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The Long and Winding Road: The Quest for Admission of Prison Life Evidence in Virginia Capital Sentencing Proceedings

Latanya R. White*

I. Introduction

When the United States Supreme Court paved the way for the return of the death penalty in Gregg v. Georgia, the Court cautioned 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 have never before made a sentencing decision." Since the Supreme Court's decision in Furman v. Georgia, courts and legislatures in the United States have grappled with ways to conform their capital sentencing schemes to the strictures of the Eighth and Fourteenth Amendments. This article maintains that the Commonwealth of Virginia is failing to meet that challenge in at least one area. The Virginia courts' refusal to fashion a consistent rule to admit evidence of prison life in order to rebut future dangerousness calls into question the integrity of Virginia's capital sentencing procedure.

Prison life evidence refers to evidence presented by the defense during the penalty phase that directly rebuts the Commonwealth's contention that defendant will pose a future threat to prison society. Prison life evidence, in this context, should concentrate on the security and control methods

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2. Gregg v. Georgia, 428 U.S. 153, 190 (1976) (holding that a death sentence does not violate the Eighth and Fourteenth Amendments when it is imposed under an adequate statutory scheme).
3. 408 U.S. 238 (1972) (per curiam).
4. See Furman v. Georgia, 408 U.S. 238, 239-40 (1972) (per curiam) (holding that the imposition of the death penalty under the Georgia and Texas statutory schemes constituted cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments).
employed by correctional institutions. This evidence may be presented in the form of testimony by Virginia Department of Corrections officials.

This article explores the role of evidence in a capital sentencing proceeding and travels the path towards its effective and proper use. Part II of this article outlines various classifications of evidence involved in a capital sentencing proceeding and describes their respective functions as foundation for the argument that the Supreme Court of Virginia’s rulings on the admission of prison life evidence have been erroneous. Part III looks specifically at three Supreme Court of Virginia decisions and their effect on the status of the admission of prison life evidence in capital sentencing proceedings. This section also looks at a Fourth Circuit decision and its rational framework as a solution to Virginia’s prison life evidence quandary. Part IV of this article solidifies the argument for the admission of prison life evidence by referencing several United States Supreme Court decisions that establish a defendant’s right to rebut evidence for which the prosecution has the burden of proof. Finally, Part V reviews two Supreme Court of Virginia cases to further support the proposition that prison life evidence should be admitted in capital cases in order to insure a constitutionally adequate proceeding. The ultimate destination of this quest for admission of prison life evidence is a fair and accurate sentencing proceeding that allows a defendant to challenge the very evidence that may lead to the stripping of the defendant’s most fundamental right – his life.  

II. First Things First: Understanding the Function of Evidence in Capital Sentencing Proceedings

As a preliminary matter, it is crucial to understand the function of each category of evidence in Virginia capital sentencing proceedings. Misunderstanding the evidence will necessarily lead to improper characterization of evidence, which in turn will lead to mistakes. This is where the Supreme Court of Virginia has been deficient as an initial matter. The court’s misconception of the role of certain evidence in capital sentencing has resulted in the rejection of legal and relevant evidence. The fundamental rights of the capital murder defendant have been the casualty of the court’s lack of clarity on the admission of prison life evidence. Hence it is important to be clear on the purpose of evidence in order to insure its admission and proper use.

5. Because at the time of this writing all of Virginia’s death row defendants are male, this article employs the masculine pronoun. See Virginians for Alternatives to the Death Penalty (visited Nov. 2, 2000) <http://www.vadp.org/menrow.htm> (listing persons on death row in Virginia). However, not all Virginia capital murder defendants have been male. See, e.g., Tibbs v. Commonwealth, 525 S.E.2d 579 (Va. Ct. App. 2000); Winckler v. Commonwealth, 531 S.E.2d 45 (Va. Ct. App. 2000).

A. Future Dangerousness

The Virginia capital murder statutory scheme requires that the death penalty is only imposed upon a finding beyond a reasonable doubt that a defendant is a future danger to society or that the defendant's conduct in committing the offense was "outrageously or wantonly vile." To find future dangerousness under current Virginia case and statutory law, a jury must conclude "beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society."8

The function of future dangerousness evidence is to look forward to predict a defendant's future conduct.9 The Commonwealth uses future dangerousness evidence to convince the jury that, if spared, the defendant will commit further violent acts that will present a serious and continuous threat to society. Future dangerousness evidence relies upon the defendant's past behavior and the circumstances surrounding the offense to show that defendant will continue to pose a threat in the future.10 The Commonwealth may use a broad range of evidence to prove future dangerousness. Some examples of future dangerous evidence admissible in Virginia capital cases are as follows: past criminal convictions;11 unadjudicated misconduct before or after the capital offense;12 victim impact evidence;13 expert opinion evidence.

