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May 7, 1999

The Honorable James S. Gilmore, III
Governor of the Commonwealth of Virginia
Office of the Governor
State Capitol, 3rd Floor
Richmond, Virginia 23219

Re: Calvin Eugene Swann - Petition for Clemency

Dear Governor Gilmore:

We write on behalf of Calvin Swann, who is scheduled to be executed on Wednesday, May 12, 1999. For the reasons discussed below, we request that you grant executive clemency to Calvin and commute the sentence of death to a sentence of life without the possibility of parole.

This case is dramatically set apart from other cases you have seen or will ever see as Governor. Calvin Swann is a 44-year-old African-American man, who since 1974 has been repeatedly diagnosed as severely schizophrenic and psychotic. These facts are beyond dispute. Physicians employed by the Commonwealth of Virginia have diagnosed him as schizophrenic at least 41 times, have characterized him as psychotic at least 31 times, and have committed him - with the support and often urging of his family - to psychiatric hospitals at least 16 times. In addition, judges in Virginia have found him to be incompetent to stand trial at least twice.

KAYE, SCHOLER, FIERMAN, HAYS & HANDLER, LLP
The Honorable James S. Gilmore, III

May 7, 1999

Page 2

Yet, under the mental health system that existed in years past, Calvin was repeatedly released without supervision or treatment.

The prosecutor's decision to seek the death penalty in this case was a very close call. The charge was a single murder with a single shot fired while committing a robbery. Calvin confessed to the crime. The only aggravating circumstance was an assertion of potential future danger to society. The prosecutor has publicly stated that, if a sentence of life without parole had been available at the time of trial, he "probably would have gone for that option."¹

The prosecutor acknowledged the existence of evidence supporting a non-frivolous claim that Calvin Swann was not mentally competent, and he prepared for trial with the knowledge that it would be a "battle of psychologists and psychiatrists."² But that "battle" never occurred. Defense counsel's request for the appointment of a psychiatrist to testify as an expert witness for Calvin was denied, and the psychologist who was appointed told the court that he was "not qualified to medically render an opinion" with respect to "issues of medication" because he was not a medical doctor.³ Although serious questions concerning Calvin's mental competency were raised during the trial, no competency hearing was ever held.

The serious questions about Calvin's mental illness and competence remain today. The prosecutor has submitted a post-trial affidavit stating that there was some evidence that Calvin was not competent at the time of trial. The jurors obviously struggled with the issue of whether Calvin was malingering or truly mentally ill, because the only testimony they asked to

The Honorable James S. Gilmore, III

May 7, 1999

Page 3

have read back during their deliberations was that of the psychologist appointed to assist in Calvin's defense. At sentencing, the judge acknowledged that "maybe society or the mental health people have failed in some of their dealings with [Calvin]. That may be true."⁴ And the Fourth Circuit has expressly held open the issue of whether or not Calvin is competent to be executed today.

Strongly tipping the balance in favor of clemency is significant evidence of Calvin's severe mental illness – evidence which the prosecutor and defense counsel did not have at the time of trial, and therefore could not present to the jury or the court. This new evidence, discussed in some detail below and in accompanying medical charts, includes overwhelming proof of Calvin's long history of pervasive mental illness, which began long before he faced trial on a capital offense. The pervasive, bizarre and grossly unpleasant and self-destructive nature of his condition and conduct puts to rest any suggestion that he was or is malingering.

Calvin was examined less than six weeks ago by Dr. Mark Mills, a psychiatrist who is retained by the U.S. Department of Justice and who works with state and federal prosecutors across the country. Dr. Mills reports that Calvin's mental illness is unchanged from the last time he saw Calvin in 1996. According to Dr. Mills, Calvin's mental illness is "devastating" and he describes Calvin "as miserable, unlike some psychotic patients who are able to lose themselves in their own reverie." Dr. Mills concludes that, out of the thousands of

The Honorable James S. Gilmore, III

May 7, 1999

Page 4

severely mentally ill patients he has examined personally, he has only "ever seen one person" that he "would classify as exhibiting a more devastating pathology than Calvin Swann."

Even the prison's own medical records describe Calvin as "disoriented," "unable to articulate," and having a "tormented look." The prison has medicated Calvin with strong anti-psychotic medications prescribed solely for the treatment of schizophrenia. When he has not taken these medications, the prison has placed him in four point restraints.

Under these circumstances, no legitimate purpose would be served by executing this severely mentally ill man. The notion of retribution rings false in light of Calvin's mental deterioration and hopelessness. As you have recognized so eloquently, those who suffer from the type of severe mental illness that afflicts Calvin are "Virginia's most vulnerable citizens" who require treatment and supervision. Calvin, unfortunately, did not receive adequate treatment or supervision over the past 25 years. As a result, his condition has deteriorated to the point where he is unable to care for himself, where he responds to questions not with words, but with a series of numbers, and where it is unclear whether he truly understands the nature and reason for his punishment or is merely repeating words he has heard, just as he repeats numbers in response to questions.

The thought of exacting retribution from such a vulnerable and devastated individual is inconsistent with the mercy which tempers our system of justice and which is the foundation of clemency.

The Honorable James S. Gilmore, III

May 7, 1999

Page 5

~~As for deterrence,~~ the prosecutor who pursued the death sentence at trial states publicly today that he would not have sought the death penalty at the time if the option of life without parole had been available. However, the option of life without parole did not exist under Virginia law at the time of trial. The prosecutor was acutely aware, as he argued at trial, that at that time life did not really mean life.⁵ The jury also considered imposing a sentence of life without parole, but they were told that their only choices were between life *with* the possibility of parole or death.

Now that the option of life without parole is available – thanks in large part to your efforts when you were Attorney General – justice and human decency cry out for a grant of clemency that would convert the death sentence to one of life without parole. This result is also supported by substantial medical evidence that Calvin is not a danger to society today if he receives basic medical treatment and supervision appropriate for his mental illness.

These are undeniably ~~rare and pitiful circumstances~~ that are unlikely to be seen again. You have taken significant steps to address the deficiencies in the mental health system and the limited sentencing options of the past. You have publicly recognized that "[t]he long deterioration of Virginia's system of [mental health] care didn't occur overnight, and it won't be fixed overnight. However, with strong leadership and commitment, we're beginning to bring about the kind of change that has been too long overdue."⁶ And as Attorney General, you were a driving force to get the General Assembly to adopt life without parole as an option.

