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# Death by Ambush: A Plea for Discovery of Evidence in Aggravation

Tamara L. Graham\*

## I. Introduction

On February 26, 1997, the Commonwealth of Virginia executed Coleman Wayne Gray for the capital murder of Richard McClelland, the manager of Murphy's Mart in Portsmouth, Virginia.<sup>1</sup> One might argue, however, that he was actually executed for the murders of Lisa and Shanta Sorrell, despite having never been charged with those crimes.<sup>2</sup> The Sorrell murders looked somewhat like McClelland's murder; however, the only direct link that the Commonwealth had between Gray and the Sorrell murders was the testimony of Melvin Tucker, Gray's accomplice in the McClelland murder.<sup>3</sup> Tucker received a life sentence in exchange for, among other things, his testimony that Gray told him that he had killed the Sorrells.<sup>4</sup> To convince the jury that Gray would "constitute a continuing serious threat to society," the Commonwealth introduced testimony from the detective and the medical examiner in the Sorrell case and, in effect, conducted a mini-murder trial within the sentencing phase of the trial of the only crime for which it had actually indicted Gray.<sup>5</sup> Gray's counsel asked the trial court to exclude the surprise evidence.<sup>6</sup> The court refused, and the jury

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1. *Gray v. Netherland*, 518 U.S. 152, 155–56 (1996); Bob Piazza, *Gray Executed for Slaying Store Manager*, RICH. TIMES-DISPATCH, Feb. 27, 1997, at B1.

2. *See Gray v. Commonwealth*, 356 S.E.2d 157, 175 (Va. 1987) (detailing the conviction and death sentence of Coleman Gray).

3. *Id.*

4. *Id.*; *Gray*, 518 U.S. at 156.

5. *Gray*, 356 S.E.2d at 175; Brief for Petitioner at \*7, *Gray v. Netherland*, 518 U.S. 152 (1996) (No. 95-6510); *see* VA. CODE ANN. § 19.2-264.2 (Michie 2004) (providing that one of the aggravating factors that can make a capital defendant death eligible is a finding "that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society").

6. *Gray*, 518 U.S. at 157.

sentenced Gray to death.<sup>7</sup> Putting aside the Commonwealth's use of a tenuous link between the murders to gain a death sentence, the most disturbing feature of Gray's case was that the Commonwealth did not inform defense counsel that it planned to conduct a full-scale "mini-trial" of the Sorrell murders until the night before the sentencing phase began.<sup>8</sup>

Although the United States Supreme Court rejected Gray's claim for federal habeas corpus relief under the *Teague v. Lane*<sup>9</sup> "new rule" doctrine, the issue of adequate notice and discovery of the prosecution's evidence in aggravation remains troublesome for capital defendants in Virginia.<sup>10</sup> During the sentencing phase, a capital defendant must investigate and present a complete and effective case in mitigation while rebutting either or both aggravating circumstances of vileness and future dangerousness.<sup>11</sup> Because the Commonwealth may introduce evidence of prior unadjudicated conduct in order to prove future dangerousness, the capital defendant might have the difficult task of refuting acts that no one ever proved he committed.<sup>12</sup> Although the prosecution now has a statutory obligation, upon request by the defendant, to give "a description of the alleged unadjudicated criminal conduct" upon which it intends to rely, a defendant should nonetheless seek additional discovery of that evidence so that he may mount an effective sentencing defense.<sup>13</sup>

The defendant's entitlement to such discovery is grounded in the due process right of rebuttal elucidated in *Gardner v. Florida*,<sup>14</sup> which held unconstitutional a death sentence based upon "information [that the defendant] had no opportunity to deny or explain."<sup>15</sup> The defendant can bolster this due

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7. *Id.* at 157–58.

8. *Id.* at 157.

9. 489 U.S. 288 (1989).

10. *Gray*, 518 U.S. at 155, 169–70; see *Teague v. Lane*, 489 U.S. 288, 309–11 (1989) (prohibiting the retroactive application in federal habeas corpus proceedings of new rules of criminal procedure unless the Court has deemed them to be "watershed" rules).

11. See VA. CODE ANN. § 19.2-264.2 (Michie 2004) (prohibiting the imposition of the death penalty unless a jury finds beyond a reasonable doubt that "the past criminal record of convictions of the defendant . . . [shows that] there is a probability that [he] would commit criminal acts of violence that would constitute a continuing serious threat to society" or that the crime "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim"); VA. CODE ANN. § 19.2-264.4(C) (Michie 2004) (allowing the prosecution to prove future dangerousness by introducing "evidence of the prior history of the defendant").

12. See VA. CODE ANN. § 19.2-264.4(B) (allowing "the history and background of the defendant" as admissible evidence during the sentencing phase of a capital trial).

13. See VA. CODE ANN. § 19.2-264.3:2 (Michie 2004) (requiring that the Commonwealth, upon request, give notice to the defendant that it plans to introduce evidence of prior unadjudicated conduct).

14. 430 U.S. 349 (1977).

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

process argument with the Sixth Amendment principle put forth in *Ring v. Arizona*<sup>16</sup> that each element of the offense, including aggravating factors, that can increase the maximum penalty to death must be found by the jury beyond a reasonable doubt.<sup>17</sup> Because future dangerousness and vileness are sentencing factors that operate essentially as elements of the crime of death-eligible capital murder, a defendant's due process right to have a proper opportunity to defend against these elements implies an expanded right to discovery of the evidence the prosecution will use in aggravation.

Part II of this article analyzes *Gray v. Netherland*<sup>18</sup> and points out the difficulties capital defense counsel face in a jurisdiction that allows introduction of evidence of prior unadjudicated conduct to prove the future dangerousness aggravating factor. Part III explores the status of criminal discovery in Virginia and the measures taken to avoid such "sentencing by ambush" since *Gray*. Part IV places Virginia's discovery practices in the national context of reciprocal and open-file discovery rules. Finally, the article argues for a constitutional right to notice and discovery of evidence of aggravating circumstances under *Gardner* and *Ring*.

## II. *Gray v. Netherland*

According to the Commonwealth's evidence, on May 2, 1985, Coleman Wayne Gray and Melvin Tucker planned a robbery of Murphy's Mart in Portsmouth, Virginia. High on cocaine, the two waited in the parking lot until store manager Richard McClelland got into his car to leave. Gray and Tucker followed McClelland to a stop sign, where Gray blocked the man's car with his own and ordered him, at the point of a .32-caliber revolver, into Gray's car. After taking nearly \$13,000 from the store, Gray drove McClelland and Tucker into a remote area. Gray forced McClelland out of the car, made him lie on the ground, and shot six rounds into the back of his head. Gray and Tucker left McClelland's body behind and returned to McClelland's car, which they doused in gasoline and set aflame.<sup>19</sup>

Approximately five months before the Commonwealth charged Gray with the capital murder of McClelland, police found Lisa Sorrell's body, and that of her three-year-old daughter Shanta, in Sorrell's partially burned car in

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16. 536 U.S. 584 (2002).

17. *Ring v. Arizona*, 536 U.S. 584, 588–89 (2002); see *Apprendi v. New Jersey*, 530 U.S. 466, 483 (2000) (prohibiting a defendant from being "expose[d] . . . to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone").

18. 518 U.S. 152 (1996); see *Gray*, 518 at 156–58 (illustrating the difficulties that defendants may have when they are forced to rebut evidence concerning unadjudicated acts of which they had insufficient notice).

19. *Gray*, 518 U.S. at 155–56. McClelland had recently fired Gray's wife. *Id.* at 156.

Chesapeake, Virginia.<sup>20</sup> Sorrell had been shot in the head six times with a .32-caliber weapon.<sup>21</sup> Gray denied any involvement in the Sorrell murder.<sup>22</sup> Tucker, however, who had pleaded guilty and received a lesser sentence in exchange for testimony against Gray in the McClelland murder, testified that Gray told him that "he had 'knocked off' Lisa Sorrell."<sup>23</sup> The Commonwealth never charged Gray with the Sorrell murders and had not even publicly considered him a suspect prior to the sentencing phase of the McClelland trial.<sup>24</sup> At the McClelland sentencing hearing, however, the prosecution introduced testimony from the detective and the medical examiner, who had investigated the Sorrell murders, along with photographs from the crime scene and autopsy.<sup>25</sup> The only direct link between Gray and the Sorrell murders was Tucker's testimony, but in closing argument, the prosecution pointed to the similarities between the two murders.<sup>26</sup> Gray's guilt in the Sorrell murders, the prosecution argued, provided sufficient evidence that he would present such a threat of future violence that he should be sentenced to death.<sup>27</sup> The jury agreed.<sup>28</sup>

The most troubling aspect of the prosecution's approach to its future dangerousness case in *Gray* was not its use of evidence of a crime for which Gray had not even been charged, for Virginia allows such evidence as long as it is otherwise admissible under the rules of evidence.<sup>29</sup> Rather, the problem lay in

20. *Id.* at 156–58.

21. *Gray*, 356 S.E.2d at 175. Chesapeake is approximately four miles from Portsmouth.

