PETITION FOR EXECUTIVE CLEMENCY

of

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TABLE OF CONTENTS

INTRODUCTION

Michael Satcher is a loving father of two small boys, respected within his church, and, prior to 1990, had no history of violent behavior. He was also convicted of the cold-blooded killing of a young Arlington, Virginia woman in March 1990 and sits on death row with a fast approaching execution date of December 9, 1997. This contradiction of character could have a simple explanation -- innocence -- which has not yet been fully explored by the Commonwealth despite the strong reasons presented post-trial for doing so. We implore the Governor to rectify this situation before allowing Michael to be put to death.[1/]

Michael has consistently maintained his innocence. All of the evidence presented at trial supports his innocence except one piece -- a deoxyribonucleic acid ("DNA") test. As discussed below, however, that evidence is now in grave doubt.

We did not become involved as Michael's counsel until after his state court remedies were exhausted and the time had come to pursue federal habeas corpus relief. As of that point, no attorney for Michael had done anything to check the accuracy of the critical DNA test introduced at trial in 1990 (the "1990 test"). Because the physical evidence found at the crime scene was in the custody of the Commonwealth, we did the only thing we could to double-check the 1990 test before

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1/ Currently pending before the United States Supreme Court is a petition by Michael for a writ of certiorari and an application for a stay of execution. We nonetheless have filed this petition to avoid a last-minute plea to the Governor's Office. If the stay motion is decided favorably to Michael, we will notify the Governor's Office immediately.

filing a federal habeas petition -- we ran a new DNA test on Michael's blood, the only relevant DNA to which we had access.

We arranged with the Lifecodes Corporation in Stamford, Connecticut to conduct this test (the "1995 test") and then compared the results to those of the 1990 test on the crime scene evidence. (We replicated the 1990 test as closely as possible; in fact Lifecodes was selected as the laboratory to do the test because it was capable of using the same procedures as the laboratory that conducted the 1990 test.)[2/] The results were stunning: the DNA from Michael's blood did not match the DNA extracted from the 1990 crime scene evidence.

Why did Michael's blood match the crime scene evidence in 1990 but not in 1995? The most obvious explanation is that the 1995 test supports Michael's persistent claim of innocence and the 1990 test was flawed. The Attorney General's Office does not accept this explanation, however, and has argued in the federal habeas corpus proceeding that the discrepancy between the two tests results from the two tests having been run at different times, in different laboratories. Our experts disagree with these arguments. Neither the federal district court nor the United States Court of Appeals for the Fourth Circuit determined the reason for the conflict between the two tests; instead, both federal courts held that a "battle of experts" was an insufficient reason to grant a writ of habeas corpus.

2/ Ironically, the laboratory that conducted the 1990 test, the Tidewater Regional Crimes Laboratory (which is available only for police use and therefore off limits to us), no longer uses the same protocol used in 1990.

We respectfully submit that it would be irresponsible to execute Michael before this "battle of experts" is resolved, especially when a clear and simple means to resolving it exists -- a new test. In fact, Michael has been willing for some time to address the Commonwealth's arguments regarding the 1995 test: he authorized us to request the crime scene evidence from the Commonwealth, so that a new test could be run comparing the crime scene evidence and his blood at the same time, in the same laboratory.

The Attorney General's Office has consistently prevented such a test by refusing us access to the crime scene evidence even though the test would not significantly delay the execution (it would take approximately four weeks to complete and, in fact, could have been run two years ago had the Attorney General made the requisite material available when we first asked for it), will not cost the Commonwealth anything (we will pay for it), and, most importantly, will clear up the discrepancy between the 1990 test and 1995 test. Thus, simply put, the issue for the Governor's Office is why it should not authorize a free test in order to eliminate any doubt whatsoever about the 1990 test. We urge the Governor to order a new DNA test of the crime scene evidence and Michael's blood before Michael is executed.

Furthermore, even if there were no new DNA evidence demonstrating his innocence, Michael should not be executed. Rather, as one of the jurors from Michael's trial has stated in an affidavit accompanying this Petition, life without the possibility of parole would be the more appropriate punishment for Michael.

Since word that the Commonwealth has set an execution date has spread, there has been an outpouring of community support for Michael, not only from friends and family, but from others who have known Michael throughout his life. A District of Columbia corrections officer,[3/] a junior high school principal,[4/] the owner of a beauty shop,[5/] church choir members[6/] -- people from all walks of life have written and called to tell us that they do not believe that Michael should be executed. All state their belief that Michael could not have committed these crimes. And all unanimously describe Michael as a good father, a family man, a quiet man, a religious man, and a peaceful man. Michael's conduct during incarceration also demonstrates that he is not the type of person the Commonwealth should execute. His record is devoid of a single instance of violent behavior. Indeed, there is nothing to suggest that he poses a future danger to others within the prison community.

The jury that determined Michael's sentence did not have the option of choosing life without the possibility of parole because Virginia did not offer that option

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3/ Affidavit of Raleigh James ("Raleigh James Affidavit"), sworn to on Nov. 5, 1997, annexed hereto as Exh. 2.

4/ Affidavit of Dr. George Rutherford ("Rutherford Affidavit"), sworn to on Oct. 23, 1997, annexed hereto as Exh. 3.

5/ Affidavit of Gerald L. Harrington ("Harrington Affidavit"), sworn to on Oct. 20, 1997, annexed hereto as Exh. 4.

6/ Affidavit of Rosemary Alexander ("Alexander Affidavit"), sworn to on Oct. 17, 1997, annexed hereto as Exh. 5; Affidavit of Daniel Harrison ("Harrison Affidavit"), sworn to on Oct. 24, 1997, annexed hereto as Exh. 6.

at the time of Michael's trial. The Governor does. Thus, we respectfully urge the Governor to consider that option.

