EQUAL JUSTICE AND FAIR PLAY

An Assessment of the Capital Justice System in Virginia

ENDORSING ORGANIZATIONS:

American Civil Liberties Union of Virginia
Friends Committee for Commonwealth Legislation
Legal Aid Justice Center
Richmond Peace Education Center
The Rutherford Institute
Virginia Association of Criminal Defense Lawyers
Virginia Catholic Conference
Virginia Council of Churches
Virginia CURE
Virginia Interfaith Center for Public Policy
Virginia Organizing Project
Virginia State Conference NAACP
Virginians for Alternatives to the Death Penalty

Published by
Virginians for Alternatives to the Death Penalty
September 2006

For additional copies of this report, contact:
VADP
Post Office Box 4804
Charlottesville, VA 22905
888-567-VADP • mail@VADP.org
www.VADP.org

Cover Design by Chris Combs
courtesy of The Rutherford Institute

Introductory Statement from William G. Broaddus,
Former Attorney General, Commonwealth of Virginia (1985-86)

From a distance, our system of criminal justice is a gleaming American jewel which we can proudly hold up to the world as a model for fairly separating the innocent from the guilty and determining their just punishment. Viewed close up, however, we know that, even with the increased scrutiny by the courts and legislative bodies, the system's ideals are, on occasion, imperfectly protected.

Because of the finality of the death penalty, it is essential that we carefully examine that portion of the criminal justice system dealing with capital cases and root out all practices and policies that may cause the system, even in one case, to fall short of our ideal. As with all systems of government, scrutiny is important to ensure that the system functions as we hope and expect.

Over the past fifteen years, Virginia governors have commuted death sentences to life in prison without the possibility of parole in seven cases. While three of the seven cases involved problems other than guilt or innocence, each should be a call to action. How did the system fail? Why did the system fail? Why did a case get all the way through the courts to the executive branch with only the Governor standing between the convicted felon and the death penalty?

Thirty years ago, the Supreme Court of the United States ended the Court's moratorium on the death penalty in *Gregg v. Georgia* finding that the system approved in that case would effectively separate those deserving the death penalty from those who were not so deserving. Since that time, approximately 125 men have been freed from death row after being sentenced to death for crimes they did not commit. That's one innocent person released for every eight executed. In Virginia, Earl Washington Jr. was exonerated after DNA evidence proved he was not responsible for the crime for which he was convicted.

Over the past five years, as exonerations mount up, the inevitable question of "How did that happen" occurs too frequently, and legislators are increasingly studying their capital punishment system and making changes. The most comprehensive of those studies was the Illinois Commission on Capital Punishment set up by then Governor George Ryan (R) in 2000 after thirteen people had been exonerated from Illinois' death row. Ryan, a capital punishment supporter, also halted executions while the Commission conducted its review, declaring that, as long as the system was so fraught with error, *he could not take the chance of risking execution of an innocent person.* The Illinois Commission was charged with developing recommendations to reduce, if not eliminate, the risks of execution of an innocent person. After two years of study, the Commission issued its report suggesting eighty-five reforms to the Illinois system. Those reforms drew from some of the most up-to-date and best research on subjects such as eye witness identification, false confession, misconduct, inadequate defense representation, scientific advances such as DNA testing, and the necessity of providing adequate resources to fund a capital case defense.

Equal Justice & Fair Play, a comprehensive study led by Joseph Tydings, a former United States Attorney who later served as a United States Senator and a member of the Senate's Judiciary Committee, finds that a majority of the protections recommended by the Illinois Commission do not exist in Virginia. Some of the study's recommendations, although not yet in place in the Commonwealth, are under study by the legislature or other governmental agencies. Some of the recommendations may require modification to work effectively in the Commonwealth. Some may be inappropriate for our capital justice system. In each instance, however, the recommendations provide a structured starting point from which to design and implement an objective and comprehensive measure of our progress or failure as we continue our commitment to a high quality system of capital justice in the Commonwealth.

Death penalty supporters and opponents can agree that a system which permits execution of the innocent has no moral authority. The same may be said for a system which, on occasion, capriciously results in the death penalty for one defendant and life imprisonment for another, based on similar factual circumstances. Such a system undermines respect for the law in general and our criminal justice system in particular.

While we pray that our system has not resulted in the execution of an innocent person, we do know there is strong evidence that, on occasion, the system works capriciously. If we are to maintain a system of capital punishment, it is time for Virginia to carefully examine that system to assure that all findings of guilt and punishment are accurate, are as just as possible, and are consistent across the Commonwealth.

I commend **Equal Justice & Fair Play** to you and hope that it will promote further study and dialogue on this subject. In addition, as in Illinois, I hope that the General Assembly will enact a moratorium during its deliberations to ensure the system's integrity before we continue to use it.

Sincerely,

William G. Broaddus

EQUAL JUSTICE AND FAIR PLAY:
AN ASSESSMENT OF THE CAPITAL JUSTICE SYSTEM IN VIRGINIA

A COMPARISON OF
THE 2002 RECOMMENDATIONS OF
THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT
TO CURRENT VIRGINIA LAW

September 12, 2006

EQUAL JUSTICE AND FAIR PLAY:
AN ASSESSMENT OF THE CAPITAL JUSTICE SYSTEM IN VIRGINIA
A COMPARISON OF THE 2002 RECOMMENDATIONS OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT TO CURRENT VIRGINIA LAW

Table of Contents

Chapter 1: Introduction, Background, and Overview

DICKSTEINSHAPIROLLP

1825 Eye Street NW | Washington, DC 20006-5403
TEL (202) 420-2200 | FAX (202) 420-2201 | dicksteinshapiro.com

September 12, 2006

Jack Payden-Travers, Director
Virginians for Alternatives to the Death Penalty
P.O. Box 4804
Richmond, VA 22905

Dear Jack:

At the request of Virginians for Alternatives to the Death Penalty ("VADP") Dickstein Shapiro LLP has conducted a comparison between the April 15, 2002 report released by the Illinois Governor's Commission on Capital Punishment and current Virginia law. As a former United States Attorney for Maryland, United States Senator for Maryland, member of the Judiciary Committee of the Senate, and counsel to a capital defendant, I had a strong interest in this project. I supervised a team of over a dozen attorneys at Dickstein Shapiro LLP, who researched and analyzed whether Virginia's laws, policies and procedures satisfy the 85 recommendations of the Illinois Commission.

By way of background, the Illinois Commission's report was the product of 24 months of study, research, and discussion by the Commission selected by the Governor regarding the state of capital punishment and criminal justice in general in Illinois. The Illinois Commission, composed of individuals with varied viewpoints and experience and varying opinions on the merits of capital punishment itself, agreed unanimously that significant reforms must take place in order to "answer the Governor's call to enhance fairness, justice, and accuracy of capital punishment in Illinois." Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* i (2002). The Commission's report noted that in 2002, Arizona, Indiana, Nebraska and North Carolina had already begun examinations of their own death penalty systems. Since the release of the Illinois Commission's report, state-based groups have compared its recommendations to California, Florida, and New Jersey law, among others.

General Results

Virginia has taken positive steps in a number of the areas which the Crime Commission recommends. I believe that there are a number more which may be helpful in any effort to improve the basic criminal justice system in the Commonwealth.

The following is a summary of Virginia's performance in each of the areas covered by the Illinois Commission's report.

Police and Pretrial Investigations

Virginia needs to make significant improvements in this area to ensure fairness and accuracy in police and pretrial investigations. Most of the recommendations in this area are not met under

current Virginia law. Though the House of Delegates recently encouraged the Virginia Crime Commission to study mistaken identity in lineups and photospreads, no uniform statewide police procedures have yet been established.

DNA and Forensic Testing

Virginia mostly meets the Illinois Commission's recommendations regarding DNA and forensic testing. As the Commission recommended, Virginia has an independent, state-run DNA lab, adequately funded and set apart from the police. Areas for improvement would include: (1) implementing of standards requiring discovery and competent presentation of DNA evidence; and (2) permitting forensic and DNA testing where it has the potential to produce new evidence of innocence. Virginia allows such testing only after a defendant overcomes significant barriers, many of which are too difficult for indigents to overcome, regardless of their innocence.

Eligibility for Capital Punishment

The Illinois Commission reasoned that, while all murders are serious crimes, capital punishment must be reserved only for the most heinous of those crimes. Thus, the Commission recommended that the number of death-eligible crimes in Illinois' death penalty statute be reduced. In contrast, recent legislation in Virginia has only expanded the death penalty. No efforts have been made to restrict it.

Prosecutors' Selection of Cases for Capital Punishment

Inequity by region in the application of the death penalty has been documented in many states, including Virginia. Most of the procedures recommended by the Illinois Commission for improving and standardizing the selection of cases for capital punishment do not exist in Virginia.

Trial Judges

Training, and funding for that training, is vitally important for judges who will hear capital cases. Virginia provides a small amount of training, but does not require any, and thus falls short of the Illinois Commission's recommendations.

Trial Lawyers

Well-qualified, highly trained trial counsel are also essential to fairness for capital defendants. Virginia has enacted mandatory standards for counsel appointed in capital cases, but state-funded training programs are notably absent.

Pretrial Proceedings

Virginia does not fully meet many of the Illinois Commissions' recommendations regarding pretrial proceedings. Pretrial procedures of Commonwealth attorneys and law enforcement officers are particularly important in capital cases where the media may have written prejudicial articles. This is an area where enlightened review and leadership could be very important. Our recommendations focus on court rules and rules of procedure that might enhance fairness, as well as judicial supervision to examine the reliability of the pretrial handling of the case.

The Guilt-Innocence Phase

Virginia does not meet many of the Illinois Commission's recommendations relating to the guilt-innocence phase of trial. This is another area where enlightened review and reform by Commonwealth attorneys and law enforcement officers could materially improve the fairness and effectiveness of the Commonwealth criminal justice system.

The Sentencing Phase and Imposition of Sentence

Virginia meets most of the Illinois Commission's recommendations regarding sentencing. Jury verdict forms appear to make clear that life without parole is an alternative to the death penalty and that the jury should independently weigh the factors in the case and reach its own conclusion regarding the sentence. Areas for improvement include: (1) permitting defendants to make statements before the imposition of sentence, in both bench trials and jury trials; and (2) reducing the overall number of eligibility factors for the death penalty.

Proceedings Following Conviction and Sentence

Virginia partially meets the Illinois Commission's recommendations for post-conviction proceedings. Virginia needs to standardize and make mandatory the review of capital cases. Virginia should continue to support prosecutors' efforts to consistently and conscientiously disclose exculpatory evidence.

Funding

Though trial counsel for capital cases in Virginia for the most part are reasonably compensated, other indigent defense counsel, including public defenders, frequently are not. The Illinois Commission recommended a large-scale and systemic economic support for all facets of criminal procedure as a necessary part of a fair capital system. Virginia should increase funding to ensure that all sectors and parts of the Commonwealth's criminal justice system including public defenders are adequately compensated and funded and that police and sheriff's offices have the funds and support necessary to improve and modernize their offices and procedures.

General Recommendations

Virginia judges and commonwealth prosecutors and law enforcement leaders need to assume real responsibility and exercise wise and enlightened leadership to ensure that in this great and historic Commonwealth no innocent defendant is convicted and executed.

Virginia reforms are moving in the general direction of the recommendations of the Illinois Commission. Virginia could improve its procedures by: (1) creating a uniform system to collect information at the trial level so that capital cases can adequately be studied; and (2) requiring and reminding judges to report attorneys in violation of the rules of professional conduct.

We are very proud of this comprehensive report and hope that its findings are of assistance to all phases of the criminal justice system in Virginia and will serve VADP well in its endeavors. Please do not hesitate to contact me if we can be of any further assistance.

Sincerely,

Joseph D. Tydings

JDT/elw
Enclosures
cc: Ann-Marie Luciano
Erin L. Webb

EQUAL JUSTICE AND FAIR PLAY:
AN ASSESSMENT OF THE CAPITAL JUSTICE SYSTEM IN VIRGINIA
A COMPARISON OF THE 2002 RECOMMENDATIONS OF THE ILLINOIS GOVERNOR'S COMMISSION ON CAPITAL PUNISHMENT TO CURRENT VIRGINIA LAW

OVERVIEW OF VIRGINIA'S COMPLIANCE WITH ILLINOIS RECOMMENDATIONS

Virginia law **fully satisfies 12 out of 85** recommendations:
a 14% complete satisfaction rate.

Virginia law **completely fails to satisfy 47 out of 85** recommendations:
a 55% total failure rate.
(failures are shaded)

Recommendation Summary	Pending Bills?	VA Comply?
1. Police should pursue all reasonable lines of inquiry	No	No
2. Enact uniform police record-keeping requirements	No	No
3. Appoint a public defender in custodial interrogations	No	No
4. Require videotaping of custodial interrogations in a homicide case	No	No
5. Unrecorded statements by homicide suspects should be repeated to the suspect on tape to record comments	No	No
6. Provide for uniform videotaping of interviews of homicide suspects	No	No
7. Permit police taping of suspect's statements in homicide cases even without suspect's consent	No	Yes
8. Record interviews of significant witnesses in homicide cases	No	No
9. Require police to make reasonable attempt to determine suspect's mental capacity before interrogation and, if so determined, avoid leading questions and implications of guilt	No	No
10. Police should ensure that lineup/photo spread facilitator does not know who the alleged suspect is	- V.A. H.J. Res. 79, 2004 Sess. (Va. 2004) - House directed VA Crime Commission to study mistaken identification in criminal cases, including lineup and photospread procedures; Commission encouraged all VA law enforcement to adopt procedures that are "consistent, standardized, and unbiased"	No, but has begun to study it

Recommendation Summary	Pending Bills?	VA Comply?
	- Newly enacted Va. Code § 19.2-390.02 instructs Commonwealth and local police to establish written policies and procedures for conducting in-person and photographic lineups	
11. Police should inform eyewitness that suspect may not be in lineup/photo spread and facilitator may not know who it is	See Recommendation 10	No, but has begun to study it
12. If a facilitator of the lineup/photo spread doesn't know who the suspect is, a sequential procedure should be used	See Recommendation 10	Mostly
13. Suspects should not stand out as different from the distracters in a lineup/photo spread	See Recommendations 10 and 12	No
14. Require a clear written statement of any statements made by an eyewitness at the time of the identification procedure regarding confidence in the identification of the culprit	See Recommendations 10 and 12	No
15. Videotape lineup procedures where practicable	See Recommendations 10 and 12	No
16. Train homicide police on the risks of false testimony, wrongful confessions and police investigative and reporting methods	See Recommendations 10 and 12	Partially
17. Train police on consular rights and notification obligations during arrest and detention of foreign nationals	No	No
18. Commonwealth's AG should remind police of obligations under the Vienna Convention on Consular Relations and review police's efforts in that regard	No	No
19. Consider police perjury (even without conviction) as a basis for revocation of peace officer certification	No	No
20. Create an independent state forensic laboratory with its own budget, operated by civilians and separate from the police	No	Yes
21. Provide adequate funding to hire and train forensic scientists and provide additional facilities in order to expand DNA testing and evaluations (and outsource to private companies when necessary)	No	Yes
22. Establish minimum standards for DNA evidence	No	Partially
23. Commonwealth and federal government should provide adequate funding to develop a DNA database	No	Yes

Recommendation Summary	Pending Bills?	VA Comply?
24. Allow defendants in capital cases the opportunity to apply for a court order to obtain a search of the DNA database to identify others who may be guilty	No	Yes
25. Forensic testing and DNA testing should be permitted where it has potential to produce new evidence of innocence	-HB 2349 – VA Innocence Protection Act -HB 2802- Retention of biological evidence for 15 years in felony cases upon defendant's motion	Partially
26. Provide public funding for forensic testing for those facing capital sentences separately from other non-capital funding	No	No; all capital and non-capital indigent defense is commonly funded
27. Reduce the list of 13 eligibility factors	No bills to reduce eligibility factors; just bills to expand them (e.g., HB 1800)	No
28. Require that there only be five eligibility factors	No bills to reduce eligibility factors; just bills to expand them (e.g., HB 1800)	No
29. Recommend that the Commonwealth's Attorney General and Commonwealth's Attorney offices adopt recommendations (rather than legal requirements) as to the procedures prosecutors should follow in deciding whether or not to seek the death penalty	No	No
30. Revise the death penalty sentencing statute to include a review of death eligibility undertaken by a state-wide review committee	No	No
31. Prosecutor should file a notice of intention to seek or decline death penalty	No	No
32. Trial judges should receive training specific to capital cases	No	Partially -- Not req'd, but generally available
33. Trial judges should receive training specific to capital cases before presiding over such a case	No	Partially -- Not req'd, but generally available
34. Trial judges should receive training regarding the rules applicable to capital cases and the management of discovery	No	Partially -- Not req'd, but generally available

Recommendation Summary	Pending Bills?	VA Comply?
35. Trial judges trying capital cases should receive training on certain topics from experts	No	Partially -- Not req'd, but available
36. Develop funding for state-wide materials and staff to provide training to judges in capital cases	No	No
37. Consider ways legal information and resources can be made available to attorneys	No	No
38. Develop certification process for judges who hear capital cases	No	No
39. Appoint a standing committee of judges familiar with capital case management to provide resources to trial judges who handle capital cases	No	No
40. Establish qualifications and standards for counsel in capital cases	SB 177 – signed by Governor in 2004, requiring at least 2 attorneys to be appointed in capital cases	Yes
41. Require that counsel in a capital case first be admitted to the capital litigation bar	Codified when Governor signed HB 2580	Partially
42. Impose requirements for qualifications of counsel in capital cases	SB 177 – signed by Governor in 2004, requiring at least 2 attorneys to be appointed in capital cases	Yes
43. Disseminate information re: defense counsel who are qualified	No	Partially
44. Train prosecutors and defenders in capital litigation and provide funding to ensure high quality training	No	No
45. Periodically train prosecutors and defense lawyers who try capital cases on a variety of topics dealing with the risks of error	No	No
46. Enact Virginia Supreme Court rule that calls for discovery depositions in capital cases upon leave of court for good cause shown	No	No
47. Enact Virginia Supreme Court rule mandating case management conferences in capital cases	No	No
48. Enact Virginia Supreme Court rule requiring that a certificate be filed establishing that a conference occurred with all those involved in the investigation or preparation of the case and that all discovery has been disclosed	No	No
49. Virginia Supreme Court should adopt rule defining "exculpatory evidence" to aid counsel in making disclosures	No	No
50. Require that discussions with a witness regarding any benefit or detriment to be imposed	No	No

Recommendation Summary	Pending Bills?	VA Comply?
by a prosecutor or the police be put in writing and disclosed to the defense prior to trial		
51. Commonwealth should inform the defense as to the identity and background of any in-custody informant who has agreed to testify regarding a statement made by the defendant	No	Partially
52. Trial judge should hold a pre-trial evidentiary hearing to evaluate the reliability and admissibility of an in-custody informant's testimony	No	No
53. In capital cases courts should scrutinize any tactic that misleads the suspect as to the strength of the evidence or the likelihood of guilt to determine risk of involuntary or false confession	No	No
54. Determine whether or not plea negotiations should be restricted regarding the death penalty	No	N/A
55. Trial judge should determine admissibility of expert testimony regarding reliability of eyewitness testimony on a case by case basis	No	Partially
56. Jury instructions should enumerate factors for jury to consider regarding eyewitness testimony (e.g., difficulty of making cross-racial identification) and should state that eyewitness testimony should be carefully examined in light of the other evidence in the case	No	No
57. Consider developing a jury instruction providing for caution with respect to the reliability of in-custody informant testimony	No	No
58. Develop a jury instruction re: reliability of a defendant's statement if recorded versus non-recorded	No	No
59. Results of polygraph examinations during innocence/guilt phase of capital trials should continue to be rejected	No	Yes
60. Make rules of discovery applicable to sentencing phase of capital trials	No	No
61. During sentencing phase, courts should consider defendant's history of extreme emotional or physical abuse and whether defendant suffers from reduced mental capacity	Legislation is pending but it does not affect the substance of the statute	Partially
62. Allow defendant to have the right to make a statement during aggravation/mitigation phase without being subject to cross-examination	No	Partially
63. Jury should be instructed as to alternative sentences that may be imposed if death penalty is not imposed	No	Yes
64. Continue to reject results of polygraph	No	Yes

Recommendation Summary	Pending Bills?	VA Comply?
examinations during the sentencing phase of capital trials		
65. Jury should be instructed to weigh the factors in the case and reach its own independent conclusion regarding whether the death penalty should be imposed	No	Partially
66. After the jury renders a death sentence, the trial judge should indicate on the record whether he or she concurs in the result and if he or she doesn't, the defendant should be sentenced to life in prison as a mandatory alternative	No	No
67. In any capital punishment case under a scheme with five eligibility factors, if the fact finder determines that death is not appropriate, the mandatory alternative sentence should be life in prison	No	Mostly- except 13 elig. factors
68. Prohibit the imposition of the death penalty on those who are found to be mentally retarded	HB 957 and SB 497 (death penalty prohibited for the mentally retarded)	Yes
69. Adopt a statute prohibiting the use of uncorroborated in-custody informant testimony regarding an admission by the defendant as the sole basis for imposing the death penalty and prohibit convictions for murder in capital cases based on the testimony of a single eyewitness or accomplice	No	No
70. In capital cases the Virginia Supreme Court should consider on direct appeal whether the sentence imposed was due to an arbitrary factor, whether there was an independent weighing of the aggravating and mitigating circumstances and whether the death sentence was excessive or disproportionate to penalties in similar cases	No	Partially
71. Create a prosecutorial conduct rule requiring that a prosecutor have a continuing obligation to make a timely disclosure (after an opportunity to investigate) to the defendant or defense counsel of the existence of evidence that tends to negate the guilt of the defendant or mitigate the capital sentence	No	No
72. Require a petition for a post-conviction proceeding in a capital case to be filed within 6 months after the issuance of a mandate by the Supreme Court following the affirmance of the direct appeal of trial	No	Yes
73. Require trial court to convene the evidentiary hearing on a habeas petition one year	No	Partially

Recommendation Summary	Pending Bills?	VA Comply?
within the date it is filed		
74. In capital cases, allow a proceeding to be initiated where there is newly discovered evidence that offers a substantial basis to believe that defendant is actually innocent, without any time limit after conviction; for claims of actual innocence, court may make initial determination with or without a hearing	-SB 218 (2004) – would have eliminated the time limit for petitions and the limit on the type of nonbiological evidence and would have called for preponderance of the evidence standard – bill killed in cmte -HB 1805/SB 914 (2005) – called for preponderance of the evidence standard and removal of certain prerequisites to a petition; -HB 1805 killed in cmte; SB 914 passed on Senate floor and tabled in House Courts	Partially -- Only meets objectives with respect to biological evidence
75. Law should provide that after all appeals are exhausted and after the AG applies for final execution date, a clemency petition may not be filed later than 30 days after the Virginia Supreme Court enters an order setting an execution date	No	No
76. Leaders in the executive and legislative branches should significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms in capital cases	HB 815 – Would permit indigent defendants to file an *ex parte* motion for appointment/funding of experts	No
77. Reauthorize the statute containing the Capital Litigation trust fund	No	No – VA has no such statute
78. Provide adequate compensation to trial counsel in capital cases for both time and expense and regularly consider whether the hourly rates authorized under statute for compensation to trial counsel reflect the actual market rates for private attorneys	No	Mostly
79. Construe Capital Litigation trust fund broadly to ensure that public defenders can effectively secure additional trial counsel and reimbursement of all reasonable trial related expenses in capital cases	No	Partially
80. Continue the work of the Commonwealth's appellate defender's office in providing trial support in capital cases and appropriate funds for this purpose	No	No

Recommendation Summary	Pending Bills?	VA Comply?
81. Reduce student loans and improve salaries for those entering criminal justice careers	HB 1596 - increase public defenders' pay by 50% (died in committee)	No
82. Commonwealth should provide adequate funding to police agencies to pay for electronic recording equipment, personnel and facilities needed to conduct electronic recordings in homicide cases	No	Partially
83. Consider the ways to broaden the application of many of the recommendations to improve the criminal justice system as a whole	No	No
84. Collect information at the trial level regarding prosecutions of first degree murder cases to determine whether the death penalty is being fairly applied	SJ 31 – proposed examining the administration of criminal justice in VA with regard to wrongful executions and issues generally re: the death penalty (bill in Cmte on Rules)	Partially
85. Judges should be reminded of their obligation to report violations of the rules of professional conduct by prosecutors and defense lawyers	No	Partially

Chapter 2: Police and Pretrial Investigations

Recommendation 1
After a suspect has been identified, the police should continue to pursue all reasonable lines of inquiry whether these point towards or away from the suspect.

Virginia Practice
Current Virginia law does not meet the objectives set forth in Recommendation 1. Virginia has no official requirement that police pursue "all reasonable" lines of inquiry that point away from a suspect after that suspect has been identified (other than an investigator's generic duty to fully investigate a given case). Although the Virginia Department of Forensic Science may establish compulsory training courses for law enforcement officers relating to entrapment, evidence, and other matters and awareness of the potential for biased policing, Va. Code § 9.1-102(6), (38)[1], it does not specifically have a training requirement regarding "tunnel vision."

Pending or Prior Legislative Bills in Virginia
No pending or prior legislation found.

Comments
The phenomenon whereby investigators quickly jump to the conclusion that a particular suspect is guilty, or focus solely on one person to the exclusion of other viable suspects, is commonly referred to as "tunnel vision" or "confirmatory bias." As part of this trend, the police may minimize or even ignore evidence that suggests a suspect is innocent or that might undermine the evidence of guilt against a suspect, or evidence that indicates that another suspect may have committed the crime. The Innocence Commission for Virginia, in its March 2005 report regarding wrongful convictions in Virginia, identified tunnel vision as a "special danger in law enforcement" in Virginia. *See* Innocence Comm'n for Virginia, *A Vision For Justice: Report and Recommendations Regarding Wrongful Convictions in the Commonwealth of Virginia* 69, 73 (2005) ("ICVA Report"), *available at* http://wcl.american.edu/innocenceproject/ICVA/full_r.pdf (finding that improper police "tunnel vision" may have contributed to eight of eleven cases of wrongful convictions studied by the Innocence Commission).

