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William S. Geimer

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# Two Decades of Death: Trashing the Rule of Law in Virginia

William S. Geimer\*

## *I. Introduction: Rule of Law?*

In the late unlamented impeachment proceedings, politicians of both parties piously intoned *ad nauseum* about the “rule of law.” If these leaders actually have concerns about threats to the rule of law, they should learn something about the administration of the death penalty. That political exercise, masquerading as a legal process, is a disgrace to the rule of law. Nowhere is that more plainly apparent than in the Commonwealth of Virginia.

To one who has pride in being a member of the legal profession the best definition of “rule of law” is a non-violent check on the coercive power of the state. When the government has the physical or technological capability to do something; and when there is popular support for doing it but it is not done because the *law* forbids the action, the rule of law is operating in its greatest magnificence. When we say, “we are a government of laws, not men,” that is what we mean. It is the most despised and isolated among us who have the greatest need of the protection of the rule of law. It is when those in power, who have little immediate need for its protection, accept the restraints imposed by the rule of law that they distinguish themselves and their community. The importance of the rule of law is in large measure the reason the legal profession is an honorable profession.

It is members of this honorable profession who should be most concerned about the utter disregard for the rule of law that characterizes the administration of the death penalty in Virginia. Lawyers who will never see a criminal case should be gravely concerned. They should be concerned because the same judges and courtrooms they call upon for the resolution of their disputes are used in a killing selection system that mocks the rule of law, thereby cheapening their justice system as well. They should be concerned because the indifference and conscious rejection of the rule of law that characterizes death penalty law is a poison that can spread.

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\* Professor of Law, Washington & Lee University School of Law; Director, Virginia Capital Case Clearinghouse, 1988-1999.

There are numerous reasons for my disgust with state killing. It is perfectly understandable that many of these reasons would not be shared by all members of the legal profession. A diversity in religious faiths and personal moral codes, for example, is perfectly natural and acceptable in our profession. But no lawyer committed to the rule of law can support the death penalty as it is currently administered in the Commonwealth of Virginia. The current situation should be particularly painful for teachers of the law. It is for me. When we teach rules and exceptions and doctrines and procedures, are we not implicitly communicating to students that these things are supposed to be real operating constraints upon human behavior? How should we go about explaining to them that in certain areas this is all a lie—that the rules, exceptions and doctrines do not operate and the government is free to do what it wishes to those it has chosen to disfavor?

I am convinced that this blot on our profession is broadly sustained by ignorance and indifference rather than malevolence. Justice Marshall was surely correct that the more people learn about how their actual, not hypothetical, death penalty operates the less they will like it. That has certainly proved to be the case at the Virginia Capital Case Clearinghouse. In our selection process, we do not consider or even inquire about the views of a prospective student member on "the death penalty." Those views, formed in any event in ignorance of Virginia reality, are irrelevant. Our mission is to help make the Sixth Amendment right to counsel mean something and to provide a unique approach to legal education. Nevertheless, for many students the wisdom of Justice Marshall becomes increasingly apparent as they work in the program. Some graduate still ambivalent about the larger philosophical issues. But the ugly reality of Virginia's system has no defenders.

Deciding how to illustrate this reality in a brief essay has not been easy. That is because the damage to the rule of law in Virginia takes so many forms, and the examples are exceedingly numerous.<sup>1</sup> Finally, I de-