The Honorable James S. Gilmore, III

May 7, 1999

Page 6

As Governor, you now have an option that the prosecutor, the jury, and the sentencing judge did not have – the option of life without parole. In the spirit of mercy and grace that underlay the Governor's power of clemency, we appeal for such a result on Calvin's behalf, and set forth the following facts and circumstances to support this just and merciful result.

The Governor's Power of Clemency

"The criminal code of every country partakes so much of necessary severity that without any easy access to exceptions in favor of unfortunate guilt, justice would wear a countenance too sanguinary and cruel." *Alexander Hamilton (1778)*

"I am one who has supported the death penalty for hardened criminals. But I do think that any justice system that is worthy of the name must have room for mercy." *Pat Robertson (1998)*

Clemency is "an act of grace, proceeding from the power intrusted with the execution of the laws, which exempts the individual, on whom it is bestowed, from the punishment the law inflicts from a crime he has committed."⁷ As an act of grace, a Governor may bestow it separate and apart from the issue of guilt or innocence.

The Governor's clemency power is a "broad discretionary power to temper retribution with mercy, to correct error, and to do justice where the rigorous inflexibility of the judicial system has not adjusted to compelling social needs."⁸ In this case, the "rigorous

The Honorable James S. Gilmore, III

May 7, 1999

Page 7

inflexibility" of an inadequate sentencing system in the past and the "compelling social need" to provide adequate care for the mentally ill are plainly evident.

We are not asking you to disrespect the judicial decisions in this case. Rather, we are asking you to exercise the inherent authority of your office. We ask you to temper justice with mercy, as the power of executive clemency was intended to operate. Former North Carolina Governor Terry Sanford described this unique power of the executive branch as follows:

The use of executive clemency is not a criticism of the courts, either express or implied. I have no criticism of any court or any judge. Executive clemency does not involve the changing of any judicial determination. It does not eliminate punishment; it does consider rehabilitation.

It falls to the Governor to blend mercy with justice as best he can, involving human as well as legal considerations, in the light of all circumstances after the passage of time, but before justice is allowed to overrun mercy in the name of the power of the state.

The Crime

The facts of Calvin Swann's crime are not subject to dispute and are based primarily on his confession.

On November 7, 1992, Calvin Swann roamed the streets of Danville at 10:00 p.m. carrying a shotgun. As he walked past one house, Calvin noticed the front door was open. Calvin opened the storm door, entered the living room, and saw a man, Conway Richter, seated

The Honorable James S. Gilmore, III

May 7, 1999

Page 8

at his kitchen table eating supper. Calvin pointed the shotgun at Mr. Richter and said, "This is a stickup."

Mr. Richter got up from the kitchen table and charged toward Calvin, who fired a single shot that struck Mr. Richter in the center of his chest. Although Mr. Richter kept coming towards Calvin, no further shots were fired. When Mr. Richter collapsed, Calvin took \$60 from his wallet and fled.

On December 22, 1992, Calvin agreed to be interviewed by David L. Dalton, a Danville police detective. Detective Dalton told Calvin that the police had found the shotgun, and that "a so-called 'Retinal Image Machine' was being developed which would reflect the 'last impression or vision' that a dead person had seen."⁹ As described by the Virginia Supreme Court, "After some discussion of Swann's prior confinements in a mental institution, Swann finally confessed to killing Richter and agreed to 'tell [Dalton] about it.'"¹⁰ Calvin then confessed to the crime.

The Honorable James S. Gilmore, III
May 7, 1999
Page 9

Serious Questions of Mental Competency at Trial

The central issue at Calvin's trial was mental competency; specifically, whether Calvin was truly mentally ill, or was simply a malingerer. The evidence on this issue was fairly divided. Indeed, in an affidavit submitted during post-conviction proceedings, the prosecutor in this case, Commonwealth's Attorney William H. Fuller, III, stated that "there was some evidence that Swann had mental problems," although he also believed "there was evidence, just as compelling, if not more so, that he was a malingerer and that he sought hospitalization when incarcerated because he had more privileges there than in the penitentiary."¹¹ In light of this conflict in the evidence, Mr. Fuller commenced jury selection "[k]nowing that the case was going to be a battle of psychiatrists and psychologists."¹²

The "battle" of psychiatrists and psychologists that Mr. Fuller predicted never occurred. At trial, defense counsel sought the appointment of a psychiatrist to evaluate Calvin's schizophrenia and psychosis – including the nature and effects of the numerous pharmaceutical drugs Calvin had been prescribed over the years – and to testify to Calvin's competence to stand trial and his future danger to society. This request was denied. Instead, defense counsel was limited to appointment of a psychologist, who was not a medical doctor. The psychologist told the court that with regard to "issues of medication, I am not qualified to medically render an opinion."¹³

The Honorable James S. Gilmore, III
May 7, 1999
Page 10

No competency hearing was ever conducted. Nonetheless, some evidence of Calvin's mental illness was presented to the jury. Unfortunately, key aspects of this evidence were untrue. For example, the psychologist appointed for Calvin testified to the jury that Calvin had been found competent to stand trial in every prior judicial proceeding. This testimony was not true. In fact, Calvin had been found incompetent to stand trial on two previous occasions.

Defense counsel also offered testimony from Dr. Miller Ryans, a psychiatrist. However, because Calvin could not afford to pay for an evaluation of his current mental condition, Dr. Ryan's testimony was limited to his examination of Calvin eight years earlier. Significantly, Dr. Ryan was forced to acknowledge that he could not offer any information regarding Calvin's mental condition at the time of the crime or at trial, and he could not correct the psychologist's *erroneous* testimony that Calvin had never been found incompetent to stand trial.

