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Christina S. Pignatelli

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Residual Doubt: It's a Life Saver

Christina S. Pignatelli*

I. Introduction

One of the most fearful aspects of the death penalty is finality. There is simply no possibility of correcting a mistake. The horror of sending an innocent defendant to death is thus qualitatively different from the horror of falsely imprisoning the defendant. The belief that such an ultimate and final penalty is inappropriate where there are doubts as to guilt, even if they do not rise to the level necessary for acquittal, is a feeling that stems from common sense and fundamental notions of justice.¹

This statement of Justice Marshall's reflects the notion that when residual doubt about the innocence of a capital murderer exists, the idea of inflicting the most serious of penalties is morally and socially repugnant. Residual doubt, in fact, may be the strongest possible mitigating factor that a jury uses to determine the appropriate penalty for a capital defendant.² In Virginia, procedural deficiencies that exist in the death penalty scheme are never going to move public, judicial or legislative opinion. In contrast, residual doubt about the possibility of innocence may help to change the tide. Recent studies by the Death Penalty Information Center suggest a growing number of cases in which inmates on death rows across the country are innocent of the crimes for which they were convicted.³ In fact, with the pardoning of Earl Washington, the fallibility of Virginia's capital punishment system has been exposed.⁴ Residual, or "lingering," doubt has been

* J.D. Candidate, May 2002, Washington & Lee University School of Law; B.A., Emory University. Thanks to my parents, Dyan and Jim, and to my sister, Melissa, for their constant support.

1. *Heiney v. Florida*, 469 U.S. 920, 921-22 (1984) (Marshall, J., dissenting from denial of certiorari).

2. See Scott E. Sundby, *The Capital Jury and Absolution: The Intersection of Trial Strategy, Remorse, and the Death Penalty*, 83 CORNELL L. REV. 1557, 1583 (1998) (examining results of case study in which denial was part of defense).

3. Frank Green, *Innocent Inmates on Rise, Study Says*, RICH. TIMES-DISPATCH, July 14, 1997, at B1, available in 1997 WL 7623699.

4. Frank Green, *DNA Clears Washington; First Pardon in VA. After Death Sentence; Unrelated Convictions Keep Him In Prison*, RICH. TIMES-DISPATCH, Oct. 3, 2000, at A1,

defined as "(1) actual, reasonable doubt about guilt of any crime; (2) actual, reasonable doubt that defendant was guilty of a capital offense, as opposed to other offenses; (3) a small degree of doubt about (1) or (2), sufficient to cause the juror not to want to foreclose (by execution) the possibility that new evidence might appear in the future."⁵

This article examines the public, judicial and legislative response to the role of residual doubt. Upon examining public perception of residual doubt, it will become clear that the public agrees with Justice Marshall's statement above. In particular, the public response to questions about innocence is to restrict imposition of the death penalty until conflicts are resolved.⁶ With respect to judicial response to residual doubt, the United States Supreme Court has stated that jurors need not be instructed on residual doubt, and that individual states must determine whether it is an appropriate mitigating circumstance to argue at sentencing.⁷ Virginia has declined to allow residual doubt to function as a mitigating argument in the sentencing phase of a trial.⁸ Finally, this article will examine the Virginia state legislature's treatment of residual doubt post trial. In this section, the article looks at the following three avenues of recourse that a capital defendant, sentenced to death, has in Virginia's system: (1) the twenty-one day "new trial" rule;⁹ (2) collateral proceedings, such as a habeas petition based on a *Brady v. Maryland*¹⁰ violation,¹¹ or an actual innocence claim based on a *Herrera v.*

available in 2000 WL 5049127.

5. William S. Geimer & Jonathan Amsterdam, *Why Jurors Vote Life or Death: Operative Factors in Ten Florida Death Penalty Cases*, 15 AM. J. CRIM. L. 1, 27 (1987-88) (defining lingering doubt).

6. See *infra* notes 17-31 and accompanying text (providing further discussion of public response to residual doubt).

7. See *Franklin v. Lynaugh*, 487 U.S. 164, 173 (1988) (holding that defendant is not entitled to jury instruction on residual doubt); see also *infra* notes 32-36 and accompanying text (providing further discussion of judicial perception and Supreme Court jurisprudence on appropriate use of residual doubt).

8. See *Stockton v. Commonwealth*, 402 S.E.2d 196, 206-07 (Va. 1991) (holding that defendant not allowed to introduce evidence and argue residual doubt at new sentencing hearing); see also *infra* notes 37-56 and accompanying text (providing further examination of the Virginia judiciary's treatment of residual doubt).

9. See *infra* notes 60-65 and accompanying text (providing further discussion of the 21 day "new trial" rule).

10. 373 U.S. 83 (1963).

11. See *infra* notes 66-73 and accompanying text (discussing in further detail habeas proceedings based on a *Brady v. Maryland* claim).