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1. They include, but are certainly not limited to allowing gross prosecutorial misconduct and refusing to recognize the Sixth Amendment right to minimally effective assistance of counsel. See, e.g., *Bennett v. Angelone*, 374 S.E.2d 303 (Va. 1988) (allowing prosecutor's closing argument which misquoted bible and compared accused to terrorist Muslim sect); *Gray v. Commonwealth*, 356 S.E.2d 157 (Va. 1987); *Gray v. Netherland*, 518 U.S. 152 (1996) (allowing prosecutor to lie or mislead the defense about penalty trial evidence he will present). This reality is particularly distressing. Defense attorneys are denied adequate resources, including time. See *Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998) (allowing Commonwealth to force defense counsel to trial in four months); Matthew K. Mahoney, Case Note, 11 CAP. DEF. J. 95 (1998) (analyzing *Cardwell v. Greene*, 152 F.3d 331 (4th Cir. 1998). Although defense counsel have abandoned their clients, *Clozza v. Murray*, 913 F.2d 1092 (4th Cir. 1990), and done nothing to defend them, *Wise v. Commonwealth*, 337 S.E.2d 715 (Va. 1985), the Supreme Court of Virginia has yet to sustain an ineffective assistance of counsel claim in a capital state habeas, and it has been twelve years since the Fourth Circuit granted relief on this ground. See *Hyman v. Aiken*, 824 F.2d 1405 (4th Cir. 1987).

cided to focus only on the two courts that routinely disregard the rule of law. I further decided to discuss only two areas where the rule of law is damaged, and to illustrate only with cases that are contained in this issue of the *Capital Defense Journal*. If a case against these two courts can be made with these limitations, illustrated solely by opinions that happened to be decided within the dates allowed by our publication schedule, surely it is only the iceberg's proverbial tip that is being addressed.

The two courts with little or no regard for law are the Supreme Court of Virginia and the United States Court of Appeals for the Fourth Circuit. There is a spectrum of fairness in Virginia trial courts. Many circuit court judges make real efforts to conduct capital trials fairly. Unfortunately, some of these decline to recognize that the United States Constitution as interpreted by the United States Supreme Court is a writ that runs in the Commonwealth. Within that limitation, however, they try to be fair. Some are scrupulously fair in all respects. Some are little more than assistant prosecutors. Likewise, in spite of the limitations placed on habeas review by Congress, and earlier by an activist Rehnquist Supreme Court, many federal district court judges pay attention to law. In 1996, these judges, hardly known for liberal activism in criminal law, found errors so serious as to require granting the writ in five Virginia capital cases. The Fourth Circuit reinstated the death sentences in every one of them.<sup>2</sup> The record of the Supreme Court of Virginia and the Fourth Circuit, however, is one that goes beyond rubber stamp. These courts create new and innovative ways to sustain death sentences.

## II. *Two Ways to Keep the Death Train Moving*

This issue of the *Capital Defense Journal* provides current illustrations of two issues that impede application of the rule of law. The first is the hyper-technical application of procedural bars. The second is ignorance or indifference to the limits on the right to execute represented by the requirement that aggravating factors be proved.

### A. *Procedural Bars: Ho Hum*

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2. Hoke v. Netherland, 92 F.3d 1350 (4th Cir. 1996); Gray v. Netherland, 99 F.3d 158 (4th Cir. 1996); O'Dell v. Commonwealth, 95 F.3d 1214 (4th Cir. 1996); Tuggle v. Netherland, 79 F.3d 1386 (4th Cir. 1996); Stout v. Netherland, Nos. 95-4008, 95-4007, 1996 WL 496601 (4th Cir. Sept. 3, 1996). In 1997 and 1998, the Fourth Circuit reversed grants of habeas relief from the district courts in four more Virginia capital cases. Pope v. Netherland, 113 F.3d 1364 (4th Cir. 1997); Satcher v. Pruett, 126 F.3d 561 (4th Cir. 1997); Strickler v. Pruett, Nos. 97-29, 97-30, 1998 WL 391646 (4th Cir. June 17, 1998), cert. granted, 119 S. Ct. 40 (1998); Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998), cert. granted, No. 98-8384, 1999 WL 148296 (U.S. Apr. 5, 1999).

