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Inconsistencies in Virginia Capital Jurisprudence

Sarah M. Braugh*

*Truth, when not sought after, rarely comes to light.*¹

I. Introduction

In *Yarbrough v Commonwealth*,² the Supreme Court of Virginia espoused its policy of “truth in sentencing” that requires the elimination of speculation from sentencing determinations.³ The *Yarbrough* court held that, upon request of a defendant, capital sentencing juries should be given an instruction that the defendant is ineligible for parole even when the Commonwealth relied solely on the vileness aggravating factor.⁴ Prior to *Yarbrough*, the rule prohibited jury instructions “that the defendant would be *eligible* for parole or could *benefit* from an executive act of pardon or clemency.”⁵ The court explained that the policy behind the prior rule was to prevent jury speculation about parole that might

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1. Oliver Wendell Holmes, *Quotes to Inspire You*, at http://www.cybernation.com/victory/quotations/subjects/quotes_truth.html (last visited Sept. 27, 2001).

2. 519 S.E.2d 602 (Va. 1999).

3. *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 605-07 (Va. 1999) (holding that capital sentencing juries should be instructed, upon request of a defendant, regarding parole ineligibility).

4. *Id.* at 616. The *Yarbrough* court stated this was a case of first impression. *Id.* at 612. Subsequent to the United States Supreme Court’s opinion in *Simmons v South Carolina* and the abolition of parole in Virginia, the court had not been presented with a capital murder conviction in which the Commonwealth had relied only on the vileness aggravating factor and the defendant was parole ineligible. *Id.* at 611; *see also Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding that due process requires that defendant’s parole ineligibility be made clear to the jury when the prosecution offers evidence of future dangerousness). The court found that *Simmons* was not binding in this case because the holding in *Simmons* required that when a defendant’s *future dangerousness* is at issue, he is entitled to inform the jury of his parole ineligibility. *Yarbrough*, 519 S.E.2d at 612.

5. *Yarbrough*, 519 S.E.2d at 613 (citing *Hinton v. Commonwealth*, 247 S.E.2d 704, 706 (Va. 1978)); *see Jones v. Commonwealth*, 72 S.E.2d 693, 696-97 (Va. 1952) (finding juries should not be instructed on post-sentencing matters); *see Coward v. Commonwealth*, 178 S.E. 797, 800 (Va. 1935) (stating that what happens after sentencing is of no concern to sentencing juries).

cause it to impose a harsher penalty than it might otherwise.⁶ Therefore, the goal in each rule is the same: to protect defendants from receiving harsher sentences as a result of jury speculation. In *Fishback v Commonwealth*,⁷ the court extended the “truth in sentencing” rationale to sentencing proceedings against non-capital defendants.⁸ The rule announced in *Yarbrough* was codified in Section 19.2-264.4 of the Virginia Code and provides that, upon request of a defendant who has been convicted of an offense punishable by death, “a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life.”⁹

This article will examine a series of Supreme Court of Virginia decisions that appear to be inconsistent in terms of the court’s analyses and conclusions, especially in light of the “truth in sentencing” rationale. The Supreme Court of Virginia emphasized the importance of “truth in sentencing” in *Yarbrough* and *Fishback*. Unfortunately, the court has failed to adhere to that principle. For example, subsequent to the abolition of parole in Virginia, Class One felons not sentenced to death are sentenced to life in prison.¹⁰ Such a defendant is not eligible for any type of parole.¹¹ Further, hopes for executive clemency are slim.¹² Therefore, he will effectively be sentenced to death in prison. Yet, the Supreme Court of Virginia’s decisions have made it nearly impossible for defendants to introduce evidence accurately describing life in prison.¹³ Additionally, the court has precluded defendants from arguing that a life sentence means the defendant will die in prison.¹⁴ This article asserts that the rationale announced in *Yarbrough*

6. *Yarbrough*, 519 S.E.2d at 613.

7. 532 S.E.2d 629 (Va. 2000).

8. See *Fishback v. Commonwealth*, 532 S.E.2d 629, 634 (Va. 2000) (mandating that juries should be instructed about parole ineligibility in non-capital cases when the defendant has no chance of being paroled).

9. See VA. CODE ANN. § 19.2-264.4 (Michie 2000). This section also provides that where a sentence of death is not recommended in a trial by jury, the defendant shall be sentenced to life imprisonment. *Id.*

10. § 19.2-264.4.

11. See VA. CODE ANN. § 53.1-165.1 (Michie 2000) (providing, in part, that “[a]ny 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”); VA. CODE ANN. § 53.1-40.01 (Michie 2000) (prohibiting geriatric release for Class One felons convicted of offenses committed on or after January 1, 1995).

12. See *infra* Part IV.A.

13. See generally *Burns v. Commonwealth*, 541 S.E.2d 872 (Va. 2001) (holding that evidence regarding general nature of prison life is not proper rebuttal to the Commonwealth’s case for future dangerousness when the Commonwealth offers only evidence relating to defendant’s prior convictions and unadjudicated bad acts); *Walker v. Commonwealth*, 515 S.E.2d 565 (Va. 1999) (holding that prison life evidence is not relevant mitigating evidence); *Cherrix v. Commonwealth*, 513 S.E.2d 642 (Va. 1999) (same).

14. See *Lovitt v. Commonwealth*, 537 S.E.2d 866, 878 (Va. 2000) (holding trial court properly excluded defendant’s “death in prison” closing argument).

and *Fishback* was correct, but has not been consistently applied, if applied at all, to subsequent decisions made by the court.

Additionally, the Supreme Court of Virginia has been inconsistent, allowing the admission of some “good victim character” evidence but not “bad victim character” evidence.¹⁵ The court has also been inconsistent in its decisions regarding capital murder indictments.¹⁶

II. Examination of the Supreme Court of Virginia's Inconsistent Opinions

A. The Truth in Sentencing Rationale—Eliminating Speculation in Capital Sentencing

The Supreme Court of Virginia has made small steps toward allowing juries a glimpse into the future of a life sentenced capital defendant by requiring a jury instruction regarding parole ineligibility upon request of the defense. This “life means life” instruction was meant to further the goal of truth in sentencing, by eliminating speculation by capital sentencing juries.

1. *Yarbrough v. Commonwealth*

The defendant in *Yarbrough v. Commonwealth* was convicted of capital murder and sentenced to death.¹⁷ The Supreme Court of Virginia held that the trial court erred in failing to grant defendant's requested instruction that he would be ineligible for parole if given a life sentence.¹⁸ The court affirmed Yarbrough's capital conviction but vacated the death sentence and remanded his case for a new sentencing hearing.¹⁹

The question before the court was “whether the granting of an instruction on parole ineligibility is required in a capital case in which the Commonwealth relied on the vileness aggravating factor alone.”²⁰ The court held that a parole ineligibility instruction was necessary and explained that “[t]he underlying concern is whether issues are presented in a manner that could influence the jury to assess a penalty based upon ‘fear rather than reason.’”²¹ The court found that a jury may not be informed of post-sentencing procedures if that knowledge could lead a jury to impose a harsher sentence than it might otherwise.²² The court acknowledged that there was a long standing rule in Virginia, first announced in *Coward v. Commonwealth*,²³ that it is error “to instruct the jury that the defendant

15. See *infra* Part V.B.

16. See *infra* Part V.C.

17. *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 607 (Va. 1999).

18. *Id.* at 612.

19. *Id.* at 617.

20. *Id.* at 613.

21. *Id.* (internal citation omitted).

22. *Id.*

23. 178 S.E. 797 (Va. 1935).

would be eligible for parole or could benefit from an executive act of pardon or clemency."²⁴

The court stated that although *Yarbrough* presented a situation converse to the one in *Coward*, *Yarbrough* was still a case "where information about post-sentencing procedures is needed to prevent a jury from imposing a harsher sentence than it otherwise might render out of speculative fears about events that cannot transpire."²⁵ In a case in which the capital murder defendant is convicted, the jury has only two choices for sentencing: life and death.²⁶ The court found that, without knowledge that a defendant is parole ineligible, the jury might erroneously speculate on the possibility of parole and select the death penalty.²⁷ Therefore, the court found that the same policy goals underlie the old rule, barring instruction on parole status, and the new rule, mandating instruction of parole status upon request of defendant. The impetus behind each rule, therefore, is that jury speculation should not lead to the unwarranted imposition of harsher sentences.²⁸ For these reasons, the court determined that "Yarbrough was denied his right of having a fully informed jury determine his sentence."²⁹

2. Fishback v. Commonwealth

Yarbrough left open the question of whether the *Coward* rule was still viable in non-capital felony cases "where, for example, a defendant subject to a maximum term of years for a specific crime would serve that entire sentence before being eligible for geriatric parole."³⁰ The Supreme Court of Virginia answered that question in *Fishback v Commonwealth*.³¹ In *Fishback*, the court held that "juries shall be instructed, as a matter of law, on the abolition of parole for non-capital

24. *Yarbrough*, 519 S.E.2d at 613; see *Coward v. Commonwealth*, 178 S.E. 797 (Va. 1935). In *Coward*, the jury in a drunk driving case made an inquiry as to "what time the defendant would get off while he was confined in jail." *Coward*, 178 S.E. at 798. The trial court responded to the jury by explaining the rules regarding "good behavior" sentence reduction. *Id.* The court held this was error because "[the] jurors should have been told that it was their duty, if they found the accused guilty, to impose such sentence as seemed to them to be just. What might happen afterwards was no concern of theirs." *Id.* at 800.

