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IS A STANDARD OF PROOF REQUIRED FOR THE EVALUATION OF UNADJUDICATED ACTS IN CAPITAL SENTENCING?

BY: DAVID T. MCINDOE

I. Introduction

In a Virginia capital penalty trial, the Commonwealth may attempt to prove beyond a reasonable doubt that the defendant presents a future danger to society.¹ The building blocks employed by the prosecutor to make this showing may include evidence of prior violent crimes for which the defendant has never been charged, tried or convicted.² The Supreme Court of Virginia condones the introduction and use of this evidence in capital sentencing proceedings.³ Although the introduction of this evidence raises several fairness concerns, it is unlikely that the United States Supreme Court will find that the introduction of unadjudicated acts offends due process.⁴ Nevertheless, due process may require that the sentencer find, by some standard of proof, that the defendant actually committed the acts alleged before considering that evidence in support of a further finding of future dangerousness. This article discusses this requirement and suggests a simple procedural device for raising and presenting the issue.

II. The Prejudicial Nature of the Introduction of Unadjudicated Acts

The potential for prejudice is both enormous and almost certain when the Commonwealth presents evidence of prior violent acts to a jury which has recently found the defendant guilty of capital murder and is now responsible for determining the defendant's fate. The prejudice is often substantive in that the evidence is highly inflammatory and is often unreliable. The defendant may also suffer procedural prejudice. He is denied the presumption of innocence as to the acts alleged. In addition, although defendants in Virginia enjoy a statutory right to notice of what conduct the Commonwealth will introduce,⁵ there is no right to notice of the form or character of the evidence. Lack of sufficient notice creates issues of surprise and inability to meaningfully defend against alleged conduct. Furthermore, the defense is forced to spend more precious

resources preparing to defend against acts that extend beyond the commission of the capital crime.⁶

The sentencing trial of Coleman Gray illustrates the prejudice defendants face by the introduction of evidence of unadjudicated acts.⁷ At the guilt phase of Gray's trial, the Commonwealth disclosed that it would present evidence of unadjudicated acts at the sentencing trial. Specifically, the prosecutor represented that its evidence consisted of the testimony of a co-defendant and other inmates that Gray admitted to murdering Lisa Sorrell and her three year-old daughter. Gray had never been charged with either murder. The night before the sentencing hearing began, the Commonwealth informed Gray's attorney that it would present evidence beyond his alleged admissions that connected Gray to the Sorrell murders. The additional evidence included photographs of the crime scene and the bodies of the victims and the testimony of the investigating detective and the medical examiner who performed the autopsies of the Sorrells' bodies. Although defense counsel protested that this evidence exceeded the scope permitted under Virginia law, that he was taken by surprise and that he was unprepared to present a rebuttal, the trial court permitted the Commonwealth to offer the evidence to the jury. The jury subsequently sentenced Gray to death based on both the "future dangerousness" and "vileness" predicates. Gray's jury was given no instruction on how they were to consider the evidence of these two murders.⁸

The requirement of a standard of proof discussed in this article is by no means the only way to combat such highly inflammatory evidence. Defense counsel should employ every means possible to minimize the prejudice resulting from the introduction of evidence of unadjudicated acts. Motions practice is an effective way to combat this prejudice. Forcing the Commonwealth to disclose and discuss its evidence reduces the element of surprise and allows the defense to better allocate resources. In addition to this tactical advantage, litigation of issues raised by defense motions creates a record upon which the defendant may rely during direct appeal and habeas proceedings.⁹

¹ Va. Code Ann. § 19.2-264.4(C). Under this section, a jury must unanimously determine that the murder for which it convicted the defendant was vile or that the defendant presents a future danger. To reach a finding of "future dangerousness," the jury must find that there exists a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society. The evidence must establish this probability beyond a reasonable doubt. *Id.* See also *Waye v. Commonwealth*, 219 Va. 683, 251 S.E.2d 202 (1979).

² See *Chichester v. Commonwealth*, 248 Va. 311, 330, 448 S.E.2d 638, 650 (1994).

³ *Stockton v. Commonwealth*, 241 Va. 192, 209-210, 402 S.E.2d 196, 206 (1991); *Pruett v. Commonwealth*, 232 Va. 266, 285, 351 S.E.2d 1, 12 (1986); *Watkins v. Commonwealth*, 229 Va. 469, 488, 331 S.E.2d 422, 436 (1985); *LeVasseur v. Commonwealth*, 225 Va. 564, 594, 304 S.E.2d 644, 660 (1983).

