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A Quarter Century of Death: A Symposium on Capital Punishment in Virginia since *Furman v. Georgia* - Introduction

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A Quarter Century of Death: A Symposium on Capital Punishment in Virginia since *Furman v. Georgia*

Introduction

I. Historical Background

In *Furman v. Georgia*,¹ the United States Supreme Court found the death penalty unconstitutional as administered in 1972. The Court's decision invalidated all capital punishment statutes then in existence. Of the five Justice majority, two Justices found capital punishment unconstitutional under all circumstances and three Justices found the death penalty was being administered in an arbitrary and capricious manner.² The Court's suspension of capital punishment proved to be short-lived. Only four years after *Furman*, the Court reinstated capital punishment. In *Gregg v. Georgia*,³ the Court approved capital punishment statutes which provided "guidance" and "direction" to juries confronted with the option of imposing a sentence of death.⁴ *Jurek v. Texas*⁵ came before the Court on the same day as *Gregg*. In *Jurek*, the Court concluded that, by narrowing capital murder to first degree murder plus one of five specified aggravating factors and by authorizing the presentation of mitigating circumstances at a separate sentencing phase, Texas had brought its capital punishment statute within the confines of "guided discretion."⁶ The Court also upheld that part of the Texas capital sentencing procedures which instructed the jury to consider "whether there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing threat to society."⁷ In doing so, the Court sanctioned the use of future dangerousness as an aggravating factor.

1. 408 U.S. 238 (1972) (per curiam) (finding then-existing death penalty statutes unconstitutional under the Eighth and Fourteenth Amendments).

2. *Furman v. Georgia*, 408 U.S. 238 (1972) (per curiam).

3. 428 U.S. 153, 169 (1976) (holding that "the punishment of death does not invariably violate the Constitution").

4. *Gregg v. Georgia*, 428 U.S. 153, 192-98 (1976).

5. 428 U.S. 262 (1976) (finding that the Texas capital sentencing procedures did not violate the Eighth and Fourteenth Amendments).

6. *Jurek v. Texas*, 428 U.S. 262, 276 (1976).

7. *Id.* at 269 (internal quotation marks and citation omitted).

After the Court's reinstatement of capital punishment, state legislatures quickly responded by amending their capital punishment statutes to fit within the "guided discretion" requirements of *Furman* and *Gregg*. Virginia was no exception. In 1975, the General Assembly responded to *Furman* by enacting its own capital punishment statute.⁸ Section 18.2-31 of the Virginia Code established a list of substantive offenses which triggered the imposition of death as a possible sentence.⁹ In 1977, the General Assembly responded to *Jurek* by passing sections 19.2-264.2 and 19.2-264.4 of the Virginia Code.¹⁰ Under these sections, a person who committed one of the substantive offenses included within section 18.2-31 and who was found to be a "continuing serious threat to society," or to have committed an offense that was "outrageously or wantonly vile," became eligible for Virginia's new death penalty. This Symposium will trace some of the substantive and procedural developments, applications, and deficiencies of capital punishment in Virginia during the post-*Furman v. Georgia* era.

II. The Substantive Offenses

A. Virginia Code Annotated § 18.2-31

The first article in this Symposium traces the history of the statutory expansion of the Virginia capital murder statute.¹¹ Section 18.2-31 of the Virginia Code originally made capital three substantive offenses: (1) a killing in the commission of abduction; (2) a killing committed by another for hire; and (3) a killing by an inmate in a penal institution or while in the custody of an employee of the institution.¹² A year later, the General Assembly added robbery and rape as predicate felonies for capital murder.¹³ Since 1975, the General Assembly has continued to expand the substantive capital murder statute. By 1999, the original capital murder statute had been expanded from three to twelve subsections.¹⁴ Each of these twelve subsections has been modified or amended by the General Assembly. The additional subsections do not by themselves convey the extent of the statutory expansion. Counting attempts for the predicate felonies and each alternative method of capital murder listed in the statute, there are now twenty-seven different capital offenses.¹⁵

8. 1975 Va. Acts, ch. 14, 15.