Police training appears to be vitally necessary in order to help police officers avoid "tunnel vision" during their investigations. *See, e.g.*, *id*. at 73 (recommending police training); Province of Manitoba, Canada, *The Inquiry Regarding Thomas Sophonow*, *available at* http://www.gov.mb.ca/justice/publications/sophonow/recommendations/ english.html#tunnel (last visited April 9, 2006); Hon. Fred Kaufman, *Report of the Kaufman Commission on Proceedings Involving Guy Paul Morin* ch. 1 at 32 (1998), *available at* http://www.attorneygeneral. jus.gov.on.ca/english/about/pubs/morin/morin_ch1.pdf. The Virginia Innocence Commission recommends that law enforcement agencies train officers to document all exculpatory *and* incriminating evidence about a particular suspect that they discover and to include this information in their official reports to ensure that all exculpatory information comes to the attention of prosecutors and defense attorneys. ICVA Report at 73-74. The Innocence Commission also recommends that law enforcement agencies train officers "to

[1] All citations herein to the Virginia Code are available at the Virginia General Assembly's Legislation Information System website, http://leg1.state.va.us/000/src.htm, updated July 18, 2005.

pursue all reasonable lines of inquiry, whether they point toward or away from a . . . suspect." *Id.* at 74.

The Virginia State Police's training materials instruct officers that some evidence may "exonerate the innocent" or eliminate a third party from consideration as a suspect. Virginia State Police, *Crime Scene Investigation*, ch. 1 at 3, 19 (2005).

Recommendation 2

(a) The police must list on schedules all existing items of relevant evidence, including exculpatory evidence, and their location.

(b) Record-keeping obligations must be assigned to specific police officers or employees who must certify their compliance in writing to the prosecutor.

(c) The police must give copies of the schedules to the prosecution.

(d) The police must give the prosecutor access to all investigatory materials in their possession.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 2. Virginia law does not require that police perform the kind of record keeping recommended by the Illinois Commission on Capital Punishment ("Illinois Commission"). In fact, no statewide recordkeeping standard exists in Virginia. Although the Virginia Department of Forensic Science may establish compulsory training courses for law enforcement officers relating to record-keeping and report writing procedures, Va. Code § 9.1-102(6), it does not have a training requirement specifically addressing record-keeping of exculpatory evidence.

The Illinois Commission recognized the practice of giving prosecutors and the court responsibility to document evidence and ensure that it would be disclosed to the defense. The study indicated that law enforcement personnel were not disclosing all information to prosecutors.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Virginia recognizes *Brady v. Maryland*, 373 U.S. 83, 87 (1963), which held that due process requires that the state disclose all material exculpatory evidence to an accused. *Jefferson v. Commonwealth*, 500 S.E.2d 219, 224 (Va. Ct. App. 1998) (adopting the law of *Brady v. Maryland*). Virginia courts recognize exculpatory evidence as evidence that is favorable to the accused, and that will tend to exculpate the accused or reduce the penalty. *Id.*; *see also Robinson v. Commonwealth*, 341 S.E.2d 159, 164 (Va. 1986). Exculpatory evidence includes impeachment evidence. *Jefferson*, 500 S.E.2d at 224. Although the Commonwealth is obligated to produce exculpatory evidence to the accused, an accused may only appeal non-production of exculpatory evidence if it was material and there was a reasonable probability that if the evidence had been produced, the outcome would have been different. *Lockhart v. Commonwealth*, 542 S.E.2d 1, 8-9 (Va. Ct. App. 2001).

Virginia's state police training encourages meticulous collection, documentation, and preservation of the chain of custody of evidence. *See, e.g.*, Virginia State Police, *Crime Scene Investigation* ch. 1 at 24 (2005). Codification of these objectives by the legislature would ensure that all state and local police departments in Virginia acted accordingly.

Recommendation 3

In a death eligible case, representation by the public defender during a custodial interrogation should be authorized by the Illinois legislature when a suspect requests the advice of counsel, and where there is a reasonable belief that the suspect is indigent. To the extent that there is some doubt about the indigency of the suspect, police should resolve the doubt in favor of allowing the suspect to have access to the public defender.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 3. Virginia law does not require a court to provide a public defender or any counsel for an adult at the time of an interrogation. If the suspect invokes his or her *Miranda* rights, the police must stop the interrogation. *Commonwealth v. Hilliard*, 613 S.E.2d 579, 584 (Va. 2005). The public defender is only appointed for adults at arraignment. *See* Va. Code § 19.2-157 ("whenever a person charged with a criminal offense . . . appears before any court without being represented by counsel, the court shall inform him of his right to counsel").

In Virginia, there is also no right to have counsel present at a post-arrest photo display. *See Simms v. Commonwealth*, 346 S.E.2d 734, 734-35 (Va. Ct. App. 1986). A defendant need not be provided with counsel for a lineup conducted shortly after arrest -- before the defendant is indicted or given a preliminary hearing. *Hunter v. Commonwealth*, 349 S.E.2d 154, 156-57 (Va. Ct. App. 1986). Before indictment or a preliminary hearing, neither the intricacies of court proceedings nor the advocacy of a public prosecutor -- the circumstances under which defense counsel is needed -- confront an accused. *Id*. at 156.

Though the Virginia Code requires a defendant to be brought before the court and advised of the right to counsel the first day after arrest, Va. Code § 19.2-158, a delay of 25 days in appointing counsel did not require dismissal where no showing of prejudice was made. *Graves v. Commonwealth*, 402 S.E.2d 500, 502 (Va. Ct. App. 1991).

The Illinois Commission on Capital Punishment noted the "inherent coerciveness" of station house interrogations. Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 24 (2002), *available at* http://www.state.il.us/defender/report/complete_report.pdf. This recommendation is intended to reduce false confessions while imposing relatively little financial burden. *Id*.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 4

Custodial interrogations of a suspect in a homicide case occurring at a police facility should be videotaped. Videotaping should not include merely the statement made by the suspect after interrogation, but the entire interrogation process.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 4. Virginia law does not require law enforcement personnel to tape record interrogations of capital suspects. Videotaping may occur, but is not required. Though the Supreme Court of Virginia has not considered the issue, at least one Virginia circuit court judge called for change following a ruling by the Supreme Court of Alaska. In *Commonwealth v. Sink*, No. CR88-367, 1988 WL 626028, at *15 (Va. Cir. Ct. Aug. 24, 1988), the court noted that a rule mandating recorded interrogations would enhance the reliability of police work and eliminate battles at trial between an accused and an officer of the law about what was actually said during questioning. Accordingly, the judge pronounced a "prospective ruling" that "all interrogation conducted in an interview room where recording equipment is available, or can be made available, should be faithfully recorded from beginning to end." *Id*.

Without an accurate record of interrogation proceedings, the accused may suffer infringements of his basic right against self incrimination, his right to have counsel present, and ultimately, his right to a fair trial. *See* David Alan Sklansky, *Quasi-Affirmative Rights in Constitutional Criminal Procedure*, 88 Va. L. Rev. 1229, 1259-70 (2002) (detailing the constitutional violations that can arise from unrecorded interrogations).

The ("Illinois Commission") found that prosecutors would sometimes use false confessions to convict people later found to be innocent. These "confessions" were often the result of "psychological coercion and trickery" by interrogators. Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 24-25 (2002), *available at* http://www.state.il.us/defender/report/ complete_report.pdf. The Illinois Commission concluded that videotaping confessions would help ensure that valid confessions were obtained.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Despite widespread and national calls for routine taping of interrogations, only three states other than Illinois require electronic recording of interrogations: Alaska, Minnesota, and Texas. *Stephan v. State*, 711 P.2d 1156, 1159-60 (Alaska 1985) (applying the due process guarantee of the Alaska Constitution and concluding that "when the interrogation occurs in a place of detention and recording is feasible," an electronic record is "a reasonable and necessary safeguard, essential to the adequate protection of the accused's right to counsel, his right against self incrimination and, ultimately, his right to a fair trial"); *State v. Scales*, 518 N.W.2d 587, 592 (Minn. 1994) (requiring that custodial interrogations "shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention"); *see also* Tex. Code Crim. Proc. Ann. art. 38.22 § 3(a)(1) (stating that oral and sign language statements by a defendant are not admissible against the accused unless an electronic recording is made).

Additionally, in Prince Georges County, Maryland, videotaping of interrogations is now "common procedure." Lawrence Hurley, *Videotaped interviews now common procedure in Prince George County Police Dept.*, The Daily Record, July 9, 2004, *available at* http://www.nacdl.org/sl_docs.nsf/freeform/Mandatory:301; *see also* April Witt, *Pr. George's Police to Videotape Interviews: Interrogation Tactics Have Been Criticized*, Wash. Post, Feb. 1, 2002, at B01, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A5628-2002Jan31&not Found=true ("Prince George's County police say they will install video cameras in interrogation rooms and begin recording all their interviews of suspects in major crimes by March 31, and a Montgomery County legislator is seeking to put cameras in every police interrogation room in Maryland.").

Recommendation 5

Any statements by a homicide suspect which are not recorded should be repeated to the suspect on tape, and his or her comments recorded.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 5. Virginia law does not require that law enforcement personnel record a suspect's statements or specify the manner in which recording should be conducted.

The Illinois Commission on Capital Punishment recognized that it would be difficult to videotape all statements of all defendants (notwithstanding its recommendation that videotaping be done whenever possible). For example, statements may be made in a police car on the way to the station, when videotaping is not possible. Adoption of this recommendation would help avoid false confessions, and would help document valid confessions.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

See Comments for Recommendation 4.

Recommendation 6

There are situations in which videotaping may not be practical, and some uniform method of recording such interrogations, such as tape recording, should be established. Police investigators should carry tape recorders for use when interviewing suspects in homicide cases outside the station, and all such interviews should be audiotaped.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 6. Virginia law does not require homicide investigators to record interrogations or to carry tape recorders.

Videotaping helps police preserve statements that they believe to be reliable. As noted above, videotaping may be impractical for many investigators in the field. In these situations it is important to have an alternative to videotaping.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

See Comments for Recommendation 4.

Recommendation 7

The Illinois Eavesdropping Act (720 ILCS 5/14) should be amended to permit police taping of statements without the suspects' knowledge or consent in order to enable the videotaping and audio taping of statements as recommended by the Commission. The amendment should apply only to homicide cases, where the suspect is aware that the person asking the question is a police officer.

Virginia Practice

Current Virginia law meets the objectives set forth in Recommendation 7. The Virginia statute regarding unlawful interceptions allows consent by one party to the communication. The statute provides, "[i]t shall not be a criminal offense under this chapter for a person to intercept a wire, electronic or oral communication, where such person is a party to the communication or one of the parties to the communication has given prior consent to such interception." Va. Code § 19.2-62(B)(2). Accordingly, unlike the Illinois statute, 720 ILCS 5/14, which requires consent by both parties, only one party to the communication need consent to the recording in Virginia. Va. Code § 19.2-62(B)(2). The Virginia statute contains no limitation to homicide cases, and there is no requirement that the suspect be aware that the person asking the question is a police officer.

Indeed, statements made in areas controlled by the police may be recorded even if neither party consents. In *Belmer v. Commonwealth*, 553 S.E.2d 123, 128-29 (Va. Ct. App. 2001), the court held that the electronic recording of a statement made by a suspect to a family member in an interview room of a police station did not violate the Virginia interception statute, because the suspect did not have a reasonable expectation of privacy in making the statement. The opinion noted that there is generally "no reasonable expectation of privacy in areas controlled by the police." *Id.* at 128.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 8

The police should electronically record interviews conducted of significant witnesses in homicide cases where it is reasonably foreseeable that their testimony may be challenged at trial.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 8. It does not appear that Virginia police currently record interviews of significant witnesses.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Virginia State Police training materials instruct officers to photograph or videotape crime scenes, but not witness interviews. *See* Virginia State Police, *Crime Scene Investigation*, ch. 2 at 1 (2005); Virginia State Police, *Techniques of Interviews and Interrogation* (2005); Virginia State Police, *Witness Interviewing Skills* (2004).

Recommendation 9

Police should be required to make a reasonable attempt to determine the suspect's mental capacity before interrogation, and if a suspect is determined to be mentally retarded, the police should be limited to asking nonleading questions and prohibited from implying that they believe the suspect is guilty.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 9. Virginia state police receive training regarding "[i]nterviewing child and mentally challenged *victims*," not suspects. Virginia State Police, *Techniques of Interviews and Interrogation* 1 (2005) (emphasis added). State troopers are trained to "identify special circumstances and assistance" that might be needed to interview a "mentally challenged" *victim*, but interrogation of the mentally retarded *suspect* is not addressed. *Id.* at 33.

Under Virginia law, the mental capacity of a suspect is a factor in determining whether the suspect voluntarily waived his or her *Miranda* rights and gave a voluntary confession. *Goodwin v. Commonwealth*, 349 S.E.2d 161, 163-64 (Va. Ct. App. 1986); *Commonwealth v. Strosnider*, Nos. R91F477-478 & 479, 1992 WL 884488, at *6 (Va. Cir. Ct. Feb. 10, 1992). Despite this rule, Virginia courts have upheld confessions as voluntary even where police asked leading questions and implied their belief that the suspect was guilty, and even where the suspect was a minor.

In *Dickerson v. Commonwealth*, No. 3003-99-4, 2000 WL 1876478, at *2-*3 (Va. Ct. App. Dec. 28, 2000), during the questioning of a fourteen-year-old with a disability (noted in school records as an "Emotional Disturbance"), police suggested to the boy that they believed he was involved in the crime. The boy ultimately confessed, and that questioning tactic was not criticized by the court. *Id*. at *2. To the contrary, in affirming the boy's convictions, the Virginia Court of Appeals found that the confession was voluntary. *Id.* at *3. The court also held that the boy was not in custody when he confessed to the police, and thus, the safeguards of *Miranda* did not apply. *Id.* at *2.

Similarly, in *Moore v. Commonwealth*, No. 1088-97-2, 1999 WL 1126334, at *2-*3 (Va. Ct. App. Mar. 16, 1999), the police "deci[ded] to employ lying and deceit as an interrogation technique" in examining a seventeen-year-old suspect, where there was evidence that the suspect was not mentally retarded but had "'learning problems,'" "'poor grades,'" and "'attention deficit disorder.'" The Virginia Court of Appeals upheld the conviction. *Id*. at *6*7.

The examples above suggest that Virginia may not have procedures – or at least not uniform procedures – consistent with Recommendation 9.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Lineups and Photospreads

Recommendations 10 to 15 are intended to apply only to homicide cases.

Recommendation 10
[In homicide cases,] [w]hen practicable, police departments should [e]nsure that the person who conducts the lineup or photospread should not be aware of which member of the lineup or photo spread is the suspect.

Virginia Practice
Current Virginia law does not meet the objectives set forth in Recommendation 10. Virginia has no current law specifying procedures in this area. Rather, pursuant to newly enacted Virginia Code section 19.2-390.02, titled "Policies and procedures for law enforcement to conduct in-person and photo lineups:" "The Department of State Police and each local police department and sheriff's office shall establish a written policy and procedure for conducting in-person and photographic lineups." Therefore, policy or procedure likely will differ by law enforcement agency throughout the Commonwealth.

According to a survey by the Virginia State Crime Commission, only 37% of Virginia law enforcement agencies had voluntarily adopted a written procedure on conducting lineups. The other 63% (95 police departments and 68 sheriff's offices) had no written policies as of the date of the survey. *See* Dara McLeod, *Problems With Police Lineups: Report: Changes Needed in Procedures to Prevent Wrongful Convictions*, Va. Law. Wkly., Feb. 28, 2005 ("*Problems With Police Lineups*"), *available at* http://www.vachiefs.org/vacp/ news/2005-02-28.html.

The Virginia State Crime Commission has asked Virginia law enforcement agencies to adopt new procedures for presentation of lineups and photospreads, which include a suggestion to use the double-blind technique, i.e., where the investigator administering the lineup does not know who the suspect is. Beginning in October 2005, law enforcement recruits in Virginia will be trained only in the new procedures, and current officers will receive the training as well. The new procedures will only "encourage" use of the double-blind technique because it could be difficult for small departments to implement. Some departments already use the procedures. For example, the Virginia Beach Police Department adopted the new methods three years ago and now gives presentations on the procedures to other departments. In addition, the Virginia Sheriffs' Association has agreed to push sheriffs to use the new procedures because they are more credible in court. *See* Karin Brulliard, *Revamping Virginia's Police Lineups: New Methods Urged To Curb Mistakes*, Wash. Post, Mar. 6, 2005, at C01.

Pending or Prior Legislative Bills in Virginia
In March 2004, by Virginia House Joint Resolution 79, the House directed the Virginia State Crime Commission to study mistaken identification in criminal cases. As part of the study, the Commission was directed to examine lineup and photospread procedures. H.J. Res. 79, 2004 Sess. (Va. 2004). The House expressly acknowledged the huge role played by mistaken identification in the wrongful convictions that have been brought to light through post-conviction DNA testing. *Id.*

Comments
The Virginia State Crime Commission stated that "there is overwhelming psychological evidence supporting the need for changes in the current procedures Virginia law enforcement is

required and trained to use in conducting in-person and photographic lineups." Virginia State Crime Comm'n, *Mistaken Eyewitness Identification: Report of the Virginia State Crime Commission to the Governor and the General Assembly of Virginia*, H. Doc. No. 40, at 14 (2005). The Virginia State Crime Commission's report and recommendations are intended to encourage all Virginia law enforcement agencies to adopt lineup procedures that are "'consistent, standardized, and unbiased.'" *Problems With Police Lineups* (quoting Kimberly J. Hamilton, Executive Director of the Virginia State Crime Commission).

Recommendation 11

[In homicide cases:]

(a) Eyewitnesses should be told explicitly that the suspected perpetrator might not be in the lineup or photospread, and therefore they should not feel that they must make an identification.

(b) Eyewitnesses should also be told that they should not assume that the person administering the lineup or photospread knows which person is the suspect in the case.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 11. As noted in Recommendation 10, Virginia has no current law specifying procedures in this area, but the Virginia Code indicates that written policies and procedures for in-person and photographic lineups shall be determined locally. Va. Code § 19.2-390.02.

Pending or Prior Legislative Bills in Virginia

See Recommendation 10.

Comments

In *Charity v. Commonwealth*, the Virginia Court of Appeals noted that a lineup was not unduly suggestive where the police did not pressure the victim to identify the appellant: they did not tell her the lineup would include the perpetrator and they told her to take her time and not to worry if she could not identify the intruder. 482 S.E.2d 59, 61 (Va. Ct. App. 1997); s*ee also Currie v. Commonwealth*, 515 S.E.2d 335, 343 (Va. Ct. App. 1999) (affirming conviction; finding victim's eyewitness identification competent and credible in part because detective who administered photospread did not tell victim her assailant would be in photospread). However, Virginia courts has held that the mere fact that witnesses are not explicitly told that the perpetrator may not be in the lineup will not alone create undue suggestiveness that would amount to a denial of due process. *Hill v. Commonwealth*, 347 S.E.2d 913, 923 (Va. Ct. App. 1986); *see also Drewry v. Commonwealth*, 191 S.E.2d 178, 181 (Va. 1972) (finding that it was harmless error for police officer to state his belief that assailant did appear in photospread, in part because "the officer's statement did not amount to an indication that the police had 'other evidence that one of the persons pictured committed the crime'").

Recommendation 12

[In homicide cases,] [i]f the administrator of the lineup or photospread does not know who the suspect is, a sequential procedure should be used, so that the eyewitness views only one lineup member or photo at a time and makes a decision (that is the perpetrator or that is not the perpetrator) regarding each person before viewing another lineup member or photo.

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 12. As noted in Recommendation 10, Virginia has no current law specifying procedures in this area, but the Virginia Code indicates that written policies and procedures for in-person and photographic lineups shall be determined locally. Va. Code § 19.2-390.02.

Forty-six representatives from agencies responding to the Virginia State Crime Commission's survey reported that they used only the sequential method of lineup presentation (whereby witnesses are shown lineup members or photos one at a time rather than simultaneously), and six reported using either the traditional simultaneous method or the sequential method, depending upon the investigator in charge of the lineup. *See* Dara McLeod, *Problems With Police Lineups: Report: Changes Needed in Procedures to Prevent Wrongful Convictions*, Va. Law. Wkly., Feb. 28, 2005 ("*Problems With Police Lineups*"), *available at* http://www.vachiefs.org/vacp/news/2005-02-28.html.

The Virginia State Crime Commission has asked state law enforcement agencies to adopt a sequential procedure for presentation of lineups and photospreads. Va. State Crime Comm'n, *Mistaken Eyewitness Identification: Report of the Virginia State Crime Commission to the Governor and the General Assembly of Virginia*, H. Doc. No. 40 (2005). Beginning in October 2005, law enforcement recruits in Virginia will be trained only in the sequential procedure, and current officers will receive the training as well. The new procedures will only "encourage" the double-blind technique (where the investigator administering the lineup does not know who the suspect is) because it could be difficult for small departments to implement.

Some departments already use the procedures. For example, the Virginia Beach Police Department adopted the new methods three years ago, modeled on the guidelines issued by the U.S. Department of Justice,[2] and now gives presentations on the procedures to other departments. In addition, the Virginia Sheriffs' Association has agreed to encourage sheriffs to use the new procedures because they are more credible in court. *See* Karin Brulliard, *Revamping Virginia's Police Lineups: New Methods Urged To Curb Mistakes*, Wash. Post, Mar. 6, 2005, at C01; *Problems With Police Lineups*.

Pending or Prior Legislative Bills in Virginia

As part of the study directed by Virginia House Joint Resolution 79, the Virginia State Crime Commission was directed to examine lineup and photospread procedures and to consider the sequential method of lineup presentation. Va. H.J. Res. 79, 2004 Sess. (Va. 2004). In resolving to explore sequential lineups as an improved procedure, the House recognized that "traditional police lineups or photographic review may create a situation where eyewitnesses identify the

[2] Nat'l Inst. of Justice, U.S. Dep't of Justice, NCJ No. 178240, *Eyewitness Evidence: A Guide For Law Enforcement* (1999).

person in the lineup or in the photograph who looks most like the suspect relative to the others in the lineup or photo array." *Id.*

Comments
See Recommendation 10.

Recommendation 13

[In homicide cases,] [s]uspects should not stand out in the lineup or photo spread as being different from the distractors, based on the eyewitnesses' previous description of the perpetrator, or based on other factors that would draw attention to the suspect.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 13. As noted in Recommendation 10, Virginia has no current law specifying procedures in this area, but the Virginia Code indicates that written policies and procedures for in-person and photographic lineups shall be determined locally. Va. Code § 19.2-390.02.

Virginia courts have noted that "[a] valid lineup does not require 'that all the suspects or participants be alike in appearance and have the same description, as long as there is nothing to single out the accused from the rest.'" *Charity v. Commonwealth*, 482 S.E.2d 59, 60 (Va. Ct. App. 1997) (quoting *Williamson v. Commonwealth*, 175 S.E.2d 285, 287 (Va. 1970).

Pending or Prior Legislative Bills in Virginia

See Recommendations 10 and 12.

Comments

See Recommendations 10 and 11.

Recommendation 14

[In homicide cases,] [a] clear written statement should be made of any statements made by the eyewitness at the time of the identification procedure as to his or her confidence that the identified person is or is not the actual culprit. This statement should be recorded prior to any feedback by law enforcement personnel.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 14. As noted in Recommendation 10, Virginia has no current law specifying procedures in this area, but the Virginia Code indicates that written policies and procedures for in-person and photographic lineups shall be determined locally. Va. Code § 19.2-390.02.

Pending or Prior Legislative Bills in Virginia

See Recommendations 10 and 12.

Comments

See Recommendations 10 and 11.

Recommendation 15
[In homicide cases,] [w]hen practicable, the police should videotape lineup procedures, including the witness's confidence statement.

Virginia Practice
Current Virginia law does not meet the objectives set forth in Recommendation 15. As noted in Recommendation 10, Virginia has no current law specifying procedures in this area, but the Virginia Code indicates that written policies and procedures for in-person and photographic lineups shall be determined locally. Va. Code § 19.2-390.02.

Pending or Prior Legislative Bills in Virginia
See Recommendations 10 and 12.

Comments
See Recommendations 10 and 11.

Recommendation 16
All police who work on homicide cases should receive periodic training in the following areas and experts on these subjects should be retained to conduct training and prepare training manuals on these topics:

1. **The risks of false testimony by in-custody informants ("jailhouse snitches").**
2. **The risks of false testimony by accomplice witnesses.**
3. **The dangers of tunnel vision or confirmatory bias.**
4. **The risks of wrongful convictions in homicide cases.**
5. **Police investigative and interrogation methods.**
6. **Police investigating and reporting of exculpatory evidence.**
7. **Forensic evidence.**
8. **The risks of false confessions.**

Virginia Practice
Current Virginia law only partially meets the objectives set forth in Recommendation 16. Virginia State Police training materials reveal training only for two of the eight topics completely. Two additional topics may be touched upon. *See* Virginia State Police, *Techniques of Interviews and Interrogation* (2005) (topic 5); Virginia State Police, *Crime Scene Investigation* (2005) (covering topic 7; touching slightly upon topics 3 and 6); Virginia State Police, *Witness Interviewing Skills* (2004) (topic 5).

Additionally, because training is not standardized statewide, there is no guarantee that any of these topics will be addressed in the many police departments in Virginia.

Pending or Prior Legislative Bills in Virginia
See Recommendations 10 and 12.

Comments
See Recommendations 1, 2, 10, and 11. In addition, Virginia's Department of Forensic Science ("DFS") is empowered to establish compulsory training courses for law enforcement officers relating to (1) entrapment, evidence and other matters; and (2) ensuring sensitivity to and awareness of cultural diversity and the potential for biased policing. Va. Code § 9.1-102(6), (38). DFS was created and required to establish a DNA testing program. Va. Code § 9.1-1101(B)(2).

Recommendation 17

Police academies, police agencies and the Illinois Department of Corrections should include within their training curricula information on consular rights and the notification obligations to be followed during the arrest and detention of foreign nationals.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 17.
The Virginia State Police training course on the topic mentions the 1963 Vienna Convention on Consular Relations. Clay Hays, Office of Foreign Missions, Diplomatic Motor Vehicle Office, *Dealing With Foreign Diplomats* 3 (2004). It also instructs state police that "all non U.S. citizens should be considered foreign nationals," but the training materials do not direct police to notify the foreign national's consulate upon arrest. *Id.* at 2.