25. *Yarbrough*, 519 S.E.2d at 613; see *Coward*, 178 S.E. at 799 (holding that jurors should not be instructed on the parole status of defendants).

26. See VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) (providing that when a sentence of death is not recommended in a trial by jury, the defendant shall be sentenced to life imprisonment).

27. *Yarbrough*, 519 S.E.2d at 616. In footnote 10, the court stated that "these conclusions arise not merely from reasoned logic, but have been repeatedly confirmed through empirical research." *Id.* at n.10.

28. *Id.* at 615.

29. *Id.* at 616.

30. *Id.* at 615.

31. See *Fishback v. Commonwealth*, 532 S.E.2d 629, 634 (Va. 2000) (holding that "juries shall be instructed, as a matter of law, on the abolition of parole for non-capital felony offenses committed on or after January 1, 1995").

felony offenses committed on or after January 1, 1995.³² If the defendant's age allows for possible geriatric release, the jury shall be instructed on the provisions of the applicable statute.³³ The court found that jurors do not need to receive an instruction that defendants could be released based on good behavior credits, as it is too speculative a consideration.³⁴

The *Fishback* court stated that "truth in sentencing" is a desirable goal in the judicial process.³⁵ The court also expressed the need to keep the judicial branch's job of assessing punishment separate from the executive branch's job of administering that punishment.³⁶ The executive branch no longer has the discretion to grant or deny parole, as the statute abolishes parole.³⁷ In accordance with the "truth in sentencing" rationale, the *Fishback* court stated that "it simply defies reason that this [parole ineligibility] information ought not to be provided to the jury by an instruction of the trial court."³⁸

The court concluded that an instruction regarding credit earned for good behavior is not required, reasoning that at the time of sentencing a jury has no factual basis from which to factor the provisions for good behavior credit into its sentencing decision and "such an effort would be an exercise in pure speculation."³⁹ For the same reason, the court held that the Commonwealth is not permitted to offer an instruction regarding executive clemency.⁴⁰ The *Fishback* court reiterated the "truth in sentencing" policy underlying its opinion and the importance of a well-informed jury which bases its decision on reason rather than fear, facts rather than speculation: "Speculation by the jury is inconsistent with

32. *Id.* at 634.

33. *Id.*; see VA. CODE ANN. § 53.1-40.01 (Michie 2000).

34. *Fishback*, 532 S.E.2d at 634.

35. *Id.* at 632.

36. *Id.*

37. *Fishback*, 532 S.E.2d at 633. Virginia Code Section 53.1-165.1 provides in part, "[a]ny 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." VA. CODE ANN. § 53.1-165.1 (Michie 2000).

38. *Fishback*, 532 S.E.2d at 633. Defendants convicted of non-capital offenses, however, are not ineligible for parole in all instances. The provisions of Sections 53.1-40.01 and 53.1-202.2 are implicated and conditionally allow early release and sentence reduction in every non-capital felony conviction. *Id.* These sections deal with geriatric parole and good behavior credit, respectively. *Id.* The court determined that trial courts must give instructions regarding the abolition of parole for non-capital defendants according to the facts of a particular case. *Fishback*, 532 S.E.2d at 634. "Thus, when a defendant's age and the permissible range of punishment for the offense in question totally negate the applicability of Section 53.1-40.01, the jury will be instructed that the defendant is not eligible for parole in accordance with Section 53.1-165.1." *Id.* If the defendant is eligible for geriatric parole, an instruction will be given in accordance with the applicable provisions of Section 53.1-40.01, as well as an instruction that parole is otherwise abolished. *Id.*

39. *Fishback*, 532 S.E.2d at 634.

40. *Id.* at 634 n.4.

a fair trial both to the defendant and the Commonwealth.⁴¹ The elimination of speculation regarding executive clemency was not a new concept for the court. In *Dingus v Commonwealth*,⁴² the court concluded that the trial court erred by permitting the Commonwealth to state to the jury: "Give him the death penalty. What does life imprisonment mean to a criminal with pardon so easy?"⁴³ The court found this statement was improper and that "such a reflection upon the executive department as a reason for imposing the death penalty could not be justified, and should not under any circumstances be tolerated."⁴⁴

The Supreme Court of Virginia made a significant start in helping juries make informed decisions in capital sentencing. Unfortunately, the momentum did not last long.

B. Moving Away From the Truth

1. Lovitt v. Commonwealth

Robin Lovitt ("Lovitt") was indicted for, and convicted of, capital murder.⁴⁵ A jury sentenced him to death based on the finding that he presented a future danger.⁴⁶ On appeal, Lovitt contended that the trial court erred in preventing him from arguing that he would die in prison during closing argument.⁴⁷ The "death in prison" argument is that capital defendants are not eligible for parole and, therefore, will die in prison. The Supreme Court of Virginia found no error in the trial court's decision to exclude the argument.⁴⁸ The court determined that there was no evidence to support the argument Lovitt wished to make and deemed it "speculative in nature."⁴⁹ The court, relying on the fact that prisoners

41. *Id.* at 634.

42. 149 S.E. 414 (Va. 1929).

43. *Dingus v. Commonwealth*, 149 S.E. 414, 415 (Va. 1929) (finding that "no jury should be urged be to impose the death penalty upon any accused person because because the attorney for the Commonwealth thinks that pardons in this State are easily secured").

44. *Id.*

45. *Lovitt v. Commonwealth*, 537 S.E.2d 866, 870 (Va. 2000) (holding that trial court properly excluded defendant's "death in prison" closing argument).

46. *Id.*

47. *Id.* at 878.

48. *Id.*

49. *Id.* Note that the court has attempted repeatedly to eliminate speculation on post-sentencing evidence. See *Fishback v. Commonwealth*, 532 S.E.2d 629, 634 (Va. 2000) (finding that "[s]peculation by the jury is inconsistent with a fair trial both to the defendant and the Commonwealth"). See generally *Yarbrough v. Commonwealth*, 519 S.E.2d 602 (Va. 1999) (standing for the proposition that jury speculation should not lead to the unwarranted imposition of harsher sentences). Note also that Section 19.2-265.2 of the Virginia Code requires the court to take judicial notice of laws. See VA. CODE ANN. § 19.2-265.2 (Michie 2000). Sections 53.1-40.01, 53.1-165.1, and 19.2-264.4(A) are clearly "laws." Thus, the law is that a capitally convicted defendant must be sentenced by his jury to death or "imprisonment for life," and he cannot be paroled from the latter sentence. Judicial notice is a substitute for evidence. The "evidence" supporting a "death in prison" argument, therefore, is the law which the court is required by statute judicially to notice.

sentenced to life imprisonment without parole could possibly receive executive clemency, found the “death in prison” argument incorrect as a matter of law.⁵⁰ Thus, the Supreme Court of Virginia found that Lovitt was properly precluded from arguing that he would die in prison if given a life sentence without possibility of parole.⁵¹ A jury recommending a death sentence based on future dangerousness must find “there is a probability that the defendant would constitute a continuing serious threat to society.”⁵² Lovitt argued, in his attack on the jury’s determination of his future dangerousness, that prison society would be the only society to which he could pose a future danger, as he was ineligible for parole.⁵³ The Supreme Court of Virginia disagreed, stating that Section 19.2-264.2 did not constrain society to mean only prison society.⁵⁴ Justice Keenan declined to “rewrite the statute to restrict its scope.”⁵⁵

2. Burns v. Commonwealth

The Supreme Court of Virginia once again veered from *Yarbrough’s* “truth in sentencing” rationale in *Burns v Commonwealth*.⁵⁶ William Joseph Burns (“Burns”) was convicted of capital murder and the trial jury recommended a sentence of death based on its finding of both vileness and future dangerousness.⁵⁷ At the penalty phase of Burns’s trial, the Commonwealth presented evidence relating to his future dangerousness.⁵⁸ To establish the future dangerousness aggravator, the Commonwealth presented evidence of Burns’s prior convictions and unadjudicated bad acts.⁵⁹ In mitigation, Burns offered the testimony of family members regarding abuse he suffered as a child, a former inmate who described Burns as a “peacemaker,” and a county jail employee who testified that Burns had never been violent during his incarceration there and was always respectful.⁶⁰

Burns argued on appeal that it was error for the trial court to refuse to admit evidence about prison life in a maximum security prison in rebuttal to the Com-

50. *Lovitt*, 537 S.E.2d at 878; see *infra* Part IV.

51. *Id.*

52. *Id.* (citing VA. CODE ANN. § 19.2-264.2 (Michie 2000)).

53. *Id.*

54. *Id.* at 879.

55. *Id.* Justice Keenan, speaking for the court, did not note that the statute need not be rewritten but merely read in conjunction with other applicable statutes to properly infer the meaning of “society.” See *infra* Part III.

56. See *Burns v. Commonwealth*, 541 S.E.2d 872, 893 (Va. 2001) (holding that circuit court did not err in refusing to admit evidence about prison life in a maximum security prison in rebuttal to the Commonwealth’s evidence of future dangerousness).

57. *Id.* at 877.

58. *Id.* at 880.