In closing arguments, the prosecutor emphasized the lack of expert medical evidence of Calvin's mental illness and argued to the jury that the "whole record indicates that there is no mental illness."¹⁴ The prosecutor also emphasized the *erroneous* testimony of the psychologist by arguing to the jury that Calvin "has been held repeatedly, by every psychiatrist and psychologist, who examined him, to be mentally competent to stand trial."¹⁵

Despite the limited, one-sided and inaccurate nature of the medical testimony, the jurors struggled with the issue of Calvin's mental competency and the appropriate sentence for

The Honorable James S. Gilmore, III
May 7, 1999
Page 11

Calvin's crime. The only testimony that the jurors asked to have read back during their deliberations was the testimony of Calvin's appointed psychologist. Several jurors have subsequently said that they discussed the possibility of parole during their deliberations.¹⁶ The jurors understood that, under Virginia law at the time, a life sentence did not mean life in prison. They knew that Calvin would be released on parole at some point if they gave a life sentence. One juror recalls that "the possibility of parole was a big problem during the penalty phase."¹⁷ Another recalls that "the jurors had asked the judge if they could give life without parole, and the judge said no."¹⁸

The option of life without parole that was foreclosed to the jurors during Calvin's trial is no longer precluded by the laws of the Commonwealth. Imposing that option now in a grant of clemency would be consistent with the justice the prosecutor and the jury sought to do at the time of trial. Indeed, the prosecutor who pursued the death sentence at trial states publicly today that he would not have sought the death penalty at the time if the option of life without parole had been available. We encourage you to speak with the prosecutor on this issue.

***Calvin Swann's Complete Medical Records Demonstrate
A Long and Increasingly Worsening History of Mental Illness***

The prosecutor's principal focus at trial was the possibility that Calvin was a malingerer, and was not actually mentally ill. Given the limited record presented at the time, the

The Honorable James S. Gilmore, III

May 7, 1999

Page 12

prosecutor cannot be faulted for making this argument, or for submitting the issue to the jury.

But extensive medical records from various agencies of the Commonwealth that neither the prosecuting attorney nor defense counsel had at the time of trial now squarely refute any such allegation of malingering.

Schizophrenia is a devastating mental disorder which most often begins in late adolescence and gradually worsens overtime. It can be managed with medication under careful supervision, but almost never gets better and never goes away. If left untreated, schizophrenia often leads to psychotic episodes. Schizophrenic psychosis can manifest itself in numerous ways: hallucinations and other thought disturbances, destructive outbursts, and bizarre behaviors to name a few. These symptoms can worsen over time and are exacerbated when a medicated patient stops taking his medication. In the case of Calvin Swann, this is exactly what happened.

Calvin Swann's history, as documented by the Commonwealth's own records, paints as grim a picture of schizophrenia's toll as can be imagined. Repeated in the medical records at each and every institution where Calvin was held are references that he "paced" and "spoke to himself" or to no one in particular, that he spoke incomprehensibly and rambled. Episodes of his self-abusive behavior escalated over the years, from banging his head against the wall, to inflicting cuts on himself, to putting staples in his ears. He was increasingly described as hostile and held in seclusion and restraints. All of these symptoms long pre-dated Calvin's arrest for this crime and his sentence to death. Given this long history - which was not available

The Honorable James S. Gilmore, III

May 7, 1999

Page 13

to the jury or the sentencing judge - there is no question that Calvin's severe mental illness is real.

The medical records are summarized in a chart at Tab 1 of the accompanying appendix. The records that were not in the possession of the prosecutor or defense counsel at the time of trial - and therefore were not available to the jury or judge - are indicated with shaded text. They paint the following, disturbing picture.

Calvin Swann was a fairly normal student at a community college, when, as his aunt, brother and other relatives attest, he began to change. He withdrew, and started spending time alone. He stopped caring about his hygiene, stopped showering or wearing deodorant.¹⁹ His siblings remember he started doing bizarre things like picking up an ashtray and screaming at them to look at it.²⁰ Calvin's mother, brother and aunt became so concerned that they had him committed to Central State Hospital on February 5, 1974. Upon his commission, doctors said Calvin "impressed as psychotic." They found he was hearing voices²¹ and that he was mentally retarded. Calvin was often "agitated" and hostile, and had to be restrained on occasion. But Calvin was not given long-term treatment. Instead, he was placed on medications and discharged two months later.²²

Calvin's first arrest, for robbery, occurred very shortly thereafter. From the Danville Jail, he was committed for psychiatric evaluation at the Southwestern State Hospital. While in the hospital he was frequently placed in seclusion and restraints. He often walked the

The Honorable James S. Gilmore, III

May 7, 1999

Page 14

floor, talking to himself. Doctors diagnosed Calvin as having a schizoid personality. Following his discharge, Calvin was sentenced to prison for his robbery conviction on December 4, 1974.

In prison, Calvin's illness worsened. His behavior began to deteriorate; he admitted to hearing voices, demonstrated confabulation²³, and was acutely psychotic. Calvin was diagnosed with chronic undifferentiated schizophrenia²⁴ and transferred to Central State Hospital for treatment. His schizophrenic behavior continued, including hallucinations, paranoia, talking to himself incomprehensibly and pacing. He was medicated and returned to prison three months later. This was just the beginning of a seemingly endless cycle in which Calvin deteriorated into psychosis, was committed to a mental hospital where he was medicated for his condition, and was returned to prison where, because prisons are not structured to treat serious mental illness, he would refuse medication and lapse into psychosis again - each episode generally more destructive and bizarre than the one before.

It was not long then before Calvin's condition deteriorated and he had to be committed again. While in jail, Calvin was frequently reported to be beating on walls, pacing and talking incoherently. As a result, on November 5, 1976, he was transferred to Southwestern State Hospital. He appeared delusional and was hallucinating. The staff described him as increasingly combative, aggressive, and paranoid. The records from this stay reflect idiosyncratic behavior common in schizophrenics, which continue to appear throughout Calvin's medical records: constant movement and talking to himself, walking the floor, continuous water

The Honorable James S. Gilmore, III

May 7, 1999

Page 15

drinking. During his stay, he was frequently placed in seclusion and restraints. Eventually, after almost five months, Calvin was stabilized on medication and returned to prison. He was again diagnosed with schizophrenia.

Gradually, after his return to prison, Calvin's mental condition again deteriorated. Just two months after his return to the Virginia State Penitentiary, the staff recommended hospital isolation. He continued his behavioral problems, including flooding his cell, repeatedly pacing the floor and bizarre speech. He refused to take medications because he believed they did something to his heart.²⁵ As before, Calvin was confused and confabulating and had difficulty distinguishing between real and imagined sounds. In July 1977, Calvin was committed again.

