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Improving Process in Virginia Capital Cases

Robert H. Robinson, Jr.*

While the idea of the death penalty as a form of punishment seems without question to have passed constitutional muster in both federal¹ and state courts,² the debate over its fairness and constitutionality has shifted to a consideration of the process by which it is imposed. Whether it is cruel and unusual in violation of the Eighth Amendment is not presently considered seriously by any court.³ With most states using lethal injection as the means of execution, the Eighth Amendment inquiry does not have the impact that it did when the electric chair was used.⁴ Other arguments attacking the constitutionality of the death penalty have also failed. Racial bias in capital cases, while well-documented, has not provided a strong enough basis for calling the penalty into question.⁵ Also, many groups have

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1. See *Gregg v. Georgia*, 428 U.S. 153, 187 (1976) (holding that “the infliction of death as a punishment for murder is not without justification and thus is not unconstitutionally severe”).

2. See, e.g., *Pope v. Commonwealth*, 360 S.E.2d 352 (Va. 1987). Although the Supreme Court of Virginia usually dismisses arguments that the Virginia capital statute is unconstitutional with a minimum of discussion and consideration, defense counsel should continue to make this claim as a matter of routine so that the issue will not be defaulted in the unlikely event of a change in courts’ treatment. A sample motion may be obtained from the Virginia Capital Case Clearinghouse.

3. The Supreme Court initially granted certiorari in a Florida case, *Bryan v. Moore*, after several problems with the electric chair caused the prisoners to bleed profusely or take a long time to die, but dismissed the writ as improvidently granted once Florida agreed to let defendants choose the form of execution. 120 S. Ct. 1003 (2000).

4. Only four states still have the electric chair as the sole means of execution, and seven use the electric chair in certain circumstances. *Death Penalty Information Center* (visited April 4, 2000) <<http://www.essential.org/dpic/methods/.html>>.

5. Stephen Bright, *Challenging Racial Discrimination in Capital Cases*, CHAMPION, Jan.-Feb. 1997, at 19, 22-23; see also, *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (holding that statistical evidence of racial disparity in the charging and convictions in capital cases is not a violation of due process). After his retirement, Justice Powell later told his biographer that the five-to-four *McCleskey* decision, which he authored, was the only vote he would have changed, since he had come to the conclusion that the death penalty should be abolished. JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL, JR.: A BIOGRAPHY 451-52 (1994).

made moral, rather than constitutional, arguments against the death penalty,⁶ but these efforts at attacking the death penalty have failed to sway the court system or legislative bodies to reject capital punishment.⁷ In the Supreme Court, there are no Justices, like Justices Brennan and Marshall in the past, who file automatic dissents in death penalty cases stating that it is cruel and unusual.⁸ Moreover, the various attacks on the death penalty have had little effect on the public, which still seems to be strongly in favor of it.⁹

So where do defense attorneys now look to attack the death penalty? Our personal opposition may be strong, but how do we convince courts and the general public that the death penalty has serious problems and is not a solution to the crime problem? Fortunately, overzealous prosecutors and courts have provided an answer: the death penalty itself may be constitutional, but the system by which it is imposed is not. Lawyers have long been aware of specific glitches in the system—the so-called “machinery of

6. Many religions have taken an active role in opposing capital punishment. For example, the Pope recently stated “[n]or can I fail to mention the unnecessary recourse to the death penalty when other bloodless means are sufficient to defend human lives against an aggressor and to protect public order and the safety of persons This model of society [where the death penalty is seen as a cure for crime] bears the stamp of the culture of death, and is therefore in opposition to the Gospel message.” Pope John Paul II, *National Conference of Catholic Bishops, United States Catholic Conference* (visited April 4, 2000) <<http://www.nccbuscc.org/sdwp/national/criminal/stlouissmt.htm>>.

7. Some states and governors have considered moratoriums on executions and reviews of the death penalty processes. Nebraska’s unicameral legislature passed a moratorium last year, but the Governor vetoed it. Debbie Howlett, *Moratorium Effort Intensifies in Illinois*, USA TODAY, Jan. 21, 2000. Maryland Governor Parris Glendening is planning to fund a study of the fairness of his state’s death penalty scheme. Paul Schwartzman, *Glendening Proposes Study of Executions*, WASH. POST, Feb. 9, 2000, at B2.

8. See, e.g., *Watkins v. Murray*, 493 U.S. 907, 908 (1989) (Brennan, J., and Marshall, J., dissenting from denial of certiorari) (citing *Gregg v. Georgia*, 428 U.S. 153, 231 (1976) (Brennan, J., and Marshall, J., dissenting)).

9. According to the 1999 Quality of Life in Virginia Survey by Virginia Tech Center for Survey Research:

[T]hree-fourths (74%) of Virginians (versus 80% in 1997) favor the death penalty for convicted murderers However, when given the alternative of a life sentence without the possibility of parole for 25 years, combined with a requirement that the prisoner work for money that would go to families of murder victims, 55 percent would agree with eliminating the death penalty, with women (58% versus 52% for men) and younger residents (60% versus 50% for those over age 40) particularly supportive of this alternative.

Susan M. Willis-Walton and Alan E. Bayer, *Quality of Life in Virginia: 1999 (Research Design and Highlights)* (visited Mar. 7, 2000) <<http://gopher.vt.edu:10021/centers/survey/qol/highlts.html>>. Interestingly, after the Governor of Illinois instituted a moratorium on all executions in the state after over a dozen inmates were released from death row, a poll indicated that the moratorium was supported by two-thirds of the state’s voters. Rick Pearson, *Support for Ryan Hits New Low; Poll Finds More Disapproval Than Approval as License Scandal Takes Toll*, CHI. TRIB., Mar. 5, 2000, at A1.

death"¹⁰—and taken together, these glitches indicate that the system as a whole has problems. These glitches, combined with reviewing courts' eagerness to avoid new trials and reversals,¹¹ have created cases in which the results are very questionable and seemingly arbitrary. In many jurisdictions, the shortcomings of the capital process have raised serious doubt about the ability of the current laws to lead to a fair outcome in any case. The law of capital procedure clearly needs improvements.

