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CHALLENGING THE FUTURE DANGEROUSNESS AGGRAVATING FACTOR

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[W]here discretion is afforded a sentencing body on a matter so grave as the determination of whether a human life should be taken or spared, that discretion must be suitably directed and limited so as to minimize the risk of wholly arbitrary and capricious action.

Gregg v. Georgia.1

Part of a State’s responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates “standardless [sentencing] discretion.” It must channel the sentence’s discretion by “clear and objective standards” that provide “specific and detailed guidance,” and that “make rationally reviewable the process for imposing a sentence of death.”

Godfrey v. Georgia.2

Gregg and Godfrey were intended to provide a basic framework by which to narrow death penalty statutes and eliminate the arbitrary and capricious implementation of the death penalty. Nevertheless, courts throughout the Commonwealth have failed to adhere to this mandate. Even though these mandated standards encompass all aspects of death penalty law, courts in particular have failed to provide specific and detailed guidance in construing the scope of the “future dangerousness” aggravating factor. This note will look at how to challenge the Commonwealth’s use of future dangerousness both as a constitutional matter and as an evidentiary matter at trial.

I. The Vagueness Of The Future Dangerousness Aggravating Factor

After the United States Supreme Court rulings in Furman v. Georgia,3 Gregg, Jurek v. Texas,4 and their progeny, Virginia created two aggravating factors to meet the constitutional requirements of narrowing the class of death eligible defendants and guiding the jury’s discretion. These aggravators consist of the “vileness” factor and the “future dangerousness” factor. The United States Supreme Court has spoken directly about the viliness factor, holding that its statutory language is unconstitutionally vague absent a sufficient narrowing construction that is communicated to the jury or applied at an appellate level.5 In striking down the viliness factor, the Court stated that “[t]here is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence.”6

These constitutional deficiencies are also present in Virginia’s application of the future dangerousness aggravating factor. Section 19.2-264.4(C) of the Virginia Code states in part that:

[[t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society . . . .7

Many of the terms used to define the aggravator have no clear meaning or scope. Furthermore, there is no narrowing construction for this amorphous language or effort at the appellate level to confine the application of this aggravating factor.

The phrase “prior history,” for instance, does not denote whether or not the statute refers to prior adjudicated or unadjudicated acts. As it currently stands, the prosecution can introduce evidence of prior acts without any requirement that such acts be adequately proven.8 Without further clarification, the Commonwealth can introduce evidence of prior criminal history that has not been proven by any standard, let alone beyond a reasonable doubt. Allowing a capital jury to hear such evidence without any meaningful controls over its veracity or relevance resembles the “standardless sentencing discretion” condemned by the Court in Godfrey.

The future dangerousness aggravator also asks the jury to determine if the defendant will be a “continuing serious threat to society.”9 What is the meaning of “serious” and “society?”

The term “serious” is defined by Webster’s New World Dictionary as “giving cause for concern.”10 Such language, however, does not clarify the meaning of this term in the constitutional sense of ensuring that juries will not apply it in an arbitrary fashion. When the Court in Godfrey dealt with “vileness,” the Court stated that “[a] person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile . . . .”11 Such a deficiency is also applicable to the term “serious.” A person of ordinary sensibility could consider every defendant convicted of a murder as a continuing serious threat to society.

Furthermore, this phrase does not instruct a jury that the threatened “society” would be that of the prison community, given that all capital murder convictions now result in a minimum punishment of life without parole.12 In other words, a jury should be instructed to consider the probability that the defendant would be a “continuing serious threat to society” within the context of the life imprisonment regimen. The absence of such a necessary construction allows a jury to define “society” in an arbitrary fashion. The jury must be told that, once convicted of a capital crime, the defendant faces either life imprisonment without parole or death.

3 408 U.S. 238 (1972).
6 Godfrey, 446 U.S. at 428.
10 Webster’s New World Dictionary 1225 (3d Ed. 1988).
11 Godfrey, 446 U.S. at 428-29.

without proving beyond a reasonable doubt that the defendant committed such acts) and case summary of Breaard, Capital Defense Digest, Vol. 7, No. 1, p. 19 (1994).
The statute's use of the term "probability" is also vague because this term has three commonly acceptable meanings, thereby failing to guide a sentencer's discretion. Mathematically speaking, a "probability" means a chance an event will occur, regardless of how remote. A "probability" has also been construed to mean a greater than 50% likelihood that an event will occur. It may also mean a high likelihood. Each of these interpretations are semantically valid, yet the sentencer is not instructed upon which construction to rely when conducting its "future dangerousness" analysis. This is contrary to the state's constitutional obligation to limit the arbitrary infliction of the death penalty.

