



**PETITION FOR EXECUTIVE CLEMENCY
FOR MARIO BENJAMIN MURPHY**

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PETITION FOR EXECUTIVE CLEMENCY FOR MARIO BENJAMIN MURPHY

I. INTRODUCTION

Without any inducements or promises from the prosecution, Mario Benjamin Murphy pled guilty to the capital murder for hire of James Radcliff on July 20, 1992, and was sentenced to death on October 19, 1992. He was 19 years old when the crime occurred and he did not act alone, but he was alone in being selected for and sentenced to death. Yet though Murphy is guilty of participating in the murder of James Radcliff, three compelling reasons support the exercise of the Governor's power of mercy in his case.

First, Murphy's death sentence is utterly out of proportion to the sentences of his codefendants. Murphy was one of six defendants involved in the murder of James Radcliff, four of whom were eligible for the death penalty. Every other defendant was offered life imprisonment in exchange for a guilty plea; Murphy was singled out for death. This might be understandable if Murphy had such a leading role in the crime or possessed so lengthy a criminal record as to set him apart from his codefendants. But he did not. He had no record of violence at all, and even the Attorney General of Virginia has acknowledged that Murphy is no more culpable than his codefendants. The disparity in sentence might be understandable if Murphy had been the leader of the plot against Radcliff, or the greatest beneficiary of the crime, or the oldest and most mature of the defendants, or the least cooperative with the police on arrest, or the least remorseful. But none of these things are true. Rather than getting equal time for equal crime, Murphy is simply the loser in a lottery of life and death.

The Governor's mercy is all the more appropriate as to this issue because a disparity in sentencing among codefendants is beyond the power of the courts to correct. Murphy asked the Circuit Court that tried him to reconsider his sentence in light of the sentences given his codefendants, but the court expressly refused to do so. The Supreme Court of Virginia conducts a proportionality review of all death sentences, and it did so in Murphy's case, but in accordance with its longstanding rule the Court expressly refused to consider the sentences of Murphy's codefendants in conducting that review. There is no federal constitutional right to proportionality in sentencing and the district court that decided Murphy's federal habeas case declared itself procedurally barred from considering the merits of a claim based on the disparity between the sentences of Murphy and his codefendants. The result is that between the prosecutor and the Governor, no court has had the power to review this aspect of his sentence, and though he has tried, Murphy has never had an opportunity to raise this issue until now.

Second, Murphy's conviction and condemnation occurred in undoubted violation of the Vienna Convention on Consular Relations, a treaty ratified by the United States in 1969. Article 36 of the Convention is intended to protect the ability of countries to defend the interests of their citizens arrested or detained abroad. Article 36 accomplishes that goal by requiring that arresting authorities inform detained foreign nationals "without delay" of their right to contact their consul for assistance in their defense. Murphy is a Mexican national, the only participant in this crime not a U.S. citizen. Although the State Department informed the previous Governor and previous Attorney General of this legal requirement, Murphy was never informed of his rights under Article 36 during his trial and direct appeal. Just as important, Mexico's policy is to provide all necessary assistance to their nationals

facing capital prosecution, and the Mexican consul is confident of its ability to affect the outcome, particularly as to sentencing, of trials involving Mexican citizens. Yet Mexico did not learn of Murphy's situation until five years after his conviction and sentencing, long after the time when consular intervention is to occur and would be expected to make a difference.

Although to date the federal courts have refused to redress this undoubted violation of Murphy's rights, partly on account of technicalities, several reasons exist for the Governor to exercise his extraordinary powers in this case. Article 36 protects the interests of Americans abroad as well as foreign nationals arrested here, and the State Department has long recognized that failure to enforce the treaty in this country compromises its ability to protect Americans who travel abroad^{1/} (found at Clemency Appendix, 318-336; 348-366, hereafter "C.A. ____"). Whatever degree of consideration the federal courts have given in fact to the undisputed violation of Murphy's Article 36 rights — and he did not receive even an evidentiary hearing on the issue — Mexicans are certain to see the federal courts' dismissal of Murphy's claim as a failure to enforce the treaty. The consequence of that perception is

^{1/} The State Department for years has taken the position that failure of State or federal authorities to respect consular notification requirements jeopardizes the ability of the United States to provide consular assistance to our citizens when they are detained or arrested abroad. For example, in 1934 — before the Vienna Convention on Consular Relations was written — when California refused Mexico's request for access to one of its citizens. In that instance, Secretary Hull strongly urged the governor, *in the interests of U.S. citizens*, to reverse California's stance:

Even in the absence of applicable treaty provision this Government has always insisted that its consuls be permitted to visit American citizens imprisoned throughout the world and it is believed that if attitude District Attorney is maintained in instant case there will be repercussions in Mexico and perhaps other countries unfavorable to American citizens. It is earnestly requested that you take prompt action looking to reversal District Attorney's position.

Secretary Hull to Governor Rolph, telegram of Apr. 10, 1934, Dept. of State file 311.1221 Aragon, Jose/3, reprinted in 4 Green Haywood Hackworth, *Digest of International Law* 836-37 (1942), also cited in *Consular Law and Practice*, p. 137. The Department of State has stressed the importance of the reciprocal nature of Article 36 in testimony before the Senate Foreign Relations Committee: "The United States Government has to consider the Vienna Convention on Consular Relations both from the viewpoint of the United States as sending State and from the viewpoint of the United States as receiving State." *Sen. Exec. Rep. No. 9*, 91st Cong., 1st Sess., app. at 8 (1969).

that execution of Murphy's sentence will raise serious international issues as to the legitimacy of his conviction and punishment and to the commitment of the United States to enforcement of this reciprocal obligation. Such concerns, again according to the State Department, pose a threat to the interests of Americans abroad. Along with the treaty violation in his prosecution, these international concerns warrant mercy.

The third reason for commutation of Murphy's sentence is the compelling and unrefuted contemporary evidence that he will pose no danger to the Commonwealth if his sentence is commuted. When the 19-year-old Murphy committed this crime, he had no record of violence; friends, teachers, and other acquaintances of Murphy agreed that his participation in this crime was out of character for him. Murphy accepted responsibility for his wrongdoing from the moment of his first contact with the police, and he has never tried to blame anyone else for his wrongdoing. He is undeniably remorseful for what he has done. On the twin foundations of responsibility and remorse, Murphy has made of himself a person who would contribute positively to the prison society in which he would live if his sentence were commuted. Indeed, four experts who subjected Murphy to extensive evaluation now agree that his prospects for rehabilitation are very strong and that the process of rehabilitation is exceptionally advanced, especially in view of the fact that he has spent the past five years on death row. Apart from revenge, no penological purpose can now be served by executing Murphy, and considering that he was unfairly singled out among his codefendants for the death penalty, the exaction of revenge solely against Murphy is so random as to require the Governor's intercession. For all these reasons, Murphy requests that the Governor exercise his power of mercy and commute his death sentence to a sentence of life imprisonment.

II. THE CRIME

In July 1991, while Navy cook James Radcliff was away at sea, his wife Robin Radcliff^{2/} began an affair with Gerardo Hinojosa. C.A. 1044, C.A. 1576 - C.A. 1577. Hinojosa was a parachute rigger for a Navy squad, but he liked to hold himself out to teenagers and younger men as a former SEAL. Both lovers were in their mid-thirties. Before Radcliff came home, Robin concluded she was pregnant. While the affair might have been concealed from Radcliff, a pregnancy could not be, so when Radcliff returned, Robin felt compelled to inform Radcliff of the affair and of her pregnancy.

The revelation prompted angry arguments between Robin and Radcliff, C.A. 1023, C.A. 1577, and led to discussions of divorce, and at one point an agreement that the couple would divorce. There also was a fight between the Navy cook and the self-proclaimed SEAL; by all accounts, Radcliff won that fight handily.^{3/} In any event, despite the agreement to divorce, Radcliff ultimately told both Robin and Hinojosa that he would kill Robin and her unborn child before he would let her leave him. His threats could not be dismissed: Michael Bourne, Robin's son-in-law, testified that Radcliff got drunk all the time and sometimes would come home drunk and threaten to kill Robin. C.A. 255.^{4/}

Neither Robin nor Hinojosa wanted to end their affair, so they resolved to kill Radcliff. Their motives were far from pure; Radcliff had a \$100,000 life insurance policy on which Robin was the named beneficiary. C.A. 1591.

^{2/} For the sake of clarity and brevity, this petition refers to James Radcliff as "Radcliff" and to Robin Radcliff as "Robin."

^{3/} During the trial of Robin Radcliff there was testimony proffered that James Radcliff "had kicked Hinojosa's ass" in the fight that they had at the CPO club, C.A. 1186, lines 1-4. This may have provided Hinojosa with an additional motive to have James killed.

^{4/} This testimony was corroborated by Dr. Keenan, Robin's physician, and Susan Avery, her former therapist, who testified at Robin's trial that James Radcliff was physically abusive, C.A. 1381, line 8 - C.A. 1382, line 1.

They initiated their plan to kill Radcliff the morning of July 28, 1991, by entering the bedroom of Michael Bourne to borrow his car. C.A. 1577. Bourne, a 19-year-old sailor, was married to Robin's daughter Tina. He and Tina lived in a room in Hinojosa's house, and it was to this room that Robin and Hinojosa came that morning to recruit the first of the "young boys," as the prosecutor would call them, C.A. 1579,^{5/} that Robin and Hinojosa would use to carry out their plans.

Robin and Hinojosa asked Bourne if they could borrow his car because "Someone is going to take care of James." C.A. 934. Bourne asked what she meant by that, and she said, "Someone is going to shoot James," C.A. 935, and "It's going to cost a lot of money." C.A. 936.^{6/} Bourne lent them the car. C.A. 957.

Around 4:30 pm that day, Mario Murphy arrived at Hinojosa's house to get Bourne's car. C.A. 958-959. Like Bourne, Murphy was 19 years old; he was the second of the "young boys" recruited to carry out Robin's and Hinojosa's plan, and he had been induced to assist Hinojosa in part by accounts of Radcliff's threat against Robin and her unborn child.

Robin and Hinojosa took Murphy into the bedroom to talk. C.A. 959. When Bourne looked in the room, "they" were taking a shotgun from its case. C.A. 961. Robin then left,^{7/} and Bourne gave his keys to Murphy. *Id.* Murphy drove away. *Id.* The plan was for Robin to lure Radcliff to a deserted parking lot, where he would be shot, C.A. 963, but that plan did not work out. Murphy called Hinojosa to tell him that Radcliff had not shown

^{5/} See also C.A. 1293, lines 8-9.

^{6/} In his September 3, 1991 statement, Bourne said nothing about any money being involved. C.A. 1017 - C.A. 1018.

^{7/} At some point, Robin went by Hinojosa's house to confirm with Hinojosa that the plan was still on. C.A. 1580. After that, she went to the house of a friend, where she refused the offer of a drink because, she said, "somebody's got to keep their head straight so they don't get their throat cut." C.A. 1581.

up. C.A. 962-963. Bourne drove with Hinojosa to meet Murphy, because Hinojosa "wanted to talk to Mario." C.A. 943. All three returned to Hinojosa's house, and then Murphy left. C.A. 965. Hinojosa told Bourne that he and Robin "wanted James dead and out of the way." C.A. 966.

Later that evening, Bourne and Tina went to Robin's apartment, where they saw Robin and Radcliff. Robin asked Bourne and Tina to come into her bedroom, C.A. 967, where she told them "they were going to try again and make it look like a burglary and kill James then that night." C.A. 944. She told them that "somebody was going to break into the house, make it look like a burglary and kill James." C.A. 968. Robin told Bourne what things ought to be taken from her apartment to make it look like a burglary. C.A. 945, C.A. 968. Finally, she told Bourne and Tina to take the dog back to Hinojosa's house with them, C.A. 969, but she insisted they leave her thirteen-year old son John at the apartment with her to bolster the burglary story she planned to tell the police. C.A. 969, C.A. 1054, C.A. 1582. Bourne and Tina returned to Hinojosa's house. C.A. 970. Either then or earlier in the day while at the apartment, Bourne left a window open. C.A. 1084. Robin remained with Radcliff and even made love to him as she awaited the completion of her plan. C.A. 1583, C.A. 1588.

Around 12:30 p.m., Murphy and Aaron Turner arrived. C.A. 970. Murphy was best friends and lived with Turner, who was 17 years old. They went into a spare bedroom with Hinojosa and donned dark clothes. *Id.*; C.A. 1047. When they were partly dressed, they returned to the living room, where Hinojosa directed Bourne to draw a map of the Radcliffs' apartment. C.A. 973 - C.A. 974. Bourne "showed Mr. Murphy and [Turner] where the window was that they were supposed to come in and where the bedroom was

where Mr. Radcliff would be sleeping." C.A. 974. Bourne related the items that Robin had said they were to take. *Id.* While he was talking to them, Hinojosa was collecting weapons for them, a knife and an empty barbell. C.A. 975, C.A. 1051 - C.A. 1052. Hinojosa related to them his idea that Radcliff should be struck in the head and rendered unconscious. C.A. 1050. Murphy and Turner returned to the bedroom to finish dressing. C.A. 975.

As preparations were being completed, Hinojosa's roommate James Hall arrived. C.A. 976, C.A. 1041, C.A. 1045. He was 21 years old and in the Navy. He went into the bedroom where Murphy and Turner were, "and really without saying much, he just kind of got into it, too. He started changing from his clothes to some dark clothes that he had" C.A. 977. Murphy and Turner were "kind of not really paying attention to him," C.A. 978, and "were trying to avoid telling [Hall] what they were doing," C.A. 1048, so Hall asked Hinojosa what was going on. C.A. 1082. Hinojosa told Hall that "Mario and [Turner] were going to take care of some business," C.A. 978, and said, "'If you're going to be part of it, you need to know it all.' He told [Hall] that they were going to kill Robin's husband." C.A. 1049. Hinojosa directed Bourne "to drive them over there" and to get the gun that was supposed to be in the trunk of Robin's car at her apartment. C.A. 979. Bourne, Hall, Murphy, and Turner left in Bourne's car. C.A. 980, C.A. 1056.

At Radcliff's apartment, Bourne looked for the gun in Robin's car, but could not find it. C.A. 981, C.A. 1057 - C.A. 1058. He pointed out Radcliff's apartment to the others, C.A. 981, C.A. 1056 - C.A. 1057, and then parked the car near the pool. C.A. 981, C.A. 1058. Hall, Murphy, and Turner got out of the car and headed toward the apartment. C.A. 982.

According to Hall, Turner entered the apartment first, followed by Murphy. C.A. 1058, C.A. 1060. At Radcliff's bedroom, Turner had begun to open the door, C.A. 1058, when Robin pulled it open from inside, came out, and went to the living room. C.A. 1060 - C.A. 1061. Turner, carrying the barbell and knife that Hinojosa had given him, went around the bed in which Radcliff lay sleeping. C.A. 1062. Then Turner, who went by the nickname Meat because of his size and muscularity, C.A. 971, hit Mr. Radcliff across the side of the head with the metal bar, C.A. 1064, and Murphy stabbed Radcliff in the chest. C.A. 1065. Turner gave Murphy the barbell and stabbed Radcliff. *Id.* Murphy hit Radcliff with the bar, then Turner grabbed Radcliff's face, "pushed him back down and attempted to cut his throat." *Id.* Hall pulled the phone cord out of the wall, and he and Murphy left the room. C.A. 1067. After taking Radcliff's wallet from the dresser, Turner followed them into the living room. *Id.* Robin pointed out the VCR as one of the items they were supposed to take. C.A. 1069. With the designated items in a seabag, they left the way they came. C.A. 1070.

Twelve minutes after they left Bourne's car, Hall, Murphy, and Turner returned. C.A. 983. Bourne drove them back to Hinojosa's house. *Id.* In the car on the way back, one of them — Hall could not remember who — mentioned they were going to be paid for the crime. C.A. 1075. Turner looked through Radcliff's wallet and commented that there was only two dollars in it. C.A. 1080.

Left alone with Radcliff, Robin returned to their bedroom. She got in bed with Radcliff, who was still alive, and rolled in his blood to support her story. C.A. 1586. Although the plan was for her to call the police, she did not do so immediately; she delayed

calling^{8/}, and the paramedics did not arrive until Radcliff's blood had dried on his body.

C.A. 1587.

Back at Hinojosa's house, Hinojosa told them that no one was to mention Turner or Murphy, but that instead Hall should say he had been at a friend's house, after seeing Hinojosa asleep in his room between 12:15 and 1:30 a.m. C.A. 1078. They changed clothes. C.A. 1071. Then Hinojosa received a call from Robin saying that Radcliff was still alive. C.A. 255. Hall, Murphy, and Turner left in Hall's car with the "stolen items," the dark clothes, and the weapons. C.A. 986. At Turner's house, they weighted the seabag with a brick, then drove to a bridge across the Chesapeake Bay and threw the seabag in. C.A. 1072.

