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A Positive First Step: The Joint Legislative Audit and Review Commission's Review of Virginia's System of Capital Punishment

I. Introduction

Although Virginia is one of thirty-eight states whose laws currently provide for the imposition of the death penalty, the eight executions conducted in the Commonwealth in 2000 accounted for nine percent of the total number of executions in the United States for that year.¹ Virginia has carried out more executions in its history than any other state and holds the second highest total since the reintroduction of capital punishment in the 1970s.² Statistics such as these have been employed by critics of capital punishment to call into question the fairness of Virginia's system of capital punishment. On November 13, 2000, the Joint Legislative Audit and Review Commission ("JLARC") unanimously approved a subcommittee report recommending a review of the capital punishment system in Virginia.³

JLARC's study of capital punishment in Virginia came in response to three principal concerns about the system. The first concern addressed was whether local Commonwealth's Attorneys were equally and fairly exercising their discretion to pursue the death penalty in capital murder cases.⁴ Opponents of capital punishment contend that prosecutorial discretion has led to arbitrary enforcement of capital crimes, whereby impermissible factors such as race are considered by prosecutors when deciding whether to seek a death sentence.⁵ The Commis

1. J. LEGIS. AUDIT AND REVIEW COMM'N, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT, at 1 (2002).

2. Virginians for Alternatives to the Death Penalty, *Virginia Death Penalty Information*, at <http://www.vadp.org/info.htm> (last visited January 28, 2002).

3. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 1.

4. *Id.*

5. See AMNESTY INTERNATIONAL, UNITED STATES OF AMERICA ARBITRARY, DISCRIMINATORY, AND CRUEL: AN AIDE-MÉMOIRE TO 25 YEARS OF JUDICIAL KILLING 15, available at [http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR510032002ENGLISH/\\$File/AMR5100302.pdf](http://web.amnesty.org/aidoc/aidoc_pdf.nsf/index/AMR510032002ENGLISH/$File/AMR5100302.pdf) (January 2002) (stating that factors such as race and prosecutorial discretion were capable of influencing outcome of capital case as much as circumstances of crime); AMERICAN CIVIL LIBERTIES UNION OF VIRGINIA, UNEQUAL, UNFAIR AND IRREVERSIBLE: THE DEATH PENALTY IN VIRGINIA 8-9, available at http://members.aol.com/ht_a/achura/DPSTUDY.doc (December 2000) (explaining results of study showing significant disparities in use of capital punishment among Commonwealth's Attorneys in Virginia); AMERICAN CIVIL LIBERTIES UNION, BRIEFING PAPER: THE DEATH PENALTY 1, available at <http://achu.org/library/DeathPenalty.pdf>

sion also addressed concerns about the fundamental fairness of Virginia's appellate review process for defendants sentenced to death.⁶ In 1995, the Virginia legislature adopted legislation that expedited the appellate review process by requiring state habeas corpus petitions to be filed directly with the Supreme Court of Virginia instead of with the circuit courts.⁷ Since this change, the average time that inmates spend on death row has decreased from ten to six years.⁸ The reduction has fueled the comments of critics who question whether the system is dismissing valid claims on appeal for technical reasons, resulting in the retention of innocent death row inmates.⁹ The final concern which gave rise to JLARC's inquiry into the death penalty was the quality of the legal representation received by capital defendants.¹⁰

In January 2001, JLARC staff initiated the review process with extensive data collection and analysis.¹¹ The Commission completed its review in the fall of 2001 and issued its final report, *Review of Virginia's System of Capital Punishment*, in January 2002.¹² The JLARC study examined the entire prosecutorial process of capital crimes in Virginia, from arrest to post-conviction sentence review.¹³ The study also attempted to examine the quality of legal representation in Virginia capital murder cases but was unable fully and adequately to address it.¹⁴ The JLARC staff attempted to survey a sample of attorneys who had represented individuals charged with capital murder, but the response rate to the survey was too low to generate reliable findings.¹⁵ The Commission recommended that more extensive research be conducted to address questions regarding the adequacy of the legal representation received by indigent individuals charged with capital offenses.¹⁶

(Spring 1999) (pointing to race and prosecutorial discretion as factors in large disparity nationwide in imposition of capital punishment).

6. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 1.

7. *Id.* at 57; see VIRGINIA CODE ANN. § 8.01-654(C)(1) (Michie 2000) (providing that Supreme Court of Virginia has exclusive jurisdiction over writs of habeas corpus filed by those sentenced to death).

8. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 1.

9. See American Civil Liberties Union of Virginia, *supra* note 5, at 23-24 (questioning application of procedural default in review of capital cases by Virginia courts); James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1858 (2000) (questioning Virginia's review procedures on basis of statistics showing Virginia to have very high execution rate and very low reversal rate).

10. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 18.

11. *Id.*

12. *Id.* at I.

13. *Id.* at 2.

14. *Id.* at 25.

15. *Id.* Only 28% of the attorneys polled responded to the survey. *Id.*

16. *Id.*

The review conducted by JLARC represents the first systematic review of Virginia's system of capital punishment by the Virginia legislature and will serve as a benchmark for future reform of capital punishment.¹⁷ For the first time, systematically-collected empirical data will enter the debate surrounding Virginia's system of capital punishment.¹⁸ The report focuses on the review's findings regarding two issues: (1) prosecutorial discretion; and (2) the appellate and post-conviction review process for capital punishment cases. The discussion below will examine these issues separately, focusing on the methodology employed by JLARC and analyzing the implications and limitations suggested by the results of the review.

II. Prosecutorial Discretion

Both statute and custom in Virginia have established a criminal justice system in which Commonwealth's Attorneys are granted nearly unbridled discretion over the prosecution of criminal charges.¹⁹ Thus, the local Commonwealth's Attorney has the sole authority to decide whether to seek a death sentence when presented with a murder case that meets the statutory elements of capital murder.²⁰ Opponents of the system contend that such broad discretion leads to an arbitrary system of enforcement which produces inconsistent and racially-charged results.²¹ Many Commonwealth's Attorneys, however, claim that broad discretion is essential in order to address adequately the unique set of circumstances that each case presents.²² JLARC conducted an extensive examination of the prosecution of capital-eligible cases in order to assess how the Commonwealth's Attorneys exercise their prosecutorial discretion and determine the impact of this discretion on Virginia's system of capital punishment.²³

A. Methodology

JLARC staff began its review of the capital punishment system by collecting data on all the murders that took place in Virginia between 1995 and 1999 to

17. *Id.* at 2; see Brooke A. Masters, *Death Penalty, Location Are Linked in Virginia Study*, WASH. POST Dec. 11, 2001, at A1, available at <http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&code=8&contentId=A22698-2001Dec10> (noting that groups on both sides of aisle praise study for its systematic and factual approach).

18. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 2.

19. *Id.* at 27.

20. *Id.*

21. *Id.* at 27; see sources cited *supra* note 5.

22. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 44. Linda D. Curtis, president of the Virginia Association of Commonwealth's Attorneys, warns against the restriction of prosecutorial discretion: "No two cases are identical. No two defendants can have the same background." See Masters, *supra* note 17.

23. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 19-23

determine which of these crimes were capital-eligible.²⁴ The Commission classified a murder arrest as capital-eligible if it resulted in a capital murder indictment or if all of the elements necessary to support a capital murder indictment were alleged to have occurred.²⁵ JLARC staff then examined the exercise of discretion by the Commonwealth's Attorney in each capital-eligible case to determine both whether the prosecutor sought a capital indictment and whether she sought death at the punishment phase.²⁶ A sample of capital-eligible cases then was selected out of this universal set in order to conduct a more complex analysis.²⁷ JLARC staff reviewed a variety of primary data sources, such as indictments, court transcripts and witness files, and constructed an electronic file for each capital-eligible case in the sample.²⁸ The cases in the sample were then subjected to a multivariate model, which applied logistic regression to examine how several factors collectively influence the Commonwealth's Attorneys' decisions.²⁹ Finally, JLARC staff divided the sample cases into three categories based on population density and grouped the cases together within each category based on similarities in the type of offense committed, evidence of guilt and existence of similar aggravating factors.³⁰ The Commission compared groups of cases across population density categories to check for consistency in treatment of similar cases.³¹ In addition to collecting information on capital-eligible cases, JLARC also conducted a mail survey in order to obtain information about the Commonwealth's Attorneys in each of Virginia's 121 jurisdictions.³²

