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VIRGINIA'S "21 DAY RULE" AND ILLINOIS' DEATH ROW DEBACLE: A COMPARATIVE STUDY IN CAPITAL JUSTICE AND THE RELEVANCE OF INNOCENCE

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VI. Conclusion

The circumstances surrounding a client’s election of execution is certainly complex and troubling for both the defendant and the attorney who is trying to present a case on his or her behalf. Consider the following statement that was made in Lenhard v. Wolff: “Bishop [the defendant] is an individual who, for reasons I can fathom only slightly, has chosen to forego his federal remedies. Assuming his competence...he should be free to choose. To deny him that would be to incarcerate his spirit—the one thing that remains free and which the state need not and should not imprison.”7

The very suggestion that “we”, as a society, should preserve a defendant’s “spirit” by allowing him or her to die at the hands of the state is deeply troubling. This type of suggestion highlighting a move away from protecting society’s interest in non-arbitrary application of the death penalty must be resisted. Several areas of the law permit, if not demand, defense attorneys to persist in representation throughout a capital trial. Each stage of death penalty litigation carries with it ethical considerations which present defense attorneys with the difficult dilemma of choosing between a client’s desire to die and the attorney’s personal and legal beliefs. It is valid to argue that the decision to die is not specifically allocated to the defendant and therefore, counsel has an ethical obligation to pursue legally available channels in opposition to death. Admittedly, the ultimate decision to plea, to appeal, or to fire the attorney rests with the client. However, short of a definitive, explicit decision, the attorney should proceed and preserve the issues that may save the life of the defendant.

Even when the defendant does explicitly waive his or her rights in a capital case, it is important for counsel to continually assess the defendant’s competency level. Due to the finality and severity of a decision to die, the defense attorney may have an obligation to question and ask for a hearing to determine the defendant’s current level of competency. Finally, it is essential that the defense attorney remind the court in any argument that he or she makes that “death is different” and there is much more than the defendant’s preference at stake. Society, as a whole, including those who will face the death penalty in the future, has an interest in the non-arbitrary imposition of the death penalty. Once a defendant knows that he or she may face death, many psychological factors play into the decision to die. Some even suggest that defendants intentionally used the death penalty to complete a suicide that he or she is unable to do alone.”8 When these kinds of virtually unknowable mental issues are at stake, it is best to err on the side of process.

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7White, supra note 2, at 874.

VIRGINIA’S “21 DAY RULE” AND ILLINOIS’ DEATH ROW DEBACLE:
A COMPARATIVE STUDY IN CAPITAL JUSTICE AND THE RELEVANCE OF INNOCENCE

BY: ANNE E. DUPREY

I. The 21 Day Rule

A. Its Contours

In Virginia, compelling evidence of the innocence of a death row inmate usually generates a newspaper headline, but it virtually never results in a court’s consideration of the evidence or exoneration and release of the inmate. Under Rule 1.1 of the Supreme Court of Virginia (hereinafter “the 21 Day rule”), the Commonwealth grants capital defendants who have been sentenced to death a period of only 21 days from the date of the entry of final judgment to present new evidence, including evidence of innocence.1 This Rule pro-

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mandates that when faced with such evidence, the Commonwealth must march ahead with its plans for execution.  

B. Its Dubious Origins and Elusive Rationale

The practical significance of the 21 Day Rule is belied by its rather unremarkable origins. Delegate J. Samuel Glasscock (D-Suffolk) was a member of the Virginia House of Delegates at the time when the legislature sought to ensure the Commonwealth’s compliance with the mandate of Furman v. Georgia. He characterized the 21 Day Rule’s application to capital punishment cases as an oversight rather than a deliberate policy decision, noting that as a general proposition, 21 days was the standard period of time required for a judge’s order to become final. Delegate Glasscock explained the origins of the 21 Day Rule as follows: “I don’t think there was any conscious consideration of the 21 days. The discussion… was, ‘Do we allow the death penalty to be used at all and which offenses could be included? I don’t recall any real discussion on… the 21-day rule until recent years.” That lawmakers could have been so indifferent (if not simply oblivious) to the implications of the laws that they crafted themselves is appalling but not unbelievable.

In fact, Delegate Glasscock’s explanation seems entirely plausible. Most states impose a time limit upon the ability of litigants to seek new trials based upon findings of new evidence. Remarkably, Virginia stands alone in the United States as the only state not to create an exception to the rule in capital cases. Present-day defenders of the 21 Day Rule ground their defense in an administrative efficiency rationale along with a wholesale belief in the accuracy of Virginia’s criminal justice system. A letter to the editor published by a Virginia newspaper in 1997 typifies a popular argument in support of the 21 Day Rule. The author stated, “[t]he 21-day rule is an attempt, and a good one, to end the mountains of legalese and the indefinite appeals that have become standard in these cases. . . . The United States will have to either quickly implement a swift, severe system of punishment or face the worsening of the already apparent consequences of a society gone soft on the criminal.” This perspective fails to take into account the high probability, if not certainty, that the 21 Day Rule holds the equivalent potential to end innocent people’s lives by denying access to Virginia’s courts to death row inmates with valid, viable claims and evidence of innocence. It also betrays the author’s presumption that the utility and efficacy of punishment relates directly to the speed of its administration and the degree of its severity.

Many of Virginia’s Commonwealth’s Attorneys and politicians have voiced their support for the 21 Day Rule. Delegate G. Steven Agee (R-Salem) complained that changing procedural rules such as the 21 Day Rule “would open up a no man’s land of inability to bring a capital case to a conclusion.” House Majority Leader C. Richard Cranwell (D-Roanoke County) echoed Delegate Agee’s sentiments. Both men indicated that they would prefer to attack the problem by working to improve the quality of defense counsel in capital cases. Their approach exaggerates the problems that would be posed by waiving the 21 Day Rule in capital cases, fails to acknowledge the extremely high probability that a change in the law would also result in the consideration of valid claims and the exoneration of innocent death row inmates, and overestimates the extent to which providing for competent counsel would correct for inaccuracy and error in the disposition of capital cases. Reportedly, the Attorney General’s Office has continually voiced its strenuous objections to altering the rule, contending that a change in the Rule would result in endless litigation.