In 1977, Calvin was committed to the hospital, and released back to the penitentiary, twice. The amount of time he spent in seclusion and restraints steadily increased. His psychosis continued to manifest itself, followed by doctors working to control it with medications. He continually walked the floor, and spoke to himself incoherently. The psychiatric staff noted that he "needs meds badly. Can't make it without it." The hospital staff recognized that the improvement Calvin experienced was due to fact that he was adequately medicated while hospitalized, and that he was known to be unwilling to take his medications on a regular basis outside of the hospital. Despite this recognition, in August 1977, Calvin was returned to the penal system.

The Honorable James S. Gilmore, III

May 7, 1999

Page 16

Almost immediately upon return to prison, Calvin's condition deteriorated. He was noted to be hallucinating to voices in his head and believed to have marginal contact with reality. The staff recognized that Calvin was "evidently in need of hospital and in need of meds there." Accordingly, in October 1977, Calvin returned to Southwestern State Hospital through the end of the year.

By June 1978, Calvin's disease had worsened to the point that he was inflicting cuts on himself. He had lost all insight into his condition. He began using neologisms.²⁶ He was violent - throwing things and kicking guards - and rambling irrationally. Finally, after he was denied parole in March 1979, Calvin was ordered by the court into treatment again.

Upon his readmission to Southwestern State Hospital, Calvin remained disoriented and hard to understand. He was increasingly restless, paced the floor, and constantly ran his hands over his thighs. Aides recorded that Calvin did not seem to know why he was in the hospital. He was described as paranoid and experiencing hallucinations. He was hostile and aggressive and generally uncommunicative. Again, toward the end of his greater than two month stay, Calvin was able to comply with his medication. When his psychosis accordingly subsided, he was returned to the penal system. He was diagnosed as chronic schizophrenic.

Calvin was able to maintain his remission for several months in prison. By December 1979, however, he was off his medication, and the prison physician noted he demonstrated marginal, tangential thinking, consistent with his chronic condition. His behavior

The Honorable James S. Gilmore, III
May 7, 1999
Page 17

was marked with destructive outbursts including throwing his food tray, setting fires, and flooding his cell. In March 1980, he was committed once again to Central State Hospital, and later to Southwestern State Hospital, where he again had to be secluded and restrained. Repeating the cycle typical of his treatment over the years, Calvin was medicated to the point that he was calm and cooperative, and the hospital discharged him again in April 1980 back to Mecklenburg. He was diagnosed with chronic undifferentiated schizophrenia.

In July of 1980, prison guards reported that Calvin was in the midst of a psychotic break and needed to be medicated "before he injures someone or perhaps even worse commits a homicide." He continued setting fires in his cell, pacing the floors, and speaking in fragmented conversation.

In 1981, Calvin was denied parole and transferred back to Mecklenburg. At Mecklenburg, the staff psychologist recognized that Swann's condition was deteriorating and recommended hospitalization because "this pattern last time ended in a serious psychotic disturbance." Accordingly, on March 12, 1981, Calvin was again transferred to Central State Hospital. Records reflect Calvin's characteristic disjointed speech, inappropriate responses, and his pacing the floor. He also appeared paranoid, yelled out profanity, and kicked doors. He drank water constantly.²⁷ He demonstrated a gross indifference to himself and his surroundings and was very delusional. He jumped from topic to topic during conversation and believed that people were trying to "steal his name." Aides noted that Calvin would have to be placed where

The Honorable James S. Gilmore, III

May 7, 1999

Page 18

ongoing psychiatric services were available. Once again, however, when Calvin was in a medicated remission, he was released into the prison system with a diagnosis of chronic undifferentiated schizophrenia.

Very shortly after returning to prison in April 1981, Calvin was placed in segregation due to his psychiatric instability. His behavior and adjustment deteriorated markedly. He set fires, fought with another inmate, and threw things in his cell. Calvin was found naked in his cell, sleeping inside of his mattress, and covering his face while speaking. His personal hygiene was so poor and the accumulated filth in his cell so putrid, staff called his condition a "health hazard."²⁸

Calvin was returned to Central State, where it was noted he was obviously acutely psychotic. During this hospitalization, Calvin was again almost constantly subject to seclusion and restraints. He was bizarre, obscene and hallucinating. His speech was nonsensical and rambling. His destructive behavior appeared to escalate and he was increasingly hostile. Calvin had "no insight into his criminal behavior." Eventually, Calvin was stabilized on Stelazine. His discharge summary noted a poor prognosis for functioning in society; it was not expected that he would be able to comply with medication. One month later he was released on mandatory parole on April 12, 1982.

The same day he was released from prison, Calvin showed up in the emergency room, described as "confused." The next day, Calvin was arrested on charges of assault and

The Honorable James S. Gilmore, III

May 7, 1999

Page 19

battery. While in the Danville Jail, records reflect that Calvin was incoherent and psychotic and spoke of being raised by animals of the wild. He was committed to Southern Virginia Mental Health Institute for evaluation. He appeared at the evaluation wearing only shorts and was constantly grabbing his genitals. He had "no idea who is attorney [was] or the consequences if convicted of assault." He was found incompetent to stand trial and committed to Central State Hospital. He demonstrated loose associations²⁹, poor concentration and described auditory hallucinations. After being extensively medicated, Calvin was determined to be competent to stand trial, and was subsequently convicted. He was released on June 24, 1982.

During July, Calvin attended the Danville/ Pittsylvania Mental Health Center as an out-patient where his diagnosis was recorded as schizophrenia, undifferentiated in remission. Records describe him as tense and anxious, and rubbing his legs constantly.

On September 9, 1982, Calvin was arrested for burglary and grand larceny, and was placed on anti-psychotic medication immediately in the Danville Jail. He was transferred to the Southern Virginia Mental Health institute for evaluation. He appeared floridly psychotic, actively hallucinating, was making loose associations, and was preoccupied with voices he was hearing. He did not know why he was in jail. He was found to be not competent to stand trial. He was again committed to Central State Hospital, for the seventh time.

At Central State, consistent with his long history, Calvin paced the floor, cursing and swearing. Escalating his self-mutilating behavior, he was observed with a staple in his ear

The Honorable James S. Gilmore, III

May 7, 1999

Page 20

and his personal hygiene was poor. He was loud and agitated and threw his food tray. In a final staff conference, Calvin was said to have been stabilized on medication and was to be returned for trial, although staff notes for the next day said that Calvin continued to talk of animals talking to him and telling him what to do. He said the animals were in control, and spoke of his home beneath the earth. Calvin was nonetheless discharged, with the diagnosis of schizophrenia, undifferentiated, chronic, with acute exacerbation.

