid in 1984 for capital defense could not have conducted a time consuming, travel-intensive mitigation investigation and still held his practice together. Second, by relying on Joe, who is borderline mentally retarded, to decide whether an investigator was needed, particularly with respect to the sentencing trial, Claiborne demonstrated his lack of expertise in capital defense and placed unwarranted faith in Joe's legal acumen. When he chose not to get an investigator, Claiborne relinquished the chance Joe had to be acquitted at the sentencing trial.

Craig Cooley's experience demonstrates how wrong Claiborne was. Like Claiborne, Cooley also was just over two years out of law school when he handled his first capital cases in 1979-80 for Linwood Briley, and the comparison is instructive. Cooley had tried murder cases and jury trials, but beyond that, he had co-counsel appointed by the court, he consulted widely with other attorneys, he engaged in extensive pretrial motions practice, he employed an investigator, and most importantly, he prepared and presented a case in mitigation, with the result that Linwood Briley did not receive the death penalty for any of the three murders on which Cooley represented him. Affidavit of Craig Cooley, *passim*. Claiborne, by contrast, had not tried any murder cases or jury trials, he asked for no co-counsel, he consulted with no experienced attorneys, he filed virtually no pretrial motions, he engaged no investigator, and he prepared no case in mitigation. Hab. Tr. 24. Had Claiborne looked

outside himself for answers, he would have discovered that he should have followed Cooley's path instead of his own.

4. The Death Threat Against Claiborne

At home one night after the trial began, Claiborne received a telephone call in which the caller threatened him with death in connection with Joe's trial. Claiborne, who is black, thought the caller was white. He reported the call immediately to the police. Thereafter, for as long as the trial continued, the Mecklenburg police waited at the county border each morning for Claiborne, and accompanied him back to the border each evening.[2] So far as Claiborne knew, no effort was made to find the perpetrator.[3] Nothing ever came of the threat, yet it seems reasonable that a young attorney, trying as his first jury trial a difficult and emotional capital case, could not help but be alarmed by the threat. Whatever the effect, it could not have contributed to the fairness of the trial.

5. Consequences Of Inexperience: Forfeit At The Sentencing Trial

Claiborne made many errors and mistakes during the case that demonstrated how overwhelmed he was. He revealed his inexperience almost as soon as the trial began. During voir dire, prosecutor Frank Harris questioned almost every juror in such a way as to impart the notion *that Joe had to prove his innocence beyond a reasonable doubt* before the jury could acquit him. For example, Harris asked prospective juror E. Walker these questions:

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[2]Given the likelihood that the caller could drive, a more sensible approach, if the threat was taken seriously, would seem to have been for the police to pick Claiborne up at his home in Halifax in the morning and return him there in the evening.

[3]The source of this information is an interview with Claiborne.

> Mr. Harris: . . . If you are selected as a juror here today, would you come and serve with an open mind and listen to all the evidence and if you believe from the evidence beyond a reasonable doubt that the defendant is guilty, would you find him guilty?
>
> Prospective Juror Walker: Yes, sir.
>
> Mr. Harris: If you believe from the evidence beyond a reasonable doubt that he was not guilty, would you vote to turn him loose?
>
> Prospective Juror Walker: Yes, sir.

Hab. Tr. 32.

Joe's lawyer never objected, even though the Commonwealth's Attorney had twisted the two most treasured precepts of our system of justice – the presumption of innocence and the requirement that the state prove guilt beyond a reasonable doubt. Asked to defend this failure at the state habeas hearing four years later, Claiborne expressed the surprising view that Harris's distortion of these two precepts was merely a matter of semantics. Hab. Tr. 28-34. Strangely, Claiborne saw this question as objectionable in his capacity "as an attorney" but he did not object on Joe's behalf. Hab. Tr. 30. "I think that's a small point," Claiborne remarked. Hab. Tr. 31.

Claiborne's most important omission concerned the sentencing trial. This forfeiture began long before the sentencing trial did, with Claiborne's basic misunderstanding of Eighth Amendment law. Under that law, there are no crimes for which the death penalty *must* be imposed. Instead our law requires, before the death penalty can be imposed, first, that the jury find that an aggravating factor exists beyond a reasonable doubt, and second, that the jury find, in light of the defendant's particularized circumstances and history, that the defendant deserves the death penalty. The existence of an aggravator *does not* dictate imposition

of the death penalty; it merely allows it. If the jury likely will find that an aggravator exists, then the need is all the greater to offer mitigating evidence to show that the defendant does not deserve to die.

The opportunity to offer mitigating evidence during the penalty phase of a capital trial is not a nicety of law provided to capital defendants by the good graces of the Commonwealth. Rather, it is a constitutional imperative:

> [T]he Eight and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death . . . Given that the imposition of death by public authority is so profoundly different from all other penalties, we cannot avoid the conclusion that an individualized decision is essential in capital cases. The need for treating each defendant in a capital case with that degree of respect due the uniqueness of the individual is far more important than in non-capital cases . . . The non-availability of corrective or modifying mechanisms with respect to an executed capital sentence underscores the need for individualized consideration as a constitutional requirement in imposing the death sentence.

Lockett v. Ohio, 438 U.S. 586, 605, 606 (1978).

Thus, Joe Wise had a constitutional right - and Claiborne had a constitutional duty - to present to the jury any and all relevant mitigating evidence tending to show that Joe deserved a sentence less than death. That Claiborne failed to grasp this fundamental precept of capital jurisprudence is truly astounding.

Claiborne believed that if the Commonwealth proved an aggravating factor, mitigating evidence could not prevent the death penalty. Even four years after the trial, he persisted in this belief, as he indicated in response to state habeas attorney Hawthorne's question concerning whether the presentence report contained any mitigating evidence:

> Like I said, based on the law and you know the law in terms of imposition of the death sentence and if you look at the argument of the Commonwealth's Attorney in the transcript also, the argument was arguing on the wantonness and the vileness and the atrociousness of the crime. He was using that standard for to seek the death sentence.
>
> If the evidence proved that in the case, then it was sufficient for them [the jury] to act for the death sentence. If you look at the facts that were presented, the facts showed the wantonness of the killing. And that was the basis for the imposition of the death sentence.
>
> And all you have to do is show one, you don't have to show both parts of it.

Hab. Tr. 77. Claiborne repeated this theme elsewhere in his testimony, when he recounted a conversation he had with Joe:

> A And I told him [Joe] that the facts that were presented during the trial were sufficient to uphold the death penalty against him.
>
> Q [by Hawthorne] So, you were convinced the outcome was already pre-determined?
>
> A It was my feeling that the death sentence would be upheld. Now, that's one thing that I must state at this time in all honesty.
>
> Q Did you feel that these mitigating circumstances were an opportunity to avoid the imposition of the death sentence?
>
> A Under the circumstances, no.

Hab. Tr. 74; *see also* Hab. Tr. 45-47. This is incorrect, of course, as Professors Geimer and Bonnie and defense lawyer Cooley point out in their affidavits. Affidavit of William S. Geimer, p. 4; Affidavit of Richard J. Bonnie, ¶ 5; Affidavit of Craig S. Cooley, ¶ 12(A).

As a consequence of his misunderstanding of the law, Claiborne did not pursue mitigating evidence on Joe's behalf. As explained above, he did not ask for an investigator because he did not understand the uses for one with respect to sentencing. Hab. Tr. 24. He

failed to respond to psychiatrist Gwaltney's requests for additional information. Hab. Tr. 34-41.

> "[Claiborne] substituted his own non-expert opinion, and his client's assurances that 'I am not insane' for expert opinion to decide to not seek psychiatric or neurologic evaluation. That decision was made even though Mr. Wise had been previously tested as borderline mentally retarded. Counsel failed to prepare in any meaningful manner for a sentencing hearing. Although it is clear substantial mitigating evidence was available (and presented in the 'presentence' report provided to the judge), no evidence of mitigation was developed by counsel or presented to the jury."

