# PETITION FOR EXECUTIVE CLEMENCY

# OF

# TOMMY DAVID STRICKLER

Barbara L. Hartung
1001 East Main Street
Suite 504
Richmond, VA 23219
(804) 649-1088

Mark E. Olive
Virginia Capital Representation Resource Center
1001 East Main Street
Suite 510
Richmond, VA 23219
(804) 643-6845

Counsel for
Tommy David Strickler

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## INTRODUCTION

Evidence produced after Tommy David Strickler was tried and convicted of capital murder points to Ronald Henderson, acting alone, as the murderer Leeann Whitlock. Critical evidence that impeached the Commonwealth's star "eyewitness" was never produced to Strickler's defense counsel. The Commonwealth admits this. The trial court delivered an erroneous charge on capital murder. The Courts admit this. The Commonwealth's own forensic experts provided evidence that exculpated Strickler at Henderson's trial. Strickler's jurors never learned this. And the Commonwealth that discredited Strickler's key defense witness at Strickler's trial, embraced him as their own at Henderson's trial. The jurors never learned this. These are only the highlights of a prosecution that was flawed from the beginning. Unless the Governor intervenes, the Commonwealth will execute a man innocent of capital murder while the probable murderer lives.

## I. THE LEGAL PROCEEDINGS IN STATE AND FEDERAL COURT

On January 5, 1990, Leann Whitlock disappeared along with the blue car she had borrowed from her boyfriend, John Dean. On January 13, 1990, her nude body was discovered in a wooded area in Augusta County, Virginia. She died from multiple head fractures.

A. The Trial and Sentence: Strickler was arrested on January 11, 1990, and, based on his possession of Dean's car, charged with grand larceny in neighboring Rockingham County. The prosecution was later transferred to Augusta County. On February

27, 1990, Strickler was indicted in the Circuit Court of Augusta County on one count of abduction and one count of robbery. JA 20-23[1]. On April 23, 1990, he was indicted for the capital murder of Whitlock during the commission of "robbery, rape or abduction with the intent to extort money or a pecuniary benefit." JA 20. Va.Code sec. 18.2-31.

In June, 1990, Strickler was tried by a jury and convicted of capital murder, robbery, and abduction. JA 1278-80. The jury sentenced Strickler to death based on the two statutory aggravators--future dangerousness and vileness. Va.Code. sec. 19.2-264.2. The court imposed the death sentence on September 19, 1990, in addition to two life sentences for robbery and abduction.

A co-defendant, Ronald Henderson, was charged with the same offenses in separate indictments but had not been arrested prior to Strickler's trial. Henderson was apprehended after Strickler's conviction and was granted a change of venue. Henderson was tried in March, 1991, convicted of first degree murder, abduction and robbery and sentenced to life. JA 1086.

B. The Direct Appeal

The Virginia Supreme Court affirmed the conviction and sentence on direct appeal on April 19, 1991. Strickler v. Commonwealth, 404 S.E.2d 227 (Va. 1991). Ex. A Petition for certiorari was denied. Strickler v. Virginia, 112 S. Ct. 386 (1991).

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[1] "JA" refers to pages of the Joint Appendix filed in the United States Court of Appeals.

C. The States Habeas Proceedings

Strickler filed a state habeas petition with the Circuit Court of Augusta County. JA 467-517. The court denied all motions for expert and investigative assistance and dismissed the petition without an evidentiary hearing in September, 1993. JA 638-41. The Virginia Supreme Court granted a limited appeal on trial counsel's failure to object to the defective jury instruction on capital murder. The instruction included a predicate offense--abduction with intent to defile--that did not by statute support a capital conviction. Finding no prejudice from counsel's performance, the Court affirmed the denial of the writ. Strickler v. Murray, 452 S.E.2d 648 (Va. 1995). Ex. B. Petition for a writ of certiorari was denied. Strickler v. Angelone, 116 S. Ct. 146 (1995).

D. Federal District Court Grants The Writ

On May 20, 1996, Strickler filed an amended federal habeas petition in federal district court. JA 705-835. A motion to dismiss was filed in June, 1996. On December 10, 1996, the district court granted an evidentiary hearing on eight claims and dismissed the remainder. Ex. C. On a motion for reconsideration, the district court dismissed five additional claims and reaffirmed the grant of a hearing on the claims of ineffective assistance of counsel, suppression of Brady material, and denial of due process and a fair trial on January 16, 1997. Ex. D.

Strickler conducted discovery in preparation for the hearing. Based on the evidence produced, Strickler moved for summary judgment on his Brady and fair trial claims. The Warden submitted

a cross-motion for summary judgment alleging procedural default and opposed Strickler's motion on the merits. On October 15, 1997, the district court granted Strickler's motion for summary judgment on both claims and vacated his conviction and death sentence. Ex. E.

In federal habeas, Strickler alleged for the first time that his constitutional rights under Brady v. Maryland, 373 U.S. 83 (1963), were violated by the state's suppression of materials on a key witness, Ann Stoltzfus. The district court held that Strickler had demonstrated cause for his failure to raise the claim in state court. The district court found that Strickler "had no independent access to this material and the Commonwealth repeatedly withheld it throughout Petitioner's state habeas proceedings." Ex. D.

The district court found that five documents (exhibits 1, 3, 4, 5, and 6)(Ex. G) were never disclosed to defense counsel or to the prosecutor[2]. These documents remained in a nonpublic file of the Harrisonburg police throughout state court proceedings. The prosecutor had an open file policy during both Strickler's and Henderson's trials and defense counsel had "full access" to that file. Det. Claytor, who prepared some of the materials, recalled distributing only exhibit 2 to the Rockingham prosecutor and had no recollection of distributing any of the other documents. In view of these facts, the district court found that the recollections of

[2] The district court concluded that it need not resolve a dispute concerning exhibits 2, 7 and 8, where the failure to disclose the remaining five documents constituted a Brady violation.

Strickler's co-counsel, Roberts, concerning possible knowledge of the contents of Stoltzfus' documents were "much too vague and insufficient to create a genuine dispute" about the disclosure of these five documents. The district court also found that a newspaper story on June 17, 1990, containing a pretrial interview with Stoltzfus "contain[ed] virtually none of the information contained in the Stoltzfus materials[.]." The district court found that the Warden had "not offered evidence to show that the abundance of information in the Stoltzfus materials were provided to Strickler or would have been available to him through diligent investigation." Id. The district court found that the prosecutor was on notice that several separate police departments and jurisdictions had investigated the Whitlock murder and that relevant materials might be contained in their files. As a result of the state's actions, the five Stoltzfus documents were never disclosed to Strickler.

The district court found that the Stoltzfus materials contradicted or impeached the witness's trial testimony "in many crucial respects." Ex. E. The court concluded that the documents taken as a whole provided "potentially devastating impeachment material, casting doubt on her testimony." The Commonwealth had argued at trial that Stoltzfus, the only eyewitness, established both the abduction and armed robbery predicates for the capital murder count. The district court held that the documents were material under Brady and rejected the Warden's argument that Stoltzfus' testimony was irrelevant to Strickler's conviction.

