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Suggestions for Capital Reform in Virginia

Alix M. Karl*

I. Introduction

As set out in the preceding sections of this Symposium, the Virginia capital scheme fails in many ways to protect adequately the rights of capital defendants. This portion of the compilation distills specific appropriate remedies to the Virginia courts and General Assembly.

At the outset, it is imperative to recognize that the United States Supreme Court has explicitly held that the imposition of the death penalty by the state does not, *per se*, violate the Eighth Amendment of the United States Constitution.¹ Furthermore, this view of capital punishment is not likely to change despite the arguably arbitrary imposition of the death penalty.² The death penalty as administered thus becomes the focus of analysis. This article considers the various ways the capital scheme in Virginia may be altered to eliminate the present ambiguities and contradictions.

The problems associated with the imposition of the death penalty have been the subject of much research. Many high-profile participants in the judicial system, those who come in direct contact with capital murder trials and appeals, view the manner in which the death penalty is imposed as "arbitrary and capricious."³ On February 3, 1998, the American Bar Associ-

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1. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (concluding that "the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe"). The Eighth Amendment prohibits the imposition of "cruel and unusual" punishment by the state. U.S. CONST. amend. VIII.

2. See *McCleskey v. Kemp*, 481 U.S. 279, 298-99, 305-06 (1987) (concluding that statistical evidence displaying a disparity in the imposition of capital punishment due to the race of the victim and race of the defendant is insufficient to show either a denial of equal protection or the violation of the Eighth Amendment).

3. See Stephen B. Bright, *Death Penalty Moratorium: Fairness, Integrity at Stake*, CRIM. JUST., Summer 1998, at 28, 29-30 (citing former United States Supreme Court Justice Lewis Powell, United States Supreme Court Justice John Paul Stevens, and United States Court of Appeals Judge Gerald W. Heaney as judges who have publicly voiced their concerns about

ation ("ABA") issued a controversial resolution calling for a moratorium on executions in the United States.⁴ The number of individuals exonerated and released from death rows across the country, in large part due to the advent of sophisticated DNA profiling, sends a disturbing message: not only is the American justice system imposing the death penalty in a random fashion, but individuals facing death sentences may actually lack the requisite culpability.⁵ Two factors have been highly publicized as causing these problems: first, the United States Supreme Court has interpreted the Sixth Amendment right to counsel as inapplicable to discretionary appeals;⁶ and second, capital defense representation at the trial level is notoriously inadequate.⁷ While these problems are national in scope, they do not necessarily preclude adequate representation in Virginia. The Virginia defense bar is composed of many attorneys who have dedicated their professional careers to providing indigent defendants with competent representation and who work

the consistency with which capital punishment is imposed).

4. See James Podgers, *Time Out For Executions*, 83 A.B.A.J., April 1997, at 26. While the ABA's official position on the death penalty is one of neutrality, the resolution identified the following four problem areas with the imposition of capital punishment today: (1) the apparent inability of capital defense procedure to preserve the defendants' due process rights; (2) the lack of competent legal counsel for capital defendants at each stage of the criminal process, including conviction, sentencing, and appeals; (3) the racially discriminatory imposition of the death penalty; and (4) the "unconscionable" executions of juvenile offenders and the mentally retarded. Kara Thompson, *The ABA's Resolution Calling For A Moratorium on Executions: What Jurisdictions Can Do To Ensure That The Death Penalty Is Imposed Responsibly*, 40 ARIZ. L. REV. 1515 (1998) (citing Podgers, *supra* this note).

5. Stephen Bright, Director of the Southern Center for Human Rights in Atlanta, summarizes the recent events as follows:

At least 70 people sentenced to death in the United States in the last 20 years have been found innocent and released from death rows. Others have had their death sentences commuted to life imprisonment because of doubts about their guilt, and some have been executed despite questions of innocence. In Illinois, more people have been released from death row than have been executed.

Bright, *supra* note 3, at 30.

6. See *Ross v. Moffitt*, 417 U.S. 600, 618-19 (1974) (holding that an indigent defendant is not entitled to the appointment of counsel for the purpose of bringing discretionary appeals); *Murray v. Giarratano*, 492 U.S. 1, 10 (1989) (holding that states are not required to provide counsel to indigent death row prisoners seeking state post-conviction relief; "meaningful access" to the courts can be satisfied in various ways by the states).

7. Bright, *supra* note 3, at 30. The following are examples: (1) failure of trial counsel to adequately prepare mitigating evidence for the sentencing phase of a capital trial; (2) court appointment of inexperienced counsel; and, perhaps most offensively, (3) the "ability" of trial counsel to actually sleep during a capital trial. *Id.* at 29-30. See *McFarland v. Texas*, 928 S.W.2d 482, 501-03, 505-06 (Tex. Crim. App. 1996) (holding that, where defense counsel failed to question any witnesses, failed to visit the crime scene, and fell asleep during trial, ineffective assistance of counsel was not established), *cert. denied*, 519 U.S. 1119 (1997); *Ex parte Burdine*, 901 S.W.2d 456 (Tex. Crim. App. 1995) (denial of certiorari despite the trial court's finding that defense counsel fell asleep while the prosecution was questioning witnesses and presenting evidence).

creatively and diligently to do so. In addition, Virginia has been relatively fair with respect to providing capital defense counsel with compensation for their services; that compensation is far better than that provided for the defense of other felonies and may even be considered adequate.

