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# Future Dangerousness: Issues and Analysis

Jason J. Solomon\*

## Introduction

In 1976, the waves created by *Furman v. Georgia*<sup>1</sup> were cascading across the land. States faced with emptied death rows scrambled to find constitutionally acceptable ways to impose the ultimate punishment. The state of Texas tried Jerry Jurek on a murder charge for the drowning of a ten-year-old girl. Jurek was convicted of capital murder.<sup>2</sup> In the process of sentencing Jurek, the Texas jury was asked to consider “whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society.”<sup>3</sup> The jury answered that, beyond a reasonable doubt, Jurek would be such a threat. On the basis of this affirmation, Jurek was sentenced to death under a brand new statutory scheme designed to reinstate capital punishment.<sup>4</sup> On appeal, Jurek’s sentence was affirmed by the United States Supreme Court and the so-called “future dangerousness” inquiry was found sufficient to guide the jury’s discretion under *Furman*.<sup>5</sup> From this decision, the future dangerousness factor was born.

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1. 408 U.S. 238 (1972) (per curiam) (declaring death penalty statutes then in existence to be unconstitutional under the Eighth and Fourteenth Amendments).

2. *Jurek v. Texas*, 428 U.S. 262, 264-67 (1976).

3. TEX. PENAL CODE, Art. 1257 (1973). This article has since been superseded, see TEX. PENAL CODE ANN. § 19.03 (West 1999).

4. See *Jurek*, 428 U.S. at 267-68.

5. *Id.* at 276-77. In *Furman*, the Court held that all death penalty statutes then in existence violated the Eighth and Fourteenth Amendments of the Constitution. Although there was no opinion proffered as the opinion of the court, several of the justices argued that the death penalty, as it existed at the time, was unconstitutional because the systems allowed the sentencing body untrammelled discretion in its decision whether to impose or not impose a death sentence. In Chief Justice Burger’s dissent, he summed up many of the concurring opinions in *Furman* by stating that “the decisive grievance . . . is that the . . . system of discretionary sentencing in capital cases has failed to produce evenhanded justice; the problem is not that too few have been sentenced to die, but that the selection process has followed no rational pattern.” *Furman*, 408 U.S. at 398-99 (Burger, C.J., dissenting). The *Furman* opinions called for the reeling in of broad sentencing discretion. Indeed, in *Godfrey v.*

The Commonwealth of Virginia, in recreating its death penalty, included the future dangerousness factor in the statutory language adopted in 1977. Under sections 19.2-264.2 and 19.2-264.4 of the Virginia Code, the General Assembly approved the execution of persons who had committed one of the capital crimes listed in section 18.2-31 of the Virginia Code<sup>6</sup> if such a person was found to be a "continuing serious threat to society."<sup>7</sup> The language of the future dangerousness language has remained the same since its enactment in 1977. There has been enormous change, however, in the context in which the future dangerousness inquiry operates. As a result, several types of evidence relied on to prove future dangerousness are not relevant to the inquiry. Further, changes to the punishment system in Virginia, particularly the abolition of parole, have also altered the relevance of certain types of evidence used to prove or disprove future dangerousness. More specifically, this article will discuss the proof of future dangerousness by the circumstances surrounding the commission of the offense,<sup>8</sup> the proof of future dangerousness by unadjudicated acts of criminal conduct,<sup>9</sup> the irrelevance of victim impact evidence to the future dangerousness inquiry,<sup>10</sup> and the effect of *Simmons v. South Carolina*<sup>11</sup> and the abolition of parole on the future dangerousness inquiry.<sup>12</sup>

### I. Initial Interpretations of Future Dangerousness - Smith v. Commonwealth

The Virginia version of the future dangerousness factor faced its first courtroom challenge in a 1978 case. In *Smith v. Commonwealth*,<sup>13</sup> the

*Georgia*, 446 U.S. 420 (1976), the Court explained that *Furman* required channeling of the sentencer's discretion "by clear and objective standards" that provide "detailed and specific guidance." *Id.* at 428 (internal quotation marks and citations omitted). This requirement, of guided jury discretion in sentencing, was the basis for the creation of such inquiries as future dangerousness.

6. VA. CODE ANN. § 18.2-31 (Michie 1999). For a discussion of the expansion of section 18.2-31 since 1977, see Hammad Matin, *Expansion of Section 18.2-31 of the Virginia Code*, 12 CAP. DEF. J. 7 (1999) (Part I this Symposium) and Heather Necklaus, *Predicate Felonies in the Context of Capital Cases*, 12 CAP. DEF. J. 37 (1999) (Part II this Symposium).

7. VA. CODE ANN. § 19.2-264.2, 264.4 (Michie 1999). The statutes also allowed for death to be imposed if the defendant's conduct in committing the crime enumerated in section 18.2-31 was "outrageously or wantonly vile, horrible, or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim." *Id.* This alternate factor, known as the "vileness" factor, will not be discussed in this article. For a full discussion of the vileness factor see Douglas Banghart, *Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77 (1999) (Part IV this Symposium).

8. See *infra* Section II.

9. See *infra* Section III.

10. See *infra* Sections IV, V(E).

11. 512 U.S. 154 (1994).

12. See *infra* Section V.

13. 248 S.E.2d 135 (Va. 1978) (holding the death penalty statutes adopted by the

Supreme Court of Virginia interpreted the future dangerousness inquiry in the face of a claim that it was unconstitutionally vague under the Eighth and Fourteenth Amendments.<sup>14</sup> Smith, like Jurek, claimed that the statutory standards created by the General Assembly were so vague as to vest unbridled discretion in the sentencing authority in violation of *Furman*. The court rejected this claim and held the language of the Virginia statute to be constitutional.<sup>15</sup> The court based its finding, in large part, on the United States Supreme Court's decision in *Jurek v. Texas*.<sup>16</sup>

#### A. *Jurek v. Texas - Virginia's Future Dangerousness Basis*

*Jurek* was the result of a challenge to the Texas statutory scheme, which was the first scheme explicitly to use future dangerousness as justification for imposition of a death sentence. The statute at issue in *Jurek* presented the jury with questions, the answers to which determined whether a death sentence would be imposed. One of the determinative questions required the jury to decide "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."<sup>17</sup> The death penalty could be imposed only upon a finding that the state had proven, beyond a reasonable doubt, that the question was answered in the affirmative. Jurek challenged the future dangerousness query by asserting that "it is impossible to predict future behavior and that the question is so vague as to be meaningless."<sup>18</sup>

The Supreme Court acknowledged that predicting future dangerousness is not a precise practice but rejected Jurek's vagueness challenge.<sup>19</sup> The Court found the future dangerousness inquiry, although difficult, to be "no different from the task performed countless times each day throughout the American system of criminal justice."<sup>20</sup> Allowing the query to stand, the Court held that the "essential" inquiry to be asked of an aspect of a capital sentencing scheme is that procedure permits the jury with access to all information, both mitigating and aggravating, that is relevant to the defendant.<sup>21</sup> Finding that the statutory scheme in question did allow sufficient

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Virginia General Assembly to be constitutional under the Eighth and Fourteenth Amendments, both facially and as applied).