22. *Id.* at 175.

23. *Id.* at 166–67, 175.

24. *Gray*, 518 U.S. at 157–59.

25. *Id.* at 157–58.

26. *Gray*, 518 U.S. at 176–77 (Ginsburg, J., dissenting).

27. *Gray*, 356 S.E.2d at 177.

28. *Gray*, 518 U.S. at 158.

29. See VA. CODE ANN. § 19.2-264.4(B) (Michie 2004) (providing that "[i]n cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence"). In *Johnson v. Commonwealth*, the Supreme Court of Virginia explained the admissibility requirements for evidence of other crimes used to prove *modus operandi*: the evidence "need not bear such an exact resemblance to the crime on trial as to constitute a 'signature.'" *Johnson v. Commonwealth*, 529 S.E.2d 769, 782 (Va. 2000) (quoting *Chichester v. Commonwealth*, 448 S.E.2d 638, 648 (Va. 1994) (citations omitted)). Instead, the crime offered as proof need only "bear a singular strong resemblance to the pattern of the offense charged." *Id.* (quoting *Chichester*, 448 S.E. 2d at 648 (citations omitted)). In *Johnson*, the court upheld the trial court's admission of evidence of prior rapes because those crimes "[bore] sufficient marks of similarity to the crime charged to establish that the defendant [was] probably the common perpetrator." *Id.* (quoting *Chichester*, 448 S.E.2d at 649). The court outlined the similar facts as follows:

The victims were all young African-American women. Each victim knew Johnson, and there were no signs of forced entry into the dwellings in which the crimes occurred. . . . Each victim was raped, and the attacker stabbed the victims who resisted him. The attacker asked Scott and Chambliss for a drink of water before he attacked them, and a bloodstained broken drinking glass was found in the kitchen of Hall's apartment.

the prosecution's failure to provide Gray with adequate notice of its intent to do so.<sup>30</sup> Because defense counsel had only expected to need to rebut Tucker's somewhat suspect testimony, of which the prosecution had informed them before trial, they were not ready for the last-minute announcement that the prosecution intended to put on a full-scale *modus operandi* presentation regarding the Sorrell case.<sup>31</sup> As Gray's flummoxed lawyer protested:

[F]or the first time [the Commonwealth's Attorney] made known to us . . . that he intends basically to put on evidence to try or go a long ways in trying another murder. This is the first time that Mr. Eason and I heard that he would do anything other than put on . . . supposed inmates' statements. . . . [W]e were prepared for that, argumentatively and evidentiary-wise. However, we are not prepared to rebut, put on any rebuttal evidence because of the shortness of notice. We are not prepared to try the Sorrell murder today. We have not been given sufficient notice.<sup>32</sup>

The last-minute notice served the same function as the confidential presentence report upon which the judge in *Gardner* based a death sentence: Gray had no opportunity "to deny or explain" the Sorrell murders with evidence that he had not committed them.<sup>33</sup> With no time to investigate the Sorrell case and having spent their scarce resources elsewhere, Gray's counsel were hamstrung by the prosecution's late notice and left only with the weak argument that the McClelland murder might have been committed by a copycat and not by Gray.<sup>34</sup> The jury, which had already convicted Gray of that crime and which

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*Id.* at 783. Despite the fact that the Commonwealth did not believe that it had enough evidence to charge Gray with the Sorrell murders, the judge found the similarities compelling enough to allow the prosecution to introduce the Sorrell murders in the sentencing phase of the McClelland case. Brief for Petitioner at \*7, \*9–\*10 *Gray* (No. 95-6510).

30. *Gray*, 518 U.S. at 157.

31. *Id.* at 156–57. Rebutting the "sold" testimony of a jailhouse snitch required an entirely different defense strategy because it was likely that the jury would not credit such testimony and because Tucker would not have been able to testify to the graphic details of the Sorrell murders. *Gray*, 518 U.S. at 184 (Ginsburg, J., dissenting). Gray's counsel made the strategic decision to spend their investigative resources elsewhere because Tucker's testimony alone would have been of marginal significance to the prosecution. *Id.* For a more complete discussion of methods for dealing with testimony from jailhouse snitches, see generally C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1 (2003) (exploring the uncertainty of snitch testimony and proposing defense strategies in response).

32. Brief for Petitioner at \*7, *Gray* (No. 95-6510).

33. *Gray*, 518 U.S. at 157–59, 162; *Gardner*, 430 U.S. at 351. See generally *Gardner*, 430 U.S. at 351–362 (overturning *Gardner*'s death sentence because the sentencing judge based his sentencing decision in part on a confidential presentence investigation report that neither *Gardner* nor his counsel had seen).

34. *Gray*, 518 U.S. at 157–58. Although Gray's counsel requested more time from the judge to investigate this new line of evidence, the Supreme Court found fault with them for not making

had heard a great deal of gruesome evidence about the similar murder of a woman and her baby, was understandably not convinced.<sup>35</sup>

As Justice Ginsburg pointed out in her dissenting opinion in *Gray*, the problem arising from the late notice was not merely theoretical.<sup>36</sup> Had Gray's defense counsel had sufficient notice and time to conduct an investigation of the Sorrell murders, they would have discovered a great deal of evidence linking Timothy Sorrell, Lisa's husband, to the Sorrell murders.<sup>37</sup> Specifically, as a federal habeas court later found, Timothy Sorrell had been the police's main suspect in its investigation.<sup>38</sup> At a party the night before the murders, Sorrell told friends that he had a .32 caliber weapon.<sup>39</sup> He had been involved in the sale of stolen goods, and Lisa was unhappy about these activities.<sup>40</sup> Two weeks before the murders, the family purchased a life insurance policy for Lisa and named Timothy and Shanta as the beneficiaries.<sup>41</sup> Timothy had also made statements to friends that he wanted his wife killed.<sup>42</sup> The prosecution had knowledge of all of the evidence that strongly suggested that the victims' husband and father, not Gray, had committed the Sorrell murders.<sup>43</sup> Unfortunately, with less than a day's notice, Gray's counsel had no opportunity to investigate or uncover the evidence that strongly linked Timothy to the murders.<sup>44</sup>

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a formal motion for a continuance. *Id.* at 167 n.4. The Court concluded that the only formal relief counsel sought was exclusion of the evidence. *Id.* at 167.

35. *Id.*; *Gray*, 518 U.S. at 175–77 (Ginsburg, J., dissenting). The prosecution introduced testimony from the detective who had investigated the Sorrell murders and from the medical examiner who made much of the six bullet wounds to the back of Sorrell's head. Brief for Petitioner at \*10, *Gray* (No. 95-6510). The prosecution also showed the jury multiple photographs of the crime scene and the autopsy, including a photograph of "the driver's side of the Sorrell car, with an empty baby seat . . . a close-up . . . color autopsy photograph of Lisa Sorrell with a portion of her head shaved to show five gunshot wounds," and a "color photograph of Lisa Sorrell's body at the crime scene, showing fire damage to the vehicle." *Id.* at \*10 n.6.

36. *Gray*, 518 U.S. at 184 (Ginsburg, J., dissenting).

37. *Id.* at 178–80.

38. Brief for Petitioner at \*25–\*26, *Gray* (No. 95-6510).

39. *Id.* at \*26 n.28.

40. *Id.* at \*27.

41. *Id.* at \*26.

42. *Id.* at \*26 n.28.

43. *Gray*, 518 U.S. at 179 n.8, 179–80 (Ginsburg, J., dissenting). The Commonwealth's failure to notify Gray about its intention to use evidence from the Sorrell crime obviously created a separate question of prosecutorial misconduct under *Brady v. Maryland*. *Id.* at 179 n.8. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment"). The Supreme Court, however, held that Gray had defaulted the *Brady* claim because he had not raised it in state proceedings. *Gray*, 518 U.S. at 161–62.

44. *Gray*, 518 U.S. at 178–80 (Ginsburg, J., dissenting). See Brief for Petitioner at \*25–\*27, *Gray* (No. 95-6510) (discussing in detail the evidence linking Timothy Sorrell to the murders).