59. *Id.*

60. *Id.*

monwealth's evidence offered to prove future dangerousness.⁶¹ Prior to trial, a subpoena duces tecum was issued to a regional director of the Virginia Department of Corrections at Burns's request.⁶² The subpoena requested "documents or records describing the daily inmate routine, general prison conditions, and security measures at the Red Onion Correctional Center and Wallens Ridge State Prison, . . . and videotapes" of those facilities.⁶³ The Commonwealth moved the court to quash the subpoena and the trial court granted the motion after a hearing on the matter.⁶⁴

At the penalty phase of his trial, Burns sought to introduce evidence of the conditions of incarceration at the prisons mentioned in the subpoenas in order to rebut the future dangerousness evidence presented by the Commonwealth.⁶⁵ Because the court indicated it would grant a motion to quash subpoenas issued to the wardens of the two "super-max" prisons, counsel for Burns gathered newspaper articles regarding the security of super-max prisons and the life of a prisoner at one of those facilities.⁶⁶ The articles were proffered as "what the testimony would show," but the court did not admit the testimony.⁶⁷

The Supreme Court of Virginia found Burns's argument, that evidence of prison life was proper rebuttal to the Commonwealth's evidence of future dangerousness, unpersuasive.⁶⁸ The court concluded that prison life evidence was not proper rebuttal as the Commonwealth offered no evidence regarding the nature of prison life for a convicted capital murderer, the number of violent crimes committed in prison or the chances of a prisoner escaping.⁶⁹ The court first relied on the principle stated in *Cherrix v Commonwealth*,⁷⁰ namely that the United States Constitution "does not limit 'the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.'"⁷¹ Thus, the court deemed "the relevant inquiry is not whether Burns *could* commit criminal acts of violence in

61. *Id.* at 892.

62. *Id.*

63. *Id.*

64. *Id.* Subpoenas were also issued to the wardens of those facilities, however, the Commonwealth's motion did not reach those subpoenas. *Id.* The court made no ruling on them; nevertheless, the court indicated it would make the same ruling if the Commonwealth included them in its motion. *Id.* at 892 n.14.

65. *Id.* at 892.

66. *Id.*

67. *Id.* at 892-93.

68. *Id.* at 893. The *Burns* court cited *Louitt* when rejecting the defendant's argument that Section 19.2-264.2 restricted the consideration of "society" to prison society. *Id.*

69. *Id.* The *Burns* court also noted that evidence regarding prison life was not admissible as mitigating evidence, citing *Walker* and *Cherrix*. See *supra* note 13.

70. 513 S.E.2d 642 (Va. 1999).

71. *Burns*, 541 S.E.2d at 893 (citing *Cherrix v. Commonwealth*, 513 S.E.2d 642 (Va. 1999)).

the future but whether he *would*.⁷² The court determined that the focus of the inquiry in future dangerousness is the individual defendant and a specific crime, and that prison life evidence relating to the general nature of a maximum security facility was not relevant to that focus.⁷³

In sum, the *Burns* court would admit prison life evidence to rebut future dangerousness only in a one for one correlation with evidence presented by the Commonwealth. For example, if the Commonwealth introduced evidence of the nature of prison life, the likelihood a prisoner could escape, or other specific evidence of prison life, then evidence of prison life might be used as rebuttal.⁷⁴ Because the Commonwealth introduced only evidence of Burns's prior criminal record and prior unadjudicated bad acts to prove future dangerousness, Burns was precluded from prison life rebuttal.⁷⁵

C. Prison Life Evidence Is Not Proper Mitigating Evidence in Virginia Capital Sentencing Proceedings

Despite the fact that the Supreme Court of Virginia's "truth in sentencing" rationale has led the court to allow an instruction on parole ineligibility, the court has not allowed defendants to present general evidence concerning prison life to rebut the Commonwealth's future dangerousness evidence. In *Cherrix* and *Walker v Commonwealth*,⁷⁶ cases decided prior to *Yarbrough* and *Fishback*, the court found that prison life evidence was not admissible as mitigation. Then, in *Vinson v Commonwealth*,⁷⁷ the court mischaracterized mitigation evidence as anti-future dangerousness evidence and allowed the Commonwealth to rebut that evidence with future dangerousness evidence. *Vinson* was a disconcerting glimpse at the inconsistent nature of the court's subsequent decisions.

1. Cherrix v. Commonwealth

Brian Lee Cherrix ("Cherrix") was convicted of capital murder and sentenced to death by a jury on a finding of both vileness and future dangerousness.⁷⁸ At trial, Cherrix sought to present evidence regarding prison life and how it might reduce or eliminate the probability of future dangerousness through the testimony of several Virginia corrections officials, an expert penologist, a crimi-

72. *Id.* See generally VA. CODE ANN. §§ 19.2-264.2 and 264.4(C) (Michie 2000).

73. *Burns*, 541 S.E.2d at 893.

74. *Id.*

75. *Id.*

76. *Walker v. Commonwealth*, 515 S.E.2d 565, 574 (Va. 1999) (holding that prison life evidence is not relevant mitigating evidence).

77. *Vinson v. Commonwealth*, 522 S.E.2d 170, 178 (Va. 1999) (finding the trial court did not err in allowing the Commonwealth to present rebuttal evidence regarding the probability of the defendant's future dangerousness).

78. *Cherrix v. Commonwealth*, 513 S.E.2d 642, 647 (Va. 1999) (holding that prison life evidence is not proper mitigating evidence).

nologist, a sociologist, and an individual serving a life sentence in the custody of the Virginia Department of Corrections.⁷⁹ Cherrix proffered the testimony of these witnesses and the trial court found the evidence to be immaterial as mitigation evidence; the court refused to subpoena the witnesses.⁸⁰ The Supreme Court of Virginia agreed with the trial court that prison life evidence was not relevant mitigating evidence.⁸¹ In support of its decision, the court stated that while the United States Constitution guarantees the defendant in a capital case the right to present mitigating evidence, it does not limit "the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."⁸² The court also relied on Section 19.2-264.4(B) of the Virginia Code which "vests the trial court with the discretion to determine, subject to the rules governing admissibility, the evidence which may be adduced in mitigation of the offense."⁸³ The court found that the evidence proffered by the defendant was not specific to his history or experience, but merely demonstrated the "general nature of prison life."⁸⁴

2. Walker v. Commonwealth

Darick Demorris Walker ("Walker") was convicted of capital murder and sentenced to death based upon a finding of both vileness and future dangerousness.⁸⁵ In the penalty phase of his trial, Walker attempted to introduce the testimony of a Virginia Department of Corrections official regarding the conditions of prison life, especially life without parole in a maximum security prison.⁸⁶ Walker argued the evidence was relevant and admissible, as it would mitigate against his receiving the death penalty.⁸⁷ The Supreme Court of Virginia disagreed, citing *Cherrix*.⁸⁸

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

80. *Id.*

81. *Id.*

82. *Id.* (citing *Lockett v. Ohio*, 438 U.S. 586, 605 n.12 (1978) (holding that a death penalty statutory scheme that precludes consideration of relevant mitigating factors is unconstitutional)).

83. *Id.* (citing *Coppola v. Commonwealth*, 257 S.E.2d 797, 804 (Va. 1979) (holding that a death sentence of one defendant may be upheld when a sentence of life imprisonment or less has been imposed upon a co-defendant)); see also VA. CODE ANN. § 19.2-264.4(B) (Michie 2000) (providing, in part, that "[i]n cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence").

84. *Cherrix*, 513 S.E.2d at 653. The court distinguished the evidence proffered by Cherrix from the prison life evidence admitted by the court in *Skipper v. South Carolina*. *Id.* at n.4; *Skipper v. South Carolina*, 476 U.S. 1 (1986) (holding that prior incarceration of defendant was admissible as rebuttal to the State's case for future dangerousness). The *Cherrix* court noted that the evidence in *Skipper* addressed the defendant's ability to conform or his experience in conforming to prison life and the evidence in *Cherrix* did not. *Cherrix*, 513 S.E.2d at 653 n.4.

85. *Walker v. Commonwealth*, 515 S.E.2d 565, 568 (Va. 1999).

86. *Id.* at 574.

87. *Id.*

88. *Id.*; see *supra* Part II.C.1.

3. Vinson v. Commonwealth

Dexter Lee Vinson ("Vinson") was convicted of capital murder and sentenced to death upon a finding by the jury of vileness and future dangerousness.⁸⁹ In the penalty phase of Vinson's trial, to prove future dangerousness, the prosecution introduced evidence that in 1987, the defendant had previously assaulted a police officer trying to arrest him; in 1988, the defendant had assaulted a corrections officer who was attempting to move him to another cell; and, in 1997, defendant had resisted arrest so violently that it took eight police officers to control him.⁹⁰ The defendant's mitigation evidence included testimony of his mother, his step-father, his high school band instructor, his construction work supervisor and a minister.⁹¹ Additionally, the defendant introduced the testimony of two mental health experts as mitigation.⁹² The experts testified that the defendant suffered from "intermittent explosive disorder" and, therefore, was unable to conform his conduct to the law at the time of the crimes.⁹³ In rebuttal, the Commonwealth introduced the testimony of another mental health expert who agreed that while the defendant exhibited the characteristics of intermittent explosive disorder, "almost all violent criminals fit that category of illness."⁹⁴ The expert also testified "that there is at least a fifty percent chance that defendant would commit another violent offense in the next five years."⁹⁵

On appeal, the defendant argued that it was error for the Commonwealth's expert to testify in rebuttal about defendant's future dangerousness "when the defense's medical experts did not testify directly about future dangerousness."⁹⁶ The Supreme Court of Virginia found that the trial court did not err in allowing the Commonwealth to present rebuttal evidence regarding the probability of the defendant's future dangerousness.⁹⁷ The court reasoned that "even though defendant's medical experts did not use the term 'future dangerousness' as applied to defendant, they opined about defendant's mental condition and offered excuses for defendant's behavior."⁹⁸

The Supreme Court of Virginia was incorrect in characterizing Vinson's expert testimony as anti-future dangerousness evidence and allowing the Commonwealth to rebut it with further future dangerousness evidence. Mitigation

89. *Vinson v. Commonwealth*, 522 S.E.2d 170, 172-73 (Va. 1999).