This article suggests ways of improving the process of capital cases in Virginia, and in doing so, critiques the Commonwealth's current death penalty laws. Other states and the federal government have reformed their capital laws, and this article reviews these reforms for possible adoption in Virginia. In making these suggestions, this article presumes that death penalty cases, because of the finality of the punishment, should be treated more carefully and deliberately than average criminal cases.

I. Problems With the System: Recent Events in Illinois

Although defense attorneys are well aware of the lack of protections of a capital defendant's constitutional rights, the issue was brought to the attention of the general public with the recent exonerations of thirteen people on Illinois's death row.¹² Because of concerns that other death row inmates may also be innocent, the Governor of Illinois issued a moratorium on executions until a committee reviews the flaws of the death penalty system in the state.¹³ He stated, "disbarred lawyers, jailhouse informants—those kinds of problems are in the system, and we've got to get them out."¹⁴ The Governor's action was in response to the fact that Illinois has released more people from death row than it has executed since the death penalty was reinstated in 1977—thirteen and twelve, respectively.¹⁵

The problems with many of the death penalty convictions were thoroughly documented in a five-part investigative report in the *Chicago Tribune* which detailed problems ranging from prosecutorial misconduct to testimony of jailhouse informants.¹⁶ For example, the series reported that

10. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

11. For a detailed discussion of the shift in the treatment of *Brady v. Maryland*, 373 U.S. 83 (1963), see Ashley Flynn, Case Note, 12 CAP. DEF. J. 165, 169 (1999) (analyzing *Strickler v. Greene*, 119 S. Ct. 1936 (1999)).

12. William Claiborne, *Illinois Order on Executions Lauded; Governor Backs Moratorium After 13 Death Row Inmates Are Exonerated*, WASH. POST, Feb. 1, 2000, at A2.

13. Ken Armstrong & Steve Mills, *Ryan Suspends Death Penalty; Illinois First State to Impose Moratorium on Executions*, CHI. TRIB., Jan. 31, 2000, at A1.

14. *Id.*

15. Ken Armstrong & Steve Mills, *Gov. Ryan Plans to Block the Execution of any Death Row Inmates*, CHI. TRIB., Jan. 30, 2000 at A1.

16. Ken Armstrong & Steve Mills, *Death Row Justice Derailed*, CHI. TRIB., Nov. 14, 1999, available in 1999 WL 2932178 [hereinafter *Derailed*]; Ken Armstrong & Steve Mills,

questionable snitch testimony was used in at least forty-six of the 285 death penalty cases in Illinois and that thirty-three inmates on death row were represented by attorneys who were later suspended or disbarred.¹⁷ The problems in Illinois are illustrative of problems that plague the administration of the death penalty on both the state and federal levels and show that additional safeguards are needed to ensure that all defendants receive due process. They also provide an impetus for change.

"Illinois touched off this powder keg," said one Democratic [U.S.] Senate aide [speaking about new federal legislation that would require states to allow for the introduction of newly obtained scientific evidence]. "The idea is that this is one state that's only carried out a dozen executions. It's all the more reason to be concerned about states like Texas and Florida that are in a competition to carry off the most executions."¹⁸

II. *The ABA's Involvement in the Debate*

The importance of the death penalty has caused it to be the subject of a great deal of study and review, with particular attention paid to the representation received by capital defendants. Discussing the difficulties with indigent capital defense, United States Court of Appeals for the Ninth Circuit Judge Alex Kozinski recently stated, "[T]he jurisprudence of death is so complex, so esoteric, so harrowing, this is the one area where there aren't enough lawyers willing and able to handle all the current cases."¹⁹

Perhaps the most important studies of the death penalty in general, and the role of counsel in particular, have been done by the American Bar Association ("ABA"), which has researched and offered suggestions for reform of the death penalty. The ABA officially takes a neutral position toward the death penalty as a punishment, except that it opposes the execution of mentally retarded individuals and defendants who were under the age of eighteen at the time of the offense.²⁰ In 1986, the ABA created the Death Penalty Representation Project, which recruits volunteer lawyers to

Inept Defenses Cloud Verdict, CHI. TRIB., Nov. 15, 1999, available in 1999 WL 2932352; Ken Armstrong & Steve Mills, *The Jailhouse Informant*, CHI. TRIB., Nov. 16, 1999, available in 1999 WL 2933041 [hereinafter *Informant*]; Ken Armstrong & Steve Mills, *A Tortured Path to Death Row*, CHI. TRIB., Nov. 17, 1999, available in 1999 WL 2933090; Ken Armstrong & Steve Mills, *Convicted by a Hair*, CHI. TRIB., Nov. 18, 1999, available in 1999 WL 2933194.

17. Armstrong & Mills, *supra* note 13.

18. Mike Dorning, *Senator to Propose Death Row Safeguards*, CHI. TRIB., Feb. 10, 2000, at A1.

19. Alex Kozinski & Sean Gallagher, *For an Honest Death Penalty*, N.Y. TIMES, Mar. 8, 1995, at A21.

20. Randall Coyne & Lyn Entzeroth, *Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions*, 4 GEO. J. ON FIGHTING POVERTY 3, 40, 46 (Fall 1996).

represent inmates on death row.²¹ Further, it established the Task Force on Death Penalty Habeas Corpus, which conducted a study of how capital convictions are reviewed on appeal.²² After a year of research, the task force issued *Toward a More Just and Effective System of Review in State Death Penalty Cases: A Report Containing the American Bar Association's Recommendations Concerning Death Penalty Habeas Corpus and Related Materials from the American Bar Association Criminal Justice Section's Project on Death Penalty Habeas Corpus* ("Report"). The Report "comprises a carefully crafted package of interconnected reforms designed as a whole to make the process less complex and to preserve fairness," and contained sixteen recommendations ("Recommendations") to accomplish this goal.²³ Although the entire Report is too extensive to discuss in this article, the critical proposals center on the appointment of competent counsel (Recommendations One through Six)²⁴ and a one-year statute of limitations on new appeals (Recommendation Thirteen).²⁵

