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THE CAPITAL DEFENDANT AND PAROLE ELIGIBILITY

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jury.[30] Further, counsel must establish the need for the change.[31] For instance, it would be helpful in establishing need and prejudice to show publicity concerning any of the following: defendant's confession, inadmissible evidence, sympathetic information about the victim, wrong or inaccurate information.

Also of significant interest in *Thomas* is the court's use of statistics to counter Thomas' arguments concerning the biased jury pool. Having determined that in *Thomas* only 31 percent of the prospective jurors were dismissed for bias, the court compared this statistic with that for other Virginia trials. The court found 31 percent compatible with juror dismissal rates in other Virginia cases (i.e., 20 percent, 37.84 percent, 18 percent, 26 percent).[32] Therefore, the court concluded, "a jury was selected with relative ease."[33] Practitioners will want to watch the court's future opinions to determine whether the use of statistics in an effort to prove the condition of the jury is an aberration with the *Thomas* court or a trend in Virginia appellate review.

Summary and analysis by:
Roberta F. Green

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30 *Stockton v. Commonwealth*, 227 Va. 124, 314 S.E.2d 371 (1984).

31 *Murphy v. Florida*, 471 U.S. 794 (1978).

32 *Thomas*, 244 Va. at 11, 419 S.E.2d at 611 (citing *George v. Commonwealth*, 242 Va. 264, 275, 411 S.E.2d 12, 18 (1991), *cert. denied*,112 S.Ct. 1591 (1992); *Greenfield v. Commonwealth*, 214 Va. 710, 717, 204 S.E.2d 414, 420 (1974); *Wansley v. Commonwealth*, 210 Va. 462, 468, 171 S.E.2d 678, 682-83 (1970); *Beck v. Washington*, 369 U.S. 541, 556 (1962)).

33 *Id.*

THE CAPITAL DEFENDANT AND PAROLE ELIGIBILITY

BY: CRYSTAL S. STRAUBE

I. INTRODUCTION

"You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life."[1] In contemplating the proper penalty for the capital defendant members of the jury are likely to question if and when the defendant may be released on parole should the penalty be set at life imprisonment. In fact, it is not uncommon for Virginia juries to interrupt their deliberations to ask the trial judge about the defendant's eligibility for parole.[2] The Virginia Supreme Court, however, consistently has refused to provide any explanation to jurors, contending that parole is of "no concern."[3] The Virginia Supreme Court's answer itself is of concern, given that juror misperceptions on parole often prove to be a critical factor in the sentencing determination.[4]

Although the mandatory minimum sentence in Virginia for capital murder is twenty-five years imprisonment,[5] studies reveal that people believe that a capital defendant, if sentenced to life imprisonment, will serve only seven to ten years in prison before being released on parole.[6] In 1988, the National Legal Research Group issued a report that the typical jury-eligible citizen living in Edward County, Virginia believes that a defendant sentenced to "life" for a murder during the commission of a robbery will serve only ten years before being released.[7]

These misperceptions may lead a juror to choose death because of a belief that a life sentence would allow the defendant to be released after serving just a few years. One study, for example, indicated that more than two-thirds of those questioned would be more likely to favor a life sentence over a death sentence if they knew the defendant would have to serve at least 25 years before becoming eligible for parole.[8] Clearly, a jury's ability to distinguish between the myth and the reality of parole eligibility carries vast consequences for capital defendants in Virginia.

This article looks at the defendant's right to introduce evidence of parole in the capital murder trial from five different aspects: (1) Virginia law and policy on the introduction of parole evidence; (2) the defendant's right to question or educate jurors on parole during voir dire; (3) the defendant's right to present evidence concerning parole eligibility as a potential mitigating factor; (4) the right to introduce parole evidence in

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1 Va. Model Jury Instructions, Instruction No. 34.120, (1991). *See* Va. Code Ann. § 19.2-264.4 (1991).

2 *See Delong v. Commonwealth*, 234 Va. 357, 370, 362 S.E.2d 669, 776 (1987), *cert. denied*, 108 S.Ct. 1100 (1988); *Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836, *cert. denied*, 474 U.S. 865 (1985); *Peterson v. Commonwealth*, 225 Va. 289, 296, 302 S.E.2d 520, 525, *cert. denied*, 464 U.S. 865 (1983); *Clanton v. Commonwealth*, 223 Va. 41, 54-55, 286 S.E.2d 172, 179-80 (1982); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784, 792 (1979), *cert. denied*, 444 U.S. 1049 (1980); *Stamper v. Commonwealth*, 220 Va. 260, 278, 257 S.E.2d 808, 821 (1979), *cert. denied*, 445 U.S. 972 (1980); *Jones v. Commonwealth*, 194 Va. 273, 275, 72 S.E.2d 693, 694 (1952).

3 *Coward v. Commonwealth*, 164 Va. 639, 646, 178 S.E. 797, 799-800 (1935); *Hinton v. Commonwealth*, 219 Va. 492, 494-95, 247 S.E.2d 704, 706 (1978).

4 For a comprehensive analysis of jurors' misperceptions, *see* Paduano & Smith, *Deathly Errors: Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211 (1987)[hereinafter Paduano & Smith, *Deathly Errors*].

5 Va. Code Ann. § 53.1-151(C)(1991). A capital defendant's sentence may be reduced for good conduct in prison, but even with the maximum reduction possible the defendant must serve twenty-one years and nine months in jail before even being considered for parole eligibility. Va. Code Ann. § 53.1-199 (1991). This section states that a defendant sentenced to life shall be eligible for up to five days credit for each 30 days served. Thus, a person convicted of capital murder can receive up to three years and three months good conduct credit.