In at least one Virginia case, three police officers acknowledged that they "had attended training regarding law enforcement's responsibilities as to foreign nationals who are arrested in this country." *Bell v. Commonwealth*, 563 S.E.2d 695, 706 (Va. 2002). But in that case, the court refused to suppress the statement of the defendant, a foreign national, to the police, taken before his consulate had been contacted and before he had been notified of his right to have his consulate notified. *Id.* The court found that there was no support in the provisions of the Vienna Convention for such a remedy. *Id.* In *Bell*, the Supreme Court of Virginia concluded that a 36-hour delay in the police department's notification to the Consulate of Jamaica was not unreasonable. *Id.* The court also held that it was not improper for the officers to have questioned the defendant before advising him of his consular rights under the Vienna Convention. *Id.* "The provisions of Article 36 [of the Vienna Convention] do not mandate immediate notification, nor do they necessarily require consular notification before an arrestee is advised of Miranda rights and agrees to waive those rights by answering questions." *Id.* The court found that even if the defendant's rights under Article 36 *were* violated, any such error was harmless -- in other words, it did not make a difference in the ultimate result. *Id.* at 707.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 18

The Illinois Attorney General should remind all law enforcement agencies of their notification obligations under the Vienna Convention on Consular Relations and undertake regular reviews of the measures taken by state and local police to ensure full compliance. This could include publication of a guide based on the U.S. State Department Manual.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 18. No Commonwealth's Attorney general advice or guide could be located regarding the Vienna Convention on Consular Relations ("VCCR"). *See* Recommendation 17.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

In *Breard v. Greene*, 523 U.S. 371 (1998), the U.S. Supreme Court held that (1) by not asserting his Vienna Convention claim in Virginia state court, the habeas petitioner procedurally defaulted on his claim; and (2) Virginia authorities' violation of the Vienna Convention had no continuing consequences that would permit Paraguay to bring suit against the Commonwealth under the Eleventh Amendment exemption. The Court stated that "even were Breard's Vienna Convention claim properly raised and proved, it is extremely doubtful that the violation should result in the overturning of a final judgment of conviction without some showing that the violation had an effect on the trial." *Id.* at 377.

The Supreme Court of Virginia also has rejected a defendant's argument that failure to advise him of his right to consult with a Pakistani diplomat (and alleged violations of an extradition treaty) should result in suppression of all statements obtained. *Kasi v. Commonwealth*, 508 S.E.2d 57, 62 (Va. 1998). The court noted that the VCCR deals with the notice to be furnished to the consular post and violations of the treaty do not create any legally enforceable individual rights. *Id.* at 64.

Recommendation 19

The statute relating to the Illinois Law Enforcement Training and Standards Board, 50 ILCS 705/6.1a, should be amended to add police perjury (regardless of whether there is a criminal conviction) as a basis upon which the Board may revoke certification of a peace officer.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 19, because Virginia law mandates decertification only where there is a felony conviction or plea for police perjury.

The Virginia Criminal Justice Services Board ("the Board") has the authority and the duty to establish training and qualification standards and to certify and decertify law enforcement officers and jail officers for employment in Virginia. Va. Code § 9.1-102. All law enforcement and jail officers must obtain pre-employment certification by successfully completing state-regulated training and examinations. Va. Code §§ 15.2-1706, 15.2-1707.

The Board is required to decertify law enforcement and jail officers who have "been convicted of or pled guilty or no contest to a felony or any offense that would be a felony if committed in Virginia." Va. Code § 15.2-1707. Thus, only perjury that results in a felony conviction (or plea) is grounds for decertification.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Recommendation 19 of the Illinois Commission on Capital Punishment's 2002 report suggests that the Illinois Police Training Act be amended to include decertification of Illinois police officers who are found to have knowingly and willingly made false statements under oath as to a material fact that goes to an element of the offense of murder (50 ILCS 705/6.1(h)-(r)). Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 42-43 (2002), *available at* http://www.state.il.us/defender/report/complete_report.pdf. This statutory language may serve as a basis for legislative recommendations in Virginia to amend Va. Code § 15.2-1707 (decertification of law-enforcement officers).

Virginia State Police training emphasizes the importance of an officer's honesty in court. Virginia State Police, *Court Organization, Procedure, Preparation & Testimony* 23 (2005).

Chapter 3: DNA and Forensic Testing

Recommendation 20
An independent state forensic laboratory should be created, operated by civilian personnel, with its own budget, separate from any police agency or supervision.

Virginia Practice
Current Virginia law meets the objectives set forth in Recommendation 20. The report of the Illinois Commission on Capital Punishment recommended that the state create a forensic lab "as its own state agency, not under the jurisdiction of the Illinois State Police." Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 52 (2002), *available at* http://www.state.il.us/ defender/report/complete_report.pdf. Virginia's Department of Forensic Science ("DFS") is an executive state agency with its own budget, initiatives, and civilian staff. It is not under the control of any police agency or prosecutor's office in Virginia.

Effective July 1, 2005, Virginia's state forensic lab was elevated to Department status, making DFS an executive branch agency. Va. Code § 9.1-1100. The former Division of Forensic Science was previously a division of the Department of Criminal Justice Services. *Id.*

DFS has been called "one of the nation's leading crime laboratories." *Promega and Beckman Coulter Partnership Yield Significant Advance in DNA Typing*, PR Newswire, Nov. 14, 2001. The Department provides "comprehensive forensic laboratory services to over 400 law enforcement agencies in the Commonwealth, *while remaining independent of any of them*." *See* DFS, About DFS, http://www.dfs.virginia.gov/about/index.cfm (last visited April 9, 2006); *see also* Va. Code § 9.1-1101. The Director of DFS is appointed by the Governor pursuant to qualifications recommended by the Forensic Science Board ("FSB") (a policy board in the executive branch of state government) and subject to confirmation by the Virginia General Assembly. Va. Code §§ 9.1-1109 (FSB; membership), 9.1-1110 (Functions of FSB). The Administration Section of DFS (Director; Deputy Director; four laboratory Directors) independently defines the Department's policies, manages its fiscal and human resources, and establishes legislative and budgetary initiatives. DFS, About DFS.

With respect to staff, Virginia law mandates that DFS "ensure that its services are performed by skilled professionals who are qualified to testify in court regarding such services." Va. Code § 9.1-1102(C). The DFS website posts employment opportunities, explains qualifications, and hires skilled civilians who satisfy the requisite educational and other requirements. DFS, General Questions, http://www.dfs.virginia.gov/ faqs/general.cfm#2 (last visited April 9, 2006). For more information regarding staff qualifications, see Recommendation 21.

Lastly, under Virginia law, independent experts employed by an attorney of record for a person accused of a crime or the accused to reexamine materials previously examined in any laboratory of the Department of Forensic Science, shall conduct their analyses independently of the Department's facilities, equipment, or supplies. Va. Code § 9.1-1105.

Pending or Prior Legislative Bills in Virginia
No pending or prior legislation found.

Comments

A minority of members of the Illinois Commission on Capital Punishment expressed the view that state forensic labs, in the vast majority of cases, provide DNA analysis and testimony for police agencies and prosecutors; therefore, it is difficult to remove the stigma of a "police/prosecutor" lab. The same principle is true in Virginia, which already has an independent lab, but Virginia law allows for reevaluation by independent experts and other safeguards (see subsequent recommendations). As noted above, DFS is accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board and appears to operate one of the highest quality labs in the country.

Recommendation 21

Adequate funding should be provided by the State of Illinois to hire and train both entry level and supervisory level forensic scientists to support expansion of DNA testing and evaluations. Support should also be provided for additional up-to-date facilities for DNA testing. The State should be prepared to outsource by sending evidence to private companies for analysis when appropriate.

Virginia Practice

Current Virginia law meets the objectives set forth in Recommendation 21.

Staff

The Virginia Department of Forensic Science ("DFS") is accredited by the American Society of Crime Laboratory Directors Laboratory Accreditation Board ("ASCLD/LAB"). DFS, About DFS, http://www.dfs.virginia.gov/about/index.cfm (last visited April 9, 2006). At DFS and other ASCLD/LAB accredited labs, fully qualified DNA examiners are required to have a bachelor's degree and graduate level course work in molecular genetics, and forensic toxicologists hold PhDs in chemistry, toxicology, or pharmacology. DFS, General Questions, http://www.dfs.virginia.gov/ faqs/general.cfm (last visited April 9, 2006).

The DFS Central Laboratory Director and three Regional Laboratory Directors oversee the daily activities of their respective labs and report to the Deputy Director. DFS, About DFS. In addition, the major analytical disciplines (Controlled Substances, Firearms & Toolmarks, Forensic Biology, Forensic Toxicology, Latent Prints, Questioned Documents and Trace Evidence) each have a section chief at the Central Laboratory. *Id.* Section chiefs have statewide responsibility for the technical aspects of their area, including resource and training needs, quality assurance, analytical procedures and protocols, interpretation, and reporting of analytical results. *Id.* Each of the four labs also has a supervisor for each section to ensure that forensic examiners and technical assistances uphold the section's technical procedures. *Id.* In addition to the lab director, support staff, and technical staff, each laboratory employs a forensic photographer and forensic evidence specialists who provide evidence intake services and control custody of evidence. *Id.* The Central Laboratory also maintains a Photo Processing Section which develops and prints crime scene and autopsy photographs for all agencies served by the Department, and the Central Lab houses a Training Section that instructs law enforcement personnel in crime scene processing and evidence handling. *Id.* Each staff member, facility, and section must meet high quality standards to maintain ASCLD/LAB accreditation.

Facilities

In addition to ASCLD/LAB accreditation requirements, Virginia law mandates that DFS and its facilities are located to ensure the protection of evidence and requires DFS to provide security and protection of evidence and all samples submitted for analysis or examination. Va. Code § 9.1-1102(A)-(B). DFS facilities also use up-to-date technology to test DNA.[3] In 2001, Promega Corporation partnered with Beckman Coulter, Inc. to release this new DNA purification system capable of extracting DNA from virtually any type of forensic sample. *Promega and Beckman Coulter Partnership Yield Significant Advance in DNA Typing*, PR Newswire, Nov. 14, 2001.

[3] DFS uses Promega's PowerPlex® 16 BIO System, which includes the D3S1358, TH01, D21S11, D18S51, vWA, D8S1179, TPOX, FGA, D5S818, D13S317, D7S820, D16S539, CSF1PO, Penta D, Penta E, and Amelogenin loci. DFS, Forensic Biology, FAQs, http://www.dfs.virginia.gov/services/forensicBiology/ faq.cfm#23 (last visited April 9, 2006).

DFS became one of the first state laboratories to implement this new technology and automate the extraction of DNA from crime scene evidence. *Id.* This system greatly increases efficiency and reduces any backlog. For instance, manual extraction of a single DNA sample can take roughly 5 hours, whereas the automated Promega system can extract DNA from 40 samples in approximately one hour with only 15 minutes of hands-on time by the forensic examiner. *Id.*

DFS is known as "one of the nation's leading crime laboratories" and "is known for being the first state laboratory to offer DNA analyses to law enforcement agencies and . . . the first [DNA databank] to identify an interstate 'cold hit.'[4] As a result of its leading-edge practices, the [department] is widely recognized for its efficient and effective forensic laboratory system." *Id.*

Outsourcing (to reduce backlog)
Virginia currently has *no* backlog. DFS, DNA Databank Statistics, http://www.dfs.virginia.gov/statistics/index.cfm (last visited April 9, 2006). DFS has taken several steps over the last five to ten years to increase internal DNA analysis and outsource analysis of convicted offender and arrestee samples to eliminate and prevent any backlog.

- In 1998, Virginia partnered with the Bode Technology Group of Springfield, Virginia to run backlogged convicted offender samples for three years, making it the first state to outsource databank work in its effort to reduce backlog. *Evolution of DNA Testing in Virginia*, Daily Press, Sept. 4, 2000, at A6; DFS, DNA Databank Statistics.
- In 1999 and 2000, DFS hired additional forensic examiners to analyze crime scene material, and continues to hire new staff when needed. *Evolution of DNA Testing in Virginia*, Daily Press, Sept. 4, 2000; DFS, Job Openings, http://www.dfs.virginia.gov/jobs/jobs.cfm (last visited April 9, 2006).
- In 2004, Virginia received a $2 million grant from the Department of Justice to expand and enhance DNA testing. Lisa Bacon, *Virginia: DNA Testing*, N.Y. Times, Sept. 22, 2004, at A18.
- Virginia was the first state to receive federal financing in a five-year, $1 billion effort to increase DNA analysis to solve crimes and exonerate the innocent. *Id.*

Pending or Prior Legislative Bills in Virginia
No pending or prior legislation found.

Comments
The primary concern in the Illinois Report for Recommendation 21 was a significant backlog in DNA testing in Illinois due to insufficient staff and outsourcing. In Virginia, however, it is simply a different situation. Virginia has no backlog. The Commonwealth has recognized the need for outsourcing and expanded DNA testing and has taken the steps necessary to eliminate

[4] A "cold hit" is a term used to refer to a link made between DNA profiles in the Combined DNA Index System (CODIS), which is the national DNA database operated by the FBI and in which state and local crime labs participate. CODIS has two indexes (or sub-databanks), the forensic index and the offender index. A cold hit can be made in either the forensic or offender index. If the crime lab enters a DNA profile from crime scene evidence into the databank and gets a "forensic hit," that means the lab has linked that profile to evidence from another crime, possibly in another state (thus the investigating agencies can share information and hope to develop more leads). If the lab gets an "offender hit," that means the DNA profile they entered matches the profile of a convicted offender whose profile was entered into the database pursuant to the particular state's (the state in which he was convicted) DNA databank law (which specifies the offenses for which a DNA sample must be taken and put in the database) -- i.e., they have identified a suspect.

any backlog. As to strong quality assurance programs, DFS is accredited by ASCLD/LAB and must fulfill ASCLD standards to maintain accreditation. Further, DFS is required by law to ensure the protection of evidence and samples, and it also employs qualified staff and uses state of the art technology to increase both efficiency and accuracy.

Recommendation 22
The Commission supports Illinois Supreme Court Committee Rule 417, establishing minimum standards for DNA evidence.

Virginia Practice
Current Virginia law meets the objectives set forth in Recommendation 22. Pursuant to Virginia Code sections 9.1-1104 and 19.2-187.2, judges generally allow discovery of DNA data. Illinois Supreme Court Rule 417 ("Illinois Rule 417") also mandates discovery of DNA test results and underlying technical data. Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 56 (2002) ("Illinois Report"), *available at* http://www.state.il.us/defender/report/ complete_report.pdf. Virginia also permits such discovery. "[U]pon affidavit that the requested writings or documents are material," a defendant may obtain "the production of writings or documents used to reach the conclusion contained in a certificate of analysis prepared pursuant to § 19.2-187." Va. Code § 19.2-187.2.

The Statement of Purpose for Illinois Rule 417 states that the rule is promulgated "to allow a proper, well-informed determination of the admissibility of DNA evidence and to insure that such evidence is presented competently and intelligibly." Illinois Report at 56. Virginia Code section 19.2-270.5 allows for admission of not only DNA evidence, but also "any relevant evidence bearing upon any question at issue before the court, *including the accuracy and reliability of the procedures employed in the collection and analysis of a particular DNA sample*." (Emphasis added.)

Moreover, independent experts employed by (i) an attorney of record for a person accused of a crime or (ii) the accused to reexamine materials previously examined in any laboratory of the Department of Forensic Science ("DFS"), have the right to conduct their analyses independently of the DFS's facilities, equipment, or supplies. Va. Code § 9.1-1105.

Pending or Prior Legislative Bills in Virginia
In 2006, the House and Senate passed a bill making "it a Class 6 felony for a clerk of court or other public official to willfully violate a court order" commanding the "storage, preservation and retention of human biological evidence in a felony case." SB 552, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061& typ=bil&val=sb552 (last visited April 10, 2006). The bill, which would penalize court clerks or other public officials for destroying, among other things, DNA evidence, passed both houses of the Virginia General Assembly, but as of April 10, 2006, had not yet been signed by the Governor. *Id*.

Comments
There are also numerous statutory and regulatory standards for collecting and analyzing DNA samples. *See* Va. Code § 19.2-310.4; *see also* Recommendation 23.

Recommendation 23

The [f]ederal government and the State of Illinois should provide adequate funding to enable the development of a comprehensive DNA database.

Virginia Practice

Current Virginia law meets the objectives set forth in Recommendation 23. In 1989, the Virginia Division of Forensic Sciences (now the Department of Forensic Science, "DFS") implemented DNA testing in its criminal investigations, making it the first state crime lab to have such a policy. Michelle Hibbert, *DNA Databanks: Law Enforcement's Greatest Surveillance Tool?*, 34 Wake Forest L. Rev. 767, 774 (1999). Later that year, the Virginia General Assembly became the first U.S. legislature to enact legislation requiring certain classes of offenders[5] to submit DNA samples for inclusion in a DNA database, and just one year later, the legislature expanded the law to require that all felons provide samples for inclusion in the Virginia DNA database. Va. Code § 19.2-310.2.

DFS must make the results of a DNA analysis and comparison of the identification characteristics from two or more samples (blood, saliva, or tissue) available directly to federal, state, and local law enforcement officers upon request when such request is made in furtherance of an official criminal investigation. Va. Code § 19.2-310.5. Furthermore, DFS must confirm whether or not there is a DNA profile on file for a specific individual if a federal, state or local law enforcement officers requests such information in furtherance of an official criminal investigation. *Id.*

Since 1993, the size of the convicted offender sample database has grown exponentially from 2,184 samples in 1993 to 242,016 samples in 2005 (and as of January 31, 2006, it has 243,152 samples). DFS, DNA Databank Statistics, http://www.dfs.virginia.gov/ statistics/index.cfm (last visited March 13, 2006). In turn, the hit rate has increased dramatically. A Databank hit occurs when the DNA profile from a crime scene sample with no suspect matches a DNA profile in a database of previously convicted offenders, a database of samples from those individuals

---

[5] Under current Virginia law, the following individuals must provide a blood, saliva, or tissue sample for DNA analysis and incorporation of the resulting DNA profile in the Virginia Databank:

- individuals convicted of a felony offense on or after July 1, 1990;
- individuals convicted of a felony offense under Va. Code § 18.2-61 *et seq.* (sexual crimes);
- juveniles (14-18 years of age at the time of the offense) who are convicted of a felony or adjudicated delinquent on the basis of an act that would be a felony if committed by an adult 18 or older; and
- individuals arrested for committing or attempting to commit the following crimes (as of January 1, 2003): a violent felony; burglary; or breaking and entering with intent to commit murder, rape, robbery, arson, larceny, assault, battery, or any other felony or misdemeanor (saliva or tissue samples; but not blood samples for these individuals).

See Va. Code § 19.2-310.5 (DNA samples and DNA Databank); Va. Code § 19.2-310.2 (felons); Va. Code § 16.1-299.1 (juvenile felons); Va. Code § 16.1-228 (definitions of "adult" and "juvenile"); Va. Code § 19.2-310.2:1 (felony arrestees); *see also* Va. Code § 19.2-310.3 (procedures for withdrawal of blood, saliva, or tissue for DNA analysis from persons sentenced to incarceration); Va. Code § 19.2-310.3:1 (procedures for taking saliva or tissue samples for DNA analysis from arrestees); Va. Code § 19.2-310.4 (procedures for conducting DNA analysis of blood, saliva, or tissue samples); 6 Va. Admin. Code § 20-210-10 (definitions related to DNA analysis upon arrest); and 6 Va. Admin. Code § 20-210-20 *et seq*. (procedures related to DNA samples and analysis upon arrest); *see also* DFS, About DFS, http://www.dfs.virginia.gov/ about/index.cfm (last visited April 9, 2006); DFS, Forensic Biology FAQs, http://www.dfs.virginia.gov/services/forensicBiology/ faq.cfm#19 (last visited April 9, 2006).

arrested for specified crimes, or a database of other crime scene profiles. *Id.* The following figures demonstrate the growing number of hit rates in the Virginia Databank:

- 308 hits in 2001;
- 445 hits in 2002 (an average of 37 hits per month);
- 608 hits in 2003 (an average of 51 hits per month);
- 695 hits in 2004 (an average of 58 hits per month);
- 810 hits in 2005 (an average of 68 hits per month); and
- 9 hits in January 2006.

Id.

In addition, since the arrestee database was established in January 1, 2003, it has obtained 247 hits (63 in 2003; 68 in 2004; 107 in 2005 and 9 in January 2006). *Id.* Approximately 80% of the hits would have been missed if the Databank was limited to only violent offenders. *Id.* Approximately 39% of violent crimes that were solved were perpetrated by individuals with previous property crime convictions. *Id.*

Additionally, in 1992, Virginia also became a pilot state for the comprehensive national DNA database, CODIS (Combined DNA Index System), a national system of computer databases designed by the FBI to store DNA profiles from convicted offenders and crime scene evidence. *Id*. Any DNA profile developed from the evidence in a case with no suspect(s) can then be searched against CODIS to yield possible investigative leads from any profiles that match the DNA profile of a convicted offender or arrestee (i.e., "hits"). *Id.*

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 24

Illinois statutes should be amended to provide that in capital cases a defendant may apply to the court for an order to obtain a search of the DNA database to identify others who may be guilty of the crime.

Virginia Practice

Current Virginia law meets the objectives set forth in Recommendation 24.

Pre-Conviction (Generally)

Under Virginia law, upon request of any person accused of a crime or his or her attorney, the Virginia Department of Forensic Science ("DFS")or the Division of Consolidated Laboratory Services ("DCLS") must furnish the accused or his or her attorney the results of any investigation that has been conducted by DFS or DCLS and that is related in any way to a crime for which the person is accused. Va. Code § 9.1-1104. In any case in which the accused or his or her attorney of record desires a scientific investigation, he or she must, by motion filed before the court in which the charge is pending, certify that in good faith he or she believes that a scientific investigation may be relevant to the criminal charge. *Id.* The motion must be heard *ex parte* as soon as practicable, and the court must, after a hearing upon the motion and being satisfied as to the correctness of the certification, order that the investigation be performed by DFS or DCLS. *Id.* The court must also prescribe in its order the method of custody, transfer, and return of evidence submitted for scientific investigation. *Id.* Upon the request of the Commonwealth's Attorney for the jurisdiction in which the charge is pending, he or she also must receive the results of the scientific investigation. *Id.*

Post-Conviction (Generally)

Under Virginia law, any person convicted of a felony ("petitioner") may, by motion to the circuit court that entered the original conviction, apply for a new scientific investigation of any human biological evidence related to the case that resulted in the felony conviction if:

1. the evidence was not known or available at the time the conviction became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at DFS at the time the conviction became final in the circuit court;

2. the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way;

3. the testing is materially relevant, noncumulative, and necessary, and may prove the convicted person's actual innocence;

4. the testing requested involves a scientific method employed by DFS; and

5. the convicted person has not unreasonably delayed the filing of the petition after the evidence or the test for the evidence became available at DFS.

Va. Code § 19.2-327.1 (emphasis added).

Virginia law also specifies the information the petitioner must include in the motion; the procedures for hearing and deciding such a motion; and testing procedures when ordered by the

court. *Id.* The law also states that DFS "shall give testing priority to cases in which a sentence of death has been imposed." *Id.*

DFS has developed standards and guidelines for the method of custody, transfer, and return of evidence under Va. Code §§ 19.2-327.1 (motion by convicted felon for scientific analysis of newly discovered or previously untested scientific evidence), 19.2-270.4:1 (storage, preservation, and retention of human biological evidence in felony cases); 6 Va. Admin. Code § 20-210-10 *et seq.*; DFS, Post-Conviction DNA Issues, http://www.dfs.virginia.gov/services/forensicBiology/dnaIssues.cfm (last visited April 9, 2006). DFS also worked with the Virginia Supreme Court to develop model court orders that follow these standards and guidelines. *Id.*

DFS analyzes DNA and creates and maintains a report that includes the DNA profile and identifying information. Va. Code § 19.2-310.4. A certificate and the results of this analysis "shall be admissible in any court as evidence of the facts therein stated." *Id.* In addition, upon his or her request, the Department must provide a copy of the request for a DNA Databank search to any person identified and charged with an offense as the result of such search. Va. Code § 19.2-310.5.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

In Capital Cases

Under Virginia law, in any criminal proceeding, DNA testing is deemed a reliable scientific technique and the evidence of a *DNA profile comparison* may be admitted to prove/disprove any person's identity. Va. Code § 19.2-270.5. A party also may introduce otherwise relevant evidence bearing upon any question before the court, including the accuracy and reliability of the procedures employed in the collection and analysis of a particular DNA sample. *Id.* The statute also contains procedural requirements regarding notice of evidence and objections. *Id.*
See Recommendation 74 for a discussion of time limitations on bringing new evidence to the court's attention in Virginia.

Recommendation 25

In capital cases, forensic testing, including DNA testing pursuant to Illinois law 725 ILCS 5/116-3, should be permitted where it has the scientific potential to produce new, noncumulative evidence relevant to the defendant's assertion of actual innocence, even though the results may not completely exonerate the defendant.

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 25. Under Virginia Code § 19.2-327.1, a convicted felon may make a motion for scientific analysis of newly discovered or previously untested scientific evidence.

However, the procedure is stringent in this instance, and the following requirements must be met:

(i) the evidence was not known or available at the time the conviction became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at the Department of Forensic Science ["DFS"]at the time the conviction became final in the circuit court;
(ii) the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way;
(iii) the testing is materially relevant, noncumulative, and necessary and *may prove the convicted person's actual innocence*;
(iv) the testing requested involves a scientific method employed by [DFS]; and
(v) the convicted person has not unreasonably delayed the filing of the petition after the evidence or the test for the evidence became available at [DFS].

Id. (emphasis added). These requirements pose a difficult hurdle, as the test is available only when the test may prove actual innocence; commentators have noted that "Virginia has some of the highest barriers to testing."[6]

Pending or Prior Legislative Bills in Virginia[7]

HB 2349 – Virginia Innocence Protection Act of 2001 (post-conviction testing of biological material for DNA). This would establish a procedure for the application of a convicted defendant to apply for post-conviction DNA testing, for the purpose of establishing innocence (or verifying guilt); this would also require the DNA to be preserved for such purposes subject to certain exceptions.