C. Why Recent Efforts to Revise or Repeal It Have Failed

1. Death Penalty Politics In Virginia and Across the Country

A sampling of the newspaper headlines in Virginia in the months and weeks leading to its 1997 gubernatorial election reveals the degree to which crime control policy has been politicized by legislators and, in turn, the manner in which they seek to establish and use their reputations for being “tough on crime” to stockpile political capital and ensure victory. In recent years, policies designed to reduce crime by exacting tougher penalties upon criminals have become a dominant form of currency among political opponents. In October of 1997, the opposing candidates for Attorney

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3Because Virginia’s laws ensure that new evidence of innocence is never heard by a court (and thus, never transcribed onto a court record), most of the sources for this article are extrajudicial. National studies and local media accounts, which include interviews with convicted capital defendants and their attorneys, Commonwealth’s Attorneys, and Virginia legislators, contain ample proof of the abject failure of Virginia’s criminal justice system to accord its capital defendants and death row inmates a very basic level of fairness. By keeping new evidence of innocence out of court, Virginia has effectively denied the legitimacy and concealed the existence of such evidence, thus insulating from judicial and public scrutiny the malfeasance of the Commonwealth’s Attorneys and police.

408 U.S. 238 (1972) (holding that the imposition of the death penalty under then-existing statutory schemes violated the Eighth Amendment prohibition against the imposition of cruel and unusual punishment).

5See Jackson & Arney, supra note 2, at 17.

6Until April of 1994, Texas had a similar limit of 30 days. See infra notes 59-71 and accompanying text for a discussion of the constitutionality of the Texas rule and the subsequent judicial circumvention of that rule.


9Id.

10Id. at 5.
General and Governor of Virginia, alike, waged an open, contentious fight over their respective rankings on the “tough on crime” scale. Although it is true that, as a general proposition, Republican party candidates since Reagan have sought to establish their superiority in this arena, both local and national Democratic party candidates have demonstrated recently that the “tough on crime” stance can be an equal opportunity platform. This is especially true in the context of death penalty politics. As Governor of Arkansas, Bill Clinton declined to halt the execution of a mentally retarded black man who had lost a portion of his brain to a self-inflicted gunshot wound. As President, he has expanded the range of offenses capable of punishment by death and drastically reduced the opportunities for postconviction relief in capital cases. Last year, Virginia’s Democratic candidate for Governor, then-Lieutenant Governor Don Beyer, accused the Republican candidate, now-Governor Jim Gilmore, of being too lenient in his punishment of criminals, including rapists and murderers, while he was Attorney General.

Many of the Virginia politicians who continue to support the application of the 21 Day Rule in capital cases may do so in response to political pressure to uphold their reputations for being “tough on crime.” Being “tough on crime,” in its popular conception, is typically conflated with inflicting increasingly severe punishment upon convicted criminals, regardless of the actual utility of such an approach. Likewise, defenders of the 21 Day Rule may believe that they are responding to some vague public mandate to be tougher on criminals. It may be true, for a combination of reasons, that when the issue is marketed in a form so abstract and nebulous as to be virtually without content, many Virginians believe that politicians should be “tough on crime.” However, an examination of the many factors that might explain the prevalence of that vague sentiment is unnecessary here, for the will of the people with respect to the 21 Day Rule is quite clear. A 1996 poll by the Center for Survey Research at Virginia Tech found that an overwhelming majority of Virginians—74 percent—oppose the 21 Day Rule while only 22 percent support this law. The Virginia legislature’s refusal to revise or repeal the 21 Day Rule directly contradicts the will of the people.

2. A Sampling of Recent Bills to Revise or Repeal the 21 Day Rule

Virginia’s General Assembly first examined the 21 Day Rule in 1992, in the wake of the controversy surrounding Roger Keith Coleman’s execution on May 20th of that year. The House of Delegates created a subcommittee of the House Courts of Justice Committee to consider possible alternatives to the 21 Day Rule. Since that time, the Virginia legislature has considered a number of proposals to revise the 21 Day Rule but has accepted none.

In 1994, the subcommittee of the House Courts of Justice Committee unanimously decided that a change in the law should be drafted which would allow new evidence to be heard in court beyond the 21 day period. One member of the subcommittee, Delegate C. Richard Cranwell (D-Roanoke County), explained, “I wouldn’t want to appear soft on crime. But if a condemned person can show innocence, as bloodthirsty as I am . . . I think we ought to give them another bite at the apple [in court].”

Delegate Chip Woodrum (D-Roanoke) sponsored House Bill 213, which, if passed, would have permitted death row inmates to petition for a hearing “at any time” if there existed “new discovered evidence that establishes a significant probability that the prisoner is actually innocent.” Delegate Woodrum stated, “As long as we have the death penalty in this state, we have to make it as fail-safe as possible. I don’t want to turn anyone loose that is deserving of death - these are vile people who committed unspeakable acts. But I think the ultimate horror would be for the state to execute someone who is not guilty of the crime.” The Attorney General’s Office opposed the legislation based upon its concern that death row inmates seeking to postpone their executions...
would abuse the appeals process.\textsuperscript{19} The House Courts of Justice Committee approved the bill. However, as the legislative session neared its end, the Senate Courts of Justice Committee defeated the bill.\textsuperscript{20}

In 1998, the House of Delegates considered two bills—House Bill 606 and House Bill 933—to revise the 21 Day Rule in the context of capital cases. House Bill 933 provided, in pertinent part:

Notwithstanding any rule of the Supreme Court, a prisoner may, at any time, present a bill of review as a civil proceeding to the circuit court which entered the order sentencing a prisoner to death, provided the bill of review alleges that there exists newly discovered evidence, not known by the prisoner or his trial counsel at the time the prisoner was tried upon the charge resulting in the sentence of death, which establishes a significant probability that the prisoner is actually innocent of the crime for which the sentence was imposed.\textsuperscript{21}

The House sent this bill to a committee and then a subcommittee, where it was defeated.

If enacted, House Bill 606 would have provided for a "capital case bill of review," whereby death row prisoners or prisoners whose death sentences have been commuted to life imprisonment by the Governor could present a bill of review as a civil proceeding alleging newly discovered evidence of actual innocence.\textsuperscript{22} If the prisoner could meet the specified standards, the court would grant the bill of review. After the House referred this bill to the Committee for Courts of Justice, which in turn referred it to a subcommittee, the subcommittee members deferred further consideration of the bill until 1999. Neither of these bills would have created clear pathways for death row prisoners who wish to present new evidence of innocence to Virginia state courts, but both would have made access to the state courts a realistic possibility for some death row inmates.