90. *Id.* at 175.

91. *Id.*

92. *Id.*

93. *Id.*; see also VA. CODE ANN. § 19.2-264.4(B) (Michie 2000) (identifying a defendant's inability to conform his conduct to the law as a mitigating factor).

94. *Vinson*, 522 S.E.2d at 175 (internal quotations omitted).

95. *Id.* (internal quotations omitted).

96. *Id.* at 178.

97. *Id.*

98. *Id.*

evidence looks back at the defendant and his offense and seeks to convince the sentencer that, despite the finding of any aggravating factor, the defendant should be spared the death penalty, while future dangerousness evidence looks forward and is used to predict the future behavior of the defendant. Thus, the Supreme Court of Virginia was probably correct in *Cherrix* and *Walker* when it held that prison life evidence was not proper mitigation evidence. In *Vinson*, the court improperly allowed the Commonwealth to introduce future dangerousness evidence to rebut defendant's mitigation evidence. It is interesting and indicative of the court's confusion that it decided *Vinson* just nine months after *Cherrix* and five months after *Walker*. In both *Cherrix* and *Walker*, the court sharply distinguished rebuttal and mitigation evidence and held that prison life evidence was not proper mitigation evidence. However, in *Vinson*, the court appeared not to understand the difference between future dangerousness evidence and mitigation.

D. Prison Life Evidence is Proper Rebuttal to the Commonwealth's Evidence of Future Dangerousness

Taken together, a series of United States Supreme Court decisions suggest that defendants have a due process right to rebut the Commonwealth's evidence when the Commonwealth seeks to prove future dangerousness.⁹⁹ The trial court in *Gardner v Florida* sentenced the defendant to death.¹⁰⁰ In making its decision, the court relied in part on a pre-sentence report containing confidential information that was not disclosed to the defendant.¹⁰¹ In a plurality opinion, the United States Supreme Court held that it was a violation of the defendant's due process rights to impose a death sentence based on information that the defendant "had no opportunity to deny or explain."¹⁰² In *Skipper v South Carolina*, the United States Supreme Court found that when prosecutors seek death on the basis of future dangerousness, due process mandates the defendant be allowed to introduce evidence of prior conformity to incarceration to rebut the State's evidence.¹⁰³ The principle announced in *Gardner* and *Skipper* that fundamental due process required that a defendant be allowed to rebut evidence the sentencer might have relied upon in its decision was reaffirmed in *Simmons v South Carolina*.¹⁰⁴ In *Simmons*, the Court held that due process requires that a defen-

99. See *Gardner v. Florida*, 430 U.S. 349, 362 (1977) (holding that basing a death sentence on information that the defendant had no opportunity to "deny or explain" violated defendant's due process right); *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986) (holding that due process mandates defendant be allowed to introduce rebuttal evidence when prosecutors seek death based on future dangerousness); *Simmons v. South Carolina*, 512 U.S. 154, 162 (1994) (holding that due process requires that the defendant be allowed to introduce evidence of parole ineligibility when the prosecution raises the issue of defendant's future dangerousness).

100. *Gardner*, 430 U.S. at 350.

101. *Id.*

102. *Id.* at 362.

103. *Skipper*, 476 U.S. at 5 n.1.

104. *Simmons*, 512 U.S. at 154.

dant's parole ineligibility be made clear to the jury when the prosecution offers evidence of future dangerousness.¹⁰⁵ Thus, in light of *Gardner*, *Skipper* and *Simmons*, a defendant has a constitutional due process right to rebut the Commonwealth's case for future dangerousness.

The Supreme Court of Virginia has been consistent in one thing: construing the capital sentencing statutes in such a way that precludes defendants from introducing evidence of prison life. The following section attempts to demonstrate that the court's reading of these statutes is incorrect.

III. *The Truth: For Convicted Capital Murder Defendants in Virginia, Society Means Prison Society*

Section 19.2-264.4(C) of the Virginia Code allows a capital sentencing jury to recommend a sentence of death only if one or both aggravating factors are found.¹⁰⁶ The pertinent language of the section reads as follows:

The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon the evidence of the prior history of the defendant . . . that he would commit criminal acts of violence that would constitute a continuing serious threat to society.¹⁰⁷

In *Lovitt*, the defendant asserted that the Commonwealth's evidence was insufficient to support the jury's finding of future dangerousness.¹⁰⁸ As part of the argument, Lovitt asserted that because he was ineligible for parole, the only society relevant for purposes of determining his future dangerousness was prison society.¹⁰⁹

The court rejected his argument and determined that it is incorrect only to consider prison society when determining future dangerousness even when a defendant has been sentenced to life without the possibility of parole.¹¹⁰ In light of the applicable sections of the Virginia Code it is difficult to understand how the Supreme Court of Virginia could conclude that society is not limited to prison society. The *Lovitt* court was certainly correct that the literal language of Sections 19.2-264.4(C) and 19.2-264.2 does not restrict "society" to prison

105. *Id.* at 171.

106. VA. CODE ANN. § 19.2-264.4(C) (Michie 2000) (requiring a finding of vileness and/or future dangerousness before a death sentence may be recommended); see VA. CODE ANN. § 19.2-264.2 (Michie 2000) (same).

107. § 19.2-264.4(C).

108. *Lovitt v. Commonwealth*, 537 S.E.2d 866, 878 (Va. 2000).

109. *Id.*

110. *Id.* The analysis of the *Lovitt* court determining that the relevant "society" was not limited to prison society was affirmed by the recent Supreme Court of Virginia case *Burns v. Commonwealth*. *Burns v. Commonwealth*, 541 S.E.2d 872 (Va. 2001). See generally Jeffrey D. Fazio, Case Note, 14 CAP. DEF. J. 131 (2001) (analyzing *Burns v. Commonwealth*, 541 S.E.2d 872 (Va. 2001)).

society. It is imperative, however, to read statutes together with other relevant statutes in order to better understand their meaning.¹¹¹

Parole had not yet been abolished at the time Sections 19.2-264.2 and 264.4(C) were enacted.¹¹² Prior to the enactment of Section 53.1-165.1, "society," for purposes of Sections 19.2-264.2 and 264.4(C), was probably inclusive of all persons in the general population.¹¹³ After Section 53.1-165.1 abolished parole for defendants convicted of felonies committed on or after January 1, 1995, Sections 19.2-264.2 and 264.4(C) remained unchanged. The enactment of Section 53.1-165.1 necessarily impacted the interpretation of Sections 19.2-264.2 and 264.4(C), as convicted capital defendants sentenced to life will never re-enter the general population or "society" as previously defined.¹¹⁴ The abolition of parole thus acts as a restriction on the scope of Sections 19.2-264.2 and 264.4(C).

Section 53.1-40.01 further narrows the scope of Sections 19.2-264.2 and 264.4(C), as it expressly excludes Class One felons from receiving geriatric release.¹¹⁵ Therefore, once a defendant is convicted of capital murder, the only alternative to a death sentence is a sentence of life without parole or release. It follows that the only society to which a convicted capital defendant would ever pose a future danger is prison society. In light of the statutory changes since the passage of Sections 19.2-264.2 and 264.4(C), therefore, it is error to interpret "society" as encompassing both prison and non-prison populations. Such an interpretation is illogical and ignores the rules of statutory construction.

The *Louitt* court's conclusion that "society" in Sections 19.2-264.2 and 264.4(C) was not limited to prison society was affirmed by the court in *Burns*.¹¹⁶ In addition to affirming a defective definition of "society," the *Burns* court determined that the relevant inquiry was not whether a defendant *could* commit criminal acts of violence but whether he *would*.¹¹⁷ Even assuming that is the correct inquiry, if "society" means prison society, evidence about incarceration is necessary for the jury to make a fully informed decision as to whether a defendant would pose a future danger to prison society. The "would" inquiry was answered erroneously by the court in two different ways.

111. HENRY CAMPBELL BLACK, M.A., CONSTRUCTION AND INTERPRETATION OF THE LAWS 60-61 (West Publishing Co. 1896). "[T]o harmonize laws with laws, is the best method of interpretation . . . where two statutes on the same subject, or on related subjects, are apparently in conflict with each other, they are to be reconciled, by construction . . . and validity and effect given to both, if this can be done without destroying the evident intent and meaning of the later act." *Id.*

112. Code Section 19.2-264.2 was enacted in 1977. See VA. CODE ANN. § 19.2-264.2 (Michie 2000) (setting out aggravating factors that must be found for a jury to impose a sentence of death).

