

**HERBERT R. BASSETTE**

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**A COMPELLING CASE**

**FOR CLEMENCY**

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PETITION FOR CLEMENCY BY HERBERT R. BASSETTE

To: The Honorable L. Douglas Wilder, Governor of Virginia

I. A COMPELLING CASE FOR CLEMENCY

A government's system of criminal justice succeeds only to the extent it eliminates doubt as to the propriety of conviction and condemnation. If doubts surface that the government has convicted the innocent or punished the undeserving, the government fails -- a system of criminal justice is transformed in that particular case into a criminal system of justice. Virginia's system erects numerous safeguards against such a failure, and sometimes we succumb to the comforting illusion that these safeguards are failsafe. They are not, and indeed they cannot be, entrusted to human beings as they are. So we come to the final defender against doubt, the final safeguard: executive clemency.

Doubts indeed have surfaced about the propriety of Herbert Bassette's conviction and sentence. Those doubts fall into three categories. The first category of doubt concerns the sentencing phase of the trial in which Herbert was given the death penalty. Herbert's death sentence was based on his 1966 conviction for shooting Holiday Inn clerk James Wallace in the course of a robbery. Compelling evidence now shows that Herbert was innocent of that 1966 crime. Thus, his death sentence was based on false evidence, and the judgment of the jury that condemned him is bankrupted. For the Commonwealth to proceed with Herbert's execution in light of these facts requires that the Commonwealth substitute its judgment for the now-tainted judgment of the Burwell jury.

Second, the case against Herbert, flimsy from the outset, has weakened with each passing year. Time has brought to light significant new evidence that a man named Tyrone Jackson committed the murder of Albert Burwell, Jr. and confessed credibly soon after it occurred. This new evidence also establishes that the three accomplices to the murder deliberately withheld from the jury evidence that Jackson was with them on the night of the crime, deceitfully striving to improve the poor case against Herbert. The case needed improving: no physical evidence or independent witnesses linked Herbert to the crime, forcing the prosecution to rely entirely on the testimony of these three accomplices. Drug addicts and career criminals, these accomplice accusers emerged from the worst segments of society to point the finger at Herbert. Facing the chair themselves, the accomplices had strong incentive to blame Herbert, yet they never could agree on what happened that night. Nor does the story they tell today resemble the many different stories they told back then. Herbert and his family, in contrast, have remained steadfast in his claim of innocence and constant in their story of that night's events.

Finally, there is doubt that the kind of evidence of guilt mounted against Herbert ever could support the death penalty. All the evidence against Herbert came from his accomplices, a trio of drug-using felons with much to gain and nothing to lose by pointing the finger at Herbert. In the 72 capital cases in Virginia since *Furman v. Georgia*, 408 U.S. 239 (1970), the Commonwealth has not sentenced to death any man solely on the basis of accomplice testimony except Herbert. (See Appendix A). In every other case, the Commonwealth has relied on a confession, non-accomplice eyewitness testimony, or physical evidence to provide the certainty essential for the imposition of death, but no such evidence has ever been found to

bolster the shaky testimony of Herbert's drug-addled accusers. Indeed, we know of no case in this century in which the Commonwealth has executed a man based only on testimony from witnesses such as these.

Because of these doubts, Herbert R. Bassette petitions the Governor to commute his death sentence. Based on the substantial evidence of his innocence, both that available at his trial and that recently uncovered, Herbert is requesting a new trial in court. In this petition, Herbert asks only that his life be spared and that his sentence be commuted to life in prison.

## II. THE HISTORY

Late in the evening of November 23, 1979, Albert Lee Burwell, Jr., was shot and killed. He died within minutes. His body was found the next morning by a passerby. In December 1979, the police arrested Tyrone Jackson and charged him with the capital murder of Burwell based on his confession of guilt to Robinetta Wall and his possession and sale of the murder weapon on the day after the murder.

After he was arrested, Jackson implicated Betty Winfield, who was arrested and charged. She in turn accused Samuel Walker "Dap" Cook and Jeanette Green as accomplices in the murder. Each was charged with capital murder. Together, Winfield, Cook, and Green conspired to implicate Herbert, claiming he was the triggerman. The case against Jackson was dismissed, and the Commonwealth proceeded against Herbert alone. Herbert always has maintained his innocence, claiming that he was with his family in Richmond at the time of the crime. Members of Herbert's family testified in support of his claim at both of his trials.

Herbert was tried for the murder on June 17-20, 1980. Robinetta Wall did not appear to recount Jackson's confession, so Herbert's defense was forced to proceed without her. The

trial stalled at the guilt phase and the court declared a mistrial when the jurors could not agree that Herbert was guilty of the charges against him. Herbert nevertheless was tried again by the Commonwealth on August 19-22, 1980. Despite the lack of credible testimony, the dearth of any independent evidence linking him to the crime, the absence of a motive, and his protestations of innocence, he was convicted and sentenced to death.

### III. A DEATH PENALTY BASED ON A FALSE CONVICTION CANNOT STAND

Immediately following its verdict of guilt, the jury was reconvened to pass sentence on Herbert Bassette -- life or death. The Court instructed the jury that:

Before the penalty of death can be imposed as punishment in this case, the Commonwealth must prove beyond a reasonable doubt either one of the following two alternatives: One, That, after consideration of his past criminal record, there is a probability that he would committ [sic] criminal acts of violence that would constitute a continuing serious threat to society; or Two, That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind or aggravated battery beyond that necessary to accomplish the act of murder.

Trial II at 624-25. (See Appendix B). In addition to future dangerousness, the Commonwealth's Attorney argued that the crime also should be considered "vile or depraved."

Trial II at 597. The jury decided differently:

We, the jury, on the issue joined, having found the defendant guilty of the wilful, deliberate and premeditated killing of Albert Burwell, Jr., in the commission of robbery while armed with a deadly weapon, and having found that, *after careful consideration of his past criminal record that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society . . .* unanimously fix his punishment at death.

Exh. 1 (Jury Verdict)(emphasis added). The jury affirmatively rejected "vileness or depravity" as a basis for its sentencing judgment. Id. Thus, Herbert was sentenced to death solely because the jury and judge concluded he was a future danger to society.

Only one conviction provided the basis for the jury's conclusion of future dangerousness, and that was Herbert's 1966 conviction for shooting James Wallace. Details about the 1966 crime were provided by Commonwealth's Attorney Albert Nance, who read from the 1966 trial transcript:

Then I turned to the left to get down on the floor as he directed me and when I turned to the left my knee, left knee gave way a little bit and in order to catch my balance I throwed up my arms - my arms up and just as I throwed my arms up he fired the revolver.

Trial II at 580. One juror, David L. Maiden, recently stated during an interview with the *Richmond Times-Dispatch* that, "'You knew you had done the right thing' [after hearing about the Petersburg robbery]." *Richmond Times-Dispatch*, December 15, 1991. Judge Wallace, accepting the jury's recommendation of death, stated that "One of the things that the Court must think about in whether to choose between life or death is the probability that it might occur again." Exh. 2 (Wallace excerpt from Sentencing Hearing). Noting that "the jury also considered this question," Id. Judge Wallace agreed that "the probability of this happening again would appear . . . to be very great." Id. He remarked that "the Court is mindful of the transcript from the Petersburg Circuit Court of a previous robbery. And the Court, noted . . . in the sentencing stage, noticed at the time the similarity of the actions of the defendant in that

case compared to this case." Id.<sup>1/</sup> Both jury and judge then, relying exclusively on his 1966 conviction for shooting James Wallace, concluded Herbert would pose a future danger to society. Exh. 3 (Affidavit of Robert M. Wallace).

Herbert did not shoot James Wallace. Herbert has denied his guilt of that Petersburg crime for 26 years, and evidence now exists to prove that he is innocent. Two men, close friends of the four participants in the 1966 crime, have come forward to confirm Herbert's innocence. Exh. 4 (Affidavit of Willie Bassette); Exh. 5 (Affidavit of Benny Ruffin). These men, Willie Bassette and Benny Ruffin, also have provided Herbert's attorneys with the identity of the actual culprit. Though not involved in the crime, Willie Bassette and Ruffin knew about the crime, and on more than one occasion, discussed the crime with its participants. In those conversations, the true perpetrator confessed that he, not Herbert Bassette, robbed the Holiday Inn and that he, not Herbert Bassette, was the gunman. He also offered at the time to clear Herbert's name by confessing to the crime.

Recently, Willie Bassette located the admitted gunman and gave him a letter from Herbert in which Herbert asked the gunman to come forward. Exh. 6 (Herbert's letter of December 15, 1991). When Willie asked the gunman if he were willing to make good on his old offer and admit his role in the crime, the gunman again admitted his guilt, but expressed

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<sup>1/</sup> Oddly, the only similarity noted by the Court makes little sense:

In the Petersburg case . . . that person was told to do certain things before that person was shot . . . Before Albert Burwell was shot six times he begged for mercy, and was shot, and he was begging and he was still shot again.

Exh. 2.

reluctance to come forward.<sup>2/</sup> He did agree to speak with Herbert's attorneys about coming forward so that Herbert's life could be spared. In that conversation, a transcript of which has been attached as Exhibit 8 (transcript of conversation with gunman), the gunman confirmed that Herbert was wrongfully convicted. Just as importantly, during the conversation, the gunman never denied committing the shooting. Taken as a whole, that conversation compels the conclusion that he, not Herbert, shot Wallace, as these excerpts show:

Schwarzschild: Because when they were deciding -- what we're trying to stop is his death . . .

Gunman: Right, I understand. I'm all for saving anybody's life, but I can't see putting my life on the line for something that happened, you know, 26 years ago. Now I'm 45 years old, I've got a family, I'm working on the same job 15 years, I'm getting promoted to different things, but I just can't see, you know, me coming in and stating that, I mean, implicating myself in a crime. *You know, I mean it's bad for me to say this when I know maybe I could help.* And then I'm not saying then again, maybe if I did it, it still wouldn't help. You understand what I'm saying?

