APPLICATION FOR EXECUTIVE CLEMENCY

in the matter of

DERICK LYNN PETERSON

vs.

THE COMMONWEALTH OF VIRGINIA

addressed to

The Honorable Lawrence Douglas Wilder

Governor of the Commonwealth of Virginia
State Capitol,
Richmond, Virginia

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On Behalf of Derick Lynn Peterson

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Derick Lynn Peterson, by and through his undersigned counsel, respectfully requests that the Governor, pursuant to Article V, Section 12 of the Constitution of Virginia and Va. Code Sections 53.1-229 et seq., consider this request for commutation of his sentence of death; for a 90 day stay of his execution, presently scheduled for Thursday, August 22, to permit consideration of his application; and, finally, to commute his sentence of death.

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INTRODUCTION[1]

Under any rational scheme of administering capital punishment, Derick Peterson's execution would be inexplicable. He was a twenty year old mentally disabled man child in 1982 when his crime occurred. His one day capital proceeding -- trial and sentencing -- shed no light on Derick Peterson's mental state or mental age, and did not scratch the surface of the futility that had been his life. Born with irreversible brain damage, raised in an environment stained by poverty, debasement, neglect, abuse, and brutality, he needed help. An alcoholic, by genetic predisposition, before he was of school age, and a drug addict, at his mother's hand, before he was a high school student, that Mr. Peterson would have trouble functioning is not surprising. Given what we now know, it would have been surprising had Derick Peterson's life turned in any other direction but the one it which it began.

What is truly surprising, however, is that the government is now marshalling its resources and might to execute him. He is not an appropriate candidate for this ultimate punishment. No government resources were marshalled when he was born with a brain

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[1]On August 8, 1991, J. Gray Lawrence, Jr., Esq., submitted an application for commutation of Derick Peterson's death sentence. Mr. Lawrence's cogent and compelling application presents more than sufficient cause to grant commutation of Mr. Peterson's sentence.

Undersigned counsel, who also represents Petitioner, hereby offers additional reasons for granting the requested commutation. It is also respecfully suggested that if the time remaing before the scheduled execution is insufficient for a thourough review of the materials provided, a stay of execution is appropriate.

incapable, without significant help, of leading him through a productive and nondestructive life. No government resources were marshalled to help him avoid the terrible destruction wrought by his toxic home environment. No government resources were marshalled to come to his aid when he was cast, intellectually, psychologically, and emotionally defenseless, into the abyss of the urban drug culture before he was even old enough to attend school. Nothing was ever done for Mr. Peterson: everything was done to him. It is not too late, however, to stop the gathering momentum and to act, for the first time ever, to do something for Derick Peterson -- help him live.

The compelling information contained herein has never before been presented to anyone, and certainly not someone with the power of life and death over Mr. Peterson. It was not presented to the people who decided that he should die. Had it been, there can be little doubt that Derick Peterson would not be where he is today. It was not, however, because Derick Peterson's trial was much like his life: he was deprived of everything that he needed, deserved, or was entitled to. In this application, Derick Peterson explains the luck of the draw that shackled him from birth, and prays for the grace of the extraordinary power of clemency in this, an extraordinary case.

A. The Commutation Power

This application presents compelling reasons for the Governor to exercise his power to commute Derick Peterson's sentence of death, reasons which are well supported by the materials that are

submitted with the application. Before the Governor commences his review of Mr. Peterson's application, however, it is appropriate to reflect upon the purpose and office of the commutation power.

The executive power to spare prisoners from the death penalty is deeply rooted in Anglo-American criminal law. From the earliest times in our country, persons with sentences of death have sought clemency from select officials of the government. See, United States v. Wilson, 32 U.S. (7 Pet.) 150 (1833). Perhaps the most basic reason as to why the clemency power has historically existed is society's time-honored judgment that review outside of the courts must exist to weigh and adjust sentences. As the United States Supreme Court found in 1925,

> Executive clemency exists to afford relief from the undue harshness or evident mistake in the operation or enforcement of the criminal law. The administration of justice by the courts is not necessarily always wise or certainly considerate of the circumstances which may properly mitigate guilt. To afford a remedy, it has always been thought essential to popular governments, ... to vest in some other authority than the courts power to ameliorate or avoid particular criminal judgments. It is a check entrusted to the executive for special cases.

Ex parte Grossman, 267 U.S. 87, 120-121. In exercising the review power in a capital case, it is absolutely critical that the Executive have at his or her disposal accurate information not only about the crime, but also about the character of the defendant. Chief Justice Warren Burger underscored this point while writing for the Court in the landmark decision, Lockett v. Ohio, 438 U.S. 586, 605 (1978).

> 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. A variety of flexible techniques--probation, parole, work furloughs, to name a few--and various post-conviction remedies, may be available to modify an initial sentence of confinement in non-capital cases. The unavailability 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.

The need for "individualized consideration" in Derick Peterson's case can now be met only by the Governor. Mr. Peterson merits consideration for a 90-day stay as well as for clemency. The person on whose behalf this application is submitted is clearly not responsible for the tragic circumstances which shaped and controlled his psyche, his behavior, and his life, and he is not a threat to anyone inside the prison walls.

In presenting this petition for clemency, its authors and the person for whom it is written wish to make two things very clear from the outset:

1. This plea to act mercifully toward Derick Peterson is in no way an attempt to minimize the fact that an innocent human being was murdered. Neither Mr. Peterson nor his family nor his attorneys feel anything but deep sorrow for the death of Howard Kaufman.

2. There are extraordinarily compelling mitigating

factors not heretofore presented or considered which require us to argue that Derick Peterson deserves clemency. These factors form the basis of this plea for mercy.

The final resolution of a capital case can never be simple or easy. Because each begins with tragedy -- the taking of a human life -- a fair ending to the case can be reached only through painstaking and often painful reflection.

The tragic culmination of Mr. Peterson's young life was the murder of Howard Kaufman. This undoubtedly was the tragedy of Mr. Kaufman's family's life as well. The central question remains: can justice be served best by taking yet another life, or would this only compound the tragedy?

B. Special Circumstances of a Twenty Year Old, Helpless Offender

Derick Peterson was a brain damaged twenty year old black male convicted of the murder of a white store manager during the course of a robbery. He was the first man sentenced to death in the Hampton judicial circuit since 1937.[2] No one who was twenty years old or younger at the time of the offense has been executed in Virginia since Furman. The proceeding which resulted in Derick Peterson's conviction and sentence of death took considerably less than one day. No evidence was presented on his behalf, and his

[2] Only three, including Mr. Peterson, have been sentenced to death in the Hampton circuit since 1937. Of those three, who are all black, Mr. Peterson's case is by far the least egregious and least aggravated, and, consequently, the least deserving of the death penalty. The differences between these three death cases are in fact so startling as to raise a serious question as to the proportionality of Mr. Peterson's sentence, a question which will be addressed in a subsequent section of this application.

trial attorney's unprofessional, unethical, and incompetent actions prevented the jury from hearing the truth about Mr. Peterson. He is deserving of clemency for a number of equally compelling reasons:

(1) Mr. Peterson was severely brain damaged from birth, and the effects of his organic brain disorder were compounded tenfold by his genetically predisposed substance abuse disorders;

(2) Mr. Peterson's tragic upbringing by an alcoholic, abusive, drug-dealing mother permanently disfigured him, and the damage caused by his environment ameliorates his culpability for the offense of which he was convicted;

(3) Compelling evidence which would have prevented a conviction of capital murder and/or mitigated against a sentence of death was never presented to the sentencer because of trial counsel's unprofessional, unethical, and incompetent performance;

(4) This case is unlike any other for which the death penalty has been imposed in Virginia since Furman.

Singly, and certainly in the aggregate, these circumstances warrant the Governor's serious consideration, and, ultimately, the granting of clemency. Derick Peterson's execution would be the gratutiotous infliction of pain and violence, inasmuch as he did not choose his home, he did not choose to be beaten, and he did not choose to become addicted. His execution would not set an example for twenty year old persons or convince seven year olds not to smoke marijuana and ingest drugs with their mothers. Neither the offense nor the offender warrant the ultimate punishment.

I.

Derick Peterson Was Born With a Damaged, Malfunctioning Brain

This case is unique -- tragically so for Derrick Peterson; fortunately so for society. This case is not about a promising young man who went astray, or was led astray. Nor is this case about an otherwise normal, healthy young man who was misshapen solely by his environment, although, as will be discussed, the environment which shaped Derick Peterson was a physically, emotionally, and morally toxic one. Rather, this case is about a young person much of whose destiny was preordained from his very conception, by circumstances utterly and unquestionably beyond his control.