Affidavit of Craig S. Cooley, ¶¶ 12(B)-12(C). He failed, in short, to gather any mitigating evidence whatever. Having gathered no evidence for a case in mitigation, Claiborne was in no position to offer evidence at the sentencing trial, and he offered none. Hab. Tr. 67.

Claiborne followed up on his failure to offer evidence with an extraordinarily brief, cryptic, and unenthusiastic argument, reprinted in its entirety on page 2. What is most apparent about this summation is that no thought or preparation went into it. It is inordinately brief for an argument for a man's life, it concentrates irrelevantly on guilt trial concerns, and it refers to mitigating evidence that Claiborne had not bothered to develop. Claiborne never even mentions Joe by name, holding him at arm's length as "the defendant" and "this man." The appalling lack of concern and coherence in this summation hardly suggests that Claiborne devoted much thought or care to it.

Probably the greatest deficiency of this argument is its lack of zeal:

> It is no argument at all. It demonstrates not only a violation of the requirement for competent representation set out in Canon 6 [of the Code of Professional Responsibility], but also of the Canon 7 requirement of zealous advocacy, and its concomitant duty of loyalty. Even an unprepared advocate who had presented no evidence should have been able to present for the jury's consideration some reason not to sentence his client to death.

Affidavit of William S. Geimer, p. 6.

Joe effectively faced the sentencing jury alone. Professor Bonnie believes that Claiborne's abandonment of Joe at the sentencing trial represents a failure of the justice system:

> I am of the opinion that the criminal justice system in Virginia has failed to afford Joe Louis Wise a fair opportunity to demonstrate that death is not an appropriate sentence in this case. There was a complete default of representation on behalf of Joe Wise in relation to the sentencing phase of his trial. Of all the capital cases that I have reviewed regarding counsel's effectiveness, this case reflects the least competent representation in relation to preparing for and presenting a case in mitigation. Mr. Wise essentially had no representation at and in connection with the sentencing phase of his trial.

Affidavit of Richard J. Bonnie, ¶ 3. Veteran capital defender Cooley has reviewed Joe's case and reached a similar conclusion about Claiborne's dereliction of his duty. Affidavit of Craig S. Cooley, ¶ 14.

At one point during the state habeas hearing, Claiborne offered the surprising opinion that he "would have had to probably step out of the case if I concluded that [Joe] was guilty." Hab. Tr. 42. This attitude is inappropriate for any criminal defense lawyer, but it is particularly dangerous for a capital defender, who must redouble his efforts to save his client following a finding of guilt, not "step out." At the sentencing trial following Joe's conviction, stepping out is just what Claiborne did.

6. State Habeas: The Big Default

Joe's opportunity to challenge Claiborne's effectiveness came first in state habeas corpus. But Joe's lawyers failed him in two ways during those proceedings. First, his state habeas lawyers, who were themselves new to capital habeas, failed to offer evidence of the prejudice Joe suffered from Claiborne's ineffectiveness. Second, his lawyer neglected to file Joe's notice of appeal from the Circuit Court's denial of relief. Not only did this default eliminate appellate review of Joe's habeas, it precluded federal review of virtually all of Joe's claims, including his claim that Claiborne gave him ineffective assistance.

Joe began his state habeas with volunteer counsel James Crawford from the Philadelphia law firm of Schnader, Harrison, Segal & Lewis. Philadelphia lawyers obviously could not investigate Joe's case except with great difficulty and at great expense, and Crawford informed the Mecklenburg court of the difficulties he faced. The court declined to alleviate Crawford's difficulties by appointing an investigator. Order of Mecklenburg Circuit Court entered October 7, 1986 (Tab 8). So when *Murray v. Giarratano*, 847 F. 2d 1118 (1988), ruled that the Commonwealth must appoint lawyers for indigent condemned prisoners, Crawford asked the Mecklenburg court to substitute local lawyers for the Philadelphia firm. As the primary basis for his motion, Crawford declared that Joe would benefit from local counsel who could efficiently and economically investigate Joe's case. The court granted this motion, and appointed Bruce Robinson and Robert Hawthorne as Joe's state habeas lawyers. Order of Mecklenburg Circuit Court, August 4, 1987 (Tab 9).

Joe's best claim was that Claiborne had provided him ineffective assistance of counsel, particularly at the sentencing trial. To prove this, Joe's lawyers had to show both

that Claiborne's performance was deficient and that Joe's case suffered as a consequence of Claiborne's deficiency. With respect to the performance prong of this case, Joe's lawyers presented the testimony of Claiborne. They had never discussed the case with Claiborne before they called him to the stand, according to Claiborne, and they presented no other witnesses, such as expert capital defenders, to show that Claiborne's performance was deficient. Hab. Tr. *passim*. Nonetheless, though Judge McCormick found otherwise, Order of Mecklenburg Circuit Court entered December 11, 1989 (Tab 10), Claiborne's own testimony established his obvious lack of understanding of capital law and capital defense.

This was only half the case, however. Joe's lawyers presented no evidence whatever to bolster the case that Claiborne's derelictions had injured Joe's case. Hab. Tr. *passim*. This was no strategic decision; the record demonstrates that these lawyers, in the less than sixty hours they dedicated to the case, *see* Invoices of Bruce Robinson and Robert Hawthorne for Reimbursement of Attorney Fees (Tab 11), performed no investigation at all. They simply defaulted on this half of the case. As we demonstrate in Section D, The Untried Mitigation Case, there was plenty of evidence, readily available to anyone who cared to look, to prove this half of the case. *Compare* Affidavit of Craig S. Cooley, ¶¶ 12-13. Despite ample clues to the existence of this evidence, Joe's lawyers simply did not look.

Joe himself presented more evidence to the court on this point than his lawyers. Joe prepared and circulated to potential witnesses a document declaring the witnesses' availability to appear on Joe's behalf. Declaration of Witnesses' Availability, November 27, 1987 (Tab 12). Joe's lawyers apparently were unmoved by the fact that his initiative outstripped their own; they presented none of these witnesses at the habeas hearing. Hab. Tr. *passim*.

This failure by Robinson and Hawthorne did not necessarily foreclose the possibility that Joe could obtain federal habeas relief for Claiborne's shortcomings. It was Hawthorne's next failure that slammed that door.

In order to present his ineffectiveness claims to the federal habeas court, Joe had to preserve them against a procedural bar – a technicality that prevents a court from considering many claims, no matter how meritorious – while passing through state habeas. One necessity for preserving Joe's claims was an appeal to the Virginia Supreme Court from the Circuit Court's denial of his state habeas. The first, mandatory step to appealing was the simple filing of a notice of appeal in the Circuit Court within 30 days after that court issued a decision. Rules of the Supreme Court of Virginia 5:9.

That turned out to be too much for Hawthorne, who missed the date, not by a day or a week, but by 2½ months. Notice of Appeal filed March 28, 1990 (Tab 13). After that, no amount of lawyering could get Joe an appeal. Though his lawyers filed notices and motions and briefs in the Circuit Court and the Virginia Supreme Court, the damage was done and the damage was irreversible. *See* Index, *Wise v. Rogers*, Circuit Court of Mecklenburg (Tab 14). Hawthorne had saddled Joe's claims with an insuperable procedural default. Joe could get no federal review of his federal constitutional claim that Claiborne was ineffective. Opinion and Order of Judge Robert R. Merhige, *Wise v. Williams*, March 17, 1992 (Tab 15).

7. Joe's Neglected Warnings About His Lawyers' Deficiencies

What is particularly unfair about saddling Joe with the consequences of the default committed by his state habeas lawyers is that not one of them occurred without Joe having complained to the court *in advance* about the performance and dedication of his lawyers. Each and every one of Joe's warnings proved in some way to be true; each and every one of them was ignored by the Circuit Court; and each and every deficiency that Joe raised was later held against Joe by the courts.