Schwarzschild: I do.

\* \* \*

Gunman: I'm not -- see, but this is what I'm saying. There's not no guarantee that you can save him even if we had you proof of that -- now be honest. There's not no sure fire guarantee, now be honest. *Then if I step forward or Dukie stepped forward, all of us would be implicating ourselves. Then if they still put him to death, we did it for nothing. Do you understand what I'm saying. I could see it if we had a sure fire cure, it's fine, but to just step up with, you know, then the man can still put it up, that was a waste. It's not a sure -- I could see it if you could give me a sure fire that this would work* (slapping hand on table).

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<sup>2/</sup> Among the persons who heard this confession was Tifney Ward. Her affidavit describes the essence of this conversation. Exh. 7 (Affidavit of Tifney Ward). Ward is no relation to Herbert.

Schwarzschild: If we can do that, would you think about it?

Gunman: What I been telling you, you got to prove it to me, I mean, not just tell me that it will work, you know, because what I'm saying is . . .

Schwarzschild: I'm not saying that -- no, no, I'm not going to tell you. But if we could . . .

Gunman: Because I can't see where all this will have a bearing on what's happening now, (slapping hand on table) you understand what I'm saying.

Schwarzschild: Okay, but if we go to the Attorney General or the Governor and we suggest to them that we might be able to show this "x" and they agree that if we can show that somebody else pulled the trigger in the Holiday Inn, then they would commute his sentence, then would you?

Gunman: Yeah, then if they commuted -- this is what I'm saying.

Schwarzschild: No, I'm saying if I got that.

Gunman: *Yeah, if you got this in writing or something I can see*, but what I'm saying is even if they put me in the cell, then they're going to ask you, say well you got an affidavit from somebody else, most likely all I have to be is present to give an affidavit to him, the Attorney General or whoever, stating what I know about the crime.

Schwarzschild: That's right.

\* \* \*

Gunman: But see like I'm saying, it's 25, I guess it's around to what around 26 years now and like I said I'm gonna have to talk to her and think about it. I know I don't have much time to think about it, but I've got to think about this matter a whole lot. I got to just go on and discuss it, you know, with my old lady, my mom, my nephew. Cause I can't just, you know, I'm . . . you know, I don't want to see the man die and I'm being honest with you, I do not want to see that. But to me I can't see like you all keep saying that testimony from what happened in '66 is what the jury

and them believed, that he shot this man, and if I was to come forward and say that I shot the man, it would save him and give him clemency. But it still ain't getting him out of jail.

Schwarzschild: *But it would save his life.*

Gunman: *Yeah, I know it would save his life, but this is what I'm saying, then I'm in jail.*

\* \* \*

Gunman: You know, I can't just you know . . . see it ain't only me that I don't, that I'm worried about, I have kids and stuff. You know it ain't only me. You know that I'm sure enough worried about the law, but *if this had of happened, shit, 20 years ago, I'd have been all for going, you know, cause I was still doing wrong and then I was in jail myself. But now, it's just a hard pill to swallow, you understand what I'm saying, don't you? And I'm not going to sit here and tell you that I can do it, but I might get there at the last minute and get cold feet even if I tell you I did it cause it's, you know, it's working on my mind all day.* You know, it's been working on my mind all day and I don't know why, *I just felt when I saw that big article in the Sunday paper that I was going to hear something about this, you know. It just was, it's just something that clicked in my mind, you know. Cause I ain't never knew that the man was only . . . was that had death until about -- not this week, I think I saw another article where he was supposed to die or something for killing somebody, and I kept saying, Herbert, you know, just then it clicked on and I said I know he was in prison, but I knew he got out because people had told me they saw him on the street. But he wasn't out that long he got locked up again, you know. But I didn't know he was on no -- expecting to die, you know. And then when I saw him in the paper, I said damn, that is Herbert, he's just bigger now, you know.*

Despite our appeals, the gunman refused to come forward. For the past eighteen years, he has lived a productive and law-abiding life. He is married, has a family, and has remained in steady employment for the last fifteen years. He refuses to confess to his crime because of the serious consequences to his life, his family, and his freedom. Although these concerns are legitimate, they pale in comparison to the ultimate consequence awaiting Herbert if the true gunman is not identified. Therefore, we feel compelled to reveal the name of the individual identified by Willie Bassette, Benny Ruffin, and Tifney Ward in sworn statements as the man who robbed and shot James Wallace at the Holiday Inn in Petersburg on August 17, 1966. His name is George Johnson.

Why Herbert permitted this travesty of justice to go on for so long is a good question. The answer requires an understanding of the culture in which such men lived and the expectations they had regarding our legal system. When Herbert Bassette was arrested in 1966, like all of us, he believed the system would work; since there was no valid evidence against him, his innocence would be confirmed. On the other hand, George Johnson was his friend; they ran together. And Herbert would not turn on his friend.

Unfortunately, our system did not work properly, and Herbert was convicted and sentenced to a term of 99 years. Despite this outcome, Herbert still refused to turn on his friend. The unwritten code by which he and his friends existed did not permit "snitching." As a result, he served more than 13 years before he was paroled. At the beginning of this sentence, Johnson -- also serving time for an unrelated crime -- offered to confess to the shooting and exonerate Herbert. Herbert refused, however, observing that the likely result would not be his release, but rather the conviction of Johnson. Herbert's observation, given

the racial climate in Petersburg, Virginia during the late Sixties,<sup>3/</sup> was probably quite

insightful.

In light of this evidence, the conclusion by both judge and jury that Herbert posed a future danger to society was based on false evidence -- Herbert's wrongful conviction for the 1966 crime. Of course, Herbert's 1980 sentencing jury was required to eliminate every reasonable doubt before finding Herbert to be a future danger. Our law and society demand no less. Conclusions of future dangerousness based entirely on false evidence *never* can support a sentence of death, much less eliminate every reasonable doubt.<sup>4/</sup> Justice can be done only by commuting Herbert Bassette's sentence to life. A death sentence premised on a crime that Herbert Bassette did not commit cannot stand.

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<sup>3/</sup> See, for example, Exh. 9, the *Petersburg Progress-Index* article reporting Herbert's arrest, the headline of which identified Herbert only as a "Negro."

<sup>4/</sup> The Attorney General abided by this principle in the case of Wilbert Evans, when it became clear that the jury had based its finding of Evans' future dangerousness on an inaccurate criminal record. Considering those inaccuracies, and recognizing that the finding of future dangerousness was based solely on the inaccurate record, the Attorney General was "constrained to concede that Wilbert Evans' current death sentence cannot stand." Exh. 10 (Letter from Attorney General's office to Judge W. R. Wright, Jr.). Justice, according to the Attorney General, could be served no other way.

IV. THE SUBSTANTIAL EVIDENCE AGAINST JACKSON AND THE FLIMSY EVIDENCE AGAINST HERBERT DESTROY THE CERTAINTY OF HERBERT'S GUILT

A. The Substantial Evidence That Tyrone Jackson Killed Burwell

Significant new evidence indicates that Tyrone Jackson killed Burwell.<sup>5/</sup> This newly discovered evidence reveals, among other things, that Jackson made a believable confession to Robinetta Wall within days after Burwell's murder and that Jackson was with the admitted accomplices on the night of the Burwell murder, contrary to their testimony. Because the jury never heard this evidence, they turned a deaf ear to the other evidence against Jackson. Had the jury considered this evidence, along with the existing evidence against Jackson, Herbert would not be on death row today.

The best evidence that Tyrone Jackson murdered Burwell came from his own mouth.

He confessed to Robinetta Wall early in the morning after the murder:

Tyrone Leon Jackson told her the early morning of the 24th of November, 1979, that he killed a boy last night for \$97 . . . shot him 5-6 times, threw him in some woods and he worked at the Mascot Service Station, the reason for him killing the boy was because he was some kin to his wife Karen and could easily identify him, and it wasn't worth it etc. . . .

Copy of report of D. P. O'Keefe, Henrico Police, concerning statement taken of Robinetta

Wall on Dec. 12, 1979. Wall testified about the confession at Herbert's second trial, but she

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<sup>5/</sup> In December 1979, the police arrested and charged Tyrone Jackson with capital murder. All charges against him were dropped inexplicably before a full investigation had been completed. The police never searched Jackson's house or car for evidence of the robbery or murder. Trial II at 357-358. Herbert's attorneys sought to ask the chief investigator in the Burwell murder, Henrico County Police Detective Daniel O'Keefe, why the charges against Jackson were dismissed. But under instructions from the Attorney General's office, Detective O'Keefe has refused to meet with Bassette's attorneys.

scuttled the impact of Jackson's confession by claiming she did not believe him and thought he was showing off. Trial II at 342.

Wall now has retracted her statement about Jackson's proclivity towards bragging. She states that before Herbert's second trial, she was directed by the prosecution to claim that Jackson's confession was unbelievable because he was a braggart. Exh. 11 (Affidavit of Robinetta Wall). At no time did she consider Jackson a braggart or disbelieve his confession. Id. She testified as she did during the trial because she feared being implicated in the murder. Id. Indeed, during an interview of Wall on November 28, 1979, just four days after the murder, Wall told Detective James Gaudet that she believed Jackson's confession, that no reason existed for Jackson to confess to her if it were not true,<sup>6/</sup> and that she was not surprised by the confession because Jackson had shot people before. Exh. 12 (Police interview of Robinetta Wall). The Commonwealth failed to provide Herbert's trial attorneys with this exculpatory statement. Instead, it allowed false or misleading evidence to reach the jury. Because Herbert's trial attorneys could not, and the prosecutor did not, correct Wall's testimony, the jury was permitted to rely on this false and misleading evidence -- evidence that materially impacted the outcome of the trial.