Mr. Peterson's mother, by her own admission, "drank almost every day while [she] was pregnant" with her son, Derick. [Affidavit of Eloise Peterson, App. 9]. She was not merely a social drinker: Eloise Peterson regularly drank the night away, drank until she was demonstrably intoxicated, throughout her pregnancy. [Id.; see also Affidavit of Phillip Peterson, App. 14].

The effects of alcohol on fetuses during a mother's pregnancy are well documented in the medical literature. Drinking during pregnancy, or even before or prior to recognition of pregnancy, has been definitively linked to a plethora of neonatal problems, including brain damage, behavioral disorders, intellectual deficits, emotional instability, thought disorders, and subsequent substance abuse disorders. See, e.g., Dorris, The Broken Cord (1989). As will be discussed, Derick Peterson exhibits evidence of

these and many, many more related problems.

The etiology of the varying results of ingestion of alcohol by the pregnant mother is relatively uncomplicated:

> When a person ingests more alcohol than his or her liver can process, the excess is released into the bloodstream to circulate until it can be detoxified. Once the placenta of a pregnant woman is formed, any raw ethanol present in her body envelops the fetus, where it is distributed in the liver, pancreas, kidney, thymus, heart, and brain, concentrating in the gray matter of the developing child. It may interfere with zinc metabolism, with hormonal balance, or with the ability of the placenta to carry oxygen, thus creating anoxia and subsequent brain damage, especially during the first and third trimesters. Alcohol is a dehydrating agent, so it absorbs water. This is a reason it stings abraded tissue, and this may well be the reason that the brain of a newborn whose mother drank appears desiccated, smaller than it should be -- water has been sucked out of the developing cells, killing them outright or rendering them functionless. (The ability of the fetus to eliminate alcohol is only about 50% of adult capacity, meaning that the same amount is present twice as long.) The amniotic fluid itself becomes a kind of alcohol that soon adapts to the milieu. Short circuits develop and no amount of education in later life can realign them.

Dorrit, p. 147 (footnote and citation omitted).

Derick Peterson, predictably, suffers from severe neurological impairment. [See Reports of Drs. Rollins, Evans, and Voris, Apps. 1-3]. The organic brain damage with which is he is so obviously inflicted began in utero, and has manifested itself throughout his life. [Id.]. As is to be expected, Mr. Peterson was a hyperactive and uncoordinated child. He had significant difficulties in school, caused by or magnified by sub-normal intellectual functioning, attention and thought disorders, and severe learning

disabilities. All of these outward signs are, of course, precisely what any mental health professional would expect from someone who, like Derick Peterson, was a functional, albeit non-volitional, alcoholic from the moment he was conceived.

All of these outward signs, moreover, lead to the same inescapable conclusion: Derick Peterson's brain was severely damaged before he took his first breath. All of the mental health professionals who have examined him have in fact reached that same conclusion: Derrick Peterson's brain was irrevocably damaged in utero as the result of his mother's constant consumption of alcohol during her pregnancy, and there neither was nor is any possibility of developmental recovery from such brain damage. [Id.].

Thus, from the very moment of birth, Derick Peterson was a person without any chance of being psychiatrically, neurologically, or emotionally normal. It could have been predicted with an absolute certainty at the time of his birth that Derick would never achieve normal levels of intellectual functioning, would never fully develop emotionally, would never, in sum, be a mentally well or whole human being. His course was charted before his ship ever left the wharf.

In and of itself, without more, Derick Peterson's neonatally predestined malady would be amply sufficient to ameliorate his morale culpability for his crime and justify the dispensation of mercy. Had his jury been informed of any of the relevant medical circumstances, he would not have been sentenced to death. There are, however, even more, and even more compelling, circumstances

which tragically explain his life and behavior, mitigate his crime, and require the exercise of the clemency power.

II.

Derrick Peterson's Tragic, Brutal, and Disabling Home Environment and Upbringing Mitigate Against Punishing Him With Death

a. Derick Peterson's Childhood Home was Nightmarish

Derick Peterson is not and could never be psychologically, intellectually, or emotionally normal. However, had he received even a modicum of professional help, intellectual guidance, or emotional support from anyone, his life could have been different. Derick received nothing: neither society nor his family did anything to assist him in adapting to his deficiencies or to provide the type of structured environment required by someone with his disabilities. To the contrary, the familial and societal milieu which shaped the already damaged Derick Peterson was so dysfunctional that no human being, much less one born with a profoundly damaged brain, could have escaped unscathed.

The story of Derick Person's short life is appalling beyond words. It needs no embellishment or embroidery; the simple facts are sufficiently shocking on their own, without adornment. Most of that story will therefore be told by its witnesses: their statements provide a distressingly stark portrait, and will be liberally quoted throughout. Those statements, submitted herewith, should also be read independently and in their entirety. They speak volumes.

As discussed, Derick Peterson's mother was a profound alcoholic who virtually spent her entire pregnancy in an alcohol-

induced stupor. Although the prenatal damage inflicted on Derick by his mother's behavior was irrevocable, what followed was equally debilitating, perhaps even more so, and compounded tenfold his pre-existing difficulties.

Mrs. Peterson's problems did not ameliorate after Derick was born. She continued her drinking, without a pause, after his birth and throughout his dependent life. Moreover, she developed what became a severe, persisting pattern of drug abuse and addiction, behavior which she never even attempted to conceal from her children. As a result, Derick's infancy and early childhood was a paradigm of malignant neglect. He and his older sister were left alone for long periods, even as infants, while Mrs. Peterson would go out drinking all night. Sometimes her episodes would last for several days, and Derick and his sister would have to fend for themselves or be cared for by whatever friend or relative was available. The recollections of Derick's biological father, Phillip Peterson, reveal in stark detail his wife's disregard of her maternal responsibilities:

> On one occasion, when Derrick was six months and Sharmin [Derick's sister] was barely two years old, I returned to our house at midnight after working overtime to find Sharmin and Derick unattended. Eloise did not return to the house for two or three days. Because I had to work, and because I feared for the children's safety, I drove through the night. I left the children with my sister in North Carolina, and returned in time to work the next morning.

[Affidavit of Phillip Peterson].

Mr. Peterson soon, for obvious reasons, separated from his

errant wife:

> Eloise returned to the house several days later with a strange man. I caught them attempting to break in the door. After this encounter, we separated. Eloise's father suggested that, for my own safety, I should move from this location. He was concerned that Eloise or one of her boyfriends would try to hurt me. I followed his advice.

[Id.]. Although Mr. Peterson was concerned for his children, and made numerous attempts to reconcile with his wife and maintain the family, Eloise continued her destructive behavior, and his obligation to work to support the family left him without the necessary time to devote to the care of his children:

> I moved the children back to Newport News when Eloise and I attempted a reconciliation.... After our move, Eloise immediately returned to her wild ways, drinking and running away with other men. Eloise's brother... showed me Eloise with one of the men with whom she was running. I had all I could take and moved to Baltimore.... I wanted to take the children with me, as I was extremely concerned about their welfare in their mother's hands, but knew that I could not work full time and take care of two children.

[Id.].

Phillip Peterson made yet another attempt to reunite his family, when Derick was five, and took them to the Washington, D.C., area to live with a friend and his family, the Evanses. Predictably, this attempt was no more successful than the proceeding ones:

> During our stay in Capital Heights [suburban Washington D.C.] Eloise worked at a bar. It was my hope that she would have calmed down some since we was separated. I was disappointed. Eloise continued with her drinking and all night running around. I could

> not tolerate her behavior and returned to Baltimore.

[Id].

Their stay with the Evanses also had a profoundly disturbing effect on the children, as Derick's sister Sharmin recalls:

> While in Washington, D.C., Pamela Evans, Bobby and Eva's 15 year old daughter crawled into bed with me one night and started messing with me. When I went to the bathroom my privates were sore. I had to go to the emergency room, and the doctor there found a screw in my vagina. Pamela Evans also messed with Derrick. She started when he was five years old and didn't stop until we moved back to Newport News.... Also, Eva Evans' sister had three boys, and one of them used to make me sit on his lap and rub him on his privates. He touched me on mine, too.

[Affidavit of Sharmin Peterson Howard, App. 15]. The sexual abuse which occurred during this period had a palpable and long lasting effect on the children: family members recall that Sharmin, in particular, remained withdrawn and disturbed for quite some time, and would refuse to take her clothes off or sleep in a bed. [See affidavits of Phillip Peterson and Connie Ivey Graves, Apps. 10 and 14].

Sharmin also recalls the final breakup of her parents, which occurred during this period:

> When we lived in Washington, D.C., my mother...was always out drinking and partying. She was never home and didn't pay any attention to Derick and me. About this time, my father left my mother for good. He went to go and pick her up at her job and caught her in another man's lap. This left me to take care of Derick. I also had to cook and clean and take care of mother when she was sick from drinking to much.

