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**ANYTHING SOMEONE ELSE SAYS CAN AND WILL BE USED
AGAINST YOU IN A COURT OF LAW: THE USE OF
UNADJUDICATED ACTS IN CAPITAL SENTENCING**

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language as support for admissibility of juror testimony demonstrating a "mental bias" on the part of one or more jurors. This language is available in support of both Eighth and Fourteenth Amendment claims.¹⁰⁷ Second, if the evidence is excluded under Rule 606(b), attorneys should address the dichotomy between Rule 606(b)'s exclusions and *McCleskey*'s requirements for proving a race discrimination claim. In this situation, attorneys should distinguish *Tanner* and refer to the analysis of the district court in *Dobbs*. Attorneys should argue that a juror can testify to statements and deliberations at trial, notwithstanding Rule 606(b), if the "evidence of a juror's racial prejudice is so strong that the death penalty appears to have been imposed on the basis of the defendant's race."¹⁰⁸

D. Argue for a More Stringent Standard Under the Virginia Constitution

Several state courts have considered imposing higher obligations under their own constitutions than the United States Supreme Court has required when contemplating statistical claims of racial discrimination in capital cases.¹⁰⁹ Article I, Section 11 of the Virginia Constitution provides that "the right to be free from any governmental discrimination upon the basis of . . . race . . . shall not be abridged."¹¹⁰ Although this clause has been held to be no broader than the Equal Protection Clause

¹⁰⁷ See *supra* note 96 and accompanying text.

¹⁰⁸ *Dobbs*, 720 F. Supp. at 1574.

¹⁰⁹ See, e.g., *State v. Mallett*, 732 S.W.2d 527 (Mo.) (Blackmar, J., dissenting) (advocating that the Missouri Supreme Court should "be mindful of appearances" and reduce a death sentence to life imprisonment without probation or parole pursuant to a state statute, notwithstanding *McCleskey*), *cert. denied*, 484 U.S. 933 (1987); *State v. Koedatich*, 548 A.2d 939 (N.J. 1988) (Handler, J., dissenting) (stating that, despite *McCleskey*, "[t]he course of federal jurisprudence should not distract state courts from an independent evaluation of the issue," and concluding that the New Jersey constitution forbids administration of the death penalty in a racially discriminatory manner), *cert. denied*, 488 U.S. 1017 (1989); *State v. Green*, 406 S.E.2d 852 (N.C. 1991) (rejecting a state and federal constitutional claim of racial discrimination premised on statistical evidence, but leaving the door open on the state claim, rejecting it on the basis that "the statistical studies offered by the defendant do not relate specifically to North Carolina or to the district in which the defendant was tried"); *People v. Adcox*, 763 P.2d 906 (Cal. 1988) (Mosk,

of the Fourteenth Amendment of the United States Constitution,¹¹¹ Virginia attorneys should make race discrimination challenges under both the Virginia and federal constitutions, if for no other reason than to draw attention to the problems of race discrimination which continue to plague the death penalty in Virginia.¹¹² Moreover, such a comprehensive challenge acts as a safeguard against potential arguments of procedural default, arguments which courts have so frequently embraced as a means of precluding post-conviction review.

IV. CONCLUSION

Although the United States Supreme Court has severely limited the opportunities to challenge a death sentence based on racial discrimination, the opportunities have not been completely eviscerated. This article has provided several avenues through which such a claim might be presented to a court. Attorneys should be prepared to assign racially discriminatory patterns more specifically to individuals who can be held accountable for the entire pattern. Attorneys must also be alert to any case-specific evidence which might show that racial bias has played a part in their clients' trials. Finally, statistical evidence of state-wide disparities in the administration of Virginia's death penalty should be assigned as error under the Virginia Constitution.

J., dissenting) (arguing that, where a defendant has shown that similarly situated individuals have received lesser sentences, the defendant's death sentence is unconstitutionally disproportionate, under either the United States Constitution or the California Constitution).

¹¹⁰ Va. Const. Art. I, § 11.

¹¹¹ See, e.g., *Archer v. Mayes*, 213 Va. 633, 194 S.E.2d 707 (1973).

¹¹² See *Turner v. Commonwealth*, 234 Va. 543, 555, 364 S.E.2d 483, 490, *cert. denied*, 486 U.S. 1017 (1988). In *Turner*, the defendant proffered a statistical study relating to the discriminatory impact of the death penalty in Virginia. After *Turner* originally made his claim, the United States Supreme Court decided *McCleskey*. *Turner* admitted that *McCleskey* prevented a defendant from relying on statistics alone to prove a statute invalid, but nevertheless asked the Supreme Court of Virginia "to hold to the contrary." *Turner*, 234 Va. at 555, 364 S.E.2d at 483. The court stated simply: "We decline this request." *Id.* It is unclear whether *Turner*'s request was premised on the United States Constitution or Article I, Section 11 of the Virginia Constitution.

ANYTHING SOMEONE ELSE SAYS CAN AND WILL BE USED AGAINST YOU IN A COURT OF LAW: THE USE OF UNADJUDICATED ACTS IN CAPITAL SENTENCING*

BY: LAURA J. FENN

Picture yourself; you are tired, exhausted, after so many days sitting with the same eleven people in that jury box. It is a strange place to be. You didn't expect the courtroom would look so much like a church. All week long you have been listening, your mind alternately concentrating and wandering. You have heard testimony, testimony from experts, from witnesses, from family members, even from the defendant himself. You have seen evidence, compelling and personal physical evidence from the crime scene, about the victim, who is dead now. You have heard enough testimony and seen enough evidence to convince you and the eleven others that this man was guilty of committing a horrible, brutal crime. This man is a murderer.

You have unanimously decided to convict the defendant of capital murder and now you must decide whether he should be sentenced to life imprisonment or be sentenced to die.

You hear more evidence. You hear psychiatrists discussing the mental state of the defendant. You hear a sibling telling you about the background of the defendant. The stories of child abuse and the testimony about the defendant's mental disturbance begin to give you a glimpse into his background, a hint of how someone might have such a troubled upbringing that his behavior would culminate in such a horrible act. . . not that it would excuse what was done, but that it becomes slightly more understandable; understandable enough that you begin to change your mind, to think that perhaps death is not the best punishment.

But then you hear a jail cell mate relating stories about other things the defendant has done. He tells you that the defendant boasted about another murder he committed. Maybe he tells you that the defendant bragged about "taking" a girl and forcing her

to do as he wished. Or maybe he tells you that the defendant has a terrible temper and has, on many occasions, exploded into fits of rage.

You hear this knowing you must decide whether the defendant has a potential to be violent, whether he would pose a future threat to society.

You are not told that the evidence you have just heard has not been established in a court of law. You are not warned that you need not take the evidence into account unless you find beyond a reasonable doubt that it actually occurred. You are not informed that the evidence you have just heard may be mere speculation or fabrication.

All you know is that you now hear that the man you have just convicted of a horrible, brutal murder has committed other horrendous crimes and gotten away with them. What could be more devastating — and more convincing?

I. INTRODUCTION

Evidence of a defendant's prior unadjudicated conduct is admitted at a capital sentencing trial so that the sentencer may hear all information relevant to sentencing the defendant.¹ The Supreme Court of Virginia has justified this rationale through the words of the United States Supreme Court, "in determining the probability of a defendant's future criminal conduct, it is 'essential . . . that the jury have before it all possible relevant information about the individual defendant whose fate it must determine.'"² Thus, the reasoning goes, although prior unadjudicated acts generally are not admissible in the guilt phase of a capital trial because the defendant's character is not at issue in the guilt phase,³ it is precisely the defendant's character which is at issue for a sentencing jury considering whether to impose the death penalty. In theory, this policy is a means of ensuring that the sentencing decision will be appropriately individualized,⁴ but, in practice, it enables the Commonwealth to introduce highly damaging yet slightly reliable evidence in pursuit of a capital sentence.