HB 2580 – Directs the Supreme Court of Virginia and the Public Defender Commission to develop standards and a list of capital qualified attorneys to represent both indigent and non-indigent defendants. Additionally, the new qualifications are required to take into account current training in the analysis and introduction of forensic evidence, including deoxyribonucleic

[6] Siobhan Roth, *Virginian DNA Law Under the Microscope*, Legal Times, Jul. 13, 2001, at 3.

[7] Unless otherwise noted, all bills listed are described at: Virginia Legislature and the Death Penalty, http://www.vadp.org/legis.htm (last visited April 9, 2006) (2006 legislation); Current Legislation, Death Penalty Issues in the 2005 General Assembly, http://www.vadp.org/ga2004.htm (last visited April 9, 2006) (2005 legislation); or VADP and the General Assembly, http://www.vadp.org/DPBills.htm (last visited April 9, 2006) (1997-2004 legislation). Information about pending and prior bills can also be obtained at Virginia General Assembly, Legislative Information System, http://leg1.state.va.us (last visited April 9, 2006).

acid (DNA) testing and the evidence of a DNA profile comparison to prove or disprove the identity of any person. *Passed*.

HB 2802 – Requires that any human biological evidence used for testing (e.g., fingerprinting, chemical analysis, blood or DNA analysis) in a felony trial where the defendant is convicted, be retained for 15 years upon motion of the defendant. In the case of a person sentenced to death, such evidence must be kept until the judgment is executed. *Passed*.

HJR 508 – Would establish a joint subcommittee to study the need for a moratorium on death sentence executions in the Commonwealth. Among other matters, the subcommittee would determine the procedures that should be established regarding post-conviction access to forensic evidence, including DNA testing when such testing could result in new evidence of innocence. *Died in House*.

Comments

In 2004, the United States Congress enacted the Justice for All Act. This legislation was intended to

> protect crime victims' rights, to eliminate the substantial backlog of DNA samples collected from crime scenes and convicted offenders, to improve and expand the DNA testing capacity of Federal, State, and local crime laboratories, to increase research and development of new DNA testing technologies, to develop new training programs regarding the collection and use of DNA evidence, to provide post-conviction testing of DNA evidence to exonerate the innocent, to improve the performance of counsel in State capital cases, and for other purposes.

Justice for All Act, Pub. L. No. 108-405, 118 Stat 2260, 2260 (2004). The Justice for All Act includes the Innocence Protection Act, which contains subsections regarding exoneration of the innocent through DNA testing, improvement of the quality of representation in state capital cases, and compensation for the wrongfully convicted. Justice for All Act, Pub. L. No. 108-405, §§ 401-32, 118 Stat 2260, 2278-93 (2004); *see also* 18 U.S.C. §§ 3600, 3600A.

Recommendation 26

The provisions governing the Capital Litigation Trust Fund should be construed broadly so as to provide a source of funding for forensic testing pursuant to 725 ILCS 5/116-3 when the defendant faces the possibility of a capital sentence. For non-capital defendants, provisions should be made for payment of costs of forensic testing for indigents from sources other than the Capital Litigation Trust Fund.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 26. No explicit discussion of a source of funds for forensic testing was found in Virginia. Commonwealth public defenders must rely on the trial court to approve funds for forensic testing. The same is true for court-appointed lawyers. *See* Virginia Indigent Defense Coalition, *Progress Report: Virginia's Public Defense System* (2003), *available at* http://www.vidcoalition.org/pdf/vidc_ReportFINAL.pdf. Funding for court-ordered expenses in indigent cases, such as expert witnesses, investigators, interpreters, and other costs, comes from the general criminal indigent defense fund, which is administered by the Virginia Supreme Court. *See* American Bar Association, *A Comprehensive Review of Indigent Defense in Virginia* (2004), *available at* http://www.abanet.org/legalservices/ downloads/sclaid/indigentdefense/va-report2004execsum.pdf. The vast majority of criminal fund expenditures are for court-appointed attorney costs. Other expenditures include writs of habeas corpus, court reporters (felony cases), extradition allowance, interpreters for the deaf (criminal and civil cases), interpreters for non-English-speaking persons (criminal cases), medical fees, psychiatric exams, blood withdrawal and analysis (drug and alcohol cases), paternity tests, DNA analysis, jurors' per diem, expert witness fees, and witnesses for the Commonwealth.

No evidence was found of a separate or special fund for forensic testing in capital cases in Virginia. Funds allowed for court-appointed attorneys and experts are greater for capital cases than for other criminal cases. In capital cases, the Virginia Supreme Court recommends that circuit court judges pay $125 an hour for in-court and out-of-court work. The Spangenberg Group, *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, A State By State Overview*, American Bar Association Bar Information Program (Apr. 2003); *see also* Office of the Executive Secretary of the Supreme Court of Virginia, *Court Appointed Counsel – Public Defender: Procedures and Guidelines Manual* 31-32 (2005), *available at* http://www.courts.state.va.us/ed/resources/ ctapptattyman05.pdf. Similarly, Virginia Code § 19.2-175, concerning compensation of expert witnesses, provides that fees for court-appointed experts shall not exceed $400, except in capital murder cases.

Pending or Prior Legislative Bills in Virginia

HB 176 – Criminal procedure; compensation for court-appointed counsel. Chief patron: Lacey E. Putney. HB 176, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061 &typ=bil&val=hb176 (last visited April 10, 2006). This 2006 bill would authorize Virginia trial courts, "in cases where court-appointed counsel represents a defendant on a felony charge that may be punishable for a period of more than 20 years, to provide additional compensation of up to $850 for such counsel when the time and effort expended, the result obtained, the novelty and difficulty of the issues, or other circumstances warrant such additional compensation." *Id.* The bill is not limited to capital cases. *Continued to 2007 in the Senate Finance Committee. Id.*

Comments

None.

Chapter 4: Eligibility for Capital Punishment

Recommendation 27
The current list of 20 eligibility factors should be reduced to a smaller number.

Virginia Practice
Current Virginia law does not meet the objectives set forth in Recommendation 27. Virginia law provides that *thirteen* separate categories of willful, deliberate, and premeditated killings constitute capital murder:

- the killing of any person during the commission of an abduction committed with the intent to extort money or a pecuniary benefit or with the intent to defile the victim of the abduction;
- the killing of any person for hire;
- the killing of any person by a prisoner confined in a state or local correctional facility;
- the killing of a person in the commission of a robbery or attempted robbery;
- the killing of a person in the commission of, or subsequent to, a rape or attempted rape;
- the killing of a law enforcement officer;
- the killing of more than one person as part of the same act;
- the killing of more than one person during a three-year period;
- the killing of any person engaged in drug dealing or manufacturing;
- the killing of a person at the direction of another who is engaged in drug dealing or manufacturing;
- the killing of a pregnant woman by one who knows the woman is pregnant and has the intent to terminate the woman's pregnancy;
- the killing of a person under the age of fourteen by a person age twenty-one or older; and
- a killing committed during an act of terrorism or attempted terrorism.

Va. Code § 18.2-31. Virginia law currently provides that all thirteen of these so-called Class 1 felonies carry the mandatory alternative sentence of natural life. Va. Code § 19.2-264.4. Further, a defendant who is convicted of a Class 1 felony committed after January 1, 1995 shall not be eligible for parole. Va. Code § 19.2-264.4(A).

Pending or Prior Legislative Bills in Virginia[8]
Research revealed no bills attempting to contract Virginia's eligibility factors.
There have been a significant number of bills seeking to expand Virginia's eligibility factors. Bills for the last ten years are listed below.

2006

[8] Unless otherwise noted, all bills listed are described at: Virginia Legislature and the Death Penalty, http://www.vadp.org/legis.htm (last visited April 9, 2006) (2006 legislation); Current Legislation, Death Penalty Issues in the 2005 General Assembly, http://www.vadp.org/ga2004.htm (last visited April 9, 2006) (2005 legislation); or VADP and the General Assembly, http://www.vadp.org/DPBills.htm (last visited April 9, 2006) (1997-2004 legislation). Information about pending and prior bills can also be obtained at Virginia General Assembly, Legislative Information System, http://leg1.state.va.us (last visited April 9, 2006).

HB 782 – Triggerman rule; eliminated. This bill would have eliminated Virginia's "triggerman rule," which "provides that only the actual perpetrator of a capital murder is eligible for the death penalty , and that accessories and principals in the second degree can only be punished with first degree murder." HB 782, http://leg1.state.va.us/ cgi-bin/legp504.exe?ses=061&typ=bil&val=hb782 (last visited April 10, 2006). While this bill would not have added another factor to Virginia Code section 18.2-31, it would have expanded eligibility for the death penalty. Chief patron: C. Todd Gilbert. *Referred to the Virginia State Crime Commission. Id.*

HB 1018 – Capital murder; includes premeditated killing of justice or judge. This bill would have added an additional factor to Virginia Code section 18.2-31. Chief patron: Robert Hurt. *Referred to the Virginia State Crime Commission.* HB 1018, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb1018 (last visited April 10, 2006).

HB 1311 – Capital murder; includes premeditated killing of person assisting in criminal investigation. This bill would have added an additional factor to Virginia Code section 18.2-31. Chief patron: C. Todd Gilbert. *Referred to the Virginia State Crime Commission.* HB 1311, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb1311 (last visited April 10, 2006).

HB 1441 – Law-enforcement officer; definition thereof. This bill would have expanded the definition of a "law-enforcement officer" in the Virginia Code to include "any investigator of the Department of Corrections who is designated by the Director of the Department to have police power." HB 1441, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb1441 (last visited April 10, 2006). While this bill would not have added another factor to Virginia Code section 18.2-31, it would have expanded eligibility for the death penalty. Chief patron: R. Steven Landes. *Died in House Appropriations Committee. Id.*

2005

HB 1800 -- Expanding the death penalty in regard to gang killings. This bill makes the deliberate and premeditated killing of any person by another under the direction or order of a gang member capital murder and hence an offense punishable by death. HB 1800 was reported out of the House of Delegates but was passed by in the Senate Courts of Justice Committee. Chief patron: David Albo. *Referred to Virginia State Crime Commission for study.*

2003

HB 2612 - Killing a conservation officer; penalty. Conservation officer defined as law-enforcement officer; training exemption. Redefines "law-enforcement officer" to include a conservation officer of the Department of Conservation and Recreation and exempts such officers appointed prior to July 1, 2003 from minimum training standards for law-enforcement officers. Defining conservation officers as law-enforcement officers includes them in the capital murder statute and has other consequences throughout the Code. Chief patron: L. Preston Bryant, Jr. *Passed.*

2002

HB 644 - Capital murder; includes killing in commission of burglary. Capital murder; penalty. Adds burglary and attempted burglary to the list of offenses which, if committed in conjunction with the willful, deliberate, and premeditated killing of a person, constitutes capital murder.

Chief patron: James K. O'Brien, Jr. *Died in committee*. HB 644, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=031&typ=bil& val=hb644 (last visited April 10, 2006).

SB 315/SB 514 - Comprehensive Terrorism Act. Among other things, this bill eventually added terrorism to the eligibility factors for the death penalty. Chief patron: Kenneth W. Stolle. *Passed*; *see* Va. Code § 18.2-31(13).

2001
HB 1656 - Expands death penalty statute to include murder of a person who is going to testify as a witness. Chief patron: Harry J. Parrish. *Defeated in House Courts of Justice, 9-13*.

2000
HB 270/SB 129 - Capital murder defined; penalty. Makes it a capital offense to kill a person because of the victim's actual or perceived race, color, gender, sexual orientation, religious conviction, or national origin. Chief patrons: Harry J. Parrish and Charles J. Colgan.

HB 271/SB 130 - Capital murder defined; penalty. Makes the killing of a person for the purpose of preventing that person from testifying in any judicial proceeding a capital offense. Chief patrons: Harry J. Parrish/ Charles J. Colgan.

All four of the 2000 bills described above were held over until 2001 so that the Virginia State Crime Commission could make the decision whether it, rather than the Legislature, would decide on bills to expand the death penalty. House Joint Resolution (HJ307).

1998
HB 107/ HB 1420 - Create capital punishment eligibility for the murder of a child under the age of sixteen by a custodial adult. Chief patron: Beverly J. Sherwood (HB 107); Clarence E. Phillips (HB 1420). HB 1420, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=981&typ=bil&val=hb1420 (last visited April 10, 2006). *Passed*. *Id*.

HB 251 - Create capital punishment eligibility for the murder of a spouse or former spouse. Chief patron: Frank M. Ruff. HB 251, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=991&typ=bil&val=hb251 (last visited April 10, 2006). *Died in committee*. *Id*.

SB 90 - Create capital punishment eligibility for the murder of a witness who will testify in court. Chief patron: Charles J. Colgan. SB 90, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=991&typ=bil&val=sb90 (last visited April 10, 2006). *Passed by Senate; died in House committee*. *Id*.

HB 97/SB 149 - Create capital punishment eligibility for murder of a member of a neighborhood crime watch program. Chief patron: Harry J. Parrish. HB 97, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=991&typ=bil&val=hb97 (last visited April 10, 2006). *Died in committee*. *Id*.

SB 222 - Create capital punishment eligibility for murder combined with animate object penetration. Chief patron: Frederick M. Quayle. SB 222, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=981&typ=bil&val=sb222 (last visited April 10, 2006). *Passed*. *Id*.; *see also*

Va. Code § 18.2-32.

SB 271 - Create capital punishment eligibility for conviction of a second or subsequent sexually violent offense, i.e., rape, forcible sodomy, object penetration, or aggravated sexual battery.[9] *Killed in committee.*

1997
HB 2911/SB 774 - Create capital punishment eligibility for the murder of a law enforcement officer, from the federal government or another state, who has the power to arrest for felonies. *Passed*.

SB 513 - Create capital punishment eligibility for the willful, deliberate, and premeditated killing of more than one person, within five years of another killing. *Passed*.

SB 495 - Create capital punishment eligibility for the murder of a pregnant woman with the intent to kill the fetus. *Passed*.

HB 1670 - Create capital punishment eligibility for the murder of a child under the age of sixteen by an adult in a supervisory or custodial role. *Failed*.

Comments
The Virginia State Crime Commission noted that "[s]ince 1994, the Virginia General Assembly has refused to broaden the number of death penalty offenses on 9 separate occasions . . . ." Virginia State Crime Commission, *Comparison of Virginia and Illinois Death Penalty Statutes* 3 (Jan. 2003). Nevertheless, these refusals represent failed attempts to *expand* the death penalty; no attempts to *contract* the number of death-eligible offenses could be found.

The Illinois Commission noted that "only two [of Illinois' twenty eligibility factors] account for the vast majority of cases in which capital punishment has been imposed." Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 67 (2002), *available at* http://www.state.il.us/defender/report/ complete_report.pdf. A study of which factors are most often in play in Virginia death penalty cases might be useful in an attempt to reduce Virginia's eligibility factors. "Reducing the number of eligibility factors should lead to more uniformity in the way in which the death penalty is applied . . . and provide greater clarity in the statute, while retaining capital punishment for the most heinous of homicides. The scope of the statute should be narrowed." *Id.*

[9] Such a statute would violate the United States Constitution's Eighth Amendment prohibition on cruel and unusual punishment, as applied to Virginia through the Fourteenth Amendment. *See Coker v. Georgia*, 433 U.S. 584, 592 (1977) (holding that the death penalty is an impermissibly excessive penalty for rape, in violation of the Eighth and Fourteenth Amendments to the United States Constitution).

Recommendation 28
There should only be five eligibility factors:

(1) The murder of a peace officer or firefighter killed in the performance of his/her official duties, or to prevent the performance of his/her official duties, or in retaliation for performing his/her official duties;

(2) The murder of any person (inmate, staff, visitor, etc.), occurring at a correctional facility;

(3) The murder of two or more persons [either two murders in a single incident or one murder with a prior conviction for first degree murder];

(4) The intentional murder of a person involving the infliction of torture. For the purposes of this section, torture means the intentional and depraved infliction of extreme physical pain for a prolonged period of time prior to the victim's death; depraved means the defendant relished the infliction of extreme physical pain upon the victim evidencing debasement or perversion or that the defendant evidenced a sense of pleasure in the infliction of extreme physical pain; and

(5) The murder by a person who is under investigation for or who has been charged with or has been convicted of a crime which would be a felony under [Virginia] law, of anyone involved in the investigation, prosecution or defense of that crime, including, but not limited to, witnesses, jurors, judges, prosecutors and investigators.

Virginia Practice
As noted in Recommendation 27, there are currently thirteen eligibility factors in Virginia. Thus, current Virginia law does not meet the objectives set forth in Recommendation 28.

Three of the five recommended eligibility factors are included in Virginia's capital eligibility statute; one is partially included; and the fifth does not appear.

Factor (1) is met by Va. Code § 18.2-31(6), which provides that "[t]he willful, deliberate, and premeditated killing of a law-enforcement officer . . . having the power to arrest for a felony under the laws of [any] state or the United States, when such killing is for the purpose of interfering with the performance of his official duties" is an eligibility factor for the death penalty. It should be noted, however, that firemen are not included, and retaliation-motivated killings are not mentioned.

Factor (2) is met by Va. Code § 18.2-31(3), which provides that "[t]he willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility . . . or while in the custody of an employee thereof" is an eligibility factor for the death penalty.

Factor (3) is met by Va. Code § 18.2-31(7) and § 18.2-31(8), which provide that: (i) "[t]he willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction"; or (ii) the killing "of more than one person within a three-year period" are eligibility factors. The three-year time limit goes beyond factor (3), however.

Factor (4) is only slightly covered by Va. Code § 18.2-31(5), which provides that "[t]he willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration" is an

eligibility factor. This section only deals with one type of action that could be considered torture, and the defendant's depravity is not considered.

Factor (5) is not covered by any of Va. Code § 18.2-31's subsections.

Pending or Prior Legislative Bills in Virginia
See Recommendation 27.

Comments
In its choice of five death-eligibility factors, the Illinois Crime Commission sought to limit the death penalty to "the most heinous homicides and to other circumstances widely regarded as presenting compelling public policy concerns in favor of execution." Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 69 (2002), *available at* http://www.state.il.us/defender/report/ complete_report.pdf. The Commission noted, though, that "the greater weight of the research finds no evidence that the death penalty is a measurable general deterrent to murder." *Id.* Thus, it was "the view of those Commission members in the majority on this point that general deterrence cannot be used to justify the death penalty." *Id.* The reasons for the reductions in eligibility factors was based in part on the great expansion in Illinois of eligibility factors. The Commission was mindful that "the United States Supreme Court has said that execution is not permissible for all first-degree murders, and that a state must have a rational manner, free of arbitrariness,. for choosing those deliberate killings to be punished capitally." *Id.* at 68.

The United States Supreme Court has also limited the death penalty to adults. In 2002, when the Illinois Commission on Capital Punishment published its report, Illinois did not impose the death penalty on defendants who were under 18 at the time their crimes were committed. 720 ILCS 5/9-1(b); *see also* Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 66 (2002), *available at* http://www.state.il.us/ defender/report/complete_report.pdf. Since the Illinois Commission on Capital Punishment released its report, the United States Supreme Court has held that "[t]he Eighth and Fourteenth Amendments forbid imposition of the death penalty on offenders who were under the age of 18 when their crimes were committed." *Roper v. Simmons*, 543 U.S. 551, 578 (2005). In the wake of this decision, Virginia passed HB 45/SB 362, amending Virginia Code section 18.2-10 to require that the offender be "18 years of age or older at the time of the offense." *See* SB 362, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ= bil&val=sb362 (last visited April 10, 2006); HB 45, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ= bil&val=hb45 (last visited April 10, 2006); Revised Version of Virginia Code Section 18.2-10, http://leg1.state.va.us/cgi-bin/legp504.exe?061+ful+HB45ER (last visited April 10, 2006). The bill has not yet been signed by the Governor. SB 362, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ= bil&val=sb362 (last visited April 10, 2006); see also VADP Media Release: Elimination of Capital Punishment for Minors Act Now Before Gov. Kaine, http://www.vadp.org/action.htm (last visited April 10, 2006).

Yet overwhelmingly, as noted in Recommendation 27, Virginia has made repeated, largely successful, attempts to expand, not limit, the eligibility factors for the death penalty in Virginia. This is unlikely to be a fruitful area for change in Virginia law in the near future.

Chapter 5: Prosecutors' Selection of Cases for Capital Punishment

Recommendation 29

The Illinois Attorney General and the Illinois State's Attorneys Association should adopt recommendations as to the procedures State's Attorneys should follow in deciding whether or not to seek the death penalty, but these recommendations should not have the force of law, or be imposed by court rule or legislation.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 29. No such recommendations exist.

Pending or Prior Legislative Bills in Virginia

Since the recommendations are not intended to be imposed by legislation, no pending or prior legislation would be relevant. No pending or prior legislation empowering or recommending the creation of such recommendations was found.

Comments

None.

Recommendation 30

The death penalty sentencing statute should be revised to include a mandatory review of death eligibility undertaken by a state-wide review committee. In the absence of legislative action to make this a mandatory scheme, the Governor should make a commitment to setting up a voluntary review process, supported by the presumption that the Governor will commute the death sentences of defendants when the prosecutor has not participated in the voluntary review process, unless the prosecutor can offer a compelling explanation, based on exceptional circumstances, for the failure to submit the case for review.

The state-wide review committee would be composed of five members, four of whom would be prosecutors. The committee would develop standards to implement the legislative intent of the General Assembly with respect to death eligible cases.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 30. While every death sentence receives review by the Virginia Supreme Court, there is no committee composed of prosecutors to review death eligibility. Additionally, Recommendation 30 recommends a review of the prosecutor's initial decision to seek the death penalty, not the final imposition of sentence – which is what the Virginia Supreme Court reviews. Finally, the Virginia Supreme Court's review occurs after trial and sentencing. The Illinois Commission intended that the review recommended in Recommendation 30 take place "prior to the commencement of trial." Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 85 (2002), *available at* http://www.state.il.us/defender/report/ complete_report.pdf.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found. *See* Recommendation 29.

Comments

The Supreme Court of Virginia reviews every death sentence. Va. Code § 17.1-313.[10] This

---

10 **Review of death sentence.** -- A. A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.

B. The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall, within ten days after receipt of the transcript, compile the record as provided in Rule 5:14 and transmit it to the Supreme Court.

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

review is required even where the defendant does not pursue an appeal. *Zirkle v. Commonwealth*, 553 S.E.2d 520, 522 (Va. 2001); *see also Hudson v. Commonwealth*, 590 S.E.2d 362, 364 (Va. 2004) (same; defendant cannot waive this review; "'the purpose of the review process is to assure the fair and proper application of the death penalty statutes in this Commonwealth and to instill public confidence in the administration of justice.'" (citation omitted)).

But the Virginia Supreme Court's review includes only limited issues.

> Mandatory review in the Virginia Supreme Court is limited to certain issues, however. The Court is required to review only "1. Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." The contemporaneous objection rule applies to other issues, and, in fact, the Virginia Supreme Court has applied its contemporaneous objection rule in capital cases.

Briley v. Bass, 584 F. Supp. 807, 816 (E.D. Va. 1984) (citing *Peterson v. Commonwealth*, 225 Va. 289, 302 S.E.2d 520, 525 (Va. 1983)). The Virginia Supreme Court has never found a death sentence to be excessive or disproportionate since the enactment of the statute. *See* Kelly E.P. Bennett, *Symposium: A Quarter Century of Death: A Symposium on Capital Punishment in*

> D. In addition to the review and correction of errors in the trial of the case, with respect to review of the sentence of death, the court may:
>
> 1. Affirm the sentence of death;
>
> 2. Commute the sentence of death to imprisonment for life; or
>
> 3. Remand to the trial court for a new sentencing proceeding.
>
> E. The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.
>
> F. Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated. The defendant and the Commonwealth shall have the right to submit briefs within time limits imposed by the court, either by rule or order, and to present oral argument.
>
> G. The Supreme Court shall, in setting its docket, give priority to the review of cases in which the sentence of death has been imposed over other cases pending in the Court. In setting its docket, the Court shall also give priority to the consideration and disposition of petitions for writs of habeas corpus filed by prisoners held under sentence of death.

Va. Code § 17.1-31.

Virginia Since Furman v. Georgia: *Proportionality Review: The Historical Application and Deficiencies*, 12 Cap. Def. J. 103, 107 (1999).

Virginia Code section 19.2-303 also provides that the trial court judge may review and suspend sentences imposed for felony convictions if appropriate under the circumstances. *See* Comments to Recommendation 66.

Recommendation 31

The Commission supports Illinois Supreme Court Rule 416(c), requiring that the state announce its intention to seek the death penalty, and the factors to be relied upon, as soon as practicable but in no event later than 120 days after arraignment.

Supreme Court Rule 416(c), which took effect on March 1, 2001, provides as follows:

> **416(c.) Notice of Intention to Seek or Decline Death Penalty -- The State's Attorney or Attorney General shall provide notice of the State's intention to seek or reject imposition of the death penalty by filing a Notice of Intent to Seek or Decline Death Penalty as soon as practicable. In no event shall the filing of said notice be later than 120 days after arraignment, unless for good cause shown, the court directs otherwise. The Notice of Intent to seek imposition of the death penalty shall also include all of the statutory aggravating factors enumerated in section 9-1(b) of the Criminal Code of 1961 (720 ILCS 5/9-1(b)) which the State intends to introduce during the death penalty sentencing hearing.**

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 31. No laws or regulations exist in Virginia requiring the Attorney General's office or any Commonwealth's Attorney's office to file a notice of intention to seek the death penalty. An attorney in the Fairfax County, Virginia, Commonwealth's Attorney's Office confirmed that no such law or regulation exists. He added, however, that the prosecutor's office *usually* informs the defendant or his or her attorney that it is going to seek the death penalty as a matter of professional courtesy, although no practice or guideline is in place to ensure that this occurs every time.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

The United States Attorney's Manual includes a process for determining whether the death penalty will be sought in the federal system. The final decision is made by the U.S. Attorney General. *See* The *United States Attorneys' Manual*, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm. United States Attorneys must file a Notice of Intent to Seek the Death Penalty with the court, after consultation with defense counsel. *Id.* at 9-10.030, 9-10.090.