[Id.].

Even when she was around and available to her children, Eloise Peterson provided nothing in the way of normal maternal nurturing, support, or love. To the contrary, her limited presence harmed her children more than her complete absence did or could have:

> My mother beat Derick and me just about every day. She hit and pulled my hair, but she was always hitting Derick with a broom or a shoe on his head. One time she threw a high heeled shoe at his head and he had to go to the hospital for stitches. I remember she told Derick to tell the doctor that he fell off a swing. The worst beating she ever gave me was when I was pregnant. She also beat Derick in his sleep.... It seemed like our mother was never there for us and our father was not around at all. I felt like I tried to raise Derick, but I am only a year and 1/2 older than him. Our mother was never interested in school work or anything like that. She only cared about getting drunk and high.

[Id.]. The children's cousin also remembers the physical abuse regularly administered by Eloise Peterson:

> When she beat us, Eloise always went for the head. She hit hard too[;] on many occasions I was dizzy and I could see scars. The children got the same treatment, and also complained of being dizzy. When she hit them, it seemed like she put her whole power behind it; she hit them real hard.... Out of the two children, Derick was the stronger; he could take much more of this type of abuse than Sharmin could. Consequently, he received much more. The fact that he didn't break down as quick just made Eloise madder, and she would beat him still more.

[Affidavit of Linda Lethcoe, App 11]. Mrs. Peterson herself remorsefully recalls how she treated her children:

> I know I wasn't the mother I should have been. I guess the most attention I ever paid them was when I'd get mad and beat them. I had a

> bad temper in those days. Probably because I was either high or hung over all the time.

[Affidavit of Eloise Peterson].

Obviously, Mrs. Peterson's severe alcoholism and poly-substance abuse problems left her in no better shape to care for herself than for her children. Appallingly, she made not even a pretense of attempting to conceal her lifestyle from her children. As Sharmin recalls,

> My mother was always drunk or high on drugs. She sometimes used to walk around the house naked when she was like this. I've seen her smoke pot, shoot up T's and snort cocaine.... It seemed like she needed a joint just to wake up in the morning.

[Affidavit of Sharmin Peterson Howard]. What is even more appalling, however, is that Eloise Peterson not only made no attempts to conceal her drug use from her children, but she also, as will be discussed in detail, actively involved them in the use and sale of drugs.

Given not only his genetic predisposition to alcohol and substance dependency, but the environment in which he grew up, it would have been a virtual miracle had Derick Peterson not developed his own severe alcohol and substance dependency disorders. As was certain, Derick did, in fact, very early on become dependent on and addicted to alcohol and drugs. His home environment, from infancy, was one in which taking a drug was as developmentally preordained as learning to talk or walk. An infant learns from his environmental cues, and Derick Peterson's cues were that alcohol and substance abuse was not only expected but was socially required

behavior. Derick Peterson effectively had no choice in the matter: the course already embarked upon before his birth was carved in granite before he even reached adolescence.

The tender age at which Derick began using alcohol and drugs is utterly shocking, although not surprising, given what we now know. Derick began regularly drinking to the point of inebriation before he was seven years old. He was expected to. His grandfather brewed a potent beer in his home, and Derick and his friends freely sampled the brew. As a childhood friend of Derick's recalls:

> Derrick and I and other guys we hung around with were into drinking and drugs from an early age. Derrick and I first started experimenting with alcohol around 7 or so. It was real easy for us to get, especially at Derick's house. His mother always drank, and always had liquor sitting around the house. We started early drinking Derick's Grandfather's home brew, which he always had making at his house. That was pretty fierce stuff, like a really strong home-made beer, and one cup of it would just about knock us out. By the time we were 9 or 10, we were always drunk, even at school. Me, Derrick, and a couple of our friends were actually suspended in the sixth grade for bringing beer and whiskey on the school bus.

[Affidavit of Yusef Ahmad Mustafa, App. 17]. This type of behavior was, of course, not only condoned by the adults in Derick's life, but was encouraged.

Full blown alcoholism by the age of nine was, predictably, closely followed by an emerging and rapidly accelerating pattern of substance abuse combined with the continual use of alcohol:

> We learned about sniffing glue when we were about 10, from older kids in the neighborhood

> who we hung out with. They taught us to buy model airplane glue, put it in the bottom of a brown paper bag, and hold the bag over our nose and mouth. Derrick and I liked it, and spent about 2 years with our noses in the bag. We sniffed it all the time during that period, sometimes so much that we couldn't remember anything we'd done for long periods of time. I remember once, when we were about 12, waking up in a boat floating out off the pier after sniffing glue all day. I had no idea where I was, or how I'd got in that boat. This was especially scary for me, because I can't swim and am scared to death of the water.... After a while, when the stores got wind of why kids were buying so much glue, they took it off the shelves and it got harder and harder to get. Derick and me started sniffing lighter fluid then when we couldn't get glue. We'd soak an old sock in it, and put the sock in the bottom of a plastic bread bag. We couldn't get as high from it as we did from the glue, though, and it would give us terrible headaches. We also started smoking reefer about this time, when we were 11 or so, and would smoke reefer while drinking and hitting the bag.

[Id.].

Derick's access to drugs was facilitated by his mother: starting in his early youth, Eloise Peterson ran what were referred to in the community as "shot houses," illegal establishments where the patrons could purchase bootleg alcohol and a variety of narcotics which they would consume on the premises. Derick lived in and worked at his mother's "shot houses."

> When we were in 6th or 7th grade, Derick and I started hanging around his mother's shot house. We'd pick up a few bucks working for her, and we could drink all the liquor we wanted. It was at the shothouse that we got our first taste of real drugs. Eloise, Derick's Mom, sold just about any kind of drug anything you could think of-- smack, cocaine, T's [Talwin], Bam [preludin], you name it. Her customers would buy it from her at the shot house and then take it next door to an

> empty house that she had and shoot up. Me and Derick were fascinated by the whole process, and would hang around the house watching guys shoot up.

[Id.].

The effect of Derick's exposure to his mother's "business" was predictable enough:

> Me and Derick were shooting up regularly by the time we were 12 or 13. We started off shooting T's or T's and Blues [Talwin, Talwin and Benadryl]. I already knew how to shoot myself up from watching my sisters do it, but Derick would have to get the men hanging around his Mom's place to do him, until he learned how to do it himself. T's were real cheap then, about 75 cents a pop, so we could stay high all day for about $2. We'd also do other stuff when we could get it, like Bam [Preludin], Valium, and anything else we could get. At first we'd shoot up 2 or 3 times a day, for a couple of days in a row, and then try to take a couple of days off, because we were both worried about getting habits. After a while, though, it got harder and harder to take those days off-- we'd get real sick, shaking and puking, and would have to do more just not to be sick. Before long we were doing it everyday, all day.

[Id.].

To support his drug habit, Derick sold drugs for and at his mother's direction and under her control:

> When I knew him, Derick was helping his mother run the shot house. When she had a large stash to sell, she would front some of it to Derick, and let him keep any thing he made over the amount she wanted out of it. Derick would take his profit either in cash or drugs. Sometimes Derick would give her nothing back, and Eloise would get real mad.

[Affidavit of Rodney Bernard Irving, App. 16].

Thus, by the age most young men are emerging from puberty into

young manhood, Derick Peterson was, through no fault of his own, addicted to heroin and cocaine:

> When we were about 15, we started experimenting with heroin and cocaine. I liked to do just heroin, but Derick liked to mix it with coke, when we could get it, to make speedballs. There was smack on the street then called Thriller from Manilla that was some of the most potent heroin that there probably ever was. People who got strung out on Thriller were wasted; after a while, their skin would fade and they'd get all pasty and white.

[Affidavit of Yusef Ahmad Mustafa]. At the age most young men's lives are just beginning, Derick Peterson's life was insiduously consumed by drugs:

> I went to Norfolk for about 6 months when I was 16 or 17, and when I came back Derick and the guys we hung out with were so strung out that they couldn't do anything else. Their whole lives were doing drugs and getting money to do drugs. They'd wake up and first thing hit up T's, or T's mixed with heroin, then go to a shot house and hang out. All the time they were hitting up, they were also drinking-- corn liquor and beer, mostly-- and smoking reefer.