113. Code Section 53.1-165.1 was enacted in 1994. See VA. CODE ANN. § 53.1-165.1 (Michie 2000) (abolishing parole for defendants convicted of first-degree felonies committed on or after January 1, 1995).

114. See VA. CODE ANN. § 53.1-40.01 (Michie 1998) (prohibiting geriatric release for Class One felons convicted of offenses committed on or after January 1, 1995).

115. § 53.1-40.01.

116. *Burns v. Commonwealth*, 541 S.E.2d 872, 893 (Va. 2001).

117. *Id.*

First, whether a defendant *would* pose a danger depends on whether he will have an opportunity to do so. To conclude otherwise is to conclude that a capital sentencing jury may *speculate* in making its sentencing decision, as no one is able to predict what a person *would* do without knowing what he *will have the opportunity to do*. In other words, one must answer the *could* question before answering the *would* question. As the Supreme Court of Virginia stated in *Fishback*, “[s]peculation by the jury is inconsistent with a fair trial both to the defendant and the Commonwealth.”¹¹⁸

Second, the *Burns* court determined the relevant inquiry to be whether a defendant “would” pose a future danger. The wording of the inquiry makes it a test of character rather than opportunity. In capital sentencing hearings, the Commonwealth at least uses prior bad acts to prove that a defendant would commit bad acts in the future. This is why the *Skipper* opinion is so important when a court is trying to answer the “would” question. *Skipper* holds that, as a matter of constitutional law, a defendant’s past behavior while incarcerated should be admitted if it is available and the defendant offers such evidence.¹¹⁹ The Court in *Skipper* found that such evidence is relevant, as “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.”¹²⁰ Most capital defendants have previously been incarcerated or have at least been incarcerated while awaiting trial. Furthermore, most capital defendants behave well while incarcerated.¹²¹ How a defendant acted previously in a structured environment is more predictive of his behavior in a structured environment than his past behavior in an unstructured environment. Thus, this type of evidence is more germane to the “would” question than other types of character evidence, such as prior bad acts, and should be admitted to answer that question.

IV. *Misunderstanding or Misapplying the Truth in Sentencing Rationale*

Although the Supreme Court of Virginia started well in *Yarbrough* and *Fishback*, the trend has not continued in its subsequent decisions. The same idea of ridding speculation from capital sentencing has either been misunderstood or misapplied by the court. The result is case law that appears to be divorced from the original “truth in sentencing” rationale.

118. *Fishback v. Commonwealth*, 532 S.E.2d 629, 634 (Va. 2000).

119. *Skipper v. South Carolina*, 476 U.S. 1, 8 (1986).

120. *Id.* at 7.

121. Not all defendants behave well. In *Vinson*, the defendant assaulted a correctional officer who was attempting to move him to a cell. The Commonwealth presented this evidence to prove future dangerousness. *Vinson v. Commonwealth*, 522 S.E.2d 170, 175 (Va. 1999).

A. Lovitt and Executive Clemency

In *Yarbrough*, the Supreme Court of Virginia adamantly stated that capital sentencing juries should not have to resort to speculation when making critical sentencing determinations.¹²² In *Lovitt*, decided only about fourteen months after *Yarbrough*, the court characterized the defendant's requested "death in prison" closing argument as speculative in nature because defendants sentenced to life without parole are eligible to receive executive clemency. This article asserts that a capital defendant who receives a life sentence has very little chance of receiving executive clemency.

In fact, only six defendants sentenced to *death* in Virginia have had their sentences commuted.¹²³ The standard for a capital defendant who receives a death sentence seems to be that some evidence of actual innocence is required for a defendant's sentence to be commuted from death to life. The sentences of Joseph Giarratano, Jr., Herbert Bassette, Joseph Payne, Sr., and Earl Washington, Jr. were commuted from death to life only when doubt about their actual guilt was developed.¹²⁴ In Earl Washington, Jr.'s case, the Governor commuted his sentence from death to life in 1994.¹²⁵ He was subsequently pardoned in 2000, when DNA evidence completely excluded him as the murderer and he was fully

122. See *supra* Part II.A.1.

123. See *Death Sentences Commuted in Virginia*, RICH. TIMES-DISPATCH, Nov. 15, 1998, at A17, available at 1998 WL 2051048. In February 1991, Governor L. Douglas Wilder granted a conditional pardon to Joseph M. Giarratano, Jr. *Id.* In January 1992, Herbert Russell Bassette's death sentence was commuted. In November 1996, the death sentence of Joseph Patrick Payne, Sr. was commuted to a sentence of life without parole. *Id.* The death sentence of William Aristede Saunders was commuted by Governor George Allen in September 1997. *Id.*; see Donald P. Baker, *Gilmore Stops Execution First Time; Mental Illness of Inmate Cited*, WASH. POST, May 13, 1991, at A01, available at 1999 WL 17002680. Calvin E. Swann was granted executive clemency by Governor James Gilmore in May 1999. *Id.*; see Tim McGlone, Matthew Dolan, & Bill Sizemore, *A Near-Fatal Injustice: How One Man's Wrongful Murder Conviction Almost Cost Him His Life and Led the State That Held Him for 18 Years to Question Its Faith in the Death Penalty*, VA. PILOT, Jan. 22, 2001, at A1, available at 2001 WL 9708206. The death sentence of Earl Washington, Jr. was commuted by Governor Wilder in January 1994. *Id.* Governor James Gilmore granted Washington a full pardon in February 2000 after exhaustive DNA tests excluded Washington as the person who committed the rape and murder of Rebecca Lynn Williams. *Id.*

124. See *Death Sentences Commuted in Virginia*, *supra* note 123, at A17. In February 1991, Governor L. Douglas Wilder granted a conditional pardon to Joseph M. Giarratano, Jr. *Id.* In January 1992, Herbert Russell Bassette's death sentence was commuted. In November 1996, the death sentence of Joseph Patrick Payne, Sr. was commuted to a sentence of life without parole. *Id.*; see McGlone, *supra* note 123, at A1. The death sentence of Earl Washington, Jr. was commuted by Governor Wilder in January 1994. *Id.* Governor James Gilmore granted Washington a full pardon in February 2000 after exhaustive DNA tests excluded Washington as the person who committed the rape and murder of Rebecca Lynn Williams. *Id.*

125. See McGlone, *supra* note 123, at A1. The death sentence of Earl Washington, Jr. was commuted by Governor Wilder in January 1994. *Id.* Governor James Gilmore granted Washington a full pardon in February 2000 after exhaustive DNA tests excluded Washington as the person who committed the rape and murder of Rebecca Lynn Williams. *Id.*

pardoned.¹²⁶ The implication arising from these cases is that doubt about the guilt of a convicted capital defendant who receives a death sentence will not reduce his sentence to less than life. These cases, therefore, suggest that it takes something extraordinary, such as absolute proof of actual innocence, to obtain executive clemency resulting in a sentence less than life.

Furthermore, the *Louitt* court's reliance on the existence of executive clemency to forbid a death-in-prison closing argument is unconstitutional. In *Caldwell v. Mississippi*,¹²⁷ the United States Supreme Court faced a similar situation.¹²⁸ In *Caldwell*, the Court decided whether a prosecutor's argument to the jury was in violation of the Eighth Amendment's heightened "need for reliability in the determination that death is the appropriate punishment in a specific case."¹²⁹ Defense counsel's closing argument emphasized the gravity of the capital sentencing jury's decision.¹³⁰ In an attempt to alleviate some of this burden from the jury, the prosecutor then responded in *his* closing argument that defense counsel was overemphasizing the jury's sentencing power because its decision would be reviewed on appeal.¹³¹ The Court concluded that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."¹³²

In its analysis, the Court reiterated the need for reliability in capital sentencing determinations: "This Court has repeatedly said that under the Eighth Amendment 'the qualitative difference of death from all other punishments requires a correspondingly greater degree of scrutiny of the capital sentencing determination.'"¹³³ Thus, reliability and responsibility are the touchstones of the Court's Eighth Amendment analysis.¹³⁴ The Court stated that sentencer discretion is consistent with the Eighth Amendment's "need for reliability" in death determinations when sentencers view their power to make death sentencing decisions as an "awesome responsibility."¹³⁵

The Court noted that individuals chosen to serve on capital sentencing juries are in very unfamiliar territory and are expected to make a critical and

126. *Id.*

127. 472 U.S. 320 (1985).

128. *Caldwell v. Mississippi*, 472 U.S. 320, 328-329 (1985) (holding "that it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere").

129. *Id.* at 323 (quoting *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976)).

130. *Id.* at 324.

131. *Id.* at 325.

132. *Id.* at 328-29.

133. *Id.* at 329 (quoting *California v. Ramos*, 463 U.S. 992, 998-99 (1983)).