Unfortunately, representing capital defendants remains difficult under the Virginia capital scheme; for example: (1) the Commonwealth is permitted to lie to and intentionally mislead defense counsel;⁸ (2) a capital defendant is denied a bill of particulars sufficient to notify him of the aggravating factor(s) to be relied upon at sentencing;⁹ (3) the Commonwealth is permitted to withhold relevant evidence from the defense;¹⁰ (4) the defense may be

8. See *Gray v. Netherland*, 518 U.S. 152 (1996). In *Gray*, the Commonwealth deliberately misled defense counsel with respect to the evidence it intended to present in the sentencing phase. The Commonwealth notified defense counsel that, in the event Gray was found guilty of capital murder, it intended to introduce evidence that Gray had committed a double-murder several months before, for which Gray was never charged. Originally, the Commonwealth told defense counsel that it intended to offer only Gray's admissions to his codefendant and other inmates that he committed these murders. However, the evening after the jury returned a guilty verdict, the Commonwealth informed defense counsel that it would offer additional evidence, including photographs of the crime scene as well as the testimony of the police detective who investigated the murders and the state medical examiner who performed the victims' autopsies. Defense counsel objected to the admission of this additional evidence first thing the following morning. On appeal to the United States Supreme Court, Gray asserted that because the Commonwealth gave him inadequate notice of the evidence it intended to introduce and that the Commonwealth intentionally misled him with respect to this evidence, his due process rights were violated. The Court remanded to the United States Court of Appeals for the Fourth Circuit for a determination as to whether Gray effectively preserved his "prosecution misrepresentation" claim. *Id.* at 156-57.

Gray's claim, succinctly phrased in his petition for certiorari, appears in the Fourth Circuit's opinion but is substantively ignored. The court held that, despite the opportunity to do so, defense counsel failed to adequately preserve the claim for federal habeas review. *Gray v. Netherland*, 99 F.3d 158, 164 (4th Cir. 1996).

9. The purpose of the bill of particulars is to provide the defendant with sufficient facts regarding the crime to adequately inform an accused in advance of the offense for which he is to be tried. See *Swisher v. Commonwealth*, 506 S.E.2d 763 (Va. 1998). Where the indictment provides the defendant with adequate notice of the nature and character of the offense charged, a bill of particulars is not required to provide notice of the aggravating factors the Commonwealth intends to use. See generally *Quesinberry v. Commonwealth*, 402 S.E.2d 218, 223-24 (Va. 1991).

10. See *Strickler v. Greene*, 119 S. Ct. 1936 (1999); Ashley Flynn, Case Note, 12 CAP. DEF. J. 165 (1999) (analyzing *Strickler*, 119 S. Ct. 1936). Strickler was convicted of capital murder, in large part due to the testimony of eye-witness Anne Stoltzfus. In her initial conversations with the police, Stoltzfus was unsure as to what events she had actually witnessed. Over time, her memory miraculously cleared and she was able to identify Strickler, because of her "exceptionally good memory." Defense counsel was unaware of Stoltzfus's original interviews with the police and did not have access to the Stoltzfus materials (which were located in the police file), despite the Commonwealth's open file policy. Defense counsel raised a *Brady* claim based upon this information in federal district court. *Strickler*, 119 S. Ct. at 1944-47.

The Fourth Circuit determined the *Brady* claim to be procedurally defaulted because "reasonably competent counsel would have sought discovery in state court of the police files,

barred from presenting relevant evidence at sentencing;¹¹ and (5) the future dangerousness aggravator has not been modified to fit into the life-without-parole context.¹² In addition, Virginia's twenty-one day rule severely restricts a convicted defendant's ability to reopen his case to introduce exculpatory DNA evidence or other evidence of actual innocence.¹³

In this article, the major problem areas in the Virginia capital murder statutory blueprint will be discussed in the following order: (1) the predicate felonies and their expansion over time; (2) the aggravating factors, future dangerousness and vileness; (3) the admissibility of victim impact evidence; (4) the proportionality review statutory provision; and (5) the twenty-one day bar on newly discovered evidence. In the discussion of each, suggestions

and that in response to this simple request, it is likely the state court would have ordered the production of the files." *Id.* at 1947 (citation omitted) (internal quotation marks omitted). The United States Supreme Court disagreed as to this point but affirmed the conviction, deciding that Strickler had failed to demonstrate a "reasonable probability that the jury would have returned a different verdict if [Stoltzfus's] testimony had been either severely impeached or excluded entirely." *Id.* at 1955.

See also *Cherrix v. Commonwealth*, 513 S.E.2d 642 (Va. 1999). The facts in *Cherrix* are somewhat unusual but are nonetheless illustrative of the Commonwealth's ability to withhold exculpatory evidence from the defense. *Cherrix's* grandmother testified as an alibi witness for him at trial. The Commonwealth introduced a written statement, signed by *Cherrix's* grandmother, containing essentially the same information as her trial testimony, albeit with a fifteen-minute time discrepancy. Presumably, the statement was offered to impeach *Cherrix's* grandmother. The defense objected to the admission of the statement since it contained exculpatory information that had not been disclosed by the Commonwealth, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). *Cherrix* argued on appeal that, despite the defense counsel's knowledge of the general exculpatory material contained in the statement, the admission of the statement demonstrated the Commonwealth's lack of good faith and violated the due process clause. The Supreme Court of Virginia rejected this argument, noting that the statement would not have been material exculpatory evidence, as required by *Brady*. *Cherrix*, 513 S.E.2d at 649 (basing finding of immateriality upon defense counsel's knowledge of *Cherrix's* grandmother's availability as an alibi witness).

Strickler and *Cherrix* illustrate the slippery slope employed by the Virginia courts when evaluating a *Brady* claim. The Commonwealth's duty to disclose has slowly become defense counsel's duty to discover. The *Cherrix* court overlooked an important point, relevant to many capital *Brady* issues—that is, a capital defendant may be uncooperative and unwilling to provide any information, much less exculpatory information, to his trial counsel.

11. See Jason J. Solomon, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55 (1999) (Part III this Symposium); see also *Walker v. Commonwealth*, 515 S.E.2d 565, 572-73 (Va. 1999) (unequivocally stating that prior unadjudicated conduct (1) is relevant to a finding of future dangerousness and (2) need not be proven beyond a reasonable doubt); *Cherrix*, 513 S.E.2d 653 & n.4 (affirming trial court's refusal to admit expert testimony regarding general prison conditions).

12. In 1995 parole was abolished in Virginia. See VA. CODE ANN. § 53.1-165.1 (Michie 1999). Thus, the future dangerousness inquiry requires only a consideration of the capital defendant's future danger to prison society.

