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WHAT TO DO WHEN YOU'RE AMBUSHED BY UNDISCLOSED EVIDENCE OF UNADJUDICATED ACTS TO SHOW FUTURE DANGEROUSNESS

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WHAT TO DO WHEN YOU'RE AMBUSHED BY UNDISCLOSED EVIDENCE OF UNADJUDICATED ACTS TO SHOW FUTURE DANGEROUSNESS

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You are defense counsel in a capital murder trial in the Commonwealth of Virginia. Earlier in the day, the jury returned a guilty verdict, convicting your client of capital murder. Tomorrow morning the penalty phase will begin. During the guilt phase of the trial you had filed a motion requesting the Commonwealth to reveal the evidence it planned to use to prove future dangerousness if the defendant was found guilty. In response only three days ago, the Commonwealth's Attorney stated that the Commonwealth would introduce statements that the defendant allegedly made about other crimes, including a double murder. It is now the evening before the penalty phase is to begin and the Commonwealth's Attorney has just informed you that despite the earlier pledge to only introduce the defendant's statements, the Commonwealth now intends to offer actual evidence of the double murder in addition to the incriminating statements. This evidence consists of testimony by the police detective who investigated the double murder and by the state medical examiner who performed the victims' autopsies. The additional evidence is also to include photographs and forensic evidence of the crime scene.

As alarming as the previous scenario is, it is the fact pattern of a Virginia case, *Gray v. Thompson*,[1] that now sits before the United States Supreme Court. This article will examine different responses by defense counsel when faced with surprise evidence of unadjudicated acts.

I. Object Loudly And In As Many Ways As Possible

A. Object Strenuously on the Record

Recent Fourth Circuit opinions make clear that simply stating your objection on the record leads to a negative inference – that if defense counsel did not object strenuously, counsel could not have been greatly disadvantaged. Consequently, you must make your objection formally on the record and develop at length how, without a continuance, a fair trial cannot possibly be had. And if the objection is being made at an in-chambers conference, the objection must also be made on the record or the court will deem the objection to be defaulted.[2] Unless these measures are taken, the Fourth Circuit has shown it is all too willing to summarily dispose of the defendant's objection, as it did in *Gray*.

In *Gray*, for example, the Fourth Circuit stated that if the defense had felt unprepared to undertake effective cross-examination, it should have made a formal motion for continuance; instead, counsel had moved only that the evidence be excluded.[3] The court further emphasized that Gray had not advanced any meaningful contention as to how he would have proceeded differently at the penalty phase had he known about the additional evidence any sooner than the night before the penalty phase was to begin. The court thus speculated that Gray's case would have unfolded in much the same fashion that it did.[4]

B. State Your Objection Both as a Statutory and as a Constitutional Violation

1. The Statutory Violation

In addition to establishing on the record the very real hardships the undisclosed evidence imposes, it is critical to state the defendant's rights which are being affected. First, note for the court that the Commonwealth has violated the state statute which requires "[u]pon motion of the defendant, in any [capital] case . . . if the . . . Commonwealth intends to introduce during . . . sentencing . . . evidence of defendant's unadjudicated criminal conduct, the . . . Commonwealth shall give notice in writing . . . [which] 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."[5] To make such a claim most effective, it is important that defense counsel press the Commonwealth early on for disclosure of what unadjudicated acts it will rely on and in what form. Then, any variance will take on even greater significance.

It is critical, however, not to forget to also raise the federal constitutional rights that are jeopardized or later federal review may be foreclosed. Several federal constitutional rights are at stake when defense counsel is ambushed.

2. Due Process and Eighth Amendment Rights to Present Rebuttal Evidence

The Supreme Court of Virginia allows the Commonwealth to present at a capital sentencing hearing evidence of a defendant's prior unadjudicated conduct as proof that the defendant poses a future danger. The court has justified the admissibility of such evidence based on the United States Supreme Court's statement that "in determining the probability of a defendant's future criminal conduct, it is 'essential . . . that the jury have before it **all possible relevant information** about the individual defendant whose fate it must determine.'"[6]

The Supreme Court, however, also has stated that, "it is now clear that the sentencing process, as well as the trial itself, must satisfy the requirements of the Due Process Clause."[7] Due process in this context includes the requirement that a capital sentencing jury be provided accurate sentencing information. Similarly, the Court has stated that "'accurate sentencing information [is] an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die'" under the Eighth Amendment.[8]

These well-established Due Process and Eighth Amendment rights to a reliable sentencing hearing include the right to present rebuttal evidence; "where the prosecution relies on a prediction of future dangerousness in requesting the death penalty, elemental due process principles

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[1] *Gray v. Thompson*, 58 F.3d 59 (4th Cir. 1995), *cert. granted sub nom. Gray v. Netherland*, 116 S. Ct. 690 (1996).