*Collins*¹² proceeding,¹³ and (3) executive clemency proceedings, including commutation and pardon.¹⁴ These options will be discussed with reference to two Virginia cases in which death sentences were recently commuted to life sentences¹⁵ and one case in which a pardon was issued.¹⁶

II. Public Response to Residual Doubt

If asked whether he believed that the procedural deficiencies in Virginia's capital sentencing structure warrant a moratorium on the death penalty, the average citizen would probably say "no." Alternately, if you asked him whether the execution of a potentially innocent person warranted a moratorium, he may change his mind. A *CNN/USA Today/Gallup* poll shows that sixty-six percent of Americans favor the death penalty for a person convicted of murder, while twenty-six percent oppose it.¹⁷ However, according to a poll taken June 23-25, 2000, fifty-one percent of Americans believe the death penalty is applied fairly, while forty-one percent believe it is applied unfairly, and eight percent have no opinion.¹⁸ Further,

12. 506 U.S. 390 (1993).

13. See *infra* notes 66-73 and accompanying text (providing further discussion of habeas proceedings grounded upon actual innocence claims).

14. See *infra* notes 74-78 and accompanying text (providing further examination of Virginia's executive clemency proceedings); VA. SUP. CT. R. 1.1 (mandating that all new evidence be introduced within 21 days of judgment); *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution); *Herrera v. Collins*, 506 U.S. 390, 393 (1993) (holding that an independent claim of actual innocence does not constitute grounds for federal habeas relief); VA. CODE ANN. §§ 53.1-229, 53.1-230, 53.1-231 (Michie 2000) (providing procedures for granting executive clemency).

15. See *infra* notes 97-117 and accompanying text; *Giarratano v. Commonwealth*, 266 S.E.2d 94 (Va. 1980); *Bassette v. Thompson*, 915 F.2d 932 (4th Cir. 1990). Three other death sentences were recently commuted, but will not be discussed in this article: Joseph Payne's death sentence was commuted due to doubts about his guilt; William Aristede Saunders's was commuted based upon insufficient evidence of future dangerousness to warrant the death penalty; and Calvin E. Swann was granted a commutation based upon mental illness which made him unable to understand his crime or the impending punishment. See *Death Sentences Commuted in Virginia*, RICH. TIMES-DISPATCH, Nov. 15, 1998, at A17, available in 1998 WL 2051048.

16. See *infra* notes 79-95 and accompanying text; *Washington v. Commonwealth*, 323 S.E.2d 577 (Va. 1984).

17. Jeffrey M. Jones, *Slim Majority of Americans Think Death Penalty Applied Fairly in this Country*, June 30, 2000 (visited Mar. 21, 2001) <<http://www.gallup.com/poll/releases/pr000630.asp>>.

18. *Id.* The results were based on telephone interviews with randomly selected national

eighty percent of those polled believed that at least one innocent person has been executed within the past five years.¹⁹ Of those eighty percent, forty-one percent believed that one to five percent of those executed were innocent.²⁰ Finally, with respect to DNA tests, ninety-two percent of Americans believe that prisoners who were convicted before DNA tests were conducted should be allowed to have DNA tests now because the tests may show their innocence.²¹ These national polls suggest that while Americans are generally in favor of the death penalty, they want it to be applied fairly and are distressed by the possibility of an innocent person being executed.

Results in Virginia polls were similar. Polls taken a month after Governor James Gilmore pardoned Earl Washington of rape and capital murder²² suggest that fifty-eight percent of Virginians favor a moratorium on executions until controversies surrounding the death penalty are resolved.²³ Respondents further favored DNA testing to establish guilt or innocence by ninety-one percent to nine percent.²⁴ It is apparent from these results that the citizens of Virginia are concerned about the possibility of sending an innocent person to death.

The formation of various groups to study capital punishment and recommend solutions is further evidence of the distress that the American

samples of 1,021 adults, 18 years of age and older, conducted June 22-25, 2000, and 1,020 adults, 18 years of age and older, conducted June 23-25, 2000. *Id.* One can say with 95% confidence that the maximum error attributable to sampling and other random effects is plus or minus three percentage points. *Id.*

19. *Id.*

20. *Id.*

21. Mark Gillespie, *Americans Favor DNA "Second Chance" Testing for Convicts*, June 1, 2000 (visited Mar. 21, 2001) <<http://www.gallup.com/poll/releases/pr000601b.asp>>. The results in Gillespie's article were based on telephone interviews with a randomly selected national sample of 1,024 adults, 18 years of age and older, conducted March 17-19, 2000. *Id.* One can say with 95% confidence that the maximum error attributable to sampling and other random effects is plus or minus three percentage points. *Id.*

