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# Proportionality Review: The Historical Application and Deficiencies

Kelly E.P. Bennett\*

## I. Introduction

In an attempt to make the imposition of the death penalty as fairly and evenly applied as possible, the General Assembly of Virginia, in section 17.1-313 of the Virginia Code, has mandated proportionality review.<sup>1</sup> That statute provides that “[a] sentence of death, upon the judgment thereon becoming final in the circuit court, *shall* be reviewed on the record by the supreme court.”<sup>2</sup> The statute further provides that,

[i]n addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine: 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.<sup>3</sup>

### A. Present Procedure

As the procedure for proportionality review presently stands, the Supreme Court of Virginia, “may accumulate the records of all capital cases tried within such period of time as the court may determine.”<sup>4</sup> In fact, the records compiled by the Supreme Court of Virginia pursuant to section 17.1-313 of the Virginia Code consist only of capital cases previously reviewed by that court on appeal.<sup>5</sup> Defendants convicted of capital murder and sentenced to life can neither appeal directly to the Supreme Court of

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1. VA. CODE ANN. § 17.1-313 (Michie 1998).

2. § 17.1-313(A) (emphasis added).

3. § 17.1-313(C).

4. § 17.1-313(E).

5. See *Hedrick v. Commonwealth*, 513 S.E.2d 634, 642 (1999) (citing *Swisher v. Commonwealth*, 506 S.E.2d 763, 773 (1998)); *Orbe v. Commonwealth*, 519 S.E.2d 808, 816-17 (Va. 1999).

Virginia nor appeal on the issue of sentence.<sup>6</sup> Only a few such cases reach the Supreme Court of Virginia on discretionary review. Thus, the records compiled by the Supreme Court of Virginia consist primarily of capital cases in which the defendant received a death sentence. Allegedly, the records of these cases are kept on file at the supreme court to enable access for comparative proportionality review.

### 1. Proportionality Analysis: Part One

When a sentence of death is automatically appealed to the Supreme Court of Virginia, the case will first be reviewed to assure that the penalty was not imposed arbitrarily or because of passion or prejudice.<sup>7</sup> Section 17.1-313 of the Virginia Code states, "[t]he [supreme] court shall consider and determine: . . . [w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor."<sup>8</sup> In conducting this review, the court focuses on the events of trial, paying particular attention to evidence or argument to which the defense, asserting undue prejudice, objected.

Whether to admit proffered items into evidence is a decision within the discretion of the trial court. In *Stamper v. Commonwealth*,<sup>9</sup> a case involving possibly prejudicial evidence, the Supreme Court of Virginia reviewed the record to determine whether items admitted into evidence caused the jury to impose death under influence of passion or prejudice.<sup>10</sup> It is important to note that, because the admission of evidence is a matter resting solely within the sound discretion of the trial court, the decision to admit such evidence will not be disturbed on appeal unless a clear abuse of discretion is demonstrated.<sup>11</sup> The defendant argued to the Supreme Court of Virginia that significant evidence, such as the murder weapon, photographs, and a videotape sound recording graphically describing the crime scene so inflamed the jurors that they imposed a sentence of death under passion and prejudice.<sup>12</sup> The court reviewed the evidence brought to its attention by the defendant and determined that the jury and circuit court did not act with passion or prejudice in imposing a sentence of death.<sup>13</sup> In *Payne v. Common*

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6. See *infra* sections II(A)(2)(b).

7. § 17.1-313(C)(1).

8. *Id.*

9. 257 S.E.2d 808, 823 (Va. 1979).

10. *Stamper v. Commonwealth*, 257 S.E.2d 808, 823 (Va. 1979).

11. See *Stockton v. Commonwealth*, 402 S.E.2d 196, 210 (Va. 1991).

12. *Stamper*, 257 S.E.2d 808, 823.

13. *Id.* See also *Peterson v. Commonwealth*, 302 S.E.2d 520, 527-28 (Va. 1983) (holding that "admitting photographs of the victim. . . , admitting the testimony that [the defendant] threatened [a witness] for testifying against him, and admitting evidence of [defendant's] convictions of other crimes when those convictions were pending appeal" did not cause

*wealth*,<sup>14</sup> the defendant argued that the trial court and the jury acted in response to undue passion and prejudice in imposing two sentences of death.<sup>15</sup> The defendant asserted that the court's admission of autopsy photographs as well as a videotape and photographs of the crime scene "were 'unduly graphic . . . and [were] shown to inflame the passions of the jury.'"<sup>16</sup> The Supreme Court of Virginia reviewed the evidence shown to the trial court and jury, to which the defendant objected, and determined that admission of these items into evidence was not an abuse of trial court discretion. The court ruled that passion and prejudice did not influence the jury and the court affirmed the two death sentences.<sup>17</sup> It is clear that, unless the defendant can convince the supreme court that the trial court abused its discretion in allowing the admission of the evidence, the defendant loses on the argument that death was imposed under the influence of passion or prejudice. In effect, the Supreme Court of Virginia equates the admissibility standard, "more probative than prejudicial," with "not too prejudicial" to determine the influence of passion or prejudice in reviewing a sentence of death.

During the sentencing proceeding in *Payne*, the prosecutor displayed photographs of victims while describing the defendant as a "predator" and a "monster."<sup>18</sup> The defendant asserted that these statements by the prosecutor so inflamed the court as to cause the imposition of a sentence of death under influence of passion and prejudice.<sup>19</sup> The defendant further opined that the effect of the prosecution's characterization of the defendant "as a 'predator' and a 'monster'" was proven by the court's response to such evidence. Specifically, *Payne* asserted that the prosecution's argument "had the desired effect on the court' because the court 'described [the defendant] as a mad dog who should be put in a gunny sack with some bricks and dropped off a bridge.'"<sup>20</sup> He further contended that "this language by the court 'is ample evidence that the sentence of death was imposed under influence of passion and prejudice.'"<sup>21</sup> The Supreme Court of Virginia decided that the statements by the court and Commonwealth alone were

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influence of passion, prejudice, or arbitrary factors in the imposition of the death penalty).