The district court granted Strickler's motion for summary judgment on the Brady claim and the denial of a fair trial claim, vacating his conviction and sentence. The Warden appealed.

E. The Fourth Circuit Court Reverses: Respondent appealed to the United States Court of Appeals for the Fourth Circuit. That Court reversed the district court. Strickler v. Pruett, No. 97-29 (June 17, 1998). Ex. F.

The Court of Appeals excused the prosecutor's failure to disclose the Stoltzfus materials first at the time of trial and later during the state habeas proceedings. The Court held that Strickler had procedurally defaulted the claim when he had failed to file a discovery motion in state habeas for production of the Harrisonburg police files, citing Va.S.Ct. Rule 4:1(b)(5).[3] Because state habeas counsel did not exercise the "reasonable diligence" required under Brady, Strickler "cannot establish cause [to excuse default] based upon the unavailability of the Brady claim." Ex. F. The Court also rejected Strickler's argument that trial counsel was constitutionally ineffective when he failed to make a Brady motion at trial, thus demonstrating cause. Given the prosecutor's open file policy, "trial counsel were under no obligation to file a Brady motion." Id. at 23. Finally, the Court concluded that the documents were not "material" because there was no "'reasonable probability' of a different result" if they had

[3] The State did not rely on this Rule in the district court or on appeal. It was raised sua sponte by the Fourth Circuit. The Rule itself prohibits disclosure of privileged materials and police documents are privileged under Virginia statutes.

been disclosed. Id. at 23-24.

Strickler's motion for rehearing and suggestion for rehearing en banc were denied on July 14, 1998. His motion to stay the mandate and for a stay of execution was denied on July 30, 1998. He is scheduled to be executed on September 16, 1998.

F. Petition to the United States Supreme Court

On September 1, 1998, Strickler filed a Petition For A Writ Of Certiorari with the United States Supreme Court seeking review of the decision of the Fourth Circuit. He also moved for a Stay Of Execution. The Commonwealth opposed the Petition and Stay. Strickler filed Reply on September 9, 1998. No decision has been issued.

## II. THE COMMONWEALTH SHOULD NOT EXECUTE A MAN WHO IS MOST LIKELY INNOCENT OF CAPITAL MURDER

Tommy David Strickler is scheduled to be executed on September 16, 1998, for the murder of Leann Whitlock in Augusta County in January, 1990. A review of all the evidence in Strickler's case--much of it only revealed after his trial--and the decisions of the state and federal courts raises the real concern that the Commonwealth will be executing an innocent man, while the man who actually committed the murder has escaped the death penalty and is serving a life sentence. This case is one of the rare few where clemency is appropriate.

### Summary Of The Evidence Presented At Trial

Strickler was convicted and sentenced to death in June, 1990, for the capital murder of Leanne Whitlock, a black woman who was a

student at James Madison University. He was also convicted of robbery and abduction. According to a prosecution witness, Anne Stoltzfus, Strickler, along with Ronald Henderson and an unidentified white woman, abducted Whitlock from the Valley Mall parking lot in Harrisonburg, Virginia, on the evening of January 5, 1990. Whitlock had been driving a car belonging to her boyfriend, John Dean. As Stoltzfus watched, the three forced themselves into Whitlock's car, and the car, with Whitlock driving, headed east on Route 33. Based on Stoltzfus' testimony, the Commonwealth argued that Strickler had a weapon during the abduction. Stoltzfus was the only eyewitness to the abduction of Whitlock.

On the night of January 5, 1990, around 7:30 p.m., Kurt Massie saw a blue car turn onto an unlit dirt road along Rt. 340. Massie saw two white men and a white woman in the car. Three weeks later, Massie identified Strickler in a police lineup as the driver of the car.

Both Strickler and Henderson went to Dice's Inn in Staunton, Virginia, on the night of January 5, 1990 arriving around 9 p.m. They met several women, including Donna Tudor, at the Inn. Tudor left with Strickler and Henderson a few hours later. Tudor testified that she overheard Strickler and Henderson talking about getting into a fight with "it" and referring to "it" as a "nigger." Strickler said he kicked "it." They said something about a rock crusher.

Several witnesses saw Strickler at Dice's Inn that evening but did not report seeing any blood on his clothing. The

Commonwealth's serologist found no blood on Strickler's jeans. Only Tudor, who had been charged with grand larceny and was held in jail until Strickler's trial (although the charges against her had been dropped) reported seeing blood on Strickler's clothing.

A defense witness, Kenneth Workman, testified that Henderson came to him on the night of January 5th and admitted he had just killed a "nigger." Workman saw blood on the knee areas of Henderson's jeans.

Strickler and Tudor were arrested on January 11, 1990, after abandoning the car Whitlock had been driving when she disappeared. Whitlock's possessions were found in the car. Prior to their arrest, Strickler and Tudor had driven to Virginia Beach and back, sometimes sleeping in the car. Henderson's jacket was found in the car and had at least four human bloodstains.

On January 13, 1990, Whitlock's nude body was discovered under some logs in a field adjacent to Route 340 in Augusta County. Her skull had been fractured in four places. A large rock with blood on it was found in the area. Dr. David Oxley, the medical examiner, concluded that Whitlock had been struck three or four times with the rock. Henderson's wallet was found in the field as well as a bra and blouse purportedly belonging to Whitlock.

The Commonwealth argued at trial that Strickler and Henderson acted together in murdering Whitlock. One of them, according to the Commonwealth, held her down while the other dropped the rock on her head. Any one of the head fractures could have been fatal. On cross-examination, Dr. Oxley admitted that Whitlock could have been

strangled. Abrasions on her neck were consistent with strangling.

The Commonwealth conceded that the forensic evidence did not prove Strickler had raped Whitlock. Rape was one of the capital predicates charged. The forensic evidence did not eliminate the possibility that semen found in the victim was that of Whitlock's boyfriend, Dean, or of Henderson. Henderson had fled and could not be tested prior to Strickler's trial.

The jury convicted Strickler of capital murder after receiving a flawed jury instruction that included an offense which was not a capital predicate (abduction with intent to defile). The court sua sponte charged the jury on armed robbery as an element of the capital murder count; the indictment had charged only robbery, which was not a capital predicate. Va. Code section 18.2-31. The Commonwealth conceded they could not prove rape, the only other capital predicate. Defense counsel presented a minimal case at the sentencing phase, and Strickler was sentenced to death based on both future dangerousness and vileness. Va. Code sections 19.2-264.2, 19.2-264.4.

Several months later, Henderson was apprehended and tried. His motion for a change of venue was granted. At his trial, the Commonwealth called Workman as its witness and argued that Henderson had killed Whitlock with the rock. Stoltzfus repeated and embellished her testimony from Strickler's trial. Tudor did not testify. Although the original charges and the evidence were the same, Henderson was found guilty of only first degree murder and sentenced to life.