9. VA. CODE ANN. § 18.2-31 (Michie 1977).

10. VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4 (Michie Cum. Supp. 1977).

11. See Hammad S. Matin, *Expansion of Section 18.2-31 of the Virginia Code*, 12 CAP. DEF. J. 7 (1999) (Part I this Symposium).

12. 1975 Va. Acts, ch. 14, 15.

13. 1976 Va. Acts, ch. 503.

14. VA. CODE ANN. § 18.2-31 (Michie 1999).

15. See Alix M. Karl, Case Note, 11 CAP. DEF. J. 449, 455 & n.57 (1998) (analyzing *Payne v. Commonwealth*, 509 S.E.2d 293 (Va. 1999) (holding that each offense identified

After pinpointing the statutory changes, the article explores the motivating forces which sparked the changes. Most of the changes, whether they added, deleted, or changed the language of the statute, expanded the scope of capital murder in Virginia. In some situations, a specific decision by the Supreme Court of Virginia ignited the legislative drive to ensure that the capital murder statute was read expansively by the Virginia courts. In other situations, a particularly horrific crime or systemic problem in society attracted the attention of the public and the General Assembly. In many cases, political gamesmanship appears to have played a significant role in the statutory expansion. The result is a massive statutory expansion of capital murder. After twenty-five years of legislative expansion, the General Assembly is still not satisfied. At least six new capital offenses are being contemplated by the General Assembly.

B. Predicate Felonies in the Capital Context

In addition to legislative action substantially broadening the number and types of murders that can be capital murder in Virginia, the Virginia courts have also played a significant role in expanding the scope of capital murder. The second article in this Symposium discusses the judicial expansion of capital murder in Virginia.¹⁶ Judicial expansion in the predicate felony arena has developed from an alarming trend to a dangerous one. The current predicate felonies for capital murder are robbery, rape, forcible sodomy, and object sexual penetration.¹⁷ After the General Assembly added robbery and rape as predicates to capital murder, the Virginia courts began to interpret these traditional felonies loosely. Over time, the definitions of robbery and rape have expanded in the capital context. The same trend appears to be emerging in the context of forcible sodomy and object sexual penetration, the other statutory predicates for capital murder. Judicial expansion of these felonies establishes a dangerous standard for capital cases predicated upon one of these felonies.

III. The Sentencing Process

In the years following *Furman*, expansion of capital murder in Virginia has not been limited to legislative and judicial enlargement of the substantive offenses. On the procedural side, the sentencing process has also experienced significant expansion.

within a subsection of section 18.2-31 of the Virginia Code is a separate capital murder)).

16. See Heather L. Necklaus, *Predicate Felonies in the Context of Capital Cases*, 12 CAP. DEF. J. 37 (1999) (Part II this Symposium).

17. VA. CODE ANN. § 18.2-31(4)-(5) (Michie 1999).

A. *The Future Dangerousness Aggravator*

Future dangerousness of the defendant was included as one of the original aggravating factors for imposition of a death sentence.¹⁸ The third article in this Symposium explores the expansion of the future dangerousness aggravating factor.¹⁹ While the language of the future dangerousness factor has remained the same, the evidence accepted to prove future dangerousness has been expanded. This article will show that the Virginia courts have misread the statutory sentencing scheme by admitting both prior criminal conduct and current offense evidence to prove future dangerousness. A natural reading of the statute reserves the circumstances of the offense for proof of vileness only. The Virginia courts have also accepted victim impact evidence as relevant to the capital sentencing phase. However, the purpose of the future dangerousness factor is limited in scope to all relevant information about the defendant. Because victim impact evidence focuses on the collateral victims and has no bearing on how dangerous a defendant will be in the future, it has no logical connection to future dangerousness and is therefore irrelevant in the future dangerousness context.

After the General Assembly abolished parole for defendants who had committed felonies on or after January 1, 1995,²⁰ all defendants who are convicted of capital murder, whether sentenced to life or death, will die in prison. Because the only society that a capital murder defendant will ever know is a prison society, previous fears of future dangerousness to society at large are erased. Evidence of prison structure and conditions should thus be admissible as rebuttal to future dangerousness evidence.

