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A MODEST PROPOSAL: REQUIRING PROOF BEYOND A REASONABLE DOUBT FOR UNADJUDICATED ACTS OFFERED TO PROVE FUTURE DANGEROUSNESS

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dant's Fourteenth Amendment Due Process[65] rights for the trial court to keep from the jury knowledge of defendant's parole ineligibility. Watkins sought to extend the *Simmons* holding to his own situation, where a life sentence carried the possibility of parole after twenty years.[66] The court of appeals did not reach the substance of Watkins' assertion, however, because in *O'Dell v. Netherland*,[67] the United States Supreme Court held that Simmons was a new rule under *Teague v. Lane*.[68] Therefore, subject to narrow exceptions which did not apply to Watkins' case, *Simmons* could not be retroactively applied. The court of appeals observed that Watkins' conviction became final in 1989, five years before *Simmons*, and thus that *Simmons* did not apply to Watkins' case.[69] The United States Supreme Court has made it clear that the *Simmons* rule was a new rule with respect to the legal landscape of 1988 (and presumably prior to that), and therefore, that all convictions which became final prior to 1989 are not subject to *Simmons*. Although not explicitly stated in *O'Dell*, it is unlikely that the Court would find the *Simmons* rule to be an "old" rule at any time before the decision of *Simmons* itself, in 1994.

Summary and analysis by:
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[65] *See* note 25, *supra*.

[66] For a discussion of jury misconceptions regarding the meaning of a life sentence, see Jenio, *"Life"=Life: Correcting Juror Misconceptions*, Cap. Def. J., Vol. 10, No. 1, p. 40. (1997).

[67] 117 S.Ct. 1969 (1997). See Case Summary of *O'Dell*, Cap. Def. J., Vol. 10, No. 1, p. 4 (1997).

[68] 489 U.S. 288 (1989).

[69] *Watkins v. Angelone*, No. 97-9, 1998 WL 2861, at *11 (4th Cir. Jan. 7, 1998) (citing O'Dell, 117 S.Ct at 1973).

A MODEST PROPOSAL: REQUIRING PROOF BEYOND A REASONABLE DOUBT FOR UNADJUDICATED ACTS OFFERED TO PROVE FUTURE DANGEROUSNESS

BY: TOMMY BARRETT

I. Introduction

At the sentencing phase of a capital murder trial, the Virginia statutory scheme requires the Commonwealth to prove beyond a reasonable doubt at least one of two statutory aggravating factors.[1] In proving the future dangerousness aggravator, the Virginia statute permits the Commonwealth to introduce, and the jury or court to consider, evidence of "the history and background of the defendant."[2] This language has been interpreted to include evidence of "unadjudicated acts," i.e. criminal acts allegedly committed by the defendant for which the defendant was never tried or possibly even charged.[3] Unadjudicated acts, to be admissible, need only demonstrate a probability that the defendant would commit future criminal acts of violence that would constitute a future danger to society.

Unlike previous journal articles that have discussed the use of unadjudicated acts in capital sentencing,[4] this one focuses solely on the Due Process requirement of heightened reliability in capital sentencing. The Supreme Court has recognized two principles, individualized sentencing and heightened reliability, as constitutionally necessary for any capital sentencing scheme. The Virginia capital sentencing scheme embraces the principle of individualized sentencing by permitting the jury or court to consider all relevant evidence, including unadjudicated acts of violence allegedly committed by the defendant. The Virginia scheme has, however, neglected the constitutional requirement of heightened reliability. Neither the Virginia capital sentencing statute nor the Supreme Court of Virginia requires the sentencer to find that the defendant in fact committed the unadjudicated acts of violence by any standard of proof. The

[1] Va. Code Ann. § 19.2-264.2 (Michie 1995). This section permits the death penalty to be imposed if Commonwealth proves that "there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society"- what is commonly referred to as "future dangerousness" aggravator. Alternatively, the death penalty may be imposed if the Commonwealth proves that the defendant's conduct in committing the instant offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim"-what is commonly referred to as the "vileness" aggravator. Virginia Code Section 19.2-264.4(C) requires the Commonwealth to prove either or both aggravators beyond a reasonable doubt.

[2] Va. Code Ann. § 19.2-264.4(B) (Michie 1995). See also Va. Code Ann. § 19.2- 264.4(C), stating that a finding of future dangerousness may be based on "evidence of the prior history of the defendant."

[3] *Peterson v. Commonwealth*, 225 Va. 289, 298, 302 S.E.2d 520, 526 (1983).

[4] *See* Fenn, *Anything Someone Else Says Can and Will be Used Against You in a Court of Law: The Use of Unadjudicated Acts in Capital Sentencing*, Cap. Def. Dig., Vol. 5, No. 2, p. 31 (1993) (considering generally the use of unadjudicated acts in capital sentencing and suggesting trial strategies to minimize their effect); McIndoe, *Is A Standard of Proof Required for the Evaluation of Unadjudicated Acts in Capital Sentencing?*, Cap. Def. J., Vol. 9, No. 2, p. 52 (1997) (arguing that a recent Supreme Court case implicitly requires a capital jury to find by a preponderance of the evidence that the defendant committed the unadjudicated acts before relying upon such evidence in assessing future dangerousness).

Due Process Clause requirement of heightened reliability mandates that the sentencer must first find beyond a reasonable doubt that the defendant committed the alleged unadjudicated acts before it may consider those acts in determining future dangerousness.

II. Why Unadjudicated Acts Require Special Consideration

In determining the defendant's future dangerousness, evidence of unadjudicated acts of violence are highly relevant. Due to their high degree of relevancy, coupled with both the unreliability of an unadjudicated act and the often suspect sources from which such evidence originates, unadjudicated acts necessitate a more cautious and focused consideration than other types of evidence.

Evidence of future dangerousness comes in three general forms: expert opinion testimony, the defendant's record of convictions for violent crimes, and evidence of unadjudicated acts of violence. Unadjudicated acts of violence, like the defendant's record of convictions for violent crimes, are highly relevant to the future dangerousness inquiry. The language of the future dangerousness aggravator requires the jury to determine whether the defendant "would commit criminal acts of violence that would constitute a continuing serious threat of violence." The jury is not asked to determine whether the defendant poses some type of abstract future danger, but rather whether the defendant would commit criminal acts that would constitute a future danger. It is hard to imagine any evidence more relevant to this determination than whether the defendant has committed criminal acts of violence in the past.