II. The Death Row Debacle in Illinois: An Instructive Example

A. The Simple Truth: Illinois Has Freed Nine and Executed Eleven

The recent death row debacle in Illinois offers an instructive example of the potentially chilling implications of the 21 Day Rule. The simple truth is remarkable. Since the reinstatement of the death penalty in 1977, the State of Illinois has freed nine death row inmates and executed eleven (only two more).\textsuperscript{23} The stories of the nine men freed from death row share much in common. Some of the convictions stemmed from coerced, perjurious statements from key prosecution witnesses, several with low IQs. Several of the cases involved prosecutorial and police misconduct, including the suppression of exculpatory evidence. Some involved key testimony which incriminated the defendants offered by witnesses later proven to be partially or solely responsible for the capital crimes which they had attributed to other people. Several of the defendants were subjected to multiple retrials by stubborn state's attorneys who were cognizant of the defects in their cases but intent upon obtaining convictions. In a few of the cases, DNA testing of "old" evidence exonerated the defendants. Six of the cases involved minority defendants who were charged with the commission of interracial murders. Finally, as many commentators have observed, eight of the nine cases were resolved in favor of the condemned prisoners not as a result of diligent, ethical prosecutors, vigilant courts, or any other forces within the system but because of the work of public interest attorneys and organizations (including the Appellate Defender's Office), law professors, media commentators, and, in one case involving two death row inmates, undergraduate journalism students.

Prior to 1996, the letter of the Illinois law somewhat restricted the ability of convicted prisoners to present new evidence of innocence in court.\textsuperscript{24} However, judges and prose-


\textsuperscript{21}Delegates Almand, Callahan, Darner, Deeds, Grayson, Plum, Van Yahres, and Watts sponsored House Bill 933.

\textsuperscript{22}Delegates Almand, Darner, Melvin, Plum, Robinson, Van Ladingham, Van Yahres, and Woodrum sponsored House Bill 606.

\textsuperscript{23}Until November of 1997, the State of Illinois had executed fewer death row inmates (eight) than it had released (nine). See David Protess & Rob Warden, \textit{Nine Lives}, CHICAGO TRIBUNE, August 10, 1997, \textit{available in} 1997 WL 3576969, for a succinct description of the events leading up to the conviction and execution of each of the nine men. Additionally, three more death row inmates have been granted new trials in the last nine months, and it is widely believed that one of the men, Ronald Jones, will become the tenth innocent man to be released from death row by the State of Illinois. For an account of the circumstances surrounding the impending retrial of Ronald Jones, see Andrew Martin, \textit{New Trial Likely in 1985 Murder of Young Mother: DNA Test Gives Death Row Inmate Hope}, CHICAGO TRIBUNE, July 9, 1997, \textit{available in} 1997 WL 3565914 and Eric Zorn, \textit{DNA Evidence Continues to Cast Doubt on Retrial}, CHICAGO TRIBUNE, Nov. 27, 1997, \textit{available in} 1997 WL 3619497. See infra notes 57-58 and accompanying text for a discussion of Jones’ case. For information on the Illinois Supreme Court’s decision to grant new trials to Earl Hawkins and Nathson Fields, see Maurice Possley, 2 Rukns Convicted in '93 by Corrupt Judge to Get a New Trial, CHICAGO TRIBUNE, Jan. 30, 1998, \textit{available in} 1998 WL 2820001.

\textsuperscript{24}Under 735 Ill. Comp. Stat. 5/2-1202(c) (West 1992), a convicted defendant may present a claim of newly discovered evidence of innocence by making a motion for a new trial within 30 days. Under 735 Ill. Comp. Stat. 5/2-1401(a) (West 1992), “[r]elief from final orders and judgments, after 30 days from the entry thereof, may be had upon petition....” Under subsection (c), “the petition must be filed not later than 2 years after the entry of the order or judgment. Time during which the person seeking relief is under legal disability or duress or the ground for relief is fraudulently concealed shall be excluded in computing the period of 2 years.”
In People v. Washington, the Illinois Supreme Court formalized that tacit understanding and created an official mechanism for the state courts' review of new evidence of innocence, or what it deemed "free standing" claim(s) of innocence," presented by condemned prisoners in Post-Conviction Hearing Act proceedings. The court stated, "We believe that no person convicted of a crime should be deprived of life or liberty given compelling evidence of actual innocence." Noting that the legislature had provided very few avenues for raising such claims, aside from the mechanism of executive clemency, the court held "as a matter of Illinois constitutional jurisprudence that a claim of newly discovered evidence showing a defendant to be actually innocent of the crime for which he was convicted is cognizable as a matter of due process." The court explained that the evidence of innocence must be "new, material, noncumulative, and most importantly, of such conclusive character as would 'probably change the result on retrial.'" By linking the right to present newly discovered evidence in court to state constitutional due process rights, the court ensured that all defendants in Illinois would receive more than the mere baseline protection afforded by the United States Constitution.

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B. Specific Examples

1. The Misguided Search for Jeanine Nicarico's Killers

The details surrounding the prosecution, conviction, and exoneration of four of the nine innocent men freed by Illinois illustrate the range of factors that have undermined public confidence in Illinois' capital justice system. The first case involved two young Latino men who were sentenced to death for the widely-reported kidnaping, rape, and murder of a young girl.

On February 25, 1983, Jeanine Nicarico, a ten-year-old white girl from Naperville, Illinois, was kidnapped from her home. She had been at home, instead of school, that day because she was sick. Police found her body several days later, and a forensic examination revealed that she had been raped and bludgeoned to death. This event inspired feelings of horror, shock, sadness, and fear, which reverberated throughout the serene suburbs of Chicago. Many suburban residents felt deprived and angered by the loss of their sense of security, safety, and enclosure. They worried about the safety of their children and craved assurance that their way of life had not been irrevocably altered.

Local police quickly found two Latino suspects, Alejandro Hernandez, an 18-year-old with a low IQ and, according to at least one newspaper account, a "propensity for fantasy," and his friend, Rolando Cruz, and served them up to a public anxious for answers. When questioned about the crime by police, who had received an anonymous telephone tip, Hernandez had explained that he was not involved in the crime but that a few of his friends might possess relevant information. The prospect of a $10,000 reward reportedly motivated Hernandez (and later Cruz) to become involved in conversations with the police about what had happened. Police said that Cruz had revealed to them details of the crime that had come to him in what was alternatively reported to be a "dream" or "vision," but they did not make any recording of the statement. A jury convicted the men and sentenced them to death.

Soon after the men were sentenced to death, Brian Dugan confessed to six rape-murders. In the course of plea discussions, he confessed to the abduction, rape, and murder of Jeanine Nicarico and offered details of the crime not known to the public. In 1988, Hernandez and Cruz were granted new trials, and the state's attorney's office re-tried them rather than pursuing charges against Dugan. The court deemed Dugan's statement inadmissible as hearsay and Dugan refused to testify because the state refused to waive the death penalty. The men were again convicted, with...
Hernandez receiving 80 years in prison and Cruz being sentenced to death. The Illinois Supreme Court affirmed their convictions and sentences.