A tragedy occurred in March of 1990; no one connected with Michael's defense forgets for one minute the terrible acts committed that evening. We simply do not believe that justice will be served by executing Michael for that offense.

I.

THE EVIDENCE AGAINST MICHAEL WAS WEAK.

Michael was convicted on July 30, 1991 of the capital murder, robbery and rape of Ann Borghesani and the attempted rape of Deborah Abel, two offenses that, over the objection of the defense, had been joined for trial. As illustrated below, the evidence supporting both crimes was extremely weak; Michael's conviction rested almost exclusively on the strength of the trial DNA evidence.

The Offenses

The Borghesani Murder

Ann Borghesani was expected at a birthday party being given for her at 8:00 p.m. on the evening of March 31, 1990. She was still at her apartment when her roommate left between 7:10 and 7:15 p.m. When Ms. Borghesani did not show up for the birthday party, her friends decided to call the police. At 8:30 a.m. the next morning, Ms. Borghesani's body was found at the bottom of an outdoor stairwell of a building that is located off a bike path in Arlington County, Virginia. A medical

examiner determined that Ms. Borghesani's death was caused by multiple stab wounds. There was no evidence presented at trial as to the specific time of death.

The Abel Assault

At approximately 7:10 p.m. on the evening of March 31, 1990, Deborah Abel was riding her bicycle along the same bike path that passed by the building where Ms. Borghesani's body was found. While cycling at a fairly rapid pace, she made brief eye contact with a man walking toward her. Seconds later, she was pushed from her bicycle, forced to the ground, and jumped on from behind. Ms. Abel's glasses were knocked off her face when she was first attacked, and for the remainder of the attack she was forced to lie on her stomach. She never saw the face of her assailant during the attack. No weapon was used in the attack.

Shortly after 7:15 p.m., a passerby was bicycling along the same bike path. The passerby, Mark Polemeni, noticed a man kneeling on the side of the bike path "throw a punch to the ground." Mr. Polemeni stopped, got off of his bicycle, and chased after the man. The man ran away, with Mr. Polemeni chasing him. When the man disappeared from sight, Mr. Polemeni returned to his bike, and saw, for the first time, Ms. Abel.

Mr. Polemeni and Ms. Abel went together to call the police. Within a short time, eight to ten police officers were at the bike path, along with a tracking dog. More than one hour after the Abel incident, at least one police officer and the tracking dog were still at the bike path investigating the scene.

Evidence Introduced to Link Michael to the Borghesani Murder

Traditional Evidence

Traditional evidence linking Michael to the Borghesani murder was scant. Perhaps because of this, no arrest was made for the Borghesani murder for nearly five months.

No eyewitness placed Michael at the crime scene. No murder weapon was ever found. An awl found in Michael's car at the time of his arrest -- which Michael testified he used to remove his car radio -- was, according to the prosecution's medical examiner, "consistent" with the weapon used to inflict Ms. Borghesani's stab wounds. The same examiner testified, however, that no traces of blood or tissue were found on the awl and that there was no sign that it had been used in an attack. Furthermore, the examiner admitted that the murder weapon also could have been any ordinary household item, such as a knife, scissors, nail, or sharpened screwdriver, and that there was no indication that Michael's awl was, in fact, the murder weapon.

Neither motive evidence nor evidence that Michael had any violent history was introduced at trial. The best the prosecution could do on this score was introduce evidence that, after Michael's arrest, the officer who transported him to the detention facility asked him: "What's up?" and, according to the officer, Michael stated: "The police are trying to frame me for a murder or something or a rape or something."

No witness testified that Michael had been seen with Ms. Borghesani either on the night of her murder or at any other time. Other than a highly suspect in-court identification by Ms. Abel, which was the basis for a grant of habeas corpus at the federal district court level and will be discussed below, and the DNA evidence, the prosecution did not present any evidence that Michael was anywhere near the bike path on the evening of the murder.

Hair and Serology Evidence

At the time of his arrest, Michael voluntarily gave the police blood, saliva and hair samples. The prosecution attempted to match these samples with hair and semen samples found on Ms. Borghesani's clothing and taken from her body.

The prosecution retained a hair expert to conduct tests on hairs found on the victim and at the crime scene. That expert, called by the defense, testified that three African-American pubic hairs found in Ms. Borghesani's pubic area at the crime scene could not have come from Michael or Ms. Borghesani. He also testified that he could not identify Michael or Ms. Borghesani as the source of the other 29 hairs found at the crime scene.

Serological analysis could only place Michael in a group comprised of about 17 million people who could have contributed the semen found on Ms. Borghesani's pants. Another suspect whose blood was tested by the Commonwealth also fell within that group.

DNA Evidence

Thus, the prosecution's only direct evidence linking Michael to the murder was DNA evidence, which was presented principally by Richard A. Guerrieri, a forensic DNA analyst employed by the Commonwealth. Mr. Guerrieri testified that he performed a Restriction Fragment Length Polymorphism ("RFLP") analysis[7/] on stained areas of the victim's pants and coat and vaginal swabs. (The tests on the pants and coat stains ultimately did not yield any results because of insufficient DNA.) Mr. Guerrieri also tested Michael's blood. The DNA testing was conducted at the Tidewater Regional Crimes Laboratory in Norfolk, Virginia (the "Tidewater Lab") -- a laboratory that at that time was not subject to accreditation or licensing requirements, was not operated under uniform standards, and often did not conduct confirmatory testing of initial test results.

Mr. Guerrieri compared the DNA in the crime scene evidence with the DNA in Michael's blood at four probes, the most discriminating of which was the D2S44 probe. Based on an application of the Commonwealth's procedures for determining a "match," Mr. Guerrieri testified that the DNA profile of the crime scene evidence matched the DNA profile of Michael's blood at all four probes, and concluded that "the probability of randomly selecting an unrelated individual with the DNA profile matching Michael's was approximately one in forty million."