Under the capital sentencing statutes in Virginia,⁵ the only limitation currently placed on the admissibility of prior acts as aggravating evidence is the trial judge's discretion in determining relevance.⁶ And because the focus of the inquiry is on the defendant's character, virtually anything the defendant may have done can be argued as relevant. For instance, Virginia courts have admitted as "relevant" to future dangerousness evidence of acts such as bigamy,⁷ attempting to use the victim's bank card,⁸ and tampering with a vending machine.⁹

While in theory it is ideal that jurors be afforded all relevant

*AUTHOR'S NOTE: As this article was going to press, the Virginia State legislature passed a bill requiring written notice to defendant of prior unadjudicated conduct which the Commonwealth intends to introduce at sentencing. Va. Code Ann. §19.2-264.3:2 (1993). The Virginia Capital Case Clearinghouse is developing a sample motion which triggers the notice requirement, requests a reasonable time frame for the notice and insists upon a continuing duty to notify.

¹ "In the cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence . . ." Va. Code Ann. § 19.2-264.4(B) (1990).

² *LeVasseur v. Commonwealth*, 225 Va. 564, 593-94, 304 S.E.2d 644, 660 (1983) (quoting *Jurek v. Texas*, 428 U.S. 262, 275-76 (1976)) (emphasis in *LeVasseur*). See also *California v. Ramos*, 463 U.S. 992, 998-1001 (1982).

³ See *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), cert. denied, 475 U.S. 1099 (1986). Such evidence is admissible at the guilt phase, however, if offered for a purpose other than to demonstrate the defendant's character and propensity to commit the crime charged. See Friend, *The Law of Evidence in Virginia* §§ 152, 153 (3d ed. 1988). See also Fed. R. Evid. 404(b).

⁴ *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring) ("[E]vidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse").

⁵ See *infra* Part II.

⁶ Note also that the same limit is placed upon the defendant offering evidence in mitigation pursuant to *Lockett v. Ohio*, 438 U.S. 586 (1978),

information in sentencing a defendant, in practice, a number of problems arise. This article will examine and explain why Virginia's current use of unadjudicated acts should be reformed. Specifically, this article will argue that Virginia's practice violates the defendant's rights under the Sixth, Eighth and Fourteenth Amendments by admitting evidence which is questionably relevant to the defendant's character and propensity for future danger, is highly prejudicial, does not measure up to constitutional safeguards for reliability, and precludes counsel from providing effective assistance at the penalty phase. Moreover, this article will explain how defense counsel may attempt to limit the Commonwealth's use of unadjudicated acts in any particular case.

II. THE LAW

The Commonwealth of Virginia has established a capital sentencing scheme whereby a defendant found guilty of capital murder¹⁰ is subject to a penalty of life imprisonment or death.¹¹ The sentencer may not impose a sentence of death, however, unless the Commonwealth has proven beyond a reasonable doubt the existence of at least one of the two statutory aggravating factors of "vileness"¹² or "future dangerousness."¹³ In assessing the defendant's propensity to commit criminal acts of violence that would constitute a serious threat to society, the sentencer is permitted to consider the defendant's "past criminal record of convictions"¹⁴ and "evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused."¹⁵ The Virginia Supreme Court has consistently interpreted the statute as allowing the Commonwealth to use prior

and its progeny, as well as by Va. Code Ann. § 19.2-264.4(B) (1990). For a thorough discussion of the use of mitigating evidence in Virginia, See Hansen, *Mitigation: An Outline of Law, Method and Strategy*, Capital Defense Digest, Vol. 4, No. 2, p. 29 (1992).

⁷ *King v. Commonwealth*, 243 Va. 353, 416 S.E.2d 669 (1992).

⁸ *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991).

⁹ *Id.*

¹⁰ See Va. Code Ann. § 18.2-31 (1991).

¹¹ See Va. Code Ann. §§ 19.2-264.2, 19.2-264.4 (1990).

¹² "Vileness" describes the defendant's conduct in committing the offense for which he stands charged as "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code Ann. §§ 19.2-264.2, 19.2-264.4(C) (1990). For a thorough discussion of the constitutionality of Virginia's vileness factor, see Lago, *Litigating the 'Vileness' Factor in Virginia*, Capital Defense Digest, Vol. 4, No. 1, p. 25 (1991).

¹³ "Future dangerousness" describes the probability that the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society." Va. Code Ann. §§ 19.2-264.2, 19.2-264.4(C) (1990).

¹⁴ Va. Code Ann. § 19.2-264.2 (1990).

¹⁵ Va. Code Ann. § 19.2-264.4(C) (1990); See *Edmonds v. Commonwealth*, 229 Va. 303, 329 S.E.2d 807 (explaining that in making future dangerousness determination, sentencer is entitled to consider not only the defendant's past criminal record of convictions, but also any matter which the court deems relevant to sentence, the prior history of the defendant or the circumstances surrounding the commission of the offense, and the heinousness of the crime), cert. denied, 475 U.S. 975 (1985).

unadjudicated criminal conduct as evidence of future dangerousness.¹⁶

Despite the Virginia Supreme Court's holdings, the United States Supreme Court has never expressly declared that using a defendant's prior unadjudicated activity to prove future dangerousness at the penalty phase of a capital trial is constitutionally permissible.¹⁷ Virginia's practice is particularly suspect compared to other states because it admits unadjudicated acts with only the barest of procedural safeguards; a state of affairs which raises serious constitutional questions on due process grounds.

III. RELIABILITY

A. The Constitutional Requirement of Greater Reliability in Capital Sentencing

The Virginia Supreme Court has held that Virginia's sentencing scheme provides sufficient measures for a jury to predict the future dangerousness of a defendant.¹⁸ However, when the Commonwealth makes allegations of prior unadjudicated criminal activity in an attempt to demonstrate future dangerousness, the jury is allowed to use those accusations without regard to, and without instruction on, the level or standard of proof necessary to decide whether those acts were in fact committed by the defendant.¹⁹ Without an articulated standard of proof, the use of unadjudicated criminal conduct cannot be relevant or reliable information about the defendant.²⁰

Allowing the Commonwealth to present such information for jury consideration without burden of proof safeguards violates the Supreme Court's procedural due process requirements in capital cases. In *California v. Ramos*,²¹ the Court voiced its ongoing concern for appropriate procedure in capital cases:

In ensuring that the death penalty is not meted out arbitrarily or capriciously, the Court's principal concern has been more

with the procedure by which the State imposes the death sentence than with the substantive factors the State lays before the jury as a basis for imposing death, once it has been determined that the defendant falls within the category of persons eligible for the death penalty.²²

The potential penalty of death makes capital crimes qualitatively different than those crimes subjecting a defendant to a sentence of years,²³ and the Supreme Court has determined that the unique nature of the death penalty requires additional protection during pretrial, guilt and sentencing stages.²⁴ The use of unadjudicated criminal conduct in the penalty phase offends notions of reliability required by due process as applied to capital sentencing proceedings.

B. Standard of Proof

1. The Need for Some Standard of Proof

Assuming unadjudicated act evidence is constitutionally admissible, the most fundamental shortcoming in the Virginia scheme is the lack of any burden of proof requirement. A defendant's death sentence may end up resting upon a jury's consideration of an unadjudicated act which the jury was not required to find had been committed beyond a reasonable doubt, or by clear and convincing evidence, or even by a mere preponderance of the evidence. Instead, the jury is allowed to use, without any guidance on reliability, the most inflammatory and prejudicial type of evidence one could imagine on the issue of future dangerousness — evidence such as an additional murder²⁵ — which no jury will ever have found was committed by the defendant based upon a legal instruction on burden of proof. Under prevailing United States Supreme Court holdings, due process and the Eighth Amendment would appear to require that such a finding be made beyond a reasonable doubt.²⁶ At a minimum, however, such a finding must be made pursuant to a legal instruction that imposes some minimum

¹⁶ *Watkins v. Commonwealth*, 238 Va. 341, 385 S.E.2d 50 (1989). See, e.g., *Williams v. Commonwealth*, 234 Va. 168, 360 S.E.2d 361 (1987); *Beaver v. Commonwealth*, 232 Va. 521, 352 S.E.2d 342, cert. denied, 483 U.S. 1033 (1987); *Pruett v. Commonwealth*, 232 Va. 266, 351 S.E.2d 1 (1986), cert. denied, 482 U.S. 931 (1987); *Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985) (explaining that although generally not admissible at guilt phase of a capital trial, evidence of prior unadjudicated acts by defendant are allowed at penalty phase for proof of future dangerousness), cert. denied, 475 U.S. 1099 (1986); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985); *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371, cert. denied, 469 U.S. 873 (1984); *Stamperv. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972 (1980).