Cruz's fate changed when, after volunteer lawyers and a local newspaper columnist, Eric Zorn, had adopted his cause, the retirement of several judges changed the composition of the Illinois Supreme Court. Cruz was granted a rehearing and then another new trial. By this time, DNA tests had been performed which showed that neither Hernandez nor Cruz had raped Nicarico but did link Dugan to her murder.

At Cruz's retrial, a police officer admitted to lying under oath to the same judge about the vision statement. The judge indicated that he had previously entertained some doubt as to the viability of that “dream” statement and that he was finally convinced that there had been no such statement. On November 3, 1995, the Judge found that the prosecution had not shown either that Cruz was involved in the crime or that Dugan was not the sole perpetrator, and he directed a verdict of not guilty. After twelve years which bore witness to perjurious and inconsistent testimony, undisclosed deals, police and prosecutorial misconduct, revealing DNA tests, and much litigation, the judge declared Cruz innocent and set him free. Prosecutors indicated that this decision would not in any way alter their plans to re-try Hernandez, but they dropped the charges against him on the eve of the trial.36

2. The Ford Heights Four

Another remarkable case involved four black defendants (popularly dubbed “the Ford Heights four”) who had been convicted for the 1978 abduction and murder of a recently engaged white couple. Three undergraduate journalism students at Northwestern University working under the direction of their professor succeeded in freeing all four men roughly eighteen years after the commission of the murder for which they had been convicted.37 Two of the men had been sentenced to death and the other two to lengthy prison terms.

On May 12, 1978, police found the bodies of Larry Lionberg and Carol Schmal in East Chicago Heights (now Ford Heights), Illinois, a predominantly black suburb. They had been abducted from a service station in Homewood, Illinois, a predominantly white suburb. Forensic reports indicated that Schmal had been raped repeatedly and shot twice in the head and that Lionberg had been shot in the head and the back. Soon after, the police interviewed Paula Gray, a 17 year old who lived in the vicinity of where the bodies were found. She implicated Kenneth Adams, William Rainge, and Dennis Williams in the crimes and later implicated Veronica Jimerson, as well. Several days later, based upon Gray’s testimony, a grand jury indicted Adams, Jimerson, Rainge, and Williams for the crimes. Gray, whose IQ fell somewhere within the range of 57 to 64, could neither read, write, nor tell time. She also implicated herself in the crimes.38

Gray stated that the group had taken the couple to a warehouse and placed Schmal upstairs and Lionberg downstairs. She claimed that she had held a lighter to illuminate the room while the males raped Schmal. She said that Williams shot Schmal in the head and that Williams and Rainge shot and killed Lionberg at the nearby creek to which they had taken him.39

A month later, at the preliminary hearing, Gray recounts her grand jury testimony and denied both knowing anything about the crimes and having any involvement in the crimes. Because the remaining evidence was insufficient to convict Jimerson, the charges against him were dismissed. The other three men were tried and convicted on varying combinations of murder, kidnaping, and rape charges based upon the testimony of a man who stated that he had seen them near the murder scene close to the time of the commission of the crime.40 Gray was subsequently charged with perjury, in addition to rape and murder, and upon conviction on all three charges, was given a lengthy prison term. Gray, Williams, and Rainge sought and received habeas relief. Following the reversal of her convictions, Gray agreed once again to testify for the State against Jimerson, Williams, and Rainge. The State then re-tried Jimerson.41

At Jimerson's trial, Gray again implicated herself and the four men. When defense counsel tried to cross-examine Gray with her statements denying knowledge of or involvement in the crime at the preliminary hearing, Gray claimed to have no recollection of that testimony. Gray also denied that the State had promised her anything in exchange for her testimony. The State presented no forensic evidence that definitively linked Jimerson to the crime. Jimerson presented an alibi defense. The jury found Jimerson guilty on both counts of murder, and the trial judge sentenced Jimerson to death.42 In a separate retrial, Williams was once again convicted and sentenced to death.43

36In 1996, a grand jury levied charges of perjury, obstruction of justice, official misconduct, and conspiracy against four police officers and three former prosecutors who had participated in the Nicarico case. See Ted Gregory & Maurice Possley, Indictments Tear at Prosecutorial Teflon: DuPage Charges Outline Conspiracy Against Cruz, CHICAGO TRIBUNE, Dec. 13, 1996, available in 1996 WL 2741251. Soon after this case ended, the lead prosecutor, Jim Ryan, was elected Illinois Attorney General.

37Chicago Tribune columnist Eric Zorn wrote a series of articles about the Ford Heights Four and the students' work on their case spanning from mid-February through the summer of 1996, after the men's exoneration. For a succinct summary of the students' six-month investigation (which led to the release of the Ford Heights four), see Eric Zorn, Students' Legwork Went Further Than Long Arm of Law, CHICAGO TRIBUNE, June 11, 1996, available in 1996 WL 2680106.


39Jimerson, 652 N.E.2d at 280.

40See Proest & Warden, supra note 23 at 9.

41Jimerson, 652 N.E.2d 278 at 280.

42Id. at 281.

The Supreme Court of Illinois initially affirmed both verdicts and sentences. However, in May of 1995, Jimerson presented evidence to the supreme court that the State had knowingly used perjured evidence by allowing Gray to testify that she had not received anything in exchange for her testimony. In fact, the State had promised to drop the murder charges against Gray in return for her testimony against Jimerson. The supreme court granted Jimerson a new trial, and in January of 1996, Judge Sheila Murphy released Jimerson on bond. At that point, the prosecution did not abandon its plans to re-try Jimerson.

That January, a journalism professor from Northwestern University named David Protess assigned three students in his investigative reporting class to look into the case of the Ford Heights Four. Over the course of the next several months, those three young women unraveled the prosecution’s case, exonerating the Ford Heights Four and leading police to the actual culprits. In February, the students met with Gray in her apartment and elicited from her a statement that the police had coerced her into falsely leading police to the actual prosecution’s case, exonerating the Ford Heights Four and several months, those three young women unraveled the inhabitants in his investigative reporting class to look into the case of the Ford Heights Four. Over the course of the next several months, those three young women unravelled the prosecution’s case, exonerating the Ford Heights Four and leading police to the actual culprits. In February, the students met with Gray in her apartment and elicited from her a statement that the police had coerced her into falsely implicating the four men. The professor conducted a follow-up interview with Gray, who in turn, told her story to a newspaper reporter, Eric Zorn, and Channel 5, the NBC affiliate in Chicago. Gray confessed that she had lied. She said, “They [the police] kept putting pressure on me, saying ‘[w]e know you know [the four men] did it.’ They told me if I didn’t tell the truth I would go to prison. I was scared.” She also indicated that the police had taken her to the crime scene and coached her on details of the crime while saying, “[t]his is what happened, isn’t it?” Media accounts of Gray’s recantation generated public pressure which led the Cook County State’s Attorney’s Office to abandon its objection to new DNA testing.