A. Strickler's Conviction Was Based On The Testimony Of Witnesses Now Known To Be Unreliable.

The prosecutor failed to give defense counsel impeachment and exculpatory evidence that would have demonstrated that Stoltzfus was an unreliable witness and not credible. Stoltzfus' testimony was essential for the abduction and armed robbery predicates. In addition, the testimony of Donna Tudor and Kurt Massie cannot be credited.

i) The Trial Testimony of the "Eyewitness"

On January 5, 1990, Stoltzfus went to the mall with her daughter. Tr. 476 Around 6 p.m. she saw two men and a woman at the Music Land store. One of the men was "revved up" and impatient. Tr. 477. She described the physical features of the three and their clothing. Tr. 478-80. Stoltzfus left the store, saw the trio inside the mall, and spoke briefly to the woman. Tr. 480. Shortly thereafter, Stoltzfus and her daughter were in their car and stopped in the parking lot when a car came by. Stoltzfus described the driver, a black woman, as "a rich college kid," "beautiful," "well dressed," "happy," "singing" and "bright eyed." Tr. 483. Stoltzfus got a good look at her and identified the driver as Whitlock. Tr. 483-484.

Whitlock pulled in front of Stoltzfus and stopped for traffic. The "revved up" man from the music store, whom Stoltzfus later identified as Strickler, came out of the mall and banged on vehicles in front of Whitlock's car. He then pounded on Whitlock's passenger side window, yanked the car door open, and sat facing her. She tried to push him away. Tr. 486-87. The second man,

later identified as Henderson, and the blonde woman, seen earlier in the mall, tried to enter the car. Whitlock accelerated and "laid on the horn." Tr. 487.. Strickler hit Whitlock repeatedly on her shoulder and head. The car stopped, Strickler opened the passenger door, and the other two got into the back seat. Id. Henderson handed his coat to Strickler who put it on the floor and "fiddled with it [for] what seemed like a long time." Tr. 488. Whitlock was "totally frozen." Id.

Stoltzfus pulled parallel to Whitlock's car, got out, and walked over to look. Henderson "laid over on the seat to hide from me." Tr. 489. Stoltzfus returned to her car, faced Whitlock, and then asked her three times "Are you O.K." Each time Whitlock looked at Stoltzfus and then looked down to her right. Tr. 489. Whitlock mouthed a word that Stoltzfus did not understand. She then realized Whitlock had said "help." Tr. 490. Stoltzfus pulled away and told her daughter to go inside the mall and get mall security. The daughter refused. Id. Whitlock drove past Stoltzfus very slowly, "went up over the curb . . . so the car really tilted," and "laid on the horn again." Tr. 491. Stoltzfus told her daughter to write the license number on an index card. Stoltzfus remembered the plate, West Virginia NKA 243, with a trick, "No Kids Alone 243." Tr. 492. Whitlock drove off onto Route 33. Stoltzfus went home and never called the police. Tr. 493-94. At trial, she identified police photographs of the blue car Whitlock had been driving. Tr. 492.

The prosecutor argued that Stoltzfus' testimony established

Strickler's commission of abduction and armed robbery, predicates to capital murder. Stoltzfus repeated her testimony at Henderson's trial several months later.

Although Stoltzfus claimed to have witnessed this dramatic event, she never contacted the police despite massive media coverage of Whitlock's disappearance, the discovery of her body, Strickler's arrest, and an interstate search for Henderson. Based on a tip, Stoltzfus was first interviewed two weeks after Whitlock's disappearance by Det. Claytor of the Harrisonburg police. Claytor prepared notes and reports of his interviews. In addition, Stoltzfus sent Claytor letters and notes she prepared after meeting with Claytor. Throughout state court proceedings, these documents were never disclosed but were held in the Harrisonburg police files. As detailed below, they contained exculpatory and impeachment material.[4] Stoltzfus refused to meet with Strickler's investigator before trial. Her trial testimony contained no hint that she had given contradictory statements to the police.

ii) The Undisclosed Stoltzfus Materials

Stoltzfus' statements and writings to Claytor contradicted her trial testimony in numerous material respects. Ex. G to this petition.

a) Exhibit 1 is a one page document containing Claytor's

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[4] The documents were discovered by federal habeas counsel in 1996 pursuant to an Order of the district court permitting counsel to examine and copy all police and prosecution files. A change in state habeas law barred Strickler from presenting his Brady claim to the state court. Va. Code sec. 8.01-654.1.

handwritten notes of his initial January 19, 1990 interview with Stoltzfus. The notes read in part:

> Can't ID B/F
> 1st W/M
> Can ID W/F 5'05" - 140 (little overweight) Blue Jean
> brown shoulder Plain Face (Pail)
> 2d W/M Tall - Dark Hair
> Cream Jacket

In her trial testimony, Stoltzfus contradicted her initial account to Claytor stating: "I gave detailed descriptions of the three persons[.]" Tr. 502. Yet in her initial interview she could not identify Strickler, describe him or his clothing, or describe the black female. At trial, she also described the black female in detail. At trial, she could not identify the white female. Tr. 504. Stoltzfus's trial description of the second white male was radically expanded and embellished. Tr. 477-78.

b) Exhibit 2 is a six page, typed report of Claytor's interviews with Stoltzfus. The report of interviews on January 19 and 22, omitted the statement in Exhibit 1 that Stoltzfus could not identify the black female and the first white male. It indicated Stoltzfus was "not sure" if she could identify the two white males but that she could identify the white female. At trial, she testified that she was "one hundred percent sure" of her identification of Strickler. Tr. 501. She testified that she "picked [the] two [men] with absolute certainty and the third [person] with a slight reservation." Tr. 501. The report contained no description of the clothing of the black female or of the first white male and stated only that the second white male had a cream colored jacket.

Contrary to her trial testimony and Exhibit 1, Stoltzfus claimed she might have seen the same white female and one white male inside the mall before the abduction, but said nothing about an encounter with the blonde woman and two white males in the music store. Stoltzfus did not recall the license number of the car, saying only that it was dark blue with West Virginia tags. When shown photo spreads by Claytor, Stoltzfus had stated only that Strickler and Henderson "resembled" the men she saw.

Exhibit 2 also stated that Stoltzfus was taken to the police impound lot on January 24, 1990, and shown the car Whitlock had been driving. The next day, Stoltzfus advised the police that she now recalled the license number, NKA-243, and "had made up a quote to help remember the license number after the incident, 'No Kids After 2-43.'" Stoltzfus also told Claytor that although her daughter had been with her at the mall, the daughter did not see anything.

c) Exhibit 3 entitled "Observations" with diagrams of the abduction was given to Claytor by Stoltzfus on January 19, 1990 at 1 p.m. She did not describe the black female, her clothing, or the first white male other than "scroungy bum-type, W.Va. hick with long scraggly blondish hair." Stoltzfus described a dark blue, new sports car with West Virginia tags but gave no license number. She said nothing about the black female mouthing the words "help" or any suggestion that the first white male had a weapon. Stoltzus did not report that she got out of her vehicle to speak to Whitlock.

d) Exhibit 4 is a typed letter, dated January 22, 1990, to Claytor and signed by Stoltzfus. The letter contradicted her subsequent trial testimony. Stoltzfus stated that she initially had no memory of being at the mall on the night of Whitlock's disappearance:

> I want to clarify some of my confusion for you. First of all, I tend to remember things in pictures rather than in over-all logical constructs. When I didn't remember any Mall purchases, I didn't remember being there. But my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me jog my memory.

