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August 19, 1998

The Honorable James Gilmore
Capitol Square
Richmond, Virginia 23219

Re: Johnile L. Dubois, # 181652
Request for Commutation of Capital Punishment
Execution Date: August 31, 1998

Dear Governor Gilmore:

This firm represents Mr. Johnile L. Dubois, a prisoner in Virginia scheduled to be executed on August 31, 1998. Pursuant to Va. Code § 53.1-229, Mr. Dubois respectfully requests Your Honor commute his sentence of capital punishment. I ask for the opportunity to meet with Your Honor to discuss this matter at Your Honor's convenience, taking into consideration, of course, the approaching execution date.

This case is unique. For the first time in Virginia's penal history, its citizens will have cause to question the Commonwealth's word.

If the Commonwealth executes him on August 31, Mr. Dubois will be the one and only person in Virginia to be executed by the Commonwealth after entering into a plea agreement with the Commonwealth by which the Commonwealth agreed not to seek his execution if he cooperated fully with the Commonwealth in its investigation and prosecution of the other defendants in the case.¹ Mr. Dubois, in faithful compliance with this agreement, completely and honestly cooperated with the Commonwealth.² He met repeatedly with the Commonwealth's Attorney and law enforcement agents. He testified truthfully for the Commonwealth at all trials of codefendants. In exchange, the Commonwealth agreed that it would recommend a life

¹ See Plea Acceptance Sheet, Attachment A.

² See Sentencing Hearing Transcript, Attachment B.

sentence to the circuit court.³ He also was assured by his attorneys that he would receive a life sentence in exchange for his truthful, complete cooperation.⁴ Further, he heard the Commonwealth's Attorney, Martin Bullock, explain to the community through the local press, The Virginia Pilot, that Mr. Dubois' prior criminal record did not, in his judgment, support the death sentence.⁵ In spite of all of this, the circuit court, acting against the Commonwealth's recommendation, sentenced Mr. Dubois to die in the electric chair after a ten minute sentencing hearing at which the Commonwealth called no witnesses, offered no evidence, and argued for the life sentence on behalf of Mr. Dubois.

Statement of Facts

On November 20, 1991, around 6:00 p.m., Mr. Dubois and three other young men entered "In a Hurry" convenience store in Portsmouth, Virginia. The three store employees were Philip Council, Angela Garcia, and Shari Watson. Ms. Garcia had her back to the door when the men came in. She heard a gunshot, turned around and saw one of the men holding a gun. Ms. Watson also had her back turned, but stated that the shot was fired just past her head. One of the men ordered the clerks to open two cash registers. Ms. Garcia opened one register. Mr. Council tried unsuccessfully to open the second cash register while Ms. Garcia and Ms. Watson hid in back of the store. Ms. Garcia and Ms. Watson heard someone ask Mr. Council again to open the register and stated that men began beating Mr. Council. The women heard the shot which hit Mr. Council in the chest. Eventually, Ms. Garcia opened the cash register, which contained approximately \$400. The robbers fled with money.

At the sentencing hearing on October 28, 1992, Mr. Bullock confirmed that Mr. Dubois complied fully with all of his obligations under the plea agreement and recommended to the circuit court that it impose a life sentence, not the death sentence, for the capital murder count. The circuit court concluded that Mr. Dubois should be sentenced to death because Mr. Dubois' criminal record suggested future dangerousness:

I have looked at your record, and you do have a record involving certain felonies. I looked at your background according to the report, and I take it is correct, because nobody has challenged it . . . You are twenty-six years of age, and you have nine children already, not supporting a one. You were on probation and parole. You couldn't make that. You came out and got back in trouble . . . [after] consideration of your past criminal history and record with respect to convictions, [the court concludes] that there is a probability that you will commit

³ See June 12, 1992, letter from Commonwealth's Attorney Martin Bullock to Mr. Dubois' trial attorney, J. Wayne Sprinkle, Attachment C.

⁴ See letters from J. Wayne Sprinkle to Mr. Dubois, Attachment D.

⁵ See Virginia Pilot, October 29, 1992, Attachment E.

criminal acts of violence that will constitute a serious continuing threat to society.”

