EARL WASHINGTON, JR.:

AN INNOCENT MAN

PETITION FOR EXECUTIVE PARDON

TABLE OF CONTENTS

I. INTRODUCTION 1

II. THE FACTS UNDERLYING MR. WASHINGTON'S CONVICTIONS . . . 3

III. THE PRIOR LEGAL PROCEEDINGS 12

IV. THE DNA EVIDENCE 15

V. THE CURRENT LEGAL STATUS: THE CAPITAL CHARGES 18

VI. THE CURRENT LEGAL STATUS: THE NON-CAPITAL CHARGES . . . 19

A. Mr. Washington's Productive Prior Life History . . 20
B. The Isolated Nature of Mr. Washington's Criminal Conduct 20

VII. CONCLUSION 22

INDEX OF EXHIBITS

	TAB
Report of Professor Ruth Luckasson	1
Résume' of Professor Ruth Luckasson	2
Opinion of Washington v. Murray (Washington I)	3
Opinion of Washington v. Murray (Washington II)	4
Excerpts from Joint Appendix	5
Forensic Reports	6
Preliminary Hearing: June 23, 1983	7
Order Dated May 1, 1984	8
Affidavit of Commonwealth's Attorney Jonathan S. Lynn	9
Order Dated May 1, 1984	10
Police Reports	11
Statement of Earl Washington, Jr. (May 22, 1983)	12
Opinion of Washington v. Commonwealth	13
Report of Jeffery Ban Virginia Department of General Services Division of Forensic Science	14
Report of David H. Bing, Ph.D.	15
Executive Clemency for Walter T. Snyder, Jr.	16
Calculation of Good Time Credit	17
Investigative Reports by Virginia Coalition on Jails and Prisons	18
School Records of Earl Washington, Jr.	19
Order Dated May 3, 1984	20

I. INTRODUCTION

This petition for a pardon seeks gubernatorial relief for an innocent man facing execution.

Earl Washington, Jr. is a 33-year-old, black man with mental retardation. His IQ score of 69 ranks him in the bottom 2% of the population. He functions at about the level of a ten-year-old child. He is cooperative, indeed gentle, deferential to those in authority, and eager to please any interlocutor. In a prosecution that relied exclusively on his own statements to the police -- and in which the jury was not informed of then-existing forensic evidence, known to the prosecution, that was facially inconsistent with his guilt -- Mr. Washington was convicted and sentenced to death for the rape and murder of a white woman. Unrepresented by counsel, he came within days of execution.

The justice of that conviction has been in doubt for years: the "confession" upon which it was based was the product of days of police rehearsal and re-shaping, and it emerged from the same series of interrogations that produced four other confessions that the Commonwealth has explicitly or implicitly acknowledged to be false.[1]

Recently, however, Virginia's state crime laboratory has put Mr. Washington's innocence beyond question. The crime laboratory

---

[1] Professor Ruth Luckasson of the University of New Mexico, a nationally-known expert on mental retardation and the death penalty whose report is included herewith, has reviewed all five of these confessions, and describes them as "archetypes of what can happen to people with mental retardation during intense questioning." Report of Professor Ruth Luckasson at 7 (Tab 1).

performed DNA testing on semen left inside the body of Rebecca Williams and had its work subjected to verification by the same outside expert whose report was relied upon to pardon Walter Snyder, Jr. The test results, read in light of the prosecution's own undisputed testimony describing Rebecca Williams dying declaration, show that Mr. Washington did not commit the crime.

Yet the judicial system now offers to Mr. Washington only one remaining step, presentation of a certiorari petition to the United States Supreme Court -- and that Court will not consider the new evidence. Mr. Washington must seek relief from the Governor.

