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Via Facsimile (804-371-6351) & U.S. Mail

The Honorable Robert F. McDonnell
Office of the Governor
Patrick Henry Building, 3rd Floor
1111 East Broad Street
Richmond, Virginia 23219

Re: Clemency for Teresa Lewis

Dear Governor McDonnell:

Your pro-life views are well-known. And as governor, you are in a unique position of wielding power to protect and foster respect for the value of human life at both ends of the spectrum. You will likely be given opportunities to advocate and sign laws providing a variety of protections for unborn human life, protections that you are known to favor. At the other end of life's spectrum, you have another incredible opportunity to promote respect for human life as you exercise your authority to grant clemency to death row inmates under Article V, Section 12 of the Constitution of Virginia. In this respect, it is our sincere hope that you will intervene in the scheduled September 23, 2010 execution of Teresa Lewis.

The Rutherford Institute is a non-profit civil liberties organization dedicated to the defense of civil liberties through litigation and education. The Institute is proud to be based in Charlottesville, Virginia, and we desire to see the Commonwealth lead the nation in promoting respect for the value of all human life. It is our conviction that those who truly value human life are committed to defending it not only for those whom we view as innocent, but even for those who have offended society through criminal acts.

If capital punishment is to continue in our Commonwealth, surely even the mildest degree of respect for human life must yield a disposition toward executing prisoners only in the most extreme circumstances. The Institute submits that if the death penalty is a necessary evil of our times, it is essential that it be implemented only where there exists virtual certainty of the defendant's factual guilt, virtual certainty of the defendant's mental capacity to understand the nature of his or her crime, and other circumstances manifesting an appalling disregard for human life.

Teresa Lewis' case is marked by a telling absence of the latter two conditions. First, the questionable nature of Teresa's mental capacity is a glaring red flag to anyone who examines the case with an eye toward ensuring that the death penalty is limited to the most extreme situations.

Teresa has a Full-Scale IQ of 72,¹ which is two points above being psychiatrically classified as mentally retarded.² However, Dr. Philip Costanzo, a professor of psychology at Duke University, said of Teresa's analysis:

Based on her tests, and the fact that the three-point disparity [between Teresa's 72 IQ and a score of 69, that of someone who is clinically mentally retarded] is within the error range of the test, I cannot reach the conclusion on the data available to me at this time that she is not mentally retarded... In any event, in pragmatic terms the level of intellectual functioning of one with a 72 IQ would not be discernibly distinctive from one with a 69 IQ.³

Surely, if it means anything to apply the death penalty conservatively and as a "last resort," it means refusing to apply it to a borderline mentally retarded woman. Based on both objective IQ testing numbers (taking into consideration the statistical range of error) and the subjective opinion of a reputed psychology expert, Teresa may, in fact, be mentally retarded. Therefore, she lacks the degree of mental capacity that should be required to make her an "appropriate" candidate for the death penalty in the Commonwealth of Virginia.

In *Atkins v. Virginia*, the Supreme Court held that capital punishment for the mentally retarded is cruel and unusual.⁴ In examining public opinion and evolving public policy on the issue, the Court noted that legislatures across the country had begun to explicitly prohibit the application of the death penalty to mentally retarded defendants

¹ Affidavit of Dr. Philip Costanzo, witness for the defense, p. 13 ¶ 6.

² Goldman, Howard H, *Review of General Psychiatry*, 5th ed. (McGraw-Hill Professional, 2000), p. 417.

³ Affidavit of Dr. Costanzo, ¶ 10.

⁴ 536 U.S. 304 (2002).

following the public outcry that followed Georgia's execution of mentally retarded Jerome Bowden in 1986.⁵ The Court found:

It is not so much the number of these States [enacting such laws] that is significant, but the consistency of the direction of change. Given the well-known fact that anticrime legislation is far more popular than legislation providing protections for persons guilty of violent crime, the large number of States prohibiting the execution of mentally retarded persons (and the complete absence of States passing legislation reinstating the power to conduct such executions) provides powerful evidence that today our society views mentally retarded offenders as categorically less culpable than the average criminal. The evidence carries even greater force when it is noted that the legislatures that have addressed the issue have voted overwhelmingly in favor of the prohibition. . . . The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it.⁶

The Supreme Court in *Atkins* went on to note that the difficulty in excluding the mentally retarded from death row lies in developing a consensus as to the definition of the term "mentally retarded."⁷ The Court cited a reputable psychiatry textbook estimation that between 1 and 3 percent of the population has an IQ between 70 and 75 or lower, which is typically considered the cutoff IQ score for the intellectual function prong of the mental retardation definition.⁸

Again, Teresa's IQ is 72, placing her at the lower end of this typical cutoff range. She essentially has the mental capacities of a 12- to 14-year-old girl.⁹ With regard to her case, the question thus becomes: is the Commonwealth's interest in executing Teresa so compelling that it is willing to risk executing a woman who, according to both objective and subjective data, may in fact be mentally retarded? The Supreme Court has recognized that the state interests that typically justify capital punishment—retribution and deterrence—are suspect where mentally retarded individuals are concerned.¹⁰ According to the Supreme Court, "Unless the imposition of the death penalty on a mentally retarded person 'measurably contributes to one or both of these goals, it 'is nothing more than the purposeless and needless imposition of pain and suffering,' and hence an unconstitutional punishment."¹¹

⁵ *Id.* at 314 FN8 (citing Montgomery, Bowden's Execution Stirs Protest, Atlanta Journal, Oct. 13, 1986, p. A1).