Likewise, it is hard to imagine that any type of inaccurate information could be more unfairly prejudicial to the defendant than inaccurate information about previous acts of violence. Unlike the defendant's record of criminal convictions, evidence of unadjudicated acts does not carry any degree of reliability. The defendant's criminal convictions have been tested by an adversarial trial and proven beyond a reasonable doubt; unadjudicated acts allegedly committed by the defendant are untested and have been proven by, at most, a preponderance and more often, by no standard whatsoever. Moreover, expert opinion testimony, about whether the defendant poses a future danger, often assumes that the defendant committed the prior unadjudicated acts of violence alleged by the Commonwealth. In short, inaccurate information that the defendant committed previous acts of violence is like a contagious disease; its harmful effects are not limited to the evidence itself but can spread and infect other evidence with which it comes into contact.

Another reason unadjudicated acts require greater scrutiny is that they lack the quantum of proof assured by a criminal adjudication. In a criminal trial each element of the crime charged must be proven beyond a reasonable doubt. It is not enough for the Commonwealth to produce accurate evidence. It also must produce a sufficient amount of evidence to convince the jury beyond a reasonable doubt that the defendant committed the crime charged. The Virginia capital sentencing scheme lacks a standard of proof by which the jury must find that an unadjudicated act occurred. Due to this lack of a standard of proof, a great danger exists that the jury's inquiry will devolve into asking whose testimony it believes more, the defendant or the Commonwealth's witness, rather than asking the pertinent questions- did the alleged unadjudicated act occur and did the defendant commit it?

When the jury's determination is reduced to a credibility contest between the Commonwealth's witness and the defendant about whether a particular unadjudicated act occurred, a tremendous amount of unreliability is injected into the jury's life or death decision. *Yeatts v. Commonwealth*[5] is an example of such a credibility contest, though by no means the only one, in which the evidence would likely be insufficient for a criminal conviction but is relied upon to impose the death penalty. There, Yeatts' sister-in-law claimed he raped her. A "friend" of Yeatts testified that Yeatts urged him to rape Yeatts' sister-in-law but that he refused. Yeatts claimed that this allegation was "beyond belief."[6] Nothing in the court's opinion suggests that there was any physical evidence that the sister-in-law had been raped or that Yeatts had raped her; the only evidence of the rape, apparently, was the testimony described above. The court, in a footnote, said simply that the question of the sister-in-law's credibility was one for the jury.[7]

Clearly, the defendant is at a severe disadvantage in this type of credibility contest. Unlike at the guilt phase where the defendant is presumed innocent, at a capital sentencing proceeding the defendant has little if any credibility remaining, having just been found guilty of at least a capital murder by the jury. It betrays common sense to suggest that this same jury can fairly and impartially judge this credibility contest. No matter how suspect the testimony of the Commonwealth's witness would be normally, such as that of a jailhouse snitch, the witness still has more credibility with the jury than the defendant. Thus the Commonwealth's witness should always win this credibility contest. But the mere fact that the Commonwealth's witness is judged to be more credible than the defendant, given the circumstances, does not provide any meaningful indication that the jury was convinced that the act occurred and that the defendant did it. In fact, without a standard of proof to focus and inform the jury's inquiry, nothing guarantees that the jury even considered the possibility that the act might

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[5] 242 Va. 121, 410 S.E.2d 254 (1991). For another example of the dangers of a credibility contest, see the testimony of Sylvester Joyner in *Gray v. Commonwealth*, 233 Va. 313, 356 S.E.2d 157 (1987). In Gray, Sylvester Joyner a fellow inmate of Gray's, claimed that Gray told him that he had killed a man in California. Gray denied killing a man in California and making such a statement to Joyner. Nothing in the court's opinion suggests that there was any evidence of who Gray supposedly killed in California, whether such a person existed, whether such a person was killed, or whether there was any evidence linking Gray to a murder in California. For a more recent example, see the Case Summary of *Eaton v. Angelone*, Cap. Def. J., this issue.

[6] *Yeatts*, 242 Va. at 139, 410 S.E.2d at 265.

[7] *Id.* at 141 n.9, 410 S.E.2d at 266 n.9.

not have occurred or that the defendant might not have committed it. In short, the Virginia capital sentencing scheme, by failing to require a standard of proof for unadjudicated acts, leaves the sentencer's determination of whether to impose death highly susceptible to inaccurate and insufficient information.

III. The Constitutional Requirements For Capital Sentencing

As one federal district court has stated, "the issue of unadjudicated criminal conduct lurks squarely at the intersection (read collision) of two powerful but competing principles of death penalty jurisprudence."[8] Those principles are the Eighth Amendment principle of individualized sentencing and the Fourteenth Amendment principle of heightened reliability. The Supreme Court, despite several petitions for certiorari and the urgings of two justices,[9] has never directly ruled on the constitutionality of admitting unadjudicated acts in a capital sentencing proceeding.[10] But, by returning to the foundations of the Court's modern death penalty jurisprudence, it is possible to discern the constitutionality of Virginia's practice of admitting evidence of unadjudicated acts without a corresponding standard of proof.

The Supreme Court's modern death penalty jurisprudence begins with *Furman v. Georgia.*[11] *Furman* held that the death penalty was being imposed and carried out in a manner that violated the Eighth and Fourteenth Amendments.[12] While two justices found the death penalty unconstitutional per se,[13] three others voted to reverse the convictions because the discretionary sentencing schemes before the court were "unguided by any legislatively defined standards."[14] Thus, *Furman* stands for the broad and vague proposition that the Eighth and Fourteenth Amendments require guided discretion.

