

EARL WASHINGTON'S ORDEAL

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By way of preface to this Symposium, I offer an account of the ordeal of Earl Washington, who—having come within days of execution—was released from prison on February 12, 2001, after DNA evidence of his innocence finally proved conclusive to the Virginia authorities.¹ I do so for two reasons.

First, I believe, both as a member of his legal team and a scholar, that history deserves an accurate account of the events.² Second, more broadly, I believe that the case exemplifies many of the phenomena that contribute to the injustice of the death penalty in America today,³ and

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During the long years of Mr. Washington's ordeal, many professionals, lawyers, and non-lawyers generously donated their resources. These included Dr. David Bing, Professor Edward J. Bronson, Dr. Henry Ehrlich, Dr. John N. Follansbee, Martha Geer, Esq., Peter C. Huber, Esq., Dr. Henry C. Lee, Professor Ruth Luckasson, Jonathan D. Sasser, Esq., Dr. T. Richard Saunders, and Jay Topkis, Esq.

The primary members of the legal team, all of whom also served pro bono, were attorneys Robert T. Hall, Peter Neufeld, Barry C. Scheck, Barry A. Weinstein, Gerald T. Zerkin, and mitigation specialist Marie M. Deans. These individuals have kindly reviewed a draft of this Article and provided helpful input, although of course I retain responsibility for the final product.

At one point or another, each of the people named in the previous two paragraphs (not to mention Mr. Washington's fellow death row inmate Joseph Giarratano, see *infra* notes 69-70 and accompanying text) was critical to saving Mr. Washington's life. Thus, there was a real need for the estimated \$10 million worth of volunteer resources that were expended during his struggle. See Jim Dwyer, *Testing the Rush to Death Row*, DAILY NEWS (N.Y.), Sept. 7, 2000, at 20.

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1. See Tim McGlone, *Former Death-Row Inmate Released into Spotlight*, VIRGINIAN-PILOT (Norfolk), Feb. 13, 2001, at A1.

2. Accordingly, all of the documents cited in this Article are available on request from the Barbara and Maurice A. Deane Law Library at the Hofstra University School of Law.

3. A recent comprehensive summary of these is to be found in Part II of the scholarly amicus brief submitted on behalf of Professor Anthony G. Amsterdam of New York University School of Law and other capital punishment experts (including myself) on November 17, 2000, in *People v. Harris* in the New York Court of Appeals. See Brief of Amici Curiae, *People v. Harris* (N.Y. Dec.

that its story therefore offers an appropriate framework within which to view the Symposium contributions that follow.

I. THE ORDEAL

On June 4, 1982, Rebecca Lynn Williams, returning home at noontime with her two young children to her apartment in the town of Culpeper, Virginia, was raped and stabbed. She could do no more than identify her assailant as a black man acting alone, and died a few hours later.⁴

At trial, the officer who responded to the call testified, "I asked her if she knew who her attacker was. She replied, no. I asked her then if the attacker was black or white and she replied, black. I then asked her if there was more than one and she replied, no."⁵

Similarly, Ms. Williams' husband testified, "I asked her, you know, who did it, and the only thing she replied to me was, a black man, and that was about it."⁶

Almost a year later, on May 21, 1983, Earl Washington, "a black man, aged 22 at the time, with a general I.Q. in the range of 69, that of a child in the 10.3 year age group,"⁷ was arrested on unrelated charges by the police in Warrenton, in Fauquier County, Virginia.

Those charges arose as follows. After Mr. Washington had spent a number of hours drinking heavily with family members, a dispute arose. Mr. Washington broke into a nearby house for the purpose of stealing a pistol that he knew to be there, and was surprised by the householder, Mrs. Hazel Weeks. He hit her over the head with a chair, and returned to the gathering. As he entered the house with the gun at his side, it accidentally discharged, hitting his brother, Robert, in the foot. Mr. Washington fled into the woods, where the police found him a few hours later.⁸

19, 2000) (No. 1399) [hereinafter Harris Brief], to be reprinted in 27 N.Y.U. REV. L. & SOC. CHANGE (forthcoming 2002). Their relationship to Mr. Washington's experience has been cogently summarized in Margaret Edds, *Virginia's Leaky System of Capital Punishment Needs to be Plugged*, VIRGINIAN-PILOT (Norfolk), Jan. 28, 2001, at J5.

4. See *Washington v. Murray*, 952 F.2d 1472, 1475 (4th Cir. 1991) [hereinafter *Washington I*].

5. 5 Joint Appendix at 1462, *Washington v. Murray*, 952 F.2d 1472 (4th Cir. 1991) (No. 89-4013) [hereinafter Joint Appendix] (Trial Testimony of Kenneth H. Buraker).

6. 5 Joint Appendix, *supra* note 5, at 1464 [hereinafter Williams Testimony] (Trial Testimony of Clifford Williams).

7. *Washington I*, 952 F.2d at 1475.

8. See *Earl Washington, Jr.: An Innocent Man*, Petition for Executive Pardon at 4 (Dec. 20, 1993) [hereinafter 1993 Pardon Petition].

While in police custody, Mr. Washington “confessed” to five different crimes. In four of the cases, the “confession” proved to be so inconsistent with the crime it purported to describe that it was simply rejected by the Commonwealth as the unreliable product of Mr. Washington’s acquiescence to the officers.⁹ In the fifth case—which resulted in the capital murder conviction and sentence—the statement had to be reshaped through four rehearsal sessions before reaching a form the authorities considered usable.¹⁰

Confession #1: The questioning began on the morning of May 21, 1993 when law enforcement officers of Fauquier County secured from Mr. Washington a waiver of his *Miranda* rights.¹¹ They began by discussing the Weeks case and ultimately obtained a “confession.” According to a vivid account contained in this document, Mr. Washington had attempted to rape Mrs. Weeks.¹² But Mrs. Weeks testified to the contrary at the preliminary hearing¹³ and the Commonwealth dropped the charge of attempted rape.¹⁴ Thereafter, Mr. Washington pleaded guilty to statutory burglary¹⁵ and malicious wounding,¹⁶ and was sentenced to consecutive fifteen-year prison terms.¹⁷ But on the morning of May 21, 1983, all of this lay in the future.

Confession #2: Having obtained Mr. Washington’s “confession” to the Weeks crime, the police turned the conversation to an attempted rape that had occurred on Waterloo Road.¹⁸ Mr. Washington confessed to this

9. See *infra* text accompanying notes 18-25.

10. See *infra* text accompanying notes 26-44.

11. See 1 Joint Appendix, *supra* note 5, at 116-17 [hereinafter Washington Interview] (May 21-23, 1983 Interview of Earl Washington, Jr.).

12. See Washington Interview, *supra* note 11, at 125; Statement by Earl Washington, Jr. at 1-2 (May 21, 1983), reprinted in *Earl Washington, Jr.: An Innocent Man*, Exhibits and Appendices to Petition for Executive Pardon at Exhibit 11 (Dec. 20, 1993) [hereinafter Exhibits to 1993 Pardon Petition].

13. See Preliminary Hearing Transcript at 6-7, *Commonwealth v. Washington* (Va. Cir. Ct. June 23, 1983) (Felony Nos. 5062, 5063) [hereinafter Prelim. Hr’g Tr.] (Testimony of Hazel Weeks), reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 7.

14. See Prelim. Hr’g Tr., *supra* note 13, at 25 (Statement of Prosecutor).

15. See VA. CODE ANN. § 18.2-89 (Michie 1996).

16. See VA. CODE ANN. § 18.2-51 (Michie 1996).

17. See Order at 2, *Commonwealth v. Washington*, Felony Nos. 5062, 5063 (Va. Cir. Ct. May 1, 1984), reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 8.

18. See Interview of Earl Washington at 1 (May 23, 1983) [hereinafter Supplemental Washington Interview], reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 11.

too, but the charge was dismissed.¹⁹ Mr. Washington's "confession" was inconsistent with important facts in that case.²⁰

Confession #3: Next, the police obtained Mr. Washington's "confession" to a breaking and entering on Winchester Street.²¹ He was never charged with this crime. The victim saw him in a line-up and stated that he was not the assailant.²²

Confession #4: Mr. Washington then "confessed" to the rape of another woman.²³ He was charged with this crime, but the charge was dismissed by the Commonwealth.²⁴ The victim's description of the attacker was inconsistent with Mr. Washington and she had previously identified someone else as the assailant.²⁵

Confession #5: At this point in the interrogation, according to handwritten police notes given to—but never used by—counsel who represented Mr. Washington in his capital case,

Because I felt that he was still hiding something, being nervous, and due to the nature of his crimes that he was already charged with and would be charged with, we decided to ask him about the murder which occurred in Culpeper in 1982.

