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GREAT MYTHS: SANTA CLAUS, THE EASTER BUNNY & VIRGINIA'S PROPORTIONALITY REVIEW

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rights at issue in both *Lockhart* and *Nix*, the right to present mitigating evidence at trial is recognized by the law.[42] Williams was entitled to present such evidence. Thus, *Lockhart* is readily distinguishable from the situation in *Williams* and the supreme court's reliance on it was badly misplaced.

In short, the Supreme Court of Virginia has attempted to take what was intended by the U.S. Supreme Court to be an infrequently used addition to the *Strickland* test and made it generally applicable to all ineffective assistance claims in Virginia. In so doing the court has made it even more difficult for a prisoner to carry the burden on an ineffective assistance claim and receive relief even where "there [was] a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[43]

[42] Va. Code § 19.2-264.4(b) (1983).

[43] *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

This case, if nothing else, illustrates the importance of presenting all the mitigating evidence that is available during the sentencing hearing. The circuit court in *Williams* put it very succinctly: "at a capital murder sentencing, *any* evidence which might be favorable or mitigating can mean the difference between 'life or death.'"[44] Following the decision in *Williams*, it is more important than ever that counsel presents an effective case during both the guilt and sentencing phases including all available mitigating evidence.

Summary and Analysis by:
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[44] *Williams v. Warden*, 487 S.E.2d 194, 197 (1997).

GREAT MYTHS: SANTA CLAUS, THE EASTER BUNNY & VIRGINIA'S PROPORTIONALITY REVIEW

BY: DEBORAH A. HILL

I. Introduction

Under Virginia Code Section 17-110.1(C)(2) the Supreme Court of Virginia is required to determine whether a sentence of death in a given case is disproportionate to sentences imposed in similar cases. Despite this statutory requirement, the Supreme Court of Virginia is not conducting adequate proportionality review. Consequently, the defendant is denied a state created right in violation of the Fourteenth Amendment Due Process Clause. Additionally, the lax treatment of proportionality review in Virginia violates the constitutional requirement of meaningful appellate review.

The pathetic state of proportionality review in Virginia may be analyzed at three levels. First, under existing Supreme Court precedent, an argument exists that although proportionality review is not constitutionally required, meaningful appellate review is required. Therefore, the inadequate proportionality review conducted by the Supreme Court of Virginia, in combination with its weak application of other statutory provisions in Virginia Code Section 17-110.1, renders appellate review meaningless and, therefore, unconstitutional.

The second part of this article analyzes proportionality review under Virginia case law. Here, the emphasis is on the skewed standard that results from the limited universe of cases the court is willing to consider. Case law also suggests that the court is not following the procedures set forth in Virginia Code Section 17-110.1. The result of this is a denial of a state created right to proportionality review.

Finally, in the last section, the article compares Virginia's proportionality review process with other states that engage in more thorough review procedures.

II Proportionality Review Before *Pulley v. Harris*

The language of *Furman v. Georgia*[1] suggests that some form of meaningful appellate review is necessary to guard against the arbitrary imposition of the death penalty. When the Supreme Court reinstated the death penalty in 1976, it did so, in part, because meaningful appellate review was included in the death penalty statutes before the Court. Thus, the standard evolved from *Furman* that to pass constitutional muster, meaningful appellate review must be part of a state's death penalty statute. Nevertheless, the United States Supreme Court has held that proportionality review is not a constitutionally necessary element of meaningful appellate review.[2]

A. Meaningful Appellate Review

In *Furman*, the United States Supreme Court declared existing death penalty statutes unconstitutional. It held that the death penalty could not be imposed under sentencing schemes that created a substantial risk that death would be inflicted in an arbitrary or capricious manner. The concern for proportional sentencing was expressed by Justice Douglas in his concurrence to *Furman*. He stated that "'[t]he high service rendered by the "cruel and unusual" punishment clause of the Eighth Amendment is to require legislatures to write penal laws that are evenhanded, nonselective, and nonarbitrary, and to require judges to see to it that general laws are not applied sparsely, selectively, and spottily to unpopular groups.'"[3]

Four years later, the Supreme Court found that the death penalty schemes in Georgia, Florida, and Texas satisfied *Furman*. Part of the Court's justification for approving the sentencing schemes in these three states was the inclusion of meaningful appellate review in their death penalty statutes.

In *Gregg v. Georgia*,[4] the United States Supreme Court held that Georgia's death penalty scheme was constitutional, in part, because it required that the Georgia Supreme Court review each sentence of death and determine whether the sentence of death was proportional to those sentences imposed in similar cases.[5] The Court wrote:

[1] 408 U.S. 238 (1972).

[2] *Pulley v. Harris*, 465 U.S. 37 (1984).

[3] *Furman*, 408 U.S. at 256 (Douglas, J., concurring).

[4] 428 U.S. 153 (1976).

[5] *Gregg*, 428 U.S. at 198.

> [T]o guard further against a situation comparable to that presented in *Furman*, the Supreme Court of Georgia compares each death sentence with the sentence imposed on similarly situated defendants to **ensure that the sentence of death in a particular case is not disproportionate.** On their face, these procedures seem to satisfy the concerns of *Furman*. No longer should there be "no meaningful basis for distinguishing the few cases in which [the death penalty] is imposed from the many cases in which it is not."'[6]

The language in *Gregg* indicates that proportionality review is a safeguard against the freakish and arbitrary imposition of the death penalty, a concern the *Furman* Court relied on in declaring existing death penalty schemes unconstitutional. Although the Court in *Gregg* did not expressly state that proportionality review was constitutionally required, it seemed to regard such review as an element of effective appellate review.[7]

The decision in *Gregg* was issued the same day as the decisions in *Proffitt v. Florida*[8] and *Jurek v. Texas*.[9] In *Proffitt*, the Court ruled that the Florida death penalty statute was constitutionally sound partly because it provided for automatic review of all death sentences by the Florida Supreme Court. Unlike the Georgia statute, the Florida statute did not require any specific form of review. Nonetheless, the two statutes were similar in that both considered the function of meaningful appellate review to be to "'[guarantee] that the [aggravating and mitigating] reasons present in one case **will reach a similar result to that reached under similar circumstances in another case.** . . . If a defendant is sentenced to die, this Court can review that case in light of the other decisions and determine whether or not the punishment is too great."[10]