In addition to the absolute pardon on the capital conviction that simple justice demands, Mr. Washington seeks return of the good-time credit he has lost during the ten and a half years he has been wrongly incarcerated on Death Row. This action is necessary to restore the status quo ante with respect to unrelated non-capital convictions that followed from the same interrogation session by the police that led to the capital conviction. The non-capital charges, of burglary and wounding, resulted in a total sentence of 30 years. Mr. Washington should be eligible for parole on those charges, but, because the present situation is one not contemplated by Virginia's statutory structure, the Governor's intervention is needed to assure this result.

II. THE FACTS UNDERLYING MR. WASHINGTON'S CONVICTIONS

The facts set forth in this section are not disputed, and are for the most part drawn from the opinions of the United States Court of Appeals for the Fourth Circuit in Washington v. Murray, 952 F.2d 1472 (4th Cir. 1991) ("Washington I") (Tab 3) and Washington v. Murray, 4 F.3d 1285 (4th Cir. 1993) ("Washington II") (Tab 4), as well as documents from the Joint Appendix ("J.A.") (Tab 5), submitted in connection with the latest appeal.

On June 4, 1982, Rebecca Lynn Williams, returning home at noontime with her two young children to her apartment in the town of Culpeper, 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. Washington I, 952 F.2d at 1475. (Tab 3).

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." (J.A., Vol. V, 1462). (Tab 5).

Similarly, Rebecca 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." (J.A., Vol. V, 1464). (Tab 5).

Suspicion initially focused on one James Pendleton -- and forensic tests showed that seminal fluid stains on the bedding where the rape took place and hairs found in the pocket of a

shirt found at the scene were consistent in some particulars with his, see Forensic Reports (Tab 6) -- but he was never charged, and the crime lay unsolved in the files of the Culpeper County Police Department. Washington I, 952 F.2d at 1475, 1478 & n.6. (Tab 3).

Almost a year later, on May 21, 1983, petitioner Earl Washington, Jr. -- "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," Washington I, 952 F.2d at 1472 (Tab 3) -- was arrested on unrelated charges by the police in Warrenton, in Fauquier County.

These 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 which he knew to be there, and was surprised by the householder, Mrs. Helen 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.

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. In the

fifth case -- which resulted in the present capital murder conviction and sentence -- the statement had to be re-shaped through four rehearsal sessions before reaching a form the authorities considered usable. See Police Reports and Statement of Earl Washington, Jr. (May 22, 1983). (Tabs 11 and 12).

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. They began by discussing the Weeks case, and obtained a "confession." According to a vivid account contained in this document, Mr. Washington had attempted to rape Mrs. Weeks. (J.A., Vol. I, 125). (Tab 5). But Mrs. Weeks testified to the contrary at the preliminary hearing (Tr., June 23, 1983, at 6-7) (Tab 7) and the Commonwealth dropped the charge of attempted rape. (Tr., June 23, 1983, at 25). (Tab 7). Thereafter, Mr. Washington pleaded guilty to statutory burglary (Va. Code, § 18.2-89) and malicious wounding (Va. Code, § 18.2-51), and was sentenced to consecutive 15-year prison terms. See Order dated May 1, 1984. (Tab 8). (These events are described in greater detail in the affidavit of former defense attorney (now Fauquier Commonwealth's Attorney) Jonathan S. Lynn. See Affidavit of Jonathan S. Lynn. (Tab 9). 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. Mr. Washington confessed to this too, but the charge was dismissed. Mr. Washington's "confession" was inconsistent with important facts in that case. See Order dated May 3, 1984. (Tab 20).

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

Confession #4. Mr. Washington then "confessed" to the rape of a woman named Rawlings. (1 J.A. 118-20). (Tab 5). He was charged with this crime, but the charge was dismissed by the Commonwealth. See Order dated May, 1, 1984. (Tab 10). The victim's description of the attacker was inconsistent with Mr. Washington and she had previously identified someone else as the assailant. See Affidavit of Commonwealth's Attorney Jonathan S. Lynn. (Tab 9).

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." (1 J.A. 120). (Tab 5). See also Police Reports. (Tab 11).