The Court revisited the death penalty four years later in a series of five cases decided on July 2, 1976.[15] Furman's broad principle of guided discretion was broken into two separate constitutional principles. The two constitutional principles that emerged from those cases were the Eighth Amendment requirement of individualized sentencing and the Fourteenth Amendment requirement of heightened reliability. The following key passage from *Woodson v. North Carolina*[16] expresses both:

> While the prevailing practice of individualized sentencing determinations generally simply reflects enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment . . . requires consideration of the character and record of the individual offender and the circumstances of the particular offense as a constitutionally indispensable part of inflicting the penalty of death. This conclusion rests squarely on the predicate that the penalty of death is qualitatively different from a sentence of imprisonment, however long . . . Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.[17]

The statement that "the Eighth Amendment requires consideration of the character and record of the individual offender" expresses the constitutional principle of individualized sentencing. The Court's subsequent recognition that because death is different from any other punishment, "there is corresponding need for reliability" in the jury or court's determination "that death is the appropriate punishment," embodies the principle of heightened reliability. Arguably, *Woodson* holds that individualized sentencing is necessary to produce heightened reliability. Under this reading, the principles of individualized sentencing and heightened reliability are not competing principles but rather the mean to an end. There is indeed some validity to the notion that the more information a jury or court has about a defendant the more able it will be to make a reasoned determination about whether death is the appropriate punishment.

A closer reading of the above passage from *Woodson* demonstrates, however, that individualized sentencing and heightened reliability are two distinct, and often competing principles. In a key phrase, "[t]his conclusion," the Court refers to its conclusion that while individualized sentencing is usually only a matter of enlightened policy in a non-capital case, it is part of the constitutionally required process in a capital case. Thus, the principle of heightened reliability stands for the general proposition that extra process, which may be merely enlightened policy in a non-capital case, may be constitutionally required in a capital case.

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[8] *United States v. Walker,* 910 F. Supp. 837, 852 (N.D.N.Y. 1995).

[9] *Robertson v. California,* 493 U.S. 879, 879 (1989)(Marshall, J., joined by Brennan, J., dissenting from denial of certiorari); *Sharp v. Texas,* 488 U.S. 872, 872 (1988)(Marshall, J., joined by Brennan, J., dissenting from denial of certiorari); *Miranda v. California,* 486 U.S. 1038, 1038 (1987) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari); *Devier v. Kemp,* 484 U.S. 948, 948-49 (1987)(Marshall, J., joined by Brennan, J., dissenting from denial of certiorari); *Williams v. Lynaugh,* 484 U.S. 935, 935 (1987) (Marshall, J., joined by Brennan, J., dissenting from denial of certiorari).

[10] Steven Paul Smith, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials,* 93 COLUM. L. REV. 1249, 1250 (1993).

[11] 408 U.S. 238 (1972).

[12] *Furman,* 408 U.S. at 239-40.

[13] *Id.* at 305-06 (Brennan, J., concurring); at 370-71 (Marshall, J., concurring).

[14] *Lockett v. Ohio,* 438 U.S. 586, 599 (1978).

[15] *Gregg v. Georgia,* 428 U.S. 153 (1976); *Proffitt v. Florida,* 428 U.S. 242 (1976); *Jurek v. Texas,* 428 U.S. 262 (1976); *Woodson v. North Carolina,* 428 U.S. 280 (1976); *Roberts v. Louisiana,* 428 U.S. 325 (1976).

[16] 428 U.S. 280 (1976).

[17] *Woodson,* 428 U.S. at 304-05 (citations omitted).

Similarly, the Court's reference to individualized sentencing as "a constitutionally indispensable part" of inflicting the death penalty necessarily implies the existence of other constitutionally required parts of a capital sentencing proceeding. If individualized consideration was the only constitutional requirement there would be no need to limit it to being merely a "part" of the process. Implicitly then, there are other constitutionally indispensable parts of the sentencing process for imposing death.

Heightened reliability is, at the very least, another constitutionally required part of the capital sentencing process. In fact, the *Woodson* passage indicates that heightened reliability is the overarching constitutional requirement for capital sentencing. In the passage, it is the principle of heightened reliability that elevates individualized sentencing to the level of constitutional requirement. Regardless of whether heightened reliability is a constitutional principle of equal weight with individualized sentencing or is the overarching constitutional requirement, one thing is irrefutably true. It would be a severe misreading of *Woodson* to allow the principle of individualized sentencing to undermine the reliability of a jury's decision to impose the death penalty. Individualized sentencing was intended to increase reliability in the jury's life or death determination, not diminish it.

These two competing constitutional principles were also expressed in some of the other cases decided on July 2, 1976. *Jurek v. Texas*[18] enunciated the "all relevant evidence" doctrine. The Court stated, "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."[19] The all relevant evidence doctrine is simply a different formulation of the constitutional requirement of individualized "consideration of the character and record of the individual offender" as expressed in *Woodson*. The all relevant evidence doctrine is used interchangeably with the principle of individualized sentencing. *Jurek* arguably has additional significance in relation to the Virginia statutory scheme because the Texas and Virginia statutes use identical language to define future dangerousness. Not surprisingly, the Supreme Court of Virginia has cited *Jurek* as constitutional support for allowing the sentencer to consider unadjudicated acts in determining future dangerousness.[20]

While *Jurek* provided additional support for the principle of individualized sentencing, *Gregg v. Georgia*[21] provided similar support for heightened reliability. After first noting the importance of individualized sentencing, the Court in *Gregg* stated:

> If an experienced trial judge, who daily faces the difficult task of imposing sentences, has a vital need for accurate sentencing information about defendant and the crime he committed in order to be able to impose a rational sentence in a typical criminal case, then 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.[22]

This passage, when considered along with the above passage from *Woodson,* further develops and defines the principle of heightened reliability. Initially, the passage is another example of the principle of heightened reliability. Its essential message is that what is important in the normal criminal case, in this instance accurate sentencing information, is an indispensable prerequisite in a capital case. It is remarkably similar to the passage from *Woodson.* Both express the notion that the context of capital case elevates an enlightened practice or important need into a constitutionally indispensable part of imposing the death penalty.

But the passage from *Gregg* is more than a mere example of heightened reliability. More importantly, it casts the principle of heightened reliability in terms of the accuracy or quality of the evidence the jury considers. A comparison of the passage from *Woodson* with this one from *Gregg* establish the dual aspects of heightened reliability. In the former case, heightened reliability centered on the quantity of information; it demanded that the sentencer be given a more complete picture of the defendant than his or her criminal record. In the latter case, heightened reliability focused on the quality of the information; it deemed accurate sentencing information to be an indispensable part of inflicting death. What a comparison of these passages does not reveal, however, is how a conflict between the quantity and the quality of sentencing information is to be resolved. This is the precise dilemma presented by evidence of unadjudicated acts of violence allegedly committed by the defendant. Although the Court has yet to directly address the precise issue of unadjudicated conduct, it has, in at least one other capital case, considered and resolved a conflict between the quantity of evidence and quality of it.