The vagueness problem with "probability" is further heightened because of how the term is used within the statute. Section 19.2-264.4(C) of the Virginia Code provides that this "probability" must be proven by the Commonwealth "beyond a reasonable doubt." When applying the "beyond a reasonable doubt" standard, a jury is required to find a very high likelihood of something being true. So when a jury is subsequently asked to find a probability beyond a reasonable doubt, confusion can occur. Simply stated, the jury is asked to find a "very high probability" that there is a "probability" that the defendant will be dangerous in the future. As one commentator has observed, the phrase "probability beyond a reasonable doubt" — "is and can be only puzzling — even mind boggling — to a jury or to anybody." Such language reveals the inherent vagueness and unconstitutionality of the future dangerousness aggravating factor, yet juries in Virginia are consistently asked to interpret such language without guidance. Such circumstances increase the likelihood that juries will arbitrarily impose the death penalty since they must guess as to the meaning of "probability." The jury's lack of guidance is further exacerbated by the statutory verdict form given to the jury which does not even contain the "beyond a reasonable doubt" standard.

As a result, an even greater likelihood exists that an already confused jury will not use the proper standard of proof, but will instead find only a "probability" of "future dangerousness" and impose the death penalty.

The vagueness of the future dangerousness factor was raised in Mickens v. Commonwealth. The court, however, rejected the claim, observing that in a prior case it had defined "probability" as "a reasonable "probability," i.e., a likelihood substantially greater than a mere possibility," that an accused would commit violent acts in the future...

The problem is that the court did not require that the jury be given this definition, leaving them to flounder on a misleading verdict form. Accordingly, the "future dangerousness" aggravating factor is unconstitutionally vague on its face and as applied by Virginia courts.

Consequently, it is evident that the statutory language of section 19.2-264.4(C) does not meaningfully narrow the class of death eligible defendants or guide the jury's discretion as is constitutionally required for the similarly situated vileness aggravating factor. The current system is no more than an unfocused appeal to a jury's fear, thus creating an arbitrary and capricious application of the future dangerousness aggravating factor.

II. Pretrial Litigation Of The Commonwealth's Proof Of Future Dangerousness

At the penalty phase of a capital case, few restrictions apply to what the Commonwealth may introduce to prove a defendant's future dangerousness. Therefore, many acts committed and allegedly committed by the defendant, including unadjudicated acts, may be offered without even meeting a threshold of minimal reliability. Such circumstances have led to the introduction of evidence ranging from tampering with vending machines to bigamy.

Due to the amount of leeway given to the Commonwealth during sentencing, it is necessary for the Virginia attorney to begin an attack on the future dangerousness aggravating factor even before the guilt phase begins. This pre-trial litigation is currently one of the only avenues afforded a defense attorney in creating the leverage necessary to combat the future dangerousness aggravating factor.

The goal of pre-trial litigation is to create a mini-trial. The rationale behind such a concept is to apprise the Commonwealth of the defense's intent to closely scrutinize every maneuver made by the Commonwealth. This is not a delaying tactic, but part of being a zealous advocate. By approaching "future dangerousness" evidence with this attitude in mind, a defense team can begin to create the parity necessary to effectively assist a capital case defendant.