Next, the three students found copies of old police investigatory notes that implicated four other men in the murders of Lionberg and Schmal. The police had never interviewed any of the four men. The students followed these unpursued leads, and the three suspects who were still living ultimately confessed. In June of 1996, the results of the DNA tests exonerated the Ford Heights Four. A Cook County judge released Adams, Rainge, and Williams that month (Jimerson had already been released on bond), and the State dropped all charges against the men. Additional DNA tests corroborated the confessions of the three new suspects, who are presently serving life sentences in prison for the murders.

B. Public Debates Inspired by the Death Row Debacle

As a result of the rash of releases from Illinois’ death row in the last several years, Illinois public opinion seems to have settled into two schools of thought. Some residents, media commentators, attorneys, and scholars believe that the recent exoneration of the nine men reveals significant, fundamental flaws in Illinois’ capital justice system. Others, including the Cook County State’s Attorney’s Office (which handled several of the cases), believe that the release of the innocent men provides unequivocal proof that Illinois’ criminal justice system works. Neither of those arguments bear any relevance to the imposition of the death penalty in Virginia, for Virginia simply has no system in place to handle the contingency of newly discovered evidence of innocence. A majority of the nine men in Illinois secured their freedom via the presentation of evidence that would be deemed “new” by Virginia. It is utterly appalling to consider what the fate of those nine men would have been had their lawyers been working under the constraints of Virginia’s statutory system and, in particular, the 21 Day Rule.

The general public debate in Illinois concerning the State’s imposition of the death penalty quickly spawned several key policy initiatives. The first involved a specific proposal by two very conservative members of the Illinois General Assembly, Representative Peter Roskam (R-Wheaton) and Senator Ed Petka (R-Plainfield), to allow defendants to secure forensic testing on evidence that was not subject to such testing at the time of trial because of the unavailability of certain technology. Representative Roskam explained, “Everybody wants to be tough on crime, but you want to make sure you’ve got the right guy. There’s nobody who wants an innocent person in prison. If there is an innocent person behind bars, there’s a perpetrator at large.” Governor Jim Edgar signed into law, effective January 1, 1998, Chapter 725, Act 5, Title VI, Article 116, which allows defendants to make such motions without time limitations. Another public debate revolves around the possibility of placing a moratorium upon the imposition of the death penalty so that the system may be probed and the source of the errors discovered. On July 15, 1997, a broad coalition of lawyers, judges, and legal organizations, along with several religious leaders, submitted an amicus curiae
brief to the Illinois Supreme Court requesting a one-year moratorium on executions. The coalition requested the creation of a special commission that would seek to discover how and why Illinois had sentenced at least nine innocent men to death. This proposal drew the support of many legislators and media commentators, including the editorial staffs of decidedly conservative newspapers like the Chicago Sun-Times and the Peoria Journal Star. The Cook County state’s attorney’s office responded with the tired argument that the exoneration of the nine men proved that Illinois’ system works. In September of 1997, the Illinois Supreme Court issued an order refusing to accept the brief. However, the rejection of this brief did not end the debate. Illinois newspapers have continued to publish articles and editorials that feed and reflect the public debate concerning the accuracy and legitimacy of the state’s capital justice system.

In fact, the case of a tenth death row inmate now believed to be innocent captured the media’s attention in the latter half of 1997. Ronald Jones, an indigent, homeless black man, spent eight years on death row for a 1985 rape-murder. When the results of new DNA tests were released in July of 1997, they showed that neither Jones nor the victim’s fiancé had intercourse with the victim, which suggested that another person altogether was responsible for the crime. Incredibly, prosecutors have indicated thus far that they will retry Jones, but they have agreed not to seek the death penalty because they “don’t have the moral certainty anymore” as to whether Jones was, indeed, the culprit.

III. Why Virginia Must Repeal the 21 Day Rule

A. Legal Requirements and Practical Considerations

1. U.S. Constitutional Protections: The Supreme Court’s Implicit Mandate

A recent decision by the Supreme Court suggests that the application of Virginia’s 21 Day Rule to capital cases may violate the constitutional requirements of due process and fundamental fairness. Although the holding is not promising on its face, upon closer examination, the fractured opinion suggests the unconstitutionality of the Rule. In *Herrera v. Collins*, the Court considered the defendant’s Eighth and Fourteenth Amendment challenges to the constitutionality of a Texas rule which prohibited defendants (including those sentenced to death) from filing a motion for a new trial based upon new evidence more than 30 days after the imposition of a sentence. A majority of the Court held that Herrera’s claim of innocence based upon newly discovered evidence did not entitle him to federal habeas relief. Several members of the Court indicated that the overwhelming evidence of Herrera’s guilt substantially

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62Several days before the State’s planned double execution of Walter Stewart and Darlyn Eddmonds in November of 1997, the Chicago Tribune published an editorial that urged the Governor to initiate a moratorium on the imposition of the death penalty by granting a stay. The editorial stated, “[y]ou don’t have to be an opponent of capital punishment to conclude that in death penalty cases, something is obviously wrong with the way the criminal justice system in Illinois works. In recent years, nine different men convicted of murder and sentenced to die here have been exonerated—nine men who, without some struck of luck, could all have been put to death by the state. . . . Chance and factors unrelated to guilt and the severity of the crime continue to play far too big a role in the choice of who gets selected for Illinois’ ultimate sanction.” Editorial, Governor, Stay This Execution, CHICAGO TRIBUNE, Nov. 14, 1997, at 2, available in 1997 WL 3611416.

63See Martin, supra note 23 & Zorn, supra note 23.

64See Zorn, supra note 18 at 3. According to Rule 3.8 of the American Bar Association Annotated Model Rules of Professional Conduct and long-standing rules regarding the special responsibilities of prosecutors, the principal objective of prosecutors should always be to seek justice. Comment 1 states, “[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate.” In *Berger v. U.S.*, 295 U.S. 78, 88 (1935), the Court held, “[The prosecutor] is the representative not of an ordinary party to a controversy, but of a sovereignty whose obligation to govern impartially is as compelling as its obligation to govern at all; and whose interest, therefore, in a criminal prosecution is not that it shall win a case, but that justice shall be done.” In light of the prosecutors’ lack of “moral certainty” that Ronald Jones was guilty and the overwhelming evidence of his innocence, their plan to re-prosecute Jones is inconsistent with their ethical duties.