14. 509 S.E.2d 293 (Va. 1999).
15. *Payne v. Commonwealth*, 509 S.E.2d 293, 297 (Va. 1999).
16. *Id.* (citation omitted).
17. *Id.* at 301.
18. *Id.* at 299.
19. *Id.*
20. *Id.* (citation omitted).
21. *Id.* (citation omitted).

not enough to show that death was imposed under influence of passion or prejudice.<sup>22</sup> The court affirmed both of Payne's death sentences.<sup>23</sup>

In sum, influence of passion or prejudice can enter the trial through either potentially prejudicial evidence presented by the Commonwealth or through inherently prejudicial arguments by the Commonwealth. The Supreme Court of Virginia's review of evidence employs a standard that only determines whether the trial court abused its discretion in admitting each particular piece of evidence, viewed alone. The review determining whether passion or prejudice influenced the imposition of a sentence of death should review *all* of the evidence admitted in the trial and penalty phases, and determine whether, considering all of the evidence together, the jury was influenced in a way as to unduly heighten the desire to impose death. Looking at evidence piece by piece and determining whether each piece, viewed alone, is more probative than prejudicial in no way assists in determining whether all the evidence together could so inflame the jury as to cause it to impose death under influence of passion or prejudice.

When the Supreme Court of Virginia reviews a claim that the Commonwealth's argument inflamed the jury and thus caused the imposition of death under influence of passion or prejudice, the court uses the same abuse of discretion standard described immediately above. The facts of *Payne*, in which the Commonwealth called the defendant a "monster" and a "predator," and the court, in response to such remarks, stated that the defendant should be "put in a gunny sack with some bricks and dropped off a bridge," are quite egregious.<sup>24</sup> If these facts are not enough to prove that a sentence of death was imposed under influence of passion or prejudice, then it is nearly impossible to establish that a sentence of death was imposed under passion or prejudice.

## 2. Proportionality Analysis: Part Two

The Supreme Court of Virginia's second level of proportionality analysis focuses primarily on whether, in light of other capital cases and considering the defendant's conduct in committing the crime, the imposition of the death penalty was disproportionate or excessive.<sup>25</sup> To determine the proportionality of a sentence of death the court employs a test: "whether generally juries in [the same] jurisdiction impose a death sentence for conduct similar to that of the defendant."<sup>26</sup> To answer this question the

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22. *Id.*

23. *Id.*

24. *Id.* at 299.

25. § 17.1-313(C)(2)

26. *Stamper v. Commonwealth*, 257 S.E.2d 808, 824 (Va. 1979) (stating that the test is not whether a jury may have declined to recommend death in a particular case but whether generally juries in the same jurisdiction impose the death sentence for conduct similar to that

Supreme Court of Virginia compares the case at hand with cases that include similar circumstances around the commission of the crime.<sup>27</sup> In this comparison the court reviews the circumstances of the case on review in light of other similar cases previously reviewed by the court to determine whether generally juries impose the death penalty for similar conduct.<sup>28</sup> If the review of other cases reveals that, as a general rule, juries here imposed death for similar circumstances, the court will find the sentence proportionate.<sup>29</sup>

When evaluating the proportionality of a death sentence, the court does not consider it necessary that *all* similar cases resulted in a death sentence.<sup>30</sup> The applicable test examines whether juries generally impose death sentences in similar situations:<sup>31</sup> “[If in] consideration of both [the defendant] and the crime he committed, [the court] is satisfied that, ‘while there are exceptions,’ other sentencing bodies in this Commonwealth generally imposed the supreme penalty [of death] for comparable or similar offenses,” then a sentence of death is proportionate.<sup>32</sup> To date there has been no reversal of a death sentence on the grounds of proportionality.

## *II. Inherent Problems With the Historical and Present Comparative Proportionality Review Procedure*

Several inadequacies diminish the value of the procedure used by the Supreme Court of Virginia in conducting proportionality review. First, the comparative process engaged in by the court to determine whether juries generally impose death for similar conduct is inherently inaccurate. The compilation of records the Supreme Court of Virginia uses in the required proportionality review does not include a complete cross section of cases. Cases in which a capitally-convicted defendant received life imprisonment are significantly under-represented. Second, the procedure employed by the Supreme Court of Virginia in conducting a proportionality review comes after having ignored a requirement mandated by section 17.1-313 of the

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of the defendant).

27. § 17.1-313(C)(2).

28. See, e.g., *Stamper*, 257 S.E.2d at 824.

29. See *Peterson v. Commonwealth*, 302 S.E.2d 520, 528 (Va. 1983) (stating that “[i]f juries generally in Virginia impose the death sentence for conduct similar to that of the defendant, then the sentence is not excessive or disproportionate”).

30. See *Williams v. Commonwealth*, 472 S.E.2d 50, 54 (Va. 1996) (concluding that, since juries generally impose death in similar circumstances, imposition of the death penalty was not excessive or disproportionate) (citing *Roach v. Commonwealth*, 468 S.E.2d 98, 114 (Va. 1996) (concluding that, while there are exceptions, the Commonwealth generally imposed death for conduct similar to that of the defendant, and thus, the defendant’s death sentence was not disproportionate)).

31. *Id.*

32. *Id.* (citation omitted).

Virginia Code:<sup>33</sup> the court does not regularly supply the circuit courts with the compiled records of capital cases. Thus, there currently is no proportionality analysis by the circuit court prior to the imposition of a jury-recommended death sentence. As a result, the review conducted by the Supreme Court of Virginia is a *de novo* review of the record rather than a review of the circuit court's proportionality analysis. Finally, despite the language of section 17.1-313 of the Virginia Code, the Supreme Court of Virginia does not include a comparison of defendants (beyond the facts of their crimes) in its proportionality review.

