Unequal, Unfair and Irreversible

The Death Penalty in Virginia

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This report is primarily the work of Laura LaFay.
Before attending law school at Northeastern University,
Laura was a reporter for the *Virginian-Pilot* for eight years,
where she covered criminal justice issues.

The following individuals assisted with this report:

Michele Brace
Linda Buckley
Bill Cooper
Marie Deans
Paula Hannaford
Henry Heller
Rob Lee
William H. Wright, Jr.
Gerald T. Zerkin
Professor Richard S. Bonnie, University of Virginia Law School
Professor Neil Henry, Virginia Commonwealth University
Professor James S. Liebman, Columbia Law School

Cover photo by William Tiernan*, Virginian-Pilot.*
The photograph depicts individuals who died
in Virginia's electric chair from 1908, the year the
chair was first used, through September 1993.

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PREFACE

Capital punishment invites controversy. Like many other compelling issues of our day, it is complex, having moral, political, legal and social dimensions. But unlike almost all other issues, there is a profound and solemn finality to capital punishment that demands absolute fairness and precision in carrying it out -- whether or not one believes it should exist at all.

Among the states, Virginia is second only to Texas in the number of persons it has executed since the reinstatement of the death penalty in 1977. Indeed, Virginia's execution rate, expressed as a proportion of the state's total population, exceeds that of Texas. This stark figure provoked our study.

In recent years, many dedicated individuals have worked both independently and in coalition to advocate for reform of the death penalty in Virginia. Some have directly experienced the inequities of the system, from the inside. Others have observed it from the outside, where the obvious inequities can be deduced but not always documented with absolute certainty.

With this expertise available to us, identifying the areas for study was easy. Finding the information, however, was a different matter, as the state's records are both incomplete and unorganized. How, we wondered, could Virginia presume to execute individuals without the ability to study the system closely enough to insure fairness?

The purpose of Unequal, Unfair and Irreversible: The Death Penalty in Virginia is educational. It is also meant to be a springboard for further study. For this reason, the original data we have compiled is on file at the ACLU of Virginia and is available for anyone to review.

This report casts a dark shadow over Virginia, a shadow that will not be dispelled so long as individuals are charged, tried, and executed under the existing system for administering the death penalty here. It is time to do something about that.

Charles Rust-Tierney, President
American Civil Liberties Union of Virginia

INTRODUCTION

Governor Mills Godwin signed the final version of Virginia's current death penalty statute in 1977, five years after the U.S. Supreme Court held in *Furman v. Georgia*[1] that capital punishment, as practiced until that time, violated the U.S. Constitution. Among the reasons cited by the Court in *Furman* were that the death penalty was disproportionately applied to the "poor and despised," that it was frequently imposed on the "constitutionally impermissible basis of race," and that those accused were receiving poor legal representation. As a result of these factors, one of the justices noted, there was a high risk of executing the innocent. Virginia's pre-*Furman* death penalty was a case in point. Of the 236 persons executed by the state under its pre-*Furman* statute, 201 were African-American.[2]

This statistic, coupled with the national emphasis on civil rights during the 1960s, caused Virginia executions to taper off and then stop in 1964. By 1977, when the state's new death penalty law was enacted, Virginia's electric chair had been in storage for 15 years. It would be five more years--until August 10, 1982--before a condemned prisoner was strapped to it again. Since then, Virginia has executed 81 prisoners.[3] With the exception of Texas, no state has executed more.

Modeled on a Georgia statute upheld by the Supreme Court in 1976, Virginia's amended death penalty provisions were supposed to prevent the arbitrariness and discrimination cited by the justices when they outlawed capital punishment in *Furman.* In addition, the governor believed that the new statute would have "some deterrent effect" on citizens who might otherwise be inclined to commit capital murder.[4]

There is no evidence that it has done either. Instead, two decades after the law's enactment, the state's murder rate is virtually unchanged. An analysis of Virginia crimes for

which the death penalty could have been charged and death sentences handed down between 1978 and 1997[5] indicates that race remains a controlling factor in the way the death penalty is administered here.[6] The state still has no enforceable means of ensuring that competent lawyers are appointed to represent indigent capital defendants, and 97 percent of those sentenced to death have been too poor to afford their own lawyers.[7]

Despite the potential for problems, there is little chance that Virginia's appellate courts will correct errors that occur in the state's capital trials. The Virginia Supreme Court, which has reversed fewer death sentences than any other state supreme court in the country, has never granted an evidentiary hearing or appointed an expert or an investigator to a death penalty case. Virginia has never released an innocent death row inmate from prison.[8] And, in recent years, the state has repeatedly set national records for speedy executions. Since 1993, the amount of time between sentencing and execution--time used primarily by higher courts to review death sentences for fairness--has grown shorter here. In 1998, 1999 and 2000, Virginia executed nine prisoners within five years of their sentencing dates.[9] No other state comes close to this record. Nationally, the average time between sentencing and execution is nine years.