. . . Earl didn't look at us, but was still very nervous. Asked Earl if he knew anything about it. Earl sat there and didn't reply just as he did in the other cases prior to admitting them. At this time I asked Earl—"EARL DID YOU KILL THAT GIRL IN CULPEPER?" Earl sat there silent for about five seconds and then shook his head yes and started crying.²⁶

The entire interrogation that followed consisted of the officers asking Mr. Washington a series of leading questions about the crime and

19. See Order at 1, *Commonwealth v. Washington*, Felony Nos. 5032, 5061 (Va. Cir. Ct. May 3, 1984), reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 20.

20. Compare Supplemental Washington Interview, *supra* note 18, at 1-1a, with Warrenton Police Department, Preliminary Investigation Report at 1-3 (Case No. 02148-82) (Nov. 12, 1982), both reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 11.

21. See Supplemental Washington Interview, *supra* note 18, at 1a-2, reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 11.

22. See 1993 Pardon Petition, *supra* note 8, at 6.

23. See Washington Interview, *supra* note 11, at 3-4, reprinted in 1 Joint Appendix, *supra* note 5, at 118-19.

24. See Order, *Commonwealth v. Washington*, Felony Nos. 5033, 5034 (Va. Cir. Ct. May 1, 1984), reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 10.

25. See Warrenton Police Department, Supplementary Investigation Report at 2 (Case No. 1286-83) (May 2, 1983), reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 11; see also Affidavit of Commonwealth's Attorney Jonathan S. Lynn paras. 6-8 (Dec. 7, 1993), reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 9.

26. Washington Interview, *supra* note 11, at 120.

obtaining affirmative responses.²⁷ This process eventually ceased, as the police notes frankly acknowledge, because the police had exhausted their store of information about the crime.²⁸ Thus, for example, the Fauquier County officers did not know that Ms. Williams had been raped,²⁹ and Mr. Washington did not supply any such information.

At this point, the Fauquier police called the Culpeper police and invited them to participate in the questioning.³⁰ The following morning, May 22, 1983, Mr. Washington first had another session with the Fauquier authorities at which, according to the officers' notes, "[h]e went through the story (as on 05/21/83) again."³¹ Then two officers from Culpeper, following oral *Miranda* warnings, began to interrogate Mr. Washington.³² No contemporaneous records of this second interrogation have ever been produced, and it was apparently not recorded.

However, the interrogating officer later described the session in court.³³ He testified that Mr. Washington initially wrongly identified Ms. Williams as having been black, and only corrected the statement on being re-asked the question.³⁴ This pattern was common throughout the interrogation: "I asked him to describe this woman. He had problems with describing."³⁵

Thus, in addition to not knowing the race of Ms. Williams, when asked non-leading questions:

—He had described the victim as "short."³⁶ She was 5'8" tall.³⁷

—He had said that he stabbed the victim "once or twice."³⁸ She had been stabbed 38 times.³⁹

27. For example, the interrogating officer testified that, as soon as Mr. Washington stopped crying, "I told him, to clarify things, I told him, I'm talking about the girl that was found stabbed laying naked outside the apartment or townhouse in Culpeper. I asked him if that's the one and he said, yes." 5 Joint Appendix, *supra* note 5, at 1535 [hereinafter Schrum Testimony] (Trial Testimony of Terry Schrum).

28. See Washington Interview, *supra* note 11, at 121.

29. See Schrum Testimony, *supra* note 27, at 1536.

30. See *id.* at 1537.

31. Washington Interview, *supra* note 11, at 127.

32. See 5 Joint Appendix, *supra* note 5, at 1558-59 [hereinafter Wilmore Testimony] (Trial Testimony of Reese Wilmore).

33. See *id.* at 1559-62.

34. See *id.* at 1560.

35. *Id.*; see also *Washington I*, 952 F.2d at 1478 n.5.

36. See Washington Interview, *supra* note 11, at 121.

37. See 5 Joint Appendix, *supra* note 5, at 1479 [hereinafter Beyer Testimony] (Trial Testimony of Dr. James C. Beyer).

38. 4 Joint Appendix, *supra* note 5, at 1030 [hereinafter Second Washington Statement] (May 22, 1983 Statement of Earl Washington, Jr.).

39. See Beyer Testimony, *supra* note 37, at 1474.

—He had said he saw no one else in the apartment.⁴⁰ Two of the victim's young children were present.⁴¹

After approximately an hour of review of the facts, according to the police testimony, the officers informed Mr. Washington that they would ask him the same questions once more, this time reducing the conversation to writing. They did so, and the resulting document was admitted at trial as his "confession."⁴²

During the afternoon of May 22, 1983, while Mr. Washington's statement of that day was being typed up for his signature, officers drove him to numerous apartment buildings in Culpeper in an effort to get him to identify the scene of the crime. Three times they drove into the apartment complex where the crime had actually occurred. On the third occasion, when asked to point out the scene of the crime, Mr. Washington "pointed to an apartment on the exact opposite end from where the Williams girl was killed. At that time I pointed to the Williams apartment and asked him directly, is that the one?" This question obtained an affirmative response.⁴³

Similarly, the police officers had Mr. Washington identify as his own a shirt of unknown provenance that was found at the apartment and given to them by family members six weeks after the crime.⁴⁴

During the guilt phase of the trial, the only evidence offered by the prosecution to link Mr. Washington to the crime consisted of his statements (including his identification of the shirt).⁴⁵

Defense counsel failed to obtain or offer available evidence that:

—The Commonwealth's own serologic analysis of the seminal fluid found on the blanket where the crime took place showed that it could not have come from Mr. Washington.⁴⁶

40. See Second Washington Statement, *supra* note 38, at 1031.

41. See 5 Joint Appendix, *supra* note 5, at 1455-56 (Trial Testimony of Officer J.L. Jackson).

42. See Wilmore Testimony, *supra* note 32, at 1574-84.

43. *Id.* at 1588.

44. See *Washington I*, 952 F.2d at 1478.

45. See *id.* at 1477-78.

46. Compare BUREAU OF FORENSIC SCIENCE, COMMONWEALTH OF VA., AMENDED COPY OF CERTIFICATE OF ANALYSIS (Aug. 26, 1983) [hereinafter AUG. 26 CERTIFICATE], with BUREAU OF FORENSIC SCIENCE, COMMONWEALTH OF VA., CERTIFICATE OF ANALYSIS (Aug. 12, 1983) [hereinafter AUG. 12 CERTIFICATE], both reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 6 (showing that Earl Washington's blood and secretion type is O, while the semen stains on a blue blanket found on the victim's bed were type A); see also *Washington I*, 952 F.2d at 1476; 8 Joint Appendix, *supra* note 5, at 2281, 2290-94 (Evidentiary Hearing Testimony of David A. Stoney and John C. Bennett).