The presentence report, however, revealed that Mr. Dubois had only three convictions: grand larceny, possession of a firearm by a felon and, the only prior crime of violence, a misdemeanor assault.⁶

Prior Proceedings

Mr. Dubois was charged with one count of capital murder in violation of Va. Code § 18.2-31(4), one count of robbery in violation of Va. Code § 18.2-58, one count of attempted murder, one count of using a firearm in commission of capital murder in violation of Va. Code § 18.2-53.1, one count of using a firearm in commission of robbery in violation of Va. Code § 18.2-53.1, and one count of using a firearm while attempting to commit murder, in violation of Va. Code § 18.2-53.1.

On August 4, 1992, Mr. Dubois pled guilty to all charges pursuant to the plea agreement with the Commonwealth. The Honorable Johnny E. Morrison accepted Mr. Dubois' guilty pleas and found him guilty as charged on all counts.

On October 28, 1992, Judge Morrison sentenced Mr. Dubois to death for capital murder. In addition, he sentenced Mr. Dubois to life imprisonment for robbery, ten years imprisonment for attempted murder, two years imprisonment for the first firearm charge, four years imprisonment for the second firearm charge, and four years imprisonment for the third firearm charge.

Mr. Dubois filed timely notice of appeal to the Virginia Supreme Court. On September 17, 1993, the Virginia Supreme Court affirmed judgment of the Portsmouth Circuit Court. Dubois v. Commonwealth, 246 Va. 260, 435 S.E.2d 636 (1993).⁷

On March 28, 1994, the Supreme Court denied Mr. Dubois' pro se Petition for Writ of Certiorari from the judgment of the Virginia Supreme Court. Dubois v. Virginia, 114 S. Ct. 1389 (1994) (Blackmun, J., dissenting).

On April 17, 1995, Mr. Dubois filed his Petition for a Writ of Habeas Corpus in the Circuit Court for the City of Portsmouth. On March 15, 1996, the Virginia Supreme Court

⁶ See Excerpts from the Presentence Report, Attachment F.

⁷ See Dubois v. Commonwealth, 246 Va. 260, 435 S.E.2d 636 (1993), Attachment G.

dismissed this Petition.⁸ On June 7, 1996, the Virginia Supreme Court denied a Petition for Rehearing. Judge Morrison then ordered Mr. Dubois to be executed on August 28, 1996. On August 22, 1996, the United States District Court denied Mr. Dubois' Motion to Stay Execution. On August 23, 1996, Mr. Dubois filed an appeal to the Fourth Circuit Court of Appeal, which automatically stayed execution. On September 13, 1996, the Fourth Circuit Court of Appeals granted a stay of execution until the District Court ruled on merits of Mr. Dubois' application for relief under 28 U.S.C. § 2254.

On June 30, 1997, the District Court dismissed the Petition. On July 29, 1997, the District Court denied Mr. Dubois' Motion to Alter or Amend the Judgment. On August 26, 1997, Mr. Dubois filed his Notice of Appeal to the Fourth Circuit Court of Appeals. On May 26, 1998, the Fourth Circuit denied Mr. Dubois' appeal. On June 22, 1998, the Fourth Circuit denied Mr. Dubois' Petition for Rehearing with Suggestion for Rehearing in Banc. Mr. Dubois intends shortly to file his Petition for a Writ of Certiorari in the Supreme Court and to seek a stay of execution from the Court.

Recent Proceedings

On Thursday, August 13, I met with Judge Morrison in Portsmouth, Virginia. Mr. Bullock and Ms. Pamela Anne Rumpz, the Assistant Attorney General involved in this case at the habeas level, also were present. I asked Judge Morrison to reconsider the death sentence he imposed on October 28, 1992. At this meeting, Mr. Bullock echoed his 1992 position, on behalf of the Commonwealth, that a life sentence for the capital murder count was the appropriate resolution of this matter. Ms. Rumpz, on behalf of the Attorney General's Office, took no position. She represented to the Judge Morrison that her office never took a position regarding the sentence or clemency. She allowed Mr. Bullock to speak for the Commonwealth. There is good cause for this reconsideration.

Judge Morrison premised his sentence on Mr. Dubois' future dangerousness.⁹ His concern finds scant support in Mr. Dubois' prior criminal history, which includes only one crime of violence: the misdemeanor assault conviction. Moreover, though repugnant, as is every murder, the facts of the case recommend a conclusion these young men did not enter the convenience store with murder in mind. A fair interpretation of the events suggests impulsive and panic-driven violence prompted by the delay in opening the register. Given Mr. Dubois's age and modest, non-violent record, these events cannot support his execution.