Wall has provided additional evidence that lends credence to Jackson's confession of the Burwell murder, but that evidence never got to the jury. On the day of the robbery, Wall says, she cased the Mascot station with Jackson and Betty Winfield. Exh. 11.

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<sup>6/</sup> In fact, Jackson also "bragged" to Wall that he had committed another armed robbery three days later in which a gun was used. Trial II at 344. This was no mere boast, however; Jackson pled guilty to the offense.

In addition to Tyrone Jackson's confession, other evidence has been uncovered that would have suggested to the jury that Jackson, rather than Herbert, committed the murder. The accomplices crudely, but deliberately, conspired to deny that Jackson was with the accomplices on the night of the murder. During Herbert's preliminary hearing, Winfield stated that the parties present at Herbert's apartment after the murder were Herbert, his wife Demetress, Green, Cook, Winfield, and Tyrone Jackson. Prelim. Hearing at 20 (See Appendix C). She even related a conversation she supposedly had with Demetress and Jackson. But at both of Herbert's trials, Winfield withheld this information from the jury.<sup>2/</sup> Green followed Winfield's cue by claiming that Tyrone Jackson was not with them on the night of the murder. Trial II at 329, 333.

The truth about Jackson's whereabouts finally emerged during an interview that Herbert's attorneys conducted with Jeanette Green. Although she had never admitted this fact at trial, Green now places Jackson in the car with the accomplices as they looked for someplace to rob. Exh. 13 (Affidavit A of Alfred Brown). She even suggested that Jackson might have been carrying a pistol. *Id.* Green's recent revelation lends credence to Demetress Bassette's testimony that in the early morning of November 24, 1979 (after the murder), Winfield arrived at the apartment in a white Cadillac, carrying a large amount of money. Trial II at 375-76. In 1979, Jackson drove a white Cadillac. Trial II at 279. This new evidence from Wall and Green casts a new light on the other evidence against Jackson.

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<sup>2/</sup> At both trials, Winfield testified that she, Cook, and Herbert returned to the apartment alone after the murder. Cook and Herbert subsequently left to find Green and returned with her a short time later. Winfield maintained that she first met Jackson after she left Herbert's house the next morning. Trial I at 162-63 (See Appendix D); Trial II at 249-52.

Unlike Herbert, for example, Jackson can be linked to the murder weapon. Winfield

suggested at both trials that the gun belonged to Jackson, and that she got it from him in a trade:

I had it when we went into the house. Tyrone had done gave it back to me and I put it in my pocketbook and carried it in 'cause he wanted everything that - *it was my pistol 'cause he owed me some money for drugs.*

Trial I at 165.

Tyrone had it until we got to the front door and then when we had got to the front door he had owed them some money for some bam or something, so he gave it to me, and we went in the house.

Trial II at 253. Whoever owned the gun, Jackson took charge of its disposal. Belinda Atkinson and Gladys Mock, on the day after the murder, purchased the pistol from Winfield, Jackson, and Green for \$75. Trial II at 213-16, 218-21.

When Jackson sold the weapon, he explained to Atkinson that it had been used in a murder. Jackson soon found a need for the gun again. As Belinda Atkinson indicated in a police interview about Jackson's involvement in the November 27, 1979 bank robbery, Jackson returned to her house several days after the murder to borrow the murder weapon. Exh. 14 (FBI Interview of Atkinson). After committing the bank robbery, he returned the weapon. Id. This important information never was brought to the attention of the jury.<sup>8/</sup> The

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<sup>8/</sup> The jury also never learned that Jackson, Winfield, and Green were together the night before the bank robbery, just as they had been both the day of the murder and the day after. Exh. 15 (FBI interview of Betty Winfield). In direct contrast to Winfield's statement to the FBI, Green testified that she had never gone anywhere with Jackson. Trial II at 329.

gun appeared briefly in Herbert's hands, but only through the testimony of the accomplices, while eyewitnesses with no interest in Herbert's trial linked the gun inextricably to Jackson.

Cook's reaction to Jackson's arrest for the murder in December 1979 also hints at Jackson's guilt. Cook testified that he quit using drugs when he found out that Jackson had been arrested for Burwell's murder:

After I heard the announcement that came on the T.V. about the robbery I got scared and I went and hid in the house and I didn't come back out for no drugs or anything at all. . . . On T.V. that, I believe his name was Tyrone Jackson had got charged with that charge, and that's when I got kinda scared.

Trial I at 133, 136. Cook's reaction to the arrest does not make sense if, as the three accomplices swore, Jackson was not involved in the murder and they never saw him until after the crime. Cook could not know that Winfield had met up with Jackson after the murder and told him of Cook's involvement: he claimed not to have talked with Winfield since the murder. Trial II at 204. The arrest of a man who could not implicate him -- if Winfield's and Cook's testimony is to be believed -- should have relieved Cook, not frightened him. Cook could not have been afraid that the investigation had begun because he already knew the police were looking for Burwell's killer. Cook's behavior is most logically explained if Jackson was involved in the crime.

Unlike Herbert, Jackson possessed a motive to both rob and murder Burwell. Jackson was a heroin addict.<sup>2/</sup> He worked part-time, but the thirty dollars he earned each day could not cover his \$75 per day heroin addiction. Exh. 16 (Jackson testimony from April 28, 1980

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<sup>2/</sup> By all accounts, including those of the accomplices, Herbert was not.

trial, *U.S. v. William E. Russell & George W. Ford*).<sup>10</sup> Less than 12 hours after the murder, Jackson, Winfield, and Green needed more money because Jackson was "sick" and in need of more drugs. Trial I at 164. Additionally, Jackson's wife, Karen was jailed awaiting trial, and according to Karen, Jackson was trying to scrape up money for her bond. Exh. 17.

Evidently, Jackson considered Burwell and the Mascot station an easy mark. Winfield confessed in a letter to a friend, dated July 15, 1980, that Tyrone Jackson had robbed Burwell *three* times in the past. Exh. 18 (Winfield letter to Billy Ferby). These earlier robberies also provided Jackson with the motive to kill Burwell. After four robberies of the same station and same attendant, Jackson could hardly avoid being recognized. There is no evidence that Herbert knew Burwell, and Cook suggested he did not. Exh. 19 (Affidavit B of Alfred Brown).

B. The Dearth Of Reliable Evidence Against Herbert

1. There Is No Physical Evidence To Implicate Herbert

The same investigation that turned up ample evidence against Jackson was unable to gather *any* physical evidence to link Herbert to the crime. This was not for lack of diligence on the part of investigators. The police were at the scene within 12 hours after the murder. Trial II at 99-127. They thoroughly investigated the scene and the surrounding area. They located Burwell's clothes and personal belongings, took numerous pictures, and gathered the forensic evidence available at the scene. On his arrest, the Commonwealth thoroughly

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<sup>10</sup> Tyrone's wife Karen testified that he spent \$200 per day on drugs. Exh. 17 (FBI interview with Karen Jackson).

searched Herbert's car and the area surrounding his apartment. Trial II at 123-24. Despite these efforts, Detective Priddy, a Henrico forensic detective, was forced to admit that they found no fingerprints, footprints, tire marks, bloodstains, clothing fibers, or other forensic evidence to even suggest that Herbert was at the murder scene or took part in the crimes. Trial II at 114. Moreover, they failed to connect the murder weapon to him. They could not even show independently that Herbert owned a .22 caliber pistol. In short, the Commonwealth's case rested precariously on the testimony of the accomplices, Winfield, Cook, and Green.

2. There Are No Non-Accomplice Eyewitnesses  
Against Herbert Nor Any Witnesses to  
Corroborate The Accomplices' Stories

In contrast to virtually all capital convictions, the Commonwealth could not provide any non-accomplice who witnessed Herbert committing any act that would implicate him in Burwell's murder. Indeed, during Green's trial on July 29, 1980, Detective O'Keefe admitted that his department could not locate anyone to corroborate even the smallest detail of the accomplices' story. Exh. 20 (Green Trial Transcript). This was not because the crime was played out in secret. Indeed, Herbert's accusers described a course of events in which many people would have had the opportunity to see Herbert. For example, Herbert is supposed to have marched Burwell from the Mascot station (located at the heavily trafficked intersection of Mosby Avenue and Fairmount Avenue) up the hill to the waiting car. Yet the prosecution produced no witnesses to this event, even though Green herself admitted, "there was [sic] quite a few guys out there." Trial II at 323. Indeed, at Green's trial, the Commonwealth stipulated that two men, Eugene Ampey and Darry Bean, saw Winfield and Green at the

Mascot station, but that neither had seen Herbert or any man. The Mascot station is a small building set in a large open area; that Green and Winfield could see Herbert, but Ampey and Bean could not, even though they could see Green and Winfield, is implausible.

The Commonwealth also could not produce a witness who observed Winfield allegedly being forced into the car (after it supposedly *screached* to a halt), even though the neighborhood behind the service station is residential. Moreover, no eyewitness testified that Green hid from Herbert by kneeling behind two cars even though Green stated that, "there were two guys there playing dice or something." Trial II at 325.

In the absence of an independent eyewitness testifying against Herbert, one at least might expect corroboration of the accomplices' details by witnesses without a strong motive to lie. For example, the Commonwealth could have produced a non-accomplice witness who could testify that Herbert owned a .22 pistol like the one that killed Burwell, or a witness who recalled Herbert trying to purchase such a weapon with Cook, or someone who could testify that Herbert was in dire need for money. But despite its thorough investigation, the police and prosecution could not unearth even one such witness. In fact, the converse is true. Several independent witnesses exist who contradict aspects of the accomplices' testimony.<sup>11/</sup> Consequently, the jury convicted and condemned Herbert entirely on the testimony of three known liars and conspirators.