The officers then asked Mr. Washington a series of leading questions about the crime and obtained affirmative responses.[2] This process eventually ceased, as the police notes frankly acknowledge, because the police had exhausted their store of information about the crime. (J.A., Vol. I, 121). (Tab 5). See also Police Reports. (Tab 11). Thus, for example, the Fauquier County officers did not know that Rebecca Williams had been raped (J.A., Vol. V, 1536) (Tab 5), 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. (J.A., Vol. V, 1537). (Tab 5). The following morning, May 22, 1983, Mr. Washington first had a further session with the Fauquier authorities at which, according to the officers' notes, "He went through the story (as on 05/21/83) again." (J.A., Vol. I, 127). (Tab 5). Then two officers from Culpeper, following oral Miranda warnings, began to interrogate Mr. Washington. (J.A., Vol. V, 1558). (Tab 5). No contemporaneous records of this session have

---

[2] For example, the interrogating officer testified that, as soon as petitioner stopped crying, "I told him, to clarify things, I told him I'm talking about the girl that was found stabbed lying naked outside the apartment in Culpeper. I asked him if that's the one and he said, yes." (J.A., Vol. V, 1535). (Tab 5).

been produced, and it was apparently not recorded.

However, the interrogating officer later described the session in court. (J.A., Vol. V, 1560-61). (Tab 5). He testified that Mr. Washington initially wrongly identified Rebecca Williams as having been black, and only corrected the statement on being re-asked the question. (J.A., Vol. V, 1560). (Tab 5). This pattern was common throughout the interrogation: "I asked him to describe this woman. He had problems with describing." (Id.) See Washington I, 952 F.2d at 1478 n. 5. (Tab 3).

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

-- He described the victim as "short". (J.A., Vol. I, 121). (Tab 5). She was 5'8" tall. (J.A., Vol. V, 1479). (Tab 5).

-- He said that he stabbed the victim two to three times. (J.A., Vol. IV, 1064). (Tab 5). She had been stabbed 38 times. (J.A., Vol. V, 1474). (Tab 5).

-- He said he saw no one else in the apartment. (J.A., Vol. V, 1581). (Tab 5). The victim's two young children were present. (J.A., Vol. V, 1455-56). (Tab 5).

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." (J.A., Vol. IV, 1026; J.A., Vol. V, 1585). (Tab 5). See also Statement of Earl Washington, Jr. (May 22, 1983). (Tab 12).

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 the time, I pointed to the Williams apartment and asked him directly, is that the one?" This question obtained an affirmative response. (J.A., Vol. V, 1588). (Tab 5).

Similarly, the police officers had Mr. Washington identify as his own the shirt of unknown provenance that was found at the apartment and given to them by family members six weeks after the crime. See Washington I, 952 F.2d at 1478. (Tab 3).

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). See Washington I, 952 F.2d at 1477-78. (Tab 3).

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. See Washington I, 952 F.2d at 1476. (Tab 3).

-- The semen type was that of the Commonwealth's first

suspect, James Pendleton. See Washington I, 952 F.2d at 1478 n.6. (Tabs 3 and 6).

-- The hairs found in the pocket of the shirt found at the crime scene were consistent in part with James Pendleton's facial hair, but did not compare to Mr. Washington's hairs. See Forensic Reports. (Tab 6). When the state crime laboratory pointed out this inconsistency to the Culpeper police and requested additional Washington hairs for comparison, the police refused. See Washington I, 952 F.2d at 1478. (Tabs 3 and 6).