Her "memories" were based on her daughter's recollections. Stoltzfus related her visit to the record store in the mall but omitted any mention of the encounter with Strickler, Henderson, and the unidentified blonde woman that she testified to at trial. The letter contains no description of the features or clothing of the black female, the two white males, or the unidentified white female.

Stoltzfus admitted that she was not certain the man she saw inside the mall with the white female was the same man who later forced his way into the victim's car. Stoltzfus was also very uncertain of what she "saw" in the parking lot, in direct contrast to her trial testimony:

> I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. then the guy I saw came running up to the black girl's window? Were those 2 memories the same person?
>
> I'm sorry my initial times were so far off. First I remembered it being dark and remembered driving on past

> Leggetts and not going in. I placed the time around 9:00 pm thinking I must have not gone in because the Mall was closing. Later I thought I hadn't gone into the Mall because I made no purchases. Katie remembered the small Centerpoint purchase and I knew that if that happened January 5 I could trace our path from there. [JA 1045].

Stoltzfus did not report the car's license number or her trick for remembering it. Exhibit 4 contained both exculpatory and impeachment material that was not contained in any other document.

e) Exhibit 5 is an undated, typed document entitled "Notes for Det. Claytor: My Impressions of The Car (Anne Stoltzfus)." This document contained no information about the license plate or license number. The car was described as "dark blue(navy) and shiny," American, and "about the size of a Buick Skyhawk." It was no longer a sports car. Stoltzfus "think[s] it was a two-door" but was not sure.

f) Exhibit 6 is a handwritten note to Det. Claytor from Anne Stoltzfus dated 1-25-90, 1:45 a.m. Stoltzfus reported that she spent "several hours" with Whitlock's boyfriend viewing photographs of Whitlock and was now certain Whitlock was the black girl Stoltzfus saw on January 5, 1990. Her identification and description at trial were probably based on these photographs and not on any "memory" of January 5, 1990.

g) Exhibit 7 is a typed letter (2 pages) dated January 26, 1990, to Det. Claytor and signed by Anne Stoltzfus. This letter contained Stoltzfus's first description of the encounter with the two white males and the unidentified female at the music store and her first description of the clothing of the first white male. Stoltzfus reported that six to eight people in the mall and a

couple people in the parking lot witnessed Whitlock's abduction. The letter concludes:

> Thank you for your patience with my sometimes muddled memories. I know if I believed at the time that I was witnessing a crime I would have much, much more vivid memories. I really didn't believe that's what I saw until I saw Leanne's pictures. In fact, I'm sure that if Kim Davis hadn't called the police and that other detective hadn't come to JMU and asked me to come in and talk to you, I never would have made any of the associations that you helped me make.

The January 26, 1990, letter directly contradicted the January 22, 1990 letter and was inconsistent with the contents of her initial interviews with Claytor. The letter graphically demonstrated how her testimony evolved into that given at Strickler's trial.

h) Exhibit 8 (3 pages) is a typed document, undated, signed by Anne Stoltzfus entitled "Details of Encounter With Mountain Man, Shy Guy & Blonde Girl." This document expanded on the January 26th letter and contained additional details that were ultimately included in Stoltzfus's trial testimony. Stoltzfus reported that once everyone was in Whitlock's car, the second white male transferred his coat to the first white male who was seated next to Whitlock and he "fooled with it for a while." For the first time, Stoltzfus claimed she got out of her car and walked over to Whitlock's car to speak with her. For the first time, Stoltzfus reported that her daughter wrote the West Virginia license number, NKA-243, on a card that Stoltzfus later threw away. For the first time, Stoltzfus reported that Whitlock directed her eyes towards her side on three occasions, and Stoltzfus wondered if there was a

gun or knife held to her side. Stoltzfus reported seeing a picture of the car in the newspaper after learning of Whitlock's disappearance but claimed that she had not associated these facts with the events she witnessed. At trial, she denied seeing any news accounts of Whitlock's disappearance. Tr. 498, 503.

Viewed as a whole, the Stoltzfus materials reveal that Stoltzfus fabricated her testimony at Stickler's (and later Henderson's) trial. The prosecutor used Stoltzfus' testimony to establish the armed robbery[5] and the abduction predicates for the capital murder count.

The material nature of the undisclosed Stoltzfus documents is demonstrated by the prosecutor's summation. The prosecutor argued that Stoltzfus' testimony established both the abduction predicate and the armed robbery predicate for the capital murder count[6]:

> First of all, Leanne Whitlock was abducted. There is absolutely no question about that. Ms. Stolzfus [sic] said that she was right behind Leanne's car when this "Mountain Man" who she identified as the defendant came out, forcibly opened the car door, jumped in, fought with Leanne, slapping her, hitting her a few times and then he and another man and another girl all drove off with Ms. Whitlock. She was brought here to Augusta County where she was detained, where she was taken by abduction. Absolutely no issue about that.

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[5] As set forth earlier, the capital conviction was flawed as the jury was charged an inapplicable predicate to capital murder (abduction with intent to defile), the indictment never charged armed robbery, and the trial court failed to charge the jury on armed robbery as a capital predicate.

[6] The prosecutor admitted that there was no proof Strickler had raped Whitlock (Tr. 794), and Strickler was never charged with rape.

Tr. at 794.

* * *

> And we are lucky enough to have an eyewitness who saw what happened out there in that parking lot. A lot of cases you don't. A lot of cases you can just theorize what happened in the actual abduction. But Ms. Stoltzfus [sic] was there, she saw what happened.

Tr. at 799. The Commonwealth's Attorney then repeated Stoltzfus' testimony in detail. (Tr. 799-801). He argued to the jury based on Stoltzfus' testimony that Strickler had a knife and that he held it against Whitlock as she drove out of the mall:

> [Whitlock] looked at [Stoltzfus] and then looked down again. Why was that? I suggest to you that this man had a knife. He had the knife that he carries with him all the time. He had a knife later on with him in the car. <u>That was pressed right up against Leanne</u>. . . . Ms. Stolzfus [sic] positively identified Mr. Strickler as the man who first got into the car. The man who struck Leanne Whitlock both times, the man that sat right beside her when she was forced to drive off. It was him, the evidence shows it was him.

Tr. 800-801 (emphasis added).

Stoltzfus described Strickler alone as committing violent acts against Whitlock--he forced his way into her car and struck her repeatedly. In this way the Commonwealth's Attorney used Stoltzfus to prove that Strickler was the instigator and leader in Whitlock's abduction and, by inference, in her murder. (At Henderson's trial based on this same testimony, the Commonwealth also maintained that Strickler was the leader in these events. Tr. 215).