The Recommendations concerning appointment of trial counsel are of central importance because of the ripple effect trial errors have throughout the stages of trial and review:

[C]apital litigation in the United States today too often begins with poor legal representation. Thereafter, the petitioner, the state, and society pay the price as each successive stage of the case becomes more complicated, more protracted, and more costly. Poor representation after the trial is also not uncommon, and it, too, imposes costs—in terms of both efficiency and fairness—at each successive stage of the litigation. The goals of better, more efficient, and more orderly justice can be achieved when the quality of legal representation at all stages of capital cases is improved.²⁶

Capital representation disaster stories are well known,²⁷ but the ABA report requires more than minimum attentiveness and diligence for capital cases. Recommendation One states that defense attorneys should be competent and adequately compensated in accordance with the ABA Guidelines For

21. *Id.*

22. *Id.*

23. ABA TASK FORCE ON DEATH PENALTY HABEAS CORPUS, TOWARD A MORE JUST AND EFFECTIVE SYSTEM OF REVIEW IN STATE DEATH PENALTY CASES, A REPORT CONTAINING THE AMERICAN BAR ASSOCIATION'S RECOMMENDATIONS CONCERNING DEATH PENALTY HABEAS CORPUS AND RELATED MATERIALS FROM THE AMERICAN BAR ASSOCIATION CRIMINAL JUSTICE SECTION'S PROJECT ON DEATH PENALTY HABEAS CORPUS (1990) [hereinafter RECOMMENDATIONS].

24. *Id.* at 6-17.

25. *Id.* at 30-35.

26. *Id.* at 17.

27. See, e.g., Stephen Bright, *Glimpses at a Dream Yet to be Realized*, CHAMPION, Mar. 1998., at 12.

the Appointment and Performance of Counsel in Death Penalty Cases ("Guidelines").²⁸

Recommendations Two through Six set out specific suggestions for reform, some of which have broader policy implications. Recommendation Two suggests that local bar associations should influence the appointment of defense counsel, and Recommendation Three proposes that jurisdictions with the death penalty should establish and fund an organization to "recruit, select, train, monitor, support, and assist attorneys involved at all stages of capital litigation and, if necessary, to participate in the trial of such cases."²⁹ Recommendations Four and Five deal with the appointment of counsel for appeals: the ABA recommends that the trial counsel should be replaced by new appointed counsel for both the state direct appeal and all subsequent appellate proceedings.³⁰ Perhaps the most sweeping recommendation is number Six, which states that the procedural barriers—exhaustion of state judicial remedies, procedural default rules, and the presumption of correctness of state court findings of fact—should not apply to federal habeas review when the defendant was denied adequate representation of counsel as outlined in Recommendation One.³¹

Unfortunately, the response to the Report was so poor that the ABA reviewed the matter and passed, by a vote of 280 to 119, a resolution calling for a moratorium on the imposition of the death penalty.³² Indeed, the Report Regarding Implementation of the American Bar Association's Recommendations and Resolutions Concerning the Death Penalty and Calling for a Moratorium on Executions ("Resolution"), found that "notwithstanding the enormous efforts of the ABA, the crisis in capital cases has only worsened Judicial decisions have contributed to the crisis."³³ The Resolution asked for a moratorium until all jurisdictions with the death penalty: (1) implemented the Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases and other policies regarding competency of attorneys; (2) "preserve[d], enhance[d], and streamline[d] state and federal courts' authority and responsibility to exercise independent judgment on the merits of constitutional claims in state post-conviction and federal habeas corpus proceedings;" (3) made serious efforts to eradicate racial discrimination in capital sentencing; and (4) ended the execution of mentally retarded defendants and of persons who were under eighteen years

28. ABA, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF COUNSEL IN DEATH PENALTY CASES (1989) [hereinafter GUIDELINES].

29. RECOMMENDATIONS, *supra* note 23, at 1.

30. *Id.* at 1-2.

31. *Id.* at 2.

32. See James Podgers, *Time Out for Executions*, A.B.A.J., April 1997, at 26; 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).

33. Coyne & Entzeroth, *supra* note 20, at 4.

old at the time of the offense.³⁴ This Resolution remains in effect. The Charlottesville-Albemarle (Virginia) Bar Association passed a similar resolution—the fourth of its kind in the country and the first in Virginia—in April of 1999.³⁵

The Virginia Public Defender Commission (“Commission”), along with the Virginia State Bar is charged with creating and maintaining standards (“Standards”) for appointment of counsel in capital cases under section 19.2-163.8(E) of the Virginia Code.³⁶ Although the statute authorizing the Standards does not mandate it, the Commission strongly encourages that two attorneys be appointed in every capital case.³⁷ The Standards list the various requirements that lead trial counsel and co-counsel must meet in order to be appointed, as well as the minimum requirements for appellate counsel and habeas corpus counsel. The ABA Guidelines are very similar to the Standards in that they both emphasize that two attorneys are needed in every capital case, and that those attorneys must meet certain levels of experience, training, and familiarity with criminal law, felony cases, and jury trials.³⁸

However, the Guidelines go beyond the Standards in several respects. First, Guideline 7.1 states that the appointing authority, described in Guideline 3.1 as either a central defenders office or a committee of no fewer than five attorneys familiar with criminal defense law, should “monitor the performance of assigned counsel to ensure that the client is receiving quality representation” and remove any attorney from the roster of qualified attorneys if “there is compelling evidence that he has inexcusably ignored basic responsibilities of an effective lawyer, resulting in prejudice to the client’s case.”³⁹ The Standards do not contain a similar monitoring provision and make no mention of performance-based grounds for removal from the list of qualified attorneys.

Second, the Guidelines establish certain performance criteria for every stage of a capital trial, from pre-indictment⁴⁰ through clemency⁴¹ proceed-

34. *Id.* at 49.

35. Frank Green, *Execution Moratorium Urged Action By Bar Group Apparent First for Virginia*, RICH. TIMES-DISPATCH, Apr. 15, 1999, at B1.