Although the statute in *Proffitt* did not use the magic words "proportionality review," that is the end to which the statute is clearly directed. This interpretation is further supported by the Court's reference to *Proffitt* in *Gardner v. Florida*.[11] There, the Court referred to *Proffitt* when stating:

> Since the State must administer its capital-sentencing procedures with an even hand . . . it is important that the record on appeal disclose to the reviewing court the considerations which motivated the death sentence in every case in which it is imposed. Without full disclosure of the basis for the death sentence, the Florida capital sentencing procedure would be subject to the defects which resulted in the holding of unconstitutionality in *Furman v. Georgia*.[12]

This language smacks of proportionality review. Essentially, the Court is requiring full disclosure by the trial court to the reviewing court of the considerations used in determining sentencing so that the state's capital sentencing procedures would be administered with "an even hand."

In *Jurek*, the Court found that the Texas death penalty statute was constitutionally sound. It stated that:

> By providing prompt judicial review of the jury's decision in a court with statewide jurisdiction, Texas has provided a means to promote the **evenhanded**, rational, and consistent imposition of death sentences under law. Because this system serves to assure that sentences of death will not be "wantonly" or "freakishly" imposed, it does not violate the Constitution.[13]

Although the Texas statute did not expressly provide for proportionality review, the quoted language calling for evenhandedness and consistency in sentencing evidence a concern for proportionality.

Gardner, *Proffitt*, and *Jurek* signaled a new beginning for death penalty law. These three cases provided a framework for states to structure their death penalty statutes in conformity with the requirements of *Furman*. One of these requirements was meaningful appellate review. Arguably, the Court defined mandatory appellate review as containing some element of proportionality. This is clear in both *Gardner* and *Proffitt*, and although the Texas statute in *Jurek* did not expressly call for a proportionality review, it did contain an evenhandedness requirement that is synonymous with proportional sentencing.

B. Proportionality Review after Pulley v. Harris

While the Court seemingly indorsed proportionality review in *Gregg* and *Proffitt*, its holding in *Pulley v. Harris* foreclosed any argument that proportionality review is constitutionally required. Harris argued that the California death penalty statute was unconstitutional under *Gregg* because it did not provide for proportionality review. The Court, in analyzing *Gregg*, *Proffitt*, and *Jurek*, concluded that its decision in *Jurek*, finding the Texas statute constitutionally sound without an express requirement of proportionality review, made it clear that proportionality review was not a constitutional requirement.[14] The Court reasoned that the *Jurek* holding, which found that the Texas' appellate review provided "a means to promote the evenhanded, rational, and consistent imposition of death sentences," was revealing, in part, because "in light of the other safeguards in the Texas statute, proportionality review would have been constitutionally superfluous."[15]

Whatever the *Harris* Court meant by this statement, it certainly did not adequately address the evenhandedness language of *Jurek*. Moreover, it suggested that proportionality review, which was seemingly a clear requirement in *Proffitt* and *Gardner*, was not necessary. As a result, the decision in *Pulley* established that proportionality review was not constitutionally necessary.

Nevertheless, the Court in *Harris* qualified its holding by stating that a "a capital sentencing system so lacking in other checks on arbitrariness" may not "**pass constitutional muster without comparative proportionality review.**"[16] This language supports the argument that absent some type of meaningful appellate review, proportionality review may be constitutionally required.

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[6] *Id.* at 198 (quoting *Furman*, 408 U.S. at 313 (White, J., concurring))(emphasis added).

[7] *See also Zant v. Stephens*, 462 U.S. 862, 890 (1983), where the Court stated: "Our decision in this case depends in part on the existence of an important procedural safeguard, the mandatory appellate review of each death sentence by the Georgia Supreme Court to avoid arbitrariness and assure proportionality.... As we noted in *Gregg*... we have also been assured that a death sentence will be vacated if it is excessive or substantially disproportionate to the penalties that have been imposed under similar circumstances."

[8] 428 U.S. 242 (1976).

[9] 428 U.S. 262 (1976). Although *Woodson v. North Carolina*, 428 U.S. 280 (1976), was also decided on the same day as *Gregg*, *Proffitt* and *Jurek*, its holding (that a mandatory death penalty scheme was unconstitutional) is not relevant to this article.

[10] *Proffitt*, 428 U.S. at 251 (quoting *State v. Dixon*, 283 So.2d 1, 10 (Fla. 1973))(emphasis added).

[11] 430 U.S. 349 (1977).

[12] *Gardner*, 430 U.S. at 361.

[13] *Jurek*, 428 U.S. at 276 (quoting *Furman*, 408 U.S. at 310)(emphasis added).

[14] *Harris*, 465 U.S. at 44-45.

[15] *Id.* at 49.

[16] *Id.* at 51 (emphasis added).

Meaningful appellate review was also deemed a constitutional necessity in *Parker v. Dugger*.[17] There, the Court held that it was constitutional error for the state supreme court to not consider nonstatutory mitigating evidence in its review of the death sentence. In so doing, the Court stated that meaningful appellate review plays a crucial role in preventing the arbitrary and irrational imposition of the death penalty.[18] The Court stated that "[i]t cannot be gainsaid that meaningful appellate review requires that the appellate court consider the defendant's actual record" including the character of the defendant and the circumstances of the crime.[19]

Harris and *Parker* suggest that the absence of meaningful appellate review may lift proportionality review from the level of a mere procedural safeguard to that of a constitutional requirement. Therefore, because the Supreme Court of Virginia is failing to fulfill its statutory and constitutional requirement of meaningful appellate review, proportionality review becomes a necessity.

Virginia Code Section 17.110.1[20] establishes the process of appellate review of death penalty cases. Subsection (C)(1) requires the Supreme Court of Virginia to consider whether the death sentence was imposed "under the influence of passion, prejudice or any other arbitrary factor." Subsection (C)(2) sets out the standard of proportionality review. A review of case law reveals that the Supreme Court of Virginia is not fulfilling the requirement of reviewing for "passion, prejudice or any other arbitrary factor."