14. *Smith v. Commonwealth*, 248 S.E.2d 135, 148-49 (Va. 1978).

15. *Id.* at 148-49.

16. *Id.*

17. *Jurek*, 428 U.S. at 272.

18. *Id.* at 274.

19. *Id.* at 274-75.

20. *Id.* at 275-76.

21. *Id.* at 276. This requirement became increasingly important as a basis for later Supreme Court decisions on the topic of mitigation. For instance, in *Lockett v. Ohio*, 438 U.S. 586 (1978), *Jurek* was cited by the court to support its holding that death penalty

access to such information, the Court rejected Jurek's challenge and upheld the Texas statutory scheme.<sup>22</sup>

### B. Future Dangerousness Dawns in Virginia

After *Jurek*, Virginia passed death penalty statutes that included language similar to that approved in *Jurek*. Included in these statutes was the future dangerousness inquiry. In *Smith v. Commonwealth*, the Supreme Court of Virginia faced a vagueness challenge to Virginia's version of the future dangerousness factor.<sup>23</sup> The court looked to the United States Supreme Court's decision in *Jurek* and quoted nearly all of the *Jurek* opinion relating to future dangerousness.<sup>24</sup> The court elaborated on the nature of the factor, describing its focus to be "on prior criminal conduct as the principal predicate for a prediction of future dangerousness."<sup>25</sup> If a defendant has been

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schemes must allow consideration "as a mitigating factor, any aspect of the 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." *Id.* at 604-05 (citing *Jurek v. Texas*, 428 U.S. 262 (1976)).

22. *Jurek*, 428 U.S. at 276-77.

23. *Smith*, 248 S.E.2d 135. At the time, section 19.2-264.2 of the Virginia code, entitled "Conditions for imposition of death sentence," provided that a defendant could not be sentenced to death, unless "after consideration of the *past criminal record of convictions* of the defendant, [the sentencing body] f[ound] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." VA. CODE ANN. § 19.2-264.2 (Michie Cum. Supp. 1977) (emphasis added). However, section 19.2-264.4(C), entitled "Sentence proceeding," provided that a defendant could not be sentenced to death, unless "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 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." VA. CODE ANN. § 19.2-264.4(C) (Michie Cum. Supp. 1977) (emphasis added). Clearly, a much tougher case is created for the Commonwealth if it is forced to rely only upon the "past criminal record of convictions" rather than the broader language allowing consideration of "evidence of prior history of the defendant." Recognizing this conflict when presented with a vagueness challenge, the Supreme Court of Virginia resolved it by reciting the finding in *Smith*—that the future dangerousness factor was not unconstitutionally vague—and by noting that later cases had allowed introduction of evidence other than criminal convictions to prove future dangerousness. See *LeVasseur v. Commonwealth*, 304 S.E.2d 644, 660 (Va. 1983) (citing *Quintana v. Commonwealth*, 295 S.E.2d 643 (Va. 1982)).

24. See *Smith*, 248 S.E.2d at 148 (quoting *Jurek*, 428 U.S. at 274-77).

25. *Smith*, 248 S.E.2d at 149. In a footnote, the court mentioned that the "circumstances" surrounding the offense may also be used to establish the defendant's future dangerousness. *Id.* at 149 n.4. Allowing circumstances surrounding the offense to dictate a finding of future dangerousness is contrary to the rest of the death penalty statutory scheme. This problem is discussed in Section II, *infra*.

"convicted of criminal acts of violence," the court found that a substantial likelihood greater than a mere possibility exists that the defendant "would commit similar crimes in the future."<sup>26</sup> "Such a probability," the court held, "fairly supports the conclusion that society would be faced with a continuing serious threat."<sup>27</sup> Accordingly, the court held that the inquiry sufficiently guided the jury's discretion under *Furman* and was not unconstitutionally vague.<sup>28</sup> Relying on this interpretation, the court upheld Smith's sentence because of his prior criminal conduct, namely a past forcible rape conviction, and psychiatric testimony concerning the possibility that he might commit future crimes of violence.<sup>29</sup>

Cases decided shortly after *Smith* that involved future dangerousness similarly cited criminal record evidence as proof of future dangerousness. In *Clark v. Commonwealth*,<sup>30</sup> the defendant's prior criminal record and lack of remorse proved future dangerousness.<sup>31</sup> In *Turner v. Commonwealth*,<sup>32</sup> the defendant's prior convictions for maiming, malicious wounding, escape, and second degree murder were the basis for a finding of future dangerousness.<sup>33</sup> In *Clanton v. Commonwealth*,<sup>34</sup> convictions of murder and robbery supported future dangerousness.<sup>35</sup> In short, early future dangerousness cases held close to the notion announced in *Smith* that "prior criminal conduct" was to be the impetus for a prediction of future dangerousness. Thus, the flavor of Virginia future dangerousness was established. The factor was initially perceived to be a prediction of future violent criminal conduct on the basis of prior criminal conduct and such perceptions were supported by the evidence presented to prove future dangerousness. However, shortly after *Smith*, this initial characterization underwent some changes.

## II. Proof of Future Dangerousness by the Circumstances Surrounding the Offense

Footnote four of the court's opinion in *Smith* noted that the "circumstances" surrounding the commission of the capital offense provide a second-

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26. *Id.*

27. *Id.*

28. *Id.*

29. *Smith*, 248 S.E.2d at 150.

30. 257 S.E.2d 784 (Va. 1979).

31. *Clark v. Commonwealth*, 257 S.E.2d 784, 790 (Va. 1979).

32. 273 S.E.2d 36 (Va. 1980).

33. *Turner v. Commonwealth*, 273 S.E.2d 36, 44 n.11 (Va. 1980).

34. 286 S.E.2d 172 (Va. 1982). *Clark*, *Turner*, and *Clanton*, were the first three cases after *Smith* in which the court was faced with a claim that the evidence presented on the issue of future dangerousness was insufficient.

35. *Clanton v. Commonwealth*, 286 S.E.2d 172, 180 (Va. 1982).

ary predicate that can be used to prove future dangerousness.<sup>36</sup> Indeed, in *Quintana v. Commonwealth*<sup>37</sup> the defendant was found to pose a continuing serious threat to society solely because of the "heinous circumstances" surrounding the homicide.<sup>38</sup> Moreover, in *Edmonds v. Commonwealth*,<sup>39</sup> the court explicitly noted that the circumstances surrounding the offense may be used to prove future dangerousness.<sup>40</sup> Thus, the *Smith* court's initial characterization of the future dangerousness factor as a determination of future conduct based on prior criminal conduct was quickly forgotten as the circumstances of the crime became a sufficient ground for a prediction of future conduct. Section 19.2-264.4(C) of the Virginia Code ("Section C"),<sup>41</sup> relied on by the court in *Smith*, *Edmonds*, and *Quintana* as the primary basis for allowing circumstances of the offense to prove future dangerousness, conflicts with the rest of Virginia's death penalty statutes. As will be seen, allowing Section C to justify use of the circumstances of the offense to prove future dangerousness is a misreading of the death penalty statutes.