13. See VA. SUP. CT. R. 3A:15(b) (limiting motions to set aside verdict to the first twenty-one days after entry of the final order). Note that a court may only grant a new trial in the wake of a successful motion to set aside the verdict.

will be made as to what changes should be fashioned to improve the capital system in Virginia.

II. Predicate Felonies in the Capital Context

Two observations may be made with respect to the judicial application of section 18.2-31 of the Virginia Code.¹⁴ First, the Virginia courts seem to have stretched the requirements of rape and robbery in order to sustain capital convictions based on these predicate felonies.¹⁵ Second, courts appear to have manipulated the requisite proof of sex offenses which are capital murder predicates.¹⁶

Inconsistencies in the law have resulted. Perhaps the most illustrative example is the disparate treatment of the asportation element of larceny in the capital and non-capital context. In *Welch v. Commonwealth*,¹⁷ the Virginia Court of Appeals sustained the larceny conviction of a defendant who was apprehended with a shopping cart full of televisions while still on the store's premises. The court held that "[w]here there is evidence that an individual has acted in a manner that is inconsistent with that of a prospective purchaser, and has exercised immediate dominion and control over the property, *despite his continued presence within the owner's store*, such conduct establishes sufficient possession to satisfy [the asportation] element of larceny."¹⁸ In marked contrast, the Virginia Court of Appeals upheld a capital murder conviction on a theory of "continuing asportation" in *Tross v. Commonwealth*.¹⁹ Tross entered a convenience store, removed some beer from a cooler and placed it in his pocket. On his way out of the store, he encountered the store manager and shot him. The Virginia Court of Appeals declined to accept Tross's theory that, because the asportation element was completed at the time of the murder, the taking was a larceny, not a robbery. The court held, instead, that "appellant's asportation of the beer *continued until he shot the store manager* in the face and took beer from the manager's dominion and control."²⁰

The willingness of the courts to stretch the elements of predicate felonies also results in unfortunate, perhaps unintended, circumstances; the

14. VA. CODE ANN. § 18.2-31 (Michie 1999) (defining capital offenses in Virginia).

15. See Heather L. Necklaus, *Predicate Felonies in the Context of Capital Cases*, 12 CAP. DEF. J. 37 (1999) (Part II this Symposium).

16. *Id.*

17. 425 S.E.2d 101 (Va. Ct. App. 1992).

18. *Welch v. Commonwealth*, 425 S.E.2d 101, 105 (Va. Ct. App. 1992) (emphasis added).

19. 464 S.E.2d 523, 534 (Va. Ct. App. 1995) (although capitalily-convicted, Tross received a life sentence).

20. *Tross v. Commonwealth*, 464 S.E.2d 523, 534 (Va. Ct. App. 1995) (emphasis added).

best example of this phenomenon is found among the sex offenses.²¹ In *Tuggle v. Commonwealth*,²² the Supreme Court of Virginia upheld a capital murder conviction based on the rape predicate, although there was no evidence of penile penetration of the victim's vagina.²³ The court held that evidence of penetration by "something," in light of semen found in the victim's anus, was sufficient to satisfy the penal penetration element of rape.²⁴

Similarly, with respect to the underlying offense of object sexual penetration ("OSP"), also encompassed by subsection five of the capital murder statute, the distinction between attempted and completed offenses is blurred, if not abolished. Homicide in the commission of attempted OSP is *not* a crime punishable by death in the state of Virginia.²⁵ Several non-capital cases have addressed the underlying offense of OSP; these cases illustrate the vanishing line between attempted and completed offenses.

Roger Lee Jett was convicted of OSP and appealed to the Virginia Court of Appeals; he argued that the evidence presented at trial was insufficient to prove the actual penetration required by statute.²⁶ Evidence offered by the Commonwealth included the victim's testimony that Jett had, on multiple occasions, instructed her to rub a hairbrush or doll on the *outside* of her vagina.²⁷ In addition, the victim's mother testified that the victim's clitoris was red and swollen.²⁸ The court of appeals noted that there was a "reasonable inference that penetration had occurred" and affirmed the conviction.²⁹

James Matthew Marshall appealed his conviction for attempted OSP to the court of appeals, arguing that the evidence offered at trial failed to exclude the possibility that the victim's injuries were incurred during

21. See Necklaus, *supra* Part II this Symposium.

22. 323 S.E.2d 539 (Va. 1984).

23. *Tuggle v. Commonwealth*, 323 S.E.2d 539, 549-50 (Va. 1984). The court noted that, in order to prove the predicate offense of rape, the Commonwealth "must prove that there has been an actual penetration to some extent of the male sexual organ into the female sexual organ." *Id.* (quoting *McCall v. Commonwealth*, 65 S.E.2d 540, 542 (Va. 1951)).

24. *Id.* at 550.

25. Subsection five of the Virginia Code defines the following as capital murder: "The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration. VA. CODE ANN. § 18.2-31(5) (Michie 1999).

26. *Jett v. Commonwealth*, 501 S.E.2d 457, 458 (Va. Ct. App. 1998). See VA. CODE ANN. § 18.2-67.2 (Michie 1999) (reading in relevant part: "An accused shall be guilty of [OSP] if he or she *penetrates* the labia majora or anus of a complaining witness . . .") (emphasis added).

27. *Jett*, 501 S.E.2d at 458.

28. *Id.*

29. *Id.* at 460 (emphasis added).

medical treatment.³⁰ The court held that because the anal injuries to the victim were of the same age as injuries sustained from a punch to the stomach, to which Marshall confessed, the jury's finding of attempted OSP was reasonable.³¹ After Jett's and Marshall's cases, there is no apparent distinction between OSP and attempted OSP.

These cases illustrate the ease with which Virginia courts have lessened proof requirements, thus blurring the original distinction between different offenses—OSP and attempted OSP. Put simply, the decision in *Jett* relaxed the proof sufficient to prove penetration for the purpose of OSP. Although *Jett* was a non-capital case, the Commonwealth will certainly rely upon the expansive rationale in capital cases. To that extent, what is now first degree felony murder will become capital murder. Contrary to intuition, it is clear from *Tuggle* that the courts are *not* exercising more care in the capital context.

