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"LIFE" = LIFE: CORRECTING JUROR MISCONCEPTIONS

Lisa M. Jenio

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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).

ousness, and because juries will inevitably consider future dangerousness when making the sentencing decision, and (2) the Eighth Amendment right to introduce any relevant evidence in mitigation of the offense, based upon the constitutional concerns for individualized sentencing decisions and reliability in such decisions.

II. A Bit of Background

A. About Juror Misconceptions: What Does a "Life" Sentence Really Mean?

After finding a defendant guilty of a capital offense, a Virginia jury must decide whether to sentence the defendant to death or to "life" in prison.[4] A jury's awareness about a defendant's eligibility for parole can have a profound effect on the sentence that it imposes on the defendant. Researchers have found that the number of years a jury believes a defendant will actually serve if sentenced to life is a vital factor in the jury's decision to choose life imprisonment instead of the death penalty.[5]

Studies have also demonstrated that potential jurors may labor under misconceptions regarding parole eligibility. For example, a comprehensive survey of the residents of Prince Edward County, Virginia, revealed that such residents believed that a capital defendant sentenced to life imprisonment would serve only ten years in prison before being released on parole.[6]

Such juror confusion is especially disturbing in the light of the numerous instances in which Virginia jurors have interrupted their deliberations to ask the trial court for clarification on the meaning of "life imprisonment," and the trial court has refused to directly answer their question. Rather, in response to such juror questions, the court has usually asserted that what might happen in the future "should be of no concern" to them.[7] This disturbing phenomenon is not particular to Virginia juries. For example, the South Carolina jury in *Simmons* itself sent a note to the judge asking if a life sentence carried with it the possibility of parole.[8] Furthermore, a survey of all Georgia capital cases in which a death sentence was imposed from 1973 to 1990 indicated that Georgia sentencing juries asked questions about the defendant's potential parole eligibility on a life sentence in twenty-five percent of the cases.[9] Because juries are not necessarily informed of their right to ask questions, the survey results likely underestimate the extent of juror concern about parole eligibility in capital cases. As noted by one commentator, "' [i]t cannot be said . . . that the possibility of parole is not being considered in those cases where a question is not posed. . . . It appears likely that in all but the most extraordinarily heinous capital murder case, parole is a factor in the jury's deliberations.'"[10]

Prior to *Simmons*, the United States Supreme Court provided little guidance as to what parole information was proper for a jury to consider. Although common sense might indicate that a jury should always be informed of a defendant's parole eligibility, the Supreme Court generally left this determination to the states,[11] thereby implicitly allowing State trial courts to evade juror questions regarding what "life" imprisonment really means. It was in the face of such juror confusion and trial court evasion that the Supreme Court decided *Simmons v. South Carolina*.

B. *Simmons v. South Carolina*

Simmons was charged with the first-degree murder of an elderly woman. Under South Carolina law, Simmons was ineligible for parole if convicted because he had confessed to sexually and physically assaulting elderly women on three prior occasions. The jury convicted Simmons of first-degree murder, thereby rendering him ineligible for parole.[12]

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[4] Unlike a number of other states (Alabama, Arkansas, California, Connecticut, Delaware, Louisiana, Missouri, New Hampshire, and Washington) which identify the jury's options as **"life without parole"** or "death," Virginia juries are instructed that their sentencing options are "life" or "death."

[5] *See Simmons*, 512 U.S. at 159 (citing study in which more than 75% of South Carolina citizens indicated that the amount of time the convicted murderer actually would have to spend in prison would be an "extremely important" or "very important" factor in choosing between life and death). *See also* Luginbuhl and Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 Ind. L.J. 1161, 1178 (1995) (study of North Carolina jurors revealed that of jurors who sentenced defendant to death, 74% believed that he would serve less than 20 years, whereas of jurors who sentenced defendant to life, 72% believed that he would remain in prison for at least 20 years); Eisenberg and Wells, *Deadly Confusion: Juror Instructions in Capital Cases*, 79 Cornell L. Rev. 1, 7 (1993) ("[J]urors who believe the alternative to death is a relatively short time in prison tend to sentence to death. Jurors who believe the alternative treatment is longer tend to sentence to life."); Paduano and Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211, 220-25 (1987) (recounting study of potential Georgia capital jurors in which over two-thirds indicated that they would be more likely to impose a sentence of life if assured that "life" meant at least twenty-five years).