#### A. *The Misreading of the Statutory Complex by the Smith Court*

Section 19.2-264.2 of the Virginia Code is entitled "Conditions for imposition of death penalty."<sup>42</sup> This statute provides that a defendant may be sentenced to death if the sentencing body finds the existence of one of the following two conditions:

after consideration of the past criminal record of convictions of the defendant . . . there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim.<sup>43</sup>

A clear dichotomy exists in this language. In determining future dangerousness, a court or jury is to consider the past criminal record of convictions. In determining vileness, a court or jury is to consider the conduct of the defendant in the commission of the offense. If the statutory complex were

36. *Smith*, 248 S.E.2d at 149 n.4.

37. 295 S.E.2d 643 (Va. 1983).

38. *Quintana v. Commonwealth*, 295 S.E.2d 643, 655 (Va. 1983).

39. 329 S.E.2d 807 (Va. 1985).

40. *Edmonds v. Commonwealth*, 329 S.E.2d 807, 813 (Va. 1985) (citing VA. CODE ANN. § 19.2-264.4(B) (Cum. Supp. 1985)). For a discussion of why section 19.2-264.4(B) should not support admission of circumstances of the offense to prove future dangerousness, see *infra* notes 52-55 and accompanying text.

41. VA. CODE ANN. § 19.2-264.4(C) (Michie 1999).

42. VA. CODE ANN. § 19.2-264.2 (Michie 1999).

43. *Id.* (emphasis added).

comprised of solely section 19.2-264.2, it is clear that a sentencing body could consider only the evidence set out in each part of that statute in its search for the existence of that condition.

However, Section C also makes up part of the Virginia statutory scheme. This section, entitled "Sentencing proceeding," prohibits imposition of the death penalty 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 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.<sup>44</sup>

The *Smith* court fell into a trap created by this language when it noted that circumstances of the offense may be used to prove future dangerousness.<sup>45</sup> At first glance, Section C seems to confirm this view. However, when Section C is considered in the context of the entire statutory scheme, this confirmation is lost.

### *B. Commingling Section C and Section 19.2-264.2*

It seems that a more consistent reading of Section C, given the apparent dichotomy of section 19.2-264.2, is that the prior history language of Section C is meant to modify the future dangerousness factor and the circumstances surrounding the offense language is meant to modify the vileness factor.<sup>46</sup> This reading of Section C is supported by the immediately following section 19.2-264.4(D) of the Virginia code ("Section D"), which creates a suggested verdict form for juries to use at sentencing.<sup>47</sup> This form allows a jury to

44. VA. CODE ANN. § 19.2-264.4(C) (Michie 1999).

45. See *Smith*, 248 S.E.2d at 149 n. 4; see also *Murphy v. Commonwealth*, 431 S.E.2d 48, 53 (Va. 1993) (reading Section C to allow the circumstances of the offense to prove future dangerousness).

46. See also, *LaVasseur v. Commonwealth*, 304 S.E.2d 644 (Va. 1983), which reads as follows:

We note that although the jury was instructed as to both the "dangerousness" and the "vileness" predicates for capital punishment, and the Commonwealth argued that both were present, the jury's verdict rejected "dangerousness" and fixed punishment solely on the basis of the "vileness" predicate. Obviously, a finding of "vileness" can be based only on the circumstances of the case on trial. The defendant's "prior history" is thus irrelevant to a finding of "vileness." "Past criminal record of convictions" and "prior history" would be relevant only to the "dangerousness" predicate.

*Id.* at 660 n.4. While not wholly on point, the quote clearly evidences an inclination to read the circumstances of the offense language to apply only to vileness and the prior history language to apply only to future dangerousness.

47. See VA. CODE ANN. § 19.2-264.4(D) (Michie 1998).



impose a death sentence if "after consideration of [the defendant's] prior history," the jury finds that the defendant would be a future danger, or if the jury finds that the defendant's "conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman."<sup>48</sup> This language reinforces the notion that future dangerousness can be based only upon the defendant's prior history or criminal record and not upon the circumstances of the offense for which he is being sentenced. Moreover, the current Virginia model jury instruction on future dangerousness makes no mention of the circumstances of the offense as proof of future dangerousness. Instead the jury is instructed to consider "the prior history" and "past criminal conduct" of the defendant.<sup>49</sup>

Furthermore, the statutory construction rule of *in pari materia* provides that where statutory words are not sufficiently explicit, the intent of the legislature may be determined by comparing the statute to other parts of that statute or to other statutes.<sup>50</sup> Correctly understood, section 19.2-264.2 clearly states that prior criminal conduct is to be the basis for a finding of future dangerousness and the circumstances of the offense are to be the basis for a finding of vileness.<sup>51</sup> Furthermore, Section D and the Virginia Model Jury Instruction on future dangerousness make it clear that circumstances of the offense bear only on the question of vileness and are not to be considered in relation to the future dangerousness inquiry. Thus, any confusion that exists in Section C is clarified by the surrounding statutes. Following the rule of *in pari materia*, the misreading by the *Smith* court becomes even clearer. Section C does not provide justification for allowing circumstances of the offense to prove future dangerousness. The statutory context makes it clear that the prior criminal conduct or past history of the defendant are the only grounds for a finding of future dangerousness.

Even if the Supreme Court of Virginia were to concede that the language of Sections C, D, and 19.2-264.2 allows admission of only the prior history or past criminal record to prove future dangerousness, another hurdle would exist for a defendant challenging the admissibility of the circumstances of the offense to prove future dangerousness. Section 19.2-264.4(B) ("Section B") states that a court may allow into evidence "any matter which the court deems relevant to sentence."<sup>52</sup> This language seems

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48. *Id.*

49. Va. Model Jury Instruction 33.132.

50. See *Hanson v. Commonwealth*, 509 S.E.2d 543, 547 (Va. Ct. App. 1999) (where statute language is unclear and its meaning is not readily decipherable, the rule of *in pari materia* allows intent of the legislature to be determined by examining other statutes or sections of the same statute and comparing them to the unclear language).