Responding to Robin's telephone call, Bourne and Tina drove back to the Radcliffs' apartment, followed by Hinojosa. C.A. 986. At the apartment, Bourne and Tina were interviewed by the police, and both adhered to the story about the burglary that Robin and Hinojosa had concocted. C.A. 987. Hall was interviewed by the police two times, and he too gave the police the planned story. C.A. 1086. Robin spoke with several police officers that night, and she stuck with the story she and Hinojosa had invented. C.A. 1588 - C.A. 1589. Radcliff died at the hospital around 4:00 a.m.

Robin went to Texas for Radcliff's funeral. C.A. 991. There, she draped herself over his coffin and cried, "Who could have done something like this to you?" C.A. 1590. After the August 2 funeral, she returned to Virginia, staying at Hinojosa's house, C.A. 992,

^{8/} The delay was a critical factor in the cause of James Radcliff's death. When paramedics arrived at the scene of the crime, James Radcliff was conscious. James Radcliff asked paramedic Michael Phillips, "Help me." C.A. 639, lines 19-21.

and then went back to Texas a few days later with Hinojosa. C.A. 991. Robin and Hinojosa were married seven days after Radcliff's funeral. C.A. 992.

On returning to Virginia to find the police still suspicious of her, Robin began to complain about the treatment she was receiving from the police. C.A. 1591 - C.A. 1592. On August 13, she complained to Sergeant Vanderheiden about the investigation. C.A. 1592. On August 19, she complained to Vanderheiden's superior, Lieutenant Guertin. *Id.* On August 21, over the course of a six hour interview with Detective Yoakam, she never budged from her story. C.A. 1592 - C.A. 1593. The next day, and again the day after, she contacted Captain Buzzy and registered complaints about the way she was being treated and harassed. C.A. 1593.

On September 3, the police asked Bourne to come down for an interview. C.A. 1594. Before Bourne was interviewed, Robin discussed the interview with him. She told him "to stick to the story that I don't know anything, that the police don't have anything on us; that if they did, we would already have been arrested; and she just basically said stick with the story." C.A. 996. The story Robin was referring to was one that Hinojosa had made up about what Bourne, Hinojosa, and Tina were doing during the crime. *Id.* Despite Robin's directions, Bourne confessed to his involvement during the interview. C.A. 997. The other defendants were arrested soon after Bourne's confession. Bourne was arrested the next day. *Id.*

Murphy confessed immediately on being arrested. He showed the police the spot from which they had thrown the "stolen" items and the seabag. Told that Turner was denying all knowledge of the crime, he agreed to talk to Turner and urge him to tell the truth. C.A. 277. After that conversation, Turner cooperated with the police. *Id.*

Murphy's attorney, Michael F. Fasanaro, attempted to obtain a plea bargain for Murphy from the outset of his representation. C.A. 374-376, ¶¶ 15-21. The prosecution refused, however, even to consider the idea. In light of his age (19) at the time of the crime, his lack of any criminal record of violence,^{9/} C.A. 144, ¶ 16, his remorse for the crime and acceptance of responsibility for his actions, his cooperation with the police on arrest^{10/} and the greater culpability of the adults who involved him in the murder,^{11/} Murphy was advised by his attorney to plead guilty. C.A. 338-339, C.A. 375, ¶¶ 18-19. He did so without any inducements or assurances from the prosecution.

At his sentencing trial, Murphy testified, and Judge Friedman took notes. Judge Friedman wrote in his notes, "[Murphy] never agreed to accept the money." Later, in pronouncing sentence, he stated that the crime was committed "either [for] money . . . or . . . in trying to protect someone you hardly knew." C.A. 98.

Though the prosecutor rejected Murphy's offers, *he did offer such inducements to all other defendants*, even ringleaders Robin and Hinojosa. C.A. 305 ¶ 362; C.A. 339-340. Turner struck the first blows against Radcliff, stabbed him, and tried to cut his throat. Nonetheless, he was offered life imprisonment on a charge of capital murder. He accepted and will be eligible for parole around the year 2016.

Hinojosa, a sailor in his mid-thirties, conceived the plot against Radcliff, recruited teenagers to do his dirty work, and planned the entire crime. Nonetheless, he received an

^{9/} Murphy had two minor larceny offenses at the time of the crime. C.A. 127-128; C.A. 136.

^{10/} Murphy cooperated truthfully with the police from his first questioning. (Closing argument of Humphreys, C.A. 78, lines 18-21) ("now, in fairness I should point out that what is going for Mr. Murphy is . . . the fact that he was unquestionably cooperative with the police"); Murphy convinced co-participant, Turner, to "tell the truth," C.A. 277.

^{11/} On the subject of the greater culpability of Robin and Hinojosa, see sections III.A.1.a and III.A.1.b below.

offer of life imprisonment plus twenty years for capital murder and conspiracy.^{12/} He accepted the offer, while remorselessly continuing to insist on his innocence. Hinojosa also will be eligible for parole around the year 2016.

Robin Radcliff, also in her mid-thirties, recruited her son-in-law to the conspiracy and insisted on having her own son in the apartment during the crime to support her alibi. After the assault, she delayed calling for assistance until Radcliff could not be saved and rolled in his blood to support her cover-up. She then orchestrated the cover-up, coolly playing the grieving widow at Radcliff's funeral and even complaining to the police about harassment. Robin committed the crime while on parole from more than twenty felony convictions, and she stood to gain \$100,000 in life insurance benefits from Radcliff's death. Nonetheless, she was offered life imprisonment plus twenty years for capital murder and conspiracy. She turned the offer down in hopes of acquittal, but at trial was convicted and sentenced to life. Presumably she, too, will be eligible for parole around the year 2016.

Murphy was the only defendant not offered life in exchange for a guilty plea, he was the only defendant sentenced to death, and significantly, he was the only defendant not a citizen of the United States. Instead, Murphy was a Mexican citizen, and therefore was entitled under the Vienna Convention on Consular Relations, April 24, 1963, TIAS 6820,

^{12/} Humphreys has suggested that he offered deals to Robin and Hinojosa because they were hirers, and not triggermen. According to Humphreys, "The only thing I can say is there was never a case in Virginia of someone other than the triggerman getting the death penalty. . . . That had to be the basis for making any sort of plea offer to her. That the chances of getting the death penalty were remote." C.A. 2167.

Humphreys' premise is wrong. Those who hire others to do their dirty work are made eligible for death under Va. Code § 18.2-18, and when Robin and Hinojosa were arrested, there was at least one hirer, David Fisher, on Virginia's death row, and just like Robin and Hinojosa, Fisher committed the crime for \$100,000 in life insurance proceeds. *Fisher v. Commonwealth*, 374 S.E.2d 46 (1988)(affirming conviction and death sentence of Fisher for hiring Bobby Mulligan to kill victim in life insurance scheme).

21 UST 77 (hereafter, "the Convention"),^{13/} to notice of his right to receive the assistance of the Mexican consul in the defense of his case. He was never given this notice and the Mexican consul did not learn of Murphy's situation until five years after he was convicted and sentenced to death.

III. MURPHY'S SENTENCE IS GROSSLY DISPROPORTIONATE TO THE SENTENCES OF HIS CODEFENDANTS

Murphy's prosecutor has called Robin the "mastermind" behind and Hinojosa the "moving party in arranging for the death" of James Radcliff. This is certainly in accordance with the facts set forth above. Under any common sense view of crime and culpability, the leading role played by these two defendants would have ensured that they, not the instruments of their avarice, would receive the most severe punishment. But that is not what happened; instead Murphy was selected to pay the highest price. As demonstrated below, the reasons advanced by the prosecutor for singling out Murphy cannot be reconciled with the facts, and even the pronouncements of the prosecutors and state officials charged with obtaining and defending Murphy's sentence are impossible to square with the decision to exact the greatest penalty from Murphy.

A. NONE OF THE STATED REASONS ADVANCED BY THE PROSECUTION FOR SINGLING MURPHY OUT FOR DEATH IS SUPPORTED IN FACT.

The prosecution has advanced two reasons for the decision to refuse Murphy the same treatment as his codefendants and three reasons that he should be subjected to the harshest punishment. Those reasons are that he "recruited" Aaron Turner to assist him in the crime,

^{13/} C.A. 1727 - C.A. 1752.

that he had a primary role in the crime, (Humphreys affidavit, C.A. 385, ¶4),^{14/} that he was remorseless about his participation, that his actions were vile, and that he was dangerous.^{15/} To whatever extent any of these reasons is true, none of them provides any basis for the decision to single Murphy out for death. Indeed, many of the factors identified by the prosecutor as factors appropriately to be considered in plea negotiations, such as age and lack of criminal record, obviously were ignored in the decision to discriminate against Murphy. Viewed in this light, the decision to refuse Murphy the same treatment as his codefendants is plainly unfounded and indefensible.

1. The Prosecutor's Stated Reasons For Refusing Murphy A Plea Bargain

a. Primacy

Humphreys does not explain what he means by "Murphy's primary role," but some facts are clear. Murphy did not originate the conspiracy against James Radcliff; Robin and Gerardo Hinojosa did. (Closing argument of Robert J. Humphreys, C.A. 1639, lines 3-11; C.A. 1577, lines 18-24; C.A. 965, line 19 - C.A. 970, line 11); (testimony of Michael Bourne, C.A. 979, line 13 - C.A. 980, line 7).

Murphy was not the primary beneficiary of the crime. The primary beneficiaries were Robin, who stood to gain \$100,000 from life insurance proceeds (closing argument of Humphreys, C.A. 1637, lines 7-10), and Hinojosa, who sought the safety (not to mention the

^{14/} Humphreys also offers his hindsight avowal that the possibility of having Murphy serve his sentence in Mexico, thereby saving the Commonwealth hundreds of thousands of dollars, would not have influenced him. Given that the intervention of the Mexican consul would have significantly improved his prospects for obtaining a life sentence, Murphy doubts that Humphreys in fact would have persisted in so profligate an attitude toward the use of public funds.

^{15/} In light of Humphreys' acknowledgement, in a recent article in *The Virginian-Pilot*, that future dangerousness was not an issue in Murphy's case, dangerousness cannot be a basis for distinguishing Murphy from his codefendants. C.A. 2166 - C.A. 2167.

new-found riches) of his paramour Robin and their unborn child. (Statement of Michael Bourne, C.A. 255; Statement of Hinojosa, C.A. 269; C.A. 274).

Murphy was not the primary planner of the crime; Hinojosa devised and orchestrated both attempts on James Radcliff's life (summary of evidence by Humphreys, C.A. 527, line 25 - C.A. 528, line 4) ("in any event, it's clear that this defendant was the moving party in arranging for the death of his now wife's husband, James Radcliff"); C.A. 963, lines 1-12; C.A. 965, line 19 - C.A. 970, line 11; C.A. 952, line 20 - C.A. 975, line 4; C.A. 979, line 13 - C.A. 980, line 7 (testimony of Michael Bourne), with the assistance of Robin and Michael Bourne. C.A. 1580, line 3 - C.A. 1583, line 7 (closing argument of Albert); C.A. 1635, lines 15-25 (closing argument of Humphreys). Hinojosa also provided most of the weapons. C.A. 975, lines 3-4, 11-12; C.A. 1051, lines 6 - C.A. 1052, line 13; C.A. 1052, lines 18-24; C.A. 1053, lines 20-24.

Murphy was not the first of the co-defendants to strike a blow against James Radcliff; Turner did that, striking Radcliff hard with a heavy metal rod, C.A. 1064, lines 14-16, before also stabbing him and trying to cut his throat, C.A. 1065, lines 19-21. Hall has testified that Turner was the first to enter the Radcliff apartment, C.A. 1058, lines 13-16. There never has been any suggestion that there was any distinction between Murphy and Turner in responsibility for Radcliff's death.

Humphreys has argued that Murphy was the leader of the "team" that entered Radcliff's apartment to perform the murder, but there are no real facts to support that assertion.^{16/} There is no evidence that Turner or Hall was taking direction from Murphy, or

^{16/} Indeed, even Humphreys' own statements do not support the suggestion that Murphy was the leader among Hall, Turner, and himself. When Humphreys argues at sentencing that Murphy "was the main actor" among the principals in the first degree, C.A. 77, he supports his argument by reference, not to any leadership role by
(continued...)

that Murphy declared himself to be in charge or was put in charge by Hinojosa. Any such suggestion is wholly lacking in the testimony of both Bourne and Hall from Robin's trial. Moreover, according to Hall, Turner was the first one into the apartment, and more importantly, the first one into Radcliff's bedroom. By all accounts, the decision to club Radcliff into unconsciousness was Hinojosa's, and Turner, not Murphy, put that idea into practice when he struck the first blow against Radcliff. While it is true that Murphy was involved in the first attempt on Radcliff's life, that cannot be the basis for singling him out inasmuch as Robin, Hinojosa, and Bourne were also involved in that attempt.

Finally, Murphy was not the primary coordinator of the cover-up. The coverup stories were concocted largely by Hinojosa and were palmed off on the police by Robin, Hinojosa, Bourne, Hall, and Robin's daughter Tina. C.A. 1588, line 1 - C.A. 1590, line 21; (Closing argument of Albert, C.A. 1591, line 17 - C.A. 1594, line 18); (Testimony of Bourne, C.A. 995, line 25 - C.A. 997, line 5); (Testimony of Hall, C.A. 1076, line 19 - C.A. 1079, line 1).

Indeed, unlike all the other co-defendants, only Murphy cooperated truthfully with the police from his first questioning.¹⁷ (Closing argument of Humphreys, C.A. 78, lines 18-21) ("now, in fairness I should point out that what is going for Mr. Murphy is . . . the fact

¹⁶ (...continued)

Murphy in Radcliff's apartment, but to the fact that Murphy recruited Turner and Hall. As demonstrated by his testimony at Robin's trial and by his affidavit, Hall was not recruited by Murphy. C.A. 1049, lines 4-9; C.A. 1855. The testimony of Bourne also indicates that Hinojosa, not Murphy, recruited Hall. This excerpt from Humphreys' argument gives the unsettling impression that "recruitment" and "primary role," as used in his affidavit, are equivalent terms.

¹⁷ It is true that Murphy was the primary person responsible for the confession of Aaron Turner, who would not cooperate with the police until Murphy advised Turner to be honest with them. ("0213 hours, Sergeant Vanderheiden brought Mario Murphy into our interview room, which is room #136. Mario sat in a chair next to Aaron and Mario told Aaron to tell the truth because we knew everything and it would be better for all of them."); C.A. 277.

that he was unquestionably cooperative with the police). If these facts leave any room for Murphy to have taken a primary role, Humphreys does not point it out.

b. Recruitment

Humphreys also claims that Murphy was singled out because he had recruited "others."^{18/} Yet this cannot distinguish Murphy from Robin and Hinojosa, the originators of the conspiracy and the "hirers" in the murder for hire. Both Robin and Hinojosa lured teenagers into their plot, Robin obtaining her son-in-law's assistance and Hinojosa getting that of Murphy, and based on Hall's testimony at Robin's trial and his affidavit, most probably Hall. Indeed, the very fact that Humphreys prosecuted and convicted Robin and Hinojosa for capital murder establishes his belief that they had recruited others to do their bidding. *See* Va. Code §§ 18.2-31(b) (murder for hire made a capital crime); 18.2-18 (those who hire others to commit murder eligible for the death penalty and for conviction for capital murder).

Indeed, if there is any distinction on the basis of recruitment between Murphy and the middle-aged adults who conceived and arranged the murder of James Radcliff, that distinction must favor Murphy. Murphy was a teenager who brought his best friend, with whom he was living, along with him and perhaps offered to share proceeds with him. Robin and Hinojosa were two middle-aged adults who enticed four "young boys" to do their dirty work so they could continue their illicit affair *and* collect \$100,000. Any suggestion that

^{18/} Use of the plural here is erroneous. There is no evidence that Murphy involved anyone in the crime other than Aaron Turner. Obviously Murphy did not involve Robin Radcliff and Gerardo Hinojosa, the originators of the plan to kill James Radcliff. Michael Bourne's testimony shows he was involved, before he ever met Murphy, out of loyalty to his wife and Robin. C.A. 940, line 10 - C.A. 941, line 15; C.A. 258.

James Hall belonged to the same Navy squadron as Hinojosa and was his roommate. C.A. 1041, lines 9-17; C.A. 1042, lines 13-15. Hall testified that Hinojosa, *not* Murphy, invited his participation. C.A. 1049, lines 4-9. *See also* Hall's affidavit, C.A. 1855.

