

***A QUESTION OF INNOCENCE:
A CASE OF SELF-DEFENSE***

***Petition for Executive Clemency
for
Dana Ray Edmonds***

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INTRODUCTION

On July 23, 1983, Dana Ray Edmonds was arrested for the robbery and murder of John Elliott, a Danville, Virginia grocer. Mr. Edmonds was 21 years old at the time of the crime, is black and is of low intelligence. He has steadfastly maintained that he never intended to rob Mr. Elliott, that the killing resulted from an altercation provoked by Mr. Elliott, and that he stabbed Mr. Elliott in self-defense because Mr. Elliott was threatening him with a gun. Nevertheless, Mr. Edmonds was convicted of capital murder in the commission of a robbery and sentenced to death. Mr. Edmonds' execution is scheduled for 11:00 p.m. on January 24, 1995.

Mr. Edmonds seeks commutation of his death sentence because he can prove today with reliable and convincing new evidence that he has been telling the truth all along. The killing did in fact occur in self-defense, and had nothing to do with robbery. A polygraph examination conducted by Robert H. Edwards -- a former Virginia law enforcement officer/licensed polygrapher for over 25 years who was instrumental in setting up the Virginia State Police polygraph program -- confirms that Mr. Edmonds is being truthful in denying any intention to rob the Elliott store and in claiming that Mr. Elliott pulled a gun on him that day. In light of this evidence and more, justice cannot permit Mr. Edmonds' execution to proceed. The Governor should grant commutation, or at least order a Commonwealth-sponsored polygraph to confirm Mr. Edwards' findings.

This is a truly extraordinary case. Many would argue that Mr. Edmonds deserves clemency based simply on his deprived and disadvantaged background, the fact that he was impaired with a borderline intelligence at the time of the offense, and the fact that almost all of his past legal problems stemmed from a destructive relationship with an older, psychotic and violent woman. These matters are discussed in the report of Dr. Glenn Caddy, which is Exhibit 3 to this Petition.

Many would argue that Mr. Edmonds deserves clemency because a United States District Court found he was denied effective assistance of counsel in the sentencing phase of his trial. That Court also found that, with competent counsel, Mr. Edmonds would not have received the death penalty because there was no evidence of future dangerousness. See Exhibit 2. Although these findings were set aside on procedural grounds (Exhibit 6), no court ever questioned the substantive rulings that Mr. Edmonds' death sentence rests on unconstitutional proceedings, that there was no evidence of future dangerousness presented by the Commonwealth, and that Mr. Edmonds does not deserve the death sentence.

All of these issues pale, however, beside the single issue on which Mr. Edmonds bases his commutation petition: the very real and very substantial evidence that Mr. Edmonds is in fact innocent of the capital crime of murder in the course of robbery. As explained below, his

innocence is demonstrated both by the evidence presented at Mr. Edmonds' non-jury trial and -- to an even greater extent -- by evidence that has come to light since his trial. Mr. Edmonds acted in self-defense in killing Mr. Elliott. And there is not a shred of evidence that Mr. Edmonds' actions were motivated in any way by robbery. Because he is innocent of capital murder, Mr. Edmonds respectfully requests that the Governor grant him clemency.

BACKGROUND

Mr. Edmonds was convicted of the July 22, 1983 murder of John Elliott, a Danville, Virginia grocer. His non-jury trial was the first capital case tried in Danville since the 1977 re-enactment of the death penalty. It was also the first capital case for both the judge and Mr. Edmonds' defense counsel. Although Mr. Edmonds was convicted of murder in the course of a robbery, the evidence at the non-jury trial -- as well as substantial new evidence not available at trial -- demonstrated that the killing occurred as a matter of self defense and had no relationship whatsoever to robbery.