In *Gardner v. Florida,*[23] the Court held that the defendant was denied due process when a death sentence was imposed in part on secret information in a pre-sentence report that he had no opportunity to deny or explain.[24] For two reasons *Gardner* is *significant* to the development of

[18] 428 U.S. 262 (1976).

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

[20] See e.g. *Watkins v. Commonwealth,* 229 Va. 469, 487, 331 S.E.2d 422, 436 (1985); *Beaver v. Commonwealth,* 232 Va. 521, 530, 352 S.E.2d 342, 347 (1987).

[21] 428 U.S. 153 (1976).

[22] *Gregg,* 428 at 190 (emphasis added).

[23] 430 U.S. 349 (1977).

[24] *Gardner,* 430 U.S. at 362.

the principle of heightened reliability beyond the precise issue presented in that case. First and foremost, the Court explicitly recognized what was implicit in the 1976 series of cases: the Due Process Clause applies to the sentencing process because death is fundamentally unlike any other punishment.[25] The Due Process Clause, thus explicitly became the constitutional foundation for the principle of heightened reliability.[26]

Secondly, *Gardner* provides an example of how the Court has treated a conflict between the quantity of information and the quality of it. In *Gardner,* the Court expressed concern about a sentencing process that allowed the quality and reliability of sentencing information to be trumped by an alleged need for a greater quantity of information. The Court stated:

> The availability of [information about a defendant's background or character], it is argued, provides the person who prepares the report with greater detail on which to base a sentencing recommendation and, in turn, provides the judge with a better basis for his sentencing decision. But consideration must be given to the quality, as well as quantity, of the sentencing information on which the sentencing judge may rely.[27]

The passage makes clear that quantity of information is not the sole standard for capital sentencing, but that quality of information must be taken into account as well. The Court continued and added further, that if the secret information of the defendant's character and background is the basis for a death sentence, "the interest in reliability plainly outweighs the State's interest in preserving the availability of comparable information in other cases."[28] In *Gardner*, the state had argued that disclosure of the evidence of a defendant's background or character might prevent some people from coming forward and thus impair the state's ability to present all relevant evidence. Despite that possibility, the Court essentially held that the all relevant evidence doctrine must yield to the need for reliability.

Though not controlling, the Court's reasoning in *Gardner* in resolving the conflict between the need for a more complete picture of the defendant and the need for an accurate picture of the defendant is persuasive on the issue of unadjudicated acts. The goal of capital sentencing is to have the sentencer make a reasoned determination. The sentencer, in determining whether the defendant would commit future criminal acts of violence, certainly needs a complete picture of the defendant's history of violence and non-violence to make a reasoned determination. And, it is unlikely that a defendant's mere record of convictions will provide a complete picture of the defendant. The need for a complete picture of the defendant, as *Gardner* demonstrates however, is not the only ingredient for a reasoned determination. The sentencer also needs an accurate picture of the defendant. Thus while it is important that a jury be able to consider evidence of unadjudicated acts, it is equally important to ensure that the jury be allowed to consider such acts only if the defendant actually committed them. Otherwise, though the sentencer will consider more evidence than the defendant's criminal record, the sentencer will by no means obtain a fuller and more accurate picture of the defendant.

Individualized sentencing and heightened reliability, despite sharing the same birthday and an encounter in *Gardner*, have for the most part been developed separately in subsequent cases. The two main cases invoking the principle of individualized sentencing are *Lockett v. Ohio*[29] and *Barefoot v. Estelle.*[30] In *Lockett*, the Court invalidated an Ohio statute that precluded the sentencer from considering "any aspect of the defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[31] In *Barefoot* the Court, uncomfortable with the defendant-preferred approach in *Lockett*,[32] made clear that the all relevant evidence doctrine applied with equal force to aggravating evidence.[33] As the Court put it, "[T]here is no doubt that the psychiatric testimony increased the likelihood that petitioner would be sentenced to death, but this fact does not make the evidence inadmissible, any more than it would with respect to other relevant evidence."[34] In short, individualized sentencing has developed into a broad principle that allows the jury to consider all relevant evidence and applies with equal force to mitigating and aggravating evidence.

The Supreme Court cases following *Gardner* have relied on the principle of heightened reliability to require or justify extra process. The cases have not, for the most part, talked about heightened reliability in terms of the accuracy or quality of the sentencing information as did cases like *Gregg* and *Gardner.* In *Beck v. Alabama*[35] the Court recognized that the heightened reliability principle

[25] *Id.* at 357-58.

[26] In *Woodson,* the Court held that the North Carolina death penalty scheme, because it lacked individualized sentencing and heightened reliability, violated the Eighth and Fourteenth Amendments. *Woodson,* 428 U.S. at 304-305. The previously cited passage from *Woodson* specifically rooted individualized sentencing in the Eighth Amendment. But the specific constitutional basis for the principle of heightened reliability was not explicit in *Woodson.* Not until *Gardner* did the Court make it unmistakably clear that heightened reliability was grounded in the Due Process Clause of the Fourteenth Amendment.

[27] Gardner, 430 U.S. at 359.

[28] *Id.*

[29] 438 U.S. 586 (1978)

[30] 463 U.S. 880 (1983).

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

[32] Smith, 93 COLUM. L. REV. at 1255.

[33] *Barefoot,* 463 U.S. at 897 (citing *Jurek*, 428 U.S. at 274-76).

[34] *Id.* at 905.

[35] 447 U.S. 625 (1980).

will invalidate "procedural rules that tended to diminish the reliability of the sentencing determination" in a capital case though not necessarily in a non-capital case.[36] In other cases, the Court has found that heightened reliability requires additional protections that may not be warranted in non-capital cases.[37] The principle of heightened reliability is thus concerned with both the reliability of the sentencing information as well as sentencing procedures (or lack of procedures) that make a sentencer's decision less reliable. Evidence of unadjudicated acts of violence, and the admission of such acts without a corresponding standard of proof, implicate both of these concerns.