Murphy's "recruitment" deserves greater censure than Robin's and Hinojosa's "recruitment" is fatuous.

c. Remorse And Responsibility

Humphreys also has argued that Murphy deserved death because of a supposed lack of remorse.^{19/} Long before Murphy pled guilty, however, there was considerable evidence that Murphy was remorseful and accepted responsibility for his action. Murphy was the only defendant who cooperated with the police from his first contact with them. Robin, Hinojosa, Bourne, and Hall all participated in the coverup, and Turner denied all knowledge of the crime until Murphy advised him to tell the truth. By contrast, Murphy confessed immediately and without hesitation assumed responsibility for his own part in the crime. He took the police to the place where the "stolen" items and weapons had been tossed into the Chesapeake Bay. Most remarkably, when he was told that Turner was stubbornly denying guilt, Murphy agreed to meet with Turner to get him to tell the truth. Murphy did meet with Turner, who confessed right after their meeting. Murphy's cooperation was completely voluntary; he was offered no inducements by the police and he got none. Even Humphreys could not deny "the fact that he was unquestionably cooperative with the police." C.A. 78, lines 20-21.

If all these facts were not enough to demonstrate Murphy's remorse, at sentencing, Murphy testified without a quibble that he accepted responsibility for his crimes and that he was sorry about what he had done. C.A. 46-47. If frequency is meaningful, the many times

^{19/} Humphreys made much at Murphy's trial of Detective Yoakam's testimony that Murphy's primary concern on arrest was discovering who had informed the police. C.A. 14. Assuming this was true, it is no more indicative of a lack of remorse than Turner's question, after he confessed, whether he would be able to make football practice. Humphreys also sought to elicit from Murphy testimony that he and Turner had conspired to attribute the murder to Hall, C.A. 48. When that failed, he did not offer any proof that it had happened, and the evidence is undisputed that no such attempted attribution ever occurred.

that Murphy apologized during his testimony, including an apology specifically directed to the family of James Radcliff, is notable. It is significant to the evaluation of Murphy's testimony that Humphreys acknowledged in closing argument that "maybe he should get points for honesty." C.A. 79, line 24.

Thus it appears there was more reason to conclude that Murphy was remorseful than that he wasn't, even if one was not personally acquainted with Murphy. But those who knew Murphy personally concluded that he was remorseful even before he testified at his sentencing trial. In an affidavit offered *in defense of Murphy's death sentence by the Attorney General*, trial attorney Michael Fasanaro states that Murphy "had candidly admitted his guilt" and "was remorseful about what he had done." C.A. 373. Fasanaro knew Murphy because he employed Murphy's mother and had represented him in defense of the petty larcenies that constituted, at the time of this crime, Murphy's entire criminal record. The affidavits of Armindo and Eloisa Zari, who had known Murphy from the time he was 12 years old, support this point, also. The Zaris, along with their three sons, visited Murphy while he awaited trial. Both Armindo and Eloisa report that Murphy was remorseful about his crime. C.A. 2162 - C.A. 2165.

Assuming, in the face of all this evidence, that Murphy was not remorseful, that still would not distinguish Murphy from his codefendants. To begin with Hinojosa, at the hearing in which his plea bargain was fulfilled, he could not have made his lack of remorse and refusal to accept responsibility for his actions more clear. On that day, aspects of the unvarnished and Machiavellian man were unveiled throughout the proceeding. Starting off, he demonstrated his arrogance and mendacity:

THE COURT: Mr. Hinojosa, do you desire to make any statement at this time?

THE DEFENDANT: Yes, sir.

THE COURT: Very well. The court will hear you.

THE DEFENDANT: There is a deep - a deep mistrust of the justice system in the U.S. In the law and justice system we need to have faith that we are and will be protected. Not only in L.A. is the law and justice blind but also in Virginia Beach. We have been manipulated by the use of TV coverage, and the prosecution and police give out only the information that may help to get a conviction. I assure you that if there is any conspiracy, it is with the police department. We have detectives who can't or don't know how to properly interview suspects without resort to some type of torture or other torment. In my case my problem was with my prosecutor and the police detective using my wife, telling me that she would be getting thirty years if I didn't write my statement as he wanted, plus an abnormal fear of being confined in an enclosed space and being bound, both of which were done to me to get a fictitious statement along with promising to release my wife and son-in-law and along with the guarantee that I would be rewarded with cooperation. They would insure I only got a one to one-and-a-half-year sentence in the city jail.

I assure you I have not seen or experienced any leniency. I have never seen - I have never been in trouble before with the law, and this is my nature. I believe and trust the very people who are supposed to be protecting us. I can assure you that a year ago I was on the same side of the courtroom the people are in, thinking and assuming the police department were here to protect and to serve. I now know that I have been compromised not only by the law and justice systems but by the news and media systems as well by the hysterical news coverage of this crime I did not plan nor participate in.

I am sorry to say that the legal system is corrupt here as it is in most any other city. The prosecutors are promising deals if this person will testify against a person who was most likely to see that he or she is dead. Masterminds make their jobs easier at the expense of an innocent person.

I ask you to think about this. Tomorrow you, your child or your loved one may be on this side of the railing facing the same thing I am facing here because in modern society he or she needs money or to cut a good deal with a story made up as you, being the main character with having a feeling of total helplessness as you try to tell your side of the - try to tell your side of the whole situation but not allowed to, having no choice but to take a plea agreement.

We cannot stand around with our arms akimbo and say that doesn't happen here or that would never happen to me. I assure you I used to think that before it would never happen to me. That was before. Now, I know that I cannot believe nor trust the law, legal, news or TV coverages, which are

heard and read by anyone who watches television today or who has a quarter in their pocket.

The term, Justice is Blind, has certainly taken a new and sad meaning in my life. I pray it doesn't happen in your life, but it may. The recent trials nationwide will show that your laws and courts do not result in fair treatment. This situation will not come easily or happen overnight unless the press and the news coverage will stop printing what the reporters and editors know as filth, and they have the uncanny ability to know what the public wants to hear, so they sensationalize what they want to print and omit the truth to make a few sales at the expense of a man's life, to further the status of the reporter, and to earn a bonus.

The truth is reported and printed very rarely and only when the truth is so blatantly obvious that it will hinder or compromise a promotion or bonus.

I have been victimized three times. First by the lies and deception of the police, secondly by the news coverage condemning me before I was even in front of the judicial system.

I am now being victimized the fourth time - by the law system, which has the dangerous effectiveness to a whimpy society grown weak and cowardly. It is - Is it any wonder why Khadafy will not allow his citizens to contrive their punishment in American courts, when a native-born American citizen cannot get justice in America? Justice concerns itself with fairness, having respect for others. It is treating rich, poor, black, and white equally. It is not being nice to some in order to improve our own self-image.

I am a victim of a system that is out to get someone punished. The truth really does not matter. The police and prosecutors are out to make an example of me, and I have always been concerned on most occasions of their getting false recognition at my expense.

Your Honor, I hope your attitude toward capital punishment is not that of the shah's business characters, who upon furnishing a dead man who was innocent, said it was better to have the wrong fellow than no fellow at all.^{20/}

Even while entering his guilty pleas, Hinojosa continued to deny that he was guilty, C.A. 507, and launched into an extended diatribe against the criminal justice system that he said entrapped him, C.A. 537-541, charging a conspiracy among the police, C.A. 537, the

^{20/} C.A. 536, line 22 - C.A. 541, line 7.

use of torture in his interrogation, *id.*, the corruption of the system in Virginia Beach, C.A. 538, and finally that — even though innocent, *id.* — he had been victimized by the police, the news media, and by the "law system." C.A. 540. This is not remorse.

Robin did not demonstrate any more remorse than Hinojosa, but she was offered a deal, too. One would be hard-pressed to discover remorse in Robin's chilling simulation of grief at James Radcliff's funeral, where she draped herself over his coffin in tears, only to marry Hinojosa scant days later. C.A. 1590. Nor would one find remorse in the woman who coolly charged the police with harassment while she continued to insist that the crime was a burglary gone wrong. C.A. 1593. And one would have to ignore the comments of the woman who testified at her trial in these words:^{21/}

Q Robin, did you hire anybody to kill James?

A No, I didn't.

Q Did you know that there was a plan to kill James?

A No, I didn't know it at the time either.

Q Did you ever know anything about any payment of money to kill James?

A No, I didn't.

The evidence that Murphy was remorseful and accepted responsibility for his actions is compelling, and the evidence that Hinojosa and Robin were not is overwhelming and undeniable. Any difference in remorsefulness and responsibility between, on the one hand, Murphy, and on the other hand, Hinojosa and Robin, unquestionably favors the extension of prosecutorial mercy to Murphy. Neither remorse nor acceptance of responsibility for wrongdoing can explain the decision to single Murphy out.

^{21/} Excerpt from testimony of Robin K. Radcliff on Feb. 12, 1993, *Commonwealth v. Radcliff*, Virginia Supreme Court Record No. 0987-93-1, C.A. 1263, lines 14-21.

d. Vileness

While Humphreys argued in support of Murphy's condemnation to death that the murder of Radcliff was vile, he has never suggested that Murphy's conduct in the murder exhibited a greater degree of vileness than that of Robin or Hinojosa. For example, Humphreys argues that the crime is vile because Murphy did not know Radcliff. C.A. 76. But neither did Turner, and Hinojosa knew him only from the fight they had, so that fact cannot distinguish Murphy.^{22/} Humphreys description of the vileness of the assault and of the nature of Radcliff's wounds makes no effort whatever to distinguish between the actions of Murphy and Turner — rather he treats them indivisibly, C.A. 76-77 — so that cannot be a distinguishing factor.

Moreover, this factor cannot be the basis for any distinction between Murphy and Robin in light of Humphreys argument at Robin's sentencing trial. As is plain in that argument, Humphreys attributes to Robin, because she is the hirer, the vileness of both Murphy's and Turner's actions. C.A. 2027-28, *see also* Tr. 1687. If Robin is chargeable with their vileness, in addition to her own, then plainly Murphy's vileness cannot be the basis for setting him apart from Robin. Humphreys' logic applies with equal force to Hinojosa.

e. Dangerousness

Va. Code § 19.2-264.2(1) declares Virginia's policy that criminal record must be considered in reaching conclusions as to future dangerousness. None of the participants in this crime, Murphy included, had records of violence of any kind. To whatever degree a

^{22/} Humphreys also argues that Murphy's recruitment of Turner bears on the issue of vileness. C.A. 76. For the reasons set forth above, *see* section III.A.1.c, V.A., this factor cannot distinguish Murphy from Robin and Hinojosa.

record of non-violent crime might support execution, the records of the participants in this crime offer no reason why Murphy should have been singled out for death.

Murphy's criminal record consisted of two petty larcenies, both misdemeanors. He never spent time in jail for either offense, and the record does not reveal that he ever violated terms of probation or parole. Neither conviction provides any support for the decision to seek Murphy's death. In the case of the second conviction, while employed by Rose's Department Store, Murphy permitted some friends to take merchandise without paying. Confronted with his wrongdoing, Murphy ensured that the property was returned to his employer, thereby mitigating the loss to a very great degree. The best evidence that neither conviction supported the argument that Murphy deserved harsher treatment is that the Humphreys ignored them in arguing for Murphy's death.

By contrast, when she initiated Radcliff's murder, Robin had more than 20 felony convictions. Her criminal career began more than 16 years ago when she was convicted of the felony of forgery. Then known as Robin Kalleen McCleskey, she became a one-woman crime wave plying her criminal trade of forgery and fraud. The likelihood of prison did not deter her from probation violations,^{23'} and throughout a 10-year probationary period, she was charged with numerous infractions of probation as well as additional crimes.^{24'} Those crimes were committed in Texas, Florida, and Virginia, during the periods she was resident in each.

^{23'} See Letters of Lisa Redwine, Adult Probation Officer to Robin McCleskey Hindman Radcliff dated March 23, 1988 C.A. 1814 and to Robin McCleskey dated June 7, 1988, C.A. 1813.

^{24'} See Florida Department of Corrections, Affidavit Violation of Probation, dated August 29, 1988 C.A. 1815 - C.A. 1816; State of Florida, Department of Corrections, Violation Report Form dated August 29, 1988 C.A. 1821 - C.A. 1825; Letter to Robin McCleskey Radcliff from Lubbock-Crosby County, Texas, Adult Probation Department dated June 7, 1989 C.A. 1819 - C.A. 1820; First Amended Application to Revoke Probation, No. 23,405, Lubbock County, Texas C.A. 1817 - C.A. 1818.

By 1990, she had been sentenced and placed on probation in three states. In Virginia, she had received a term of 80 years, suspended for 10 years.^{25/} An application to revoke probation, filed in Texas in August 1990, alleged 28 crimes in addition to a host of other violations of the conditions of her probation. That was followed by a "Fourth Amended Application to Revoke Probation," filed in October 1990.^{26/} Her probation was revoked by the State of Texas in November 1990, and she was sentenced to three years, subject to credit for jail time previously served (apparently sufficient so that she was not then incarcerated for any appreciable period). She was, however, on probation at the time she planned the death of her husband.

Comparing Robin's extensive felony record to Murphy's slight record of two misdemeanors makes it plain that this factor could never support the decision to single Murphy out for death.^{27/} In any event, "in the cases of both Murphy and Driscoll,^{28/} Humphreys said [on September 8, 1997], future dangerousness was not an issue because neither Murphy nor Driscoll had a violent criminal record." C.A. 2166-2167. Thus Murphy's supposed dangerousness cannot now support Humphreys' decision to refuse only Murphy a life sentence.

^{25/} See Virginia Interstate Compact Unit dated 3/6/90 with attached Notice to Russell H. Quynn, Jr., Deputy Compact Administrator, dated February 20, 1990 from the Commonwealth of Virginia C.A. 1826 - C.A. 1827; Department of Corrections, Trial Disposition Form dated February 14, 1990 C.A. 1829; Virginia Department of Corrections Presentence Investigation Report Offender Information, Criminal History Attachment C.A. 1830 - C.A. 1844.

^{26/} See, Fourth Amended Application to Revoke Probation, No. 23,405, C.A. 1845 - C.A. 1853.

^{27/} See also section III.A.1.c, V.A, regarding the opinion of many people who knew Murphy before he was arrested for this offense and who believe it was out of character for him.

^{28/} Dana T. Driscoll was a 42 year old ex-deputy who, "in September 1996, blasted his way into his ex-wife's home, murdered her boyfriend, and then — after a four-hour standoff with police — fatally shot his ex-wife in the head." C.A. 2166-2167. According to the *Virginian-Pilot*, "In an agreement that shocked some of Humphreys own prosecutors, Driscoll was allowed to plead guilty in exchange for three life sentences," *Id.*

2. Every Other Factor Recognized By The Prosecutor As Relevant To Plea Bargain Decisions Suggests That Murphy Should Have Been Treated The Same As His Codefendants

Other factors that could go into a prosecutor's decision to offer a plea bargain are identified in *Prosecutorial Ethics In Charging And Plea Negotiations*, the outline authored by Robert J. Humphreys for the second part of the "Prosecution Professionalism" course. C.A. 2176 *et seq.* These factors fall into four categories: general considerations, character of the defendant, strength of the case, and sentencing evaluation. Each of these factors is further divided into subfactors. C.A. 2179-81. Considering each factor and its subfactors in turn, none suggests any reason why five defendants should have received plea offers and Murphy should not have, and several of the factors supply compelling reason to believe Murphy should have received the same treatment as his codefendants.

Many of the subfactors identified in *Prosecutorial Ethics* do not distinguish among the codefendants in this case in any way. General considerations such as the nature of the crime, whether the crime is one of violence or one against property, the extent of the injuries, the type of weapon used, or the involvement of drugs or alcohol, and the relationship of the victim and the defendant (which might distinguish Murphy from Robin, but not from Turner and Hinojosa) plainly do not disfavor Murphy. Characteristics of the defendant that inform the plea process and also do not disfavor Murphy are education (that Murphy was still in high school would, if anything favor him in the plea process), employment (all had jobs except Turner), substance abuse (none appeared to be troubled by this), prior escape attempts, and mental condition. Many of these subfactors favor Murphy; none can distinguish him from his codefendants. So far as strength of the case goes, possible constitutional problems, factual weaknesses in the case, and victim problems, such as prior

relationship or unwillingness to testify, have never been identified as a problem by the prosecution. *Prosecutorial Ethics* identifies subfactors related to sentencing that go into the plea bargain decision, but apart from the weight of aggravating versus mitigating factors, which is discussed above, none of them would appear to suggest a reason why Murphy should have been singled out. The possibility of multiple convictions at trial, consecutive versus concurrent sentencing options, characteristics of the sentencing judge,^{29/} community concerns about the type of crime, and sentencing guidelines results, to whatever degree relevant, would all appear to be neutral at best in the decision whether to offer Murphy a plea bargain relative to his codefendants.

Several factors identified in *Prosecutorial Ethics* unequivocally suggest that Murphy should have been offered a plea bargain along with his codefendants. These factors are his slight criminal record and lack of any record of violence, C.A. 2180, ¶ 2a, which is discussed above, his youthfulness, *id.* at ¶ 2b, and his undoubted cooperation with the police. *Id.* at ¶ 2i.