6506 U.S. 390 (1993) (holding that death row inmate’s claims of innocence based upon newly discovered evidence did not entitle him to federal habeas relief). In *State ex rel. Holmes v. Court of Appeals for the Third District*, 885 S.W.2d 389 (Tex. Crim. App. 1994) (en banc), the court lifted a death row inmate’s stay of execution but set forth a process by which death row inmates in Texas could present claims of actual innocence. The court held that habeas corpus was the appropriate vehicle for the presentation of claims of actual innocence by death row inmates and established the following threshold standard for such claims: “whether the newly discovered evidence, if true, would create a doubt as to the efficacy of the verdict to the extent that it undermines our confidence in the verdict and that it is probable that the verdict would be different.” *State ex rel. Holmes*, 885 S.W.2d at 398.

66Herrera, 506 U.S. 390 at 400.

67Id.
influenced their decision to deny his request for a new hearing. The Court noted that the traditional function of habeas courts is to ensure that defendants are not imprisoned in violation of the Constitution and "not to correct errors of fact." In the context of Virginia's 21 Day Rule, the Court's statement leaves unresolved the crucial issue of who shall correct errors of fact in cases originating in Virginia.

The Court continued, "This is not to say that our habeas jurisprudence casts a blind eye toward innocence. . . . This body of our habeas jurisprudence makes clear that a claim of 'actual innocence' is not itself a constitutional claim, but instead a gateway through which a habeas petitioner must pass to have his otherwise barred constitutional claim considered on the merits." This language ostensibly would allow capital defense attorneys to reach a federal habeas court in cases in which the defense discovers that the prosecution suppressed evidence in violation of Brady and is denied access to the state courts to present this new evidence.

Citing the availability of executive clemency, the Court claimed that Texas defendants are not left without a forum in which to raise claims of actual innocence. However, Texas's clemency statute is distinguishable from that of Virginia. It allows, in capital cases, requests for a full pardon, a commutation of a death sentence to life imprisonment or appropriate maximum penalty, or a reprieve of execution. The Texas Board of Pardons and Paroles makes recommendations regarding clemency to the Governor, who possesses the ultimate authority to make clemency determinations. Thus, notwithstanding questions about whether clemency is the best mechanism for making guilt/innocence determinations in capital cases, clemency, at least in the abstract, offers death row inmates in Texas the realistic possibility of exoneration and release. Although Virginia's clemency statute grants the Governor an almost unlimited power to determine the exact contours of a clemency agreement, in practice, the potential for clemency in Virginia is only the potential for a new prison sentence, not exoneration or release. Thus, the Herrera Court's claim that, "the traditional remedy for claims of innocence based on new evidence, discovered too late in the day to file a new trial motion, has been executive clemency," is inapplicable in Virginia, where clemency in practice does not provide a realistic possibility of exoneration or release. The historical practice of Virginia's Governors in granting clemency, coupled with the unparalleled oppressiveness of the 21 Day Rule, provides an arguable basis for distinguishing and finding Virginia law insufficient to protect innocent death row inmates from execution.

Finally, a careful reading of Herrera yields a rather promising fact: a majority of the justices indicated that a condemned prisoner who could make an adequate showing would be entitled to federal relief. Most of the justices stated that Herrera simply could not make an adequate showing, regardless of the standard employed. The majority stated:

We may assume, for the sake of argument in deciding this case, that in a capital case a truly persuasive demonstration of "actual innocence" made after trial would render the execution of a defendant unconstitutional, and warrant federal habeas relief if there were no state avenue open to process such a claim. But because of the very disruptive effect that entertaining claims of actual innocence would have on the need for finality in capital cases, and the enormous burden that having to retry cases based on often stale evidence would place on the States, the threshold showing for such an assumed right would necessarily be extraordinarily high. The showing made by petitioner in this case falls short of any such threshold.

Justice O'Connor, who concurred and was joined by Justice Kennedy, stated, "I cannot disagree with the fundamental legal principle that executing the innocent is inconsistent with the Constitution." Nonetheless, she concluded that Herrera's affidavits purporting to show his innocence were utterly unconvincing and that he was "not innocent, in any sense of the word." Justice O'Connor continued, "Of course, the Texas courts would not be free to turn petitioner away if the Constitution required otherwise. But the District Court did not hold that the Constitution required them to entertain petitioner's claim. On these facts, that would be an extraordinary holding."

With the language quoted above, the Court indicated that a showing that meets or surpasses the threshold showing would trigger a constitutional claim. Virginia procedure does not enable a death row inmate to make a threshold showing if proof of actual innocence is developed more than 21 days after the entry of final judgment. Although the Court narrowly tailored its decision to address one particular question—whether a proffer of evidence of actual innocence entitles a death row inmate to federal habeas relief—the Court's language strongly suggests that the Constitution's due process guarantee would nullify state
procedural rules designed to prevent actually innocent death row inmates from presenting evidence of that innocence and, thus, to ensure their execution.

2. Standards of Decency in Virginia

The United States Constitution and the Supreme Court, in its interpretation of the Constitution, prescribe the bare minimum of procedure that is required by the most basic concepts of fundamental fairness and decency. Again, Virginia stands alone as the only state in the country that denies condemned prisoners access to a state court to present new evidence of innocence after 21 days. The Constitution of Virginia should offer Virginians more than the base line of protection afforded by the United States Constitution. Capital defense counsel should urge state courts to strike the 21 Day Rule on independent state law grounds, which, as always, are based on standards of decency as embodied by the Constitution of Virginia.72

3. Clemency Doesn’t Cut It: The Courts Must Make Innocence Relevant

Proponents of the 21 Day Rule often argue that clemency, alone, offers sufficient protection to innocent death row inmates. Article V, Section 12, of the Constitution of Virginia vests the power to commute capital punishment in the Governor. Virginia Code Section 53.1-229 echoes that provision in granting to the Governor the power to commute capital punishment. Since the reinstatement of the death penalty, Virginia’s Governors have granted clemency to only five inmates. Former Democratic Governor L. Douglas Wilder granted conditional clemency to three death row inmates—Earl Washington, Herbert Bassette, and Joseph Giarratano.73 Former Governor George Allen, a Republican, granted conditional clemency to Joseph P. Payne, Sr., and William Ira Saunders.74 None of the five inmates was exonerated or released, and all five men remain in prison.