No other witness placed Strickler in the vicinity of Whitlock, her car, or the parking lot during the time period when Whitlock

was believed to have been at the mall. Despite widespread publicity about Whitlock's case, no other witness came forward to report the very public events that Stoltzfus claims to have witnessed. Stoltzfus was the critical witness on the abduction count. Likewise, no other witness saw Strickler with a knife or any other weapon when at the mall. Stoltzfus herself never testified that Strickler had a knife when he was in the mall or in the car with Whitlock. That inference was provided by the prosecutor based on Stoltzfus' claim that Whitlock looked down while Strickler sat beside her in the car. Again Stoltzfus was the critical witness for the armed robbery predicate based on what she "observed" at in the parking lot.

Thus, as the Commonwealth's Attorney recognized, Stoltzfus's testimony played a central role in Strickler's conviction and portrayed Strickler, rather than Henderson, as the leader and instigator in the violent abduction and robbery. Without such testimony, the jurors would have been reduced to speculation concerning these events and concerning the role played by Strickler in Whitlock's disappearance and murder. His subsequent possession of Dean's car and Whitlock's property was equally consistent with several noncapital offenses, including participation as an accessory after the fact to the murder.

Without Stoltzfus' testimony, the jury could have concluded that Henderson was responsible for the abduction, armed robbery and murder. The evidence shows that Strickler may have been an accessory after the fact or a principal in the second degree--but

not a principal in the first degree to capital murder. The court had charged the jury on the offense of first degree murder, the charge on which Henderson was convicted in his subsequent trial.

iii) The State's Failure To Disclose Under Brady

Strickler, and later Henderson, were prosecuted by the Augusta County Commonwealth's Attorney, Lee Ervin. Ervin had an "open file" policy. Defense counsel for both Strickler and Henderson reviewed Ervin's files. The Stoltzfus materials were not in Ervin's files when counsel reviewed the files prior to the June, 1990, and March, 1991, trials. Ex. H.. Counsels' cross examination of Stoltzfus at Strickler's trial, and later Henderson's, did not employ any of the Stoltzfus materials. Counsel would have used these materials to impeach Stoltzfus if they had been available.

The prosecutor, Ervin, admitted during federal habeas discovery that he had never seen five of the documents. He did have three of the documents prior to the two trials. Ervin believed the three documents (exhibits 2, 7, and 8) had been in his "open" file for counsels' examination and copying. Ex. I.

In state habeas, Strickler argued in part that his counsel had been ineffective for failing to make a formal, pretrial Brady motion. The Commonwealth responded that all Brady materials had been in the prosecutor's "open file" and that counsel had been given everything Brady required:

> From the inception of this case, the prosecutor's files were open to the petitioner's counsel. Each of the petitioner's attorneys made numerous visits to the prosecutor's offices and

> reviewed all [sic] the evidence the Commonwealth intended to present . . . Given that counsel were voluntarily given full disclosure of everything known to the government, there was no need for a formal motion. The petitioner has failed to proffer any exculpatory or favorable evidence of which trial counsel were unaware.
>
> * * *
>
> Nor, when counsel in fact obtained all the information to which they were entitled under Brady, can [Strickler] show prejudice.

Ex. J. (emphasis added). In state habeas, the Warden also submitted the sworn affidavit of Strickler's trial counsel, Bobbitt and Roberts, who stated that "the prosecutor's office . . . gave us full access to their files and the evidence they intended to present. We made numerous visits to their office to examine these files[.]" Thus, the Warden persuaded the state habeas court to deny a hearing on the ineffectiveness claim, where the Stoltzfus documents might have been disclosed, based on the representation that all Brady material had been provided to trial counsel and a pretrial Brady motion was unnecessary.

As Strickler had no access to or knowledge of the Stoltzfus materials, he did not present any state habeas claim based on their suppression. Strickler had moved for the appointment of an investigator and various experts to assist in the development of his state habeas petition. The Commonwealth opposed these motions arguing that there was no right to such assistance in state habeas. The petition and all motions were denied without a hearing.

Although it had a constitutional obligation to do so, the Commonwealth never voluntarily disclosed the Stoltzfus documents. They were produced during federal proceedings when Strickler was

permitted to review the police and prosecution files pursuant to a court order. Although the federal district court granted the writ based on suppression of the Slotzfus documents, the Fourth Circuit Court of Appeals reversed on grounds of procedural default. The Court reasoned that Strickler had failed to ask for discovery of the police files during state habeas, although Strickler had no basis to do so given the Commonwealth's repeated representations that all materials had been disclosed. Thus, all legal relief has been foreclosed despite the unreliable testimony employed by the Commonwealth to convict Strickler and to secure his death sentence.

iv) Tudor Gave Inconsistent Accounts To The Police And Her Trial Testimony Cannot Support A Death Sentence.

Once Dean's car was recovered on January 11, 1990, both Strickler and Donna Tudor were arrested. Tudor was charged with grand larceny based on her presence in the stolen car. She gave several inconsistent accounts to the police during pre-trial interviews and, her accounts conflicted with her trial testimony in highly important respects. Tudor was given immunity from prosecution in exchange for her testimony and thus had a motive to fabricate her account.

On January 11, 1990, Tudor told the officers that she had known Strickler for two or three weeks. She then changed her story and said they had met for the first time at Dice's Inn. Tudor also denied knowing anything about the stolen car and claimed that she and Strickler had hitchhiked to Virginia Beach with a black man, adding that she hated black people. She later retracted this account and admitted riding in the stolen car with Strickler to

Virginia Beach. Ex. K: Report of Officer J.E. Emswiller, 1/16/90, at 2-3. During a January 12, 1990, interview, Tudor reported that Strickler and Henderson were both in the front seat of the car and "were talking in low voices about something." Ex. K. Tudor was in the back seat. Notes of Det. E.A. McDorman.

Tudor's trial testimony was different. On January 5, 1990, she arrived at Dice's Inn at 8 p.m. She had not known Strickler before. She left with Strickler and Henderson at closing time in a blue car. Henderson was driving. As Tudor sat in the back seat, she overheard the two men talking about getting into a fight with "it" and referring to "it" as a "nigger." She thought they said something about a "rock crusher." Tr. 545-46. Strickler had a scraped spot on his knuckle. Tr. 549. At some point, Henderson and Strickler argued and Strickler pulled out a knife. Tudor and Strickler left Henderson at a friend's house that night, took the car, and spent the night at a local motel. The next day they picked up some additional clothes and drove to Virginia Beach where they spent a week, sometimes sleeping in the car. Tudor found a driver's license, bank card, and identification belonging to Whitlock in the glove compartment of the car. Tr. 549. Strickler gave her a pair of pearl earrings[7]. Tudor said Strickler had blood and a burn spot on his jeans, but never stated that his clothing was in this condition when Strickler arrived at Dice's

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[7] The earrings had a screw on fastener. However, Whitlock had pierced ears according to her friend, Kim Davis, who was interviewed by Officer D. W. Farley on January 13, 1990. Ex. J, Report of Farley.

Inn. Tr. 570. When they returned, Strickler's mother washed his clothes. Defense counsel failed to cross examine Tudor with her prior inconsistent statements.