With sex offenses in particular, it is imperative that members of the judicial system remember that no matter how horrible, distasteful, hateful or atrocious a killing may be, it is not a crime punishable by the death penalty unless the General Assembly identifies it as such under section 18.2-31 of the Virginia Code. For example, at the time *Tuggle* was decided, forcible sodomy was not a predicate for capital murder.³² It is fair to read that case as permitting clear evidence of anal sodomy to prove rape in order to preserve a capital conviction and death sentence. The court's willingness to loosen the requirements necessary to sentence a defendant to death amounts to both judicial legislation and judicial activism.

This problem cannot be addressed by amending the capital murder statute. It must come from within the judicial branch itself; in order to do so, judges must conservatively define offenses and their corollary proof requirements.

III. Predicate Expansion

As noted above, the General Assembly alone is charged with the responsibility of defining capital murder. Unfortunately, two problems emerge: first, judicial interpretation may have gone beyond the intent of the General Assembly when it enacted the specific language found in section 18.2-31; and second, the General Assembly appears to have overlooked, or ignored, the expansive nature of parts of the statute.

30. *Marshall v. Commonwealth*, 496 S.E.2d 120, 123-24 (Va. Ct. App. 1998).

31. *Id.* at 124.

32. It was *subsequent* to the *Tuggle* decision that the General Assembly amended subsection five of the capital murder statute to cover the killing in the commission of forcible sodomy scenario.

With respect to the General Assembly's intent, the Supreme Court of Virginia in *Payne v. Commonwealth*³³ held that a capital defendant may receive more than one death sentence per victim.³⁴ In so doing, the court examined legislative intent after conducting an analysis under *Blockburger v. United States*.³⁵ The court concluded that it was "clear" as well as "logical" that the General Assembly intended "for each statutory offense to be punished separately as a Class 1 felony."³⁶ The perhaps unintended result of this holding is that a capital defendant may receive, for example, two death sentences for a violation of a single subsection of 18.2-31. This was the result in *Payne*, in which the death sentences were affirmed on the basis that the willful, deliberate, and premeditated killing in the commission of rape and the willful, deliberate, and premeditated killing in the commission of OSP are two distinct crimes found within the same subsection of the capital murder statute. The court found that *each* violation of subsection five was sufficiently independent to subject *Payne* to the death penalty.³⁷ The General Assembly is urged to address this decision and clarify the legislature's intent with respect to multiple death sentences.

Andre L. Graham was convicted of capital murder as part of the same act or transaction, in violation of section 18.2-31(7) of the Virginia Code.³⁸ Graham, pointing to the triggerman statute as a defense,³⁹ argued that the Commonwealth was required to prove that he was the immediate perpetrator in both killings in order to sustain a conviction under subsection seven.⁴⁰ The court, citing the principle of gradation, interpreted the language of subsection seven to define an offense "qualitatively more egregious than an isolated act of premeditated murder."⁴¹ The court explained that the General Assembly did this by "add[ing] . . . a gradation crime to the single act of premeditated murder."⁴² As a result, a conviction under subsection seven only requires proof that the defendant was the triggerman in the principal

33. 509 S.E.2d 293 (Va. 1999).

34. *Payne v. Commonwealth*, 509 S.E.2d 293, 301 (Va. 1999).

35. 284 U.S. 299, 304 (1932) (holding that in order to determine whether two acts or transactions are separate offenses, "the test to be applied . . . is whether each [statutory] provision requires proof of a fact which the other does not").

36. *Payne*, 509 S.E.2d at 301 (citation and internal quotation marks omitted).

37. See VA. CODE ANN. § 18.2-31(5) (Michie 1999).

38. *Graham v. Commonwealth*, 464 S.E.2d 128, 128 (Va. 1995); see VA. CODE ANN. § 18.2-31(7) (Michie 1999).

39. VA. CODE ANN. § 18.2-18 (Michie 1999); see also *Coppola v. Commonwealth*, 257 S.E.2d 797, 806-07 (Va. 1979) (holding that only the immediate perpetrator of a homicide may be convicted of capital murder).

40. *Graham*, 464 S.E.2d at 129-30.

41. *Id.* at 130.

42. *Id.*

murder charged and was at least an accomplice in the second murder.⁴³ This rationale can likely be extended to subsection eight, the willful, deliberate, and premeditated killing of more than one person within a three year period.⁴⁴ The General Assembly should address whether these subsections were indeed designed to trump the policy embodied within the triggerman statute.

In other areas, the General Assembly itself has created ambiguities in the capital murder statute. Two areas are particularly troublesome. First, the ballooning definition of "law enforcement officer," referenced in subsection six, has effectively created numerous new and different forms of capital murder. Second, the curious overlap between subsections seven (same act or transaction murder) and eight (serial murder) serves to confuse attorneys and judges alike.

Over the years, expansion through incorporation by reference has broadened the definition of a "law enforcement officer."⁴⁵ Originally, the term was defined as a full-time employee of a police department or sheriff's office, responsible for the prevention and detection of crime and the enforcement of penal, traffic, or highway laws of the State.⁴⁶ Over the years, the definition has expanded so that it now includes railroad police and state lottery officials. While all of these augmentations have been sanctioned by the General Assembly, it seems doubtful that the legislature has examined the *purpose* behind subsection six of the capital murder statute each time it has expanded its scope by amending section 9-169(9) of the Virginia Code, which defines the term "law enforcement officer."⁴⁷ Section 9-169(9) is found in Title 9, the portion of the Code covering "Commissions, Boards and Institutions Generally." The textual context of the section certainly does not suggest its application to the capital murder statute. It is quite possible that, when amending section 9-169(9), the General Assembly has overlooked the purpose behind the adoption of the original subsection six—that is, to subject those who kill law enforcement officers in the line of duty to the death penalty or, more specifically, to prevent killings in the midst of a suspected criminal's apprehension.⁴⁸

Furthermore, one key element of capital murder (as with most crimes) is that the defendant be on notice as to the general severity of the consequences his actions may carry. While it may be plainly obvious that killing a police officer who is in pursuit of the defendant will carry a harsh penalty,

43. *Id.*

44. VA. CODE ANN. § 18.2-31(8) (Michie 1999).

45. See generally Hammad S. Matin, *Expansion of Section 18.2-31 of the Virginia Code*, 12 CAP. DEF. J. 7 (1999) (Part I this Symposium).