A. The Trial and Post-Trial Proceedings

All the evidence at trial indicated there was a dispute between Mr. Edmonds and Mr. Elliott well prior to Mr. Elliott's death. Anita Curley testified that Elliott had, in conversation with her, accused Edmonds of stealing watches

from his store.^{1/} Elliott told her that Edmonds was no longer welcome as a customer in his store. (Trial Record, at 228-29). Downin Dalton, a soft-drink salesman, testified that Elliott told him he was having "trouble" with a black guy and that "[t]hat damn nigger down yonder is coming back Friday and kill me." (Trial Record, at 142). Given these views, Mr. Elliott believed he had reason to be hostile to Mr. Edmonds on the day in question.^{2/}

The evidence purportedly showing the existence of a robbery was circumstantial at best. Shortly before Elliott's death, a witness observed a stack of one-dollar bills in his cash register. (Trial Record, at 169). A twelve-year old boy passing by the store about the time of the murder observed a person he later identified as Mr. Edmonds "stooping below the cash register." (Trial Record, at 183). Another witness saw Mr. Edmonds shortly after Mr. Elliott's death and concluded that Edmonds' pockets were "bulging out." (Trial Record, at 257). Somewhat later, Mr. Edmonds was observed giving several dollars to three children, and spending money at a convenience store. (Trial Record, at 274).

^{1/} Actually, Mr. Edmonds' brother, Tony Edmonds, recently admitted that it was Tony -- not Dana -- that had stolen watches from the Elliott store. Tony also stated that he and Dana were frequently confused. Affidavit of Tony Edmonds (Exhibit 4).

^{2/} As noted above, Mr. Elliott's feud was really with Mr. Edmonds brother Tony -- not with Dana Ray. See Exhibit 4. It is clear, however, that Mr. Elliott believed he had reason to feel threatened by Dana Ray Edmonds.

No evidence was introduced that Mr. Edmonds had any intention to rob the Elliott store prior to killing Mr. Elliott. Indeed, as the Virginia Supreme Court summarized the evidence:

The record reveals a history of enmity between Edmonds and Elliott. Elliott had accused the defendant of stealing two watches and told him he was no longer welcome in his store. According to Lisa Clark, Edmonds acknowledged that he had not denied the accusation and, in her presence, had threatened to "get" his accuser. Two days before the crime, Elliott told Downin Dalton that he was having trouble with a black man who lived on Ivy Street (the address Edmonds gave the police) and that he believed that he was "coming back Friday to kill him."

* * * *

[After the killing], with Elliott's body gagged and concealed from view, Edmonds emptied the cash register, fled from the scene as the police approached, burned his clothes, and, just before he was arrested near the bus station, called the police and attempted to cast suspicion on some unidentified person.

(Exhibit 1, at 811-12). This evidence demonstrates the killing resulted from the disagreement between Mr. Edmonds and Mr. Elliott, not from any intent to rob the store.

The Commonwealth introduced several statements Mr. Edmonds had made to the police and to others. Mr. Edmonds

admitted he killed Mr. Elliott, but said the killing occurred because Mr. Elliott pulled a gun on him:

I went into the store, I went around the thing and I told Mr. John [Elliott] I was going to get a thing of chocolate milk and I placed the thing of chocolate milk on the counter, but before I could reach in my pocket and pull out my money Mr. John had stuck a gun in my head and that's the truth. He stuck the gun in my head and he asked me about his watches, his watches, his watches he said that was missing. . . .

You know when he did it, that incident, it was nothing I could do at that point. He had it at my head and I couldn't do nothing. So he pulled me toward the heater and he stood right there with my head right there and kept calling me all these profanity words. . . . He was calling me a black mother fucker nigger, I ain't worth a damn and all of this

I was thinking of something to do to try to help myself for me not to get shot. . . . Then it was, ah, a brick lying on the floor. I threw the . . . threw it at him and it hit him on the head. His gun fell down and he got back up. He got back up. . . .