[2] *Id.* at 64.

[3] *Id.*

[4] *Id.* at 66.

[5] Va. Code Ann. § 19.2-264.3:2 (1995).

[6] *LeVasseur v. Commonwealth*, 225 Va. 564, 593-94, 304 S.E.2d 644, 660 (1983), *cert. denied*, 464 U.S. 1063 (1984) (quoting *Jurek v. Texas*, 428 U.S. 262, 275-76 (1976)) (emphasis in *LeVasseur*). *See also California v. Ramos*, 463 U.S. 992, 998-1001 (1983) and Fenn, *Anything Someone Else Says Can and Will be Used Against You in a Court of Law: The Use of Unadjudicated Acts in Capital Sentencing*, Capital Defense Digest, Vol. 5, No. 2, p. 31 (1993).

[7] *Gardner v. Florida*, 430 U.S. 349, 358 (1977).

[8] *Simmons v. South Carolina*, 114 S. Ct. 2187, 2198 (1994) (concurring opinion) (quoting *Gregg v. Georgia*, 428 U.S. 153, 190 (1976)).

operate to require admission of the defendant's relevant evidence in rebuttal."[9] The Court, in *Skipper v. South Carolina*,[10] stressed that, "it is not only the [Eighth and Fourteenth Amendment guarantees as explained in] Lockett and Eddings that require[] that the defendant be afforded an opportunity to introduce evidence [in rebuttal of the prosecution's case for future dangerousness]; 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.'"[11] The Court further explained, in a subsequent case, that "[t]he Constitution guarantees a fair trial through the Due Process Clauses, but it defines the basic elements of a fair trial largely through the several provisions of the Sixth Amendment[.]"[12] Consequently, "[w]hen the prosecution urges a defendant's future dangerousness as cause for the death sentence, the defendant's right to be heard means that he must be afforded an opportunity to rebut the argument."[13]

The Supreme Court has noted that a capital sentencing proceeding is essentially a trial in and of itself. Presenting evidence of unadjudicated acts is essentially a mini-trial; the Commonwealth is presenting unadjudicated acts to prove the charge that the defendant poses a future danger, while the defendant is trying to counter these allegations. As with any criminal charge, to meet the case against him the defendant must have notice of the unadjudicated acts the Commonwealth intends to introduce so that he may make *Brady* motions, investigate the alleged conduct, find defense witnesses, make use of experts, prepare his rebuttal, and make a motion for a continuance if necessary.

3. The Right to Notice

In *Simmons v. South Carolina*,[14] Justice O'Connor's concurrence noted that the capital defendant's right to rebut the prosecution's case for a sentence of death goes beyond mere admissibility of the defendant's relevant rebuttal evidence, but "'must of course satisfy the dictates of the Due Process Clause,' and one of the hallmarks of due process in our adversary system is the defendant's ability to meet the State's case against him."[15] Justice O'Connor cited to the comparable holding of *Crane v. Kentucky*,[16] where the Court stated that a fair trial includes the "'meaningful opportunity to present a complete defense.'"[17] Thus, any process through which the State's evidence is permitted to escape "'the crucible of meaningful adversarial testing'" is to be condemned,[18] and certainly lack of notice is such a process. In *Lankford v. Idaho*,[19] the United States Supreme Court reversed the defendant's death sentence because it found that the defense did not have adequate notice that the judge might sentence the defendant to death. The Court stated that the inadequate notice had "frustrated counsel's opportunity to make an argument that might have persuaded the [sentencer] to impose a different sentence"[20] thus creating the "impermissible risk that the adversary process may have malfunctioned . . . ."[21]

In a different context, the Court has stated that although "'many controversies have raged about the cryptic and abstract words of the Due Process Clause . . . there can be no doubt that at a minimum they require that . . . adjudication be preceded by notice . . . appropriate to the nature of the case.'"[22] The Court further explained that "the timing and content of the notice . . . will depend on appropriate accommodation of the competing interests involved."[23] As the Court noted in *Goss v. Lopez*,[24] "'[n]o better instrument has been devised for arriving at truth than to give a person in jeopardy of serious loss notice of the case against him and an opportunity to meet it.'"[25] Given that *Goss* was a school disciplinary case, certainly even more process is owed capital defendants at sentencing, and United States Supreme Court opinions have so indicated.

