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H.B. 2580 (Va. 2001)

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I. Introduction

In its 2001 session the Virginia General Assembly amended two sections of the Virginia Code that have implications for capital defense practice.[1] The two amended sections should be read together.

II. Discussion

A. Virginia Code Section 19.2-163.7

Amended Code Section 19.2-163.7 requires the circuit court judge, upon request of an indigent capital defendant, to appoint qualified counsel from lists established by the Supreme Court of Virginia, the Public Defender Commission, and the Virginia State Bar.[2] The amendment to Code Section 19.2-163.7 authorizes the Supreme Court of Virginia, along with the Public Defender Commission and the Virginia State Bar, to establish lists of qualified capital defense attorneys.[3] The statute prior to the amendments placed this authority with the Public Defender Commission and the Virginia State Bar.[4]

B. Virginia Code Section 19.2-163.8

Code Section 19.2-163.8, as amended, provides standards for the creation of lists of qualified attorneys to represent both indigent and non-

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1. The amendments to Sections 19.2-163.7 and 19.2-163.8 of the Code of Virginia were introduced in the House of Delegates by Robert F. McDonnell (R), House District 84, and Samuel A. Nixon, Jr. (R), House District 27, on January 10, 2001. The bill passed in the House of Delegates on February 10, 2001, passed in the Senate on February 16, 2001, and was signed by the Speaker of the House and the President of the Senate on February 26, 2001. Governor Gilmore approved the bill on March 26, 2001. Virginia General Assembly, *Legislative Information System* (visited Apr. 4, 2001) <http://legl.state.va.us>.

2. H.B. 2580 (Va. 2001); Virginia General Assembly, *supra* note 1. Upon request of an indigent defendant accused of capital murder the trial judge "shall appoint one or more attorneys from the list or lists established by the Supreme Court and the Public Defender Commission . . . to represent the defendant at trial and, if the defendant is sentenced to death, on appeal." H.B. 2580. If, on appeal, the death sentence is affirmed, "the court shall . . . appoint counsel from the same list, or such other list as the Supreme Court and the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding." *Id.*

3. H.B. 2580.

4. *See* VA. CODE ANN. §§ 19.2-163.7, 19.2-163.8 (Michie 2000).

indigent defendants in capital cases.[5] The amendments to Section 19.2-163.8 can be summarized as the following major changes: (1) all responsibilities previously delegated to the Public Defender Commission and the Virginia State Bar under this statute are now to be handled by the Supreme Court of Virginia, the Public Defender Commission and the Virginia State Bar;[6] (2) training in forensic evidence and deoxyribonucleic acid (DNA) analysis has been added to the list of criteria for determining attorney qualifications;[7] and (3) the amendments extend the scope of the list to attorneys representing both indigent and non-indigent capital defendants.[8]

The first change authorizes the Supreme Court of Virginia to share power with the Public Defender Commission and the Virginia State Bar to create lists of qualified attorneys for capital cases, establish standards for inclusion on those lists, and evaluate an individual attorney's background and competence.[9] This power had been reserved exclusively for the Public Defender Commission and the Virginia State Bar in the prior statute.[10] The Supreme Court of Virginia has had no role in the creation and maintenance of the lists, and it is not entirely clear what additional information and expertise the Supreme Court of Virginia will provide.

The second change adds training in the analysis of current forensics evidence, including DNA testing and profile comparison, to the set of criteria for determining an attorney's qualification to represent capital defendants.[11] The previously established criteria focus primarily on an attorney's familiarity with the general criminal system and his death penalty litigation experience.[12] The new criterion appears out of place because the

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5. *See* H.B. 2580 (providing that "the Supreme Court and the Public Defender Commission, in conjunction with the Virginia State Bar, shall adopt standards for attorneys admitted to practice law in Virginia who are qualified to represent defendants charged with capital murder or sentenced to death").

6. *Id.*

7. *Id.*

8. *Id.*

9. *Id.* (providing that "[t]he Supreme Court and the Public Defender Commission, in conjunction with the Virginia State Bar, shall adopt standards" and that "[t]he Supreme Court and the Public Defender Commission shall maintain a list or lists of attorneys admitted to practice law in Virginia who are qualified to represent defendants charged with capital murder or sentenced to death . . . the Court and the Commission shall consider all relevant factors, including but not limited to . . . the Court's and the Commission's assessment of whether the attorney is competent to provide quality legal representation").

10. *See* § 19.2-163.8(A).

11. *See* H.B. 2580 (requiring the Supreme Court of Virginia and the Public Defender Commission, in establishing standards for qualification of defense attorneys in capital cases, to consider "current training in the analysis and introduction of forensic evidence, including deoxyribonucleic acid (DNA) testing and the evidence of a DNA profile comparison to prove or disprove the identity of any person").

