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"LIFE" = LIFE: CORRECTING JUROR MISCONCEPTIONS

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I. Introduction

In 1994, the Virginia legislature abolished parole for capital offenses committed after January 1, 1995.1 However, a number of studies have shown that the average layperson believes that a capital defendant, if sentenced to life imprisonment, will serve only a few years in prison before being released on parole.2 In order to combat such misconceptions, it is essential that defense counsel introduce evidence of a defendant’s parole ineligibility at trial. Parole ineligibility evidence may be introduced for two purposes: 1) to rebut evidence of future dangerousness, and 2) to mitigate the offense.

In Simmons v. South Carolina,3 the United States Supreme Court explicitly recognized that a defendant has a constitutional right to introduce evidence of his or her parole ineligibility to rebut evidence of future dangerousness offered by the prosecution. However, even when the Commonwealth does not rely specifically on the future dangerousness aggravating factor, defense counsel in Virginia should argue that the prosecution’s evidence of future dangerousness is unconstitutionally excessive.4

II. The Supreme Court of Virginia and Parole Ineligibility

The Supreme Court of Virginia only reviews cases that resulted in capital convictions, life cases that were based on similar fact patterns but were not prosecuted as capital are excluded. Therefore, relevant life cases are taken out of proportionality review, skewing the review in favor of death. Moreover, the due process concerns addressed by the district court in Harris and Justice Utter’s dissent in Brett arguably apply to the Virginia statute.

V. Conclusion

Although it is unlikely that the Supreme Court of Virginia will follow the lead of Washington and expand the universe of cases to include those cases that could have been prosecuted as capital but were not, defense counsel should still make the most of what the Virginia statute and case law requires. There are two ways to accomplish this.

First, if counsel is presented with a capital case in which a sentence of death is clearly excessive, he or she should prepare an exhibit of cases involving similar fact patterns that did not result in a sentence of death. This exhibit should be included with a motion to quash the capital indictment and should be based on the inherent proportionality requirement contained within the Eighth Amendment prohibition against cruel and unusual punishment. This is beneficial for at least two reasons. It raises the proportionality issue at the trial level which could possibly result in getting death out of the case. The exhibit also provides a ready-made universe of cases that the Supreme Court of Virginia may be willing to address on mandatory review.

Secondly, counsel should prepare an appendix to the appellant’s brief including other capital cases which demonstrate the excessiveness of a sentence of death. By doing this, the appendix becomes part of the record that will be reviewed by the federal courts in determining the adequacy of the Supreme Court of Virginia’s appellate review.

Regardless of which method is appropriate in the defendant’s situation, it is advisable that defense counsel play an active role in proportionality review. Otherwise, it is a virtual guarantee that the Supreme Court of Virginia will ignore its statutory duty to ensure that the defendant’s sentence of death is proportional.

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1 Va. Code § 53.1-165.1 (Supp. 1994). In pertinent part, § 53.1-165.1 provides that “[a]ny person sentenced to a term of incarceration for a felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense.”

2 See infra notes 5-6 and accompanying text.

ousness, and because juries will inevitably consider future dangerous-
ness when making the sentencing decision, and (2) the Eighth Amend-
ment right to introduce any relevant evidence in mitigation of the offense,
based upon the constitutional concerns for individualized sentencing
decisions and reliability in such decisions.

II. A Bit of Background

A. About Juror Misconceptions: What Does a “Life” Sentence Really Mean?

After finding a defendant guilty of a capital offense, a Virginia jury
must decide whether to sentence the defendant to death or to “life” in
prison. A juror’s awareness about a defendant’s eligibility for parole can
have a profound effect on the sentence that it imposes on the defendant.
Researchers have found that the number of years a jury believes a
defendant will actually serve if sentenced to life is a vital factor in the
jury’s decision to choose life imprisonment instead of the death penalty.