36. VA. CODE ANN. § 19.2-163.8(E) (Michie 1999).

37. VIRGINIA PUBLIC DEFENDER COMMISSION, STANDARDS FOR THE QUALIFICATIONS OF APPOINTED COUNSEL IN CAPITAL CASES (1999).

38. GUIDELINES, *supra* note 28, at 2.1-5.1.

39. *Id.* at 7.1.A.

40. Guideline 11.3 reads:

Counsel appointed in any case in which the death penalty is a possible punishment should, *even if the prosecutor has not indicated that the death penalty will be sought*, begin preparation for the case as one in which the death penalty will be sought while employing strategies to have the case designated by the prosecution as a non-capital one.

ings. The Guidelines pertaining to performance criteria are very precise and extensive. For example, Guideline 11.4.1 provides a thorough list of documents, reports, potential witnesses (both lay and expert), and mitigation sources that defense counsel should pursue and acquire.⁴² This Guideline even states that defense counsel should meet with the accused within twenty-four hours of being appointed to the case,⁴³ as well as locate members of the victim's family that may be opposed to the imposition of the death penalty in the particular case.⁴⁴ Even though these Guidelines are not binding in Virginia, they are an excellent checklist for attorneys with capital cases in that they cover the many angles that a capital case may take and offer suggestions that may lead defense counsel to a strategy previously overlooked.⁴⁵

The ABA Report and Guidelines together provide in-depth reviews of the current state of death penalty law and offer several helpful suggestions. However, the ABA premise that ensuring good attorneys with plenty of resources will result in a fair and efficient administration of the death penalty is perhaps too simplistic. Even the best capital defense attorneys face inequities and difficulties under the Virginia Code and state case law.⁴⁶ The Virginia capital defense bar, through tenacious representation and repeated efforts, has improved capital law immensely. *Yarbrough v. Com-*

Id. at 11.3 (emphasis added).

41. *Id.* at 11.9.4.

42. *Id.* at 11.4.1.

43. *Id.* at 11.4.1.2.

44. *Id.* at 11.4.1.3.C.

45. For example, Guideline 11.4.1.1 tells defense counsel that:

Copies of all the charging documents in the case should be obtained and examined in the context of the applicable statutes and precedents, to identify (inter alia):

A. the elements of the charged offense(s), including the element(s) alleged to make the death penalty applicable;

B. the defenses, ordinary and affirmative, that may be available to the substantive charge and to the applicability of the death penalty;

C. any issues, constitutional or otherwise, (such as statutes of limitations or double jeopardy) which can be raised to attack the charging documents.

Id. at 11.4.1.1. Often, defense counsel, focusing on the larger issues of a capital case, overlook faults in the indictment and other charging documents. It is the experience of the Virginia Capital Case Clearinghouse that many of these faults can be mined and exploited by defense counsel, whether to simply cause annoyance to the Commonwealth and make the prosecution look bad in front of the judge, or to develop a whole trial strategy based on the wording of the charge.

46. See, Alix M. Karl, *A Quarter Century of Death: A Symposium on Capital Punishment in Virginia since Furman v. Georgia: Suggestions for Capital Reform in Virginia*, 12 CAP. DEF. J. 123 (1999) (reviewing deficiencies in the Virginia statutory scheme and offering suggestions for improvement).

*monwealth*⁴⁷ and *Lilly v. Virginia*⁴⁸ are examples. But, the defense bar still encounters unfair and confounding outcomes.⁴⁹ The ABA Recommendations and Guidelines are good first steps to ensuring due process—especially since a highly skilled defense bar is necessary to expose and counter the shortcomings of the Virginia death penalty scheme.

III. Pre-Indictment Review of Federal Capital Cases

Murder defendants are often haphazardly charged. Often, cases that do not warrant the death penalty are charged anyway because there are so many variables that enter into a prosecutor's charging decision. To assure some consistency in indictments, the federal government created several innovations. Before a United States Attorney can seek the death penalty, he or she must receive written authorization from the Attorney General.⁵⁰ The prosecutor is also encouraged, but not required, "to consult . . . with the appropriate section of the Criminal Division or the Criminal Section of the Civil Rights Division."⁵¹ This process has effectively narrowed the number of death penalty cases brought by the federal government. In the last seven years, Attorney General Janet Reno reviewed 498 submissions for capital indictments but authorized only 141 of them.⁵² This approval process ensures that the federal prosecutorial power "speaks with one voice" in defining what cases deserve the death penalty.⁵³ In effect, this requirement is a built-in pre-trial proportionality review.

The process of seeking approval is set out in section 9-10.020 of the United States Attorney's Manual ("Manual"). The United States Attorney must prepare a "Death Penalty Evaluation" form and an accompanying memorandum, which consists of the following parts: "(i) an introduction . . . (ii) the theory of liability, (iii) the facts and evidence, including evidence relating to any aggravating or mitigating factors, (iv) the defendant's back-

47. 519 S.E.2d 602 (Va. 1999) (extending application of "life means life" jury instruction to all capital murder sentencing phases).

48. 119 S. Ct. 1887 (1999) (remanding case to Supreme Court of Virginia for harmless error analysis in light of erroneous use of unavailable co-defendant's testimony at trial).

49. See, e.g., *Strickler v. Greene*, 119 S. Ct. 1936 (1999) (holding that the police's withholding of evidence that a witness's memory of the events to which she testified improved after extensive police questioning was not prejudicial enough for a new trial); *Vinson v. Commonwealth*, 522 S.E.2d 170 (Va. 1999) (allowing the Commonwealth to twist mitigation evidence into rebuttal of future dangerousness evidence).