⁴ The United States Supreme Court has not directly ruled on the issue of admission of evidence of unadjudicated acts. While considering different sentencing issues, the Court has developed what is now accepted as the "all relevant evidence" standard. See Steven Paul Smith, *Unreliable and Prejudicial: the Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum. L. Rev. 1249 (1993). The "all relevant evidence" standard originates from the Court's policy that capital defendants deserve personal consideration in sentenc-

ing. A jury can best weigh aggravating and mitigating factors particular to a defendant if exposed to all relevant evidence. *Woodson v. North Carolina*, 428 U.S. 280 (1976); *Gregg v. Georgia*, 428 U.S. 153 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976). The Court has held that, in addition to the standard's application to mitigation evidence, the "all relevant" standard also applies to introduction of evidence establishing aggravating factors. *Barefoot v. Estelle*, 463 U.S. 880 (1983).

⁵ Va. Code Ann. § 19.2-264.3:2.

⁶ See, Linda E. Carter, *Beyond a Reasonable Doubt Standard in Death Penalty Proceedings: A Neglected Element of Fairness*, 52 Ohio St. L.J. 195 (1991); Steven Paul Smith, *Unreliable and Prejudicial: the Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 Colum. L. Rev. 1249 (1993); Fenn, *Anything Someone Else Says Can and Will be Used Against You in a Court of Law: The Use of Unadjudicated Acts in Capital Sentencing*, Capital Defense Digest, Vol. 5, No. 2, p. 31 (1993).

⁷ *Gray v. Netherland*, 116 S.Ct. 2074 (1996) ("Gray I"). See also case summary of *Gray I*, Capital Defense Journal, Vol. 9, No. 1, p. 4 (1996), and case summary of *Gray II*, Capital Defense Journal, this issue.

⁸ *Id.* at 2078-79.

⁹ See Spencer, *Challenging the Future Dangerousness Aggravating Factor*, Capital Defense Journal, Vol. 8, No. 2, p. 33 (1996). One such motion is a motion for the disclosure of exculpatory evidence pursuant

III. Standard of Proof for the Evaluation of Evidence

Current capital sentencing procedure creates a due process concern that a defendant's sentence may rest wholly or in part upon evidence that is unreliable. Defendants have a right to due process during sentencing, although the requirements are less demanding than during the guilt phase.¹⁰ For instance, the standard for the admission of evidence is much lower. The evidence does not have to meet any requirement beyond being relevant to the defendant's character. The resulting broad universe of admissible evidence creates a practical problem. A jury may find "future dangerousness," but it is not required to state what evidence it relied upon. It is possible that it relied solely on evidence that, in addition to being highly inflammatory, may simply be erroneous. Yet, defendants and reviewing courts have no means of determining if such improper consideration occurred and correcting the problem. To make matters worse, there currently is no procedural mechanism to prevent a jury from considering erroneous and unreliable evidence, or to guide its consideration of the evidence. Without adequate procedural protections, the introduction of unadjudicated acts at sentencing creates a risk of an erroneous sentence that is both unfair and in violation of the defendant's right to due process.

A standard of proof for the evaluation of evidence of unadjudicated acts is a step toward ensuring that a capital defendant receives due process during the penalty-phase. In *Addington v. Texas*,¹¹ the United States Supreme Court found 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.¹²

In capital sentencing, a standard of proof would help provide the sentencer with confidence that its ultimate finding of "future dangerousness" rests upon events it collectively believes the defendant committed.¹³ Given the finality of a death sentence, a standard is also essential to sufficiently allocate the risk of an erroneous sentence. In addition, a standard of proof helps ensure that the guided discretion of the sentencer will not subject a defendant to the risk of an arbitrarily imposed sentence. Therefore, trial judges should instruct juries that, in evaluating the Commonwealth's evidence of unadjudicated acts, they must be certain, by some standard of proof, that the defendant committed those acts before relying on that evidence to find "future dangerousness." Senten-

cers could employ one of three possible standards of proof in evaluating evidence of prior criminal behavior: "beyond a reasonable doubt," "by a preponderance of the evidence," or "by clear and convincing evidence."

At first glance, the current capital sentencing procedure suggests the standard should be beyond a reasonable doubt. "Future dangerousness," like the element of the underlying offense, must be proven beyond a reasonable doubt. If unadjudicated acts are the building blocks for a finding of "future dangerousness," it is logical that a jury should find the defendant committed the alleged conduct by the same standard.