In *Mu'Min v. Pruett*,[21] the defendant argued that Virginia Code Section 17-110.1(C) required the Supreme Court of Virginia to "determine[ ] that his conviction and sentence were free of fundamental constitutional error because such errors would constitute arbitrary factors requiring the invalidation of his death sentence."[22] The United States Court of Appeals for the Fourth Circuit disagreed, stating that Virginia Code Section 17-110.1(C) did not require the Supreme Court of Virginia to review the trial record for constitutional error. Instead, the court of appeals reasoned that subsection (C) required the Supreme Court of Virginia to determine only "whether the imposition of the death penalty was influenced by improper considerations; the provision simply does not require the court to examine the record for constitutional errors not specified on appeal."[23]

According to the court of appeals analysis of subsection (C), the statute has no teeth. The court's review of "improper considerations" is virtually meaningless because it is not looking for constitutional error. Therefore, Virginia appellate review of death sentences has little effect in safeguarding against the freakish and arbitrary imposition of the death penalty, a major concern of *Furman* and a requirement which *Gardner, Proffitt* and *Jurek* were designed to prevent. In light of the weak application of (C)(1) of the Virginia Code, the absence of true proportionality review would render Virginia appellate review meaningless. Arguably, under the qualified holding of *Harris*, proportionality review would become constitutionally required in this situation.

III. Proportionality Review in Virginia

Even though the United States Supreme Court has held that proportionality review is not constitutionally required, it is mandatory under Virginia law.[24] Thus, the Supreme Court of Virginia must "consider and determine . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[25] In doing this, the court considers a limited universe of cases consisting of "all capital felony cases tried within such period of time as the court may determine."[26] Case law has interpreted this to mean that the court must consider all capital murder cases "in which the death penalty was based on both predicates, including cases where life imprisonment was imposed."'[27]

In practice, however, the court is not conducting proportionality review as envisioned by the statute and case law. First, it fails to give weight to life imprisonment cases. Instead, the court gives a cursory review of life imprisonment cases while according a greater degree of analysis to cases where death was imposed. In selecting the cases in this manner, the court is able to find a sentence of death proportional in every situation. Second, by not considering both the crime and the defendant in its analysis, the Supreme Court of Virginia violates Virginia Code Section 17-110.1(C) which expressly requires that the crime and defendant be considered in proportionality review. Finally, the court's refusal to consider lesser sentences received by a codefendant in its proportionality analysis violates the requirement of determining whether a sentence was excessive compared to those generally imposed for a given set of facts.

A. Life Imprisonment Ignored

The Supreme Court of Virginia has stated numerous times that in conducting proportionality review it considers all capital murder cases. In analyzing the court's procedures, it is apparent that considering "all capital murder cases" translates into a mere skimming of those cases where the defendant was sentenced to life, while giving "particular

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[17] 498 U.S. 308 (1991).

[18] *Parker*, 498 U.S. at 321.

[19] *Id. See also Buchanan v. Angelone*, 103 F.3d 344 (4th Cir. 1996), where the United States Court of Appeals for the Fourth Circuit reiterated the necessity of appellate review in its analysis of Virginia Code Section 17-110.1(C). There, the court of appeals stated that "[m]eaningful appellate review is an important safeguard against improper imposition of the death penalty." *Id.*, at 350 (citing *Parker v. Dugger*, 498 U.S. 308, 321 (1991)).

[20] Specifically, Virginia Code Section 17-110.1 (1996) states:

> C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:
>
> 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
>
> 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

[21] 1997 WL 468283 (4th Cir. 1997). *See* case summary of *Mu'Min*, Cap. Def. J., this issue.

[22] *Mu'Min*, 1997 WL at 4.

[23] *Id.*

[24] *See* Va. Code §§ 17-110.1(C)(1) and (2) (1996).

[25] Va. Code § 17-110.1(C)(1) (1996). Because the statute requires the court to consider "both the crime and the defendant," it is the responsibility of defense counsel to provide information on this matter in the form of an appellate index in addition to what was offered at trial.

[26] Va. Code §§ 17-110.1(E) (1996). Specifically, subsection (E) states that "[t]he Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts." Apparently, the Supreme Court of Virginia consults a computerized database in conducting proportionality review. In response to a request by the author to gain access to this database, the Director of Management Information Systems stated that this database is "a work in progress" and not yet available for use or distribution at this time.

[27] *Jenkins v. Commonwealth*, 244 Va. 445, 462, 423 S.E.2d 360, 371 (1992)(quoting *Satcher v. Commonwealth*, 244 Va. 220, 261, 421

attention" to cases resulting in a sentence of death.[28]

This practice is clear in *Turner v. Williams*.[29] There, the defendant argued that Virginia Code Section 17-110.1(C) was unconstitutional because it failed to compare his death sentence to cases where life imprisonment was imposed. The court rejected the defendant's argument by stating that the Supreme Court of Virginia interprets Virginia Code Section 17-110.1(C) to "require only a comparison with death sentence cases, rather than also requiring comparison with life imprisonment cases."[30]

In support of its conclusion, the court cited *Stamper v. Commonwealth*.[31] In *Stamper*, the court stated that, for proportionality review purposes, "[t]he test is not whether a jury may have declined to recommend the death penalty in a particular case but whether generally juries in this jurisdiction impose the death sentence for conduct similar to that of the defendant."[32]

According to *Stamper*, the court must give weight only to those cases in which the jury chose to sentence the defendant to death, not to cases in which the "jury may have declined to recommend the death penalty."[33] This leads to a form of proportionality review that is skewed in favor of death. When the universe of cases is limited to death cases, a defendant stands little chance of convincing the court that the circumstances of his or her crime is deserving of life, since there are no life cases with which to compare. Rather, the defendant is left to the impossible task of convincing the court that his or her **capital** crime was not as egregious as those cases in which death was imposed.[34] Arguably, the court has developed a convenient standard by which a defendant convicted of a capital crime, is, by definition, deserving of a sentence of death. In other words, death is always proportional.