Studies have also demonstrated that potential jurors may labor
under misconceptions regarding parole eligibility. For example, a
comprehensive survey of the residents of Prince Edward County, Vir-
ginia, revealed that such residents believed that a capital defendant
sentenced to life imprisonment would serve only ten years in prison
before being released on parole. Such juror confusion is especially dis-
puting in the light of the numerous instances in which Virginia juries have interrupted their
deliberations to ask the trial court for clarification on the meaning of “life
imprisonment,” and the trial court has refused to directly answer their
question. Rather, in response to such juror questions, the court has
usually asserted that what might happen in the future “should be of no
concern” to them. This disturbing phenomenon is not particular to
Virginia juries. For example, the South Carolina jury in Simmons itself
sent a note to the judge asking if a life sentence carried with it the
possibility of parole. Furthermore, a survey of all Georgia capital cases
in which a death sentence was imposed from 1973 to 1990 indicated that
Georgia sentencing juries asked questions about the defendant’s poten-
tial parole eligibility on a life sentence in twenty-five percent of the
cases. Because juries are not necessarily informed of their right to ask
questions, the survey results likely underestimate the extent of juror
concern about parole eligibility in capital cases. As noted by one commen-
tator, “[i]t cannot be said . . . that the possibility of parole is not
being considered in those cases where a question is not posed. . . . It
appears likely that in all but the most extraordinarily heinous capital
case, parole is a factor in the jury’s deliberations.”

Prior to Simmons, the United States Supreme Court provided little
guidance as to what parole information was proper for a jury to consider.
Although common sense might indicate that a jury should always be
informed of a defendant’s parole eligibility, the Supreme Court generally
left this determination to the states, thereby implicitly allowing State
trial courts to evade juror questions regarding what “life” imprisonment
really means. It was in the face of such juror confusion and trial court
evasion that the Supreme Court decided Simmons v. South Carolina.

B. Simmons v. South Carolina

Simmons was charged with the first-degree murder of an elderly
woman. Under South Carolina law, Simmons was ineligible for parole
if convicted because he had confessed to sexually and physically assault-
ing elderly women on three prior occasions. The jury convicted Simmons
of first-degree murder, thereby rendering him ineligible for parole.

S.E.2d 815, 836 (1985); Peterson v. Commonwealth, 225 Va. 289, 296-
201, 214, 257 S.E.2d 784, 792 (1979); Stumper v. Commonwealth, 220
Va. 260, 278, 257 S.E.2d 808, 821 (1979); Jones v. Commonwealth,

8 See infra note 15 and accompanying text.

9 Lane, “Is There Life Without Parole?”: A Capital Defendant’s Right To A Meaningful Alternative Sentence, 26 Loy. L.A. L. Rev. 327,
335 (1993). This study involved the review of every Georgia trial during
the 17-year period in which a death sentence was returned by a jury, and
for which transcripts were available. Specifically, of the 280 trials
reviewed, 70 of the resulting death sentences were returned following
jury questions to the court regarding the nature of the life sentence and
the possibility of release on parole. Id. at 335-36.

10 Lane, 26 Loy. L.A. L. Rev. at 336 (quoting Paduano and Smith,
Deathly Errors: Juror Misperceptions Concerning Parole in the Imposi-
(recounting study of potential Georgia capital jurors in which over two-thirds indicated that they would be more likely
to impose a sentence of life if assured that “life” meant at least twenty-
five years).

instruction that informed jurors of the California governor’s power to
commute a life sentence without possibility of parole to a lesser sentence
that included the possibility of parole). As the Court acknowledged in
Simmons, Ramos is generally cited for the proposition that the Court will
generally “[d]efer to a State’s determination as to what a jury should and
should not be told about sentencing.” Simmons, 512 U.S. at 156.

12 Simmons, 512 U.S. at 156.
During the sentencing phase, the prosecutor urged the jury to consider Simmons' future dangerousness in deciding his punishment. Specifically, the prosecutor argued that the "question for the jury...was 'what to do with [petitioner] now that he is in our midst.'" He added that a death sentence "would be a response of society to someone who is a threat. Your verdict will be an act of self-defense."\(^\text{13}\) Simmons' counsel requested a jury instruction explaining that a life sentence meant that Simmons could not be released on parole, but the judge refused.\(^\text{14}\)

After ninety minutes of deliberation, the jury sent a note to the judge asking: "Does the imposition of a life sentence carry with it the possibility of parole?" The judge replied that parole was not an issue for the jury to consider and that "[t]he terms life imprisonment and death sentence are to be understood in their plain[sic] and ordinary meaning." Twenty-five minutes later, the jury returned a sentence of death.\(^\text{15}\)