51. See *supra* Section II A.

52. VA. CODE ANN. § 19.2-264.4(B) (Michie 1998). This section has been used by the Supreme Court of Virginia to justify admission of evidence of the circumstances surrounding the crime to prove future dangerousness. See *Edmonds v. Commonwealth*, 329 S.E.2d 807,

broadly than either 19.2-264.2 or Section C and has been used to allow into evidence any matter relevant to a death sentence, including circumstances of the offense to prove future dangerousness.<sup>53</sup> However, the clear tenor of Section B is that it describes the evidence that may be used in mitigation.<sup>54</sup> To say that this phrase justifies admission of aggravating evidence contradicts the remaining language of Section B. In other criminal cases, Virginia courts have noted that a fundamental rule of statutory construction is to construe a statute from its four corners, and "not by singling out particular words or phrases."<sup>55</sup> To allow one phrase in section B to justify the admission of circumstances surrounding the offense to prove future dangerousness violates this basic statutory construction rule.

### *III. Proof of Future Dangerousness by Unadjudicated Acts of Criminal Conduct*

Lodged deeply within Virginia death penalty jurisprudence is the notion that unadjudicated acts of criminal conduct are relevant to the determination of a defendant's future dangerousness.<sup>56</sup> In the first case to expressly rule on the use of unadjudicated acts at a capital trial, the defendant challenged the admission of a confession linking him to four killings for which he had not been tried.<sup>57</sup> The defendant claimed that admission of the confession was unreliable because he was "in effect, being tried . . . for

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813 (Va. 1985) (in determining whether circumstances of the offense could be used to prove future dangerousness, "the factfinder is entitled to consider not only the defendant's past criminal record of convictions, but also any matter which the court deems relevant to sentence")(internal quotation marks omitted).

53. See *Quintana v. Commonwealth*, 295 S.E.2d 643, 655 (Va. 1983).

54. If the language of Section B seems to mirror anything, it seems to mirror the statutes held to be constitutional in *Jurek*, *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Gregg v. Georgia*, 428 U.S. 153 (1976). The statutes approved in these cases, all decided on the same day, were the basis for death penalty schemes around the country. In these opinions, the justices repeatedly stated that a constitutionally valid death penalty scheme was one that did not preclude consideration of any evidence that may mitigate against imposition of the death penalty. For example, in *Proffitt*, the opinion of Justices Stewart, Powell, and Stevens approved the Florida death penalty scheme at issue, in part, because it did not contain language limiting the consideration of mitigating factors. See *Proffitt*, 428 U.S. at 250 n.8. In *Jurek*, the court noted that the Texas Court of Criminal Appeals had interpreted the death penalty scheme at issue to allow consideration of "whatever mitigating circumstances the defendant might be able to show." *Jurek*, 428 U.S. at 272-73 (Stewart, Powell, Stevens, J.J., concurring) (internal quotation marks and citations omitted). Read in the context of these decisions, section B is no more than an attempt to comply with Supreme Court mandate on the mitigation issue. Accordingly, use of this section to justify admission of evidence to prove an aggravating circumstance is improper.

55. See *Smith v. Commonwealth*, 379 S.E.2d 374, 376 (Va. Ct. App. 1989) (citing *Commonwealth Natural Resources, Inc. v. Commonwealth*, 248 S.E.2d 791, 795 (Va. 1978)).

56. See, e.g., *Pruett v. Commonwealth*, 351 S.E.2d 1, 11-12 (Va. 1986).

57. *Poyner v. Commonwealth*, 329 S.E.2d 815 (Va. 1985).

unrelated crimes."<sup>58</sup> The Supreme Court of Virginia rejected the defendant's challenge, finding that the statutory scheme did not "restrict the admissible evidence to the record of convictions," and that the defendant's confessions to the other murders were "highly reliable" and "wholly relevant" to the issue of future dangerousness.<sup>59</sup> Later cases elaborated on this paltry explanation. In *Frye v. Commonwealth*,<sup>60</sup> the defendant claimed that unadjudicated acts of criminal conduct were not relevant to the future dangerousness inquiry because section 19.2-264.2 of the Virginia code stated that future dangerousness was to be proved by the defendant's prior record of criminal convictions.<sup>61</sup> In rejecting Frye's claim, the court held that Section C contemplated proof of future dangerousness by the defendant's "prior history," in addition to his prior criminal convictions, and that unadjudicated acts of criminal conduct were part of the defendant's past history and were thus admissible.<sup>62</sup>

Given the nature of the future dangerousness inquiry as detailed in *Smith*, a prediction of future violent criminal conduct to be determined by looking at past criminal conduct, it is understandable that the Commonwealth would want to introduce past criminal conduct, albeit unadjudicated, to prove future criminal conduct. However, unadjudicated criminal conduct is not required to be connected, with any degree of legal certainty, to the defendant.<sup>63</sup> This means that the Commonwealth does not have to prove that the unadjudicated conduct occurred, by any standard of proof, to be admissible at sentencing. Such a broad allowance for admission of unadjudicated criminal conduct is problematic in at least two respects.

First, because there is no level of proof which must be established, there is no way to know whether the alleged conduct ever occurred. Second, even if the alleged criminal conduct is proven to have occurred, there is no requirement that the Commonwealth prove that the defendant did it. The only limitation on such evidence, according to the Supreme Court of Virginia, is the valueless limit of credibility of the person testifying to the unadjudicated conduct.<sup>64</sup> At almost every other stage of a criminal

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58. *Id.* at 827.

59. *Id.* at 828 (internal quotation marks and citations omitted).

60. 345 S.E.2d 267 (Va. 1986).

61. *Frye v. Commonwealth*, 345 S.E.2d 267, 283 (Va. 1986).

62. *Id.* (quoting VA. CODE ANN. § 19.2-264.4(C) (Michie 1984)) (internal quotation marks omitted).

63. See *Walker v. Commonwealth*, 515 S.E.2d 565, 571-72 (Va. 1999) (rejecting defendant's claim that unadjudicated acts of criminal conduct must be proven to have occurred beyond a reasonable doubt to be relevant to capital sentencing).