### A. No Effective Comparison Procedure

#### 1. The Collected Cases

Section 17.1-313 of the Virginia Code requires the Supreme Court of Virginia, in conducting a proportionality review, to consider available records to guide a determination of whether a sentence of death is excessive.<sup>34</sup> The relevant portion of the statute reads, "[t]he court *shall* consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive."<sup>35</sup> Because the statute requires each death sentence be subject to review for proportionality, the court is obligated to consider available records of other cases to determine whether death is excessive or disproportionate.<sup>36</sup> However, section 17.1-313 on the Virginia Code does not require the court actually to collect cases.<sup>37</sup> Rather, section 17.1-313(E) states that "[t]he Supreme Court *may* accumulate the records of all capital felony cases tried within such period of time as the court may determine."<sup>38</sup> Yet, immediately following this sentence the statute requires the court to conduct a comparative proportionality review.<sup>39</sup> The language is confusing. In using the term "may," the General Assembly might have intended to either preclude a claim for relief if the court neglected to gather *every* capital case or to relieve the burden on the Supreme Court of Virginia to gather *every* capital conviction tried in the circuit courts.

In fact, the Supreme Court of Virginia does not collect capital cases from either the Virginia Court of Appeals or the Virginia circuit courts. However, in several cases the supreme court has stated that, in reviewing for proportionality, it compares the records of the case on review with those of

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33. § 17.1-313(E).

34. *Id.*

35. *Id.* (emphasis added).

36. § 17.1-313(A)

37. § 17.1-313(E)

38. *Id.* (emphasis added).

39. *Id.*

other capital cases reviewed by the court, "including capital cases where a life sentence was imposed."<sup>40</sup>

2. *Supreme Court of Virginia Capital Life Cases: Not an Effective Representation of all Capital Life Cases*

a. *Death Sentenced Capital Cases Outnumber Life Sentenced Capital Cases*

Since all cases in which death is imposed are automatically appealed to the Supreme Court of Virginia, the other class of cases remaining to be collected are the capital cases in which the defendant received a life sentence. Though a few capital cases in which the defendant received a life sentence have reached the Supreme Court of Virginia, they are infrequent and do not provide a fair representation of the cases in which capital convictions actually result in life sentences.<sup>41</sup> If a defendant does appeal a capital murder case upon receiving a life sentence, the Virginia Court of Appeals will conduct the review. Only in the instance of a *second* and discretionary appeal will the Supreme Court of Virginia review this kind of case. Inevitably, there are very few cases heard by the supreme court in which the defendant received a conviction for capital murder and was subsequently sentenced to life imprisonment.<sup>42</sup> Thus, because the Supreme Court of Virginia only compiles the cases previously heard by the court itself, there are few cases included in the records where a capitally convicted defendant received a life sentence.<sup>43</sup> Because of this disparity, the pool of cases the court uses in conducting its required comparative proportionality determination is skewed.

b. *Life-Sentenced Capital Cases Reviewed by the Supreme Court of Virginia do not Address Sentencing*

None of the few cases reviewed by the Supreme Court of Virginia in which a capitally convicted defendant received life involve an analysis of

40. Hedrick, v. Commonwealth, 513 S.E.2d 634, 642 (Va. 1999); see Cherrix v. Commonwealth, 513 S.E.2d 642, 655 (Va. 1999); Swisher v. Commonwealth, 506 S.E.2d 763, 773 (Va. 1998); Reid v. Commonwealth, 506 S.E.2d 787, 793 (1998); Fitzgerald v. Commonwealth, 455 S.E.2d 506, 512 (Va. 1995); Wilson v. Commonwealth, 452 S.E.2d 669, 676 (Va. 1995) (noting that in conducting proportionality review the Supreme Court of Virginia used cases reviewed by the supreme court where a life sentence was imposed).

41. See Graham v. Commonwealth, 464 S.E.2d 128 (Va. 1995); Cheng v. Commonwealth, 393 S.E.2d 599 (Va. 1990); Robinson v. Commonwealth, 341 S.E.2d 159 (Va. 1986); Horne v. Commonwealth, 339 S.E.2d 186 (Va. 1986); Harward v. Commonwealth, 330 S.E.2d 89 (Va. 1985); Morris v. Commonwealth, 321 S.E.2d 633 (Va. 1984); Simpson v. Commonwealth, 318 S.E.2d 386 (Va. 1984); Keil v. Commonwealth, 278 S.E.2d 826 (Va. 1981); Johnson v. Commonwealth, 273 S.E.2d 784 (Va. 1981). All of these cases are examples of life cases reviewed by the Supreme Court of Virginia.

42. See *supra* note 40.

43. *Id.*



sentencing.<sup>44</sup> A conviction of capital murder permits only two possible sentences: the circuit court may impose a sentence of death or a sentence of life. Consequently, there are no grounds on which to challenge a life sentence for a capital conviction.<sup>45</sup> When the trial court imposes life and the defendant appeals, the issues appealed are never issues of sentencing. Thus, none of the capital cases resulting in life sentences heard by the Supreme Court of Virginia are factually developed on the issue of sentencing. As a result, the few capital life imprisonment cases used by the Supreme Court of Virginia in conducting the mandated comparative proportionality review provide little guidance to the court in evaluating the excessiveness of a death sentence.<sup>46</sup>

Cases in which a defendant was convicted of capital murder in the course of a robbery exemplify the failure of the few capital life cases reviewed by the court to represent effectively all cases in which a defendant was convicted of capital murder and sentenced to life.<sup>47</sup> Though there are cases in which a defendant received death for capital murder in the course of a robbery, there are also numerous capital cases in which the defendant committed murder during the course of a robbery and was sentenced to life.<sup>48</sup> Proportionality review should include "similar cases" from the Virginia Court of Appeals in which the defendant received life imprisonment for a similar offense. Inclusion of capital cases in which a life sentence was imposed by the circuit courts and in which there was no appeal would yield an even more accurate picture of how juries treat similar cases. Without the inclusion of these cases comparative review is unavoidably incomplete and unreliable.

### *3. Cases Collected by the Supreme Court of Virginia do not Fairly Represent what Sentences Juries Generally Recommend in Capital Cases*

Despite the inconsistent language of section 17.1-313, the Supreme Court of Virginia could, and should, include in its records a much broader class of cases than it currently does. At the very least, a logical interpretation of the statute imposes a duty to compile a cross-section of both life and death capital cases which fairly represent how juries generally sentence for various conduct.