Joe's complaints about Robinson and Hawthorne began almost as soon as they were appointed. On September 11, 1987, Joe wrote court clerk Coleman under the belief that Coleman was the judge (his letter was forwarded to Judge McCormick) to advise that his lawyers were not doing the job:

> You appointed me two lawyers. But if they wont respond to my letters and needs to see them or except calls from me to get the material I have and need to discuss with them, then they are doing me no good. Mr. Crawford asked for these lawyers so they could investigate mitigating evidence and all that is needed to be done but they do not respond to my letters nor except my calls therefore they care not for my life or the case, they do not have my best interest at heart and this I do not need.

Letter from Joe Wise to Eugene Coleman of September 11, 1987 (Tab 16). This letter was filed on October 6, 1987. Judge McCormick did not appoint new lawyers, but he did order that Joe be transported to Mecklenburg so Robinson and Hawthorne could see him. Transportation Order entered October 9, 1987 (Tab 17).

Several months later, Joe dispatched another letter to the court clerk, again warning that his attorneys were not properly representing him:

> The two lawyers you have appointed to my case did not even know what mitigating evidence was, and had to ask me to find it for them, when the habeas [petition] and the cert. [petition] filed [on direct appeal] pointed what it was all too clear, plus they refuse to do the investigation needed just as Mr. Claiborne did when he picked up my case, and neither one of them believes in me and wont allow me to call them and I hardly ever see them or know where my case is with them. So I ask that I be appointed two lawyers who are interest in my life and my case as well and someone who knows what they are doing.

Letter from Joe Wise to Eugene Coleman of December 6, 1987 (Tab 18). This request was denied by the court and did not result in Joe's habeas attorneys doing any extensive work on the case. At the conclusion of the case, the two attorneys asked for reimbursement for an amount of time clearly inadequate to properly investigate Joe's case. Robinson had "devoted" 33 hours to the case, including five hours in court, and Hawthorne had spent 25.5 hours, twelve of them in court. Invoices of Bruce Robinson and Robert Hawthorne for Reimbursement of Attorney Fees. Neither asked to be reimbursed for costs associated with collect calls from Joe, if in fact they accepted any. Invoices of Bruce Robinson and Robert Hawthorne for Reimbursement of Attorney Fees. Neither asked to be reimbursed for any costs associated with investigating Joe's case in mitigation, Invoices of Bruce Robinson and Robert Hawthorne for Reimbursement of Attorney Fees, and the record of the state habeas proceeding confirms that no such investigation was undertaken. Hab. Tr. *passim*.

Joe's charges that his lawyers did not know what mitigating evidence was and were not investigating the case were right on the mark. Robinson and Hawthorne presented no evidence to support their claim that Claiborne had failed Joe by presenting no mitigating

evidence. Hab. Tr. *passim*. Even so, Joe still could have looked forward to the possibility of a hearing in federal court, except for the fact that Hawthorne neglected to note an appeal.[4] Here, too, Joe had warned Judge McCormick of the danger and tried to protect his interests.

Judge McCormick announced his intent to dismiss Joe's habeas petition in a letter to all counsel and to Joe on August 4, 1988 (Tab 19). Believing that his case was concluded and not trusting his lawyers to preserve his appeal, Joe wrote to the Virginia Supreme Court on August 12, 1988, to inform them that he wanted to appeal and to ask them to appoint lawyers for his appeal. Letter from Joe Wise to Virginia Supreme Court of August 12, 1988 (Tab 20). The Circuit Court had not formally ruled, however, so the Supreme Court took no action in response to Joe's letter.

About a year later, Judge McCormick formally denied Joe's petition and entered an order to that effect. Order of Mecklenburg Circuit Court entered December 11, 1989. That order started the clock running on Joe's time to note an appeal. Even though Joe had made clear to all concerned his fervent desire to appeal, Hawthorne simply neglected to file the required notice of appeal. Accordingly, Joe was not permitted to appeal the denial of his state habeas to the Virginia Supreme Court, even though no one could contend that Joe himself had done anything to deserve such a result. Order of Virginia Supreme Court of September 24, 1990 (Tab 21). The denial of his appeal, however, was not the only consequence of this failure.

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[4]Mr. Robinson was allowed to withdraw from the case when he took a position as an assistant prosecutor for the county.

Hawthorne's oversight had the disastrous effect of precluding federal review of Joe's meritorious ineffectiveness issues, and indeed of virtually any issue that could have been raised on Joe's behalf. The consequence of Hawthorne's dereliction was that Judge Merhige refused to consider the merits of Joe's habeas petition. Accordingly, Joe never received either state appellate or any federal review of the competency of his trial lawyer. Opinion and Order of Judge Robert R. Merhige, *Wise v. Williams*.

This need not have happened. Joe had asked that attorneys be appointed who would attend to his case and keep him informed about developments, but the court ignored Joe. As Joe wrote Judge McCormick on July 30, 1991:

> Sir you have really have done me an injustice. I had writen you about lawyer Hawthorne and Warner and asked to remove them from my case. But you denied me that request, as I told you they never let me know what was going on. I asked that I be able to get my own lawyers that would keep me up on appeals and motions but you did not grant me that. Now these lawyers defaulted my case. . . . I feel that if I had known I could have got help to file the appeal myself, but I got nothing from them, so now I wish to know why you denied me relief on new attorneys when I requested it.

Letter from Joe Wise to Judge McCormick of July 30, 1991 (Tab 22). In response, Judge McCormick directed court clerk Coleman to send Joe a copy of the order in which Judge McCormick reappointed Crawford as Joe's lawyer. Letter from Eugene Coleman to Joe Wise of September 3, 1991 (Tab 23). This order was cold comfort indeed; it had come far too late to work any change in the disastrous consequences of Hawthorne's failure to file the notice of appeal.

All Joe could do to protect his legal interests from the dereliction of his lawyers was to complain to the courts that appointed his lawyers. Joe did this. Had the Circuit Court

listened even once to Joe, the deficiencies in his representation might have been corrected. But the court never did. Joe tried to fulfill his responsibility for his own case; in this effort he turned out to be alone.

8. What Might Have Been: The Probability Of Federal Relief

Had Joe gotten to litigate, with competent counsel, his claims of ineffective assistance of counsel in federal court, there is a great probability – more nearly a certainty – that he would have received a new sentencing trial. The federal jurisprudence concerning ineffective assistance of counsel is built on a bedrock constitutional principle – an accused's absolute right to be represented by counsel. The United States Supreme Court never has wavered from this principle because lawyers in criminal cases "are necessities, not luxuries." *Gideon v. Wainwright*, 372 U.S. 335, 344 (1963). The accused's right to counsel is by far the most important and pervasive of his rights, because it affects his ability to assert any other constitutional or statutory rights he may have. Indeed, without counsel, the right to a trial itself would be "of little avail." *Powell v. Alabama*, 287 U.S. 45, 68-69 (1932).

Given its special value, it is not surprising that the constitutional right to counsel is the right to the effective assistance of counsel, or in other words, a reasonably competent attorney whose advice is within the range of competence demanded of attorneys in criminal cases. *McMann v. Richardson*, 397 U.S. 759, 770 (1970). In fact, the text of the sixth amendment itself suggests as much, requiring not merely the provision of counsel to the accused, but "assistance . . . for his defense."

In *Strickland v. Washington*, 466 U.S. 668 (1984), the seminal ineffective assistance of counsel case, the United States Supreme Court recognized that it is a fundamental duty of

counsel appointed to represent a capital defendant to conduct a reasonable mitigation investigation:

> These standards require no special amplification in order to define counsel's duty to investigate, the duty at issue in this case. As the Court of Appeals concluded, strategic choices made after thorough investigation of law and facts relevant to plausible options are virtually unchallengeable; and strategic choices made after less than complete investigations are reasonable precisely to the extent that reasonable professional judgments support the limitation on investigation. In other words, counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments.

466 U.S. at 690-91.

Under the *Strickland* standard, a decision not to investigate mitigation for the penalty phase of a capital trial nearly always is indefensible. Although counsel may make difficult decisions not to present certain mitigation, these decisions must be informed ones – in other words, counsel must perform a reasonable investigation before making an *informed* decision not to present mitigation. Because a decision not to present mitigation, made without reasonable investigation, is not a strategic decision or trial tactic, dozens of state and federal courts have reversed death sentences when counsel for a capital defendant forfeited the penalty phase of a capital trial, as Claiborne did in Joe's case. Claiborne's performance rivals the worst performance by defense counsel in any of these cases.