64. *Id.* There is a procedural limitation on the use of such testimony. Under section 19.2-264.3:2 of the Virginia Code, the Commonwealth is required to inform a defendant of its intention to present unadjudicated acts of criminal conduct at sentencing. See VA. CODE ANN. § 19.2-264.3:2 (Michie 1999). This limitation has no effect on the standard of proof, nor

proceeding, evidence regarding the commission of a crime must at least be proven by the probable cause standard. Indeed, even in the most introductory moments of the criminal process, for example at a preliminary hearing, criminal conduct at least must be proven to the level of probable cause. It is very difficult to understand how, at the very least, a similar standard should not be applied to criminal conduct that may be the basis for a death sentence. Moreover, admission of such evidence without some standard of proof flies in the face of the Eighth Amendment command of "heightened reliability"<sup>65</sup> in capital sentencing because there is no requirement that such evidence be reliable at all. If "heightened reliability" truly is required in determining whether death is the appropriate sentence, then admission of unadjudicated acts at sentencing must not continue unless some standard of proof is established.<sup>66</sup>

A comparison of the use of unadjudicated criminal conduct at sentencing for capital crimes to the use of such evidence at sentencing for non-capital felonies further illustrates the lack of reliability such evidence has at capital sentencing. Similar to capital trials, non-capital felony trials in Virginia have a separate sentencing proceeding if the defendant is convicted of the felony.<sup>67</sup> At this proceeding, section 19.2-295.1 of the Virginia code requires the Commonwealth to present "certified, attested or exemplified copies" of the "prior criminal convictions" of the defendant.<sup>68</sup> In this context, "prior convictions" are defined as "convictions and adjudications of delinquency under the laws of any state, the District of Columbia, the United States or its territories."<sup>69</sup> According to Virginia courts, the defendant's record of convictions "bear[s] upon a tendency to commit offenses, the probabilities of rehabilitation, and similar factors indispensable to the determination of an appropriate sentence."<sup>70</sup> Thus, at sentencing for non-capital felonies, unadjudicated criminal conduct is inadmissible.<sup>71</sup> However, adjudicated criminal conduct is admissible to

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does it create any bar to admission unless the Commonwealth fails to inform the defendant of its intention.

65. *Sumner v. Shuman*, 483 U.S. 66, 72 (1987) (citing *Woodson v. North Carolina*, 428 U.S. 262, 303-05 (1976) (plurality opinion)).

66. See Tommy Barrett, *A Modest Proposal Requiring Proof Beyond a Reasonable Doubt for Unadjudicated Acts Offered to Prove Future Dangerousness*, CAP. DEF. J., Spring 1998, at 58-67.

67. See VA. CODE ANN. § 19.2-295.1 (Michie 1999) ("in cases of trial by jury, upon a finding that the defendant is guilty of a felony, a separate proceeding limited to the ascertainment of punishment shall be held as soon as practicable before the same jury").

68. *Id.*

69. *Id.*

70. *Gilliam v. Commonwealth*, 465 S.E.2d 592, 594 (Va. Ct. App. 1996).

71. See *Byrd v. Commonwealth*, 517 S.E.2d 243, 245 (Va. Ct. App. 1999) ("[W]e can discern no relationship between the purposes of sentencing and the jury's role in determining

prove, to some extent, future dangerousness. Nevertheless, in capital cases, where the punishment is final and more severe, evidence of unadjudicated criminal conduct is admissible.<sup>72</sup> If the Virginia legislature and courts are unable to see any "relationship" between unadjudicated conduct and the appropriate sentence in non-capital cases,<sup>73</sup> it is difficult to understand how the legislature and courts can see such a relationship in capital cases where the potential punishment is infinitely more severe and final.

#### IV. Use of Victim Impact Evidence in Future Dangerousness Cases

##### A. Supreme Court Precedent and Virginia Adoption

In *Booth v. Maryland*,<sup>74</sup> the United States Supreme Court held that the "Eighth Amendment prohibits a capital sentencing jury from considering victim impact evidence."<sup>75</sup> In *Payne v. Tennessee*,<sup>76</sup> the Supreme Court overruled *Booth* when it held that "if [a] State chooses to permit the admission of victim impact evidence and prosecutorial argument on that subject, the Eighth Amendment erects no *per se* bar."<sup>77</sup> The *Payne* ruling allows for testimony of the family and friends of capital murder victims to be admitted at a capital sentencing proceeding and, thus, to be considered by the jury in their sentencing decision.<sup>78</sup> Following the invitation of the Supreme Court in *Payne*, the Supreme Court of Virginia decided in *Weeks v. Commonwealth*<sup>79</sup> that, without limitation, victim impact evidence is relevant to capital sentencing in Virginia and is therefore admissible at the sentencing phase of a capital trial.<sup>80</sup> In *Beck v. Commonwealth*,<sup>81</sup> the court tempered the broad language of *Weeks* by holding that victim impact evidence is inadmissible if its prejudicial effect outweighs its probative

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appropriate punishment in non-capital cases that would make evidence of nolle prossed charges relevant to the jury's task.").

72. See e.g., *Beaver v. Commonwealth*, 352 S.E.2d 342, 347 (Va. 1986).

73. See *Byrd*, 517 S.E.2d at 245.

74. 482 U.S. 496 (1987).

75. *Booth v. Maryland*, 482 U.S. 496, 501-03 (1987), *overruled in part by Payne v. Tennessee*, 501 U.S. 808 (1991). The *Booth* Court found that victim impact evidence was irrelevant to the capital sentencing decision and presented the risk of improperly diverting the jury's attention to matters irrelevant to the jury's decision. See *Booth*, 482 U.S. at 502-03.

76. 501 U.S. 808 (1991).

77. *Payne v. Tennessee*, 501 U.S. 808, 827 (1991).

78. The only limitation that remained on victim impact evidence after *Payne* was the *Booth* Court's holding that the Eighth Amendment barred testimony regarding the family members' "opinions and characterizations of the crimes." *Booth*, 482 U.S. at 508. The *Payne* Court explicitly did not overrule this aspect of *Booth*. See *Payne*, 501 U.S. at 830 n.2.

79. 450 S.E.2d 379 (Va. 1994).

80. *Weeks v. Commonwealth*, 450 S.E.2d 379, 389 (Va. 1994).

81. 484 S.E.2d 898 (Va.), *cert. denied sub nom*, 118 S.Ct. 608 (1997).

value.<sup>82</sup> It follows from these broad holdings that victim impact evidence can be entered at a sentencing proceeding where either future dangerousness or vileness is at issue. In 1998 the General Assembly, which adopted section 19.2-264.4(A1) of the Virginia code,<sup>83</sup> expressly approved the use of victim impact evidence at capital sentencing.

*B. Relevant Evidence is That Evidence Which Makes Future Dangerousness or Vileness More or Less Likely*

In *Jurek v. Texas*, the United States Supreme Court held that the "essential" inquiry to be asked of a sentencing scheme is whether or not that scheme allows the jury to have access to all relevant information *about the defendant*.<sup>84</sup> Information about the defendant that is relevant to the Virginia capital sentencing scheme is that information that makes the existence of future dangerousness or vileness more or less likely.<sup>85</sup> Thus, victim impact evidence is relevant to a future dangerousness inquiry only if it makes the proposition that a defendant will constitute a future danger more likely.<sup>86</sup> This is the basic test of relevancy.

*C. Victim Impact Evidence is Irrelevant to Capital Sentencing in Virginia*

According to the Supreme Court of Virginia and the *Payne* Court, victim impact evidence is relevant to capital sentencing because it describes the specific harm caused by the defendant's actions.<sup>87</sup> The harm caused by the defendant's actions, while morally significant, has no bearing on whether the defendant would constitute a future danger to society. Testimony by collateral victims as to their pain and suffering, or any similar feelings likely to come out in victim testimony,<sup>88</sup> does not make it more or

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82. *Beck v. Commonwealth*, 484 S.E.2d 898, 904 (Va.), cert. denied sub nom., 118 S.Ct. 608 (1997).