8. § 19.2-264.4(C). When § 19.2-264.4(C) is read with the overall statutory scheme, it becomes obvious that the General Assembly intended that only evidence based on the defendant's history may be used to establish the future dangerousness predicate. Jason J. Solomon, Future Dangerousness: Issues and Analysis, 12 CAP. DEF. J. 55, 60-63 (1999). However, the Supreme Court of Virginia has incorrectly held that evidence relating to the circumstances surrounding the offense and any matters relevant to sentencing are admissible to prove future dangerousness. Id.; see Edmonds v. Commonwealth, 329 S.E.2d 807, 813-14 (Va. 1985) (concluding that the fact-finder may include all relevant matters in its future dangerousness determination, including the circumstances and heinousness of the crime).
10. See § 19.2-264.4(C).
on defendant’s propensity for committing criminal acts; \textsuperscript{14} heinousness of the crime or circumstances; \textsuperscript{15} defendant’s lack of remorse; \textsuperscript{16} defendant’s escape plan; \textsuperscript{17} defendant’s statements to a fellow inmate about past and future planned crimes; \textsuperscript{18} defendant’s videotaped confession; \textsuperscript{19} defendant’s status as a parolee at the time of the offense; \textsuperscript{20} and defendant’s juvenile record. \textsuperscript{21}

\textbf{B. Mitigation}

Section 19.2-264.4(B) of the Virginia Code refers to mitigation and reads 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.”\textsuperscript{22} Contrary to future dangerousness evidence, mitigation evidence looks back at the defendant and the offense in order to determine if death is an appropriate sentence under the circumstances. \textsuperscript{23} Through mitigation evidence, the defense seeks to convince the jury that despite a finding of future dangerousness or vileness, factors relating to past events demand that the defendant be spared from death. In other words, mitigation evidence functions to say that despite the presence of any aggravating factor, defendant should not be sentenced to death.

The United States Supreme Court has defined mitigation evidence to include “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.”\textsuperscript{24} The Virginia statutory scheme provides for the consideration of certain mitigating factors.\textsuperscript{25} However, this list is illustrative

\begin{itemize}
\item \textsuperscript{14} See Payne v. Commonwealth, 357 S.E.2d 500, 505-06 (Va. 1987).
\item \textsuperscript{15} See Quintana v. Commonwealth, 295 S.E.2d 643, 655 (Va. 1982).
\item \textsuperscript{16} See Clark v. Commonwealth, 257 S.E.2d 784, 790 (Va. 1979).
\item \textsuperscript{17} See Frye v. Commonwealth, 345 S.E.2d 267, 283 (Va. 1986).
\item \textsuperscript{18} Id. at 281-83.
\item \textsuperscript{19} See Poyner v. Commonwealth, 329 S.E.2d 815, 827-28 (Va. 1985).
\item \textsuperscript{20} See Pope v. Commonwealth, 360 S.E.2d 352, 360 (Va. 1987).
\item \textsuperscript{21} See Beaver v. Commonwealth, 352 S.E.2d 342, 347 (Va. 1987).
\item \textsuperscript{22} VA. CODE ANN. § 19.2-264.4(B) (Michie 2000).
\item \textsuperscript{23} See Solomon, \textit{supra} note 9, at 72.
\item \textsuperscript{24} Lockett v. Ohio, 438 U.S. 586, 604 (1978) (holding that a death penalty statutory scheme that precludes consideration of relevant mitigating factors is unconstitutional).
\item \textsuperscript{25} See § 19.2-264.4(B). The statute enumerates the following statutory mitigating factors: insignificant criminal history; extreme mental or emotional disturbance at the time of the crime; victim’s participation or consent; defendant’s inability to appreciate the criminality of his actions or conform his conduct to the law; defendant’s age; and defendant’s mental retardation. \textit{Id}.
\end{itemize}
and not exhaustive. The following are examples of mitigation evidence found admissible in capital cases: expert testimony that defendant suffered from mental or physical conditions such as depression, bipolar disorder, intermittent explosive disorder, and borderline personality disorder; defendant’s history of substance abuse; defendant’s turbulent family history and troubled youth; defendant’s adjustment to incarceration and good behavior while incarcerated; testimony by family, friends, clergy, and co-workers regarding defendant’s loving and kind nature; and childhood abuse suffered by the defendant.