7/ A brief description of DNA testing, RFLP analysis and the methods of calculating the probability of a match is annexed as Exh. 7 hereto.

Mr. Guerrieri admitted, however, that had the two samples not matched at any one of the four probes, Michael would have been ruled out as the source of the DNA in the crime scene evidence.

Dr. Ronald T. Acton, a molecular geneticist, and Dr. Laurence D. Mueller, a population geneticist, testified as DNA experts on behalf of Michael. Dr. Acton described problems inherent at that time in forensic DNA testing and specific deficiencies in the Tidewater Lab's testing procedures that could result in false matches, which could not necessarily be detected from looking at the autoradiographs.

Drs. Acton and Mueller both testified that the population database used by the Tidewater Lab understated the probability of a random match because, among other reasons, it did not take into account the higher frequencies of random matches within certain ethnic, racial and geographic subpopulations whose constituents tend to have children with people in their own subpopulation. Drs. Acton and Mueller also testified that the use of the product rule did not accurately reflect the true probability of a random match because the assumptions underlying the use of the product rule -- that the DNA fragments identified by the probes used in forensic DNA testing are independent of each other -- had not been established, thereby resulting in artificially low numbers for probabilities of matches.

Evidence Linking Michael to the Abel Attack

The Abel Identification

Immediately following her assault, Ms. Abel gave a police sketch artist a detailed description of the man she had seen briefly on the bike path. Mr. Polemeni likewise described the man he saw to police.

As shown in the chart below, Michael's appearance at the time of his arrest (according to police arrest records) differed substantially from the person described by Ms. Abel and Mr. Polemeni:

Trait	Abel Contemporaneous Description	Polemeni Contemporaneous Description	Michael at Time of Attack
Age	25-30	25-30	21
Height	5'9" to 5'10"	5'9" to 5'10"	5'6"
Weight	190-200	195	152
Build	"large, stocky"	"large, stocky"	medium
Face	"no scars of any kind"	"no scars"	visible facial scarring
Hair	"Afro" style	"full head of hair"	short, cropped
Complexion	medium	--	dark

See Satcher v. Netherland, 944 F. Supp. 1222, 1295 (E.D. Va. 1996), annexed hereto as Exh. 8.

Over 15 months after the attack and eleven months after Michael's arrest, Ms. Abel and Mr. Polemeni were called in to view a police lineup that included Michael. Immediately prior to the lineup, Ms. Abel and Mr. Polemeni reviewed the

sketch of the assailant that they had helped the police prepare the day after the attack, and, following their review, were told to choose one of the six people in the lineup only if they were "absolutely sure" that he was the assailant. After viewing the line up participants for an unlimited time, all of whom were asked to walk forward and back, Ms. Abel identified "Number Two" in the line-up as her assailant. "Number Two" was not Michael. Mr. Polemeni could not identify any of the six men in the lineup as the man he saw on the night of the attack.

The trial commenced two weeks after the police lineup. During the two days of jury selection, Michael, the only African-American man in the area, sat at the defense table. Ms. Abel also sat through jury selection, fully aware that Michael was the accused.

After the trial commenced, the prosecution called Ms. Abel to the witness stand where she pointed to Michael as the person who had attacked her. The defense immediately objected to Ms. Abel's identification as "highly suggestive" and one "that's going to lead to misidentification" because it was "basically an in-court show-up of one person." The trial judge overruled the objection. On cross-examination concerning Ms. Abel's sudden ability to identify Michael, she stated that "the way he walked" and "the way he shrugged his shoulders" in the courtroom "remind[ed] her of that night."

The only other evidence presented by the prosecution linking Michael to the Abel assault was the evidence of the Borghesani offense, which the prosecution

claimed was committed by the same person because (i) Ms. Borghesani's body was found not far from the site of the Abel attacks; and (ii) Ms. Borghesani was last seen shortly after the Abel assault. However, because of the presence of police and search dogs in the area of the Abel attack, it was unlikely that the Borghesani murder occurred in that area before they left at approximately 8:30 p.m. Evidence was also introduced that Ms. Borghesani's and Ms. Abel's purses were found in the same area frequented by homeless people.

Judicial Proceedings

On direct appeal, a majority of the Virginia Supreme Court affirmed the convictions and death sentence over the dissents of two justices. Satcher v. Commonwealth, 421 S.E.2d 821 (Va. 1992), annexed hereto as Exh. 9. Thereafter, the U.S. Supreme Court denied Michael's petition for a writ of certiorari, Satcher v. Virginia, 507 U.S. 933 (1993), and his petition for rehearing, 507 U.S. 1046 (1993).

Two weeks before the date scheduled for Michael's execution, the Circuit Court for Arlington County appointed counsel to represent Michael in state habeas proceedings. Untrained and inexperienced in capital cases, Michael's counsel sought additional time to prepare a petition. That request was denied, and thereafter Michael's state habeas petition was summarily denied on the grounds that the arguments raised in the petition -- including the argument that the joinder of the Abel

and Borghesani offenses violated the U.S. Constitution -- had been determined previously on direct appeal.

Because of an error by the Clerk's office, Michael's counsel was not notified of the dismissal of the petition until after the time for filing a notice of appeal had expired. Although the Circuit Court entered a new order dismissing Michael's petition so that Michael's time to file his appeal would be revived, the Virginia Supreme Court dismissed Michael's appeal as untimely. Thus Michael was denied any substantive appellate review of his state habeas petition. Michael's pro se petition for a writ of certiorari was denied by the U.S. Supreme Court. Satcher v. Netherland, 513 U.S. 1193 (1995).