¹⁷ *Sharp v. Texas*, 488 U.S. 872, (1988) (denying certiorari on the question of admissibility of defendant's prior unadjudicated behavior at capital sentencing); *Miranda v. California*, 486 U.S. 1038 (1988) (same); *Devier v. Kemp*, 484 U.S. 948 (1987) (same); *Williams v. Lynaugh*, 484 U.S. 935 (1987) (same).

¹⁸ *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981) (holding that the aggravating factors subsection of the capital sentencing statute has a commonsense meaning which a jury can understand and thus supplies a sufficient standard for a jury to predict future criminal conduct), cert. denied, 456 U.S. 938 (1982).

¹⁹ *Spencer v. Commonwealth*, 238 Va. 295, 317, 384 S.E.2d 785, 799 (1989) (rejecting the claim that such evidence was unreliable and prejudicial because it failed to require proof beyond a reasonable doubt).

²⁰ Note that the statute requires the Commonwealth to demonstrate beyond a reasonable doubt that there is a probability of future dangerousness. Va. Code Ann. § 19.2-264.4(C) (1990). This is very different from proving beyond a reasonable doubt the existence of the unadjudicated acts which the Commonwealth uses to demonstrate the future dangerousness of the defendant.

²¹ 463 U.S. 992 (1982).

²² *Id.* at 999 (emphasis in original).

²³ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two").

²⁴ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis added); *Woodson*, 428 U.S. at 305 ("Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case").

²⁵ See, e.g., *Wright v. Commonwealth*, Nos. 920810 & 920811, 1993 Va. LEXIS 26 (Feb. 26, 1993); *Saunders v. Commonwealth*, 242 Va. 107, 406 S.E.2d 39 (1991). See case summary of *Saunders*, Capital Defense Digest, Vol. 4, No. 1, p. 19 (1992).

²⁶ See *Zant v. Stephens*, 462 U.S. 862, 874 (1982) (arguing that the function of an aggravating circumstance is to narrow the class of persons convicted of murder who are eligible for the death penalty). See also *Giarratano v. Procnier*, 891 F.2d 483 (4th Cir. 1989) (arguing that future dangerousness and other aggravating circumstances are part of means to narrow class of persons who receive the death penalty).

vener of reliability on the jury's use of such unadjudicated evidence.²⁷

Standards of proof are the means of ensuring that the jury's decision is properly based upon the evidence presented. The Supreme Court has explained that:

The function of a standard of proof, as that concept is embodied in the Due Process Clause and in the realm of factfinding is to "instruct the factfinder concerning the degree of confidence our society thinks he should have in the correctness of factual conclusions for a particular type of adjudication." The standard serves to allocate the risk of error between the litigants and to indicate the relative importance attached to the ultimate decision.²⁸

Just as a factfinder in a guilt trial must consider the evidence offered in light of a proof standard, so must a sentencer in a penalty trial appraise the information presented with some level of confidence. To provide no guidance to the sentencer on what standard of proof is necessary for the use of an alleged unadjudicated act is to invite the arbitrary use of highly prejudicial allegations that have never been scrutinized under any legal standard of proof.²⁹ This does not comport with the "correspondingly greater degree of scrutiny of the capital sentencing determination"³⁰ required by due process.

2. Reasonable Doubt as the Proper Standard

Although the Supreme Court has stated as a general proposition that the reasonable doubt rule does not normally apply to sentencing,³¹ the Court has added that the reasonable doubt rule is implicated if the challenged factor "exposed [the defendant] to greater or additional punishment,"³² or if the defendant is faced with a "'radically different situation' from the usual sentencing proceedings."³³ In these types of cases, "*Winship's* reasonable-doubt requirement applies to facts not

²⁷ Use of the defendant's criminal record of convictions, on the other hand, is not offensive to due process so long as it is limited to relevant information speaking to defendant's propensity to be a future threat to society, i.e. crimes of a violent nature. Such matters consist of prior adjudicated criminal acts which have sufficient indicia of reliability in that they are conclusively determined; provided, however, that their admission into evidence is not deemed too prejudicial against the defendant.

The use of defendant's adjudicated criminal conduct has been recognized repeatedly by the Virginia Supreme Court. *See, e.g., Watkins v. Commonwealth*, 229 Va. 469, 331 S.E.2d 422 (1985), *cert. denied*, 475 U.S. 1099 (1986); *Bassett v. Commonwealth*, 222 Va. 844, 284 S.E.2d 844 (1981); *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d 520, *cert. denied*, 464 U.S. 865, 104 S.Ct. 202 (1983); *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (asserting that the presence or absence of a criminal record is pertinent to future dangerousness), *cert. denied*, 464 U.S. 977 (1983).

²⁸ *Addington v. Texas*, 441 U.S. 418, 423 (1979) (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

²⁹ *Gregg v. Georgia*, 428 U.S. 153, 189 (1976) (opinion of Stewart, Powell, and Stevens, JJ.) ("[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action."). *Cf. Zant v. Stephens*, 462 U.S. 862 (1982) (arguing that in addressing the matter of weighing the significance of statutory aggravating circumstances, the trial court need not channel the jury's discretion by enunciating the specific standards to guide consideration).

³⁰ *California v. Ramos*, 463 U.S. 992, 998-999 (1982) (footnote

omitted).

formally identified as elements of the offense charged."³⁴ In *McMillan v. Pennsylvania*,³⁵ the Supreme Court upheld a statutory provision which subjected the defendant to a mandatory minimum sentence when the judge found by a preponderance of the evidence that the defendant visibly possessed a firearm during the commission of a statutory offense. According to the Court, the ruling was consistent with due process because the visible possession of a firearm was a sentencing factor rather than an element of the offense; the factor was considered only after the defendant had been found guilty beyond a reasonable doubt of the underlying offense.³⁶ Additionally, the statute merely increased the possible minimum sentence; it did not raise the maximum punishment nor create a separate offense with a separate penalty.³⁷

In contrast, the use of unadjudicated acts at capital sentencing falls within the ambit of *McMillan's* exceptions. Unlike *McMillan's* case where the firearm factor did not expose the defendant to a penalty he otherwise would not face, a capital defendant cannot receive the death penalty unless an aggravating factor is found. Thus, to allow unadjudicated acts to form a basis for the aggravating factor of future dangerousness is to "expose [the defendant] to greater or additional punishment."³⁸ And, as the Court has noted many times in its opinions, the death penalty is a "'radically different situation' from the usual sentencing proceedings."³⁹ One radical difference being, of course, that capital sentencing carries special concerns for reliability,⁴⁰ which reinforces the reasons why the use of unadjudicated acts falls within *Winship* and *McMillan's* requirements for the reasonable doubt rule.⁴¹

C. A Comparison: Admissibility of Unadjudicated Acts Evidence in Other Jurisdictions

While the Supreme Court of the United States has not ruled on the admissibility of prior unadjudicated conduct by a defendant at a capital sentencing hearing,⁴² the states are divided in their approaches to, and treatment of, unadjudicated acts evidence in the capital context.⁴³ The Commonwealth of Virginia, however, stands as one of only four jurisdic-

omitted).

³¹ *McMillan v. Pennsylvania*, 477 U.S. 79, 84 (1985) ("[I]n *Patterson v. New York*, 432 U.S. 197 (1976) we rejected the claim that whenever a State links the 'severity of the punishment' to 'the presence or absence of an identified fact' the State must prove that fact beyond a reasonable doubt") (citing *Patterson* at 214).

³² *McMillan*, 477 U.S. at 88.

³³ *Id.* at 89 (citing *Specht v. Patterson*, 386 U.S. 605, 608 (1967)).

³⁴ *Id.* at 86.

³⁵ 477 U.S. 79 (1985).

³⁶ *Id.*

³⁷ *Id.*

³⁸ *Id.* at 88.