6 *See, e.g.*, Hood, *The Meaning of "Life" for Virginia Jurors and Its Effect on Reliability in Capital Sentencing*, 75 Va. L.Rev. 1605, 1624 (1989) [hereinafter, Hood, *The Meaning of "Life"*] (citing National Legal Research Group, Inc., Jury Research and Trial Simulation Services, *Report on Jurors' Attitudes Concerning the Death Penalty* (Dec. 6, 1988) [hereinafter *NLRG Report*]).

This study was completed for and utilized in *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483 (1988). *See also*, Paduano & Smith, *Deathly Errors* (citing Codner, *The Only Game in Town: Crapping Out in Capital Cases Because of Juror Misconceptions About Parole* (Jan. 24, 1986) (unpublished study supervised by the Southern Prisoners' Defense Committee) [hereinafter Codner, *The Only Game in Town*]).

7 Hood, *The Meaning of "Life,"* at 1606 (citing *NLRG Report*, Question no.4, at 3).

8 *See* Paduano & Smith, *Deathly Errors*, at 223 (citing Codner, *The Only Game in Town*, 45, n. 114).

relation to Eighth Amendment and due process reliability; and (5) the right to present jury instructions on parole eligibility to rebut Commonwealth arguments based on future dangerousness. The article concludes by suggesting various trial strategies to implement the legal arguments that have been developed.

II. VIRGINIA LAW AND POLICY

The Supreme Court of Virginia has consistently prohibited instruction and argument on parole eligibility.[9] Virginia's present position on excluding evidence concerning parole eligibility in both capital and non-capital cases was set forth in *Hinton v. Commonwealth.*[10] The Court stated:

> In response to the oft-asked question concerning parole eligibility, the trial judge should only tell the jurors that if they find the accused guilty, they must impose such sentence, within the limits fixed by law, as appears to be just and proper, and that what might afterwards happen is of no concern to them.[11]

The Court has based its prohibition upon two rationales. The first justification is a fear that juries will not impose a just punishment for the defendant's crimes, but will try to adjust a sentence based on speculation over parole.[12] The second justification is founded on a separation of powers argument concerning the proper functioning of the executive and judicial branches. The Court's position is derived from a 1935 drunk driving case, *Coward v. Commonwealth,*[13] in which it declared "Virginia is committed to the proposition that the trial court should not inform the jury that its sentence, once imposed and confirmed, may be set aside or reduced by some other arm of the state." In *Hinton*, the Court reiterated the notion that "the assessment of punishment is a function of the judicial branch of government, while the administration of such punishment is a responsibility of the executive department," and concluded by explaining that:

> The aim of the rule followed in Virginia is to preserve, as effectively as possible, the separation of those functions during the process when the jury is fixing the penalty, in full recognition of the fact that the average juror is aware that some type of further consideration will usually be given to the sentence imposed.[14]

In *Stamper v. Commonwealth,*[15] the Court applied the same separation of powers rationale to uphold the banning of parole eligibility evidence in a capital murder case. Since *Stamper*, the Virginia Supreme Court has repeatedly affirmed its position in a long line of capital cases.[16] The Fourth Circuit, in its review of a Virginia case, has held that the refusal to admit evidence of parole eligibility is not violative of the United States Constitution.[17]

Whatever Virginia's justifications for banning evidence on parole in non-capital cases, they should give way to a capital defendant's decision to introduce such evidence. In the non-capital context, prohibition of evidence on parole is often thought to protect defendants. The concern is that jurors will lengthen a sentence in order to compensate for the probability that the defendant will not serve the entire sentence due to parole. In a capital case, where the defendant wants to introduce the evidence, this proposition of protecting the defendant is nonsensical. Most often, a juror's perceptions on the length of a life sentence for capital murder is much shorter than the actual length. Admission of evidence of parole eligibility is intended to correct juror's misperceptions by revealing the severity of the punishment and, in some instances, to disclose the fact that the defendant may never be eligible for parole.

Moreover, the two rationales upon which the Virginia Supreme Court relies are ridden with imperfections in their application to a capital trial in the present statutory scheme.[18] The speculation rationale operates on the theory that the jury should not consider the possibility of parole in making its sentencing decision because such speculation might harm the defendant. But given that jurors do not believe "life" means life, barring capital defendants from introducing evidence to inform jurors on this issue actually fosters rather than reduces speculation. The Virginia Supreme Court itself acknowledged this problem when it stated in *Hinton* that they were "in full recognition of the fact that the average juror is aware that some type of further consideration will usually be given to the sentence imposed."[19]

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9 *Mueller v. Commonwealth*, Nos. 920287, 920449, 1992 Va. LEXIS 97 (Sept. 18, 1992); *King v. Commonwealth*, 243 Va. 353, 416 S.E.2d 669 (1992); *Yeatts v. Commonwealth,* 242 Va. 121, 410 S.E.2d 254 (1991); *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991); *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990); *Spencer v. Commonwealth*, 240 Va. 78, 393 S.E.2d 609, *cert. denied*, 111 S.Ct. 281 (1990); *Watkins v. Commonwealth*, 238 Va. 341, 351, 385 S.E.2d 50, 56 (1989), *cert. denied*, 494 U.S. 1074 (1990); *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483, *cert. denied*, 486 U.S. 1017 (1988); *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491, *cert. denied*, 488 U.S. 871 (1988); *Delong v. Commonwealth*, 234 Va. 357, 362 S.E.2d 669 (1987), *cert. denied*, 108 S.Ct 1100 (1988); *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815, *cert. denied*, 474 U.S. 865 (1985); *Clanton v. Commonwealth*, 223 Va. 41, 286 S.E.2d 172 (1982); *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980).