Defense counsel also failed to show the process of suggestion by which the police officers had obtained the statement that was ultimately admitted into evidence, that Mr. Washington was wholly incapable of understanding Miranda warnings, and that his entire adaptive strategy for living in the normal world consisted of attempting to please his interlocutors by telling them what they wanted to hear.[3] In short, although "All the circumstances surrounding the 'confession' indicate that its contents came (intentionally or not) from the police and were

---

[3] Had defense counsel hired a competent mental health expert, the jury would have received the full context of the "confession" as now presented by Professor Luckasson: during the interrogations in all five cases, Mr. Washington "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' ... [He] believed they 'knew' the facts so he was trying to guess until his guesses matched what they 'knew.'" Like Professor Luckasson's report, this expert's opinion would have relied upon the officers' own notes of the questioning, together with the extensive professional literature on the effects of police interrogation techniques in obtaining false confessions from people with mental retardation. Report of Professor Luckasson at 7 (Tab 1).

simply parroted back by Earl piece by piece as he learned it," Report of Professor Ruth Luckasson at 7 (Tab 1), defense counsel failed to present any evidence whatsoever to this effect.

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. (J.A., Vol. VI, 1977-79). (Tab 5). See Washington I, 952 F.2d at 1481. (Tab 3).

Not surprisingly, Mr. Washington was convicted.

At the punishment phase, defense counsel's jury argument took up in its entirety 27 lines in the record. After the prosecutor had graphically and repeatedly described the 38 stab wounds to 14 vital organs and the "pool of blood" in which the victim lay, defense counsel advised the jury that "this is Earl Washington's day in court and you must do him justice." (J.A., Vol. V, 1679-80). (Tab 5). He gave no reason why the jury should not impose the death penalty. As to the factors the jury should consider, he submitted that:

> there is really, not really, in that the course of human experience, any particular standard that governs in 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. (Id.)

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

III. THE PRIOR LEGAL PROCEEDINGS

Mr. Washington's conviction and death sentence were affirmed on direct appeal, Washington v. Commonwealth, 228 Va. 535, 323 S.E.2d 577 (1984), (Tab 13) cert. denied 471 U.S. 1111 (1985), with trial counsel serving as appellate counsel. See Washington I, 952 F.2d at 1475 n.2. (Tab 3).

That counsel ceased serving once certiorari was denied. Thus, in August of 1985, Mr. Washington was facing an execution date of September 5 utterly alone. The Commonwealth's view was that Mr. Washington, mentally retarded or not, should investigate, write and file his own petition for state habeas corpus relief, and then -- perhaps, if the petition seemed meritorious -- counsel might be appointed. The alternative was later starkly described under oath by Senior Assistant Attorney General James Kulp:

> Q. If you didn't hear from Mr. Washington, you were going to execute him whether he had a lawyer or not, isn't that correct?
>
> A. The order would have been carried out I am sure.
>
> Q. The order of execution?
>
> A. That is correct.[4]

Another inmate, Joseph M. Giarratano, made urgent efforts to call this situation to the attention of anyone who would listen, resulting in a frantic nationwide search for counsel -- during which 30 to 40 law firms declined the case, in almost all

---

[4] Transcript of Proceedings, July 11, 1986, Giarratano v. Murray, at 443.

instances precisely because of the imminence of the execution date.

Finally, a New York City law firm was prevailed upon to volunteer. With Mr. Washington already having been transferred to the Penitentiary to await execution, a state habeas corpus petition was filed on his behalf in the Culpeper Circuit Court on August 26, 1985 (J.A., Vol. I, 69-275). That court stayed the impending execution, and no subsequent warrant was signed.

The state petition was dismissed without an evidentiary hearing on December 23, 1986 (J.A., Vol. III, 721-22). The Virginia Supreme Court denied a petition for appeal in a brief summary order dated February 26, 1988. (J.A., Vol. VII, 2224). Mr. Washington then sought federal habeas corpus relief from the United States District Court for the Eastern District of Virginia (J.A., Vol. III, 751-868), which dismissed the petition without a hearing (J.A., Vol. VII, 2182). Washington I, 957 F. 2d at 1475. (Tab 3).