The public can hardly be expected to understand or care about the doctrines of default and waiver. Many members of our profession also appear indifferent. This is particularly regrettable because the Virginia experience is one of courts demonstrating far, far greater concern for procedural regularity than for fundamental constitutional error. People are killed on technicalities in Virginia. Let me put it this way. Suppose you went to a police station, reported that you had just witnessed a rape, and asked that someone investigate to confirm or deny that you were telling the truth and, if you were, to do something about it. Suppose you called back later to check on the investigation. You were told that, to preserve order and maximize the efficient use of police time felony complaints could not be made in person. Rather, such complaints had to come in by phone or fax. Consequently, there would be no investigation and no answer to the question of whether a rape had occurred. That essentially describes capital appellate practice before the Supreme Court of Virginia and the Fourth Circuit.

*Yeatts v. Angelone*<sup>3</sup> is a good starting point. At trial and on direct appeal, Ronald Yeatts assigned error to the trial court's failure to permit the jury to be informed that if he were sentenced to life in prison he would not be eligible for parole for thirty years.<sup>4</sup> At habeas, he made the same claim. The problem was, in the first two stages the asserted ground was the Eighth Amendment right to present mitigating evidence, unencumbered by procedural barriers.<sup>5</sup> At habeas, the claim of error was grounded in the Fourteenth Amendment right to confront the state's case for death. Thus, said the Fourth Circuit, the claim was defaulted. The court also noted, however, that the Commonwealth's claim of default was itself defaulted. Not until the claim reached the Fourth Circuit did the Commonwealth claim default. The court then went on to pave the way for Yeatts's execution. It forgave the Commonwealth's default, observing that the failure to object in district court was "unintentional," and that it really believed that it had raised the issue. Absent was any discussion of whether Yeatts's failure to include both grounds for the same objection was "unintentional."

This uneven application of the rules of the game was not Yeatts's only bizarre experience with procedural bars. Under then current Virginia habeas procedures, Yeatts had sought relief in the circuit court on a claim of ineffective assistance of counsel. The claim was dismissed without granting an evidentiary hearing. He appealed the denial of a hearing to the

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3. 166 F.3d 255 (4th Cir. 1999).

4. Yeatts's trial preceded the abolition of parole in Virginia, and the decision of the United States Supreme Court in *Simmons v. South Carolina*, 512 U.S. 154 (1994), which held that the due process right to rebut the state's case for death includes the right to inform jurors of parole ineligibility.

5. See *Lockett v. Ohio*, 438 U.S. 586 (1978); *Eddings v. Oklahoma*, 455 U.S. 104 (1982); *Mills v. Maryland*, 486 U.S. 367 (1988).

Supreme Court of Virginia. The court held that to be *insufficient* to preserve the underlying claim of ineffective assistance and ruled that it was defaulted. The Fourth Circuit bought this, disagreeing with the federal magistrate judge and the federal district court.<sup>6</sup>

The default machinations of the Supreme Court of Virginia were *almost* too much for the Fourth Circuit in *Sheppard v. Taylor*.<sup>7</sup> The state court had defaulted all of Sheppard's specific assignments of error directed at the application of the "future dangerousness" aggravator in his case because he failed also to throw in a general objection to the application of the factor as a whole.<sup>8</sup> Since this was a new twist, the Fourth Circuit felt impelled to observe that "it appears that a persuasive argument can be made that Sheppard cannot be deemed to have been apprized of the requirement in time . . . ."<sup>9</sup> The court quickly recovered, however, and stated "we need not address this issue here, though, because we conclude that the four issues either are procedurally defaulted for other reasons or lack merit."<sup>10</sup> Note well, however, that the only reason all of Sheppard's future danger claims were not flatly defaulted by the absurd holding of the Supreme Court of Virginia is that the requirement was imposed for the first time on Sheppard. From now on, defense counsel are on notice of the requirement that it is essential to throw in the general assignment of error.