Writing for a plurality, Justice Blackmun overturned Simmons' conviction on Fourteenth Amendment due process grounds, stating that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible."\(^\text{16}\) In so holding, the plurality concluded that Simmons had been sentenced to death on the basis of information which he had no opportunity to "deny or explain" in violation of the due process clause and the principles enunciated in \textit{Gardner v. Florida}\(^\text{17}\) and \textit{Skipper v. South Carolina}.\(^\text{18}\)

Justice Blackmun reasoned that Simmons was sentenced to death, at least in part, on the basis of the prosecution's future dangerousness arguments which the defendant had no opportunity to rebut.\(^\text{19}\)

\section*{C. Post-Simmons Cases in Virginia}

For offenses committed after January 1, 1995, the Supreme Court of Virginia has recognized that \textit{Simmons} requires jury instructions on parole ineligibility whenever future dangerousness is "an issue in the sentencing phase" of a capital murder case.\(^\text{20}\) However, it appears that future dangerousness is only "an issue" to the Supreme Court of Virginia when the Commonwealth relies on the future dangerousness aggravating factor in making its case for death. Thus far, the court has acknowledged the necessity of a \textit{Simmons} instruction only in cases where the prosecution has sought and secured a death sentence on the basis of future dangerousness.

\section*{III. Extending Simmons to Cases Where the Commonwealth Does Not Specifically Rely on Future Dangerousness}

\textit{Simmons} stands for the proposition that a defendant has a Fourteenth Amendment due process right to rebut the Commonwealth's case for death.\(^\text{21}\) Even when the Commonwealth does not specifically rely on the future dangerousness aggravating factor in making its case for death, defense counsel in Virginia should argue that the defendant retains his or her due process right to introduce evidence of parole ineligibility to rebut the Commonwealth's case for death on two bases: 1) a defendant's potential for future dangerousness is always an implicit aggravating factor when a death sentence is being considered, and 2) any evidence used to show vileness will inevitably impress future dangerousness upon the jury.

\subsection*{A. Future Dangerousness is Always a Factor in Sentencing}

As community members themselves, jurors will be instinctively concerned that a defendant will be a threat to society. Even where the state asserts a reliance upon another predicate, such as vileness, a jury choosing between a prison sentence and a death sentence will invariably focus upon whether the defendant will continue to commit violent crimes if released from prison. Parole eligibility is a factor very much on the minds of capital juries, and it often forms the basis of their sentencing decisions.\(^\text{22}\) As such, the possibility of parole from a life sentence—or at least the belief in such a possibility—operates as a silent aggravating circumstance in many capital sentencing proceedings, and often may be the decisive factor underlying a jury's decision to sentence a defendant to death.

Given that sentencing jurors will inevitably consider the propensity and ability of the defendant to commit future crimes regardless of whether the Commonwealth specifically asks them to find future dangerousness, defense counsel must vigorously argue that the defendant has a Fourteenth Amendment due process right to rebut such jury considerations of future dangerousness. Support for this argument is found in \textit{Simmons} itself, where future dangerousness was not a statutory aggravating factor necessary to establish death eligibility but the Court found that it became an issue through the remarks of the prosecutor. Thus, the direct command of \textit{Simmons} is that information regarding parole should be allowed whenever future danger is an issue, not only when it is formally relied upon as an aggravating factor.\(^\text{23}\)

\subsection*{B. Vileness and Future Dangerousness Predicates are Inextricably Intertwoven}

In construing Virginia Code Section 19.2-264.4(C),\(^\text{24}\) the Supreme Court of Virginia has recognized that the future dangerousness and

\begin{itemize}
  \item[\textbf{21}] Significantly, unlike the Virginia sentencing scheme, "future dangerousness" is not a statutory aggravating factor in South Carolina. In \textit{Simmons}, the prosecutor made only generalized arguments about Simmons' future dangerousness; he did not explicitly argue to the jury that Simmons would kill again if they did not give him the death penalty.\(^\text{22}\) See \textit{supra} notes 5-9 and accompanying text.
  \item[\textbf{22}] Thus, \textit{Simmons} is arguably applicable in any case where the prosecution presents evidence of the defendant's past crimes, even if the Commonwealth has not chosen to rely on future dangerousness as an aggravating factor.
  \item[\textbf{23}] Va. Code § 19.2-264.4(C) provides 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
vileness predicates are inextricably interwoven by concluding that evidence which is used to show vileness may also be relied upon in finding future dangerousness. In *Edmonds v. Commonwealth*,

for example, the Supreme Court of Virginia stated that, in determining future dangerousness, the factfinder may rely upon “the circumstances surrounding the commission of the offense” and the “heinousness of the crime.”