But he had the gun again. I grabbed his wrist. When I grabbed his wrist I grabbed the knife, and I grabbed the knife and he grabbed my wrist, and I was trying. I wasn't trying to hurt the man in no way. I mean he did that on his own. I was pulling down, trying to pull away, trying not to hurt him, just hold the gun out of my way. Before I knew it it just happened. . . The man got cut . . . He got cut on the neck.

(Trial Transcript, at 373-75).

Several undisputed facts belie any claim that Mr. Edmonds intended to rob the Elliott store. First, Mr. Edmonds lived in the neighborhood, worked in the area and

frequently visited the Elliott store. He worked, cleaning a different store, on the day of the killing, and was waiting for his employer to pay him when he went over to the Elliott store. See Saunders Affidavit, at 1 (Exhibit 12). In addition, Mr. Elliott was killed with a brick and a knife that were in his store when Mr. Edmonds entered. Thus, Mr. Edmonds entered Mr. Elliott's store completely unarmed. It simply makes no sense to imagine that Mr. Edmonds decided on the spur of the moment, with no planning and no weapon, to go over and rob Mr. Elliott's store.

The defense case was limited to two witnesses. Gary Griffin testified that shortly after Mr. Elliott's death Mr. Edmonds left a small caliber pistol in his car, which Griffin subsequently sold. (Trial Record, at 465-66). Mr. Edmonds' mother testified that she gave Mr. Edmonds fifty dollars the morning of Mr. Elliott's death. (Trial Record, at 478).

At the close of the evidence, the Court found Mr. Edmonds guilty of capital murder and robbery. On December 12, 1983, the court entered a written order sentencing Mr. Edmonds to death for the murder in the course of a robbery.^{3/}

^{3/} This sentence was later set aside by the trial court because it was imposed without the presentence report required by Virginia law. When new sentencing proceedings were scheduled, Mr. Edmonds trial counsel inexplicably failed to seek a new judge to conduct them, even though counsel knew that the trial judge had already concluded death was the appropriate sentence. See Exhibit 5. The United States District Court found this failure to seek a new judge constituted ineffective assistance. (Exhibit 2, at 15). The Court also found -- after a full review of all factors --

(continued...)

B. New Evidence That Was Not Available At Trial

As explained above, the evidence presented at trial demonstrated that Mr. Elliott's death resulted from the hostility between Edmonds and Elliott, not from any intention to rob Mr. Elliott's store. There is, however, substantial new evidence confirming that what occurred was not "murder in the course of robbery."

Most importantly, Mr. Edmonds recently underwent two polygraph examinations conducted by Robert H. Edwards. Mr. Edwards has been a licensed polygraph examiner for the past 26 years. He worked for the Virginia State Police between 1959 and 1971. For the next two years, he was employed by the Division of Justice and Crime Prevention of the Commonwealth of Virginia. Between 1973 and 1985, he was Assistant Director and Supervisor of Training and Public Relations for the Bureau of Forensic Science (the state crime laboratory). He has conducted literally thousands of polygraph examinations. See Affidavit of Robert H. Edwards and polygraph examinations (Exhibit 7).

Mr. Edwards' first polygraph examination of Mr. Edmonds occurred on October 17, 1994. Edwards asked Edmonds the following questions^{4/} and received the following answers:

^{3/} (...continued)
that with a new and unbiased fact-finder, Mr. Edmonds would not likely have received the death penalty. (Exhibit 2, at 19-21).

^{4/} In both polygraph examinations, there were additional preliminary and exploratory questions asked. Mr. Edwards is willing to provide the Governor with the full records and
(continued...)

1. On the day John Elliott was killed, before you went into his store, had you already thought about robbing him?

ANSWER: NO.

2. When you went to John Elliott's store the day he was killed, did you plan to rob him?

ANSWER: NO.

3. On the day Mr. Elliott was killed, did he point a gun at you?

ANSWER: YES.

4. After you cut Mr. Elliott did you take his gun?

ANSWER: YES.