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<sup>11/</sup> Frank E. Crawley, Jr., owner and operator of the Mascot station in 1979, told Herbert's attorneys that he spoke with Darry Bean soon after Burwell's disappearance was noted. Bean informed him that Burwell walked up the hill behind the station with two women. This was contrary to the testimony of Winfield and Green. Belinda Atkinson and Gladys Mock testified that Green was in Richmond with Jackson and Winfield on the day after the murder, though Green denied this at trial. And David Phillips, Winfield's parole officer clearly remembered that Winfield missed her appointment because of troubled feet in late December, not November, as Winfield asserted in her fantastic account of torture at Herbert's hand.

C. The Case Against Herbert Depends Entirely On The Testimony  
Of The Accomplice Accusers

The Commonwealth produced three accomplice witnesses that linked Herbert to the murder of Burwell. Their testimony is the only evidence that links Herbert to the crime. These witnesses are inherently unreliable and were motivated by tremendous self-interest -- to escape death in the electric chair -- to lie and shift blame to another person. In their effort to deflect guilt, the witnesses manufactured conversations, events, and other facts about the crime. However, with each attempt at telling the "truth" the accomplices contradicted themselves and each other, thereby casting serious doubts on the veracity of any version. Moreover, because of their fear of the electric chair, the accomplices apparently entered into a *de facto* arrangement with the Commonwealth, whereby they would receive lesser sentences for providing the evidence necessary to convict Herbert. In their efforts to do so, the accomplices collaborated on their stories to ensure consistency on the major issues, though with limited success. As they fine-tuned their stories they also embellished once bare stories, fabricated information, or changed the order of events to have the most damaging impact on Herbert's defense.

1. The Character Of Herbert's Accusers

Betty Winfield, Jeanette Green, and Samuel Cook are career criminals, long-time drug users, and suspects in Burwell's murder. Nothing in the accomplices' backgrounds suggests that they are inclined towards, or even capable of, telling the truth.

a. Betty Jean Winfield<sup>12/</sup>

Winfield was the star witness for the prosecution. Winfield is a proven liar, schemer, and manipulator. At Herbert's first trial, Winfield admitted to lying while under oath during his preliminary hearing. Trial I at 170, 172. Her lying did not end at the preliminary hearing, however. During the second trial, for example, Winfield testified that she never tried to implicate Herbert in the November 27, 1979 bank robbery that Tyrone Jackson committed. Trial II at 285-86. But in a January 8, 1980 interview, Winfield told FBI agent John Carroll that:

They [the bank robbers] made their escape in Russell's car which was driven by Herbert Russell Bassette. Bassette received \$500 for driving the getaway vehicle. . . .

Exh. 15. As to her own involvement in that bank robbery, Winfield took the Fifth. Exh. 21. (Winfield testimony from April 28, 1980 trial, U.S. v. William E. Russell & George W. Ford). According to Demetress, Winfield's motivation for these lies was Herbert's refusal to provide Jackson, and evidently Winfield, with an alibi for the bank robbery. Exh. 22 (Demetress Bassette testimony from April 28, 1980 trial, U.S. v. William E. Russell & George W. Ford).<sup>13/</sup> Fortunately for Herbert, he was in traffic court during the time of that robbery, and a police officer, Robert House, testified to that fact at the bank robbery trial. Exh. 23 (House testimony from U.S. v. William E. Russell & George W. Ford). But for this coincidence, Winfield's lies might have ensnared Herbert as they ultimately did in the Burwell trial.

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<sup>12/</sup> Winfield relies on numerous aliases, including Betty Jean McNeil, Betty Jean Wingfield, Betty McNeil Winfield, Betty Smith, and Priscilla Garland.

<sup>13/</sup> Jackson joined with Winfield in the attempt to frame Herbert. He told his wife Karen that Herbert got \$1000 for driving the getaway car. Exh. 17.

Winfield went so far in Herbert's trial as to instruct her accomplices on specific false testimony they should give. Winfield wrote several letters to Green and Cook that directed each of them to "get their testimony straight" and offered obviously false versions of testimony that might insulate Winfield and her two accomplices from conviction. The three were never successful in coordinating or orchestrating their stories into a consistent, credible tale. These facts not only underscore Winfield's malicious and mendacious nature, but expose her vendetta against Herbert.

Winfield's nature was fully reflected in her criminal record. At trial, Winfield admitted to five felony and ten misdemeanor convictions. Trial II at 229. In fact, Winfield had been convicted of at least seven felonies and seventeen misdemeanors. Her convictions included: felonious and unlawful wounding, armed robbery, possession of heroin with intent to distribute, welfare fraud, grand larceny, shoplifting, and prostitution. Trial II at 229. Between 1961 and 1980, she was arrested and charged with over seventy-five offenses, including these: shoplifting, prostitution, possession of an unlawful weapon (razor), solicitation for immoral purposes, lewd and lascivious behavior, battery, carrying a pistol without a license, driving under the influence, driving without a license, disorderly conduct, credit card theft, carrying a concealed weapon (pistol), robbery, felonious shooting, petit larceny, grand larceny, disorderly conduct, trespassing, destruction of private property, contempt, gambling, breaking and entering, possession of narcotics, possession of drug paraphernalia, escape from custody, assault, armed robbery, tampering with a motor vehicle, fraudulently obtaining welfare benefits, burglary, malicious damage, resisting arrest, ill fame, creating a turmoil, failure to answer summons, threatening to kill, and violation of the State

Health Code. Exh. 24 (Presentence Report of Winfield). Four days before the murder she had been released from the penitentiary where she had been serving a sentence for larceny. Prelim. Hearing at 15-16. In addition, she had been convicted as an accessory to the very crime for which she was testifying - the murder of Burwell. Since Herbert's trial in 1980, Winfield has been convicted of at least three other felonies. In 1981, Winfield was twice convicted of grand larceny and once convicted of petit larceny. In 1982, she was convicted of grand larceny and conspiracy. She also may have served time for violating the conditions of her parole.

Winfield is a drug addict whose habit includes heroin, amphetamines, barbiturates, and marijuana. Trial II at 230. She has been addicted to drugs since 1961, and in 1974, she admitted to a \$3,000 per day drug habit.<sup>14/</sup> Before she was charged for Burwell's murder, Winfield had been institutionalized at least once in a mental hospital for heroin addiction. Prelim. Hearing at 17. At least three times, the courts imposed, in addition to incarceration, drug treatment and rehabilitation. She was unemployed at the time of the murder and obtained money by shoplifting. Her criminal record indicates that she also earned her living through prostitution. Even as late as December 1991, Winfield resided in Visions, a drug rehabilitation clinic in Petersburg. Winfield has acknowledged that her drug habit has permanently impaired her memory. Exh. 27 (Winfield letter to Sheppard).

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<sup>14/</sup> In a January 9, 1974 letter to Judge Rosenstock of the Petersburg General District Court, Winfield stated, "Sir I know I was wrong for leaving the Clinic but you've never had a \$3,000 dollar a day habit and got taken off it without any medication." Exh. 25 (Winfield letter to Judge L. A. Rosenstock).

b. Samuel "Dap" Cook

Cook had been convicted of a variety of felonies and misdemeanors when he testified, including breaking and entering and larceny. Trial II at 191. He also is a drug addict who admitted that he had taken amphetamines every day and heroin several times in November 1979. Trial II at 168-71. Cook travelled to Richmond the night before the murder to shoot heroin and Preludin, an amphetamine (also known as "bam"). Trial I at 102, Trial II at 148. The afternoon of the murder he was under the influence of both heroin and Preludin. Trial II at 150. He had been treated for drug addiction in the past. Trial II at 151. At the time of the murder he had been unemployed for at least five months, yet still maintained a drug habit of at least \$60 per day. Trial I at 120. He testified that he made his living by shoplifting and gambling. Trial II at 189-90. Since Herbert's trial, Cook has been convicted of receiving stolen property.

c. Jeanette Thienia Green<sup>15/</sup>

Green was 23 when she testified. As a minor, Green was convicted of at least three offenses. In 1976, Green was convicted of first-degree murder and armed-robbery. Masquerading as a Housing Authority representative, Green duped the victim, James Brown, into opening his front door. After her accomplices had gained entrance to the home, Green returned to the car. There she waited as her friends robbed Brown of \$550 and then murdered him. During the trial, Green admittedly was the "star witness" for the prosecution. Exh. 26 (Green letter to Judge Appollo [sic]). Because her testimony was so effective -- one defendant

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<sup>15/</sup> Green uses the following known aliases: Jeannette Allen and Thienia Allen.

was convicted of murder and sentenced to twenty-five years, while the other received five years for robbery -- Green received suspended sentences. She received twenty years for murder, which was suspended on good behavior for fifteen years, and five years for robbery, of which two years were suspended. Because she was on probation for an unknown federal offense when she aided in Brown's murder, she was sentenced in federal court to three years in prison in California for violating federal probation.

Green began using drugs when she was fifteen. Trial II at 330. She has numerous convictions for drug offenses, including a 1983 conviction for possession of Preludin. Drug abuse has exacted a heavy toll on Green. In a recent interview, she acknowledged permanent loss of memory for the periods when she was addicted. Around the time of the murder, Green was addicted to heroin and on a binge. On the day of the murder, she had been taking Preludin at least since the day before. Trial II at 330. She obtained more Preludin and heroin as the day wore on and injected them with Winfield and Cook. Trial II at 320. In addition to the drugs Green was injecting, she had been drinking large amounts of alcohol. Trial II at 331. She was so drunk that she eventually got sick at the Mascot Station. Trial II at 323-24. It is unclear how she made her living. She was unemployed at the time of the murder, but she often earned money as a prostitute.