In Washington I, the Fourth Circuit rejected on various grounds most of the claims of error, including an attack on the failure of counsel to elucidate for the jury the process by which the "confession" had been obtained. The Court of Appeals did, however, reverse the District Court's summary dismissal of Mr. Washington's habeas corpus petition and order an evidentiary hearing on his claim that trial counsel had been ineffective in that they "had received but failed to appreciate the significance of, and hence to introduce at trial, the results of exculpatory

laboratory tests on semen stains found on a blanket recovered from the bed where the rape of Mrs. Williams occurred." Washington I, 952 F.2d at 1476. (Tab 3).

At the hearing on remand, all the experts agreed that the semen stains on the bedclothes could not have come from Mr. Washington -- and the Commonwealth's scientist revealed for the first time that she had so advised the prosecutor prior to trial (J.A., Vol. VII, 2291-92, 2226). (Tab 5). Mr. Washington's experts testified that this fact, in conjunction with the other forensic evidence in the case -- none of which counsel had ever been aware of or presented to the jury -- made James Pendleton the most likely suspect (J.A., Vol. VIII, 2340-41). (Tab 5). The Commonwealth's experts testified that if the stains had been contaminated by fluids from the victim -- a fact that no one could know, since there is no scientific test for making this determination (J.A., Vol. VIII, 2313, Vol. VII, 2227) -- then the test results could be explained (J.A., Vol VIII, 2227). (Tab 5).

The District Court ruled that the performance of counsel had been professionally reasonable, and, in any event, had not prejudiced Mr. Washington. Accordingly, it dismissed the petition. (J.A., Vol. VII, 2225). (Tab 5).

In Washington II, the Fourth Circuit affirmed by a vote of 2-1. All three panel members agreed that the failure of counsel to pursue and present the forensic evidence represented ineffective assistance. The majority ruled, however, that the error was harmless; the detailed nature of the "confession" made

the prosecution's case so strong that even a jury which knew that the semen stains on the bedding could not have come from Mr. Washington would have convicted him and sentenced him to death. By the same 2-1 vote as before, the panel denied rehearing on October 8, 1993.

IV. THE DNA EVIDENCE

While the case was pending on appeal to the Fourth Circuit for the second time, the parties began discussions for the purpose of arranging for DNA testing of biological samples that had been taken from the body of the victim.[5] They eventually agreed that testing would be carried out both by the central laboratory of the Virginia Division of Forensic Science and by an expert chosen by Mr. Washington's attorney. (The latter was Dr. David Bing of Boston, whose results the Governor relied upon earlier this year in pardoning Mr. Snyder on rape charges.)

The Commonwealth reported its results first.[6] See Report of Jeffery Ban. (Tab 14). These were as follows: Mr. Washington

---

[5] Unlike the semen stains found on the bedding, which were at issue in the appellate proceedings, this material could not be blood-typed. Hence, until the invention of DNA testing several years after trial, there was no useful forensic examination of it that could be done. Thus, evidence concerning it has not at any time been the subject of judicial proceedings, nor, as noted in Part V below, could it be.

[6] Dr. Bing eventually determined that the amount of biological material left to him for testing was insufficient to enable him to obtain independent results on the critical sample, viz. the one taken from the victim. He did however confirm the Commonwealth's DNA typing of the other relevant individuals. See Report of David H. Bing, Ph.D. (Tab 15).

has DNA type 1.2, 4; Rebecca and Clifford Williams both are of DNA type 4,4; the DNA type of the sperm found in Rebecca Williams body was 1.1, 1.2, 4. Thus, as the crime laboratory reported, the sperm contains a genetic characteristic (a 1.1 allele) that could not belong to any of these individuals.[7] Put another way, sperm with a 1.1 allele is inconsistent with both Mr. Washington and Mr. Williams.[8] Thus, the sperm must have been contributed by another person. Doubtless, this person was the real perpetrator of the crime. But in any event, it was not Mr. Washington.

To be sure, as the crime laboratory states, if some hitherto-unmentioned person (one with a 1.1 allele) had joined with Mr. Washington in raping Rebecca Williams, then this might provide an explanation for the test results.[9] That hypothesis, however, is entirely inconsistent with the known facts. Not only did the Commonwealth's case at trial rest on Mr. Washington's

---

[7] In the words of the Commonwealth's report, "Neither 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." (Tab 14).