50. UNITED STATES ATTORNEYS MANUAL, at § 9-10.020 (U.S. D.O.J. 1997) [hereinafter MANUAL].

51. *Id.*

52. Bill Miller, *U.S. Attorney Overruled in Starbucks Slaying Case*, WASH. POST, Feb. 10, 2000, at B1.

53. *Id.* (citing statements made by Channing D. Phillips, spokesman for United States Attorney Wilma A. Lewis).

ground and criminal history, (v) the basis for Federal prosecution . . . and (vi) any other relevant information."⁵⁴ This information, along with other relevant information such as statements from the defense and police and autopsy reports, is submitted to the Assistant Attorney General for the Criminal Division.⁵⁵

This compilation of documents is reviewed by a committee, pursuant to section 9-10.050 of the Manual.⁵⁶ This committee is appointed by the Attorney General and must include the Deputy Attorney General and the Assistant Attorney General of the Criminal Division (or their designees).⁵⁷

Defense counsel is permitted to present, either orally or in writing, reasons why the death penalty should not be sought.⁵⁸ The committee is explicitly told to consider the possibility of racial bias in the charge itself and in the federal death penalty scheme overall.⁵⁹ If the indictment is cleared by the committee, then the prosecutor must file an "Notice of Intention to Seek the Death Penalty."⁶⁰

The standards for the committee's determination are set out in Manual section 9-10.080.⁶¹ These standards are extremely helpful in that they require thorough and objective deliberation over whether or not to seek a death sentence. The committee is, in effect, asked to think like a jury and "determine whether the statutory aggravating factors applicable to the offense and any non-statutory aggravating factors sufficiently outweigh the mitigating factors applicable to the offense to justify a sentence of death, or, in the absence of any mitigating factors, whether the aggravating factors themselves are sufficient to justify a sentence of death."⁶² In addition, the committee must find that the aggravating factors exist beyond a reasonable doubt.⁶³ Mitigating factors, which may not have been developed extensively at that point, are to be considered in the light most favorable to the defendant.⁶⁴ Such careful scrutiny is beneficial to defendants in that it obviously reduces the number of capital indictments that are actually sought, though the real reasons for these innovations are stated in the Manual: "there must be sufficient admissible evidence of the aggravating factors to obtain a death

54. MANUAL, *supra* note 50, at § 9-10.000.

55. *Id.*

56. *Id.* at § 9-10.050.

57. *Id.*

58. *Id.*

59. *Id.*

60. *Id.*; see also, John P. Cunningham, Comment, *Symposium the Federal Courts: Death in the Federal Courts: Expectations and Realities of the Federal Death Penalty Act of 1994*, 32 U. RICH. L. REV. 939 (1998).

61. MANUAL, *supra* note 50, at § 9-10.080.

62. *Id.*

63. *Id.*

64. *Id.*

sentence and to sustain it on appeal. The authorization process is designed to promote consistency and fairness.⁶⁵ Thus, while there may be fewer capital indictments charged, the ones that are charged will be extremely strong prosecution cases.

The Federal Death Penalty Act includes other safeguards. The Act specifically excludes pregnant women,⁶⁶ mentally retarded defendants,⁶⁷ and anyone incapable of understanding the death penalty⁶⁸ from facing a capital indictment. Once the Justice Department Committee approves the capital indictment, the prosecutor must send a statement to the defendant enumerating the aggravating factors.⁶⁹ This notice is much like a bill of particulars, but one that is statutorily required. In Virginia, the defendant's request for a bill of particulars is often denied⁷⁰ even though notice of charges is a constitutional right.⁷¹ Also, the Act requires that two counsel be appointed to all capital cases.⁷²

While Virginia cannot implement a system similar to the federal government's because of the nature of the relationship between the Office of the Attorney General and the elected Commonwealth's Attorneys, the ideas behind the federal scheme are instructive for Virginia death penalty jurisprudence. The essence of the federal policies is that there should be some fairness and proportionality when indicting someone to be on trial for his life and that the decision whether or not to prosecute a capital charge should not be based entirely on the personal or political views of the prosecutor. The gravamen of the *Furman v. Georgia*⁷³ decision, the basis of the modern death penalty, is that "the death penalty must be imposed fairly, and with reasonable consistency, or not at all."⁷⁴ Fairness and consistency

65. *Id.*

66. 18 U.S.C. § 3596(b) (2000).

67. 18 U.S.C. § 3596(c) (2000).

68. *Id.*

69. 18 U.S.C. § 3593(a) (2000). Section 3593 of Title 18 of the United States Code states:

The factors for which notice is provided under this subsection may include factors concerning the effect of the offense on the victim and the victim's family, and may include oral testimony, a victim impact statement that identifies the victim of the offense and the extent and scope of the injury and loss suffered by the victim and the victim's family, and any other relevant information.

Id.

70. See, e.g., *Swisher v. Commonwealth*, 506 S.E.2d 763, 768 (Va. 1998) (holding that the decision whether or not to require a bill of particulars is left to the trial judge's decision, but that the bill of particulars should only be used to challenge the sufficiency of the indictment).

71. See U.S. CONST. amend. VI (stating that "accused shall enjoy the right . . . to be informed of the nature and cause of the accusation").

72. 18 U.S.C. § 3005 (2000).

73. 408 U.S. 238 (1972).

74. *Collins v. Collins*, 510 U.S. 1141, 1144 (1994) (Blackmun, J., dissenting).

can best begin with the indictment; this is the position taken by the federal government in its death penalty guidelines.

Virginia has a "hook" for a similar policy in the proportionality requirement of section 17.1-313(C) and (E) of the Virginia Code.⁷⁵ Subsection (E) states that records of capital cases "shall be made available to the circuit courts," apparently so the circuit courts can use them to conduct their own proportionality consideration.⁷⁶ Furthermore, the Commonwealth Attorneys could agree to a voluntary review of potential capital cases by the Attorney General of Virginia, perhaps through a committee comprised of selected Commonwealth Attorneys and representatives from the Office of the Attorney General. Voluntary pre-indictment review by such a committee would be advantageous for all parties involved in capital litigation: the defendants presumably would get fairer charging decisions, and the Commonwealth would have more coordination between the trials and appeals of capital cases.