Appended to this petition is a summary of 26 state and federal cases in which courts have reversed death sentences because counsel failed to properly investigate and present the

mitigation available on behalf of a capital defendant. Summary of Successful Habeas Cases (Tab 24). These cases have in common some or all of the following critical factors:

1. Trial counsel was inexperienced in capital defense;
2. Trial counsel overemphasized the guilt trial;
3. Trial counsel labored under a fundamental misunderstanding of capital jurisprudence;
4. Trial counsel failed to investigate and present mitigation; and
5. Post-conviction counsel developed and presented mitigation on behalf of the capital defendant.

Each of the first four factors is true of Claiborne. Though Joe's case fell within a familiar pattern for successful habeas petitions on the basis of the first four factors, the last factor is decidedly *untrue* of Robinson and Hawthorne.

For example, in *Lloyd v. Whitley*, 977 F.2d 149 (5th Cir. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 2343 (1993), the Fifth Circuit found that an attorney's failure to pursue independent psychiatric examination of a capital defendant was based on a misunderstanding of the law and amounted to ineffective assistance of counsel. *Id.* at 158-59. The court stated that:

> [w]hether counsel's omission served a strategic purpose is a pivotal point in *Strickland* and its progeny. (footnote omitted) The crucial distinction between strategic judgement calls and plain omissions is echoed in the judgments of this court. (footnote omitted)

Id. at 158. Lloyd's attorneys had the benefit of some investigation that indicated that Lloyd had mental problems, but they failed to pursue it. *Id.* at 151-52. The court found "that the decision of defense counsel not to pursue an independent psychological analysis of Lloyd was neither a strategic choice made after investigation nor a strategic choice made in light of limits on investigation." *Id.* at 158. "[Counsel's] decision had nothing to do with

strategy . . . [and was] not [ ] made after thorough investigation of the law; [counsel] was unaware of the law." (footnote omitted) *Id.*

In *People v. Perez*, 592 N.E.2d 984 (Ill. 1992), *cert. denied*, ___ U.S. ___, 113 S.Ct. 608 (1992), the Illinois Supreme Court found that Perez's trial counsel was ineffective and reversed his sentence of death. Perez's trial counsel did little, if any, investigation to present mitigating evidence on behalf of Perez at the sentencing hearing. The attorney testified that he had two interviews with the Perez before trial. *Id.* at 986. At both interviews Perez refused to cooperate with his attorney. *Id.* The attorney testified that he initially knew nothing about Perez's family, except that they had lived somewhere in Chicago. *Id.* In the week between the guilt and sentencing phases of the trial, Perez gave his attorney some information on his background and family, including that his family had moved away without telling him when he was out one day. *Id.* The attorney called some telephone numbers Perez gave him, but obtained no useful information. *Id.* 986-87. He never went to visit the places identified by Perez, nor did he send his investigator. *Id.* at 987.

Unlike Claiborne, Perez's attorney had secured his school records, which contained information about his childhood and family and included scholastic aptitude reports that indicated Perez's full scale IQ fell into the "mentally deficient" range. *Id.* The attorney did not introduce this evidence at the sentencing hearing, though he could not recall why he had not introduced it. *Id.* Despite evidence of mental deficits, the attorney did not attempt to have any mental health experts appointed. *Id.* at 989.

At the post-conviction evidentiary hearing, Perez's post-conviction attorneys presented extensive evidence regarding his family background. This included evidence that the father

was an active drug dealer, alcoholic, and abusive to his children, who lived in fear of him every day. *Id.* at 989. He whipped the children with electrical cords. Like Joe Wise, Perez and his siblings were terrorized by their criminal father. *Id.*at 988-89.

Faced with this evidence, the Illinois Supreme Court held that Perez's trial counsel was ineffective because of his failure to perform any investigation or present evidence he had at the sentencing hearing. The court specifically found that it was trial counsel's "lack of diligence, rather than any drawback or strategy, which prevented him from introducing important mitigating evidence" and that a failure to investigate Perez's mental history or background precluded any determination that the failure to present such evidence was a strategic decision. *Id.* at 993-95. The court further found that the failure of the trial counsel to present such evidence denied Perez a fair sentencing hearing and the court vacated the sentence and remanded for a new sentencing hearing. *Id.* at 996-97.

In *Louisiana v. Sullivan*, 596 So.2d 177 (La. 1992), *judgment affirming conviction rev'd.*, *Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078 (1993), the Supreme Court of Louisiana determined that Sullivan was provided ineffective assistance at the sentencing phase of his capital murder trial because his counsel completely failed to perform any investigation of mitigating evidence. *Id.* at 190-91. Sullivan's trial counsel admitted that he had done no investigation into mitigating evidence because he did not believe the jury would return a capital murder conviction. *Id.* The Louisiana Supreme Court concluded that, absent a complete investigation, there could be no tactical reason not to put on mitigating evidence. *Id.* at 191. The court further concluded that a reasonable investigation would have uncovered mitigating evidence. For example, trial counsel could have presented evidence

that Sullivan was raised in an abusive, alcoholic, often brutal environment and that petitioner was mentally ill. *Id.* The trial court found that this evidence was sufficient to undermine confidence in the outcome of the sentencing phase and remanded the case for a new sentencing hearing. *Id.* at 192. *See also Mak v. Blodgett*, 970 F. 2d 614 (9th Cir. 1992), *cert. denied* 112 S. Ct. 2282 (1993) (new sentencing trial granted in case of defendant, represented by two lawyers with three and four years of experience, convicted of killing thirteen persons; without any tactical reason, counsel failed to develop or present evidence, including background, family relationships, or cultural location, to humanize defendant); *In re Marquez*, 822 P.2d 435 (Ca. 1992) (trial counsel's total lack of investigation for mitigating evidence found to be ineffective and prejudicial to the outcome of the sentencing hearing where the only evidence presented in the post-conviction proceedings related to the good qualities possessed by the defendant).

As in these cases, Claiborne's failure to present the wealth of mitigation available for his defense of Joe Wise did not result from a tactical decision. To the contrary, Claiborne was ignorant of this evidence, because he misunderstood the law and failed to perform even a minimal investigation into Joe's background. This cannot be defended as trial strategy. Moreover, the prejudice to Joe is manifest – the trial court and jury knew about Joe Wise only what the prosecution had told them. We know now that there was much more to Joe's story. Claiborne's ineffectiveness cost Joe his constitutional right to individualized capital sentencing – in other words, Joe was deprived of his right to have an informed jury decide, after getting to know Joe, whether he should live or die.

Faced with the disturbing facts of this case, the probability that the federal courts would have required a reliable sentencing trial for Joe is high. Though federal courts on occasion affirm decisions of counsel, after reasonable investigation, to forego presentation of mitigation, they routinely censure "decisions" by counsel not to prepare at all for the penalty phase of a capital trial. Joe accordingly may pay a very high price for his habeas counsel's failure to file a notice of appeal – he may pay with his life.

D. THE UNTRIED MITIGATION CASE

Claiborne need not have forced the jury to decide Joe's fate in ignorance of his life. Evidence of Joe's deprived childhood and depraved family background, all of it readily available to Claiborne and Joe's state habeas lawyers, is exactly the sort of evidence on which juries routinely base verdicts for life imprisonment. *See* Letter of Professor Scott E. Sundby of August 27, 1993 (Tab 25). Unfortunately, Joe's trial lawyer offered none of it to the jury.