83. VA. CODE ANN. § 19.2-264(A1) (Michie 1999).

84. See *supra* notes 23-24 and accompanying text.

85. For a full discussion of vileness and evidence that is relevant or irrelevant to that inquiry, see Douglas Banghart, *Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77 (1999) (Part IV this Symposium).

86. See *Utz v. Commonwealth*, 505 S.E.2d 380, 384 (Va. Ct. App. 1998) ("evidence is relevant if it has any logical tendency, however slight, to establish a fact at issue in a case") (internal quotation marks and citations omitted).

87. See *Weeks*, 450 S.E.2d at 390 (quoting *Payne v. Tennessee*, 501 U.S. 808 (1991)).

88. See e.g., *Payne*, 501 U.S. at 814-15 (quoting testimony from grandmother of three-year-old survivor of murders killing his mother and sister: "He cries for his mom . . . . And he cries for his sister Lacie. He . . . asks me, Grandmama, do you miss my Lacie. And I tell him yes."); *Booth*, 482 U.S. at 511 (quoting victim impact testimony of the victim's granddaughter to the effect that her wedding two days after the attack was a woeful occasion and that instead of going on her honeymoon, she attended her grandparents' funerals.); *McDuff v. State*, 939 S.W.2d 607, 619-20 (Tex. Crim. App. 1997) (en banc) (noting that,

less likely that the defendant will commit any future acts, let alone future dangerous acts. If anything, such testimony bears on the defendant's moral blameworthiness for the crime he has already committed. In no way is such evidence predictive of the defendant's embodiment of a continuing future danger. Accordingly, victim impact evidence is irrelevant to the future dangerousness inquiry because such testimony does not make it more or less likely that the defendant constitutes a future danger to society.

#### V. *Simmons v. South Carolina - Making Parole Evidence Relevant*

Prior to 1994, Virginia courts had held that juries were not entitled to information about the parole eligibility of any defendants.<sup>89</sup> Even when a defendant had somehow fallen into the class of murderers who would never be eligible for parole, Virginia refused to inform juries of this fact.<sup>90</sup> However, in *Simmons v. South Carolina*,<sup>91</sup> the United States Supreme Court held that where future dangerousness is at issue and state law prohibits parole if the defendant is sentenced to life in prison, due process requires that the jury be informed, either by instruction or argument of counsel, that the only alternative to a death sentence is a sentence of life without parole.<sup>92</sup> This decision had limited impact in Virginia in 1994. In 1995, the decision took on added significance when the General Assembly abolished parole for any defendant who committed a felony on or after January 1, 1995. At this point, the so-called *Simmons* instruction became mandated in Virginia for defendants being considered for a death sentence under the future dangerousness factor.

#### A. *A Simmons Instruction Prior to the End of Parole in Virginia*

Before the abolition of parole, defendants convicted of capital murder and sentenced to life imprisonment in Virginia were generally eligible for parole twenty-five years after they began serving their terms.<sup>93</sup> Surveys of

because of her daughter's murder, victim's mother was afraid to go out alone at night, experienced marital difficulties, and missed victim's "acceptance and love").

89. See e.g., *Poyner v. Commonwealth*, 329 S.E.2d 815, 828 (Va. 1985) (holding that a jury has "no right to know what might happen to defendant, in terms of parole eligibility, after sentencing")

90. See *Eaton v. Commonwealth*, 397 S.E.2d 385, 391-92 (Va. 1990) (holding that proposed voir dire question informing potential jurors that the defendant would be ineligible for parole if convicted was not "relevant evidence to be considered by the jury") (citing *California v. Ramos*, 463 U.S. 992, 1013-14 (1983) (holding states are free to decide under state law whether to inform juries of post-sentencing events)).

91. 512 U.S. 154 (1994).

92. *Simmons v. South Carolina*, 512 U.S. 154, (1994).

93. See VA. CODE ANN. § 53.1-151(C) (Michie 1999) (class one felons sentenced to life imprisonment are generally eligible for parole after twenty-five years); but see VA. CODE ANN. § 53.1-151(D) (Michie 1999) (where a class one felon has been sentenced to two terms

the public revealed that few jurors actually knew the length of time that a capital murderer would serve in prison; many assumed that the defendant would serve much less than the twenty-five years required by law.<sup>94</sup> Since the future dangerousness factor asked jurors to decide whether the defendant would be a continuing criminal threat to society, this belief led jurors to impose the death sentence, at least in part, out of a fear that the defendant would soon return to and threaten their society.<sup>95</sup> Nevertheless, the Supreme Court of Virginia continuously held that juries had "no right" to know what would happen to a defendant after the sentence was imposed,<sup>96</sup> even though they were instructed to predict what the defendant would be capable of doing. This prediction could have been performed much more competently if the jury knew where the defendant would, in fact, be spending his days.<sup>97</sup>

### B. *Simmons and its Immediate Consequences in Virginia*

In *Simmons*, the Court recognized that the prosecution's argument for future dangerousness is "undercut" if the defendant is ineligible for parole.<sup>98</sup> The Court held that "truthful information" about parole ineligibility allows the defendant to deny or explain future dangerousness and must be admitted at the sentencing phase in order to satisfy the mandates of *Gardner v. Florida*.<sup>99</sup> The Court held that where future dangerousness is at issue, due process requires that the defendant be entitled to inform the jury of his parole ineligibility, either by jury instruction or argument of counsel.<sup>100</sup> Because defendants convicted of capital murder and sentenced to life were generally eligible for parole in Virginia, this holding had a limited immediate impact in Virginia.

For example, in a 1994 case, *Ramdass v. Commonwealth*,<sup>101</sup> the Supreme Court of Virginia held that the defendant was not entitled to a *Simmons* instruction where he was eligible for parole if convicted of capital murder.<sup>102</sup>

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of life imprisonment for separate crimes, be they both for class one felonies or not, he is eligible to be paroled from the second life term after thirty years).

94. See William H. Hood, III, Note, *The Meaning of "Life" for Virginia Jurors and its Effect on Reliability in Capital Sentencing*, 75 VA. L. REV 1605, 1624 (1989).

95. *Id.* at 1625.

96. *Poyner*, 329 S.E.2d at 828.

97. See *Simmons*, 512 U.S. at 165-66 (noting that in the pre-*Simmons* regime, a jury was left to speculate whether life imprisonment meant life without parole or something else).

98. *Id.* at 168-69 (citation omitted).

99. *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (holding that due process in a capital trial requires that a defendant be afforded an effective opportunity to rebut any aggravating factors which the state posits as a basis for imposing death).

100. *Simmons*, 512 U.S. at 166.