*Sheppard* also puts defense counsel on notice of another useless procedural requirement. For the first time at state habeas, Sheppard made the far from frivolous claim that appellate review in Virginia, including statutorily mandated proportionality review, is meaningless.<sup>11</sup> Of course, he could not know that it was meaningless in his own case until the Supreme Court of Virginia had issued its opinion on direct appeal. Nevertheless, the Fourth Circuit upheld the Supreme Court of Virginia's finding that the claim was defaulted because it was not raised on direct appeal. Where does that leave counsel? It would appear that facial challenges to Virginia's proportionality and appellate review must be made at trial and preserved through direct appeal. Further, these deficiencies, when revealed in a particular case, must be also be preserved at the direct appeal stage. The only way to do that is by a petition for rehearing. Thus, a procedural device once thought not to be intended for routine use in every case is now an indispensable step in avoiding default. I trust all of this is very clear.

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6. The court went on to reject the merits of the claim in spite of having found it be defaulted. The court often takes this action and the reason is a mystery. Of course, it has never concluded that a defaulted claim was meritorious.

7. *Sheppard v. Taylor*, No. 98-12, 1998 WL 743663 (4th Cir. Oct. 23, 1998).

8. *Sheppard v. Commonwealth*, 464 S.E.2d 131 (Va. 1995).

9. *Sheppard*, 1998 WL 743663, at \*4.

10. *Id.*

11. For a rather plain indicator that these claims have merit, see discussion of *Payne v. Commonwealth*, 509 S.E.2d 293 (Va. 1999), *infra* notes 42-46 and accompanying text.

The issue of preserving systemic challenges to Virginia's death penalty would not be complete without noting another default trap designed to keep those challenges bottled up. In *Swisher v. Commonwealth*<sup>12</sup> and *Hedrick v. Commonwealth*,<sup>13</sup> the court continued its practice, announced in 1992 in *Jenkins v. Commonwealth*,<sup>14</sup> of not permitting a claim to be preserved by reference to trial documents. Consider how clever this scheme really is. Many of these claims have been repeatedly rejected and the only purpose of including them is to preserve the record.<sup>15</sup> In order to be preserved, they must not only be raised at trial at the appropriate time and manner, but also assigned as error and briefed. Failure at any one of these stages means default of the claim. Appellant's brief, absent permission of the court, is limited to fifty pages.<sup>16</sup> Counsel wishing to preserve what in state court will surely be "losers" must sacrifice space that would otherwise be devoted to her best issues.<sup>17</sup> Is there any legitimate reason for this requirement? No. Part of the appellate process is designation of the record on appeal. It is common and accepted in capital cases to designate the entire record. Thus, the bench brief whose argument counsel simply wishes to adopt by reference is before the court on appeal. The court simply refuses to look at it.

These cases only begin to describe the cozy cooperation of these two courts in elevating procedural regularity over justice. But I promised to rely only on opinions summarized in this issue of the *Capital Defense Journal*.

### B. All Aggravators All the Time

In addition to proof of a premeditated murder and a predicate offense or event, the law renders the accused *ineligible* for a sentence of death unless the Commonwealth can prove one of two aggravating factors beyond a reasonable doubt. The statutory language of these factors, commonly referred to as "future dangerousness" and "vileness," contains a great deal of verbiage.<sup>18</sup> In practice, however, the essence is "fear" and "loathing." The

12. *Swisher v. Commonwealth*, 506 S.E.2d 763 (Va. 1998).

13. *Hedrick v. Commonwealth*, Nos. 982055, 982056, 1999 WL 101079 (Va. Feb. 26, 1999).

14. *Jenkins v. Commonwealth*, 492 S.E.2d 131 (Va. 1997).

15. In spite of the court's advice to the contrary, consider *Kasi v. Commonwealth*, 508 S.E.2d 57 (Va. 1998), winnowing out weaker claims on appeal in *capital cases* is foolhardy. The claim that juries had to be apprized of parole ineligibility, for example, had been rejected by the Supreme Court of Virginia numerous times before the United States Supreme Court upheld it in *Simmons v. South Carolina*, 512 U.S. 154 (1994).