B. Analysis of Findings

JLARC's review of prosecutorial discretion propagated two principal findings. First, the study revealed that, of all the factors examined, location had the greatest impact on the probability that prosecutors would actually seek the

24. *Id.* at 19. JLARC selected 1995 as the starting point for their review of the capital punishment system because parole was abolished in Virginia in 1995. *Id.* at 12. It has been suggested that this statutory change impacted the behavior of jurors, who were now given the option to sentence a defendant to life imprisonment without the option of parole in lieu of death, and Commonwealth's Attorneys, who could now pursue a first degree murder conviction instead of capital murder and still ensure that the defendant would remain in prison for life. *Id.*

25. *Id.* at 12-14.

26. *Id.* at 28, 34.

27. *Id.* at 19. In order to ensure geographic diversity among the sample, a cluster sampling technique was employed to select the sample of cases for the study, whereby three clusters were created based on the population density of each locality, "high-density," "medium-density" and "low-density." *Id.* at 20. A combination of critical case and random sampling techniques were used to select a subset of localities from each of the three clusters. *Id.* at 20-21.

28. *Id.* at 19.

29. *Id.* at 34, 42.

30. *Id.* at 44-45.

31. *Id.* at 45.

32. *Id.* at 23.

death penalty for capital murder cases.³³ The report also contended that neither the race of the defendant nor the race of the victim impacted the Commonwealth's Attorney's exercise of discretion in capital-eligible cases.³⁴ Although these findings are helpful in evaluating Virginia's system of capital punishment, it is important to recognize that, like all studies, the JLARC review is subject to limitations and voids, requiring further research.³⁵

The JLARC study revealed that throughout the prosecution process for capital-eligible cases, great disparity in the treatment of these cases existed between high-density jurisdictions, on the one hand, and small and medium-density jurisdictions on the other hand.³⁶ The Commonwealth's Attorneys in small and medium-density locations sought a capital murder indictment for defendants arrested for a capital-eligible crime in eighty-five percent of all capital-eligible cases in those jurisdictions between 1995-1999.³⁷ In high-density locations, defendants arrested for a capital-eligible crime were indicted for capital murder only seventy-two percent of the time during the same time period.³⁸ The study found this disparity between high-density and low-density locations to pervade each stage of the system.³⁹ An evaluation of the cases in which the prosecutor actively sought the death penalty throughout the trial revealed that persons who committed capital-eligible offenses in high-density jurisdictions faced death penalty prosecutions at a substantially lower rate than individuals who committed capital-eligible crimes in medium-density and low-density locations.⁴⁰

The study identified the location of the prosecution as a statistically significant factor in prosecutorial discretion at both the indictment and trial phases of prosecution.⁴¹ At each of those stages of the prosecution, a defendant's chance of facing a prosecution for capital murder increases if she is being prosecuted in a low or medium-density jurisdiction.⁴² JLARC evaluated the responses to mail

33. *Id.* at 29. In addition to location, the study also evaluated the impact of factors related to the strength of the evidence, the race of the defendant and victim and characteristics of the victim, such as her relationship to the defendant. *Id.* at 34.

34. *Id.* at 29.

35. *See* Masters, *supra* note 17 (reporting that "[w]e need to study the system from A to Z, and this study only covers a couple of letters," said Henry Heller, of Virginians for Alternatives to the Death Penalty").

36. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 29, 43.

37. *Id.* at 28.

38. *Id.* at 32 fig.11.

39. *Id.* at 43.

40. *Id.* Commonwealth's Attorneys in high-density jurisdictions sought the penalty of death for 16% of all individuals arrested for a capital-eligible offense, whereas their colleagues in medium- and low-density locations sought capital punishment for 45% and 34% of capital-eligible crimes respectively. *Id.* at 40.

41. *Id.* at 31, 43.