Thereafter, with new counsel, Michael commenced federal habeas corpus proceedings in the United States District Court for the Eastern District of Virginia. On October 8, 1996, the District Court granted Michael's petition, concluding that the admission of the Abel in-court identification violated Michael's constitutional rights and had a highly prejudicial influence on the jury's decision to convict. That determination was reversed by the United States Court of Appeals for the Fourth Circuit.

II.

EXECUTION CANNOT BE JUSTIFIED ON THE BASIS OF THE FLAWED TRIAL DNA EVIDENCE.

Since his arrest, Michael has consistently maintained his innocence. And, as explained above, a considerable amount of evidence supports his innocence. For instance:

- A Commonwealth forensic expert testified that African-American pubic hair removed from the pubic area of the victim was neither the victim's nor Michael's.
- The murder weapon was never found. The awl found in Michael's car when he was arrested showed no traces of having been used in a murder.
- Michael had no history of violent behavior. There was no evidence that he had committed any prior violent acts. There was no motive evidence whatsoever.
- The police sketches drawn immediately after the Abel assault look nothing like Michael[8/] and failed to help either Ms. Abel or Mr. Polemeni identify Michael at a neutral police lineup. Indeed, Ms. Abel identified someone other than Michael at the lineup as her attacker, and Mr. Polemeni could not identify anyone in the lineup as the man he saw.

In fact, the only evidence that pointed to Michael as the murderer is the 1990 test performed by the Tidewater Lab. Until the federal habeas corpus stage of

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8/ A copy of the police sketch is annexed hereto as Exh. 10. A picture provided by Michael's family taken within a few months of the Abel attack is annexed hereto as Exh. 11. Clearly, the sketch is not of Michael.

post-conviction proceedings, the Tidewater Lab's test was the only DNA evidence in the case. That has changed.

In preparation for the filing of Michael's federal habeas corpus petition, a new DNA test was run on Michael's blood. The results of that test cast serious doubt on Tidewater Lab's test.

Specifically, on April 12, 1995, a sample of Michael's blood was sent to Lifecodes Corporation ("Lifecodes"), a DNA testing laboratory that has in the past performed tests for the Commonwealth, with instructions to perform a DNA test using the same method, probes and restriction enzyme used by the Tidewater Lab to conduct the 1990 test. Because the Tidewater Lab's 1990 testing procedures were based on Lifecodes' procedures, and because Lifecodes was equipped to conduct a new test using those procedures, a retest by Lifecodes was the best and only way to replicate the Tidewater Lab's test.[9/] (The Tidewater Lab is available only to the police and, in any event, no longer uses the same procedures and protocols it used in 1990.) The sample was sent to Lifecodes anonymously -- nothing was done (or could have been done) by Michael or the defense team to affect the results of the 1995 test.

The results of the 1995 test fully support Michael's claim of innocence. Dr. Aimée Bakken, a molecular geneticist, analyzed the results. After comparing the

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9/ Affidavit of Dr. Peter D'Eustachio ("D'Eustachio Affidavit"), sworn to on November 28, 1997, ¶ 6, annexed hereto as Exh. 12.

Tidewater Lab's measurements of the two bands for one of the DNA probes (the highly discriminating D2S44 probe) with Lifecodes' measurements of the two bands for the same probe, Dr. Bakken concluded, based on the Tidewater Lab match criteria used by the Commonwealth at trial, that the DNA from Michael's recent blood sample did not match the crime scene evidence.[10/] In other words, the bands "fell outside (exceeded) the ±2.5% match criterion" and were not a "match" pursuant to the Tidewater Lab's own match criterion.[11/] This is not a technicality -- as the Commonwealth's expert Mr. Guerrieri admitted at trial, no two DNA samples can be declared a match unless the difference between the measurements falls within the applicable match window.

It is a fundamental tenet of forensic DNA testing that "[i]f there is a non-match on one probe, it is irrelevant how many matches there are for other probes -- the DNA samples could not have originated from the same source."[12/] Indeed, Mr. Guerrieri, the Commonwealth's forensic expert, confirmed at trial that a non-match on any one probe would eliminate a suspect as the source of the sample.[13/] Thus, the 1995 test eliminates Michael as the source of the semen evidence.

10/ Affidavit of Dr. Aimée Bakken ("Bakken Affidavit"), sworn to on July 13, 1995, ¶ 18, annexed hereto as Exh. 13.

11/ Bakken Affidavit, ¶ 18 (Exh. 13); D'Eustachio Affidavit, ¶ 6 (Exh. 12).

12/ Affidavit of Laurence D. Mueller, sworn to on Oct. 27, 1995, ¶ 5, annexed hereto as Exh. 14.

13/ Transcript of Trial, July 22, 1991, at 201-02, annexed hereto as Exh. 15.

In response to the 1995 test, the Attorney General's Office has not disputed that the two bands for the D2S44 probe on the 1995 test, when compared to the same bands on the 1990 test introduced at trial, fall outside the Tidewater Lab's match window. Moreover, none of the Commonwealth's experts dispute that, had the 1995 test of Michael's blood been introduced at trial rather than the test that was conducted on Michael's blood in 1990, a non-match would have been the result. Instead, what they contest is the viability of comparing Lifecodes' 1995 test to the Tidewater Lab's 1990 test.