But see, Smith v. Commonwealth, 219 Va. 455, 481, 248 S.E.2d 135, 151 (1978), *cert. denied*, 441 U.S. 967 (1979) (Virginia Supreme Court discussed, without disapproval, trial court's allowance of argument on parole eligibility as mitigation evidence during the penalty phase).

10 219 Va. 492, 247 S.E.2d 704 (1978)(non-capital offense involving a malicious wounding where, in response to a jury question concerning the defendant's prospects for parole, the trial judge issued a protracted statement concerning Virginia's parole system which included numerous references to early release).

11 *Id.* at 495, 247 S.E.2d at 706.

12 *See, e.g., Jones v. Commonwealth*, 194 Va. 273, 278, 72 S.E.2d 693, 696-97 (1952)(capital murder case, under pre-1977 sentencing scheme, where there was no consideration of mitigating or aggravating factors, in which suggestion of the possibility of parole by the trial court was held to be reversible error because of the potential prejudice to the defendant resulting from improper speculation).

13 164 Va. 639, 178 S.E. 797, 799-80 (1935)(an instruction on the manner in which good time credit was calculated was reversible error).

14 *Hinton v. Commonwealth*, 219 Va. 492, 494-95, 247 S.E.2d 704, 706 (1978).

15 220 Va. 260, 278, 257 S.E.2d 808, 821 (1979), *cert. denied*, 445 U.S. 972 (1980).

16 *See* cases cited *supra* note 9.

17 *Peterson v. Murray*, 904 F.2d 882, 886-87 (4th Cir. 1990), *cert. denied*, 111 S.Ct. 537 (1990).

18 *See* Va. Code Ann. §§ 18.2-31, 19.2-264.2, 19.2-264.4, 53.1-151(C), 53.1-199 (1990).

19 219 Va. 492, 494-95, 247 S.E.2d 704, 706 (1978).

Indeed, the idea that barring evidence on parole eligibility dampens speculation has a certain "Alice-in-Wonderland" aspect when applied to capital sentencing. In this situation, it is the defendant who wishes to introduce evidence on the real meaning of a life sentence and the Commonwealth which wants to prevent the jury from being told the reality of Virginia law. Why would the Commonwealth oppose the jury being told such information unless the Commonwealth believed that the jury was likely to speculate that a life sentence meant far less time than its actual meaning in the case at hand? If undue speculation is the problem, the cure would seem to be accurate information.

Virginia's separation of powers argument is equally unpersuasive. This argument rests on the idea that the division of responsibility between the sentencer and the authorities deciding parole are intentionally distinct and should not be commingled. Providing jurors with information on parole eligibility in no way limits the executive branch's control over parole; it merely enables jurors to base their sentencing decisions on accurate information rather than unfounded speculation. Moreover, because of previous sentences, a capital murder defendant may want to introduce evidence that he will never be eligible for parole.[20] In such a case the separation of powers argument is especially inapplicable because the jury cannot interfere with the duties of the parole authorities if parole is not even a possibility.

However the Virginia Supreme Court eventually resolves the issue as a matter of state law, the Sixth, Eighth, and Fourteenth aAmendments of the United States Constitution entitle a capital defendant to the opportunity to question or educate the jurors on parole during voir dire, as well as to present evidence on parole eligibility in order to provide the jury with accurate information concerning potential mitigating factors and to rebut the Commonwealth's future dangerousness case.

III. VOIR DIRE

The Sixth and Fourteenth Amendments secure the right of an accused in all criminal prosecutions to trial by an impartial jury.[21] Voir dire plays a critical function in assuring the criminal defendant that his Sixth Amendment right to an impartial jury will be honored.[22] Limits on voir dire that create an unreasonable risk that juror misperceptions or bias may infect the trial process violate the Constitution.[23]

In *Eaton v. Commonwealth*,[24] the Virginia Supreme Court held that "the jury has no right to be advised of post-sentencing events." The defense in *Eaton* proposed a voir dire question which informed the jury that Eaton would be ineligible for parole by reason of sentences previously imposed upon him for other murders. The voir dire question also asked whether the jurors could consider a sentence "less than death" if they were instructed not to concern themselves with the possibility of parole or of Eaton's ultimate return to society. Stating that information regarding parole eligibility is not relevant evidence to be considered by the jury, the Virginia Supreme Court held that the trial court did not err in refusing Eaton's proposed voir dire question.[25]

The Virginia Supreme Court's stance on disallowing voir dire on parole is in violation of the Sixth Amendment. Studies reveal that many jurors have misconceptions about parole law.[26] Such misconceptions may bear upon the jurors' impartiality and their ability to properly follow the law. Refusal by the trial court to allow a defendant to question jurors about their perceptions on parole law is an infringement on the defendant's right to ensure through voir dire that jurors are not under misconceptions that could preclude them from being able to properly follow the law; a right that was strongly reaffirmed recently by the United States Supreme Court in *Morgan v. Illinois*.[27]

In *Morgan*, the Supreme Court adopted a "reverse-*Witherspoon* rule."[28] Citing the Due Process Clause of the Fourteenth Amendment and the Sixth Amendment guarantees of an impartial and indifferent jury, the Court stated, "In essence, the right to a fair trial guarantees to the criminal accused a fair trial by a panel of impartial, 'indifferent' jurors. The failure to accord an accused a fair hearing violates even the minimal standards of due process."[29] The Court stressed that a juror may affirmatively answer that she could obey the law, but not be aware of her misconceptions about the law or the impact of her beliefs regarding capital punishment. Continuing, the Court stated, "A defendant on trial for his life must be permitted on *voir dire* to ascertain whether his prospective jurors function under such misconception."[30]

Morgan's constitutional concern with juror misconceptions thus strongly supports the argument that voir dire allows the questioning of jurors concerning their understanding of what a life sentence means. If, as Virginia case law holds, jurors are barred from considering the possibility of parole in their capital sentencing decision, a potential juror's belief that a life sentence will lead to a shortened jail term makes that juror incapable of following the law. Yet, just as with the jurors in *Morgan*, this is the type of misconception members of the venire would not be aware of in answering general questions concerning their ability to follow the law, making it constitutionally relevant that voir dire be allowed on parole so that such jurors can be ferreted out.