The court of appeals condoned this practice in *Peterson v. Murray*.[35] Petitioner argued that the Supreme Court of Virginia erred by "considering only cases in which the death penalty had been imposed" and ignoring those where death was sought but the defendant received another sentence.[36] The United States Court of Appeals for the Fourth Circuit rejected Peterson's argument and found that due process was not violated by the Supreme Court of Virginia's emphasis on death cases in its proportionality review. The court concluded by stating that "[i]n any event, "'this court may not issue a writ of habeas corpus on the ground that the [Virginia] Supreme Court has made an error of state law.'"[37]

The combined effect of *Turner*, *Stamper*, and *Peterson* is that the Supreme Court of Virginia is free to exclude life imprisonment cases from its proportionality review with the Fourth Circuit's blessing. As it stands, the universe of cases under Virginia Code Section 17-110.1(C) is limited to those cases in which the defendant was found guilty of capital murder and sentenced to death at the penalty phase. As a result, death will always be proportional.[38]

S.E.2d 821, 845 (1992). *See also Fry v. Commonwealth*, 250 Va. 413, 419, 463 S.E.2d 433, 436 (1995), where the Supreme Court of Virginia defined the geographic scope of proportionality review, stating that "we do not confine our review to a single city or county; instead, we compare the case before us to all capital murder cases this Court has reviewed, giving particular attention to cases similar in crime and aggravating factor." *Id.*

[28] *Cardwell v. Commonwealth*, 248 Va. 501, 516, 450 S.E.2d 146, 155-56 (1994). *See also Goins v. Commonwealth*, 251 Va. 442, 469, 470 S.E.2d 114, 132 (1996)(stating that the court examines all capital murder cases, including those where life was imposed, but gives particular attention to those where the death penalty was imposed); *Mickens v. Commonwealth*, 252 Va. 315, 323, 478 S.E.2d 302, 307 (1996)(stating that all capital murder cases are reviewed for proportionality, but particular attention is given to those cases where the death sentence was based upon the same predicates as defendant's); *Wilson v. Commonwealth*, 249 Va. 95, 105, 452 S.E.2d 669, 676 (1995)(stating that while life sentence cases are reviewed, particular attention is given to those cases where death is based on the same predicates as in defendant's case); *Breard v. Commonwealth*, 248 Va. 68, 89, 445 S.E.2d 670, 682 (1994)(giving particular attention to cases where death was imposed); *Williams v. Commonwealth*, 248 Va. 528, 550, 450 S.E.2d 365, 379 (1994)(stating that, while it does review cases where life is imposed, it pays particular attention to those cases in which death was based on both predicates); *Chabrol v. Commonwealth*, 245 Va. 327, 335, 427 S.E.2d 374, 378-79 (1993)(reviewing all capital felony cases, but giving particular attention to those cases where the death penalty was based on the relevant predicate in defendant's case); *Smith v. Commonwealth*, 239 Va. 243, 271, 389 S.E.2d 871, 886 (1990) (court only considered cases in which the sentence of death was based on aggravating factors similar to defendant's case); and *Washington v. Commonwealth*, 228 Va. 535, 553, 323 S.E.2d 577, 589 (1984)(stating that although the court considers all capital murder cases, it takes "particular note" of those cases where the jury imposed capital punishment).

[29] 812 F. Supp. 1400 (E.D.Va. 1993).

[30] *Turner*, 812 F.Supp. at 1419, *aff'd. Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994), *rev'd on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996).

[31] 220 Va. 260, 257 S.E.2d 808 (1979). The court also cited *King v. Commonwealth* 243 Va. 353, 371, 416 S.E.2d 669, 679 (1992)(Supreme Court of Virginia reaffirmed that the test for proportionality review was "not whether a jury may have declined to recommend the death penalty in a particular case but whether generally juries in [Virginia] impose the death sentence for conduct similar to that of the defendant"); and *Townes v. Commonwealth*, 234 Va. 307, 340, 362 S.E.2d 650, 669 (1987)(Supreme Court of Virginia, in conducting proportionality review, considered all capital felony cases, as required by subsection (E), but gave particular emphasis to those cases where the death penalty was based upon the same predicate as Townes' sentence).

[32] *Stamper*, 220 Va. at 283-84, 257 S.E.2d 808 at 824. *See also Poyner v. Commonwealth*, 229 Va. 401, 430, 329 S.E.2d 815, 834-35 (1985)(stating that "whether defendant *could* be sentenced to life imprisonment is not the question; the question is whether the death penalty is customarily imposed in crimes of this kind")(emphasis in original).

[33] *Id.* at 284, 257 S.E.2d at 824.

[34] Another example of how the Supreme Court of Virginia disregards life sentences and focuses only on death sentences in proportionality review is found in *Yeatts v. Commonwealth*, 242 Va. 121, 410 S.E.2d 254 (1991). There, the court focused on cases in which the death penalty was based on a predicate identical to that in defendant's case. The one life imprisonment case the court cursorily reviewed was simply tagged as an "exception" to what juries within the relevant jurisdiction "generally" impose. *Id.* at 141, 410 S.E.2d at 268.

[35] 904 F.2d 882 (4th Cir. 1990).

[36] *Peterson*, 904 F.2d at 887.

[37] *Id* (quoting *Shaw v. Martin*, 733 F.2d 304, 317 (4th Cir.), *cert. denied*, 469 U.S. 873 (1984)).

[38] The National Center for State Courts summarized this problem, stating that:

> Comparing a case under review solely to other cases in which a death sentence has been imposed makes the size of the pool more manageable. However, it fails to address the question framed by Justice White in *Furman* - how can the few cases in which a death sentence is imposed be "meaningfully distinguished" from the many apparently similar cases that resulted in a life sentence? Although the case under review may be similar to another death case, it may also be similar to thirty life cases. Without

B. Make the Court Consider Both the Crime and the Defendant

Not only has the Supreme Court of Virginia failed to review life imprisonment cases while conducting proportionality review, it has also not fulfilled its statutory obligation to consider both the crime and the defendant when reviewing for proportionality. Therefore, it is paramount that defense counsel either include in a motion to dismiss the indictment an exhibit demonstrating the excessiveness of a death sentence in the defendant's case or prepare an appendix to the appellate brief to the Supreme Court of Virginia to assist in its proportionality review.