³⁹ *Id.* at 89 (citing *Specht v. Patterson*, 386 U.S. 605, 608 (1967)).

See Woodson v. North Carolina, 428 U.S. 280, 305 (1976).

⁴⁰ *See supra* notes 21-24 and accompanying text.

⁴¹ *See supra* notes 32-34 and accompanying text. *Cf. Hildwin v. Florida*, 490 U.S. 638, 640 (1989) ("Like the visible possession of a firearm in *McMillan*, the existence of an aggravating factor here is not an element of the offense but instead is a 'sentencing factor that comes into play only after the defendant has been found guilty'") (citing *McMillan* at 86). Note, however, that *Hildwin* concerns the existence of an aggravating factor generally and not evidence of a prior unadjudicated act offered as an aggravating factor without the benefit of a standard of proof. Even the visible firearm offered as a sentence enhancer in *McMillan* had to be demonstrated by a preponderance of the evidence.

⁴² *See supra* note 17 and accompanying text.

⁴³ *See Williams v. Lynaugh*, 484 U.S. 935, 937 (1987) (Marshall, J., dissenting) (citing jurisdictions with diverse perspectives).

tions which allows admission of such evidence without promulgating any standard by which it should be judged.⁴⁴

In some jurisdictions, the use of unadjudicated act evidence has been found so offensive to the state constitution that those states do not allow unadjudicated acts to be admitted at all, under any standard of proof, for purposes of capital sentencing.⁴⁵ The rationale expressed by the states prohibiting the admission of such evidence is a concern for the lack of reliability and resulting prejudice against the defendant in violation of state statutes and the Eighth and Fourteenth Amendments to the Federal Constitution.⁴⁶ For example, in *State v. Bartholomew*, the Washington Supreme Court concluded that evidence of prior unadjudicated criminal activity at the penalty phase is prejudicial, unreliable, irrelevant and fundamentally unfair.⁴⁷ The remaining jurisdictions that allow the admission of unadjudicated acts in capital sentencing at least require notice and some standard of proof or provide other means of guaranteeing the reliability of the evidence. The state of Florida, for instance, admits only prior convictions as evidence of aggravation while absolutely prohibiting admission of unadjudicated acts which are allegations, arrests or even pending charges.⁴⁸ Similarly, South Dakota permits evidence of only prior serious assaultive criminal convictions.⁴⁹ Many jurisdictions specifically require notice of evidence to be used in aggravation so that counsel may effectively defend against the acts presented.⁵⁰ In addition, a number of jurisdictions require, at a minimum, that the basic evidentiary standards for admissibility of other act evidence at the guilt trial be met by evidence used in aggravation at the penalty phase.⁵¹ Finally, in jurisdictions where state legislatures have failed to ensure proper standards of reliability of unadjudicated act evidence, the courts have provided for appropriate guidance of the sentencer.⁵²

⁴⁴ The four jurisdictions are Virginia, Texas, Georgia, and Nebraska. See *supra* note 16 (citing Virginia cases); See also, e.g., *Milton v. State*, 599 S.W.2d 824, 827 (Tex. Crim. App. 1980) (en banc), cert. denied, 451 U.S. 1031 (1981); *Fair v. State*, 268 S.E.2d 316, 319-20 (Ga.), cert. denied, 449 U.S. 986 (1980); *State v. Reeves*, 453 N.W.2d 359, 375 (Neb. 1990).

⁴⁵ See, e.g., *State v. Bobo*, 727 S.W.2d 945, 952-53 (Tenn.), cert. denied, 484 U.S. 872 (1987); *State v. McCormick*, 397 N.E.2d 276, 280 (Ind. 1979); *Cook v. State*, 369 So.2d 1251, 1257 (Ala. 1978); *State v. Bartholomew*, 683 P.2d 1079, 1085-86 (Wash. 1984) (en banc).

⁴⁶ *Reeves*, 453 N.W.2d at 371.

⁴⁷ *Bartholomew*, 683 P.2d at 1082-85.

⁴⁸ See, e.g., *Odom v. State*, 403 So.2d 936 (Fla.), cert. denied, 456 U.S. 925 (1981); *Perry v. State*, 395 So.2d 170 (Fla. 1980). But see *Walton v. State*, 547 So.2d 622 (Fla. 1989) (holding that state can present evidence of criminal activity for which convictions were not obtained to rebut defendant's assertion that he lacked significant history of prior criminal activity).

⁴⁹ S.D. Codified Laws Ann. § 23A-27A-1 (1989).

⁵⁰ See, e.g., Idaho Code § 19-2515 (1987); Ky. Rev. Stat. Ann. § 532.025 (Michie/Bobbs-Merrill 1990); N. H. Rev. Stat. Ann. § 630:5 (1992); Okla. Stat. Ann. tit. 21, § 701.10 (West 1992); Wyo. Stat. § 6-2-102 (1992).

⁵¹ See, e.g., Ariz. Rev. Stat. Ann. § 13-703 (1989); Ark. Code Ann. § 5-4-604 (Michie 1991); Conn. Gen. Stat. Ann. § 53a-46a (West 1985).

⁵² See, e.g., *State v. Middleton*, 368 S.E.2d 457 (S.C. 1988) (holding that trial judge must charge the jury and caution members as to manner of considering the evidence); *People v. Devin*, 444 N.E.2d 102 (Ill. 1982) (explaining that the only requirement is that evidence be relevant and reliable but the use of such evidence should be carefully guided).

⁵³ See generally *Huddleston v. United States*, 485 U.S. 681 (1988) (without regard to the capital context, holding that the Federal Rules of Evidence allow admissibility of other unadjudicated crimes

Still other jurisdictions have imposed particular standards of proof.⁵³ At least two jurisdictions have declared, for instance, that such evidence may not be considered in capital sentencing unless demonstrated by clear and convincing evidence.⁵⁴ Louisiana decided on a clear and convincing standard for the defendant's unadjudicated acts at the penalty stage reasoning that such acts must be proven by at least the same standard used for admission of evidence of unrelated crimes during the guilt phase.⁵⁵ And at least two other jurisdictions have gone even farther, declaring that such evidence may not be admitted in capital sentencing unless demonstrated beyond a reasonable doubt.⁵⁶ Relying on the greater need for reliability in capital sentencing, California and Utah both require the prosecution to prove unadjudicated acts in the capital context at a higher standard (beyond a reasonable doubt) than the preponderance standard used for admission of evidence of unrelated crimes at the guilt phase of a trial.⁵⁷

If Virginia continues to admit evidence of prior unadjudicated acts of a capital defendant, the Commonwealth should look to the California Supreme Court's reasoning in deciding the standard of proof required in offering such information.⁵⁸ Although the general rule in California is that the standard of competency for evidence at the penalty trial is the same as the standard required at guilt trial, i.e. a preponderance of the evidence,⁵⁹ the court reasoned that "[s]ince evidence of other crimes. . . may have a particularly damaging impact on the jury's determination whether the defendant should be executed . . . there should be an exception to the normal standard of proof at the [penalty trial]."⁶⁰ Therefore, a higher standard is imposed to meet the enhanced requirement of reliability at capital sentencing.

The Commonwealth of Virginia, likewise, should recognize that evidence used in its capital sentencing determinations must carry the

if demonstrated by a preponderance of the evidence). Note, however, that the Federal Sentencing Guidelines do not specifically address the subject of standards of proof in sentencing determination. *U.S. v. Urrego-Linares*, 879 F.2d 1234 (4th Cir. 1989). Some jurisdictions have required a clear and convincing standard while others have suggested that a "sufficient indicia of reliability" may be upheld. *Id.* at 1237-38 (citing cases). Recently, though, "courts examining the appropriate standard of proof under the guidelines have generally agreed that a preponderance standard is the proper measure." *Id.* at 1238 (citations omitted).