101. 450 S.E.2d 360 (Va. 1994).

102. *Ramdass v. Commonwealth*, 450 S.E.2d 360, 361 (Va. 1994).



The court noted the express holding of *Simmons*, that a defendant is entitled to inform the jury of the fact that he is parole ineligible, but concluded that it did not apply to cases where the defendant was parole eligible, even if such parole was many years away. Therefore, until 1995, *Simmons* was of value only to capital defendants, defending against future dangerousness, who would fit in the small class of capital murderers who were not eligible for parole.<sup>103</sup>

### C. The Parole Landscape Changes in Virginia

In 1994, the Virginia General Assembly, by enacting section 53.1-165.1 of the Virginia Code,<sup>104</sup> eliminated parole for all defendants sentenced to a term of imprisonment for the commission of any felony occurring on or after January 1, 1995.<sup>105</sup> The only possibility for parole left after the enactment of section 53.1-165.1 was geriatric parole under section 53.1-40 of the Virginia code.<sup>106</sup> That section excludes class one felons.<sup>107</sup> Class one felons are capital murderers.<sup>108</sup> Thus, a life sentence imposed upon a capital murderer is life without parole.

The abolition of parole essentially changed the decision that sentencing bodies are required to make in capital cases. While a jury had always had only two choices, death or life imprisonment, the choice of life imprisonment was now a statement that the defendant should die in prison. Thus, the fear jurors had of capital murderers rejoining the society in which the jurors lived became groundless. Moreover, because of *Simmons*, juries are required to be affirmatively informed of the fact that the defendant is not eligible for parole.<sup>109</sup> Rebuttal of the Commonwealth's case for death based on future dangerousness became easier because a significant part of the Commonwealth's calculus, fear of return to society, was effectively removed from the jury's consideration.

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103. See VA. CODE ANN. § 53.1-151 (Michie 1999). Under this statute, capital murderers were ineligible for parole if the murder was the third rape, murder, or robbery (or any combination of the three) committed by the defendant that was not part of the same act or transaction, see VA. CODE ANN. § 53.1-151(B1) (Michie 1999), or if the defendant had been paroled from a previous life sentence and then was sentenced to life imprisonment again for the commission of a second crime, see VA. CODE ANN. § 53.1-151(E) (Michie 1999).

104. See VA. CODE ANN. § 53.1-165.1 (Michie 1999).

105. *Id.*

106. VA. CODE ANN. § 53.1-40.01 (Michie 1999).

107. *See id.*

108. See VA. CODE ANN. § 18.2-31 (Michie 1999).

109. See e.g., *Mickens v. Commonwealth*, 457 S.E.2d 9 (Va. 1995) (jury was entitled to be informed of defendant's parole ineligibility where future dangerousness was the aggravating factor).

*D. Prison Condition Evidence - The Logical Extension of Simmons and its Gardner Rationale*

In *Simmons*, a plurality of four justices voted to reverse Simmons's death sentence on the grounds that he was not allowed to rebut information that was considered by the sentencing authority in its sentencing decision.<sup>110</sup> This notion was based in large part on the requirement of *Gardner v. Florida* that, under the Fourteenth Amendment, a defendant must be permitted to introduce any evidence that rebuts the state's argument for imposition of the death penalty.<sup>111</sup> In Virginia, only two arguments can be asserted by the Commonwealth as grounds for imposition of the death penalty: future dangerousness and vileness. Thus, under the Fourteenth Amendment, a capital defendant in Virginia must be allowed to introduce any evidence that rebuts the Commonwealth's case for future dangerousness.<sup>112</sup>

Recall the central question that the future dangerousness inquiry seeks to answer: Is there a probability that the defendant will commit criminal acts of violence that will constitute a continuing serious threat to society? Given the present parole landscape, the only society to which a defendant convicted of capital murder could ever constitute a threat is the prison society. Thus, the future dangerousness inquiry really asks if the defendant will commit criminal acts of violence within prison that will constitute a continuing serious threat to the prison society.<sup>113</sup> Defendants, who have a constitutional right to be allowed to enter any evidence tending to disprove the Commonwealth's case for death,<sup>114</sup> can rebut future dangerousness in many ways. One way to rebut dangerousness in the prison society is with evidence explaining the structure, procedures, and standards that make violent criminal behavior less likely in a prison setting. Evidence of the safety and precautionary regimens of prison tends to negate the probability that the defendant will commit criminal acts of violence that constitute a continuing serious threat to that society and therefore is admissible under *Simmons* and *Gardner* as evidence rebutting the Commonwealth's case for future dangerousness. It is important to note that the admissibility of such evidence is based on the Fourteenth Amendment rationales of *Simmons* and *Gardner*.

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110. *Simmons*, 512 U.S. at 165.

111. *Gardner*, 430 U.S. at 362.

112. See *Simmons*, 512 U.S. at 165.

113. In *Simmons*, the Court recognized that the future dangerousness inquiry, in states with life imprisonment without parole as the only other sentencing option, becomes a question of whether the defendant will be a danger to prison society. See *Simmons*, 512 U.S. at 166 n.5. Given this acknowledgment, it would be hard to imagine that the United States Supreme Court would find prison society evidence to be inadmissible in rebuttal of the future dangerousness argument.

114. See *supra* notes 111-12 and accompanying text.

Recently, the Supreme Court of Virginia rejected a somewhat similar argument in *Cherrix v. Commonwealth*.<sup>115</sup> In *Cherrix*, the defendant sought to introduce the testimony of an expert penologist, an official from the Virginia Department of Corrections, a criminologist, a sociologist and an inmate serving a life sentence in a Virginia prison.<sup>116</sup> The defendant argued to the trial court that the evidence was admissible as mitigating evidence, and justified by the Eighth Amendment, rather than as rebuttal evidence under the Fourteenth Amendment.<sup>117</sup> The trial court refused to admit this testimony.<sup>118</sup> On appeal, Cherrix claimed that the evidence was relevant mitigating evidence under the Eighth Amendment and thus its admission was compelled by *Skipper v. South Carolina*<sup>119</sup> and *Eddings v. Oklahoma*.<sup>120</sup> The Supreme Court of Virginia rejected Cherrix's claim that the Eighth Amendment rationale of *Skipper* and *Eddings* applied to the "general nature of prison life" evidence because such evidence, the court held, was not relevant to the history or experiences of the defendant.<sup>121</sup>

This determination illustrates the difference between mitigation and rebuttal evidence. Mitigation evidence looks, retrospectively, for reasons why a defendant should not be sentenced to death even if the defendant does constitute a future danger; thus, the *Cherrix* court described proper mitigation evidence as involving the defendant's history and experiences. It is important to note that the *Cherrix* court rejected only an Eighth Amend-

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115. 513 S.E.2d 642 (Va. 1999); see also *Walker v. Commonwealth*, 515 S.E.2d 565, 574 (Va. 1999) (rejecting defendant's argument that prison condition evidence is admissible as mitigating evidence).