On a scientific level, the arguments advanced by the Commonwealth's experts suffer from significant flaws. DNA tests performed at different laboratories at different times are regularly compared in forensic DNA analysis. Indeed, every time the DNA profile of an evidentiary sample is compared to a population database to estimate the probability of that profile occurring in the general population, comparisons are necessarily made between tests conducted at different times and in different laboratories.[14/]

On a practical level, whether or not such a comparison is scientifically sound boils down to scientific judgments. In the judgment of Michael's experts, such a comparison is scientifically sound. In the judgment of the Commonwealth's experts,

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14/ D'Eustachio Affidavit, ¶ 17 (Exh.12); Affidavit of Aimée Hayes Bakken ("Bakken Affidavit #2"), sworn to on Oct, 27, 1995, ¶¶ 2-5, annexed hereto as Exh. 16.

such a comparison is not. However, at the end of the day, relying on expert judgments is unnecessary because a better way to resolve this dispute exists -- conducting a new DNA test on both the crime scene DNA and Michael's blood at the same time and in the same laboratory.[15/]

At trial, the Commonwealth's expert testified that insufficient DNA remained for a new RFLP test. However, a new type of DNA test -- a Polymerase Chain Reaction ("PCR") test -- has been developed since Michael's trial that can yield conclusive results on even small, aged samples of genetic material that might not be sufficient for RFLP testing.[16/]

It should be noted (and is discussed in further detail in the accompanying affidavit of Dr. Peter D'Eustachio) that the 1995 test is not the only reason to question the 1990 test. In 1990, RFLP testing was relatively new and the people who did it were relatively inexperienced. Vast improvements have occurred over the last seven years.

Moreover, unexplained anomalies existed on the autoradiograph of the 1990 test of the D2S44 probe, the same probe where the non-match occurred in 1995.

15/ D'Eustachio Affidavit, ¶¶ 17-21 (Exh. 12).

16/ D'Eustachio Affidavit, ¶ 18 (Exh. 12). PCR testing is quick. Complete results could be obtained in a mere four weeks. Michael's counsel are ready and willing to pay for such testing. Dr. Edward Blake of Forensic Science Associates in Richmond, California, has advised us that he is willing to perform such testing, and Michael is willing to permit the Attorney General's Office to be present during the test and review Dr. Blake's work product.

Specifically, there should be a maximum of only two bands per DNA probe on the autoradiograph; the D2S44 autoradiograph of the 1990 test, however, contained four "unmatching extra bands" in the lane that purported to contain Michael's blood.[17] These bands were not reported and not sized by the Tidewater Lab in analyzing the results of the 1990 test.[18] According to Drs. Bakken and D'Eustachio, appropriate procedure would have required the Tidewater Lab to report and explain these extra bands. The Tidewater Lab's failure to do so casts independent doubt on the 1990 test.[19]

For the past two years, Michael has been trying without success to obtain access to the crime scene evidence to determine whether enough of the evidence remains for additional DNA testing. However, the Attorney General's Office has steadfastly refused to grant Michael and his attorneys access to such evidence. Thus, we have never been able to address directly the criticisms of the 1995 test made by the Attorney General's Office's experts or the questions raised by our experts concerning the anomalies in the 1990 test by retesting Michael's blood and the crime scene samples in the same laboratory, at the same time.

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[17] Bakken Affidavit, ¶¶ 11-14 (Exh. 13).

[18] Bakken Affidavit, ¶ 16 (Exh. 13).

[19] Bakken Affidavit, ¶¶ 15-17 (Exh. 13); D'Eustachio Affidavit, ¶ 16 (Exh. 12).

The Attorney General's steadfast refusal to release any remaining forensic evidence for independent testing is deeply troubling. If the Attorney General's Office is convinced of Michael's guilt, one would think it would welcome further DNA testing. We respectfully ask the Governor to intervene and require any remaining forensic evidence to be released for further testing.[20/]

III.

EVEN IF MICHAEL WERE NOT INNOCENT, LIFE WITHOUT PAROLE WOULD BE A MORE APPROPRIATE SENTENCE FOR HIM.

When the jury met to consider the appropriate sentence for Michael, it was not given the option of life imprisonment without parole because, in 1990, Virginia did not provide for such a sentence. Thus, the jury, which had already determined that Michael had committed a heinous murder, had only one way to keep

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20/ The 1996 National Research Council's Committee on DNA Forensic Science strongly urges that such a retest be allowed:

> A wrongly accused person's best insurance against the possibility of being falsely incriminated is the opportunity to have the testing repeated. Such an opportunity should be provided whenever possible. As we have previously noted, retesting provides an opportunity to identify and correct any errors that might have been made during the course of analysis.

National Research Council, Committee on DNA Forensic Science: An Update, The Evaluation of Forensic DNA Evidence, at 87 (1996).

him off the streets -- a sentence of death.[21/] One of the jurors who sat on the jury has stated that, had life without parole been an option, she would have voted for it instead of a death sentence. Two others have stated that they would have seriously considered the option of life without parole if it had existed.

The Governor has the option to commute Michael's death sentence to life in prison without parole.[22/] We respectfully submit that, regardless of the new DNA test or its results, the Governor should commute Michael's sentence.

21/ That this issue posed a problem for the jurors is evident from the transcripts of the sentencing hearing. See Trial Transcript, July 31, 1991, at 98-106, annexed hereto as Exh. 17.

22/ A recent poll conducted by Virginia Polytechnic Institute shows that Virginians favor life without the possibility of parole over a death sentence. See Quality of Life in Virginia Poll, Center for Survey Research at Virginia Tech (1997). Polls from other states confirm that support for the death penalty dwindles to a minority when the public is given the option to choose between death and life without the possibility of parole. See, e.g., Courier Journal, Kentucky Execution Re-opens Life-Without Parole Debate, Sunday, July 13, 1997, at 1; Buckeye State Poll (Ohio State Univ. College of Social and Behavioral Sciences, Survey Research Unit) (for a copy, contact Drs. Erik Stewart and Paul Lavrakas at (614) 292-6671.); William Bowers et al., A New Look at Public Opinion on Capital Punishment: What Citizens and Legislators Prefer, 22 Am. J. Crim. L. 77 (Fall 1994); see also Brown v. Texas, 66 U.S.L.W. 3295 (U.S. Oct. 20, 1997) (noting that poll data shows that support for the death penalty dropped when life without the possibility of parole was presented as an alternative).