The availability of executive clemency does not mitigate in support of the 21 Day Rule. First of all, the theoretical availability of this remedy does not justify Virginia’s courts’ abdication of their responsibility to ensure that cap-

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72Article I, Section 11, of the Constitution of Virginia guarantees, “[t]hat no person shall be deprived of his life, liberty, or property without due process of law.” Article I, Section 8, provides that in criminal prosecutions, “[a] man shall not be deprived of life or liberty, except by the law of the land or the judgment of his peers.” *See supra* notes 26-31 and accompanying text for a discussion of the Supreme Court of Illinois’s decision in People v. Washington. The court found a substantive and procedural due process right in the state constitution which the Supreme Court of the United States had not found in the United States Constitution, noting, “we labor under no self-imposed constraint to follow federal precedent in ‘lockstep.’” *Washington,* 665 N.E.2d at 1335.

73*See* Jackson & Arney, *supra* note 2 at 9. Joseph Giarratano accepted Governor Wilder’s conditional clemency agreement, which provided that Giarratano would serve life in prison with the possibility of parole and that Giarratano could ask then-Attorney General Mary Sue Terry to petition the court for a new trial so that he might present his new evidence and claims of innocence in court. Joseph Williams, Michael Hardy, & Mike Allen, *Wilder Spares Giarratano’s Life,* RICHMOND TIMES-DISPATCH, Feb. 20, 1991, *available in* 1991 WL 4742020. Terry (who served as the Democratic nominee for Governor of Virginia several years later) refused Giarratano’s request. According to one news account, Terry stated, inexplicably, “[i]f they had anything substantial, ‘they
ital defendants receive not only technically fair trials, but also justice. Historically, the administration of justice in criminal cases is a task that has rested exclusively with the judiciary. Trained judicial officers are much better equipped to gauge the reliability, relevance, and significance of new evidence. And, in fact, when the legislature deprives the courts of their ability to perform that task, it precludes them from fulfilling their primary responsibilities to weigh evidence in individual cases and actualize the promise of justice for all. While preventing the execution of innocent people is about justice, executive clemency, in its traditional conception, is about mercy. In this context, the concept of mercy applies only in combination with some element of wrongfulness or guilt; it has no application in the case of an innocent person who has been wrongly convicted and sentenced to death. Thus, this reliance upon clemency and the Governor's potential for mercy is philosophically misguided.

Secondly, the dynamics of death penalty politics dictate that an elected executive officer should not be given the power to determine whether a death row inmate should live or die. Many external, inappropriate factors inevitably influence a Governor's determination of whether sufficient evidence exists to question a defendant's guilt and cancel an execution. When the life of a potentially innocent person is in the balance, factors such as a Governor's political party affiliation, recent approval ratings, or future political aspirations should not interfere. Yet, the reality of death penalty politics indicates that if the legislature leaves in place the 21 Day Rule and continues to strip the judiciary of its responsibility to address legitimate questions about the guilt and innocence of the men and women sentenced to death, those very factors will continue to drive Governors' clemency decisions and will result in the loss of innocent life at the hands of the Commonwealth.

Finally, the history of executive clemency since the reinstatement of the death penalty in Virginia has shown that, even when granted to prevent the Commonwealth's execution of an innocent death row inmate, clemency constitutes an incomplete remedy. Although substantial questions regarding innocence have prompted Virginia's Governors to grant clemency to five death row inmates, none of the inmates has been declared innocent, freed from prison, or given an opportunity to present new evidence of innocence in court. When faced with compelling evidence of death row inmates' innocence or, at least, substantial questions regarding their guilt, Virginia's Governors have responded, at most, by commuting their death sentences to sentences of life imprisonment. This general failure to provide fair and just dispositions to wrongly convicted, innocent death row inmates is without exception. Additionally, Virginia law provides no forum in which the evidence that compels a Governor to commute a death sentence may be heard and no mechanism for the exoneration or release of prisoners whose death sentences have been commuted. Executive clemency, thus, represents a fundamentally unsatisfying alternative from the standpoint of an innocent person wrongly convicted of capital murder in Virginia.

B. The Price of Our Misguided Confidence in the Accuracy of the Criminal Justice System

1. The National Track Record

Virtually no one contests that in this century, the United States has convicted and executed people who were factually innocent of the charges for which they were sentenced to die. Commentators who are honest and informed disagree only as to the prevalence of such errors and their horrific consequences. A study released in 1987 by Professor Adam Bedau of Tufts University and Professor Michael Radelet of the University of Florida documented three hundred and fifty known cases in this century in which innocent defendants were wrongly convicted of "potentially capital" crimes, including twenty three cases in which the defendants were executed. In 1996, Professors Bedau and Radelet, along with Professor William E Lofquist of SUNYGeneseo, published their finding that between 1970 and 1995, "one death row inmate [was] released because of innocence for every five inmates executed."

In 1993, the United States House Judiciary Committee released a report which documented that 52 people had been released from death rows nationwide since 1972. The report revealed:

Some of these men were convicted on the basis of perjured testimony or because the prosecutor improperly withheld exculpatory evidence. In other cases, racial prejudice was a determining fac-

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77This observation concerning the insufficiency of "clemency" as the only mechanism for sparing the life of an actually innocent defendant is made notwithstanding the Supreme Court's treatise on mercy in Herrera, which frames clemency as a traditional and logically consistent mechanism for correcting errors made by courts in sentencing innocent people to death.

78See supra notes 73-74 and accompanying text.


80Michael L. Radelet, William S. Lofquist, & Hugo Adam Bedau, Prisoners Released From Death Rows Since 1970 Because of Doubts About Their Guilt, 13 T.M. COOLEY L. REV. 907, 916 (1996). The authors included a lengthy appendix which documented the details surrounding the conviction and ultimate exoneration of 68 men released from death row since 1970. They noted that since their publication went to press, the total had risen to 70. Id. at 962 (n. 51). See also Michael L. Radelet, Hugo Adam Bedau, & Constance Putnam, In Spite of Innocence, 1992.
The Committee further stated, "[i]nexcusable persons are still being sentenced to death, and the chances are high that innocent persons have been or will be executed." The report indicated that although Florida, Georgia, and Texas (among others) released many death row inmates during the time period studied, Virginia had not freed any inmates after reviewing new evidence.