—According to the same serological methodology the semen type was consistent with the Commonwealth's first suspect, James Pendleton.⁴⁷

—The hairs found in the pocket of the shirt found at the crime scene were consistent in part with that suspect's facial hair,⁴⁸ but were not compared to Mr. Washington's hairs. When the state crime laboratory pointed out this inconsistency to the Culpeper police and requested additional Washington hairs for comparison, the police refused.⁴⁹

Defense counsel also failed to show that Mr. Washington was wholly incapable of understanding *Miranda* warnings,⁵⁰ or that the process of suggestion by which the police officers had obtained the "confession" dovetailed precisely with his adaptive strategy for living in the normal world, which consisted of attempting to please his interlocutors by telling them what they wanted to hear.⁵¹ Instead, defense counsel put Mr. Washington on the stand, perhaps intending that this mentally challenged individual—who cannot name the colors of the American flag or state the function of a thermometer⁵²—testify that, although he had signed the confession, its contents were false. In any event, what he did testify was that he had never made the confession.⁵³

Defense counsel then made a closing argument which simply asked the jury to give Mr. Washington his day in court, without, however, discussing one iota of the evidence the jury had heard.⁵⁴

47. See AUG. 26 CERTIFICATE, *supra* note 46, at 8 (noting that James Pendleton's blood type is A); see also *Washington I*, 952 F.2d at 1478 n.6. In 2000, it was revealed that DNA analysis of the semen stain showed it to be inconsistent with that of Mr. Pendleton and consistent with an individual incarcerated in Virginia for a sex crime. See Gov. James S. Gilmore, III, Absolute Pardon of Earl Washington 2 (Oct. 2, 2000); Editorial, *State Being Mum About 1982 Rape-Murder*, VIRGINIAN-PILOT (Norfolk), June 20, 2001, at B10; Frank Green, *No One Charged in Killing*, RICHMOND TIMES-DISPATCH, June 16, 2001, at B1; McGlone, *supra* note 1.

48. See AUG. 26 CERTIFICATE, *supra* note 46, at 8-9; see also *Washington I*, 952 F.2d at 1478.

49. See *Washington I*, 952 F.2d at 1478; AUG. 12 CERTIFICATE, *supra* note 46.

50. See 1 Joint Appendix, *supra* note 5, at 154 [hereinafter Saunders Declaration] (Aug. 25, 1985 Declaration of Richard T. Saunders, Ph.D.).

51. See Ruth Luckasson, Evaluation of Earl Washington at 7-8 (Dec. 17, 1993), reprinted in Exhibits to 1993 Pardon Petition, *supra* note 12, at Exhibit 1. Professor Luckasson, one of the country's leading experts on mental retardation, volunteered her services to examine Mr. Washington. See *Washington I*, 952 F.2d at 1481; see also *supra* note * (listing the other professionals who volunteered to help save Earl Washington's life).

52. See Saunders Declaration, *supra* note 50, at 150.

53. See 5 Joint Appendix, *supra* note 5, at 1608-09, 1616-18 (Trial Testimony of Earl Washington, Jr.).

54. See 6 Joint Appendix, *supra* note 5, at 1977-79 [hereinafter Defense Counsel's Closing] (Closing Statement of Defense Counsel); see also *Washington I*, 952 F.2d at 1481.

Not surprisingly, Mr. Washington was convicted.

At the punishment phase, the Commonwealth relied solely on the aggravating circumstance that the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman."⁵⁵ It called as a witness, without objection by defense counsel, Helen T. Richards, the victim's mother.⁵⁶ The exclusive subject of her testimony was the traumatic psychological effect of the murder upon two of the victim's young children.⁵⁷ After describing this, and the special psychiatric care that the two were receiving, Mrs. Richards continued:

[T]hey have a telephone that is just used for talking to their mama in heaven and this is the way they talk about their problems. They sit down on the phone and they take turns talking to mama in heaven, to let her know how things are going, especially if they're very, very upset or something has upset them, and they sit down . . . it's a little . . . it's just a regular telephone, a little black phone, and they sit down and they dial and they talk to their mama. It's not an easy thing to work with children that are emotionally disturbed like this. They're beautiful children.⁵⁸

Defense counsel's jury argument at the punishment phase took up in its entirety twenty-seven lines in the record.⁵⁹ After the prosecutor had graphically and repeatedly described the thirty-eight stab wounds to fourteen vital organs and the "pool of blood" in which the victim lay,⁶⁰ defense counsel advised the jury that "this is Earl Washington's day in Court and you must do him justice."⁶¹ He gave no reason why the jury

55. 6 Joint Appendix, *supra* note 5, at 2063 (Jury Instruction No. 17, Commonwealth v. Washington (Va. Cir. Ct. 1984) (No. 52-F(83))).

56. See 5 Joint Appendix, *supra* note 5, at 1648-49 [hereinafter Richards Testimony] (Trial Testimony of Helen T. Richards).

57. See *id.* at 1645-49.

58. *Id.* at 1648-49. If defense counsel had objected to this argument, it probably would have been disallowed under the Eighth Amendment as then interpreted. See *Booth v. Maryland*, 482 U.S. 496, 500-03 (1987) (holding that a victim impact statement describing the emotional impact of the crime on family members was irrelevant to a capital sentencing decision and risked imposition of the death penalty "in an arbitrary and capricious manner," thus violating the Eighth Amendment); *Rushing v. Butler*, 868 F.2d 800, 803 (5th Cir. 1989) (holding that a victim impact statement introduced during the sentencing phase "created the constitutionally impermissible risk" that defendant was sentenced to death primarily "on the basis of emotionally charged testimony from the victim's family"). But defense counsel made no objection. See Richards Testimony, *supra* note 56, at 1649. *Booth* was subsequently overruled by *Payne v. Tennessee*, 501 U.S. 808 (1991).

59. See Defense Counsel's Closing, *supra* note 54, at 1679-80.

60. See 5 Joint Appendix, *supra* note 5, at 1675-78 (Closing Statement of Prosecutor John C. Bennett).

61. Defense Counsel's Closing, *supra* note 54, at 1679.

should not impose the death penalty. As to the factors the jury should consider, he submitted:

there is really, not really, in the course of human experience, any particular standard that governs us all with respect to punishment, so each of you, each of you must search within yourself to consider the crime and consider the gentleman whom you have found to be its perpetrator and look at him and look at the crime and determine what punishment is just for him. His life is in your hands.⁶²

Not surprisingly, the jury sentenced Mr. Washington to death.

The direct appeal was handled by the trial lawyer. Not surprisingly, it was summarily denied.⁶³

On the reasonable assumption that certiorari would not be granted at this stage, the next step would be the filing of a state habeas corpus petition, which, among other things, was and is a statutory prerequisite to the filing of a federal habeas corpus petition.⁶⁴ Virginia, however, did not provide for the appointment of counsel at this phase,⁶⁵ and the trial lawyer's motion for that relief was denied.⁶⁶

62. *Id.* at 1679-80.

63. *See* *Washington v. Commonwealth*, 323 S.E.2d 577, 589 (Va. 1984), *cert. denied*, 471 U.S. 1111 (1985). In fairness to trial counsel, this result was probably independent of the merits of his presentation. Since 1976, the Virginia Supreme Court has granted relief on direct appeal in a capital case only twelve times, the majority of which occurred after Earl Washington's appeal. *See Powell v. Commonwealth*, 544 S.E.2d 679, 699 (Va. 2001) (vacating capital conviction and remanding case for retrial on first degree murder charges only); *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 617 (Va. 1999) (remanding for resentencing); *Lilly v. Commonwealth*, 523 S.E.2d 208, 210 (Va. 1999) (reversing capital conviction); *Atkins v. Commonwealth*, 510 S.E.2d 445, 457 (Va. 1999) (remanding for resentencing based on jury verdict form error); *Mickens v. Commonwealth*, 457 S.E.2d 9, 10 (Va. 1995) (remanding for resentencing); *Rogers v. Commonwealth*, 410 S.E.2d 621, 629 (Va. 1991) (reversing capital conviction); *Cheng v. Commonwealth*, 393 S.E.2d 599, 608-09 (Va. 1990) (reversing capital conviction); *Frye v. Commonwealth*, 345 S.E.2d 267, 288 (Va. 1986) (vacating death sentence and remanding for resentencing); *Patterson v. Commonwealth*, 283 S.E.2d 212, 219 (Va. 1981) (commuting death sentence to life imprisonment); *Justus v. Commonwealth*, 266 S.E.2d 87, 93 (Va. 1980) (reversing capital conviction and awarding a new trial), *appeal after remand* at 283 S.E.2d 905, 913 (Va. 1981) (affirming capital conviction and death sentence after retrial); *Martin v. Commonwealth*, 271 S.E.2d 123, 131 (Va. 1980) (reversing capital conviction); *Johnson v. Commonwealth*, 255 S.E.2d 525, 532 (Va. 1979) (reversing capital conviction). In fact, the rate at which the Virginia state court system upsets death cases on either direct appeal or collateral review is only thirteen percent, by far the lowest in the country. *See* JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995* app. at A-59, C-1, C-50 (rev. ed. 2000).