1. Generational Abuse

Little is known about Joe's father Ray Boose's childhood, but Joe's mother Alma Wise Johnson suffered through a home life very similar to the one she eventually would provide for Joe. Alma was one of 12 children, although three of her siblings died as infants. Her parents worked as sharecroppers on tobacco farms, and she described them as "pure alcoholics" who would get drunk in town every weekend and start fighting with others. Her father often told her she was not his child, and he "whipped me all of my life with extension cords, belts and switches that were twined together three at a time." Statement of Alma W. Johnson, p. 1 (Tab 26). When she was nine years old her father pushed her through a glass

window because she had eaten some beans without asking. She was cut, but she was not allowed to see a doctor. When she was ten years old, she got angry with her father after he punished her and grabbed his shotgun, planning to kill him. He knocked the gun out of her hand and it fired, knocking her backward; she says he laughed and whipped her with an extension cord until the color of her skin could not be discerned beneath the blood. Alma says her brothers treated her as badly as her father did. She describes an incident where her brothers hit her in the head with a rock and knocked her out, and then her father blamed her for the incident and beat her. *Id.*, pp. 1-2.

When Alma was older, she was riding in a convertible with her parents and they got into an argument. She told her father to stop the car and stood up, thinking he would stop. Instead he pushed her, Alma says, and she fell out and was knocked unconscious. She was taken to the hospital and her father had her committed to a psychiatric hospital, where she was told she was being treated for alcoholism. *Id.* p. 2.

Alma's sister Hilda Ann Dunn describes how her father mistreated Alma by swearing at her, beating her, and kicking her out of the home when she was pregnant. According to Ann, Alma argued often with her brothers and sisters and was the "black sheep" of the family. She and her sister Doza Dunston both described the car incident, but said Alma was trying to commit suicide. Statement of Hilda Ann Dunn, p. 1 (Tab 27); Statement of Doza Dunston, p. 1 (Tab 28).

Alma's mother, Alma Williams, said that Alma's father hated her and told her when she was nine "that was one I should have thrown away, when I got you." He would often disappear for days or weeks at a time, and Mrs. Williams said her husband "wanted every

woman that wore a skirt except me." He left when she told him she was pregnant with their last child and didn't come back until the baby was three weeks old. Statement of Alma Williams, p. 1 (tab 29). Whenever her husband returned from one of his alcoholic binges, he would "knock the hell out of" his wife. Statement of Hilda Ann Dunn, p. 1.

When fifteen-year-old Alma became pregnant with Ray Boose's child, her father kicked her out of the house. She returned home frequently to escape Boose's violent assaults on her, but her family offered no protection against Boose. On one occasion Boose shot into Alma's family's house in an attempt to force Alma to come back home. Alma's father was angry because Boose missed Alma and nearly shot her sister. *Id.*

2. Poverty And Education

Joe came from an almost inconceivably impoverished family. When Joe was born, his father Boose was running from the police for a murder he had committed. Because he was always on the lam, Boose kept his family in rural shacks and woodland cabins. These seldom had indoor plumbing, so the family used latrines when they did not use the woods themselves. Statement of Alma W. Johnson, p. 2. After five years, Alma tired of the fugitive life and she turned Boose in to the authorities. Statement of Doza Dunston, p. 1.

When Joe was twelve, his family finally made the upward move into the Massey public housing project. Joe's life in public housing represented the longest sustained period in his life when he had the luxury of an indoor toilet. Public assistance supported the family, but sometimes that still left them without resources for necessities. For example, Joe entered the Wake Forest-Rolesville Middle School, after the family moved in to the Massey projects. Joe was sent home from school the first day because he had no shoes. Social service notes

from that time indicate that the social worker helped Alma obtain shoes and clothing, which allowed Joe to return to school. Social History For Joe Louis Wise (Tab 30), Exhibit G. The worker also noted that Alma needed mental health services for emotional problems that were affecting her children's behavior. *Id.* p. 13. It was at this time that Joe began to act out in school, engaging in fights that resulted in his suspension.

Joe attended first and second grade at DuBois Elementary School (an all-black school), where he was held back in the first grade. He went to Rolesville Elementary School for grades three through six. His grades were average to below-average, which probably reflected the fact that during this time Joe's family was subsisting on welfare and living in a series of run-down homes, as well as the limitations on Joe's intellectual capabilities. His mother, who was frequently depressed, drank heavily throughout this period and physically abused the children. Social History for Joe Louis Wise, p. 12.

A social worker assigned to their case documented the condition of their various homes. One had beer cans and whiskey bottles thrown about the yard; another was unheated, causing Alma to take her children elsewhere during the day to keep them warm. A third house was so dilapidated that the social worker had trouble getting onto the porch because of the broken steps; yet another house could be reached only by crossing a creek, and the path leading to the house was impassable in bad weather. *Id.* pp. 9-12.

Jim Peebles, the assistant principal of Wake Forest-Rolesville Middle School, remembers Joe as a boy who had a lot of potential but whose background "hung around his neck like a ball and chain." He attributes some of Joe's difficulties to his life in the public housing projects, which "did not provide a positive environment for him." Peebles visited

with Joe and his mother at the housing project, but his impression was that Alma would agree with anything he said in order to get him "off of her back" and that she failed to follow through on his suggestions regarding Joe. Peebles also received information that Alma was prostituting at their apartment. Teachers reported to him that Joe was sleeping in class. When Peebles questioned him, Joe reluctantly told Peebles that Alma had locked her children out of the house the previous night so she could entertain "guests." Statement of James Peebles, pp. 1-3 (Tab 31).

Peebles stated that as a result of the lack of supervision in the home, Joe was allowed to stay out as late as midnight and fell in with the "harder elements" of the housing projects, a group of older boys with whom Joe engaged in shoplifting. Joe's school attendance dropped significantly during these years; his school records show no more than two absences in each of his elementary school years, but over thirty absences each year during middle school. Despite Joe's troubles during this time, Peebles had this to say about Joe:

> Joe was a special kid to me. I felt that I could not do all I could for Joe. I saw his potential but I was not able to get through. I did not succeed with Joe and I really wanted to. Although I am not surprised, I was very disappointed when I heard about his trouble. I felt good about Joe but he was unable to overcome the peer pressure and his background. I wish I had accomplished more with him and I am disappointed that I did not.
>
> I know that when Joe was 13, 14 and 15 years old, he came from a disadvantaged situation. He was not raised or cared for in any manner approaching what could even distantly resemble the best of circumstances. I believe Joe would have been successful had he just had a few more good turns in his life. But those positive turns were too few and too far between for Joe. Joe has a special place in my memory. He is a good person. I saw his potential and felt Joe was just on the verge of making the turn and had hoped the best for him. Yet it became obvious to me that over the three years that I knew Joe, the extent to which his background hung around his neck like a ball and chain

> certainly exceeded my best efforts to give Joe a positive outlook and hope for the future. I will always remember Joe because I felt good about him and because he was a young man that I wanted so much to succeed.

Id.

When Joe was 13 years old, he ran away from his mother's home and was placed in a detention center. Social worker Linda Banks Dillard recalls the frustration she felt while working with the family:

> I remember Alma Johnson as being overwhelmed emotionally most of the time, somewhat hysterical and immature. She had a difficult time coping and blamed Joe for her problems. Joe reported to me that his mother often lost control and cried, which was upsetting to him, and that she singled him out among his brothers as the 'bad guy.'
>
> Joe was a lost child with very little self-awareness. I was frustrated that I was not effective in helping Joe resolve his inner turmoil. I saw his potential for good but there was some underlying force moving him that I could not put my finger on. At one point I wanted to try removing Joe from his home and placing him in foster care or with his maternal aunt because he was so conflicted living with his mother.

Statement of Linda Banks Dillard, pp. 1-2 (Tab 32).

A major source of conflict between Joe and his mother was Joe's desire to live with his father. Dillard noted in a report to the court considering Alma's runaway petition against Joe that Joe needed a relationship with his father, to which Alma was opposed, and that as a result Joe was resentful of and uncooperative toward his mother. She also indicated that there was a great deal of hostility between Alma and Boose, and that Alma showed "little understanding of Joe's feelings for his father." Social History for Joe Louis Wise, pp. 14-15.

As a result of Joe's problems in school, including an incident when he was caught carrying a knife, he was admitted at age 14 to Haven House, a halfway house for juveniles.