5. When you left Mr. Elliott's store did you really take his gun with you?

ANSWER: YES.

Mr. Edwards' conclusions concerning Edmonds' truthfulness in giving these answers was as follows:

The Examinee showed responses indicative of truthfulness when answering "no" to questions #1 and #2. He answered "yes" to questions #3, #4 and #5. His responses when answering these questions were inconclusive. It is recommended the Examinee be re-examined.^{5/}

^{4/} (...continued)

charts of the examinations. The questions discussed in text are those Mr. Edwards characterizes as substantive.

^{5/} An "inconclusive" response means that the person undergoing the polygraph examination gives physical responses that are not sufficient to evaluate truth or deception. An "inconclusive" response simply means there is not enough data to determine if the person is being truthful or not. Because certain responses were "inconclusive," Mr. Edwards suggested that Mr. Edmonds be re-examined, which is exactly what occurred.

Pursuant to Mr. Edwards' recommendation, Mr. Edmonds was re-examined by polygraph on November 21, 1994. At this time, Mr. Edwards asked the following questions and Mr. Edmonds gave the following answers:

1. On the day John Elliott was killed, did he point a gun at you?

ANSWER: YES.

2. When you cut Mr. Elliott, was he holding a pistol?

ANSWER: YES.

3. Regarding the death of John Elliott, that day did you see him with a pistol in his hand?

ANSWER: YES.

Mr. Edwards' conclusions as to Mr. Edmonds' truthfulness in giving these responses was as follows:

The Examinee showed responses indicative of truthfulness when answering "yes" to questions #1, #2 and #3.

Over the course of the two examinations, therefore, Mr. Edmonds gave truthful responses indicating: (1) that Edmonds had no intention of robbing Mr. Elliott's store; (2) that Mr. Elliott pointed a gun at Mr. Edmonds on the day of the killing; and (3) when Dana Ray Edmonds cut John Elliott, Elliott was holding a gun on Mr. Edmonds. This evidence is powerful support for Mr. Edmonds' innocence of murder in the course of a robbery, and for his truthfulness in describing the events of July 22, 1983.

Polygraph testing is used quite frequently and extensive in the criminal justice system. Skilled investigative agencies such as the FBI, the secret service,

military intelligence and law enforcement agencies use the polygraph. Moreover, the Virginia state police and other law enforcement agencies rely on polygraph examinations in their law enforcement work. Tremendous advances have been made in polygraph instrumentation and techniques and polygraph testing has gained widespread acceptance as a useful and reliable scientific tool. See generally the polygraph literature collected in Exhibit 8.

Other new evidence further confirms this version of what happened on July 22, 1983. Several witnesses confirm that John Elliott typically kept a gun in his store. Thus, Margaret Clark states:

John had a reputation of having a gun in the store . . . He was known to make gestures like he was going to get a gun. Like, you aren't going to motion to get one if you don't have something there. You aren't going to motion.

Clark Affidavit, at 2 (Exhibit 9). Anita Curley confirms that Mr. Elliott had a gun in the store the day before the killing:

It wasn't anything uncommon for John to have a gun in the store. He kept the gun up under the counter. . . I saw the gun the day before it happened. . . The gun was laying right up under the cash register on the first shelf next to the brown bags. . . .

Anita Curley Affidavit, at 2 (Exhibit 10).

Other witnesses say Mr. Elliott had previously threatened or assaulted persons that frequented his store.

As Thomas Garrett put it:

one morning I came into the store, I wanted to buy something; I was running late for the bus and John [Elliott] said, these are his words, "I'm tired of niggers coming into this store, leaving that door open." And I said well John I just don't want anything then and I was ready to leave. . . [H]e reached for a stick, he said I'm tired of y'all niggers coming here leaving that door wide open in the morning. And then we got into an argument and stuff, a misunderstanding. He struck me across my leg and I got made and I started saying bad words to him and then I left.

Thomas Garrett Affidavit, at 1 (Exhibit 11).