16. VA. SUP. CT. R. 5:26(a).

17. For our advice on combating this scam, see Alix M. Karl, Case Note, 11 CAP. DEF. J. 463 (analyzing *Swisher v. Commonwealth*, 506 S.E.2d 763, 765 (Va. 1998)); Kelly E. P. Bennett, Case Note, 11 CAP. DEF. J. 429 (analyzing *Hedrick v. Commonwealth*, Nos. 982055, 982056, 1999 WL 101079 (Va. Feb. 26, 1999)).

18. The Virginia Code provides the following:

vileness factor in particular is treated exactly like the famous United States Supreme Court quote about obscenity: "I can't define it, but I know it when I see it." That might be satisfactory. After all, why not just tell the citizen jurors that death sentences are to be reserved for "really bad" murders. If that is not sufficient guidance, they might be instructed also that the state of their stomachs after viewing autopsy and crime scene photos is a further guide. This scenario essentially describes current Virginia practice, except that those two explicit instructions are not actually given only implied.

Unfortunately, the rule of law is supposed to have something to say about this. When the United States Supreme Court permitted the death penalty to resume for some murderers,<sup>19</sup> to the dismay of many of us, it flatly prohibited death sentences for all of them.<sup>20</sup> A decade later, it reiterated that there are no circumstances of a homicide for which the legislature can create a mandatory death penalty.<sup>21</sup> So, supposedly, the legal systems of the states that wished to execute were required to find a way to choose among murderers, identifying the "worst" for the ultimate penalty. One of the approved procedures for this sorting process involved guiding the sentencer's discretion with "aggravating factors" that demonstrated an increased level of personal culpability in the slayer. In turn, one of the factors approved was Georgia's "vileness" factor. Virginia adopted this factor verbatim.

In 1980, and after, the Court set out further restrictions on the application of this vague factor. The Supreme Court of Virginia has consistently ignored and evaded those restrictions, tailoring its opinions to do whatever is necessary to shoehorn the trial events into a satisfactory application of the factors.<sup>22</sup> Approaching 140 opinions on direct appeal of death sentences, the court has yet to find a single flaw in the application of either aggravating factor. To read those opinions one would have to conclude that our trial

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In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty for death be imposed.

VA. CODE ANN. § 19.2-264.2 (Michie 1995).

19. *Gregg v. Georgia*, 428 U.S. 153 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976); *Jurek v. Texas*, 428 U.S. 262 (1976).

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

21. *Sumner v. Shuman*, 483 U.S. 66 (1987).

22. In keeping with the promise of this essay, the machinations of the Supreme Court of Virginia to preserve findings of "future dangerousness" will not be discussed here. They are not as well illustrated by the opinions in this issue as is the manipulation of the "vileness" factor. They are, however, every bit as egregious.

courts and juries are performing the difficult task of identifying the "worst" murderers *perfectly*. It is not only the gravestones of the mentally retarded, the mentally ill, and juveniles that give lie to that impression. It is the opinions themselves. They are transparently *post-hoc* justifications.

What is this law that the court consistently ignores or evades? Here is a brief outline. In *Godfrey v. Georgia*,<sup>23</sup> the United States Supreme Court held that the vague statutory language of the vileness factor was insufficient to guide sentencers in choosing among murderers. The Court went on to require that some further "narrowing construction" of the vague terms be either given to the sentencer, or applied by the appellate court. Later, the Court made it clear that not all attempts at clarifying the statutory language would satisfy the Constitution,<sup>24</sup> and that appellate courts were likewise forbidden to simply look at an "ugly" set of facts and pronounce the killing vile.<sup>25</sup>

How has Virginia reacted to the purportedly serious legal constraints upon this visceral exercise in discretion guiding? First, it has never overruled or otherwise acknowledged error in its pre-*Godfrey* holding that the statutory language was just fine, containing terms with commonly understood meanings.<sup>26</sup> In the wake of *Godfrey*, however, someone must have gotten a little nervous. References began to appear to further meanings of two of the three components of the factor: torture, depravity of mind, and aggravated battery. In *Smith v. Commonwealth*,<sup>27</sup> its initial post-reinstatement opinion validating the Virginia scheme, the Supreme Court of Virginia "defined" the latter two. Depravity of mind was said to be "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."<sup>28</sup> Aggravated battery had been said to be a battery that was "qualitatively and quantitatively . . . more culpable than the minimum necessary to accomplish an act of murder."<sup>29</sup> Torture was not defined in *Smith* and has not been since defined. Remembering that the object of this exercise is to identify killers with an enhanced degree of individual culpability, where are we? There is no torture definition. The depravity of mind definition is obviously as useless as the statutory language itself. Aggravated battery, however, might be sufficient if the court knew or cared enough to interpret and apply it as the