Sufficient notice and discovery of the evidence the prosecution used against Gray in the sentencing proceeding would likely have shifted the balance in sentencing, at least with respect to the Sorrell murders. Gray's trial counsel were already at a disadvantage, with no capital trial experience, little time, and fewer resources than the prosecution.<sup>45</sup> In a later federal evidentiary hearing, lead counsel James Moore described the effect the late notice had on him:

It blew me completely away. And is blowing me eight-and-a-half, almost nine years later, and it still blows me away. It is unbelievable. It is incredible . . . . Coleman Gray had not even been arrested for the thing, much less gone to a preliminary hearing, which is for a defense counsel in Suffolk the only place you can do any real investigation.<sup>46</sup>

With more notice and more discovery, Gray's counsel might have had a better chance to refute the prosecution's characterization of Gray as a serial murderer based on evidence of a crime for which he had never been a suspect.<sup>47</sup> Instead, the jury heard only the prosecution's argument that "[Gray] committed murder after murder, many in the same style, and he's done it to Richard McClelland, he's done it to a man in California, he did it to Lisa Sorrell, and he even did it to Shanta Sorrell, the little daughter."<sup>48</sup>

### III. *Criminal Discovery in Virginia*

#### A. *Cases Since Gray*

Although no reported Virginia capital case has revealed another prosecutorial surprise so extreme in the decade since the Supreme Court rejected Gray's petition for relief, Virginia capital defendants still face unfair disadvantages in investigating and rebutting the evidence the Commonwealth presents in aggravation. In 1993 the Commonwealth enacted Code section 19.2-264.3:2, requiring the prosecution to give notice, upon defense request, of the unadjudicated misconduct evidence it plans to introduce.<sup>49</sup> Because of this new tool for discovery, the main issue in most of the recent *Gray*-type cases has been the trial court's refusal to force the prosecution to narrow its construction of the

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45. See Brief for Petitioner at \*20, *Gray* (No. 95-6510) (detailing the lack of experience and resources of trial counsel). Gray's lead trial attorney, James Moore, described himself as "a defense attorney with a 'country doctor practice of law,'" who had never defended a capital case. *Id.* His co-counsel, Carl Eason, had not previously worked on a murder trial. *Id.* They had no investigator to help them in the case. *Id.*

46. *Id.* at \*21.

47. *Id.* at \*11.

48. *Id.* Gray had previously been acquitted of a murder charge in California. *Id.* at \*7 n.4.

49. See VA. CODE ANN. § 19.2-264.3:2 (Michie 2004) (requiring that the prosecution, upon request, describe the unadjudicated conduct evidence it plans to introduce in the sentencing phase of a capital trial).



aggravating circumstance upon which it plans to seek a death sentence. Capital defendants often seek advance warning of the prosecution's case in aggravation by requesting a bill of particulars that identifies the aggravating factors and provides discovery of aggravating evidence.<sup>50</sup>

Defendants who have attempted to use a motion for a bill of particulars to gain access to evidence in aggravation so that they might adequately prepare their sentencing cases have met with solid rejection by the Virginia courts. In *Bailey v. Commonwealth*,<sup>51</sup> defense counsel requested "more extensive discovery because of 'the unique and irreversible nature of the death penalty.'"<sup>52</sup> The trial court refused Bailey's request for expanded discovery and refused to order the prosecution to "specify which of the aggravating factors of future dangerousness or vileness it would rely upon in seeking to impose the death penalty."<sup>53</sup> The Supreme Court of Virginia concluded that the trial court had not erred in refusing Bailey's requests because "Bailey received all of the discovery to which he was entitled" and was adequately informed " 'of the nature and character of the offense charged.' "<sup>54</sup> Faced with request after request from capital defendants, Virginia courts have relied on the Supreme Court of Virginia's holding in *Strickler v. Commonwealth*<sup>55</sup> that "[t]here is no general constitutional right to discovery in a criminal case, even where a capital offense is charged."<sup>56</sup> Occasionally a court in its discretion will grant a motion for a bill of particulars that identifies the component of the vileness aggravator—depravity of mind, torture, or aggravated battery—for which the prosecution will argue, but these instances are rare.<sup>57</sup>

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50. See VA. CODE ANN. § 19.2-230 (Michie 2004) (giving a trial court discretion to order the Commonwealth to provide a bill of particulars); *Jackson v. Commonwealth*, 587 S.E.2d 532, 538 (Va. 2003) (denying a narrowing construction of the vileness component via a bill of particulars); *Bailey v. Commonwealth*, 529 S.E.2d 570, 575 (Va. 2000) (affirming the trial court's denial of a bill of particulars because the indictment adequately informed the defendant of the nature of the charge); *Goins v. Commonwealth*, 470 S.E.2d 114, 123 (Va. 1996) (same); *Strickler v. Commonwealth*, 404 S.E.2d 227, 233 (Va. 1991) (same); *Commonwealth v. Waddler*, No. 03-2890, 2004 WL 2096104 at \*1, \*5-\*6 (Va. Cir. Ct. Aug. 30, 2004) (denying a bill of particulars because the indictment was sufficient to inform the defendant of the nature of the charge).

51. 529 S.E.2d 570 (Va. 2000).

52. *Bailey*, 529 S.E.2d at 577.

53. *Id.* at 575.

54. *Id.* at 577-78 (quoting *Strickler*, 404 S.E.2d at 233).

55. 404 S.E.2d 227 (Va. 1991).

56. *Strickler*, 404 S.E.2d at 233; see, e.g., *Bailey*, 529 S.E.2d at 578; *Walker v. Commonwealth*, 515 S.E.2d 565, 570 (Va. 1999); *Swisher v. Commonwealth*, 506 S.E.2d 763, 768 (Va. 1998); *Williams v. Commonwealth*, 450 S.E.2d 365, 372 (Va. 1994).

57. See *Thomas v. Commonwealth*, 559 S.E.2d 652, 656 (Va. 2002) (noting the trial court's approval of the prosecution's revising its bill of particulars to detail the specific components of the vileness aggravator on which the Commonwealth sought death); VA. CODE ANN. § 19.2-264.2 (Michie 2004) (identifying the aggravating factors that can make a defendant who is convicted of

Virginia capital defendants have had little success in gaining expanded discovery. In *Walker v. Commonwealth*,<sup>58</sup> the Supreme Court of Virginia detailed Walker's attempts to obtain more discovery prior to his capital trial.<sup>59</sup> Walker requested a bill of particulars that included the grounds for the capital murder charge, the evidence of guilt, a listing and a narrowing construction of the statutory aggravating factors, and the evidence in aggravation.<sup>60</sup> The Commonwealth responded by indicating that it would pursue a death sentence based on the "depravity of mind" and "aggravated battery" sub-elements of the vileness aggravating factor as well as on Walker's future dangerousness, as evidenced by his adult and juvenile criminal records, the circumstances of the offense, and evidence of Walker's other crimes.<sup>61</sup> The Commonwealth did not, however, afford Walker any discovery beyond that required by Virginia Supreme Court Rule 3A:11.<sup>62</sup> Walker claimed that this refusal violated both the Sixth and Fourteenth Amendments.<sup>63</sup> He argued that "such extension [of discovery] is required to ensure the defendant's right to effective assistance of counsel and to meet the due process requirement of reliability in the determination that the death penalty is the appropriate punishment."<sup>64</sup> Unlike Gray, Walker was not surprised by any evidence.<sup>65</sup> Indeed, the Commonwealth gave him notice of the kinds of evidence it planned to use at trial.<sup>66</sup> Walker argued, however, that the very nature of evidence about unproven crimes placed defense counsel at such

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capital murder eligible for a death sentence as including "a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society" or the fact that "his conduct in committing the offense . . . was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim").

58. 515 S.E.2d 565 (Va. 1999).

59. *Walker*, 515 S.E.2d at 569–70.

60. *Id.* at 570.

61. *Id.*

62. *Id.*; see VA. SUP. CT. R. 3A:11 (providing for limited reciprocal discovery in felony cases). Criminal defendants can receive their own statements or confessions; "written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests"; and reports of physical and mental examinations of the accused and the victim. VA. SUP. CT. R. 3A:11(b)(1). A defendant may also make a motion to allow inspection of "designated books, papers, documents, tangible objects, buildings or places," if these items are material to the defense. VA. SUP. CT. R. 3A:11(b)(2). See *infra* Part III(B) of this article for a more detailed treatment of the items of evidence Virginia allows its criminal defendants to discover.

63. *Walker*, 515 S.E.2d at 569.

64. *Id.*

65. *Id.* at 569–70; *Gray*, 518 U.S. at 157.

66. *Walker*, 515 S.E.2d at 570.

a disadvantage that only expanded discovery of specific evidence could allow counsel to be effective.<sup>67</sup> The court did not agree with his argument.<sup>68</sup>

In light of the situation in *Gray*, Walker's argument for expanded discovery, especially of unadjudicated conduct evidence, is compelling. Walker claimed that he was denied due process of law and that his counsel had no chance to be constitutionally effective because the Commonwealth supported its assertion of future dangerousness with evidence of a crime that it did not prove he committed.<sup>69</sup> He articulated his claims as follows:

(1) without a positive connection of the evidence to the defendant by some standard of proof, the evidence does not meet the test of relevancy; (2) due process requires proof of unadjudicated prior criminal acts beyond a reasonable doubt when such conduct is relied upon to expose the defendant to greater or additional punishment; and (3) the use of unadjudicated criminal acts evidence denies the defendant his due process rights to notice and a meaningful opportunity to be heard on evidence used against him which also results in denial of the defendant's Sixth Amendment right to effective assistance of counsel.<sup>70</sup>

Because this evidence " 'exposes' the defendant to greater punishment and presents a 'radically different situation from the usual sentencing procedures,' " Walker argued, the Commonwealth should be required to prove beyond a reasonable doubt that he committed the prior crimes before the court allows them to be received as evidence supporting the future dangerousness aggravating factor.<sup>71</sup> Although Walker's argument concerned simply the use of evidence of unadjudicated conduct, its principles could support a claim that in order for a capital defendant to have a legitimate opportunity to be heard and to confront his or her accusers, notice and expanded discovery regarding crimes of which he or she has not been convicted is necessary.