In fact, passages from *Jurek* and *Gregg* suggest that these concerns are paramount when the sentencer is a jury and its decision is based on predicting the defendant's future dangerousness. In *Jurek* the defendant challenged the future dangerousness aggravator in the Texas sentencing scheme on the basis that predicting future behavior is impossible. The Court first conceded that predicting future behavior is difficult. But it then added that since trial courts predict future behavior on a daily basis, such as whether to grant bail or not, it is not impossible for a jury of twelve people to predict future behavior.[38] The Court either failed to recognize the different levels of experience in predicting future behavior between a trial court and a jury or it failed to consider the disparity sufficient to make future dangerousness an impermissible aggravator. More likely, it is the latter explanation in light of the previously cited passage from *Gregg*. In *Gregg*, the Court recognized that the difference in sentencing experience between a trial judge and a jury transformed accurate sentencing information into an "indispensable prerequisite to a reasoned determination of whether a defendant should live or die."[39] Read together, *Jurek* and *Gregg* demonstrate that while a jury's lack of experience in predicting future behavior does not make such a prediction impossible, its lack of experience is not irrelevant. The ultimate decision for which the jury is being asked to predict future behavior is, after all, not whether the defendant should be given bail; it is whether the defendant should be sentenced to death. Given all of these factors, i.e. the jury's lack of experience in predicting future behavior, the ultimate decision it must make, and the recognition in *Gregg* that the disparity in sentencing experience between a trial judge and jury makes accurate sentencing information indispensable, it follows that procedures for ensuring that the jury relies upon accurate and sufficient sentencing information are equally indispensable. A sentencing scheme, in order to be constitutional, must strike a balance between individualized sentencing and heightened reliability. As a federal district court recently observed:

> [I]t is Constitutionally essential to assure that the principle of heightened reliability serves as a meaningful limit to the admission of "all relevant evidence" in order to prevent the less stringent concept of relevance from predominating over the cardinal principle of reliability. This necessarily requires a balance to be struck between these two competing doctrines.[40]

The question then becomes, has Virginia, through its statutory scheme or courts struck a balance between these two competing Constitutional doctrines? Is any threshold test of reliability required before the jury is allowed to consider evidence of unadjudicated acts in determining future dangerousness? Are there any procedures in place to ensure that a capital jury considers accurate information only?

III. The Use of Unadjudicated Acts in Virginia

Virginia courts have done exactly what other courts warned against: they have consistently and repeatedly allowed the principle of individualized sentencing, or the "all relevant evidence" doctrine, to trample the principle of heightened reliability. Virginia Code Section 19.2-264.4 provides Virginia courts with the statutory authority to admit prior unadjudicated acts and the Supreme Court of Virginia has invoked *Jurek* to give this practice constitutional support. The Supreme Court of Virginia has responded to Due Process challenges to the practice of admitting evidence of unadjudicated acts without a corresponding standard of proof in one of three ways. None of these responses, however, have answered these challenges in any meaningful way.

The practice of admitting evidence of unadjudicated acts of violence to prove future dangerousness has both a statutory and, through Virginia case law, a constitutional basis. Under Virginia Code Section 19.2-264.4(B), "evidence may be presented as to any matter which the court deems relevant to sentence" and this includes the "history and background of the defendant" in determining future dangerousness.[41] In *Peterson v. Commonwealth*,[42] the Supreme

[36] *Beck*, 447 U.S. at 638 n.14.

[37] *See e.g., Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that the Due Process Clause requires that an indigent defendant be provided with the basic tools to marshal his defense.) Justice Burger's concurring opinion clearly reflects the heightened reliability principle where he states, "[i]n capital cases the finality of the sentence imposed warrants protections that may or may not be required in other cases. Nothing in the Court's opinion reaches non-capital cases." *Ake*, 470 U.S. at 87.

[38] *Jurek*, 428 U.S. at 274-76.

[39] *Gregg*, 428 U.S. at 190.

[40] *United States v. Beckford*, 964 FSupp. 993, 1000 (E.D. Va.. 1997)

[41] *See* Va. Code Ann. § 19.2-264.4(C), which states 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 ... that he would commit criminal acts of violence that would constitute a continuing serious threat to society," as further support for the admission of unadjudicated acts in the capital sentencing proceeding.

[42] 225 Va. 289, 302 S.E.2d 520 (1983).

Court of Virginia, interpreting code sections 19.2-264.4(B) and (C), held that in determining a defendant's propensity for violence, "it is clear that more than the mere police record of the defendant may be introduced."[43] Following *Peterson*, the court met one of its first lack of reliability challenges in *Poyner v. Commonwealth.*[44] In *Poyner,* the Commonwealth introduced the defendant's videotaped confession to five unadjudicated murders in the sentencing proceeding. Poyner argued that the evidence was irrelevant and unreliable.[45] The court answered Poyner's objection with the conclusory statement, "[h]ere, defendant's confession to five murders was highly reliable and wholly relevant to the issue of future dangerousness."[46]

In *Watkins v. Commonwealth,*[47] the court firmly established as a general principle what it had done in previous cases such as *Poyner.* The court stated, "we hold that evidence of prior unadjudicated criminal conduct, while generally not admissible in the guilt phase of capital-murder trial, may be used in the penalty phase to prove the defendant's propensity to commit criminal acts of violence in the future."[48] In addition to stating a general principle for the use of unadjudicated acts in capital sentencing, the court in Watkins also recognized, as support for its general principle, the all relevant evidence doctrine set forth in *Jurek.*[49] Thus, *Watkins* firmly established the principle in Virginia, that in determining future dangerousness, it is constitutionally essential that the jury consider all relevant evidence, which necessarily includes evidence of unadjudicated acts of violence.

The Supreme Court of Virginia has responded to challenges to the reliability of such evidence in several ways-none of which demonstrate any recognition or regard for the Fourteenth Amendment's heightened reliability requirement. The main response has been simply to avoid the issue. This avoidance technique was developed in two cases. In the first case, *Beaver v. Commonwealth,*[50] the defendant argued that evidence of unadjudicated criminal activity "was not reliable and thus should not have been considered in deciding whether" he presented a future danger to society.[51] The court responded that all relevant evidence should be admitted; that it had repeatedly and consistently relied on that principle in prior cases; that *Jurek* approved of this practice; and that it saw no reason to depart from prior cases.[52] The court concluded that the unadjudicated acts of violence "were relevant to the issue of future dangerousness."[53] In short, the court never directly responded to defendant's lack of reliability objection.