Both *Chandler v. Commonwealth*[39] and *Roach v. Commonwealth*[40] exemplify how counsel can take an active role in proportionality review. Both cases involve relatively minimal circumstances, and in each the court found the sentence of death proportional despite defense counsel's attempts at demonstrating that the circumstances of the crime and the individual defendant did not warrant death.

In *Chandler*, the defendant was convicted of capital murder in the commission of a robbery. The facts showed that Chandler entered a convenience store planning to steal beer and money. He approached the cashier and with a gun in his hand, demanded money. The cashier did not respond. Chandler then closed his eyes and shot the cashier once, followed by a second shot to the cashier's head, killing him.[41]

On automatic review to the Supreme Court of Virginia, Chandler's attorney presented forty-eight cases to assist in the court's proportionality review. In eighteen of these cases the sentence of death was based on future dangerousness. In the other thirty, the sentence of death was based on both vileness and future dangerousness. Chandler claimed that the circumstances surrounding his case and his own personal background demonstrated that he was much less likely to pose a danger to society in the future.[42]

Despite defense counsel's efforts to assist the court in its proportionality review, the court failed to consider information regarding the particular defendant. Instead, it considered only the circumstances of the crime, ignoring mitigating evidence, the comparison between this particular defendant and other defendants convicted of capital murder, and the likelihood that the defendant would be a danger to society in the future. This action by the court violates the requirement in Virginia Code Section 17-110.1(C) that the court must consider "both the crime and the defendant." Arguably, the court's failure to comply with the statutory requirements is a denial of a state created right in violation of the Due Process Clause of the Fourteenth Amendment.[43] Nonetheless, defense counsel's actions in gathering information regarding the circumstances of the crime and the character of the defendant is commendable.[44]

Similar to counsel in *Chandler*, Roach's defense counsel played an active role in proportionality review. Roach was convicted of capital murder in the commission of robbery while armed with a deadly weapon. The facts showed that the victim, Roach's neighbor whom he had visited frequently and helped with household chores, died of a single gunshot wound to the chest. Her purse and Buick had been taken from her home. Roach, who was 17-years old at the time of the offense, confessed to the murder.[45]

Pursuant to Virginia Code Section 17.1-110.1(E), Roach's counsel submitted an appendix to his appellate brief containing a summary of seventy-two Virginia capital cases, fifty-eight of which resulted in a sentence of life imprisonment. The appendix contained information regarding the seventy-two cases, including other crimes proved or described leading to defendant's conviction, facts supporting vileness or aggravated battery, age of defendant, age of and relationship to victim, type of firearm used and the number of shots discharged, other causes of the victim's death, and defendant's other violent and nonviolent crimes. This appendix was used in support of the argument that the circumstances of Roach's case warranted a sentence of life imprisonment and that a sentence of death was excessive and disproportionate under Virginia Code Section 17-110.1(C).

Although the court claimed to conduct its proportionality review in compliance with the standard set out in *Jenkins v. Commonwealth*,[46] which requires the court to consider both the crime and the defendant, it ignored the majority of appellant's appendix.[47] Instead, it chose to compare appellant's case to three other cases that contained more

examining the life cases, it is impossible to develop the rational distinctions required. Lawrence S. Lustberg & Lenora M. Lapidus, *The Importance of Saving the Universe: Keeping Proportionality Review Meaningful*, 26 Seton Hall L. Rev. 1423, 1430 (1996)(quoting National Center for State Courts, *User Manual for Prototype Proportionality Review Systems*, at A-7 (1984) (citations omitted).

[39] 249 Va. 270, 455 S.E.2d 219 (1995).

[40] 251 Va. 324, 468 S.E.2d 98 (1996).

[41] *Chandler*, 249 Va. at 274, 455 S.E.2d at 221-22.

[42] *Id.* at 283-84, 455 S.E.2d at 227.

[43] *See Evitts v. Lucey*, 469 U.S. 387, 401 (1985)(stating that the state must comply with the Fourteenth Amendment Due Process Clause when it provides for a right of review or appeal); *Hewitt v. Helms*, 459 U.S. 460 (1983)(mandatory state procedures may give rise to a protected liberty interest).

[44] Along with highlighting the role of defense counsel in proportionality review, *Chandler* raises three other important points. First, regarding future dangerousness, the court stated that proportionality review does not consist of a comparison of "perceived degrees of potential future dangerousness" between the defendant and others convicted of similar crimes. Rather, the court reasoned that "a finding of future dangerousness delineates the category of cases in which a sentence of death was imposed that we will use for comparison purposes." 249 Va. at 284, 455 S.E.2d at 227. Second, the court indicated that it would not consider mitigation in its review by stating that "mitigating circumstances generally have been a factor in instances where similar crimes have received the lesser penalty." *Id.* at 284, 455 S.E.2d at 227-28. Finally, the court found that in instances where the defendant was sentenced to death, "cruelty and lack of respect for human life" was a circumstance of the crime. *Id.* at 284, 455 S.E.2d at 227. Arguably, this is a circumstance of every murder, making it impossible to distinguish between those crimes deserving of death and those where life imprisonment is appropriate. The narrowing requirement of death cases is eliminated. For more on Chandler, *see* case summary of *Chandler*, Cap. Def. Dig., Vol. 8, No. 1, p. 28 (1995).

[45] *Roach*, 251 Va. at 330-32, 468 S.E.2d at 101-02.

[46] 244 Va. 445, 423 S.E.2d 360 (1992). The *Jenkins* standard requires the court to consider "whether other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and defendant." *Id.* at 461, 423 S.E.2d at 371.