Unfortunately, both the United States Supreme Court and the Supreme Court of Virginia have rejected the reasonable doubt standard for such fact finding at the penalty phase of trial. In *McMillan v. Pennsylvania*,¹⁴ the United States Supreme Court held that the prosecution does not need to prove a fact beyond a reasonable doubt even if the existence of that fact relates to the severity of punishment.¹⁵ The Supreme Court of Virginia employed similar reasoning in upholding Virginia's capital sentencing statute in response to a defendant's claim that the permitted use of unadjudicated acts without a reasonable doubt standard rendered the statute unconstitutional.¹⁶ Despite the need for a reasonable doubt standard, the likelihood that Virginia trial courts will use and instruct juries on the reasonable doubt standard in considering unadjudicated acts is slim at best, as is the likelihood that failure to require this instruction is constitutional error.

However, the United States Supreme Court's recent holding in *United States v. Watts/Putra*,¹⁷ strongly suggests that, at a minimum, due process requires a preponderance standard for the consideration of non-adjudicated acts. In *Watts/Putra* the Court addressed whether trial courts, in making sentencing decisions under the federal sentencing guidelines, could consider conduct for which the defendant had been acquitted.¹⁸ The Court held that a jury's acquittal does not prevent the trial court from considering the conduct of that acquitted charge, "so long as that conduct has been proven by a preponderance of the evidence."¹⁹ There is no indication from its opinion that the United States Supreme Court intended to have an acquittal act as a prerequisite for the requirement of a preponderance standard. It is arguable, in fact, that a standard would not be as essential in cases of acquittal compared to one where no charge was ever made. In the acquittal cases, there must have been one or more determinations of probable cause that the defendant committed the crime.²⁰

While the Court's holding in *Watts/Putra* applies to sentencing procedure under the federal sentencing guidelines, the holding should also extend to state sentencing procedures because it is founded in part on constitutional grounds. In support of its holding, the Court relied upon its earlier finding in *McMillan v. Pennsylvania*,²¹ that the "application of the preponderance standard at sentencing generally satisfies due pro-

to *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 115 S.Ct. 1555 (1995). In *Gray v. Netherland*, 116 S.Ct. 2074 (1996), the defendant claimed that the prosecution had an obligation under *Brady* and *Kyles* to produce any exculpatory evidence concerning unadjudicated conduct that it elected to introduce during the penalty trial. The Court did not dismiss this claim on its merits, but held the defendant defaulted the issue by not presenting his claim on direct appeal. *Id.* at 2080-81.

¹⁰ See generally *Gardner v. Florida*, 430 U.S. 349 (1977).

¹¹ 441 U.S. 418 (1979).

¹² *Id.* at 423 (quoting *In re Winship*, 397 U.S. 358, 370 (1970) (Harlan, J., concurring)).

¹³ Carter, *supra* note 6, at 207.

¹⁴ 477 U.S. 79 (1986).

¹⁵ *Id.* at 84.

¹⁶ *Stockton v. Commonwealth*, 241 Va. 192, 210, 402 S.E.2d 196, 206 (1991). See also *Breard v. Commonwealth*, 248 Va. 68, 86-87, 445

S.E.2d 670, 681 (1994) (upholding the lower court's refusal to instruct the jury that the Commonwealth must prove the defendant committed unadjudicated acts beyond a reasonable doubt because the requirement that the jury find "future dangerousness" by that standard was sufficient).

¹⁷ 117 S.Ct. 633 (1997).

¹⁸ *Id.* at 634.

¹⁹ *Id.* at 638 (emphasis added).

²⁰ The Court discussed three rationales in reaching its finding. First, the Court stated that the sentencing guidelines and common law provided that a sentencing body could consider all relevant evidence. Second, the prohibition against double jeopardy does not preclude the enhancement of a sentence for conduct underlying an acquitted charge. Third, the Court noted that an acquittal was not a finding of fact that the defendant did not commit the underlying conduct. *Id.* at 635-38.

²¹ 477 U.S. 79 (1986).

cess."²² Accordingly, the Court's opinion suggests that a standard of proof may be required in order to eliminate any due process concerns created by the admission of evidence of unadjudicated acts.

Remarkably, the Court of Appeals for the Fourth Circuit has also held that sentencers should be convinced by preponderance of the evidence that a defendant committed an act before using that conduct to impose a sentence.²³ In *United States v. Urrego-Linares*,²⁴ the Court of Appeals held that "due process is satisfied by application of a preponderance standard to factual findings made by a court during sentencing."²⁵ The court found that a standard of proof assures a defendant the "opportunity to oppose and specifically address the application" of an aggravating factor which may increase his sentence.²⁶ An application of the preponderance standard, the court of appeals stated, substantially increased fairness afforded to a defendant.²⁷

It is even possible that the more demanding "clear and convincing" standard of proof will ultimately be required in capital cases. Although finding it unnecessary to decide in the case before it, the *Watts/Putra* Court acknowledged "a divergence of opinion among the circuits as to whether, in extreme circumstances, relevant conduct that would dramatically increase the sentence must be based on clear and convincing evidence."²⁸ There is hardly more conceivable a dramatic increase in sentence than from life in prison to death. The United States Supreme Court has said:

[T]he penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. 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.²⁹

Given the immense difference between a life and death sentence, a requirement that evidence of unadjudicated acts be evaluated by "clear and convincing" standard of proof is clearly warranted.