On June 12, 1983, Calvin was admitted to Central State Hospital from the Danville Jail to evaluate his competency for sentencing. It was determined that he was too disturbed to understand the procedure and his doctor requested permission to medicate him involuntarily. Dr. Miller Ryans noted Calvin Swann's delusional thinking and found it to be consistent with his previous diagnosis of chronic undifferentiated schizophrenia with acute exacerbation. Once Calvin was again stabilized on medication, he was returned to Judge Ingrahm's court for sentencing. On July 11, 1983, Calvin Swann was sentenced to prison.

In prison, Dr. Hope Herring noted that Calvin used quite a few neologisms. Calvin was loud and hostile, and grabbing his genitals. He was paranoid and self-destructive. Dr. Herring recommended assignment to a psychiatric institution, and Calvin was transferred to Bland Correctional Facility. At Bland it was noted that Swann had "extremely little understanding of his behavior," and he became agitated and was isolated.

The Honorable James S. Gilmore, III
May 7, 1999
Page 21

On January 13, 1984, Calvin was again admitted to Central State Hospital. He had been disregarding his personal hygiene and was belligerent. Once again, Calvin was quickly stabilized on medication and released. In the following 10 months, Calvin was transferred between three different correctional facilities. His psychosis began to take over again. He had difficulty communicating rationally, and was delusional. He refused to bathe. Calvin was described as living a regressive, marginal, and unproductive life. His overall picture was said to be one of "regression, dilapidation, and severe schizophrenia scarring." He was discharged from Buckingham with a diagnosis of chronic, undifferentiated schizophrenia.

At Marion Correctional facility, Calvin's illness continued. His idiosyncracies, such as talking to himself, persisted, but other more extreme aspects of his psychosis become even more difficult for prison staff to manage. He yelled, cursed, and beat on his door. He became very destructive and disturbed, and again had to be placed in restraints. He openly masturbated. In June 1985, Calvin was again transferred to Central State Hospital, where he was stabilized with medication. His affect became flat and he became quieter. A week later, Calvin returned to Marion, where he was able to comply with his medication for about two months. He was diagnosed again as having schizophrenia, undifferentiated, chronic with history of self-destructive behavior.

Over the next year, Calvin continued to pace and talk to himself, and was increasingly belligerent with others around him. His personal hygiene deteriorated - he refused

The Honorable James S. Gilmore, III

May 7, 1999

Page 22

to bathe, wore the same clothes for many days at a time and was generally incapable of taking care of himself. Other behavior became increasingly bizarre: He put cigarette ashes on the floor and rolled in them. He was preoccupied with saying certain words repeatedly in the middle and the end of sentences.

Finally in January 1987, Calvin was, again, committed to Central State Hospital. Simultaneously his parole was denied because he reportedly showed no interest in parole. He responded to medication with Haldol - although many of his symptoms continued - and was discharged to the prison system with a diagnosis of schizophrenia, undifferentiated chronic with acute exacerbation.

After two months, however, Calvin refused to take his medications. Almost immediately, his condition deteriorated and he again would repeat words or sounds, talk incoherently, became hostile and disregarded his personal hygiene. As Calvin's mandatory parole date neared, officials at Marion encountered resistance in developing an aftercare plan for Calvin. Central State Hospital refused to take him, and Danville/Pittsylvania Mental Health Services also declined to help. Eventually, however, upon his October 29, 1987, mandatory parole release date, Calvin was involuntarily committed to Central State Hospital, where he remained for nine months.

Records from this hospitalization recognized that Calvin was in need of long-term treatment for his mental illness, and that he did not understand or accept his own past. On

The Honorable James S. Gilmore, III

May 7, 1999

Page 23

January 28, 1988, Calvin was discharged from parole, yet remained in the hospital. During this time, Calvin began having episodes that appeared to be seizures. On one occasion, he was found eating a roll of deodorant. Overall, while he was medicated, Calvin's psychosis appeared under control; however, once he refused medications, his condition rapidly deteriorated. After having some success on a two-week visit home, Calvin was released on July 22, 1988, with the recommendation that he continue his medication.

For a couple of months Calvin was able to make his outpatient appointments and receive his medication. After that, he began missing appointments, and dropped out of the care of the mental health community. He was arrested on March 9, 1989, for breaking and entering and assault. He was placed in the Danville Jail and immediately started on medication. While he was well-medicated on oral Mellaril and Haldol injections, he was evaluated by Dr. Arthur Centor and found competent to stand trial, despite the fact that another report just two weeks later found that Calvin clearly had little understanding of the actual process. Records from the Danville Jail after Calvin was sentenced indicate that his mental condition required immediate attention. He was subsequently transferred to Deep Meadow Correctional Center and placed in the psychiatric unit, then was transferred to Powhatan. After experiencing poor institutional adjustment and demonstrating poor insight, he was transferred to Marion Correctional Treatment Center.

The Honorable James S. Gilmore, III

May 7, 1999

Page 24

At Marion, Calvin exhibited many of the same symptoms as past hospitalizations. He was pacing, nervous, and constantly moving. He was hostile and his behavior gradually worsened. After an unsuccessful attempt to stabilize Calvin on low-dose Thorazine, it was discontinued. He appeared paranoid, his conversation was rambling. He was transferred to Nottoway where he seemed to fare slightly better. But gradually, as his condition deteriorated, he had disciplinary problems which were attributed to his mental health. He was transferred to Greensville Correctional Center where he was fairly successfully maintained on medication. He was then released on mandatory parole on January 29, 1992.

Following his release on mandatory parole, Calvin initially was compliant, but within a month began refusing medications. On August 28, 1992, Dr. Schmidt, a physician at Danville-Pitts Substance Abuse Services, noted that Calvin had not seen a doctor. Dr. Schmidt also noted that Calvin described spirits who had visited him in prison. Calvin described the spirits' belief systems in fairly elaborate detail. While Dr. Schmidt noted that these spirits had no connection to reality, he also noted that they were real to Calvin.

At that point, the medical records stop. There is no record of any treatment or medications after Calvin's August 28, 1992, visit with Dr. Schmidt at the end of August.

Then, a little more than two months later, on November 7, 1992, Calvin shot and killed Conway Richter during a robbery. Shortly thereafter, Calvin confessed to the crime.