In the John Allen Muhammad (the "D.C. Sniper") death penalty case, the Commonwealth of Virginia filed a Notice of Intent to Seek the Death Penalty. The Notice, though, did not indicate that it was pursuant to any law, regulation, guideline, or practice requiring or suggesting that it be filed. It is possible, if not probable, that the Commonwealth's Attorney's office filed the Notice to notify the public, rather than the defendant, that the Commonwealth intended to seek the death penalty in that high-profile case.

Chapter 6: Trial Judges

Recommendation 32
The Illinois Supreme Court should give consideration to encouraging the Administrative Office of the Illinois Courts (AOIC) to undertake a concerted effort to educate trial judges throughout the state in the parameters of the Capital Crimes Litigation Act and the funding sources available for defense of capital cases.

Virginia Practice
Current Virginia law only partially meets the objectives set forth in Recommendation 32. Virginia does not require judges to undergo training specific to capital cases, but recently began offering an optional course.

Among Virginia's yearly optional "continuing education opportunities" for circuit judges is one course called "Managing the Capital Case." Supreme Court of Va. Educ. Servs., *Circuit Judges Course List*, http://www.courts.state.va.us/ed/courseinfo/ cirjudges.html#coretwo (last visited April 9, 2006). The course analyzes "procedural and substantive issues surrounding the trial of death penalty cases, including statutory and constitutional challenges, punishable offenses, mitigation, and jury selection." *Id.*

In his 2005 Virginia State of the Judiciary Address, the Virginia Supreme Court's Chief Justice provided that "consistent with our goals to improve the quality of criminal justice in this Commonwealth, we have created training programs for judges who preside over capital murder trials." Hon. Leroy Rountree Hassell, Sr., *2005 Virginia State of the Judiciary Address*, http://www.courts.state.va.us/scv/ state_of_the_judiciary_address.html (last visited July 14, 2005) ("Hassell").

Pending or Prior Legislative Bills in Virginia
No pending or prior legislation found.

Comments
In 2004, the Virginia General Assembly created the Virginia Indigent Defense Commission, an independent oversight commission. While the Commission has the power to develop training courses for defense counsel, Va. Code § 19.2-163.01(A)(2), it has no similar power to require judges to undergo continuing education, whether related to capital cases or not. Thus, unlike Illinois, Virginia requires no additional training for judges who may be called upon to preside over capital cases. Because Virginia does not provide any mandatory training for judges handling capital cases, it follows that Virginia does not require that judges become educated in the funding sources available to indigent defense counsel involved in capital cases.[11]

Two states—Florida and California—have enacted mandatory training for judges who preside over capital cases. Specifically, Florida provides that all judges who preside over capital cases

[11] During his 2005 Virginia State of the Judiciary Address, the Chief Justice detailed new sponsorship of an annual training seminar for indigent defense counsel to teach various investigative techniques, such as challenging DNA evidence, the use of scientific evidence, and others. Hassell, *supra*. However, he provided no similar sponsorship to educate judges in the funding sources necessary for indigent defense counsel to make use of these investigative techniques. *Id.*

must, among other things, complete a "Handling Capital Cases" course and then attend "refresher courses" during each of the subsequent continuing judicial education reporting periods. Fla. Admin. Code. Ann. r. 2.050 (2005). California provides that judges assigned to capital cases should attend comprehensive training relevant to capital cases provided by the California Center for Judicial Education and Research. Cal. Stan. J. Admin. § 25.4 (West 2005). California, though, does not require education specifically in funding sources available to indigent defendants. Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment with the Capital Punishment System in California*, 44 Santa Clara L. Rev. 101, 151 (2003).

Recommendation 33

The Commission supports the provisions of new Illinois Supreme Court Rule 43 (which took effect March 1, 2001) as to "Seminars on Capital Cases." The Illinois Supreme Court should be encouraged to undertake more action as outlined in this report to [e]nsure the highest quality training and support are provided to any judge trying a capital case.

The Commission also supports the revised Committee Comments to new Supreme Court Rule 43, which contemplate that capital case training will occur prior to the time a judge hears a capital case. The Supreme Court should be encouraged to consider going further and *requiring* that judges be trained before presiding over a capital case.

Virginia Practice

Current Virginia law only begins to meet the objectives set forth in Recommendation 33, but Virginia is making progress. Chief Justice Hassell's remarks, noted in Recommendation 32, indicate some focus on training for judges in capital cases, though not nearly to the extent recommended by the Illinois Commission. Virginia does not *require* judges to obtain any training before hearing a capital case, and there is no contemplation of when any capital case training will occur. An optional education course in capital cases was recently created in Virginia. *See* Recommendation 32.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 34

In light of the changes in Illinois Supreme Court rules governing the discovery process in capital cases, the Supreme Court should give consideration to ways the Court can [e]nsure that particularized training is provided to trial judges with respect to implementation of the new rules governing capital litigation, especially with respect to the management of the discovery process.

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 34. Virginia does not require judges to obtain any training before hearing a capital case. *See* Recommendation 32. The optional course currently offered appears to cover discovery management. "Managing the Capital Case" addresses "procedural and substantive issues surrounding the trial of death penalty cases, including . . . jury selection." Supreme Court of Va. Educ. Servs., *Circuit Judges Course List,* http://www.courts.state.va.us/ed/courseinfo/cirjudges.html#coretwo (last visited April 9, 2006).

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 35

All judges who are trying capital cases should receive periodic training in the following areas, and experts on these subjects be retained to conduct training and prepare training manuals on these topics:

1. **The risks of false testimony by in-custody informants ("jailhouse snitches").**
2. **The risks of false testimony by accomplice witnesses.**
3. **The dangers of tunnel vision or confirmatory bias.**
4. **The risks of wrongful convictions in homicide cases.**
5. **Police investigative and interrogation methods.**
6. **Police investigating and reporting of exculpatory evidence.**
7. **Forensic evidence.**
8. **The risks of false confessions.**

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 35. Virginia does not require judges to obtain any training before hearing a capital case, although an optional education course was recently created. *See* Recommendation 32. It is unclear whether the optional course "Managing the Capital Case," would address the topics above. Supreme Court of Va. Educ. Servs., *Circuit Judges Course List*, http://www.courts.state.va.us/ed/courseinfo/cirjudges.html#coretwo (last visited April 9, 2006). The course analyzes "procedural and substantive issues surrounding the trial of death penalty cases, including statutory and constitutional challenges, punishable offenses, mitigation, and jury selection." *Id.*

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 36

The Illinois Supreme Court, and the Administrative Office of the Illinois Courts, should consider development of and provide sufficient funding for state-wide materials to train judges in capital cases, and additional staff to provide research support.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 36. Virginia has not taken any initiative with regard to funding state-wide materials for training for judges trying capital cases nor has it provided additional research support for such judges.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

The Ninth Circuit has implemented both of the measures recommended by the Illinois Commission. After establishing a permanent Capital Case Committee, the Ninth Circuit designates one death penalty law clerk for each fifteen capital cases in a district in order to provide judges with expert research assistance. Additionally, the Ninth Circuit publishes a regularly updated Capital Punishment Handbook, which gives an introduction to issues in both capital litigation and federal habeas corpus cases, and includes case law and secondary sources. This Manual is provided free to judges, staff, and attorneys handling capital cases.[12]

Because of the high standards for a grant of habeas corpus relief, the above protections are even more critical at the state trial level.

[12] The Ninth Circuit Capital Punishment Handbook, *available at* http://www.ce9.uscourts.gov/dph.

Recommendation 37

The Illinois Supreme Court should consider ways in which information regarding relevant case law and other resources can be widely disseminated to those trying capital cases, through development of a digest of applicable law by the Supreme Court and wider publications of the outline of issues developed by the State Appellate Defender or the State Appellate Prosecutor and/or the Attorney General.

Virginia Practice

Though Virginia has made a start, current Virginia law does not meet the objectives set forth in Recommendation 37. Neither the Supreme Court of Virginia nor the Virginia State Bar has implemented a method for wide-scale dissemination of resources and case law to attorneys trying capital cases. Currently, attorneys in Virginia must rely on independently run resource centers such as the Virginia Capital Case Clearinghouse in order to access useful materials for trying capital cases.[13]

As of June 13, 2005, a new Rule of the Virginia State Bar Organization and the Government was adopted by the Supreme Court of Virginia. Effective July 13, 2005, it authorizes and directs the Virginia State Bar to provide an on-line legal research program for its members in an effort to (1) increase and improve the available knowledge and information base for attorneys; (2) enhance the quality of legal research and advice; (3) make legal research more efficient for many attorneys; and (4) provide additional resources to lawyers who are appointed by courts to represent indigent defendants. Currently, the Virginia State Bar is authorized to solicit proposals from providers of online computerized legal research services and to enter into contracts for those services. Va. Sup. Ct. R. 6:4-21, *available at* http://www.vsb.org/profguides/ org.pdf.

Virginia also offers a general online manual for public defenders and appointed counsel, but it covers only the appointment of counsel and related procedures, such as fee recovery, not actual criminal practice. *See* 2005 Court-Appointed Counsel-Public Defender Procedure and Guidelines Manual, *available at* http://www.courts.state.va.us/ ed/resources/ctapptattyman05.pdf.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

While the Commonwealth's authorization of a system to provide free online services to its attorneys is a step in the right direction, such a general measure does not begin to address the need for attorney instruction on the complex and intricate points of capital litigation. Attorneys in Virginia currently lack reference manuals or updated syllabi of case law to help them navigate ever-changing death penalty law. Virginia should consider following the lead of the following states in providing its attorneys with ready access to the materials that they need to best try a capital case:

California

The California Appellate Project ("CAP"), a non-profit law firm established in 1983 by the State Bar of California, maintains a website covering death penalty practice in California. "In addition

[13] The Virginia Capital Case Clearinghouse, http://www.vc3.org, is a comprehensive capital defense resource maintained by Professor David Bruck at the Washington & Lee School of Law in Lexington, Virginia. The site contains numerous stock motions and accompanying explanations.

to assisting private counsel appointed to represent indigent defendants in capital cases, [CAP's San Francisco office] provides professional training and litigation resource materials to counsel. It also consults, at the request of the judiciary, on policy matters regarding indigent defense representation in capital cases." About CAP, http://www.capsf.org/Welcome5.html (last visited October 11, 2005).

Florida
The Florida Legislature's Commission on Capital Cases maintains a website that includes a link to volunteer resource attorneys in the state as well as a link to relevant publications helpful to attorneys trying capital cases. Publications include articles, orders, opinions, jury instructions, case histories, and commission reports. *See* Commission on Capital Cases, The Florida Legislature, http://www.floridacapitalcases. state.fl.us/index.cfm (last visited April 9, 2006).

Georgia
The Office of the Georgia Capital Defender, created as a result of the cooperation between the Georgia General Assembly and the Georgia Supreme Court, offers online materials to assist capital defense attorneys. *See* Georgia Capital Defenders, http://www.gacapdef.org/main.htm (last visited April 9, 2006) (includes pages for Articles, Resources, History, and Training).

Tennessee
The Tennessee Supreme Court created a section on its website that allows attorneys to access some court documents for several current Tennessee capital cases. Tennessee Administrative Office of the Courts, Capital Case Information and Filings, http://www.tsc.state.tn.us/OPINIONS/TSC/CapCases/CapCases.htm (last visited April 9, 2006).

Recommendation 38

The Illinois Supreme Court, or the chief judges of the various judicial districts throughout the state, should consider implementation of a process to certify judges who are qualified to hear capital cases either by virtue of experience or training. Trial court judges should be certified as qualified to hear capital cases based upon completion of specialized training and based upon their experience in hearing criminal cases. *Only such certified judges should hear capital cases.*

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 38. Currently, any training for judges in capital cases in Virginia is optional only. *See* Recommendation 32.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Certification of judges for adjudication of capital cases should go hand-in-hand with training of trial, appellate, and habeas counsel. A defendant could have the most well-trained attorney but still suffer a miscarriage of justice if a judge is not well-acquainted with the unique aspects of capital litigation.

Florida has implemented a type of certification requirement for judges hearing capital cases. The Supreme Court of Florida requires that judges serve a minimum of six months in the felony criminal division and that they successfully complete a course on handling capital cases before they may preside over one. The required course, "Handling Capital Cases," is offered by the Florida College of Advanced Judicial Studies. A judge must thereafter attend a refresher course during each of the subsequent continuing judicial education reporting periods. This refresher course may be a six-hour block during any Florida Court Education Council approved course offering sponsored by any approved Florida judicial education provider, including the Florida College of Advanced Judicial Studies and the Florida Conference of Circuit Judges. The block must contain instruction on certain topics such as the penalty phase and jury selection for a capital trial. Failure to complete the refresher course during the three-year judicial education reporting period will necessitate completion of the original "Handling Capital Cases" course.[14]

Neighboring Maryland has not formally implemented any special training requirements for judges handling capital cases. At one point, former Chief Judge Murphy of the Maryland Court of Appeals had requested that death penalty cases not be assigned to circuit court judges who had not taken a special course offered by the Maryland Judicial Institute. However, "[t]he request was never in the form of an administrative order or binding directive" and it "has not been universally followed."[15]

[14] *See* Florida Rules of Judicial Administration, Rule 2.050(b)(10)(2005); *see also Death Penalty 101: Judges Told to Take Course in Capital Cases*, Broward Daily Business Review (Feb. 14, 1997).

[15] *See Burch v. State*, 696 A.2d 443, 465-66 (Md. 1997).

Recommendation 39

The Illinois Supreme Court should consider appointment of a standing committee of trial judges and/or appellate justices familiar with capital case management to provide resources to trial judges throughout the state who are responsible for trying capital cases.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 39. Virginia does not currently have a standing committee of judiciary members to help the Commonwealth's judiciary with case management. The closest thing to such a standing committee in Virginia is the Indigent Defense Commission ("IDC"), which focuses its efforts on assisting the capital bar rather than the judiciary.

The IDC, previously known as the Public Defender Commission, and subsequently the Virginia Indigent Defense Commission, is an agency charged with carrying out the Commonwealth's constitutional obligation to provide attorneys for indigent persons accused of crime. The IDC has four regional capital defender offices that were opened in 2002 and 2003. Virginia Indigent Defense Commission, Capital Defender Offices, http://www.indigentdefense.virginia.gov//capitaldefenderoffices.htm (last visited April 9, 2006).

The IDC, working alongside the Supreme Court of Virginia and the Virginia State Bar, establishes standards for the qualification of counsel appointed in capital cases and maintains a list of counsel for use by the circuit courts. Virginia Indigent Defense Commission, Requirements, http://www.indigentdefense.virginia.gov// requirements.htm (last visited April 9, 2006); Virginia Indigent Defense Commission, About Us, http://www.indigentdefense.virginia.gov//aboutus.htm (last visited April 5, 2006).

Pending or Prior Legislative Bills in Virginia

In 2004, the governor abolished the Public Defender Commission and established the IDC (HB 1956, SB 330). http://leg1.state.va.us/cgi-bin/legp504.exe?ses=041&typ=bil&val= sb330 (last visited April 5, 2006).

Comments

None.

Chapter 7: Trial Lawyers

Recommendation 40
The Commission supports new Illinois Supreme Court Rule 416(d) regarding qualifications for counsel in capital cases.

Virginia Practice
Current Virginia law meets the objectives set forth in Recommendation 40. In 1992, pursuant to § 19.2-163.8 of the Code of Virginia, the Virginia Public Defender Commission, the Virginia Supreme Court, and the Virginia State Bar developed a set of standards governing the selection of attorneys for indigent persons who were charged with capital murder. Virginia's rules are substantially identical to the qualifications for membership in Illinois's Capital Litigation Bar:

A. Standards for Lead Trial Counsel: Lead counsel must

1. Be an active member in good standing of the Virginia State Bar or be admitted to practice pro hac vice;
2. Have at least five years of criminal litigation practice (defense or prosecution) within the past seven years, including experience as defense counsel in at least five jury trials, tried to verdict, involving violent crimes with maximum penalties of at least 20 years or more;
3. Have had, within the past two years, at least six hours of specialized training in capital litigation, plus at least four hours of specialized training in the analysis and introduction of forensic evidence, including DNA testing and evidence of a DNA profile comparison (See Va Code Ann. § 19.2-163.8 (A)(vii) for details on this requirement);
4. Have at least one of the following:
    i. Experience as **lead counsel in the defense of at least one capital case** within the past five years; or
    ii. Experience as co-counsel in the defense of **at least two capital cases** within the past seven years;
5. Be thoroughly familiar with the appropriate court systems and procedural rules regarding timeliness, filings, and procedural default;
6. Have demonstrated proficiency and commitment to quality representation.

B. Standards for Trial Co-Counsel: Trial co-counsel must meet all of the requirements for lead counsel except for (4).

C. Standards for Appellate Counsel: Appellate counsel must

1. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*;

2. Have, **within the past five years**, briefed and argued the merits, after writs have been granted, in:

- at least three felony cases in an appellate court; or
- the appeal of a case in which the death penalty was imposed by the trial court;

3. Have had, within the past two years, at least six hours of specialized training in capital litigation, plus at least four hours in **training in the analysis and introduction of forensic evidence;**

4. Be thoroughly familiar with the rules and procedures of appellate practice.

D. Standards for Habeas Corpus Counsel: Habeas Corpus counsel must satisfy **one** of the following requirements

1. Possess experience as counsel of record in Virginia or federal post conviction proceedings involving attacks on the validity of one or more felony conviction, as well as working knowledge of state and federal habeas corpus practice through specialized training in the representation of persons with death sentences, including training **in the analysis of and introduction of forensic evidence**; or

2. Have served as **counsel in at least one capital habeas corpus proceeding in Virginia and/or federal courts** during the past three years; or

3. Have at least **seven years civil trial and appellate litigation experience** in the Courts of Record of the Commonwealth and/or federal courts.

Office of the Executive Secretary, Supreme Court of Virginia, *Court Appointed Counsel-Public Defender Procedure and Guidelines Manual* 24-26 (2005), *available at* http://www.courts.state.va.us/ed/resources/ctapptattyman05.pdf. The above standards apply to appointed counsel, but the circuit court is encouraged to make retained counsel aware of the above criteria for capital defense counsel. *Id.* at 24.

A circuit court judge is required to appoint at least two attorneys to represent a defendant being tried for a capital offense, and if the defendant is sentenced to death, on appeal. Effective July 1, 2004, one of the attorneys appointed must be from a capital defender office maintained by the Indigent Defense Commission ("IDC"). *See* Va. Code § 19.2-163.7. The Virginia Supreme

Court and the IDC are also required to maintain, in conjunction with the Virginia State Bar, a list of attorneys qualified to represent defendants charged with capital murder.[16]

Pending or Prior Legislative Bills in Virginia

In 2004, Governor Warner signed a bill requiring that at least two attorneys be appointed in capital cases (SB 177). VADP and the General Assembly, http://www.vadp.org/DPBills.htm (last visited April 9, 2006). In 2001, a bill was signed into law requiring improved standards for capital defense counsel for both indigent and non-indigent defendants, including training in DNA and other forensic analysis and introduction. Va. Code § 19.2-163.8.

Comments

Although Virginia provides written guidelines for establishing minimal qualifications and standards, there is no subjective component. Anecdotal advice from criminal defense lawyers suggests that a subjective evaluation by peer defense lawyers will help eliminate appointment by judges of select criminal defense lawyers who are qualified on paper, but who do not have the respect of their peers.

Whether the required training is sufficient depends not only on the hours required, but also on the rigor of the courses offered and the quality of the instructors. The required appointment of two attorneys, one from the new capital defender offices, will help the difficult task of trying these very complex cases. But defendants attempting an ineffective assistance of counsel claim may face additional difficulty as a result. Federal courts, especially in the Fourth Circuit, already require highly egregious handling of a case to find ineffective assistance of counsel. The appointment of two attorneys to a capital case may make it that much more difficult to argue ineffectiveness, since the federal judiciary could reason that "two heads are better than one." This predicament can only be solved by assuring that the two attorneys appointed receive the most training possible and are carefully screened before they are allowed to try a capital case.

Additionally, more experience may be desirable for habeas corpus counsel given the critical nature of these post-conviction proceedings.

It is also important to note that while it is essential to require training for counsel representing defendants, Commonwealth's Attorneys should also be required to undergo training on how to prosecute a capital case responsibly.

[16] In establishing the list, the Virginia Supreme Court and the IDC shall include all relevant factors, including the attorney's background, experience, and training, and the Court's and the IDC's assessment of the attorney's competency. A judge of a circuit court may appoint counsel who is not included on the list, but who otherwise qualifies under the standards established and maintained by the Virginia Supreme Court and the IDC. *See* Va. Code § 19.2-163.8.

Recommendation 41

The Commission supports new Illinois Supreme Court Rule 701(b) which imposes the requirement that those appearing as lead or co-counsel in a capital case be first admitted to the Capital Litigation Bar under Rule 714.

Virginia Practice

Current Virginia law partially meets the objectives set forth in Recommendation 41. While no Virginia rule or statute creates a "Capital Litigation Bar," Virginia Code section 19.2-163.8(B) requires the Virginia Supreme Court and the Indigent Defense Commission ("IDC") to maintain a list of attorneys admitted to practice law in Virginia who are qualified to represent defendants charged with capital murder or sentenced to death. Judges are not, however, obliged to consult the list of qualified lawyers.

Pending or Prior Legislative Bills in Virginia

The rule described above was codified when HB 2580, introduced by Delegate Robert F. McDonnell, passed the House and Senate with unanimous approval and was signed by then Governor Gilmore. Since then, no other legislative action has been taken.

Comments

There is no substantial difference between the qualifications set forth in Illinois Rule 714 and those set forth in Virginia Code section 19.2-163.8. In fact, to the extent that there is any difference at all, section 19.2-163.8 seems to provide for qualifications and standards higher than those provided for in the Illinois rule. But it is important to note that the judge of the circuit court may appoint counsel who is not included on the list, but who otherwise qualifies under the standards established and maintained by the Virginia Supreme Court and the IDC, as noted in Recommendation 40. Failure to comply with the requirements of section 19.2-163.8 cannot form the basis for a claim of error at trial, on appeal, or in any habeas corpus proceeding. Va. Code § 19.2-163.8(D). The provision requiring judges to appoint from a list of qualified counsel should be mandatory to give effect and confidence to the appointment process.

Recommendation 42
The Commission supports new Illinois Supreme Court rule 714, which imposes requirements on the qualifications of attorneys handling capital cases.

Virginia Practice
Current Virginia law meets the objectives set forth in Recommendation 42. *See* Recommendations 40 and 41.

Pending or Prior Legislative Bills in Virginia
See Recommendation 40.

Comments
The Illinois Commission noted the important consideration that experience may not always guarantee good advocacy. "There are attorneys who have demonstrated very poor advocacy on behalf of death row inmates who would likely qualify under the experience based requirement of the rules of admission to [Illinois'] Capital Litigation Trial Bar." Illinois Commission on Capital Punishment, *Report of the Governor's Commission on Capital Punishment* 108 (2002), *available at* http://www.state.il.us/defender/ report/complete_report.pdf.

It is also important to note that the standards articulated in Recommendation 40 apply only to appointed counsel for indigent defendants, not privately retained counsel.

Recommendation 43

The office of the State Appellate Defender should facilitate the dissemination of information with respect to defense counsel qualified under the proposed Supreme Court process.

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 43. According to Virginia Code section 19.2-163.8(B), the Virginia Indigent Defense Commission (formerly known as the Virginia Public Defender Commission), in conjunction with the Virginia Supreme Court, is required to maintain a list of Virginia attorneys qualified to represent defendants charged with capital murder or sentenced to death. *See* Recommendations 40 and 42. But no requirements or procedures for disseminating that information were found.

In Illinois, the Supreme Court has exclusive authority for setting the standards for admission to the Capital Litigation Bar under Rule 714. However, there is no mechanism in place to facilitate identification by the Court of those attorneys who might be qualified for admission. The same apparently is true in Virginia; no statute or rule specifically sets out a procedure for identifying qualified attorneys. As is the case in Illinois, the stringent qualifications for appearance in a capital case, while necessary, likely result in practical concerns regarding the availability of those who can satisfy these standards. This is particularly true in more rural, less populated areas.

Additionally, there are no resources or mechanisms for the evaluation of a lawyer's capital defense skills or quality of performance, and no procedure for removing an incompetent or ineffective attorney so long as he or she meets the objective criteria.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

If counsel is retained (as opposed to appointed), it is recommended that the circuit court inform the defendant and/or counsel of the standards required for capital defense counsel.

Recommendation 44

The Commission supports efforts to have training for prosecutors and defenders in capital litigation, and to have funding provided to [e]nsure that training programs continue to be of the highest quality.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 44. Virginia public defender offices provide their attorneys with continuing legal education and training necessary to meet the minimum state requirements. Beyond that, no other training opportunities are provided. There are no capital litigation-specific training programs provided and no funding specifically designated for the creation of such programs. While relevant statutes do require that counsel in capital cases attend specialized training, such training is not provided by the Commonwealth.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

There is a need for funding to fulfill this requirement.

Recommendation 45

All prosecutors and defense lawyers who are members of the Capital Trial Bart who are trying capital cases should receive periodic training in the following areas and experts on these subjects should be retained to conduct training and prepare training manuals on these topics:

1. **The risks of false testimony by in-custody informants ("jailhouse snitches").**
2. **The risks of false testimony by accomplice witnesses.**
3. **The dangers of tunnel vision or confirmatory bias.**
4. **The risks of wrongful convictions in homicide cases.**
5. **Police investigative and interrogation methods.**
6. **Police investigating and reporting of exculpatory evidence.**
7. **Forensic evidence.**
8. **The risks of false confessions.**

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 45. While some specialized training (six hours) is required, Va. Code § 19.2-163.8; 6 Va. Admin. Code § 30-10-10, the subject matter of that training is not defined. Additionally, there is no rule requiring that the Commonwealth provide this training and no provision mandating the expenditure of state funds for the retention of experts or the creation of manuals.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

The Regional Capital Defender Units in Virginia may provide defense lawyers with training in the recommended areas, though this could not be verified. *See* Virginia Indigent Defense Commission, Training & Conferences, http://www.indigentdefense. virginia.gov/training.htm (last visited April 9, 2006).

Chapter 8: Pretrial Proceedings

Recommendation 46
The Commission supports new Illinois Supreme Court Rule 416(e), which permits discovery depositions in capital cases on leave of court for good cause.