The defense called Tudor's husband, Jay. He stated that in March, 1990, Tudor had admitted that she was present when Whitlock was killed. Tudor and Strickler remained in the car while Henderson chased Whitlock and beat her with his fists and a rock. Tr. 779. Strickler did not participate in the murder of Whitlock. Tr. 776. Tudor may have been threatened by Henderson at the time to prevent her truthful testimony at trial. A note in the Commonwealth's files supports Jay Tudor's story. Junior Knight, who was related to Tudor by marriage, called the Commonwealth's Attorney's in February, 1990, to report that Henderson had been calling the house. Ex. N. Donna Tudor was living there.

Jay Tudor reasserts here that Tudor said she was at the scene. He has provided her letter on June 24, 1994, admitting she lied in court and that Strickler did not kill Whitlock. Ex. M.

Strickler should not be executed on the basis of Donna Tudor's testimony. She tailored her testimony to avoid prosecution for any role in these events. It is significant that the Commonwealth did not call her as a witness at Henderson's trial, implicitly conceding this point. All charges against her were dropped.

v) Henderson Contradicted Massie's Identification

The remaining identification witness is also highly suspect. At Strickler's trial, Massie testified that on the night of Whitlock's disappearance he saw a car turn off Route 340 and into

the field where Whitlock was found. Massie believed he saw four people in the car, but then realized there were only three: a white man and a white woman in the front seat and a second white man in the back seat. Tr. 492, 498, 501. Massie identified Strickler, three weeks after the event, as the driver but could not describe the second man. Massie was the only witness to place Strickler on the night of Whitlock's disappearance near the location where Whitlock's body was later discovered. He repeated this testimony at Henderson's trial. Hend. Vol. II, 141-143.

Massie was wrong according to Henderson. At his trial, Henderson testified that he, Henderson, drove the car, Strickler sat in the back seat behind the driver's seat and Whitlock was in back behind the passenger seat. There was no white woman in the car. Hend., Vol. III, 96.

Massie's error was no doubt due to a suggestive identification procedure. Strickler's investigator, Ashby, was present at the line-up identification and noted that Strickler did not resemble the others and was "the only one with sandy blond, bushy hair. All of the others in the lineup had darker hair. Some were bearded, but none of the other had hair as long as Strickler's." Ex. O, Aff. of Ashby (8/26/92)(submitted in state habeas). Extensive media coverage had featured photos of Strickler.

### B. Henderson Admitted He Killed Whitlock And The Prosecutor Adopted Strickler's Defense Witness At Henderson's Trial

Substantial evidence points to Henderson rather than Strickler

as the one responsible for Whitlock's abduction, robbery and death. This evidence undermines the Commonwealth's theory that Strickler was the leader in Whitlock's abduction and then her murder. Henderson confessed to his friend, Workman, on the night of the murder that he had just killed an unnamed black person. Workman observed blood on Henderson's jeans around the knees.

The Commonwealth adopted Workman at one trial and sought to discredit him at the other trial. Strickler's jurors never learned this, of course. At Henderson's trial, the Commonwealth called Workman as its witness and argued that he was credible because he was a friend of Henderson's and had no reason to lie. Tr. 218, 224. In contrast, at Strickler's trial, the Commonwealth had attacked both Workman and Henderson's admission emphasizing that Workman had not believed Henderson and Henderson had been drunk at the time.

While Henderson's jeans were blood stained, witnesses who observed Strickler's clothing at Dice's Inn within an hour of the alleged murder did not observe any blood, tissue, or stains on his clothing. Carolyn Brown testified that Strickler was dressed "right nice" and was wearing blue pants that were "a little bit dirty," "like they had been wore [sic] a couple days or so." JA 531. Brown said nothing about blood or dirt on his pants or shirt. Debra Sievers was also at Dice's and described Strickler's clothing: "[A] tank top that was low cut under the arms and he had on, looked like jeans, but they wasn't jeans, they was jean material and boots." When asked, Sievers said the jeans were "a

little dirty." Tr. 536. Sievers did not describe any blood or dirt and did not describe any stains on the shirt. Nancy Simmons danced with Strickler at Dice's that night and gave no testimony concerning his clothing, lending further support to the conclusion that his clothing was unremarkable. Tr. 539-41..

Henderson had property belonging to Whitlock and gave her watch to a woman, Simmons, while at Dice's Inn.[8] Tr. 541. Simmons testified that Henderson said the watch had belonged to his ex-wife. Vol. II, 97-98. Henderson left Dice's Inn driving Whitlock's car. Henderson's wallet was found in the vicinity of Whitlock's body and was no doubt lost during his struggle with her. His jacket was later found in the stolen car.

Henderson testified in his own defense and stated he had been a helpless witness while Strickler alone hit Whitlock with a large rock in a field 20 feet from where Henderson stood. Henderson said Strickler had raped Whitlock (Vol. III at 97). As discussed below, the forensic evidence contradicts Henderson's claim about the rape. Id. at 103. On cross examination, the Commonwealth demonstrated that Henderson's account was false since he had placed the murder in an open field. The rock, blood, and other physical evidence, as well as Whitlock's body, had been found in a wooded area. Vol. III, Tr. 112, 117.

Henderson contradicted Stoltzfus and stated that he had driven Dean's car out of the mall parking lot with Whitlock in the back

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[8] The opinion of the Virginia Supreme Court erroneously attributes this act to Strickler. Ex. A - 404 S.E.2d 227, 230.

seat. Tr. Vol. II, 206; Vol. III, 95, 192. At trial, he placed the murder around 7:30-8 p.m. Id. at 119. However, in a phone call on May 22, 1990, Henderson had placed the abduction much later--around 9 p.m.--which meant Stoltzfus never saw Strickler, Henderson, or Whitlock as she had claimed. Vol. III, 150. Further undercutting Stoltzfus, Henderson also testified that they did not have a white woman in the car with Whitlock. Vol. III, 109. Thus, Henderson contradicted Stoltzfus, as well as Kurt Massie who claimed he saw a white woman in the car on Route 340 in the vicinity of the murder scene.

Additional physical evidence implicated Henderson, contrary to his trial testimony that he had never touched Whitlock. A forensic expert testified that three hairs found on the bra and shirt retrieved from the field were consistent with Henderson's hair. (Vol. III, 69). This evidence had not been available at Strickler's trial since Henderson had not been apprehended. Twenty hairs on a cap found in the field were identified as being consistent with Henderson's hair. (Vol. III, 69). These hairs were distinct from Strickler's. The cap was found in the vicinity of Henderson's wallet.

Finally, Henderson had a history of abusive behavior against women, a fact that was not revealed at Strickler's trial. Det. Hoover interviewed Henderson's ex-wife, Gloria, on January 13, 1990. Ex. L, Report of Hoover at 16. Gloria stated that Henderson was violent, and he beat her. She brought a warrant against him, and he was charged and convicted of assault and battery. He was

also ordered to undergo counseling.

Henderson was convicted of robbery, abduction, and murder in the first degree. He was sentenced to life imprisonment and is currently incarcerated at Sussex State Prison.