15 Id. at 4.
16 Godfrey, 446 U.S. at 428.
17 Black, supra note 13, at 4.
18 The verdict form under Va. Code Ann. § 19.2-264.4(D)(1) (1995) states that "We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) ( depravity of mind) (aggravated battery to the victim), and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.
Signed ............................ foreman" (emphasis added).
19 See, e.g., Furman, 408 U.S. at 313 (White, J., concurring); Gregg, 428 U.S. at 183 (1976); Godfrey, 446 U.S. at 428.
21 Id. at 403, 442 S.E.2d at 684.
22 Section 19.2-264.4(B) (1995) of the Virginia Code allows the jury to view evidence as to "any matter which the court deems relevant to sentencing." The only exceptions consist of reports pursuant to § 19.2-299 of the Virginia Code or any rule of court.
23 The Supreme Court of Virginia did, however, state in Chichester v. Commonwealth, 248 Va. 311, 327, 448 S.E.2d 638, 649 (1994), that "[i]f the evidence of other crimes bears sufficient marks of similarity to the crime charged to establish that the defendant is probably the common perpetrator, that evidence is relevant and admissible if its probative value outweighs its prejudicial effect," (emphasis added). Therefore, it should be argued that this is the applicable standard the Commonwealth must meet in order to introduce evidence of unadjudicated acts. For a detailed analysis of the need for a standard of some proof for unadjudicated acts see Penn, Anything Someone Else Says Can and Will Be Used Against You in a Court of Law: The Use of Unadjudicated Acts in Capital Sentencing, Capital Defense Digest, Vol. 5, No. 2, p. 31 (1993).
A. Bill of Particulars

As in any other case, a motion for a bill of particulars is paramount. This simple motion, made pursuant to section 19.2-266.2 of the Virginia Code, orders the Commonwealth to identify the grounds for the capital murder charge and upon what aggravating factors it intends to rely. Furthermore, in cases in which the Commonwealth relies on future dangerousness, section 19.2-264.3:2 requires the Commonwealth to identify what acts it will introduce to show this aggravator. The information gained from this motion can give the defense team a foundation from which to build a penalty phase defense. Additionally, this motion pins the Commonwealth down on what aggravating factors it will pursue and by what means it will prove them.

B. Discovery Motions

In addition to a bill of particulars, the defense attorney must file standard discovery motions. The twist on this standard procedure is to require discovery of the particulars of every unadjudicated act in addition to discovery for the capital offense itself. Such motions are to be made pursuant to Rule 3A:11 of the Supreme Court of Virginia, (which specifically dealt with exculpatory evidence at the capital penalty phase), and, Giglio v. United States. Additionally, as a result of the United States Supreme Court’s recent ruling in Kyles v. Whitley, Brady evidence includes evidence bearing on the thoroughness and good faith of the police investigation, including the investigation of other suspects. Kyles, therefore, may be especially valuable when dealing with unadjudicated acts since the Commonwealth has decided for some reason not to prosecute the act. If the reason for non-prosecution was insufficiency or conflicting evidence, the defense is entitled under Kyles to know the exculpatory evidence that makes the Commonwealth believe the case is weak. Therefore, when requesting discovery, the defense should consistently refer to Kyles’ expansion of Brady/Giglio and demand all exculpatory information for unadjudicated acts.

This aggressive approach forces the Commonwealth to evaluate the actual merits and pitfalls of introducing unadjudicated acts. It also gives the defense more information from which to combat the effectiveness of unadjudicated acts. If adhered to, such steps will slow the prosecutorial machine and allow the courts and the defense to keep pace.

C. Motions for an Expert to Refute Evidence of Future Dangerousness

With forensics playing such a substantial role in modern jurisprudence, the acquisition of an expert is invaluable. In a capital case, it is a necessity, because much of the evidence relied upon by the Commonwealth will be supported by an expert’s technical knowledge. By acquiring experts as part of the defense team, the defense will be able to adequately cross-examine the Commonwealth’s experts and note discrepancies in different scientific disciplines. Even the Virginia legislature has noted this need and enacted section 19.2-264.3:1 of the Virginia Code allowing for state funded experts for the defense under certain circumstances.

In addition to 3:1 experts, defense experts can also be acquired under the authority of Ake v. Oklahoma, in which the United States Supreme Court held that when the assistance of an expert is a basic tool of defense, a denial of this right would be a violation of due process. Though Ake’s scope was initially limited to mental health experts, its reach has grown considerably. Consequently, it is beneficial to use Ake