Virginia Practice
Current Virginia law does not meet the objectives set forth in Recommendation 46. Virginia does not permit discovery depositions in capital cases, or in any criminal case. There is only limited pretrial discovery permitted for the accused, which is governed by Rules 3A:11 and 3A:12 of the Rules of the Supreme Court of Virginia.

Rule 3A:11 provides that an accused may file a written motion to inspect and copy or photograph any relevant written or recorded statements, confessions made by the accused, the substance of oral statements made by the accused to a law enforcement officer, and written reports of autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine, and breath tests and written reports of physical or mental examination of the accused or the alleged victim made in connection with the particular case, that are within the control of the Commonwealth. The accused must show that the evidence that he or she is requesting may be material to the preparation of his or her defense and that the request is reasonable. The accused does not have a right to inspect statements made to the Commonwealth by witnesses or prospective witnesses or reports, memoranda or other internal Commonwealth documents made by agents in connection with investigation or prosecution of the case. Va. Sup. Ct. R. 3A:11.

Rule 3A:12 gives an accused the right to request that the court issue a subpoena for writings or objects (not for testimony) that are material to the proceedings and are in the possession of persons not parties to the action. Va. Sup. Ct. R. 3A:12.

Pending or Prior Legislative Bills in Virginia
No pending or prior legislation found.

Comments
Virginia has not made any ruling regarding a request for depositions by the accused in a capital case. The only reference to depositions in criminal cases in the Virginia Code refers to depositions taken in lieu of trial testimony. Va. Code § 18.2-67.

Recommendation 47

The Commission supports the provisions of the new Illinois Supreme Court Rule 416(f) mandating case management conferences in capital cases. The Illinois Supreme Court should consider adoption of a rule requiring a final case management conference in capital cases to [e]nsure that there has been compliance with the newly mandated rules, that discovery is complete and that the case is fully prepared for trial.

Virginia Practice:

Current Virginia law does not meet the objectives set forth in Recommendation 47. Virginia does not require case management conferences in capital cases.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 48

The Commission supports Illinois Supreme Court Rule 416(g), which requires that a certificate be filed by the state indicating that a conference has been held with all those persons who participated in the investigation or trial preparation of the case, and that all information required to be disclosed has been disclosed.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 48. Virginia does not require that a conference be held with all persons involved with the investigation of the accused's alleged crime and the trial preparation of the case or that a certificate be filed certifying that the Commonwealth has disclosed all information required to be disclosed to the accused.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

In one Virginia circuit court's standard form Order for Discovery and Inspection of the Court, the court orders, pursuant to the accused's Motion for Discovery pursuant to Virginia Supreme Court Rule 3A:11, that "the Commonwealth shall timely provide, to the defendant, all evidence as to guilt or in mitigation of punishment that is required to be disclosed pursuant to *Brady v. Maryland* (377 U.S. 83 (1963)) and its progeny." *See*, *e.g.*, Loudoun County Circuit Court, Form for Order for Discovery and Inspection, *available at* http://inetdocs.loudoun.gov/clerk/docs/forms_/circuitcourtfor_/index.htm. If the Commonwealth does not comply with the Order of the Court, the "[c]ourt shall order such party to permit the discovery or inspection of materials not previously disclosed, and may grant such other relief as it may deem appropriate." *Id.*; Va. Sup. Ct. R. 3A:11(g).

Recommendation 49

The Illinois Supreme Court should adopt a rule defining "exculpatory evidence" in order to provide guidance to counsel in making appropriate disclosures. The Commission recommends the following definition:

> **Exculpatory information includes, but may not be limited to, all information that is material and favorable to the defendant because it tends to:**
>
> **(1) Cast doubt on the defendant's guilt as to any essential element in any count in the indictment or information;**
>
> **(2) Cast doubt on the admissibility of evidence that the state anticipates offering in its case-in-chief that might be subject to a motion to suppress or exclude;**
>
> **(3) Cast doubt on the credibility or accuracy of any evidence that the state anticipates offering in its case-in-chief; or**
>
> **(4) Diminish the degree of the defendant's culpability or mitigate the defendant's potential sentence.**

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 49. Virginia does not have any statute or rule that specifically defines "exculpatory evidence." Virginia defines exculpatory evidence through federal and Virginia case law.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments:

Virginia recognizes *Brady v. Maryland*, 373 U.S. 83, 87 (1963), and its progeny that hold that due process requires the Commonwealth to disclose all material exculpatory evidence to an accused. *Jefferson v. Commonwealth*, 500 S.E.2d 219, 224 (Va. Ct. App. 1998). Exculpatory evidence has been recognized by Virginia courts as evidence that is favorable to the accused, will tend to exculpate him or her or reduce the penalty, and includes impeachment evidence. *Id.*; *see also Robinson v. Commonwealth*, 341 S.E.2d 159, 164 (Va. 1986).

While the Commonwealth is obligated to produce exculpatory evidence to the accused, an accused may only appeal non-production of exculpatory evidence if it was material and there was a reasonable probability that if the evidence had been produced the outcome would have been different. *Id.*

Recommendation 50

Illinois law should require that any discussions with a witness or the representative of a witness concerning benefits, potential benefits, or detriments conferred on a witness by any prosecutor, police official, or anyone else should be reduced to writing, and should be disclosed to the defense in advance of trial.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 50. Virginia does not recognize the right to discover the existence or contents of a plea agreement *prior* to trial. *O'Dell v. Commonwealth*, 364 S.E.2d 491, 497 (Va. 1988). There is no constitutional right to this type of pretrial discovery in a criminal case. *Watkins v. Commonwealth*, 331 S.E.2d 422, 430-31 (Va. 1985).

The defense may cross-examine Commonwealth's witnesses *at trial* regarding any plea agreement or other arrangement made with the Commonwealth in exchange for testimony. *Whittaker v. Commonwealth*, 234 S.E.2d 79, 81 (Va. 1977).

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Discovery in criminal cases in Virginia is limited to exculpatory evidence and the specific materials that can be requested pursuant to Virginia Supreme Court Rule 3A:11.

Recommendation 51

Whenever the state may introduce the testimony of an in-custody informant who has agreed to testify for the prosecution in a capital case to a statement allegedly made by the defendant, at either the guilt or sentencing phase, the state should promptly inform the defense as to the identification and background of the witness.

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 51. No statute or regulation requires that the Commonwealth inform the defense of the identity of any in-custody informants who plan to testify at trial. Thus, the question whether such notification is required is governed on a case-by-case basis. Under Virginia case law, the prosecution must disclose certain exculpatory information, which may include impeachment evidence regarding the identity/background of an in-custody informant who will be called as a witness, where the defense makes a motion for disclosure of exculpatory evidence pursuant to *Brady v. Maryland*, 373 U.S. 83 (1963). Pursuant to Virginia Rule of Professional Conduct 3.8(d), prosecutors also have an ethical obligation to reveal exculpatory evidence in a timely fashion.

In *Bramblett v. Commonwealth*, 513 S.E.2d 400, 408-09 (Va. 1999), the prosecution used an in-custody informant in its case-in-chief (although the prosecution originally planned to use the informant as a possible rebuttal witness). The prosecution notified the defense several days prior to the date the informant was to testify and at that time revealed the informant's name and criminal record. *Id.* at 409. The defense requested that the testimony be barred due to the late disclosure of the informant's criminal record that did not allow the defense enough time to investigate the witness. *Id.* However, the trial court overruled the motion and permitted the testimony. *Id.* Concluding that the defense had sufficient time to investigate the informant and that there was no showing that the accused had been prejudiced, the Supreme Court of Virginia upheld the trial court's ruling. *Id.*

But, in another case where the prosecution failed to share the identity of an informant prior to trial, the Court of Appeals of Virginia reversed the defendant's conviction because the prosecution's failure to timely disclose the informant's statement, criminal record, and plea agreement. *Walker v. Commonwealth*, 356 S.E.2d 853, 859-60 (Va. Ct. App. 1987)

> [I]f the subject matter of . . . a request is material, or indeed if a substantial basis for claiming materiality exists, it is reasonable to require the prosecutor to respond either by furnishing the information or by submitting the problem to the trial judge.

Id. at 861). But "the Commonwealth is not required to disclose a potential witness' identity simply on the basis that a possibility exists that the witness may be called to testify because of the vagaries of trial if, in fact, the Commonwealth in good faith expects not to call the person as a witness. . . ." *Moreno v. Commonwealth*, 392 S.E.2d 836, 841 (Va. Ct. App. 1990). "[T]he Commonwealth is not required to furnish exculpatory impeachment evidence on the contingency that a witness may be called to appear." *Id.*

In describing the prosecution's duty to disclose exculpatory evidence, the Court of Appeals of Virginia has explained that it is not an unreasonable burden for the prosecution to provide the criminal background of its witnesses to the defense if required to do so after a *Brady* motion.

Burrows v. Commonwealth, 438 S.E.2d 300, 303 (Va. Ct. App. 1993).[17] Furthermore, the court reasoned that the defense is entitled "to full disclosure of the criminal record of a witness who has shown a propensity for avoiding prosecution by testifying for the Commonwealth" where a general request for *Brady* material and specific requests for a chance to investigate the criminal background of the prosecution's witnesses are made. *Id.*

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

The timing of the disclosure of exculpatory evidence to a defendant and to his or her attorney is also critical. Exculpatory evidence does little good if counsel does not have time to effectively use it. Such evidence, if not received until the eve of trial is also damaging to the defense. Thus, the "prompt" disclosure recommended is crucial.

With respect to professional conduct, there is very little guidance regarding a prosecutor's ethical obligations to promptly inform the defense as to the identification and background of an informant witness. In *Lemons v. Commonwealth*, the Virginia Court of Appeals emphasized "the importance of the prosecutor's *ethical* duty to 'make [a] timely disclosure' of exculpatory material." 446 S.E.2d 158, 160 (Va. Ct. App. 1994) (emphasis added) (alteration in original) (citation omitted) (reiterating the ethical obligation now encompassed in Virginia Rule of Professional Conduct 3.8(d)). The court stated that a "prosecutor does not meet his or her ethical and constitutional duty simply by making a pretrial determination that the information, if disclosed, would not likely change the outcome of the trial." 446 S.E.2d at 161. If the prosecutor is in doubt about whether certain material is exculpatory, he or she should submit it to the trial court for an *in camera* review. *Id.* In *Lemons*, however, the court ultimately held that, although the prosecutor should have disclosed an exculpatory statement, the defendant failed to establish that there was a reasonable probability that disclosure would have resulted in a different outcome. *Id.*

In *Humes v. Commonwealth*, the court also stressed the prosecutor's *ethical* responsibility to disclose exculpatory evidence. 408 S.E.2d 553, 555 n.2 (Va. Ct. App. 1991). The court held, however, that although the evidence had exculpatory value and the prosecutor should have disclosed it, when considered in the context of all of the trial evidence, there was no reasonable probability that if the evidence had been disclosed to the defense, the result would have been different. *Id*. at 554.

[17] Also, Virginia Code section 19.2-269 provides that a person convicted of a felony is not incompetent to testify, "but the fact of conviction may be shown in evidence to affect his credit."

Recommendation 52

(a) Prior to trial, the trial judge shall hold an evidentiary hearing to determine the reliability and admissibility of the in-custody informant's testimony at either the guilt or sentencing phase.

(b) At the pretrial evidentiary hearing, the trial judge shall use the following standards:

> **The prosecution bears the burden of proving by a preponderance of the evidence that the witness' testimony is reliable. The trial judge may consider the following factors, as well as any other factors bearing on the witness' credibility:**
>
> **(1) The specific statements to which the witness will testify.**
>
> **(2) The time and place, and other circumstances of the alleged statements.**
>
> **(3) Any deal or inducement made by the informant and the police or prosecutor in exchange for the witness' testimony.**
>
> **(4) The criminal history of the witness.**
>
> **(5) Whether the witness has ever recanted his/her testimony.**
>
> **(6) Other cases in which the witness testified to alleged confessions by others.**
>
> **(7) Any other evidence that may attest to or diminish the credibility of the witness, including the presence or absence of any relationship between the accused and the witness.**

(c) The state may file an interlocutory appeal from a ruling suppressing the testimony of an in-custody informant, pursuant to Illinois Supreme Court Rule 604.

Virginia Practice:

Current Virginia law does not meet the objectives set forth in Recommendation 52. The pretrial evidentiary hearing and related procedures suggested in Recommendation 52 are not required in Virginia. In Virginia, in-custody informants are treated like other unreliable witnesses, with the ultimate determination of witness reliability made by the jury. As set forth in Recommendation 51, defense counsel should make a motion for timely disclosure of exculpatory evidence.[18]

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

[18] C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 Cap. Def. J. 1 & n.66 (Fall 2003) (recommending informant-related evidence that defense counsel should request in the motion for exculpatory evidence).

Recommendation 53

In capital cases, courts should closely scrutinize any tactic that misleads the suspect as to the strength of the evidence against him/her, or the likelihood of his/her guilt, in order to determine whether this tactic would be likely to induce an involuntary or untrustworthy confession.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 53. In Virginia, when a criminal defendant moves to suppress evidence at trial of his or her confession, Virginia Code section 19.2-266.2 provides that the trial judge must hold a hearing and rule on the motion before trial. A confession that was not freely and voluntarily made will not be admitted: "[v]oluntariness determines admissibility." *Griggs v. Commonwealth*, 255 S.E.2d 475, 477 (Va. 1979). The Commonwealth has the burden of establishing by a preponderance of the evidence that a confession was voluntary. *Id*.

No statute or rule requires courts to closely scrutinize police tactics that mislead the suspect as to the strength of the evidence against him/her, or the likelihood of his or her guilt, in capital cases or otherwise. Nor does a higher evidentiary standard apply at suppression hearings in capital cases. Virginia courts have held that a "lie by a law enforcement officer 'does not, in and of itself, require a finding that a resulting confession is involuntary.'" *Daggs v. Commonwealth*, No. 2231-99-1, 2000 WL 1693433, at * 1 (Va. Ct. App. Nov. 14, 2000) (quoting *Rodgers v. Commonwealth*, 318 S.E.2d 298, 304 (1984)). Instead, "[w]hether police were truthful about the strength of the evidence against the accused while interrogating him is but 'one factor that must be considered in determining whether [the defendant's] will was overcome and his capacity for self-determination critically impaired.'" *Id.* (quoting *Wilson v. Commonwealth*, 413 S.E.2d 655, 658 (Va. Ct. App. 1992). Virginia courts have upheld the admission of confessions obtained under circumstances where the police lied about the strength of the evidence against the accused. *See, e.g., Arthur v. Commonwealth*, 480 S.E.2d 749, 750-52 (Va. Ct. App. 1997) (in noncapital murder case, affirming admission of confession made after police had shown defendant false laboratory report indicating that defendant's fingerprints were at the crime scene); *Wilson*, 413 S.E.2d at 658 (in noncapital case, affirming admission of confession made after police had falsely told defendant that the victim had identified him); *cf. Smith v. Commonwealth*, 248 S.E.2d 135, 144-45 (Va. 1978) (capital case, waiver of *Miranda* rights not involuntary despite the fact that police had falsely suggested to the defendant that his fingerprints and footprints had been found at the crime scene).

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Virginia State Police interrogation training materials indicate that officers are trained that "allowable demeanor" during an interrogation includes "repeatedly accusing the suspect of lying" and "advising that accomplice has confessed and [is] blaming him." Virginia State Police, *Techniques of Interview and Interrogation* 17 (July 28-29, 2005); Virginia State Police, *The Art of Interrogation* 20 (Aug. 31, 2004). They also instruct that promises not to bring, to drop, or to lessen charges against the suspect are *not* permitted during an interrogation. Virginia State Police, *Techniques of Interview and Interrogation* 17 (July 28-29, 2005); Virginia State Police, *The Art of Interrogation* 20 (Aug. 31, 2004).

Recommendation 54

The Commission makes no recommendation about whether or not plea negotiations should be restricted with respect to the death penalty.

Virginia Practice

Since no recommendation is made for Recommendation 54, no evaluation of Virginia's compliance is possible.

Virginia law imposes no special restrictions on the use of plea negotiations with respect to the death penalty. Virginia Supreme Court Rule 3A:8 contemplates that the Commonwealth will negotiate plea agreements in which it will "[m]ake a recommendation, or agree not to oppose the defendant's request, for a particular sentence, with the understanding that such recommendation or request shall not be binding on the court." Va. Sup. Ct. R. 3A:8(c)(1)(B). Under Virginia law, "an alleged confession is inadmissible where it was induced by the hope of the gain of some advantage or to avoid some evil in reference to the proceeding against the defendant." *Jackson v. Commonwealth*, 81 S.E. 192, 194 (Va. 1914). In *Jackson*, the Virginia Supreme Court found that the defendant confessed in the hope, inspired by "those having the control of the prosecution against him," that by confessing he could avoid the death penalty. Id. at 193-94. This motivation rendered the confession inadmissible. *Id*. at 194. But even where the Commonwealth does not seek the death penalty pursuant to a plea agreement, the trial court may still impose it at sentencing. *Dubois v. Commonwealth*, 435 S.E.2d 636, 639 (Va. 1993).

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Virginia's recent modification of the "21-day rule" offers increased protections on postconviction appeal, but excludes defendants who pleaded guilty. *See* Recommendation 74.

Federal prosecutors are prohibited from using the threat of a death sentence to gain an advantage in plea negotiations. *See The United States Attorneys' Manual*, Title 9 Criminal Division, 9-10.100, *available at* http://www.usdoj.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm#9-10.100.

Chapter 9: The Guilt-Innocence Phase

Recommendation 55
Expert testimony with respect to the problems associated with eyewitness testimony may be helpful in appropriate cases. Determinations as to whether such evidence may be admitted should be resolved by the trial judge on a case-by-case basis.

Virginia Practice
Current Virginia law only partially meets the objectives set forth in Recommendation 55. Virginia courts may admit expert testimony concerning eyewitness identification evidence in certain circumstances—generally, where the trial court deems the information beyond the ken of the average juror, but they seem to discourage the use of such experts.

In *Rodriguez v. Commonwealth*, 455 S.E.2d 724, 727 (Va. Ct. App. 1995), the Virginia Court of Appeals considered, as a matter of first impression, the admissibility of expert testimony on eyewitness identification, holding that "the decision whether to allow expert testimony concerning an eyewitness identification is a decision left to the sound discretion of the trial court." Virginia courts generally find that such testimony interferes with the province of the jury as fact finder and arbiter of witness credibility, and that the subject area is not generally beyond the common knowledge and experience of the average juror. *See id.* Virginia courts have recognized that, in certain "narrow" circumstances, expert testimony on eyewitness identification can be useful to the jury, in areas such as cross-racial identification, the impact of the passage of time since observation or stressful circumstances of observation, and certain psychological phenomena such as transference and the effect of feedback. *See id.* But the *Rodriguez* court noted that simply "asking an expert to render an opinion about the propriety of lineup procedures and the reliability of eyewitness identifications . . . in effect asks the expert to comment upon the credibility of the identifying witness, an issue clearly within the jury's province." *Id.*

The *Rodriguez* court affirmed the trial judge's decision to exclude as within the lay knowledge of jurors expert testimony concerning: (1) proper subjects for photospreads and live lineups; (2) using police fillers in lineups; (3) eliminating anything in a lineup or photospread that makes the suspect stand out; (4) the unreliability of a subsequent identification; (5) effects of stress, poor lighting, or delay on identification accuracy; and (6) the relationship between eyewitness confidence and accuracy of identification. *Id*. at 728. The court noted that such topics could be adequately explored by counsel in the closing argument, and added that other factors ensured that the jury had enough information to evaluate the evidence: the photospread and a picture of the live lineup were introduced into evidence, and corroborating circumstantial evidence was present in the case. *Id.*

In *Currie v. Commonwealth*, the trial court specifically found that the following categories of proffered expert testimony were within the common knowledge and experience of the jurors and would not be allowed: (1) the correlation between eyewitness certainty and accuracy; (2) the effect of observation time and stress on eyewitness accuracy; (3) the effect of the perpetrator's display of a weapon on eyewitness accuracy; (4) the effect of participation in preparing a composite sketch on accuracy of later identifications; and (5) the concept of transference. 515 S.E.2d 335, 337-39 (Va. Ct. App. 1999) (citing *Rodriguez* and holding that trial judge did not abuse discretion in excluding certain expert testimony). However, the trial court in *Currie* had specifically found that testimony concerning principles of human memory and problems of

cross-racial identification were not within the common knowledge and experience of the average juror and therefore were a proper subject of expert testimony, a finding the Court of Appeals did not disturb. *See id.* at 338.

Pending or Prior Legislative Bills in Virginia

HB 815 (2002) - Ex parte motions in death penalty cases. Provides that a defendant represented by appointed counsel shall be permitted to file an ex parte motion seeking appointment of one or more experts or funding for expert assistance. Chief patron:
James F. Almand.[19] *Introduced January 9, 2002 and passed by indefinitely -- effectively killed.*

Comments

Virginia has been criticized by scholars for remaining "one of the few capital jurisdictions in which statutory or case law does not permit defendants to apply *ex parte* for expert funding or in which judges do not routinely allow *ex parte* applications." Justin V. Shane, *Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing for Expert Funding*, 17 Wash. & Lee Cap. Def. J. 347, 347 (2005). To critics, this forces indigent defendants to reveal potential defense strategies and "provide non-reciprocal accelerated discovery to the prosecution." *Id.*

A recent study reveals that all public defenders and court-appointed counsel have a tremendous shortage of resources and funding, including funding for expert witnesses and investigators. *See, e.g.*, American Bar Association, *A Comprehensive Review of Indigent Defense in Virginia* (2004), Executive Summary, *available at* http://www.abanet.org/legalservices/ downloads/sclaid/indigentdefense/va-report2004execsum.pdf; Virginia Indigent Defense Coalition, *Progress Report: Virginia's Public Defense System* (Mar. 2003), *available at* http://www.vidcoalition.org/pdf/ vidc_ReportFINAL.pdf.

[19] Mr. Almand is currently a Virginia judge and serves on the Arlington County Circuit Court in Arlington, Virginia. Virginia Judges, http://www.courts.state.va.us/judges_rule115.pdf (last visited April 6, 2006).

Recommendation 56

Jury instructions with respect to eyewitness testimony should enumerate factors for the jury to consider, including the difficulty of making a cross-racial identification. The current version of IPI [the pattern jury instructions] is a step in the right direction, but should be improved.

IPI 3.15 [the section of the pattern jury instructions concerning the circumstances of the identification] should also be amended to add a final sentence which states as follows: Eyewitness testimony should be carefully examined in light of other evidence in the case.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 56. No Virginia pattern jury instructions were found concerning eyewitness testimony.

"In a few instances, it is proper for the court to warn the jury that certain evidence or testimony is to be received with caution, or that it is to be considered only for a limited purpose." Va. Prac. Jury Instructions § 3:10 (2005 ed.). Despite this instruction, the Virginia Court of Appeals "has consistently refused special instructions concerning the reliability of eyewitness identifications because such instructions have the 'effect of emphasizing the testimony of those witnesses who made identifications.'" *Rodriguez v. Commonwealth*, 455 S.E.2d 724, 727 (Va. Ct. App. 1995) (quoting *Wise v. Commonwealth*, 367 S.E.2d 197, 203 (Va. Ct. App. 1988)); *see also Johnson v. Commonwealth*, 345 S.E.2d 303, 309 (Va. Ct. App. 1986). In *Wise*, the court held that "[t]he jury was properly instructed on . . . [its] function in determining the credibility of the witnesses [and] that further instruction on the credibility and reliability of identification testimony was unnecessary and inappropriate." 367 S.E.2d at 203.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Virginia courts do examine the following factors in considering the reliability of eyewitness identification evidence:

> "the opportunity of the witness to view the criminal at the time of the crime, the witness' degree of attention, the accuracy of the witness' prior description of the criminal, the level of certainty demonstrated by the witness at the confrontation, and the length of time between the crime and the confrontation."

Currie v. Commonwealth, 515 S.E.2d 335, 343 (Va. Ct. App. 1999) (quoting *Neil v. Biggers*, 409 U.S. 188, 199-200 (1972)).

Recommendation 57

The Committee on the Illinois Pattern Jury Instructions-Criminal should consider a jury instruction providing a special caution with respect to the reliability of the testimony of in-custody informants.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 57. Currently, there appears to be no jury instruction regarding the reliability of the testimony of in-custody informants.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Warnings regarding credibility are mandatory in Virginia in cases where *accomplice* testimony is at issue. In *Lilly v. Commonwealth*, 523 S.E.2d 208, 210 (Va. 1999), the court found that the credibility of an accomplice's testimony "will be a significant factor in the jury's determination of the accused's level of culpability." In *Johnson v. Commonwealth*, 298 S.E.2d 99, 101 (Va. 1982), the court found that the trial court is required to "warn the jury of the danger of basing a conviction upon such uncorroborated [accomplice] testimony."

Virginia does offer an instruction that provides for Mitigation in a Capital Murder charge. 2-33 Va. Model Jury Instrs., Crim. Instr. No. P33.127. Because Virginia recognizes certain circumstances in which testimony should be examined for veracity by a jury (see above), this instruction could be modified to include an additional instruction regarding the reliability of the testimony of in-custody informants, in the following manner:

Instruction No. P33.127 reads:

> If you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you shall consider any mitigation evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment.

Id. The section could be modified, and an additional jury instruction could read:

> If you find that the Commonwealth has presented proof beyond a reasonable doubt that the defendant killed [name of person(s)]; that the [killing(s) was/were] willful, deliberate and premeditated; and that the killing(s) [included elements necessary for a capital charge]; and if this proof is based on the testimony of *[an] in-custody informant(s)*, the jury shall consider that testimony with special care when determining the appropriate punishment, and shall consider any mitigation evidence presented of circumstances which in fairness or mercy may extenuate or reduce the degree of reliability associated with such testimony.

See id.; 2-33 Va. Model Jury Instrs., Crim. Instr. No. G33.100 (excerpts taken from both sources). Concerns have already been noted on this issue. Particularly, testimony by jailhouse

witnesses was an issue in Virginia in a capital murder trial where defense counsel complained that, "[t]here's evidence in the case that a witness demanded money from the government [in exchange for cooperation]." Associated Press, *Defense Lawyers Want More Information on Jailhouse Informants*, Hampton Roads.com/ PilotOnline.com, Jan. 5, 2004. Accordingly, Virginia should also consider a jury instruction providing a special caution with respect to the reliability of the testimony of in-custody informants.