[6] *See* Hood, *The Meaning Of "Life" For Virginia Jurors And Its Effect On Reliability In Capital Sentencing*, 75 Va. L. Rev. 1605, 1606 (1989) (citing National Legal Research Group, Inc. Jury Research and Trial Simulation Services, *Report on Jurors' Attitudes Concerning the Death Penalty* (Dec. 6, 1988)). Although, at the time of the survey, parole remained available for some capital defendants in Virginia (those who had not been previously convicted of two other felony offenses), such defendants would not be eligible until he or she served at least 25 years. *See* Va. Code Ann. § 53.1-151(C) (1988).

[7] *See, e.g., Delong v. Commonwealth*, 234 Va. 357, 370, 362 S.E.2d 669, 776 (1987); *Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836 (1985); *Peterson v. Commonwealth*, 225 Va. 289, 296-97, 302 S.E.2d 520, 525 (1983); *Clanton v. Commonwealth*, 223 Va. 41, 54-55, 286 S.E.2d 172, 179-80 (1982); *Clark v. Commonwealth*, 220 Va. 201, 214, 257 S.E.2d 784, 792 (1979); *Stamper v. Commonwealth*, 220 Va. 260, 278, 257 S.E.2d 808, 821 (1979); *Jones v. Commonwealth*, 194 Va. 273, 275, 72 S.E.2d 693, 694 (1952).

[8] *See infra* note 15 and accompanying text.

[9] Lane, *"Is There Life Without Parole?": A Capital Defendant's Right To A Meaningful Alternative Sentence*, 26 Loy. L.A. L. Rev. 327, 335 (1993). This study involved the review of every Georgia trial during the 17-year period in which a death sentence was returned by a jury, and for which transcripts were available. Specifically, of the 280 trials reviewed, 70 of the resulting death sentences were returned following jury questions to the court regarding the nature of the life sentence and the possibility of release on parole. *Id.* at 335-36.

[10] Lane, 26 Loy. L.A. L. Rev. at 336 (quoting Paduano and Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211, 237, n. 91 (1987)).

[11] *See California v. Ramos*, 463 U.S. 992 (1983) (upholding a jury instruction that informed jurors of the California governor's power to commute a life sentence without possibility of parole to a lesser sentence that included the possibility of parole). As the Court acknowledged in *Simmons*, *Ramos* is generally cited for the proposition that the Court will generally "[d]efer to a State's determination as to what a jury should and should not be told about sentencing." *Simmons*, 512 U.S. at 168.

[12] *Simmons*, 512 U.S. at 156.

During the sentencing phase, the prosecutor urged the jury to consider Simmons' future dangerousness in deciding his punishment. Specifically, the prosecutor argued that the "question for the jury . . . was 'what to do with [petitioner] now that he is in our midst.'" He added that a death sentence "would be a response of society to someone who is a threat. Your verdict will be an act of self-defense."[13] Simmons' counsel requested a jury instruction explaining that a life sentence meant that Simmons could not be released on parole, but the judge refused.[14]

After ninety minutes of deliberation, the jury sent a note to the judge asking: "Does the imposition of a life sentence carry with it the possibility of parole?" The judge replied that parole was not an issue for the jury to consider and that "[t]he terms life imprisonment and death sentence are to be understood in their plan [sic] and ordinary meaning." Twenty-five minutes later, the jury returned a sentence of death.[15]