While living at Haven House Joe was permanently expelled from Daniels Junior High School. Joe was sent next to Samarkand Manor, a training school, where he spent several months before being conditionally released. Two months later Joe was expelled from Rolesville Middle School because of fighting. *Id.* p. 19. At the age when Joe was most in need of stability and obviously in need of attention and help, he was shuffled from home to home and from school to school. Joe's behavior resulted in his being labeled a problem, but as Hans Selvog points out in his Social History of Joe, "Behavioral indicators of abuse frequently emerge or intensify as children approach adolescence." *Id.* p. 21.

3. Borderline Mental Retardation

Joe's intellectual capabilities have been tested numerous times in his life, and he has always tested as borderline mentally retarded. In June of 1978, Joe was evaluated at the Western Correctional Center for a presentence diagnostic study by order of the Wake County Superior Court. Psychological testing revealed that Joe was functioning intellectually in the borderline mentally retarded range, with a WISC-R IQ score of 79. *Id.* pp. 18-19. The examining psychologist "suggested that Joe's intellectual potential may well be within the low average range, but social deprivation, learning disability, and emotional problems combine to interfere with Joe's ability to realize his full potentials." The psychologist observed:

> Joe's relationship with his mother is quite dysfunctional. Joe related to his mother both as son and protector. He has learned to manipulate her [through] temper tantrums, physical threats, and threats of self-injurious behavior, thereby avoiding her overly harsh discipline, coping with her inconsistent and confusing manner of showing him affection, and generally getting his own way. His attempts to manipulate others in the same manner have been not only ineffective but have resulted in his getting into various kinds of trouble and becoming increasingly anxious and frustrated.

Id. p. 19.

More recently, Joe was evaluated by Dr. James B. Wade, a clinical neuropsychologist at Medical College of Virginia. After extensive testing, over twelve hours spent with Joe, and review of voluminous records documenting his life, Dr. Wade concluded that Joe is indeed borderline mentally retarded, and that this condition had a negative impact on Joe's social development:

> Clearly, this patient was taught quite early in life that the world is a hostile, dangerous place. His parents frequently tortured him with physical and mental abuse. His father offered him attention and praise only when he followed his commands (which often meant rebelling against societal norms). Joe learned as a child that he could not rely on others to meet his needs for security and love. Unfortunately, due to cognitive limitations (Borderline Mental Retardation), and destructive parenting, he developed a "chip on his shoulder" attitude in order to protect himself from hurt and rejection. He also learned to manipulate others to satisfy his needs. With his father's encouragement, he began abusing recreational drugs (e.g. alcohol). Alcohol intoxication contributed to behavioral acting out by further reducing his brain's ability to inhibit asocial behavior. The specific events taking place the day of the homicide are unknown. Nevertheless, based on the social development data presented in this report, aggressive retaliation when threat is perceived is a clear norm taught to him by his family.

Report of James B. Wade, Ph.D, p. 5 (Tab 39).

4. Joe's Violent And Abusive Upbringing

Joe's primary role model was his father, Massey Ray Boose. Described as an "exploitative, nefarious, criminal figure," and "Charles Manson-like," Boose made his living from selling drugs, alcohol, and stolen property, and running a prostitution ring. He and Joe's mother moved frequently when their children were young, because Boose was "on the run" from the police for a murder he had committed. At the time that Joe's older brother Thomas was born, the family was living in an abandoned car. Joe's mother Alma was 15 years old at the time; Boose was 18. When Joe was born, they lived in a house without

electricity or plumbing. Frequently they hid in shacks in the woods and slept on straw mattresses. Statement of Alma W. Johnson, p. 2.

Boose treated his children "like they were nothing," and he was extremely violent with Alma and the children. He beat Alma while she was pregnant with Joe, and he terrorized his children when he was with them. For example, Boose had a special method of punishment for Joe's younger brother Donnell; he would throw the baby up to the ceiling and let him fall onto a bed, where Donnell would lie screaming. Statement of Alma W. Johnson, p. 3.

When Joe was two years old, he was crying one day and wanted his father to pick him up. Boose's response was to grab Joe and put him behind a stove. Joe's face blistered from the heat, but Boose refused to let Alma take Joe to a doctor. When Joe was four, Boose held him by the foot and beat his head on the floor. Statement of Hilda Ann Dunn, p. 3. Another time when Thomas and Joe were caught playing in the family's water barrel, Boose beat and stabbed Thomas with a stick, then beat Joe. Statement of Thomas Ray Wise, p. 1 (Tab 33). Alma says that Joe was so frightened of his father when he had done something wrong that he would wet himself when Boose came into the room. Statement of Alma W. Johnson, p. 3.

Alma tried many times to leave Boose, but he always found her and forced her, at gunpoint, to return. On one occasion he tied her to a bed, threatening to kill her for leaving him, and shot into the wall over her head nine times. He also brought his other girlfriends into their home. Joe and Thomas once walked into a room where Boose was in bed with his

girlfriend. Boose sent them out with a lit rag in kerosene to use as a lamp; Thomas caught fire and was badly burned, requiring a skin graft. Statement of Alma W. Johnson, p. 3.

Boose's usual method of controlling those around him was to threaten them with guns or other violence. Thomas says that Boose always carried guns, sometimes two or three at a time, and that Boose would shoot at him for talking back. Boose shot Thomas in the leg with a handgun when he was four, and shot him with a rifle when he was 17, later picking out the bullet himself because he wouldn't allow Thomas to go to a doctor. Boose also used violence as a teaching tool for his children; he once made them watch him shoot a man who had stolen from him, then told his children the same would happen to them if they disobeyed him. Statement of Thomas Ray Wise, pp. 1-2.

According to Thomas, Joe was treated worse than the rest of his siblings, and Boose and Alma would often beat Joe for no reason. Statement of Thomas Ray Wise, p. 2. Joe's aunt, Hilda Ann Dunn, also says that Joe received worse treatment than his brothers, and that Alma frequently hit him in the head. Statement of Hilda Ann Dunn, p. 1. Joe's brothers also beat him and encouraged their friends to beat him, and they called him "that half white boy" and "redhead." Statement of Thomas Ray Wise, p. 2; Statement of Hilda Ann Dunn, p. 2. Thomas describes Joe as "the child that nobody wanted," and says he is surprised Joe never committed suicide. Joe's only hope for getting attention or praise from his father was to emulate his father's behavior. Boose actively encouraged Joe to behave violently; he once gave Joe a gun and told him to shoot his brother Thomas. When Joe refused, Boose beat him. Statement of Thomas Ray Wise, p. 2.

Eventually Alma helped the police find Boose, and he went to prison for murder. After Boose was locked up, Alma continued to beat her children, often with switches and electrical cords, the same weapons Alma's father had used on her as a child. She was unable to feed her children and often begged food from the neighbors until she found out how to get welfare. They moved frequently, living in houses that were infested with snakes or that did not have plumbing and electricity. Statement of Alma W. Johnson, pp. 3-4.

During this time Alma had a parade of lovers who often physically abused her, sometimes in front of her children. Alma was married to Joe Johnson, an alcoholic, for two years, and Thomas recalls that they fought often and that once Alma knocked Johnson out. Statement of Thomas Ray Wise, p. 1. Alma also told a social worker that Johnson abused Joe and the other children by assaulting and kicking them. Alma suffered from depression and twice attempted suicide, resulting in psychiatric hospitalization. She also suffered nervous breakdowns for which she blamed Joe, and she threatened to put him into foster homes.

Boose resumed his corrupting influence on Joe after his release from prison. He taught Joe how to gamble, and Joe would stop to gamble between school and home. Thomas says Joe wanted to make fast money, like his father. When Joe was 12, he and Thomas spent some time in South Carolina with Boose, where they worked in the fields picking cucumbers. Thomas left when Boose refused to pay them and treated them badly, but Joe stayed longer. Boose, who was selling drugs and running a prostitution ring, introduced Joe to drugs and had Joe sleep with the prostitutes, who were as young as 14. Boose controlled the women in his usual manner: he beat them regularly, even when they were pregnant, and

ran over one of them with a car. He controlled the money they earned, and forced them to take drugs, which he supplied to them as long as they obeyed him. He threatened to kill them if they did not do what he demanded. Statement of Thomas Ray Wise, p. 2.