134. *Id.*

135. *Id.* at 330 (quoting *Woodson v. North Carolina* 428 U.S. 280, 305 (1976)).

uncomfortable choice.¹³⁶ Jurors are instructed on law, confronted with evidence and arguments, and then asked to make a judgment on whether another person should die—all without significant guidance.¹³⁷ In such a situation, “the uncorrected suggestion that the responsibility for any ultimate determination of death will rest with others presents an intolerable danger that the jury will in fact choose to minimize the importance of its role.”¹³⁸

In light of the *Calduell* decision, it seems the *Lovitt* court’s reliance on the existence of executive clemency to forbid a death in prison closing is unconstitutional, as well as adverse to the “truth in sentencing” rationale. This is because “it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant’s death rests elsewhere.”¹³⁹ The *Lovitt* court refused the defendant’s “death in closing” argument based upon its belief that the argument was speculative, in that it did not account for the possibility of executive clemency.¹⁴⁰ Therefore, in relying on executive clemency in its refusal of defendant’s argument, the *Lovitt* court permitted a death sentence to be imposed by reliance on the vain hope that relief would be available in another forum. This is exactly the situation the Court in *Calduell* held to be unconstitutional.

In *Frye v Commonwealth*,¹⁴¹ the Supreme Court of Virginia held that, in light of *Calduell*, the Commonwealth is barred from commenting on the power of the trial court and the Supreme Court to set aside a jury’s verdict, as such comments could “lead a jury to believe the sentencing responsibility lies ‘elsewhere.’”¹⁴² Reliance on the vain hope that the defendant will receive executive clemency in order to deny a defendant’s request to argue “death in prison” likewise thwarts the policy goals enumerated in *Calduell*. It is imperative that the jury should believe it holds the ultimate power to sentence the defendant.

Additionally, it is important to note that, in Virginia, the power to commute capital sentences is vested in the Governor.¹⁴³ This means that executive clemency is completely removed from the judicial process. *Fishback*, in fact, expressed the necessity of keeping the judicial branch’s job of sentencing separate from the job of the executive branch in administering that sentence.¹⁴⁴ Accordingly, the *Lovitt* court erroneously relied on the speculative possibility that the defendant

136. *Id.* at 333.

137. *Id.*

138. *Id.*

139. *Calduell*, 472 U.S. at 328-29.

140. *Lovitt v. Commonwealth*, 537 S.E.2d 866, 878 (Va. 2000).

141. 345 S.E.2d 267 (Va. 1986).

142. *Frye v. Commonwealth*, 345 S.E.2d 267, 285 (Va. 1986) (quoting *Calduell*, 472 U.S. at 328-29 (1985)).

143. See VA. CODE ANN. § 53.1-229 (Michie 2000); see also VA. CONST. art. V, § 12.

144. *Fishback v. Commonwealth*, 532 S.E.2d 629, 632 (Va. 2000).

might receive reprieve from another branch of the State's government. The Supreme Court of Virginia in *Yarbrough* held that "the jury should not be permitted to speculate on the potential effect of parole, pardon, or an act of clemency on its sentence because doing so would inevitably prejudice the jury in favor of a harsher sentence than the facts of the case might otherwise warrant."¹⁴⁵ The Supreme Court of Virginia prohibits jurors from speculating on post-sentencing matters because of the distinct possibility that such speculation would be prejudicial to the defendant. It is likewise impermissible for the trial court to rest a death sentence on speculative post-sentencing matters.

B. Commonwealth Has Been Allowed to Argue Prison Life in its Last Closing

In *Burns*, the Commonwealth argued in its closing argument "that, if Burns receives life imprisonment, he would pose a continuing danger to the prison staff and could escape from prison."¹⁴⁶ As noted above, the court precluded Burns from introducing evidence of prison life as rebuttal to the Commonwealth's evidence of future dangerousness.¹⁴⁷ The Commonwealth, however, was allowed to argue prison life evidence in its closing argument, as the Supreme Court of Virginia found that the defense had not made a timely objection.¹⁴⁸

In *Schmitt v Commonwealth*,¹⁴⁹ the defendant was again precluded from introducing prison life evidence and the Commonwealth again argued prison life in its closing argument.¹⁵⁰ The Commonwealth argued that Schmitt would have a "wonderful life" in prison if he received a life sentence.¹⁵¹ The defendant asserted that the trial court erred in failing to give a curative instruction or grant a mistrial regarding the comments by the prosecutor, however, the Supreme Court of Virginia did not reach the merits because the defendant did not make a timely objection.¹⁵²

It is a well settled rule that arguments are improper when unsupported by evidence introduced at trial. In *McCoy v Commonwealth*,¹⁵³ the Supreme Court of Virginia reversed a murder conviction in part due to prejudicial statements made by the Commonwealth during its closing argument.¹⁵⁴ In his argument, the

145. *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 615 (Va. 1999).

146. *Burns v. Commonwealth*, 541 S.E.2d 872, 896 (Va. 2001). The Commonwealth's argument occurred during its rebuttal closing argument at the end of the penalty phase, thereby making it impossible for the defense to rebut. *Id.* at 896 n.17.

147. *See supra* Part I.D.2.

148. *Burns*, 541 S.E.2d at 896 n.17.

149. 547 S.E.2d 186 (Va. 200[1]).

150. *Schmitt v. Commonwealth*, 547 S.E.2d 186, 199-200 (Va. 200[1]) (finding the defendant could not introduce prison life evidence).

151. *Id.* at 200.

152. *Id.*

153. 99 S.E. 644 (Va. 1919).

154. *McCoy v. Commonwealth*, 99 S.E. 644, 646-47 (Va. 1919) (holding that closing argument

Commonwealth's Attorney gave his theory of how a weapon was found near the decedent.¹⁵⁵ The court found that the statement was unsupported by the evidence, was highly prejudicial to the accused, and precluded a reply by the defense, as it was made in the final closing argument.¹⁵⁶ "Such statements are prejudicial to the accused, and if not promptly corrected and the jury instructed to disregard them are grounds for reversal."¹⁵⁷ Additionally, in *Dingus v Commonwealth*,¹⁵⁸ the court emphasized that the Commonwealth's closing argument was improper if not supported by evidence produced at trial.¹⁵⁹ "[E]very person charged with a crime is entitled to have his case determined solely by the evidence produced at his trial."¹⁶⁰ Thus, when the Commonwealth argues prison life in its closing, it is violating fundamental issues of fairness by precluding defendant his right to rebuttal and by asking the jury to speculate without evidence.

Unfortunately, this situation, in which the defendant is precluded from introducing evidence of prison life and the Commonwealth uses its closing to argue prison life, is not unique. It is precisely this situation that the Supreme Court of Virginia has failed to rectify in its case law and seems to actually encourage in its rulings. The defense is unable to introduce evidence of incarceration that would rebut such unfounded remarks made by the Commonwealth. Therefore, the Commonwealth is able to benefit from and encourage the jury's preconceived notions of prison life while avoiding opening the door for defendants to bring in evidence to correct any misunderstandings the jury may have regarding prison life and to rebut the Commonwealth's evidence regarding future dangerousness. Such a circumstance leads to speculation by the jury of facts that are not even in evidence because the court has deemed them to be irrelevant as rebuttal to future dangerousness. Speculation by jurors is what the court has allegedly attempted to eliminate from capital sentencing procedures. In keeping with the spirit of "truth in sentencing," capital sentencing jurors must be informed of the nature of prison life. In keeping with the spirit of fairness, the Commonwealth must not be allowed to preclude a defense rebuttal by arguing prison life in its final closing.

C. *Yarbrough and Fishback vs. Lovitt and Burns: A Comparative Study*

It is difficult to believe the same Supreme Court of Virginia that decided *Yarbrough and Fishback*, decided *Lovitt and Burns*. In *Yarbrough*, the court held that in the penalty phase of a trial, when the defendant has been convicted of capital

made by Commonwealth that was unsupported by the evidence was grounds for reversal).

155. *Id.* at 646.

156. *Id.*

157. *Id.*

158. 149 S.E. 414 (Va. 1929).

159. *Dingus v. Commonwealth*, 149 S.E. 414, 416 (Va. 1929) (standing for the proposition that trial judges should require prosecuting attorneys to limit their argument to evidence).

160. *Id.* at 415.

murder, the trial court shall instruct the jury that the defendant is parole ineligible.¹⁶¹ The *Yarbrough* court emphasized the importance of “truth in sentencing,” for if the sentencing decision were made “without this knowledge of [parole ineligibility] the jury may erroneously speculate on the possibility of parole and impose the death sentence.”¹⁶² The *Yarbrough* court’s goal was to eliminate the “unwarranted imposition of harsher sentences.”¹⁶³

The court in *Fishback* picked up where *Yarbrough* left off and held that sentencing juries should be instructed as a matter of law on the abolition of parole for non-capital felony offenses committed on or after January 1, 1995.¹⁶⁴ Once again the Supreme Court of Virginia emphasized the goal of “truth in sentencing.”¹⁶⁵ The court stated that a jury should not have to perform the critical and difficult task of making sentencing determinations “without the benefit of all significant and appropriate information that would avoid the necessity that it speculate or act upon misconceptions concerning the effect of its decision.”¹⁶⁶ The court also noted that “in the context of achieving the goal of ‘truth in sentencing,’ it simply defies reason that this information [parole ineligibility] ought not to be provided to the jury by an instruction of the trial court.”¹⁶⁷

The court in *Lovitt*, as discussed previously, found that the trial court did not err in refusing defense counsel’s request to argue in closing that defendant would die in prison if sentenced to life.¹⁶⁸ The court deemed the argument to be too speculative in nature to grant, as it was possible for the defendant to receive executive clemency.¹⁶⁹ After a jury has been instructed that a life sentence means a life sentence with no possibility of parole, a “death in prison” argument in closing merely helps to remove residual doubt from jurors’ minds that defendant may not serve his entire prison term. It helps jurors remember that a sentence of life does carry great consequences for the defendant. The “truth in sentencing” rationale actually supports the idea of “death in prison” arguments, as such arguments have the potential to assist jurors in basing their sentencing decisions on reason rather than fear. Without such an argument, jurors are more likely to speculate that a defendant would somehow gain release from prison. Thus, admitting a “death in prison” closing argument would strengthen the instruction regarding parole abolition and thereby further the court’s policy goal of fully informed capital sentencing juries.