C. Rebuttal to Mitigation

Because the Commonwealth carries the burden of proof on the issue of penalty, it is allowed to rebut the defendant’s case for mitigation. The Commonwealth’s rebuttal to defendant’s mitigation evidence counters the defendant’s assertions that he should not be sentenced to death. In rebuttal, the Commonwealth seeks to show that the defendant’s asserted factors are not truly mitigating and that he should be put to death. Logically, the Commonwealth’s rebuttal evidence should consist of evidence which directly disputes or contradicts the defense’s mitigation evidence.

D. Rebuttal to Future Dangerousness Evidence

The structure of the Virginia capital sentencing proceeding deteriorates in regards to the issue of permitting a defendant to rebut the Commonwealth’s future dangerousness evidence. The United States Supreme Court has stated that

[w]here the prosecution specifically relies on a prediction of future dangerousness in asking for the death penalty, it is not only the rule of Lockett and Eddings that requires that the defendant be

33. See Smith v. Commonwealth, 248 S.E.2d 135, 150 (Va. 1978) (finding that “(§) 19.2-264.4(C) places upon the Commonwealth the burden of proving aggravating circumstances beyond a reasonable doubt” and that “the party having the affirmative of the issue has the right to open and conclude the argument before the jury”) (internal citation omitted).
offered an opportunity to introduce evidence on this point; it is also the elemental due process requirement that a defendant not be sentenced to death "on the basis of information which he had no opportunity to deny or explain."

Despite this clear statement on the admissibility of evidence to rebut future dangerousness, Virginia courts have been inconsistent in admitting evidence that rebuts danger. Like future dangerousness evidence itself, this type of rebuttal evidence is prospective. The evidence looks to the future to dispel the Commonwealth's notion that defendant will be a future danger. Rebuttal to future dangerousness evidence communicates to the jury that there is little chance that the defendant will commit further acts of violence. The following list is demonstrative of evidence offered to rebut future dangerousness: expert testimony that defendant does not show a high probability of being a danger; parole ineligibility; testimony that a person's dangerousness decreases with age; defendant's good behavior while awaiting trial; and prison life evidence.

E. Surrebuttal

Although not offered frequently, surrebuttal evidence is admissible to respond to any new matter brought up on rebuttal. This evidence is admissible "if it contradicts or alters the import of material evidence introduced for the first time in rebuttal." Surrebuttal evidence that is cumula-

35. See infra notes 49-63 and accompanying text.
36. See Solomon, supra note 9, at 73.
37. See id.
38. See id.
42. See Skipper v. South Carolina, 476 U.S. 1, 3-5 & n.1 (1986).
43. See discussion infra Part IV.
tive or simply duplicates evidence that has been presented is admitted at the discretion of the trial court.\(^\text{46}\)

Surrebuttal evidence is offered effectively to contradict new evidence presented on rebuttal. This evidence allows a defendant to present evidence not formerly presented in mitigation. The surrebuttal evidence challenges new evidence by the Commonwealth that cannot be effectively addressed through cross-examination alone.\(^\text{47}\) An example of surrebuttal evidence in the capital context is defense expert testimony disputing the testimony of a Commonwealth expert who offered new psychiatric evidence on rebuttal.\(^\text{48}\)

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**III. Prison Life Evidence in Virginia Capital Sentencing Proceedings**

**A. The Supreme Court of Virginia Cases**

The Supreme Court of Virginia's treatment of the roles of evidence in capital sentencing proceedings has greatly contributed to the difficulties in the admission of prison life evidence. The following cases illustrate the court's handling, or mishandling, of prison life evidence.

1. **Cherrix v. Commonwealth**

Brian Lee Cherrix ("Cherrix") was convicted in the Circuit Court of Accomack County of capital murder and was sentenced to death.\(^\text{49}\) During mitigation at the sentencing phase, Cherrix sought to offer the testimony of an expert penologist, several officials from the Virginia Department of Corrections, a criminologist, a sociologist, and an inmate serving a life sentence in a Virginia prison presumably to show how prison life would significantly diminish defendant's possible dangerous behavior.\(^\text{50}\) On appeal, the Supreme Court of Virginia agreed with the trial court's conclusion that "what a person may expect in the penal system" is not relevant mitigation evidence.\(^\text{51}\) Because the Supreme Court of Virginia concluded that the testimony did not relate to Cherrix's history or experience, it affirmed the trial court's exclusion of the evidence.\(^\text{52}\)

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47. See id. at 824.
48. See id. at 821-24.
50. See id. at 653.
51. Id. (citation omitted).
52. Id.
2. Walker v. Commonwealth

Darrick Demorris Walker ("Walker") was convicted of capital murder and was sentenced to death. At sentencing, Walker sought to introduce the testimony of the Chief of Operations of the Virginia Department of Corrections official as mitigation evidence. The testimony was to describe prison conditions, specifically life without parole in a maximum security facility. The Supreme Court of Virginia tersely rejected Walker's proffered evidence as inadmissible based on the court's holding in Cherrix.