Joe's half-sister, Diane Boose, described how Boose forced her to work in the tobacco fields starting at the age of five. She was whipped if she failed to wake up at 3:00 a.m., and during busy periods she worked until 8:00 p.m. Boose fathered around 30 children, and he forced all of them to work in the fields and to steal property, which he would resell. Everyone was afraid of Boose; Diane says when Boose beat her in front of the other workers, no one comforted her because they were all scared of him. Statement of Diane M. Boose, p. 2 (Tab 34).

Boose beat Diane regularly, and she describes the type of punishment he would inflict:

> If we looked or said anything wrong, made a loud noise or talked out of turn, we were hit with a fan belt or switch. Sometimes we were forced to stand in one place in the woods all night long. We were afraid of the woods because my father always said that men were killed in those woods. If we weren't doing what we were suppose[d] to we would be forced to pick up rocks, 15 buckets full, and place them in piles. We were punished by forcing us to chop grass by pulling it by hand or using a hoe. Other times, we were made to dig ditches all day long. Often times he would strip us before he whipped us.

Statement of Diane M. Boose, pp. 1-2.

Diane now refuses to have contact with her mother, because her mother still lives with Boose. She and Joe's grandmother both state that Boose took "credit" for murdering Ricketson; Diane says he did it "to inflate his violent and criminal reputation in order to intimidate people he was trying to control." Statement of Diane M. Boose, p. 2.

According to Alma, after Joe lived with his father, he began to act "like he had a mental problem." He would act as though he didn't understand what people were telling him, and he talked to himself or laughed for no reason. A social worker took him to a psychiatrist, but Alma never received a report about any treatment Joe received. Statement of Alma W. Johnson, p. 4.

Joe's traumatic childhood included witnessing a murder. When Joe was eleven years old, he was at a neighbor's house when two brothers started arguing. One shot the other and killed him. Joe ran home to tell his mother, and for months afterward he had nightmares and would wake up and call out in the night. Statement of Alma W. Johnson, p. 4. Joe has repressed his memory of the killing.

5. The Mitigating Force Of Joe's Awful Upbringing

The jury that sentenced Joe to death knew none of these facts. Claiborne's decisions preventing the jury from achieving a better understanding of who and what shaped Joe into the person he was. No juror could have heard these descriptions of Joe's home life without realizing that Joe was trained to accept violence as a way of life. His father taught him that people can and should be controlled through violence, and that violence, together with sex, drugs, and thievery, is an acceptable way to make a living. Joe was taught to do unto others as his family did unto him. Joe learned that he could gain acceptance from his father only by acting like him.

In summary, Joe's "early childhood is marked by abandonment, neglect and rejection . . . punctuated with hunger, fear of parents' abuse, transience and an unpredictable environment." Social History for Joe Louis Wise, p. 20. The facts were horrible and

horrifying. Their mitigating force would have been powerful, as Professor Scott Sundby explains:

> Could an even minimally competent presentation of Mr. Wise's childhood have made a difference? I strongly believe so. As a professor at University of California - Hastings College of the Law, I participated in a National Science Foundation funded study of why jurors impose the death penalty. The portion of the study which I conducted involved interviewing over 130 jurors who had served on 36 cases; in half the cases the jury had chosen life imprisonment and in half they imposed death. The interviews were exhaustive, lasting between 3-5 hours on average.
>
> What I found regarding mitigating evidence was that jurors look closely to see whether somewhere along the line the defendant had an opportunity to choose a law abiding path. If such an opportunity existed, hardships, such as poverty or an alcoholic parent, would not sway the jury to life, because the jury would believe that, despite the hardships, the defendant could have chosen the high road. If, however, the jury felt that the defendant faced severe hardships and never was given the support and opportunity that would have enabled him to overcome his disadvantages, they would choose life over death. Without a doubt, severe abuse as a child by family members was the archetypal example of where juries would find that the primary support system a child depends upon – his parents and siblings – had so failed the defendant that they would not find death justified. They would not, of course, find that the hardships excused the murder, but simply that death was too great a punishment to impose upon someone who never had the chance to lead a normal life and abide by societal norms.
>
> Do Joe Wise's circumstances fit this latter scenario? All a minimally competent attorney had to do was paint a cursory picture of Joe's childhood to impress upon the jury how he never had the opportunity to choose the high road – a father who physically tortured him when he was as young as two years of age; a father who openly abused his siblings and tried to get Joe to participate; a father who ran a prostitution ring out of the home; a father who introduced his own son to drugs at age 12; a father who openly abused Joe's mother; a father who gave positive reinforcement only when Joe did his anti-social bidding. What of the other possible source of guidance and comfort, Joe's mother? A product of a horrible family situation herself, she physically abused Joe and threatened to place him in foster homes; she was mentally unstable and tried to commit suicide several times; she taught Joe morals by bringing a parade of lovers through the house. Might Joe have found understanding in a brother or sister? Joe's siblings openly admit that they would physically abuse Joe as a child and make him feel like an outcast. It

> would not take a silver-tongued orator to make a jury understand that Joe never had a fighting chance to become a productive member of society and that imposing the death penalty would serve no valid penological purpose.

Letter of Professor Scott E. Sundby of August 27, 1993. Neither silver-tongued orator, nor for the purposes of capital defense, minimally competent attorney, Claiborne neglected to present any of these facts to the jury, thus surrendering Joe's chance for a life sentence.

E. REHABILITATION AND REMORSE

Whatever Joe's family and background may have done to him, Joe has not accepted, even on death row, that he cannot change and rise above his background and upbringing. Death row provides few, if any, opportunities for rehabilitation; certainly the prison does not devote its efforts to rehabilitating those sentenced to die. Despite those circumstances, Joe has managed to make himself valuable to the many friends he has made in the last eight years.

Dave Herbertson has known Joe for eight years and personally experienced the positive effect Joe has had on people. Dave states that Joe has performed many valuable services for him:

> After I started visiting Joe, I began a ministry at the juvenile detention center in Chesterfield County. I asked Joe to write letters to the kids at the center to help get them back on the right track. Joe readily agreed, and he wrote many letters to the kids I told him about. I found from these letters and from other efforts by Joe that he had a talent for counseling, and I believe that Joe was a valuable asset in this ministry.
>
> When I left Virginia for Florida, Cruz Soto took over the ministry at the detention center. I had introduced Cruz to Joe, and Joe continued to assist Cruz however he could after I left.
>
> Just because I had left Virginia did not mean that Joe could not continue to help me. I taught a junior high-level Sunday School class in Florida, and Joe wrote to my students in that class just as he had with the

detention center. Joe had devoted considerable study to the Bible, and this, combined with his talent for counseling people, made his letters both informed and effective.

My nephew and my brother-in-law both experienced problems with drug and alcohol problems. When Joe found this out, he wrote both of them to try to help them get over their problems. My brother-in-law Steve Clark said to me, one time after receiving Joe's letter, that he was very moved and impressed that someone facing the fate that Joe was facing and living in the conditions in which Joe was living could muster such concern for Steve. Both of them are doing better now, and while Joe is no miracle worker, I do give him some credit for their improvement.

I remember another time when Joe's friend Sister Maria Castillo was depressed and wondering whether she was doing any meaningful work. Joe did all he could to help her overcome her depression and reassure her that God would find a way to use her. I know that Sister Maria benefitted from Joe's efforts.

I do not remember any occasion when I asked Joe for help that he did not provide it.

Affidavit of David Herbertson, ¶¶ 3-8 (Tab 35).