22. Green, *supra* note 4, at A1 (discussing pardon issued to Earl Washington in wake of DNA tests).

23. Frank Green, *Moratorium on Executions?; Poll: 58 Percent Favor Stoppage Until Resolution*, RICH. TIMES-DISPATCH, Nov. 6, 2000, at A1 (citing poll results from *Richmond Times-Dispatch/NBC12 Poll*), available in 2000 WL 5052195. The *Times-Dispatch/NBC12* poll was conducted by the research department of *Media General, Inc.* *Id.* The poll was based on telephone interviews from October 27 through November 2, 2000, with 735 Virginians saying that they were registered to vote and were likely to cast ballots in the year's election. *Id.* The survey had a margin of error of plus or minus 3.7 percentage points. *Id.* Telephone numbers were purchased from *Survey Sampling, Inc.* of Fairfield, Connecticut. *Id.* Numbers were selected by a random method to ensure reaching households with listed and unlisted telephone numbers, as well as a representative sample from each county in the state. *Id.*

24. *Id.*

people feel regarding residual doubt issues. A group called Virginians for Alternatives to the Death Penalty²⁵ has sought to encourage Governor Gilmore to impose a moratorium on executions and to issue guidelines which ensure that the death penalty is administered fairly, and the risk of executing innocent people is eliminated.²⁶ A national committee made up of death penalty proponents and opponents has also been formed to study wrongful death sentences across the country and to develop resolutions.²⁷ The "Death Penalty Initiative" was formed by The Constitution Project, a nonprofit organization that works to resolve controversial legal, governance and citizenship issues but does not take a position on the death penalty.²⁸ The former Chief Justice of the Supreme Court of Florida and "Death Penalty Initiative" chairman, Gerald Kogan, summarized the group's focus: "[What] we share is a common abhorrence that innocent people are at risk of execution because of failures of the legal system."²⁹ Senator Kenneth W. Stolle, chairman of the Virginia State Crime Commission, a capital punishment proponent, said there should be greater protections for the innocent in order to maintain the public's confidence.³⁰

These results of state and national polls undeniably show that Americans are concerned about the execution of innocent people. This residual doubt is manifested by the formation of groups to address the concern. Judges and legislators are also becoming involved. The public's perception of residual doubt is similar to that of Justice Blackmun: "[T]he execution of a person who can show he is innocent comes perilously close to simple murder."³¹

25. For more information, see the homepage of *Virginians for Alternatives to the Death Penalty* <<http://www.vadp.org>>.

26. Frank Green, *Executions Moratorium Urged*, RICH. TIMES-DISPATCH, Feb. 2, 2000, at B4 (discussing current state of moratorium movement in Virginia), available in 2000 WL 5028970.

27. Frank Green, *Bipartisan Group Targets Wrongful Death Sentences*, RICH. TIMES-DISPATCH, May 12, 2000, at A3 (examining the development of the "Death Penalty Initiative" to discuss wrongful death sentences), available in 2000 WL 5037729. For more information, see <<http://www.constitutionproject.org/dpi/index.html>>.

28. Green, *supra* note 27, at A3.

29. *Id.*

30. Rex Springston, *Evidence Proposal Relaxes Law; Crime Panel's Draft Softens 21-Day Rule*, RICH. TIMES-DISPATCH, Nov. 16, 2000, at A1 (examining draft proposal amending the 21 day rule), available in 2000 WL 5053098. Senator Stolle asked, "How do you tell people a guy is innocent and has no forum to get out of jail? You can't sell that product." *Id.*

31. Nat Hentoff, *Sentencing the Wrong Men*, WASH. POST, Aug. 29, 1998, at A17 (examining two cases in which capital murderers were found innocent and paid \$500,000 by the state of Florida), available in 1998 WL 16552544.

III. Judicial Response to Residual Doubt

The courts have long been aware of the existence and power of residual doubt and have sought to limit its use during the sentencing phase of trial. The United States Supreme Court, in *Franklin v. Lynaugh*,³² held that a defendant is not entitled to a jury instruction on residual doubt.³³ In that case, the defendant argued that he was constitutionally entitled to an instruction informing his sentencing jury that it could consider residual doubt as a basis for mitigation.³⁴ The Court rejected this argument and stated that its prior decisions did not suggest that capital defendants have a right to demand jury consideration of "residual doubt" in the sentencing phase of a capital trial.³⁵ Beyond this, the Supreme Court seems to have left it to the states to determine the role of residual doubt at sentencing.³⁶

While some states have given residual doubt a prominent role in their sentencing schemes, Virginia has declined to do so.³⁷ Virginia's sentencing statute, Virginia Code Section 19.2-264.4, suggests that residual doubt could be admissible as mitigating evidence.³⁸ The pertinent section states: "Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and *any other facts in mitigation of the offense.*"³⁹ However, through precedent, the Virginia courts have foreclosed use of this section to argue residual doubt as a fact in mitigation.