2. The Story Told By Winfield, Cook, And Green  
Does Not Hold Up Under Scrutiny

Herbert was tried twice.<sup>16/</sup> Winfield and Cook testified in both trials. Green testified only at Herbert's retrial. In addition, Winfield testified at Herbert's preliminary hearing on February 15, 1980. All three accomplices provided statements to the police when arrested.<sup>17/</sup> Recently, Green and Cook talked separately with Herbert's attorneys and private investigator about the events of November 23-24, 1979. Accordingly, eleven accounts of the events surrounding the murder exist -- four from Winfield, four from Cook, and three from Green.

This section reviews and tests the stories of Winfield, Cook, and Green. What this test reveals is that each accomplice is incapable of telling a consistent, credible story; few details, material or otherwise, survive from one telling to the next. During any one stage, the accomplices contradict one another, and from one stage to the next, they contradict themselves and the others. While some inconsistencies are relatively minor, most are glaring.

This section does not attempt to outline all the inconsistencies and contradictions in their accounts -- it analyzes only a handful of the most egregious errors. The analysis of the contradictions reveals fabrication, manipulation, and failed efforts at collaboration by the accomplices. Several lies are so obvious and outrageous that each alone casts doubt on the prosecution's case. The remaining material contradictions are listed at the end of this section to illustrate the overwhelming nature of this evidence.

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<sup>16/</sup> His first trial was heard on June 17-20, 1980, and his second trial occurred on November 19-22, 1980.

<sup>17/</sup> Winfield provided a statement to the police on January 8, 1980. Exh. 28. Cook and Green were interviewed separately by the police on March 7, 1980. Exh. 29; Exh. 30.

a. Inconsistencies, Contradictions, and Lies

*Two Monte Carlos*

Herbert does not dispute that on the afternoon of November 23, 1979, Winfield, Green, and Demetress drove to Herbert's place of work to pick up his paycheck. He does contest, however, Cook's testimony surrounding Herbert's activities during this time. The first time Cook was questioned on this topic, he stated that he and Herbert waited at the apartment for the women to return: "Betty and ah, Jeannette went to get his check with his wife and me, me and him *stayed there*." Exhibit 29 (emphasis added). In the first trial, he abandoned this story in an effort to show Herbert's intent and premeditation to commit armed robbery by saying that while the women were away, he drove with Herbert to find a second gun to use in the robbery. Trial I at 107-08.

Pressed for details about this ride, Cook asserted that he and Herbert drove Herbert's black Monte Carlo to find the second gun. Id. at 108. Winfield, however, testified that during this same time, she, Demetress, and Green drove in the black Monte Carlo to pick up the paycheck. Trial I at 156. Therefore, according to the prosecution's two main witnesses, either Herbert had two black Monte Carlos, or the same car carried different people in different places at the same time.

Recognizing that he had been caught in a lie, Cook altered his story a third time for Herbert's second trial. Testifying again, he stated that he and Herbert left in "another car."

Although in the first trial he specifically recalled that the car was a black Monte Carlo, Cook now remembered neither the color nor the make of this vehicle.<sup>18/</sup> Trial II at 205-206.

### *The Abduction*

The accomplices suggested that Herbert abducted Burwell and, alone, led him to the car at gunpoint. The independent evidence that exists suggests this story is untrue. Frank E. Crawley, Jr., the owner and operator of the Mascot station, arrived at the station shortly after learning of Burwell's disappearance and spoke with Darry Bean, the other pump attendant on duty that night. Bean informed Crawley that Burwell walked up the hill *with two women*. He never mentioned seeing a man with Burwell.<sup>19/</sup> Nor did Eugene Ampey, whose testimony was stipulated in Green's trial. Thus, the accomplices' testimony that Herbert was present at the Mascot station not only is uncorroborated, it is at odds with the available independent evidence.

### *The Shooting*

Winfield not only contradicted herself and the other accomplices, but she also embellished her lies as she practiced them. For example, in her police statement, Winfield stated that she only heard the gun being fired and did not witness the actual shooting. Exh. 28. During the preliminary hearing, she claimed that she watched, but then turned her head: "Did I see? It was dark. I didn't see it . . . . I turned my head because I didn't want to see it." Prelim. Hearing at 24-25. She turned back in time for the first trial, where she

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<sup>18/</sup> Demetress and Herbert owned another car in 1979, but the evidence that this car was inoperable was not disputed. Trial II at 382.

<sup>19/</sup> Darry Bean disappeared shortly after the murder and has not been located.

claimed for the first time that she saw Burwell kneeling when he was shot. Trial I at 169.

Then at the second trial, Winfield added the most provocative piece of testimony. After equivocating over whether Burwell was lying down or kneeling (another inconsistency), she claimed that she knew Burwell was kneeling because "That's when you're saying your prayers."<sup>20/</sup> Trial II at 284-85.

### *The Pistol Whipping*

Winfield's credibility also is damaged by her deliberate manipulation of testimony, as evidenced by her recounting of events that occurred between Herbert and her in the car.

During the first trial, Winfield testified about the following event as they left the Mascot station:

He started driving around, driving real crazy like and I went to call his name, and he just turned around and hit me in the mouth with his pistol.

Trial I at 160. In this version, Burwell must still be alive for Winfield's use of Herbert's name to matter. But in her version for the second trial, Burwell is dead and Herbert has a different reason to hit Winfield, one calculated to paint for the jury a much worse image of Herbert:

After we left the place [where Burwell was killed] then he rode back and on the way back I told him, I said, "you mean to tell me you took this boy's life for \$97", right. So that's when he turned around and hit me with the pistol in my mouth.

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<sup>20/</sup> Green stated that Winfield told her that the boy was shot while lying on the ground. Trial II at 327. Cook also testified that Burwell was shot while lying on the ground. Trial II at 193.

Trial II at 248. This material discrepancy cannot be due to a faulty memory, but rather must be a product of intentional manipulation and deceit.

### *Green's Whereabouts*

Disturbing inconsistencies surround Green's whereabouts after the murder. By the second trial, Winfield, Cook, and Green agreed that Herbert and Cook drove around after the murder, found Green, and brought her to the apartment. But Winfield, in two earlier versions, told different stories. In the first, Winfield presumably never saw Green again because she is never mentioned again. During the preliminary hearing, however, Winfield stated that Green walked into the apartment by herself later that evening *after* Cook had left for Petersburg. Prelim. Hearing at 20. Cook came close to this story in a recent interview, when he stated that he did not see Green again until he returned to Petersburg. Exh. 19. This version, of course, contradicts his testimony at trial. Trial I at 116-17.

During Herbert's second trial, Green claimed that she learned about the murder from an agitated Winfield in the bathroom of Herbert's apartment. Trial II at 326-27. Winfield did not corroborate Green's story. She testified instead that Green refused to come into Herbert's apartment after she was found because she was "scared." As a result, Winfield walked out to the car and told Green what had happened. Trial II at 250. Cook offered yet another version. He testified that during the ride to Herbert's apartment, Herbert told Green about the murder. Trial II at 162. Green changed her story in a recent interview and adopted Cook's version.

Cook and Green testified at the second trial that, upon learning of the murder, Green asked to be taken to the bus station so she could go home to Petersburg. Cook recently recanted this testimony in an interview with Herbert's attorneys. He stated that after leaving

Green at the Mascot station, he did not see her again until he returned to Petersburg. Exh. 19.

During this ride, Green claimed Herbert allegedly confessed to the murder and threatened to kill Green. Trial II at 328; Exh. 30 at 8. Winfield's testimony in the second trial lends no support to Green's version: Q: "Before you left and before Dap left were you ever in the company of Jeannette Green?" A: "For about five minutes." Q: "Did y'all go anywhere?" A: "No.". Trial II at 251.

During the first trial, Winfield did corroborate that Green was taken to the bus station. In her story, however, *Winfield and Tyrone Jackson* drove Green to the station *the next afternoon* after they had sold the murder weapon for drug money. "Then me and Tyrone and Jeannette, we're lucky 'cause Jeannette needed bus fare to get to Petersburg with. She didn't have no money, so we took and carried her down to the bus station and I gave her the money to go home with." Trial I at 166. This version of events provides one of the few instances where one of the accomplice's stories can be corroborated by the testimony of independent witnesses. Belinda Atkinson and Gladys Mock bought the murder weapon from Jackson and Winfield the next day. They confirmed that Green was present with Jackson and Winfield during the sale. Trial II at 215-16, 221. *Significantly, this version omits any mention of Herbert.*

#### *Winfield's Torture*

Finally, Winfield also told several incredible accounts of what happened to her after she sold the murder weapon. In the first trial, Winfield stated that she returned to Herbert's apartment to get her clothes after she and Jackson sold the gun, "but I didn't never get them 'cause when I went in there to get them Herbert and Demetress held me down and cut me all

up with a piece of barb [sic] wire fence." Trial I at 167. She went on to recount that she could not leave Herbert's apartment for two days because her feet "was swollen up and [she] couldn't walk." Trial I at 168.

In the second trial, the story evolved substantially. In this incarnation, Winfield went back to Herbert's apartment to get her clothes, and while there fell asleep. When she awoke, Herbert had a "shotgun" in her ear and accused her of turning him in. Trial II at 255. "I waited until he took the *pistol* out of my ear and then I left the house . . . ." The confused Commonwealth's Attorney tried to get her back on track:

- Q: Miss Winfield, I asked you about barbed wire, do you know what that is?  
A: That's what he used to cut me up with.  
Q: When did he do that?  
A: The same morning he put the pistol at my ear, shotgun rather.

Trial II at 256. Was it a shotgun or a pistol? Did she fall asleep or was she attacked on entering the house? Did Herbert attack her with barbed wire and then put the weapon in her ear, or vice versa? Most confusing, did she leave the house soon after the incident with the pistol/shotgun or were her feet were so swollen that she could not leave the house for three days?