### C. The Forensic Evidence Points To Henderson, Not Strickler, As The Murderer Of Whitlock.

At trial, the Commonwealth admitted clothing Strickler had been wearing at the time of his arrest on January 11, 1990--seven days after Whitlock's disappearance. In the intervening period, Strickler and Tudor had driven to Virginia Beach and back, sleeping and having sex in the car and in a motel.

Strickler's black tank top was examined by the forensic expert (CW ex. 7) who found one human blood[9] stain on the top. The blood type could not be identified. However, at Henderson's trial months later, the forensic expert testified that the blood on the shirt was Strickler's blood. Hend., Vol. III, Tr. 38.

The shirt had a semen stain, identified as Strickler's, "very defused and in several areas of the shirt." Tr. 697. At Strickler's trial, the expert explained: "Perhaps [the shirt] might have been used to wipe off with. That's characteristic of what the stain looks like." Tr. 698.

Strickler's blue jeans were examined by the same forensic expert who did not find evidence of any stain. Tr. 695. When

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[9] Whitlock, her boyfriend John Dean, Strickler and Henderson all had Type O blood. In addition, Dean testified that he and Whitlock had sex the night before her disappearance.

asked by the prosecutor about the effects of washing on the analysis, she gave the following testimony:

> Q. O.K. If a pair of jeans or some cloth that has some type of stain on it or blood on it, was washed three or four times, would you expect to be able to find anything to analyze?
>
> A. I would not expect to. Occasionally you might be able to perform a test that would indicate that blood might be there but in most cases you cannot determine whether the blood was human or animal.
>
> Q. Would that be true if it was washed once or twice?
>
> A. Yes, that's true.

Tr. 695-96. Upon his return, Strickler's mother washed the jeans once, not three or four times, as the prosecutor had suggested.

In contrast, the same expert testified that he found four human blood stains on Henderson's blue jeans (CW Ex. 35). Tr. 683. The expert examined Henderson's green jacket (CW Ex. 30) and found six blood stains, four of which were clearly human blood. Tr. 695. She gave this same testimony at Henderson's trial. Hend., Vol. III, at 25-28. At that time, she identified the blood on the jacket as Type O. Tr. 37.

At Strickler's trial, the Commonwealth admitted on summation that there was no proof Strickler had raped Whitlock (JA 432): "Now the laboratory technician who testified said there was sperm present. She cannot say whose it was. She can't say it was this man's. It does not appear to be this man's (inaudible)."

Further evidence that Strickler had no part in Whitlock's murder came from patrons at Dice's Inn. The women who saw Strickler at Dice's shortly after the alleged time of the murder

did not state that they saw any blood, semen, or tissue on his clothing. As noted above, Brown, Sievers, and Simmons were all in a position to observe any inculpatory evidence[10]. Only Donna Tudor, who gave her testimony in exchange of immunity on the grand larceny count, claimed to have seen blood on Strickler's pants, and she never claimed to have seen blood during the time they were at Dice's Inn.

Moreover, at Henderson's trial, the forensic expert testified for the first time that Henderson and Strickler had some differences in enzyme composition (PGM subtype contained 1- for Strickler and 1+ for Henderson) further supporting the Commonwealth's charge that Henderson had raped Whitlock. Hend., Vol. III, Tr. 34-44. The fluids found in Whitlock's body did not contain the 1- element. Of course, Strickler's jury never heard this testimony which further supports Strickler's innocence.

D. Evidence Never Presented At Trial Indicates Innocence

Harry Dice, III, the owner of Dice's Inn, had a good chance to view Strickler on the night in question. Defense counsel failed to present Dice's testimony which would have provided further evidence

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[10] The Virginia Supreme Court misstated the women's testimony concerning Strickler's clothing:

> Between 9:00 and 9:15 p.m., Strickler and Henderson walked into Dice's Inn in Staunton. Strickler was wearing blue jeans which were dirty, bloody, and had a burn mark on them. He gave a wristwatch, later identified as the property of Leanne Whitlock, to a girl named Nancy Simmons.

404 S.E.2d 227, 230.

that Strickler had no part in the murder of Whitlock. Dice saw Strickler in a well-lit area of Dice's Inn when Dice observed Strickler using a knife to fix a chain. Dice did not see blood on Strickler's clothing. Dice gave this information to defense counsel's investigator, Ashy. Ex. P, Notes of Ashby, dated 6/8/90. Dice could have refuted Tudor's claim that she saw blood on Strickler's pants after Whitlock's disappearance. Ex. P, Aff. of Harry Dice, III (8/20/92)(exhibit of Strickler's State Habeas Petition).

Dice's testimony supports Strickler's innocence and points to Henderson, not Strickler, as the murderer. Dice's testimony is consistent with Workman's testimony at both trials that Workman saw blood on Henderson's jeans in the hours after the murder.

Defense counsel failed to challenge the Commonwealth's theory concerning the cause of death. Counsel conducted only a minimal examination of the forensic pathologist, Dr. Oxley. Dr. Oxley testified to the gruesome nature of Whitlock's injuries and bolstered the Commonwealth's theory that Whitlock was killed by two men who bludgeoned her with a rock. On cross examination, defense counsel failed to question Dr. Oxley about the physical evidence that pointed to death by strangulation and demonstrated that one person could have murdered Whitlock. Tr. 592. Counsel never questioned Dr. Oxley about the characteristics of ligature strangulation or the

As demonstrated by the report from Dr. Werner Spitz, submitted

in federal court, Whitlock's injuries were consistent with death by strangulation prior to infliction of the head injury. Ex. O, Aff. of Spitz (executed copy is in federal court files). The external abrasions on her neck are visible in the autopsy photographs, and should have been alerted defense counsel that further inquiry was required. In one of her police interviews, Tudor stated that Henderson had been wearing a leather headband that was wound twice around his head. Henderson could have used this to strangle Whitlock without any help from Strickler. If Whitlock had been strangled first or strangled to the point of unconsciousness but not death, then one person could have delivered the blows with the rock without assistance from a second person. No restraint of the victim would have been required.[11]

E. The Jury Convicted After Receiving A Defective Charge On Capital Murder

Neither the prosecutor or defense counsel objected to the trial court's erroneous charge on capital murder based on an offense that was not a predicate for capital murder at the time of Strickler's trial. The predicate, abduction with intent to defile,

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[11] Moreover, the Commonwealth's joint participation theory is implausible on its face. The party who held the allegedly struggling victim would have risked being hit by the rock as the second party threw it and the victim resisted. Given testimony from Tudor that Strickler had a knife that evening, the use of a 69 pound rock as a murder weapon would have been unnecessary. These facts make it more probable that Henderson alone, not Strickler, murdered Whitlock.

During jury deliberations, the jurors tested the Commonwealth's theory in part. At least two jurors each lifted the rock without assistance. Ex. R, Aff. of Juror James Dewitt, date, submitted in federal district court proceedings.

applied only when the victim was under 12 years old. The jury may well have convicted on this basis, and the erroneous charge was enormously prejudicial to Strickler. The Commonwealth had conceded that it could not prove Strickler had raped the victim but argued that a sexual assault had been a motive for the abduction.