[Id.].

b. David Peterson's Twenty Year Old Body and Fifteen Year Old Mind Were Not Fully Culpable

The debilitating effects of this sort of substance abuse, particularly when beginning at such an early age, are so obvious as to hardly need further exposition. For example, school records reflect that Derick Peterson functioned in school at a level five years below his age. The opinion of a Doctor of Pharmacology who evaluated Mr. Peterson's substance abuse history, however, highlights the extraordinariness of Mr. Peterson's case:

> It is obvious that Mr. Peterson has a severe alcohol and drug problem.... [T]his is not surprising due to the familial history of substance abuse. This problem existed at the time of the offense in 1982, and clinically is referred to as psychoactive polysubstance abuse disorder. The range of substances abused is wide and each group of drugs has their own long term and short term toxicities....When any of these drugs are used at the same time, an effect called synergism occurs. Synergism is defined as "the joint action of agents so hat their combined effect is greater than the algebraic sum of their individual effects." That means that instead of an additive effect of the drugs taken together, a multiplication of the effects is seen.... In other words, a person would be less able to make sound judgments, or may have memory deficits, or be less able to make long term plans. These problems would be exacerbated during periods of active intoxication and substantially increased in a person with preexisting organic damage. It is important to understand that after a long standing abuse, chronic [OBS] does not disappear. Its behavioral manifestations may lessen, but additional abuses will continue the process of deterioration.... There never appeared to be a time in Mr. Peterson's life (after his early teens) that he was not intoxicated....

[Report of Dr. James Voris].

The deplorable facts of Derick Peterson's life can speak for themselves. When the consequences of these facts are interpreted and explained by experts, however, the conclusions are inescapable: Derick Peterson is not and was not responsible for his actions.

As the mental health professionals who have examined him have unanimously concluded, Mr. Peterson's pre-existing organic brain damage was compounded by his inescapable abuse of alcohol and drugs. [See generally Apps. 1-3] Moreover, the effects of alcohol and drugs are exacerbated in people with organic brain conditions

such as Derick Peterson's. [Id.]. As a practical matter, Mr. Peterson was unable to control his actions, appreciate their consequences, or comprehend their results. As a moral matter, Mr. Peterson was not and cannot be held responsible for those actions to the same degree as other persons.

Dr. Bob Rollins, M.D., the chief of Forensic Services for the State of North Carolina, a psychiatrist who normally testifies for the state in the criminal courts of North Carolina, has examined Derick Peterson. His conclusions are that Derick Peterson was severely disabled at the time of the offense:

> Mr. Peterson was convicted of capital murder and sentenced to death for the 1982 murder of an individual that occurred during the robbery of a grocery store in Hampton, Virginia. Mr. Peterson was 20 years old at the time, but, emotionally and intellectually, was much younger. Mr. Peterson's preordained and chronic substance abuse and his organic brain damage, in my opinion, which I hold to a reasonable degree of medical certainty, would have significantly impaired his judgment and impulse control, his ability to intend and comprehend the consequences of his acts, and his ability to develop and follow through on an intentional, culpable, and rational course of conduct at the time of the offense...

[Affidavit of Dr. Bob Rollins]. Dr. Rollins, who has extensive legal experience as the result of his role as a forensic psychiatric examiner for the state, also expressed opinions regarding the legal ramifications of Mr. Peterson's condition -- Derick Peterson was basically incapable of capital murder:

> Capital murder in Virginia must be "willful, deliberate, and premeditated." Mr. Peterson's brain damage which existed in February of 1982, when combined with poly-substance abuse, would have so reduced his ability to plan and

> premeditate that I do not believe that he possessed the requisite mental state for capital murder at the time of the offense, or at the time of other offenses [during] this time period. Furthermore, even assuming he could be found guilty of capital murder, this combination of mentally debilitating factors satisfies the criteria for a number of mitigating circumstances. For example, it is my opinion that at the time of the offenses... Mr. Peterson was under the influence of an extreme mental or emotional disturbance and that his capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired. In short, Mr. Peterson did not in 1982 possess the ability to think strategically and logically in stressful situations, to understand the long term consequences of his actions, or to properly control his impulses. His ability rationally to plan his conduct was virtually nil. Without regard to how Mr. Peterson's mental makeup may have affected his actions at the time of the capital offense, his tragic upbringing, documented clinical history of brain impairment, and psychiatric deficiencies provide significant evidence in mitigation of punishment which was available upon a proper mental examination being conducted at that time.

[Id.].

Dr. Vorhis also expressed an opinion with regard to the effects of Derick Peterson's disorders on his culpability:

> It is my opinion, which I hold to a reasonable degree of certainty in my profession, after considering Derick Peterson's chronic abuse patterns which existed on February 7, 1982, that Mr. Peterson's ability to think, plan, premeditate, and deliberate were severely compromised, as was his ability to appreciate the long term consequences of his acts. He would, as a result of his drug and alcohol dependence and abuse, have been likely to engage in impulsive behavior. Furthermore, due to the extent of his addiction and the amount of drugs he was abusing in February of 1982, Mr. Peterson would have had difficulty

> conforming his conduct to the requirements of the law.

[Report of Dr. James Vorhis].

Here, imposition of the death penalty hinged upon the finding that Mr. Peterson posed a threat of future dangerousness to the community. Dr. Rollins' studied opinion also sheds light on the incorrectness of that finding and, consequently, the impropriety of the sentence of death:

> The sentencing jury based its death verdict on a finding that there was "a probability that Mr. Peterson would commit criminal acts of violence that would constitute a continuing threat to society." My evaluation, and Mr. Peterson's history, does not support this finding. While there was evidence that Mr. Peterson committed this offense as well as several additional robberies in a several week period in 1982, he had no[] other adult convictions. During a prior juvenile incarceration at Hanover when he was 15 years old, Mr. Peterson did quite well. In fact, Mr. Peterson reports that he did not want to leave the institution and return home. My evaluation did not reveal evidence that he satisfies the criteria for a serious continuing threat to society. I base this assessment not only on my evaluation but also by comparing him with the thousands of inmates and persons charged with and convicted of violent criminal offenses whom I have examined during my tenure as director of clinical services for the State of North Carolina. While Mr. Peterson is a person of very limited abilities, if not under the influence of drugs, he poses no significant threat to society.

[Report of Dr. Bob Rollins].

Of course, many, many people convicted of serious crimes have significant histories of alcohol and substance abuse. The degree to which the voluntary consumption of drugs lessens culpability varies from case to case. In Derick Peterson's case, however, it

is crucial to remember that his drug and alcohol abuse decidedly was not voluntary: he was addicted to alcohol at birth, genetically predisposed to substance dependence, and literally programmed all of his life to consume drugs. Derick Peterson simply had no choice: his fate was inescapable.

This case is a tocsin of the future: everyday we read the alarming statistics about babies born addicted to cocaine-- "crack babies" -- and learn that those children are irrevocably damaged from birth. We know that those children need help, will need help all of their lives just to survive, and our society rallies to their cause. No one suggests that these innocent children should be eliminated, or otherwise punished because of the unfortunate circumstances of their births. It is appalling that anyone should now suggest that Derick Peterson be eliminated because of the ill-fated circumstances of his birth and life. In the sense that he was wholly without fault with regard to his preordained organic brain condition and substance abuse disorders, Derick Peterson is, too, and innocent babe, and desperately needs the same kind of assistance. He can and should receive the type of assistance he needs in the state prison system. To eliminate Derick Peterson because of what his mother, society, and nature did to him would be an affront to common notions of decency, and a gross repudiation of our accepted principles of justice. If Mr. Peterson's is not an appropriate case for the exercise of mercy, no case can ever be. Clemency should be granted to avoid a gross miscarriage of justice.

III

Mr. Peterson Would Not Have Been Convicted and Sentenced to Death But For The Unprofessional, Unethical, and Incompetent Performance of His Trial Counsel

a. Counsel's Conflicting Loyalties, and His Unethical Choice Between Those Loyalties, Precluded the Presentation of True Facts to the Jury and Resulted in the Presentation of False Evidence

As discussed at length in the preceding sections, any reasonable investigation into Derick Peterson's background and upbringing leads, and would have lead, directly to Eloise Peterson as the source of his tragically profound mental problems and the cause of his troubled life. As previously related, everyone who knew Derick Peterson and his mother readily discuss and would have testified to the fact that Eloise Peterson was an alcoholic drug dealer, and that her son was her most accessible and defenseless prey since his conception. She narcotized him in her womb, she narcotized him in his crib, she narcotized him in his school, and then she made him into her employee. She beat him, she neglected him, and she doped him.

The conditions under which Derick Peterson was raised formed the mentally disabled twenty year old the jury saw, and those conditions were highly relevant to both guilt/innocence and sentencing issues. See, e.g., Essex v. Commonwealth, 322 S.E.2d 216,220 (Va. 1984)("The defendant may negate the specific intent requisite for capital or first-degree murder by showing that he was so greatly intoxicated as to be incapable of deliberation or premeditation."); Parker v. Dugger, 111 S.Ct. 731, 737 (1991)("[A] difficult childhood, including an abusive, alcoholic father," is mitigating evidence, as is intoxication at the time of the

offense.).