^{29/} It is not clear to Murphy that a prosecutor *should* consider the characteristics of the sentencing judge in deciding whether to seek life or death. But in any event, that precise issue is taken up in the affidavit of trial counsel offered by the Attorney General in Murphy's state habeas proceedings. At the behest of the Attorney General, that attorney says:

Once I learned which particular trial judge had been assigned to the case, I conferred with numerous lawyers and members of the community who were personally familiar with the judge, and I solicited from them their opinions as to how the judge was likely to view the case, particularly in terms of sentencing. The consensus of opinion was that, based upon all the facts and circumstances, Mario Murphy would be far better off being sentenced by the judge than by a Virginia Beach jury.

* * *

In my opinion, and in the opinions of those with whom I consulted, Mario's best chance for a life sentence was to allow the judge to sentence him on his own, without the prior intervention of a jury.

C.A. 375, ¶¶ 18-19. Thus it would appear this factor would favor a plea bargain being offered to Murphy.

a. Age And Maturity

When Hinojosa recruited Murphy to participate in this crime, Murphy was nineteen years old. As Ms. Albert acknowledged in Robin's trial, Murphy was but a "young boy." Generally speaking, teenagers without violent records would appear to be inappropriate candidates for the death penalty, and this common sense notion finds expression in Va. Code § 19.2-264.4(B)(v), which requires consideration of youth in mitigation of capital crime, and in Va. Code §§ 19.2-264.2(1) and 19.2-264.4(B)(i), which instructs decisionmakers to consider an offender's record of violence or nonviolence in determining sentence.

Prosecutorial Ethics is in evident agreement. Murphy was a "young boy" with no record of violence and little record of wrongdoing at all.

Aaron Turner was seventeen years old at the time of the crime and he had no criminal record. Murphy agrees that those factors may be sufficient reasons in themselves to afford Turner mercy. But to whatever degree those considerations explain why death was not sought against Turner, they suggest that the decision to single out Murphy was unfounded. After all, the less than two year difference in the age of Murphy and the age of Turner — Ms. Albert drew no distinction between them when she called them both "young boys" — is nothing compared to the nearly two decade difference between Murphy's age and Robin's and Hinojosa's ages. These masterminds of the murder²⁰ were both 35 years old. By no stretch of the imagination was either a greenhorn or ingenue. As noted below, Hinojosa was a longtime Navy veteran, and the oft-married Robin had 23 felony convictions. Common

²⁰ Of Robin, Humphreys recently said that, "As far as I was concerned, she was the mastermind of the whole thing, and I think the evidence bears that out." C.A. 2166-2167. At another time, Humphreys has said of Hinojosa, "it's clear that this defendant was the moving party in arranging for the death of his now wife's husband, James Radcliff." C.A. 527, lines 11-17. Never has Humphreys cast Murphy as the overall leader of the plot against Radcliff.

sense clearly suggests that the great disparity in age between Murphy and the middle-aged adults who involved him in this crime was a powerful factor *against* Murphy receiving the harshest punishment. In short, Murphy's youth, when contrasted against Robin's and Hinojosa's experience and maturity, favored leniency. Far from explaining the decision to single him out, Murphy's age undermines that decision.

b. Cooperation With Authorities

This subfactor plainly favors Murphy. Alone among all the defendants, Murphy cooperated with the police from the moment of his first contact with them. Hinojosa, Robin, Bourne, and Hall all participated in the five-week coverup after the crime, during which they gave repeated false statements to the police. On his arrest, Turner denied any knowledge or role in the crime and adhered to that position *until Murphy convinced him otherwise*. Aside from gaining Turner's cooperation, Murphy also led police to where the weapons and "burglary" items had been thrown in the Chesapeake Bay.

Murphy's willingness to cooperate did not end there. His trial attorney repeatedly approached the prosecution about Murphy's willingness to testify for the prosecution, but the offer always was rebuffed. And finally, only Murphy pled guilty without any inducement or promise from the prosecution. Greater cooperation with the authorities hardly was possible, and quite obviously none of his codefendants was any more cooperative than Murphy. The prosecutor acknowledged as much at Murphy's sentencing, when he admitted that what Murphy had going for him was "the fact that he was unquestionably cooperative with the police." C.A. 78, lines 20-21. Thus the subfactor clearly favors Murphy.

B. THE STATEMENTS OF PUBLIC OFFICIALS RESPONSIBLE FOR PROSECUTING MURPHY AND FOR DEFENDING HIS CONVICTION AND SENTENCE REINFORCE THE DISPROPORTIONALITY OF HIS SENTENCING

Over the history of litigation involving Murphy, three officials have represented the Commonwealth. They are Commonwealth's Attorney Robert J. Humphreys and his assistant Pamela H. Albert, who prosecuted Murphy and urged his execution, and for the office of the Attorney General, Senior Assistant Attorney General Donald R. Curry, who defended the death penalty imposed on Murphy. Statements made and positions taken by *all* three lend support to the case that Murphy was no more culpable than his codefendants and that no legitimate reason existed to single Murphy out for harsher punishment.

1. The Attorney General Of Virginia Has Acknowledged That Murphy Is No More Culpable Than His Codefendants

In a case completely unrelated to that of Murphy or his codefendants, the Attorney General conceded that Murphy was no more culpable than the other co-defendants. That case was the death penalty appeal of Mark Sheppard to the Supreme Court of Virginia. Sheppard had been sentenced to death in Chesterfield County; his co-defendant Graham was given a life sentence. Sheppard argued that his sentence was disproportionate to Graham's, but the Supreme Court of Virginia has consistently taken the position that proportionality review cannot include comparison to one's co-defendants. One of the cases in which the Supreme Court has stated this rule was *Murphy v. Commonwealth*, 431 S.E.2d 48 (Va. 1993), in which the Supreme Court declined to compare Murphy's death sentence to the life sentences offered to and given to his codefendants. In order to support his effort to compare himself to Graham, Sheppard therefore was compelled to distinguish *Murphy*. Sheppard's proposed distinction was that "Murphy was more culpable . . . because he had recruited [others]." C.A. 2121.

The Attorney General vigorously opposed Sheppard's proposed distinction in the brief filed in the Supreme Court of Virginia on behalf of the Commonwealth. His response - a

winning one, *Sheppard v. Commonwealth*, 464 S.E.2d 131, 141 (1995) (citing Murphy) – was that Sheppard's "*allegation[] that Murphy was more culpable than any of his co-defendants . . . [is] simply wrong.*" C.A. 443. Brief of the Commonwealth, *Sheppard v. Commonwealth*, (August 24, 1995), C.A. 387-484. In other words, the senior law enforcement official for the Commonwealth of Virginia has taken the position, *as a matter of fact*, before the Supreme Court of Virginia that Murphy is no more culpable for the murder of James Radcliff than the other defendants, to all of whom life sentences were offered. This acknowledgement alone is a sufficient basis to support commutation of Murphy's sentence. But as we demonstrate below, recognition that Murphy is no more culpable than his codefendants is not unique to the Attorney General.

2. The Commonwealth's Attorneys' Arguments At Robin Radcliff's Trial And Gerardo Hinojosa's Sentencing Reinforce The Fact That Murphy Is No More Culpable Than His Codefendants

a. Pamela H. Albert

As to the death of James Radcliff, his widow's calculated and reprehensible role was accurately outlined to the jury by Ms. Pamela H. Albert, then Assistant Commonwealth's Attorney for the City of Virginia Beach.^{31/} Though one of the privileged offered a plea bargain by Mr. Humphreys, Robin opted to plead "not guilty" and be tried before the court and jury. She was convicted of capital murder and conspiracy to commit capital murder and sentenced to life imprisonment plus twenty years. Ms. Albert summarized Robin's conniving and manipulative involvement at trial.^{32/} Her summation is included at length here because

^{31/} Now judge of the Second Judicial District, Virginia Beach General District Court.

^{32/} C.A. 1570, line 9 - C.A. 1596, line 1.

it is so plainly irreconcilable with the position that Murphy was more deserving of death than the woman to whom the prosecution had offered life:

In July of '91 James Radcliff was serving his country with the United States Navy, and he was not in Virginia Beach. He was out to sea beginning in June, returning home July 18th. James comes home July 18th. Now, what do we know about this defendant and her co-defendant, Gerardo Hinojosa, before James returns from his duties at sea on the 18th? We know that the defendant's daughter, Tina, marries Michael Bourne. Where? At the South Budding residence. And who's going to give Tina away in the wedding? Mrs. Radcliff then is married to James Radcliff, but she has Gary Hinojosa, according to the evidence, on July 13th give away Tina Bourne.

James returns home from sea just five days later to his residence on South Budding Avenue and there began trouble. For a while James had been out to sea. This defendant had taken herself an extramarital affair, a lover. *She was having an extramarital affair on her husband with Gary Hinojosa, a man who ultimately worked with her to have James killed.*

James returned on the 18th. What's the next thing we know about James's life before it was taken from him? We know that on July the 27th D. J. Foley, a young sailor, was over at South Budding Avenue, and he helped this defendant move some of her belongings out of the apartment. We know James was home, and we know they discussed the division of some of the property, and we know basically that James watched television while this was going on. So we know at this point in time that the defendant has taken actions to leave James Radcliff, to move out of South Budding Avenue. James is present watching T. V. and does not stop the defendant from moving out. She moves out. She spends that Saturday night at Mr. Hinojosa's - at Gary Hinojosa's house. She sleeps over there. She wakes up the morning of July 28th. She goes into Michael Bourne's bedroom with Gary Hinojosa, and that is the beginning right here of the plan directed to a third person between Mrs. - Mr. Hinojosa and Mrs. Radcliff to kill James Radcliff.^{33/}

* * *

Mr. Bourne did not stand alone in the Commonwealth's case. Mr. Hall did not stand alone. They were just two of over twenty witnesses that were called. Listen carefully to what he [Michael Bourne] had to say. He's woken up to borrow the car. He doesn't willingly allow the car to be borrowed. He questions more; and when he questions more, who says something to him? Not Gary Hinojosa, but this defendant. This defendant. What does she say?

^{33/} C.A. 1576, line 9 - C.A. 1577, line 24.

Someone is going to shoot James. Shoot James. She - Michael Bourne testified from this witness stand that she even made the motion of holding a gun. That's this defendant, ladies and gentlemen of the jury, that's on trial this week. She makes a motion holding a gun, says, Someone's going to shoot James. Michael Bourne inquires, Someone's going to shoot James? They are just going to shoot him? And she says, No. It's going to cost a lot of money.

Sunday morning, July 28th, here we already know now in the presence of Mr. Hinojosa this defendant has commented the car is necessary. She's the one trying to get the car for the job. What the job is is to shoot James, which is her husband; and is it going to cost anything? Yes. It's going to cost a lot of money.²⁴ Who's mouth does that come out of? This defendant right here. That's starting Sunday morning. Does the boy let the car be borrowed? Yes, he does. What else does she do on Sunday? On Sunday, by her own statements ultimately to Detective Yoakam, she shows - Mario Murphy now is our next person involved. She shows Mario Murphy her husband's car - what her husband's car is. Why? So that when she is left there at the Woodside Shopping Center like her car is broken down and her husband - and isn't it ironic she knew her husband well enough to know that he'd come and help her? They could count on that as part of the plan that her husband would come and help her fix her car. She can pull in there. She can lure him there, and then Mario Murphy can shoot him. She. Nobody else.

The defendant told Detective Yoakam ultimately in her statement that she showed Mario Murphy her husband's car. Is that assisting? Is that aiding? Is that encouraging? That's making sure that the plan is going to work. On July 28th after all of that what does she do? Does she work according to plan? And, again, ladies and gentlemen of the jury, you're thinking about what this - what makes this person tick that had her husband killed. Does she operate according to plan on July 28th? She most certainly does. She even goes by Gary's house - on her own statement to Detective Yoakam ultimately she even goes by Gary's house to make sure the plan is still on. It's still on. Are we still on? Still going to shoot James in the parking lot? I'm still supposed to act like I got car trouble? Yes. Still on.

She goes over to the Frank's residence, and we know James is just sitting at home on South Budding Avenue having no idea what's about to happen. None. She goes over to the Frank's residence, and while at the Frank's she does not take an alcoholic beverage offered to her by Charlie Frank. He

²⁴ Significant dispute existed about the money. As a beneficiary of a policy of insurance on the life of James Radcliff, Robin stood to receive \$100,000 from life insurance proceeds. Conflicting versions about how the money would be paid, from where the money would come, what division would be made among Turner, Murphy, and Hall were told. Compelling arguments explain that Hall was "in" for fun; Turner was a violent person who sought excitement; and Murphy tragically needed to "prove" himself in the eyes of Hinojosa if he wanted to be a Navy SEAL (a position to which Hinojosa falsely lay claim).

offers her one a couple times. She doesn't take it. Ultimately she says she doesn't want one because somebody's got to keep their head straight so they don't get their throat cut. That's what this defendant says. Is Mr. Hinojosa around? Anybody else around? No. This defendant over at the Frank's residence.

She leaves there. Does she go home? Does she go somewhere else? No. No. She does not because they had a plan. They have a plan to kill James, and it's costing a lot of money. She goes to the Woodtide Shopping Center and there she parks her car. She calls James. She gets James there; and when James comes to fix her car, according to what she tells Detective Yoakam, she comes out of the shadows. She stayed in the shadows to watch. There was lots of people around Kindercare, and she comes out of the shadows.

Plan number one is foiled. James is still alive. What does James Radcliff do - the man who's the victim and this trial is all about? What does he do? Puts water in her radiator, fixes her car, tells her to go on home. Little does he know what already occurred and what ultimately will occur.

The 28th. This is a very important day. When that plan does not work, she goes back to South Budding Avenue; and when Michael and Tina Bourne come over, she takes them into the master bedroom as well as out in the parking lot and she talks to them about plan number two. Plan two; because James is going to die and it's costing money, but it will happen. Not giving up. She'[s] not giving up. She tells them, People are going to break in, and they are going to make it look like a burglary or robbery; and this defendant, ladies and gentlemen of the jury, this defendant - that's who you're concerned about - she also tells them what property to take - the VCR, the ring on the nightstand, specific things which we ultimately know in her actions throughout it she was persistent and consistent in wanting to make sure those things got taken.

July 28th Michael and Tina Bourne say, let us take John over to Gary's. No. No. Why not? This whole plan was to make it look like strangers broke in and stole property. It's too arranged. That may not be believable to the police. So she has her thirteen-year old son stay on the premises of a small apartment when she knows what's about to happen. Again, that's the person you're considering who's on trial.

She stays with her husband, she stays with her husband, and her husband gets in bed to go to sleep, and he falls asleep. It gets past midnight, and now we are into July 29th, the day when her plan, her plotting, her dreams, her money, it finally happens. James is dead. James gets killed. How does James die? Does he die quickly? Does he die effortlessly? Did any planning have to go into it? The individuals had to get into the house.

Commonwealth's Exhibit 4. We know from the defendant's own statements, ladies and gentlemen of the jury, she told Detective Yoakam in the final interview that *she did check the window. That was one of the things she had to do was check the window to see if it was unlocked.* She did so, allowing three individuals to come into the house. Then she heard the individuals coming into the house. She gets up out of the bed. Keep in mind I am speaking of her last interview with the police - and we know there were numerous ones - but her last one, the Commonwealth's Exhibit C-2. Commonwealth's 2. She gets out of the bed. Where is James? James is innocently and naively sleeping his last moments of his life; and as he sleeps next to her she gets out of the bed, leaving him there, opens this door, and there are Mario Murphy, Aaron, Jamie Hall.

Jamie Hall, who is there, told us that she exited that door and she calmly walked right between the three men. Look at that hallway. She didn't say anything to them. She didn't push them away. She didn't discourage them. Of course not. What silly questions of me to ask. They were there for a reason. They were planned. This was a plan. Her money was going into it. Maybe this plan would work. She walked past them and lets them go into her bedroom where James is asleep. Over and over again these things seem inhuman. It seems unbelievable almost to see that somebody would leave somebody there, but then one has to remember this was a plan. This was far from a surprise. This was what the payments were for. She walks down that hall to the living room, ladies and gentlemen of the jury, where she stays. She stays. She waits. Jamie Hall told us about the moaning - the loud moaning that came from James. Does she leave the apartment? Does she do anything? No. She does not stay in the bedroom either or in the hallway. Not frozen in any way in that regard; but goes to a safe distant place in the living room where she doesn't leave the scene. She stays there. When they come out, she is in the living room.

Commonwealth's Exhibit 1, the very first exhibit we saw - she's in the living room where she stands in front of the television and motions to the VCR to these men as if don't forget our plan. You need to take something because this must look like a burglary. She's not standing pointing at the couch. She's not standing pointing at photos. She's not pointing at the front door, anything out of the ordinary. She's pointing at what we already know was the plan. The plan she discussed earlier that evening with Mike and Tina Bourne, the plan that was conveyed back to Gary, the plan that was discussed at Gary's house amongst the men involved. Must take property to make it look like burglary; and there we see the television, and she was gesturing, as Michael Bourne told us, right there, Commonwealth's Exhibit 1. Aiding, assisting, gesturing, encouraging in some way in the commission of the crime; and there she was found by Officer Molleen a period of time later where her first statement was, They took the VCR, and he's in there; and he is in there.