IV. Unreliable Evidence: Unadjudicated Acts and Snitch Testimony

Although the seriousness of capital cases would seem to require that only the best evidence be used, two forms of notoriously unreliable evidence are routinely admitted at capital trials: unadjudicated acts used to show future dangerousness at penalty phase proceedings and testimony of jailhouse informants. Many of the problems in the Illinois death penalty debacle are attributable to unreliable evidence.⁷⁷ These types of evidence do not need to be banned outright, but they can be more cautiously evaluated and more carefully used.

A. Testimony of Jailhouse Informants

Testimony of jailhouse informants is routinely used but notoriously unreliable because informants are often given "deals" for their testimony. Evidence of these deals may be hard for defense counsel to discover and eventually use in cross-examinations.⁷⁸ Snitches, by nature, are self-serving

75. VA. CODE ANN. § 17.1-313(C), (E) (Michie 1999).

76. VA. CODE ANN. § 17.1-313(E) (Michie 1999); see also, Kelly E. P. Bennett, *A Quarter Century of Death: A Symposium on Capital Punishment in Virginia Since Furman v. Georgia: Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103 (1999).

77. "In at least forty-six cases where a defendant was sentenced to die, the prosecution's evidence included a jailhouse informant In one Cook County case, the word of a convicted con man, called a 'pathological liar' by federal authorities, put a man on Death Row. In exchange for a sharply reduced sentence, the con artist testified that while in jail together the defendant confessed to him, even though a tape recording of their conversation contains no confession." Armstrong & Mills, *Derailed*, *supra* note 16.

78. For example, in *Bramblett v. Commonwealth*, the Commonwealth decided to use a jailhouse informant, whom it had planned possibly to use as a rebuttal witness, in its case-in-

and can be very resourceful in helping themselves by helping the prosecution. For example, in 1988, a prolific jailhouse informant, Leslie Vernon White, showed how easy it was to fabricate a confession. By using a phone at the jail and impersonating various people, he was able to get detailed information about a murder suspect he had never met and was even able to falsify jail records to "show" he had shared a cell with the suspect.⁷⁹

The reliability of snitch testimony can be greatly increased by requiring courts to take a closer look at the quality of the evidence, mandating disclosure of evidence of possible deals and issuing a cautionary jury instruction if questionable practices arise. Oklahoma recently took the step of increasing the reliability of snitch testimony in *Dodd v. State*⁸⁰ by requiring extensive pre-trial disclosure by the prosecution about the snitch and his anticipated testimony, and by mandating cautionary instructions to the jury whenever a snitch is used. The court was concerned about reliability problems with snitches, who often elicit or create statements from the defendant with the expectation of some benefit.⁸¹ Statements made by an incarcerated defendant awaiting trial that are deliberately elicited by an informant working for the state are not admissible under *United States v. Henry*.⁸² However, the Oklahoma court saw that there are reliability problems in all snitch statements. Whether the informant was already working for the state or whether he anticipated some future benefit from eliciting incriminating statements on his own initiative, his initial motivation is the same.⁸³ The court pointed out that "while the state action affected by such a government/informant relationship triggers careful constitutional scrutiny, it permits equally insidious reliability problems to escape attention."⁸⁴

Dodd replaced an earlier opinion in the same case which went even farther in protecting against unreliable snitch testimony by requiring a separate, pre-trial hearing to determine the admissibility of the snitch's

chief to testify as to several severely incriminating statements allegedly made by defendant. 513 S.E.2d 400, 409 (Va. 1999). It notified defense counsel several days before the snitch was to testify and only then revealed the snitch's name and criminal record. *Id.* Defense requested that the testimony be barred due to the late disclosure of the record which did not give defense adequate time to investigate the witness, but the court allowed it anyway. *Id.*

79. *Armstrong & Mills, Informant, supra* note 16. White admitted that he had lied in dozens of cases. *Id.* In response, the district attorney's office established a clearinghouse to keep track of informants and to provide information that prosecutors could use to corroborate their testimony. *Id.*

80. 993 P.2d 778 (Okla. Crim. App. 2000).

81. *Dodd v. State*, 993 P.2d 778, 783 (Okla. Crim. App. 2000).

82. 447 U.S. 264 (1980).

83. *Dodd*, 993 P.2d at 783-84.

84. *Id.*

testimony.⁸⁵ Remains of this decision are contained in the concurrences of *Dodd*.⁸⁶ This pre-trial hearing was much like a *Daubert v. Merrell Dow Pharmaceuticals, Inc.*⁸⁷ hearing in that the trial court assumed a gatekeeper role and decided whether or not the snitch would be allowed to testify.⁸⁸ Supporters of this hearing argued that "the use of such untrustworthy witnesses carries considerable costs, especially in death-penalty cases where the stakes are the highest. The misuse of such informants also adds financial costs to taxpayers when convictions based on their testimony are reversed to be retried."⁸⁹ Apparently, the majority thought a *Daubert*-type hearing went too far since "many witnesses, in addition to jailhouse informants, may have a motive to lie. That is not a sufficient reason to remove the trier of fact from making a determination of the credibility of such witness."⁹⁰

To prevent constitutional violations involving snitch testimony, the Oklahoma Court of Criminal Appeals revised its earlier decision and in its new opinion instituted a set of procedures that enhance the reliability of snitch testimony by giving defense counsel information that will assist with the cross-examination of the snitch. The state must, ten days before trial, disclose in discovery:

- (1) [T]he complete criminal history of the informant; (2) any deal, promise, inducement, or benefit that the offering party has made or may make in the future to informant . . . ; (3) the specific statements made by the defendant and the time, place, and manner of their disclosure; (4) all other cases in which the informant testified or offered statements against an individual but was not called, whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for or subsequent to that testimony or statement; (5) whether at any time the informant recanted that testimony or statement, and if so, a transcript or copy of such recantation; and (6) any other information relevant to the informant's credibility.⁹¹

This information allows defense attorneys to prepare strategies to counter the evidence offered by jailhouse snitches. More importantly, these requirements may have the effect of discouraging the presentation of snitch evidence that the prosecution knows is questionable. By imposing a high threshold showing of reliability on the prosecution, the holding of *Dodd*

85. *Id.* at 785 (Strubhar, P.J., specially concurring) (citing *Dodd v. State*, 1999 OK CR 29 (reh'g granted vacating and withdrawing opinion, 70 OBJ 2952 Oct. 6, 1999)).