Morgan also appears to require that courts allow voir dire of each juror's ability to consider specific mitigating factors.[31] Parole eligibility

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20 *See, e.g., Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990). Eaton was sentenced to three consecutive life sentences plus 40 years prior to his capital murder trial. As a result of the consecutive life sentences and pursuant to Va. Code Section 53.1-151(B)(1), Eaton will never be eligible for parole. *See also Mueller v. Commonwealth*, 1992 Va. LEXIS 97 at *39 (upholding the trial court's refusal to allow parole eligibility evidence despite the fact that Mueller would never be eligible for release). *See* case summary of *Mueller*, Capital Defense Digest, this issue.

21 *Turner v. Murray*, 476 U.S. 28, 36 (1986).

22 *Rosales-Lopez v. United States*, 451 U.S. 182, 188. (1981).

23 *See Turner*, 476 U.S. 28, 33-35; *Ham v. South Carolina*, 409 U.S. 524 (1973); *Morgan v. Illinois*, 112 S.Ct. 2222 (1992) (requiring courts to permit defense counsel to question potential jurors on *voir dire* about their biases in favor of the death penalty and using juror misperceptions as a partial justification for the holding). *See* case summary of *Morgan*, Capital Defense Digest, this issue.

24 240 Va. 236, 397 S.E.2d 385 (1990) (quoting *Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836, *cert. denied*, 474 U.S. 865 (1985)). *See* case summary of *Eaton*, Capital Defense Digest, Vol.3, No.1, p.22 (1990).

25 *Id.* at 249, 397 S.E.2d at 392-93.

26 *See supra* notes 5-8 and accompanying text.

27 112 S.Ct. 2222 (1992).

28 *Id.* In *Witherspoon v. Illinois*, the United States Supreme Court held that a juror may be excluded for cause if he makes it "unmistakably clear" that he would automatically vote against the death penalty. 391 U.S. 510 (1968)

29 *Morgan*, 112 S.Ct. at 2228.

30 *Id.* at 2233.

31 The Court stated, "Because a juror has already formed an opinion on the merits, the presence or absence of either aggravating or mitigating circumstances is entirely irrelevant to such juror.... A capital defendant may challenge for cause any prospective juror who maintains such views." *Id.* at 2229-30. If the juror is to be excluded for refusing to consider such mitigating circumstances, the juror must first be questioned on them.

or non-eligibility is likely to be a mitigating factor for many capital defendants. Therefore, if non-eligibility for parole is considered a mitigating circumstance in that it may lead a juror to believe a sentence less than death is sufficient, *Morgan* would appear to require that courts allow voir dire on parole law.[32]

Finally, educating and questioning jurors during voir dire simply makes good policy sense by eradicating juror misconceptions about parole law. In *Caldwell v. Mississippi*,[33] Justice O'Connor interpreted the theme of the majority opinion in *California v. Ramos*[34] as not "foreclos[ing] a policy choice in favor of jury education."[35] Such policy concerns also are reflected in the Fourth Circuit's recognition that a defendant must have the opportunity to exercise his peremptory challenges "meaningfully,"[36] which means that voir dire examination must at least permit the defendant an "opportunity to make reasonably intelligent use of his peremptory challenges and challenges for cause."[37] If Virginia continues in its determination that juries are not to be informed about parole at all during trial, then the defendant should be allowed to voir dire prospective jurors about their understanding of the parole system so that they can exclude those jurors obviously misinformed on parole law. Indeed, utilizing the rationale of *Morgan*, the defense could move the trial court to strike for cause.[38]

IV. MITIGATION

As required by United States Supreme Court rulings, Virginia's capital murder scheme permits a jury to impose a sentence of life in prison in lieu of death despite a finding of one of the statutorily defined aggravating factors.[39] Death penalty schemes must allow consideration as a mitigating factor any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.[40] *Lockett v. Ohio*, decided under the Eighth and Fourteenth Amendments, stands for the proposition that the sentencer must be able to independently consider all evidence in mitigation that is relevant.[41] "Independently consider" means that the sentencer is able to give weight to the evidence without restriction and whenever the sentencer deems appropriate.[42] Furthermore, "all evidence" means any evidence relevant to a finding that death is not justified in the particular case, not just evidence that is statutorily enumerated as relevant.[43] *Lockett* and its progeny explicitly prohibit states from limiting the sentencer's consideration of any relevant circumstance that could "cause it to decline to impose the death sentence."[44] The Supreme Court's only limitation on the introduction of evidence in mitigation is that it not be "[irrelevant] evidence concerning other persons, crimes and events, [that are] completely distinct."[45]

This limitation, however, does not disallow evidence on parole because such evidence is relevant under *Lockett*. A capital defendant's parole eligibility is undoubtedly a relevant mitigating factor for several reasons relating to the defendant's offense. The defendant's parole eligibility may be evidence that a life sentence is a severe and adequate punishment for the defendant's crime. To make the jury's choice between life and death a meaningful one, the jury must know the extent of the defendant's minimum period of incarceration before any possibility of parole. Evidence of extended incarceration before any possibility of parole or that the defendant is never eligible for parole may lead the jury to impose a life sentence rather than death because they may believe that the life sentence is sufficiently harsh punishment. In addition, information concerning a defendant's eligibility for parole has heightened relevance to counter the common misconceptions concerning life imprisonment which jurors bring to the penalty phase of a trial.