[47] Although the Supreme Court of Virginia is not obligated to consider appellant's independent proportionality review, it is recommended that defense counsel include this type of appendix to appellant's brief. By doing so, the appendix becomes part of the record for review by federal courts in their review of the adequacy of appellate review by the Supreme Court of Virginia. Additionally, in the event that a sentence of death would be extremely disproportional in a given case, defense counsel, in his or her motion to quash the capital indictment, should include the issue and consider filing an exhibit containing cases that

aggravating facts then those in *Roach*.[48] In failing to consider appellant's appendix, the Supreme Court of Virginia ignored the varying degrees of aggravating evidence. It also ignored mitigating evidence, as all three of the cases reviewed by the court did not include the extensive evidence in mitigation as Roach's case did. Nor were any of the three defendants minors at the time of the offense. As in *Chandler*, the *Roach* court failed to comply with the requirement of Virginia Code Section 17-110.1 that it consider both the crime and the defendant thereby infringing upon the Fourteenth Amendment by denying Roach his state created right of proportionality review.[49]

C. The "Lucky" Co-defendant Analysis

Finally, the court's disregard of proportionality review is apparent in its decisions involving codefendants. According to case law, codefendants who are equally culpable and convicted of capital murder based on similar evidence may receive different sentences without implicating proportionality review.[50] Because the court must consider all capital cases in determining what sentences juries generally impose given particular facts, some consideration should be given to instances in which one defendant is sentenced to death while the other is sentenced to life based on the same fact pattern. Certainly, the sentence of life should be considered in the court's analysis of proportionality review since the life sentence demonstrates what type of sentencing juries find appropriate for which crimes.

In *Coppola*, a case involving codefendants, the Supreme Court of Virginia held that a codefendant is not necessarily entitled to commutation of a death sentence simply because an "equally culpable confederate, on substantially the same evidence, has been sentenced to life imprisonment."[51] This lucky-codefendant rule seems to contradict the requirement that the Supreme Court of Virginia consider whether the sentence of death is disproportionate to the penalty imposed in similar cases. It goes without saying that a codefendant is involved in a **similar** case as that of the defendant. Although it is certainly not necessary, or desirable, that a defendant receive the same sentence as his or her codefendant, it merely seems logical that a lesser sentence received by a codefendant should be given considerable weight in proportionality review.

In *Coppola*, the defendant and codefendant both participated in the robbery and murder of the victim. The facts showed that Coppola "struck the [victim] in the face and repeatedly beat her head against the floor" and that his codefendant, Militer, also struck the victim.[52] The evidence showed that both defendants participated in the fatal beating of the victim and that Militer actively participated in the planning and commission of the robbery. Furthermore, there was testimony that Militer's blows actually killed the victim and that the morning after the murder, he stated that he was the one who killed the victim.[53]

Nevertheless, the Supreme Court of Virginia managed to find that Coppola was more culpable then Militer. The court decided to read its own meaning into Militer's testimony, stating "[a]lthough Militer may have believed that he delivered the final blow to [the victim], most of his attention was directed to [the victim's] husband, and Coppola dealt primarily with [the victim]".[54] Although the court went to great lengths to find Coppola more culpable then his codefendant, it stated that equally culpable defendants convicted on substantially the same evidence pass proportionality review even though one is sentenced to death and the other to life. Essentially, the court labeled this discrepancy as jury sentencing "discretion," stating that "some degree of discretion inheres in our criminal justice process."[55]

The court stated that "[a] jury's decision not to recommend the death sentence where the evidence would support a sentence of death does not change the applicable statewide standard." This reasoning does not comport with the requirements of Virginia Code Sections 17-110.1(C) and (E) and *Jenkins*. According to the statute and case law governing proportionality review, any decision by a jury to sentence a defendant to life imprisonment on a certain set of facts should be factored into the court's consideration of what sentences juries in a particular jurisdiction generally impose for particular conduct. Certainly the court is not obligated to ensure that both defendants are sentenced to the same punishment. Nonetheless, it is obligated to consider the lesser sentence imposed on the codefendant when reviewing similar cases as required by the statute. But the court did not see it this way. Instead, it chose to view the jury's decision in sentencing Militer to life imprisonment as an isolated incident not to be considered in proportionality review.[56] This "lucky-codefendant" analysis by the court is yet another example of its total disregard for adequate proportionality review.[57]

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demonstrate the excessiveness of a sentence of death. As grounds for this claim, defense counsel may assert a violation of the Eighth and Fourteenth Amendments. By raising the issue in the trial court, counsel can establish the seriousness of the proportionality claim in the case.

[48] *Roach*, 251 Va. at 351, 468 S.E.2d at 113. The court, in picking and choosing cases for comparison, selected *Chichester v. Commonwealth*, 248 Va. 311, 448 S.E.2d 638 (1994)(defendant and accomplice planned and carried out the robbery of a restaurant, where the defendant shot and killed an employee; defendant had previously committed armed robbery where he attempted to shoot an employee in the head; counsel presented little mitigation at the penalty phase); *Chandler*, 249 Va. 270, 455 S.E.2d 219 (1995)(defendant convicted of capital murder in the commission of armed robbery and had previously been convicted of assault and battery, armed robbery, and several other offenses); *Joseph v. Commonwealth*, 249 Va. 78, 452 S.E.2d 862 (1995)(defendant convicted of capital murder in the commission of armed robbery; defendant shot the sandwich shop employee in the back while the employee lay face down on the floor; defendant had been convicted of armed robbery and abduction twice before and of assaulting a police officer; mitigation presented by defense counsel was not as extensive as that presented in *Roach*).

[49] For more on *Roach*, *see* case summary of *Roach*, Cap. Def. J., Vol. 8, No. 2, p.11 (1996).

[50] *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979).

[51] *Coppola*, 220 Va. at 258, 257 S.E.2d at 807.

[52] *Id.* at 246, 257 S.E.2d at 800.

[53] *Id.* at 257, 257 S.E.2d at 806-07, n.5.

[54] *Id.* at 257, 257 S.E.2d at 807.

[55] *Coppola*, 220 Va. at 258, 257 S.E.2d 807.

[56] For other cases in which the defendant unsuccessfully argued that his sentence was not proportional to an accomplice, *see Murphy v. Commonwealth*, 246 Va. 136, 145, 431 S.E.2d 48, 53-54 (1993); *Thomas v. Commonwealth*, 244 Va. 1, 26, 419 S.E.2d 606, 620 (1992); *King v. Commonwealth*, 243 Va. 353, 371, 416 S.E.2d 669, 679 (1992); *Evans v. Commonwealth*, 222 Va. 766, 780, 284 S.E.2d 816, 823 (1981).