3. Vinson v. Commonwealth

In 1998, Dexter Lee Vinson ("Vinson") was convicted of capital murder and sentenced to death. During the sentencing phase, two mental health experts testified in defendant's case for mitigation. Each doctor diagnosed Vinson as suffering from "intermittent explosive disorder," which prevented him from conforming his conduct to the law at the time of the offenses. The Commonwealth presented the testimony of its own mental health expert who agreed with the defense experts' diagnoses, but concluded there was at least a fifty-percent chance that Vinson would commit another violent crime within the next five years. On appeal to the Supreme Court of Virginia, Vinson argued that the trial court erroneously allowed the Commonwealth to present rebuttal testimony as to his future dangerousness in response to defense's mitigation evidence. Oddly, the court found that the defense's experts indirectly testified regarding Vinson's dangerousness because they referred to the defendant's mental condition and offered excuses for his behavior. Hence, the court found that it was proper for the Commonwealth to rebut the evidence.

54. Id. at 574.
55. Id.
56. Id. (citing Cherrix, 513 S.E.2d at 653 (holding that prison life evidence was not proper mitigation evidence because it did not relate to the defendant's history or experience)).
58. Id. at 175.
59. Id. The defendant's ability to conform his conduct to the law at the time of the offense is a statutory mitigating factor. See VA. CODE ANN. § 19.2-264.4(B) (Michie 2000).
60. Vinson, 522 S.E.2d at 175.
61. Id. at 178.
62. Id. The court's finding is odd because looking back at the defendant's mental state at the time of the offense in an effort to explain the defendant's behavior is the exact function of mitigation evidence. See supra notes 22-32 and accompanying text.
63. Vinson, 522 S.E.2d at 178.
4. Analytical Deficiencies in Cherrix, Walker, and Vinson

a. Cherrix and Walker

The Supreme Court of Virginia in Cherrix and Walker unequivocally held that prison life evidence is not proper mitigation evidence.⁶⁴ What these cases do not unequivocally state is whether prison life evidence is admissible to rebut the Commonwealth’s future dangerousness showing. Prison life evidence, like other evidence used to rebut dangerousness, directly refutes the Commonwealth’s contention that the defendant will pose a continuing threat to society. Because the Commonwealth has the burden of proving danger beyond a reasonable doubt, it follows that the defendant be allowed to meet this evidence with his own evidence. However, the Supreme Court of Virginia has not yet interpreted the situation this way, but instead has chosen to deny the defendant an opportunity to respond to the Commonwealth’s case in chief. Clearly, this contradicts notions of fundamental fairness guaranteed by the Fourteenth Amendment.⁶⁵ The court completely ignores the crucial point that despite the defendant’s mislabeling of the evidence, he should have been allowed to rebut the Commonwealth’s future dangerousness showing. Because neither Walker nor Cherrix sought to introduce prison life evidence as rebuttal to the Commonwealth’s assertion of future dangerousness, the court was not forced to actually decide whether a defendant is allowed to rebut the Commonwealth’s case with prison life evidence. If Cherrix and Walker had in fact expressly classified the prison life evidence as rebuttal evidence rather than mitigation, the court’s decisions undoubtedly would be erroneous.

b. Vinson

Any skepticism on the order and admissibility of evidence during sentencing was increased tenfold after the Supreme Court of Virginia’s decision in Vinson. Vinson was decided nine months after Cherrix and five months after Walker, yet the decision is shamelessly incongruent with both. The Vinson court’s analysis is erroneous and suffers from faulty reasoning. The court incorrectly characterized defense’s statutory mitigation evidence as anti-future dangerousness evidence and erroneously allowed the Commonwealth to rebut it with further future dangerousness evidence.

⁶⁴. See Cherrix, 513 S.E.2d at 653; Walker, 515 S.E.2d at 574.
⁶⁵. See Skipper v. South Carolina, 476 U.S. 1, 4 n.1 (1986) (stating that when the prosecution seeks death based on future dangerousness, due process requires that the defendant be entitled to present evidence to rebut that notion).
The court’s analysis in Vinson is an example of why it is crucial to understand the function of evidence in order to insure its correct classification. Mitigation is not “anti-future dangerousness evidence.” The functions and purposes of the two are completely different. Mitigation evidence seeks to account for defendant’s past behavior, while future dangerousness evidence aims to predict defendant’s future behavior. As one federal circuit noted, “[r]ebutting evidence’ is that which tends to explain or controvert evidence produced by an adverse party. . . . One cannot rebut a proposition that has not been advanced.”66 Evidence offered to show that the defendant could not conform his conduct to the law at a particular point in time in the past does not analytically or factually rebut the contention that defendant will pose a threat at some time in the future.67 The evidence instead asks the jury to spare the defendant’s life even if it found that the defendant may pose a future danger.68 The Supreme Court of Virginia in Vinson failed to consider this important and evident distinction.