### *B. Criminal Discovery in Virginia*

Virginia has a long history of minimizing criminal defendants' discovery of the Commonwealth's evidence. In the 1939 case of *Abdell v. Commonwealth*,<sup>72</sup> the Supreme Court of Virginia spelled out the principles supporting a limited discovery rule:

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67. *Id.*

68. *Id.*

69. *Id.* at 571.

70. *Id.*

71. *Id.* (quoting *McMillian v. Pennsylvania*, 477 U.S. 79, 89 (1986)).

72. 2 S.E.2d 293 (Va. 1939).

A different rule would tend to subject the attorney for the Commonwealth to great annoyance, to the probable destruction or loss of material evidence, and to compel the Commonwealth not only to furnish the accused with a full bill of particulars, but to supply the accused with the physical evidence it intends to introduce upon the trial. Such a rule as is urged by accused would, in our opinion, subvert the whole system of criminal law.<sup>73</sup>

The court, while maintaining its dedication to the principles of a fair trial, emphasized that it also had a fundamental duty to protect "the ability of the Commonwealth to prosecute."<sup>74</sup> The Commonwealth cannot, however, abuse this power by ignoring defense requests for discovery.<sup>75</sup> In *Sennett v. Sheriff of Fairfax County*,<sup>76</sup> the United States Court of Appeals for the Fourth Circuit admonished a Commonwealth's attorney who refused to acknowledge a specific request by the defendant for the names of witnesses.<sup>77</sup> In granting a writ of habeas corpus, the Fourth Circuit observed that "if the subject matter of [a specific] request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge." <sup>78</sup>

### 1. Virginia Supreme Court Rule 3A:11

Following the trend of the rest of the country, in 1972 Virginia eventually codified a limited form of reciprocal criminal discovery in Virginia Supreme Court Rule 3A:14, which later became Rule 3A:11.<sup>79</sup> According to the rule, a defendant may request discovery of the following:

- "written or recorded statements or confessions made by the accused . . . or the substance of any oral statements or confessions made by the accused to any law enforcement officer";<sup>80</sup>
- "written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination of the

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73. *Abdell v. Commonwealth*, 2 S.E.2d 293, 298-99 (Va. 1939).

74. *Bellfield v. Commonwealth*, 208 S.E.2d 771, 774 (Va. 1974).

75. *See Sennett v. Sheriff of Fairfax County*, 608 F.2d 537, 538 (4th Cir. 1979) (admonishing a prosecutor for not responding to a defendant's specific request for discovery).

76. 608 F.2d 537 (4th Cir. 1979).

77. *Sennett*, 606 F.2d at 538.

78. *Id.* (quoting *United States v. Agurs*, 427 U.S. 97, 106 (1976)).

79. Michael J. Barbour et al., *Criminal Procedure and Criminal Law: Virginia Supreme Court Decisions During the 70's*, 15 U. RICH. L. REV. 585, 639 (1981).

80. VA. SUP. CT. R. 3A:11(b).

accused or the alleged victim made in connection with the particular case",<sup>81</sup>

• "designated books, papers, documents, tangible objects, buildings or places . . . upon a showing that the items sought may be material to the preparation of his defense and that the request is reasonable."<sup>82</sup>

The defendant does not have a right to any statements made by prosecution witnesses or to any of the Commonwealth's investigative work product.<sup>83</sup>

If a defendant makes such a discovery request under Rule 3A:11, the Commonwealth then has the right to inspect any scientific reports "the defense intends to proffer or introduce into evidence at trial or sentencing."<sup>84</sup> When a court grants the defendant statutory discovery, the rule requires the defendant to disclose the following to the prosecution:

• "whether he intends to introduce evidence to establish an alibi and, if so, . . . the place at which he claims to have been at the time of the commission of the alleged offense";<sup>85</sup>

• "[i]f the accused intends to rely upon the defense of insanity or feeble-mindedness, . . . any written reports of physical or mental examination of the accused made in connection with the particular case, provided, however, that no statement made by the accused in the course of an examination . . . shall be used by the Commonwealth in its case-in-chief."<sup>86</sup>

The Commonwealth and defense may also expand the scope of discovery by agreement.<sup>87</sup> With the approval of the court, when a "discovery order has been entered in a criminal case, it governs discovery in that case."<sup>88</sup>

The Virginia discovery rule is still somewhat limited, however.<sup>89</sup> The rule does not entitle the defendant to statements of witnesses for the prosecution or to any other records related to the Commonwealth's investigation and prosecution.<sup>90</sup> This aspect of Virginia's discovery rule stands in contrast to the federal rule for disclosure of witness statements, codified in the Jencks Act at 18 U.S.C. § 3500.<sup>91</sup> The Jencks Act provides that a criminal defendant may not

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81. *Id.*

82. *Id.*

83. *Id.*

84. VA. SUP. CT. R. 3A:11(c)(1).

85. VA. SUP. CT. R. 3A:11(c)(2).

86. VA. SUP. CT. R. 3A:11(c)(3).

87. *See Smoot v. Commonwealth*, 599 S.E.2d 409, 411 (Va. Ct. App. 2002) (stating that the prosecution had told the defense that it had an "open file" discovery policy).

88. *Id.*

89. VA. SUP. CT. R. 3A:11(b)(2).

90. *Id.*

91. 18 U.S.C. § 3500 (2000).

discover the statements of the Government's witnesses until after direct examination.<sup>92</sup> To allow for more effective cross-examination, however, the Act does provide that "[a]fter a witness called by the United States has testified on direct examination, the court shall . . . order the United States to produce any statement . . . of the witness . . . which relates to the subject matter as to which the witness has testified."<sup>93</sup> In practice, many federal courts and prosecutors provide these statements to the defense prior to trial so they do not have to disrupt the flow of the trial to allow the defense time to study the statements before cross-examination.<sup>94</sup> Virginia provides no such discovery, either before or during trial.<sup>95</sup>

## 2. *Special Statutory Discovery in Capital Cases*

Since 1993 Virginia has provided for some discovery of particular evidence in aggravation when a prosecutor chooses to prove a capital defendant's future dangerousness through evidence of prior unadjudicated criminal acts.<sup>96</sup> The Commonwealth has long allowed the prosecution to introduce evidence of prior unadjudicated criminal conduct in order to prove future dangerousness, and it was common practice for the prosecution to give notice to the defense of such evidence.<sup>97</sup> The Supreme Court of Virginia warned in *Peterson v. Commonwealth*<sup>98</sup> that "[i]n fairness to the defendant . . . the preferred practice is to make known to him before trial the evidence that is to be adduced at the penalty stage if he is found guilty."<sup>99</sup> The Virginia General Assembly codified this "preferred practice" in 1993 in Virginia Code section 19.2-264.3:2, which provides as follows:

Upon motion of the defendant, in any case in which the offense for which the defendant is to be tried may be punishable by death, if the attorney for the Commonwealth intends to introduce during a

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92. *Id.*

93. *Id.*

94. See *United States v. Jordan*, 316 F.3d 1215, 1252 n.78 (11th Cir. 2003) (noting that "it is customary in many jurisdictions for the government to produce *Jencks* materials prior to trial"); *United States v. Velarde-Lopez*, 54 Fed. Appx. 265, 268 (9th Cir. 2002) (noting that the "district court ordered the government to make early *Jencks* and *Brady* disclosure no later than 72 hours before the beginning of trial").

95. See VA. SUP. CT. R. 3A:11 (defining the limits of discovery allowed to both parties in a criminal trial).

96. See VA. CODE ANN. § 19.2-264.3:2 (Michie 2004) (requiring the prosecution to give notice, upon request, of intent to introduce prior unadjudicated act evidence at sentencing).

97. See *Pruett v. Commonwealth*, 351 S.E.2d 1, 11-12 (Va. 1986) (providing that evidence of prior unadjudicated criminal conduct is relevant to proving future dangerousness).

98. 302 S.E.2d 520 (Va. 1983).

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

sentencing proceeding . . . evidence of defendant's unadjudicated criminal conduct, [he or she] shall give notice in writing to the attorney for the defendant of such intention. The notice shall include a description of the alleged unadjudicated criminal conduct and, to the extent such information is available, the time and place such conduct will be alleged to have occurred.<sup>100</sup>

The trial judge will direct the time by which the prosecution must provide this notice.<sup>101</sup> By this enactment, Virginia responded in part to the unfairness Coleman Gray faced when the prosecution ambushed his defense with evidence of the Sorrell murders.<sup>102</sup>

### 3. *Bill of Particulars*

One method that many capital defendants in Virginia have used to attempt to garner more discovery is to demand the prosecution's evidence through a bill of particulars.<sup>103</sup> A defendant may, pursuant to Virginia Code section 19.2-230, request a bill of particulars from the prosecution before he or she enters a plea.<sup>104</sup> Defendants request such a bill to require the prosecution to clarify the indictment so that they know precisely against what charges they must defend. The Due Process Clauses of both the United States and Virginia Constitutions require such notice.<sup>105</sup> The Supreme Court of Virginia recognized this important function of the bill of particulars in *Hevener v. Commonwealth*,<sup>106</sup> explaining that "[t]he purpose of a bill of particulars is to state sufficient facts regarding the crime to inform an accused in advance of the offense for which he is to be tried."<sup>107</sup>

100. VA. CODE ANN. § 19.2-264.3:2.

101. *Id.*

102. *Gray*, 518 U.S. at 157.