Writing for a plurality, Justice Blackmun overturned Simmons' conviction on Fourteenth Amendment due process grounds, stating that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."[16] In so holding, the plurality concluded that Simmons had been sentenced to death on the basis of information which he had no opportunity to "deny or explain" in violation of the due process clause and the principles enunciated in *Gardner v. Florida*[17] and *Skipper v. South Carolina.*[18] Justice Blackmun reasoned that Simmons was sentenced to death, at least in part, on the basis of the prosecution's future dangerousness arguments which the defendant had no opportunity to rebut.[19]

C. Post-*Simmons* Cases in Virginia

For offenses committed after January 1, 1995, the Supreme Court of Virginia has recognized that *Simmons* requires jury instructions on parole ineligibility whenever future dangerousness is "an issue in the sentencing phase" of a capital murder case.[20] However, it appears that future dangerousness is only "an issue" to the Supreme Court of Virginia when the Commonwealth relies on the future dangerousness aggravating factor in making its case for death. Thus far, the court has acknowledged the necessity of a *Simmons*' instruction only in cases where the prosecution has sought and secured a death sentence on the basis of future dangerousness.

III. Extending *Simmons* to Cases Where the Commonwealth Does Not Specifically Rely on Future Dangerousness

Simmons stands for the proposition that a defendant has a Fourteenth Amendment due process right to rebut the Commonwealth's case for death.[21] Even when the Commonwealth does not specifically rely on the future dangerousness aggravating factor in making its case for death, defense counsel in Virginia should argue that the defendant retains his or her due process right to introduce evidence of parole ineligibility to rebut the Commonwealth's case for death on two bases: 1) a defendant's potential for future dangerousness is always an implicit aggravating factor when a death sentence is being considered, and 2) any evidence used to show vileness will inevitably impress future dangerousness upon the jury.

A. Future Dangerousness is Always a Factor in Sentencing

As community members themselves, jurors will be instinctively concerned that a defendant will be a threat to society. Even where the state asserts a reliance upon another predicate, such as vileness, a jury choosing between a prison sentence and a death sentence will invariably focus upon whether the defendant will continue to commit violent crimes if released from prison. Parole eligibility is a factor very much on the minds of capital juries, and it often forms the basis of their sentencing decisions.[22] As such, the possibility of parole from a life sentence— or at least the belief in such a possibility— operates as a silent aggravating circumstance in many capital sentencing proceedings, and often may be the decisive factor underlying a jury's decision to sentence a defendant to death.

Given that sentencing jurors will inevitably consider the propensity and ability of the defendant to commit future crimes regardless of whether the Commonwealth specifically asks them to find future dangerousness, defense counsel must vigorously argue that the defendant has a Fourteenth Amendment due process right to rebut such jury considerations of future dangerousness. Support for this argument is found in *Simmons* itself, where future dangerousness was **not** a statutory aggravating factor necessary to establish death eligibility but the Court found that it **became** an issue through the remarks of the prosecutor. Thus, the direct command of *Simmons* is that information regarding parole should be allowed whenever future danger is **an issue**, not only when it is formally relied upon as an aggravating factor.[23]

B. Vileness and Future Dangerousness Predicates are Inextricably Interwoven

In construing Virginia Code Section 19.2-264.4(C),[24] the Supreme Court of Virginia has recognized that the future dangerousness and

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[13] *Id.* at 157.

[14] *Id.* at 158, 160.

[15] *Id.* at 160.

[16] *Simmons,* 512 U.S. at 156.

[17] 430 U.S. 349 (1977) (invalidating a death sentence where the defendant was sentenced to death on the basis of a presentence report which was not made available to him and which he therefore could not rebut, and explaining that sending a man to his death "on the basis of information which he had no opportunity to deny or explain" violated fundamental notions of due process).

[18] 476 U.S. 1 (1986) (invalidating a death sentence where the trial court refused to admit evidence of the defendant's good behavior in prison during the penalty phase, and explaining that where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, elemental due process principles operate to require admission of the defendant's relevant evidence in rebuttal).