Recommendation 58

IPI – Criminal -3.06 and 3.07 [the jury instructions relating to a defendant's statement] should be supplemented by adding the italicized sentences, to be given only when the defendant's statement is not recorded:

> **You have before you evidence that the defendant made a statement relating to the offenses charged in the indictment. It is for you to determine [whether the defendant made the statement, and, if so,] what weight should be given to the statement. In determining the weight to be given to a statement, you should consider all of the circumstances under which it was made.** ***You should pay particular attention to whether or not the statement is recorded, and if it is, what method was used to record it. Generally, an electronic recording that contains the defendant's actual voice or a statement written by the defendant is more reliable than a non-recorded summary.***

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 58. No specific jury instruction in Virginia appears to address statements made by defendants or the circumstances surrounding those statements.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Videotaped confessions allow for review to determine their voluntariness. *See, e.g., Jenkins v. Commonwealth*, 423 S.E.2d 360, 365-67 (Va. 1992) (noting that both jury and Virginia Supreme Court reviewed videotape of defendant's confession and found it to be made knowingly and voluntarily).

Recommendation 59

[Illinois] courts should continue to reject the results of polygraph examinations during the innocence/guilt phase of capital trials.

Virginia Practice:

Current Virginia law meets the objectives set forth in Recommendation 59. In Virginia, polygraph results are inadmissible, even for impeachment purposes. *See Goins v. Angelone*, 226 F.3d 312, 325 (4th Cir. 2000); *Robinson v. Commonwealth*, 341 S.E.2d 159, 167 (Va. 1986). Virginia courts should continue to reject the results of polygraph examinations during the guilt-innocence phase of capital trials.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments:

None.

Chapter 10: The Sentencing Phase

Recommendation 60
The Commission supports the new amendments to Illinois Supreme Court Rule 411, which make the rules of discovery applicable to the sentencing phase of capital cases.

Virginia Practice
Current Virginia law does not meet the objectives set forth in Recommendation 60. The rules of discovery are not applicable to the sentencing phase of capital cases. *See* Recommendation 46 for an explanation of the limited discovery allowed in Virginia in criminal cases.

Pending or Prior Legislative Bills in Virginia
No pending or prior legislation found.

Comments:
See Recommendations 19-24 for various laws related to DNA collection and analysis. In *Brady v. Maryland*, 373 U.S. 83, 87 (1963), the Supreme Court ruled that prosecutors must disclose exculpatory evidence to the defense, "where the evidence is material either to guilt or to punishment." In the interest of fairness, balanced rules of discovery should apply during the sentencing phase of a capital case.

Recommendation 61

[In addition to considering the mitigating factors already codified in 720 ILCS 5/9-1(c), during the sentencing phase of a trial, courts should consider] a defendant's history of extreme emotional or physical abuse, and that the defendant suffers from reduced mental capacity.

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 61. Virginia courts are not *required* to consider mitigating evidence at all during the sentencing phase. Va. Code § 19.2-264.4.

Additionally, only mental capacity, not past abuse, is articulated in the statutory list of mitigating factors that may be considered.

> Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: . . . (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, . . . (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, . . . (vi) even if § 19.2-264.3:1.1 is inapplicable as a bar to the death penalty, the subaverage intellectual functioning of the defendant.

Va. Code § 19.2-264.4(B).

Pending or Prior Legislative Bills in Virginia

Legislation is pending but it does not affect the substance of the statute.

Comments

Although the Virginia statute only mentions consideration of the defendant's extreme mental or emotional disturbance *when* he or she committed the crime, case law makes it clear that the defendant's history of extreme mental or emotional disturbance *may* be considered as well. *See Powell v. Commonwealth*, 590 S.E.2d 537, 562 (Va. 2004).

Recommendation 62

The defendant should have the right to make a statement on his [or her] own behalf [] during the aggravation/mitigation phase, without being subject to cross-examination.

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 62. Virginia law requires the trial judge, in a bench trial, to inquire of the defendant if he or she wishes to make a statement to the court, prior to pronouncing the sentence. Va. Code § 19.2-298. In a jury trial, the defendant's statement is deferred until after the jury has deliberated and decided the sentence. *Id*.; *Bassett v. Commonwealth*, 284 S.E.2d 844, 853-54 (Va. 1981). The Fourth Circuit does not consider such statements to be constitutionally required; however, if a defendant requests to make a statement, it is a constitutional violation to then deny him or her that request. *Stamper v. Baskerville*, 531 F. Supp. 1122, 1127 (E.D. Va. 1982).

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

In a jury trial, the judge may choose to reduce a jury-imposed death sentence to life imprisonment based on the defendant's statement and a post-sentencing report. Va. Code § 19.2-264.5. The defendant should be permitted to make a statement before the jury deliberates, so that the jury, too, can consider the defendant's statement when deciding upon a sentence. However, despite the language in the jury verdict forms, some jurors remain confused as to the punishment for a capital defendant in Virginia when the jury does not sentence him or her to death. Some jurors do not fully understand that if they do not impose the death penalty, the defendant automatically receives a life sentence with no possibility of parole. Therefore, judges should clarify the jury verdict forms to ensure the jury's full comprehension of its choices in capital cases. *See, e.g.*, Bill Burke, *Death-Penalty Forms Could Confuse Juries High Court Says Wording Is Unclear*, Virginian-Pilot, June 20, 2003, at A1 ("Virginia jurors may be sentencing convicted murderers to death because they don't know they have the option of issuing an alternative sentence of life without parole. The state's highest court has warned that the printed form jurors rely on in death-penalty cases is unclear."); William J. Bowers et al., *The Capital Sentencing Decision: Guided Discretion, Reasoned Moral Judgment, or Legal Fiction* (2003), *in* James R. Acker et al., *America's Experiment with Capital Punishment: Reflections on the Past, Present, and Future of the Ultimate Penal Sanction* (Carolina Academic Press, 2d ed.), *available at* http://www.cjp.neu.edu/ Capital_Decision.pdf (discussing juror confusion generally, including research regarding jurors in Virginia and other states); Stephen P. Garvey & Paul Marcus, *Virginia's Capital Jurors*, 44 Wm. & Mary L. Rev. 2063, 2093-96 (2003) (recognizing the importance of a clear instruction regarding parole ineligibility); *Deadly Decisions, Juror Confusion* (American Radio Works, Minnesota Public Radio and NPR News broadcast Aug. 2002), *available at* http://www.americanradioworks.org/features/deadlydecisions/ index.html (discussing juror confusion generally).

Recommendation 63

The jury should be instructed as to the alternative sentences that may be imposed in the event that the death penalty is not imposed.

Virginia Practice

Current Virginia law meets the objectives set forth in Recommendation 63. The jury verdict form mandated in Va. Code § 19.2-264.4(D) sets forth one of two options to be chosen: death or life imprisonment with an optional fine. In addition, "[u]pon request of the defendant, a jury shall be instructed that for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life." Va. Code § 19.2-264.4(A).

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

"Upon a finding that the defendant is guilty of an offense which may be punishable by death, a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment." Va. Code § 19.2-264.4(A). "In case of trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life." *Id.*

Virginia's statutory jury verdict forms clearly give the alternate sentencing options and have been referenced with approval by the Virginia Supreme Court. *See, e.g.*, *Morrisette v. Warden of the Sussex I State Prison*, 613 S.E.2d 551, 561 (Va. 2005); 2-33 Va. Model Jury Instrs., Crim. Instr, No. P33.125.

Recommendation 64

Illinois courts should continue to reject the results of polygraph examinations during the sentencing phase of capital trials.

Virginia Practice

Current Virginia law meets the objectives set forth in Recommendation 64. The Virginia Supreme Court has long recognized that the results of polygraph tests "'are so thoroughly unreliable as to be of no proper evidentiary use whether they favor the accused, implicate the accused, or are agreed to by both parties.'" *White v. Commonwealth*, 583 S.E.2d 771, 772 (Va. Ct. App. 2003) (citations omitted) (refusing to allow polygraph examination results as evidence at a probation revocation hearing). Though research revealed no Virginia cases specifically addressing the admissibility of polygraph tests at sentencing, it is virtually certain that no Virginia court would ever consider polygraph evidence at any stage of a criminal proceeding.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Chapter 11: Imposition of Sentence

Recommendation 65

The statute which establishes the method by which the jury should arrive at its sentence should be amended to include language . . . to make it clear that the jury should weigh factors in the case and reach its own independent conclusion about whether the death penalty should be imposed. The statute should be amended to read as follows: "If the jury finds unanimously, after weighing the factors in aggravation and mitigation, that death is the appropriate sentence . . . ."

Virginia Practice

Current Virginia law partially meets the objectives set forth in Recommendation 65. Jurors are instructed to *consider* mitigating factors, but not necessarily to *weigh* them against aggravating factors. The statutory jury verdict form imposing the death penalty states, in pertinent part:

> We, the jury, on the issue joined, having found the defendant guilty of (here set out statutory language of the offense charged) and that (after consideration of his prior history that there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society) or his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved (torture) (depravity of mind) (aggravated battery to the victim), and *having considered the evidence in mitigation of the offense*, unanimously fix his punishment at death.

Va. Code § 19.2-264.4(D) (emphasis added).

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

The statutory jury verdict form's language could be improved by the addition of a phrase stating that the jury has found "that death is the appropriate sentence." Subsection B specifically lists mitigating factors that *may* be considered by the jury. Va. Code § 19.2-264.4(B). It could be amended to instruct the jurors that they *should* do so.

Recommendation 66

After the jury renders its judgment with respect to the imposition of the death penalty, the trial judge should be required to indicate on the record whether he or she concurs in the result. In cases where the trial judge does not concur in the imposition of the death penalty, the defendant shall be sentenced to natural life as a mandatory alternative (assuming the adoption of a new death penalty scheme limited to five eligibility factors).

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 66. Virginia law does not require the trial judge to indicate on the record whether he or she concurs in a jury's imposition of the death penalty. In a jury trial, the judge may choose to reduce a jury-imposed death sentence to life imprisonment based on the defendant's statement and a post-sentencing report. Va. Code § 19.2-264.5.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Virginia has thirteen, not five, eligibility factors. *See* Recommendation 27.

The Virginia State Police indicate during officer training that the judge may choose to reduce a jury-imposed death sentence to life imprisonment. Virginia State Police, *Court Organization, Procedure, Preparation & Testimony* 13 (June 9, 2005).

"In case of a trial by jury, where a sentence of death is not recommended, the defendant shall be sentenced to imprisonment for life." Va. Code § 19.2-264.4(A).

> If a person has been sentenced for a felony to the Department of Corrections but has not actually been transferred to a receiving unit of the Department, the court which heard the case, if it appears compatible with the public interest and there are circumstances in mitigation of the offense, may, at any time before the person is transferred to the Department, suspend or otherwise modify the unserved portion of such a sentence.

Va. Code § 19.2-303. The purpose of this law is to provide for the review and suspension of sentences imposed for felony convictions if appropriate under the circumstances. *Esparza v. Commonwealth*, 513 S.E.2d 885, 887-88 (Va. Ct. App. 1999). While the Virginia State Crime Commission's January 2003 report stated that § 19.2-303 is one of "two additional checks on all death sentences imposed by juries," there is no data on how often this provision has been used to modify jury-imposed death sentences. Virginia State Crime Commission, *Comparison of Virginia and Illinois Death Penalty Statutes* (Jan. 2003) at 2.

Recommendation 67

In any case approved for capital punishment under the new death penalty scheme with five eligibility factors, if the finder of fact determines that death is not the appropriate sentence, the mandatory alternative sentence would be natural life.

Virginia Practice

Current Virginia law would meet the objectives set forth in Recommendation 67, if the eligibility factors were reduced. As discussed in Recommendation 27, Virginia law currently provides for capital punishment in thirteen different categories of willful, deliberate, and premeditated homicide. Virginia law currently provides that all thirteen of these so-called Class 1 felonies carry the mandatory alternative sentence of natural life (without parole for crimes committed after January 1, 1995). Va. Code § 192.264.4.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 68

Illinois should continue to prohibit the imposition of the death penalty on those defendants who are found to be mentally retarded.

Virginia Practice

Current Virginia law meets the objectives set forth in Recommendation 68, but Virginia's procedures for determining who is mentally retarded need closer examination.

After the United States Supreme Court held that it is unconstitutional to execute the mentally retarded, the Virginia State Legislature passed an amendment to the Virginia Code making the death penalty unavailable to people who are determined to be mentally retarded. *Atkins v. Virginia*, 536 U.S. 304 (2002); Va. Code § 18.2-10(a). The amendment requires that if the person convicted of a Class 1 felony is determined to be mentally retarded pursuant to § 19.2-264.3:1.1, the maximum punishment for that person is life imprisonment and a fine of up to $100,000. Va. Code § 18.2-10(a).

In any case in which the offense may be punishable by death, the issue of mental retardation must be determined by a preponderance of the evidence by the trier of fact during the sentencing proceeding. Va. Code § 19.2-264.3:1.1(C).

The determination of mental retardation is governed by Va. Code § 19.2-264.3:1.1. That statute defines "mental retardation" as

> a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

Va. Code § 19.2-264.3:1.1(A).

Upon motion of the defense attorney and a showing that the capital defendant is unable to pay for an expert, Virginia law requires the court to select, appoint, and provide one. Va. Code § 19.2-264.3:1(A). That expert must evaluate the defendant and "assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition." *Id.* Though the defendant is not permitted to choose the expert, Virginia law sets forth specific qualifications the expert must meet.

> The mental health expert appointed pursuant to this section shall be (i) a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of Mental Health, Mental Retardation and Substance Abuse Services and (ii) qualified by specialized training and experience to perform forensic evaluations.

Id. But "[t]he defendant shall not be entitled to a mental health expert of the defendant's own choosing or to funds to employ such expert." *Id.* The statute also allows for the appointment of "one or more" experts. *Id.*

Pending or Prior Legislative Bills in Virginia[20]

Two bills were proposed in 2002; both were postponed pending the United States Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002).
HB 957 - Death penalty prohibited for mentally retarded. Chief patron: Almand. *Postponed.*
SB 497 - Death penalty prohibited for mentally retarded. Chief patron: Edwards. *Passed unanimously in Senate, postponed.*

Comments

Virginia procedure provides that retardation is determined after both the guilt and sentencing phases, and places the burden to prove retardation on the defendant. Both of these positions should be reconsidered. Placing a defendant whose guilt and death sentence have already been determined before a jury to determine retardation is highly likely to encourage bias in favor of death eligibility. If retardation is determined before trial, this potential bias is removed with no difference in cost. Additionally, since it is unconstitutional to execute the mentally retarded, this issue should not be treated as a "defense"; thus, the burden should be placed on the Commonwealth, not the defendant.

Ironically, Virginia has found Daryl Atkins, the defendant in *Atkins v. Virginia*, 536 U.S. 304 (2002), not to be retarded under the standard set forth in Virginia Code section 19.2-264.3:1.1.

> The [United States Supreme Court] did not determine whether Atkins met the definition for mental retardation, and this summer, a trial was held in York County[, Virginia] on that question. In an unusual proceeding that drew national attention, more than 50 witnesses testified about Atkins's IQ scores, school records and childhood abilities. Prosecutors have long argued that Atkins is not mentally retarded and should be put to death for the 1996 carjacking and murder of Eric Nesbitt, 21, an Air Force mechanic.
>
> After 13 hours of deliberation, jurors concluded that Atkins was not mentally retarded. Execution was set for Dec. 2.
>
> The notice of appeal was filed in mid-September, Atkins's execution will be stayed and new legal briefs will be drafted, his attorneys said. Arguments before the state Supreme Court probably will occur next year.

Donna St. George, *UPDATE: Killer's Retardation Case Reprised*, Wash. Post, Oct. 9, 2005, at C02, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2005/10/08/AR2005100800946.html.

[20] Unless otherwise noted, all bills listed are described at: Virginia Legislature and the Death Penalty, http://www.vadp.org/legis.htm (last visited April 9, 2006) (2006 legislation); Current Legislation, Death Penalty Issues in the 2005 General Assembly, http://www.vadp.org/ga2004.htm (last visited April 9, 2006) (2005 legislation); or VADP and the General Assembly, http://www.vadp.org/DPBills.htm (last visited April 9, 2006) (1997-2004 legislation). Information about pending and prior bills can also be obtained at Virginia General Assembly, Legislative Information System, http://leg1.state.va.us (last visited April 9, 2006).

Recommendation 69
Illinois should adopt a statute which provides:

A. The uncorroborated testimony of an in-custody informant witness concerning the confession or admission of the defendant may not be the sole basis for imposition of a death penalty.

B. Convictions for murder based upon the testimony of a single eyewitness or accomplice, without any other corroboration, should not be death eligible under any circumstances.

Virginia Practice
Current Virginia law does not meet the objectives set forth in Recommendation 69. Virginia does not have any statute that prohibits the use of uncorroborated testimony of an in-custody informant witness in death penalty cases.

Pending or Prior Legislative Bills in Virginia
HB 188 – Sentencing; death sentence. This proposed 2006 bill would have required that, at the sentencing phase of a capital case,

> at the request of the defendant, [the] jury shall be instructed that an individual who was sentenced to death in the Commonwealth and twice scheduled to be executed was later granted an absolute pardon absolving him of guilt for a capital murder conviction on the basis of DNA testing, and that eyewitness identifications have been shown in many cases to be inaccurate and highly susceptible to suggestion, in addition to the requirement under current law that the jury be told that a defendant is not eligible for parole if sentenced to imprisonment for life.

Chief patron: Robert G. Marshall. HB 188, http://leg1.state.va.us/cgi-bin/legp504.exe?ses=061&typ=bil&val=hb188 (last visited April 10, 2006). *Died in committee. Id*.

Comments
Virginia State Police training materials educate officers about the difficulty eyewitnesses face in recalling memories. Virginia State Police, *Witness Interviewing Skills* (Aug. 30, 2004).

Uncorroborated witness testimony is a serious problem in criminal cases, especially death penalty cases. Juan Melendez was the twenty-fourth person exonerated and released from Florida's death row after being wrongfully convicted on the basis of the testimony of two uncorroborated witnesses. Vickie Chachere, *Florida Death Row Inmate To Be Released, 99th Freed Nationwide*, Florida Times-Union, Jan. 3, 2002, *available at* http://www.jacksonville.com/tu-online/apnews/stories/010302/D7GQ8SJO0.html. Virginia may want to focus on proposing legislation to prevent the use of such witness testimony in death penalty cases.

Chapter 12: Proceedings Following Conviction and Sentence

Recommendation 70
In capital cases, the Illinois Supreme Court should consider on direct appeal (1) whether the sentence was imposed due to some arbitrary factor, (2) whether an independent weighing of the aggravating and mitigating circumstances indicates death was the proper sentence, and (3) whether the sentence of death was excessive or disproportionate to the penalty imposed in similar cases.

Virginia Practice
Current Virginia law only partially meets the objectives set forth in Recommendation 70. In 1977, the Virginia Legislature enacted a law mandating proportionality review by the Virginia Supreme Court, which reads as follows:

> In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:
>
> 1. Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and
>
> 2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

Va. Code § 17.1-313(C). The statute requires that the review take place "on the record" and provides that to effectuate this review, "[t]he Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine . . . [and] [t]he court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive." Va. Code § 17.1-313(A),(E).

Despite the stated legislative intent of the statute, however, actual proportionality review has yet to be realized in Virginia. The Virginia Supreme Court has never found a death sentence to be excessive or disproportionate since the enactment of the statute. *See* Kelly E.P. Bennett, *Symposium: A Quarter Century of Death: A Symposium on Capital Punishment in Virginia Since* Furman v. Georgia: *Proportionality Review: The Historical Application and Deficiencies*, 12 Cap. Def. J. 103, 107 (1999).

Because the Virginia Supreme Court only accumulates the records of capital felony cases it has reviewed (rather than "all capital felony cases tried within a certain period of time"), many of the cases where the judge or jury imposed life imprisonment (that were not appealed) are not considered when the court conducts its proportionality review. *See* Rachel King, ACLU Capital Punishment Project et al., *Broken Justice: The Death Penalty in Virginia* 27 (Nov. 2003) (recommending that the Virginia Supreme Court collect the records of all capital cases, regardless of whether the death penalty was imposed and regardless of whether the case resulted in an appeal to Virginia Supreme Court).

Significantly, the report of the Virginia General Assembly also studied Virginia's proportionality review, finding that "the Court's practice of not consistently considering those capital murder

cases in which a life sentence was imposed, and at other times, its decision to give a particular emphasis to the death cases, limits the reliability of the Court's review." Report of the Joint Legislative Audit and Review Commission of the Virginia General Assembly 72 (2000), *available at* http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD72002/$file/rpt274.pdf. The report recommended that specific language may be useful to guide the Supreme Court in conducting a proportionality review based on more consistent comparisons of capital murder death sentences. *Id.*

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

According to the Illinois Commission Report, the following states have some form of proportionality review as part of their death sentencing scheme: Alabama, Delaware, Georgia, Idaho, Kentucky, Louisiana, Mississippi, Missouri, Montana, Nebraska, New Hampshire, New Jersey, New Mexico, North Carolina, Pennsylvania, South Carolina, South Dakota, Tennessee, and Washington.

Recommendation 71

Rule 3.8 of the Illinois Supreme Court Rules of Professional Conduct, Special Responsibilities of a Prosecutor], should be amended in paragraph (c) by the addition of the italicized language:

> **(c) A public prosecutor or other government lawyer in criminal litigation shall make timely disclosure to counsel for the defendant, or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused or mitigate the degree of the offense.** ***Following conviction, a public prosecutor or other government lawyer has the continuing obligation to make timely disclosure to the counsel for the defendant or to the defendant if the defendant is not represented by a lawyer, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the defendant or mitigate the defendant's capital sentence. For purposes of this post-conviction disclosure responsibility "timely disclosure" contemplates that the prosecutor or other government lawyer should have the opportunity to investigate matters related to the new evidence.***

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 71. Virginia's prosecutorial conduct rules neither contain a "continuing obligation" requirement nor specify what is meant by "timely disclosure" for purposes of a prosecuting attorney's post-conviction disclosure responsibility. Rule 3.8 of the Virginia Rules of Professional Conduct states that:

> A lawyer engaged in a prosecutorial function shall:
>
> . . .
>
> (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court . . . .

Rule 3.8(d) addresses "knowing violations of the respective provisions so as to allow for better understanding and easier enforcement by excluding situations (paragraph (d)), for example, where the lawyer/prosecutor does not know the theory of the defense so as to be able to assess the exculpatory nature of evidence . . . ." Rule 3.8 cmt. [6]. The Comment to Rule 3.8 also explains that the court order exception "recognizes that a prosecutor may seek a protective order from the tribunal if disclosure of information to the defense could result in substantial harm to an individual or the public interest." *Id*. cmt. [5].

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Effective January 1, 2000, the Virginia Code of Professional Responsibility was replaced by the Virginia Rules of Professional Conduct. According to the Virginia State Bar's Professional Guidelines for 2004-2005, Rule 3.8(d) under the new rules is different from its predecessor, DR 8-102(A)(4),[21] in that Rule 3.8(d) "requires actual knowledge on the part of prosecuting lawyers that they are in possession of exculpatory evidence as opposed to simply being in knowing possession of evidence that may be determined to be of such a nature, although acknowledging that such disclosure may be affected by court orders." Va. State Bar, Prof'l Guidelines 2004-2005, Va. R. Prof'l Conduct R. 3.8 Va. Code Comparison. As explained in the Committee Commentary to the Virginia State Bar's Professional Guidelines for 2004-2005, the disclosure of exculpatory evidence to the defense "would apply only to that evidence which the prosecutor knows is exculpatory as opposed to a more subjective analysis of evidence which may be in the knowing possession of the prosecutor but which he does not have reason to believe would be exculpatory." Va. State Bar, Prof'l Guidelines 2004-2005, Va. R. Prof'l Conduct R. 3.8 Comm. Comment.

[21] "A public prosecutor or a government lawyer in criminal litigation shall . . . (4) [m]ake timely disclosures to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence, known to the prosecutor or other government lawyer, that tends to negate the guilt of the accused, mitigate the degree of the offense or reduce the punishment." Va. Code of Prof'l Responsibility DR 8-102(A)(4).

Recommendation 72

The Post-Conviction Hearing Act should be amended to provide that a petition for a post-conviction proceeding in a capital case should be filed within 6 months after the issuance of the mandate by the Supreme Court following affirmance of the direct appeal from the trial.

Virginia Practice

Current Virginia law meets the objectives set forth in Recommendation 72. If anything, Virginia's time limitations are far more stringent than those recommended by the Illinois Commission, allaying any concerns about undue delay on appeal. The petition for a writ of habeas corpus in the Supreme Court of Virginia must be filed within 60 days after the United States Supreme Court either denies certiorari following affirmance of the direct appeal or affirms the imposition of the death sentence after granting certiorari, or the period for filing a timely petition for certiorari has expired without a petition for writ of certiorari being filed, whichever occurs first. Va. Code § 8.01-654.1. "However, notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus, an indigent prisoner may file such a petition within 120 days following appointment, made under § 19.2-163.7, of counsel to represent him." *Id.*

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

The United States Supreme Court has agreed to hear very few of the Virginia Supreme Court's direct review decisions. According to the Joint Legislative and Review Commission's Review of Virginia's System of Capital Punishment (2002), of the 113 cases in which a petition for writ of certiorari was filed with the United States Supreme Court from 1997 to 2001, 108 were denied certiorari. *Id.* at 57-58. Of the remaining five cases remanded to the Virginia Supreme Court, only two were remanded to the circuit court (the defendant received a life sentence in one of the cases, and in the other, the defendant received a second death sentence). *Id.*

Recommendation 73

The Illinois Post-Conviction Hearing Act should be amended to provide that in capital cases, the trial court should convene the evidentiary hearing on the petition within one year of the date the petition is filed.

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 73. In Virginia, the Supreme Court of Virginia has "exclusive jurisdiction to award writs of habeas corpus upon petitions filed by prisoners held under the sentence of death." Va. Code § 17.1-310; *see also* Va. Code § 8.01-654(C)(1) ("With respect to any such petition filed by a petitioner held under the sentence of death, and subject to the provisions of this subsection, the Supreme Court shall have exclusive jurisdiction to consider and award writs of habeas corpus."). The Court, in setting its docket, shall give priority to the consideration and disposition of such petitions. Va. Code § 17.1-313(G).