What was he doing in there – the James that she wanted to have killed? James is in his bed.

Commonwealth's Exhibit 3. James has suffered numerous blows to the head. James has suffered stab wounds to the torso. James is not dead. James was holding on. A man who held on for life. He escaped it at the Woodside Shopping Center, and on this morning, two something in the morning, he still holds on. He was living. His eyes were open. We know that from paramedics and the uniformed police officer.

Now, after this defendant makes sure the VCR is gestured to – each and every piece of evidence, ladies and gentlemen of the jury, is important to see her persistence and her consistency in the plan. After those three people leave, what does she do? What does this defendant do? She has not been in the room during the beating. She has not been in the room during the stabbing; and, remember, the plan is this is to look like a burglary. A burglary where a couple, an innocent couple, is at home in their bed with a child down the hall. How is this to look if she has no blood on her, nothing? One man's killed and she's totally scotch free? Nothing on her? So she walks back down that long hall. She walks back down to the bedroom. What a walk that must have been. Her husband is at the end of the hall. He is still alive in that bed. Not a cry for help. Not a walk out the door. Not a bang on the wall. Nothing. At this point in time that apartment is sealed. The people that are left are James struggling for his life and this defendant. She walks down there and she gets in the bed. She gets in the bed with a man that a good period of time later still has his eyes open. Could still ask Officer – was still looking at Officer Molleen, could still ask the paramedics for help. That's how he was by the time Officer Molleen responded and by the time paramedics got there. Could still ask for help.

So what do you think was going on when she climbed back into the bed with him? She gets in the bed and rolls in the blood; so as you see on the pajamas, as Evidence Technician Holmes testified, it's not splatters. It's on the front. It's on the side. It's on the back. She really got into a sufficient amount of blood to leave substantial stains next to her in that bed because Commonwealth's Exhibit 3 doesn't really show us what she was doing.

Let's look at Commonwealth's Exhibit 6. Now, this is – this is Mr. Radcliff, ladies and gentlemen of the jury, but this is after somebody has already tried to help him, all right? That's after they've tried to help him. That's after a paramedic has scraped some of the dried blood off. That is the man; and don't for one minute not think about that she got into the bed with that man in a condition not as nice as it is now – far from it – who was still alive asking paramedics for help, and she stayed there at least a sufficient amount of time to get blood on her pajamas. That's the person. That's the person we're talking about in the trial. She ultimately gets out of the bed and she goes

outside where Willie Evans hears her, thinks she's been injured, which fits with the plan. They wanted it to look like the burglary. Offers her help, pulled her into the apartment, calls the police, and the police come, and there it begins. It begins with Willie Evans, and it continues for over a month - the lies, the deceit, the tales, the tales always fitting with the plan that we were burglarized. I don't know who could have done this. Oh, James. Always remembering the plan, remembering and retelling; and that's important when they want you to think she was insane.

July 29th. Speaks to Willie - July 29th speaks to Willie Evans: Someone's broken in; my husband is hurt. Speaks to Officer Molleen: They took the VCR; he's in there. Speaks to Officer Hayes: Oh, we had a romantic evening; we made love; somebody broke in, held me down, hurt James. Detective Tommy Lewis at the hospital: Everything was going well; Someone broke in; pressure on my back; I heard them say, Where's the money. Always going with the plan, going with the story consistently; Evans, Molleen, Hayes, Lewis.

Fifth person she talked to on the 29th was Detective Yoakam, which she spent four hours in the detective bureau. Four hours speaking to this detective. She has been up all night. She has talked to police officers, and she speaks to the chief investigating officer on the case for four hours. What happens during that conversation? She says, We were fine. Our marriage was great. Everything was fine. People broke in. They did these things to James.

Time goes by. Time goes by. Car gets searched. In the car is found Commonwealth's Exhibit Number 32. This speaks to us a little differently than what she was telling Detective Yoakam. Ultimately after four conversations she's confronted with this, and she admits, Okay. Okay. They found out. Okay. I admit to you I was having an affair. She tells a little bit about the affair. Still people broke in. She knows nothing, nothing of what happened to James. That's July 29th.

What happens July 30, 31? July 30, 31 is a time period leading up to James's funeral where she calls Sandra Turner, James's first wife, mother of his two sons. During those telephone conversations she is again consistent. Again, Somebody broke in. Now, the first time she talked to Sandra Turner she said, I was in the bed. I slept through the whole thing. Second time she talked to Sandra Turner it was, Somebody broke in. I was knocked off the bed, hurt my ankle; but still always somebody broke in.

That leads us to August. August the 2nd, James's funeral. She speaks to Sandy Turner during this period again. More lies. This is the sixth person she's spoken to and told lies consistent with their plan during this time period. The funeral is Friday, August 2nd. *On Friday, August 2nd, this defendant at the funeral home is observed draping herself over James's casket and saying,*

Oh, James. Who could have done something like this to you? Who could have done something like this to you? Standing there, standing there knowing exactly what has happened; but it's consistent with the plan. The grieving widow. The grieving widow who one week to the day later marries her co-defendant, Gary Hinojosa.

On August 2nd she spoke with Sandra Turner again, and again Sandra Turner questioned her, wanted to know more about the death of her son's father. Pushed. There again consistently talked about people breaking in. August 2nd is the funeral in Texas. 4, 5, 6, 7 - during that time period we know from Michael Bourne she would return to Virginia Beach, Virginia, and then ultimately left again with Gary Hinojosa.

You met Ben Garza. Ben Garza tells us that on August 8th Mr. Hinojosa and the defendant applied to get married, and then on August 9th they do get married in Texas. They get married. Plan number two has worked, and James is dead, and Robin Radcliff is the beneficiary of the one-hundred-thousand-dollar insurance policy because the victim served in the armed forces, the United States Navy. She is going to get that, and she does not waive that, as the stipulation was read to you. She does not waive it. Going to collect that money, that hundred thousand.^{35/}

* * *

September 3rd. She's complained to everybody she can on the detective. She's lied over and over again to citizens and police officers consistently. A month has gone by. This murder has not been solved. She's walking around Virginia Beach. September 3rd Michael Bourne gets a call. The police have new evidence. They'd like Michael to come down. Michael tells this defendant, Police have new evidence. They want me to come down. Police wanted Michael to come down and talk to them some more. What does this defendant say?

On September 3, 1991, a month after James Radcliff's brutal murder, this defendant tells that twenty-year old man, They don't have anything on us. Stick to the story. The don't have anything on us or we would have been arrested by now. She thought they had it beat. She tells Michael Bourne not to tell; to stick to the story. Things did not work the way Robin Radcliff desired them, and on September 3 and September 4, 1991, the investigation of this case, solving of this case, finally came to a close with a successful arrest of Aaron Turner, Mario Murphy, Jamie Hall, Michael Bourne, Gerardo Hinojosa, and the woman - the wife, the one who wanted her husband killed, the one who had the affair, the one that then had the baby with her lover. The defendant, Robin Radcliff.^{36/}

^{35/} C.A. 1578, line 13 - C.A. 1591, line 16.

^{36/} C.A. 1594, line 1 - C.A. 1595, line 2.

From the sentencing trial:

MRS. ALBERT: We know, ladies and gentlemen of the jury, also from the testimony that you heard here today that sometime in the year 1988 she is in Florida. . . . for the record. Now we're in 1988. She is in Florida in '88. In Florida. In March of '88 she commits more felonies. She was convicted ultimately of forgery and uttering March 14th and larceny on that same date. On March 30, 1988, she committed two more felonies and another theft. She's in Florida. . . . Next May of 1988 more crimes are committed in Florida. In May she commits three more felonies. This is committing them now. This is forgery and uttering and grand larceny in Florida. Next, the month of June more felonies are committed in Florida - June 2nd, June 7th, and June 17th, totaling in Florida in the year of 1988 some fifteen felonies and three misdemeanors. This, ladies and gentlemen of the jury, is being committed in Florida after in '83 being told by the court that she has ten years - a ten-year sentence probated for supervision, okay? So we know what that mean to her because we see five years later she, while with that in mind, has committed fifteen felonies and three misdemeanors.

Now, she leaves the state of Florida because we know she comes to Virginia Beach where she commits more crimes the next year, March '89, in Virginia Beach where she commits two worthless check misdemeanors, which you have the certified copies, March 31, after committing those on the 1st and 3rd of the month. She goes to the end of the month, March 31st, where she commits two more felonies. Again, this is after this. This is after this. The next month, April 1989, more crimes committed. These also in our city. April 11th, April 13th, April 26th more felonies for which she was ultimately convicted.

She is in Virginia Beach in 1989. She is then taken to Texas where in 1990 she serves six months of the year; June, July, August, September, October, November to December. She is incarcerated that entire time in the Texas -^{37/}

MRS. ALBERT: We know the defendant from the records in 1990 now is serving - serves a six-month sentence in the Lubbock County facility, which was testified to. She is released at the end of December. On December 29, 1990, she is released from Texas to the authorities in Florida. In February of 1991, February 13, 1991, in Florida she is found in violation of her probation. So she goes from Texas to Florida, commits crimes. Florida, Virginia Beach commits crimes. Then she's taken back to Texas to serve a sentence. Then she's released to Florida to have a violation of probation.

^{37/} C.A. 2042, line 24 - C.A. 2044, line 14.

Remember we are now February of 1991. Getting close to the time when she will take her lover, Gary Hinojosa, they will plot to kill James Radcliff, and they will successfully kill him, which is exactly - approximately six months later. We know in July of '91 she is here. She is in Virginia Beach because, as the more specific calendar noted yesterday, we know the progression. James out to sea; James coming home, the plot to kill; hiring the killing; and James is killed.

James is killed July 29, 1991. She returns full circle, for we know June 9, 1991, she returns to Texas to marry her co-conspirator, her lover, the man that she wanted more than she wanted James Radcliff.^{38/}

b. Robert J. Humphreys

Mr. Humphreys agreed with Ms. Albert's assessment of Robin. At the same trial, he added this factual background and profile of Robin Radcliff:

Ladies and gentlemen of the jury, this date right here, July 27th, Mrs. Albert drew a box, a red box, and that date, July 28th, she put an x because those were two of the more significant dates in this whole affair; and let me remind you of some evidence that hasn't been really touched on too much. It's been a little bit, but not too much, and I'd ask you to use your common sense and draw some reasonable inferences from it, which you're entitled to do.

During this - sometime during this week preceding James Radcliff's death you will remember that William Nickerson, one of his shipmates on the "Comte de Grasse," testified that he talked to Robin - he couldn't remember the exact date; he thought it was sometime during the week prior to James's death - and had a conversation with the defendant to the effect that she and James were getting a divorce. They had agreed to get a divorce. Corroborating that statement is what happened on July the 27th when it's undisputed from Mr. Foley that Robin and her husband James basically separated. She moved out of the house. Foley helped her move out of the house. James watched T.V., and she spent that night, the night of the 27th, with her lover, now husband, Gerardo Hinojosa. Now, we don't know what their pillow talk was about that night, but we can make some reasonable inferences; because, remember, basically the first thing the next morning Robin and her lover are standing in Michael and Tina Bourne's bedroom talking about a plan that's going to cost some money to murder James. That plan, of course, as you know now, involved a setup at Woodtide Shopping Center. Remember, focusing on the fact that she doesn't reside with James Radcliff anymore on

^{38/} C.A. 2044, line 23 - 2045, line 23.

this - on this occasion. She's living over at Foxglove Court with Mr. Hinojosa.

From the evidence before you, the next time she talks with James is when she says words to the effect of, My car is broken down; I need help; come help me. Now, this is the man she has moved out on. This is the man she is apparently planning on divorcing; but what does that mean? He comes to her assistance. He comes to her assistance. Again, we don't know for sure what transpired in the way of conversation between James Radcliff and the defendant, Robin Radcliff, because James Radcliff isn't here to tell us, and Robin couldn't remember; but, again, one can infer I would submit that either out of gratitude or for whatever reason she convinced James Radcliff that she wanted to either come back to him or at least spend the night with him. We don't know for certain what that pillow talk involved that night. There was some statements about it to various police officers. Supposed discussions about saving for a shrimp boat for example.

Divorce - something that obviously this defendant was not inexperienced with. Something that the victim was not inexperienced with. This was not their first marriage for either one of them; and I told you in the beginning of this case that this case was not about love; it was about money; and that's why I'm drawing your attention to those two dates because that's where the money angle comes in, and you can use your common sense and draw some reasonable inferences; because if it's just a matter of running off with her lover, making him husband number five, there is a lot of lawyers that would have been glad to take the divorce case; but, of course, you don't get a hundred thousand dollars plus other unpaid benefits when you do that. So it all hangs together.

I told you in my opening statement that when you heard the evidence in this case you would be convinced of three things: That Robin Radcliff was a liar; that Robin Radcliff was a con artist and that Robin Radcliff was a murderer.

This case, ladies and gentlemen of the jury, comes down to two m's. I've told you about one of them already, money. The other is manipulation from day one and even going, as a matter of fact, back in time prior to this case. Things that we know about from - from her background through the psychiatrist mostly. Thirty suicide attempts for example. You'd think by number thirty you'd be able to get the hang of it. She's manipulating people. She's trying to manipulate you, ladies and gentlemen of the jury.

By the time the Commonwealth had rested its case, out of our twenty-five witnesses we had presented ten people who told you lies that Robin Radcliff had told to them. By the time Robin Radcliff finished testifying we could now add you fourteen people to that list because she lied to you as well.

This case is not about whether or not Robin Radcliff committed these crimes. This case is about whether you should hold her responsible for her role in committing these crimes; and on the one hand you've got the Widow Radcliff that sympathetic creature that she would like you to believe she is, the person who throws herself on her husband's casket, pleading aloud to the assembled people in the church, in the funeral home, for the affect that who could have done such a thing. The Widow Radcliff.

The other picture that has been painted here by the Commonwealth I would submit is Mrs. Gerardo - Mrs. Gary Hinojosa, the soon to be moderately wealthy widow and heiress ready to start a new life with her new husband and her new child at the expense of her prior husband and his life.^{39/}

And then, at the sentencing phase of Robin Radcliff's trial, the prosecutors launched another appropriately deserved salvo, saying:

Where was Robin? Where was Robin? Robin was in the next room already beginning the planning of the cover-up, the fake burglary. Where was Robin? Robin walked down the hall as her husband who we now know was alive at the time, climbed into bed next to him, rolled around in her husband's blood, again, to help make it look like a burglary in which she was also a victim. Don't know exactly how long she waited to notify anybody, but we know that it was certainly long enough for some of that blood to already begin to dry; and by the time the police and rescue squad were called, it was already too late for saving James Radcliff's life.

Vileness. Look at her actions after this horrible crime was committed. She didn't think all that much of James Radcliff. I think that's pretty obvious. She took a lover. That's not unusual in this day and age, and it's certainly not something you should punish her for, but we do have other ways of legally terminating marriages other than through the use of blunt instruments and knives. Now, they don't always net you a hundred thousand dollars, but they are at least legal.

Aggravated battery, vileness, inhumanity. Robin Radcliff has demonstrated that over and over and over again to virtually everyone she has talked to about this case. I told you that manipulation and money were really the heart of Robin Radcliff's activities. Not just concerning this crime as we now know, but basically throughout most of her adult life, which takes me to the second avenue which you can consider in deciding what the appropriate sentence is.

^{39/} C.A. 1638, line 6 - C.A. 1642, line 12.

After considering the evidence of the defendant's history and background, is there a probability that she would commit criminal acts of violence that would constitute a continuing serious threat to society? Let's analyze that for a moment. One forgery conviction in Texas, fifteen felony convictions for forgery and uttering forged instruments in the state of Florida; three additional misdemeanors also in the state of Florida, eight felony convictions involving forgeries and uttering forged instruments in the city of Virginia Beach, Virginia, as well as two additional misdemeanors. You have the records. You'll be able to go through them at your leisure. In addition, she violated her probation in Texas and she's violated her probation in Florida; but what's the thread that runs through those crimes? Greed. Money. In each and every occasion she stole from people who trusted her. In most cases her employer; and what's this case about? Money.

Robin Radcliff, I would put it to you, ladies and gentlemen of the jury, is willing to do criminal acts for money. Now, they have not all been violent criminal acts, but I think we can argue to you now, ladies and gentlemen of the jury, that she has graduated to that level in her criminal career. There sits a career criminal by any definition.^{40/}

* * *

Just a moment I ask you to consider the last decade in time in the life of Robin Radcliff, the person that you are to apply the laws of the state on.