In *Gardner v. Florida*,[26] the Court stressed that due process applies in capital sentencing, and although the *Gardner* Court itself warned that this "does not . . . implicate the entire panoply of criminal trial procedural rights," the Court went on to explain that "due process . . . . calls for such procedural protections as the particular situation demands."[27] In a capital sentencing situation where the defendant is facing the ultimate sanction, the demand for procedural protection is undoubtedly at its highest. As the Supreme Court has often recognized, "the penalty of death is qualitatively different from a sentence of imprisonment, however long,"[28] and, because of that qualitative difference, "the [Eighth] Amendment imposes a heightened standard 'for reliability in the determination that death is the appropriate punishment in a specific case'[29] . . . . and . . . invalidates 'procedural rules that ten[d] to diminish the reliability of the sentencing determination[.]'"[30] The Court has thus concluded that where contested information "is the basis for a death sentence, the interest in reliability plainly outweighs the State's interest[s]. . . ."[31]

A lack of notice as to unadjudicated acts clearly implicates the reliability of any proceeding and can be extremely debilitating in capital sentencing procedures, especially at the penalty phase when counsel is given last minute notice of evidence of unadjudicated acts. Without notice the defendant will be unable to make proper *Brady* motions to trigger Commonwealth disclosure of material exculpatory evidence. The defendant will be precluded from sufficiently investigating the alleged conduct and finding witnesses. The defendant will also be unable to prepare his rebuttal. As a result of these deficiencies, the reliability of the Commonwealth's case of "future dangerousness" will not have been tested by a true adversarial proceeding.

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9 *Id.* at 2194 (citing *Skipper v. South Carolina*, 476 U.S. 1, 4, 5 n.1 (1986) (citing *Lockett v. Ohio*, 438 U.S. 586, 604 (1978))).

10 476 U.S. 1 (1986).

11 *Skipper*, 476 U.S. at 5, n.1 (quoting *Gardner*, 430 U.S. at 362). *See also Skipper*, 476 U.S. at 9-11 (concurring opinion) and *Simmons*, 114 S. Ct. at 2200 (concurring opinion).

12 *Crane v. Kentucky*, 476 U.S. 683, 690 (1986) (quoting *Strickland v. Washington*, 466 U.S. 668, 684-85 (1984)).

13 *Simmons*, 114 S. Ct. at 2199 (concurring opinion) (citing *Skipper*, 476 U.S. at 5, n.1).

14 114 S. Ct. 2187 (1994).

15 *Simmons*, 114 S. Ct. at 2200 (concurring opinion) (quoting *Clemons v. Mississippi*, 494 U.S. 738, 746 (1990) and citing *Crane*, 476 U.S. at 690).

16 476 U.S. 683 (1986).

17 *Crane*, 476 U.S. at 690 (quoting *California v. Trombetta*, 467 U.S. 479, 485 (1984); and citing *Strickland*, 466 U.S. at 684-85).

18 *Id.* at 690-91 (quoting *United States v. Cronic*, 466 U.S. 648, 656 (1984)).

19 500 U.S. 110 (1991).

20 *Lankford*, 500 U.S. at 124.

21 *Id.* at 127.

22 *Goss v. Lopez*, 419 U.S. 565, 579 (1975) (quoting *Mullane v. Central Hanover Trust Co.*, 339 U.S. 306, 313 (1950)).

23 *Id.* (citing *Cafeteria Workers v. McElroy*, 367 U.S. 886, 895 (1961) and *Morrisey v. Brewer*, 408 U.S. 471, 481 (1972)).

24 419 U.S. 565 (1975).

25 *Goss*, 419 U.S. at 580 (quoting *Joint Anti-Facist Committee v. McGrath*, 341 U.S. 123, 170, 172-73 (1951) (concurring opinion)).

26 430 U.S. 349 (1977).

27 *Gardner*, 430 U.S. at 358, n.9 (quoting *Morrisey*, 408 U.S. at 481).