Winfield asserted she could verify this incident through her parole officer. She claimed to have called her parole officer to cancel an appointment because the injuries inflicted on her by Herbert prevented her from walking. Trial II at 260. Called by the prosecution, her parole officer, David Phillips, confirmed that Winfield did call to cancel an appointment because her feet were swollen. However, he specifically recalled that he received this call around Christmas, not Thanksgiving. Trial II at 299. Winfield gave a more likely explanation for the

wounds she blamed on Herbert when she admitted, in a 1974 letter found in one of her criminal records in Petersburg Circuit Court, that her heroin addiction had caused her to "cut myself all up." Exh. 27 (Winfield letter to Sheppard). Here is another incident where corroboration of the accomplices' story might be expected, but contradiction results instead.

#### *Other Inconsistencies*

Many other inconsistencies infest the testimony of the accomplices. The following list provides a brief look at the problems inherent in the testimony and illustrates the implausibility of Herbert's guilt beyond a reasonable doubt:

1. The accomplices contradict themselves and each other in their testimony about when Herbert supposedly decided to commit robbery. Winfield - Trial I at 153-55; Trial II at 237; Green - Exh. 30 at 2-3; Trial II at 321; Cook - Trial I at 124, 127.
2. Cook and Winfield cannot agree whether it was daytime or nighttime when the group left Herbert's apartment to commit the robbery. Winfield - Trial II at 239; Cook- Trial I at 109; Trial II at 197.
3. The conspirators contradict each other about who suggested the Mascot service station as a suitable target. Winfield - Trial II at 240; Cook - Exh. 29 at 2; Trial I at 110; Trial II at 157; Exh. 19. Green - Exh. 30 at 3; Trial II at 322.
4. Winfield cannot consistently testify about the abduction of Burwell. Exh. 28 at 3; Prelim. Hearing at 10-11; Trial I at 159; Trial II at 243-44.
5. Winfield lies about trying to escape from Herbert and about being forced into his car after the abduction. Winfield - Trial I at 159-60; Trial II at 244; Green - Exh. 30 at 4; Trial II at 325; Cook - Exh. 29 at 2; Trial I at 113; Trial II at 159.
6. Cook and Winfield dispute who drove the car as they fled the Mascot station. Cook - Trial II at 159; Winfield - Trial II at 244.

7. Cook and Winfield could not agree on whether Herbert gave Winfield the murder weapon. Cook - Trial I at 113-14; Trial II at 159-60; Winfield - Trial II at 283-84.
8. Cook, Green, and Winfield cannot agree on their story about purchasing the drugs that they injected in Herbert's apartment. Cook - Exh. 29 at 1; Trial I at 105-06, 125-26; Trial II at 148-50; Green - Trial II at 317-19; Winfield - Trial II at 234-36, 277.
9. The accomplices disagree about which drug they injected on the night of the murder. Winfield - Trial I at 152-55 (Preludin); Trial II at 234-36, 277 (heroin); Green - Trial II at 317-319 (Preludin); Cook - Trial I at 125-26; Trial II at 150 (heroin).
10. Cook and Winfield contradict themselves and each other about when Burwell was forced to strip. Cook - Exh. 29 at 2; Trial I at 114; Trial II at 159, 194; Exh. 19; Winfield - Trial II at 244-45.
11. Cook cannot properly identify where the murder occurred. Trial II at 159.
12. Cook and Winfield contradict themselves about what happened to the money from the robbery. Cook - Trial I at 132; Trial II at 160; Winfield - Trial I at 161, 169; Trial II at 247.
13. Cook and Winfield contradict themselves and each other about whether the pistol was reloaded by Cook after the murder. Cook - Trial I at 115; Trial II at 160; Winfield - Trial I at 161; Trial II at 285.
14. Cook and Winfield have conflicting accounts of who disposed of the pistol. Cook contradicts himself within several pages in his testimony at trial. Cook - Trial II at 161, 164; Exh. 19; Winfield - Trial II at 252.
15. Winfield inconsistently testified about who sold the murder weapon. Prelim. Hearing at 34; Trial II at 252-53.
16. Winfield inconsistently testified about what they received in return for the murder weapon. Prelim. Hearing at 34; Trial II at 253.

17. Cook's and Winfield's testimonies conflict regarding Cook's departure from Herbert's apartment. Winfield - Prelim. Hearing at 20; Trial II at 250-51; Cook - Trial I at 118.
18. Winfield lies about using drugs on November 23-24, 1979. Winfield - Prelim. Hearing at 33; Trial I at 177; Trial II at 235-36; Cook - Trial I at 125-26; Trial II at 192.
19. Green lies about using heroin on November 23-24, 1979. Green - Trial II at 330; Cook - Trial II at 150; Winfield - Trial I at 176.
20. Cook both denies and admits knowing Tyrone Jackson. Cook - Trial I at 136; Trial II at 165.

3. Winfield, Cook, And Green Had A Motive For The Crime And The Opportunity To Collaborate On Their Story, And Winfield And Jackson Had Tried To Frame Herbert Before

The Burwell crime was not the first instance when Winfield implicated Herbert.

Though she specifically denied doing so at Herbert's trial, Winfield tried to frame Herbert for the bank robbery committed by Jackson. Winfield told FBI Agent Carroll that Herbert drove the getaway car during the bank robbery. Jackson assisted in the frame: he told his wife Karen that Herbert drove the getaway car. Both were lying. At the trial of Jackson's accomplices, Henrico County Police Officer Robert F. House exonerated Herbert completely. He testified that while Jackson was robbing the bank, Herbert was in Henrico County Traffic Court to pay a ticket Officer House had given him. Winfield's and Jackson's motive to frame Herbert, according to Demetress, was that he refused to give them an alibi for the bank robbery.

In addition to their questionable character, unreliable testimony, and Winfield's

previous attempt to frame Herbert, his accusers possessed ample motive and proclivity to commit such a crime. Cook and Green were in Richmond on a drug spree and had run out of money and drugs. Winfield, four days out of the penitentiary, had no place to live, no money, and was herself on a drug binge. Green herself suggested finding money to buy more drugs. Trial I at 156.<sup>21/</sup>

Moreover, each witness possessed a motive to lie. Winfield and Jackson were lovers. Trial II at 262. Cook and Green also were lovers. Trial II at 101, 131. Furthermore, Winfield, Cook, and Green were long-time friends, who grew up together in Petersburg. Trial II at 283. These close ties by themselves provide ample motive for the accomplices to lie.

Several other possible motives exist for their fabricated testimony. First, they may have wanted to protect the real murderer, Tyrone Jackson. As noted above, Winfield admitted that she was "sure enough tight" with Jackson. Trial II at 262. This bond of allegiance likely was coupled with a sense of fear. Robinetta Wall stated that Jackson threatened to kill both Wall and Winfield if they ever exposed him. Exh. 11. Such a threat from Jackson probably shocked neither woman: in her November 28, 1979 statement, Wall stated that she was not surprised by Jackson's confession that he had killed Burwell because he had shot people before. Exh. 12. Finally, the accomplices may have manipulated facts simply to avoid death

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<sup>21/</sup> Herbert's account of November 23, 1979 makes more sense logically, especially when considering motives. Winfield, Cook, and Green arrived at Herbert's apartment on Friday afternoon. Herbert asked his wife to pick up his paycheck. When the group returned, Winfield asked for money, but was rejected by Herbert. "If I had got my check, I was going to give it to her, but I didn't have it to give to her to spare right then." Trial II at 436.

in the electric chair. Winfield implicated Herbert long before Cook and Green were

questioned. From that point, the police considered Herbert the murderer. Therefore, it benefitted Cook and Green to side with Winfield and focus blame on a single "triggerman." In addition, Winfield's story tended to absolve them from direct participation in the murder. In letters to Cook and Green, Winfield repeatedly instructed them that they would avoid the death penalty only if they could convince the jury that they did not participate in the crime in any way. Exh. 31 (Winfield letters to Green); Exh. 32 (Winfield letter to Cook).

The credibility of the witnesses and their stories also must be questioned based on their close involvement with the prosecution. Each accomplice was charged with capital murder. Although each denied an agreement with the Commonwealth to favor them in return for a conviction of Herbert, the circumstances indicate that a *de facto* agreement did exist.

For example, Herbert's initial trial was scheduled for June 17, 1980. Cook was scheduled to be tried July 31, 1980. After Herbert's first trial resulted in a hung jury and was rescheduled, the Commonwealth successfully requested that the court postpone Cook's trial until *after* a verdict for Herbert was returned in the second trial. Trial II at 175-88. Even more interesting is the fact that Winfield and Cook each received only 12 month sentences as accessories after the fact for their roles in the murder of Burwell. Incredibly, in light of her past record and her role in Burwell's murder, Winfield's sentence was suspended.

The story told by Winfield, Cook, and Green was a clumsy, artless attempt to place all blame for the murder on Herbert. The accomplices portrayed themselves as innocent, duped, drug addicts who did not realize what was happening and were both terrified and horrified by Herbert and the violent crime. Between them, however, these duped innocents had been

convicted of murder, felonious wounding, assault, battery, armed robbery, breaking and entering, grand larceny, distribution of narcotics, welfare fraud, and prostitution. We now know, based on Winfield's letters to Cook and Green, that the accomplices created this impression intentionally to avoid the electric chair themselves. Exhs. 31, 32.

