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JUSTICE BLACKMUN AND THE "FAILED EXPERIMENT"

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trial court's action "to attain the ends of justice." It did so, however, not because the trial court necessarily erred in reducing the amount of support or erred in the manner in which it did so, but rather because the entry of a support order without any written findings as to why the guideline amount is unjust or inappropriate and without justifying the deviation would not provide an adequate basis for setting support in the future.

In *Int'l Union, United Mine Workers of America, v. Covenant Coal Corp.*,[66] the unions appealed from orders which held them in contempt for violating an injunction prohibiting certain strike-related activities. The unions claimed that the trial court improperly imposed criminal contempt fines on them in violation of their constitutional protections. The unions, however, failed to make a contemporaneous or specific objection in the trial court on these grounds. Nonetheless, "to attain the ends of justice" the court addressed the issue for the first time on appeal and reversed. The appellate court found that the trial court imposed the criminal fines based on a burden of proof other than guilt beyond a reasonable doubt. Therefore, the court held that the unions were "denied their constitutional protections, which are mandated when a party is subjected to criminal penalties."[67]

In *Roane v. Roane*,[68] on appeal following a divorce action, the wife appeared pro se, filed no brief, and alleged no error. The husband had appealed asserting that the evidence was not sufficient to support the trial court's finding that corporate stock had been transmuted to marital property. The appellate court found error during its examination of the record. The court discovered that the trial court had failed to respond to the wife's request that it consider some proffered exhibits and a closer review of the husband's assertion that no guaranty existed. Despite the wife's failure to file a brief and assign error, the appellate court considered errors "to attain the ends of justice" and, *sua sponte*, found error in the trial court's failure to admit the proffered exhibits.[69]

Unlike the noncapital cases, however, where the life of a prisoner is at stake, the Supreme Court of Virginia has overlooked procedural default **"to attain the ends of justice"** only once. In *Ball v. Commonwealth*,[70] the Supreme Court of Virginia reversed the capital murder conviction of the defendant because the defendant had been convicted of a crime of which, under the evidence, he could not properly be found guilty. In *Ball*, the defendant was convicted of murder in the commission of robbery while armed with a deadly weapon under Virginia Code section 18.2-31(4), which at that time allowed conviction of capital murder only for "robbery," not "attempted robbery."[71] The defendant had not raised this issue at trial. The Commonwealth argued that review of the claim was barred under Rule 5:21 (now Rule 5:25). Nonetheless, the Supreme Court of Virginia invoked the "to attain the ends of justice" exception. The court found that in the light most favorable to the Commonwealth, the evidence showed that the victim was killed during an attempted robbery rather than in the actual commission of a robbery. At that time, the most that the defendant could be convicted of was felony murder under Virginia Code section 18.2-32.

V. CONCLUSION

Researching and attacking the bias against death sentenced prisoners demonstrated by the Virginia courts in the application of state procedural bars is an underutilized tool of appellate defense practice. Given the growing use of other doctrines to close the doors of federal court,[72] confronting Virginia's default rules directly deserves more attention. After all, before getting caught up in this legal game playing it is worthwhile to ask as a matter of policy and justice whether absolute procedural order is a value that should be elevated above protection against execution of prisoners whose trials have been infected by fundamental constitutional error.

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[66] 12 Va. App. 135, 402 S.E.2d 906 (1991).
[67] *Id.* at 149, 402 S.E.2d at 914.
[68] 12 Va. App. 989, 407 S.E.2d 689 (1991).
[69] *Id.* at 994, 407 S.E.2d at 701.
[70] 221 Va. 754, 273 S.E.2d 790 (1981).
[71] The legislature promptly changed the statute to include "attempted" robbery.
[72] *See Teague v. Lane*, 489 U.S. 288 (1989); *Penry v. Lynaugh*, 492 U.S. 302 (1989) (adopting no-retroactivity principle in the context of capital habeas proceedings).