The reasons which precluded Derick Peterson's attorney from presenting evidence regarding Eloise Peterson and her effect on Derick's life are simple, yet troubling. As discussed, Eloise Peterson was and is addicted to controlled substances. She is a dealer; she has made her living selling drugs. She has been charged with drug and alcohol related violations -- including selling drugs -- many times, including being charged with the illegal sale of narcotics shortly after Derick's arrest.

At the time of Mr. Peterson's trial and sentencing, and while his mother was testifying, she was being represented, on the drug sale and other matters, by Charles Huffman. Charles Huffman also represented Mr. Peterson. Furthermore, Mr. Huffman was paid by Eloise Peterson to represent Eloise Peterson with respect to her criminal charges, and Mr. Huffman was paid by Eloise Williams to represent Mr. Peterson with respect to his capital charges. [See Apps. 6-7].

Thus, trial counsel put himself in a position in which he could not even consider presenting evidence regarding the relationship between Eloise Peterson and her son, and her son's problems. He could not ethically present evidence that his client, Eloise Peterson, destroyed his client, Derick Peterson. He could not present evidence that she ran a shot house and sold drugs, that she had for years, and that she had exposed Derick to and enmeshed him in this criminal milieu.

This "straitjacket" contributed not only to the jury's finding

that Derick Peterson would constitute a continuing threat to society, and that therefore death was the appropriate punishment, but also to the jury's finding of guilt. Counsel could offer no reason for Mr. Peterson's entanglement with the juvenile justice system, which was without question the product of Eloise and her corrupting influence, or for Derick's commission of those crimes, evidence of which was introduced at sentencing. A proper mental health evaluation of Derick Peterson -- which necessarily required an investigation into his background[3]-- would have (and has, as

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[3]Because "[i]t is often only from the details in the history that organic disease may be accurately differentiated from functional disorders or from atypical lifelong patterns of behavior," R. Strub & F. Black, Organic Brain Syndromes 42 (1981), an accurate and complete medical and social history has often been called the "single most valuable element to help the clinician reach an accurate diagnosis." H. Kaplan & B. Sadock, Comprehensive Textbook of Psychiatry 837 (4th ed. 1985).It is well recognized that the patient is often an unreliable and incomplete data source for his own medical and social history. "The past personal history is somewhat distorted by the patient's memory of events and by knowledge that the patient obtained from family members." H. Kaplan & B. Sadock, 488. Accordingly, "retrospective falsification, in which the patient changes the reporting of past events or is selective in what is able to be remembered, is a constant hazard of which the psychiatrist must be aware." Id. Because of this phenomenon,

> [I]t is impossible to base a reliable constructive or predictive opinion solely on an interview with the subject. The thorough forensic clinician seeks out additional information on the alleged offense and data on the subject's previous antisocial behavior, together with general "historical" information on the defendant, relevant medical and psychiatric history, and pertinent information in the clinical and criminological literature. To verify what the defendant tells him about these subjects and to obtain information unknown to the defendant, the clinician must consult, and rely upon, sources other than the defendant.

discussed throughout this application) revealed at the very least that Derick Peterson was not eligible for a death sentence because he was not a continuing threat to society. Indeed, a proper investigation of Derick Peterson's life, in combination with a properly conducted mental health evaluation, would have provided a defense to the crime. In the thick of such an investigation, however, and central to any mental health evaluator's accurate diagnosis of Derick Peterson, is Derick's mother, Eloise.

Eloise Peterson had done nothing to help her son. As extensively discussed in sections I and II, Eloise was the source of Mr. Peterson's problems from the womb to his capital trial. We know that Huffman was aware of Eloise's proclivities at least as early as the year before the offenses in this case -- he was her attorney. Specifically he represented her with respect to the following charges, in one city alone: a.) felony possession of a controlled substance on April 21, 1981; b.) felony possession of a controlled substance on May 15, 1991; c.) malicious wounding on May 12, 1981; d.) possession of marihuana on May 12, 1991, e.) possession of a controlled substance; f.) maintaining a house of common nuisances; g.) another charge of possession of a controlled substance charge; h.) another charge of possession of

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Kaplan & Sadock at 550; American Psychiatric Association, "Report of the Task Force on the Role of Psychiatry in the Sentencing Process," Issues in Forensic Psychiatry 202 (1984); Pollack, Psychiatric Consultation for the Court, 1 Bull.Am.Acad.Psych. & L. 267, 274 (1974); H. Davison, Forensic Psychiatry 38-39 (2d ed. 1965).

a controlled substance, and i.) a reckless driving charge. All of these charges arose when Derick was 18 years of age.

In the Fall of 1981, Eloise was arrested for selling drugs, and six gallons of whiskey were confiscated from her home. She was represented by Hoffman. She freely admitted to running a shot house.

On February 11, 1982, Mr. Peterson was arrested. On February 18, 1982, Eloise was arrested for selling Talwin, a pain killer and controlled substance. Huffman represented her. On April 29, 1982, she was arrested for threatening witnesses during Derick's preliminary hearing. Huffman represented her on the charge.[4] He also represented Mr. Peterson at the hearing. She served a jail sentence between this time and the time of trial, and, shortly before she testified at her son's trial, she was released from the Newport News jail. Charles Huffman represented her on the charges leading to the jail sentence. [Apps. 6-7].

Notwithstanding his intimate knowledge with respect to his client Eloise Peterson's criminal proclivities, Huffman actually argued to the Court during Derick Peterson's sentencing that his client Eloise Peterson had tried the best she could to raise his

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[4]This incident was widely reported in the press, and most certainly did not advance any cause of Petitioner's. It must be assumed that the judge that tried Mr. Peterson's case was aware of Mr. Peterson's mother's actions, and Mr. Huffman's representation of her, and this notice of a conflict of interest should have triggered an inquiry.

Furthermore, because of the disturbance caused by Eloise at the preliminary hearing, Huffman agreed to a line-up for Petitioner at which witnesses could identify him, which led to testimony against Petitioner at trial.

other client, Derick Peterson. According to Huffman, "his [the client, Derick's] mother [the other client], who works, is trying to do the best she can to bring him up." Sentencing, September 24, 1982, p.23. The work she did was sell alcohol and drugs. The "bringing up" she did was to show Derick how to use alcohol and drugs. We know this now. Mr. Huffman, too, had to have known that, but his hopelessly entangled loyalties prevented him from telling the jury.

Had Huffman told the facts about his client, Eloise Peterson, he would have inculpated her in a series of illegal actions for which she could have been charged, convicted, and sent to prison. An attorney without divided loyalties would have, indeed, would have been ethically required to, made the choice to reveal the horrible abuse, neglect, and drug use inculcation that filled Derick Peterson's "bringing up" by Eloise Peterson. Eloise' attorney, however -- whose job it was to downplay her criminal conduct -- could not do that. As a result, the jury was not only prevented from learning the true facts about Derick Peterson-- that he was severely damaged, and that that damage was directly caused by his mother-- but were in fact told false facts-- that Eloise had 'tried her best,' but that her son had 'turned out bad' anyway.

In addition, Eloise Peterson paid Charles Huffman, not just to represent her, but also to represent her son Derick. Thus, at Derick's trial for his life, his attorney was representing Derick's mother with respect to serious drug charges, and she was paying the attorney to represent Derick. She was in effect paying attorney

Huffman to conceal the true facts from Derick's jury, facts which although helping him, would have incriminated her, the bill-payer. This not only directly contributed to Mr. Peterson's conviction and sentence of death, but also violated his constitutional right to counsel, and destroyed <u>any</u> reliability which might have otherwise been attributed to the guilt and sentencing determinations.

Mr. Peterson's Sixth Amendment right to counsel was violated because his attorney suffered from at least two conflicts. First, Mr. Huffman had represented and was representing Mr. Peterson's mother, and knew that she had a substantial history of charges with respect to possessing and selling drugs, and running a shot house. Second, Huffman was being paid by Eloise to represent Derick.