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44. *Id.*

45. Of course, a life sentence cannot be overturned as inadequate. Furthermore, a life sentence received for a conviction of capital murder is an implied acquittal of death. Thus, there is a double jeopardy bar against any further consideration of a sentence of death once the trial court has imposed life. See *Bullington v. Missouri*, 451 U.S. 430, 444-45 (1981) (holding that the determination by the jury not to impose a sentence of death is a judgment that the prosecution has not proven the case for death and thus is an acquittal thereof).

46. *Id.*

47. See *infra* note 56.

48. See *infra* note 56.

In *Orbe v. Commonwealth*,<sup>49</sup> the defendant entered a convenience store and pointed a revolver at the store clerk. After the clerk opened the cash drawer, the defendant shot him.<sup>50</sup> The circuit court convicted Orbe of capital murder in the commission of a robbery and sentenced him to death on a finding of future dangerousness.<sup>51</sup> Orbe appealed his case to the Supreme Court of Virginia. On appeal, the court conducted the mandated comparative proportionality review of his death sentence.<sup>52</sup> In its comparative assessment, the court stated that the Virginia Code,

requires us to determine whether the sentence of death in this case is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." Pursuant to Code § 17.1-313(E), we have accumulated the records of all capital murder cases reviewed by this Court. The records include not only those capital murder cases in which the death penalty was imposed, but also those cases in which the trial court or jury imposed a life sentence and the defendant petitioned this court for an appeal.<sup>53</sup>

In the comparative review the court focused specifically on cases with facts similar to the facts of Orbe's case. The court narrowed the review to include only cases where "an employee was murdered in a business establishment."<sup>54</sup> Although the court reviewed cases from its own docket with similar facts, the court neglected a large selection of cases that also have similar facts. The court's proportionality analysis in *Orbe* was incomplete. Numerous cases in the Virginia Court of Appeals, which have facts similar to those in *Orbe*, resulted in a conviction for capital murder in the commission of a robbery and an imposition of a life sentence.<sup>55</sup> Many of these cases

49. *Orbe v. Commonwealth*, 519 S.E.2d 808, 810 (Va. 1999).

50. *Id.*

51. *Id.* at 809.

52. *Id.* at 816.

53. *Id.* (citing *Whitley v. Commonwealth*, 286 S.E.2d 162, 171 (Va. 1982); quoting § 17.1-313(E)).

54. *Id.*

55. In each of the following cases, the defendant was convicted under section 18.2-31.4 of the Virginia Code and received a life sentence. *Williams v. Commonwealth*, 517 S.E.2d 246, 248 (Va. Ct. App. 1999) *reh'g granted*, 518 S.E.2d 858 (Va. Ct. App. 1999) (the defendant and an acquaintance broke into a crack house where they knew the seller was alone, killed the dealer, and stole the "dope" from the house); *McLean v. Commonwealth*, 516 S.E.2d 717, 719 (Va. Ct. App. 1999) (the defendant, along with three others, killed a man by slamming a concrete splash block on the victim's face and slitting the victim's throat with a broken bottle; defendant subsequently emptied the victim's wallet); *Williams v. Commonwealth*, 512 S.E.2d 133, 134 (Va. Ct. App. 1999) (the defendant killed and robbed a lawyer in her law office); *Owens v. Commonwealth*, No. 2259-95-1, 1996 WL 666739, at \*1 (Va. Ct. App. Nov. 19, 1996) (the defendant and accomplice killed four people); *Tate v. Commonwealth*, No. 1774-95-2, 1996 WL 343898, at \*1 (Va. Ct. App. June 25, 1996) (convictions for capital murder, first degree murder, second degree murder, three counts of use of a firearm in the commission of the murders, breaking and entering with a deadly weapon, and grand larceny

also involve circumstances in which the victim was an employee of the store or establishment the defendant robbed.<sup>56</sup> In omitting these cases, and others similar to these, from the comparative analysis, the Supreme Court of Virginia's analysis of juries' sentencing tendencies is necessarily unreliable.

#### 4. *Inaccurate Results From an Incomplete Review for Proportionality*

The incomplete nature of the record used to determine what sentence juries tend to impose for certain conduct has significant effect on the outcome. The overall effect of limiting the cases used by the court in proportionality review to those previously heard by the court is that the majority of cases used by the court when conducting proportionality review are cases in which the defendant received a death sentence.<sup>57</sup>

The absence of life cases necessarily disrupts the procedure defined by section 17.1-313 of the Virginia Code. By primarily considering cases in which a death penalty was actually imposed, the court reaches an unreliable and often incorrect result. The court merely concludes that the death sentence in the case under review is comparable to other death sentences. This is *not* an analysis of whether juries *generally* impose death in cases factually similar to the one at hand. Rather, it is an analysis of whether juries have *ever* imposed death in similar cases. In effect, the analysis looks

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of an automobile); *Tross v. Commonwealth*, 464 S.E.2d 523, 526 (Va. Ct. App. 1995) (the defendant shot and killed the manager of a grocery store who stood blocking the door as defendant and his companions attempted to steal beer); *Ferguson v. Commonwealth*, 427 S.E.2d 442, 443-44 (Va. Ct. App. 1993) (convictions of capital murder, robbery, abduction, and other offenses connected with a bank robbery); *Mundy v. Commonwealth*, 390 S.E.2d 525, 527-28 (Va. Ct. App. 1990) (the defendant forced a companion to kill a hotel clerk by putting a gun to his companion's head and stating "[i]f you don't kill him I am going to kill you," and killed a hotel patron in the course of robbery); *Walton v. Commonwealth*, No. 0900-85, 1986 WL 400479, at \*1 (Va. Ct. App. Dec. 11, 1986) (the defendant shot the manager of a convenience store while stealing the cash from the store's cash drawer).

