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# A Quarter Century of Death: A Symposium on Capital Punishment in Virginia since *Furman v. Georgia*

## Conclusion

This Symposium has attempted to place into context the changes in Virginia law since the United States Supreme Court's historic decision in *Furman v. Georgia*.[1] Although the Court's suspension of capital punishment was short-lived,[2] the decision was important in that it implicitly recognized that there *are* constitutional limitations on the imposition of the ultimate sanction. This Symposium has traced some of the substantive and procedural developments, applications, and deficiencies of Virginia capital punishment law in the post-*Furman* era.

The first article in this Symposium traced the legislative expansion of the Virginia capital murder statute.[3] The statute has been expanded from its original three to twelve subsections,[4] and each of these twelve subsections has been modified or amended by the General Assembly at least once. Counting attempts for the predicate felonies and each alternative method of capital murder listed in the statute, there are now twenty-seven different capital offenses.[5] Moreover, at least six new capital offenses are being contemplated by the General Assembly.

The second article in this Symposium discussed the judicial expansion of capital murder in Virginia.[6] The current predicate felonies are robbery,

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1. 408 U.S. 238 (1972) (per curiam) (finding then-existing death penalty statutes unconstitutional under the Eighth and Fourteenth Amendments).

2. *See* Gregg v. Georgia, 428 U.S. 153, 169 (1976) (holding that "the punishment of death does not invariably violate the Constitution"); Jurek v. Texas, 428 U.S. 262 (1976) (finding that the Texas capital sentencing procedures did not violate the Eighth and Fourteenth Amendments).

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

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

5. *See* Alix M. Karl, Case Note, 11 CAP. DEF. J. 449, 455 & n.57 (1998) (analyzing *Payne v. Commonwealth*, 509 S.E.2d 293 (Va. 1999) (holding that every single subsection within section 18.2-31 of the Virginia Code is a separate capital murder)).

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

rape, forcible sodomy, and object sexual penetration.[7] The Virginia courts have construed the definitions of robbery and rape loosely. As a result, the definitions of those crimes have expanded over time, thus making more defendants death eligible. The same trend appears to be emerging in the context of forcible sodomy and object sexual penetration.

The third, fourth, and fifth articles in this Symposium dealt with the expansion of the sentencing process. The third article explored the expansion of the future dangerousness aggravating factor.[8] While the language of the future dangerousness factor has not changed since it was enacted into law, the evidence accepted to prove the existence of that factor now includes prior criminal conduct, the circumstances of the offense, and victim impact evidence. At the same time, although all defendants who are convicted of capital murder will now die in prison,[9] evidence of prison structure and conditions is generally inadmissible to rebut evidence of future dangerous.

The second aggravating factor is vileness.[10] Although the United States Supreme Court in *Godfrey v. Georgia*[11] found Georgia's identical vileness statute unconstitutional,[12] Virginia's vileness factor has withstood attack. The fourth article in this Symposium addressed three issues relating to the constitutionality of the application of the vileness factor. First, the vileness factor in Virginia has been expanded such that any capital murder will, by definition, support a vileness finding.[13] Second, because the jury's decision as to the vileness factor requires it to look only at the defendant's conduct during the crime, victim impact evidence is irrelevant to vileness. Finally, if the vileness factor is to afford the jury any assistance in making its finding thereunder, the Commonwealth ought to be required to prove beyond a reasonable doubt the existence of whichever of the vileness sub-elements (torture, depravity of mind, or aggravated battery) on which it intends to rely.

The fifth article in this symposium analyzed the deficiencies of proportionality review in Virginia.[14] Current review is inadequate on three fronts. The court's inquiry as to whether the sentence was imposed under the

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7. VA. CODE ANN. § 18.2-31(4)-(5) (Michie 1999).

8. *See* Jason J. Solomon, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55 (1999) (Part III this Symposium).

9. *See* VA. CODE ANN. § 53.1-165.1 (Michie 1999) (abolishing parole for defendants who committed felonies on or after January 1, 1995). Although geriatric parole still exists, there is no geriatric parole for Class 1 felons. VA. CODE ANN. § 53.1-40.01 (Michie 1999).

10. VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4 (Michie Cum. Supp. 1977).

11. 446 U.S. 420 (1980).

12. Godfrey v. Georgia, 446 U.S. 420, 428 (1980).

13. *See* Douglas R. Banghart, *Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77 (1999) (Part IV this Symposium).

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

influence of passion or prejudice is inadequate because it evaluates each piece of evidence individually rather than the evidence as a whole. The court's comparative review is likewise flawed because the court only collects the cases it has reviewed–the overwhelming majority of which involve the imposition of a sentence of death–and because it fails to take into account the defendants' personal characteristics. Finally, although Virginia law requires that, upon request of the defendant, the collection of cases accumulated by the Supreme Court of Virginia for proportionality review be made available to the circuit courts, they are not.

The first five articles in this Symposium analyzed the substantive and procedural developments and deficiencies of Virginia's post-*Furman v. Georgia* capital scheme. The final article offered suggestions for reform, all of which could be implemented within the existing statutory scheme.[15] The Virginia Capital Case Clearinghouse hopes that the Virginia judiciary and General Assembly will consider seriously these suggestions. After all, it *is* a matter of life and death.

15. *See* Alix M. Karl, *Suggestions for Capital Reform in Virginia*, 12 CAP. DEF. J. 123 (1999) (Part VI this Symposium).

# CASE NOTES:

## United States Supreme Court