In addition to permitting the jury to consider the circumstances surrounding the crime along with other evidence in finding future dangerousness, the Supreme Court of Virginia has gone one step further, holding that a finding of future dangerousness may be based solely upon the circumstances surrounding the commission of the crime. In *Roach v. Commonwealth*,

for example, the court upheld a death sentence after striking the vileness predicate for insufficient evidence. In so doing, the court emphasized that the facts and circumstances surrounding the murder alone may be sufficient to support a finding of future dangerousness, even when those same facts are insufficient to support a finding of vileness.

Thus, the Commonwealth may rely upon “vileness” evidence to convince the jury that the defendant will be dangerous, because, as applied by the Supreme Court of Virginia, the future dangerousness aggravator explicitly has a vileness component. Given such precedent, defense counsel should argue that the defendant retains his or her Fourteenth Amendment due process right to rebut the Commonwealth’s case for death—and thereby has the right to present evidence of his or her parole ineligibility—even if the Commonwealth chooses only to present evidence related to vileness, because the evidence used to show vileness will inevitably impress future dangerousness upon the jury. After all, how can a jury, which is asked to judge whether a defendant who acted with “depravity of mind” in a manner that was “outrageously vile, horrible or inhuman,” be expected to disregard whether such a person would pose a future threat?

IV. Eighth Amendment Right to Introduce Mitigating Evidence Includes Evidence of Parole Ineligibility

In *Jurek v. Texas*,

the United States Supreme Court held that in order to comport with the individualized sentencing determination as required by the Eighth and Fourteenth Amendments,

[a] jury must be allowed to consider on the basis of all relevant evidence not only why a death sentence should be imposed, but also why it should not be imposed.

In *Lockett v. Ohio*,

the Court took its holding in *Jurek* a step further, establishing that a defendant’s right to present mitigating evidence in the penalty phase is guaranteed by the Eighth Amendment.

In an oft-quoted passage, the *Lockett* Court stated that

the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.

*Lockett* and its progeny explicitly prohibit states from “limiting the sentencer's consideration of any relevant circumstance that could cause it to decline to impose the death penalty.”

Under *Lockett*, then, a state statutory scheme must allow the sentencer to hear, consider, and give full effect to all relevant mitigating evidence, a mandate which is satisfied by the language of Virginia Code Section 19.2-264.4(B), as well as the cases interpreting this statute.

The only limitation imposed by the Supreme Court on mitigating evidence is that it not be “[i]relevant evidence concerning other persons, crimes, and events [that are] completely distinct.”

This limitation does not prohibit parole ineligibility evidence because such evidence is relevant under *Lockett*. First, in its determination of the appropriate penalty, a jury would be aided by information which accurately de-

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31 *Jurek*, 428 U.S. at 271.
33 438 U.S. at 604.
34 438 U.S. at 604 (emphasis in original).
36 *Va. Code Ann. § 19.2-264.4(B)* provides, in relevant part “evidence which may be admissible . . . may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: [defendant has no significant criminal history; capital offense was committed while defendant under extreme mental disturbance/distress; victim was a participant in/consent to the defendant’s conduct; insanity of the defendant at time of offense; age of defendant; or mental retardation of defendant].” (emphasis added).
37 See, e.g., *Briley v. Bass*, 750 F.2d 1238 (4th Cir. 1984), *cert. denied*, 470 U.S. 1088 (1985) (holding that although section 264.4(B) lists five nonexclusive mitigating circumstances, the defense is permitted to introduce any evidence relevant to the penalty decision, including the circumstances surrounding the offense, the history and背景 of the defendant, and other facts in mitigation of the offense).
38 *Lockett*, 438 U.S. at 604.
scribes the legal and practical effects of a life sentence, thereby making the existence of an appropriate alternative sentence a relevant mitigating factor. Capital juries have often evidenced their desire for accurate information about parole eligibility by interrupting their sentencing deliberations to inquire of the judge what a “life” sentence really means. 39