64. *See* 28 U.S.C. § 2254(b) (1994 & Supp. 1996).

65. A narrow Supreme Court ruling upheld the constitutionality of this practice in *Murray v. Giarattano*, 492 U.S. 1, 7-8, 12 (1989).

66. *See* 1 Joint Appendix, *supra* note 5, at 114 (Felony Order, *Commonwealth v. Washington*, No. 52-F(83) (Va. Cir. Ct. July 3, 1985)).

Thus, in August, 1985, when Mr. Washington—facing an execution date of September 5⁶⁷—was moved to Virginia's Death House, he had no legal representation.⁶⁸ Meanwhile, his fellow prisoner Joseph Giarratano had been attempting to bring Mr. Washington's plight to anyone who would listen, including the local District Judge and Marie M. Deans, director of the Virginia Coalition on Jails and Prisons.⁶⁹ Mr. Giarratano and Ms. Deans (who had been frantically but unsuccessfully soliciting law firms around the country to volunteer for the case) raised the matter with Martha Geer. Ms. Geer, then a junior associate at Paul, Weiss, Rifkind, Wharton, & Garrison of New York City, was in Virginia to prepare the lawsuit that eventually became *Murray v. Giarratano*.⁷⁰ She brought the matter to the attention of her superiors at Paul, Weiss and Jay Topkis, a senior partner in that firm who had repeatedly arranged for it to donate its resources to death penalty cases,⁷¹ agreed that it could undertake to save Mr. Washington's life.

A team of lawyers from Paul, Weiss under my direction as senior associate managed, after a virtually sleepless week, to file a 1600-page petition for state habeas corpus, along with several applications for ancillary relief.⁷² One of these, an application for a stay of execution, was granted by the circuit judge, thereby forestalling the execution nine days before it was scheduled to take place.⁷³

As planned, Paul, Weiss then sought volunteer lawyers to take its place. As a result, Peter C. Huber, and then Robert T. Hall, assumed primary responsibility for Mr. Washington's representation.⁷⁴ At this stage, Mr. Hall discovered the exculpatory semen stain evidence⁷⁵—

67. *See id.*

68. In the subsequent court challenge that eventuated in *Giarratano*, the government's representatives explained that the sentence of the court would have been executed regardless of whether Earl Washington had representation. *See* Geraldine Szott Moohr, Note, *Murray v. Giarratano: A Remedy Reduced to a Meaningless Ritual*, 39 AM. U. L. REV. 765, 765 n.5 (1990). Ultimately, the Virginia legislature responded to *Giarratano* by passing a law establishing that, within thirty days after the decision of the Supreme Court of Virginia to affirm a death sentence, the court shall appoint counsel to represent an indigent prisoner in a state habeas corpus proceeding. *See* VA. CODE ANN. § 19.2-163.7 (Michie 2000); DONALD E. WILKES, JR., STATE POSTCONVICTION REMEDIES AND RELIEF 858-59 (1996).

69. *See* Moohr, *supra* note 68, at 765 n.5.

70. 492 U.S. 1, 3 (1989).

71. *See* Susan Beck, *The Last Resort*, AM. LAW., July/Aug. 1990, at 54, 54; Michael Orey, *Paul, Weiss: Profits and Principle*, AM. LAW., June 1987, at 70, 73.

72. *See* 1 Joint Appendix, *supra* note 5, at 69-110 (Petition for Writ of Habeas Corpus).

73. *See* 3 Joint Appendix, *supra* note 5, at 714 [hereinafter Sullenberger Opinion] (Letter Opinion of Hon. Lloyd C. Sullenberger).

74. *See* Sullenberger Opinion, *supra* note 73, at 714.

75. *See supra* note 46 and accompanying text.

which, having been appropriately turned over by the government, lay unappreciated in the files of the former defense counsel.⁷⁶

Notwithstanding this evidence (and a great deal more) of ineffective performance by counsel, the state habeas corpus petition raising this and other claims was denied without a hearing.⁷⁷ The Virginia Supreme Court denied review.⁷⁸ Mr. Hall then filed a federal habeas corpus petition. This, too, was denied without a hearing.⁷⁹

Having by this time become a law professor, I undertook the appeal of this decision, which succeeded to the extent of a remand for an evidentiary hearing.⁸⁰ On remand, Gerald T. Zerkin joined the legal team, and the two sides presented a good deal of testimony, from the trial attorneys and from experts, concerning the exculpatory evidence. Eventually, the district court issued an opinion stating that defense counsel had made a conscious decision, for tactical reasons, not to offer the exculpatory evidence.⁸¹

That finding was so utterly without evidentiary support that the government did not even attempt to defend it on oral argument of the resulting appeal, on which I again represented Mr. Washington. Rather, the government urged the theory that a divided Fourth Circuit panel eventually accepted: that defense counsel's performance had indeed been ineffective, but the error was non-prejudicial in light of the overwhelming weight of the evidence against Mr. Washington, namely his confessions.⁸²

Since that case-specific ruling was hardly one likely to result in a grant of certiorari, the legal system at this point had given its final sanction to Mr. Washington's execution, which in ordinary course would be likely to occur within a few months. During this period, a

76. See 8 Joint Appendix, *supra* note 5, at 2346-47 (Affidavit of John W. Scott, Jr. ¶¶ 2, 3, 4, 7). DNA evidence did not exist at the time. Rather, as indicated in *supra* note 46, the evidence was that the blood type of the semen stain tested by the government had proved to be inconsistent with both that of Mr. Washington and that of the victim's husband, Clifford Williams.

77. See Sullenberger Opinion, *supra* note 73, at 720; 3 Joint Appendix, *supra* note 5, at 721-22 (Dismissal Order).

78. See *Washington I*, 952 F.2d at 1475. As with its decision on direct appeal, see *supra* note 63 and accompanying text, this was in accordance with the usual practice of the Virginia Supreme Court. Since Virginia's first modern death sentence in 1977, relief after the direct appeal stage has been granted in no more than four capital cases, twice (including Earl Washington) by executive pardon. See *LIEBMAN ET AL.*, *supra* note 63, app. at A-59, C-1, C-50.

79. See 7 Joint Appendix, *supra* note 5, at 2160 (Memorandum Opinion of Hon. Claude M. Hilton); 7 Joint Appendix, *supra* note 5, at 2182 (Dismissal Order).

80. See *Washington I*, 952 F.2d at 1475.

81. See 8 Joint Appendix, *supra* note 5, at 2229-30 (Memorandum Opinion of Hon. Claude M. Hilton); 8 Joint Appendix, *supra* note 5, at 2224 (Dismissal Order).

82. See *Washington v. Murray*, 4 F.3d 1285, 1292 (4th Cir. 1993).

conversation during a chance encounter on a Richmond street between Mr. Zerkin and an attorney for the government resulted in an agreement that DNA tests (which had by now become available) should be performed on samples recovered from the vaginal vault of the victim.⁸³ At this point, Barry C. Scheck and Peter Neufeld volunteered their DNA expertise, and Barry Weinstein of the Virginia Resource Center joined the legal team to help in compiling a pardon petition to Governor L. Douglas Wilder.

That petition, filed on December 20, 1993,⁸⁴ included the DNA test results as reported by the Virginia Division of Forensic Science.⁸⁵ For the single genetic marker examined, Mr. Washington had DNA type 1.2, 4; Ms. and Clifford Williams were both of DNA type 4,4; the DNA type of the sperm found in Ms. Williams body was 1.1, 1.2, 4.⁸⁶ Thus, the testing showed that the sperm contained a genetic characteristic (a 1.1 allele) that could not belong to any of these individuals.⁸⁷

It was the view of Mr. Washington's counsel—one that the Attorney General initially shared⁸⁸—that at this point there was simply no case remaining against Mr. Washington.⁸⁹ Counsel accordingly urged Governor Wilder to recognize his innocence through the grant of a full pardon.⁹⁰ But the Governor refused to do so. Instead, on January 14, 1994, hours before the expiration of his term, he commuted Mr. Washington's sentence to life imprisonment with the right of parole.⁹¹

83. Previous attempts to type that material, using conventional serology testing, had failed because there was no method for separating out the male contribution to the vaginal mixture, which contained a significant amount of the victim's own blood.