161. *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 616 (Va. 1999); see also *supra* Part II.A.1.

162. *Yarbrough*, 519 S.E.2d at 616.

163. *Id.*

164. *Fishback v. Commonwealth*, 532 S.E.2d 629, 634 (Va. 2000); see also *supra* Part II.A.2.

165. *Fishback*, 532 S.E.2d at 632.

166. *Id.* at 633.

167. *Id.*

168. *Lovitt v. Commonwealth*, 537 S.E.2d 866, 878 (Va. 2000); see also *supra* Part II.B.1.

169. *Lovitt*, 537 S.E.2d at 878.

The court in *Yarbrough* concluded that “[w]here information about potential post-sentencing procedures could lead a jury to impose a harsher sentence than it otherwise might, such matters may not be presented to the jury.”¹⁷⁰ This is at the heart of the “truth in sentencing” rationale. Using this rationale, it follows that post-sentencing matters should be disclosed when jurors would impose a harsher sentence without the disclosure. Such post-sentencing information includes prison life evidence that rebuts the Commonwealth’s evidence of future dangerousness. It is impossible for a jury to make a fully informed sentencing decision as to whether a defendant serving a life sentence without the possibility of parole would pose a future danger to others when the court withholds evidence of how maximum security facilities are administered.

In concluding that evidence of prison life is irrelevant to the determination of future dangerousness, the *Burns* court disregarded the rationale of “truth in sentencing.” The court based this conclusion on semantics, stating that the question of future dangerousness turns on whether a defendant *would* pose a future danger and not whether he *could*.¹⁷¹ The court’s analysis is founded on pure speculation, the very thing the Supreme Court of Virginia attacked in *Yarbrough*, stating that this is “a case where information about post-sentencing procedures is needed to prevent a jury from imposing a harsher sentence than it otherwise might render out of *speculative fears about events that cannot transpire*.”¹⁷² A juror would have to imagine a hypothetical in which the defendant was not in a super-max prison in order to determine if a defendant *would* pose a future danger. This type of speculation blatantly violates “truth in sentencing” and the goals enumerated in *Yarbrough*.

V. Other Inconsistencies

A. Revisiting Burns

The *Burns* court concluded that for prison life evidence to be admissible to rebut the Commonwealth’s evidence of future dangerousness, the Commonwealth must first introduce evidence that directly addresses the general nature of prison life.¹⁷³ Thus, the court has set up a system whereby there must be a “one for one correlation.” In *Vinson*, the court found that the Commonwealth could rebut defendant’s mitigation evidence with future dangerousness evidence, as the mitigation evidence “looked like” anti-future dangerousness evidence.¹⁷⁴ The court found that the characterization of the evidence did not change its nature.¹⁷⁵ In *Burns*, however, the court has broken the general heading of future dangerous-

170. *Yarbrough*, 519 S.E.2d at 613.

171. *Burns v. Commonwealth*, 541 S.E.2d 872, 893 (Va. 2001).

172. *Yarbrough*, 519 S.E.2d at 613 (emphasis added).

173. *Burns*, 541 S.E.2d at 893.

174. *Vinson v. Commonwealth*, 522 S.E.2d 170, 178 (Va. 1999).

175. *Id.*

ness evidence into sub-parts, meaning that a defendant must rebut exactly the aspect of future dangerousness the Commonwealth puts forward. The court reiterated the *Burns* theory of proper future dangerousness rebuttal evidence in *Schmitt*. In *Schmitt*, the court concluded the defendant was properly precluded from introducing evidence of prison life to rebut the Commonwealth's contention of Schmitt's future dangerousness, as "the Commonwealth did not present evidence concerning prison security or the nature of prison confinement imposed on a defendant who has been convicted of a capital murder offense."¹⁷⁶ The narrow opportunity of rebuttal is in direct contrast with the court's previous holding in *Vinson*. Nor does this decision comport with the idea of "truth in sentencing." Section 19.2-264.4(B) states that "evidence may be presented as to any matter which the court deems relevant to sentence."¹⁷⁷ The *Burns* court evades that language by saying the relevant inquiry is not whether the defendant *could* present a danger to society in the future but whether he *would*.¹⁷⁸ By framing the question of future dangerousness that way, the court has convinced itself that prison life evidence is not relevant for sentencing determinations.

The Supreme Court of Virginia appears to have an amorphous concept of relevance that allows it to be flexible in making determinations regarding what evidence is admissible and what is not. This flexibility is useful to the court when determining that victim character evidence is relevant to sentencing determinations.

B. Victim Character Evidence

The court determined that a victim's prior criminal record is not relevant to determine the future dangerousness or vileness of a defendant and is therefore not relevant.¹⁷⁹ The court, however, concluded that victim impact evidence is admissible.¹⁸⁰ In *Weeks v Commonwealth*, the Supreme Court of Virginia held that "victim impact testimony is relevant to punishment in a capital murder prosecution in Virginia."¹⁸¹ The court reasoned that victim impact evidence may be probative of the defendant's depravity of mind, a component of the vileness aggravator.¹⁸² The *Weeks* court relied heavily on the United States Supreme Court decision in *Payne v Tennessee*¹⁸³ in making the determination that victim impact

176. *Schmitt v. Commonwealth*, 547 S.E.2d 186, 199 (Va. 2001).

177. VA. CODE ANN. § 19.2-264.4(B) (Michie 2000).

178. *Burns*, 541 S.E.2d at 893.

179. *See Lenz v. Commonwealth*, 544 S.E.2d 299, 307 (Va. 2001) (finding victim's prior criminal record is not relevant in a capital sentencing hearing).

180. *See Weeks v. Commonwealth*, 450 S.E.2d 379, 389 (Va. 1994) (finding victim impact evidence relevant in capital sentencing hearings).

181. *Id.* *See generally* Matthew L. Engle, *Due Process Limitations on Victim Impact Evidence*, 13 CAP. DEF. J. 1 (2000) (arguing victim impact evidence is irrelevant in capital sentencing hearings).

182. *Weeks*, 450 S.E.2d at 390.

183. 501 U.S. 808 (1991).

evidence is relevant in capital cases.¹⁸⁴ *Payne* posed a different set of facts than do most capital cases in which the Commonwealth wants to introduce victim impact evidence. In *Payne*, the victim evidence included the testimony of the victim's mother who described the impact on her grandson who had been stabbed by the defendant and witnessed the murder of his mother and sister.¹⁸⁵ In *Weeks*, the victim impact evidence included testimony of the victim's widow and state troopers who worked with the decedent.¹⁸⁶ The witnesses "testified about the profound effect the killing had on [the victim's] surviving family and those with whom he worked."¹⁸⁷ Effectively, the testimony was "good victim character" evidence, as it implies that the victim had some special value that made his life more special than others. Furthermore, in contrast to *Payne*, the testimony in *Weeks* was much further removed from the defendant and his offense.

In *Beck v Commonwealth*,¹⁸⁸ the defendant was tried without a jury and asked the trial court to only consider victim impact evidence of the victim's families.¹⁸⁹ The court responded to this request by stating it would consider each statement to determine if the relationship of the declarant to the victim was sufficient to warrant consideration, as it "was 'mindful of the types of statements that would be inappropriate for its consideration.'"¹⁹⁰ The Supreme Court of Virginia reviewed whether the trial court erred in admitting and considering the victim impact evidence and determined that the trial court did not abuse its discretion in admitting the evidence.¹⁹¹ In making its determination, the court gave considerable weight to the fact that Beck had a trial without a jury: "A judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both."¹⁹² Thus, the court ruled the trial court did not abuse its discretion, as it was fully capable to sort the relevant from the irrelevant.¹⁹³ In *Schmitt*, a jury trial, the court refused to modify its previous ruling in *Weeks* and found that the trial court did not err in admitting "victim impact evidence."¹⁹⁴

184. *Weeks*, 450 S.E.2d at 389-90; see *Payne v. Tennessee*, 501 U.S. 808, 811 (1991) (holding that victim impact evidence is not per se violative of the Eighth Amendment to the United States Constitution).

185. *Payne*, 501 U.S. at 811.

186. *Weeks*, 450 S.E.2d at 389.

187. *Id.*

188. 484 S.E.2d 898 (Va. 1997).

189. *Beck v. Commonwealth*, 484 S.E.2d 898, 903 (Va. 1997) (finding trial court did not err in admitting victim impact evidence).

190. *Id.* at 905.

191. *Id.* at 906.

192. *Id.* (quoting *Eckhart v. Commonwealth*, 279 S.E.2d 155, 157 (Va. 1981)).

193. *Id.*

194. *Schmitt v. Commonwealth*, 547 S.E.2d 186, 195 (Va. 200[1]) (internal citations omitted).