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23. 446 U.S. 420 (1980).

24. *Shell v. Mississippi*, 498 U.S. 1 (1990).

25. See *Maynard v. Cartwright*, 486 U.S. 356 (1998) (explicitly rejecting the argument that "a particular set of facts surrounding a murder, however shocking they might be, [are] enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty").

26. *Clark v. Commonwealth*, 257 S.E.2d 784 (Va. 1979).

27. *Smith v. Commonwealth*, 248 S.E.2d 135 (Va. 1978).

28. *Id.* at 149.

29. *Id.*

United States Supreme Court has required—that is, by focusing on both *qualitative* and *quantitative culpability*. Until the cases summarized in this issue, however, the court has managed to uphold all findings of vileness simply by a quantitative assessment of the number of shots or stab wounds. Two or more of either have sufficed to define conduct that “outrageously vile, horrible, or inhumane . . . .”

The court, of course, has never formally admitted its mechanical wound-counting exercise. Its ignorance or indifference to the purpose of the aggravator, however, was revealed in the recent case of *Reid v. Commonwealth*,<sup>30</sup> summarized in this issue.<sup>31</sup> There, discussing aggravated battery, the court denied the need for any enhanced degree of culpable mental state to support a finding that one’s conduct in committing the offense was outrageously vile, etc. Although there was uncontradicted evidence that Reid had perhaps not even the mental state required for the offense of capital murder, he inflicted a number of wounds and that was good enough to keep him on death row. In *Hedrick v. Commonwealth*,<sup>32</sup> however, the court ran into a minor problem. The victim died instantly from a single gunshot wound. Unfazed, the court decided for the first time to discuss aggravated battery in terms of qualitative culpability. It did so by opening the time frame that described “defendant’s conduct in committing the offense,” moving it back to assaults and indignities inflicted upon the victim even before the intent to kill had been formed. In *Hedrick*, the victim was shot once in the face with a shotgun.<sup>33</sup> From the discussion by the court of how this came about, it appears to have been important to the court, though the choice an imprecise weapon that leaves a gory crime scene was deemed “constitutionally irrelevant” by the *Godfrey* court.<sup>34</sup> Finally, the court’s lame attempt to distinguish *Godfrey* even reported erroneously that *Godfrey*’s weapon was a rifle.<sup>35</sup> The court also concluded, gratuitously and without discussion or explanation, *Hedrick* also “tortured” the victim.<sup>36</sup>

Apparently weary of all this jurisprudential exercise, the court in *Cherrix v. Commonwealth*<sup>37</sup> simply selected a few pieces of evidence and

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30. 506 S.E.2d 787 (Va. 1998).

31. Matthew K. Mahoney, Case Note, 11 Cap. Def. J. 457 (1999) (analyzing *Reid v. Commonwealth*, 506 S.E.2d 787 (Va. 1998)).

32. *Hedrick v. Commonwealth*, Nos. 982055, 982056, 1999 WL 101079 (Va. Feb. 26, 1999).

33. This, of course, meant highly inflammatory photographs of the victim’s face, one of which was enlarged, were shown to the jury. *Hedrick*’s appellate claim on this issue was, of course, summarily rejected with boilerplate language. *Id.*, at \*6.

34. *Godfrey v. Georgia*, 446 U.S. 420, 435 (1980).

35. *Hedrick*, 1999 WL 101079, at \*7.