Because the writ of habeas corpus is filed directly with the Supreme Court, an evidentiary hearing on such petitions occurs only if the Supreme Court of Virginia exercises its discretion to order the circuit court to conduct such a hearing. Va. Code § 8.01-654.C.1 ("The circuit court which entered the judgment order setting the sentence of death shall have authority to conduct an evidentiary hearing on such a petition only if directed to do so by order of the Supreme Court.").

According to Virginia Code section 8.01-654(C)(3),

> [t]he circuit court shall conduct such a hearing within 90 days after the order of the Supreme Court has been received and shall report its findings of fact and recommend conclusions of law to the Supreme Court within 60 days after the conclusion of the hearing. Any objection to the report of the circuit court must be filed in the Supreme Court within 30 days after the report is filed.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

According to a Victim Notification Program document on the Office of the Virginia Attorney General's website explaining the appellate process for a capital murder conviction, such an evidentiary hearing rarely occurs:

> The Supreme Court of Virginia reviews the petition and, in nearly all cases, decides the case without an evidentiary hearing. If the Supreme Court of Virginia decides a hearing is necessary to properly resolve the petitioner's claims, the hearing is held in the circuit court where the prisoner was convicted, ordinarily before the same judge who presided at the trial.

Attorney General of Virginia, *The Appellate Process for a Virginia Capital Murder Conviction*, http://www.oag.state.va.us/Special%20Projects/Victim%20Notification/ victim.htm#capital (last visited April 9, 2006).

Recommendation 74

The Post-Conviction Hearing Act should be amended to provide that in capital cases, a proceeding may be initiated in cases in which there is newly discovered evidence which offers a substantial basis to believe that the defendant is actually innocent, and such proceedings should be available at any time following the defendant's conviction regardless of other provisions of the Act limiting the time within such proceedings can be initiated. In order to prevent frivolous petitions, the Act should provide that in proceedings asserting a claim of actual innocence, the court may make an initial determination with or without a hearing that the claim is frivolous.

Virginia Practice

Current Virginia law meet the objectives set forth in Recommendation 74 only regarding biological evidence.

Biological Evidence

In 2001, Virginia law was amended to allow a convicted felon to apply at any time for a new scientific investigation of newly discovered or previously untested human biological evidence. For a discussion of Virginia's law on this issue, see Recommendation 25.

Non-Biological Evidence

Prior to 2004, those convicted of a crime in Virginia had only 21 days after sentencing to introduce newly discovered nonbiological evidence of innocence. After this three-week period, no new evidence of such innocence, no matter how compelling, could be reviewed. Given that DNA evidence is only one form of exculpatory evidence, this so-called "21-Day Rule" barred claims of innocence that came to light more than three weeks after sentencing, leaving those sentenced to death without recourse even for evidence that the defendant could not have had beforehand (e.g., a key witness recants his or her testimony, another person credibly confesses, or a reliable alibi surfaces after trial). This law (which the American Civil Liberties Union of Virginia, Virginians for Alternatives to the Death Penalty, and other organizations had described as "archaic and indefensible" and "desperately in need of reform" in a 2003 report) imposes the nation's shortest deadline on death row inmates seeking to introduce new evidence. Rachel King, ACLU Capital Punishment Project et al., *Broken Justice: The Death Penalty in Virginia*, at v, 17 (Nov. 2003).

At the urging of Governor Warner to reform the 21-Day Rule, the Virginia General Assembly in 2003 responded with a bill that would extend the time limit from 21 days to 90 days (*see* SB 1143)[22] -- a band-aid remedy that only gave the appearance of reform without adequately addressing the repressive limitations the law continued to impose. The Governor, seeking a more comprehensive solution, amended the bill to delay its implementation until 2004. A special task force of the Crime Commission was tasked with studying the issue during the interim session.

[22] Unless otherwise noted, all bills listed are described at: Virginia Legislature and the Death Penalty, http://www.vadp.org/legis.htm (last visited April 9, 2006) (2006 legislation); Current Legislation, Death Penalty Issues in the 2005 General Assembly, http://www.vadp.org/ga2004.htm (last visited April 9, 2006) (2005 legislation); or VADP and the General Assembly, http://www.vadp.org/DPBills.htm (last visited April 9, 2006) (1997-2004 legislation). Information about pending and prior bills can also be obtained at Virginia General Assembly, Legislative Information System, http://leg1.state.va.us (last visited April 9, 2006).

In 2004, SB 233, which allowed convicted felons to seek review of any new, nonbiological evidence of innocence, was introduced and passed, ending the 21-Day Rule by removing the time limit for filing a petition. While this law is a step in the right direction, only those who pled not guilty to the crime of which they were accused may petition for a writ of actual innocence, and such qualified individuals may so petition only once.[23] *See* Va. Code §§ 19.2-327.10,[24] 19.2-327.11.[25]

---

[23] The House rejected Governor Warner's amendment to strike the one petition limit.

[24] This provision of the Virginia Code pertains to the issuance of a writ of actual innocence based on nonbiological evidence:

> Notwithstanding any other provision of law or rule of court, upon a petition of a person who was convicted of a felony upon a plea of not guilty, the Court of Appeals shall have the authority to issue writs of actual innocence under this chapter. Only one such writ based upon such conviction may be filed by a petitioner. The writ shall lie to the court that entered the conviction; and that court shall have the authority to conduct hearings, as provided for in this chapter, on such a petition as directed by order from the Court of Appeals. In accordance with §§ 17.1-411 and 19.2-317, either party may appeal a final decision of the Court of Appeals to the Supreme Court of Virginia. Upon an appeal from the Court of Appeals, the Supreme Court of Virginia shall have the authority to issue writs in accordance with the provisions of this chapter.

Va. Code § 19.2-327.10.

[25] Section A of this provision describes the contents of the petition for a writ of actual innocence based on previously unknown or unavailable evidence:

> A. The petitioner shall allege categorically and with specificity, under oath, all of the following: (i) the crime for which the petitioner was convicted, and that such conviction was upon a plea of not guilty; (ii) that the petitioner is actually innocent of the crime for which he was convicted; (iii) an exact description of the previously unknown or unavailable evidence supporting the allegation of innocence; (iv) that such evidence was previously unknown or unavailable to the petitioner or his trial attorney of record at the time the conviction became final in the circuit court; (v) the date the previously unknown or unavailable evidence became known or available to the petitioner, and the circumstances under which it was discovered; (vi) that the previously unknown or unavailable evidence is such as could not, by the exercise of diligence, have been discovered or obtained before the expiration of 21 days following entry of the final order of conviction by the court; (vii) the previously unknown or unavailable evidence is material and when considered with all of the other evidence in the current record, will prove that no rational trier of fact could have found proof of guilt beyond a reasonable doubt; and (viii) the previously unknown or unavailable evidence is not merely cumulative, corroborative or collateral. . . . Human biological evidence may not be used as the sole basis for seeking relief under this writ but may be used in conjunction with other evidence.

Va. Code § 19.2-327.11(A).

Pending or Prior Legislative Bills in Virginia

SB 218 (2004) - Would have eliminated the time limit for such petitions and the limit on the type of nonbiological evidence, and would have called for a preponderance of the evidence standard. *Killed in the Senate Courts of Justice Committee (15-0).*

HB 1805/SB 914 (2005) - The Freedom Restoration Act. Had it passed, it would have called for using a preponderance of the evidence standard and would have removed the limit of one writ of actual innocence per conviction and the requirements that the petitioner must have pled not guilty and that the evidence must have been previously unknown or unavailable at the time of the conviction. *HB 1805 was killed by the House Courts of Justice Committee (13-Y, 8-N). SB 914 passed the Senate floor and was tabled in the House Courts of Justice Committee (10-Y, 9-N).*

Comments

"Bars to successive litigation effectively defeat th[is] recommendation's purpose." Robert M. Sanger, *Comparison of the Illinois Commission Report on Capital Punishment With the Capital Punishment System in California*, 44 Santa Clara L. Rev. 101, 192 (2003).

Recommendation 75

Illinois law should provide that after all appeals have been exhausted and the Attorney General applies for a final execution date for the defendant, a clemency petition may not be filed later than 30 days after the date that the Illinois Supreme Court enters an order setting an execution date.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 75. Under Virginia law, there is no such time limitation for filing petitions for executive clemency, which represents the final stage of the post-conviction review process for those who have been sentenced to death in Virginia. Article V, section 12 of the Virginia Constitution vests the Governor with the power to commute capital punishment sentences and to grant pardons or reprieves:

> The Governor shall have power to remit fines and penalties under such rules and regulations as may be prescribed by law; to grant reprieves and pardons after conviction except when the prosecution has been carried on by the House of Delegates; to remove political disabilities consequent upon conviction for offenses committed prior or subsequent to the adoption of this Constitution; and to commute capital punishment.
>
> He shall communicate to the General Assembly, at each regular session, particulars of every case of fine or penalty remitted, of reprieve or pardon granted, and of punishment commuted, with his reasons for remitting, granting, or commuting the same.

Va. Const. art. V, § 12; *see also* Va. Code § 53.1-229 ("In accordance with the provisions of Article V, Section 12 of the Constitution of Virginia, the power to commute capital punishment and to grant pardons or reprieves is vested in the Governor.").

Upon receipt of a petition for executive clemency, the Governor may request that the Virginia Parole Board investigate and report on the matter. Va. Code § 53.1-231 ("The Virginia Parole Board shall, at the request of the Governor, investigate and report to the Governor on cases in which executive clemency is sought."). Also, if a formal request is not made, the Parole Board at its discretion "may investigate and report to the Governor with its recommendations." *Id.*

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

The Attorney General's Office should not be allowed to seek an execution date until final appeals have been exhausted or any pending writs of actual innocence have been considered.

Governors may also use executive clemency to prevent executions in cases where a death sentence is deemed inappropriate due to other factors, such as the mental condition of the person who has been condemned to die. Currently, the inner-workings and deliberations of the clemency process occur largely beyond public view and are shielded from serious scrutiny.

Regardless of the outcome of judicial review, inmates on death row can use the clemency process in an attempt to stop their scheduled executions. Attorneys for the defendants are free to restate any old claims of innocence that were initially raised at trial, or bring to the Governor's attention any new evidence they believe exonerates their clients. If the guilt of those convicted is conceded, attorneys can base the petitions on a general plea for mercy, or any other mitigating factor they believe to be relevant.

Chapter 13: Funding

Recommendation 76
Leaders in both the executive and legislative branches should significantly improve the resources available to the criminal justice system in order to permit the meaningful implementation of reforms in capital cases.

Virginia Practice
Current Virginia law does not meet the objectives set forth in Recommendation 76. Research revealed no recent attempts to improve resources available for capital case reform.

Pending or Prior Legislative Bills in Virginia[26]
HB 815 - Ex parte motions in death penalty cases. Provides that a defendant represented by appointed counsel shall be permitted to file an ex parte motion seeking appointment of one or more experts or funding for expert assistance. Chief patron: James F. Almand. *Passed by indefinitely -- effectively killed.*

Comments
None.

[26] Unless otherwise noted, all bills listed are described at: Virginia Legislature and the Death Penalty, http://www.vadp.org/legis.htm (last visited April 9, 2006) (2006 legislation); Current Legislation, Death Penalty Issues in the 2005 General Assembly, http://www.vadp.org/ga2004.htm (last visited April 9, 2006) (2005 legislation); or VADP and the General Assembly, http://www.vadp.org/DPBills.htm (last visited April 9, 2006) (1997-2004 legislation). Information about pending and prior bills can also be obtained at Virginia General Assembly, Legislative Information System, http://leg1.state.va.us (last visited April 9, 2006).

Recommendation 77

The Capital Crimes Litigation Act, 725 ILCS 124/1 et seq., which is the state statute containing the Capital Litigation Trust Fund and other provisions, should be reauthorized by the General Assembly.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 77. No statute authorizes any particular fund for capital litigation.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

Virginia's Public Defender Commission includes four regional capital defender offices. Virginia Indigent Defense Commission, Capital Defender Offices, http://www.indigentdefense.virginia.gov/capitaldefenderoffices.htm (last visited April 6, 2006).

Recommendation 78

The Commission supports the concept articulated in the statute governing the Capital Litigation Trust Fund, that adequate compensation be provided to trial counsel in capital cases for both time and expense, and encourages regular consideration of the hourly rates authorized under the statute to reflect the actual market rates of private attorneys.

Virginia Practice

Current Virginia law mostly meets the objectives set forth in Recommendation 78. Though there is no Virginia fund earmarked just for capital litigation, hourly rates for court-appointed attorneys are reasonable.

Virginia courts decide, based on a reasonableness standard, how much of a court-appointed attorney's requested fees should be reimbursed. Capital counsel are compensated at "an amount deemed reasonable by the court." Va. Code § 19.2-163(2). In capital cases, the Virginia Supreme Court recommends that circuit court judges grant $125 an hour for in-court and out-of-court work. The Spangenberg Group, *Rates of Compensation for Court-Appointed Counsel in Capital Cases at Trial, A State by State Overview*, American Bar Association Bar Information Program (Apr. 2003).

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 79

The provision of the Capital Litigation Trust Fund should be construed as broadly as possible to [e]nsure that public defenders, particularly those in rural parts of the state, can effectively use its provisions to secure additional counsel and reimbursement of all reasonable trial related expenses in capital cases.

Virginia Practice

Current Virginia law partially meets the objectives set forth in Recommendation 79. Though there is no capital litigation fund, payment for capital defense attorneys is reasonable. *See* Recommendation 78.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comment

The four Regional Capital Defender Offices would presumably cover all areas of the Commonwealth, including rural areas. *See* Virginia Indigent Defense Commission, Capital Defender Offices, http://www.indigentdefense.virginia.gov/ capitaldefenderoffices.htm (last visited April 9, 2006). But recent studies of indigent defense generally reveal that Virginia public defenders and court-appointed counsel have a tremendous shortage of resources and funding. *See, e.g.*, American Bar Association, *A Comprehensive Review of Indigent Defense in Virginia* (2004), Executive Summary, *available at* http://www.abanet.org/legalservices/downloads/sclaid/ indigentdefense/va-report2004execsum.pdf; Virginia Indigent Defense Coalition, *Progress Report: Virginia's Public Defense System* (Mar. 2003), *available at* http://www.vidcoalition.org/pdf/vidc_ReportFINAL.pdf.

Recommendation 80

The work of the State Appellate Defender's office in providing statewide trial support in capital cases should continue, and funds should be appropriated for this purpose.

Virginia Practice

Current Virginia law does not appear to meet the objectives set forth in Recommendation 80. There is a central Appellate Defender office in Richmond, part of the Virginia Indigent Defense Commission. Virginia Indigent Defense Commission, Appellate Defender Office, http://www.indigentdefense.virginia.gov/ appellatedefenderoffice.htm (last visited April 6, 2006). But there is no evidence that the Appellate Defender provides any trial support in capital cases unless he or she is appointed to do so.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

Recommendation 81

The Commission supports the recommendations in the Report of the Task Force on Professional Practice in the Illinois Justice System to reduce the burden of student loans for those entering criminal justice careers and improve salary levels and pension contributions for those in the system in order to [e]nsure retention of qualified counsel.

Virginia Practice

Current Virginia law does not meet the objectives set forth in Recommendation 81. Although the salaries for Virginia prosecutors and defenders vary, it has been said that public defenders are in a "state of crisis." WTJU Radio News, "Charlottesville Public Defenders Seek Higher Salaries," *available at* http://wtju.radio.virginia.edu/news/ archive/2005-03-29.html, accessed October 9, 2005. Charlottesville public defenders have been in the news recently for requesting salary increases. *Id.*

Though public defender salaries vary in Virginia, "[a]cross the board, from entry level to the most senior positions, attorneys working as Commonwealth's Attorneys earn more - sometimes significantly more - than public defenders in like jobs." American Bar Association, *A Comprehensive Review of Indigent Defense in Virginia* (2004), at 34, *available at* http://www.abanet.org/legalservices/downloads/sclaid/ indigentdefense/va-report2004execsum.pdf.

Virginia currently offers no school loan forgiveness.

Pending or Prior Legislative Bills in Virginia

A bill was introduced in the 2005 General Assembly (R. Black, R-32) which would have increased the pay for Virginia public defenders by 50%. HB 1596, Court-Appointed Counsel; Increases Compensation, http://leg1.state.va.us/cgi-bin/legp504.exe?051+sum+ HB 1596 (last visited April 9, 2006). The bill died in the House Appropriations Committee by a vote of 22-1. *Id*.

Comments

In the United States Congress in 2005, the House of Representatives drafted H.R. 198 "[t]o authorize funding for student loan repayment for public attorneys." Library of Congress, THOMAS, H.R.198, http://thomas.loc.gov/cgi-bin/bdquery/D?d109:198:./list/ bss/d109HR.lst::|TOM:/ bss/109search.html| (last visited April 9, 2006). The bill would help repay federal student loans for graduates that take positions as either state or local prosecutors or public defenders for a period of at least three years. *Id*. The bill would give prosecutors and public defenders up to $6,000 a year in federal loan forgiveness, capping at $40,000 per attorney.[27] A three-year commitment of continued employment would be required. *Id*.

[27] Similar bills were introduced in the last session in both the House and the Senate (HR 2198 (108th) and S-1090 (108th), respectively), but those bills died. Library of Congress, THOMAS, H.R. 2198, http://thomas.loc.gov/cgi-bin/bdquery/ D?d109:2198:./list/bss/d109HR.lst::|TOM:/bss/109search.html| (last visited April 9, 2006); Library of Congress, THOMAS, S. 1090, http://thomas.loc.gov/cgi-bin/bdquery/D?d109:1083:./list/bss/d109SN.lst::|TOM:/bss/109search.html| (last visited April 9, 2006).

Recommendation 82

Adequate funding should be provided by the State of Illinois to all Illinois police agencies to pay for electronic recording equipment, personnel, and facilities needed to conduct electronic recordings in homicide cases.

Adequate f[u]nding should be provided by the State of Illinois to hire and train both entry level and supervisory level forensic scientists to support expansion of DNA testing and evaluation. Support should also be provided for additional up-to-date facilities for DNA testing. The State should be prepared to outsource by sending evidence to private companies for analysis when appropriate. *Recommendation 21, Chapter 3.*

The [f]ederal government and the State of Illinois should provide adequate funding to enable the development of a comprehensive DNA database. *Recommendation 25, Chapter 3.*

The Illinois Supreme Court, and the AOIC, should consider development of state-wide materials to train judges in capital cases, providing additional staff to provide research support, and obtaining sufficient f[u]nds for this purpose. *Recommendation 36, Chapter 6.*

The Commission supports efforts to have training for prosecutors and defenders in capital litigation. Funding should be provided to [e]nsure that training programs continue to be of the highest quality. *Recommendation 44, Chapter 7.*

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 82. "Virginia law does not require videotaping of police interrogations." *Avalos v. Commonwealth*, Record No. 2874-03-4, 2005 Va. App. LEXIS 241, at *9 (Ct. App. June 21, 2005). *See also* Recommendations 4-8. No evidence of funding for optional videotaping was found.

Virginia does, however, fund forensic scientists and facilities for DNA testing, and was the first state to use outsourcing for DNA testing. *See* Recommendation 21. Virginia currently has no backlog. *Id*.

Virginia also funds and maintains a comprehensive DNA database. *See* Recommendation 25.

But Virginia has not taken any initiative with regard to funding state-wide materials for training for judges trying capital cases nor has it provided additional research support for such judges. *See* Recommendation 36.

Virginia public defender offices provide their attorneys with continuing legal education and training necessary to meet the minimum state requirements. Beyond that, no other training opportunities are provided. There are no capital litigation-specific training programs provided and no funding specifically designated for the creation of such programs. While relevant statutes do require that counsel in capital cases attend specialized training, such training is not provided by the Commonwealth. *See* Recommendation 44.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

The Minnesota Supreme Court has held that taping of all police interrogations of suspects in custody is required:

> [A]ll custodial interrogation including any information about rights, any waiver of those rights, and all questioning shall be electronically recorded where feasible and must be recorded when questioning occurs at a place of detention. If law enforcement officers fail to comply with this recording requirement, any statements the suspect makes in response to the interrogation may be suppressed at trial.

State v. Scales, 518 N.W.2d 587, 592 (Minn. 1994).

Additionally, in Prince Georges County, Maryland, videotaping of interrogations is now "common procedure." Lawrence Hurley, *Videotaped Interviews Now Common Procedure in Prince George County Police Dept.*, The Daily Record, July 9, 2004, *available at* http://www.nacdl.org/sl_docs.nsf/freeform/Mandatory:301; *see also* April Witt, *Pr. George's Police to Videotape Interviews: Interrogation Tactics Have Been Criticized*, Wash. Post, Feb. 1, 2002, at B01, *available at* http://www.washingtonpost.com/ac2/wp-dyn?pagename=article&contentId=A5628-2002Jan31&not Found=true ("Prince George's County police say they will install video cameras in interrogation rooms and begin recording all their interviews of suspects in major crimes by March 31, and a Montgomery County legislator is seeking to put cameras in every police interrogation room in Maryland.").

Chapter 14: General Recommendations

Recommendation 83
The Commission strongly urges consideration of ways to broaden the application of many of the recommendations made by the Commission to improve the criminal justice system as a whole.

Virginia Practice
Current Virginia law does not meet the objectives set forth in Recommendation 83, as most of the Illinois Commission's recommendations are not met. Many of the recommendations herein that are not specific to capital cases, such as interrogation, DNA, and lineup procedures, would improve the criminal justice system as a whole, not just the death penalty process.

Pending or Prior Legislative Bills in Virginia
No pending or prior legislation found.

Comments
None.

Recommendation 84

Information should be collected at the trial level with respect to prosecutions of first degree murder cases, by trial judges, which would detail information that could prove valuable in assessing whether the death penalty is, in fact, being fairly applied. Data should be collected on a form which provides details about the trial, the background of the defendant, and the basis for the sentence imposed. The forms should be collected by the Administrative Office of the Illinois Courts, and the form from an individual case should not be a public record. Data collected from the forms should be public, and should be maintained in a public access database by the Criminal Justice Information Authority.

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 84. It does not appear that trial judges in Virginia are required to collect detailed information like the information discussed in this recommendation.

> There are two sources of information available on capital indictments, but both are problematic. Since 1995, section 19.2-217.1 has required clerks of Virginia's circuit courts to send copies of all capital murder indictments to the clerk of the Virginia Supreme Court. Presently, four files of indictments exist, one for every year. However, these files are not complete. A review during the summer of 1999 revealed that the indictments of nine people currently on death row were missing.
>
> The second source of information about capital indictments is the State Compensation Board, which determines staffing and funding for the offices of Virginia's commonwealth's attorneys. No agency in Virginia keeps track of the number of capital murder trials that take place within the state every year, or the number of such cases in which prosecutors ask for the death penalty.

Rachel King, *ACLU Capital Punishment Project et al., Broken Justice: The Death Penalty in Virginia* 9 n.33 (Nov. 2003).

The Virginia Criminal Sentencing Commission monitors "sentencing practices in felony cases throughout the Commonwealth . . . and maintain[s] a database containing the information obtained." Va. Code § 17.1-803(7); *see also* Virginia Criminal Sentencing Commission, http://www.vcsc.state.va.us (last visited April 6, 2006). No capital-specific data appear to be collected.

Pending or Prior Legislative Bills in Virginia[28]

SJ 31 - Death penalty; joint subcommittee to study moratorium thereon. Proposed conducting a subcommittee to examine (i) the administration of criminal justice in Virginia to determine the

[28] Unless otherwise noted, all bills listed are described at: Virginia Legislature and the Death Penalty, http://www.vadp.org/legis.htm (last visited April 9, 2006) (2006 legislation); Current Legislation, Death Penalty Issues in the 2005 General Assembly, http://www.vadp.org/ga2004.htm (last visited April 9, 2006) (2005 legislation); or VADP and the General Assembly, http://www.vadp.org/DPBills.htm (last visited April 9, 2006) (1997-2004 legislation). Information about pending and prior bills can also be obtained at Virginia General Assembly, Legislative Information System, http://leg1.state.va.us (last visited April 9, 2006).

extent to which the process has failed resulting in wrongful executions of innocent persons; (ii) issues concerning the death penalty including disparity, fairness, equity, due process, competence of counsel for capital defendants, and limitations on the introduction of newly discovered and possibly exculpatory evidence. Chief patron: Henry L. Marsh III. *Left in the Committee on Rules as of February 8, 2005.*

Although SJ 31 does not directly address the Virginia trial courts' collection of data, the study suggested by this bill would analyze the types of data recommended for collection.

Comments

A lack of a comprehensive data collection system hampers accurate assessment of the capital punishment system in Virginia. The creation of the Virginia Public Defender Units should greatly assist in the collection of such data.

Other jurisdictions, for example the State of New York, do require data collection and reporting, particularly for certain crimes. In certain criminal actions in New York (including capital murder cases), the clerk of the court is required to prepare a data report by reviewing the record and by consulting with the prosecutor and defense counsel. The report has to be submitted to the New York Court of Appeals (the highest state court) within forty-five days following disposition of the case by the trial court. "The form and the content of the report shall be consistent with the purpose of assisting the court of appeals in determining pursuant to 470.30. . . whether a particular sentence of death is disproportionate or excessive in the context of penalties imposed in similar cases." N.Y. Judiciary Law § 211-a (McKinney 2005).

Recommendation 85

Judges should be reminded of their obligation under Canon 3 to report violations of the Rules of Professional Conduct by prosecutors and defense lawyers.

Virginia Practice

Current Virginia law only partially meets the objectives set forth in Recommendation 85. The Virginia Canon of Professional Responsibility for Judges instructs Virginia judges that they "should inform the Virginia State Bar" if they know of an attorney's ethical violation. Va. Sup. Ct. Jud. Cond. Canon 3D(2) (2005). However, no evidence of a "reminder" of this duty could be found.

Pending or Prior Legislative Bills in Virginia

No pending or prior legislation found.

Comments

None.

NOTES:

Published by
Virginians for Alternatives to the Death Penalty
September 2006

For additional copies of this report, contact:
VADP
Post Office Box 4804
Charlottesville, VA 22905
888-567-VADP • mail@VADP.org
www.VADP.org