Joe's friend Rich Hutchinson states that Joe is a positive force in his and his family's lives:

I believe that what Joe is doing in prison right now is worthwhile. I know, for example, that Joe has been very helpful to me because of his upbeat attitude and positive approach. Whenever I am depressed about something in my life, I think of Joe and of how he is approaching his difficult situation, and I feel better. This is a gift from Joe that I have been able to share with many people.

Affidavit of Rich Hutchinson, ¶ 5 (Tab 36). This theme is echoed by Dave Herbertson:

In the time I have known him, Joe has helped me more than I have helped him. Joe does his best to stay positive and upbeat, despite the difficult circumstances in which he lives and the fate hanging over him. He is always encouraging his friends and lifting their spirits. For the eight years that I have

known Joe, I have been able to compare all the problems I have faced in my life to the problems Joe faces and the positive way in which he approaches his situation. Joe's positive encouragement and approach always uplifts me.

Affidavit of Dave Herbertson, ¶ 11.

Joe has been a comfort to his friends in their most difficult moments. According to Rich Hutchinson, Joe was able to help him and his ex-wife improve their relationship, to the benefit of their son:

> When my wife and I separated in Arkansas, for a long time, she did not want to speak with me. Joe and I discussed the difficulties I was having. Because both of us were friends with Joe, he was in a position, and he made many efforts, to bridge the gap between my wife and me. Even after our divorce was final, Joe did not quit. On our wedding anniversary, Joe sent Sally a poem that expressed my feelings about Sally that I had discussed with Joe. There is no question but that this act by Joe helped to alleviate the bad feelings that had come between Sally and me. The resulting improvement in our relationship helps in dealing with our kids, and for that I thank Joe.

Affidavit of Rich Hutchinson, ¶ 6.

Similarly, Joe provided solace to his friend Ben Peacock when he was dying of cancer and to Ben's daughter Elizabeth after Ben died, as Ben's widow relates:

> Ben died of cancer two years ago this October. Once Ben became sick, we were not able to visit Joe. Joe concealed his disappointment that we could not visit him as we used to, and he threw himself into doing all that he could to help Ben and us through Ben's terminal illness. When Ben was confined to bed at home for three weeks toward the end, Joe called Ben at home all the time, talking to him for hours and keeping his spirits up. Many people are uncomfortable around terminally ill people, but Joe spent hours a day on the phone with Ben. Ben moved back to St. Mary's after the three weeks, and Joe stayed in touch with him right to the end. I know that Joe's concern meant a great deal to Ben.
>
> In addition to this, Joe got every one he knew to pray for Ben, and he urged his friends who could, such as Reverend Bill Wells and Rich Hutchinson, to visit with Ben. At Joe's request, some of these friends came to a prayer service for Ben's recovery at St. Mary's Hospital.

> Elizabeth was thirteen when Ben died. After he died, she often had trouble falling asleep at night. Joe would call and tell her stories until she fell asleep. He continued to do this until they moved him to Greensville in August. I am grateful for Joe's help in getting us through the time after Ben's death.

Affidavit of Lynda Peacock, ¶¶ 3-5 (Tab 37).

Another example of Joe's unselfishness earned a story in the *Richmond News-Leader* on December 29, 1986. Donald Halley Stratton's mother was gunned down in a Richmond doctor's office when he was eleven months old. A trust fund was established for Donald, and letters and donations poured in:

> One of the most touching letters – one Mrs. Pillow [the trust administrator] says she had difficulty reading aloud – was sent by Joe Lewis [*sic*] Wise, a convicted murderer sentenced to die in Virginia's electric chair.
>
> He said, in part: I've always loved children, and it just broke my heart to hear what happened to you. . . . I only have $5, so I hope that the $2 that I sent you helps you to find all that it can give.

Excerpt, *Richmond News-Leader*, December 29, 1986 (Tab 38). Joe wrote a poem for Donald, called "In My Heart," which the paper published with the story.

All Joe's friends have remarked on Joe's growth while on death row. Dave Herbertson says that "Joe has shown steady growth in the eight years I have known him. When I first met Joe he would sometimes react to adverse situations in inappropriate ways. Now, however, Joe confronts adversity in much more positive ways." Affidavit of Dave Herbertson, ¶ 10. Lynda Peacock has seen the same thing. Affidavit of Lynda Peacock, ¶ 2. Rich Hutchinson, who has experience dealing with convicts and parolees, sees significant growth and potential in Joe:

> When I was in Chesterfield County, I volunteered at a work release program for parolees. Because of this experience, I am not naive about

> prisoners and ex-convicts. I can distinguish between insincerity and sincerity, and I can tell with a fair degree of accuracy which ones will succeed on the outside and which will fail. My belief is that the changes for the better which I have seen in Joe are authentic, and if Joe right now would not be able to make it on the outside, I am firm in my opinion that his efforts to better himself will get him to that point before too long. Given the limited opportunities available to prisoners on death row, these changes are entirely of Joe's making.

Affidavit of Rich Hutchinson, ¶ 3.

Based on these actions and on his exhaustive evaluation of Joe, Dr. Wade has concluded that objective evidence substantiates Joe's growth while on the row and that Joe has advanced significantly beyond the legacy of his dysfunctional family and upbringing. Accordingly, Dr. Wade has concluded that Joe has shown significant potential for rehabilitation:

> It is interesting to note that the patient indicated that the last 8 years of incarceration have been the happiest years of his life. When I inquired further about this he offered that the prison environment has provided him (for the first time in his life) with an opportunity to feel appreciated by others. I must admit that in the years that I have been conducting Neuropsychological evaluations of inmates, I was impressed by Mr. Wise's altruistic behavior, because it is atypical. Notwithstanding the infractions described in his prison records, it appears that Mr. Wise responds well to, and should continue to grow in, the structured environment of prison.
>
> * * *
>
> Each of the affidavits reviewed speak to a growth in maturity during the past eight years. These data are consistent with the patient's self-report that prison life gave him the opportunity to learn prosocial ways to contribute to the lives of others; and through these deeds he enjoyed being appreciated. The data provided above are consistent with my evaluation findings, and suggest that Mr. Wise has demonstrated good rehabilitation potential. In my opinion he is likely to show further personal growth if he remains incarcerated.

Report of Dr. James B. Wade, pp. 6,8.

Dr. Wade also noticed in Joe " intense emotional turmoil while discussing the events surrounding his incarceration. He became visibly depressed while discussing the homicide. In my opinion, and based upon my clinical experience, this behavior is consistent with remorse regarding his actions." Report of James B. Wade, Ph.D, p. 6.

F. CONCLUSION

In *Gideon v. Wainwright*, the United States Supreme Court held that under the Sixth Amendment to the Constitution, an indigent defendant facing criminal prosecution in state court has the right to have counsel appointed for him. The Court stated for all of us that:

> The right of one charged with crime to counsel may not be deemed fundamental and essential to fair trials in some countries, but it is in ours. From the very beginning, our state and national constitutions and laws have laid great emphasis on procedural and substantive safeguards designed to assure fair trials before impartial tribunals in which every defendant stands equal before the law. This noble ideal cannot be realized if the poor man charged with crime has to face his accusers without a lawyer to assist him.

372 U.S. 335, 344 (1963).

In a very real sense, this is a fundamental clemency case in the same way that *Gideon v. Wainwright* was a fundamental constitutional case. Joe Wise does not seek relief from this office because he claims innocence. Rather, he seeks commutation of his death sentence because, like Clarence Earl Gideon, he was denied his constitutional right to the assistance of counsel. Unlike Gideon, however, Joe was on trial for his life. And unlike Gideon, Joe was unable to present his constitutional claim to the federal courts of the United States. As a consequence, Joe faces a September 14, 1993 execution date.

Joe does not complain about Virginia's capital sentencing system or its system of appointing counsel to represent those charged with capital murder. Rather, Joe requests commutation because, in his case, these systems have failed completely, in a way that could not now be repeated. Joe's death sentence is a true miscarriage of justice. It is wholly unreliable, because for all these years it has gone untested by the crucible of our adversarial system. Under these unique circumstances, it would be appropriate for the Governor to commute Joe's sentence of death to one of life imprisonment.

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