⁵⁴ *State v. Wilson*, 385 A.2d 304 (N.J. 1978) (ruling that trial court properly admitted evidence of defendant's prior behavior who was charged with the murder of her son because acts of child abuse were proven by clear and convincing evidence); *State v. Brooks*, 541 So.2d 801, 814 (La. 1989) (holding that "evidence of unadjudicated crimes at the sentencing phase of the trial will be admissible once a trial court determines: 1) the evidence of defendant's connection with commission of the unrelated crimes is clear and convincing; 2) the proffered evidence is otherwise competent and reliable; and 3) the unrelated crimes have relevance and substantial probative value as to the defendant's character and propensities, which is focus of the sentencing hearing under La.C.Cr.P. art. 905.2.").

⁵⁵ *Brooks*, 541 So.2d 801.

⁵⁶ See, e.g., *State v. Lafferty*, 749 P.2d 1239 (Utah 1988); *People v. Howard*, 749 P.2d 279 (Cal. 1988); *People v. Balderas*, 711 P.2d 480 (Cal. 1985). See also *People v. Robertson*, 655 P.2d 279, 298 (Cal. 1983); *People v. Stanworth*, 457 P.2d 889 (Cal. 1969); *People v. McClellan*, 457 P.2d 871, 879 (Cal. 1969); *People v. Polk*, 406 P.2d 641, 646 (Cal. 1965).

⁵⁷ *Id.*

⁵⁸ *Balderas*, 711 P.2d at 516, n. 33 (asserting that only the reasonable doubt standard ensures sufficient reliability so that the evidence is not improperly prejudicial or unfair).

⁵⁹ *Polk*, 406 P.2d at 646.

⁶⁰ *Id.* (citations omitted).

appropriate indicia of reliability. Of the thirty-seven jurisdictions that permit capital punishment in the United States, Virginia and three other states stand alone in admitting unadjudicated act evidence in pursuit of the death penalty with no procedural safeguards beyond a trial judge finding the evidence "relevant." Without any meaningful standards of reliability or notice or guidance of the sentencer's discretion, the Commonwealth does not comply with the defendant's constitutional safeguards in a capital case and would not withstand a challenge at the United States Supreme Court.

IV. NOTICE AND DUE PROCESS

The use of unadjudicated acts for proof of future dangerousness also compromises the defendant's due process rights to notice and a meaningful opportunity to be heard. A defendant in Virginia who has just been convicted of capital murder is faced with a sentencing hearing in which the Commonwealth may present any information concerning the defendant's character or the circumstances of the offense which may be relevant to sentencing.⁶¹ When the Commonwealth offers evidence of defendant's prior behavior to impress upon the jury the future threat to society which the defendant poses, the defendant may have no idea what the jury is about to hear. Virginia case law reveals that the use of defendant's prior behavior supporting the future dangerousness aggravating factor can consist of virtually anything. Courts have allowed observations about the defendant's general character or history,⁶² admissions and confessions of crimes similar to that charged,⁶³ and other allegations of behavior non-criminal in nature.⁶⁴ Because nearly any act of the defendant could be considered prior unadjudicated conduct, the Commonwealth has few parameters to constrain it. Indeed, without definition or indication of what constitutes an unadjudicated act, the Commonwealth can and does present a litany of allegations with varying levels of severity and the defendant is left with the impossible task of countering each and every implication or innuendo made by the prosecution.⁶⁵

Beyond the problem a defendant encounters in not knowing what the Commonwealth could use against him, the defendant is not granted any notice of evidence the Commonwealth will use against him.⁶⁶ Evidence of prior unadjudicated behavior is to be used against the defendant by a sentencing jury when the defendant has not been accorded any hearing on the issues. Admission of evidence at the penalty trial of prior unadjudicated criminal acts results in an inability to exercise a meaningful opportunity to defend himself because he has not been given

notice as required by due process.⁶⁷ It would be impossible for a defendant to adequately defend against all allegations first revealed to him only when asserted before the jury.⁶⁸

In the context of variances between indictment and proof, the United States Supreme Court has stated that "the obvious requirements [are] . . . that the accused shall be definitely informed as to the charges against him, so that he may be enabled to present his defense and not be taken by surprise by the evidence offered at the trial . . ."⁶⁹ If one applies this most basic principle to the use of unadjudicated acts to prove future dangerousness, the fundamental unfairness is evident. To inform the defendant only that the Commonwealth will rely on future dangerousness but not to specify the acts is like a defendant being indicted for a crime without any notice as to the alleged facts surrounding the incident. Such a Kafkaesque scenario would be a blatant violation of due process if it occurred during the guilt phase, yet is a regular feature of penalty hearings in the Commonwealth of Virginia. The United States Supreme Court, however, has extended due process notice requirements to capital sentencing,⁷⁰ and this may supply the portal through which such practices can now be challenged.

V. VIOLATION OF THE SIXTH AMENDMENT RIGHT TO EFFECTIVE ASSISTANCE OF COUNSEL

The Sixth Amendment right to effective assistance of counsel entitles a defendant to be informed of the nature and cause of the accusations against him. It is well settled that the Sixth Amendment entitles a defendant to effective assistance of counsel at the sentencing phase of a capital trial as well as the guilt/innocence phase of the capital trial.⁷¹ If the Commonwealth is permitted to introduce evidence of prior unadjudicated misconduct of the defendant at the penalty trial, defendant must be permitted effective representation to defend against those accusations.

Yet defense counsel, when faced with the potential admissibility of any number of unadjudicated acts by the defendant, must investigate and attempt to uncover any possible evidence which could be included as unadjudicated acts evidence. To avoid surprise and counter the Commonwealth's evidence as effectively as possible, counsel must prepare mini-trials on any potential bad act from the defendant's past, including jail time while awaiting trial. Given the law in place, the only way to effectively counteract the Commonwealth's evidence of future dangerousness is to anticipate what the evidence might be and attack each item.

⁶¹ See *supra* notes 1-2 and accompanying text.

⁶² See, e.g., *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986) (allowing evidence of the defendant's lack of remorse); *Beaver v. Commonwealth*, 232 Va. 521, 352 S.E.2d 342 (allowing evidence of the defendant's juvenile record), *cert. denied*, 483 U.S. 1033 (1987).

⁶³ *Payne v. Commonwealth*, 233 Va. 460, 357 S.E.2d 500, *cert. denied*, 484 U.S. 933 (1987); *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157, *cert. denied*, 484 U.S. 873 (1987); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985).

⁶⁴ *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991) (allowing evidence that the defendant tampered with a vending machine and boasted about his commission of the crime); *King v. Commonwealth*, 243 Va. 353, 416 S.E.2d 669 (1992) (permitting evidence of the defendant's unauthorized possession of money, drug paraphernalia, and intoxicants while in jail); *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254 (1991) (allowing evidence that the defendant sent a letter to a neighbor ordering him to stay away from defendant's girlfriend).

⁶⁵ See, e.g., *King*, 243 Va. at 369-70, 416 S.E.2d at 678-79. In *King*, the prosecution introduced the following evidence at a 1990 capital sentencing trial: King's 1975 conviction of bank robbery, use of a firearm in the commission of the robbery, and abduction; 1976 conviction of carrying a concealed weapon; 1976 conviction for contributing to

the delinquency of a minor; 1976 failed attempt to rob a bank in which King made a fake bomb, carried a pistol, and threatened to kill his co-conspirator; 1982 conviction of petit larceny; 1990 conviction of bigamy; 1989 act of entering home of first wife with second wife and knocking door in, jerking phone out of wall, threatening first wife with pistol and shooting it in the air; various parole violations involving assault, destruction of property, traffic offenses and technical violations of parole rules; various institutional violations while imprisoned such as filling out false prescriptions and inducing girlfriend to make drug deliveries to him, unauthorized possession of currency, drug paraphernalia, intoxicants, marijuana, and being under the influence of intoxicants.

⁶⁶ But see Author's note, *supra*, and Va. Code Ann. §19.2-264.3:2 (1993). In comparison, note that the 1992 Amendment to Federal Rule of Evidence 404(b) addresses this concern and requires that pre-trial notice of prior bad acts must be given to the defendant in federal criminal cases.

⁶⁷ See generally *Lankford v. Idaho*, 111 S.Ct. 1723, 1733, (1991); *Goss v. Lopez*, 419 U.S. 565, 579 (1975).

⁶⁸ See *infra* Part V.