42. *Id.* at 32 fig.11, 39 fig.15.

surveys and interviews made by Commonwealth's Attorneys in high-density areas in order to identify potential explanations for the disparity between jurisdictions.⁴³ The responses revealed a perception on the part of Commonwealth's Attorneys that juries in high-density localities were reluctant to impose a death sentence.⁴⁴ Some Commonwealth's Attorneys in these areas expressed a preference to seek a first-degree murder conviction rather than face a potentially higher burden of proof imposed by reluctant juries in capital cases.⁴⁵

JLARC staff also compared cases with similar facts between the three population density categories in its search for an explanation for the disparity between jurisdictions.⁴⁶ In this way, JLARC identified three factors it believed to have a strong impact on the disparity between how Commonwealth's Attorneys exercised their prosecutorial discretion.⁴⁷ The study reported variation among Commonwealth's Attorneys regarding the consideration, if any, that should be given to the wishes of the victim's family members.⁴⁸ The second factor leading to disparity was the Commonwealth's Attorney's prediction of jury behavior.⁴⁹ Finally, JLARC identified disparity among Commonwealth's Attorneys in their philosophical beliefs about the use of capital punishment, with some prosecutors never seeking a death sentence and others believing that the punishment should be reserved for "monsters."⁵⁰ Although JLARC's discussions with Commonwealth's Attorneys and case comparisons offer insight into some of the factors that potentially impact the exercise of prosecutorial discretion, the results are merely anecdotal and further research is required to determine why defendants in low and medium-density jurisdictions are more likely to face capital charges than defendants in high-density jurisdictions. Future research should take into consideration additional factors, such as socio-economic status, and should focus more intently on identifying the reasons underlying the disparity in imposition of the death penalty among Virginia jurisdictions.⁵¹

43. *Id.* at 31.

44. *Id.*

45. *Id.*

46. *Id.* at 44.

47. *Id.* at 45, 47-49.

48. *Id.* at 45.

49. *Id.* at 47.

50. *Id.* at 48-49. Sixty percent of the surveyed Commonwealth's Attorneys always seek a capital murder indictment in capital-eligible cases and two percent never seek a capital murder indictment. *Id.* at 31.

51. See Frank Green, *Study Findings 'Muddled' ACLU Critical of State Report*, RICH. TIMES-DISPATCH, Jan. 10, 2002, at B2, available at 2002 WL 7188802 (quoting Laura LaFay, ACLU of Virginia associate director, who contended that JLARC report overlooked "many important facets of the issue," including quality of representation, police and prosecutorial misconduct and impact of socioeconomic status); Virginians for Alternatives to the Death Penalty, *Joint Legislative and Audit Review Commission of the Virginia General Assembly: Review of Virginia's System of Capital Punishment*, at <http://www.vadp.org/nl.htm> (last visited Feb. 24, 2002) (pointing out six areas not addressed by JLARC study: execution of juveniles and mentally retarded; innocence of current death row

The second principal finding of the JLARC review was that "the findings clearly indicate that local prosecutors do not base the decision of whether to seek the death penalty in capital-eligible cases on the race of the defendant or the race of the victim."⁵² Although it is true that JLARC's analysis did not find race to be a statistically significant factor in explaining prosecutorial discretion, it is important to note the limitations inherent in this finding. The review data did reveal large racial disparities.⁵³ The Commonwealth's Attorneys sought the death penalty in capital-eligible cases at a substantially higher rate for white defendants than black defendants.⁵⁴ Other figures indicated that prosecutors were over three times more likely to seek the death penalty when the victim was white.⁵⁵ Although neither of these figures are statistically significant, they do reflect the need for more research to determine the cause of these disparities. Further, JLARC's review of the capital punishment system limited its examination of race to the context of prosecutorial discretion. Thus, the study does not account for arrest rates, which result in a higher total number of black defendants facing capital-eligible charges.⁵⁶ The study also fails to evaluate the influence of race on judges and juries at the trial level.⁵⁷

The JLARC report on prosecutorial discretion adds two substantial, empirical findings to the debate surrounding Virginia's system of capital punishment. The data show that there is significant disparity in how prosecutorial discretion is exercised among localities and that neither the race of the defendant nor the race of the victim are statistically significant factors in the Commonwealth's Attorneys pursuit of the death penalty.⁵⁸ Although these findings provide valuable insight into the role of prosecutorial discretion in the capital punishment system, much more research is needed to understand better the reasons for

inmates; quality of capital defense representation; adequacy of jury selection and instructions; adequacy of collection, preservation and testing procedures of material evidence; and impact of socioeconomic status).

52. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 27.

53. *Id.* at 40, 43.

54. *Id.* at 40. Commonwealth's Attorneys, on the whole, sought the death penalty in 42% of capital-eligible cases where the defendant was white, whereas the rate was 22% for black defendants. *Id.*

55. *Id.* at 43, 42 tbl.7. Forty-four percent of all defendants who were charged with a death-eligible crime in which at least one of the victims was white faced a death prosecution, whereas only 21% of those who were charged with a crime in which the victims were black faced a death prosecution. *Id.* at 43. This disparity lost its statistical significance when the character of the victim was accounted for in the regression model. *Id.* The study contended that black victims in capital-eligible cases were often less sympathetic than white victims, because they were more likely to be involved in illegal activities such as drug use, drug dealing and prostitution. *Id.* However, the study did not offer statistical evidence for this proposition and failed to address whether race was used as a proxy for negative characteristics by Commonwealth's Attorneys, judges and juries.

56. *Id.* at 33.

57. *Id.* at 19.

58. *Id.* at 27-28.

disparities and evaluate the role of additional factors, such as socioeconomic status, not covered in this review.

III. *The Appellate and Post-Conviction Review Process for Capital Punishment Cases in Virginia*

Critics of Virginia's capital punishment system have focused considerable attention on what they consider to be a hollow system of review for capital punishment cases.⁵⁹ Statistics showing that Virginia executes its death row inmates at more than twice the rate of any other state and that the average time spent on death row in Virginia decreased by over four years between 1995 and 2000 bolster these criticisms.⁶⁰ Proponents of Virginia's system claim that these numbers reflect an efficient, well-functioning system.⁶¹ In response to these views and in an attempt to add empirical evidence to the debate, JLARC included in its review an examination of Virginia's appellate and post-conviction review process for cases in which the defendant received a death sentence.⁶²

A. *Methodology*

In order to conduct its evaluation, JLARC reviewed cases at each of the four levels of review to which capital cases are subject.⁶³ Following the imposition of a death sentence by the circuit court, direct review of the sentence by the Supreme Court of Virginia is mandated by Virginia Code Section 17.1-313.⁶⁴ JLARC staff examined all 132 capital cases that were directly appealed between 1977, the year capital punishment was reinstated in Virginia, and January 2001, the date the study commenced.⁶⁵ If a defendant's direct appeal fails, she may then file a petition of habeas corpus with the Supreme Court of Virginia.⁶⁶ Prior

59. See American Civil Liberties Union of Virginia, *supra* note 5, at 23-24 (questioning application of procedural default in review of capital cases by Virginia courts).

60. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 1, 53; see James S. Liebman et al., *supra* note 9, at 1858 (questioning Virginia's review procedures on basis of statistics showing Virginia to have very high execution rate and very low reversal rate).

61. See Frank Green, *Gilmore Says No to Delay; Moratorium Sought on Virginia Executions*, RICH. TIMES-DISPATCH, June 27, 2000, at B1, available at 2000 WL 5041395 (stating that capital punishment proponents, such as Virginia Attorney General, claim that Virginia's criminal justice system is most effective in country).

62. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 24.

63. *Id.* The four levels of appeal available to death row inmates are direct review to the Supreme Court of Virginia, state habeas corpus petitions, federal habeas corpus petitions, and petitions for clemency to the Governor of Virginia. *Id.*

64. *Id.* at 55, 57; see VA. CODE ANN. § 17.1-313 (Michie 1999) (providing that sentence of death "shall be reviewed on the record" by Supreme Court of Virginia).

65. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 56-57.