46. VA. CODE ANN. § 9-108 (Michie 1973); see also Matin, Part I this Symposium.

47. VA. CODE ANN. § 9-169(9) (Michie 1999).

48. See generally Matin, *supra* Part I this Symposium.

it may be less apparent that, for example, killing a state lottery official may result in the state's ultimate censure. The General Assembly should examine the current definition of "law enforcement officer" and specifically address whether the killings of all the persons listed therein should be punishable by death and justify their inclusion into this class.

The second point of concern in this area concerns the conspicuous overlap between subsections seven and eight of section 18.2-31.⁴⁹ It would appear that all murders that are part of the same act or transaction are necessarily committed within the requisite three-year time frame which limits the application of subsection eight. If the General Assembly intended to abolish same act or transaction capital murder with the adoption of the serial murder provision, it needs to affirmatively say so. If, on the other hand, the General Assembly intended for the two subsections to coexist, it should specify which acts are covered under each of the two subsections.

IV. *The Aggravators*

In Virginia, one of two aggravating factors must be found by the factfinder before a defendant who has been convicted of capital murder may be sentenced to death.⁵⁰ The jury must be unanimous in finding one or both of the two aggravators, future dangerousness and vileness.⁵¹

A. *Vileness*

A finding of vileness may only be based on three "sub-elements":⁵² depravity of mind, torture, or aggravated battery.⁵³ The Commonwealth has the burden to prove, beyond a reasonable doubt, the existence of vileness. There is new authority supporting the proposition that the Commonwealth must prove at least one vileness sub-element beyond a reasonable doubt and that the jury must be unanimous in finding that sub-element.

Earlier this year, the United States Supreme Court decided *Richardson v. United States*,⁵⁴ a case interpreting 21 U.S.C. § 848, the section of the United States Code that defines a "continuing criminal enterprise" (CCE).⁵⁵ Like the finding of vileness, the finding of a CCE requires proof of underly-

49. VA. CODE ANN. §§ 18.2-31(7) (Michie 1999) (covering "same act or transaction" multiple killings); 18.2-31(8) (Michie 1999) (covering "serial murder" scenarios).

50. VA. CODE ANN. §§ 19.2-264.2; 19.2-264.4 (Michie 1999).

51. See generally *Hoke v. Commonwealth*, 377 S.E.2d 595, 602 (Va. 1989).

52. See Douglas R. Banghart, *Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77 (Part IV this Symposium) (discussing the term "sub-element" and its application to an analysis of the vileness aggravator).

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

54. 119 S. Ct. 1707 (1999).

55. *Richardson v. United States*, 119 S. Ct. 1707, 1709 (1999).

ing sub-elements, specifically, a "continuing series of violations."⁵⁶ The issue in *Richardson* was whether the jury was required to unanimously find the existence of each of the individual "violations" sufficient to constitute a particular "continuing series," or whether the jury was required only to unanimously find the existence of *any* continuing series.⁵⁷ The "continuing series" at issue in *Richardson* corresponds to the vileness finding under the Virginia capital murder statute, in that a continuing series is composed of individual violations in the same way that a vileness finding is based upon a finding of any of its three sub-elements—aggravated battery, torture, and depravity of mind.

In *Richardson*, the Supreme Court questioned whether the applicable statute identified the "means" by which the "element" of a "continuing series" may be found or whether the statute identified "elements" which must be found in order to find the "element" of a "continuing series."⁵⁸ Generally, the jury must unanimously agree as to all elements of a crime, but not to the means by which the crime was committed.⁵⁹ In a relatively brief and unadorned opinion, the Court found the underlying violations to be elements of the crime, and thus, the defendant in a 28 U.S.C. § 848 case is entitled to a unanimous jury finding as to each of the violations comprising a "continuing series."⁶⁰

The import of a finding of one or more of the vileness sub-elements is substantively identical. If anything, the vileness case is stronger than in the CCE instance, in that the jury need only find *one* of the vileness sub-elements as opposed to a *series* of "violations." The *Richardson* framework is clearly applicable to Virginia's capital murder statute. Absent a unanimity requirement with respect to the sub-elements, jurors reach the illogical conclusion that they have found vileness beyond a reasonable doubt even though they were unable to agree on the facts that led them to this conclusion.⁶¹

The Supreme Court of Virginia should revisit the unanimity issue and require the same standard for agreement regarding the sub-elements of vileness as the overall finding of vileness demands.

B. Future Dangerousness

Perhaps the most muddled area of capital law in Virginia concerns the fact-finder's determination of "future dangerousness"—the degree to which the capital defendant poses a threat to "society" if he is spared a death

56. 21 U.S.C. § 848(c) (1999).

57. *Richardson*, 119 S. Ct. at 1709.

58. *Id.* at 1710.

59. *Id.*

60. *Id.* at 1713.

61. See Banghart, *supra* Part IV this Symposium.

sentence.⁶² The abolition of parole in 1995⁶³ should have affected the application of this factor in significant ways. In addition, there are fundamental problems with the structure of sections 19.2-264.2 and 19.2-264.4 of the Virginia Code; these statutes confuse the evidence admissible to support a finding of future dangerousness with that admissible to support a finding of vileness.⁶⁴

First, section 19.2-264.2 of the Virginia Code refers to a finding of future dangerousness predicated upon only "consideration of the past criminal record of convictions of the defendant" and specifically connects vileness with "conduct in committing the offense."⁶⁵ Thus, section 19.2-264.2 creates a clear dichotomy between future dangerousness supported by past criminality and vileness supported by current offense conduct.