⁶⁹ *Berger v. United States*, 295 U.S. 78 (1935).

⁷⁰ *Lankford*, 111 S.Ct. 1723.

⁷¹ See *Strickland v. Washington*, 466 U.S. 668 (1984).

Even the best attorney could not effectively provide assistance under such circumstances. In effect, it is as if defense counsel were appointed the morning of a trial without the benefit of notice or discovery. Counsel has been afforded no time because she receives the information concurrently with the jury. She has had no opportunity to investigate, and the jury has been given no level of scrutiny by which the evidence will be judged.

The Commonwealth's ability to introduce evidence of unadjudicated acts under these conditions is a violation of the defendant's Sixth Amendment right to counsel in that it undermines the adversarial process as described in *United States v. Cronin*.⁷² The United States Supreme Court has stated that some circumstances can occur in which "counsel entirely fails to subject the prosecution's case to meaningful adversarial testing . . . [making] the adversary process itself presumptively unreliable."⁷³ The Commonwealth's use of unadjudicated acts creates such circumstances. It is an instance where a court need "not examine the actual performance of counsel at trial, but instead [must] conclude[] that under these circumstances the likelihood that counsel could have performed as an effective adversary was so remote as to have made the trial inherently unfair."⁷⁴

Requiring the accused to defend against unadjudicated acts without adequate notice offends the notion of fairness in the adversarial system. Defense counsel cannot possibly be expected to defend against all conceivable accusations made against the defendant at the sentencing phase when the defendant has just been found guilty of capital murder by the same jury. Circumstances of great magnitude may be present on some occasions when, even though counsel is available to assist the accused during trial, the likelihood that any lawyer, even a fully competent one, could provide effective assistance is so small that the court must presume prejudice.⁷⁵

VI. CHALLENGING UNADJUDICATED ACTS AS IRRELEVANT AND PREJUDICIAL

The admission of unadjudicated acts, like the admission of any evidence, requires that the information presented be relevant to the matter at issue. Where unadjudicated act evidence is proffered, the issue will be whether the act is in fact probative of Virginia's aggravating factors.⁷⁶ In particular, unadjudicated acts must speak to whether the defendant poses a future threat to society.⁷⁷ If the acts offered do not make such an indication, they are irrelevant and cannot be admitted.⁷⁸

⁷² 466 U.S. 648 (1984).

⁷³ *Id.* at 659.

⁷⁴ *Id.* at 660-61 (citing *Powell v. Alabama*, 287 U.S. 45, 58 (1932)).

⁷⁵ *Cronin*, 466 U.S. at 646-47.

⁷⁶ See *supra* notes 11-13 and accompanying text.

⁷⁷ *Edmonds v. Commonwealth*, 229 Va. 303, 329 S.E.2d 807, cert. denied, 475 U.S. 975 (1985). See Va. Code Ann. § 19.2-264.4(C) (1990).

⁷⁸ See *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 196-97, 361 S.E.2d 436, 441 (1987) (explaining that evidence is relevant if it tends to establish a proposition toward which it is offered).

⁷⁹ *Dawson v. Delaware*, 112 S.Ct. 1093 (1992). See case summary of *Dawson*, Capital Defense Digest, Vol. 5, No. 1, p. 6 (1992).

⁸⁰ *Id.* at 1098.

⁸¹ *Id.* at 1096.

⁸² See *Penry v. Lynaugh*, 492 U.S. 302, 319 (1989) ("[P]unishment should be directly related to the personal culpability of the criminal defendant") (relying on *Lockett v. Ohio*, 438 U.S. 586 (1978) and *Eddings v. Oklahoma*, 455 U.S. 104 (1982)).

⁸³ *Evans-Smith v. Commonwealth*, 5 Va. App. 188, 196-76, 361

The United States Supreme Court recently struggled with the problem of what constitutes relevant evidence for future dangerousness.⁷⁹ In *Dawson*, the Supreme Court overturned the death sentence because a stipulation that the defendant was a member of a white racist prison gang was introduced at the penalty phase as evidence of future dangerousness.⁸⁰ In this case, admission of the evidence was not proper because the narrow stipulation — simply that the group that the defendant belonged to holds racist beliefs⁸¹ — was not tied to the murder of the victim and thus was not relevant to the sentencing proceeding. Thus, although the *Dawson* Court formally struck down the aggravating evidence because its associational nature violated the First Amendment, the case reemphasizes the requirement that evidence directly bear on the defendant's culpability.⁸²

Even if the prior acts are deemed relevant by the court, they must be excluded if their prejudicial impact outweighs the evidence's probative value.⁸³ In assessing the probative value, the court should consider the necessity of the evidence and its reliability.⁸⁴ Other factors helpful in assessing the probative value of the evidence are the similarity of the acts to the offense charged and the temporal proximity to the crime for which the defendant stands trial.⁸⁵ Although these rules of evidence are propounded in the context of a guilt trial, the dangers to which they are addressed are also present in capital sentencing. Evidence admitted in the sentencing phase, like that at the guilt phase, must be more probative than it is prejudicial.⁸⁶ "The responsibility for balancing these competing considerations is largely within the sound discretion of the trial judge [and] a trial judge's discretionary ruling will not be disturbed on appeal absent a clear abuse of discretion."⁸⁷

The danger of prejudice by the admission of defendant's prior unadjudicated conduct is especially great because of the incremental and cumulative effect it has upon the jury. When a number of accusations are made, the evidence presented will make a very strong and prejudicial impact upon the jury as it is considered in the aggregate. Inevitably, its admission will confuse the issues and mislead the jury as to the subject of its deliberations; instead of analyzing the evidence for indications of future dangerousness, the jury will feel that the defendant should be punished for those activities rather than for the crime of which he was just convicted. The rules of evidence are designed to protect against this very danger.⁸⁸ Given the importance of safeguarding reliability in capital sentences,⁸⁹ a sentencing jury should not be given such highly prejudicial information about the defendant.

S.E.2d 436, 441 (1987).

⁸⁴ *United States v. Lewis*, 780 F.2d 1140, 1142 (4th Cir. 1986); *United States v. Davis*, 657 F.2d 637, 639 (4th Cir. 1981); *United States v. DiZenzo*, 500 F.2d 263, 266 (4th Cir. 1974).

⁸⁵ *United States v. Beahm*, 664 F.2d 414, 417 (4th Cir. 1981); *United States v. Beechum*, 582 F.2d 898 (5th Cir. 1978).

⁸⁶ But see, e.g., *George v. Commonwealth*, 242 Va. 264, 273, 411 S.E.2d 12, 18 (1991) (ruling that trial court properly admitted as relevant to future dangerousness, as an indication of a "life long character flaw," evidence that the defendant had been cruel to animals twenty years before the offense, despite the "emotional aspects" of the evidence).

⁸⁷ *Coe v. Commonwealth*, 231 Va. 83, 87, 340 S.E.2d 820, 823 (1986). This rule is particularly troubling given the higher degree of scrutiny required in capital sentencing determinations. See *California v. Ramos*, 463 U.S. 992, 998-99 (1982) ("[T]he qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination") (footnote omitted).

⁸⁸ *Beechum*, 582 F.2d at 914.

⁸⁹ See *supra* notes 23-24 and accompanying text.

VII. PRACTICAL CONSIDERATIONS AND TACTICAL SUGGESTIONS

A. The Challenge

When representing a client who has just been convicted of capital murder and now stands trial to see whether he will be allowed to live or die, defense counsel is faced with a tremendous challenge. For the Commonwealth to pursue a sentence of death, the prosecutor must prove vileness or future dangerousness.⁹⁰ If the Commonwealth intends to impress upon the sentencer the future threat that the defendant poses to society, it will be permitted to introduce evidence of the defendant's prior behavior and character speaking to that issue.⁹¹ Defense counsel must be armed with the ammunition to attack the Commonwealth's use of unadjudicated acts which will be devastating to the defendant at sentencing. While posing policy and constitutional arguments to the court will be essential for federalizing the arguments for any appeal, ultimately, the attorney's best hope is to challenge particular unadjudicated acts on statutory and evidentiary grounds. The objective is to increase the court's disposition to consider the matter through constitutional challenges and then succeed in the motion for excluding particular unadjudicated acts.