66. *Id.*; see VA. CODE ANN. § 8.01-654 (Michie 2000) (providing time and manner requirements for writs of habeas corpus).

to 1995, habeas petitions were initially filed with the circuit court.⁶⁷ Due to the difficulty and expense of obtaining the petitions filed with the circuit court, JLARC limited its review of the state habeas process to the fifty-six habeas corpus cases filed since the statutes were modified in 1995 to require state habeas corpus petitioners to be filed directly with the Supreme Court of Virginia instead of with the circuit courts.⁶⁸ Once a habeas corpus petition has been denied by the state court, a capital defendant is entitled to file a petition for habeas corpus in the federal courts.⁶⁹ The JLARC study examined all 111 habeas corpus cases filed by Virginia capital defendants in the United States District Court between 1977 and January 2001.⁷⁰ Finally, if a capital defendant's appeals and habeas corpus reviews prove unsuccessful, she may petition the Governor for executive clemency.⁷¹ JLARC staff also reviewed the sixty-three clemency petitions to which Virginia governors have responded since 1977.⁷² At each of these four levels, the cases were evaluated to determine the nature of claims raised and the basis for the ruling on each claim.⁷³ In order to evaluate the impact of procedural default, JLARC staff grouped the claims raised on direct appeal and at state and federal habeas proceedings into the following three categories: claims denied on the merits, claims procedurally defaulted and claims denied for other reasons.⁷⁴ The claims in each category were then compared to assess the impact of procedural default at each stage of review.⁷⁵

B. Analysis of Findings

The JLARC study reported two principal findings relating to the appellate and post-conviction review process for cases in which the defendant received a death sentence. The study found that procedural default did not have a substan-

67. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 56-57.

68. *Id.*; see VA. CODE ANN. § 8.01-654(C)(1) (Michie 2000) (providing that Supreme Court of Virginia has exclusive jurisdiction over writs of habeas corpus filed by those sentenced to death).

69. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 58-59.

70. *Id.* at 59.

71. *Id.* at 78.

72. *Id.* at 81.

73. *Id.* at 24.

74. *Id.* at 65-66. Claims were categorized as "denied on the merits" if the court considered the entire claim and related arguments; this category included claims that the court found to be procedurally defaulted if the court stated that the claim would have failed on the merits and included claims that were summarily denied because the issue had been thoroughly addressed in a prior opinion. *Id.* at 65. Claims were categorized as "procedurally defaulted" when the entire claim, or parts of the claim, were not evaluated pursuant to Rule 5:25. *Id.* at 65; see VA. SUP. CT. R. 5:25 (stating that claim of error must be made at trial with reasonable certainty in order for error to be assigned to ruling of trial court). Claims were categorized as "other" when they were neither decided on the merits nor procedurally defaulted, such as claims waived by the defendant and moot issues. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 66.

75. *Id.* at 53.

tial impact on the low reversal rate of death sentences on direct appeal but did have a substantial impact in state and federal habeas corpus cases.⁷⁶ Secondly, the study revealed that the narrow definition applied to proportionality review by the Supreme Court of Virginia has led to an analysis of proportionality that assures that sentencing outcomes will be upheld.⁷⁷ JLARC's findings offer a clearer vision of the review process for death cases in Virginia and the need for continued evaluation and reformation of this process.

1. *Procedural Default*

The JLARC study confirmed that the national reversal rate of sixty-eight percent for capital sentences far exceeds Virginia's reversal rate.⁷⁸ The study found that only eight percent of capital sentences in Virginia were reversed on direct appeal, and only an additional two and four percent were reversed on state and federal habeas corpus review respectively.⁷⁹ The JLARC report opined that the low reversal rate on direct appeal could not be attributed to the court's enforcement of procedural default rules.⁸⁰ Only nine percent of the claims reviewed on direct appeal were dismissed due to procedural default.⁸¹ Instead, the study attributed the low reversal rate to the court's great level of deference to the discretion of the trial court and its strict adherence to considering the evidence in a light most favorable to the Commonwealth.⁸² The study found procedural default to be a more substantial barrier to effective review of claims at state and federal habeas corpus proceedings.⁸³ Thirty-three percent of the claims raised in the state habeas corpus petitions and thirty-five percent of the claims raised in the federal habeas corpus petitions reviewed by the study were rejected on the basis of procedural default without a review of the merits.⁸⁴ The report referenced two opinions by federal judges who explicitly stated that they were forced to deny meritorious claims due to procedural default rules to demonstrate the negative implications of the high number of claims being dismissed without a discussion of the merits.⁸⁵

76. *Id.* at 54-55.

77. *Id.* at 55.

78. *Id.* at 54.

79. *Id.* at 54-55.