103. Black's Law Dictionary defines a *bill of particulars* as "[a] formal, detailed statement of the claims or charges brought by a plaintiff or a prosecutor, usu[ally] filed in response to the defendant's request for a more specific complaint." BLACK'S LAW DICTIONARY 177 (8th ed. 2004). Legal scholars have noted the frequent use of the bill of particulars as a tool for discovery: "Although it has been said that the bill of particulars is not a discovery device, it seems plain that it is a means of discovery. . . . It is the one method open to a defendant in a criminal case to secure the details of the charge against him." CHARLES ALAN WRIGHT, FEDERAL PRACTICE AND PROCEDURE §129 (3d ed. 1999).

104. VA. CODE ANN. § 19.2-230 (Michie 2004) (stating "[a] court of record may direct the filing of a bill of particulars at any time before trial").

105. See U.S. CONST. amend. VI (stating that "[i]n all criminal prosecutions, the accused shall enjoy the right to . . . be informed of the nature and cause of the accusation"); U.S. CONST. amend. XIV, § 1 (stating that no "State [shall] deprive any person of life, liberty, or property, without due process of law"); VA. CONST. art. I, § 8 (stating "[t]hat in criminal prosecutions a man hath a right to demand the cause and nature of his accusation").

106. 54 S.E.2d 893 (Va. 1949).

107. *Hevener v. Commonwealth*, 54 S.E.2d 893, 899 (Va. 1949).

A capital defendant may seek a bill of particulars to force the prosecution to reveal each element of the charge that makes the offense capital, including the particular aggravating factor upon which the Commonwealth is basing its request for a death sentence.<sup>108</sup> In *Swisher v. Commonwealth*,<sup>109</sup> the defendant requested a detailed explanation of the aggravating factors, including the specifications of all “components of the factor [upon which the Commonwealth intends to rely] . . . [and] to further identify every narrowing construction of that factor on which it intends to offer evidence.”<sup>110</sup> Swisher requested these details and the evidence upon which they were based to provide him with adequate opportunity to make pretrial challenges to the constitutionality of Virginia’s death penalty statutes and to safeguard his right to the effective assistance of counsel.<sup>111</sup> In this manner a capital defendant can demand that the Commonwealth state, not only that it plans to prove vileness or future dangerousness as the basis of rendering the defendant death-eligible upon conviction, but also to specify upon which component of vileness—torture, depravity of mind, or aggravated battery—it is relying.<sup>112</sup>

Virginia provides a criminal defendant with another ground upon which to request a bill of particulars in Virginia Code section 19.2-266.2.<sup>113</sup> This code section requires the defense to file any motions seeking suppression of evidence or dismissal on constitutional grounds prior to trial.<sup>114</sup> The section also provides that the trial court “shall, upon motion of the defendant, direct the Commonwealth to file a bill of particulars” to “assist the defense in filing such motions or objections.”<sup>115</sup> A defendant may also request that the trial court order the Commonwealth to supplement the bill of particulars for good cause.<sup>116</sup> Although the trial court has the discretion to decide if a bill of particulars is necessary to assist the defense, a capital defendant should nonetheless request a bill of particulars both to clarify the indictment and to assist in making evidentiary motions in the hopes that the bill might provide some of the Commonwealth’s evidence.<sup>117</sup>

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108. See *Swisher*, 506 S.E.2d at 767–68 (detailing Swisher’s request for a bill of particulars regarding his capital murder charge).

109. 506 S.E.2d 763 (Va. 1998).

110. *Swisher*, 506 S.E.2d at 767–68.

111. *Id.* at 768. The court rejected his requests because it concluded that “[t]he indictment adequately informed Swisher of the charged offenses.” *Id.*

112. See *supra* note 11 (explaining VA. CODE ANN. § 19.2-264.2 (Michie 2004)).

113. VA. CODE ANN. § 19.2-266.2 (Michie 2004).

114. *Id.*

115. *Id.*

116. *Id.*

117. See *Weeks v. Angelone*, 4 F. Supp. 2d 497, 538 (E.D. Va. 1998) (noting that the “good cause” requirement in Virginia Code section 19.2-266.2 keeps the granting of a bill of particulars to



The Supreme Court of Virginia has held that the granting of a motion for a bill of particulars is within the discretion of the trial court, and it has rejected attempts to use a bill of particulars as a discovery tool.<sup>118</sup> In *Quesinberry v. Commonwealth*,<sup>119</sup> the Supreme Court of Virginia interpreted section 19.2-230 as a purely discretionary rule and stated that "a defendant is not entitled to a bill of particulars as a matter of right."<sup>120</sup> If a trial court finds that the indictment is sufficient to give the defendant "notice of the nature and character of the offense charged so he can make his defense," then it need not grant a defendant's motion for a bill of particulars.<sup>121</sup> Quesinberry had requested that the trial court require the prosecution to identify the grounds on which it believed him guilty of capital murder and the aggravating factors on which it sought a death sentence.<sup>122</sup> He also requested that the Commonwealth provide him with "the evidence, and all of it, upon which it intends to rely in seeking a conviction . . . upon the charge of capital murder . . . [.] in support of the aggravating factors identified, and . . . in support of its contention that death is the appropriate punishment."<sup>123</sup> The court found no error in the trial court's denial of the motion, for it found Quesinberry's attempt to use the "bill of particulars to expand the scope of discovery in a criminal case" to be improper.<sup>124</sup> The court, in rejecting such requests for evidence, appears to be relying on the principle that "there is no general constitutional right to discovery in a criminal case, even when a capital offense is charged."<sup>125</sup>

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assist in evidentiary motion-making within the discretion of the trial court).

118. See *Quesinberry v. Commonwealth*, 402 S.E.2d 218, 223 (Va. 1991) (holding that a bill of particulars need only give notice of the nature of the charge and may not be used as a tool for discovery).

119. 402 S.E.2d 218 (Va. 1991).

120. *Quesinberry*, 402 S.E.2d at 223; see *Mickens v. Commonwealth*, 478 S.E.2d 302, 306 (Va. 1996) (stating that "[w]hether to require the Commonwealth to file a bill of particulars is a matter that rests within the sound discretion of the trial court"); *Goins*, 470 S.E.2d at 123 (agreeing that "[a] defendant is not entitled to a bill of particulars as a matter of right"); *Roach v. Commonwealth*, 468 S.E.2d 98, 107 (Va. 1996) (same).

121. *Wilder v. Commonwealth*, 225 S.E.2d 411, 413 (Va. 1976); see *Strickler*, 404 S.E.2d at 233 (finding the indictment detailed enough not to require a bill of particulars); *Ward v. Commonwealth*, 138 S.E.2d 293, 296-97 (Va. 1964) (same); *Tasker v. Commonwealth*, 121 S.E.2d 459, 462-63 (Va. 1961) (same); *Sims v. Commonwealth*, 507 S.E.2d 648, 653-54 (Va. Ct. App. 1998) (finding that the indictments of Sims sufficiently notified him of the nature and character of the crime with which he was charged).

122. *Quesinberry*, 402 S.E.2d at 223.

123. *Id.*; see *Strickler*, 404 S.E.2d at 232-33 (noting Strickler's request that the prosecution give him a detailed list of evidence it planned to use in its case).

124. *Quesinberry*, 402 S.E.2d at 222; see *Raja v. Commonwealth*, 581 S.E.2d 237, 243 (Va. Ct. App. 2003) (criticizing Raja's attempt to use a bill of particulars to conduct a "fishing expedition" into the prosecution's evidence).

125. *Swisher*, 506 S.E.2d at 768; see *Weatherford v. Bursey*, 429 U.S. 545, 559 (1977) (holding that "[t]here is no general constitutional right to discovery in a criminal case"); *Lowe v. Common-*

#### 4. Constitutional Discovery

The Supreme Court's decisions in *Brady v. Maryland*<sup>126</sup> and its progeny also expanded the scope of criminal discovery in Virginia.<sup>127</sup> *Brady* held "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution."<sup>128</sup> The Court refined this principle in *United States v. Agurs*<sup>129</sup> by making clear that the prosecution had a duty to disclose even if the defendant made no request for the evidence.<sup>130</sup> Evidence subject to the *Brady* rule of disclosure must be material and exculpatory or impeachment evidence.<sup>131</sup> The Court has defined evidence as "material" when it creates "a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."<sup>132</sup> Virginia acknowledged the *Brady* rule in *Stover v. Commonwealth*,<sup>133</sup> thus giving Commonwealth prosecutors a continuing duty to disclose to the defense any evidence they or their agents have or know of that is material and exculpatory or of value in impeachment.<sup>134</sup> In *Hoke v. Netherland*,<sup>135</sup> however, the Fourth Circuit held that *Brady* did not require disclosure of evidence to which the defendant already had access or could get from other sources.<sup>136</sup>

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wealth, 239 S.E.2d 112, 118 (Va. 1977) (emphasizing that the accused has no constitutional right to discovery); *Spencer v. Commonwealth*, 384 S.E.2d 785, 791 (Va. 1989) (same); *Strickler*, 404 S.E.2d at 233 (same).