B. Notice

The first step in the process is to pin the prosecution down on notice grounds. This may be accomplished initially by filing a pretrial motion for a bill of particulars.⁹² If the Commonwealth replies in its answer that it will rely on one of the factors, it will be precluded from introducing evidence of the other factor during sentencing.⁹³ Thus, if the Commonwealth intends to rely on the vileness predicate, it will not be allowed to introduce evidence of prior unadjudicated acts of the defendant at all.

If the Commonwealth indicates that it will rely on evidence of future dangerousness as its basis for a sentence of death, defense counsel should begin with a blanket motion to exclude all unadjudicated acts in the present case.⁹⁴ This calls for a general motion which must then be tailored to the facts of the client's background. Counsel should anticipate denial of her request for exclusion of unadjudicated acts overall and be prepared to argue in the alternative that such evidence only be permitted in the jury's consideration if demonstrated by a reliable standard of proof, i.e. the reasonable doubt standard.⁹⁵

Counsel should also keep in mind that the Commonwealth must comply with a court's order to reveal the grounds upon which it intends to rely for proof of future dangerousness within a reasonable amount of time before trial. If the prosecution fails to provide such notice within a reasonable time before trial to allow for defense investigation and preparation pertaining to evidence of future dangerousness, including prior unadjudicated conduct, the defendant may rely on due process

⁹⁰ Va. Code Ann. §§ 19.2-264.2, 19.2-264.4(C) (1990).

⁹¹ *Id.*

⁹² In addition, defense counsel should file a motion requesting notice of unadjudicated acts evidence pursuant to Va. Code Ann. §19.2-264.3:2 (1993). See also Author's note, *supra*. The Virginia Capital Case Clearinghouse urges defense attorneys in every case to file a motion requesting the court to require the Commonwealth to reveal whether it intends to rely upon vileness or future dangerousness as an aggravating factor in its pursuit of a capital sentence. The bill of particulars also should request the grounds upon which the Commonwealth bases its factors in aggravation.

⁹³ See *Peterson v. Commonwealth*, 225 Va. 289, 296, 302 S.E.2d 520, 525 (1983). Cf. *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991) (holding that a capital defendant is not entitled, as a matter of right, to a bill of particulars on aggravating factors). See case

grounds to exclude the introduction of such evidence altogether.⁹⁶ Again, the inquiry will be very fact-based and success will depend upon the advocacy of counsel.

C. Relevance and Prejudice

Having been given notice of the Commonwealth's intention to present evidence of defendant's unadjudicated criminal conduct, a defense attorney is also called upon to demonstrate to the court that the particular acts which the prosecution plans to introduce are not indicative of defendant's propensity for future danger. Defense counsel in this position should challenge the Commonwealth's use of the conduct evidence on relevance grounds. The Commonwealth is concededly permitted to introduce character evidence within the context of future dangerousness but the Commonwealth is not permitted to present a litany of bad acts in an effort to persuade the jury that the defendant is just "a really bad guy" who deserves to die.⁹⁷ The purpose of the sentencing trial is to determine an appropriate penalty for a single capital crime,⁹⁸ not to punish the defendant for all of the things he may or may not have done in his life. For this reason it is imperative to impress upon the judge that the alleged acts have no relevance and must be excluded at sentencing because they do not bear on the issue of future dangerousness. Even if the court deems such behavior relevant to future dangerousness, defense counsel must make a compelling argument for the prejudicial impact that the cumulative presentation of such evidence will have upon a sentencing jury.⁹⁹ The defendant should not have to bear the risk of being sentenced to die because of the overwhelming effect that evidence, which has not even been determined by any level of proof, will have upon a jury.

Should the court permit the Commonwealth to introduce prior unadjudicated behavior at the defendant's sentencing hearing, counsel should be attentive to the evidentiary grounds upon which each accusation is raised. It is very important here to make the Commonwealth do its job. Defense counsel should consider each allegation as if it were another incident on which there should be a mini-trial. Make sure that foundations are properly laid, that witnesses are properly qualified, and that all evidence is properly introduced. The prosecution should be put to the test on each and every item it attempts to introduce.

D. Double Jeopardy

Another matter for defense counsel to consider in this situation is the potential for a double jeopardy claim. The Commonwealth is attempting to introduce evidence of actions previously committed by the defendant. If the defendant has been charged and previously acquitted of that conduct, the grounds of the accusation have already been rejected by a neutral jury which determined that the defendant was not guilty of the

summary of *Quesinberry*, Capital Defense Digest, Vol. 4, No. 1, p. 23. See also *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271, cert. denied, 464 U.S. 977 (1983). Although the trial court ruled that the jury could consider the aggravating circumstance of vileness but not future dangerousness, it was not error for the trial court to permit the Commonwealth's attorney to comment on evidence which pertained to future dangerousness in closing argument.

⁹⁴ The Virginia Capital Case Clearinghouse has a motion which is based on the grounds posed in this article and has been successful at the trial court level.

⁹⁵ See *supra* Part III-B.

⁹⁶ See *supra* Parts IV & V.

⁹⁷ See *supra* note 27 and accompanying text.

⁹⁸ Va. Code Ann. §§ 19.2-264.2, 19.2-264.4 (1990)

⁹⁹ See *supra* Part VI.

offense and, as such, can not be held accountable for it.¹⁰⁰ The Commonwealth, constitutionally, cannot use such evidence against the defendant as an indication of his propensity to commit future violent acts.

E. Voir Dire

If the possibility exists that the Commonwealth will introduce evidence of the defendant's prior unadjudicated acts at sentencing, defense counsel should attempt to diminish the effect or impact that the information will have by gauging jurors' attitudes at voir dire. Qualifying a jury for a capital case provides counsel with the opportunity to inquire into such matters. Defense counsel will want to know in advance how susceptible a juror will be to implications that a defendant, if found guilty of one crime, is likely to be guilty of other crimes as well. Such a perspective will be particularly damaging in cases where the defendant also has a history of prior convictions,¹⁰¹ where the testimony of a victim from a prior crime is sought to be introduced,¹⁰² and where defendant's prior statements or confessions are admitted.¹⁰³ In such a case, it will be important for defense counsel to sensitize the jury by stressing standards of reliability and ascertaining the level of confidence that a juror must have before believing that an event has occurred. In this context, defense counsel should keep in mind the nature of the community and the "shock value" of the prior acts. Voir dire should reveal those things that might produce a strong reaction so as to inflame certain members (such as drug use or theft). It would be worth exploring the jurors' perceptions of such conduct that was not part of the underlying crime.

F. Jury Instruction

If the court decides to allow evidence of unadjudicated acts, counsel should request that reliability concerns be addressed through a jury instruction requiring that evidence of prior conduct may not be considered in deliberations of future dangerousness unless such conduct has been demonstrated beyond a reasonable doubt. This requirement assures that a jury has determined that the alleged criminal conduct actually occurred. Certainly, defense counsel must submit that some standard of proof be promulgated before it is used in sentencing the defendant to death, even if only by a clear and convincing or a preponderance standard. Such an instruction for future dangerousness might read:

Members of the jury, as you know, the purpose of a sentencing trial is to determine the appropriate punishment for the single crime of which you have convicted the defendant. You must now decide whether the defendant is subject to life imprisonment or to death for his part in the commission of that crime.

Before you may sentence the defendant to death, the Commonwealth must demonstrate to you beyond a reasonable

doubt the existence of an aggravating factor, beyond the commission of the crime. For you to impose a capital sentence, the Commonwealth must prove beyond a reasonable doubt that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.

You have heard evidence of prior criminal conduct which the Commonwealth alleges the defendant committed. Such evidence may not enter into your consideration of the defendant's future dangerousness unless you determine beyond a reasonable doubt that such conduct was actually committed by the defendant and that such conduct tends to establish defendant's propensity to commit future acts of violence.

You are not to punish the defendant for the commission of the alleged conduct; rather, your function is to determine whether such conduct occurred and whether, on the basis of future dangerousness, its existence elevates the appropriate penalty, from life imprisonment to death, for the single capital crime of which the defendant has been convicted.