This listing does not include cases in which the defendant was charged with capital murder pursuant to section 18.2-31 of the Virginia Code, but was convicted of first degree murder. The following cases are cases in which the defendant was charged with capital murder and convicted by a jury of first degree murder: *Allen v. Commonwealth*, No. 2737-96-2, 1998 WL 49064, at \*1 (Va. Ct. App. Feb. 10, 1998) (the defendant killed a man and stole money from his wallet); *Braxton v. Commonwealth*, 493 S.E.2d 688, 689 (Va. Ct. App. 1997) (defendant killed the victim to keep her quiet and stole from her home); *Moats v. Commonwealth* 404 S.E.2d 244, 245 (Va. Ct. App. 1991) (the defendant robbed a convenience store and killed the clerk); *Chappell v. Commonwealth*, No. 0465-85, 1986 WL 400464, at \*1 (Va. Ct. App. Oct. 10, 1986) (defendant paid an accomplice to kill the victim).

56. See § 17.1-313(E) (stating that records collected by the Supreme Court of Virginia "shall be made available to the circuit courts").

57. See *Peterson v. Commonwealth*, 302 S.E.2d 520, 528 (Va. 1983) (stating that the court reviewed for proportionality by examining "the records in all capital murder cases reviewed by this court" and in the discussion immediately following this statement referred to the cases examined, none of which were cases where the defendant received life imprisonment).

for the minimal level of similarity necessary between cases where the defendant was sentenced to death and the case at hand to conclude that death in the case at hand is not excessive or disproportionate. Thus, when the Supreme Court of Virginia conducts proportionality review, the significant void of capital cases in which the defendant was sentenced to life ensures that the review will not disclose how juries *generally* sentence.

## *B. Circuit Court Proportionality Review*

### *1. Introduction*

The Virginia Code requires that, at a minimum, the Supreme Court of Virginia transmit the cases presently used in the required proportionality review to the circuit courts.<sup>58</sup> Historically, the Supreme Court of Virginia has not distributed the compiled records to the circuit courts. By neglecting to request that records be made available to them by the Supreme Court of Virginia, defendants are partially responsible for the problem. Although the defendant is under no duty to do so, if the defendant does move the circuit court to request proportionality review records from the Supreme Court of Virginia, the court is statutorily obligated to make such records available.<sup>59</sup> The requirement to transfer compiled records of capital cases to the circuit courts advances a quite practical goal and creates a right in the defendant. The circuit court judge has statutory authority to impose a life sentence after the jury has recommended death. The facts and circumstances of the case are never as clear on appeal as they are at the trial level, where the circuit court has witnessed first hand the presentation of evidence and mitigating factors. Furthermore, the transcript cannot convey to an appellate court the defendant's demeanor and the overall "feeling" of the trial. Consequently, the trial judge has the most informed viewpoint from which to conduct an effective proportionality review. Thorough proportionality review by the trial court is important to the defendant because the standard of review on appeal as to proportionality is significantly higher than that of the trial court. The Supreme Court of Virginia will find reversible error on appeal only if the trial court clearly abused its discretion in imposing a sentence of death. Finally, and most significantly, courts lack jurisdiction to impose sentence until the specific mandates found in sections 17.1-313 and 19.2-264.5 have been fulfilled.<sup>60</sup>

### *2. Statutory Framework*

The circuit courts do not presently conduct proportionality review. Section 17.1-313 of the Virginia Code states that the records accumulated by

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58. § 17.1-313(E).

59. *Id.*

60. See *Brenham v. Smith*, 90 S.E. 657, 658 (Va. 1916).

the Supreme Court of Virginia “shall be made available to the circuit courts.”<sup>61</sup> There is no plausible purpose for this language other than to require the Supreme Court of Virginia to make the records of other capital cases collected for comparative proportionality review available to the circuit courts, thereby giving the circuit courts a basis to conduct a proportionality review of their own for each capital case *before* a sentence is imposed.

Section 19.2-264.5 of the Virginia Code mandates a review of a post-sentence report and of “good cause shown” for the setting aside of the jury’s death verdict before the imposition of a sentence of death.<sup>62</sup> No better cause exists to set aside a sentence of death than to prohibit the unfair imposition of the country’s ultimate punishment. “Good cause shown” clearly includes a demonstration that in factually similar cases, involving similar defendants, the trial court did not impose death. The Supreme Court of Virginia must make available to the circuit courts upon request all records used in comparative proportionality review as mandated by section 17.1-313(E) of the Virginia Code.<sup>63</sup> This statute, read in tandem with section 19.2-264.5 of the Virginia Code, requires the trial court to conduct a proportionality review of a recommended sentence of death prior to the imposition of sentence.<sup>64</sup> Without such review that circuit court lacks jurisdiction to impose a sentence of death.<sup>65</sup>

Section 19.2-264.5 of the Virginia Code requires that “[w]hen the punishment of any person has been fixed at death, the court shall, before imposing a sentence, direct a probation officer of the court thoroughly to investigate the history of the defendant and any and all other relevant facts to the end that the court may be fully aware as to whether the sentence of death is appropriate and just.”<sup>66</sup> The statute requires that the post-sentence report contain the information acquired through the mandated investigation.<sup>67</sup> Section 19.2-264.5 of the Virginia Code further provides that in the post-sentence review of whether death is appropriate and just, the court may “set aside the sentence of death and impose a sentence of imprisonment for life . . . [a]fter consideration of the [prepared] report, and upon *good cause shown*.”<sup>68</sup> Though setting aside a sentence of death and imposing a sentence

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61. § 17.1-313(E) (emphasis added). To the extent the Supreme Court of Virginia collects life sentenced records as suggested *supra*, section II(A), all of those records must be included in the transmittal. However, this argument does not depend on the content of transmitted records.

62. VA. CODE ANN. § 19.2-264.5 (Michie 1998)

63. § 17.1-313(E).

64. *Id.*; § 19.2-264.5.

65. *Brenham*, 90 S.E. at 658.

66. § 19.2-264.5.