In *Frye v. Commonwealth*,⁴⁰ the Supreme Court of Virginia held that a defendant cannot contest the correctness of a guilty verdict during the sentencing phase.⁴¹ In that case, the defendant argued that the jury should consider the possibility that additional evidence might later demonstrate his innocence.⁴² The Supreme Court of Virginia, in affirming the trial court's

32. 487 U.S. 164 (1988).

33. *Franklin v. Lynaugh*, 487 U.S. 164, 173 (1988).

34. *Id.*

35. *Id.*

36. See Jennifer R. Treadway, Note, 'Residual Doubt' in Capital Sentencing: No Doubt it is an Appropriate Mitigating Factor, 43 CASE W. RES. L. REV. 215, 222 (1992) (examining the role of residual doubt as a mitigating factor at sentencing).

37. *Id.* at 222-23.

38. See VA. CODE ANN. § 19.2-264.4(B) (Michie 2000) (mandating that mitigating evidence may include circumstances surrounding offense, history and background of defendant and any other facts in mitigation of the offense).

39. *Id.* (emphasis added).

40. 345 S.E.2d 267 (Va. 1986).

41. See *Frye v. Commonwealth*, 345 S.E.2d 267, 283 (Va. 1986).

42. *Id.*

prohibition, said that "the trial court would have been remiss if it had permitted defense counsel" to argue that the jury's verdict "was wrong, that the Commonwealth had failed to prove its case against Frye."⁴³ The court further stated that "[t]he issue of guilt had been resolved in the first phase of the trial and could not properly be raised again in the penalty phase."⁴⁴

The Supreme Court of Virginia revisited the role of residual doubt at sentencing in *Stockton v. Commonwealth*.⁴⁵ Stockton contended that the trial court erred by refusing to allow argument suggesting that he did not murder the victim.⁴⁶ He claimed that failure to allow the jury to consider this evidence violated notions of fundamental fairness, and violated the Eighth and Fourteenth Amendments to the United States Constitution because it was relevant mitigating evidence.⁴⁷ The trial court excluded evidence of residual doubt because his guilt had already been decided at the guilt phase of the trial.⁴⁸ The court held that the defendant was not allowed to argue residual doubt at a new sentencing hearing.⁴⁹

More recently, in *Atkins v. Commonwealth*,⁵⁰ the defendant contended that Virginia's bifurcated jury system is constitutionally defective because he could not, at resentencing, argue residual doubt with regard to his guilt in the commission of the crime.⁵¹ The court again determined that argument about residual doubt is inappropriate.⁵²

Despite the state court's power to prohibit residual doubt as mitigation, studies show that juries use their own sense of residual doubt in determining appropriate sentences.⁵³ Residual doubt acts as an operative mitigating

43. *Id.*

44. *Id.*

45. *Stockton v. Commonwealth*, 402 S.E.2d 196 (Va. 1991).

46. *Id.* at 210.

47. *Id.* at 210-11; see U.S. CONST. amends. VIII, XIV.

48. *Stockton*, 402 S.E.2d at 210-11. The court was hesitant to allow argument about residual doubt at the sentencing phase of trial because guilt had already been determined "beyond a reasonable doubt" in the first phase of Stockton's trial. *Id.*

49. *Id.* at 206-07.

50. 534 S.E.2d 312 (Va. 2000).

51. *Atkins v. Commonwealth*, 534 S.E.2d 312, 315 (Va. 2000) (holding that defendant cannot argue residual doubt at new sentencing proceeding).

52. *Id.*

53. Arnold Barnett, *Some Distribution Patterns for the Georgia Death Sentence*, 18 U.C. DAVIS L. REV. 1327, 1338-45 (identifying three common factors appearing in murder convictions that resulted in death sentences in Georgia: (1) certainty that the defendant was the deliberate killer; (2) status of the killer in relation to the victim; and (3) heinousness of the killing). Professor Barnett found that by increasing or decreasing the first factor, the

factor when juries decide not to impose a death sentence because they are not absolutely certain of the defendant's guilt.⁵⁴ The extent to which jurors consider residual doubt may depend on whether the state court permits argument about residual doubt at sentencing. In Florida, where argument about residual doubt is prohibited, studies show that residual doubt is cited by jurors more often than any other factor in the life recommendation cases examined.⁵⁵ Thus, despite Virginia's prohibition on the use of residual doubt as mitigating evidence, jurors may independently decide to use their own residual doubt about the defendant's innocence in making their sentencing recommendation. Further, comments by capital case jurors in Virginia indicate that despite Virginia's prohibition on argument about residual doubt at sentencing, their own residual doubt impacted their decision to recommend a life sentence.⁵⁶