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BY: WILLIAM S. GEIMER

On February 22, 1994, a symbolic but important event occurred. It merits at least passing mention as Virginia, now third among all states in carrying out executions in modern times,[1] continues to struggle with the administration of its capital murder statutes. In a dissent from the Court's denial of certiorari in *Callins v. Collins*,[2] Supreme Court Justice Harry Blackmun announced that he would no longer vote to sustain any death sentences. The announcement is merely symbolic in the sense that Justice Blackmun currently stands alone among court members in taking that position. But because of who Justice Blackmun is and the unique opportunity which he has had to watch the modern death penalty in action, his explanation for his change in position deserves to be read and thoughtfully considered.

This brief essay is written in the hope that it will prompt all concerned with the administration of Virginia's death penalty—judges, prosecutors, defense counsel, legislators—to read his opinion in its entirety.

Justice Blackmun was appointed by President Nixon. He came to the Court with a deeply held personal antipathy for the death penalty, but with a clear understanding of his role as one of the ultimate arbiters of the

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[1] *Death Row USA*, NAACP Legal Defense and Education Fund, Spring 1994.

[2] 114 S. Ct. 1127 (1994).

Constitution. He dissented in *Furman v. Georgia*,[3] the case that struck down the death penalty and emptied the nation's death rows in 1972. While observing that if he were a legislator he would not support the death penalty, Justice Blackmun concluded that the majority was improperly acting as a legislature, given that capital punishment was implicit in the very text of the Fifth Amendment,[4] and had been previously found by the Court not to be violative of the Eighth and Fourteenth Amendments. Despite his vote to retain the death penalty, however, Justice Blackmun left the door open for later developments by expressly agreeing with the *Furman* majority and earlier opinions of the Court that the meaning of the Eighth Amendment's ban on cruel and unusual punishment was not fixed forever at the time the republic was founded, but is to be judged by "evolving standards of decency that mark the progress of a maturing society".[5]

Four years later, in a series of decisions passing on the efforts of thirty-five states to respond to the deficiencies found by the *Furman* majority, the Court rejected the contention of Justices Brennan and Marshall that standards of decency had evolved to the point of prohibiting capital punishment altogether. The 1976 decisions approved the death penalty schemes of Florida, Georgia, and Texas,[6] and rejected those of North Carolina and Louisiana.[7] The majority found the death penalty acceptable **only** if state procedures could insure both that death sentences would be rational and reviewable by providing some meaningful basis for distinguishing the few cases resulting in death sentences from the many that did not, and that sentencers be permitted to exercise virtually unlimited discretion not to impose death after considering the "diverse frailties of humankind." The Court expressed confidence that the Florida, Georgia, and Texas statutes would meet those twin goals.[8] Even then, Justice Blackmun may not have shared completely the optimism of his brethren. He wrote simply, "I concur in the judgment."[9]

For more than twenty years afterward, Justice Blackmun was part of the judicial enterprise attempting to oversee the administration of the death penalty and make it work within the Constitutional limitations prescribed by the Court in 1972 and 1976. Eventually, however, as a matter of Constitutional law, he determined that the requirements of consistency and rationality on one hand, and the requirement of individualized consideration on the other, simply could not be reconciled. Twenty years of struggling to make the death penalty work finally had convinced Justice Blackmun to step through the door he had left ajar in his *Furman* dissent and conclude that the death penalty could not be administered in a manner consistent with evolving standards of decency.