12. *See* § 19.2-163.8(A) (listing the qualifications for capital defense attorneys). The qualifications include the following: "(i) license or permission to practice law in Virginia; (ii)

existing criteria concern an attorney's general, fundamental courtroom aptitude and litigation experience, while the new criterion requires specific knowledge of a particular substantive area of the law.[13] This is problematic because (1) the vast majority of capital cases do not involve DNA analysis (although this may change as the central DNA database grows); and (2) as a result the preference for DNA-experienced attorneys may disqualify good attorneys from involvement in capital cases that have absolutely no need for DNA analysis.

The third change, codified in Sections 19.2-163.8(A), (B), and (E), extends the reach of the lists to include attorneys qualified to represent both indigent and non-indigent capital defendants.[14] The lists created by the prior

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general background in criminal litigation; (iii) demonstrated experience in felony practice at trial and appeal; (iv) experience in death penalty litigation; (v) familiarity with the requisite court system; (vi) current training in death penalty litigation; and (vii) demonstrated proficiency and commitment to quality representation." *Id.*

13. The amended language also requires that the training be extensive enough to include "current training in the analysis and introduction of . . . evidence of a DNA profile comparison to prove or disprove the identity of any person." H.B. 2580. The motive for inclusion of the new criterion is the result of widespread interest in exculpatory DNA evidence, stemming in part from cases in which DNA evidence has determined the innocence of previously convicted defendants. In Virginia, the pardon and subsequent release of Earl Washington, Jr., who had been convicted of capital murder and sentenced to death but later exculpated by more sophisticated DNA testing, sparked new-found support for reliance on DNA evidence. Earl Washington, Jr. was sentenced to death in 1984. *Washington v. Commonwealth*, 323 S.E.2d 577, 581 (Va. 1984). Post-conviction testing of semen taken from the crime scene excluded Washington as a possible perpetrator. *See* Brooke A. Masters, *DNA Clears Inmate in 1982 Slaying*, WASH. POST, Oct. 3, 2000, at A1. In spite of this fact, every state and federal court that reviewed Washington's conviction upheld his death sentence. *See Washington*, 323 S.E.2d at 589 (affirming death sentence); *Washington v. Virginia*, 471 U.S. 1111 (1985) (mem.) (denying certiorari); *Washington v. Murray*, 952 F.2d 1472, 1475 (4th Cir. 1991) (remanding for evidentiary hearing after denial of state habeas corpus relief and summary dismissal of habeas corpus petition in federal district court); *Washington v. Murray*, 4 F.3d 1285, 1292 (4th Cir. 1993) (affirming denial of habeas corpus petition after rehearing in federal district court). Earl Washington, Jr. spent nine-and-a-half years on death row and once came within five days of execution. *See* Masters, *supra* at A1. In 1994, Governor L. Douglas Wilder commuted Washington's sentence to life in prison because the semen stains from the crime scene could not have been left by Washington or by the victim's husband. *Id.* Finally, in October of 2000, when more sophisticated DNA testing matched the semen stains to a convicted rapist, Governor James Gilmore granted Washington an absolute pardon, stating that "a jury afforded the benefit of the DNA evidence and analysis available to me today would have reached a different conclusion regarding the guilt of Earl Washington." *Id.*

14. H.B. 2580. Amended § 19.2-163.8(A) requires that the Supreme Court and Public Defender Commission "shall adopt standards for attorneys admitted to practice law in Virginia who are qualified to represent defendants charged with capital murder or sentenced to death." *Id.* The aforementioned quotation replaced the phrase "shall adopt standards for the appointment of counsel in capital cases" from the prior statute. *See* § 19.2-163.8(A) (Michie 2000). Amended § 19.2-163.8(E) changes the same material, inserting "placed on the list of qualified attorneys" in place of "placed on a list for appointment." H.B. 2580; *see* §

statute applied only to attorneys who were to be appointed to represent indigent defendants.[15]

III. Conclusion

The primary purpose of this note is to alert the attorney to changes which may cast new light on the process of defending capital cases. The amendments to Sections 19.2-163.7 and 19.2-163.8 are scheduled to take effect on January 1, 2002.[16]

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19.2-163.8(E). The purpose of these changes is to remove the requirement that these standards apply only to appointed counsel. Amended § 19.2-163.8(B) removes the word "indigent," so that the lists apply to attorneys qualified to represent both indigent and non-indigent defendants in capital cases. H.B. 2580; *see* § 19.2-163.8(B). Of course, in the case of a non-indigent defendant, using the list to deny counsel of choice would violate that defendant's Sixth Amendment right to counsel. *See* U.S. CONST. amend. VI.

15. *See* § 19.2-163.8.

16. H.B. 2580.

Virginia Capital Case Clearinghouse Verdict Forms