Evidence of parole eligibility also mitigates a sentence of death by providing affirmative evidence that the defendant does not pose a future threat to society.[46] *Skipper v. South Carolina* explicitly recognized that evidence of a defendant's lack of future dangerousness qualifies as mitigation in the penalty phase of a trial.[47] Because incarceration substantially reduces a defendant's future dangerousness to society, such evidence must be considered as mitigation and may not be excluded from the sentencer's consideration.[48]

In *Doering v. State*,[49] the Maryland Court of Appeals held that where a defendant seeks to place before the jury relevant and competent information concerning his eligibility for parole in the event that a life sentence is imposed, that request should be granted.[50] Prior to *Doering*, the Maryland Courts, like those of Virginia, had consistently held that evidence and information on parole was inadmissible.[51] The defendant in *Doering* sought to place information on his parole eligibility as

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32 In a pre-*Morgan* case, the Fifth Circuit in *King v. Lynaugh*, 850 F.2d 1055 (1988), *rev'g* 828 F.2d 257 (5th Cir. 1987), reversed its prior decision that a capital defendant may not be prohibited by a trial court from inquiring on voir dire whether veniremen held misconceptions about the defendant's parole eligibility, holding that defendant was not constitutionally entitled to question jurors during voir dire concerning possible misconceptions about parole law. The three judge dissent favored the admission of parole eligibility, citing studies on juror misperceptions concerning parole and interpreting Supreme Court cases calling for the jury's deliberation to be individualized. *Id.* at 1062-63 (dissenting opinion).

33 472 U.S. 320 (1985).

34 463 U.S. 992 (1983). *See infra* notes 60-63 and accompanying text.

35 *Caldwell*, 472 U.S. at 342 (1985) (O'Connor, J., concurring).

36 *United States v. Rucher*, 557 F.2d 1046, 1049 (4th Cir. 1977).

37 *Id.* (citing *Swain v. Alabama*, 380 U.S. 202, 219, 220 (1965), *overruled on other grounds by Batson v. Kentucky*, 476 U.S. 79 (1986)).

38 *Morgan v. Illinois*, 112 S.Ct. 2222 (1992); *see also, Boggs v. Commonwealth*, 229 Va. 501, 331 S.E.2d 407 (1985)(holding that capital sentencing jurors must exhibit the ability to be impartial or they may be struck for cause), *cert. denied*, 475 U.S. 1031, *reh'g denied*, 475 U.S. 1133 (1986).

39 Va. Code Ann. §§ 19.2-264.2 and 19.2-264.4(C) (1991).

40 Although Virginia Code Section 19.2-264.4(B) (1991) sets forth a list of factors which may be considered in mitigation which does not include parole, United States Supreme Court rulings make clear that such a list cannot be treated as excluding other relevant mitigating evidence. *See, Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

41 438 U.S. 586 (1978).

42 *Id.*

43 *Id.*

44 *McCleskey v. Kemp*, 481 U.S. 279 (1987), *Walton v. Arizona*, 497 U.S. 639 (1990), *see* case summary of *Walton*, Capital Defense Digest, Vol. 3, No. 1, p. 5 (1990); *Saffle v. Parks*, 494 U.S. 484 (1990), *see* case summary of *Saffle*, Capital Defense Digest, Vol. 3, No. 1, p. 3 (1990); *Penry v. Lynaugh*, 492 U.S. 302 (1989), *see* case summary of *Penry*, Capital Defense Digest, Vol. 2, No. 1, p. 2 (1989); *Mills v. Maryland*, 486 U.S. 367 (1988); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Bell v. Ohio*, 436 U.S. 637 (1978); *Lockett*, 438 U.S. 586.

45 *Lockett*, 438 U.S. at 604.

46 *Skipper v. South Carolina*, 476 U.S. 1, 5 (1985).

47 *Id.*

48 *Id.*

49 545 A.2d 1281 (Md. 1988).

50 *Id.* at 1295.

51 *Booth v. State*, 507 A.2d 1098 (Md. 1986), *sentence vacated on other grounds*, 482 U.S. 496 (1987); *Bowers v. State*, 507 A.2d 1072 (Md.), *cert. denied*, 497 U.S. 890 (1986); *Evans v. State*, 499 A.2d 1261 (Md. 1985), *cert. denied*, 478 U.S. 1010 (1986); *Poole v. State*, 453 A.2d 1218 (Md. 1983); and *Shoemaker v. State*, 180 A.2d 682 (Md. 1962).

mitigating evidence. Addressing policy concerns, the Court recognized that Maryland's death penalty statute is structured to give broad discretion to the sentencing authority in determining the circumstances that will be deemed relevant to the ultimate question of whether death is the appropriate penalty.[52] The Court concluded that a jury in its determination of the appropriate penalty would be aided by information correctly describing the legal and practical effects of such a sentence, and that the existence of an appropriate alternative sentence to death must be considered a relevant mitigating factor.[53] The Virginia Supreme Court, in *Watkins v. Commonwealth*,[54] declined to follow the Maryland court's lead, without offering more than the simple refusal to do so.