In the second case, *Stockton v. Commonwealth,*[54] the defendant raised several objections to the admission of unadjudicated acts testimony based on the Due Process Clause. Stockton argued that if unadjudicated acts of violence are admissible to prove future dangerousness, "Virginia's capital sentencing scheme is unconstitutional because it fails to require proof beyond a reasonable doubt of the commission of the unadjudicated crimes and thus permits the jury to consider unreliable and prejudicial evidence."[55] The court responded: "in *Beaver v. Commonwealth* ... we rejected a contention that evidence of unadjudicated criminal activity is 'not reliable.'"[56] Of course, *Beaver* did not reject a contention that such evidence is unreliable. At best, *Beaver* held that the specific evidence of unadjudicated acts in that case raised no concerns about its reliability. At worst, *Beaver* held that the reliability of such evidence is an irrelevant consideration.

In addition, *Beaver* is not controlling since Beaver did not raise the Due Process objection raised by Stockton. Moreover, unless *Beaver* stands for the broad proposition that reliability of evidence of unadjudicated acts is always an irrelevant consideration, it is difficult to see how the determination of the reliability of the specific evidence offered in *Beaver* is controlling on the determination of the reliability of the specific evidence offered in *Stockton.* Rather, the determination of the reliability of evidence of unadjudicated acts would seem more appropriately to require a case by case inquiry. The court in *Stockton,* however, seemed to suggest that *Beaver* answered the question of reliability once and for all. Regardless of how one interprets *Beaver,* together *Beaver* and *Stockton* established an automatic response to lack of reliability objections without ever actually considering them. In at least three cases following *Stockton*, the court has rejected the due process argument by simply citing *Stockton*[57] and never addressing the claim.

The court has also applied a "presumption of reliability" to evidence of unadjudicated acts as another way of combating the defendant's lack of reliability objection. This "presumption of reliability" shifts to the defendant the burden of proving that the evidence is unreliable. In *Pruett v. Thompson,*[58] for example, a federal district court reviewed Pruett's claims that the evidence of an unadjudicated murder should not have been admitted. The court first noted that such evidence is relevant to future dangerousness. It then stated, "[t]he result may of course differ if the evidence presented is plainly unreliable, ... but there is no indication in the record that any of the evidence Pruett complains about was so unreliable."[59] In other words, unadjudicated

[43] *Peterson,* 225 Va. at 298, 302 S.E.2d at 526.
[44] 229 Va. 401, 329 S.E.2d 815 (1985).
[45] *Poyner,* 229 Va. at 418, 329 S.E.2d at 827.
[46] *Id.* at 418, 302 S.E.2d at 828.
[47] 229 Va. 469, 331 S.E.2d 422 (1985)
[48] *Watkins,* 229 Va. at 488, 331 S.E.2d at 436.
[49] *Id.* at 487, 331 S.E.2d at 436.
[50] 232 Va. 521, 352 S.E.2d 342 (1987).
[51] *Beaver,* 232 Va. at 528, 352 S.E.2d at 346.
[52] *Id.* at 529-30, 352 S.E.2d at 347.
[53] *Id.* at 530, 352 S.E.2d at 347.
[54] 241 Va. 192, 402 S.E.2d 196 (1991).
[55] *Stockton,* 241 Va. at 210, 402 S.E.2d at 206.
[56] *Id.* at 210, 402 S.E.2d at 206 (citations omitted).
[57] *See Satcher v. Commonwealth,* 244 Va. 220, 228, 421 S.E.2d 821, 826 (1993); *Ramdass v. Commonwealth,* 246 Va. 413, 418-19, 437 S.E.2d 566, 569 (1993); *Swann v. Commonwealth,* 247 Va. 222, 228, 441 S.E.2d 195, 200 (1994).
[58] 771 FSupp. 1428 (E.D.Va. 1991).
[59] *Pruett,* 771 FSupp. at 1443.

acts are presumptively reliable and the burden is on the defendant to show otherwise.

Although this observation was made by a federal district court rather than the Supreme Court of Virginia, similar "presumption of reliability" sentiments are present in cases decided by the Supreme Court of Virginia. In *Gray v. Commonwealth,*[60] for example, after recognizing that the jury accredited the testimony of the Commonwealth's witness over the defendant's, the court stated, "[w]e cannot say Tucker's testimony was incredible as a matter of law."[61] Likewise in *O'Dell v. Commonwealth,*[62] O'Dell objected to the admission of evidence regarding an attempted rape in Florida. He claimed that the charges had been dismissed on the merits, for lack of evidence. The Supreme Court of Virginia reviewed the record and found no evidence that the charges were dismissed on the merits.[63] The court, at no point in its opinion, indicated or explained why the attempted rape charge was dismissed. Yet, since the defendant was unable to prove that it was dismissed on the merits, the evidence of the attempted rape charge was admitted. This presumption of reliability of unadjudicated acts contradicts the Due Process standards of heightened reliability in capital cases. Heightened reliability is not met by presumptions.[64]

The final way that the Supreme Court of Virginia has dealt with claims of lack of reliability of unadjudicated acts is the "cross-examination cure." The court's approach is that all relevant evidence should be admitted so long as the defendant can cross-examine the adverse witnesses. The reasoning presumes cross-examination ensures reliability. This approach is illustrated in several cases. One example is *Yeatts v. Commonwealth* given above. Another example is the case of *Gray v. Commonwealth.* There, the defendant denied any involvement in two unadjudicated murders and argued that the testimony of the Commonwealth's witness lacked reliability. The court responded: "[d]etermining the credibility of witnesses is peculiarly within the province of the jury... Gray was connected to the Sorrell murders by the testimony of Melvin Tucker. The jury heard and observed both Tucker and Gray and apparently chose to believe Tucker."[65] These cases illustrate why the "cross-examination cure" is a disingenuous response and why a standard of proof is needed. The "cross-examination cure" rests on the notion that so long as cross-examination is permitted the jury should be allowed to judge the credibility of each witness thus ensuring the reliability of the evidence. At this stage in the defendant's trial, however, the jury believes beyond a reasonable doubt that the defendant committed a capital murder. It is fair to assume that the defendant's credibility is not on par with other witnesses. Moreover, without a standard of proof the jury is without any guidance as to how convinced it must be that the defendant committed the unadjudicated acts. Without any guidance, the jury's determination boils down to who it believes, the defendant or the Commonwealth's witness; the jury's inquiry should be, did the unadjudicated act occur and did the defendant commit it. When the jury's determination devolves into simply who it believes, given the defendant's likely complete lack of credibility, the jury's decision is vulnerable to inaccurate information and untruthful testimony. This type of unguided capital sentencing process is a far cry from the constitutional requirement of heightened reliability.