Even if you unanimously find beyond a reasonable doubt that such conduct occurred and that the defendant poses a future threat to society, you may, none the less, sentence the defendant to life in prison.

If no instruction is granted on the Commonwealth's use of unadjudicated acts, it is imperative that defense counsel emphasize in closing that the prosecution's evidence of prior unadjudicated conduct has never been established, never been tried in a court of law, and that the members of the jury are not required to give it the weight which the prosecution seems to indicate is suitable. Indeed, the jury need not give it any weight at all if that is what the jury deems appropriate.

G. Use of Expert Testimony

In some cases, the use of unadjudicated acts evidence may be softened through the use of expert testimony demonstrating the difficulties in determining, and inability to predict, future dangerousness. Indeed, a medical, psychological or sociological expert¹⁰⁴ may be very effective at communicating to the jury the lack of reliability in using the defendant's actions to determine his likelihood of being a future threat to society. If defense counsel is able to impress upon the jury that the particular acts presented by the Commonwealth, even if true, do not indicate with certainty that the defendant will pose serious danger in the future, the jury likely will be unable to give the unadjudicated acts evidence the weight it otherwise would have upon the Commonwealth's urging.

¹⁰⁰ Counsel should be prepared to explain why *Dowling v. United States*, 493 U.S. 342 (1990), is not controlling. In *Dowling*, the Court found that admission under Fed. R. Evid. 404(b) of a crime for which the defendant had previously been acquitted did not violate double jeopardy or due process. The Court seemed to rule out such a claim because the burden of proof for "other acts" evidence — that the jury "reasonably conclude" that the defendant did the act — was less than the reasonable doubt standard for an acquittal. *Id.* at 347-50. The court later appeared to hold out the possibility that the Double Jeopardy Clause might apply if the prior acquittal clearly was based upon a finding that the defendant was not the perpetrator. *Id.* at 350-52 (indicating that even if double jeopardy applied, the defendant did not show that the acquittal was based upon someone else being the perpetrator). At a minimum, the Court acknowledged that such evidence "has the potential to prejudice the jury

or unfairly force the defendant to spend time and money relitigating matters considered at the first trial," but urged that the problem be dealt with under the rules of evidence. *Id.* at 352 and n. 4 (noting, without addressing, that the lower court found that the introduction of evidence violated Fed. R. Evid. 403 and 404).

¹⁰¹ See, e.g., *supra* note 27.

¹⁰² See, e.g., *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), cert. denied, 445 U.S. 972 (1980).

¹⁰³ See, e.g., *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985).

¹⁰⁴ Such testimony has been used successfully in Virginia capital cases. Contact the Virginia Capital Case Clearinghouse for reference to such experts on the predictability of future dangerousness.

VIII. CONCLUSION

The use of unadjudicated acts for proof of future dangerousness in capital sentencing violates the defendant's rights under the Sixth, Eighth and Fourteenth Amendments. The presentation of such evidence with no articulated standard of proof or cautionary instructions by the judge to guide the jury in its penalty determination fails to meet the reliability standards required in capital sentencing procedures. Admission of the

alleged conduct deprives the defendant of the notice, process, and effective assistance of counsel to which he is entitled during the penalty phase. Ultimately, if relevant at all to the issue of future dangerousness, the acts as presented collectively are more prejudicial than probative of defendant's potential future threat to society. Defense counsel must meet the Commonwealth's attack by challenging each unadjudicated act and defeating the overall effect such information could have on a sentencing jury.

THE "TWO-EDGED" SWORD: MITIGATION EVIDENCE USED IN AGGRAVATION

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I. INTRODUCTION

In many capital cases, there really is little question of whether the defendant actually committed the murder. The main issue in the trial occurs during the penalty phase, when the jury is asked to answer the question of whether the defendant should be sentenced to death or life in prison. Therefore, the mitigation evidence offered in the penalty phase of a capital murder trial can be the most important part of the trial for the defendant. The defense lawyer must make sure that he or she has prepared a strong theme for mitigation and that the mitigation evidence is used only to support an argument for mitigation.

One problem which defense lawyers must be prepared to deal with is mitigation evidence that could be used by the prosecution or viewed by the jury to support the aggravating factor of future dangerousness.¹ When the defense relies on the diminished capacity of the defendant or his inability to "conform his conduct to the requirements of law,"² the same evidence could be used by the prosecution to argue that the defendant poses a future danger to society because the defendant will always suffer from the mental deficiency. The defense lawyer must be prepared to prevent the prosecutor from posing this argument and to proactively focus the jury's attention on the mitigating aspects of this evidence.

II. THE CONSTITUTIONAL BASIS

In *Zant v. Stephens*,³ the United States Supreme Court stated that if the state had attached an aggravating label to "conduct that actually should militate in favor of a lesser penalty, such as perhaps the defendant's mental illness," then "due process of law would require that the jury's decision to impose death be set aside." *Stephens'* prohibition of the use of mitigating evidence in such a fashion is best understood in light of the Supreme Court's holdings concerning the defendant's right to introduce mitigating evidence.

The Supreme Court of the United States ruled in *Lockett v. Ohio*,⁴ "that the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death." Based on this reasoning, the Court found an Ohio death penalty statute which restricted the range of mitigating circumstances that could be considered by the sentencer to be unconstitutional.⁵

The constitutional right of a defendant to present any relevant mitigating factor and to have it be considered was reaffirmed in *Eddings v. Oklahoma*.⁶ In applying the holding of *Lockett*, Justice Powell stated that "just as the state may not by statute preclude the sentencer from considering any mitigating factor, neither may the sentencer refuse to consider, as a matter of law, any relevant mitigating evidence."⁷ Read together, *Lockett* and *Eddings* stand for the proposition that the defendant must be allowed to present any relevant mitigating circumstances and that the sentencer, whether it be judge or jury, must consider the mitigating nature of the evidence. The weight to be given the evidence is still left to the sentencer's discretion, but the sentencer may not refuse to consider the evidence.

The right of the defendant to present any relevant mitigating evidence, and the responsibility of the sentencer to consider the mitigating evidence, would not mean anything unless the sentencer could give effect to that evidence. Thus, in *Penry v. Lynaugh*,⁸ the Supreme Court held that the sentencer must be able to give effect to the mitigating evidence in determining whether the defendant should be sentenced to death or life imprisonment. The Court recognized that the sentencer must have the ability to give effect to the mitigating circumstance if they were to uphold the underlying principle of *Lockett* and *Eddings*: that punishment should be directly related to the personal culpability of the criminal defendant.⁹ Justice O'Connor stated:

If the sentencer is to make an individualized assessment of the appropriateness of the death penalty, "evidence about the defendant's background and character is relevant because of the belief, long held by this society, that defendants who commit criminal acts that are attributable to a disadvantaged background, or to emotional and mental problems, may be less culpable than defendants who have no such excuse."¹⁰

In order to protect a defendant's constitutional right to present evidence in mitigation of the defendant's mental or emotional problem, and to have that evidence considered and given effect by the sentencer, the prosecution must not be allowed to penalize the defendant's exercising of a constitutional right by using this same evidence for the purpose of proving an aggravating factor. In addition, the jury must be cautioned that they may not consider the evidence offered in mitigation as proof of an aggravating factor. The danger of this happening was noted by Justice O'Connor in *Penry*, stating that "Penry's mental retardation and history

¹ See Va. Code Ann. § 19.2-264.2; § 19.2-264.4(c) (1990).

² Va. Code Ann. § 19.2-264.4 (B) (iv) (1990). The Virginia sentencing proceeding statute identifies this evidence as mitigating.

³ *Zant v. Stephens*, 462 U.S. 862, 885 (1983).

⁴ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original).

⁵ *Id.* at 608.

⁶ 455 U.S. 104 (1982).

⁷ *Id.* at 113-14 (emphasis in original).

⁸ 492 U.S. 302 (1989).

⁹ *Id.* at 319.

¹⁰ *Id.* at 319 (quoting *California v. Brown*, 479 U.S. 538, 545 (1987) (O'Connor, J., concurring)).