Subsection C of 19.2-264.4, however, seems to permit a finding of future dangerousness to be supported by evidence of the defendant's prior history and/or evidence of the circumstances of the offense. This section broadens section 19.2-264.2 in two ways: first, it permits a fully retrospective examination of the defendant's "history" rather than just his prior convictions; and second, it appears to permit current offense evidence to support a future dangerousness finding. Section 19.2-264.4(D), which sets out a verdict form, retains the "history" language of section 19.2-264.4(C) (and so is broader than section 19.2-264.2), but deletes current offense conduct from the evidentiary base (and so is narrower than section 19.2-264.4(C)).⁶⁶ The ambiguity has resulted in several cases in which the circumstances of the killing have been used to sentence the defendant to death on a finding of future dangerousness.⁶⁷ The General Assembly needs to clarify

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

63. See VA. CODE ANN. § 53.1-165.1 (Michie 1999) ("Any person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense."). The life-sentenced capital defendant is not even eligible for geriatric parole, see VA. CODE ANN. § 53.1-40 (Michie 1999).

64. See VA. CODE ANN. §§ 19.2-264.4, 19.264.2 (Michie 1999).

65. § 19.2-264.2.

66. The verdict form reads in relevant part:

We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

§ 19.2-264.4(D).

67. See, e.g., *Quintana v. Commonwealth*, 295 S.E.2d 643, 655 (Va. 1983) ("heinous circumstances" surrounding the killing sufficient basis for finding that defendant posed a continuing serious threat to society); *Edmonds v. Commonwealth*, 329 S.E.2d 807, 813 (Va. 1985) (condoning the use of current offense evidence to prove future dangerousness).

the discrepancy among these statutory provisions. In so doing, a reevaluation of *Smith v. Commonwealth*⁶⁸ may be instructive. In *Smith*, the Supreme Court of Virginia addressed Smith's argument that the statutory definition of future dangerousness was unconstitutionally vague.⁶⁹ In ruling that the language was not unconstitutionally vague, the court specifically noted, "In our view, [the statutory language detailing the future dangerousness predicate⁷⁰] is designed to focus the fact-finder's attention on *prior criminal conduct* as the principal predicate for a prediction of future dangerousness."⁷¹

The General Assembly should also reevaluate the language of subsection B of 19.2-264.4 in relation to the ambiguity discussed above. Subsection B instructs the court to hear any evidence that may be relevant to sentencing.⁷² In doing so, it identifies some examples of relevant and admissible evidence: "Evidence which may be admissible . . . may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense."⁷³ The next sentence provides further examples of mitigating evidence. From both the textual context and the fact that the statute elsewhere identifies evidence relevant to the finding of aggravating factors,⁷⁴ it seems clear that these sentences address evidence that may be presented by the *defendant* in *mitigation*. However, evidence presented by the Commonwealth to support its case for death is frequently admitted under this portion of the sentencing provisions.⁷⁵

Admission of any unadjudicated acts the capital defendant may have committed also has a doubtful statutory basis. Under section 19.2-264.2, a future dangerousness finding is based upon the defendant's prior *convictions*.⁷⁶ Yet subsections C and D of 19.2-264.4 permit the defendant's "prior history" to support future dangerousness.⁷⁷ Likewise, subsection B of 19.2-

68. 248 S.E.2d 135 (Va. 1978).

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

70. The language defining the aggravator has remained the same: "[A] probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society . . ." VA. CODE ANN. § 19.2-264.2 (Michie 1999).

71. *Smith*, 248 S.E.2d at 149 (emphasis added) (citation and internal quotation marks omitted).

72. § 19.2-264.4(B).

73. *Id.*

74. This is done so in the context of defining the aggravating factors. VA. CODE ANN. § 19.2-264.4(C) (Michie 1999).

75. See, e.g., *Quesinberry v. Commonwealth*, 402 S.E.2d 218, 227 (Va. 1991) (sustaining both the admission of Quesinberry's drug use and the admission of a photograph of the victim taken during an autopsy to support the Commonwealth's case for death).

76. § 19.2-264.2 ("after consideration of the past criminal record of *convictions* of the defendant . . .") (emphasis added).

77. §§ 19.2-264.4(C), (D) (emphasis added).

264.4 permits the defendant's "prior history" to be introduced as mitigation.⁷⁸ The "prior history" language clearly covers more than prior convictions and permits the admission of unadjudicated acts.⁷⁹

Thus, in Virginia, the sentencing procedure for capital murder differs in an important way from the procedure used to sentence other felons: prior *unadjudicated* conduct is considered relevant to and admissible in the capital defendant's sentencing.⁸⁰ In contrast, past conduct of the defendant in the felony sentencing context must be a "prior criminal conviction [proven by] certified, attested or exemplified copies of the record of conviction."⁸¹ In addition to satisfying the authentication requirement, the Commonwealth must provide a detailed notice of intent to use such prior convictions to the defendant at least fourteen days prior to trial.⁸² Virginia courts have expressly noted that the purpose of this notice provision is to permit the defense to investigate the validity of the convictions which the Commonwealth seeks to introduce.⁸³ It is difficult to believe that these concerns are not heightened when the Commonwealth seeks the death penalty. Furthermore, in capital cases the Commonwealth must prove the existence of an aggravating factor beyond a reasonable doubt. It belies common sense to allow the Commonwealth to establish future dangerousness beyond a reasonable doubt without proving beyond a reasonable doubt the prior conduct on which this finding is premised.⁸⁴

However, the language of the verdict form instructing the sentencing jury to consider the "prior history" of the defendant⁸⁵ seems to conflict with the general rule against admission of unadjudicated bad acts. The General Assembly is urged to explicitly limit the admission of past crimes to those that have been adjudicated and proven beyond a reasonable doubt. If the General Assembly believes it necessary that a defendant be accorded the right to defend himself against erroneous attributions of past criminality in the non-capital context, it surely must recognize that a capital defendant has a heightened interest in his defense.