IV. A Suggested Jury Instruction

A proposed jury instruction is an effective way to present and preserve the issue of the need for a standard of proof for evaluating evidence of unadjudicated acts. A proposed jury instruction is a simple and inexpensive way to guide the jury's discretion or develop the record. In addition, Va. Code Ann. § 19.2-263.2 allows a party to make such a submission if the instruction accurately states the law. The instruction cannot be rejected, under this statute, simply because it does not conform with the model jury instructions.³⁰

²² *Watts/Putra*, 117 S.Ct. at 637.

²³ See, e.g., *United States v. Gilliam*, 987 F.2d 1009, 1013 (4th Cir. 1993) (holding that government bears the burden of proving by a preponderance of the evidence the quantity of drugs for which a defendant should be held accountable at sentencing); *United States v. Morgan*, 942 F.2d 243, 246 (4th Cir. 1991) (holding that because the standard of proof at sentencing is less demanding, the district court may, applying a preponderance of the evidence standard, consider misconduct that did not result in conviction); *United States v. Sheffer*, 896 F.2d 842, 844, (1990) (stating that during sentencing, the district court's findings of fact should be based upon a preponderance of the evidence); *United States v. Harris*, 882 F.2d 902, 907 (4th Cir. 1989) (finding the appropriate standard of proof to be applied in a sentencing proceeding under the guidelines is a preponderance of the evidence standard and if the government seeks to enhance the sentence, it should bear the burden of proof and concomitant burdens of production and persuasion).

Relying on the United States Supreme Court's holding in *Watts/Putra*, a jury instruction should suggest that the jury must find, by a preponderance of the evidence, that the defendant committed the alleged wrongful acts before the jury can rely on those acts for a finding of "future dangerousness". Such an instruction might read:

You have heard evidence of prior criminal conduct which the Commonwealth alleged the defendant committed, but for which he was never charged, tried or convicted. Such evidence may not enter into your consideration of the defendant's "future dangerousness" unless you determine that it is more likely than not that the defendant actually engaged in the alleged conduct. Once you have identified those alleged acts which the defendant actually committed, you must then determine whether all the evidence establishes beyond a reasonable doubt that the defendant is likely to commit serious acts of violence in the future.

You are not to punish the defendant for the commission of the alleged conduct; rather, your function is to determine whether the defendant engaged in such conduct and whether this conduct suggests "future dangerousness".

If you find from all the evidence and beyond a reasonable doubt a probability that the defendant will commit criminal acts of violence that would constitute a continuing serious threat to society, he may be sentenced to death. A probability means a reasonable probability, substantially greater than a mere likelihood. However, even if you unanimously find that the defendant, more likely than not, engaged in the conduct alleged and further find beyond a reasonable doubt that the defendant presents a future violent threat to society, you may, nonetheless, sentence the defendant to life in prison without possibility of parole.³¹

V. Conclusion

In *Simmons v. South Carolina*,³² the United States Supreme Court corrected, on due process grounds, a sentencing practice that struck many as fundamentally unfair. The defendant in *Simmons* presented and preserved his issue, the right to inform the jury of his parole ineligibility, through the proposal of a jury instruction. Similarly, the introduction of unadjudicated acts in capital sentencing trials and the lack of instruction on how a jury should evaluate that evidence also raises questions of basic fairness. Perhaps a suggested jury instruction concerning a standard of proof for the evaluation of evidence of prior unlawful conduct will present the United States Supreme Court with another chance to infuse fairness into capital sentencing procedure.

²⁴ 879 F.2d 1234 (4th Cir. 1989).

²⁵ *Urrego-Linares*, 879 F.2d at 1237.

²⁶ *Id.* at 1238.

²⁷ *Id.*

²⁸ *Watts/Putra*, 117 S.Ct. at 637.

²⁹ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

³⁰ Va. Code Ann. § 19.2-263.2.

³¹ This instruction and one requiring a finding by "clear and convincing" evidence may, of course, be offered alternately or successively in order to preserve the record.

³² 512 U.S. 154 (1994) (holding that the Due Process Clause requires that the jury be informed of the defendant's parole ineligibility when considering "future dangerousness").