

Virginia death row inmate spared; debate rages over judicial barbarism

by Paul Gallagher

On Jan. 23, the Commonwealth of Virginia again came within 12 hours of executing a death-row prisoner with a very strong claim of innocence. The state's courts reached a new low in judicial barbarism, combining with Attorney General Mary Sue Terry to bar the new evidence of prisoner Herbert Bassette's innocence from being raised or heard. Finally, in Bassette's last hours on Jan. 23, Gov. Douglas Wilder saw that new evidence and commuted his sentence. Bassette now has his life—a life in prison without parole—but has no more chance of proving his innocence than he did before, unless Virginia's laws and judicial procedures are changed by the scandal.

The police-state character of the Virginia judicial system has been increasingly debated since *EIR's* Dec. 20, 1991 cover story, "Virginia: A Case Study in Judicial Barbarism." The changing climate was signaled, when Wilder's decision to commute Bassette's sentence was endorsed by the *Richmond Times-Dispatch*, the state's largest and most influential daily, which has been a strong voice for capital punishment. The newspaper—which had opposed Wilder's only other commutation last year, in the case of Joseph Giarratano—also called on the Virginia legislature to change the 1950s-era laws which currently make it virtually impossible to appeal a death sentence.

Governor Wilder made it clear that he had seen new evidence calling Bassette's guilt into question: "The test to be applied is not whether one believes that the accused committed the crime in question," he said, "but whether one holds the belief without any reasonable doubt. After a thorough review of the evidence, including evidence presented to me by counsel for Herbert Bassette which was not before the jury when they rendered their verdict . . . I cannot in good conscience erase *the presence of a reasonable doubt* and fail to employ the powers vested in me as governor to intervene" (emphasis added).

Wilder's announcement, made at a Northern Virginia forum on health care policy, was greeted with applause by many in the audience, although there had been little publicity about Bassette's case and only a few weeks' mobilization to stop his execution by the Schiller Institute, the Virginia Coalition on Jails and Prisons, and others.

Is the governor—in Virginia, Texas, and elsewhere—

going to be the *only* source of consideration of exonerating evidence, mitigating factors, or human mercy?

Giarratano's murder conviction, after all, rested on "confessions" he made while completely drugged; he remembers nothing of the days in which the murders attributed to him occurred. Similarly, Bassette was convicted of murder without any physical evidence, and entirely on testimony from three "accomplices" whose sentences added to a collective grand total of 12 months as a reward for their stories. When a witness stepped forward later to recant, she said she had been intimidated and her testimony "steered" by the prosecution. In this period of drug addiction and violent crime, prosecutors have manipulated the public's desire for "revenge" to steer murder convictions, increasingly asking the death penalty in cases involving minors and the mentally retarded. Virginia has led the way in making these convictions and sentences *irreversible*.

The callous figure of would-be governor Mary Sue Terry is central to this barbarism. One European nation recently refused to extradite a man facing capital murder charges to Virginia, in part, because the most horrible feature of Terry's policy is her commitment to speed the executions of prisoners in capital cases, including the mentally retarded and minors, even when doubts about their guilt emerge after trial.

Nowhere to take exonerating evidence

Why was evidence of Bassette's innocence ignored until it reached the governor? The answer shows a new low in the descent of this nation toward a police state; it lies in some of the new Supreme Court decisions eliminating centuries-old rights of citizens, suspects, and defendants against police and prosecutorial power, many of which have been handed down in cases arising from the suppression of such rights in Virginia.

Bassette has always maintained his innocence. His new evidence, detailed in *EIR's* Jan. 24 issue, is substantial. Another man has signed an affidavit all but admitting a 1966 armed robbery of which Bassette was convicted, and would publicly exonerate Bassette if given clemency himself (Attorney General Terry refuses to do so). A key prosecution witness in the murder case has recanted, named a different murderer, and said that her testimony against Bassette was

coerced by prosecutors.

Bassette's first *habeas corpus* motion, based on evidence of innocence of both crimes, was denied by Henrico County Circuit Court Judge George Tidey. Why? Because this evidence was not available within 21 days after the end of Bassette's murder trial. Joseph Giarratano's defense attorney, Gerald Zerkin, in an interview that appeared in the Jan. 25 *Richmond Times-Dispatch*, explained that the Virginia Supreme Court has had rules since the 1950s which effectively bar new evidence after that 21-day period! Worse, said Zerkin, another state court rule prevents a defendant from raising any new claim in an appeal, unless it was already properly raised *every time it could have been raised* during trial and previous appeals. In effect, these rules make appeals virtually meaningless, reducing them to a mere retest of procedures, rather than a rehearing of truth and law.