Clarence Saunders, Jr., similarly explains:

John [Elliott] had a very bad reputation for pulling guns out and calling people niggers and things like that. Not only that but drinking, going off, slamming doors, calling young blacks niggers because his tolerance was very low. Maybe that was the result of his drinking. Tolerance was very low with young ones, if they were two or three pennies short or something he would just snap out. And there were several people I knew of that he had called niggers and several people that I knew of that he had pulled a gun on and maybe knocked a radio or something off the counter, that the young person had brought in. . . .

I have seen John pull his gun out on an older guy, an older white man, and behind something, I don't know, behind some kind of, the products he was getting were more like under the table products. and he has had incidents . . . guns and he's shown . . . people he was going to shoot and he has even said that he would shoot Dana if Dana would come back in his store. . . .

My friend Greg, from New York, John literally knocked his music box off the counter and told him to get the hell out of the store. He didn't want to hear that damn music. And he pulled a gun on Greg and that's when Greg retaliated, blacked both his eyes.

Saunders Affidavit, at 1 (Exhibit 12) (emphasis added).

Of critical importance is the fact that Ms. Curley recalls seeing a gun -- a real gun, not a cap pistol -- in Mr. Elliott's store the day before the murder. Curley Affidavit, at 2 (Exhibit 10). Clarence Saunders, Jr., recalls seeing a gun in Mr. Elliott's store on the morning of the killing. Saunders Affidavit, at 3 (Exhibit 12). Insofar as the police reported that they found no gun in the store after Mr. Elliott was killed, the only possible explanation is that Mr. Elliott did indeed threaten Mr. Edmonds with the gun, and Edmonds then took the gun with him when he left the store.

Mr. Saunders also explains that Mr. Edmonds had no motive to engage in robbery on the day in question. Immediately before the killing, Saunders explains, Edmonds had just finished cleaning Mr. Saunders' store and had money coming: "Dana had finished, he was standing and waiting for me, I told him to come and get his money, I said 'I'll be back shortly.' . . . After the incident, I never gave him his money." Saunders Affidavit, at 1 (Exhibit 12). It makes no sense that Mr. Edmonds would have killed to facilitate a robbery when he had money coming for cleaning the Saunders store.

In addition, Gary Griffin has provided substantial additional detail concerning his finding a gun in his car after giving Mr. Edmonds a ride. See Gary Griffin Affidavit. (Exhibit 13). For example, Mr. Griffin recalls that the gun

was a silver small caliber revolver with a pearl handle, much like a gun other witnesses recall Mr. Elliott keeping in his store. Griffin Affidavit, at 2 (Exhibit 13); compare Curley Affidavit, at 2 (Exhibit 10); Saunders Affidavit, at 3 (Exhibit 12). In addition, Mr. Griffin states that he found this gun immediately after the killing, when the police were looking for Mr. Edmonds and "during the time that Dana Ray was charged with murder." Griffin Affidavit, at 1 (Exhibit 13).^{6/}

**THE GOVERNOR SHOULD GRANT MR. EDMONDS CLEMENCY
BECAUSE THERE IS SUBSTANTIAL DOUBT CONCERNING
HIS ACTUAL INNOCENCE OF MURDER IN THE COURSE
OF ROBBERY**

Mr. Edmonds' killing of John Elliott was not a crime if it was committed in self-defense. Moreover, the killing was not a capital offense unless it occurred "in the commission of a robbery" as defined by Va. Code Ann. § 18.2-31(d). Thus, Mr. Edmonds could be guilty of capital murder only if: (a) it was not self-defense; and (b) "robbery was the motive for the killing" and Mr. Edmonds "had the intent to rob when he killed" the decedent. Bunch v. Commonwealth, 225, Va. 423, 440, 304 S.E.2d 271, 280-281 (1983), cert. denied, 474 U.S. 975 (1983). The "offense is not robbery unless the animus furandi was conceived before or at the time the violence was committed." Branch v. Commonwealth, 225 Va. 91, 94-96, 300 S.E.2d 758, 759-600 (1983). As the Virginia

^{6/} Griffin recalls that he later sold the gun to one James Whipple, who is now deceased. Griffin Affidavit, at 2 (Exhibit 13).