[19] *Simmons,* 512 U.S. at 164-66.

[20] *See Mickens v. Commonwealth,* 249 Va. 423, 425, 457 S.E.2d 9, 10 (1995); *Ramdass v. Commonwealth,* 248 Va. 518, 520, 450 S.E.2d 360, 361 (1994); *Wright v. Commonwealth,* 248 Va. 485, 487, 450 S.E.2d 361, 362 (1994). Although the offenses in *Mickens, Ramdass* and *Wright* were committed prior to January 1, 1995, the court acknowledged that a *Simmons* instruction is mandated where the defendant is parole ineligible and where future dangerousness is an issue in sentencing.

[21] Significantly, unlike the Virginia sentencing scheme, "future dangerousness" is not a statutory aggravating factor in South Carolina. In *Simmons,* the prosecutor made only generalized arguments about Simmons' future dangerousness; he did not explicitly argue to the jury that Simmons would kill again if they did not give him the death penalty.

[22] *See supra* notes 5-9 and accompanying text.

[23] Thus, *Simmons* is arguably applicable in any case where the prosecution presents evidence of the defendant's past crimes, even if the Commonwealth has not chosen to rely on future dangerousness as an aggravating factor.

[24] Va. Code § 19.2-264.4(C) provides that "[t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat

vileness predicates are inextricably interwoven by concluding that evidence which is used to show vileness may also be relied upon in finding future dangerousness. In *Edmonds v. Commonwealth*,[25] for example, the Supreme Court of Virginia stated that, in determining future dangerousness, the factfinder may rely upon "the circumstances surrounding the commission of the offense" and the "heinousness of the crime."[26] Invariably, these are the same facts used to show vileness.

In addition to permitting the jury to consider the circumstances surrounding the crime along with other evidence in finding future dangerousness, the Supreme Court of Virginia has gone one step further, holding that a finding of future dangerousness may be based **solely** upon the circumstances surrounding the commission of the crime. In *Roach v. Commonwealth*,[27] for example, the court upheld a death sentence after striking the vileness predicate for insufficient evidence. In so doing, the court emphasized that the facts and circumstances surrounding the murder alone may be sufficient to support a finding of future dangerousness, even when those same facts are insufficient to support a finding of vileness.[28]

Thus, the Commonwealth may rely upon "vileness" evidence to convince the jury that the defendant will be dangerous, because, as applied by the Supreme Court of Virginia, the future dangerousness aggravator explicitly has a vileness component. Given such precedent, defense counsel should argue that the defendant retains his or her Fourteenth Amendment due process right to rebut the Commonwealth's case for death— and thereby has the right to present evidence of his or her parole ineligibility— even if the Commonwealth chooses only to present evidence related to vileness, because the evidence used to show vileness will inevitably impress future dangerousness upon the jury. After all, how can a jury, which is asked to judge whether a defendant who acted with "depravity of mind" in a manner that was "outrageously vile, horrible or inhuman," be expected to disregard whether such a person would pose a future threat?

IV. Eighth Amendment Right to Introduce Mitigating Evidence Includes Evidence of Parole Ineligibility

In *Jurek v. Texas*,[29] the United States Supreme Court held that in order to comport with the individualized sentencing determination as required by the Eighth and Fourteenth Amendments,[30] "[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, **but also why it should not be imposed.**"[31] In *Lockett v. Ohio*,[32] the Court took its holding in *Jurek* a step further, establishing that a defendant's right to present mitigating evidence in the penalty phase is guaranteed by the Eighth Amendment.[33] In an oft-quoted passage, the *Lockett* Court stated that

> the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[34]

Lockett and its progeny explicitly prohibit states from "limiting the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty."[35] Under *Lockett*, then, a state statutory scheme must allow the sentencer to hear, consider, and give full effect to all relevant mitigating evidence, a mandate which is satisfied by the language of Virginia Code Section 19.2-264.4(B)[36] as well as the cases interpreting this statute.[37]

The only limitation imposed by the Supreme Court on mitigating evidence is that it not be "[irrelevant] evidence concerning other persons, crimes, and events [that are] completely distinct."[38] This limitation does not prohibit parole ineligibility evidence because such evidence **is** relevant under *Lockett*. First, in its determination of the appropriate **penalty**, a jury would be aided by information which accurately de-

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to society, or that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim."