The Honorable James S. Gilmore, III

May 7, 1999

Page 25

Unfortunately, this was not the history that Calvin Swann's jury heard. Because hundreds of pages of documents describing the progression of Calvin's illness were not obtained by the defense, the jury was not given a comprehensive, accurate understanding of the pattern and progression of Calvin's illness. Had the jury been provided with Calvin's full history they would have known:

- about the constant cycle of imprisonment and institutionalization which produced progressively worse psychotic breaks;
- about the constant manifestations of Calvin's illness which demonstrate the progression of Calvin's mental illness and affirm the legitimacy of his condition;
- that Calvin's numerous disciplinary infractions in prison occurred during times when he was not taking his anti-psychotic medication, and are consistent with his mental illness;
- that Calvin had previously been found incompetent to stand trial *twice*, instead of never as they were told;
- that Calvin routinely requested to return *from* the hospital *to* the penitentiary, and that he was routinely placed in seclusion and restraint in the hospital, both of which contradict the theory that Calvin malingered because he preferred the hospital to the penitentiary;

The Honorable James S. Gilmore, III

May 7, 1999

Page 26

- that Calvin was routinely denied parole as the result of his mental illness which refutes the theory that Calvin malingered to gain advantage in the criminal justice system.

Separate and apart from the jury's inability to consider this overwhelming evidence in reaching its decision, that evidence is available now for consideration and compels a grant of clemency. The staggering proof as detailed in 25 years of medical records demonstrates that Calvin suffers from a very real and very devastating mental illness.

Compelling Evidence that Calvin Swann is Severely Mentally Ill Today

After the sentence of death was imposed, Calvin's mental condition continued to deteriorate. At Mecklenburg State Prison, where Calvin was held until August 1998, he was almost constantly maintained in segregation because his severe illness prevented him from adjusting to normal prisoner life. The records maintained by the Department of Corrections note that Calvin was "difficult to understand," and he did "not seem able to comprehend some simple questions." Another record indicates that Calvin constantly repeated series of numbers. He spread feces in and around his cell, and he lived in a general condition of filth.

Other inmates at Mecklenburg reported that Calvin was sticking paper clips into his ears, as well as tops of pens, and binder clips. He did not sleep on his bed, but put his mattress on the floor, and sometimes crawled under his bed. He spread jelly all over the bed,

The Honorable James S. Gilmore, III

May 7, 1999

Page 27

walls, floor, which attracted large numbers of roaches. His personal hygiene was very poor. This excessively poor hygiene is typical of schizophrenics. Medical experts note that they often must be reminded to wash and bathe.³⁰

Calvin exhibited a severe, irrational fear of guards with glasses and had an extreme reaction if they approached. He attempted to send bizarre mailings which sometimes consisted solely of shreds of paper. Occasionally he simply sent an empty envelope. He was abnormally preoccupied with obtaining cigarette butts to the extent he was often unable to pay attention to anything else. He frequently banged his stool against the wall of his cell for sustained periods, and seemed to be hearing music from a non-functional Walkman. At one time, he pulled a wick out of a cigarette lighter, reportedly because he felt it was "interfering with his airwaves." He then flushed it down the toilet and explained that now the wick was "down under."

Calvin arrived at Sussex I State Prison in August of last year. Almost immediately, the mental health staff was alerted because Calvin had placed a bar of soap in his rectum. He was screaming and continually flushing his toilet. He was placed in four point restraints. The next day, he smeared feces on the walls of his cell. Staff reported that he spoke only while covering his mouth, that he was very hard to understand, and seemed clearly disorganized. He showed psychotic thinking, very poor judgment, and no insight into understanding his illness. The prison staff prescribed Haldol which Calvin took until the side

The Honorable James S. Gilmore, III

May 7, 1999

Page 28

effects became unmanageable for him. Eventually, at the end of October, Calvin was screaming, with a wild tormented look on his face, and appeared delusional. He was once again chained to his bed in four point restraints, where he remained, often soaked in his own urine, for two days. While restrained, staff noted that Calvin showed a slow level of consciousness, a lack of orientation to time, date, place, or facility, pressured speech pattern and a flight of ideas. Before being released from the restraints, Calvin "agreed" to take anti-psychotic medication. He remained on suicide watch for three more days.

By the middle of November 1998, Calvin was once again tormented by the side effects of his medication and refused to take it. Staff noted that Calvin began lying on the floor in a fetal position, and had no clear understanding of why he had taken his medication. In December, Calvin was able, at least intermittently, to take a different medication, Stelazine.³¹ His condition improved somewhat, but psychotic features still remained: He demonstrated disoriented speech, a flight of ideas, and poor hygiene. In early 1999, Calvin was also observed to be engaged in ritualistic toe touching, and his compulsive repetition of numbers had returned.

Today, Calvin Swann is 44 years old. He has spent the last 25 of those years in the throes of schizophrenia documented by the Department of Corrections and the state mental health system. Dr. Mark Mills wrote in 1997, "Mr. Swann struck me as miserable, unlike some psychotic patients who are able to lose themselves in their own reverie. Calvin Swann is simply too disorganized to allow for any opportunity of affection, support, or care."³² As a result,

The Honorable James S. Gilmore, III

May 7, 1999

Page 29

Calvin leads a very isolated life. His brother Clyde, visited him from time to time and talked with him on the phone, but Calvin is now completely impossible to understand. When Calvin is medicated, he is able to communicate somewhat with his brother, but this remains the extent of his contact with the outside world.

The overwhelming medical evidence convincingly demonstrates that Calvin suffers from severe schizophrenia. Indeed, Dr. Mark Mills, a psychiatrist who has worked with the Department of Justice and numerous Attorneys General offices, states that he has only "ever seen one person" that he "would classify as exhibiting a more devastating pathology than Calvin Swann."³³ Unlike the experts testifying at Mr. Swann's trial, Dr. Mills conducted a thorough evaluation of Calvin and his medical records, including a recent visit with Calvin less than six weeks ago. The records Dr. Mills reviewed are from Virginia facilities and agencies, including Central State Hospital, Southwestern State Hospital, Southern Virginia Mental Health Institute, the Danville Regional Medical Center, and the Danville-Pittsylvania Mental Health Center. This documentary evidence leads Dr. Mills to conclude that Calvin is "floridly psychotic." Nonetheless, Dr. Mills is confident that Calvin would not present a future danger to society if he were properly medicated and treated for his illness in a secure environment.³⁴

The Honorable James S. Gilmore, III

May 7, 1999

Page 30

No Court Has Had an Opportunity to Review the Substance of this New Evidence

No jury or court has had the opportunity now presented to you, the Governor, to address this extensive new evidence concerning the depth of Calvin Swann's psychosis.