IV. Legislative Response to Residual Doubt

Since 1976, in Virginia, four men have had their death sentences commuted to life in prison because of residual doubt.⁵⁷ Through executive clemency proceedings, three received commutations,⁵⁸ and one was pardoned outright.⁵⁹ This section will examine the limited avenues of recourse available to these men and then will explore the facts and circumstances surrounding their commutations. Part A of this section will set out three avenues available to death-sentenced capital murderers who want to bring

likelihood of a death sentence was raised or lowered. *Id.*

54. Treadway, *supra* note 36, at 231-32.

55. Geimer & Amsterdam, *supra* note 5, at 28 (examining operative factors in jury's determination of sentence); see also *King v. State*, 514 So.2d 354, 358 (Fla. 1987) (holding that residual, or lingering doubt is not an appropriate non-statutory mitigating circumstance).

56. Comments made by life-sentence jurors at the 7th Capital Defense Workshop, Richmond, Virginia, Nov. 18-19, 1999. See also comments made by jurors on *Dateline NBC* that their residual doubts prevented them from imposing a sentence of death on George Revelle. *Dateline NBC, Search for a killer: murder before dawn* (NBC television broadcast, Feb. 26, 2001). For the full story, see <www.msnbc.com/news/535172.asp#BODY>. For results of George Revelle's appeal, see *State v. Revelle*, 957 S.W.2d 428, 434 (Mo. Ct. App. 1997) (finding that letter offered at trial was hearsay and remanding for new trial). Revelle was acquitted in his second trial in December 1998.

57. Green, *supra* note 26, at B4 (citing Henry Heller, executive director of the Virginians for Alternatives to the Death Penalty).

58. *Death Sentences Commuted in Virginia*, *supra* note 15, at A17 (reporting commutations).

59. Green, *supra* note 4, at A1 (discussing the pardon issued to Earl Washington in the wake of DNA tests).

subsequent actual innocence claims. Part B will look at three defendants who pursued these avenues and ultimately had their sentences commuted.

A. Three Options

The first avenue of recourse for convicted defendants to claim actual innocence lies in Virginia's twenty-one day "new trial" rule: "All final judgments, orders, and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended for twenty-one days after the date of entry, and no longer."⁶⁰ This stringent rule mandates that twenty-one days after judgment is final, Virginia courts are prohibited from considering new evidence.⁶¹ If new evidence suggesting actual innocence is developed after twenty-one days, the defendant cannot obtain a new trial.⁶²

The Supreme Court of Virginia has recently proposed elimination of the twenty-one day rule for defendants convicted of capital murder.⁶³ The Virginia State Crime Commission created a draft proposal, sponsored by Senator Stolle, which was amended and passed in the Senate of the Virginia General Assembly.⁶⁴ The bill, effective November 15, 2002, allows the Supreme Court of Virginia to issue a writ of actual innocence and return the case to a lower court for a new trial, or do nothing if the new evidence is unconvincing.⁶⁵

The second option for those convicted of capital murder in Virginia with an actual innocence claim is through habeas proceedings. In general, a claim made in habeas proceedings that the defendant had newly discovered evidence of actual innocence cannot be successful. Consideration of such a claim, standing alone, is foreclosed by *Herrera v. Collins*.⁶⁶ In that case, the

60. VA. SUP. CT. R. 1.1 (mandating that all new evidence be introduced within 21 days of judgment).

61. See Frank Green, *State Court's 21-Day Rule: To Amend or Not to Amend; Nov. 13 is Last Day to Offer Comments*, RICH. TIMES-DISPATCH, Nov. 6, 2000, at A1 (examination of the current state of the 21-day rule in Virginia's jurisprudence), available in 2000 WL 5052171.

62. *Id.*

63. *Id.*

64. See S.B. 1366 (Va. 2001). The bill was passed by the House of the General Assembly with 99 yeas, zero nays; it was passed in the Senate with 40 yeas, zero nays.

65. *Id.* The 2002 version of the Virginia Code Annotated §§ 19.2-327.2 - 19.2-327.6 will represent these changes.

66. *Herrera v. Collins*, 506 U.S. 390 (1993); see Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345, 355-59 (2000) (discussing

Supreme Court held that the Eighth Amendment does not bar execution of a defendant who has newly discovered evidence of actual innocence if he was sentenced to death in a trial free of constitutional error.⁶⁷ *Herrera* left open the possibility of a case in which evidence of innocence is so overwhelming that executing the defendant would be constitutionally intolerable. Such a case, which would involve much more than residual doubt, has not yet arisen.