126. 373 U.S. 83 (1963).

127. See *Brady*, 373 U.S. at 87 (defining as prosecutorial misconduct the withholding of material evidence that is favorable to the defendant).

128. *Id.*

129. 427 U.S. 97 (1976).

130. See *United States v. Agurs*, 427 U.S. 97, 107 (1976) (holding that the prosecution had a duty to disclose *Brady* evidence even when the defendant made no request for it).

131. *Brady*, 373 U.S. at 87; see *United States v. Bagley*, 473 U.S. 667, 676 (1985) (subjecting impeachment evidence to the *Brady* rule).

132. *Bagley*, 473 U.S. at 682.

133. 180 S.E.2d 504 (Va. 1971).

134. See *Stover v. Commonwealth*, 180 S.E.2d 504, 509 (Va. 1971) (incorporating the *Brady* rule into Virginia practice); see also *Strickler v. Greene*, 527 U.S. 263, 280–81 (1999) (providing further exposition of the *Brady* rule). For a more thorough discussion of current issues related to the *Brady* doctrine, see Jannice E. Joseph, *The New Russian Roulette: Brady Revisited*, 17 CAP. DEF. J. 33 (2004).

135. 92 F.3d 1350 (4th Cir. 1996).

136. *Hoke v. Netherland*, 92 F.3d 1350, 1355–56 (4th Cir. 1996). In *Hoke*, the Fourth Circuit concluded that had Hoke's counsel "undertaken a reasonable and diligent investigation," they would have found the evidence of the victim's prior sexual partners that they claimed the prosecution withheld from them. *Id.* at 1355. The court reasoned that if the police found these witnesses, then defense counsel could also have found them. *Id.*

### 5. *Extra-Statutory Prosecutorial Discovery*

While the capital defendant's opportunities for discovery are limited by statute and modest due process rights, the Commonwealth has means of discovery in addition to those available under reciprocal discovery rules. If an indigent defendant seeks funding for expert or investigative assistance under *Ake v. Oklahoma*,<sup>137</sup> a trial court must provide an indigent defendant with expert assistance upon a showing of reasonable necessity for the services required.<sup>138</sup> Virginia law, however, does not require the trial court to consider the defendant's request ex parte.<sup>139</sup> An open hearing allows the Commonwealth access to the testimony and evidence the defense presents at the hearing to make its case for an expert.<sup>140</sup> Although this access is not an acknowledged form of discovery, the prosecution will be able to learn defense strategies and to follow defense leads, especially when the defense chooses not to develop them at trial.<sup>141</sup>

The prosecution may also obtain de facto discovery of an indigent capital defendant's evidence if the defense seeks appointment of a mental health expert. If mental health or mental retardation is to be an issue in the case and if the defendant is indigent, the defendant may ask the court to appoint a mental health or mental retardation expert "to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition."<sup>142</sup> If the defendant takes advantage of this expert appointment and then uses any of the resulting evidence in mitigation Virginia law requires the defense to provide the expert's report to the Commonwealth.<sup>143</sup> In addition, the Commonwealth may move to have the defendant evaluated by its own experts, and the reports generated by that

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137. 470 U.S. 68 (1985).

138. See *Ake v. Oklahoma*, 470 U.S. 68, 83 (1985) (holding that due process requires the state to provide an indigent defendant with a mental health expert when the defendant's sanity will "be a significant factor at trial"); *Husske v. Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996) (explaining the showing defendants must make in order to trigger their constitutional right to a mental health expert).

139. THE SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA, 62-63 (2004), <http://www.abanet.org/legalservices/downloads/sclaid/indigentdefense/va-report2004.pdf>; see *O'Dell v. Commonwealth*, 364 S.E.2d 491, 498-99 (Va. 1988) (rejecting O'Dell's claim that *Ake* requires a hearing for granting an indigent defendant expert assistance to be conducted ex parte). For a more complete discussion of the expert ex parte dilemma, see generally Justin B. Shane, *Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing for Expert Funding*, 17 CAP. DEF. J. 347 (2005).

140. See Shane, *supra* note 139 at 353-55 (explaining the advantage the prosecution gains by having access to the defendant's expert funding hearing).

141. *Id.* The leads upon which the defense chooses not to rely might include pieces of the kind of evidence the prosecution needs to make its case.

142. VA. CODE ANN. § 19.2-264.3:1(A) (Michie 2004); see VA. CODE ANN. § 19.2-264.3:1.2(A) (Michie 2004) (providing similar requirements for an appointment of a mental retardation expert).

143. VA. CODE ANN. § 19.2-264.3:1(C), (D); VA. CODE ANN. § 19.2-264.3:1.2(C), (D).

examination will become available to the prosecuting attorneys before the guilt/innocence phase of the trial has begun.<sup>144</sup>

#### IV. *Discovery Across the Nation*

##### A. *General Approaches to Discovery*

Virginia is not unusual in its parsimonious approach to criminal discovery by defendants. Historically, most states have adhered to the principle that there is no general right of discovery by an accused in a criminal trial.<sup>145</sup> Other states have pointed out that due process does not require discovery of the prosecution's evidence.<sup>146</sup> In the interest of justice, however, states cannot deny the accused discovery completely. As Justice William J. Brennan has pointed out, the truth-seeking function of a trial justifies an extension of discovery rights to criminal defendants.<sup>147</sup> Justice Brennan argued that "the truth is more likely to come out at trial if there has been an opportunity for the defense to investigate the evidence."<sup>148</sup> In the spirit of this principle, most state legislatures have codified rules allowing discovery of some of the prosecution's evidence.<sup>149</sup>

No matter what the discovery rule of the state, in nearly every jurisdiction, discovery is ultimately subject to the discretion of the court.<sup>150</sup> Often, the prosecution and defense can agree on reciprocal discovery, and the trial court can

144. VA. CODE ANN. § 19.2-264.3:1(F); VA. CODE ANN. § 19.2-264.3:1.2(F). For a more complete discussion of the discovery implications of Virginia's mental health expert provision, see generally Mark J. Goldsmith, *Ask and the Commonwealth Shall Receive: The Imbalance of Virginia's Mental Health Expert Statute*, 17 CAP. DEF. J. 293 (2005).

145. See, e.g., *Edens v. State*, 363 S.W.2d 923, 925 (Ark. 1963) (stating that there is no general right to discovery in criminal cases); *Mendelsohn v. People*, 353 P.2d 587, 590 (Colo. 1960) (same); *Padgett v. State*, 59 So. 946, 948-49 (Fla. 1912) (same); *Blevins v. State*, 141 S.E.2d 426, 429 (Ga. 1965) (same); *Wendling v. Commonwealth*, 137 S.W. 205, 211 (Ky. 1911) (same); *State v. Williams*, 30 So. 2d 834, 835 (La. 1947) (same); *Commonwealth v. Jordan*, 98 N.E. 809, 811 (Mass. 1911) (same); *State v. Spica*, 389 S.W.2d 35, 51 (Mo. 1965) (same); *Cramer v. State*, 15 N.W.2d 323, 327 (Neb. 1944) (same); *State v. Lavalley*, 163 A.2d 856, 857-58 (Vt. 1960) (same); *State v. Herman*, 262 N.W. 718, 721-22 (Wisc. 1935) (same).

146. See, e.g., *State v. Thompson*, 134 A.2d 266, 267-68 (Del. 1957) (stating that a criminal defendant has no due process right of discovery); *State v. Gray*, 286 So. 2d 644, 647 (La. 1973) (same); *Commonwealth v. Bartolini*, 13 N.E.2d 382, 385 (Mass. 1938) (same).

147. William J. Brennan, Jr., *The Tyrrell Williams Memorial Lecture; The Criminal Prosecution: Sporting Event or Quest for Truth?*, 68 WASH. U. L.Q. 1, 3 (1990).

148. *Id.*

149. See, e.g., ARIZ. R. CRIM. P. 15.1 (defining discovery rights in criminal cases); DEL. R. CRIM. P. 16 (same); FLA. STAT. ANN. § 925.05 (West 2001) (same); ILL. SUP. CT. R. 412 (same); MD. R.P. 4-263 (same); MO. SUP. CT. R. 25.19 (same); N.J. CT. R. 3:13-3 (same); TENN. R. CRIM. P. 16 (same); VT. R. CRIM. P. 16.1 (same); WYO. R. CRIM. P. 16(a) (same).