The trial court never charged the jury on armed robbery as a predicate to capital murder, but instructed only a simple robbery which was not a capital predicate at the time of trial. In fact, Strickler was never indicted on armed robbery. The indictment charged simple robbery. Thus, Strickler's conviction was based on a flawed capital charge -- a charge that was certainly fatal for him.

F. Arbitrary Differences In The Trials Of Strickler And Henderson

Although the prosecution's case against the two men was identical, Strickler was denied an instruction on Virginia's "triggerman" rule while Henderson was granted that instruction in his trial. Strickler asked the court to instruct the jury that it had to find that Strickler was the person who actually delivered the blow that killed Whitlock in order to convict of capital murder. The court refused and instructed that the state need only prove that Strickler jointly participated in the fatal beating by showing that he was an active and immediate participant in the act or acts that caused her death. Tr. 1007.

Henderson's jury was told that one who is present and aids and abets in the actual killing but does not inflict the fatal blows that cause death cannot be found guilty of capital murder but is a

principal in the second degree. Hend. Vol. III, Tr. 241. Armed with this instruction, the jury convicted of only first degree murder.

Strickler, the clearly less culpable defendant based on a review of all the evidence now known, has been sentenced to death. Henderson, who most probably murdered Whitlock, received a life sentence. The result is arbitrary and capricious, and requires the Governor's intervention.

The time and location of Strickler's trial was also a factor in his conviction. The Whitlock murder generated enormous coverage from both the press and television, as it still does today. The news accounts were inflammatory, hostile, and prejudicial. Ex. S (summary of newspaper stories). Of the thirteen jurors ultimately selected for Strickler's trial, twelve admitted that they had read, seen, or heard news accounts about the case. Several jurors were excused who admitted forming an opinion about guilt based on this coverage. Despite these facts, defense counsel never asked to move the trial to another venue. Counsel believes this was an error, and a fair trial was impossible. Ex. T. Strickler, however, may die in part because of that error.

G. Favorable Mitigation Evidence Never Presented At Trial

The jury and the trial judge never learned about factors in Strickler's background and about mental impairments that would have resulted in a sentence of life rather than death. Strickler's attorney, the public defender, simply failed to conduct the type of investigate required to present a complete picture of Strickler to

the jury. The expert reports of Jan Vogelsang, a clinical social worker, and Dr. James Evans, a neuropsychologist, set out Mr. Strickler's background in detail. Ex. U (originals in federal district court).

A brief review of these materials demonstrate that Strickler's childhood was filled with neglect, abuse, deprivation and unrelenting poverty. The record shows that he grew up with not even the most basic necessities such as electricity, running water, and medical or dental care. The level of material deprivation he experienced as a boy was extreme. The family's water supply was contaminated by lead. He shared a bed with his parents for part of his childhood. Food was not always available. He was routinely abused badly by his stepfather. As a boy, Strickler watched his stepfather threaten his mother with a gun and generally terrorize the family.

Strickler's education ended in the eighth grade. He was a learning disabled child who never received any educational intervention. He is borderline mentally retarded. Owing to his premature departure from school, Strickler never gained marketable skills, although he held at least one job and performed well. He turned to drugs at an early age.

The jury never learned that Strickler suffers from organic brain dysfunction. He suffered repeated head injuries as a child. The nature of Strickler's brain dysfunction is such that his ability to manage relationships, controls impulses, and form judgments is severely impaired. As a result of these factors,

Strickler was at extremely high risk to be influenced and manipulated by those around him.

Finally, in a murder that has been repeatedly described in racial overtones, the jurors never learned of Strickler's good relations and friendships with black neighbors in his community. After he was convicted and imprisoned, Strickler married a black woman. Race should not be a factor in Strickler's punishment or in the Governor's decision.

## III. STRICKLER'S CASE IN ONE OF THE RARE FEW WHERE CLEMENCY IS APPROPRIATE

Strickler's case in unique. Generally, when capital murder cases reach this stage, there is a substantial degree of certainty as to the condemned man's guilt. Here, by contrast, an objective review of the record raises overwhelming doubt as to Strickler's guilt of capital murder.

The Commonwealth's own actions, starting even before Strickler's trial, are responsible for this uncertainty. The prosecution failed, for whatever reason, to produce evidence concerning a key witness, Stoltzfus. There can be no rational doubt that Strickler's jury was influenced by her testimony.

The court then failed in its role when it delivered a flawed charge on the critical capital murder count. Again, there can be no rational doubt that Strickler's jury may well have been convicted on the basis of that faulty charge. They may have convicted Strickler based on abduction with intent to defile.

The forensic evidence revealed at Henderson's trial further

exculpated Strickler and demonstrated Henderson' perhaps sole responsibility for Whitlock's murder. Henderson raped Whitlock, not Strickler as the Commonwealth conceded.

The Commonwealth took contradictory positions on the credibility of Kenneth Workman, who said Henderson admitted the murder. If Strickler's jurors had known the Commonwealth would embrace Workman at the second trial, they would not have convicted Strickler.

No one can be comfortable if the State executes Strickler. Virginia Governor's have provided a "fail safe" in the form of clemency when the legal system has produced the wrong or an unreliable result. Accomplice testimony is particularly untrustworthy, and Henderson's testimony cannot be the basis for denying clemency to Strickler. There are no other witnesses.

We urge you to attempt to seek some certainty in the record that Tommy David Strickler, and not Ronald Henderson, actually murdered Leeann Whitlock. We submit that you will not find it. All of the evidence points to Henderson, not Strickler, as the one responsible. Yet Henderson is serving a life sentence, while Strickler is set to be executed on September 16, 1998.

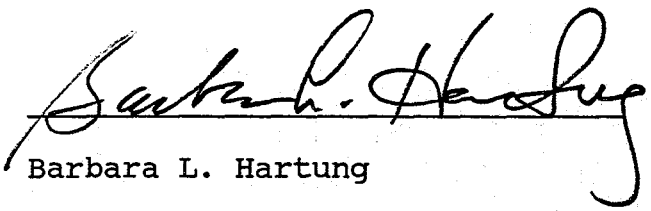
Most people in Virginia favor the death penalty. Most also are likely to agree that executions should be carried out only when there is a reasonable certainty as to the guilt of the condemned man. Going forward with the execution of a man who probably is innocent of the crime places the goal of performing executions over the ends of justice. By contrast, granting clemency to Strickler

will assure the people of Virginia that there remains a fail safe in the Commonwealth for the rare cases like this one where the flaws and errors of our criminal justice system result in the wrongful conviction and death sentence of an innocent man. Clemency in this case will send the signal that the Commonwealth seeks justice and fairness even in the most difficult cases.

## V. CONCLUSION

The Commonwealth should not executive Tommy David Strickler unless there can be no doubt that Strickler, and not Henderson, murdered Leeann Whitlock. We submit that a real doubt exists based on a review of the whole record. Accordingly, we request that Tommy Strickler be granted clemency.

Respectfully submitted,



Barbara L. Hartung

Counsel for Tommy David Strickler

September 11, 1998