[57] *See also People v. Bean*, 560 N.E.2d 258 (Ill. 1990)(in conducting proportionality review, court must determine whether defendant's sentence is "unduly severe" compared to codefendant's sentence by considering the degree of involvement of each in the offense); *People v. Jimerson*, 535 N.E.2d 889, 908 (Ill. 1989)(stating that court will consider "whether a sentence of death in a particular case is disproportionately harsh in comparison with the less severe sanction imposed on a codefendant convicted of the same crime"); *Beck v. State*, 396 So.2d 645, 664 (Ala. 1981)(stating that in conducting proportionality review, "the courts should examine the penalty imposed upon the defendant in relation to that imposed upon his accomplices, if any"); and *People v. Gleckler*, 411 N.E.2d 849 (Ill. 1980)(finding that defendant's sentence of death was

IV. The Appropriate Universe

Section III of this article defined the universe of cases the Supreme Court of Virginia considers in its proportionality review. This universe only includes those cases in which the Commonwealth sought a death sentence. This limited pool of cases leads to a pro-death analysis because it disregards those cases in which, although containing similar fact patterns, the Commonwealth chose not to proceed capitally. By eliminating these cases, the narrow pool of cases used for proportionality review is necessarily skewed in favor of death because it ignores life sentences imposed "in similar cases."[58] The problem of limiting the universe of cases in such a manner has been addressed by the Supreme Court of Washington.

In *State v. Harris*,[59] the defendant was sentenced to death for a contract killing. Because the prosecution had never sought the death penalty for contract killings in the past, the Supreme Court of Washington compared defendant's case with three other contract killings where death was not sought.[60] Rather then focusing its attention on the penalty sought in a particular case, the Washington court chose to conduct proportionality review according to similar fact patterns.[61] Nevertheless, the court found that a sentence of death was not disproportional.

At federal habeas, Harris argued that the Supreme Court of Washington violated his due process rights by performing inadequate proportionality review.[62] In analyzing petitioner's due process claim, the district court found that Revised Code of Washington Section 10.95.130, which parallels Virginia Code Section 17-110.1, did not provide reliable standards or guidelines for the Supreme Court of Washington or the parties to follow.[63] The court found that the Washington statute was overly vague for failing to define a "similar case," although the court reasoned that the "thrust of the statute seems to require the court to compare death penalty cases where the death penalty could have been, but was not, requested."[64] The court further concluded that the lack of any definition of "similar cases" deprived the defendant of notice regarding which cases the state Supreme Court would consider to be similar for purposes of proportionality review.[65]

Based on these inadequacies, the district court concluded that the Washington statute violated petitioner's due process rights by failing to give him notice of the procedure to be followed in proportionality review. The court found that:

> Harris had no adequate notice of what "similar cases" are, how they are to be selected, or the factors to be compared. He had no notice of what would happen if no "similar cases" were found. He had no adequate notice of the court's standard for review of "similar cases."[66]

For these reasons, Harris did not have a meaningful opportunity to be heard. As the court stated, due process requires that "all participants operate under the same rules" and according to the Washington statute, the vagueness of "similar cases" resulted in a uneven playing field where the defendant was sure to lose.[67]

Although the district court found the Washington statute unconstitutional, the Supreme Court of Washington thought otherwise. While the court recognized the difficulty in defining "similar cases" for purposes of proportionality review, it held that the statute was not subject to the challenges posed by *Harris*.[68] Rather, the court found that by comparing the crime and the individual defendant to all death-eligible cases as defined by the legislature in Revised Code of Washington Section 10.95.130(2)(b),[69] the due process concerns of *Harris* were adequately addressed.[70]

The court reaffirmed its *Brett* holding in *State v. Pirtle*.[71] In *Pirtle*, the Supreme Court of Washington explained why it was necessary to include all death eligible cases. The court noted that in its original application of proportionality review it limited the pool of cases to only

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excessive in comparison with codefendant, who had received a prison term for the same offense, where defendant was found to be less culpable then codefendant and defendant's rehabilitative potential was not worse then codefendant's.)

[58] Va. Code § 17-110.1(C)(2) requires the court to consider "the penalty imposed in similar cases."

[59] 725 P.2d 975 (Wash. 1986).

[60] *Harris*, 725 P.2d at 983.

[61] The universe of cases considered by the Supreme Court of Washington is set out in Wash. Rev. Code 10.95.130(2)(b), which includes those cases "reported in the Washington Reports or Washington Appellate Reports... in which the judge or jury considered the imposition of capital punishment regardless of whether it was imposed or executed, [first category] and cases in which reports have been filed with the supreme court under R.W. 10.95.120 [convictions of aggravated first degree murder, second category]." Wash. Rev. Code 10.95.130(2)(b)(1996).

[62] *Harris v. Blodgett*, 853 F.Supp. 1239, 1286 (W.D.Wash. 1994).

[63] *Harris*, 853 F.Supp. at 1288. Wash. Rev. Code § 10.95.130(1)(b) (1996) states that the Washington Supreme Court must review "whether the death sentence is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant." Compare this to the Va. Code § 17-110.1(C)(2) which states that the court must determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and defendant."

[64] *Id.* at 1288.

[65] *Id.* at 1289. The district court also criticized the Washington statute for failing to give an alternative procedure for proportionality review in the event that no similar cases are available, for not giving any standard for reviewing the selected cases leading to a superficial and incomplete analysis by the state supreme court, and for omitting any procedures regarding findings of fact as part of the sentence review. *Id.* at 1289-90.

[66] *Id.* at 1291.

[67] *Harris*, 853 F.Supp. at 1291.

[68] *State v. Brett*, 892 P.2d 29, 67 (Wash. 1995).

[69] This pool of cases includes all those in which the defendant was convicted of aggravated first degree murder, regardless of whether the death penalty was sought. *See State v. Lord*, 822 P.2d 177 (Wash. 1991); *State v. Rupe*, 743 P.2d 210 (Wash. 1987).