[25] 229 Va. 303, 329 S.E.2d 807, *cert denied*, 475 U.S. 975 (1985).

[26] *Edmonds*, 229 Va. at 312, 329 S.E.2d at 813. *See also Royal v. Commonwealth*, 250 Va. 110, 458 S.E.2d 575 (1995) (holding that the circumstances of the crime may appropriately be considered when determining whether the statutory predicate of future dangerousness exists); *DeLong v. Commonwealth*, 234 Va. 357, 371, 362 S.E.2d 669, 677 (1987) (holding that "[i]n deciding whether a defendant constitutes a future danger to society, a jury is permitted to consider his prior history and, in addition or in the alternative, the circumstances surrounding the commission of the offense"); *Frye v. Commonwealth*, 231 Va. 370, 345 S.E.2d 267 (1986) (holding that circumstances of the crime and defendant's lack of remorse are proper factors to be considered on the issue of the probability that defendant will constitute a continuing serious threat to society).

[27] 251 Va. 324, 468 S.E.2d 98, *cert. denied*, 117 S.Ct. 365 (1996).

[28] 251 Va. at 348, 468 S.E.2d at 112. *See also Murphy v. Commonwealth*, 246 Va. 136, 431 S.E.2d 48 (1993) (permitting the jury to find future dangerousness from the circumstances surrounding the offense rather than the defendant's history).

[29] 428 U.S. 262 (1976).

[30] *See Woodson v. North Carolina*, 428 U.S. 280 (1976).

[31] *Jurek*, 428 U.S. at 271.

[32] 438 U.S. 586 (1978).

[33] *Lockett*, 438 U.S. at 604.

[34] 438 U.S. at 604 (emphasis in original).

[35] *McClesky v. Kemp*, 481 U.S. 279, 306 (1987). *See also Penry v. Lynaugh*, 492 U.S. 302 (1989) (vacating a death sentence when the jury was not instructed that it could give effect to all mitigating circumstances, including nonstatutory evidence of defendant's mental retardation and abused childhood); *Hitchcock v. Dugger*, 481 U.S. 393 (1987) (holding that exclusion of evidence of defendant's family background and capacity for rehabilitation was unconstitutional); *Skipper v. Oklahoma*, 476 U.S. 1 (1986) (holding that exclusion of evidence regarding defendant's good behavior while incarcerated after arrest deprived defendant of his right to place relevant evidence in mitigation of punishment before the sentencer); *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (reversing death sentence where the sentencing judge refused to consider nonstatutory mitigating evidence of defendant's emotional disturbance, turbulent family history and beatings by a harsh father).

[36] Va. Code Ann. § 19.2-264.4(B) provides, in relevant part "[e]vidence which may be admissible . . . may include the circumstances surrounding the offense, the history and background of the defendant, and **any other facts in mitigation of the offense.** Facts in mitigation may include, **but shall not be limited to,** the following: [defendant has no significant criminal history; capital offense was committed while defendant under extreme mental disturbance/distress; victim was a participant in/consented to the defendant's conduct; insanity of the defendant at time of offense; age of defendant; or mental retardation of defendant]." (emphasis added).

[37] *See, e.g., Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985) (holding that although section 264.4(B) lists five nonexclusive mitigating circumstances, the defense is permitted to introduce any evidence relevant to the penalty decision, including the circumstances surrounding the offense, the history and background of the defendant, and other facts in mitigation of the offense).