67. *Id.*

68. *Id.* (emphasis added).

of life is discretionary, the review of the post-sentence report and of good cause shown prior to the imposition of a sentence of death is not.<sup>69</sup> Section 19.2-264.5 of the Virginia Code mandates courts to review the post-sentence report and to determine whether good cause for imposing a life sentence exists.<sup>70</sup>

Under section 19.2-264.5 of the Virginia Code, the post-sentence report is required to contain the history of the defendant, a victim impact report and other relevant facts.<sup>71</sup> The last phrase at least includes the offense and the circumstances surrounding it. The language of the statute requires the review of all of this information contained in the report *and* review of good cause shown.<sup>72</sup> Thus, "good cause shown" is necessarily information separate from and external to information included in the post-sentence report.<sup>73</sup> This language logically leads to the conclusion that information exposing why death should not be imposed must be reviewed by the court, and that the defendant has an right to proffer such information for review. The most obvious information, external to the post-sentence report, which a defendant might proffer as good cause to set aside a jury recommendation of death is information revealing that, in similar cases involving similar defendants, death was not imposed. Once a jury has recommended a sentence of death, the mandates of section 17.1-313(E) of the Virginia Code, requiring the availability of records for comparative proportionality review to the circuit courts, and section 19.2-264.5 of the Virginia Code, requiring a review of good cause shown, become operative.<sup>74</sup> Each of these statutes creates a right in the defendant to a fulfillment of the statutory mandate prior to the imposition of sentence.<sup>75</sup> The statutory mandates of sections 17.1-313 and 19.2-264.5, taken together, require that the circuit courts receive and consider proportionality evidence prior to the imposition of sentence.

### 3. *Accrual of Rights to Defendant*

At a minimum, section 19.2-264.5 creates in the defendant a right to have the trial judge consider proportionality evidence prior to imposing sentence.<sup>76</sup> Thus, when a defendant moves for proportionality review the trial court must grant it.<sup>77</sup> Section 17.1-313 of the Virginia Code creates a

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.*; § 17.10-313.

75. *Id.*

76. *Id.*

77. *Id.*

right to have the Supreme Court of Virginia's collected records before the trial court.<sup>78</sup> Thus, when the defendant moves the trial court to request transmittal of those records from the Supreme Court of Virginia, the trial court must request that the Supreme Court make available the records collected for proportionality review. Furthermore, the Supreme Court is obligated by law to honor the trial court's request for such records.

Virginia law requires courts to honor statutory mandate for relevant information pertaining to the crime and the defendant, including mitigation evidence, before imposing sentence.<sup>79</sup> Section 19.2-299 of the Virginia Code requires that, upon request by the Commonwealth or by the defendant, the court must order a presentence investigation to inform the court of all relevant information pertaining to the defendant and the crime prior to sentencing.<sup>80</sup> The Supreme Court of Virginia, in applying that statute, stated that "[a] defendant convicted of a felony has an absolute right to have a presentence investigation and report prepared upon his request and submitted to the court prior to sentencing."<sup>81</sup> Clearly, the legislative purpose behind this requirement is to address the importance that the court be "fully advise[d]" of all information that may influence the court in determining the necessary sentence.<sup>82</sup>

The same is true in situations where the court has convicted a defendant of a crime involving sexual abnormality.<sup>83</sup> A defendant convicted of a crime involving sexual abnormality, upon request, has a right to defer sentencing until a psychologist conducts a mental examination of the

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78. § 17.1-313.

79. See VA. CODE ANN. § 19.2-299 (Michie 1998) (stating "the court . . . on motion of the defendant shall, [before imposing sentence] direct a probation officer of such court to thoroughly investigate and report upon the history of the accused, including a report of the accused record as an adult and available juvenile court records, and all other facts, to fully advise the court so the court may determine the appropriate sentence to be imposed"); *Simerly v. Commonwealth*, 514 S.E.2d 387, 390 (Va. 1999) (noting that upon request the defendant was entitled to have sentencing deferred until a mental examination was conducted pursuant to his conviction of a crime involving "sexual abnormality"); *Thomas v. Commonwealth*, No. 1690-96-2, 1997 WL 191297, at \*2 (Va. April 22, 1997) (stating that the defendant has an "unequivocal right to have a presentence report completed and submitted to the court prior to his being sentenced"); *Harley v. Commonwealth*, No. 1717-95-2, 1996 WL 409210, at \*1 (Va. July 23, 1996) (citing *Duncan v. Commonwealth*, 343 S.E.2d 392, 394 (Va. 1986) (stating that "[a] defendant convicted of a felony has an absolute right to have a presentence investigation and report prepared upon his request and submitted to the court prior to the pronouncement of sentence.")).

80. § 19.2-299

81. *Duncan*, 343 S.E.2d at 394.

82. *Id.*

83. See *Simerly*, 514 S.E.2d at 390 (noting that upon request the defendant was entitled to have sentencing deferred until a mental examination was conducted pursuant to his conviction of a crime involving "sexual abnormality").

defendant.<sup>84</sup> The same logic which applies to sentencing generally under section 19.2-299 applies to this requirement. It is necessary that courts be fully aware of all factors relevant to sentence determination, including the defendant's mental capacity, prior to the imposition of sentence. Both the right to a presentence report and the right to a mental examination are rights that accrue only upon request of the defendant. If the defendant does request a presentence report or mental examination when convicted of a crime involving sexual abnormality and the court does not oblige, the sentence is voidable. In *Simerly v. Commonwealth*, the Virginia Court of Appeals determined that the trial court committed reversible error in refusing to order a mental examination of a defendant convicted of a crime involving "sexual abnormality" before imposing sentence.<sup>85</sup> The Court of Appeals reversed the trial court "for the limited purpose of allowing the court to resentence Simerly after a mental examination had been completed."<sup>86</sup> If the defendant does not request the review of a presentence report or mental examination, the rights to these procedures are waived.

#### 4. *Deprivation of Jurisdiction to Impose Sentence*

When a statute imposes an absolute duty on a court prior to that court taking action, as do sections 17.1-313 and 19.2-264.5, the court is without jurisdiction to take the action without having first performed the predicate duty.<sup>87</sup> Sections 17.1-313 and 19.2-264.5, viewed in concert, impose an absolute duty on the court to conduct a review of good cause to set aside a jury recommendation of death before imposing a sentence of death. Thus, if a circuit court does not receive collected records for comparative proportionality review from the Supreme Court of Virginia, and does not consider whether such records amount to "good cause" to set aside a sentence of death, the circuit court is without jurisdiction to impose sentence. The defendant, of course, has no obligation to take any action.