First of all, her first criminal conviction, which is now in evidence, occurred July the 6th of 1981. She committed her first felony in Texas. She was convicted of forgery. She committed the forgery July 6 of '81. She was actually brought to court and convicted of that in Texas the month of February 1983; and you've had the documents, and you can review them all.^{41/}

Consider also what the Commonwealth's Attorney said at Hinojosa's sentencing hearing pursuant to the plea bargain:

A few days after the - I think it was two days in fact after the funeral service and burial of the victim, James Radcliff, this defendant, Mr. Hinojosa, then married the widow of Mr. Radcliff, Robin Radcliff, now known as Robin Radcliff Hinojosa, who is a co-defendant in this case.^{42/}

The court will recall from the litigation of the suppression hearings in this matter in which the defendant stated his role in the statements which are before

^{40/} C.A. 2028, line 14 - C.A. 2030, line 21.

^{41/} C.A. 2042, lines 1-11.

^{42/} C.A. 527, lines 11-17.

the court. It's fair to say that they do not agree in their entirety with the statements of some of the other co-defendants in this case. The court can weigh that for what it's worth; but in any event, *it's clear that this defendant was the moving party in arranging for the death of his now wife's husband, James Radcliff.*^{43/}

Taken together, the concession of the Attorney General from Sheppard's case and the arguments of Ms. Albert and Humphreys simply do not permit the conclusion that Murphy was the most deserving of death. Those arguments instead support the conclusion that if life was to be offered to Robin and Hinojosa, it should have been offered to Murphy. But it was not, and now only the Governor can bring about proportionality of treatment between Murphy and his equally culpable codefendants.

IV. MURPHY'S CONVICTION AND SENTENCE ARE INFECTED BY AN UNDOUBTED VIOLATION OF THE VIENNA CONVENTION ON CONSULAR RELATIONS

In 1963, the United States joined numerous other nations in an international conference in Vienna, Austria, for the purpose of codifying international law concerning the duties, privileges, and immunities of consular officials. One of the duties of consuls considered by the conference was assistance of foreign nationals faced with criminal prosecution outside their native land. After much debate, the conferees agreed that this important consular function could be protected if arresting countries were required to advise each detained foreign national of his right to consular assistance without undue delay. That right was codified in Article 36 of the resulting Vienna Convention on Consular Relations.^{44/}

Article 36 states as follows:

^{43/} C.A. 527, line 18 - C.A. 528, line 5.

^{44/} Luke T. Lee, *Consular Law and Practice*, C.A. 1658 - C.A. 1662, Clarendon Press/Oxford (2d ed. 1991).

1. With a view to facilitating the exercise of consular functions relating to nationals of the sending state:

(a) consular officers shall be free to communicate with nationals of the sending state and to have access to them. Nationals of the sending state shall have the same freedom with respect to communication with and access to consular officers of the sending state;

(b) if he so requests, the competent authorities of the receiving state shall, without delay, inform the consular post of the sending state if, within its consular district, a national of that state is arrested or committed to prison or to custody pending trial or is detained in any other manner. Any communication addressed to the consular post by the person arrested, in prison, custody or detention shall also be forwarded by the said authorities without delay. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;

(c) consular officials shall have the right to visit a national of the sending State who is in prison, custody or detention, to converse and correspond with him and to arrange for his legal representation. They shall also have the right to visit any national of the sending State who is in prison, custody or detention in their district in pursuance of a judgment. Nevertheless, consular officers shall refrain from taking action on behalf of a national who is in prison, custody or detention if he expressly opposes such action.

2. The rights referred to in paragraph 1 of this article shall be exercised in conformity with the laws and regulations of the receiving state, subject to the proviso, however, that the said laws and regulations must enable full effect to be given to the purposes for which the rights accorded under this article are intended.

Vienna Convention on Consular Relations, April 24, 1963 TIAS 6820, 21 U.S.T. 77, C.A. 1727 - C.A. 1752.

The U.S. State Department has proclaimed the notification requirements and consular access protected by Article 36 as "the standard of international practice of civilized nations, whether or not they are parties to the Convention."^{45/} Clearly, the safety of Americans abroad is compromised if our country insists on executing foreign nationals in violation of

^{45/} Department of State telegram 40298 to the Embassy in Damascus, Syria, February 21, 1975, cited in Luke T. Lee, *Consular Law and Practice*, Clarendon Press/Oxford (2d ed. 1991) C.A. 1657 - C.A. 1726. See also Department of State File L/M/SCA; Department of State, *Digest*, 1973, C.A. 1683: "In the Department's view, Article 36 of the Vienna Convention contains obligations of the highest order and should not be dealt with lightly," cited in *Consular Law and Practice*, C.A. 1682. The State Department's view of the importance of Article 36 is definitive, leaving no question as to the high priority it maintains for enforcement of that article.

the Convention. Indeed, the State Department's own long-standing rationale for enforcement of the Convention emphasizes just that point, a point the Department has reiterated in its letter requesting that Texas investigate the Convention violations in the case of condemned Mexican Irineo Tristan Montoya.^{46/}

Plainly, then, violation of the Convention is no small matter. In this case, there is no doubt that the Commonwealth knew of its obligations under the Convention, knew that Murphy was not a U.S. citizen, and yet did not provide the required notification. There is also no doubt that the Mexican consul would have assisted on request and that the consul's assistance is significant and efficacious in preventing imposition of the death penalty.

A. THE COMMONWEALTH KNEW OR SHOULD HAVE KNOWN OF ITS OBLIGATIONS UNDER THE VIENNA CONVENTION

The violation of Murphy's right to consular assistance at trial occurred during previous administrations, but there can be no doubt that those administrations can and must be charged with knowledge of the existence of Article 36 of the Vienna Convention. The treaty became law in the United States on December 24, 1969, and the State Department assumed responsibility for ensuring its enforcement by the States. To inform the States of

^{46/} The aftermath of Mr. Tristan Montoya's execution on June 18, 1997, bears out the Department's fears. The day following the execution, the *Dallas Morning News* reported that a protest against the execution on the bridge between Brownsville and Matamoros "briefly turned tense, with protesters hurling water jugs while shouting invective at anyone who looked like an American. . . . Pedestrians attempting to return to the United States ran for the northern border before the protest broke up . . ." C.A. 1806 - C.A. 1809. The *Washington Post* reported that a "handful of men, apparently drunk, threatened to kill 'gringos' in Mexican prisons. A group of women yelled: 'An eye for an eye and a tooth for a tooth.' Mexican police scanned the crowd. U.S. officials cautioned tourists crossing the border that there could be trouble." C.A. 1810 - C.A. 1812.

The *Post* also reported that U.S. vice consul Jules Silberberg, stationed in Matamoros, Mexico, said that while no travel warning had been issued, Americans should exercise additional precautions. Mr. Silberberg was quoted as saying that, "[t]he fact is that people are out there saying they want to somehow retaliate or let the gringo know they don't approve of what's going on." *Id.* The angry response of the citizens of Mexico to the execution of Mr. Tristan Montoya, which we understand also included a protest at our embassy in Mexico City, fully supports the U.S. State Department's concern that the consequences of domestic defiance of Article 36 threaten the welfare of our citizens abroad.

their obligations, the State Department periodically sent advisories to the Governor and the Attorney General of all States and to the mayors of large cities, such as Virginia Beach.

One such advisory was dispatched on September 1, 1991, *just three days before Murphy was arrested*. C.A. 318 - C.A. 336. This advisory stated as follows:

This is to remind all personnel with law enforcement responsibilities that the U.S. is obligated under international agreements and customary international law to notify foreign authorities when foreign nationals are arrested or otherwise detained in the U.S.

- The arresting official should in all cases immediately inform the foreign national of his right to have his government notified concerning the arrest/detention.
 - If the foreign national asks that such notification be made, the arresting official should do so without delay by informing the nearest consulate or embassy.^{47/}
- * * *
- Finally, foreign consular officials have the right to visit their arrested/detained nationals, subject to local laws and regulations regarding access to detained persons.^{48/}

Yet another such advisory, a "Notice For Law Enforcement Officials on Detention Of Foreign Nationals," was sent on April 20, 1993, and like the previous advisories, it was distributed to the previous administrations of Governor and Attorney General and to the mayor of Virginia Beach. C.A. 348 - C.A. 366. It stated:

The U.S. Department of State wishes to remind all law enforcement personnel that, whenever they arrest or otherwise detain a foreign national in the United States, there may be a legal obligation to notify diplomatic or consular representatives of that person's government in this country. Compliance with the notification requirement is essential to ensure that similar notice is given to U.S. diplomatic and consular officers when U.S. citizens are arrested or detained abroad.^{49/}

^{47/} C.A. 335.

^{48/} C.A. 336.

^{49/} C.A. 348.

* * *

If the detainee is a national of any other foreign country, the Vienna Convention on Consular Relations and/or customary international law require that she/he must be informed without delay of the right to have his/her government notified. If notification is requested, it must be given without delay to the nearest consulate or embassy.^{50/}

Each of these advisories is perfectly unambiguous and suitably detailed as to the requirements of Article 36. Certainly it cannot have been an everyday matter for previous administrations to receive *from the State Department* notices directed to law enforcement officials, nor could there have been any real difficulty in relaying the requirements set forth in these advisories to the pertinent officers. Thus there can be no doubt that the Commonwealth can and must be charged with the requisite knowledge of a foreign national's right to notification under the Vienna Convention.

B. THE COMMONWEALTH KNEW OR SHOULD HAVE KNOWN THAT MURPHY WAS A CITIZEN OF MEXICO, BUT DID NOT ADVISE MURPHY OF HIS RIGHTS IN ACCORDANCE WITH THE VIENNA CONVENTION, AND THE MEXICAN CONSUL DID NOT PROVIDE MURPHY WITH THE ASSISTANCE TO WHICH HE WAS ENTITLED

There also can be no doubt that Murphy is a foreign national and that the Commonwealth can and must be charged with knowledge of that fact. Murphy was born Mario Benjamin Rodriguez in Tijuana, Baja California, Mexico, on October 21, 1971, to Silvia Rodriguez Garcia, a Mexican citizen. Acta de Nacimiento for Mario Benjamin Rodriguez, C.A. 2170 - C.A. 2175. His father was Mario DaSilva. While DaSilva lived in San Diego at the time of Murphy's birth, DaSilva was born in the islands of the Azores. He was a citizen of Portugal at the time of Murphy's birth and did not become a citizen of the

^{50/} *Id.*

United States until July 7, 1972, more than seven months after his son was born.^{51/} Some years later, the toddler Mario Rodriguez was adopted by U.S. citizen Philip Murphy, who had married Murphy's mother, but such an adoption does not automatically confer citizenship. Murphy was not born with any claim to U.S. citizenship, and since entering the United States on a green card, he has made no efforts to obtain U.S. citizenship. Murphy is a citizen of Mexico, not the United States.

The fact of Murphy's citizenship was known to the Commonwealth.^{52/} That Murphy was born in Mexico was published in the *Virginian-Pilot* soon after his arrest. C.A. 383-84. If state officials did not initially recognize this, they discovered the fact no later than October 30, 1991, when the Virginia Beach Corrections Center noted in a medical record that Murphy was Hispanic and that his place of "nativity" was Mexico. C.A. 298. Soon after that, the Corrections Center admitted an agent of the Immigration and Naturalization Service to see Murphy, and the agent raised with Murphy the possibility of deportation if Murphy were convicted. C.A. 310, ¶ 4. Citizens of the United States quite obviously cannot be deported, so by this time *at the latest*, officials of the Commonwealth are chargeable with the knowledge that Murphy was not a U.S. citizen.

^{51/} It is not known whether DaSilva's Portuguese citizenship gives Murphy a claim to Portuguese citizenship. Since the notification requirements of the Vienna Convention would be the same whether Murphy is both Mexican and Portuguese or only Mexican, the possibility that Murphy has dual citizenship is not important to resolution of the violation of his treaty rights.

^{52/} Murphy's prosecutor has sought to excuse the failure to comply with the treaty on the basis that he did not know that Murphy was Mexican. Although published reports about Murphy's birthplace gave ample reason for a responsible official to enquire into this issue, the limits of the prosecutor's knowledge are simply irrelevant. Nothing in the Vienna Convention or in Article 36 suggests that the ignorance of a particular official excuses a violation of Article 36. Indeed, such a rule would have the perverse effect of encouraging ignorance, and plainly that can do nothing to improve the ability of the U.S. consul to assist Americans abroad. Accordingly, the relevant question is whether the United States or any of its constituent parts had knowledge of Murphy's citizenship. That this is true cannot be disputed.

The clues to Murphy's Mexican citizenship did not end with the visit from the INS. After Murphy pled guilty, the circuit court ordered a Presentence Report. Va. Code § 19.2-294.2 required that the preparer of that report determine Murphy's citizenship. The report, dated October 13, 1992, noted that Murphy was born in Tijuana, but it did not determine whether Murphy was a citizen. C.A. 116-136. The report was introduced during Murphy's sentencing trial, and if that were not enough, the fact that Murphy was born in Mexico was revealed during the questioning of Murphy's mother by trial counsel. C.A. 25, lines 10-11. Based on all these facts, there can be no dispute that the Commonwealth had more than sufficient notice that Murphy was not a citizen of the United States.

Despite all these clues to his citizenship, the Commonwealth never took advantage of any opportunity to advise Murphy of his rights. The occasion of Murphy's arrest, so soon after the September 1 State Department advisory, did not result in the police advising Murphy of his treaty rights. Murphy did not receive the necessary warnings when he was visited by the INS. In accepting the plea, neither the circuit court nor the prosecutor informed Murphy that he had a right to the assistance of the Mexican consul in defense of the charges against him.^{53/} C.A. 302-303, ¶¶ 352-53. The probation officer failed in his duty to determine Murphy's citizenship, and he did not provide the required warnings. The testimony of Murphy's mother that he was born in Tijuana did not induce either the court or the prosecutor to advise Murphy as required by Article 36. And the April 20 State Department notice, during the pendency of Murphy's direct appeal, did not elicit the required

^{53/} The Vienna Convention places the burden of informing foreign nationals of their right to contact and receive the assistance of their country's consulate offices on detaining states, Article 36, § 1(b), 21 U.S.T. 77, ("The said authorities shall inform the person concerned without delay of his rights under this subparagraph") (Emphasis added); C.A. 299 - C.A. 308.

notice. In sum, the Commonwealth never complied with the treaty,^{54/} and the Mexican consul never played any part in Murphy's defense until Murphy was well into his federal habeas proceedings.

C. THE MEXICAN CONSUL'S ASSISTANCE COULD HAVE MADE A DIFFERENCE IN THE OUTCOME OF MURPHY'S TRIAL

Murphy accepted responsibility for his actions and confessed to his crime immediately upon arrest. Therefore it is arguable that Murphy's conviction of some degree of murder could not have been prevented by the Mexican consul, though even that fact would not mean the consul had no role to play in the guilt phase of Murphy's trial.^{55/}

^{54/} Following the publication of *Faulder v. Johnson*, 81 F.3d 515 (5th Cir. 1996), Murphy requested notification of the Mexican consul in an Inmate Request Form directed to the Warden:

In accordance with the Vienna Convention on consular relations, I request that the Mexican consulate be notified that I wish to consult my consul for assistance with my case. This is an urgent request.

The Warden refused his request. Murphy then requested that a Senior Assistant Attorney General comply with the Convention; he, too, refused to comply. The latter gave as his reason that Murphy was represented by counsel, and he argued in pleadings that once an attorney was appointed, Virginia had no obligation to inform Murphy of any rights he might have under the Convention. That is not correct, as is borne out by the fact that the Attorney General's Office recently initiated efforts to acquaint local prosecutors with the Commonwealth's obligation under the Convention.

^{55/} The U.S. State Department's *Foreign Affairs Manual* demonstrates the many different services that can be provided by the consul. Section 421 requires regular visitation. Section 421.3 sets forth the purposes of regular visitation:

(h) To impress upon host country prison directors that the U.S. Government is sincerely interested in the welfare of its incarcerated citizens, no matter what the charges against them might be or of what they were convicted. (i) To maintain liaison and nurture rapport and a cooperative relationship with host country prison directors, law enforcement officials, prosecutors and judges. (j) To let the prisoners themselves know that their government has a sincere interest in their physical and emotional well-being.

Section 423.3 establishes the case worker concept, and requires that:

To the extent possible the same consular officer should visit a prisoner regularly. There are several advantages to such a 'case worker' approach. The consular officer becomes thoroughly familiar with the specific facts and problems of the prisoner's situation. *This should enable the officer to become responsive in the maximum degree to the prisoner's needs, not only small services, but also for effective liaison with attorneys, court officials, and*

(continued...)

But even assuming a conviction for capital murder, from conviction to condemnation to death is a very long way. As is well known, most defendants convicted of capital murder are not sentenced to death. Given, first, that Murphy was no more culpable than his codefendants, and second, that a capital sentencing trial permits the almost unlimited introduction of all kinds of evidence, the ability of the consul to affect a capital sentencing trial is very great indeed.