V. EIGHTH AMENDMENT AND DUE PROCESS RELIABILITY

Since the United States Supreme Court's landmark decision in *Furman v. Georgia*[55] holding that state death penalty schemes were in violation of the Eighth and Fourteenth Amendments, the Supreme Court has attempted to limit the risk of arbitrary and capricious imposition of the death penalty.[56] The need for reliability in the sentencer's determination that death is the appropriate punishment has been stressed by the Supreme Court in numerous cases.[57] This factor provides the foundation upon which the Court has structured the constitutional right to introduce all relevant evidence in mitigation.

Because in determining a sentence jurors are likely to rely upon inaccurate information about parole,[58] introduction of accurate parole information is not merely an advantage to be enjoyed by the defendant, but a constitutional due process right to reliability in sentencing. In fact, in *Johnson v. Mississippi*,[59] the United States Supreme Court held that a death sentence could not stand where it was based on misinformation because it would violate the Eighth Amendment's prohibition against cruel and unusual punishment. Likewise, allowing jurors to operate under their misconceptions and misinformation on parole in assessing the appropriate punishment of life or death offers no reliability in sentencing and as such is in violation of the Eighth Amendment.

In *California v. Ramos*,[60] the United States Supreme Court considered whether the Federal Constitution prohibited an instruction permitting a capital jury to consider that the Governor has the power to commute a life sentence without the possibility of parole. The Supreme Court held that the instruction did not violate the Constitution.[61] Although in its decision, the Supreme Court deferred to the judgement of the States in their decision of what, if anything, a jury should be told about commutation, pardon and parole, *Ramos* does provide support for allowing evidence and argument on parole.[62] Implicit in the Supreme Court's approval of the jury's consideration of the defendant's possible release were due process and Eight Amendment rationales, when the Court stated, "What is essential is that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."[63]

Furthermore, counsel should employ *Green v. Georgia*[64] to argue that Virginia's general evidentiary ban on evidence of parole must be relaxed at the sentencing stage. In *Green*, the United States Supreme Court struck down Georgia's mechanical application of its hearsay rule at capital sentencing because, "the excluded [evidence was] highly relevant to a critical issue in the punishment phase of the trial, and substantial reasons [existed] to assume its reliability."[65]

In applying that concept to parole, counsel should argue that admissibility of parole evidence is, in essence, an evidentiary rule which should not apply at capital sentencing because it is important, relevant, and reliable evidence which the defendant wishes to introduce. Whatever the merits of the rule generally in non-capital cases, its mechanical application at capital sentencing defeats the constitutional requirements of reliability in capital sentencing. Hence, exclusion of evidence on parole clearly constitutes a violation of the Due Process Clause of the Fourteenth Amendment, just as Georgia's mechanical application of its otherwise valid hearsay rule did in Green's capital sentencing hearing.

VI. FUTURE DANGEROUSNESS

Apart from the defendant's general due process rights and the Eighth Amendment right to introduce evidence on parole, the Commonwealth may trigger the right to introduce such evidence by arguing future dangerousness. The United States Supreme Court's decision in *Skipper v. South Carolina*[66] sets forth the constitutional ground for the consideration of parole evidence once the prosecution has introduced evidence of future dangerousness:

> Where the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of *Lockett* and *Eddings* that requires that the defendant be afforded an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death on the basis of information which he had no opportunity to deny or explain.[67]

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[52] *Doering*, 545 A.2d at 1294-95. The Court's change of mind was based on the fact that the only justification for admission of parole evidence in the past was that the evidence had a direct bearing on the issue of future dangerousness. The Court did not, however, eliminate the possibility of using evidence of parole to rebut the prosecutor's argument of future danger. The Court stated "the only justification for admission offered in the past was that the evidence had a direct bearing on the issue of future dangerousness - an argument we did not **then** find persuasive." *Id.* at 1294 (emphasis added).

[53] *Id.* at 1295.

[54] 238 Va. 341, 351, 385 S.E.2d 50, 56 (1989).

[55] 408 U.S. 238 (1972).

[56] Four requirements have been established by the Supreme Court: legality, proportionality, individualization, and reliability.

[57] *See, e.g., Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Ake v. Oklahoma*, 470 U.S. 68, 83-84 (1985); *Eddings v. Oklahoma*, 455 U.S. 104, 118 (1982) (O'Connor,J., concurring); *Lockett*, 438 U.S. 586, 604-05 (plurality opinion); *Gardner v. Florida*, 430 U.S. 349, 357-58 (1977); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

[58] Studies reveal that the majority of juror's suffer from misperceptions on parole. *See supra* notes 5-8 and accompanying text.

[59] 486 U.S. 578, 108 S.Ct. 1981 (1988)(death penalty vacated because sole evidence supporting aggravating circumstance that the defendant had previously been convicted of a felony was later found invalid and thus jury had been allowed to consider evidence that had been materially inaccurate).

[60] 463 U.S. 992 (1983).

[61] *Id.*

[62] *Id.* at 1013-14. Justice O'Connor, writing for the majority, recognized that many states do not allow the jury to consider or to be informed of the possibility of commutation, pardon, or parole, and in dicta expressed that this was best left to the States. *Id.* at 1013-14, n. 30.

[63] *Id.* at 1003 (quoting *Jurek v. Texas*, 428 U.S. 262, 276 (1976)).

[64] 442 U.S. 95 (1980)(holding that due process clause precludes mechanistic application of hearsay rule to exclude potentially mitigating and reliable evidence during sentencing phase).

[65] *Id.* at 97.

[66] 476 U.S. 1 (1986).