84. See 1993 Pardon Petition, *supra* note 8.

85. See DIVISION OF FORENSIC SCIENCE, COMMONWEALTH OF VA., CERTIFICATE OF ANALYSIS (Oct. 25, 1993).

86. See *id.*

87. In the words of the Virginia report, "[n]either Earl Washington (HLA DQa Type 1.2, 4), Rebecca Williams (HLA DQa Type 4,4), nor Clifford Williams (HLA DQa Type 4,4), individually or in combination, can be the contributor(s) of the 1.1 allele previously detected on the vaginal swab." *Id.*

88. See Letter from Robert T. Hall, Defense Counsel, to Walter S. Felton, Jr., Counselor to the Governor and Director of Policy 7 (Feb. 25, 2000) [hereinafter Hall Letter].

89. That view was shared by a scientist acknowledged to be one of the world's leading authorities in the field, Dr. Henry A. Erlich. Acting pro bono, Dr. Erlich tested samples from Earl Washington, the victim, and her husband using highly advanced DNA analysis. See Letter from Henry A. Erlich, Ph.D., Director, Human Genetics, to Barry Weinstein, Defense Counsel 2 (Jan. 13, 1994) [hereinafter Erlich Letter]. He concluded that the presence of a unique 1.1 allele "cast[s] very significant doubt about Mr. Washington's contribution to the sample." *Id.*

90. See 1993 Pardon Petition, *supra* note 8, at 1-2.

91. See Governor Lawrence Douglas Wilder, Conditional Pardon of Earl Washington, Jr., at 4 (Jan. 14, 1994) [hereinafter Conditional Pardon]; *Death Sentence Is Commuted*, N.Y. TIMES, Jan. 16, 1994, at 16. Governor Wilder noted that "there are no provisions under Virginia law whereby

In the aftermath of this “political half-loaf”⁹² various government officials advanced imaginative theories to justify Governor Wilder’s failure to release Mr. Washington. For instance, if some hitherto-mentioned person (one with a 1.1 allele) had joined with Mr. Washington in raping Ms. Williams, then this might provide an explanation for the test results.⁹³ That hypothesis, however, was entirely inconsistent with the known facts. Not only did the Commonwealth’s case at trial rest on Mr. Washington’s “confession,” which made no mention of any such third person, but, as recounted above, Ms. Williams stated specifically to two people (her husband and a police officer) that she had been raped by only one man.

Moreover, this scenario was as implausible scientifically as it was forensically. The 4 allele found by the testing was probably a result of an incomplete separation of the male and female contributions to the mixture, and thus a contamination from the victim’s own genetic material.⁹⁴ In that case, the true genotype of the sperm would be 1.1, 1.2. If so, Mr. Washington could not possibly have been involved—the sample would not only contain a 1.1 allele (which concededly could not be his), but would also fail to contain a 4 allele (which it would necessarily need to contain if he were the donor).

But Mr. Washington had no judicial avenue by which to press his claims. The time limit in Virginia for the reopening of a criminal case on the basis of newly discovered evidence was (and is) twenty-one days,⁹⁵

[the] newly discovered [DNA] evidence can now be considered by the courts.” Conditional Pardon, *supra* at 1; *see infra* note 95 and accompanying text for discussion of Virginia’s 21-day rule.

It is a plausible speculation that Wilder’s decision was influenced by his contemplation of a run for the U.S. Senate. Although there had been rumors of such a campaign throughout the previous fall, Wilder announced he would not run three days before leaving office (and commuting Earl Washington’s sentence). By March of 1994, however, Wilder was publicly reconsidering his decision not to run, and officially announced his candidacy in June. He later withdrew. *See* Margaret Edds & Warren Fiske, “I Will Fight No More Forever”: Wilder Bails Out of Senate Race After 2 Polls Showed Him Trailing Badly, *VIRGINIAN-PILOT* (Norfolk), Sept. 16, 1994, at A1.

92. Eric M. Freedman, Letter to the Editor, *In Virginia, Innocent Man Stays in Prison*, N.Y. TIMES, Jan. 28, 1994, at A26.

93. *See* Hall Letter, *supra* note 88, at 6 n.7 (“The theory would be that this mysterious stranger contributed the 1.1 allele, and the remaining alleles, 1.2 and 4, belonged to Mr. Washington.”).

94. *See* Erlich Letter, *supra* note 89, at 1-2; Hall Letter, *supra* note 88, at 7.

95. *See* VA. CODE ANN. 19.2-264.6 (Michie 2000). Although this limit is the shortest in the country, the problem is a general one. Only two states (New York and Illinois) specifically recognize re-opening on the basis of DNA evidence, and, significantly, those two states have the highest number of exonerations. *See* JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGLY CONVICTED* 246-47 (2000). On May 2, 2001, in part as a result of the lessons learned from the Washington affair, Governor Gilmore signed into law S.B. 1366, which requires the preservation of biological

and the prospects in federal court were less than favorable.⁹⁶ Thus, despite one abortive effort to gain him legislative relief,⁹⁷ Mr. Washington languished in prison.

After many painful years, Mr. Scheck was able to inform the rest of the legal team that advances in DNA technology might be able to unlock the door to Mr. Washington's cell.⁹⁸ The invention of the Short Tandem Repeater (STR) test, which sampled many more genetic markers than the single marker tested in 1993, could lay to rest all scenarios, no matter how fanciful, that implicated Mr. Washington.

But without a judicial avenue available, the only recourse was to the governor. Accordingly, beginning in early 2000, counsel requested Governor James S. Gilmore, III to order additional testing.⁹⁹ Since the governor was not legally obligated to act, and had political reasons to avoid doing so for as long as possible, months went by with no reply, until eventually the Virginia press began demanding to know why.¹⁰⁰ In May, Peter Neufeld, Bob Hall and Jerry Zerkin met with Gilmore's counsel. Neufeld explained the new science and communicated that without a legal remedy, Mr. Washington's only avenue for obtaining

evidence and authorizes convicted felons to seek DNA testing. *See, e.g.*, Death Penalty Information Center, *Changes in the Death Penalty Around the U.S.*, at <http://www.deathpenaltyinfo.org/Changes.html> (last visited May 27, 2001); *Justice is Served by Virginia's New DNA Rule*, VIRGINIAN-PILOT (Norfolk), May 8, 2001, at B8; Virginians for Alternatives to the Death Penalty, *Summary: Death Penalty Bills in the 2001 General Assembly*, at <http://www.vadp.org/legis.htm> (last visited May 27, 2001). The statute is, however, so limited that its practical effect is likely to be small.

96. *See* *Herrera v. Collins*, 506 U.S. 390, 400 (1993) (stating that “[c]laims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation”).

97. *See* Capital Case Bill of Review, H.B. 213, 1994 Sess., Gen. Assem. (Va. 1994). The bill—passed by the House almost immediately but shelved indefinitely by the Senate Committee for Courts of Justice—was intended to amend the Virginia Code by allowing for the re-opening of a death penalty case upon the discovery of new evidence. *See id.*; *see supra* note 95 and accompanying text for current developments in Virginia law.

98. *See* Hall Letter, *supra* note 88, at 7.

99. *See, e.g.*, Hall Letter, *supra* note 88, at 7-8; Letter from Gerald T. Zerkin, Defense Counsel, to Walter S. Felton, Jr., Counsel to the Governor and Director of Policy (Jan. 27, 2000).

