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Eric M. Freedman
Maurice A. Deane School of Law at Hofstra University, lawemf@hofstra.edu

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EARL WASHINGTON'S ORDEAL

Eric M. Freedman*

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. 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. 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, and

* Professor of Law, Hofstra University School of Law (LAWEMF@hofstra.edu). B.A. 1975, Yale University; M.A. 1977, Victoria University of Wellington (New Zealand); J.D. 1979, Yale University. Professor Freedman served as one of Earl Washington's legal counsel.

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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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.

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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
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 capital murder conviction and sentence—the statement had to be reshaped through four rehearsal sessions before reaching a form the authorities considered usable.

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 ultimately obtained a “confession.” According to a vivid account contained in this document, Mr. Washington had attempted to rape Mrs. Weeks. But Mrs. Weeks testified to the contrary at the preliminary hearing and the Commonwealth dropped the charge of attempted rape. Thereafter, Mr. Washington pleaded guilty to statutory burglary and malicious wounding and was sentenced to consecutive fifteen-year prison terms. 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

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

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.
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.
26. Washington Interview, supra note 11, at 120.
obtaining affirmative responses. This process eventually ceased, as the police notes frankly acknowledge, because the police had exhausted their store of information about the crime. Thus, for example, the Fauquier County officers did not know that Ms. Williams had been raped, 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. 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." Then two officers from Culpeper, following oral Miranda warnings, began to interrogate Mr. Washington. 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. 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. This pattern was common throughout the interrogation: "I asked him to describe this woman. He had problems with describing"

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

—He had described the victim as "short." She was 5'8" tall.
—He had said that he stabbed the victim "once or twice." She had been stabbed 38 times.

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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).
39. See Beyer Testimony, supra note 37, at 1474.
He had said he saw no one else in the apartment. Two of the victim’s young children were present.

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.”

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.

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.

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).

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.

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, 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 thermometer—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.52

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.53

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.


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 6 (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." It called as a witness, without objection by defense counsel, Helen T. Richards, the victim's mother. The exclusive subject of her testimony was the traumatic psychological effect of the murder upon two of the victim's young children. 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.

Defense counsel's jury argument at the punishment phase took up in its entirety twenty-seven lines in the record. 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, defense counsel advised the jury that "this is Earl Washington's day in Court and you must do him justice." He gave no reason why the jury

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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

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62. *Id.* at 1679-80.
65. *A narrow Supreme Court ruling upheld the constitutionality of this practice in Murray v. Giarratano, 492 U.S. 1, 7-8, 12 (1989).*
Thus, in August, 1985, when Mr. Washington—facing an execution date of September 5—was moved to Virginia's Death House, he had no legal representation. 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. 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. 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, 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. 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.

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. At this stage, Mr. Hall discovered the exculpatory semen stain evidence—

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 Mohr, 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 Mohr, supra note 68, at 765 n.5.
70. 492 U.S. 1, 3 (1989).
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.\textsuperscript{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.\textsuperscript{77} The Virginia Supreme Court denied review.\textsuperscript{78} Mr. Hall then filed a federal habeas corpus petition. This, too, was denied without a hearing.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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

\textsuperscript{76} See 8 Joint Appendix, \textit{supra} note 5, at 2346-47 (Affidavit of John W. Scott, Jr. \textit{et al.}, 2, 3, 4, 7). DNA evidence did not exist at the time. Rather, as indicated in \textit{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.

\textsuperscript{77} See Sullenberger Opinion, \textit{supra} note 73, at 720; 3 Joint Appendix, \textit{supra} note 5, at 721-22 (Dismissal Order).

\textsuperscript{78} See \textit{Washington I}, 952 F.2d at 1475. As with its decision on direct appeal, see \textit{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., \textit{supra} note 63, app. at A-59, C-1, C-50.

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

\textsuperscript{80} See \textit{Washington I}, 952 F.2d at 1475.

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

\textsuperscript{82} See \textit{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. 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, included the DNA test results as reported by the Virginia Division of Forensic Science. 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. Thus, the testing showed that the sperm contained a genetic characteristic (a 1.1 allele) that could not belong to any of these individuals.

It was the view of Mr. Washington's counsel—one that the Attorney General initially shared—that at this point there was simply no case remaining against Mr. Washington. Counsel accordingly urged Governor Wilder to recognize his innocence through the grant of a full pardon. 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.

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.

In the aftermath of this "political half-loaf" various government officials advanced imaginative theories to justify Governor Wilder's failure to release Mr. Washington. For instance, if some hitherto-unmentioned 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. 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. 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.
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").


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. His spokeswoman said it should be completed in a few weeks. With no results received after three months, the national press intensified its coverage. Counsel filed a pardon petition on September 7. On October 2, 2000, the governor announced that he was issuing a full pardon on the capital charges. 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.

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. As a result, Mr. Washington remained in prison until his mandatory release date of February 12, 2001.


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.


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. 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. 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. What Mr. Washington’s case brings home is the reality that the police need not necessarily be malicious; 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 “race 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. This is inconsistent with an unbiased search for the truth, and is likely to impede arriving at that goal.

C. Mental Retardation

Of course, those problems are exacerbated when the suspect is mentally retarded. First, mentally retarded people are likely to be skillful at concealing their condition, so that interrogators may not even know caution is in order. 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. 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.

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. 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.


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. His "confessions" reflect these characteristics.

D. Ineffective Counsel

Had Mr. Washington been competently represented, he would have been acquitted at trial. But he was not. This problem is endemic to the capital punishment system. 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.

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. If that happened—and nowhere has it to date—there would be...
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

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127. See supra text accompanying notes 63-82.
130. See, e.g., Herrera v. Collins, 505 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.\textsuperscript{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,\textsuperscript{132} and wrongful convictions have many other causes—including inaccurate eyewitness identification,\textsuperscript{133} the unreliable testimony of prison informants,\textsuperscript{134} and false confessions.\textsuperscript{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,\textsuperscript{136} and every effort at legislative amelioration deserves support.\textsuperscript{137}

\textsuperscript{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).

\textsuperscript{132} See Dwyer, Neufeld & Scheck, supra note 95, at xv (noting that most crimes do not involve biological evidence).

\textsuperscript{133} See id. at xvi, 41-77 ("Eyewitness error remains the single most important cause of wrongful imprisonment.").

\textsuperscript{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.

\textsuperscript{135} See supra Part II.B; see also Dwyer, Neufeld & Scheck, supra note 95, at 92.

\textsuperscript{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).

Ultimately, however, no human system is perfect. Perhaps that growing realization—combined with the reality that the death penalty does not have a deterrent effect but rather diverts resources from measures that would in fact reduce the crime rate—which 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).

APPENDIX

EARL WASHINGTON'S ORDEAL: TIMELINE

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.


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.


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


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.


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.


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.


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