IV. Beyond A Reasonable Doubt Standard of Proof

To achieve the constitutionally required balance between "individualized sentencing" and "heightened reliability" several federal courts have maintained that "unadjudicated conduct may be presented to the jury only if the Court has determined that it meets the threshold test of reliability."[66] A standard of proof satisfies this requirement and serves another important function. A consideration of the reasons behind each function as well as a comparison of the standard of proof requirement in other contexts, explain why proof beyond a reasonable doubt is required for unadjudicated acts in capital sentencing.

A. The Dual Function of a Standard of Proof

A standard of proof serves dual functions. With any determination that a sentencer makes some risk of a factually erroneous decision exists. A standard of proof establishes a threshold of reliability that a particular decision must satisfy. The frequency with which an erroneous decision will occur varies depending upon how high or low a standard of proof is set.[67] This is the risk-allocation function of a standard of proof. The second function of a standard of proof is the symbolic one; it impresses upon the jury or court the degree of confidence society expects for a particular determination.[68]

The risk-allocation function assumes that "in a judicial proceeding in which there is a dispute about the facts of some earlier event, the factfinder cannot acquire unassailably accurate knowledge of what happened."[69] Because of

[60] 233 Va. 313, 356 S.E.2d 157 (1987).

[61] *Gray,* 233 Va. at 347, 356 S.E.2d at 176.

[62] 234 Va. 672, 364 S.E.2d 491 (1988).

[63] *O'Dell,* 234 Va. at 700, 364 S.E.2d at 507.

[64] More troubling perhaps, is the fact that in *Pruett v. Thompson* the court found that Pruett's confession, which was so incomplete and self-contradicting that the interrogators were not confident that Pruett in fact killed Debra McInnis, *see Pruett v. Commonwealth,* 232 Va. 266, 284, 351 S.E.2d 1, 12 (1986), did not satisfy its "plainly unreliable" standard. *Pruett,* 771 F. Supp. at 1443. One wonders whether that standard could ever be met.

[65] *Gray,* 233 Va. at 346-47, 356 S.E.2d at 175-76.

[66] *Beckford,* 964 F. Supp. at 1000. *See also, United States v. Davis,* 912 F.Supp. 938, 949 (E.D. La. 1996); *Walker,* 910 F.Supp. at 853-54; *United States v. Bradley,* 880 F.Supp. 271, 286-87 (M.D. Pa. 1994); *Milton v. Procunier,* 744 F.2d 1091, 1096 (5th Cir. 1984).

[67] *In Re Winship,* 397 U.S. 358, 370-71 (1970) (Harlan, J., concurring). *See also Addington v. Texas,* 441 U.S. 418, 425 (1979).

[68] *In Re Winship,* 397 U.S. at 364, 370.

[69] *Id.* at 370 (Harlan, J., concurring).

this inability to acquire perfect knowledge, "the trier of fact will sometimes, despite [its] best efforts, be wrong in [its] factual conclusions."[70] For any given determination then there are two possible erroneous decisions. In the ordinary criminal case, for example, the two possible erroneous decisions are that a factually innocent person will be convicted or a factually guilty person will go free. A standard of proof influences "the relative frequency of these two types of erroneous decisions."[71]

The Court has compared the interests of the two parties when deciding what standard of proof should govern a particular decision.[72] In *In Re Winship*,[73] the Court stated, "[w]here one party has at stake an interest of transcending value—as a criminal defendant his liberty—[the risk of an erroneous decision] is reduced as to him by the process of placing on the other party the burden of producing a sufficiency of proof in the first instance, and of persuading the factfinder at the conclusion of the trial of his guilty beyond a reasonable doubt."[74] In other words, since an individual defendant's interest in his or her liberty is greater than the government's interest in punishing the person, the burden of proof should reduce the risk that an innocent person will be convicted based on a factual error. Thus, in a criminal case, Due Process requires proof beyond a reasonable doubt.[75]

In a capital sentencing proceeding where a jury must find that the defendant committed the unadjudicated acts before relying upon them in assessing future dangerousness, given the relative interests at stake, Due Process demands nothing less than proof beyond a reasonable doubt. The capital defendant's interest in his or her life, is surely as transcendent a value as the ordinary criminal defendant's liberty interest. Indeed, given the Court's recognition in *Woodson* that death is qualitatively different from any other type of punishment, the defendant in a capital sentencing proceeding has the most fundamental value of all at stake- his or her life. A death sentence and execution based on a factual error is certainly the most undesirable erroneous decision a factfinder can make. On the other hand, the government has an interest in seeing that a person who deserves the death penalty, that is a person who satisfies all of the statutory and constitutional criteria, receives it. An erroneous decision against the government in a capital sentencing proceeding, however, is even less undesirable than an erroneous decision in a typical criminal case. In the typical criminal case, an erroneous decision against the government results in a factually guilty person going free. In a capital sentencing proceeding in Virginia, an erroneous decision against the government results in a sentence of life imprisonment without the possibility of parole. Thus, in light of the relative underlying interests at stake in a capital sentencing proceeding, the Due Process Clause requires the Commonwealth to prove and the jury to find that the defendant committed the alleged unadjudicated acts beyond a reasonable doubt before relying upon them.

Similar, but slightly different reasoning supports the beyond a reasonable doubt standard under the symbolic function served by a standard of proof. Given the underlying assumption that, a "factfinder cannot acquire unassailably accurate knowledge of what happened", then the most that a "factfinder can acquire is a belief of what probably happened."[76] A standard of proof instructs and impresses upon the factfinder "the degree of confidence our society thinks [it] should have in the correctness of factual conclusions for a particular type of adjudication."[77] "Increasing the burden of proof is one way to impress the factfinder with the importance of the decision and thereby perhaps reduce the chances that"[78] a death sentence will be imposed inappropriately.