116. *Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (Va. 1999).

117. An argument for admission of such evidence on Fourteenth Amendment grounds and *Simmons* may not have been possible in Cherrix's case. Cherrix committed the capital murder in 1994, prior to the abolition of parole. It is not clear from the Supreme Court of Virginia's decision whether Cherrix was ineligible for parole at the time of sentencing; thus, an argument for admission of prison condition evidence based on parole ineligibility may not have been possible. In *Walker*, however, the capital murder was committed after the abolition of parole so such an argument was possible.

118. *Cherrix*, 513 S.E.2d at 653.

119. 476 U.S. 1, 8-9 (1986) (finding that the exclusion of evidence that defendant has adjusted well to incarceration between arrest and trial violated *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that, under the Eighth Amendment, death penalty schemes must allow consideration, as a mitigating factor, of any evidence the defendant offers as a basis for a sentence less than death).

120. 455 U.S. 104, 113-14 (1982) (finding a violation of the Eighth Amendment when the sentencer was not allowed, as a matter of law, to consider any and all relevant mitigating evidence).

121. *Cherrix*, 513 S.E.2d at 653. The court's ruling was based on language in *Lockett v. Ohio* noting that the Eighth Amendment mitigation right "does not limit 'the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.'" *Id.* at 653 (quoting *Lockett v. Ohio*, 438 U.S. at 605 n.12).

ment mitigation argument for admission of prison life evidence.<sup>122</sup> Rejection of Cherrix's Eighth Amendment argument in no way effects the Fourteenth Amendment argument that such evidence is admissible as evidence in rebuttal of future dangerousness. Rebuttal evidence, in stark contrast to the retrospective character of mitigation evidence, seeks to deny that the defendant will be a future danger at all. Rebuttal evidence is prospective; it looks to the future to argue that the defendant is not likely to constitute a future danger. In other words, mitigation evidence is entered to say to the jury that even if the defendant is a future danger, because of the defendant's past, death should not be the punishment; rebuttal evidence is entered to say to the jury that there is no chance that the defendant will be a future danger. For this reason, prison condition evidence, which prospectively looks to the defendant's future living environment to show that there is no chance that he will be a future danger, should be offered on Fourteenth Amendment rebuttal grounds.

#### *E. The Effect of the Abolition of Parole on Victim Impact Evidence*

The abolition of parole has implications in areas other than *Simmons* instructions and prison life evidence. The choice of the Virginia legislature to make a life sentence a true life sentence lessens or eliminates the relevance of victim impact evidence to a sentencing decision based on future dangerousness.<sup>123</sup> To understand this assertion, it is important to understand why victim impact evidence purportedly matters in capital sentencing.

The Supreme Court of Virginia ruled in *Weeks v. Commonwealth* that victim impact evidence is relevant to capital sentencing decisions because it helps the sentencer assess the defendant's "moral culpability and blameworthiness."<sup>124</sup> Unfortunately, this is the only explanation by Virginia courts as to why victim impact evidence is relevant to capital sentencing. Presumably, if a defendant is more morally culpable and blameworthy, he is more befitting of a death sentence. However, the Supreme Court of Virginia's rationale of moral blameworthiness has no clear bearing on a defendant's propensity to commit future acts of violence. Instead, victim impact evidence can be justified only as a fairness issue—it provides closure to the victims family and allows the jury to see just how much pain the defendant has caused.

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122. The *Walker* court's decision was also based on an Eighth Amendment mitigation claim by the defendant. No Fourteenth Amendment claim was made. See *Walker*, 515 S.E.2d at 574.

123. This section assumes that victim impact evidence is relevant to a capital sentencing decision. As discussed earlier in this article, the author believes that victim impact is irrelevant to the sentencing decision. See *supra* Section IV.

124. *Weeks v. Commonwealth*, 450 S.E.2d 379, 390 (Va. 1994) (quoting *Payne v. Tennessee*, 501 U.S. 808, 825 (1991)).

Because victim impact testimony is allowed, in part, to give the victim the opportunity for closure, it had bearing on the sentencing decision prior to the abolition of parole, whether or not it was relevant to a future dangerousness inquiry. Sentencing bodies, cognizant of the pain felt by the victim, did not want to be responsible for imposing a sentence that allowed the defendant to reenter society and thus remind the victim of the pain caused by the defendant. In other words, victim impact evidence made the jury aware that a sentence less than death would open the victim up to a potential destruction of the closure received at trial. After parole was abolished, however, this danger disappeared. Sentencing bodies no longer have the opportunity to impose a sentence that may result in the release of the defendant into society. Thus, the fear of destroying closure no longer exists and victim impact evidence is not needed to make the jury aware of the victim's desire for closure.

Another justification for victim impact testimony, perhaps more relevant to future dangerousness than the desire to inform the jury of the victim's interest in closure, previously arose in cases where the deceased was especially sympathetic. Suppose a small child had been murdered. Testimony of the pain and agony suffered by the child's parents made a jury aware of the defendant's increased reprehensibility. Once the jury became aware that the defendant was able to kill the most pitiful of people, it was more likely to act in a way that prevented the defendant from ever imposing similar pain and agony again. The only way to ensure that such pain would never again be felt, prior to the end of parole, was by sentencing the defendant to death. However, once parole was terminated, there became no need for a jury to impose a death sentence to prevent such agony to other sympathetic victims. A life sentence ensures that a defendant will cause no more pain to similar sympathetic victims. Thus, two prior rationales for allowing victims to testify at the sentencing phase are outdated. Coupling this lack of justification with the irrelevance that victim impact evidence has in relation to the future dangerousness inquiry<sup>125</sup> should make that evidence inadmissible.

### Conclusion

This article has examined the roots of the Virginia future dangerousness factor. This article has argued that circumstances of the offense for which the defendant is being sentenced are irrelevant to the future dangerousness inquiry given the structure of the death penalty statutes and the initial characterization of the future dangerousness inquiry in *Smith v. Commonwealth*. This article has argued that unadjudicated acts of criminal conduct should not be admissible at sentencing where future dangerousness is at issue because such acts are unreliable. This article has argued that victim impact

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125. See *infra* Section IV.

evidence is irrelevant to the future dangerousness inquiry because it has no bearing on whether the defendant will in fact be a future danger. This article has explored the effect of *Simmons v. South Carolina* in Virginia after the abolition of parole by the Virginia General Assembly. This article has argued that, because of the abolition of parole, prison condition evidence is relevant to the future dangerousness inquiry as evidence rebutting the defendant's propensity for future dangerousness. Finally, this article has argued that the abolition of parole has made victim impact evidence even more irrelevant than it would otherwise be if parole existed. In sum, there are many problems with the future dangerousness inquiry in Virginia and this article has merely scratched the surface.