Michael Is An Appropriate Candidate for Clemency

A Devoted Family Man and Friend

As described by his family, friends, teachers, religious leaders, and mere acquaintances, Michael is a good person, a responsible person, and a caring person. The murder of Ms. Borghesani -- if Michael committed it -- would be a horrible aberration.

Since Michael's execution date was set, we have been inundated with mail and telephone calls voicing support for him. Most impressive is the unanimity of these people's descriptions of Michael. He is consistently depicted as quiet, a peacemaker, responsible, and a devoted father and Christian. The stories told by his family, friends and acquaintances all illustrate these traits. For instance, Gloria Williams, Michael's companion and the mother of his two young sons, Mike, age 9, and Mark, age 7, says:

> Michael has always been concerned about his sons. Even from prison, he still calls me about once or twice a week and talks to them on the phone at least once a week. He worries about what they have been doing, and I send him their report cards and progress sheets from school. He talks to them about school work and about acting right in school. When little Mike was born, he and Michael were just like twins. Michael would wake little Mike when he got home from work just to spend some time with him (Michael had a night job then). I have never had to get up in the middle of the night; Michael always took care of them. . . .

> Michael was such a good father -- he was always looking after those boys, taking them everywhere he went.[23/]

Michael's junior high school principal, Dr. George Rutherford, describes him as "well-mannered and respectful." He states that Michael was well-liked by the other children and that his great passion was the marching band, for which he would practice before and after school. Dr. Rutherford also says, "I have seen a lot of kids, and am a pretty good judge of character. I would have no problem believing that some of the students I have could commit the kind of crime Michael was accused of, but Michael is not even capable of doing that."[24/]

These themes of family devotion and peaceful behavior consistently are mentioned when people talk about Michael. Even before he had his own children, Michael's dedication to his parents, siblings and other relatives has always been profound. Michael comes from a large, closely knit family, and he is very close to everyone in his extended family. Even while in prison, he has been very concerned for and supportive of them.[25/] As one aunt says, "Michael was the kind of kid you could trust to do something for you over all the other kids in the family, even over [your]

[23/] Affidavit of Gloria Williams ("Williams Affidavit"), sworn to on Nov. 26, 1997, annexed hereto as Exh. 1.

[24/] Rutherford Affidavit (Exh. 3).

[25/] Williams Affidavit (Exh. 1).

own kids."[26/] His godmother describes him as lovable and the kind of person who would help anybody out -- and would refuse to accept any money for doing so.[27/] Other relatives say, "You would never see Michael fighting or horseplaying. In fact, if there was anybody in the family you would have picked out as a Christian -- a preacher -- it would have been Michael. . . . [H]e was always willing to help you." [28/]

Among his neighbors, Michael was known for being well-mannered and quiet. And Michael was also well known in his neighborhood for his love of basketball (which he frequently played with the neighborhood kids), other sports, picnics, and his family.[29/] Michael's friends consistently describe him as a good friend: someone who would offer you a place to sleep if you had a problem at home, who would stick up for you, who would help you carry your groceries, or who would do any favor asked of him.[30/]

26/ Affidavit of Annie Satcher ("Annie Satcher Affidavit"), sworn to on Oct. 7, 1997, annexed hereto as Exh. 18.

27/ Alexander Affidavit (Exh. 5); see also Affidavit of Bobbi Pruitt, sworn to on Nov. 13, 1997, annexed hereto as Exh. 19.

28/ Affidavit of Gary and Faye Satcher, sworn to on Oct. 23, 1997, annexed hereto as Exh. 20.

29/ Affidavit of Deidre Hamilton, sworn to on Oct. 16, 1997, annexed hereto as Exh. 21; Harrington Affidavit (Exh. 4); Raleigh James Affidavit (Exh. 2); Affidavit of Thelma L. Kelly, sworn to Oct. 24, 1997, annexed hereto as Exh. 22.

30/ Affidavit of Reginald James ("Reginald James Affidavit"), sworn to on Oct. 31,

(continued...)

A Non-Violent Man

According to those who know him, Michael has never displayed violent behavior. His one pre-1990 arrest was a drug-related offense. Prior to 1990, he had no history of any other criminal conduct, violent or otherwise.[31/] His family and friends have never seen any violent side to him; no one even can remember him fighting with his siblings as a child. What many do remember is that while growing up, Michael was the calm one, the peacemaker.[32/] In fact, Michael's friends say that he is, and always has been, extremely hard to provoke.[33/]

Michael's behavior in prison is consistent with the descriptions we have received of his character prior to 1990. Raleigh James, a neighbor who also was a prison guard at Lorton when Michael was incarcerated there for his drug possession offense, says that while at Lorton, Michael "was very quiet, stayed to himself, and didn't bother anybody. He was no trouble."[34/]

[30/](...continued)
1997, annexed hereto as Exh. 23; Affidavit of Robert Scott ("Scott Affidavit"), sworn to on Nov. 4, 1997, annexed hereto as Exh. 24.

[31/] On August 18, 1990, Michael was arrested on charges relating to attempted assaults of women on a different bike path. Michael has never been tried for, or convicted of, these offenses.

[32/] Annie Satcher Affidavit (Exh. 18).

[33/] Reginald James Affidavit (Exh. 23); Scott Affidavit (Exh. 24).

[34/] Raleigh James Affidavit (Exh. 2).

Since entering prison, Michael has done nothing to indicate that he must or should be put to death. Rather, he has been a model prisoner. There is no evidence of fighting or violence. His main interests have been his family, as difficult as that has been from inside a prison, and his church. In devoting himself to those interests, Michael has shown that his life is precisely as it was before March 1990.