[8] In any event, Mr. Williams testified for the prosecution that he had not had intercourse with his wife for several days before the crime (J.A., Vol. V, 1465), as a predicate for the medical examiner's testimony that the sperm cells recovered from the victim's must have come from recent sexual activity, presumably the rape. (J.A., Vol. V, 1478-79). (Tab 5).

[9] In the words of the crime laboratory, "However, none of these individuals [Earl Washington, Clifford Williams, Rebecca Williams] can be eliminated as contributing to the mixture if another individual possessing a 1.1 allele is also present." (Tab 14).

"confession," which made no mention of any such third person, but, as recounted above, Rebecca Williams stated specifically to two people (her husband, and a police officer) that she had been raped by only one man.

To give weight to a theory that would ignore those facts so as to evade the exculpatory force of the DNA evidence would be to undercut the validity of DNA testing in almost all cases, whether the results were favorable to the prosecution or the defense, since it could always be suggested that the adverse results were due to the activities of some mysterious stranger.[10]

The Governor has already demonstrated his appreciation of the force of this consideration. The situation here is precisely that which existed in Mr. Snyder's case. See Executive Clemency for Walter T. Snyder, Jr. (Tab 16). There, as reported by the Commonwealth Attorney for Alexandria, "It is clear that the only source for the relevant [sperm evidence] would be the assailant in the case, or someone else with whom the victim had recent sexual contact. All experts agree that a possible explanation of the results could arise from evidence of a third party donor of the tested material. However, they also all agree that this is very unlikely given that the victim stated at trial that she had

---

[10] Scientific considerations, as well as the known facts of the crime, make the suggestion particularly unconvincing in this case. The experts agree that the 4 allele noted in the laboratory report most probably is an artifact of the testing procedure, which was not sensitive enough to fully isolate the relatively small amount of sperm from the victim's bodily fluids. If so, then the actual genotype of the sperm sample is 1.1, 1.2 -- a result that is inconsistent with Mr. Washington's involvement even under the fanciful two-rapist scenario.

not had sexual contact with anyone else for ten days prior to the rape." Thus, notwithstanding that the victim in that case had identified Mr. Snyder and that he "was found to be among possible contributors [of the sperm] based on blood type and secretion analysis" -- both inculpatory factors that are absent here -- the Commonwealth Attorney affirmatively supported the pardon request, and the Governor granted it. In this case, too, the Governor should grant a pardon, lest an innocent man be fantasized into the electric chair.

V. THE CURRENT LEGAL STATUS: THE CAPITAL CHARGES

The deadline for seeking Supreme Court review of the rulings of the Fourth Circuit is January 7, 1994. But the DNA test results could not under the rules be included in any petition for certiorari, because (due to their emergence after the Circuit Court's denial of rehearing) no lower court has ever considered them.

Thus, any certiorari petition would have to focus on a series of rulings (relating, for example, to semen on the bedclothes) that have become entirely outdated by events -- and to ignore the reality that new DNA testing on semen samples recovered from inside the victim shows that Mr. Washington could not have been the contributor. It would hardly evidence respect for the Supreme Court to ask it to grant review of matters that are now largely of historical interest, nor do we believe that the Governor should wish us to do so.

In short, the petition that remains to be filed is not one that will enable Mr. Washington to present to the judicial system the new and compelling evidence that calls for relief.

VI. THE CURRENT LEGAL STATUS: THE NON-CAPITAL CHARGES

Mr. Washington's institutional records reveal that, with credit for jail time, his sentence on the non-capital charges began to run on March 20, 1984. Because of the capital sentence, he has not been receiving statutory good-time on these charges (Va. Code, § 53.1-116). In ordinary course, he would have received such credit, been eligible for parole, and -- in light of his good institutional record -- been released on parole.