⁸ See Dubois v. Warden of the Mecklenburg Correction Center, Attachment H.

⁹ Va. Code § 19.2-264.2 permits a death sentence only if the sentencing court finds the Commonwealth has proven beyond a reasonable doubt either that the defendant represents a continuing serious threat to the community or that the crime itself was outrageously or wantonly vile, horrible or inhuman.

Most troubling, though, is the question whether Judge Morrison even had the statutory authority to impose the death sentence. Va. Code § 19.2-262.4 permits circuit courts to impose the death sentence only after the Commonwealth has proven, beyond any reasonable doubt, at the sentencing hearing either future dangerousness or vileness of the crime. At the sentencing hearing in October, 1992, Mr. Bullock did not attempt to prove either prong of the statute which would then, and only then, trigger the circuit court's authority to impose the death sentence. In accordance with the plea agreement, the Commonwealth, instead, urged Judge Morrison to impose a life sentence. Thus, after a ten minute hearing, and without proof from the Commonwealth, the question fairly presents itself whether Judge Morrison ever had the authority to impose the death penalty. This issue was raised in Mr. Dubois' federal Petition for a Writ of Habeas Corpus. On review, the Fourth Circuit Court of Appeals rejected this argument, however, because the author of Mr. Dubois' State Petition for a Writ of Habeas Corpus neglected to frame this argument in terms of a federal constitutional infraction:

To the extent that this claim alleges a violation of the Due Process Clause or any other federal right, Dubois does not appear to have raised this precise claim in state court - a failure which forecloses our ability to award *habeas* relief based upon this non-exhausted claim . . .

Dubois v. Greene, No. 97-21, slip op. 15, (4th Cir. May 26, 1998)(unpublished opinion).¹⁰ The opinion exalts form over substance. The Fourth Circuit believes it is unable to reach this issue given the regrettable restraints of procedural due process. The statutory remedy of clemency enable's Your Honor's grasp to extend beyond procedural consistency. Your Honor's grasp can reach further, to fairness, fidelity to statutory restraints on imposition of the death sentence and to a just result. Your Honor can remedy this error by granting clemency.

At the time of this writing, Judge Morrison still is considering whether he will write to Your Honor expressing a reconsideration of his judgment. That Judge Morrison is still pondering this question raises hope. It also illustrates the dilemma this case presents. The Commonwealth, on the other hand, already has spoken in this case through the plea agreement: in 1992 it recommended Mr. Dubois be sentenced to life in prison with the possibility of parole.

Mr. Bullock remains faithful to this recommendation to this day. At the sentencing hearing Judge Morrison observed that the lawyers know a case best. Mr. Bullock, better than anyone, was in a position to assess this case and had good reason to tell The Virginia Pilot, the day after sentencing, that he did not believe the facts of the case supported a death sentence for Mr. Dubois.

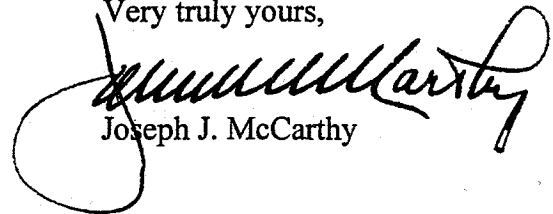
Your Honor has the power to partially restore the terms of the plea agreement Virginia

¹⁰ See, Dubois v. Greene, No. 97-21, 4th Cir. May 26, 1998)(unpublished opinion).
Attachment I.

made with one of her citizens. Your Honor cannot impose a life sentence with the possibility of parole. Your Honor, however, can impose a life sentence without the possibility of parole. The Commonwealth itself has already recommended this result to Judge Morrison and to you. Even if Judge Morrison declines to change course when he revisits this issue, clemency will in all respects accommodate Judge Morrison's 1992 concern that Mr. Dubois represented a future danger: he will never leave prison if Your Honor commutes his death sentence.

Respectfully, on behalf of Mr. Dubois, I ask for your gracious consideration of this request. I ask that you commute Mr. Dubois' sentence to life in prison without the possibility of parole. Thank you.

Very truly yours,



Joseph J. McCarthy

JJM/cp
Enclosures

xc: Mr. Johnile L. Dubois
The Honorable Johnny E. Morrison
The Honorable Martin Bullock, Esq.
Mr. Joseph Bowman, Esq.
Mr. Robert Lee, Esq.
Ms. Pamela Anne Rumpz, Esq.