5. Capital Sentencing Proceedings After Cherrix/Walker/Vinson

The Cherrix/Walker/Vinson trilogy has created confusion in the order of Virginia’s capital sentencing proceedings. The apparent course of proceedings after the three cases is as follows: (1) the Commonwealth presents its case in chief which will likely include future dangerousness evidence; (2) the defendant presents mitigation evidence, but is prohibited from rebutting the Commonwealth’s case in chief; (3) despite being precluded from introducing rebuttal evidence, defendant’s statutory mitigation evidence is classified as anti-future dangerousness evidence; (4) Commonwealth is allowed to rebut the defendant’s incorrectly classified mitigation evidence with evidence of future dangerousness; (5) defense attorneys go home with headaches asking themselves what just happened. Fortunately, the United States Court of Appeals for the Fourth Circuit’s opinion in United States v.

66. Carter v. Bell, 218 F.3d 581, 598 (6th Cir. 2000) (quoting Cozzolino v. State, 584 S.W.2d 765, 768 (Tenn. 1979)) (holding that the defendant’s mitigation evidence was “limited to an attempt to show the origin, in a troubled childhood, of the defendant’s criminal acts” and that the evidence was “not controverted by the State’s demonstration of his present criminal proclivities”). The Sixth Circuit found that under Tennessee law, the State was required to show that its rebuttal evidence was relevant to a mitigating factor actually presented by the defendant and not to the issue of punishment in general. Id.


68. See Waye v. Commonwealth, 251 S.E.2d 202, 212 (Va. 1979) (stating that “the jury was at liberty, notwithstanding proof of aggravation, to afford the defendant mercy in consideration of mitigating factors and to fix the lesser punishment of life imprisonment”).
Barnette offers clarity in the midst of the confusion created by the Supreme Court of Virginia.

B. United States v. Barnette

Aquilla M. Barnette ("Barnette") was convicted in North Carolina of various offenses including a murder that took place in Virginia. He was sentenced to death under the authority of the Federal Death Penalty Act. In its case-in-chief at sentencing, the government presented evidence that Barnette would pose a future danger to society. During mitigation and in rebuttal to the government's future dangerousness evidence, Barnette presented the testimony of three mental health experts. Dr. Cunningham, a psychologist and risk assessment expert, testified that Barnette presented a low risk of committing further violent acts in prison. Before the government began rebuttal, defendant objected to the anticipated testimony of Dr. Duncan. Duncan, a forensic psychologist, was expected to testify regarding Barnette's dangerousness based on an assessment using the Psychopathy Checklist Revised. The court denied the motion. In turn, Barnette moved to have Cunningham remain in the courtroom during Duncan's testimony. That request was likewise denied. Duncan went on to testify that, per the Psychopathy Checklist Revised, Barnette was a psychopath. Prior to Duncan's testimony, there had been no evidence that Barnette was a psychopath. Defense counsel cross-examined Duncan on the validity of

69. 211 F.3d 803 (4th Cir. 2000).
70. See United States v. Barnette, 211 F.3d 803 (4th Cir. 2000).
71. Barnette, 211 F.3d at 810-11.
72. Id. at 811; see 18 U.S.C.A. § 3594 (West 2000) (authorizing a court to sentence a defendant to death or life imprisonment without possibility of release).
73. Barnette, 211 F.3d at 810 & n.2.
74. Id. at 821-22.
75. Id. This is an example of evidence offered to rebut the Commonwealth's future dangerousness evidence.
76. Id. at 822.
77. Id. The Psychopathy Checklist Revised is a diagnostic test used to determine whether a patient is psychopathic. Id. at 811 n.4.
78. Id. at 822.
79. Id.
80. Id.
81. Id.
82. Id.
his assessment.83 The defense was not allowed to present its own mental health expert to rebut the new psychological evidence proffered by Duncan.84 The United States Court of Appeals for the Fourth Circuit found that it was reversible error not to allow the defense expert to testify in surrebuttal to contest Duncan’s diagnosis of Barnette as a psychopath.85 The Fourth Circuit vacated Barnette’s death sentence and remanded the case for a new sentencing hearing.86