28 *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

29 *Simmons*, 114 S. Ct. at 2198 (concurring opinion) (quoting *Woodson*, 428 U.S. at 305).

30 *Id.* (quoting *Beck v. Alabama*, 447 U.S. 625, 638 (1980)).

31 *Gardner*, 430 U.S. at 359.

4. Ineffective Assistance of Counsel

The difficulties posed by a lack of notice raise yet another constitutional basis for objecting to being ambushed by unadjudicated acts. In such circumstances, counsel cannot provide the effective assistance that is called for in *Powell v. Alabama*.[32]

In *Powell*, the Court stated that the time leading up to trial is, in terms of assistance of counsel, "perhaps the most critical period of the proceedings against [the] defendant[], . . . when consultation, thorough-going investigation and preparation [are] vitally important. . . ."[33] The *Powell* Court's emphasis on the need for trial counsel to have an adequate chance to prepare applies with equal force to a capital sentencing hearing and the Commonwealth's use of unadjudicated crimes to show future dangerousness. Any curtailment of an adequate opportunity to prepare for the capital sentencing mini-trial will result in the same ineffective assistance that *Powell* sought to prevent. The *Powell* Court further observed that prejudice can exist even where defense counsel proceeded with investigation and preparation that now, in the light of full disclosure, appears insufficient. The Court stated, "[i]t is not enough to assume that counsel . . . exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. **No opportunity to do so was given.**"[34]

This last sentence is particularly important when dealing with surprise unadjudicated acts evidence. While the *Powell* Court noted the "grave evils" of inexcusable delays and continuances,[35] it also recognized that a defendant must not be deprived of sufficient time to have his counsel prepare his defense. The Court stated, "[t]o do that is not to proceed promptly in the claim . . . of regulated justice but to go forward with the haste of the mob,"[36] and further observed, "'[i]t is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving [counsel] any opportunity to acquaint himself with the facts or law of the case.'"[37] The Court held, therefore, that due process was not discharged by an assignment of counsel "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[38] Even the dissent in *Powell* believed that if defendants were "denied the right of counsel, with the accustomed incidents of consultation **and opportunity of preparation for trial** . . . . they were denied due process of law . . . ."[39]

Citing *Powell*, the United States Supreme Court recently reaffirmed that in certain circumstances when defense counsel has been denied adequate notice, counsel may be so handicapped that they could not possibly provide effective assistance of counsel.[40] In *United States v. Cronic*, the Court stated that certain criteria were relevant to this determination: "'(1) the time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.'"[41]

In capital sentencing situations, where defense counsel are faced with surprise evidence of unadjudicated acts, counsel must explain how the *Cronic* factors show that it is indeed a case where defense counsel cannot possibly provide effective assistance of counsel. Although the argument will vary as to the facts, at a minimum, defense counsel will be able to state on the record, in strenuous fashion, that: the time afforded for investigation and preparation is short, the experience of counsel in preparing for a capital sentencing procedure is likely to be modest, the gravity of the charge is unmatched, the complexity of all the possible defenses involved in such a mini-trial are exceedingly intricate, and the accessibility to witnesses is likely to be inadequate. Under such circumstances, and where the defendant is denied adequate notice, defense counsel are so handicapped that they cannot possibly provide the effective assistance of counsel that is required for the filing of *Brady* motions, investigating the alleged conduct, finding witnesses, making use of experts, preparing rebuttal, and making a motion for a continuance if necessary.

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32 287 U.S. 45 (1932).

33 *Powell*, 287 U.S. at 57 (citing *People ex rel. Burgess v. Riseley*, 66 How.Pr.(N.Y.) 67 and *Batchelor v. State*, 189 Ind. 69, 76, 125 N.E. 773 (1920)).

34 *Id.* at 58 (emphasis added).

35 *Id.* at 59.

36 *Id.*

37 *Id.* (quoting *Commonwealth v. O'Keefe*, 298 Pa. 169, 173, 148 A. 73, 74 (1929)).

38 *Id.* at 71.

39 *Id.* at 73-74 (dissenting opinion) (emphasis added).

40 *United States v. Cronic*, 466 U.S. 648, 659-660 (1984).

41 *Id.* at 652 (quoting *United States v. Golub*, 638 F.2d 185, 189 (10th Cir. 1980)).