[67] *Id.* at 5 (quoting *Gardner v. Florida*, 430 U.S. 349, 362 (1977)).

Skipper, in turn, was premised on *Gardner v. Florida*'s holding that due process in a capital trial requires that a defendant be afforded an effective opportunity to rebut any aggravating factors which the State posits as a basis for imposing the death sentence.[68]

Where the Commonwealth is relying on future dangerousness, undoubtedly the issue of whether and when a defendant will be released on parole is a crucial factor in the jury's deliberations. The fact that a defendant will not be eligible for parole for twenty-five years — or, in certain cases, never eligible — is highly relevant rebuttal evidence to an argument of future dangerousness. The relevancy of such evidence may be further heightened where there is evidence that the defendant at the time of the crime was immature or that the defendant functions better within a structured environment like a prison than in general society. And, of course, the need to present such highly relevant rebuttal evidence is compounded by the grave misconceptions about life sentences that many jurors have been documented to hold.[69]

The problem is highlighted in the recent Virginia Supreme Court case of *Mueller v. Commonwealth*.[70] The court allowed the Commonwealth to introduce past parole violations as proof of future dangerousness — the clear inference being that if released, the defendant would commit crimes again — but did not allow the defendant to introduce evidence that he would never be eligible for parole because of past convictions. This situation would seem exactly parallel to the situation in *Skipper* where the United States Supreme Court ruled that the state could not introduce evidence that the defendant posed a danger in jail and then bar the defendant's rebuttal evidence that he had been a good prisoner.[71]

Skipper thus articulates the concept that irrespective of whether evidence of the defendant's actions after the crime constitute a mitigating circumstance under the standard set forth in *Lockett v. Ohio*, a capital defendant cannot constitutionally be sentenced to death on the basis of information which he has no opportunity to deny or explain.[72] A capital defendant must be allowed to rebut any type of evidence or argument the Commonwealth produces to prove future dangerousness in the penalty trial. Consequently, where the Commonwealth is relying on a future dangerousness argument, the defendant must be given a meaningful opportunity to contest the Commonwealth's argument by introducing evidence on his parole eligibility through argument or instructions.[73]

VII. TRIAL STRATEGY

Counsel will want to consider a number of ways in which to raise these issues in their capital case, such as through voir dire, evidentiary testimony, and jury instructions. Because the Virginia Supreme Court's current position on admission of parole eligibility may constitute constitutional error, defense counsel must challenge the Court's holdings on this issue by continuing to make the record on this issue through voir dire questions, proffered evidence and proposed jury instructions. Although the Virginia Supreme Court continues to reject these arguments, the constitutional challenges must still be raised at every juncture to avoid default and to ensure later appellate and habeas review in state and federal courts.

Moreover, although the Virginia Supreme Court has not held that admission of parole eligibility is constitutionally required, that does not mean that such evidence is constitutionally barred. In *Smith v. Commonwealth*,[74] for example, the Virginia Supreme Court discussed, without disapproval, evidence which the defendant had introduced that he would not be eligible for parole until he was in his sixties. Counsel should be prepared to explain to the trial judge why, despite the Virginia Supreme Court's general ruling that evidence on parole need not be admitted, the trial judge should, in his or her discretion, allow it in this case for the particular reasons set forth.

A. Voir Dire

As an initial step, counsel should attempt to voir dire potential jurors about their understanding of the parole system. In addition, counsel may attempt to educate the jurors about the defendant's parole eligibility through such questioning. Voir dire questions on parole might be phrased along the following lines:

1. Could you consider a sentence less than death if you were instructed not to concern yourself with the possibility of parole or of the defendant's ultimate return to society?[75]

2. How long do you believe a convicted capital murderer will be imprisoned before being released on parole?[76]

3. Are you aware that if a defendant is sentenced to life for capital murder that the defendant will not be eligible for parole for at least twenty-five years [or, if appropriate, "will never be eligible for parole"]?

If voir dire questions on parole are permitted, counsel should review *Knox v. Collins*.[77] In *Knox*, the Fifth Circuit reversed and remanded the case where the defendant was allowed to question jurors about their beliefs concerning parole during voir dire but the trial court then failed to keep its promise to allow the defense to correct jurors' stated misperceptions about parole with an instruction during the penalty phase.[78] Important to this analysis are several factors. First, the District Court allowed questioning of jurors on their understanding of the meaning of a "life sentence." Second, the Fifth Circuit stated, "Precedent establishing that *voir dire* and instruction regarding parole are neither mandated by the constitution nor required under [state] law does not forbid such *voir dire* and instruction."[79] Finally, the Fifth Circuit, in its analysis, found that the trial judge's failure to instruct on the meaning of life, after its promise to do so, conclusively affected the defendant's exercise of his peremptory challenges.[80]

B. Penalty Phase

At the penalty phase, jury instructions or evidence on parole law should be proposed both in mitigation and as rebuttal evidence to Com-

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68 *Skipper*, 476 at 5 (relying on *Gardner*, 430 U.S. at 362).

69 *See supra* notes 6-8 and accompanying text.

70 1992 Va. LEXIS 97 at *42; *see* case summary of *Mueller v. Commonwealth*, Capital Defense Digest, this issue.

71 476 U.S. 1 (1986). *See also Payne v. Tennessee*, 111 S.Ct. 2597, 2608 (1991) (allowing the use of "victim-impact" testimony at sentencing phase of capital trial and emphasizing the need for "balance" in such situations). *See* case summary of *Payne*, Capital Defense Digest, Vol. 4, No. 1, p. 14 (1991).