#### 5. *The Constitutional Right to a Trial Level Comparative Proportionality Determination*

In *Whalen v. United States*,<sup>88</sup> the United States Supreme Court determined that when a state court acts outside of its jurisdiction in imposing a sentence, the court violates the defendant's right to due process of law.<sup>89</sup>

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84. *Id.*

85. *Id.* at 391.

86. *Id.*

87. *Brigham v. Smith*, 90 S.E. 657, 658 (Va. 1916) ("[Where] mandatory requirements of the statute have been ignored, the jurisdiction of the court [is] thereby defeated, and the proceedings rendered null and void for all purposes.")

88. 445 U.S. 648, 649 (1980).

89. *Whalen v. United States*, 445 U.S. 684, 689 (1980).



The Court noted that "[t]he Due Process Clause of the Fourteenth Amendment . . . prohibit[s] state courts from depriving persons of liberty or property as punishment for criminal conduct except to the extent authorized by state law."<sup>90</sup> Surely the same is true as to a deprivation of life.

Sections 19.2-264.5 and 17.1-313 of the Virginia Code mandate that a comparative proportionality review be conducted at the trial court level prior to the imposition of a death sentence. Thus, if a Virginia circuit court were to impose a sentence of death without first determining if good cause, based upon a comparative proportionality review, existed so that a sentence of death should not be imposed, the court would exceed its jurisdiction. That action would be a violation of the defendant's right to due process of law protected by the Fourteenth Amendment of the United States Constitution.<sup>91</sup>

The defendant of every criminal case in Virginia has a right granted and guaranteed by the Virginia Constitution to present evidence in his favor.<sup>92</sup> If a court refuses to admit evidence in the defendant's favor to establish good cause not to impose a sentence of death, including evidence of the disproportionality of a sentence of death, the court will violate the defendant's right to the presentation of such evidence protected by the Virginia Constitution.

### C. Defendant Proportionality

The third reason why Virginia's proportionality review is inadequate and incomplete is because there is no comparison of the instant defendant to other capital defendants during the mandated proportionality review. Section 17.1-313 of the Virginia Code requires the Supreme Court of Virginia to conduct proportionality review to determine "[w]hether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and *the defendant*."<sup>93</sup> According to this language, the Supreme Court of Virginia must not only determine that a particular crime or criminal act comparatively warranted a sentence of death, but also that a particular defendant, in comparison to other defendants, is a fair candidate for death. This review of the defendant is mandatory. Without a comparative review of similar crimes involving similar defendants the review is statutorily inadequate.

Under current practice there is no comparative review of the defendant and other defendants in similar cases. On occasion the supreme court will look at the defendant in the case under review by examining prior criminal activity, home life, and personal traits showing criminal disposition. In

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90. *Id.* at 689 n.4.

91. See U.S. CONST. amend. XVI.

92. VA. CONST. art. I § 8.

93. § 17.1-313(C)(2).

*Ramdass v. Commonwealth*,<sup>94</sup> the Supreme Court of Virginia, while conducting proportionality review, discussed the defendant's criminal history, past probation violations, duration of previous prison sentences, the fact that the defendant, when arrested for a prior crime, was found by police sleeping with a loaded revolver beside the bed, the length of time the defendant was released before committing another crime, the malice involved in previous crimes, and the atrociousness of the crime under review.<sup>95</sup> Typically this sort of review is conducted when the aggravating factor in the case under review is "future dangerousness."<sup>96</sup> However, this review is not a comparative one. It only identifies the instant defendant as "bad." It cannot decide how his "badness" compares to that of other capitally convicted defendants.

In *Peterson v. Commonwealth*,<sup>97</sup> Supreme Court of Virginia came the closest to performing the actual comparative proportionality review mandated by section 17.1-313.<sup>98</sup> The court, in reviewing whether Peterson's death sentence was proportionate to that of other capital defendants, discussed the defendant's criminal record and compared it to the criminal records of other capital defendants who were sentenced to death on the "future dangerousness" predicate.<sup>99</sup> This is a comparative review, but a very limited one. It fails to include and compare any of the personal mitigation evidence presented by each defendant.

Even if the court conducts a truncated comparative review of the defendant, as in the *Peterson* case, that review suffers the same infirmities as does comparative review of offenses. The defendants reviewed are mostly defendants that have been sentenced to death. Thus, the determination of whether the death sentence under review is proportionate is actually a determination of whether the defendant under review is comparable to

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94. 437 S.E.2d 566 (Va. 1993).

95. *Ramdass v. Commonwealth*, 437 S.E.2d 566, 574 (Va. 1993).

96. *Id.* See also *Dubois v. Commonwealth*, 435 S.E.2d 636, 640 (Va. 1993) (discussing the defendant's prior criminal record, the fact that in case under review defendant committed murder while on mandatory parole, and malice displayed in present crime); *Yeatts v. Commonwealth*, 410 S.E.2d 254, 267-68 (Va. 1991) (defendant was sentenced to death only on "future dangerousness" predicate; in determination of proportionality, the supreme court reviewed only cases where predicate for death was "future dangerousness" and underlying felony was robbery; brief consideration of defendant's mental retardation in proportionality review but no comparative review of other similar defendants was conducted; sentence of death was not found to be disproportionate); *Williams v. Commonwealth*, 360 S.E.2d 361, 370 (Va. 1987) (defendant's prior criminal record and testimony from his mother explaining that he was not a threat at home and she did not believe him to be a threat to others, testimony from a female friend who had known the defendant for eleven years explaining that he was never violent around her, and similar testimony of another woman that previously dated the defendant were reviewed).

97. 302 S.E.2d 520 (Va. 1983).

98. *Peterson v. Commonwealth*, 302 S.E.2d 520, 526 (Va. 1983).