A Church-Going Man

One additional fact about Michael is mentioned over and over again by almost everyone who knows him: his dedication to God and the church. Michael was brought up in the New Macedonia Baptist Church in Southeast Washington, a large church with numerous active members. Michael did not just passively attend church, he actively participated in it: he sang with the church choir from the age of 6 and belonged to the Junior Usher Board.[35/]

Michael remains committed to God. At trial, Kenneth Butler, the prison minister, testified that Michael attended his bible classes regularly, and that, in his 18 years of religious counseling at prisons, Michael was one of only three people who had ever requested a copy of the minister's bible study notes. Mr. Butler also testified that

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35/ Harrison Affidavit (Exh. 6); Affidavit of Elease Pugh, sworn to on Oct. 22, 1997, annexed hereto as Exh. 25; Letter of Reverend Walls, Nov. 7, 1977, annexed hereto as Exh. 36.

Michael was the "meekest, mildest, quietest, self-effacing person that I have ever seen in jail."[36/]

A Man Whose Cause Has Attracted People From All Over

In addition to the affidavits described above,[37/] we have received a number of petitions collected by his family and letters from people who live out of state -- all who ask that Michael be given a chance to prove his innocence.[38/] Some of the people who wrote letters can barely read and write, yet they all felt compelled to do whatever they could on Michael's behalf.

Michael's Jury Would Have Seriously Considered Life Without Parole

Jurors who sentenced Michael to death would seriously have considered the alternative of life in prison without parole had they had the opportunity to do so. Three jurors have submitted affidavits stating as much.[39/] Moreover, one juror, Rubye Baumgardner, has sworn in an affidavit that she would have voted for life imprisonment without parole had she been given the option.[40/] This is all the more

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36/ Transcript of Trial, July 31, 1991, at 54, annexed hereto as Exh. 26.

37/ In addition to the affidavits cited in this Petition, a number of additional affidavits are annexed hereto as Exhs. 27 to 35.

38/ The letters are annexed hereto as Exh. 37; the petitions are annexed hereto as Exh. 38.

39/ See Exhibits 39 through 41 annexed hereto.

40/ Affidavit of Rubye Baumgardner, sworn to on Nov. 4, 1997, annexed hereto as (continued...)

significant because, to impose the death penalty, the jury had to be unanimous; Ms. Baumgardner's affidavit creates a substantial question as to whether such unanimity would have been possible among the jurors. Indeed, on the basis of this affidavit, it is likely that the jury would have decided that life without the possibility of parole was more appropriate for Michael.

* * *

We implore the Governor to consider and grant Michael the option that the jury did not have available to it to consider -- life imprisonment without the possibility of parole.

IV.

ERRORS AT MICHAEL'S TRIAL RENDER THE JURY'S VERDICT UNRELIABLE.

As discussed above, without the DNA evidence, the prosecution's case against Michael was almost non-existent, and now, even that DNA evidence has been called into question, further casting doubt on his conviction. The manner in which Michael's trial was conducted only creates further discomfort regarding his conviction.

[40/](...continued)
Exh. 41.

The Improper Joinder of Two Different Crimes

Michael was indicted for the murder of Ms. Borghesani on November 19, 1990. On April 15, 1991 -- some five months after the Borghesani indictments were returned -- the prosecution sought and was granted an indictment against Michael in connection with the Abel attack. Nothing had prevented the Commonwealth from obtaining the Abel indictment sooner; in fact, it had collected all evidence relating to the Abel offense before it indicted Michael for the Borghesani offense.

The trial court permitted the joinder of the two crimes for trial over the objection of the defense. Thus, instead of attempting to convince the jury that a man with no violent past should be sentenced to death because of the results of a DNA test -- a proposition the prosecution apparently found daunting -- the prosecution was able to cumulate weak evidence of two crimes, thereby making the evidence of each crime appear stronger than it really was.

Of course, the charges should never have been joined together in one trial because the evidence did not support the notion that these crimes were at all connected.[41/] In fact, the dissenting Justices of the Virginia Supreme Court -- the only

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41/ For example, the evidence connecting the offenses consisted of the fact that Ms. Abel was assaulted and Ms. Borghesani was murdered within an approximate twelve-hour period; Ms. Abel's assault occurred somewhere in the same general vicinity of where Ms. Borghesani's body was found; Ms. Abel's (continued...)

court ever to reach the merits of the joinder issue[42/] -- wrote that the joinder of the two offenses was "so unfair and unjust that it constitute[d] a denial of Satcher's rights to due process of law guaranteed by the federal constitution and the Constitution of Virginia." Satcher v. Commonwealth, 421 S.E.2d 821, 850-51 (Va. 1992). The dissenting Justices further pointed out that the only reason for the prosecution to join the two offenses was "to show the character of the accused and the accused's disposition to commit offenses similar to those charged." Id. at 850.

The impropriety and prejudice of the joinder has not been reviewed since the Virginia Supreme Court's decision due to legal technicalities. Thus, Michael, through no fault of his own, has been denied the very protection that federal habeas corpus review is intended to provide.

41/(...continued)
and Ms. Borghesani's handbags were both found six days later in a parking lot inhabited by homeless people (although that assertion is contradicted by the trial testimony of one of the Arlington County Police Department detectives); and Ms. Borghesani was raped and Ms. Abel's assailant pulled her pants down. The fact that the police were still investigating the area in which the Abel assault occurred up to one hour after the assault strongly suggests that they did not occur at the same time. And the modus operandi of the two offenses was quite different, in that Ms. Abel's assailant brandished no weapon, while Ms. Borghesani was stabbed.