Mr. Washington should be restored to the position he would have occupied if he had not been wrongfully convicted on the capital charges. But, as detailed in "Calculation of Good Time Credit," (Tab 17), the unusual nature of this case makes that relief difficult to obtain within the existing statutory structure. Thus, our first and principal reason for requesting that the Governor order that Mr. Washington be credited with all good-time accrued is simply to insure the erasure of a collateral consequence of the wrongful conviction.

That reason would apply in any such case. But in this instance there is a second reason as well. Mr. Washington's case is just the sort for which parole was designed, and the Virginia Parole Board should be given the opportunity to evaluate it. Thus it is especially important here that the Governor act to

clear away lingering technical consequences of the capital conviction that might stand in the way of Board consideration.

A. Mr. Washington's Productive Prior Life History

As Professor Luckasson describes, for approximately eight years, between the time his schooling ended at the age of 15 and the time he was arrested, Mr. Washington maintained a clean criminal record and supported himself through a series of unskilled jobs. Interviews with four different employers reflect the same series of observations; Mr. Washington was slow, but kindly and hard-working. If one explained a task to him until he understood it, he would perform it diligently. As one put it, "Other guys would bad mouth you and be rude. Earl would just say, 'Yes, boss,' and do his job without further comment." Indeed, various employers felt well enough disposed towards him that they assisted him in such matters as opening a bank account and obtaining a driver's license. See Report of Professor Ruth Luckasson. (Tab 1).

B. The Isolated Nature of Mr. Washington's Criminal Conduct

Professor Luckasson's report also explains the reasons for believing that the single criminal episode in which Mr. Washington was involved, the assault on Mrs. Weeks, was an uncharacteristic response to a stressful situation. It was a single incident out of character with his entire history.

As discussed above, on the day of the incident, Mr. Washington had spent a very long day with his family prior to the episode drinking heavily. This in itself was uncharacteristic

since Mr. Washington is normally no more than a moderate drinker, and it may have had a distinct influence on what followed. At the gathering, Mr. Washington got into a dispute with another man -- another uncharacteristic event since he is ordinarily not at all aggressive. He broke into a house across the street where he knew that a gun was kept on top of the refrigerator. Attempting to make off with it, he was surprised by the appearance of Mrs. Weeks. Lacking the verbal or social skills to try to explain or excuse his presence, he hit her over the head with a chair and retreated.

This is the only instance in which Mr. Washington has responded violently to a stressful situation. There is no reason to think it will be repeated, since:

1. His reaction was inconsistent with a lifetime of previous behavior -- as well as with his behavior during the ten years since then.
2. The episode itself taught Mr. Washington important lessons. "He is ashamed for having hurt someone and he understands that by behaving irresponsibly he caused her pain." Report of Professor Ruth Luckasson at 5. (Tab 1).
3. Despite his disabilities, Mr. Washington's adjustment to Death Row has been everything that could be asked. This is borne out by an institutional record that is free of all but the most minor sorts of infractions. As a responsible prison official stated to defense counsel, Mr. Washington has been "a model prisoner."

VII. CONCLUSION

Earl Washington, Jr. is innocent of the crime for which he was almost executed, and for which he still faces the electric chair. Mr. Washington lacks judicial recourse. The pardon power was given to the Governor for just such cases. Justice requires that he exercise it here.

EARL WASHINGTON, JR.

By: Barry A Weinstein for
Of Counsel

Robert T. Hall
Hall, Markle, Sickels & Fudala, P.C.
4010 University Drive
Fairfax, Virginia 22030
(703) 591-8600

Barry A. Weinstein
Virginia Capital Representation Resource Center
1001 East Main Street, Suite 510
Richmond, Virginia 23219
(804) 643-6848

Professor Eric M. Freedman
Hofstra Law School
Hempstead, New York 11550
(516) 463-5167

Marie Deans
1806 Chantilly Street, Suite 202
Richmond, Virginia 23230
(804) 353-0093

Dated: December 20, 1993