150. See, e.g., ARIZ. R. CRIM. P. 15.1 (stating that "[u]pon . . . showing that [the defendant] has substantial need . . . for additional material or information not otherwise covered by Rule 15.1, . . . the court in its discretion may order any person to make it available to him or her").

order discovery according to that agreement.<sup>151</sup> In some cases, the trial court may grant the defendant discovery of specific evidence upon a showing of materiality.<sup>152</sup> As in Virginia, when a defendant seeks to use a bill of particulars to gain access to expanded discovery of guilt or aggravation evidence, courts across the country usually reject the attempt as long as the charge is sufficiently detailed to inform the defendant of the nature of the charges.<sup>153</sup>

### B. Reciprocal Discovery

In response to claims of a discovery advantage for the defense, many states in the 1970s created reciprocal discovery rules.<sup>154</sup> These rules provide that once the defendant requests the limited discovery available, he or she triggers the state's right to discovery in return.<sup>155</sup> In these jurisdictions, the prosecution may get access to information about specific defenses the accused might raise, statements of witnesses who will testify at trial, and expert and scientific reports.<sup>156</sup> Many states have even given the prosecution independent rights of discovery, regardless of the defense's request.<sup>157</sup>

Like Virginia, Michigan has a reciprocal discovery rule that provides defense evidence to the prosecution upon the defense's request for discovery.<sup>158</sup> Michigan enacted this law to even the discovery balance in criminal cases and, as a result, greatly extended the amount of discovery the defense now must

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151. See, e.g., *Daniels v. State*, 275 So. 2d 169, 171 (Ala. Crim. App. 1973) (ordering discovery under an agreement); *People v. Crawford*, 252 N.E.2d 483, 486 (Ill. App. Ct. 1969) (same); *State v. Walters*, 408 So. 2d 1337, 1339 (La. 1982) (same); *Commonwealth v. Smith*, 208 A.2d 219, 229 (Pa. 1965) (same).

152. See *People v. Chapman*, 338 P.2d 428, 430 (Cal. 1959) (finding error in the trial court's refusal of a discovery order because the defendant showed that the evidence sought was material and relevant); *Williams v. State*, 819 N.E.2d 381, 387-88 (Ind. Ct. App. 2004) (concluding that Williams made a showing of materiality sufficient to grant a motion for specific discovery of the alleged victim's prescription records).

153. See, e.g., *United States v. Nguyen*, 928 F. Supp. 1525, 1549-52 (D. Kan. 1996) (denying defendant's attempt to obtain discovery of evidence via a motion for a bill of particulars); *State v. Devore*, 309 So. 2d 325, 328 (La. 1975) (same); *Wilson v. State*, 242 A.2d 194, 200 (Md. Ct. Spec. App. 1968) (same); *State v. Moore*, 504 A.2d 804, 810 (N.J. Super. Ct. Law Div. 1985) (same); *State v. Williams*, 452 S.E.2d 245, 276 (N.C. 1994) (same); *Commonwealth v. Mamon*, 297 A.2d 471, 478 (Pa. 1972) (same).

154. Robert P. Mosteller, *Discovery Against the Defense: Tilting the Adversarial Balance*, 74 CAL. L. REV. 1567, 1569-70 (1986).

155. *Id.*

156. *Id.* at 1570. See *id.* at nn.34-54 for a listing of the states with reciprocal discovery statutes and details about the items each party may request in discovery.

157. See *id.* at 1579 n.34 (listing the states that allow the prosecution independent rights of discovery).

158. See MICH. CT. R. 6.201 (detailing the discovery process in a criminal trial).

provide to the prosecution.<sup>159</sup> Pursuant to Michigan's rule, the defense can request exculpatory evidence; police reports; statements made by the defendant, co-defendants, and accomplices; "affidavits, warrants, and returns relating to a search or seizure;" plea agreements, grants of immunity, and agreements for testimony; "names and addresses of lay and expert witnesses;" statements of lay witnesses; reports by and for expert witnesses; criminal records of witnesses; and documents and tangible objects.<sup>160</sup> In return the prosecution may discover "names and addresses of lay and expert witnesses," statements by lay witnesses, reports by or for expert witnesses, criminal records, and documents and tangible objects in the possession of the defendant, if the defense plans to use any of the above at trial.<sup>161</sup>

California has taken a similar route, increasing prosecution discovery while limiting defense discovery.<sup>162</sup> The California discovery rule allows the prosecution to "retain[] its right of access to all sources of information that existed [before the change] and [to] continue . . . to enjoy unfettered access to nontestimonial evidence."<sup>163</sup> The defense, on the other hand is "no longer . . . entitled to information that the prosecution does not intend to offer at trial unless that information is specified in the new statute or is recognized as an exception."<sup>164</sup> If this trend in discovery rules continues, capital defendants might face new challenges in their already daunting task of defending against the State's request for the death penalty.

At the other end of the scale of reciprocal discovery rules, Florida allows a criminal defendant extensive discovery of the prosecution's evidence.<sup>165</sup> Florida allows the defendant to discover "a list of the names and addresses of all persons known to the prosecutor to have information that may be relevant to any offense charged or any defense thereto, or to any similar fact evidence to be presented at trial."<sup>166</sup> More importantly, the state discovery rule allows the defense access to the statements of any such person and also allows the defense to "take the deposition upon oral examination of any person authorized by this rule."<sup>167</sup> The rule provides that "[a]ny [such] deposition . . . may be used by any party for the purpose of contradicting or impeaching the testimony of the deponent as a

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159. Mark A. Esqueda, Note, *Michigan Strives to Balance the Adversarial Process and Seek the Truth with Its New Reciprocal Criminal Discovery Rule*, 74 U. DET. MERCY L. REV. 317, 339-345 (1997).

160. *Id.* at 342-43.

161. MICH. CT. R. 6.201; Esqueda, *supra* note 159, at 342-43.

162. Laura Berend, *Less Reliable Preliminary Hearings and Plea Bargains in Criminal Cases in California: Discovery Before and After Proposition 115*, 48 AM. U. L. REV. 465, 499 (1998).

163. *Id.* at 499-500.

164. *Id.* at 500.

165. See FLA. R. CRIM. P. 3.220 (outlining discovery for both parties in a criminal case).

166. FLA. R. CRIM. P. 3.220(b)(1)(A).

167. FLA. R. CRIM. P. 3.220(b)(1)(B), (h)(1).

witness.”<sup>168</sup> This deposition process allows counsel to gain a more complete picture of the prosecution’s case and a better opportunity to prepare a defense.<sup>169</sup>

### C. Open-File Discovery

Many jurisdictions have expanded the right to criminal discovery in practice by maintaining an open-file policy, in which the prosecution allows the defense open access to its files, with some redactions to protect privileged information.<sup>170</sup> Although an open-file discovery policy allows the defense more access to the prosecution’s evidence, it would not have prevented the problem that arose in *Gray*. A diligent and thorough attorney or investigator would certainly learn more through open-file discovery than through standard reciprocal discovery. If she did not, however, know that she was going to have to defend against an uncharged prior offense, then no amount of access to the prosecution’s files would point her to the useful information.

*Strickler v. Greene*<sup>171</sup> provides a cautionary lesson on the dangers of reliance on a prosecutor’s open-file policy.<sup>172</sup> In *Strickler*, the prosecutor maintained an open-file policy, and defense counsel, relying on that policy, filed no motion for *Brady* material.<sup>173</sup> Unfortunately for Strickler, the prosecution’s file did not contain the exculpatory police reports that Strickler could have used to impeach one of the Commonwealth’s main witnesses.<sup>174</sup> The witness testified vividly and in great detail at trial that she had seen Strickler confront the victim in the parking lot of a mall and abduct her; she also identified Strickler in court.<sup>175</sup> The exculpatory police reports, on the other hand, showed that the witness had trouble with her memory and was not successful in identifying most of the actors

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168. FLA. R. CRIM. P. 3.220(h)(1).

169. See, e.g., *Florida v. Nixon*, 125 S. Ct. 551, 556 (2004) (noting that Nixon’s counsel “deposed all of the State’s potential witnesses”).

170. While few states have open-file statutes, many state jurisdictions allow the prosecutor discretion to have an open-file discovery policy. See, e.g., *Martin v. State*, No. CR-99-2249, 2003 WL 21246587, at \*1, \*6 (Ala. Crim. App. May 30, 2003) (stating that there can be no *Brady* violation when a prosecutor allows open-file discovery); *Robinson v. State*, 879 S.W.2d 419, 421–22 (Ark. 1994) (requiring a prosecutor with an open-file policy to make sure that the records in the file are complete and accurate); *State v. Crews*, 799 P.2d 592, 607 (N.M. Ct. App. 1989) (taking note of the prosecution’s open file for discovery). But see *People v. Bennett*, 402 N.E.2d 650, 655 (Ill. App. Ct. 1980) (warning that a simple open-file offer by the prosecutor will not satisfy a defendant’s specific request for discovery).

171. 527 U.S. 263 (1999).