Supreme Court recently re-affirmed, the key question is thus "whether robbery was the motive for the killing." George v. Commonwealth, 242 Va. 264, 411 S.E.2d 12, 21-22 (1991).

As explained above, there is substantial evidence indicating Mr. Edmonds acted in self-defense or, at the very least, that the killing had nothing at all to do with robbery. Every bit of evidence presented at trial suggests the killing resulted from a disagreement and dispute between Mr. Edmonds and Mr. Elliott, not from any intention to rob the Elliott store. As the Virginia Supreme Court summarized, the killing resulted from the "history of enmity between Edmonds and Elliott," not from any intention to rob Mr. Elliott's store.

Even more important is the new evidence confirming that the killing occurred in self-defense and had nothing to do with robbery. The polygraph examination conducted by Mr. Edwards is powerful confirmation that Mr. Edmonds acted in self-defense and in response to Mr. Elliott pointing a gun at him. The polygraph also confirms that Mr. Edmonds had no intention to rob the Elliott store. Mr. Edmonds urges the Governor at least to order his own polygraph examination to confirm or deny the validity of Mr. Edward's findings.^{2/}

^{2/} There is precedent for ordering a polygraph examination as part of clemency proceedings. Governor Wilder asked Roger Coleman to undergo a polygraph in connection with his request for clemency. Governor Wilder did so, moreover, even though Mr. Coleman offered no polygraph evidence in support of his clemency petition. In this case, Mr. Edmonds has proffered reliable polygraph evidence demonstrating that he is telling the truth.

In addition to the polygraph, the new testimony of witnesses Clark, Curley, Garrett and Saunders further confirms Mr. Edmonds' innocence of murder in the course of robbery. Their testimony demonstrates that Mr. Elliott kept a gun in his store and used it to threaten individuals who irritated him. Their testimony further demonstrates that the gun was in the Elliott store the morning of the killing, but was not found afterwards. This is totally consistent with Mr. Edmonds' defense that Mr. Elliott pulled a gun on him, a gun which Edmonds later left in Gary Griffin's car. In addition, Mr. Saunders states that Mr. Edmonds had money coming to him that day, and thus had no motive to engage in a robbery of any sort.

CONCLUSION

Putting aside the complicated legal, ethical, moral and religious questions involved, all should be able to agree on one thing: a man should not be executed by the Commonwealth in face of credible and reliable evidence demonstrating his innocence. Our system of justice is not perfect, and occasionally, innocents are convicted and even sentenced to death. Indeed, this is one of the most important reasons the Governor of the Commonwealth of Virginia is vested with the power to grant clemency. Clemency power allows the Governor to right what otherwise would be a terrible wrong, to save the People of the Commonwealth from making an awful, irreparable mistake.

Taking the record as a whole, there is overwhelming reason to believe Mr. Edmonds is actually innocent of the capital offense of murder in the course of robbery. All the evidence suggests that Mr. Elliott's death resulted from the "history of enmity" between Mr. Elliott and Mr. Edmonds. The polygraph examinations demonstrate that Mr. Edmonds had no intent to rob Mr. Elliott and, indeed, confirm Mr. Edmonds' explanation that the altercation started when Mr. Elliott threatened Edmonds with a revolver. This version of events is further corroborated by new evidence showing Mr. Elliott had a gun in his store on the day of the killing and had a history of using guns to threaten customers in his store.

The Commonwealth of Virginia should not execute an innocent man. It is up to the Governor to prevent a terrible miscarriage of justice. The Governor should grant Mr. Edmonds clemency.

Respectfully submitted,

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