_Barnette_ appears to have finally established a firm and proper course that should be followed in capital sentencing proceedings in Virginia. The Commonwealth presents evidence to prove future dangerousness or vileness beyond a reasonable doubt. The defendant then presents mitigation evidence as well as evidence to rebut the Commonwealth’s case for death. This rebuttal evidence may include evidence of prison life in order to rebut evidence that the defendant would pose a future danger. If the defendant raises new issues on rebuttal, the Commonwealth may introduce its own rebuttal evidence in response. If in turn, the Commonwealth raises new issues during its rebuttal, the defendant may introduce evidence in surrebuttal with the limitation that it is not cumulative or repetitive of evidence previously presented.87

_Barnette_ presents a clear and fair capital sentencing process. The process preserves the defendant’s due process right to rebut future dangerousness. The proceeding also eliminates the unfair advantage to the Commonwealth of allowing it to rebut defendant’s mitigation with additional evidence of future dangerousness.


When the Commonwealth seeks to prove future dangerousness beyond a reasonable doubt in its case for death, the defendant has an elemental due process right to rebut the Commonwealth’s evidence.88 In _Gardner v. Florida_,89 the trial court sentenced the defendant to death, relying in part on a presentence report that contained “confidential” information that had not

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83. _Id._ at 823.
84. _Id._
85. _Id._ at 824-25.
86. _Id._ at 826.
87. _See id._ at 824.
88. _See infra_ notes 89-104 and accompanying text.
been previously disclosed to the defendant. In its plurality opinion, the Court held that imposing a death sentence based on information that the defendant "had no opportunity to deny or explain" violated Gardner's due process rights.

In Skipper v. South Carolina, Ronald Skipper was convicted of capital murder in South Carolina and sentenced to death. At sentencing, Skipper sought to offer the testimony of two jailers and a frequent visitor as evidence that he had "made a good adjustment to prison" during his time in jail. The trial court found the testimony irrelevant and thus inadmissible. During closing arguments the State argued that if sentenced to life, Skipper would pose a threat to the prison society. The United States Supreme Court found that the evidence that a defendant would not pose a danger in prison is clearly mitigating under Lockett v. Ohio and Eddings v. Oklahoma. Equally important, the Court found that when the prosecution seeks death based on a prediction of future dangerousness, elemental due process requires that the defendant be permitted to introduce evidence to rebut that notion.

In Simmons v. South Carolina, the Court in a plurality opinion reaffirmed the principle announced in Gardner and Skipper that fundamental notions of due process command that a defendant be allowed to rebut information that the sentencer may have relied upon in imposing the sentence. Specifically, the Court held that due process requires that the defendant be allowed to introduce evidence of parole ineligibility when the prosecution raises the issue of defendant's future dangerousness. Justice Ginsburg, in her concurrence, asserted that "[w]hen the prosecution urges a defendant's future dangerousness as a cause for the death sentence, the

91. Id. at 362.
94. Id. at 3.
95. Id.
96. Id.
99. Skipper, 476 U.S. at 5 n.1.
101. Id. at 171.
defendant’s right to be heard means that he must be afforded an opportunity to rebut the argument.” Thus, the United States Supreme Court has clearly pronounced that a defendant has a due process right to rebut the Commonwealth’s argument that a defendant will pose a continuing threat to society. Evidence of prison life is but one way to rebut that contention.

The Fourth Circuit’s holding in Barnette also indicates that a defendant has a right to rebut the prosecution’s future dangerousness evidence. The court held that “simple fairness” required that the defendant have the ability to rebut material evidence presented by the Commonwealth. In its harmless error review, the court emphasized the importance of psychiatric evidence in this type of trial and noted that leaving testimony unanswered, such as that presented by the government in Barnette, can have a devastating effect on a defendant. The court concluded that there was a reasonable possibility that the defense’s inability to rebut the government’s assertion may have contributed to the death sentence and that the government had failed to prove beyond a reasonable doubt that the error was harmless. As a direct result of these findings, the court vacated Barnette’s sentence.