In Virginia the decision whether to impose a death sentence can turn solely on the future dangerousness aggravator, and thus, solely on evidence of unadjudicated acts of violence allegedly committed by the defendant. It is essential to impress upon the jury the gravity of its decision and keep it focused on the proper inquiry. The current procedure, or rather lack of procedure, reduces and changes the jury's inquiry to who it believes instead of whether it is convinced that the unadjudicated act actually occurred and that the defendant did it. The considerations behind the symbolic function of a standard of proof, coupled with Due Process requirement of heightened reliability in death penalty cases, demand that the jury be convinced beyond a reasonable doubt that the alleged unadjudicated act occurred and that the defendant committed it before relying upon such acts in imposing a death penalty.

B. Comparing the Standard of Proof for Unadjudicated Acts in Other Cases

Other standard of proof cases decided by the Supreme Court bolster the conclusion that a beyond a reasonable doubt standard is required for unadjudicated conduct in capital sentencing.

The Supreme Court, in determining the threshold of reliability for evidence whose relevance, and thus admissibility, turns upon "preliminary factual questions" has "traditionally required that these matters be established by a preponderance of proof."[79] In *McMillan v.*

[70] *Id.*

[71] *Id.* at 371.

[72] *Addington,* 441 U.S. at 425; *See also Matthews v. Eldridge,* 424 U.S. 319, 334-35 (1976) (stating that due process requires consideration of the private interest at stake, the risk of an erroneous deprivation of the private interest under the current procedures, the probable value of additional or substitute procedural safeguards, and the government's interest, including the function involved and the burden of an additional or substitute procedural requirement).

[73] 397 U.S. 358 (1970).

[74] *Speiser v. Randall,* 357 U.S. 513, 525-26 (1958).

[75] *In Re Winship,* 397 U.S. at 364.

[76] *In Re Winship,* 397 U.S. at 370 (Harlan, J., concurring).

[77] *Id.*

[78] *Addington,* 441 U.S. at 427.

[79] *Bourjaily v. United States,* 483 U.S. 171, 175 (1987).

Pennsylvania[80] the Court considered whether the Due Process Clause was violated where the state required a five year minimum mandatory sentence if the sentencing judge found by a preponderance of the evidence, that the defendant "visibly possessed a firearm" during the commission of the offense.[81] The defendant's basic argument was that visible firearm possession was "an element of the crime for which [he was] being sentenced and thus must be proved beyond a reasonable doubt."[82] The Court rejected the defendant's argument. The Court observed that visible firearm possession does not alter "the maximum penalty for the crime committed nor create a separate offense calling for a separate penalty; it operates solely to limit the sentencing court's discretion in selecting a penalty within the range already available to it."[83] Thus, the Due Process Clause requires only a preponderance of the evidence standard when the unadjudicated act is "a sentencing consideration and not an element of any offense."[84]

The Court's rationale in *McMillan* does not apply in a capital sentencing proceeding for several reasons. First, and most obviously, the Supreme Court has clearly recognized that the death penalty context is qualitatively different from any other context. Second, a finding of future dangerousness based on evidence of unadjudicated acts calls for a separate and qualitatively greater maximum penalty, namely the death penalty, than the penalty called for absent such a finding. Third, future dangerousness can be based solely on unadjudicated acts and is not simply a sentencing consideration. Future dangerousness is a separate element, one of the two possible aggravators, for imposing a death sentence. Additionally, in *McMillan* the trial judge was required to decide a "simple, straightforward issue susceptible of objective proof"[85]—i.e. whether the defendant visibly possessed a firearm. A capital jury in Virginia, on the other hand, is required to make the less concrete, more subjective prediction of whether, in light of the defendant's history, there is a probability he or she would commit future criminal acts of violence that constitute a continuing serious threat to society. In short, the considerations that made preponderance sufficient to satisfy Due Process in *McMillan,* if they apply at all in the capital sentencing proceeding, suggest that a higher standard of proof is required to satisfy the Due Process requirement of heightened reliability.[86]

[80]477 U.S. 79 (1986).
[81]*McMillan,* 477 U.S. at 80-81.
[82]*Id.* at 83.
[83]*Id.* at 87-88.
[84]*Id.* at 93.
[85]*McMillan,* 477 U.S. at 84.

V. Conclusion

For a capital sentencing scheme to satisfy the Constitution, it must balance two competing constitutional principles: individualized sentencing and heightened reliability. The Virginia sentencing scheme and the Supreme Court of Virginia have struck an unconstitutional balance by giving effect only to the Eighth Amendment's individualized sentencing requirement. By focusing only on the notion that all relevant evidence be admitted, the Supreme Court of Virginia has ignored and undermined the Fourteenth Amendment's requirement of heightened reliability. While unadjudicated acts of violence are certainly relevant to determining future dangerousness, no procedure ensures that they meet any threshold of reliability. The best and simplest way to balance these two competing doctrines is to allow the jury to consider evidence of unadjudicated acts in determining future dangerousness only after it first determines beyond a reasonable doubt that the defendant committed the acts. A beyond a reasonable doubt standard is the standard commanded in light of the dual functions of a standard of proof, the particular decision being made, a comparison of other similar Supreme Court cases, and the Court's central and fundamental premise that because death is different there exists a greater need for reliability in the decision to impose it.

[86]*See United States v. Watts,* 117 S.Ct. 633 (1997). In *Watts* the Court held that a sentencing court may consider criminal conduct for which the defendant was acquitted so long as the government proves by a preponderance of the evidence that the conduct occurred and the defendant did it. While observing that the Due Process is usually satisfied by a preponderance standard at sentencing, the Court acknowledged that where relevant conduct might dramatically increase the sentence a higher standard of proof may be required. The use of unadjudicated acts to prove future dangerousness is the quintessential relevant conduct that can dramatically increase the defendant's sentence. Given that the Court has held that the Due Process clause requires heightened reliability in death penalty cases, and that Due Process requires a preponderance standard of proof in sentencing for ordinary criminal cases, it follows that Due Process clause requires a beyond reasonable doubt standard of proof for unadjudicated acts upon which a death sentence can be wholly based.