Pro bono counsel sought to bring these records to the attention of various courts during *habeas corpus* proceedings, but each court declined to review them on procedural grounds. The Virginia Supreme Court, which dismissed the petition in a summary order, determined that consideration of many of the claims presented was barred under the procedural rules established in the Commonwealth's common law. The U.S. district court similarly dismissed another petition on the ground that Calvin's claims were barred from review by federal statutes. The U.S. Court of Appeals for the Fourth Circuit reversed that procedural ruling, and remanded to the district court with instructions to address only the issue of Calvin's competence to be executed given his *current* mental condition. However, the Court of Appeals proscribed any such review until execution is imminent.

Accordingly, we ask you to consider this extensive medical record that was not available to the jury or sentencing judge and has not been reviewed by any court. Calvin's extraordinary illness should be evaluated in its entirety so that retribution may be tempered with mercy, and justice may be done "where the rigorous inflexibility of the judicial system has not adjusted to compelling social needs."³⁵

The Honorable James S. Gilmore, III

May 7, 1999

Page 31

The Death Penalty is Not Appropriate in this Case

As you have made clear, "capital punishment is restricted very narrowly to only murder, secondly only murder in connection with an aggravating special circumstance and then, thirdly, it was so heinous as to be inhuman or that there was a likelihood of it occurring again."³⁶ These criteria must be met "before you can even impose the death penalty,"³⁷ and even then the choice of death is left to the discretion of the jury, the trial court and, ultimately, the Governor.

In this case, the Virginia Supreme Court upheld Calvin Swann's death sentence on the grounds that the killing was done in connection with a robbery, and that the jury "could have found" that Calvin presents a danger in the future.

The fact that the murder in this case occurred during the course of a robbery is not disputed. But those circumstances alone are not sufficient to impose the death penalty.³⁸ We do not suggest in any way that the underlying crime is excusable. We merely point out the undeniable fact that these circumstances, without more, could not justify the death penalty.

The only legal basis for carrying out the death penalty in this case is a finding that Calvin poses a threat of future danger to society which cannot be avoided by a sentence of life without parole. Even at the time of trial, this was not a clear-cut case for the imposition of the death penalty. As the prosecuting attorney has said forthrightly, this was a case with significant questions going to the mental capacity of the defendant, which could be resolved only by "a battle of psychologists and psychiatrists."

The Honorable James S. Gilmore, III

May 7, 1999

Page 32

If the question was a close one at the time of trial, the evidence now available clearly tips the balance in favor of finding that execution is not appropriate in this case.

Similarly, the presently available evidence argues against continuing to accept the view that Calvin represents a danger to society. The most recent medical analysis of Calvin indicates he "would not be a danger to society if he were properly treated for his illness in a secure environment."³⁹ Instead of exacting the ultimate punishment for his pathetic psychology, Calvin Swann, as one of "Virginia's most vulnerable citizens" should be provided the treatment which he has been consistently denied by the state.

As a society, we have recognized that the only legitimate reasons for executing another human being are deterrence and retribution.⁴⁰ Unless the execution of a convicted man will advance one of these goals, the execution "is nothing more than the purposeless and needless imposition of pain and suffering."⁴¹ In this case, the execution of Calvin Swann will serve neither of these legitimate purposes. More to the point, in light of the compelling evidence of Calvin's mental illness and the availability of an alternative that will adequately protect the people of Virginia, Calvin presents a unique opportunity for you to demonstrate both mercy on one who is pitiful and a commitment to protection of Virginia's innocent citizens by commuting this sentence to life without the possibility of parole.

You were instrumental in convincing the General Assembly to establish a sentence of life without parole when you were Attorney General. That change has given juries

The Honorable James S. Gilmore, III

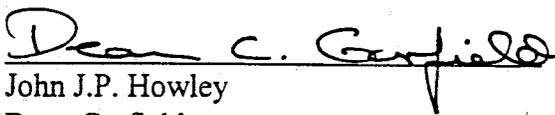
May 7, 1999

Page 33

another option for those criminals who should not be released into the civilian population. As your spokesman has said publicly, "Whether the jury chooses to do that with life in prison, which now means just that, or decides the crime justifies execution, the result is the same . . . the killer will never again be a danger to society."⁴²

While the option of life without parole was not available to the jury at the time of trial, you now have that option in granting clemency. That alternative should be accepted and Calvin's death sentence should be commuted to life without the possibility of parole. This is the only result that would be consistent with both your stated belief that Virginia must make "sure there's not going to be another victim someplace, ever,"⁴³ and your stated policy of compassion and assistance to "Virginia's most vulnerable citizens,"⁴⁴ those who suffer from severe mental illness.

Respectfully submitted on behalf of
Calvin Eugene Swann,



John J.P. Howley

Dean Garfield

Lori B. Leskin

The Honorable James S. Gilmore, III
May 7, 1999
Page 34

ENDNOTES

1. Donald P. Baker, *As Execution Nears, Mental Illness at Issue*, The Washington Post, April 30, 1999, at B1 (quoting Commonwealth's Attorney William H. Fuller, III).
2. Affidavit of William H. Fuller, III, sworn to on January 24, 1996, at p.11.
3. Letter from Dr. Samenow, Calvin Swann's Court Appointed Psychologist, to Trial Court Judge Ingram (4/15/93) (on file with the court).
4. Sentencing Transcript at 593.
5. Sentencing Transcript at 523-524.
6. Office of the Governor, News Release, *Governor Gilmore Says Mental Health Progress Being Made* (March 30, 1999).
7. *United States v. Wilson*, 32 U.S. 150, 160 (1833).
8. Caleb Foote, *Pardon Policy in a Modern State*, 39 The Prison Journal 3 (April, 1959).
9. *Swann v. Commonwealth*, 247 Va. 222, 226, 441 S.E. 2d 195, 199, (Va. 1994).
10. *Id.*
11. Affidavit of William H. Fuller, III, sworn to on January 24, 1996, at p. 11.
12. *Id.*
13. Letter from Dr. Samenow, Calvin Swann's Court Appointed Psychologist, to Trial Court Judge Ingram (4/15/93) (on file with the court).
14. Sentencing Transcript at 509.
15. *Id.*
16. Affidavit of Doris Pye, sworn to on August 23, 1995. Ms. Pye is a private investigator who conducted interviews with 11 of the 12 jurors from Calvin's trial.
17. Pye Aff. ¶ 10.