Bassette's attorneys' next attempt to present the new evidence, to the Virginia Supreme Court, was equally futile. That court wasted 11 of Bassette's remaining 12 days before execution, waiting for Attorney General Terry's office to file a response to the evidence. But Terry's brief was merely a copy of a brief submitted in a previous case, and said only that the new evidence was barred by procedure. The Supreme Court agreed without a hearing.

Bassette's attorneys then rushed to the federal court of Judge Robert Merhige, Jr., who had previously granted such a *habeas corpus* motion to death row prisoner Wilbert Evans. But in the meantime, the federal appeals court above Judge Merhige had overturned that ruling, with a shocking decision that if the state courts deny a new evidence hearing on procedural grounds, a federal court cannot grant one. The American civil rights struggle would have been a much longer and bloodier battle if such a doctrine had ruled during the past 40 years. Judge Merhige denied Bassette's hearing, saying that now his hands were tied by the state law.

Twenty-four hours from execution, and facing only the same hostile federal appeals court and the U.S. Supreme Court, Bassette's lawyers had no choice but to drop their legal claims in order to leave Bassette's life in Wilder's hands. Despite having clear, taped, signed evidence of Bassette's innocence of armed robbery, and evidence indicating a possible frameup for murder (by the same lucky "accomplices"), the attorneys had been utterly unable even to present that evidence in any state or federal court. Nor can they present it now that his sentence has been changed to life imprisonment without possibility of parole.

Terry: Innocent? Fry 'em, anyway

Herbert Bassette's treatment is standard procedure in Mary Sue Terry's Virginia courts, and now in the federal court circuit above them, with growing encouragement from the U.S. Supreme Court. Death row prisoner Roger O'Dell, for example, is so sure of his innocence and so desperate that he asked the help of TV "personality" Phil Donahue, to *have*

his own execution televised so that the public would be shocked by having to watch the execution of an innocent man. O'Dell's evidence of innocence (the evidence of his guilt, again, was flimsy and circumstantial) was barred in the Virginia courts by a ridiculous procedural trick, and the courts decided after the fact that his attorney had filed the wrong piece of paper in requesting an appeal hearing. Three U.S. Supreme Court justices, Blackmun, Stevens, and O'Connor, wrote to the federal circuit court about O'Dell's appeal in strong language: "The evidence raises serious questions about whether petitioner was guilty of the charged crime or was capable of representing himself." Yet the Supreme Court has not granted O'Dell a hearing either.

Mary Sue Terry remains unmoved. Her public statement said that Bassette was "lucky" to have escaped death in her electric chair. Terry has executed nine men in six years as Attorney General; six more, including Bassette, were expected to die in 1992. In the 10 years before Terry's election, Virginia executed only four men. Twelve of Terry's assistants work on ensuring that further *habeas corpus* reviews for death row prisoners are barred, even where her office knows that it withheld evidence which might have changed the trial. Many prosecutors nationwide do this; Terry fights for it and brags about it. Presidential candidate Lyndon LaRouche labels her America's Ilse Koch (the sadistic concentration camp overseer known as "the Bitch of Belsen").

But the pro-capital punishment *Richmond Times-Dispatch* was compelled to issue the following call: "It is chilling to think that even in a hypothetical case in which there turned up absolute proof of a condemned man's innocence, Virginia's appellate rules bar judicial consideration of the new information. The General Assembly ought to consider corrective legislation . . . to eliminate the slightest risk that the state might be sending an innocent or undeserving person to the grave."

The same Richmond daily has recently exposed political corruption by the Virginia Supreme Court. In one blatant case, the court ruled 6-1 to uphold a voters' referendum against localities pledging their tax revenues for bonds; then suddenly reversed itself under political pressure from state officials, including Terry. Now the court is defying clear state law by refusing to show the public any documents relating to this sudden "rehearing." These documents may show that the political reversal was steered by Justice Elizabeth Lacy, who got appointed to the court after a similar political decision against LaRouche's associates, when she was State Corporations Commissioner in 1987.

Held together by only selfish motives, the barbaric judicial system is not certain to perdure. It may be a sign of the times that on Jan. 22, Sheriff Marshall Honaker of Bristol, Virginia committed suicide after federal investigators said he embezzled \$500,000 from his own jail for his personal use. He was an influential supporter of Terry.