A defendant who has residual doubt evidence can also seek habeas relief through a claim based on *Brady v. Maryland*⁶⁸ if that evidence was withheld by the prosecution and discovered after verdict.⁶⁹ The difficulty for such a defendant is that his residual doubt evidence is unlikely to meet the standard: a reasonable probability that the outcome would have been different.⁷⁰

It is also possible that a defendant might have strong evidence of actual innocence and claim that his trial did contain constitutional error. For example, in *Schlup v. Delo*,⁷¹ the defendant had both strong evidence of actual innocence and a claim that the evidence had been withheld by the prosecution in violation of *Brady*.⁷² In such a case the actual innocence evidence is tested by a lower standard: the evidence must establish sufficient doubt about his guilt to justify the conclusion that his execution would be a miscarriage of justice unless his conviction was the product of a constitutionally fair trial.⁷³ Actual innocence of this strength is the "gateway" through which an otherwise procedurally defaulted constitutional claim (the *Brady* claim) can be litigated on the merits.

In summary, evidence of actual innocence, standing alone, does not make a viable habeas claim. Residual doubt, when coupled with a *Brady* violation, makes a viable but ineffective habeas claim. Strong evidence of actual innocence, coupled with a constitutional defect, makes a viable habeas

the implications of *Herrera v. Collins*).

67. *Herrera*, 506 U.S. at 393.

68. 373 U.S. 83 (1963).

69. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that the suppression of evidence favorable to an accused upon request violates due process when the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution).

70. See *Strickler v. Greene*, 527 U.S. 263, 296 (1999) (providing that petitioner must prove that there was a reasonable probability that his conviction or sentence would have been different had the materials in question been disclosed).

71. 513 U.S. 298 (1995).

72. *Schlup v. Delo*, 513 U.S. 298, 313-16 (1995) (examining the distinction between *Herrera* claims and gateway claims).

73. *Id.*

claim with a possibility of success. Thus, none of these avenues is truly a basis for successful resolution of a claim based on residual doubt.

The final option available to convicted capital murderers is executive clemency.⁷⁴ If they are unable to succeed on the two previously discussed avenues, the twenty-one day "new trial" rule and the habeas corpus proceedings, executive clemency is their only hope. The power to grant executive clemency is vested in the Governor of the State of Virginia.⁷⁵ He may choose to commute a sentence or grant an outright pardon.⁷⁶ In the commutation proceeding, the Governor may commute a death sentence to life or a term of years.⁷⁷ If the defendant is found to be innocent of the crime, he may be pardoned and set free.⁷⁸

B. Three Case Studies

1. Earl Washington

Earl Washington ("Washington") became the first man convicted of capital murder since the death penalty was reinstated in Virginia to be cleared by DNA tests and issued a pardon.⁷⁹ Washington was convicted of the capital murder and rape of Rebecca Lynn Williams.⁸⁰ After being arrested for another offense, police questioned Washington about Williams's murder and took a confession from him.⁸¹ At trial, Washington denied his guilt, but admitted signing the written statement.⁸² The Supreme Court of Virginia affirmed the conviction and declined to disturb the rulings of the trial court or to reverse the death sentence.⁸³

In 1994, Washington sought DNA tests.⁸⁴ Based upon the results of those tests, the governor commuted Washington's sentence to life imprison-

74. See VA. CONST. art. V, § 12 (vesting the power to remit fines and penalties, to grant reprieves and pardons in the Governor of the State of Virginia).

75. *Id.*

76. See VA. CODE ANN. §§ 53.1-229, 53.1-230, 53.1-231 (Michie 2000) (providing procedures for granting executive clemency).

77. *Id.*

78. *Id.*

79. Green, *supra* note 4, at A1 (discussing the pardoning of Earl Washington).

80. Washington v. Commonwealth, 323 S.E.2d 577, 581 (Va. 1984) (describing the facts of the offense).

81. *Id.* at 582.

82. *Id.* at 583.

83. *Id.* at 589.

84. Green, *supra* note 4, at A1 (discussing the pardoning of Earl Washington).

ment.⁸⁵ In June 2000, Washington's lawyers asked for additional DNA tests and the governor consented.⁸⁶ In October 2000, Washington was cleared by DNA tests and pardoned.⁸⁷ He remained in prison serving time on an unrelated assault charge.⁸⁸ Washington was released February 12, 2001, on mandatory parole, despite the fact that his lawyers contended that had he not been convicted of capital murder, he would have been released six years before.⁸⁹ Despite his release from prison, state prison officials barred him from attending a press conference in Washington D.C. and a surprise party with his family in Northern Virginia.⁹⁰

Washington's case provides an interesting examination of the options available to convicted capital murderers. In his case, the DNA evidence was certainly not discovered within twenty-one days of sentencing, so Virginia's "new trial" rule was not an option.⁹¹ Because there was no *Brady* violation, he could not obtain a habeas proceeding on that issue.⁹² Finally, without an independent constitutional defect in his trial, he could not bring an actual innocence claim pursuant to *Herrera*⁹³ or *Schlup*.⁹⁴ Within the judicial system, Washington had no further options in which he could raise the newly discovered DNA evidence. Executive clemency was his only hope. Ultimately, executive clemency proceedings freed Washington.⁹⁵ However, not all death row inmates are so fortunate. A recent American Civil Liberties Union study stated that "those with recently discovered evidence of innocence that the governor does not find persuasive or chooses to ignore are . . . without recourse."⁹⁶ For Joseph Giarratano ("Giarratano") and

85. *Id.*

86. *Id.*

87. *Id.*

88. *Id.*

89. Anonymous, *Freedom Delayed, Justice Denied*, THE VIRGINIA-PILOT, Feb. 12, 2001, at B10 (discussing Washington's release from prison), available in 2001 WL 9710323.