Second, the parole eligibility of a capital defendant is undoubtedly a relevant mitigating factor relating to the defendant’s offense. A life sentence without the possibility of parole is a severe and adequate punishment for the defendant’s offense, but the jury may not render a life sentence unless it knows that the defendant is never eligible for parole. Furthermore, such evidence is relevant because it counters common juror misconceptions concerning the length of life imprisonment. 40

Third, evidence of parole ineligibility is relevant because it mitigates a death sentence by providing affirmative evidence that the defendant does not pose a future threat to society. In Skipper v. South Carolina, 41 the United States Supreme Court explicitly recognized that evidence of a defendant’s lack of future dangerousness qualifies as mitigation in the penalty phase of a trial. 42 Because incarceration substantially reduces a defendant’s future dangerousness to society, such evidence must be considered as mitigating evidence which may not be excluded from the sentencer’s consideration. 43

Thus far, no court has found parole ineligibility to be irrelevant as mitigating evidence under Lockett. Rather, the courts that have applied Lockett to exclude evidence as irrelevant to “any aspect of defendant’s character or record” or to the “circumstances of the offense” have excluded the following types of evidence: the effect of a defendant’s character or record; 44 testimony regarding defendant’s dyslexia; 45 testimony by the victim’s sister that she did not wish the jury to impose the death penalty; 46 evidence of a plea bargain and sentencing agreement between the State and a defendant; 47 and evidence that a co-defendant was ineligible for the death penalty. 48 Thus far, the courts have refused to admit evidence of parole eligibility under Simmons only in cases where the defendant is not technically ineligible for parole. 49

On the other hand, no court has explicitly held that evidence of parole ineligibility is constitutionally relevant mitigating evidence under the principles of Lockett. In other words, no court has taken the next step after Simmons to hold that parole ineligibility evidence is relevant mitigating evidence when the prosecution chooses not to rely on or to raise future dangerousness. However, in a somewhat obscure footnote in Turner v. Williams, 50 the Court of Appeals for the Fourth Circuit stated that

The Supreme Court . . . has made clear that a sentencer may not be precluded from considering, and therefore basing a life sentence on, any mitigating evidence—even when there is no direct relationship between that evidence and the established aggravating factor(s). 51

Although the evidence at issue in Turner had nothing to do with parole eligibility, defense counsel in Virginia should employ the Turner footnote to argue that parole ineligibility evidence constitutes relevant mitigating evidence under Lockett, regardless of whether there is a direct relationship between that evidence and the established aggravating factor—in this instance, vileness.

Thus, even when the Commonwealth does not purport to rely upon future dangerousness as an aggravating factor, defense counsel should argue that the defendant has a right to introduce evidence of parole ineligibility as a constitutionally relevant mitigating factor pursuant to the principles of Lockett, its progeny, the Fourth Circuit’s interpretation of Lockett, and the language and interpretation of Virginia Code Section 19.2-264.4(B).

V. Eighth Amendment Requirement of Heightened Reliability Necessitates the Introduction of Parole Ineligibility Evidence

Prior to 1972, capital sentencers were allowed unbridled discretion to impose the death penalty once the defendant’s guilt had been established. 52 However, because such discretion often resulted in inconsistent and passion-based sentences, 53 the Supreme Court held in Furman v. Georgia 54 that a sentencer could not impose the death penalty under procedures creating a substantial risk of arbitrary and capricious action. In Gregg v. Georgia, 55 the first death penalty decision after Furman, Justice Stewart expanded upon such principles, stating that “accurate sentencing information is an indispensable prerequisite to a reasoned determination of whether a defendant shall live or die by a jury of people who may never before have made a sentencing decision.” 56

Recognizing the irreversibility of the death penalty and the arbitrariness with which unguided sentencers might impose it, the Supreme Court has construed the Eighth Amendment to require a “heightened standard for reliability in the determination that death is the appropriate punishment in a specific case.” 57 In nearly every case of the post-Furman era, the Court has stressed the need for reliability in sentencing. 58

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39 See supra notes 7-9 and accompanying text. 40 See supra notes 5-6 and accompanying text. 41 476 U.S. 1 (1985). 42 Skipper, 476 U.S. at 5.