36. *Id.*

37. *Cherrix v. Commonwealth*, Nos. 981798, 982063, 1999 WL 101077 (Va. Feb. 26, 1999).

declared in a conclusory fashion that they established both torture and depravity of mind. Cherrix's act of sodomy on the victim and his statement that she looked "beautiful" at the funeral home equaled depravity of mind. The sodomy at gunpoint while she begged for life constituted torture.<sup>38</sup>

The court's selective use of evidence for *post-hoc* approval of vileness findings in *Hedrick* and *Cherrix* furthers another injustice in Virginia. Notice and meaningful opportunity to defend are the foundations of due process. By requiring proof beyond a reasonable doubt of one of the aggravating factors, Virginia's capital scheme makes them every bit as much *elements* of the Commonwealth's case for death as are the elements of the offense of capital murder. Hedrick tried and failed to learn what the factor meant and to have the Commonwealth identify what evidence it considered relevant. The Supreme Court of Virginia in *Hedrick*, as well as in *Swisher v. Commonwealth*,<sup>39</sup> rebuffed this attempt to gain fundamental fairness as it has done in every other case. The court either mischaracterized the claim, as it did in *Swisher*, or says that the capital murder *indictment* tells the accused everything he needs to know. The indictment, of course, says absolutely nothing about the aggravating factors. To their credit, many trial judges order responses on this issue. When they do not, the Supreme Court of Virginia permits people to go to their deaths after a trial by ambush. They do not learn until after that trial what evidence was important to their demise.

*Cherrix* is an example. Remembering that the exercise is identifying a degree of enhanced culpability *among murders* so as to make eligible for death consideration, there are a few things Cherrix might like to have known before publication of the opinion sustaining his death sentence. In addition to knowing that the sodomy necessary to his guilt of capital murder was going to be double counted as part of both depravity of mind and torture, he might have wanted to deny or explain the statement about the victim at the funeral home. Would even the most able defense attorney reading a client's alleged confession to police figure out that it was critically important to address that part of it at trial? Virginia practice on vileness is this: The prosecutor enlarges the color photos of the mangled victim. The jury finds "vileness." The Supreme Court of Virginia does what it takes—summary rejection, mischaracterization of claims, manipulation of evidence, indifference to federal law—to sustain the finding. This is the rule of law in action? How does one go about teaching *Godfrey v. Georgia* to students in their first semester of law school? With fingers crossed behind

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38. *Id.*, at \*13.

39. *Swisher v. Commonwealth*, 506 S.E.2d 763 (Va. 1998). See also Alix M. Karl, Case Note, 11 CAP. DEF. J. 463 (1998) (analyzing *Swisher v. Commonwealth*, 506 S.E.2d 763 (Va. 1998)).

back? With an introductory statement that this law does not apply in some jurisdictions?

### III. A Third Issue

Like the Supreme Court of Virginia and the Fourth Circuit, I have been less than candid in my writing. I am going to close by briefly mentioning a *third* issue illustrating the disregard for the rule of law that has helped Virginia attain infamy as the second most prolific killer state in the modern era. A statute mandates that the Supreme Court of Virginia conduct a proportionality review of every death sentence, whether there is an appeal or not.<sup>40</sup> Part of that review is to ensure that a death sentence has not been imposed under the influence of passion or prejudice. This mandate is, of course, meaningless to the court. It has never set aside a death sentence on this basis. As emotional as one would think life and death trials might be, that is apparently not the case in Virginia. Everything is calm, rational and fair.