[38] *Lockett*, 438 U.S. at 604.

scribes the legal and practical effects of a life sentence, thereby making the existence of an appropriate alternative sentence a relevant mitigating factor. Capital juries have often evidenced their desire for accurate information about parole eligibility by interrupting their sentencing deliberations to inquire of the judge what a "life" sentence really means.[39]

Second, the parole eligibility of a capital defendant is undoubtedly a relevant mitigating factor relating to the defendant's **offense**. A life sentence without the possibility of parole is a severe and adequate punishment for the defendant's offense, but the jury may not render a life sentence unless it knows that the defendant is never eligible for parole. Furthermore, such evidence is relevant because it counters common juror misconceptions concerning the length of life imprisonment.[40]

Third, evidence of parole ineligibility is relevant because it mitigates a death sentence by providing affirmative evidence that the defendant does not pose a **future threat** to society. In *Skipper v. South Carolina*,[41] the United States Supreme Court explicitly recognized that evidence of a defendant's lack of future dangerousness qualifies as mitigation in the penalty phase of a trial.[42] Because incarceration substantially reduces a defendant's future dangerousness to society, such evidence must be considered as mitigating evidence which may not be excluded from the sentencer's consideration.[43]

Thus far, no court has found parole ineligibility to be irrelevant as mitigating evidence under *Lockett*. Rather, the courts that have applied *Lockett* to exclude evidence as irrelevant to "any aspect of defendant's character or record" or to the "circumstances of the offense" have excluded the following types of evidence: the effect of a defendant's incarceration upon relatives;[44] testimony regarding defendant's dyslexia;[45] testimony by the victim's sister that she did not wish the jury to impose the death penalty;[46] evidence of a plea bargain and sentencing agreement between the State and a codefendant;[47] and evidence that a codefendant was ineligible for the death penalty.[48] Thus far, the courts have refused to admit evidence of parole eligibility under *Simmons* only in cases where the defendant is not technically **in**eligible for parole.[49]

On the other hand, no court has explicitly held that evidence of parole ineligibility is constitutionally relevant mitigating evidence under the principles of *Lockett*. In other words, no court has taken the next step after *Simmons* to **hold** that parole ineligibility evidence is relevant mitigating evidence when the prosecution chooses **not** to rely on or to raise future dangerousness. However, in a somewhat obscure footnote in *Turner v. Williams*,[50] the Court of Appeals for the Fourth Circuit stated that

> The Supreme Court . . . has made clear that a sentencer may not be precluded from considering, and therefore basing a life sentence on, any mitigating evidence— **even when there is no direct relationship between that evidence and the established aggravating factor(s).**[51]

Although the evidence at issue in *Turner* had nothing to do with parole (in)eligibility, defense counsel in Virginia should employ the *Turner* footnote to argue that parole ineligibility evidence constitutes relevant mitigating evidence under *Lockett*, regardless of whether there is a direct relationship between that evidence and the established aggravating factor— in this instance, vileness.

Thus, even when the Commonwealth does not purport to rely upon future dangerousness as an aggravating factor, defense counsel should argue that the defendant has a right to introduce evidence of parole ineligibility as a constitutionally relevant mitigating factor pursuant to the principles of *Lockett*, its progeny, the Fourth Circuit's interpretation of *Lockett*, and the language and interpretation of Virginia Code Section 19.2-264.4(B).

V. Eighth Amendment Requirement of Heightened Reliability Necessitates the Introduction of Parole Ineligibility Evidence

Prior to 1972, capital sentencers were allowed unbridled discretion to impose the death penalty once the defendant's guilt had been established.[52] However, because such discretion often resulted in inconsistent and passion-based sentences,[53] the Supreme Court held in *Furman v. Georgia*[54] that a sentencer could not impose the death penalty under procedures creating a substantial risk of arbitrary and capricious action. In *Gregg v. Georgia*,[55] the first death penalty decision after *Furman*, Justice Stewart expanded upon such principles, stating that "**accurate sentencing information is an indispensable prerequisite** to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision."[56]

Recognizing the irrevocability of the death penalty and the arbitrariness with which unguided sentencers might impose it, the Supreme Court has construed the Eighth Amendment to require a "heightened standard 'for reliability in the determination that death is the appropriate punishment in a specific case.'"[57] In nearly every case of the post-*Furman* era, the Court has stressed the need for reliability in sentencing,[58] emphasiz-

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[39] *See supra* notes 7-9 and accompanying text.