172. See *Strickler v. Greene*, 527 U.S. 263, 283–84 (1999) (concluding that a defendant may rely on a prosecutor’s open-file policy to contain all exculpatory evidence).

173. *Id.* at 276.

174. *Id.* at 273–75.

175. *Id.* at 270–73.

in the altercation she said she had witnessed.<sup>176</sup> The United States Supreme Court conceded that this evidence would have been useful to the defense on cross-examination, but it ultimately concluded that Strickler had not demonstrated prejudice for his failure to raise a *Brady* claim on direct appeal.<sup>177</sup> The Court held that the defense may reasonably rely on a prosecution's open file to contain all *Brady* material, but if counsel misses such material because of that reliance, the high standard of materiality under *Brady* means that defendants will have difficulty obtaining relief when they do discover the material after trial and conviction.<sup>178</sup>

#### V. *The Argument for Discovery of the Prosecution's Evidence in Aggravation*

The argument for expanding discovery in capital cases beyond state law and *Brady* has its foundation in the constitutional imperatives for individualized sentencing determinations established by *Gregg v. Georgia*<sup>179</sup> and *Lockett v. Ohio*.<sup>180</sup> In accordance with that imperative, states have expanded their evidentiary rules to allow more evidence in the sentencing phase of capital trials.<sup>181</sup> A defendant in Virginia may introduce in mitigation any relevant evidence relating to his "history and background."<sup>182</sup> As long as the evidence is connected to the defendant, the trial court must allow it.<sup>183</sup> The prosecution may, as well, delve into the history of the defendant to find support for its argument that that

176. *Id.* at 273–74.

177. *Id.* at 296. It was not until habeas corpus proceedings that Strickler's counsel discovered the existence of this evidence. *Id.* at 278.

178. *Strickler*, 527 U.S. at 283 n.23. See *Banks v. Dretke*, 124 S. Ct. 1256 (2004), for a lesson in the dangers of relying on a prosecutor's open-file policy. See also Scott E. Sundby, *Fallen Superheroes and Constitutional Mirages: The Tale of Brady v. Maryland*, 33 MCGEORGE L. REV. 643, 645–50 (2002) (discussing the practical meaning of the "reasonable likelihood" standard in *Brady* cases).

179. 428 U.S. 153 (1976).

180. *Lockett v. Ohio*, 438 U.S. 586, 602 (1978); *Gregg v. Georgia*, 428 U.S. 153, 189 (1976).

181. See *Zant v. Stephens*, 462 U.S. 862, 879 (1982) (stating "[w]hat is important at the [death] selection stage is an *individualized* determination on the basis of the character of the individual and the circumstances of the crime").

182. VA. CODE ANN. § 19.2-264.4(B) (Michie 2004).

183. See *Tennard v. Dretke*, 124 S. Ct. 2562, 2570 (2004) (holding that the standard for relevance of mitigating evidence in capital cases is no different from that in other contexts). For a more complete discussion of *Tennard*, see generally Mark J. Goldsmith, Case Note, 17 CAP. DEF. J. 115 (2004) (analyzing *Tennard v. Dretke*, 124 S. Ct. 2562 (2004)). But see *Burns v. Commonwealth*, 541 S.E.2d 872, 893 (Va. 2001) (upholding the trial court's denial of evidence of maximum-security prison conditions because such evidence was not connected to Burns's own history and background).



individual deserves to be put to death; it may even take the *Gray* approach and link the defendant to egregious crimes never previously alleged or proven.<sup>184</sup>

The prosecution has all of the advantage in sentencing. With the resources of the Commonwealth behind it, it can weave convincing narratives of just how dangerous and deserving of death capital defendants can be. Due process and fundamental fairness require that a defendant be properly equipped to respond to, challenge, and test the accuracy of the prosecution's narrative. For defense counsel to be constitutionally effective, they need to know what to investigate and to present a defense to the prosecution's case.

A capital defendant's best argument for the right to discovery of evidence in aggravation starts in the due process right of rebuttal elucidated by the Supreme Court in *Gardner*.<sup>185</sup> In holding that a capital defendant may not be sentenced to death "on the basis of information which he had no opportunity to deny or explain," the Court applied the fundamental principles of due process to the capital sentencing phrasing.<sup>186</sup> The Fourteenth Amendment guarantees that no state "shall . . . deprive any person of life, liberty, or property, without due process of law."<sup>187</sup> In many other contexts, the Court has defined due process as notice of the claim and "the opportunity to be heard."<sup>188</sup> The Fourteenth Amendment also incorporates to the states the Sixth Amendment right of confrontation.<sup>189</sup> The Supreme Court itself stated in *Crane v. Kentucky*<sup>190</sup> that due process requires a "meaningful opportunity to present a complete defense."<sup>191</sup> For a capital defendant to take advantage of the rights of notice, opportunity, and confrontation so that she or he may mount a meaningful and complete defense, discovery of the evidence the prosecution will use to prove aggravating circumstances is essential.

This claim draws added support from the United States Supreme Court's decision in *Ring v. Arizona*.<sup>192</sup> Applying to Arizona's capital sentencing scheme

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184. VA. CODE ANN. § 19.2-264.4(B).

185. *Gardner*, 430 U.S. at 362.

186. *Id.*

187. U.S. CONST. amend. XIV, § 1.

188. *Goldberg v. Kelly*, 397 U.S. 254, 267 (1970) (quoting *Grannis v. Ordean*, 234 U.S. 385, 394 (1914)); see *Morgan v. United States*, 304 U.S. 1, 18 (1938) (stating that "[t]he right to a hearing embraces . . . a reasonable opportunity to know the claims of the opposing party and to meet them"); *Lankford v. Idaho*, 500 U.S. 110, 126 n.22 (1991) (noting "the importance of giving the parties sufficient notice to enable them to identify the issues on which a decision may turn").

189. U.S. CONST. amend. VI.

190. 476 U.S. 683 (1986).

191. *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984)).

192. *Ring*, 536 U.S. at 609 (holding Arizona's death scheme unconstitutional because it allowed the judge to find the aggravating factors that made the defendant eligible for the death penalty).

the principle of *Apprendi v. New Jersey*<sup>193</sup> that facts that increase the maximum allowable sentence must be considered as elements of the offense, *Ring* required that Arizona juries find beyond a reasonable doubt the aggravating circumstances that made a defendant eligible for a death sentence.<sup>194</sup> The reasonable doubt standard demands that the evidence presented by the prosecution be tested in a meaningful and effective way.<sup>195</sup> To ensure adversarial testing and to guarantee the capital defendant's right to due process of law, effective assistance of counsel, confrontation of witnesses, and trial by jury, Virginia courts should allow discovery of the evidence the Commonwealth plans to adduce to prove the aggravating circumstances that open the door to death.

### VI. Conclusion

Capital defense attorneys in Virginia should remember what happened to Coleman Gray and his counsel. Expecting merely to defend against a jailhouse snitch's uncorroborated accusation, Gray had no idea that the Commonwealth intended to conduct a mini-trial of the Sorrell murders during his sentencing hearing.<sup>196</sup> Defense attorneys should not be lulled into a false sense of the prosecution's case, even when granted discovery. When surprised with evidence because of failure of adequate notice or discovery, an attorney should always ask for a continuance and never rely solely on a motion for exclusion, as did Gray's attorneys.<sup>197</sup>

In the context of a capital sentencing proceeding, it is crucial for the defense to be able to rebut the prosecution's claims regarding the existence of aggravating circumstances that justify the imposition of a death sentence. Especially in Virginia, where the prosecution can introduce evidence of acts for which the defendant was never convicted or charged, fundamental fairness calls for full discovery and notice of this type of evidence. Asking the prosecution to itemize its evidence and witnesses in aggravation will place no undue burden on the Commonwealth, for the request is specific and relevant, and the prosecution should have nothing to fear from full disclosure. If the Commonwealth wants

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193. 530 U.S. 466 (2000).

194. *Ring*, 536 U.S. at 609; see *Apprendi*, 530 U.S. at 492-94 (determining that factors that increase the maximum sentence of an offense must be considered as elements of the offense).

195. Defendants in Florida and North Carolina have mounted *Ring* arguments that they deserved notice of aggravating factors, but their supreme courts have rejected those arguments, and the Supreme Court has thus far denied certiorari. See, e.g., *Kormondy v. State*, 845 So. 2d 41, 54 (Fla. 2003), cert. denied, 540 U.S. 950 (2003); *Hurst v. State*, 819 So. 2d 689, 702-03 (Fla. 2002), cert. denied, 537 U.S. 977 (2002); *Cox v. State*, 819 So. 2d 705, 724-25 (Fla. 2002), cert. denied, 537 U.S. 1120 (2003); *State v. Holman*, 540 S.E.2d 18, 23 (N.C. 2000), cert. denied, 534 U.S. 910 (2001).

196. *Gray*, 518 U.S. at 156-57.

197. *Id.*

to be sure that it is executing only the worst of the worst, such disclosure of evidence in aggravation will only aid that goal.