This was plainly unethical attorney conduct, as the affidavit of one of this country's foremost experts in legal ethics, especially under Virginia law, opines:

> 5. The affiant is familiar with the facts...indicating serious psychological and physical harm caused the Petitioner by his mother, Eloise Peterson, and facts indicating that Eloise Peterson's lawyer, Charles Huffman, was employed by Eloise Peterson to represent the Petitioner on the charge of capital murder that is here at issue while he at the same time represented the Petitioner's mother, who was paying him in both employments, on a succession of criminal charges.
>
> 6. In the affiant's opinion, as a lawyer who has devoted his scholarly life primarily to legal ethics, and as a teacher who is consulted on questions of professional responsibility in the Commonwealth of Virginia and elsewhere, Mr. Huffman's representation of both the Petitioner and the Petitioner's mother, and his situation in being employed by the Petitioner's mother to defend the Petitioner, i) were violations of the Virginia

Code of Professional Responsibility, ii) fall below the standards of behavior of Virginia lawyers in acting as defense counsel in serious criminal cases, and iii) significantly impaired Mr. Huffman's ability to provide an adequate defense for the Petitioner. More specifically:

6.(a) Disciplinary Rule 5-101(A) of the Virginia Code of Professional Responsibility imposes, as a matter of discipline, the rule that "a lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interests. . . " Mr. Huffman's long association with the Petitioner's mother, his continuing association with and representation of her during and after his representation of the Petitioner, and his business interest both in retaining Eloise Peterson's as a client and in collecting the fees she had undertaken to pay for the Petitioner's defense, constitute an impairment of professional judgment of the sort this Virginia disciplinary rule forbids. The required standard of practice in Virginia is reflected in the last sentence in Ethical Consideration 5-23 of the Virginia Code of Professional Responsibility: "Since a lawyer must always be free to exercise his professional judgment without regard to the interests or motives of a third person, the lawyer who is employed by one to represent another must constantly guard against erosion of his professional freedom." In the opinion of the affiant, Mr. Huffman did not guard against the erosion of his professional freedom, as this rule requires, and therefore did not provide adequate representation to the Petitioner.

6(b). Disciplinary Rule 5-106(A) and (B) impose, as a matter of discipline, the rules that "[A] lawyer shall not . . . accept compensation for his legal services from one other than his client [or] . . . permit a person who recommends, employs, or pays him to render legal services for another to direct or regulate his professional judgment in rendering such services." This rule allows payment of fees by a person other than the client only if the client is fully informed and freely consents to such an arrangement. It is obvious from the facts of this case that

Mr. Huffman could not explain to the Petitioner the reasons he might seek such consent from the Petitioner, since to do so would have been significantly disloyal to his other client, Eloise Peterson, and would have involved violation of his duty of confidentiality as to what Mr. Huffman knew of Eloise Peterson's criminal activities and her treatment of the Petitioner when he was dependent on her. The standard of conduct imposed by law on a defense lawyer in Virginia required that Mr. Huffman withdraw from representing the petitioner, since he could not carry out the representation in the manner described in Ethical Consideration 5-1 of the Virginia Code of Professional Responsibility: "The professional judgment of a lawyer should be exercised, within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties."

6(c). During the representation, and setting aside the issue of whether Mr. Huffman should have undertaken the employment Eloise Peterson offered him in this case, his continuing behavior in this case fell below the standards imposed on Virginia lawyers and impaired his defense of the Petitioner: When one client employs a criminal defense lawyer to defend another client, the minimum standards for defense lawyers in Virginia, as the Commonwealth's disciplinary rules indicate, is refusal to follow the direction of the third person who pays the lawyer's fee: The rule as to refusal is reflected in Ethical Consideration 5-21 of the Virginia Code of Professional Responsibility: "The obligation of a lawyer to exercise professional judgment solely on behalf of his client requires that he disregard the desires of others that might impair his free judgment."

6(d). The minimum standard described in paragraph "6(c)", above, as to the conduct of the defense where a third person pays the defense lawyer's fee, requires more than refusal to follow the direction of the third person who is paying. It also requires that the lawyer inquire carefully into any circumstances that might give rise to third-person pressure. Ethical Consideration 5-21 of the Virginia Code of Professional Responsibility provides: "The desires of a third person will seldom adversely affect a

> lawyer unless that person is in a position to exert strong economic, political, or social pressures upon the lawyer." The Virginia standard is that the lawyer who has allowed a third person to pay for his services call those sources of influence to mind and make an independent professional judgment as to their effect on his work for his client: "These influences are often subtle, and a lawyer must be alert to their existence. A lawyer subjected to outside pressures should make full disclosure of them to his client"--which means, of course, that the lawyer has first located and described the influences for himself--"and if he or his client believes that the effectiveness of his representation has been or will be impaired thereby, the lawyer should take proper steps to withdraw from representation of his client." Mr. Huffman did not undertake the analysis required by this Virginia rule; did not therefore discover third-party influences that impaired his representation of the Petitioner and therefore did not provide adequate representation in this case.

[Affidavit of Thomas L Shaeffer, App. 5].

The Sixth Amendment right to the effective assistance of counsel includes two correlative rights: the right to counsel of reasonable competence, McMann v. Richardson, 397 U.S. 759, 770-71 (1970), and the right to counsel with undivided loyalty. Wood v. Georgia, 450 U.S. 261 (1981); see also Mannhalt v. Reed, 847 F.2d 576 (9th Cir. 1988); Hoffman v. Leeke, 903 F.2d 280 (4th Cir. 1990). The concern is that when an attorney has a relationship with a current or former client who is connected in some way to the other client's case, that attorney "may not ... pursue[] their [other client's] interests single-mindedly." Wood, supra, 101 S.Ct. at 1103. For example, "[a]n actual conflict exists if counsel's introduction of probative evidence or plausible arguments

that would significantly benefit one defendant would damage the defense of another defendant whom the same counsel is representing." Baty v. Balkcom, 661 F.2d 391, 395 (5th Cir. 1981). That is precisely what occurred here: Mr. Peterson's attorney "chose between possible alternative courses of action such as eliciting or failing to elicit evidence helpful to [Derick] but harmful to [Eloise]." Porter, supra, 805 F. 2d at 939.

Huffman knew that Eloise had a significant arrest record for drugs and other offenses. He knew that she had served time for drugs -- he represented her in all the cases. He knew that she had been charged with running a house as a public nuisance, i.e., a shot house. This was what he knew simply from public information. He also knew a significant amount of information from privileged communications with Eloise Peterson. He knew information that would be helpful to Derick, but harmful to Eloise.

Worse, Eloise paid Huffman to represent Derick. This practice is fraught with peril. An attorney's actions should not be tempered by whether he or she is pleasing the person paying for the employment:

> Courts and commentators have recognized the inherent dangers that arise when a criminal defendant is represented by a lawyer hired and paid by a third party particularly when the third party is the operator of the alleged criminal enterprise. One risk is that the lawyer will prevent his client from obtaining leniency by preventing the client from offering testimony against his former employer or from taking other actions contrary to the employer's interest.

Wood, supra, 101 S.Ct at 1102. Huffman's job with respect to

sentencing was to obtain leniency for Derick. Actions he could have taken which would have been adverse to Eloise's interest include portraying her as a drunken, child abusing, drug pandering, runner of a drug house in which Derick was raised and taught to abuse controlled substances. That, however, would have been adverse to Eloise's interest -- she would have been immediately arrested -- and/or it would have involved the disclosure of attorney-client privileged information. She also would have failed to pay Hoffman's bill.

An actual conflict of interest exists when defense counsel performs in an atmosphere which is "inherently conducive to divided loyalties." Zuck v. Alabama, 588 F.2d 436, 439 (5th Cir. 1979). "In a case of joint representation, the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing." Holloway v. Arkansas, 435 U.S. at 490 (emphasis in original). Huffman refrained from even thinking about blaming Eloise for Derick's predicament, and she paid him for that service to Derick. The resulting conviction and sentence is irrevocably tainted, and that taint can only be removed through exercise of the clemency power.

b. Counsel's Performance at Trial Was Constitutionally and Professionally Inadequate, Irrespective and Independent of the Conflict of Interest Under Which he Operated, and Deprived Mr. Peterson of his Constitutional Rights to the Effective Assistance of Counsel and a Fair and Reliable Trial and Capital Sentencing Determination

Derick Peterson, a twenty year old black male, was charged with killing a white male during the course of a robbery in Hampton, Virginia. He was convicted of capital murder and

sentenced to death in a trial that lasted one day.[5] No pre-trial motions were filed. Counsel did not submit any proposed voir dire questions[6], and the entire jury qualification and selection process lasted just a few minutes (three pages of transcript). Counsel presented no evidence at the guilt-innocence phase of the trial, and the entire case in mitigation at the sentencing phase of the trial lasted approximately ten minutes. The only witness counsel called was petitioner's mother, and her testimony, as discussed previously, was false.

Thus the jury that convicted Derick Peterson of capital murder and sentenced him to death knew virtually nothing about his history and background. Part of what they knew-- i.e., that Derick's mother was a hard working woman who did the best she could-- was absolutely false. The jury also heard no expert evidence regarding Derick's mental state at either phase of his capital trial. In fact, counsel never sought the services of any expert witness to conduct a psychiatric evaluation. As a result of these and other omissions, Derick Peterson was deprived of a wealth of mitigating information, information which would have demonstrated that he was

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[5]That was all the time the trial judge believed petitioner's case warranted. At one point in the sentencing phase of the trial the trial judge stated that "we just about got to finish tonight." Tr. 218.