In light of Gardner, Skipper, Simmons, and Barnette, the argument to admit prison life evidence should be constructed as follows: because capital defendants in Virginia are ineligible for parole, if spared from death, a defendant will spend his or her entire natural life in prison. Consequently, post-sentencing, prison will be the only society in which the defendant will ever live. Therefore, the future dangerousness inquiry necessarily becomes whether the defendant “would commit acts of violence that would constitute a continuing threat to [prison] society.” A defendant has a due process right to rebut the Commonwealth’s evidence that the defendant will pose a future danger to society. Testimony describing prison conditions and an inmate’s lifestyle in a maximum security facility is essential to rebut the Commonwealth’s contention that a defendant would

103.  *Id.* at 174.
105.  *Id.* at 824-25.
106.  *Id.* at 825.
107.  *Id.* at 826.
108.  The Virginia General Assembly eliminated parole for all felonies committed after January 1, 1995. See VA. CODE ANN. § 53.1-165.1 (Michie 2000). The General Assembly also eliminated geriatric parole for all Class 1 felons which includes capital murder defendants. See VA. CODE ANN. § 53.1-40.01 (Michie 2000); see also VA. CODE ANN. § 18.2-31 (Michie 2000). As a result, defendants convicted of capital murder for offenses committed after January 1, 1995 are ineligible for parole as a matter of law.
commit future acts of violence that stand to pose a danger to the prison society.

V. Two Final Thoughts: The Effects of Yarbrough v. Commonwealth on Trying Capital Cases in Virginia

Robert S. Yarbrough ("Yarbrough") was convicted of capital murder in Mecklenburg County, Virginia and was sentenced to death. During the penalty phase, the Commonwealth apprised the court of its intention solely to present evidence to prove vileness. Hence, the jury was not to be instructed on future dangerousness. Nonetheless, Yarbrough requested a "life means life" instruction, which informs the jury that if sentenced to life, he would be ineligible for parole.

The Commonwealth argued that, under Virginia law, the defendant was not entitled to a "life means life" instruction because the Commonwealth had relied exclusively on the vileness aggravator. Yarbrough renewed his request for an instruction numerous times throughout the proceeding. Before the instant case was decided, the Supreme Court of Virginia had only required a "life means life" instruction where the defendant's future dangerousness was at issue. Prompted by the need for reliability in sentencing, the court held that the issuance of a "life means life" instruction was essential to assure that jurors based their determination on reason as opposed to fear. The court found that not instructing a jury on defendant's parole ineligibility may cause the jury to speculate and as a result impose a harsher sentence than warranted.

The effects of Yarbrough are at least twofold. First, the holding that all capital defendants sentenced for offenses committed after 1995 are entitled to a "life means life" instruction eliminates the Commonwealth's ability to keep the instruction out by solely proceeding on the vileness aggravator. In Yarbrough, the defendant contended that the Commonwealth purposely sought to avoid the applicability of the "life means life" instruction by

111. Id. at 606.
112. Id.
113. Id.
114. Id.
115. Id. at 607.
116. Id. at 611-12.
117. Id. at 613-17.
118. Id. at 616.
keeping future dangerousness out of the case. After Yarbrough, the Commonwealth no longer has the avoidance of the instruction as an incentive for keeping danger out of the case. The obvious impact is that danger stays in the case. Keeping danger in the case is beneficial to the defense because it allows for the admission of prison life evidence. Prison life evidence, used effectively, may eliminate the jury’s fear that a defendant will pose a danger to the prison staff and fellow inmates. Testimony on the regimented lifestyle that a maximum security prisoner leads, as well as testimony regarding security measures at the facility are examples of prison life evidence. If a jury is advised of the restrictiveness of a prisoner’s life and the measures taken to deal with violent inmates, the jury may find that the defendant will not have significant opportunities to commit violent acts. Also, whenever possible defense counsel should present other “anti-future dangerousness” evidence such as the likelihood of violent acts declining with age, the tendency for improved behavior when inmates are in a controlled environment, as well as statutory and non-statutory mitigation. These types of evidence, coupled with prison life evidence, should make a compelling case for life, especially when vileness is not in the case. Furthermore, because a court is prohibited from instructing the jury that there is a possibility that the defendant may be granted executive clemency, the jurors are not led to believe that there is a chance that the defendant will be released in that manner. Thus, the case for life is made even stronger.

Second, the decision in Yarbrough compels the admission of prison life evidence in order to meet the goals of obtaining a fully informed jury and consequently, “truth in sentencing.” The court in Yarbrough rejected the notion that a life means life instruction is triggered by the Commonwealth’s reliance on either the future dangerousness or vileness aggravators. Instead, the court concluded that the instruction is commanded because of the need to prevent juries from speculating on “post-sentence” procedures