100. *See, e.g.*, Editorial, *Earl Washington: Set Him Free, DNA Tests Point to Innocence*, VIRGINIAN-PILOT (Norfolk), Feb. 15, 2000, at B10; Margaret Edds, *Wrongly Accused and Sentenced: Freeing Washington Would Destroy Myth of Justice*, VIRGINIAN-PILOT (Norfolk), Apr. 16, 2000, at J5; Frank Green, *Gilmore Won't Rush Decision on DNA Test*, RICHMOND TIMES-DISPATCH, May 3, 2000, at A1. By this time, Mr. Washington's case had also benefited from a broadcast of the PBS show *Frontline*. *See Frontline: The Case for Innocence* (PBS television broadcast, Jan. 11, 2000), transcript available at <http://www.pbs.org/wgbh/pages/frontline> (last visited May 27, 2001). This revealed, among other things, that the semen stain had been subjected to DNA testing by the government in late 1993 or early 1994, and that the exculpatory results were not shared with defense counsel. *See id.*; DIVISION OF FORENSIC SCIENCE, COMMONWEALTH OF VA., CERTIFICATE OF ANALYSIS (Jan. 14, 1994).

gubernatorial action was through the press. On June 1, 2000, the governor announced that he was ordering the testing.¹⁰¹ His spokeswoman said it should be completed in a few weeks.¹⁰² With no results received after three months, the national press intensified its coverage.¹⁰³ Counsel filed a pardon petition on September 7.¹⁰⁴ On October 2, 2000, the governor announced that he was issuing a full pardon on the capital charges.¹⁰⁵ Of critical importance to Mr. Washington's proof of innocence, not only did the new round of DNA testing completely eliminate him as a contributor to either the vaginal swab or the blanket stains, but it also identified the source of semen on the blanket. The state compared the DNA profile from the blanket to the Virginia DNA database of convicted offenders and obtained a match to a prisoner serving time for rape who had been at liberty at the time of the Williams murder.¹⁰⁶

However, notwithstanding counsel's request, the governor took no action to commute the non-capital sentence for the burglary and malicious wounding of Hazel Weeks, even though Mr. Washington would have been paroled on those charges long before if he had not been wrongly convicted of the capital charges.¹⁰⁷ As a result, Mr. Washington remained in prison until his mandatory release date of February 12, 2001.¹⁰⁸

101. See Press Release, Statement of Governor Gilmore Regarding Earl Washington (June 1, 2000); Brooke A. Masters, *Gilmore Orders DNA Testing for Man Imprisoned Since '83*, WASH. POST, June 2, 2000, at A1.

102. See Masters, *supra* note 101.

103. See Francis X. Clines, *New DNA Tests Are Seen As Key to Virginia Case*, N.Y. TIMES Sept. 7, 2000, at A18; Masters, *supra* note 101; see also *Earl Washington: The Long Wait: DNA Test Results Are Overdue*, VIRGINIAN-PILOT (Norfolk), Aug. 12, 2000, at B6.

104. See Letter from Gerald T. Zerkin, Defense Counsel, to Gov. James S. Gilmore, III, Governor of Virginia (Sept. 6, 2000) (accompanying *Earl Washington, Jr.: Finally Releasing an Innocent Man*, Petition for Executive Pardon (Sept. 7, 2000) [hereinafter 2000 Pardon Petition]).

105. See Gilmore, *supra* note 47, at 2; see also *Nightline: Man Pardoned for Rape and Murder Remains Imprisoned* (ABC television broadcast, Oct. 6, 2000).

106. See Gilmore, *supra* note 47, at 2.

107. See 2000 Pardon Petition, *supra* note 104, at 6 (setting forth sentencing data showing that Mr. Washington would probably have been paroled in 1994, after serving ten to eleven years in prison).

108. See Jim Dwyer, *Virginia Gov Adds Insult to Idiocy*, DAILY NEWS (N.Y.), Feb. 11, 2001, at 8; McGlone, *supra* note 1. He had been scheduled to travel to Washington that day to confer with legislators seeking to mitigate the problems of wrongful capital convictions, but the Virginia parole authorities blocked that trip. See Dwyer, *supra*; see also Tim McGlone, *Savoring His Freedom: Off Death Row and Into the Sunshine, Earl Washington, Jr. Builds a New Life*, VIRGINIAN-PILOT (Norfolk), Aug. 12, 2001, at A1.

II. THE LESSONS

Lest this Preface pre-empt the substance of the Symposium it introduces, I present in very compressed form the salient systemic flaws that I believe Mr. Washington's story highlights.

A. *Race*

The impact of race on the criminal justice system generally, and the capital punishment system in particular, has been extensively documented.¹⁰⁹ Mr. Washington's case certainly raises the possibility that there may be aspects of the problem which are inherent in our culture and will defy capture by statistics, no matter how sophisticated. What led the initial investigators down the path that they must be dealing with a sex crime? In light of Mrs. Weeks' later testimony, they could not have had any solid basis for believing so; yet they extracted from Mr. Washington a "confession" to attempted rape, and then to a series of sex crimes.¹¹⁰ Would they have done so if he had not been black and the victim white? There is no way to know, but the question certainly lingers.

B. *False Confessions*

This problem, too, has received extensive study.¹¹¹ What Mr. Washington's case brings home is the reality that the police need not necessarily be malicious;¹¹² sloppiness will do. If the police believe that resistance from their interlocutor is simply an attempt to impede them from verifying what they "know" to be the facts, they will apply pressure that generates accounts whose content comes from the officers

109. See, e.g., Harris Brief, *supra* note 3, at 62-70 (canvassing studies demonstrating that "[r]ace discrimination is both the most detectable symptom and the most invidious consequence of the unamenability of life-and-death sentencing choices to rational regulation. It has persisted unchecked under every form of post-*Furman* capital sentencing procedure."); see also DWYER, NEUFELD & SCHECK, *supra* note 95, at 193-210, 279-80 (including resource list).

110. See *supra* text accompanying notes 11-42.

111. See, e.g., DWYER, NEUFELD & SCHECK, *supra* note 95, at 78-107, 271-72 (including resource list).

112. In arguing Earl Washington's case to the Fourth Circuit, I explicitly disclaimed any attempt to show that the police had been trying to "railroad" him. See Frank Green, *Lawyers Say Confession Details May Have Been Offered by Police*, RICHMOND TIMES-DISPATCH, June 5, 1990, at B8.

rather than the suspect.¹¹³ This is inconsistent with an unbiased search for the truth, and is likely to impede arriving at that goal.¹¹⁴

C. Mental Retardation

Of course, those problems are exacerbated when the suspect is mentally retarded.¹¹⁵ First, mentally retarded people are likely to be skillful at concealing their condition, so that interrogators may not even know caution is in order.¹¹⁶ Second, mentally retarded people suffer from severe disadvantages in an interrogation setting. They tend to be suggestible, in part because this furthers a coping strategy of concealing their limitations and in part because their experience suggests that others are more likely to be right than they are.¹¹⁷ Moreover, diminished cognitive capacity means that the retarded have less ability than other people to understand both the contents and the potentially incriminating implications of any questions they may be asked.¹¹⁸

There is little doubt that these factors were at work in Mr. Washington's case. He is an amiable, gentle person who tries hard to please others.¹¹⁹ Hence, when told the "correct" answer to a question, he

113. See *Jurek v. Estelle*, 623 F.2d 929, 950-51, 951 n.23 (5th Cir. 1980) (Johnson, J., concurring) (noting the perils of this process, especially with "highly suggestible" suspects).

114. This is not an isolated problem. In twenty-three percent of the DNA exonerations to date, the prisoner had made a false confession or admission. See DWYER, NEUFELD & SCHECK, *supra* note 95, at 92. Scheck and his co-authors note that sixty-three percent of the DNA exonerations analyzed by the Innocence Project involved significant police or prosecutorial misconduct, which courts often dismiss as "harmless error" and tolerate because law enforcement officers are seen as seeking a "greater good." See *id.* at 175, 179-80.

115. See, e.g., THE CRIMINAL JUSTICE SYSTEM AND MENTAL RETARDATION: DEFENDANTS AND VICTIMS (Ronald W. Conley et al. eds., 1992) (presenting articles by criminal justice experts on the challenges posed by the mentally retarded); Death Penalty Information Center, *Mental Retardation and the Death Penalty*, at <http://www.deathpenaltyinfo.org/dpicmr.html> (last visited May 27, 2001) (compiling statistics, cases, and news stories on the subject).

116. See James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414, 458 (1985) ("[E]fforts that many mentally retarded people typically expend in trying to prevent any discovery of their handicap may render the existence or the magnitude of their disability invisible to criminal justice system personnel."); Luckasson, *supra* note 51, at 4-5.

117. See Ellis & Luckasson, *supra* note 116, at 451 (citing PRESIDENT'S PANEL ON MENTAL RETARDATION, REPORT OF THE TASK FORCE ON LAW 33 (1963)); Luckasson, *supra* note 51, at 4.