43 Such an argument is supported by the language of Simmons itself, where, after citing to Lockett, the Court stated, “In assessing future dangerousness, the actual duration of the defendant’s prison sentence is indubitably relevant. Holding all other factors constant, it is entirely reasonable for a sentencing jury to view a defendant who is eligible for parole as a greater threat to society than a defendant who is not. Indeed, there may be no greater assurance of a defendant’s future nondangerousness to the public than the fact that he will never be released on parole.” Simmons, 512 U.S. at 163-64 (emphasis added).


49 See, e.g., Allridge v. Scott, 41 F.3d 213 (5th Cir. 1994).

50 35 F.3d 872 (4th Cir. 1994).


53 Id.

54 408 U.S. 238 (1972).


56 Gregg, 428 U.S. at 190 (emphasis added).

57 Simmons, 512 U.S. at 172 (Souter, J., concurring) (quoting Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (“Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two.”))

58 See, e.g., Maynard v. Cartwright, 486 U.S. 356 (1988) (holding that a death sentence based upon the jury’s finding that a murder was “especially heinous, atrocious, or cruel” cannot stand where the trial court failed to guide the jurors in their interpretation of such words); Mills v. Maryland, 486 U.S. 367 (1988) (holding that a death sentence must
ing the importance of channeling the sentencer’s discretion so as to minimize the “risk that ‘the death penalty [may have been] meted out arbitrarily or capriciously’ or through ‘whim . . . or mistake.’”69 Based upon such principles, defense counsel in Virginia should argue that a defendant has an Eighth Amendment right to introduce evidence of his or her parole ineligibility—regardless of whether the Commonwealth argues future dangerousness—in order to minimize the risk that the death penalty is imposed on the basis of juror misconceptions about parole law.

In concurring with the plurality’s decision in Simmons that the defendant was entitled to present evidence of his or her parole ineligibility, Justice Souter wrote separately to emphasize his belief that such an outcome was also mandated by the Eighth Amendment because it requires a heightened standard of reliability in capital cases. As part of this heightened standard, jurors must fully comprehend their sentencing options. However, as recognized by the plurality in Simmons, most juries lack accurate information about the precise meaning of a sentence of life imprisonment, and many surveys support the notion that there is a reasonable likelihood of juror confusion about the meaning of a “life” sentence.60 Most importantly, the studies demonstrate that potential jurors often believe that a defendant sentenced to life imprisonment will be in prison for a much shorter period of time than is actually the case.61 Furthermore, the studies reveal that parole eligibility and the likely period of incarceration are key factors for jurors in determining a sentence.62

The Supreme Court has emphasized that reliability is a requirement which compels the court to err on the side of giving the jury more information rather than less.63 Furthermore, the requirement of reliability be vacated if the jurors erroneously believed that, in order to give a mitigating factor any weight, they had to agree unanimously on the existence of the factor; Beck v. Alabama, 447 U.S. 625 (1980) (holding that a death sentence cannot stand if the jury was misled to believe that it had no alternative but to convict the defendant of capital murder although the evidence might have supported a conviction for the lesser included offense of felony-murder).


60 Simmons, 512 U.S. at 169, 170. See supra notes 5-7 and accompanying text.

61 See supra notes 5-6 and accompanying text.

62 Id.


RESURRECTING THE CONFRONTATION CLAUSE IN VIRGINIA

BY: JOSEPH D. PLATANIA

I. Introduction

Frequently, in capital murder trials, the Commonwealth attempts to introduce codefendant’s statements that inculpate the defendant as the triggerman. Virginia trial courts sometimes find this evidence admissible under the against interest exception to the hearsay rule, arguably violating the defendant’s Sixth Amendment rights of confrontation and cross-examination. This article examines what the Confrontation Clause of the Sixth Amendment provides, how it is affected by hearsay exceptions, and where its future lies as a constitutional doctrine. Although courts do not necessarily apply the language of the Confrontation Clause literally, it still affords significant protections to defendants who know how to utilize it properly.

II. The Confrontation Clause: What It Is

The Sixth Amendment to the United States Constitution provides that “[i]n all criminal prosecutions, the accused shall . . . be confronted