[70] *Brett*, 892 P.2d at 68-69. Justice Utter, in his dissent in *Brett*, criticized the majority for failing to explain why the constitutional defects outlined in *Harris* had no merit. Although Justice Utter agreed with the majority that meaningful review required a universe of cases including all death-eligible cases, he faulted the process applied by the majority for the following reasons: (1) after the pool of cases are chosen, the statute is silent as to how to substantively compare these cases; (2) the statute does not establish procedures to follow when there are no "similar cases;" (3) there are no statutory procedures by which the parties are notified of what cases the court may deem "similar" until after a decision has been rendered; (4) there is no mechanism for fact finding as part of the sentence review. Furthermore, Justice Utter concluded that the majority failed to include those aggravated murder cases where death was not sought and the cases it did choose to review were treated in a conclusory fashion. This process, according to Justice Utter, "forecloses any possibility of review or even discussion of [the majority's] conclusion." He stated that this inability to review the majority's conclusion violated the Equal Protection Clause of the Fourteenth Amendment "because it provides no safeguard against a death penalty which is applied arbitrarily and without meaningful standards." *Id.* at 75-77.

[71] 904 P.2d 245 (Wash. 1995).

those where the death penalty was sought. Dissatisfied with that limitation, the *Pirtle* court concluded that the appropriate universe of cases was that defined in *Brett*. In *Brett*, the court stated that the appropriate pool of cases includes all death eligible cases, reasoning that "[r]efocusing [proportionality] review to ascertain only whether a death sentence is wanton and freakish based upon the **broad range** of aggravated murder cases provides a more reliable and justifiable standard of 'disproportionality' and renders negligible the effect of slight deviations in the universe of 'similar cases.'"[72]

The analysis by the Supreme Court of Washington regarding the appropriate universe of cases for proportionality review is instructive.[73] It highlights the problems that arise when the pool of cases is limited to those where the prosecutor proceeded capitally. These problems are apparent in Virginia's proportionality review procedures. Because the Supreme Court of Virginia only reviews cases that resulted in capital convictions, life cases that were based on similar fact patterns but were not prosecuted as capital are excluded. Therefore, relevant life cases are taken out of proportionality review, skewing the review in favor of death. Moreover, the due process concerns addressed by the district court in *Harris* and Justice Utter's dissent in *Brett* arguably apply to the Virginia statute.

V. Conclusion

Although it is unlikely that the Supreme Court of Virginia will follow the lead of Washington and expand the universe of cases to include those cases that could have been prosecuted as capital but were not, defense counsel should still make the most of what the Virginia statute and case law requires. There are two ways to accomplish this.

First, if counsel is presented with a capital case in which a sentence of death is clearly excessive, he or she should prepare an exhibit of cases involving similar fact patterns that did not result in a sentence of death. This exhibit should be included with a motion to quash the capital indictment and should be based on the inherent proportionality requirement contained within the Eighth Amendment prohibition against cruel and unusual punishment. This is beneficial for at least two reasons. It raises the proportionality issue at the trial level which could possibly result in getting death out of the case. The exhibit also provides a ready-made universe of cases that the Supreme Court of Virginia may be willing to address on mandatory review.

Secondly, counsel should prepare an appendix to the appellant's brief including other capital cases which demonstrate the excessiveness of a sentence of death. By doing this, the appendix becomes part of the record that will be reviewed by the federal courts in determining the adequacy of the Supreme Court of Virginia's appellate review.

Regardless of which method is appropriate in the defendant's situation, it is advisable that defense counsel play an active role in proportionality review. Otherwise, it is a virtual guarantee that the Supreme Court of Virginia will ignore its statutory duty to ensure that the defendant's sentence of death is proportional.

[72] *Brett*, 892 P.2d at 69 (emphasis added). *See also State v. Benn*, 845 P.2d 289, 316 (Wash. 1993), where the court, in conducting an in-depth proportionality review of defendant's case, stated that "[t]he pool of 'similar cases' includes those cases in which the death penalty was sought and those in which it was not;" and *State v. Rupe*, 743 P.2d 210, 229 (Wash. 1987) where the court, in comparing Rupe's case with cases where death was not sought and those where the defendant pleaded guilty, stated that "similar cases" includes "cases where the defendant was convicted of first degree aggravated murder regardless of whether the death penalty was sought."

[73] Other states that consider all death-eligible cases when conducting proportionality review include Georgia and Nebraska. *See Horton v. State*, 295 S.E.2d 281, 289 n.9 (Ga. 1982)(stating that the court compares "cases as to which the death penalty could have been sought by the prosecutor but was not"); *State v. Williams*, 287 N.W.2d 18 (Neb. 1979)(relying on Georgia's review procedures in comparing "cases involving crimes for which the death penalty is **permissible**"); and *State v. Moore*, 316 N.W.2d 33, 44 (Neb. 1982)(comparing the records of all convictions of first degree murder, inviting the defendant to provide it with cases he wished the court to consider in its proportionality review).

"LIFE" = LIFE: CORRECTING JUROR MISCONCEPTIONS

BY: LISA M. JENIO

I. Introduction

In 1994, the Virginia legislature abolished parole for capital offenses committed after January 1, 1995.[1] However, a number of studies have shown that the average layperson believes that a capital defendant, if sentenced to life imprisonment, will serve only a few years in prison before being released on parole.[2] In order to combat such misconceptions, it is essential that defense counsel introduce evidence of a defendant's parole **ineligibility** at trial. Parole ineligibility evidence may be introduced for two purposes: 1) to rebut evidence of future dangerousness, and 2) to mitigate the offense.

In *Simmons v. South Carolina*,[3] the United States Supreme Court explicitly recognized that a defendant has a constitutional right to introduce evidence of his or her parole ineligibility to rebut evidence of future dangerousness offered by the prosecution. However, even when the Commonwealth does not rely specifically on the future dangerousness aggravating factor, defense counsel in Virginia should argue that evidence of parole ineligibility is admissible based upon: (1) the Fourteenth Amendment due process right to rebut the Commonwealth's case **for death**, as any proof of vileness necessarily implicates future danger-

[1] Va. Code § 53.1-165.1 (Supp. 1994). In pertinent part, § 53.1-165.1 provides that "[a]ny person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense."

[2] *See infra* notes 5-6 and accompanying text.

[3] 512 U.S. 154 (1994).