86. *Id.*; see also *id.* at 787 (Craig, A.J., specially concurring).

87. 509 U.S. 579 (1993); see also, *Kumho Tire Co. v. Carmichael*, 526 U.S. 137, 141 (1999) (holding that, under *Daubert*, a court's gatekeeping function applies to testimony based on "technical" and "other specialized" knowledge as well as "scientific" knowledge).

88. *Dodd*, 993 P.2d at 785 (Strubhar, P.J., specially concurring).

89. *Id.*

90. *Id.* at 787 (Craig, A.J., specially concurring).

91. *Id.* at 784.

ensures that much of the unreliable snitch evidence that is currently presented will not be admitted in the future.

In addition to these pre-trial disclosures, the *Dodd* decision also requires this jury instruction be given any time a court admits jailhouse informant testimony:

The testimony of an informer who provides evidence against a defendant must be examined and weighed by you with greater care than the testimony of an ordinary witness. Whether the informer's testimony has been affected by interest or prejudice against the defendant is for you to determine. In making that determination, you should consider: (1) whether the witness has received anything (including pay, immunity from prosecution, leniency in prosecution, personal advantage, or vindication) in exchange for testimony; (2) any other case in which the informant testified or offered statements against an individual but was not called, and whether the statements were admitted in the case, and whether the informant received any deal, promise, inducement, or benefit in exchange for that testimony or statement; (3) whether the informant has ever changed his or her testimony; (4) the criminal history of the informant; and (5) any other evidence relevant to the informer's credibility.⁹²

No part of this instruction is unreasonable since it merely makes explicit what juries might already do. It is feasible for defense attorneys in Virginia to proffer a similar jury instruction.

B. Unadjudicated Prior Acts

Unadjudicated prior acts are used in the sentencing phase of a capital trial to show that the defendant has a propensity to commit future acts that would be a threat to society.⁹³ That unadjudicated prior conduct is admissible at the sentencing phase of capital trials is clear from both case law⁹⁴ and the language in section 19.2-264.3:2 of the Virginia Code.⁹⁵ Central to the fairness of a capital scheme are individualized sentencing and heightened reliability.⁹⁶ While Virginia's use of unadjudicated acts satisfies the first of these prongs, it clearly fails the second.⁹⁷ The Virginia Code

92. *Id.*

93. VA. CODE ANN. § 19.2-264.4(B) (Michie 1999).

94. *See, e.g.,* *Watkins v. Commonwealth*, 331 S.E.2d 422, 436 (Va. 1985).

95. VA. CODE ANN. § 19.2-264.3:2 (Michie 1999).

96. *See, e.g.,* *Woodson v. North Carolina*, 428 U.S. 280, 304-305 (1976) (stating that "while the prevailing practice of individualized sentencing determinations generally simply reflects enlightened policy rather than a constitutional imperative, we believe that in capital cases the fundamental respect for humanity underlying the Eighth Amendment [demands more]. Because [death is so serious a penalty], there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.")

97. For an extended discussion of due process requirements and Virginia's use of

requires that the jury find future dangerousness beyond a reasonable doubt,⁹⁸ yet the evidence that comprises that finding is not held to as high a standard. For example, in *Gray v. Netherland*,⁹⁹ the Commonwealth introduced facts about a double murder although the only evidence that Gray committed the murder were statements he allegedly made to a snitch.¹⁰⁰ In addition to the snitch's testimony, the prosecution showed pictures of the crime scene, called the medical examiner to testify regarding the autopsy reports, and put on a police detective who testified about the crime and investigation—all for a crime that was never prosecuted.¹⁰¹ The United States Supreme Court held that the evidence was admissible since the defense had notice (albeit, one day's) and did not ask for a continuance.¹⁰²

Unadjudicated acts can be dispositive of a defendant's ultimate fate, but may be very unreliable. Virginia is one of the few states that impose no limitation on the admissibility of unadjudicated prior acts.¹⁰³ Several states, including Florida, Alabama, and Tennessee, do not allow the introduction of evidence of any unadjudicated conduct.¹⁰⁴ Others, including California, Georgia, and Arkansas, limit its use through requiring clear and convincing or reasonable doubt standards, or with the use of limiting instructions.¹⁰⁵ Virginia should join with these states and put some restrictions on the use of unadjudicated prior acts. It is ironic that the Commonwealth's capital sentencing scheme, which should be carefully constructed to protect constitutional rights such as due process, can include a sentencing factor, future dangerousness, that often relies on evidence that was not adequate enough to be brought to trial in the first place.

V. Time for Review and the 21-Day Rule

Modification of the so-called "21-day Rule" of the Supreme Court of Virginia, which mandates that all decisions of the courts are final after

unadjudicated acts, see Tommy Barrett, *A Modest Proposal: Requiring Proof Beyond a Reasonable Doubt For Unadjudicated Acts Offered to Prove Future Dangerousness*, CAP. DEF. J., Spring 1998, at 58.

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

99. 518 U.S. 152 (1996).

100. *Gray v. Netherland*, 518 U.S. 152, 156-58 (1996).

101. *Id.*

102. *Id.*

103. See Steven Paul Smith, Note, *Unreliable and Prejudicial: The Use of Extraneous Unadjudicated Offenses in the Penalty Phases of Capital Trials*, 93 COLUM. L. REV. 1249, 1267 (1993) (stating that six states as of 1993 placed no restrictions on the introduction of unadjudicated conduct at the sentencing phase: Missouri, North Carolina, Oklahoma, Oregon, Texas, Virginia).

104. *Id.* at 1277-83.