[6]For example, despite the fact that petitioner was black and the victim in this case was white, counsel did not request a voir dire question as to whether any members of the jury panel might harbor any racial bias. Turner v. Murray, 476 U.S. 28 (1986). Such questions could have been very useful in this case, as the only three persons sentenced to death in Hampton in the modern era of capital punishment have been black.

not guilty of capital murder and thus was ineligible for the death penalty. Derick Peterson's conviction and death sentence are thus fundamentally and fatally unreliable.

The jury that sentenced Derick Peterson to death did not know the truth about his life with his mother, Eloise Peterson. The jurors were not informed that she was a chronic alcoholic and drug addict, who provided Derick Peterson with drugs and alcohol from the time he was a small child. The jurors did not know that she neglected, abandoned and abused Derick. The jurors did not know that he was severely addicted to drugs and alcohol at the time of the offense. The jury did not know that Derick Peterson is brain damaged and has been since birth. The jury did not know because trial counsel did nothing to reveal that information and inform the jury of it.[7] Counsel failed to take even the most rudimentary of steps required in a capital case. He never asked any mental health professional of any kind to evaluate Derick. Thus, compelling and overwhelming evidence in mitigation of punishment went undiscovered and unpresented. As a result of the jury's failure to know these critical facts, Derick Peterson's conviction and death sentence are unreliable.

The United States Constitution guarantees a criminal defendant the right to be represented by counsel. This right is the most basic component of our criminal justice system. See U.S. Const.

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[7]As discussed in the preceding section, a primary reason for the breakdown of the truth seeking process at Mr. Peterson's trial and capital sentencing proceeding was the conflict of interest under which trial counsel operated.

amend. VI. The decisions of the United States Supreme Court have repeatedly emphasized the "fundamental" role of counsel to a fair trial. See, e.g., United States v. Cronic, 466 U.S. 648 (1984); Argersinger v. Hamlin, 407 U.S. 24, 31 (1972); Gideon v. Wainwright, 372 U.S. 335, 343-44 (1963). The basic theme of these cases is that counsel is the means through which other rights of the person on trial are secured. Cronic, 466 U.S. at 653; see also United States v. Ash, 413 U.S. 300, 307 (1973) (counsel serves as a "guide through complex legal technicalities"). It is for this reason that our system of criminal justice presumes that counsel will act as an accused's forceful and undivided advocate. Anders v. California, 386 U.S. 738 (1967). The right to counsel, of course, incorporates the right to the effective assistance of counsel. Strickland v. Washington, 446 U.S. 668 (1984).

Trial counsel's role in a capital sentencing proceeding is comparable to counsel's role at trial, i.e., to ensure that the adversarial process works to produce a just result. Strickland v. Washington, supra. One of an attorney's principal duties in a capital case is "to make a reasonable investigation or to make a reasonable decision that makes particular investigations unnecessary." Strickland, 466 U.S. at 668; see also Darden v. Wainwright, 478 U.S. 1036 (1986) (counsel not ineffective where he engaged in extensive pre-trial preparation and investigation for the penalty phase of defendant's trial). In a capital case, investigation of, preparation for, and presentation of the mitigation case at the penalty phase is in many cases a much more

critical task than is preparing for the guilt-or-innocence phase. Guilt is frequently a foregone conclusion. Whether the accused lives or dies, however, is not.

The United States Supreme Court's decisions have stressed the paramount importance of providing the sentencer with the fullest information possible concerning the defendant's life and characteristics. Lockett v. Ohio, 438 U.S. 586 (1978); see also Jurek v. Texas, 428 U.S. 262, 276 (1976)(sentencer must have before it all possible relevant information about the individual defendant whose fate it must determine). The reasoning behind this Eighth Amendment principle is self-evident. An individualized decision is essential in capital cases in order to insure that each defendant is treated "with that degree of respect due the uniqueness of the individual." Id. at 605. In a capital sentencing proceeding before a jury, "the jury is called upon to make a `highly subjective, unique, individualized judgment regarding the punishment that a particular person deserves.'" Turner v. Murray, 476 U.S. 28 (1986) (quoting Caldwell v. Mississippi, 472 U.S. 320 (1985)). It is essential, therefore, that the sentencer consider "those compassionate or mitigating factors stemming from the diverse frailties of humankind." Woodson v. North Carolina, 428 U.S. 280, 304 (1976). The sentencing body's failure to consider mitigating evidence creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty. Id.; see also Skipper v. South Carolina, 476 U.S. 1 (1986) (State's exclusion of evidence regarding adjustment to

prison violated Eighth Amendment); Eddings v. Oklahoma, 455 U.S. 104 (1982) (sentencers' failure to consider evidence of turbulent family history violated Eighth Amendment).

Underlying Lockett and Eddings is the principle that punishment should be directly related to the personal culpability of the criminal defendant. If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse." California v. Brown, 479 U.S. 538, 545 (1987) (concurring opinion).

In Tison v. Arizona, 481 U.S. ___, 107 S.Ct. 1676 (1987), the Court stated that a "critical facet of the individualized determination of culpability required in capital cases is the mental state with which the defendant commits the crime." 107 S.Ct. at 1687. The Court has continually recognized the importance of the defendant's mental state when determining the severity of the punishment. See, e.g., Enmund v. Florida, 458 U.S. 782 (1982); Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586 (1978). "Because the individualized assessment of the appropriateness of the death penalty is a moral inquiry into the culpability of the defendant," California v. Brown, 479 U.S. 538, 542 (1987) (O'Connor, J., concurring), evidence of a defendant's mental debilities is an important, relevant and compelling

mitigating circumstance which must be adequately explored by defense counsel. This emphasis is also reflected in the Virginia Capital Sentencing Complex: several of the statutory mitigating circumstances relate to the defendant's mental state at the time of the offense.[8]

In recognition of these principles, and against the backdrop of the Sixth Amendment guarantee of the effective assistance of counsel, courts have carefully scrutinized trial counsel's investigation, development and presentation of mitigating evidence in capital cases. For example, in Curry v. Zant, ___ Ga. ___, 371 S.E.2d 647 (1988), the Georgia Supreme Court determined that trial counsel's failure to obtain an independent psychiatric evaluation of his client constituted ineffective assistance of counsel. At trial, Curry pled guilty to capital murder and was sentenced to death. Two psychologists testified at Curry's state habeas evidentiary hearing that he did not have the ability to waive his constitutional rights (thus making the plea unacceptable), and that he was either incapable of distinguishing right from wrong or incapable of controlling the impulse to commit wrongful acts. The court recognized that trial counsel was personally dedicated to Curry, but nevertheless determined that the failure to meaningfully explore expert mental health assistance was unacceptable. The court stated:

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[8]See Virginia Code §19.2-264.4(B)(ii)(iii)(vi) (defendant was under the influence of extreme mental or emotional disturbance; capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired) (mental retardation).

> Conscientious counsel is not necessarily effective counsel. The failure to obtain a second opinion, which might have been the basis for a successful defense of not guilty by reason of insanity and would certainly have provided crucial evidence in mitigation, so prejudiced the defense that the plea of guilty and the sentence of death must be set aside.

Id., 371 S.E.2d at 649; see also Wilson v. State, 771 P.2d 583 (Nev. 1989).

Similarly, in Stephens v. Kemp, 846 F.2d 642 (11th Cir. 1988), a panel of the United States Court of Appeals for the Eleventh Circuit found trial counsel to be constitutionally ineffective for failing to investigate, present, and argue to the jury at the sentencing phase evidence of defendant's mental history and condition. Although counsel had learned from the defendant's sister that the defendant had spent a brief time in a mental hospital four to six months before the offense occurred, counsel failed to make any additional inquiries after a state psychiatrist filed a report indicating that the defendant was not mentally ill. The Court of Appeals concluded:

> Although trial counsel was aware well in advance of trial that appellant had spent at least a brief period of time in a mental hospital shortly before the shooting, and that for some reason a psychiatric evaluation had already been ordered, he completely ignored the possible ramifications of those facts as regards the sentencing proceeding. This omission denied appellant reasonably competent representation at the penalty phase.