⁶ *Id.* at 315-16.

⁷ *Id.*

⁸ *Id.* at 309 FN5 (citing 2 B. Sadock & V. Sadock, Comprehensive Textbook of Psychiatry 2952 (7th ed. 2000)).

⁹ Affidavit of Dr. Costanzo, p. 3 ¶ 13.

¹⁰ *Atkins v. Virginia*, 536 U.S. 304, 318-19 (2002).

¹¹ *Id.* (quoting *Edmund v. Florida*, 458 U.S. 782, 798 (1982)).

Teresa's mental disability also precludes her case from bearing indicia of the third factor that should be a prerequisite for application of capital punishment, manifestation of an appalling disregard for human life. On this point the Supreme Court's opinion in *Atkins* is particularly instructive:

Mentally retarded persons frequently know the difference between right and wrong and are competent to stand trial. Because of their impairments, however, by definition they have diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others. There is no evidence that they are more likely to engage in criminal conduct than others, but there is abundant evidence that they often act on impulse rather than pursuant to a premeditated plan, and that in group settings they are followers rather than leaders. Their deficiencies do not warrant an exemption from criminal sanctions, but they do diminish their personal culpability.¹²

It is important to note that despite her mental deficiencies and her history of non-violence, Teresa was the only one of the three persons involved in the criminal plot who received a capital sentence. While the justice system was unwilling to compare Teresa's sentence with those of her co-defendants upon review in March 2005, their life sentences are highly relevant because it is unlikely that Teresa could truly have been more culpable than they. Dr. Costanzo wrote: "From a psychological standpoint, a woman who is functionally retarded intellectually, with passive dependent personality disturbance, and a habit of submissively seeking men's approval throughout her life, is a poor bet as the mastermind of a brutal murder plot."¹³

Execution—the most drastic punishment known to our justice system—should be reserved for the degenerate and dangerous, not meted out liberally to those with diminished mental abilities who regret their wrongdoing. In fact, Teresa has become an inspiration to her other inmates at the Fluvanna Correctional Center for Women, offering them the humble example of her own Christian faith. She spends much of her time praying for her fellow inmates, and for the families she helped hurt. Julie Martel, a volunteer prison Chaplain, writes "I feel confident that if she were to receive a life sentence and be housed in general population, she would spend her life ministering to those around her."¹⁴ Teresa's execution would do more than extinguish a human life well on the way to rehabilitation, which is the very purpose of incarceration; her death would also rob other inmates of the chance to learn from her experiences, and to find the hope in God's forgiveness that Teresa has found.

¹² *Id.* at 318 (citations omitted).

¹³ Affidavit of Dr. Costanzo, ¶ 9.

¹⁴ "Teresa Lewis - Testimonials." Teresa Lewis - Home Page. Web. 30 Aug. 2010.
<<http://www.saveteresalewis.org/testimonials.html>>

The standards of decency and humanity are evolving in our nation and in the Commonwealth of Virginia. In America, 3,859 inmates were executed between 1930 and 1967. This, compared with 598 from 1977-1999.¹⁵ Recent advances in our evolving standards of decency could well mean that 30 years from now, 598 executions will be as ghastly as 3,859 executions seem to us now. The increasing safeguards put on capital sentences (including the trend toward categorically excluding the mentally retarded from death row), and the declining number of inmates placed on death row in spite of our rising population, reflect our society's increasingly suspect attitude toward the death penalty.

The Rutherford Institute submits that the execution of Teresa Lewis is simply an inappropriate and inhumane application of capital punishment. It is far more desirable for the Commonwealth to be on the forefront of a trend toward respecting human life and treating the mentally infirm with compassion than to be a heavy-handed, indiscriminate administrator of capital punishment. To be a society marked by pervasive understanding of the sanctity of each human life, we must be a society that—if it executes criminals at all—does so only under the most limited circumstances. On the other hand, to execute a remorseful woman whose mental capacity is as lacking as Teresa Lewis' is to manifest a lack of restraint and compassion that will be a blight on our Commonwealth for years to come. In light of all these considerations, we ask you to grant clemency to Teresa Lewis.

Thank you for your time and consideration. Please do not hesitate to contact me if I can ever be of assistance to your office.

Sincerely yours,

John W. Whitehead
President

¹⁵ "History of the Death Penalty & Recent Developments." UAA Justice Center. Web. 01 Sept. 2010. <<http://justice.uaa.alaska.edu/death/history.html>>