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

73 *Lankford v. Idaho*, 111 S.Ct. 1723, 1733 (1991). *See* case summary of *Lankford*, Capital Defense Digest, Vol. 4, No. 1, p. 9 (1991).

74 219 Va. 455, 481, 248 S.E.2d 135, 151 (1978).

75 A question similar to this was proposed and denied in *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990).

76 Counsel could move the trial court to strike the patently misinformed venireman for cause pursuant to *Morgan v. Illinois*, 112 S.Ct. 2222 (1992).

77 928 F.2d 657 (5th Cir. 1991).

78 *Id.*

79 *Id.* at 660.

80 *Id.* at 662.

monwealth claims of future dangerousness. Examples of each type of instruction follows.

A mitigation instruction might read as follows: "As you deliberate whether life in prison or death is appropriate punishment for the defendant's crime(s), you may consider as a possible mitigating factor that a sentence of life in prison means that the defendant will: [insert eligibility provision applicable to your case]

1. never be eligible for parole.

2. not be eligible for parole consideration for twenty-five years.

3. not be eligible for parole consideration for __ years."[81]

A future dangerousness instruction might be phrased: "When you assess the evidence presented by the Commonwealth in support of its contention that there is a probability that the defendant will commit future criminal acts of violence that would constitute a continuing threat to society, you may consider the fact that if you set defendant's punishment at life imprisonment, he will: [insert the eligibility provision applicable to your case]

1. never be eligible for parole.

2. not be eligible for parole consideration for twenty-five years.

3. not be eligible for parole consideration for __ years."[82]

Finally, defense counsel should prepare its response to the situation where the jury interrupts its deliberations to ask about parole or life imprisonment.[83] This is particularly important if all defense efforts to introduce evidence or instructions on parole have been prohibited. Defense counsel must be prepared to convince the trial judge to give an explanation more than, "I can't tell you," or "it is of no concern." First, defense counsel must object to any such response by the trial judge to preserve error. Counsel should argue that a responsive answer is critical because, as indicated by the jury's action, they are already dubious about what a life sentence actually constitutes, and as such, are more likely to speculate in their sentencing decision.[84] Second, counsel should press for one of two types of statements: (1) a flat statement that "life" means the defendant would be in jail for the rest of his life;[85] or (2) an accurate statement that the defendant would serve twenty-five years in jail before ever being eligible for parole, or if appropriate would never be eligible for parole.[86] Because a responsive answer to the jury during its deliberations may be critical to its sentencing determination, counsel must prepare, in advance, to respond to such a situation.

VIII. CONCLUSION: LIVING WITH THE CURRENT RULE

It is imperative that counsel challenge the Virginia Supreme Court's standing on parole in order to ensure that these constitutional claims are not defaulted. Several options have been presented in this article which counsel should pursue where it is appropriate for the individual case. If evidence or instruction on parole are not admitted, counsel should be alert to any signs that the jury has taken into account that the defendant might be released on parole despite being instructed to consider the choice as between life and death. In *Harris v. Commonwealth*,[87] where one of the jurors explained to the jury how the parole system would come into play with regard to the various sentences that the jury was considering, the Virginia Court of Appeals found consideration of parole eligibility by the jury constituted grounds for impeachment of the jury's verdict. Consequently, counsel should consider having jurors questioned as to whether the possibility of parole was discussed by jurors while debating between life and death. *Harris* provides a limited window of opportunity to claim error given the current policy of the Supreme Court of Virginia.

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81 These sample jury instructions have been drawn from the Virginia Capital Case Clearinghouse Manual, Defending a Capital Murder Case in Virginia (1992).

82 *Id.*

83 Such a situation is not uncommon, *see supra* note 2 and accompanying text.

84 Virginia's prohibition on parole evidence, questioning, and instructions is based on the possibility of juror speculation.

85 This may be appropriate since this is a fiction which Virginia maintains that jurors believe.

86 Va. Code Ann. § 53.1-151(C) (1991). *See also supra* note 5.

87 13 Va. App. 47, 408 S.E.2d 599 (1991).

SUBTLE INFLUENCES: THE CONSTITUTIONALITY OF JAILHOUSE INFORMANT TESTIMONY IN CAPITAL CASES

BY: WENDY FREEMAN MILES

[I]t is upon such subtle factors as the possible interest of the witness in testifying falsely that a defendant's life or liberty may depend.

— Napue v. Illinois[1]

I. INTRODUCTION

In 1982, Roger Matney, a Virginia jailhouse informant, testified for the Commonwealth in the capital murder trial against Roger Keith Coleman. Matney told the court that while sharing a cell with Coleman, Coleman confessed to the rape and murder of Wanda Fay McCoy. Matney described a floor plan of the house and mentioned a paper towel that the police found beside the victim's body. It is arguable that Matney's testimony was the Commonwealth's strongest evidence against Coleman.[2] After testifying, Matney was released from jail after serving only part of his four concurrent four-year prison sentences. Matney's mother-in-law signed an affidavit that stated that Matney said he falsified Coleman's confession.[3] Roger Keith Coleman

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1 360 U.S. 264 (1959).

2 *See generally Coleman v. Thompson*, No. 92-0352-R, 1992 U.S. Dist. LEXIS 11231 (W.D. Virginia 1992); Smolowe, *Must This Man Die?*, TIME, May 18, 1992, at 40.

3 *Coleman v. Thompson*, 1992 U.S. Dist. LEXIS 11231, at *7. *See also* Smolowe, *Must This Man Die?*, TIME, May 18, 1992, at 40. Matney denies falsifying his testimony. *Coleman*, 1992 U.S. Dist. LEXIS 11231 at *3.