The observations of the Justice about the death penalty in action, however, speak to much more than just this jurisprudential tension, and they are most eloquently expressed:

> We hope, of course, that the defendant whose life is at risk will be represented by competent counsel—someone who is inspired by the awareness that a less-than-vigorous defense truly could have fatal consequences for the defendant. We hope that the attorney will investigate all aspects of the case, follow all evidentiary and procedural rules, and appear before a judge who is still committed to the protection of defendants' rights—even now, as the prospect of meaningful judicial oversight has diminished. In the same vein, we hope that the prosecution, in urging the penalty of death, will have exercised its discretion wisely, free from bias, prejudice, or political motive, and will be humbled, rather than emboldened, by the awesome authority conferred by the State.[10]

Could anyone with knowledge seriously contend that Justice Blackmun is describing capital litigation in the Commonwealth of Virginia? Whether it is the degree that all court actors have fallen short of the hope he has just expressed, or some other cause or combination of factors that prompted re-examination of his position, Justice Blackmun does not say directly. But he concludes:

> Twenty years have passed since this Court declared that the death penalty must be imposed fairly, with reasonable consistency, or not at all . . . and despite the efforts of States and Courts to devise legal formulas and procedural rules to meet this daunting challenge, the death penalty remains fraught with arbitrariness, discrimination, caprice, and mistake . . . . From this day forward, I no longer shall tinker with the machinery of death. For more than 20 years I have endeavored—indeed I have struggled—along with a majority of this Court, to develop procedural and substantive rules that would lend more than the mere appearance of fairness to the death penalty endeavor. Rather than continue to coddle the Court's delusion that the desired level of fairness has been achieved . . . I felt morally and intellectually obligated to concede that the death penalty experiment has failed.[11]

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[3] 408 U.S. 238 (1972).

[4] "Nor shall any person be deprived of life, liberty, or property without due process of law." U.S. Const. Amdmt. V.

[5] *Furman*, 408 U.S. at 405-414 (Blackmun, J. dissenting).

[6] *Proffitt v. Florida*, 428 U.S. 242 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

[7] *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Roberts v. Louisiana*, 428 U.S. 325 (1976).

[8] "No longer can a jury wantonly and freakishly impose the death sentence; it is always circumscribed by legislative guidelines." *Gregg v. Georgia*, 428 U.S. 153, 206-207 (1976).

[9] *Id.* at 227 (Blackmun, J. concurring in the judgment).

[10] *Callins*, 114 S. Ct. at 1128-29 (Blackmun, J. dissenting from denial of certiorari).

[11] *Id.* at 1129-30. Justice Scalia wrote a churlish opinion concurring in the denial of certiorari, using it as a vehicle to criticize Blackmun's position. After reminding the reader of the very point that Justice Blackmun relied upon in *Furman*—that drafters of the Bill of Rights did not view the Eighth Amendment as prohibiting the death penalty—Justice Scalia simply drags out the bloody shirt and describes some ugly crimes. This is a strange tactic for one who is criticizing an opinion for being too "moral and personal" rather than legal. In the process, Justice Scalia also apparently denies most of the institutional authority of the Supreme Court to conduct judicial review and to provide definitive interpretation of the Constitution. He does not like the "evolving standards of decency" interpretation of the Eighth Amendment, so he ignores all the Court's opinions solidly establishing that principle. He agrees that achieving consistency, rationality, and individualized consideration in the administration of death is impossible. He simply chides Justice Blackmun for not doing as he does and ignoring the Court's many opinions requiring that sentencers be given opportunity to decline to impose death for reasons individual to each defendant. Justice Scalia's view of law is simple. It is also wrong.

Justice Blackmun is no bleeding heart. He is, however, a man of integrity, committed to the majesty of the rule of law. For more than twenty years, he made a good faith effort to make death work. Especially when Virginians, even in the absence of political leadership, are seeking non-capital alternatives,[12] Justice Blackmun's honest conclusion that the experiment has failed deserves serious consideration by all members of the legal profession in the Commonwealth of Virginia.

Justice Blackmun announced his retirement from the Supreme Court shortly after *Callins*. Perhaps his successor will learn form the wisdom of this good man, and will conclude, sooner than later, that the experiment truly has failed.

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[12] In 1989, 59% of Virginians surveyed in a study by Virginia Commonwealth University answered "yes" to the following question:

> How about a life sentence with no possibility of parole for 25 years combined with a restitution program that would require the prisoner to work for money that would go to families of murder victims. Would you favor abolition of the death penalty if this were an alternative?