The fact that Murphy would have requested and welcomed the assistance of the Mexican consul had he been informed of his rights and that he would have been willing to serve his sentence in Mexico if that was necessary has not been challenged. C.A. 310, ¶¶ 5-6. Murphy's trial counsel also has provided an affidavit, C.A. 337-340, to the effect that: he had resolved hundreds of cases through plea bargain, C.A. 337, ¶ 2; he tried to resolve Murphy's case through plea bargain; C.A. 338, ¶ 4; he believed Murphy's case was an appropriate case for such a resolution, C.A. 339, ¶ 9; Murphy was young, cooperative, and remorseful about his crime, C.A. 338, ¶¶ 5-6; Murphy had no record of violence, his conduct in trial suggested that he would adjust favorably to incarceration, and he showed potential for rehabilitation by earning his GED while awaiting trial, C.A. 338, ¶ 7; the records of the co-defendants, with which trial counsel was familiar, supplied no "good or valid reason to single out [Murphy] for the death penalty," C.A. 339, ¶ 8; Murphy was as deserving of a life sentence as any of his co-defendants, C.A. 339, ¶ 9; and the prospect of

^{55/} (...continued)
prosecutors. . . .

The State Department's view of consular services obviously encompasses matters beyond the development and presentation of evidence. The *Foreign Affairs Manual* also calls for continued liaison services for convicted prisoners engaged in appeals (§ 433) and continued regular visitation of prisoners at intervals "at least once every three months." See *Consular Law and Practice* at pp. 169-71.

having Murphy serve his sentence in Mexico offered financial advantages to the Commonwealth and was well worth exploring, C.A. 339, ¶ 10. Trial counsel also has concluded that:

the involvement of the Mexican government might have contributed to the possibility of a plea bargain in other ways. Of the six defendants, Mario was the only alien. The involvement of officials of the Mexican government in the case or their presence at court proceedings, in my opinion, might have discouraged the prosecution from singling out Mario for the death penalty while the five other defendants, all United States citizens, were offered life, C.A. 339-340, ¶ 11;

With the involvement of the Mexican government, my chances for obtaining such an agreement unquestionably may have been improved. C.A. 340, ¶ 12.

The experience of Mexican consuls fully supports the conclusion of trial consul that consular assistance can make the difference. From the case of Francisco Arreola Cardenas, the affidavit of *Consul Hernan De J. Ruiz-Bravo*, C.A. 314-317, establishes that as part of his consular duties under the Convention, he would visit detainees in jail, advise them to answer "no" to questions except in the presence of their attorney, assist with plea bargain negotiations, assist in raising legal issues arising out of the convention, and provide affidavits and documentary evidence from Mexico. Attached to Mr. Ruiz-Bravo's affidavit was a letter from Cardenas' defense attorney stating how "instrumental [the Mexican government was] in avoiding the death penalty for Mr. Cardenas." That attorney also says: "Whenever possible, it is critical that the consul be involved as soon as possible in the criminal process. It was very helpful to have you help in the pre-trial matters in this case and in preparing for the re-trial." C.A. 316-317.

From the case of Irineo Tristan Montoya, the affidavit of *Consul Juan Carlos Cue Vega*, C.A. 367-368, states that he would have visited Montoya in jail, advised him of his

right to remain silent, met with and cooperated with his lawyers, offered the assistance of the Mexican government, and attended trial on a daily basis. Consul Cue Vega also states the practice of the Mexican consul to intervene as early as possible.

Finally, specifically for Murphy's case, *Deputy Consul Arturo Chavarria* has provided an affidavit, C.A. 341-347, to the effect that: the Mexican consul was not informed that his fellow citizen faced execution in Virginia until May 1996, after the Warden filed his Motion to Dismiss in federal court, C.A. 342, ¶ 3; the plight of Mexicans faced with capital prosecution in the United States is a matter of high consular priority, C.A. 342, ¶ 4; Mexico provides capital-specific training to certain of its consuls to better enable them to protect the lives of their fellow citizens, (*id.*); the Mexican consul takes an active role in capital cases in cooperation with local counsel, C.A. 342, ¶ 5; the Mexican consul uses its considerable resources liberally to protect the lives of his fellow citizens, C.A. 342-343, ¶ 5; the Mexican consul would have made those resources available to Murphy on request, C.A. 343, ¶ 6; Mexicans informed of their Vienna Convention rights almost always request consular assistance and that in the absence of any reason why Murphy should have foregone such assistance, the Mexican consul is convinced the violation in fact deprived Murphy of such assistance, (*Id.*); the Mexican consul would have visited Murphy in jail, C.A. 343, ¶ 7; the Mexican consul would have made it possible for Murphy's relatives to testify at Murphy's trial and sentencing and to provide information of the sort set forth in the report of Marie Deans, C.A. 343-345, ¶ 8; the Mexican consul would have attended *all* proceedings held in Murphy's trial, C.A. 345, ¶ 11; the Mexican consul, as appropriate, would have addressed the relevant authorities in support of Murphy's life, C.A. 345-346, ¶ 12; our firm conviction is that our involvement has a beneficial effect on the case," C.A. 346, ¶ 14; the Mexican

consul was aware of no facts to suggest that consular intervention would have been futile, C.A. 346, ¶ 15; and "precisely on account of our confidence in the ability of our consuls to protect the rights and lives of our citizens, we have made enforcement of the Vienna Convention a point of emphasis in our relations with the United States," (*Id.*).

The experience of American attorneys representing Mexican defendants with the assistance of the consul also bears out the importance and effectiveness of consular assistance. Idaho attorney Scott Fouser has represented two Mexican nationals charged with capital crime in Idaho. The first case is a particularly strong example because the defendant, Arturo Barajas, already had been sentenced to death.

In Idaho, state habeas proceeds at the same time as the direct appeal. Thus, after Barajas had been sentenced to death, Scott Fouser was appointed to represent him in his habeas proceedings. Because the case was still on direct appeal, the prosecutor retained the power to plea bargain, making Mr. Fouser's experience instructive of the efficacy of the Mexican consul in the trial setting. As Mr. Fouser relates, C.A. 2125 - 2128, the Mexican consul was critical to his ability to save Barajas' life:

While I represented Mr. Barajas, I had the assistance of the Mexican consul from Salt Lake City, Mr. Raul Lopez-Lira, as well as his assigned case worker, Ms. Laura Espinosa. The consulate was an incredible help to me and their assistance unquestionably made a difference in my ability to represent Mr. Barajas.

Mr. Barajas' background and upbringing in Mexico had not been thoroughly investigated for his trial. I believed such an investigation was essential, and the consul was enormously helpful in conducting this investigation. Among other things, the consul defrayed all of the expense for *both* of my trips to Mexico. A representative of the foreign service met me at the airport when I arrived in Mexico, and during my travels I was accompanied by a translator provided by the Mexican government.

The government aided me in locating and meeting with members of Mr. Barajas' family. These meetings were conducted with the assistance of

the translator, and while this was necessary, it is not the best way to get to know the people you are interviewing. Thus it was critical that one of the foreign affairs personnel assisting me was present, because she was able to tell me that many of his relatives appeared during our interviews to be mentally ill, an observation I would not have been able to make. Based on this observation, the Mexican government obtained psychological workups of many of Mr. Barajas' relatives, which confirmed that mental illness was rampant throughout his family. This fact had not even been hinted at during his trial.

The government also obtained for me Mr. Barajas' school and employment records, which had not been available during his trial.

At my recommendation, the consul retained the leading expert in this country in the field of post-traumatic stress disorder among immigrants, which we suspected might be a factor in Mr. Barajas' mental condition, to examine him. While the state paid part of the expert's fee, most was paid for by the consul.

The Mexican consul also retained a bilingual investigator who was able to locate prior employers and associates in the State of California. Among those persons located was Mr. Barajas' girlfriend, who was able to add significant information confirming that Mr. Barajas was mentally ill prior to his crime.

Mr. Barajas' mental condition was a critical issue in the case. In addition to his family history of mental illness, Idaho prison officials had been forced by Mr. Barajas' own mental illness, which worsened during his incarceration, to commence civil commitment proceedings against him so they could treat him.

Using the information I obtained with the assistance of the consul, and with some hard work of my own, I was able to establish that the court-appointed psychologist's pre-trial conclusion as to Mr. Barajas' competence — a conclusion reached from an interview conducted through a translator — was based on mere guesswork. Along with the now overwhelming evidence of Mr. Barajas' own mental illness and the considerable and thoroughly documented history of mental illness in his family, I was able to demonstrate that Mr. Barajas had not been competent to stand trial. With this evidence in hand, I was able to reach an agreement with the state in which Mr. Barajas' life was spared.

I could not have obtained this evidence and this result without the assistance of the Mexican consul. In particular, it would have been virtually impossible for me to function effectively in Mexico without the capable and far-reaching aid of the consul.

C.A. 2125, C.A. 2127, ¶¶ 3-11.

Mr. Fouser later was appointed to represent a Mexican defendant, and in this case, too, he had great assistance from the Mexican consul:

Isidro Garcia Gomez was facing the charge of capital murder when the Mexican consul requested that we take part in his defense. The consul conducted the Mexican part of the investigation into Mr. Gomez's history and background and in other ways proved very helpful as a defense resource. Partly as a result of the consul's assistance, Mr. Gomez, though initially facing the death penalty, ultimately was able to plead to an accessory charge and received a term of years.

C.A. 2127, ¶ 12.

Based on his experiences, Mr. Fouser reaches this conclusion as to the efficacy of the Mexican consul:

I would not attempt to defend a Mexican national facing a capital charge in this country without the assistance of the consul. The consul's assistance helped me obtain favorable results for both the Mexican nationals I have represented.

C.A. 2127 - 2128, ¶ 13.

As these affidavits demonstrate, the Mexican consul has a proven ability to change the course of capital cases, especially in regards to sentencing. Given that the violation in Murphy's case is not in dispute, the exclusion of the consul from his case is particularly egregious. Yet it is now the case that the federal government — which is primarily responsible for enforcing the treaty in this country and which, in demanding compliance with the treaty abroad, must convince foreign powers that our good faith can be relied on — lacks the power to make good the nation's promise. In the interests of the United States and in the interests of certainty and justice in Murphy's case, Murphy asks the Governor to commute his sentence to the sentence he would have received had the treaty been respected — life imprisonment.

V. MURPHY POSES NO RISK TO THE COMMONWEALTH IF HIS SENTENCE IS COMMUTED TO LIFE IMPRISONMENT

Murphy's legal proceedings have been pursued by the parties and the courts with undeniable diligence and his case has moved rapidly through the courts. Even so, nearly six years have elapsed since the 19 year old Murphy was involved in this crime, and the person to be executed on September 17 is not the same as the boy who was sentenced to death in 1992. There was reason even then, in Murphy's youth, in his lack of record of violence, in his prompt confession, and in his resolute acceptance of responsibility for his wrongdoing, to believe that Murphy would be a good candidate for rehabilitation. There was reason then, in his disciplinary record while awaiting trial and in his successful effort to obtain his GED, to believe that he would make a good adjustment to prison.

Time has borne out those beliefs. Murphy has compiled an excellent disciplinary record in prison, and that he has made a good adjustment to prison cannot be doubted. Moreover, four experts with enormous experience in forensic psychology and in evaluation of prisoners have subjected Murphy to extensive evaluation. All agree that he poses little risk to corrections officers or other prisoners if his sentenced is commuted. All indicate that Murphy has made great strides on the road to rehabilitation.

Yet while Murphy has made these strides, no court has had the power to modify or moderate Murphy's sentence to reflect the differences that might have taken place in the boy sentenced to death. Only the Governor can do that, and accordingly Murphy requests that the Governor commute his sentence in recognition of the diminished risk to the Commonwealth now posed by Murphy.

A. THE CRIME WAS OUT OF CHARACTER FOR MURPHY AND HE WAS REMORSEFUL AND ACCEPTED RESPONSIBILITY FOR THE CRIME FROM THE OUTSET

The subject of Murphy's remorsefulness is dealt with above in section III.A.1.c, V.A and also by each of the four professionals who have examined Murphy in connection with this petition, as discussed below in section V.C. There can be no serious doubt that Murphy was and is remorseful for his crime and that he took and takes full responsibility for his actions. This is entirely in keeping with his lack of any record of violence and with the view, shared by those who knew him before his arrest, that this crime was out of character for Murphy.

Dawn Baker was a student at Open High School with Murphy and had known him about a year. She states that she "was very shocked when I heard of his arrest. It just seemed out of character for Mario to do such a thing. All the time I was with him, I never saw him hurt anyone or get into a fight." (Affidavit of Dawn Baker, C.A. 2130, ¶ 8.)

Linda Bauer was the mother of Murphy's friend Craig Johnson, and she came to know Murphy very well because he lived in her house for three months. Ms. Bauer states that "Mario was a good boy to have around. He was very polite and gentlemanly. I thought he had a good influence on Craig, and I used to tell Craig I wished he was more like Mario." (Affidavit of Linda Bauer, C.A. 2132, ¶ 2.) She also reports that "Mario never showed the slightest sign of violent tendencies when he was around me. I believe this crime was completely out of character for Mario. For these reasons, I feel very good about Mario's chances to be rehabilitated." (Affidavit of Linda Bauer, C.A. 2133, ¶ 6.)

Carolyn Callanan was an employee of the FBI who came to know Murphy when he visited her teenage daughters at her home. She says about Murphy that he "was an exceptionally nice, polite, and respectful kid, and I was fond of him. I know about the crime he committed, but I believe now, as I did then, that this crime was out of character for

Mario. I never thought of Mario as dangerous, in spite of this incident, and I believe Mario had, and has, the ability to be rehabilitated." (Affidavit of Carolyn Callanan, C.A. 2134, ¶ 2.)

Armindo and Eloisa Zari were the parents of Murphy's friend Allan Zari. Murphy spent a great deal of time at their house from the time he was twelve years old, and they got to know him well. Mr. Zari states that "When I heard what Mario had done, I thought this crime was not the sort of thing that Mario would do. I knew Mario well. He never gave me any problems when he was at our house, where he spent a lot of time." (Affidavit of Armindo Zari, C.A. 2162, ¶ 3.) Mrs. Zari's views are the same:

Mario was a good kid. Mario did not get along well with his step-father Phil Murphy, but he was always respectful to my husband and me. He was obedient in our house and behaved well. We were very fond of Mario.

Because I knew Mario so well, I was shocked when I heard what he had done. It was not like Mario to do such a thing.

(Affidavit of Eloisa Zari, C.A. 2164 - C.A. 2165, ¶¶ 2-3.)

Lillian Donnally was the principal of Open High School, and she got to know Murphy when he was a student there. Principal Donnally is an experienced and expert observer of teenagers, and her experience with Murphy strongly suggests this crime was out of character:

Mario was a capable student who never got in any major trouble. He had a engaging personality, was liked by the other students, and never got into any fights or scuffles. Like many of our students, he tried on occasion to get around the rules, but Mario was never a discipline problem.

When Mario was arrested for this crime, it was a shock to those of us who knew him. This was not his mode of operations; it was totally out of character for Mario. With respect to my students, I think nothing has ever been as shocking as that, because what happened just didn't go with the person we knew. I have had other students that I suspected would find trouble in their futures. I did not see that Mario had the kind of background that suggested this would happen to him.

(Affidavit of Lillian Donnally, C.A. 2142, ¶¶ 4-5.)

Principal Donnally's views are echoed by a member of the Open High School security department, Kathy Halpin. She says:

I worked at Open Campus in 1990-91, when Mario Murphy was attending school there. Open Campus was a new program then, with fewer than 200 kids. As a member of the security department, I was familiar with many of them. In the two years or so that Mario was in school at Open Campus, we chatted in the hall sometimes, and I got to know him pretty well.

Good kids are in the minority at Open Campus, but I believed Mario was one of the good kids. He was always respectful and polite. In the two years I knew him, I can never even remember him using profanity.

Mario was a quiet, cooperative boy. If I asked him to do something, he did it with no backtalk. I never had to write a referral on Mario.

In my experience, Mario was a helpful boy. I can remember at least four occasions when Mario helped separate kids who were arguing or fighting in the halls while I got the situation under control.

As a professional in the field of security, I am alert and sensitive to the existence of a threat, but I never once felt threatened around Mario. There are some students that I won't permit to walk behind me, but it never bothered me to have Mario behind me.

If I had been asked to make a list of people from Mario's class at Open Campus who might be involved in something like this, I would have listed Mario about a hundredth. I was shocked when I heard what he had done. It was just totally out of character for Mario to do something like this. I didn't consider Mario dangerous and I thought he had a good chance for rehabilitation. I would have said so at his trial if anyone had asked me. . . .

It bothers me that of all the people who were involved in this crime, only Mario got the death penalty.

(Affidavit of Kathy Halpin, C.A. 2143 - C.A. 2145, ¶¶ 2-8.)

Other teachers that Murphy had also believe this crime was out of character for him. Cox High School coach and physical education instructor Stuart Holland states that he was "was shocked when I found out about the crime in which Mario had gotten involved. I

thought it was out of character for Mario to be involved in anything like that. For that reason, and based on my relationship with Mario in PE class, I believe Mario can be rehabilitated." (Affidavit of Stuart Holland, C.A. 2147, ¶ 4.)