78. § 19-264.4(B).

79. See *Quintana v. Commonwealth*, 295 S.E.2d 643, 653 (Va. 1983).

80. See § 19.2-264.4(B) (Michie 1999) ("[E]vidence may be presented as to any matter which the court deems relevant to sentence."); *Beaver v. Commonwealth*, 352 S.E.2d 342 (Va. 1987); *Watkins v. Commonwealth*, 331 S.E.2d 422 (Va. 1985).

81. VA. CODE ANN. § 19.2-295.1 (Michie 1999).

82. *Id.* The notice must include (1) the date of each prior conviction, (2) the name and jurisdiction of the court issuing each conviction, and (3) a list of each offense of which the defendant was convicted.

83. See *Lebedun v. Commonwealth*, 501 S.E.2d 427, 437 (Va. Ct. App. 1998).

84. See Robert H. Robinson, Jr., Case Note, 12 CAP. DEF. J. 261 (analyzing *Orbe v. Commonwealth*, 519 S.E.2d 808 (Va. 1999)).

85. § 19.2-264.4(D).

The abolition of parole for persons convicted of capital murder in 1995 has dramatically changed the meaning of the future dangerousness aggravator. Today, the question jurors must address is whether the capital defendant will present a future danger to *prison* society. Ideally, the statutory language of the future dangerousness aggravator should be changed to reflect this limitation. In the meantime, however, Virginia courts must recognize the United States Supreme Court's holding in *Gardner v. Florida*⁸⁶ and its implications in this context. In *Gardner*, the Court held that the Fourteenth Amendment requires that a capital defendant be permitted to introduce any evidence that rebuts the prosecution's case for death.⁸⁷ The holding in *Skipper v. South Carolina*⁸⁸ is also instructive. In *Skipper*, the South Carolina trial court denied Skipper's proffer of evidence at sentencing of his good behavior during the months he spent in jail awaiting trial.⁸⁹ The United States Supreme Court remanded for a new sentencing phase, holding that "a defendant's disposition to make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination."⁹⁰ While *Skipper* concerned *past* prison conduct of the defendant, this rationale is applicable with respect to evidence offered to testify to a capital defendant's *expected* conduct while incarcerated.⁹¹

Under the rationales of *Gardner* and *Skipper*, a defendant ought to be permitted to introduce "prison life evidence" to *rebut* the Commonwealth's future dangerousness case when the Commonwealth seeks the death penalty based on the future dangerousness aggravator.⁹²

V. Victim Impact Evidence

Section 19.2-11.01 of the Virginia Code⁹³ permits the Commonwealth to introduce evidence of a homicide's effect on the victim's friends and family in support of its case for death. This is so whether the case is based on vileness or future dangerousness. However, sections 19.2-264.2 and 19.2-

86. 512 U.S. 349 (1977).

87. *Gardner v. Florida*, 430 U.S. 349, 362 (1977).

88. 476 U.S. 1 (1986).

89. *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986).

90. *Id.* at 7.

91. *Id.* at 6-7 (noting that any distinction drawn between a defendant's past behavior in prison and a defendant's future adaptability to prison is "elusive").

92. Prison life evidence encompasses evidence detailing the capital defendant's life in prison, the likely temperament of the defendant under these circumstances (based on past evidence or predictions by experts), and any other evidence that could be construed as helping paint an accurate picture of the defendant in the prison atmosphere for the jury. See Jason J. Solomon, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55 (1999) (Part III this Symposium).

93. VA. CODE ANN. § 19.2-11.01 (Michie 1999).

264.4 of the Virginia Code⁹⁴ outline the conditions under which a jury may recommend a death sentence; namely, it may do so only upon a finding of one or both of the aggravators. The General Assembly has created inconsistent systems by allowing victim impact testimony while limiting the bases on which a death sentence may be justified to vileness and future dangerousness.

Clearly, victim impact testimony is not relevant to a finding of future dangerousness, particularly since the abolition of parole for capital defendants ensures that there is no danger that the victim's family will be haunted by the defendant or by concern of his eventual release.⁹⁵

At first blush, the irrelevance of victim impact evidence is not as clear in the vileness context. However, vileness must be predicated upon one or more of the following: aggravated battery, torture, or depravity of mind. The first two of these concern only the circumstances of the offense.⁹⁶ Certainly, the testimony of a victim's family regarding the loving nature of the victim is not relevant to the jury's finding that the defendant went above and beyond what was necessary to kill his victim (as required to establish aggravated battery).⁹⁷ The same is true in the case of torture.⁹⁸ Although the depravity of mind predicate is not necessarily illustrated by the circumstances of the offense, its inclusion in the capital murder statute is intended to allow the jury to take into consideration the defendant's state of mind.⁹⁹ A defendant's *mens rea* cannot be determined by examining the impact of the victim's death upon his family.¹⁰⁰

The General Assembly is encouraged to address this inconsistency and affirmatively acknowledge that, under the Virginia capital murder scheme, victim impact evidence is not relevant to the jury during sentencing. If it has any relevance at all, it is *after* the existence of at least one aggravator has been found beyond a reasonable doubt and the jury has recommended a death sentence. At this point it is plausible that victim evidence may be relevant to the trial judge when deciding whether or not to impose the recommended death sentence. Because the General Assembly has specifically defined the aggravating factors and identified the evidence upon which findings of future dangerousness and vileness may be based, there is no

94. VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4 (Michie 1999).

95. See Solomon, *supra* Part III this Symposium (discussing rationales for admitting victim impact evidence under the prior statutory scheme).

96. See Banghart, *supra* Part IV this Symposium.

97. See BLACK'S LAW DICTIONARY 65 (6th ed. 1990) (defining "aggravated battery" as the "[u]nlawful application of force to another characterized by unusual or serious consequences or attended circumstances such as a dangerous weapon").