26 An example of this type of motion can be found in the Virginia Capital Case Clearinghouse Trial Manual.
28 Even though the Commonwealth is required to give the defense notice of the acts it intends to introduce to show future dangerousness, the Fourth Circuit Court of Appeals held in Gray v. Thompson, 58 F.3d 59 (4th Cir. 1995), cert. granted sub nom. Gray v. Netherland, 116 S. Ct. 690 (1996), that Gray did not have a constitutional right to some minimum level of advance notice of the particulars of these acts. See also case summary of Gray, Capital Defense Digest, Vol. 8, No. 1, p. 16 (1995). Therefore, it should be argued that in the interest of fair play and judicial efficiency, the Commonwealth must give the defense ample notice of such acts.
29 The importance of building a penalty phase defense prior to trial cannot be overstated since the time span between a conviction and the penalty phase of a trial is severely limited. See Chipperfield, Preparing Mitigation Prior To Guilt Phase, Capital Defense Digest, Vol. 1, No. 2, p. 19 (1989).
30 An example of these types of motions can be seen in the Virginia Capital Case Clearinghouse Trial Manual.
33 405 U.S. 150 (1972).
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38 Some examples of experts that can prove beneficial in combating future dangerousness consist of mental health, ballistic and fingerprint experts, chemists. Extremely helpful may be experts who can explain how studies have shown that future dangerousness can be reliably predicted especially for those convicted of capital homicide. After acquiring information pursuant to these types of requests and motions, an attack can be made on the future dangerousness aggravating factor through motions in limine.

D. Motions in Limine

Motions in limine should first be utilized to attack the relevancy of any acts used to show future dangerousness. Second, they should confront the prejudicial nature of such evidence. Through such a motion, the defense team can force the Commonwealth to more fully articulate its reasons for using these acts to show future dangerousness. Such a confrontation helps reveal the particularities of these acts and forces the Commonwealth to reexamine its case in aggravation.

In dealing with the suppression of unadjudicated acts, the defense should consistently stress the veracity problems of such evidence. As noted earlier, the lack of any minimal standards of proof concerning unadjudicated acts seems to run contrary to the requirement of guided sentencing discretion. It is necessary that these motions be made pursuant to the defendant’s Sixth and Fourteenth Amendment rights in order to preserve these issues in case of a federal appeal.

Moreover, by challenging unadjudicated acts pre-trial, the trial judge is made aware of the Commonwealth’s intended use of irrelevant, prejudicial and unproven information that may be unconstitutional. The Commonwealth, for example, in the past has introduced alleged acts such as grave robbing, reckless driving, and a double homicide. It is the defense’s responsibility to remind courts and the prosecution to adhere to the Gregg/Godfrey mandate.

E. Motions to Define “Future Dangerousness” Language

By way of either motions for clarification or jury instructions, the defense should request that the court bring meaning to the terms used in section 19.2-264.4(C) of the Virginia Code. Each motion should refer to the Gregg/Godfrey language, specifically noting the requirement for “clear and objective standards” that provide “specific and detailed guidance” for the jury. These motions should emphasize the definitional problems of the statute and possible solutions to remedy the situation. Such remedies should reflect the need to define “probability” in relation to “beyond a reasonable doubt,” as well as the scope of “prior history” and the meaning of “continuing serious threat to society.” Only by forcing the court to deal with these definitional problems, can the defense attorney begin to bring meaning to the amorphous language of Virginia death penalty law.

III. Conclusion

The meaning and application of the future dangerousness aggravating factor has fallen far short of the Gregg/Godfrey mandate. Nevertheless, the Commonwealth of Virginia has continued to ignore the fundamental flaws inherent in the statutory scheme of Virginia death penalty law. In essence, Virginia’s machinery of death has continued to operate without guidance or repair. As a result, the defense attorney may be the only means by which the arbitrary and capricious implementation of the death penalty can truly be avoided.

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38 An example of this type of motion can be seen in the Virginia Capital Case Clearinghouse Trial Manual.
39 See infra note 40. For the names of experts on the inability to predict future dangerousness, contact the Clearinghouse.
40 Fry v. Commonwealth, 250 Va. 413, 417, 463 S.E.2d 433, 435 (1995). A motion in limine would stress that evidence of grave robbing is highly inflammatory, yet is a non-violent crime and is not probative of the defendant’s danger to the community.
41 Roach v. Commonwealth, 1996 WL 88107, *3 (Va.). A motion in limine would severely question how reckless driving is probative of the defendant’s future dangerousness.
42 Gray v. Thompson, 58 F.3d 59 (4th Cir. 1995), cert. granted sub. nom. Gray v. Netherland, 116 S. Ct. 690 (1996). In Gray, the prosecutor introduced evidence of an unadjudicated double homicide without adequate notice or revelation that someone else was the prime suspect.