105. *Id.*

twenty-one days, is another critical step to improving due process.¹⁰⁶ The rule essentially forecloses the possibility of introducing any new evidence post-conviction which may cast doubt on the conviction or which may exculpate the defendant entirely. The rule is archaic, and its applicability to the death penalty may have been an oversight.¹⁰⁷ Supporters of the 21-day Rule argue that evidence of innocence can be considered by the Governor through clemency proceedings.¹⁰⁸ But clemency is a blunt instrument at best, since it is usually mired in political considerations and is only rarely used. Moreover, in Virginia a grant of clemency does not mean that the defendant is released from prison.¹⁰⁹ There have been only six commutations of the death penalty in Virginia, and all six defendants remain in prison even though there is evidence of actual innocence in five of the cases.¹¹⁰ Also, the separation of powers doctrine delegates questions of evidence and the determination of guilt or innocence to the judiciary, not the executive branch of the government, which further makes clemency an inappropriate remedy for mistaken convictions.

Most other states¹¹¹ and the federal government¹¹² do not have such a draconian prohibition on consideration of new evidence. The Virginia General Assembly has attempted to modify the 21-day Rule, and has nearly done so on several occasions.¹¹³ In the most recent session, delegate James

106. VA. SUP. CT. R. 1.1.

107. Joe Jackson and June Arney, *Sentenced to Die Without Fair Trials Series: Dead End on Death Row?*, VIRGINIAN-PILOT & LEDGER-STAR (Hampton Roads, Virginia), June 26, 1994, at 2 (quoting a delegate who stated that the Virginia Legislature did not consider the 21-day Rule in drafting the Commonwealth's death penalty statute after *Furman*).

108. See, VA. CONST. art V, § 12; VA. CODE ANN. § 53.1-229 (Michie 1999).

109. For example, Governor Douglas Wilder granted Joseph Giarratano a conditional pardon and gave Attorney General Mary Sue Terry the choice of whether to grant Giarratano a new trial, which she declined. Giarratano confessed to fatally stabbing Barbara Kline and raping and strangling her daughter, even though he claimed to have no memory of doing so. "The state's psychiatrist in the case later said Giarratano made up part or all of his confessions, and his lawyers say the confessions are not supported by crime scene evidence. Hairs and fingerprints found near [one of the victim's] body were not Giarratano's." *Death Sentences Commuted in Virginia*, RICH. TIMES-DISPATCH, Nov. 15, 1998, at A17.

110. See *id.*; Frank Green, *Gilmore Grants Swann Clemency Sentence Commuted to Life Without Parole*, RICH. TIMES-DISPATCH, May 13, 1999, at A1 (reporting that in Swann's case there is no question of his guilt, but Governor Gilmore commuted his sentence due to Swann's severe mental illness).

111. See *Herrera v. Collins*, 506 U.S. 390, 411 nn.8-11 (1993) (comparing the length of time that new evidence is allowed in various states).

112. See, FED. R. CRIM. P. 33 (allowing a new trial based on new evidence within three years of the verdict).

113. For information on the latest efforts to amend the 21-day rule, visit the web page of Virginians for Alternatives to the Death Penalty. *Virginians for Alternatives to the Death Penalty* (visited Apr. 4, 2000) <<http://www.vadp.org/21day.htm>>.

F. Almand introduced House Bill 1311 which would have given death row inmates up to two opportunities in three years to introduce new evidence indicating a "significant probability . . . of actual innocence."¹¹⁴ The House passed the bill by a vote of seventy-five to twenty-three but a Senate committee rejected it; a compromise version of the bill, which limited the time period for introduction of new evidence to forty-five days, was held over until the 2001 session.¹¹⁵ Despite widespread agreement that twenty-one days is too short, many in the General Assembly think a three year limitation would result in a whole new set of trials and procedures, and family members of victims argue that too long a period for introduction of new evidence would never give them closure.¹¹⁶

Although the 21-day Rule was not modified in the current legislative session, the pressure is on to change it. While the forty-five day compromise passed by the Senate Courts of Justice Committee in the 2000 session—which hopefully will be passed by the Senate and House in 2001—is a good start, death row inmates will have trouble finding and presenting such evidence in such a short time.

Recently, United States Senator Patrick Leahy (D-Vt.) introduced the Innocence Protection Act that would force states to provide ways for inmates to introduce new evidence, particularly evidence gained from new scientific methods such as DNA analysis.¹¹⁷ Leahy, the top-ranking Democrat on the Senate Judiciary Committee, has also suggested that the federal government set minimum standards of competency for attorneys who represent indigent capital defendants.¹¹⁸ The interest and attention generated by House Bill 1311 in the Virginia General Assembly, the events in Illinois, proposed federal legislation, and the rise in the importance of DNA evidence in criminal trials all indicate that persons convicted of capital murder will have greater opportunities to introduce evidence of their innocence—the question, in Virginia, is when.

VI. Conclusion

The recent events in Illinois and other states show that the current processes used to impose the death penalty are not adequate to guarantee reliable results. If indeed the death penalty is different, due to its finality,

114. Ruth S. Intress, *Emotion High, Bill Narrowed*, RICH. TIMES-DISPATCH, Mar. 6, 2000, at A8.

115. *Id.* The Virginia General Assembly offers a bill tracking system over the world wide web. See *Legislation Information System* (visited Apr. 4, 2000) <<http://leg1.state.va.us/>>.

116. Intress, *supra* note 114.

117. Frank Green, *State Fights DNA Bid by Death Row Inmate*, RICH. TIMES-DISPATCH, Mar. 24, 2000, at B1.

118. Dorning, *supra* note 18.

from other punishments society imposes, both the defendants and families of victims deserve a fair and accurate system. This increased reliability and efficiency can only be gained through improvements in process. The current flaws in the process make clear that states cannot succumb to the demands of a speedier application of the death penalty without sacrificing a great deal of reliability. Many of the suggestions for reform require very little sacrifice of time or resources and can easily be implemented in Virginia—whether by the General Assembly, courts, or perhaps even by skillful defense attorneys who proffer the proper motions. The repeated claims by Commonwealth officials that the Virginia death penalty scheme is fair and has adequate safeguards will soon fall on deaf ears. A better death penalty, ensured through improvements in process, is good for those who stand to forfeit their lives and for those who are willing to take those lives.

CASE NOTES:

United States Supreme Court

Decision on the Merits