These studies militate in favor of the conclusion that, as a general proposition, the rate of wrongful conviction of capital defendants nationwide is alarmingly high. These studies do not, in any sense, form the basis for the conclusion that all innocent, wrongly convicted death row inmates are ultimately spared the egregious injustice of execution—they do not show that the system always works. Instead, in addition to showing that some innocent capital defendants are wrongly convicted, they further indicate that some innocent death row inmates are exonerated and freed while others remain on death row and ultimately are executed. As the House Report's authors themselves concluded, "[i]n the present context, a substantial number of death row inmates are indeed innocent and there is a high risk that some of them will be executed." Finally, these studies demonstrate that the notion of the wrongly convicted, innocent death row inmate, far from representing a mere construct of death penalty opponents, has a corresponding reality that should frighten, anger, and mobilize all Americans.

These conclusions are even more disturbing in the context of Virginia's criminal justice system and the 21 Day Rule. Virginia's record is "better" than that of Illinois and other states not because Virginia's prosecutors and police err or cheat less than prosecutors and police nationwide nor because Virginia's infinitely superior criminal justice system has a 100 percent accuracy rate. Instead, Virginia has a self-executing mechanism for concealing and cleansing the system of any hint of error or inaccuracy. Virginia's scheme of statutes and court rules, in its present form, makes impossible the sort of systemic self-correction described above. Virginia's system does not facilitate or even merely allow the discovery of evidence indicative of guilt or innocence, such as perjured testimony, suppressed evidence, or definitive scientific proof. In Virginia, such evidence is kept out of the courts and relegated to the realm of rumor and innuendo so as to preclude any meaningful public debate about the quality of Virginia's capital justice.

2. Innocent Death Row Inmates in Virginia? Why We'll Never Know

The House Report highlighted the case of Roger Keith Coleman and noted that Virginia had executed Coleman despite the persistence of serious doubts concerning his guilt. Coleman was executed on May 20, 1992, for the 1981 rape and murder of his sister-in-law. In the months, weeks, and days leading to Coleman's execution, his defense counsel, who was barred by the 21 Day Rule from presenting new evidence of innocence to the Virginia state courts, used the media to disseminate information concerning evidence of Coleman's innocence. The media discussed the evidence at issue: Theresa Horn's statement that another man had bragged about committing the crimes while he tried to rape Horn in 1987; statements from two more women which echoed Horn's account and identified the man as Donney Ramey (a man who lived in a home directly behind the home of the victim); conflicting interpretations of DNA test results; and the statement of a local man whose son was friends with Ramey and his brother. That man claimed that several days after the murder he had found in his pickup truck a plastic bag which contained a bloody sheet, a flashlight, a pair of scissors, and two cowboy shirts. His wife reported the find to a county sheriff, who never pursued the lead.

The House Report noted that although news reports had indicated that Coleman's final appeal to the Supreme Court marked his 16th visit to court, Coleman's attorney's failure to file his appeal in a timely manner was fatal to his ability to raise substantive issues in both federal and state court. Finally, the Report stated, "[t]he march of time undermined Coleman's innocence, and considerable doubt concerning his guilt went with him to his execution."

If Coleman had lived in Illinois, he most likely would have been permitted to present his newly discovered evidence of innocence in a court. It is quite possible that the court would have denied Coleman's claims and sent him back to death row to await his execution. Another possible scenario is that after granting Coleman an evidentiary hearing, the court would have found his claims compelling and granted him a new trial. Either scenario is preferable to the one that played out in Virginia in the days leading to Coleman's execution. His impending execution attracted the attention of national newspapers and magazines and
the condemnation of international figures, including the Pope. While the media debated the new evidence prof-

vided by the defense, the Commonwealth moved forward with its plans for Coleman's execution. If Virginia had

allowed Coleman a chance to present the new evidence of his innocence in a court, it is unlikely that the execution

would have drawn, first, the attention and, ultimately, the condemnation of numerous media commentators and

national and world leaders that attended news of Coleman's execution.

C. Pride and Prejudice: Virginia's Reputation in the Balance

Many national figures and organizations have joined the efforts of local groups like Murder Victims' Families for

Reconciliation to urge Virginia's legislators to repeal the 21 Day Rule. This Rule has earned Virginia a reputation nation-

wide as a bloodthirsty state that ignores the mandates of due process and exhibits a marked indifference towards the

possibility of executing innocent people. One local newspaper article noted with respect to the 21 Day Rule, "[i]t is a legal

Catch-22 that has led experts to call Virginia the worst state in the nation for both unfair trials and a lack of
due process protection - even when considerable doubt concerning an inmate's guilt is found." Sister Helen

Prejean, in Virginia to lobby on behalf of allowing convicted murderer Joseph O'Dell to present what she deemed evi-
dence of his innocence, commented, "[t]here's no way to present the evidence to the court because Virginia has this

incredible 21-day rule which says that if you don't present evidence in 21 days, they'll let an innocent guy die. That's

just atrocious when you think of it." Jodi Longo, the director of the Mid-Atlantic Region of Amnesty International USA
(a group which has argued for the repeal of the 21 Day Rule), noted, "the state of Virginia is noticeably reluctant to
concede that the criminal justice system is liable to human error." In fact, Virginia's death penalty proponents should
join its opponents in working steadfastly towards the repeal of this law, which de-legitimizes Virginia's capital punish-
ment scheme in the eyes of the nation and the world and mocks "justice."

IV. Conclusion

The injustice of the 21 Day Rule is somewhat obscured by the substance of the law, itself. By precluding defendants
from introducing newly discovered evidence of innocence in a formal setting, the Commonwealth forecloses questions about
the accuracy and "justice" of its criminal justice system. A comparative study of Virginia's capital justice scheme
and that of Illinois, however, reveals the chilling truth: if the 21 Day Rule has not yet caused the death of an innocent
person, it will.

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85The implications of the 21 Day Rule are even more egregious and shocking in the context of the poor quality of legal representation provided to indigent defendants in Virginia. Virginia "leads" the nation in the minute size of the pittance that it pays private attorneys to represent indigent criminal defendants. See generally Laura LaFay, Virginia's Poor Receive Justice on the Cheap: Rock-Bottom Pay for Court-Appointed Lawyers Undermines System, Lawyer Says,VIRGINIAN-PILOT & LEDGER-STAR, Feb. 15, 1998, available in 1998 WL 5536744. This statistic and the corre-

sponding reality of capital representation in Virginia have led experts to single out the Commonwealth's capital justice system as particularly lacking in base-line Constitutional protections.

81The subsequent executions of Dennis Stockton and Joseph Roger O'Dell provoked similar debates within the media. O'Dell's execution drew the condemnation of many national and international figures.
82See Jackson & Arney, supra note 2 at 5.