118. See *Jurek*, 623 F.2d at 937 (questioning the voluntariness of a confession of a mentally retarded person where there is an "inability to comprehend the circumstances"); Ellis & Luckasson, *supra* note 116, at 451; Bob Herbert, *The Confession*, N.Y. TIMES, June 21, 2001, at A25 (describing the *Washington* case and noting that "[e]ven when mentally retarded defendants are clearly guilty, it is extremely difficult to determine their level of culpability").

119. In the words of John N. Follansbee, M.D., who examined Mr. Washington at the request of defense counsel, "It was my impression that if on the evening of his execution the electric chair were to fail to function, he would agree to assist in its repair." 1 Joint Appendix, *supra* note 5, at

will repeat it on a subsequent occasion, regardless of whether he understands it.¹²⁰ His “confessions” reflect these characteristics.¹²¹

D. Ineffective Counsel

Had Mr. Washington been competently represented, he would have been acquitted at trial. But he was not.¹²² This problem is endemic to the capital punishment system.¹²³ It is starkly pointed out in this case by the fact that Mr. Washington was competently represented on the non-capital cases: He pleaded guilty to those offenses of which he was guilty, and the charges of which he was innocent were dropped.¹²⁴

The single most meaningful reform of the capital punishment system, short of its abolition, would be the provision of effective trial counsel, through a system that provided adequate compensation, expert resources, and the training and support needed to practice in this esoteric field.¹²⁵ If that happened—and nowhere has it to date¹²⁶—there would be

134-35 (Declaration of John N. Follansbee, M.D.); *see also* Luckasson, *supra* note 51, at 4 (noting that people in Earl’s hometown described him as “very goodhearted,” “a good boy,” and “wanting to please others”).

120. *See* Saunders Declaration, *supra* note 50, at 153; Luckasson, *supra* note 51 at 7 (“All the circumstances surrounding the ‘confession’ indicate that its contents came (intentionally or not) from the police and were simply parroted back by Earl, piece by piece as he learned it.”).

121. According to Professor Luckasson’s report, during the interrogations in all five cases Earl “attempted to save face by using his coping strategy of seeming to understand, and he was taking as many cues as he could from [the officers’] behavior and words to try to ‘get it right’ . . . [H]e believed they ‘knew’ the facts so he was trying to guess until his guesses matched what they ‘knew.’” Luckasson, *supra* note 51, at 7.

122. *See supra* text accompanying notes 46-63.

123. *See, e.g.*, Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1836 (1994); Gary Goodpaster, *The Trial for Life: Effective Assistance of Counsel in Death Penalty Cases*, 58 N.Y.U. L. REV. 299, 302-03 (1983); Ira P. Robbins, *Toward a More Just and Effective System of Review in State Death Penalty Cases*, 40 AM. U. L. REV. 1, 62-92 (1990).

124. *See supra* text accompanying notes 13-25.

125. *See* James S. Liebman, *The Overproduction of Death*, 100 COLUM. L. REV. 2030, 2147 (2000).

126. Chapter 154 of the Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214, 1221-26 (1996) (amending 28 U.S.C. §§ 2244, 2253-55 and adding §§ 2261-66), provides a number of procedural advantages to states that furnish adequate counsel to capital prisoners. *See* 28 U.S.C. § 2265 (Supp. IV 1999). But no state has yet been held to qualify under Chapter 154. *See* *Spears v. Stewart*, No. 01-99000, 2001 U.S. App. LEXIS 20850, at *39 (9th Cir. Sept. 24, 2001) (Arizona does not qualify under Chapter 154); *Kreutzer v. Bowersox*, 231 F.3d 460, 462-63 (8th Cir. 2000) (Missouri does not qualify under Chapter 154), *cert. denied*, No. 00-10520, 2001 U.S. LEXIS 6178 (U.S. Oct. 1, 2001); *Tucker v. Catoe*, 221 F.3d 600, 605 (4th Cir.) (South Carolina does not qualify under Chapter 154), *cert. denied*, 531 U.S. 1054 (2000); *Ashmus v. Woodford*, 202 F.3d 1160, 1167 (9th Cir.) (California does not qualify under Chapter 154), *cert. denied*, 121 S. Ct. 274 (2000); *Baker v. Corcoran*, 220 F.3d 276, 285-87 (4th Cir. 2000) (Maryland does not qualify under Chapter 154), *cert. denied*, 121 S. Ct. 1194 (2001); *Smith v. Anderson*, 104

far fewer convictions and death sentences, but those few would be much more likely to stick. That is an outcome that would be in the best interests of all concerned. When the government attempts to evade costs at the front end, they emerge at the back end—not just in the monetary drain of lengthy appeals, but in such injustices as the irreplaceable years that Earl Washington spent wrongfully imprisoned.

E. Inadequate Postconviction Review

Having adjudicated guilt and decided upon execution under conditions that are troubling, to say the least, the system thereupon indulges every presumption in favor of the trial outcome. This ostrich-like phenomenon, which is certainly apparent in the judicial performance in Mr. Washington's case,¹²⁷ has hardly been improved since then by enactment of the Antiterrorism and Effective Death Penalty Act of 1996,¹²⁸ whose provisions were specifically designed to reduce the number of successful federal habeas corpus petitions.¹²⁹ Substantively, moreover, both state and federal judicial systems remain hostile to claims of actual innocence.¹³⁰

F. Politics

As a result, the decisions about guilt or innocence (e.g., whether to order DNA testing to be performed, what action to take on the results) are almost always in the hands of Governors (or Presidents) or their designees. And, as Mr. Washington's case certainly illustrates, those

F. Supp. 2d 773, 786 (S.D. Ohio 2000) (Ohio does not qualify under Chapter 154); *King v. Netherland*, No. 96-0641-R, 1997 U.S. Dist. LEXIS 11678, at *17 (W.D. Va. Aug. 4, 1997) (Virginia does not qualify under Chapter 154); *aff'd sub. nom. King v. Greene*, 141 F.3d 1158 (4th Cir. 1998); *Ward v. French*, 989 F. Supp. 752, 757 (E.D.N.C. 1997) (North Carolina does not qualify under Chapter 154), *aff'd*, 165 F.3d 22 (4th Cir. 1998); *Lockett v. Puckett*, 980 F. Supp. 201, 210 n.11 (S.D. Miss. 1997) (Mississippi does not qualify under Chapter 154); *Williams v. Cain*, 942 F. Supp. 1088, 1092 (W.D. La. 1996) (Louisiana does not qualify under Chapter 154).

127. See *supra* text accompanying notes 63-82.

128. See 28 U.S.C. §§ 2261-66 (Supp. IV 1999).

129. See, e.g., 142 CONG. REC. S3352, S3353 (daily ed. Apr. 16, 1996) (remarks of Sen. Orrin Hatch) (noting that the proposed habeas reform would “end the ability of . . . heinous . . . violent criminals . . . to delay the imposition of their sentence”); 142 CONG. REC. H3605, H3606 (daily ed. Apr. 18, 1996) (remarks of Rep. Henry Hyde) (calling habeas corpus reform “the Holy Grail” and stating that there is “[n]othing wrong” with a “1-year statute of limitations in habeas”); H.R. CONF. REP. NO. 104-518, at 111 (1995), *reprinted in* 1996 U.S.C.A.N. 944 (noting that title incorporates reforms to “curb the abuse of the statutory writ of habeas corpus”).

130. See, e.g., *Herrera v. Collins*, 506 U.S. 390, 399-400 (1993) (holding that a claim of actual innocence alone does not entitle petitioner to habeas relief); Harris Brief, *supra* note 3, at 76-77, 77 n.177 (noting that government officials “have a strong resistance to acknowledging the exonerative significance” of subsequently discovered evidence).

officials are political ones, who act in response to political concerns. There is nothing wrong with politics affecting the decisions of the political branches, but there is sound reason why the political branches are not entrusted with determinations of guilt or innocence.

Meaningful reform will require that prisoners claiming innocence have meaningful access to the judicial branch. And meaningful access must mean access without time limits, on the basis of realistic substantive standards, and with the assistance of counsel and experts.¹³¹ Earl Washington could not have made on his own behalf the written and oral presentations that were required to persuade Governors Wilder and Gilmore to conduct DNA testing, and would have been equally incapable of making the same case to a court; thus, granting him the right to do so without also providing the necessary resources would be simple mockery.