98. See Banghart, *supra* Part IV this Symposium; JOHN H. LANGBEIN, TORTURE AND THE LAW OF PROOF 1 (1977).

99. See Banghart, *supra* Part IV this Symposium.

100. See *id.*

justification for permitting the Commonwealth to introduce victim impact evidence to the sentencing jury.

VI. Proportionality Review

The Virginia capital scheme provides for proportionality review of a death sentence by the Supreme Court of Virginia.¹⁰¹ Section 17.1-313 of the Virginia Code instructs the court to direct this review to two areas: first, whether the death sentence was imposed under the influence of an arbitrary factor such as passion or prejudice; and second, whether the death sentence is proportionate to the sentence imposed in similar cases "considering both the crime and the defendant."¹⁰² Although the statutory language of the procedure implies the existence of a system working to ensure fairness and consistency, several problems arise in actual practice.

First and foremost, to ensure that a death sentence is proportionate to penalties imposed in similar cases, the court must review cases where the capitally-charged defendant received a life, *not death*, sentence. Presently, the court uses capital cases that have appeared before it on appeal for purposes of comparison.¹⁰³ Naturally, most capital cases that result in a life sentence are (1) not heard by the Supreme Court of Virginia since they are appealed directly to the Virginia Court of Appeals and (2) in the event that they are appealed to the supreme court, sentencing cannot be an issue presented for review.¹⁰⁴ Thus, the statutory framework only ensures a proportionality review among cases in which a death sentence was imposed. In order to remedy this situation, the Supreme Court of Virginia must collect, *at a minimum*, capitally-charged, life-sentenced cases heard before the Virginia Court of Appeals. Absent review of such cases, the court can only ascertain whether a death sentence has *ever* been imposed under similar circumstances, not whether it is *generally* imposed under similar circumstances.

Another flaw in the procedure arises when the directive language of section 17.1-313 is analyzed. The statutory language requires the court to consider "such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive."¹⁰⁵ Further, the cases considered by the court "shall" be "made available" to the trial courts.¹⁰⁶ However, the court is *not* explicitly given the responsibility to collect these cases: "The Supreme Court *may* accumulate the records of all capital felony

101. See VA. CODE ANN. § 17.1-313 (Michie 1999).

102. VA. CODE ANN. § 17.1-313(C)(2) (Michie 1999).

103. See Kelly E.P. Bennett, *Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103 (1999) (Part V this symposium).

104. See *id.*

105. § 17.1-313(E) (Michie 1999).

106. *Id.*

cases tried within such period of time as the court may determine."¹⁰⁷ The result puts the burden on the shoulders of defense counsel to provide the supreme court with cases comparable both factually and circumstantially where a life sentence was imposed. Thus, the court does *not* truly ensure proportionality. The General Assembly needs to clarify the "may"/"shall" discrepancy and decisively direct the Supreme Court of Virginia to compile an exhaustive database of capital~~ly-charged~~ cases for reference.

In daily practice, the supreme court does not, as is demanded by statute, distribute its records to the circuit courts. The fact that the statutory language of section 17.1-313 *requires* this transmittal can only mean that trial courts are, themselves, burdened with the duty of conducting a proportionality review *prior* to the imposition of the death penalty.¹⁰⁸ To remedy current practice and to ensure that this lower court review is conducted, the Supreme Court of Virginia must (1) transmit the records of all capital~~ly-charged~~ cases (including those obtained from the Virginia Court of Appeals) to the circuit courts, (2) order trial courts to conduct proportionality review within section 19.2-264.5 of the Virginia Code,¹⁰⁹ and (3) review circuit court proportionality findings if the court imposes the jury-recommended death sentence.

VII. Twenty-One Day Rule

The rule that truly constrains the ability of an innocent death-sentenced defendant to effectively contest his conviction is the "twenty-one day rule," Rule 3A:15 of the Virginia Rules of Supreme Court.¹¹⁰ With advanced DNA profiling, other technological developments, and, of course, exculpatory testimony and evidence that surfaces post-trial, this rule limits a defendant's right to prove his actual innocence. On January 21, 1998, and January 21, 1999, bills were introduced to the Virginia General Assembly to amend this rule by adding section 19.2-264.6 to the Virginia Code.¹¹¹ These amendments proposed to allow a death-sentenced defendant to present a "capital case bill of review" to the court that sentenced him to death if (1) there is newly discovered evidence that "establishes a significant probability" that the prisoner is actually innocent, (2) that evidence was not known by defendant or trial counsel at time of trial, (3) the evidence is being offered at the earliest time possible to the trial court, (4) the bill contains a

107. *Id.*

108. See Bennett, *supra* Part V this Symposium.

109. VA. CODE ANN. § 19.2-264.5 (Michie 1999) (outlining procedure for judicial evaluation of post-sentence reports).

110. VA. R. SUP. CT. 3A:15(b) (codifying the inability of a trial court to set aside a guilty jury verdict more than twenty-one days after entry of final order).

111. 1999 Va. H.B. 2298, 1999 Session; 1998 Va. H.B. 606, 1998 Session.

"sufficient recitation" of the newly-discovered evidence, and (5) the bill is filed no less than sixty days prior to the prisoner's scheduled execution.¹¹²

The Virginia Capital Case Clearinghouse strongly supports the adoption of such a provision. Although the advent of technology has greatly enhanced the possibility of valid actual-innocence claims, a defendant has no right to reopen his case and prove his innocence. Particularly in light of restricted access to federal habeas review after the passage of the Anti-terrorism and Death Penalty Act (AEDPA),¹¹³ Virginia should provide a forum for claims of actual innocence through a mechanism such as proposed section 19.2-264.6.

VIII. Conclusion

The Virginia legislature and judiciary possess the power and the resources to remedy many of the existing problems with the practice of capital law in Virginia. The problem areas have been defined and, while the suggestions made are not exhaustive, it should be noted that the majority of the remedies suggested herein do not require fundamental restructuring of the Virginia capital murder statutes.

112. *Id.*

113. Pub. L. No.104-132, 110 Stat. 1214 (amending 28 U.S.C. Title 153).