[40] *See supra* notes 5-6 and accompanying text.

[41] 476 U.S. 1 (1985).

[42] *Skipper*, 476 U.S. at 5.

[43] Such an argument is supported by the language of *Simmons* itself, where, after citing to *Lockett*, the Court stated, "In assessing future dangerousness, the actual duration of the defendant's prison sentence is **indisputably relevant**. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant's future nondangerousness to the public than the fact that he will never be released on parole." *Simmons*, 512 U.S. at 163-64 (emphasis added).

[44] *Coppola v. Commonwealth*, 220 Va. 243, 253, 257 S.E.2d 797, 804 (1979), *cert. denied*, 444 U.S. 1103 (1980).

[45] *Madden v. Collins*, 18 F.3d 304, 308 (5th Cir. 1994), *cert. denied*, 115 S. Ct. 1114 (1995).

[46] *Robison v. Maynard*, 943 F.2d 1216, 1217-18 (10th Cir.), *cert. denied*, 502 U.S. 970 (1991).

[47] *State v. Irwin*, 282 S.E.2d 439, 447 (N.C. 1981).

[48] *State v. Bond*, 478 S.E.2d 163, 180-81 (N.C. 1996).

[49] *See, e.g., Allridge v. Scott*, 41 F.3d 213 (5th Cir. 1994).

[50] 35 F.3d 872 (4th Cir. 1994).

[51] *Turner*, 35 F.3d at 903, n. 25 (citing *Hitchcock v. Dugger*, *Skipper v. South Carolina*, *Eddings v. Oklahoma* and *Lockett v. Ohio*) (emphasis added).

[52] Lane, *"Is There Life Without Parole?": A Capital Defendant's Right to a Meaningful Alternative Sentence*, 26 Loy. L.A. L. Rev. 327, 327 (1993).

[53] *Id.*

[54] 408 U.S. 238 (1972).

[55] 428 U.S. 153 (1976).

[56] *Gregg*, 428 U.S. at 190 (emphasis added).

[57] *Simmons*, 512 U.S. at 172 (Souter, J., concurring) (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) ("Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.")

[58] *See, e.g., Maynard v. Cartwright*, 486 U.S. 356 (1988) (holding that a death sentence based upon the jury's finding that a murder was "especially heinous, atrocious, or cruel" cannot stand where the trial court failed to guide the jurors in their interpretation of such words); *Mills v. Maryland*, 486 U.S. 367 (1988) (holding that a death sentence must

ing the importance of channeling the sentencer's discretion so as to minimize the "risk that 'the death penalty [may have been] meted out arbitrarily or capriciously' or through 'whim . . . or mistake.'"[59] Based upon such principles, defense counsel in Virginia should argue that a defendant has an Eighth Amendment right to introduce evidence of his or her parole ineligibility— regardless of whether the Commonwealth argues future dangerousness— in order to minimize the risk that the death penalty is imposed on the basis of juror misconceptions about parole law.

In concurring with the plurality's decision in *Simmons* that the defendant was entitled to present evidence of his or her parole ineligibility, Justice Souter wrote separately to emphasize his belief that such an outcome was also mandated by the Eighth Amendment because it requires a heightened standard of reliability in capital cases. As part of this heightened standard, jurors must fully comprehend their sentencing options. However, as recognized by the plurality in *Simmons*, most juries lack accurate information about the precise meaning of a sentence of life imprisonment, and many surveys support the notion that there is a reasonable likelihood of juror confusion about the meaning of a "life" sentence.[60] Most importantly, the studies demonstrate that potential jurors often believe that a defendant sentenced to life imprisonment will be in prison for a much shorter period of time than is actually the case.[61] Furthermore, the studies reveal that parole eligibility and the likely period of incarceration are key factors for jurors in determining a sentence.[62]