More generally, the availability of DNA testing should be taken as an alarm siren alerting us to the dangerous flaws in our criminal justice system. Testable DNA samples exist in only a small fraction of cases,¹³² and wrongful convictions have many other causes—including inaccurate eyewitness identification,¹³³ the unreliable testimony of prison informants,¹³⁴ and false confessions.¹³⁵ If Mr. Washington had been accused of a shooting rather than a rape-murder, there would have been no DNA. That would have left him just as innocent, but dead by the hand of the state. The availability of DNA in some cases acts as a check on the system in much the same way that a tax audit does. The results so far certainly indicate cause for concern,¹³⁶ and every effort at legislative amelioration deserves support.¹³⁷

131. See DWYER, NEUFELD & SCHECK, *supra* note 95, app. 1 at 255-60 (setting forth “A Short List of Reforms to Protect the Innocent”); Liebman, *supra* note 125, at 2144-50 (proposing significant reform efforts to combat the problem of excessive pursuit of death sentences).

132. See DWYER, NEUFELD & SCHECK, *supra* note 95, at xv (noting that most crimes do not involve biological evidence).

133. See *id.* at xvi, 41-77 (“Eyewitness error remains the single most important cause of wrongful imprisonment.”).

134. See, e.g., *Dodd v. State*, 993 P.2d 778, 783-84 (Okla. Crim. App. 2000) (canvassing the unreliable nature of prison informants’ testimony and imposing specific procedures for its use); see also DWYER, NEUFELD & SCHECK, *supra* note 95, at 126-57.

135. See *supra* Part II.B; see also DWYER, NEUFELD & SCHECK, *supra* note 95, at 92.

136. DNA evidence has “provided stone-cold proof that sixty-seven people were sent to prison and death row for crimes they did not commit.” DWYER, NEUFELD & SCHECK, *supra* note 95, at xiv. DNA evidence was a substantial factor in establishing the innocence of ten of the ninety-four inmates released from death row since 1973. See Death Penalty Information Center, *Innocence: Freed from Death Row*, at <http://www.deathpenaltyinfo.org/Innocentlist.html> (last visited May 27, 2001).

137. See, e.g., Innocence Protection Act of 2001, S. 486, 107th Cong. (2001), reprinted in 29 HOFSTRA L. REV. 1113 (2001).

Ultimately, however, no human system is perfect. Perhaps that growing realization—combined with the reality that the death penalty does not have a deterrent effect¹³⁸ but rather diverts resources from measures that would in fact reduce the crime rate¹³⁹—will lead in the near future to a societal reassessment of the costs and benefits of retaining the death penalty system.

Or perhaps progress will come less from an exercise in abstraction than one in imagination: Any one of us could wind up in Earl Washington's position, and what then?

138. See Harris Brief, *supra* note 3, at 101-07 (pointing out that no reputable study to date has found evidence to support the theory of deterrence as a result of the death penalty); Robert Sherrill, *Death Trip: The American Way of Execution*, NATION, Jan. 8-15, 2001, at 13, 18 (noting that the number of murders in Florida more than doubled after institution of the death penalty in 1979).

139. See Eric M. Freedman, *The Case Against the Death Penalty*, USA TODAY, Mar. 1997 (Magazine), at 48, 49.

APPENDIX

EARL WASHINGTON'S ORDEAL: TIMELINE¹⁴⁰

June 4, 1982: Rebecca Lynn Williams, a nineteen year-old mother of three, is raped and murdered in her Culpeper, Virginia, apartment.

May 21, 1983: Earl Washington is arrested in Warrenton, Virginia, in Fauquier County, on an unrelated case—burglary and malicious wounding. During two days of questioning by law enforcement officials from the Virginia State Police, Culpeper County, and Fauquier County, he confesses to four other crimes including the Williams murder.

Nov. 2, 1983: Trial Judge F. Ward Harkrader, Jr. rules that Washington's confession was voluntary and could be used against him at trial.

Jan. 18-20, 1984: Washington's trial (guilt and penalty phases), results in jury's decision to convict and impose death penalty.

March 12, 1984: Sentencing hearing and imposition of the death penalty by Trial Judge David F. Berry.

March 20, 1984: In its written order imposing the death penalty, trial court sets execution date of July 27, 1984. Execution date subsequently stayed by the Virginia Supreme Court pending appeal.

May 1, 1984: Washington pleads guilty to burglary and malicious wounding and is sentenced to two fifteen-year sentences (thirty years) to run consecutively.

May 9, 1984: Washington is sent to Virginia's death row at Mecklenburg Correctional Center.

Nov. 30, 1984: Virginia Supreme Court affirms capital conviction and sentence of death.

May 13, 1985: U.S. Supreme Court denies review.

July 3, 1985: Trial court sets execution date of September 5, 1985, and denies motion by trial counsel for appointment of state habeas counsel.

Aug. 16, 1985: Washington is transferred to the execution site, Virginia State Penitentiary in Richmond, and hears electric chair being tested.

Aug. 19, 1985: Joseph Giarratano, a fellow death-row inmate, and Marie Deans, director of the Virginia Coalition on Jails and Prisons, describe Earl's plight to Martha Geer, who is at the prison on a different

140. This document is the work of Barry Weinstein. I have edited it slightly for publication.

case. She persuades her firm, Paul, Weiss, Rifkind, Wharton & Garrison of New York City, to represent Washington pro bono.

Aug. 27, 1985: A team of lawyers from Paul, Weiss, spearheaded by Eric M. Freedman, files state habeas petition and application for stay of execution. Stay application is granted by Judge Lloyd C. Sullenberger nine days before scheduled execution. Washington returns to Virginia's death row at Mecklenburg Correctional Center. Robert T. Hall enters case.

Dec. 23, 1986: State trial court denies state habeas petition without an evidentiary hearing.

Feb. 26, 1988: Virginia Supreme Court denies petition for appeal.

July 28, 1988: Federal habeas petition filed in Eastern District of Virginia.

Oct. 25, 1989: U.S. District Judge Claude M. Hilton denies petition for federal habeas corpus relief without an evidentiary hearing. Appeal filed.

Dec. 19, 1991: U.S. Court of Appeals for the Fourth Circuit remands case back to the U.S. District Court for an evidentiary hearing on issue of ineffective assistance of counsel for failure to investigate and introduce exculpatory semen stains found on blanket where crime took place.

April 6, 1992: Gerald T. Zerkin enters case. District court conducts evidentiary hearing.

July 29, 1992: Judge Hilton once again denies petition for federal habeas corpus relief.

Sept. 17, 1993: Fourth Circuit, by a 2–1 vote, affirms district court ruling.

Oct. 8, 1993: Fourth Circuit, by a 2–1 vote, denies petition for rehearing. Lawyers anticipate imminent execution date.

Oct. 25, 1993: A DNA test done by Virginia Division of Forensic Science on biological evidence reveals a genetic marker that could not have come from Washington. But Virginia's 21-day rule prohibits a return to court for relief on the grounds of newly discovered evidence. Barry A. Weinstein, Barry C. Scheck, and Peter Neufeld enter case.

Dec. 20, 1993: Washington files petition for pardon with Governor L. Douglas Wilder.

Jan. 14, 1994: Hours before the expiration of his term on January 15, Governor Wilder commutes Washington's sentence of death to life imprisonment with possibility of parole.

Jan., 2000: Washington requests that Governor James Gilmore, III conduct further DNA testing on the biological material previously tested by the Virginia Bureau of Forensic Science.

June 1, 2000: Under press pressure, Governor Gilmore grants request and orders additional DNA testing.

Sept. 7, 2000: Still without test results, Washington files pardon petition with the governor.

Oct. 2, 2000: Governor Gilmore grants an absolute pardon to Washington as to the capital murder conviction but refuses to consider unrelated burglary and malicious wounding convictions. Virginia Department of Corrections subsequently determines that Washington would have been eligible for parole consideration on January 25, 1989, on those charges and that his mandatory release date is February 12, 2001.

Dec. 22, 2000: Virginia Parole Board denies discretionary parole release.

Feb. 12, 2001: Washington is released from prison to parole supervision.