90. *Id.*

91. See VA. SUP. CT. R. 1.1 (mandating that all new evidence be introduced within 21 days of judgment).

92. See *Brady v. Maryland*, 373 U.S. 83, 87 (1963) (holding that suppression of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment, irrespective of the good or bad faith of the prosecution).

93. See *Herrera v. Collins*, 506 U.S. 390, 393 (1993) (holding that an independent claim of actual innocence is not grounds for federal habeas relief).

94. See *Schlup v. Delo*, 513 U.S. 298, 313-16 (1995) (examining the distinction between *Herrera* claims and gateway claims).

95. Green, *supra* note 4, at A1.

96. Green, *supra* note 61, at A1 (examining 21 day rule).

Herbert Bassette ("Bassette"), sentence commutations leave them with no further recourse unless the governor elects to issue a pardon.⁹⁷

2. Joseph Giarratano

Giarratano pleaded not guilty by reason of insanity to the charge of capital murder and rape of a fifteen-year-old girl and the subsequent murder of the girl's mother.⁹⁸ Giarratano said he was high on drugs and that he awoke in the apartment to find the two dead.⁹⁹ The Supreme Court of Virginia upheld the conviction.¹⁰⁰ Giarratano exhausted his state habeas remedies and was denied a writ of habeas corpus in the Fourth Circuit.¹⁰¹

Giarratano's lawyers contended that evidence acquired after trial raised doubts about guilt: for example, bloody shoe prints found at the crime scene did not match Giarratano's boots; the stabbing and strangling were performed by a right handed person while Giarratano is left handed; hair found on the victim did not match Giarratano's; and, the autopsy report was changed after Giarratano's confession.¹⁰² Because Giarratano was barred from raising this evidence in the Virginia judicial system by the twenty-one day rule and in the federal system by the restrictive *Herrera* and *Brady* habeas corpus rules, he sought executive clemency.¹⁰³ On February 20, 1991, Governor L. Douglas Wilder ("Wilder") commuted the death sentence, just three days before Giarratano was to be executed.¹⁰⁴

Wilder gave no reason for his decision, but said that he had reviewed the evidence in the case.¹⁰⁵ He further stated that Giarratano should be eligible for parole in 2004 after serving twenty-five years.¹⁰⁶ Wilder did not have the power to offer Giarratano a chance at a new trial.¹⁰⁷ He left that decision to Attorney General Mary Sue Terry, who maintained that there

97. *Death Sentences Commuted in Virginia*, *supra* note 15, at A17.

98. *Giarratano v. Commonwealth*, 266 S.E.2d 94, 94 (Va. 1980) (describing the outcome of trial).

99. *Id.* at 95.

100. *Id.* at 103.

101. *Giarratano v. Procunier*, 891 F.2d 483, 485 (4th Cir. 1989).

102. *Colman McCarthy, More than a Reasonable Doubt*, WASH. POST, Feb. 16, 1991, at A27 (reporting Giarratano's request for commutation), available in 1991 WL 2155798.

103. *Id.*

104. *John F. Harris, Wilder Grants Reversal of Death Sentence; Murderer Could get Parole in 13 Years*, WASH. POST, Feb. 20, 1991, at A1 (describing circumstances of commutation), available in 1991 WL 2155201.

105. *Id.*

106. *Id.*

107. *Id.*

was no mechanism for a new trial even though Giarratano was willing to waive protection from double jeopardy in order to receive one.¹⁰⁸

3. Herbert Bassette

Herbert Bassette received similar treatment from Virginia's executive branch. Bassette was convicted of capital murder committed during the commission of a robbery while armed with a deadly weapon.¹⁰⁹ Three individuals who participated in the robbery testified that Bassette was the triggerman.¹¹⁰ Bassette denied committing the crime and posited an alibi defense.¹¹¹ He was sentenced to death and his conviction was affirmed by the Supreme Court of Virginia.¹¹² The United States Court of Appeals for the Fourth Circuit affirmed the dismissal of the habeas petition and held that Bassette received a constitutionally fair trial.¹¹³

After his conviction, Bassette's lawyers contended that there was no physical evidence or other testimony linking Bassette to the crime.¹¹⁴ They also said that an accomplice's police statement implicated another man in the murder.¹¹⁵ On January 23, 1992, the day of his scheduled execution, Wilder commuted Bassette's sentence to life imprisonment.¹¹⁶ Wilder said that he had seen evidence "that was not available to the court and the jury" which gave him doubts regarding Bassette's guilt.¹¹⁷

For Giarratano and Bassette, residual doubts about their innocence caused Governor Wilder to commute their death sentences to life imprisonment. However, because there was no evidence of absolute innocence, they were not issued pardons. They were further unable to get new trials because of the operation of the twenty-one day rule.