42/ The state habeas court declined to consider the issue on the ground that it had been decided previously on direct appeal; this decision was never reviewed on appeal because of the "timeliness" dismissal. The federal courts found that the issue had not been presented on direct appeal (a conclusion completely contrary to the state habeas court's decision that the issue had been decided previously) and therefore could not be presented in federal court.

The Abel In-Court Identification

The most obvious evidentiary consequence of the joinder of the Abel offense to the Borghesani prosecution is that it permitted the prosecution to put Ms. Abel on the stand to identify Michael as her assailant. This identification, however, was so unreliable that it should never have been admitted into evidence. As described earlier, the in-court identification was contradicted by Ms. Abel's identification of someone else as her assailant at a non-suggestive lineup two weeks earlier. Moreover, Michael's appearance vastly differed from the description of the assailant given by Ms. Abel and Mr. Polemeni on the day after the attack.

As the District Court observed:

> Only one factor varied between the pre-trial lineup and Ms. Abel's in-court identification of Satcher -- the circumstances of confrontation. Whereas the setting of the pre-trial lineup was neutral, the confrontation preceding the in-court identification

> was highly suggestive. It was only after Michael was effectively singled-out for prosecution by the government and the police that Abel could "identify" him as her assailant with "certainty."
>
> * * *
>
> It simply cannot be ignored that, during a neutral pre-trial lineup when Satcher stood next to four other similarly-clad black men, Abel selected someone other than Satcher. On this record, the Court concludes that Abel's identification of Satcher was determined by the circumstances of his presentment to her as her assailant in the formal judicial process, and not by her observation of him during the attack upon her.

Satcher v. Netherland, 944 F. Supp. 1222, 1296-97 & n.63 (E.D. Va. 1996).[43/]

For more than a quarter century, suggestive in-court identifications have been barred by the United States Supreme Court and the Fourth Circuit Court of Appeals as unconstitutional because they are unreliable and, consequently, have the power to lead to the conviction of innocent men. See, e.g., United States v. Wade, 388 U.S. 218, 228-29 (1967) ("The vagaries of eyewitness identification are well known; the annals of criminal law are rife with instances of mistaken identification."); Smith v. Paderick, 519 F.2d 70, 75 (4th Cir.), cert. denied, 423 U.S. 935 (1975) ("Positive identification testimony is the most dangerous evidence known to the law.... [P]ressured to solve a heinous crime, often conscious of a duty to do so, and eager to

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43/ The Court of Appeals for the Fourth Circuit did not disagree with this analysis; indeed, that court said that this issue "merits serious consideration." Satcher v. Pruett, 126 F.3d 561, at 566 (4th Cir. 1997), annexed hereto as Exh. 42. Rather, the Court of Appeals differed with the District Court only over how harmful the error was.

be of assistance, a potential witness may be readily receptive to subtle, even circumstantial, insinuation that the person viewed is the culprit.").

In a very real sense, the Abel identification evidence was the linchpin of the prosecution's case against Michael. Without it, the prosecution had only the "scientific" evidence -- which was hotly contested at trial and which later testing has confirmed was flawed. And contrary to the Fourth Circuit's determination that the admission of the identification was harmless, all indications are that at the time of trial, the prosecution itself considered the Abel identification quite harmful to Michael. Why else would it have gone to such great lengths to get the Abel identification into evidence, including joining the Abel offense to the Borghesani prosecution; conducting the lineup two weeks before trial; and putting Ms. Abel on the stand even after she could not identify Michael at the lineup. Indeed, what better illustrates the importance of the identification than the prosecution's judgment that it was better to have Ms. Abel identify Michael at trial even though her testimony would elicit cross-examination about her lineup non-identification, than not to have any identification at all.

* * *

As one final example of the many questionable and unfair rulings at trial, we note that the trial court even refused to dismiss for cause prospective juror Herbert Middle, a man who was "friendly" with the police officers that investigated

Michael, had spoken with those officers about the Borghesani investigation, and admitted that these "friendships" would interfere with his ability to render a fair and impartial verdict. Specifically, Mr. Middle said, among other things, "There's a possibility, like I said, I might be swayed to their [the police's] side of the story automatically. With a hearing of this type, it might be best to — I'd like to be excused from it as far as a fair draw on it if possible."[44/]

We could point to many other examples of questionable and unfair rulings at trial, all of which undermine confidence in its outcome. In sum, Michael's trial was so rife with significant error that the jury's "guilty" verdict cannot be trusted.

[44/] Transcript of Trial, July 17, 1991, at 171-72, 182, 199-200, annexed hereto as Exh. 43.

CONCLUSION

The Governor has an opportunity to correct two grievous errors.

First, the new DNA evidence developed by Michael's counsel since his conviction casts substantial doubt on the trial DNA evidence. Had this state of doubt existed at trial, Michael would not have been convicted because the DNA evidence was the critical evidence that identified him as Ms. Borghesani's murderer. The Governor can address this situation quite easily simply by providing Michael access to whatever crime scene evidence still exists so that the 1990 test can be redone. If the retest proves a non-match, the Commonwealth will know it has the wrong man in prison and a great injustice will be avoided. If the new test turns out to be a match, a matter that can be determined within weeks, the Governor can consider the second question presented by Michael's application.

Second, at the time of Michael's 1990 conviction, his jury did not have the option of sentencing Michael to life without parole. One juror has come forward with an affidavit asserting that, had the jury had the option of life without parole, she would have chosen it over a death sentence. Two other jurors have stated that they would have seriously considered such a sentence had it been available. The Governor has the power to heed these jurors and sentence Michael to a life behind bars, a life where he can continue, in a limited way, to be a father to his children, a son to his

parents, and a brother and friend to those who love him. His life before 1990 and his behavior in prison since his conviction warrant this sentence.

Respectfully submitted,

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