The court, using its flexible definition of “relevance” has determined that a victim’s prior criminal record is not relevant in a capital sentencing hearing. *Lenz v Commonwealth*¹⁹⁵ involved an inmate-on-inmate killing.¹⁹⁶ On appeal, the defendant argued the trial court erred by not allowing the admission of evidence regarding the victim’s criminal record.¹⁹⁷ Effectively, the defense wanted to present “bad victim character” evidence. The defendant asserted that Section 19.2-264.4(B) required evidence of the victim’s record to be admitted because it was one of the circumstances surrounding the offense.¹⁹⁸ The *Lenz* court found that no error had been committed because the prior record of the victim spoke neither to the defendant’s vileness nor to his future dangerousness.¹⁹⁹ In *Remington v Commonwealth*,²⁰⁰ decided five months after *Lenz*, the Supreme Court of Virginia again ruled the trial court did not err in refusing to admit into evidence the victim’s prior criminal history.²⁰¹ The court’s reasoning follows: “[The victim’s] prior conviction had no relevance to the issue whether the defendant’s acts were vile, inhuman, or showed depravity of mind, and the victim’s criminal record was not relevant to the issue whether the defendant would constitute a serious, continuing threat to society.”²⁰²

If the question of relevance is whether the evidence relates to a defendant’s vileness or future dangerousness, then victim impact evidence (“good victim character” evidence) is as irrelevant as is the victim’s prior criminal record (“bad victim character” evidence). The testimony of the victim’s widow in *Weeks* spoke to neither defendant’s vileness nor to the possibility of his future dangerousness. For the same reasons, the testimony of the victim’s co-workers was equally irrelevant. Application of the *Weeks*’ framework of relevance to the admissibility of victim impact evidence clearly demonstrates the court’s policy of inconsistent decision-making.

C. *Multiplicious Indictments and Burns*

In *Payne v Commonwealth*,²⁰³ there were two victims and two trials.²⁰⁴ Each trial produced two death sentences per victim, for a total of four death sentences.²⁰⁵ In the first trial (“the Fazio case”), Payne was convicted of two

195. 544 S.E.2d 299 (Va. 2001).

196. *Lenz v. Commonwealth*, 544 S.E.2d 299, 307 (Va. 2001).

197. *Id.*

198. *Id.*

199. *Id.*

200. 551 S.E.2d 620 (Va. 2001).

201. *Remington v. Commonwealth*, 551 S.E.2d 620, 635 (Va. 2001).

202. *Id.* (citing *Lenz*, 544 S.E.2d at 307).

203. 509 S.E.2d 293 (Va. 1999).

204. See *Payne v. Commonwealth*, 509 S.E.2d 293, 296 (Va. 1999).

205. *Payne*, 509 S.E.2d at 301.

counts of capital murder.²⁰⁶ The first count in the Fazio case was under Section 18.2-31(4) (robbery) and the second count was under Section 18.2-31(5) (rape) of the statute.²⁰⁷ In the second trial ("the Parham case"), the defendant was again convicted of two counts of capital murder.²⁰⁸ The first count in the Parham case was under Section 18.2-31(5) (attempted rape) and the second count was also under Section 18.2-31(5) (object sexual penetration).²⁰⁹

The *Payne* court addressed the issue of whether there can be more than one death sentence imposed when there is only one victim, or stated another way, "whether the imposition of multiple death sentences violates the provision of the Fifth Amendment . . . that no person 'shall . . . for the same offense . . . be twice put in jeopardy of life or limb."²¹⁰ The *Payne* court began its analysis of the issue by stating that "the role of the constitutional guarantee is limited to assuring that the court does not exceed its legislative authorization by imposing multiple punishments for the same offense."²¹¹ Next, the court stated the test to determine whether there is more than one offense is "whether each provision requires proof of a fact which the other does not."²¹² In applying this test, the court found that in the Fazio case, Payne violated two distinct statutory provisions, that each statutory provision required proof of a fact the other did not, and, therefore, the killing of Fazio constituted two capital offenses.²¹³ In the Parham case, the court used the same reasoning to determine that the killing of Parham constituted two capital offenses, as each subpart (attempted rape and object sexual penetration) required proof of a fact that the other did not.²¹⁴ Thus, Payne's four death sentences for two victims were upheld.²¹⁵

In *Powell v Commonwealth*,²¹⁶ the court reversed defendant's death sentence, as the trial court erred in allowing the Commonwealth to amend the capital murder indictment.²¹⁷ The original indictment returned by the grand jury charged Powell with a single count of capital murder—the gradation crime was the commission or attempted commission of robbery, in violation of Section 18.2-31(4).²¹⁸ The Commonwealth was allowed to amend the indictment to include

206. *Id.*

207. *Id.*

208. *Id.*

209. *Id.*

210. *Id.* at 300.

211. *Id.* (internal quotations omitted).

212. *Id.* (quoting *Blockburger v. United States*, 284 U.S. 299, 304 (1932)).

213. *Id.* at 301.

214. *Id.*

215. *Id.*

216. 552 S.E.2d 344 (Va. 2001).

217. *Powell v. Commonwealth*, 552 S.E.2d 344, 357 (Va. 2001) (finding trial court erred in allowing Commonwealth to amend the capital indictment, so that it changed the nature of the original charge).

218. *Powell*, 552 S.E.2d at 356.

two new gradation crimes: “and/or” commission or attempted commission of rape and the commission or attempted commission of sodomy.²¹⁹ The court stated that because the Commonwealth used the term “and/or,” the indictment was not revised but expanded “to include a new and additional charge of capital murder” so that “Powell could have been convicted and sentenced on one count of murder under Code [Section] 18.2-31(4) and another count of capital murder under Code [Section] 18.2-31(5).”²²⁰ Therefore, the court held the trial court erred in allowing the amendment to the indictment, as it “materially changed the nature of the offense originally charged.”²²¹

The *Payne* court determined that each subsection and each subpart of the capital murder statute is a separate offense. Therefore, the indictment used in *Powell* was multiplicitous, as it alleged three offenses in a single count. It seems the holding in *Powell* is consistent with the holding in *Payne*.

In *Burns*, alleging the amended indictment was multiplicitous, the defendant objected to the Commonwealth’s amendment of the indictment.²²² The original indictment contained two counts of capital murder.²²³ Count one charged capital murder in the commission of robbery and count two charged capital murder in the commission of, or subsequent to, rape or object sexual penetration.²²⁴ The Commonwealth then amended count one to allege capital murder in the commission of robbery and/or forcible sodomy and/or rape.²²⁵ The *Burns* court determined that the amended indictment was not multiplicitous, but rather “contained only one charge of capital murder and merely provided alternative ‘gradation’ offenses.”²²⁶ The court found that the indictment did not have more than one charge in a single count, clearly notified the defendant of the charged offense, and the trial court did not err in denying the defendant’s motion to dismiss the indictment on grounds of multiplicity.²²⁷ The court in *Burns* mentioned no reasoning for this finding and cited only one case “supporting” its determination that the indictment only contained one charge of capital murder with alternative

219. *Id.*

220. *Id.* at 356-57.

221. *Id.* at 357.

222. *Burns v. Commonwealth*, 541 S.E.2d 872, 881 (Va. 2001).

223. *Id.*

224. *Id.*

225. *Id.* at 881-82.

226. *Id.* at 882.

227. *Id.*

"gradation" offenses.²²⁸ The *Burns* court did not mention *Payne* in reaching its decision and the reason for this telling omission is fairly obvious.

This holding in *Burns* is starkly inconsistent with the rulings by the court in *Payne* and *Powell*. The *Payne* court clearly stated that every subsection and subpart is a separate offense; the *Powell* court clearly stated that the term "and/or" adds a new and additional charge of capital murder. In *Burns*, there was one count that charged three separate offenses (according to *Payne*) and those charges were joined by the term "and/or." The court actually decided *Powell* about three months after its decision in *Burns*, and yet *Powell* is consistent with *Payne* and not *Burns*. The *Burns* court cites no relevant case law, does not explain its decision, and severely veers from its prior decision in *Payne*.

IV. Conclusion

Saying that capital jurisprudence in Virginia has not been uniform or consistent is an understatement. This article has attempted to demonstrate how the Supreme Court of Virginia took the stance of "truth in sentencing" when requiring that defendants receive a life means life instruction, yet failed to apply this policy goal to eliminate speculation in other areas of capital sentencing.

Unfortunately, the court's inconsistent case law does not stop with "truth in sentencing." The court has also allowed the Commonwealth to present "good victim character" evidence, while precluding the admission of "bad victim character" evidence. The inconsistency of the court is further demonstrated by its decisions regarding capital murder indictments. This article hopes to highlight these inconsistencies in order to increase practitioners' awareness of their existence and, thereby, hopefully, to provide defense attorneys tools for making cogent arguments for adequate defense of their clients.

228. *Id.* The case the *Burns* court cites is *Graham v. Commonwealth*, 464 S.E.2d 128 (Va. 1995). The issues in *Graham* were not germane to the issues in *Burns* and included whether a juror should have been excluded for cause and whether a defendant can be found guilty of capital murder under Section 18.2-31(7) when he was the "triggerman" in the premeditated killing of one person, but was only an accomplice in the killing of the other person as part of the same act or transaction. *Id.* at 128. The most pertinent sentence of *Graham* reads as follows: "The General Assembly grades murder in order to assign punishment consistent with prevailing societal and legal views of what is appropriate and procedurally fair." *Id.* at 130.