The parties also had ample opportunity to coordinate their stories. They were not arrested until several months after the murder and all lived in Petersburg. By Green's own testimony, she was in contact with Winfield before they testified. Trial II at 332. Green also testified that she spent two weeks in the City jail with Winfield before testifying at trial and admitted to talking with her during this time. Trial II at 332. This, of course, provided the women with ample time to refine their fabrication of Herbert's involvement and may explain some of the stunning reversals in Winfield's testimony between the preliminary hearing and trial. Moreover, Winfield testified that she wrote Green "a whole lot of letters" while they were awaiting trial. Trial I at 195. In these letters and in others to Cook, Winfield told them how to testify and what to say. Exhs. 31, 32. For instance, she told Green, "You've got to get this down to a tee," and told both Cook and Green to "get this down like you would a record you like." *Id.* Winfield also said, "I know that if I slip we all go down." Exh. 31.

D. Other Evidence Suggests That Herbert Was Not Involved In The Crime

1. Herbert's Lack Of Motive

Evidence of Herbert's motive to rob the Mascot station was so lacking that the Commonwealth hardly tried to prove one. Although the Commonwealth implied that he committed the robbery because he could not get his paycheck, no evidence was presented that

Herbert desperately needed the money that Friday evening, or that he could not get the check on Saturday. Certainly, the accomplices did not support this notion; they claimed that Herbert discussed committing robbery even *before* he sent his wife for the check and discovered he could not get it. Trial I at 106.

The prosecution produced no evidence that Herbert needed any money. Unlike his accusers, Herbert worked regularly, as an assistant foreman at Professional Coatings, Inc., making approximately \$320 per week. Trial II at 366. Demetress earned approximately \$600 per month as a Parent Educator in the Richmond public school system. Trial II at 379-80. In stark contrast to his accusers, Herbert did not use drugs. Trial II at 280, 432. Thus, he did not share the addiction-driven motive of his accusers, who constantly needed money to feed their habits. If a need for money in fact drove Herbert to rob the Mascot, Cook's testimony that the proceeds of the robbery went to Winfield for drug money cannot be explained.

No reason exists why Herbert would accompany this trio to rob someone for drug money when he knew only one of them, did not need the money, and had no reason to kill Burwell. Jackson had many reasons, however, as we have explained above.

2. Credible Witnesses Testified Herbert Could Not Have Killed Burwell

Since the day he was arrested twelve years ago, Herbert has maintained his innocence. Through two trials and uncounted interviews, he has repeated his story with consistency and conviction. This in itself is unusual among death row inmates, nearly all of whom have confessed to their crimes. The consistency and continuity of Herbert's story contrasts sharply with the constantly changing stories told by Winfield, Cook, and Green.

In his defense, Herbert produced five witnesses -- himself, Demetress, his mother, his mother-in-law, and his niece -- who testified as to his whereabouts at the time of the robbery and murder. According to these witnesses, Herbert spent time with his family while the crime occurred.

Herbert and Demetress testified that Winfield, Cook, and Green came to Herbert's apartment on Friday afternoon. Trial II at 434. Demetress, Winfield, and Green went to get Herbert's paycheck, but Herbert's boss had left. On the way back, she stopped at a store to allow Winfield and Green to get a drink. Trial II at 369. Cook left Herbert's apartment for awhile, but returned before the women got back. Trial II at 435.

When the women returned, Winfield asked Herbert for \$50. Herbert testified that he would have lent her the money had he gotten his paycheck, but without it, he could not spare \$50. Trial II at 436. Winfield became angry and left with Cook and Green. Trial I at 273. Herbert did not see them again that night. Trial II at 436.

After Winfield, Cook, and Green left, Herbert and Demetress took Demetress's daughter and drove to the southside of Richmond to have her mother's car repaired. Trial II at 370. Earlier in the week, a man named Mike Wade had hit her mother's car and had agreed to fix it. Id. Herbert and Demetress picked up the car and arrived at Wade's house by 7:00 p.m. Trial II at 386. From there, they drove "a long distance," Id. at 371, to another man's house in Chesterfield for an estimate.<sup>22/</sup> Herbert and the family then drove home. On the

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<sup>22/</sup> Mike Wade corroborated that Herbert, his wife, and her kids met with him at his house in late November, 1979. He verified that they then drove to Chesterfield County to have somebody perform an estimate. Exh. 33 (Wade testimony from Plenary Hearing).

way, they stopped by Herbert's mother's house, at approximately 9:00 p.m., for about two hours. Trial II at 419. Finally, they dropped the car back at Demetress's mother's house at approximately 11:00 p.m., Trial II at 388, and returned home around 11:15 p.m. Id. at 387. This story was corroborated by Demetress's mother, Azzalee House, and Herbert's mother, Carrie Bassette. The prosecution made no attempt to impeach or discredit the testimony of House and Mrs. Bassette.

Herbert and Demetress went to bed before midnight. Demetress further testified that Winfield came home at 3:00 or 4:00 in the morning. Trial II at 375. Winfield arrived in a big, white car that looked like a Cadillac, and she was carrying a large sum of money. Id.

A third alibi witness, Georgeanne Mason, then 23 years old, also confirmed that Herbert came over to his mother's house that night. Unfortunately for Herbert, in her zeal to convince the jury, Mason created a journal that contained an entry that corroborated the alibi. The prosecution exposed this falsehood, and although her substantive testimony that Herbert went to the house that night was unimpeached, her credibility before the jury was ruined. This created a domino effect, and the jury discredited all of Herbert's alibi witnesses.

Without Mason's mistake, the testimony of the trio of accusers would not have been enough to condemn Herbert. Two other witnesses, both upstanding citizens without criminal records (one of whom worked for a Richmond Circuit Court judge for over twenty years), confirmed Herbert's whereabouts and firmly established his alibi. The Commonwealth never was able to discredit this testimony. Moreover, Mason's perjury conviction concerned only the journal, not her testimony that Herbert could not have committed the crime.

3. Winfield's Arrest

Herbert's activities on the day Winfield was arrested do not reflect the actions of someone who had participated in a murder. After moving out of Herbert's apartment, Winfield moved into the Eggleston Hotel. Herbert learned that Winfield's probation officer was looking for her because she had missed a meeting. He and Demetress went to the hotel, told her this, and offered to drive her to the probation office. Although supposedly terrified of Herbert and Demetress, Winfield freely accepted the ride.<sup>23/</sup> While at the probation office visiting his probation officer, Herbert learned that Winfield had been arrested for murder. Rather than fleeing Richmond, he and Demetress went to Seigels grocery store to do some shopping: "bread mostly, juice, eggs." Trial II at 441.

E. Conclusion

Grave doubts persist as to Herbert's guilt. Much of the available evidence points to Jackson. He confessed to Robinetta Wall, and contrary to her testimony at trial, she believed him, partly because he had shot people before. The accomplices deliberately withheld from the jury evidence that Jackson was with them on the night of the murder, and indeed, Winfield and Green were with Jackson when he sold the murder weapon to Belinda Atkinson and on the night before the bank robbery. Addicted to heroin like the other accomplices, Jackson had a demonstrated need for money, and according to Winfield, he had robbed the Mascot station before.

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<sup>23/</sup> Winfield alleged that after the murder, when Winfield returned to the apartment, Herbert held her down and cut her breasts and feet with barbed wire, while Demetress looked on and laughed. Trial I at 167. Our review of the evidence, however, reveals that this story is manifestly unbelievable. See p. 31.

By contrast, against Herbert there is no physical evidence or reliable eyewitness

testimony to link him to the crime. There is only the self-serving testimony of three accomplices with abysmal histories of veracity and reliability. All were drug addicts, all were career criminals, and all were admitted or demonstrated perjurers. Together they weaved a story of Herbert's guilt, but they never agreed among themselves what had happened, and they altered their stories constantly. This was true even though the accomplices had many opportunities to collaborate on their story. Winfield wrote numerous instructive letters to Cook and Green, telling them exactly what lies to tell. The accomplices had good, self-serving reasons to lie about the crime, including a *de facto* deal with the Commonwealth. Notably Winfield and Jackson also tried to frame Herbert for the bank robbery they had committed, but this effort failed in the face of a police officer's testimony that Herbert could not have had any involvement in the bank robbery. Not a single detail of the accomplices' story could be corroborated, and in the few cases where corroboration might be had, the result instead is contradiction. Credible witnesses testified that Herbert did not commit the crime, and other evidence weighed in favor of Herbert's innocence.

The evidence that Jackson killed Burwell was substantial and significant. Little of that evidence made it to the jury, however, and the impact of the evidence that did was diminished by the deceit of the accomplices and the misconduct of the prosecution. By contrast, the evidence against Herbert was flimsy and filled with contradictions. Viewed as a whole, this evidence creates compelling doubts as to Herbert's guilt.

V. A CONVICTION BASED SOLELY ON ACCOMPLICE TESTIMONY HISTORICALLY HAS NOT LED TO THE DEATH SENTENCE AND SHOULD NOT IN HERBERT'S CASE

Central to capital litigation is the principle that no one may be sentenced to death unless the evidence attains an appropriate and acceptable level of certainty and reliability. We can tolerate, in other words, only a slight amount of risk that an innocent or undeserving person might be put to death. This is an issue not of politics, but of values. It is contrary to those values, inherent in our system of capital litigation, that any person should be led to his death on the strength of evidence as poor in quality, as lacking in consistency, and as short on credibility as the evidence used against Herbert.

So accustomed are we to the difficult burdens faced by prosecutors in convicting persons charged with crime -- for example, the various constitutional privileges against unreasonable search and seizure and self-incrimination -- that we often assume that convictions remove *all* doubt as to guilt. We forget that trials are affairs of probability. A criminal conviction is actually a conclusion by the jury that the probability that defendant did not do the acts charged is acceptably small. This fact is indicated by the "beyond a reasonable doubt" standard for conviction. Absolute certainty is neither required nor expected.

One reason we are willing to accept less than absolute certainty in criminal convictions is that the consequences of a mistake are not irredeemable; although the state cannot turn back the clock, it can release the prisoner and remove the stain from his name, and it can compensate him in other ways if it wishes.