80. *Id.* at 66.

81. *Id.*

82. *Id.*

83. *Id.* at 54.

84. *Id.* at 55.

85. *Id.*

In evaluating JLARC's findings on the impact of procedural default rules on the appellate and post-conviction review process, it is important to recognize two important limitations. First, it is important to notice that in calculating the number of claims decided on the merits, JLARC included two types of claims which produce a misleading ratio of claims actually decided on the merits. Claims which the court found to be procedurally defaulted, but which the court said would fail on the merits, were included by JLARC as claims decided on the merits.⁸⁶ JLARC also included claims which the court summarily dismissed because the court previously had decided the issue.⁸⁷ Defendants raise these sure-to-fail claims in order to preserve the issue for federal appeal.⁸⁸ If these frivolous claims were removed from the total number of claims and the procedurally defaulted claims were all considered together, the ratio of claims that were procedurally defaulted would be much higher. Secondly, the JLARC study evaluated the quantity of claims raised in the review process but did not assess the merits of these claims.⁸⁹ Thus, the study fails to address the important issue of whether meritorious claims, however few in number, are being dismissed without an evaluation of their merit. In order to determine whether meritorious claims are being barred from review under Virginia's current system, further research is needed to assess the merits of each of the claims the court has denied without a consideration of the merits.⁹⁰

2. Proportionality Review

The JLARC study also revealed that the Supreme Court of Virginia's implementation of the proportionality review mandated by Virginia Code Section 17.1-313 acts as a rubber stamp for the trial court's sentencing decision.⁹¹ Proportionality review has not resulted in a single sentencing reversal since the Virginia General Assembly established the review in 1977.⁹² The study identified several reasons to explain why proportionality review has failed to serve as an effective safeguard against excessive or disproportionate sentencing. In conducting the proportionality review, the Supreme Court of Virginia often either examines only other cases in which the court imposed death or places extra

86. *Id.* at 65.

87. *Id.*

88. *See* 28 U.S.C. § 2264 (Supp. V 1999) (stating that, except for three narrow exceptions, district court will not consider claims of error unless they were raised and decided on merits in state court).

89. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 54.

90. *Id.* at 54, 65.

91. *Id.* at 70; *see* VA. CODE ANN. § 17.1-313(C)(2) (Michie 1999) (requiring Supreme Court of Virginia to consider whether sentence is excessive or disproportionate to penalty imposed in similar cases).

92. J. LEGIS. AUDIT AND REVIEW COMM'N, *supra* note 1, at 54.

emphasis on death sentence cases.⁹³ Since 1977, the court has limited its comparison solely to cases in which the defendant received a death sentence in forty-five percent of the cases it has reviewed.⁹⁴ Although the court has greatly increased its use of life sentence cases to conduct its proportionality review in recent years, it often gives particular emphasis to the death cases.⁹⁵ As a result of this preference for death sentence cases, the court has found the standard for proportionality review to be met so long as the circumstances associated with the case under review can be found in any other case where a sentence of death has been returned.⁹⁶

The JLARC findings regarding the appellate and post-conviction review process for capital cases in Virginia offer helpful insight into both the types of claims being raised and how the claims are being reviewed. Although the report suggests that procedural default may not be as large of a problem as some critics have indicated, it is important to note that the JLARC study did not evaluate the merits of claims which have been denied due to procedural default. Further, although the ratios of defaulted claims reported by JLARC are substantially lower than they would have been under a more suitable methodology, they still reflect a substantial number of claims whose merits are never determined in the Virginia system. In addition, the report highlights the ineffectiveness of proportionality review in the Virginia system.

IV. Conclusion

The JLARC review offers great insight into the role of prosecutorial discretion and the appellate and post-conviction review procedures in Virginia's system of capital punishment. In addition, the study provides empirical data to the debate surrounding the use of capital punishment. However, it is important to recognize that the factors and complexities of the capital system far exceed the scope of the JLARC study. The JLARC report, while an important first step, is only one step in a long path toward understanding and improving Virginia's system of capital punishment.

Herman J. Hoying

93. *Id.* at 68-69.

94. *Id.*

95. *Id.*

96. *Id.* at 70.

CASE NOTE:

United States Supreme Court