Id. at 653; see also Middleton v. Dugger, 849 F.2d 491 (11th Cir. 1988) (failure to conduct an investigation into petitioner's background, to uncover mitigating, psychiatric, IQ, and childhood

information, and to present that information at penalty phase of death penalty case was ineffective assistance of counsel); Evans v. Lewis, 855 F.2d 631 (9th Cir. 1988) (trial counsel ineffective for failing to investigate a capital defendant's mental condition for the purposes of presenting mitigating evidence in the sentencing phase of defendant's trial).[9]

The jury at Derick Peterson's trial was given the wholly erroneous impression that his mother, Eloise Peterson, had done her best with Derick, but that she just couldn't get him to do right.

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[9]In Ake v. Oklahoma, 470 U.S. 68 (1985), the Supreme Court recognized the critical role that mental health professionals play in criminal cases and especially capital cases.

> In this role, psychiatrists gather facts, both through professional examination, interviews, and elsewhere, that they will share with the judge or jury; they analyze the information gathered and from it draw plausible conclusions about the defendant's mental condition, and about the effects of any disorder on behavior; and they offer opinions about how the defendant's mental condition might have affected his behavior at the time in question. They know the probative questions to ask of the opposing party's psychiatrists and how to interpret their answers. Unlike lay witnesses, who can merely describe symptoms they believe might be relevant to the defendant's mental state, psychiatrists can identify the "elusive and often deceptive" symptoms of insanity, Solesbee v. Balkcom, 339 U.S. 9, 12 (1950), and tell the jury why their observations are relevant. Further, where permitted by evidentiary rules, psychiatrists can translate a medical diagnosis into language that will assist the trier of fact, and therefore offer evidence in a form that has meaning for the task at hand. Through this process of investigation, interpretation, and testimony, psychiatrists ideally assist lay jurors, who generally have not training in psychiatric matters, to make a sensible and education determination about the mental condition of the defendant at the time of the offense.

470 U.S. at 80-81.

As exhaustively discussed in the preceding sections of this application, nothing could be further from the truth. Notwithstanding his unethical conduct with respect to his client Eloise Peterson, counsel still could have uncovered and developed the critical mitigating evidence at issue here through other sources, as the numerous statements appended hereto amply demonstrate.[10] He did not, and, as the direct result of his failure, the jury which convicted Mr. Peterson and sentenced him to death did so without ever hearing the shocking truth.

The evidence set forth above was relevant to a number of critical legal issues in Derick Peterson's case. His chaotic and abusive home life, his substance abuse and brain damage are not just matters that might have evoked sympathy on his behalf from the sentencing jury. Rather, as discussed in the preceding sections, this information was directly relevant to his guilt of capital murder as well as a number of statutory and non-statutory mitigating circumstances. In short, this information greatly reduces his moral culpability for the charged offense because it necessarily affected, indeed defined, his mental state at the time of the offense.

As the mental health experts who examined Mr. Peterson unanimously concluded, this evidence, if it had been gathered and

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[10] Whether his failure to develop other sources of evidence was a consequence of his dual representation of both Derick and his mother or of his simply unreasonable failure to perform, the result is the same: Mr. Peterson was deprived of his constitutional right to the effective assistance of counsel and the jury was deprived of the truth.

presented to a competent mental health professional, would have provided powerful ammunition to challenge the state's assertion that he was guilty of capital murder. [See, e.g., Report of Dr. Bob Rollins; see also Sections I and II, supra.]. It would have also established a number of compelling statutory and nonstatutory mitigating factors which, had they been presented to the jury, would have precluded the imposition of a sentence of death. [see id.]. Finally, competent mental health evidence could have rebutted the state's contention that Derick Peterson presented a serious continuing threat to society, and thus, again, precluded a sentence of death. [Id.].

There can be no legitimate strategic reason for failing to develop and present the evidence set forth in this section of the pleading. Counsel's role is to "assure that the adversarial testing process works to procure a just result under the standards governing decisions." Strickland v. Washington, 104 S.Ct. 2052, 2064 (1984). When confronted "with both the intricacies of the law and the advocacy of the public prosecutor," United States v. Ash, 413 U.S. 300, 303 (1970), a defendant is entitled to counsel who will "bring to bear such skill and knowledge as will render the trial a reliable testing process." Strickland, 104 S.Ct. at 2065. The constitutional right is violated when "counsel's performance as a whole," United States v. Cronic, 104 S.Ct. 2039, 1046 n.20, or through individual errors, Strickland, 104 S.Ct. 2064, falls below an objective standard of reasonableness, and amounts effectively to a denial of counsel on a critical issue. Counsel's performance

here fell dismally below any conceivable standard of reasonableness. Derick Peterson was for all practical purposes without counsel at this capital trial and sentencing proceeding.

Due to trial counsel's inexcusable failure to investigate and present readily available evidence regarding Derick Peterson's home life, substance abuse and brain damage, the truth was withheld from jury and judge. Worse, demonstrably false evidence was presented to the judge and jury by Mr. Peterson's own attorney. The judge and jury simply were not given the tools to make a reliable determination of his guilt of capital murder or the appropriateness of the death penalty. As was true in Eddings v. Oklahoma, the sentence of death in Derick Peterson's case was imposed without consideration by the sentencers of "particularly relevant . . . mitigating factor(s) of great weight." Eddings, 455 U.S. at 115-116. The sentencing jury knew nothing of the devastating effects of Derick's combination of mental dysfunctions on his legal and moral culpability. Therefore, the jury's "highly subjective, unique, individualized judgment," Turner v. Murray, supra, was horribly and prejudicially skewed. Due to counsel's errors, petitioner's trial did not facilitate the reliable exercise of the jury's sentencing discretion. Caldwell v. Mississippi, 472 U.S. at 329. Certainly, and at a minimum, the evidence submitted in support of this petition creates "a reasonable probability that absent [counsel's] errors the jury . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant [the] death [penalty]." Strickland v. Washington, 466 U.S.

at 695. These fatal errors can now only be rectified by the exercise of the clemency power.

IV.

Mr. Peterson's Sentence Was Excessive And Disproportionate to His Crime

Va. Code Section 17-110.1 requires the Supreme Court to conduct a proportionality review of all death sentences imposed in Virginia. It is the Court's duty under this section to determine whether "juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes," considering both the crime and the defendant. See, e.g., Townes v. Commonwealth, 234 Va. 307, 340 (1987).

The victim in this case was killed during the course of a robbery by a single, unexpected shot. There was no torture involved nor any apprehension of impending death. An examination of cases in which the Virginia Supreme Court has approved the death penalty fails to reveal any case similar to Mr. Peterson's. Virginia juries as a general rule simply do not impose the death penalty in cases such as his; i.e., single shot, single victim, non-execution-type killings committed by a 20 year old[11] defendant during the course of a robbery and which involved no torture or apprehension of death to the victim. A review of Virginia capital cases fails to reveal a single case comparable to Mr. Peterson's.

Only three death sentences have been imposed in the Hampton judicial circuit since 1937. Of course, that fact in itself

[11] If he is executed, Derick Peterson will be the youngest person executed in Virginia since Furman.

indicates that juries in this area rarely impose the death penalty under any circumstances. A comparison of those three cases in which Hampton area juries have imposed death highlights the singularity of Mr. Peterson's case and demonstrates the disproportionality of his death sentence.

In Poyner v. Commonwealth, 229 Va. 401 (1985), the defendant killed 5 women in an 11 day period. All of the victims were abducted, robbed, and, after begging for their lives, shot in the head. One victim was raped. In Barnes v. Commonwealth, 234 Va. 130 (1987), the defendant killed two victims in the course of a robbery, shooting one of them a fatal third time when he showed signs of life after the second shot.

Mr. Peterson's case is simply, and markedly, different from any other in which a Virginia jury has imposed the death penalty. It is not, in any conventional sense, the type of case in which the death penalty is regularly or normally imposed in this State. His sentence was thus excessive and disproportionate to his crime, particularly in light of his youth and mental condition, and the Clemency power should be exercised to rectify this aberration.

CONCLUSION

You, Governor Wilder, have once before demonstrated, with regard to the power of clemency, your courage and you unrelenting commitment to justice. There are even more substantial doubts, concerns, and questions, legal and otherwise, as to whether the death penalty was or can ever be appropriate in Derick Peterson's case. Mr. Peterson, by and through the undersigned, respectfully

submits that these doubts should be resolved in his favor, and that the power of clemency be exercised to save his life.

WHEREFORE, for the reasons stated herein, and in the light of the evidence and information contained herein and in the appendices submitted herewith, Derick Lynn Peterson, by and through his undersigned counsel, respectfully requests that the Governor, pursuant to Article V, Section 12 of the Constitution of Virginia and Va. Code Sections 53.1-229 et seq., consider his request for commutation of his sentence of death; grant him a 90 day stay of his execution, presently scheduled for Thursday, August 22, to permit consideration of his application; and, finally, to commute his sentence of death.

Respectfully submitted,

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