B. *The Vileness Aggravator*

The second original aggravating factor for death is vileness.²¹ Although in *Godfrey v. Georgia*²² the United States Supreme Court found that nothing in the words "outrageously or wantonly vile, horrible and inhuman" gave the jury any guidance as to their scope or definition,²³ the vileness factor in Virginia has withstood constitutional attack.²⁴ The fourth article in this Symposium explores the expansion of the vileness factor in Virginia.²⁵

18. VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4 (Michie Cum. Supp. 1977).

19. See Jason J. Solomon, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55 (1999) (Part III this Symposium).

20. See VA. CODE ANN. § 53.1-165.1 (Michie 1999). Although geriatric parole exists in Virginia, capitally-convicted felons are ineligible. VA. CODE ANN. § 53.1-40.01 (Michie 1999).

21. VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4 (Michie Cum. Supp. 1977).

22. 446 U.S. 420 (1980).

23. *Godfrey v. Georgia*, 446 U.S. 420, 428 (1980).

24. The capital murder statutes in Virginia and Georgia are identical.

25. See Douglas R. Banghart, *Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77 (1999)

There are three sub-elements which can be used to prove vileness: (1) torture; (2) aggravated battery; and (3) depravity of mind.²⁶ The Virginia courts have expanded the scope of vileness so that any capital murder falls under one of the three vileness sub-elements. The vileness factor focuses on the circumstances of the crime and the defendant's conduct during the crime. Thus, as in the future dangerousness context, victim impact evidence is irrelevant to a finding of vileness. This article will also explain that, for the vileness factor to have any legitimacy, the Commonwealth should be required to specify which of the three sub-elements it will prove, and the jury should be required to find that sub-element beyond a reasonable doubt.

C. Proportionality Review

The fifth article in this Symposium analyzes the deficiencies of proportionality review in Virginia.²⁷ Section 17.1-313 of the Virginia Code mandates proportionality review.²⁸ Proportionality review requires the Supreme Court of Virginia to conduct a comparative proportionality analysis of death sentences on an individual basis. This requires the court to compare the case before them with other capital cases considering both the defendant and the crime. This review allows the court to determine whether a particular death sentence is excessive or disproportionate. The Supreme Court of Virginia's current comparative proportionality review is ineffective for two reasons. First, it only collects cases reviewed by the Supreme Court of Virginia. In the vast majority of the collected cases, a death sentence was imposed. Thus, there is no effective representation in the comparative analysis of cases where the defendant convicted of capital murder was sentenced to life. Second, the Supreme Court of Virginia only looks at the crime and does not comparatively review the defendant.

Section 17.1-313 of the Virginia Code also requires that, upon request of the defendant, the collection of cases accumulated by the Supreme Court of Virginia for proportionality review be made available to the circuit courts. Although this is a statutory duty, presently these cases are not transmitted to the circuit courts. For proportionality review to be effective, the circuit courts should have automatic access to the collection of cases accumulated by the Supreme Court of Virginia.

(Part IV this Symposium).

26. VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4 (Michie 1999).

27. See Kelly E. P. Bennett, *Proportionality Review: The Historical Application*, 12 CAP. DEF. J. 103 (1999) (Part V this Symposium).

28. VA. CODE ANN. § 17.1-313 (Michie 1999).

IV. Suggestions for Reform

The first five articles in this Symposium analyze the substantive and procedural developments of the Virginia capital scheme in the years following *Furman v. Georgia*. These articles identify problems and deficiencies in the capital murder statute and case law. The final article in this Symposium explores how these deficiencies can be ameliorated. In addition, the article discusses the "twenty-one day rule," which is not discussed in the first five articles. Suggestions for reform are proffered throughout this article.²⁹ The Virginia Capital Case Clearinghouse urges the Virginia judiciary and General Assembly to consider seriously these recommendations and use them in making needed changes to the Virginia capital murder scheme.

29. See Alix M. Karl, *Suggestions for Capital Reform in Virginia*, 12 CAP. DEF. J. 123 (1999) (Part VI this Symposium).