That opinion is seconded by Thomas LaBarbara, who taught Murphy's geography class at Cox High School. He got to know Murphy well in that class:

In my geography class, Mario's desk was right next to mine. To Mario I entrusted the job of setting up audio-visual equipment, which I used often. Mario did a good job with the equipment. You might say Mario was my right-hand man that year. He was a good helper to me.

As a result of Mario sitting so close to my desk and helping me out so often, we had a good rapport. We got along well and had many conversations.

(Affidavit of Thomas LaBarbara, C.A. 2152, ¶ 2.) Knowing Murphy well as he did,

Mr. LaBarbara reports that he:

was very, very surprised when I read what Mario had done. It did not sound like Mario to me. But I was also angry at Mario for what he had done. I saw a lot of good in Mario, and I hated to see him throw his potential away. Even today, I sometimes feel like punching Mario in the nose for being so stupid and doing such a thing. In spite of what he did, Mario is not an evil person.

I was and am baffled by the fact that only Mario got the death penalty.

(Affidavit of Thomas LaBarbara, C.A. 2153, ¶¶ 6-7.)

Murphy's biology teacher at Cox High School was Robert Rode, and he had Murphy in his class for two years. He also states that he is "aware of the crime Mario committed [but that to] me, it seemed out of character that Mario would be in that situation." (Affidavit of Robert Rode, C.A. 2156, ¶ 4.)

B. MURPHY'S PRISON RECORD DEMONSTRATES THAT HE WOULD NOT POSE A THREAT DURING LIFE IMPRISONMENT

From the time he was arrested until this day, Murphy has compiled a prison disciplinary record that strongly supports the view that he would not pose any threat were his sentence commuted to life imprisonment. While awaiting trial, Murphy stayed out of trouble and obtained his GED. Ed Knepp, the classification supervisor at the Virginia Beach jail during the thirteen months Murphy was there, testified for Murphy at his sentencing trial.

Mr. Knepp reported as follows:

A Okay. He's had no violation reports in his record at all. From his card, which we place his housing locations on, it shows that he has not been moved around from one place to another. He's had no problems that I know of with other inmates. Apparently he's been respectful toward authority. He's finished a GED program while he was in the jail, and he has made application for a trustee program but was turned down because of the seriousness of his charges.^{56/}

* * *

Q For thirteen months he hasn't been any problem whatsoever?

A There's no notation in his record at all.^{57/}

Since he has been on death row, Murphy has continued to compile an excellent prison record. Murphy was evaluated recently by Toni V. Bair, formerly Warden of Mecklenburg Correctional Center and Regional Administrator with the Department of Corrections supervising eleven prisons in Virginia. C.A. 1753 - 1756. After the debacle of the death row escape that was led by the Briley brothers, the Department of Corrections selected Mr. Bair as the department employee to take responsibility for correcting the deficiencies that made the escape possible. He was warden at Mecklenburg for eighteen months. Mr. Bair currently is a Corrections Consultant and a professor and Off Campus Coordinator of Criminal Justice programs at Weber State University in Utah. He was asked to opine

^{56/} C.A. 22.

^{57/} *Id.*

whether Murphy ". . . would pose a risk to staff and/or other inmates if his sentence was commuted to life."

His institutional record shows that he is in control of his behavior as the only disciplinary write ups he has received in six (6) years on death row is for not standing for count in 4/1993; delaying and hindering (they locked the entire pod down for failure to lock in as ordered 2/94; and disobeying an order (covering the window in his cell) 3/1994.^{58/}

* * *

The best indicator we have of future behavior is present and immediate past behavior. Mario has demonstrated over the past six plus (6+) years an exemplary prison adjustment. There is absolutely no indication of his being a management problem and absolutely no incidences of violence, either physical or verbal.

Therefore, it is my expert opinion that Mario's institutional behavior, the numerous insights into his own life which he has made, the discovery of his biological father a few months ago, and his maturity, indicate that Mario would represent a very minimal risk to staff and inmates if he were granted clemency.^{59/}

Based on the excellent prison record he has compiled^{60/}, there is every reason to believe Murphy's sentence could be commuted without posing any significant risk to other inmates or prison employees.

C. EXPERTS AGREE THAT MURPHY POSES NO THREAT AND HAS MADE SIGNIFICANT PROGRESS TOWARDS REHABILITATION

Murphy's current maturity, adjustment to prison, rehabilitation, and lack of risk to others are positively stated by four professionals who subjected him to extensive interrogation, analysis, and comprehensive testing (Evaluations of Dr. Tsao, Dr. Hart, Dr. Thomas and Declaration of Mr. Bair, C.A. 1753 - C.A. 1805). According to Dr. Hart,

^{58/} C.A. 1755.

^{59/} C.A. 1756.

^{60/} Murphy also has an infraction for taking an unauthorized shower, for which he received the minor punishment of fifteen days recreation restriction.

Murphy is organically whole in mind, of better than average intelligence among prison inmates, and suffers from no physical, neurological, or psychological disorders or conditions that would impair his rehabilitative potential or make him dangerous. Dr. Thomas is an experienced forensic psychologist who interviewed Murphy on three different occasions, interviewed Murphy's mother, sister, and adoptive father, and reviewed voluminous documents about Murphy and his crime. Dr. Thomas addressed the issue of Murphy's future dangerousness, C.A. 1757 - C.A. 1781, and concluded that Murphy is unlikely to pose such a risk:

With respect to risk factors for future aggressive behaviors, the subject has no prior juvenile or adult history of aggressive behavior. This would indicate that the aggressive event was an isolated and atypical occurrence and would represent relatively lower risk for future occurrence. The lack of an extensive alcohol or drug abuse history would be an attenuating factor for future aggression as the subject is not likely to experience the disinhibiting effects of these substances. He is also not likely to succumb to the possible drug-driven need to generate large amounts of income. There is little indication that the subject grew up in a violent family environment, which would be viewed as an attenuating factor for future aggressive behavior. The subject's lack of any present psychiatric diagnosis and any neurologic impairment should be considered an attenuating factor for future aggressive behavior, as the subject's reasoning and thought processes are not impaired by psychiatric or neurologic deficits. The subject's low score on the Hare Psychopathy Checklist is an attenuating factor for future dangerousness, as low scores have shown predictive value for lower recidivism. The fact that the subject did not initiate the aggressive episode, but that the opportunity solicited him would indicate a relatively lower degree of recurrence, as the behavior was not self-initiated, but was a reaction to the influence of someone else. Factors felt to increase the likelihood of future aggressive behavior would be the subject's possession and use of a weapon, his vulnerability to the influence of others secondary to poor identity formation and that the target of his aggression was someone unfamiliar to him (rather than someone he was in a relationship with). To summarize, although anyone convicted of a capital crime obviously poses some significant risk by the nature of the conviction itself, in relation to capital offenders as a whole, the subject possesses relative few risk factors for future aggression.^{61/}

C.A. 1779 - C.A. 1780.

Dr. Thomas also made the following observations and conclusions:

Some of the same life experiences of rejection and neglect contributed to his fantasy of being a heroic savior.^{62/}

* * *

. . . he initially got involved in the situation out of concern for Robin Radcliff's safety and that of her unborn child as a 'natural reaction'.^{63/}

* * *

. . . the subject was raised in a relatively unstructured, undisciplined, emotionally barren environment where his father was often away at sea and his mother often either at work or at home fatigued from work. Further, the subject was given misinformation about who his father is, and consequently embarked upon a life-long mission to extract paternal acceptance, responsibility and attention from a man who knows he is not the subject's father. Such an enterprise was doomed to frustration and failure.^{64/}

* * *

Specifically, a strong sense of self and a trusting acceptance by one's parents, is necessary to shape the healthy adolescent rebellion which leads to individuation and formation of a healthy separate identity. This type of guidance is especially important for adolescent males to receive from paternal figures.^{65/}

* * *

The subject develops a shallow, stereotypical view of masculinity characterized by excessive preoccupations with strength, independence, autonomy and protection of the underdog or the weak. He is drawn to caricatures of masculinity, like ninjas, professional wrestlers and Navy SEALs, as a default reaction to his lack of connectedness and guidance from his family.^{66/}

* * *

Further, he was approached by an older male who may represent something he aspires to be, and was asked to be a "hero" by saving a "damsel in distress." It should be noted that the subject's first relationship was with a girl who was purportedly abused. He ran away with her and considered marriage to her in response to his need to be her salvation. Obviously, this pattern of behavior demonstrates emotional immaturity and further reflects poor decision-making and judgment. . . . This explanation is not in any sense offered as a

^{62/} Neuropsychological Evaluation by Robert P. Hart, Ph.D., Professor of Psychiatry, Neurology, and Neurosurgery, MCV Hospitals, Virginia Commonwealth University, C.A. 1804.

^{63/} C.A. 1805.

^{64/} Neuropsychological Evaluation by J. Randy Thomas, Ph.D., MCV Forensic Evaluation Program, MCV Hospitals, Virginia Commonwealth University, C.A. 1778.

^{65/} C.A. 1778 - C.A. 1779.

^{66/} C.A. 1779.

rationalization, or exculpation of the subject's responsibility and accountability for his act. Instead it is offered as a possible paradigm to understand a vicious and aberrant behavior in an individual without a history of behavior in any way consistent with that event.^{67/}

* * *

With respect to the subject's prognosis for rehabilitation, I believe it to be promising. The subject's immature personality development makes him an excellent candidate for placement in a structured environment with clearly defined roles and clearly identified authority figures. His excellent behavior while incarcerated to this point, corroborates this observation. Further the subject's attainment of his GED and his assignment as pod manager indicates maturing of his sense of responsibility.^{68/}

* * *

I believe the subject will continue to function well and in a non-aggressive fashion in the structured environment of a correctional facility, posing little danger to inmates or officers.^{69/}

Murphy also was evaluated by Dr. Thomas K. Tsao, the medical director of Colonial Hospital in Newport News and the president of Atlantic Psychiatric Services in Virginia Beach. C.A. 1782 - C.A. 1784. Dr. Tsao treated Murphy and his family when Murphy was around 14 years of age, and brings to his evaluation the advantage of having known Murphy professionally both before and after the crime. Dr. Tsao performed a complete mental status examination of Murphy at Mecklenburg Correctional Center. His examination showed that Murphy's:

reasoning and judgment skills demonstrated a significant level of maturity that was clearly missing over 10 years ago. *He showed no evidence of psychotic thought processes. . . he showed no evidence of being a . . . homicidal risk.* Cogent to his current situation and his current psychiatric examination, I did find clear evidence that Mario sustained a significant level of remorse. He clearly takes full responsibility for the consequences of his actions. He openly expressed guilt about his former, very close friend, Aaron. . . . Further evidence of his remorse can be found when he stated in reference to Mr. Radcliff's sons and extended family and his own extended family that, "It

^{67/} *Id.*

^{68/} C.A. 1779 - C.A. 1780.

^{69/} C.A. 1781.

drives me crazy that they have to go through all of these adjustments because of what I did." [He has a] severe sense of guilt and sense of responsibility for what's happened

In the final analysis, we have a 25 year old, Hispanic young man whom I have known as a psychiatrist in rather unique way. First of all, it is rather unusual to be able to perform a psychiatric examination on the same person over a decade apart. More uniquely, it is unusual to get that second opportunity after such a traumatic life event. The second complete psychiatric examination . . . demonstrates a young man who has continued to learn academically and has matured in an overall emotional sense.

In my professional opinion, there is no question that Mario Murphy suffers with deep levels of guilt and sincere remorse related to the death of Mr. Radcliff.^{70/}

Remarkable, perhaps most of all, are the views of Mr. Toni V. Bair. A former Warden of Mecklenburg Correctional Center, he was asked to opine whether or not Murphy ". . . would pose a risk to staff and/or other inmates if his sentence was commuted to life."

Mr. Bair's analysis^{71/} is:

Based upon what I have read about Mario and my interview with him, there is no question in my mind that the individual who was a participant in the death of Mr. James Radcliff in July of 1991 and the Mario presently incarcerated on Death Row are not the same.^{72/}

* * *

The nineteen-year old young man who was asked to "take care of the problem" by his older friend Gary was impressionable, vulnerable and desperately seeking acceptance, belonging and an identity. Gary was an older "father figure," a proclaimed Navy SEAL (though this was determined to be a falsehood), who could influence Mario.^{73/}

* * *

. . . Gary told Mario that as a Navy SEAL, he would have to kill and he might as well get used to it. Mario readily acknowledges his own culpability

^{70/} C.A. 1783 - C.A. 1784.

^{71/} C.A. 1753 - C.A. 1756.

^{72/} Declaration of Toni V. Bair, Expert Witness/Corrections Consultant, Professor/State Off Campus Coordinator, Department of Criminal Justice, Weber State University, Ogden, Utah, C.A. 1754.

^{73/} *Id.*

and in no way during my interview with him did he offer the above as an excuse for his own behavior. Rather, he acknowledges that what he did was terribly wrong and that he was caught up in the moment with most unusual circumstances that all seemed to fall into place at the wrong time. He said to me, "I blame no one but myself." He acknowledges that he was young and impressionable, constantly seeking attention and acceptance.^{74/}

* * *

. . . the twenty-six year old man sitting on death row today is markedly different from the young, impressionable, scared "pawn" who was involved in the death of Mr. Radcliff. As a result of being locked up on death row for the past six (6) years, Mario has matured, taken advantage of his time by obtaining his GED and embarked on a journey of self-discovery.^{75/}

* * *

I asked why he was working so hard at improving himself if he were going to be executed. He responded, "I missed being a complete person. Everything was an excuse, being young, needing to belong, it was just an excuse. I got tired of me. I've changed and am changing regardless of what happens."^{76/}

* * *

In conclusion, I was impressed with how open and candid Mario was during the entire interview. I tried without success to trip him up, to see if he would change his story or contradict himself. I interviewed and interrogated him in order to see if he was giving me the answers he thought I wanted to hear. I did not find this to be the case. His attorneys did not prep him and did not even tell him what the purpose of my being there was. It was only after mentioning his visit with me on the row that another death row inmate told him of my background.

The best indicator we have of future behavior is present and immediate past behavior. Mario has demonstrated over the past six plus (6+) years an exemplary prison adjustment. There is absolutely no indication of his being a management problem and absolutely no incidences of violence, either physical or verbal.

Therefore, it is my expert opinion that Mario's institutional behavior, the numerous insights into his own life which he has made, the discovery of his biological father a few months ago, and his maturity, indicate that Mario would represent a very minimal risk to staff and inmates if he were granted clemency.^{77/}

^{74/} *Id.*

^{75/} *Id.*

^{76/} C.A. 1755.

^{77/} C.A. 1756.

That four experts so experienced in dealing with prisoners could agree that a death row inmate poses very little risk to the Commonwealth and is far advanced on the road to rehabilitation is unprecedented and unique. Though the Commonwealth may be entitled to retribution for the murder of James Radcliff, no legitimate purpose of its criminal justice system is served by exacting that retribution at random from only one of the six responsible defendants. Any legitimacy there might have been behind the decision to select Murphy for death is squandered when the boy chosen to pay the price poses little or no risk to the Commonwealth and is quite likely to contribute positively, should his sentence be commuted.

VI. CONCLUSION

Murphy has matured while incarcerated. For one thing, he has spent six years on death row. His stance, beginning on the day of arrest, is one of accountability. In no way does he deny that his crime was a terrible act, one borne of immaturity, lack of perspective and values, and fraught with *machismo*. Personal guilt, reflected upon for a lifetime in the disciplined, regimented structure of prison's protocol, is the fate he asks.

Robin's daughter, Tina Bourne, remains uncharged. Robin and Hinojosa remain eligible for parole, as are all other participants except Murphy. He stands alone, sentenced to die on September 17, 1997.

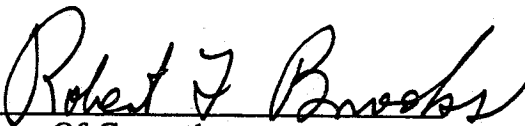
Why? *Not* because he was the primary participant. *Not* because he recruited others. No good reason existed why he should be singled out, and his native land was unable to help him in his trouble because overlooked or ignored was the duty to inform him of unalienable rights under an international treaty protecting Virginians and all United States Citizens alike.

We therefore ask the Governor of Virginia to administer justice because the courts are hobbled by technicalities and because the situation cries for honorable action to respect our nation's promise.

Though it is right to hate Murphy's crime, he is not among the worst of us and far from the worst of the participants in this crime. What he asks is *life*, in prison and with no possibility of parole, an imprisonment begun at age 19.

Even that is unjust given the greater culpability of the Robin and Hinojosa. Nonetheless, Murphy seeks only commutation of his death sentence, less than parity of treatment with the primary offenders. Without commutation, Murphy's death rations justice, and rationed justice is no justice.

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