The Honorable James S. Gilmore, III

May 7, 1999

Page 35

18. *Id.*
19. The onset of schizophrenia is generally marked by "emotional withdrawal, diminishing social engagement and social drive, and idiosyncratic responses to ordinary events or circumstances." Harold I. Kaplan & Benjamin J. Sadock, *The Comprehensive Textbook of Psychiatry*, 899 (4th ed. 1995).
20. *See* Sentencing Transcript at 123-142.
21. Hallucinations, one of the major disorders of perception that occurs in schizophrenia is also present throughout Calvin's record. Calvin is often seen talking aloud to his voices, and has described various hallucinations about animals. Although the suggestion was made at Calvin's trial that he was not hallucinating, because he rarely described their content, patients are often reluctant to discuss the voices. Kaplan & Sadock at 977. It is also true that hallucinations can be comprised of either identifiable or unidentifiable sounds. *Id.*

The Honorable James S. Gilmore, III

May 7, 1999

Page 36

22. During the course of his illness, Calvin has been prescribed most of the available anti-psychotic medications as listed in the Physician's Desk Reference, a widely used pharmacological encyclopedia. These drugs and their current descriptions are:

Haldol	"is indicated for use in the management of manifestations of psychotic disorders." Physician's Desk Reference 1575 (50th ed. 1996).
Mellaril	"for the management of manifestations of psychotic disorders." <i>Id.</i> at 2269.
Navane	"is effective in the management of manifestations of psychotic disorders." <i>Id.</i> at 2201.
Prolixin	"is indicated in the management of manifestation of psychotic disorders." <i>Id.</i> at 509.
Serentil	"Schizophrenia: Serentil is effective in the treatment of schizophrenia. It substantially reduces the severity of emotional withdrawal, conceptual disorganization, anxiety, tension, hallucinatory behavior, suspiciousness and blunted affect in schizophrenic patients." <i>Id.</i> at 684.
Stelazine	"for the management of manifestations of psychotic disorders." <i>Id.</i> at 2514.

The Honorable James S. Gilmore, III

May 7, 1999

Page 37

Thorazine "for the management of manifestations of psychotic disorders." *Id.* at 2523.

Trilafon "indicated for use in the management of the manifestations of psychotic disorders..." *Id.* at 2389.

In addition to these medications, Calvin has also been placed on Artane and Cogentin for the management of the side effects of the anti-psychotic medications.

23. Confabulation is characterized by untrue responses to questions but without a deliberate attempt to mislead. The confabulated responses are often drawn from the patient's actual experiences but are produced out of context." Kaplan & Sadock at 181.
24. Undifferentiated schizophrenia is a type of schizophrenia which features delusions, hallucinations, and disorganized speech among other symptoms, but does not meet the criteria for paranoid, disorganized, or catatonic schizophrenia. Diagnostic and Statistical Manual IV at 285, 289 (1994).
25. It is a common problem for schizophrenics to cease taking their medication if not carefully managed and supervised. The refusal to take medication is itself a symptom of the illness. Unfortunately, "when prolonged or repeated, noncompliance contributes to a downwardly spiraling cycle of relapse, recidivism, and deterioration of social and instrumental functioning." Kaplan & Sadock at 1017-8.
26. Neologisms are a disorder of thought and speech which occurs in schizophrenia. It is the use of nonsense words which have some meaning to the patient. Kaplan & Sadock at 975.
27. This behavior is known as self-induced water intoxication, which is one of the disorders of behavior noted in schizophrenia. *See* Kaplan and Sadock at 976. Calvin is reported engaging in this behavior throughout the records. In fact, Calvin's brother reports that even during his trial, Calvin was drinking water almost constantly.
28. Poor hygiene is an example of General Appearance and Behavior often seen in schizophrenics. Often they must be reminded to wash and bathe. Kaplan and Sadock at 974.

The Honorable James S. Gilmore, III

May 7, 1999

Page 38

29. Loose associations are a disorder of thought and speech that characterize schizophrenia. Sufferers utter from seemingly incongruous sentences to totally non-sensical "word salads." Kaplan & Sadock at 974.
30. Kaplan & Sadock at 974.
31. *Id.*
32. Mills Aff. ¶ 15.
33. Mills Aff. ¶ 22.
34. Mills Aff. ¶ 36(e).
35. Caleb Foote, *Pardon Policy in a Modern State*, 39 *The Prison Journal* 3 (April, 1959).
36. Frank Green, *State's Executions Reaching a Peak Under Gilmore; As Attorney General He Speeded Process*, *The Richmond Times Dispatch*, Dec. 13, 1998 at p. C-1.
37. *Id.*
38. *See, e.g., Graham v. Commonwealth*, 250 Va. 487 (1995) (sentence of life in prison imposed on defendant who murdered two victims in their home during the course of a robbery); *Walton v. Commonwealth*, 1986 WL 400479 (Va. Ct. of Appeals, Dec. 11, 1986) (sentence of life in prison imposed on defendant who murdered victim during convenience store robbery); *Scott v. Commonwealth*, 7 Va. App. 252 (Va. Ct. of Appeals, Oct. 4, 1988) (sentence of life in prison imposed on defendant who murdered victim during robbery of restaurant).
39. Mills Aff. ¶ 36(e).
40. *See, e.g., Gregg v. Georgia*, 428 U.S. 153, 183 (1976).
41. *Edmund v. Florida*, 458 U.S. 782, 798 (1982) (quoting *Coker v. Georgia*, 433 U.S. 584, 592 (1977)).
42. Frank Green, *Death Sentences Decline in Virginia; Life Term Without Parole is Factor in Change*, *The Richmond Times Dispatch*, Nov. 24, 1996, at p. A-1.

The Honorable James S. Gilmore, III

May 7, 1999

Page 39

43. Frank Green, *State's Executions Reaching a Peak Under Gilmore; As Attorney General He Speeded Process*, The Richmond Times Dispatch, Dec. 13, 1998, at p. C-1.
44. *State of the Commonwealth Address*, Jan. 8, 1995.