99. *Id.*

other defendants who received a sentence of death. It is *not* an analysis of whether juries *generally* impose death upon similar defendants. Rather it is an analysis of whether juries have *ever* imposed death upon similar defendants. In *Jackson v. Commonwealth*,<sup>100</sup> the trial court convicted the defendant, a juvenile, of capital murder and five related felonies and sentenced him to death on the "future dangerousness" predicate.<sup>101</sup> The defendant was sixteen years old at the time he committed the murder and other felonies.<sup>102</sup> The Supreme Court of Virginia, on Jackson's direct appeal, conducted the mandated proportionality review pursuant to section 17.1-313 of the Virginia Code.<sup>103</sup> In its comparative review, the court compared the crime in Jackson's case to crimes in other capital cases previously reviewed by the Supreme Court of Virginia, paying "particular consideration to other capital murder cases in which robbery or attempted robbery was the underlying felony, and the death penalty was based only on the 'future dangerousness' predicate."<sup>104</sup> The court also considered the defendant, Jackson, during this review; however, no comparative analysis was conducted.<sup>105</sup> The court stated that "[a]lthough Jackson was only 16 years old [sic] when he killed Bonney, his criminal conduct on other occasions, especially the violent acts he committed while (1) on probation, (2) free on bond, and (3) in jail awaiting trial for these offenses, manifests an escalating pattern of violent criminal behavior that compels us to conclude that the imposition of the death penalty in this case is neither excessive nor disproportionate to the penalty imposed in similar cases."<sup>106</sup> The court came to this conclusion without looking at similar defendants. Although this review is better than no review of the defendant at all, it is certainly incomplete. The court looked at the defendant in the case at hand and determined that the sentence was proportionate to those imposed on other defendants without comparing Jackson to other similar defendants. The court simply reviewed the actions and history of the defendant and determined that a sentence of death was not excessive or disproportionate.<sup>107</sup>

Justice Hassell wrote a partial dissent in *Jackson* in which he noted that in its determination of proportionality the majority did not compare the defendant to other similar defendants and that, consequently, the proportionality review was ineffective, incomplete and produced an inaccurate

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100. 499 S.E.2d 538 (Va. 1998).

101. *Jackson v. Commonwealth*, 499 S.E.2d 538, 542-43 (Va. 1998).

102. *Id.* at 542.

103. *Id.* at 542-43.

104. *Id.* at 554.

105. *Id.*

106. *Id.* at 555.

107. *Id.*

result.<sup>108</sup> Justice Hassell stated that since 1987 the trial courts have only convicted ten sixteen-year-olds of capital murder.<sup>109</sup> Of those ten, Jackson was the only one sentenced to death.<sup>110</sup> Justice Hassell argued that in conducting its proportionality review the majority erred because the court did not conduct a comparative review of the defendant and other similar defendants involved in similar crimes.<sup>111</sup> Justice Hassell went on to review cases in which other sixteen-year-old defendants received a capital conviction and compared them to the case at hand.<sup>112</sup> In this comparative review, Justice Hassell determined that in some cases in which the trial court convicted a sixteen-year-old defendant of capital murder and imposed a life sentence, the crime and the surrounding facts were more egregious than the case under review.<sup>113</sup> He also noted that many of these sixteen-year-old defendants had juvenile criminal histories similar to Jackson's. In none of these cases involving a sixteen-year-old defendant did the defendant receive a sentence of death. Justice Hassell determined that "[u]pon comparison of Jackson's sentence of death, along with his criminal history and facts surrounding his case, to the facts and criminal histories of other defendants who committed capital offenses at age 16, [sic] [it] can only [be] conclude[d] that Jackson's sentence of death is both excessive and disproportionate in violation of Code § [17.1-313(C)(2)]."<sup>114</sup> This is precisely the form of review mandated by section 17.1-313 of the Virginia Code.

In sum, the Supreme Court of Virginia almost always fails to conduct this part of the comparative proportionality review mandated by section 17.1-313 of the Virginia Code.<sup>115</sup> By failing to conduct the mandated review of a sentence of death, considering *both* the crime and the defendant, the court violates the defendant's rights under section 17.1-313. Every determination of proportionality conducted by the Supreme Court of Virginia necessarily is conducted in error unless the court comparatively reviews both the crime and the defendant and, in doing so, considers a representative cross section of capital cases in which the defendants received sentences of both life and death.

### III. Conclusion

Proportionality review, in its present form, remains incomplete, inaccurate, and violative of a defendant's rights to a fair and accurate deter-

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108. *Id.* at 557 (Hassell, J., dissenting).

109. *Id.* at 555.

110. *Id.*

111. *Id.*

112. *Id.* at 555-56.

113. *Id.*

114. *Id.* at 557.

115. § 17.1-313(C)(2).

mination of whether an imposed sentence of death is excessive or disproportionate. Because the circuit courts are not conducting a presentence proportionality review, because the Supreme Court of Virginia is not conducting a comparative review of defendants, and because in analyzing what sentence juries generally impose for specific conduct, the Supreme Court of Virginia does not use a fair, adequate and reflective cross section of capital cases, the courts have consistently denied defendants an accurate determination of proportionality in violation of rights accrued through section 17.1-313 of the Virginia Code. The trial courts have repeatedly violated the defendant's Fourteenth Amendment right to due process of law by acting beyond their jurisdiction in imposing a sentence without conducting Virginia's statutorily mandated comparative proportionality review.

To assure an accurate and complete determination of the proportionality of a death sentence, several changes to the present review are necessary. First, it is essential that all circuit courts conduct the mandated proportionality review considering both the crime *and* the defendant before the imposition of sentence in a capital case. Second, a full and unabridged collection of all cases resulting in a conviction of capital murder with which the Supreme Court of Virginia can use in comparative proportionality is essential to the fairness of the system and the rights of the defendant of every capital case. Unless such unabridged collection is used in a determination of proportionality, each determination is necessarily inaccurate. And finally, each proportionality determination is necessarily incomplete without comparative review of the defendant. Until these changes are made to the present system of proportionality review, the review itself does not comply with the mandates of the statute. The defendant of any capital conviction has an unequivocal right to a complete and accurate determination of whether a death sentence is excessive or disproportionate.