119. Id. at 606.
120. An inmate sentenced to life without parole will likely be sent to a close custody institution. In a close custody facility, inmates are subject to a multitude of security and control measures such as constant supervision and observation. Disruptive inmates are subject to segregation for twenty-three hours per day. Attorney Craig S. Cooley, Remarks at the Capital Defense Workshop sponsored by the Criminal Law Section of the Virginia Bar Association (Oct. 27, 2000).
121. See Fishback v. Commonwealth, 532 S.E.2d 629, 634 n.4 (Va. 2000) (holding that the Commonwealth is not permitted to have an instruction on executive clemency).
122. See Yarbrough, 519 S.E.2d at 616.
123. See Fishback, 532 S.E.2d at 633.
124. Yarbrough, 519 S.E.2d at 611-16.
to the defendant’s detriment.\textsuperscript{125} The effect of the court’s decision is that the goal of obtaining a fully informed jury and accuracy in sentencing requires that jurors may not speculate on matters that may lead to unwarranted imposition of a harsher sentence. Likewise, the Supreme Court of Virginia in \textit{Fishback v. Commonwealth}\textsuperscript{126} found that juror speculation on post-sentencing issues is inconsistent with a fair trial.\textsuperscript{127} Although the Supreme Court of Virginia addressed jury speculation in the specific context of post-sentencing procedures such as parole and clemency, its rulings in \textit{Yarbrough} and \textit{Fishback} imply that the failure to inform jurors on prison life is inconsistent with the goals of accurate sentencing and fairness. Absent prison life evidence, jurors are left to speculate on the defendant’s ability to commit further acts of violence. Fear that an inmate will “run rampant” in prison may influence jurors to impose death when a life sentence would otherwise be appropriate. Informing jurors of the realities of serving a life sentence in a maximum security prison will better serve the policy of steering jurors away from harsher penalties based on unwarranted fear.

\textbf{VI. Conclusion}

In \textit{Woodson v. North Carolina},\textsuperscript{128} the United States Supreme Court opined that

the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in the need for reliability in the determination that death is the appropriate punishment in a specific case.\textsuperscript{129}

\textit{Woodson} was a resounding call by the Court for heightened reliability in capital sentencing proceedings. Prohibiting a defendant from rebutting the Commonwealth’s case for death with relevant evidence is incompatible with the Supreme Court’s demand for reliable sentencing in capital cases. The admission of prison life evidence is highly relevant and necessary to guarantee the capital defendant a fair and accurate trial where future dangerousness is at issue. Prison inmates tend to be portrayed in extremes. Either

\begin{itemize}
  \item \textsuperscript{125} \textit{Id.} at 615.
  \item \textsuperscript{126} 532 S.E.2d 629 (Va. 2000).
  \item \textsuperscript{127} \textit{Fishback v. Commonwealth}, 532 S.E.2d 629, 634 n.4 (Va. 2000).
  \item \textsuperscript{128} 428 U.S. 280 (1976).
  \item \textsuperscript{129} \textit{Woodson v. North Carolina}, 428 U.S. 280, 305 (1976).
\end{itemize}
prisoners are depicted as violent, uncontrollable predators as in the television drama *OZ*;\(^\text{130}\) or they are described as living a life of ease with three meals a day, virtually unlimited recreation, and cable television.\(^\text{131}\) One New Jersey state senator commented that, "to habitual criminals, prisons are resorts with televisions, weight-training facilities and libraries that some colleges would envy. . . . For a lot of them, jail time is just an extended vacation."\(^\text{132}\) Prison life evidence is needed to correct the misconceptions and ignorance surrounding incarceration. Surely fallacies and naivete is not what the Supreme Court of Virginia had in mind when it referred to a fully informed jury.\(^\text{133}\)

The Fourth Circuit in *Barnette* has taken the first steps by outlining a coherent process that allows for the admission of prison life evidence.\(^\text{134}\) Now the Supreme Court of Virginia must take the final steps and at last allow for the consistent admission of prison life evidence in all capital sentencing proceedings.\(^\text{135}\)

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130. *Oz* is a cable television drama which chronicles the lives of inmates in a fictitious correctional facility.

131. See David McCord, *Imagining a Retributivist Alternative to Capital Punishment*, 50 FLA. L. REV. 1, 47 (1998). McCord quoted a letter sent to an editor as one commonly sent to newspapers across the country and therefore reflective of the public’s perception of the prison experience. The author of the letter described prisons as resorts with:

- libraries, televisions, access to phones, medical expenses taken care of by the taxpayers;
- also full sized basketball courts, handball area, punching bags, volleyball net, electronic exercise bicycles, aerobic machines (facing a television), theater groups, music lessons, R-rated movies on television, conjugal visits in a special building, weight-lifting equipment that causes medical expenses to rise, and musical instruments.

*Id.* McCord also pointed to nationwide news reporting that commented on the “clear-cut public desire for criminals to do ‘harder time.’” *Id.* at 48 (citations omitted). McCord further noted that there has been a flood of legislative and administrative initiatives to curtail prisoners’ amenities. *Id.* (citations omitted).


134. See discussion *supra* Part III.B.