The Supreme Court has emphasized that reliability is a requirement which compels the court to err on the side of giving the jury more information rather than less.[63] Furthermore, the requirement of reliability in sentencing has provided the foundation upon which the Court has structured the right to introduce all relevant evidence in mitigation.[64] In order to satisfy the constitutional mandate of reliability in the capital sentencing decision, defense counsel should therefore argue that the defendant has an Eighth Amendment right to introduce evidence of his or her parole ineligibility to the jury— regardless of whether the Commonwealth argues future dangerousness as a predicate to the death sentence. Allowing jurors to operate under their misconceptions and misinformation on parole in assessing the appropriate punishment of life or death offers no reliability in sentencing and as such is in violation of the Eighth Amendment.

VI. Conclusion

The Virginia legislature abolished parole for those convicted of capital murder two years ago. However, when defense counsel does not seek the introduction of parole ineligibility evidence or an instruction regarding parole ineligibility, and when the Commonwealth does not argue future dangerousness, Virginia judges continue to instruct sentencing juries that their choice is between "life" and "death," not between "life without the possibility of parole" and "death." Given the probability that most potential Virginia jurors continue to labor under the misconception that a life sentence does not mean "life" imprisonment, it is imperative that defense counsel insist upon the introduction of parole ineligibility evidence in the sentencing phase of any capital trial, regardless of which aggravating factor(s) are argued by the Commonwealth. Given the common sense emphasis that jurors place upon the length of the defendant's probable incarceration, any evidence that the defendant will never be released from prison could, quite literally, mean the difference between a life sentence and a death sentence for the defendant.

be vacated if the jurors erroneously believed that, in order to give a mitigating factor any weight, they had to agree unanimously on the existence of the factor); *Beck v. Alabama*, 447 U.S. 625 (1980) (holding that a death sentence cannot stand if the jury was misled to believe that it had no alternative but to convict the defendant of capital murder although the evidence might have supported a conviction for the lesser included offense of felony-murder).

[59] *Caldwell v. Mississippi*, 472 U.S. 320, 343 (1985) (O'Connor, J., concurring) (quoting *California v. Ramos*, 463 U.S. 992, 999 (1983)).

[60] *Simmons*, 512 U.S. at 169, 170. *See supra* notes 5-7 and accompanying text.

[61] *See supra* notes 5-6 and accompanying text.

[62] *Id.*

[63] *California v. Ramos*, 463 U.S. 992, 1001 (1983).

[64] *See, e.g., Lockett*, 438 U.S. at 604-05. In holding that the Eighth and Fourteenth Amendments require that the sentencer be allowed to consider all relevant mitigating evidence, the Court reviewed the holdings in *Furman* and *Woodson*, stating "[w]e are satisfied that this qualitative difference between death and other penalties calls for a greater degree of reliability when the death sentence is imposed." *Id.* at 604.

RESURRECTING THE CONFRONTATION CLAUSE IN VIRGINIA

BY: JOSEPH D. PLATANIA

I. Introduction

Frequently, in capital murder trials, the Commonwealth attempts to introduce codefendant's statements that inculpate the defendant as the triggerman. Virginia trial courts sometimes find this evidence admissible under the against interest exception to the hearsay rule, arguably violating the defendant's Sixth Amendment rights of confrontation and cross-examination. This article examines what the Confrontation Clause of the Sixth Amendment provides, how it is affected by hearsay exceptions, and where its future lies as a constitutional doctrine. Although courts do not necessarily apply the language of the Confrontation Clause literally, it still affords significant protections to defendants who know how to utilize it properly.

II. The Confrontation Clause: What It Is

The Sixth Amendment to the United States Constitution provides that "[i]n all criminal prosecutions, the accused shall . . . be confronted