This reason cannot salve our conscience when death is the penalty. Thus, while the certainty we require in the ordinary criminal case is high indeed, the certainty we must

demand before administering the lethal shock is virtually absolute. Above we explained the defects in the evidence against Herbert. Those defects destroy whatever certainty might attach to Herbert's conviction. But if those defects did not exist, there still would be reason to suspect the justness of Herbert's sentence.

Certainty is built on evidence, and some types of evidence inspire greater confidence than others. Physical evidence -- fingerprints, DNA comparisons, ballistics tests -- provides perhaps the surest proof of guilt or innocence. The persuasive force of this evidence varies, of course, but this is objective evidence, strongly resistant to manipulation, alteration, and bias. Because of this nature, physical evidence provides an acceptably firm footing for capital punishment. Confessions can be relied on as the basis for execution because it is so nearly unimaginable that defendants would manufacture evidence against themselves. Another class of evidence is testimony from persons not involved in the crime who were able to place the defendant at the scene, could corroborate key details of the prosecution's case, or witnessed the crime and identified defendant as the perpetrator. This testimony is reliable because the witnesses have no interest in the outcome of the trial that motivates them to alter their testimony.

By contrast, accomplice testimony has been denigrated as unreliable throughout our history. Indeed, between 1790 and 1826, some Virginia courts considered accomplice testimony so uncertain a basis for conviction that they banned it outright. *Byrd v. Commonwealth*, 2 Va. Cases 490 (1826). Since then the litany of cautions and complaints about accomplice testimony has continued unabated. The Virginia Supreme Court often has said that juries should not convict on the basis of accomplice testimony, unless other proof

shows the defendant's connection to the crime. *Brown v. Commonwealth*, 2 Leigh 777 (1839); *Johnson v. Commonwealth*, 224 Va. 525 (1982). This is because "accomplice testimony is peculiarly susceptible to influences of bias, prejudice and motivation for perjury and therefore involves the problem of reliability." *Smith v. Commonwealth*, 218 Va. 455 (1972), and because "the source of accomplice testimony is tainted with the temptation to exculpate oneself by laying the crime upon another." *Dillard v. Commonwealth*, 216 Va. 820, 821 (1976). In short, accomplice testimony historically has been treated as an unreliable basis for conviction and punishment. That reluctance to punish on the basis of accomplice testimony is readily apparent in every capital case decided since *Furman*.

Our research has determined that, since Virginia reinstated capital punishment following *Furman*, death has been recommended by juries or handed out by judges as punishment for 72 men.<sup>24/</sup> We have studied the evidence in all 72 cases. Appendix A (Summary of the Evidence In Post-*Furman* Death Cases in Virginia) details the evidence of guilt in those cases. Our study demonstrates that, with the exception of Herbert, the kind of evidence mounted against Herbert has never satisfied the sentencing jury or judge that death is appropriate. In all other cases, the death sentence has been anchored on a confession, on physical evidence, or on non-accomplice eyewitness testimony. In 54 of those 72 cases, the

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<sup>24/</sup> Of these 72, 13 have been executed and 47 reside on death row. Two men died while on death row. Ten men have obtained relief from their sentences:

- (1) One man, Giarratano, had his sentence commuted to life imprisonment;
- (2) In two cases, Rohauer and McClark, the sentencing judges rejected the juries' recommendations of death and imposed life imprisonment;
- (3) Two men, Cheng and Rogers, had their convictions reversed for insufficient evidence and were retried for first degree murder;
- (4) The other five, Johnson, Clark, Martin, Patterson, and Frye, received life sentences or less through some avenue of legal relief.

penalty has been based on at least two of those categories of evidence, and for 13 of the remaining 18 that depend on only one category, that category was a confession or guilty plea. In 32 cases, the defendant confessed or pled guilty. In 15 others, the defendant admitted involvement in the crime while denying that he was the triggerman or intended to kill anyone. Thus in 47 cases, the verdict of guilty was based in whole or in part on the defendant's own admission of complicity. In no fewer than 42 cases, physical evidence established the defendant's guilt. In 49 cases, eyewitnesses who were not accomplices linked the defendant to the crime. Accomplice testimony was used in only 16 cases, but in fifteen of those cases, the accomplice testimony was corroborated by the defendant's confession or inculpatory statements, by physical evidence, or by non-accomplice eyewitness testimony. Herbert's case is unique in that the accomplice testimony was not corroborated by *any* reliable evidence.

As we have explained above, *none* of the evidence in Herbert's case fits within these categories. Herbert did not confess to this crime; far from it, he staunchly denied his guilt, as he does to this day. No physical evidence linked him to the crime; Henrico County Police Detective Priddy admitted that no such evidence existed. Neither Burwell's fingerprints nor fibers from his clothes were found in Herbert's car. No clothing of Herbert's contained Burwell's telltale blood. The Commonwealth never found one witness, aside from its trio of felons, to corroborate even the smallest detail of Winfield's, Cook's, and Green's testimony. Herbert has not figured in the testimony of any non-accomplice from whom the Commonwealth might have wanted corroboration. Indeed, lead investigator Detective O'Keefe admitted in the trial of Jeanette Green that the police never found a single citizen who could corroborate any aspect of the accomplices' story. Exh. 20. This has left the case

against Herbert dependent entirely on the testimony of Winfield, Cook, and Green. But these felons offer so many divergent accounts of their stories that they undermine, rather than bolster, their own testimony.

The Commonwealth thus met the need for certainty and reliability with the persistent, but clumsy, lies of Betty Winfield and Dap Cook. Our system of justice must be expected to prevent the execution of a person *solely* on the basis of accusations from the least trustworthy among us. Herbert's case -- in which the Commonwealth demands the most deadly punishment on the most doubtful proof -- exposes a hole in our system of justice through which no one should be permitted to fall.

So far as we can tell, no one has been permitted to fall through this hole in the past. Virginia's governors have stood vigilant guard against execution based solely on the testimony of unreliable witnesses. Governor William Hodges Mann commuted the sentences of Eugene Dorsey, Calvin Johnson, and Richard Pines because the accomplice who testified against them had "proven himself to be unworthy of credit." Exh. 34. (Governors' List of Pardons, Commutations, etc. and Reasons Therefor, March 4, 1912). Governor Mann explained the necessity for clemency in this way:

[The accomplice Smith] was a confessed perjurer, and the judge in sentencing him declared that he was a perjurer, and no human being can tell whether he told the truth first or last, and this is the condition which confronts my conscience and involves the lives of three men. If all these facts had been before the juries trying the cases I would have less difficulty in reaching a conclusion, but they were not, and after the most careful thought I am in such a frame of mind that, while I do not think the prisoners entitled to pardon, I do not think it just to them, who are poor negroes, or to the Commonwealth, which only desires to punish those certainly guilty, to permit them to be electrocuted and thus put correction of any mistakes which may have been made out of the

power of the State if the mystery which now surrounds the murder of Schultz shall ever be cleared up.

Id. The same motivations and concerns, plus the fact that the witnesses against him were intoxicated, compelled Governor A. J. Montague to commute the death sentence of William O'Boyle.

Herbert's case is no different than these four. As we explain above, the three accomplices did not agree on the particulars at the time of trial, and they do not now. Winfield is a confessed perjurer, and Cook and Green can be demonstrated to be perjurers. All three admitted that they were high on heroin or Preludin at the time of the crime. Finally, all had criminal records that, as a Petersburg detective put it, "could be used for a stepladder."

Doubt as to the guilt of the defendant or the justness of his sentence, such as exists here, has been a recurrent reason given by governors for commutation. Doubt as to the justness of the sentence, because of disparity of sentences between the condemned and his accomplices, because of mandatory sentencing requirements, or for some other reason, has been cited by governors frequently as the basis for commutation. As many as 23 men have had their sentences commuted because there was doubt as to their guilt of a capital crime. In four of those cases, the governor specifically cited the unreliability of the witnesses against the defendant as the source of his doubt. Thus, while Herbert is unique among current death row inmates in that none of the evidence against him comes from reliable sources, he falls into a familiar pattern among those defendants whose sentences have been commuted. Doubt defines that pattern. The great doubt, risk, and uncertainty that shadow a death sentence based on evidence from witnesses such as Winfield and Cook, and on nothing else, has compelled past

governors to exercise their commutation powers. This same consideration compels commutation of Herbert's sentence.

## VI. CONCLUSION

No appellate court has examined the facts of this case as they have developed over the years or has reconsidered the incredibly fragile threads of testimony that link Herbert to this crime and support his sentence. Procedures and regulations bar courts from acting on, or even considering, these facts:

- that the jury's conclusion that Herbert deserved the death penalty was based on a 1966 crime that Herbert did not commit;
- that no physical evidence or reliable eyewitness testimony whatever linked Herbert to the Burwell murder;
- that substantial evidence pointed instead to the guilt of Jackson;
- that the case against Herbert consisted entirely of the testimony of practiced liars and felons who had everything to gain and nothing to lose from pointing the finger at an innocent man;
- that startling inconsistencies in those accomplices' testimony remained unexplained and unexplainable; and
- that since capital punishment was reinstated, the Commonwealth has never asked for a man's life based only on evidence from self-serving accomplices like Winfield and Cook.

Justice can be hard to obtain in courts hobbled by procedural rules designed to achieve efficiency and finality. Consequently, democracies grant to a single man the power to cut through rules and regulations and dispense final justice. The Governor of Virginia is that man. For the many reasons set forth in this petition, we ask the Governor to do justice for

Herbert Bassette and the Commonwealth by preventing his execution when doubts surround his conviction and sentence -- doubts that demand Herbert Bassette's deliverance from death.

Respectfully submitted,

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