Also analyzed in this issue is the case of *Payne v. Commonwealth*.<sup>41</sup> Eric Payne was convicted and sentenced by a jury. He refused direct appeal so his case was before the Supreme Court of Virginia only for proportionality review. To Payne's complaint that the prosecutor had waved the bloody photographs of the victim in front of the jury while referring to Payne as a "monster" and a "predator," the court responded that this was fair comment on properly admitted evidence.<sup>42</sup> In the context of inflammatory arguments law, this was perhaps not surprising.<sup>43</sup> Payne's related claim about the trial judge and the court's response, however, is nothing short of

40. VA. CODE ANN. § 17.1-313 (Michie 1998).

41. *Id.*

42. *Id.*

43. In *Bennett v. Angelone*, 92 F.3d 1336, 1345 (4th Cir. 1996), the defendant argued that the Commonwealth's "religiously-loaded" arguments during the penalty phase were "inflammatory, irrelevant, and grossly prejudicial" in violation of his due process rights. The following statements were made by the Commonwealth's attorney:

Some will say that society shouldn't take a life because that's murder also. That's not true. Vengeance is mine saith the Lord, but later when he covered the Earth with water and only left Noah and his family and some animals to survive, when he saw the damage what [sic] had been done to the Earth, God said "I'll never do that again" and handed that sword of justice to Noah.

Noah is now the Government. Noah will make the decision who dies. "Thou shall [sic] not kill" is a prescription [sic] against an individual; it is not against Government. Because Government has a duty to protect its citizens.

*Id.* at 1346. Despite its finding the prosecutor's comments to be "objectionable and unwarranted," the court of appeals went on to hold that because of the powerful evidence of the defendant's guilt and the "[w]hat the lawyers say is not evidence" jury instruction given, "it was not sufficiently egregious to render Bennett's trial fundamentally unfair." *Id.*

amazing. Payne complained that the aforementioned argument of the prosecutor must have had the desired effect on the judge because:

[T]he court described him as a mad dog who should be put in a gunny sack with some bricks and dropped of a bridge. Payne opines that this is ample evidence that the sentence of death was imposed under the influence of passion and prejudice. We do not agree. When all of the trial court's remarks are read, it is apparent that, before imposing the death sentences, the court considered not only Payne's criminal history, but also his evidence in mitigation.<sup>44</sup>

I am confident that the Virginia General Assembly cares very little that a mockery is made of its statutory mandate. The statute was passed at a time when it was thought to be constitutionally essential.<sup>45</sup> A tiny portion of the funds wasted on capital trials might be recouped by repealing it.

#### IV. Conclusion

In 1998, after a valid claim about the racial makeup of his venire had been misstated by both the Supreme Court of Virginia and the Fourth Circuit in order to facilitate its rejection, Ronald Watkins was put to death. Treatment of his jury claim was not the only violation of the rule of law that contributed to this result. At the time of his death, Ron was a redeemed, decent person who had become like a son to me. Shortly after he was killed, I spoke to a journalist and characterized the Supreme Court of Virginia as "mediocre." For that remark I have been criticized, perhaps justly. There is no doubt that at the time I made it, I was grieving for my friend. I grieve yet. I will tell you, however, that after another year of reviewing the state of what passes for law in Virginia, I think my characterization of the court was too generous. Apart from my involvement at a personal level, however, there is still the matter of the law. Even if I had never met Ronald Watkins; even if I was not so proud to be the first member of my family to become a lawyer; even if I were not a Christian; even if I did not view the legal profession as an honorable profession; even if I did not have such a degree of reverence for the rule of law as a constraint on raw power; even if I were a civil lawyer doing insurance defense, I would be ashamed and appalled. The sloppiness and downright injustice that is death penalty "law" in Virginia today would not be tolerated and is not tolerated where mere property is at stake. The rule of law can be rescued only if those who teach and practice outside the criminal justice field come to care

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44. *Payne*, 509 S.E.2d at 299.

45. To the surprise of many, and after Virginia had patterned its modern statute on those approved in 1976 in Georgia and Texas, the United States Supreme Court held in *Pulley v. Harris*, 465 U.S. 37 (1984), that proportionality review is not essential. Meaningful appellate review, and the arbitrary application of state created rights, however, remain as Fourteenth Amendment issues.

enough about it. If they do, the death penalty may continue for awhile, but at least the Commonwealth of Virginia will no longer stand out as a national disgrace.



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# **CASE NOTES:**

**United States Supreme Court**

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