Virginia state officials say that these commutations are proof that the system works.¹¹⁸ Mark Miner, spokesperson for Governor Gilmore stated that the "proper precautions and safeguards are in place in Virginia to

108. *Id.*

109. *Bassette v. Thompson*, 915 F.2d 932, 935 (4th Cir. 1990).

110. *Id.*

111. *Id.*

112. *Id.* at 934.

113. *Id.* at 942.

114. Jennifer Spevacek, *Wilder's Doubts get Man Off Death Row*, WASH. TIMES, Jan. 24, 1992, at B6 (discussing commutation of Bassette's sentence), available in 1992 WL 8119612.

115. *Id.*

116. *Id.*

117. *Id.*

118. Green, *supra* note 26, at B4 (discussing the movement towards moratorium).

prevent those who are innocent from being executed."¹¹⁹ However, proper procedures are not in place to prevent those who are innocent from being imprisoned for life.¹²⁰ It appears that the public is concerned that proper procedures and safeguards are not in place in Virginia's death penalty scheme.¹²¹ Henry Heller, executive director of the Virginians for Alternatives to the Death Penalty said that:

[t]hese men would have been executed if it weren't for the diligent work of a few individuals who uncovered facts not provided to the jury at trial. While Governors Wilder and Allen should be commended for their actions, I must point out that these four men remain imprisoned and unable to present their cases for innocence in a court of law.¹²²

Eric M. Freedman, one of Earl Washington's lawyers said, "What we have here is the state of Virginia desperately doing everything possible to avoid facing up to its original, almost fatal, error and releasing an innocent person who should have been free to rejoin his family a long time ago."¹²³

V. Conclusion

Residual doubt about innocence remains a factor in public, judicial, and legislative response to the application of the death penalty. Procedural deficiencies existing in Virginia's death penalty scheme do not come close to eliciting the response that residual doubt provokes. In seeking to understand the role of residual doubt in the eyes of the public, the judiciary, and the legislature, this article explored the way each group responds to allegations of actual innocence.

119. *Id.*

120. If residual doubt is sufficient to commute, it should be sufficient for a new trial. To hold otherwise is to require defendants, who have legitimate claims of actual innocence, to serve non-paroleable life sentences. The more appropriate remedy would be a new trial in which the result would be acquittal or a new conviction. Further, such a new trial would not violate the double jeopardy clause of the Constitution. This rule would parallel the rule set out in *Tibbs v. Florida*. *Tibbs v. Florida*, 457 U.S. 31 (1982). The court in *Tibbs* held that the double jeopardy clause did not bar the retrial of a defendant whose conviction was based on a verdict that was against "the weight of the evidence" rather than on insufficient evidence. In such a case, affording the defendant a second opportunity at trial did not violate double jeopardy. A legitimate claim of actual innocence is akin to a verdict that is against the weight of the evidence. It would make sense to allow a defendant with a legitimate claim of actual innocence to receive a new trial.

121. Green, *supra* note 26, at B4.

122. *Id.*

123. Green, *supra* note 4, at A1 (discussing the pardoning of Earl Washington).

The public is particularly sensitive to residual doubt. Where it perceives that the death penalty is being imposed unfairly, or that innocent people are being executed, the public cries out for restrictions on the use of the death penalty, and even complete abolition.¹²⁴ The judiciary responds differently. The United States Supreme Court has given states the freedom to prohibit argument about residual doubt during various stages at trial. Virginia has elected to ban it completely.¹²⁵

The legislature has attempted to provide avenues, including the twenty-one day "new trial" rule, collateral habeas proceedings, and executive clemency to aid death row inmates with actual innocence claims based on evidence acquired post trial.¹²⁶ However, these avenues are restrictive and do not guarantee success.¹²⁷ This was evidenced in the three case studies, and the circumstances surrounding the eventual grants of executive clemency.¹²⁸ After this close examination, it is clear that residual doubt will continue to play a role in public, judicial and legislative perception of the capital punishment scheme.

124. See *supra* Part II.

125. See *supra* Part III.

126. See *supra* Part IV.A.

127. See *supra* Part IV.A.

128. See *supra* Part IV.B.