It is the position of the state's present attorney general that the speed and resolve with which Virginia handles its capital cases indicates a high level of excellence, thoroughness and efficiency on the part of its judges and prosecutors.[10] But over the years, Virginia governors have stopped more executions than the governors of any other state.[11] In almost all of those cases, the governor acted because of significant doubts about guilt--doubts raised by evidence that juries never heard, and that higher courts believed they could not consider.[12]

Some may point to these cases as further proof of the system's reliability. But experts consider clemency--a governor's last-ditch power to stop an execution and transform a death

sentence into a life sentence--a poor safeguard against the ultimate injustice of executing an innocent person. In fact, Virginia governors have failed to stop a number of executions in cases in which there was evidence casting doubt on guilt.[13]

More compelling, however, is that these cases went all the way through both the state review process and the federal review process without such evidence ever being addressed. In large part, this has been a failure of Virginia's courts. That failure, combined with the doctrines of procedural default and non-retroactivity, and the federal Anti-Terrorism and Effective Death Penalty Act of 1996, has created a system in which the results of unfair trials are routinely permitted to prevail.

This report examines four key aspects of the administration of capital punishment in Virginia: prosecutorial discretion in the charging of capital crimes, quality of legal representation for the accused at trial, appellate review of trials resulting in the death penalty and race. During its preparation, another issue became apparent: the state's record keeping.

The evidence gathered indicates that death sentences in Virginia continue to be influenced by the location of the crime, the poverty of the defendant and the race of the victim. Until such factors are eliminated, the state compromises its integrity with every execution.

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[1] *Furman v. Georgia,* 408 U.S. 238 (1972).

[2] Many of the African-Americans executed pre-Furman in Virginia were sentenced to death for crimes other than murder. However, all of the whites executed were sentenced to death for murder. The 236 persons refered to here were executed between 1908,when Virginia began using the electric chair, and the first post-Furman execution in 1982.

[3] At this writing, the last prisoner executed by Virginia was Christopher Goins on December 6, 2000. No other executions are scheduled for the immediate future.

[4] "I believe the re-enactment of the death penalty for these crimes will have some deterrent effect," said Godwin when he signed the bill into law on Feb. 14, 1977. Stephen Fleming, "Godwin Signs Death Penalty," Virginian-Pilot, Feb. 15, 1977, P. A1.

[5] This study analyzed a database containing two decades of FBI Supplemental Homicide Reports for Virginia. These reports compile information reported by Virginia law enforcement agencies about each murder that has taken place in every city and county in the state for the 20-year period. The age, race and/or ethnic origin of each victim and each known offender is tracked, as well as certain circumstances surrounding each murder, the kind of weapon

used and the relationship between the victim and offender. Because certain crimes, such as rape-murder and robbery-murder are coded, it is possible to identify most, but not all, of the murders that are potentially capital according to Virginia's statute. The evolution of the statute--from six definitions of capital murder in 1977 to twenty in 1997--cannot be fully taken into account. The FBI coding system picks up four categories of potentially capital murders: 1) rape-murder; 2) robbery-murder; 3) murder by an incarcerated convict and 4) murder of more than one person in the same transaction. Use of these codes raises issues of both under inclusion and over inclusion. With respect to under inclusion, these codes do not represent all statutorily defined capital crimes. Murder of a police officer and murder for hire are examples of capital crimes not picked up by any code in the FBI coding system. With respect to over inclusion, attempted rape-murder and attempted robbery murder did not become capital crimes until the 1980s.

Following are the qualifiers for capital murder in the order in which they were added, with the year added:

1. Murder in the commission of abduction with intent to extort money or a pecuniary benefit--1975;
2. Murder for hire--1975;
3. Murder by one incarcerated--1975;
4. ***As of 1975, there was a mandatory death sentence for these crimes. After the Supreme Court decided against the constitutionality of such sentences in Woodson v. North Carolina and Roberts v. Louisiana, the General Assembly in 1977 amended section 18.2-10 to make death optional. Section 18.2-31, which defines capital murder, was not changed in response to Woodson and Roberts.
5. Murder in the commission of a robbery while armed with a deadly weapon--1976;
6. Murder in the commission of a rape--1976;
7. Murder of a state or local police officer for the purpose of interfering with his official duties--1977;
8. Murder of more than one person in the same act or transaction--1981;
9. Murder of a child under age 12 in the commission of abduction with intent to extort money or a pecuniary benefit or with intent to defile--1985;
10. Murder in the commission of attempted robbery--1989;
11. Murder in the commission of attempted rape--1989;
12. Murder in the commission or attempted commission of a drug transaction, when the murder is for the purpose of furthering the drug violation--1990;
13. Murder in the commission of forcible sodomy or attempted forcible sodomy--1991;
14. Murder in the commission of object sexual penetration--1995;
15. Murder in the commission of abduction of any person with intent to extort money or a pecuniary benefit or with intent to defile (consolidating 1 and 8)--1996;
16. Murder in the commission or attempted commission of robbery (deleting requirement that defendant be armed with deadly weapon)--1996;
17. Murder of more than one person within a three-year period--1996;
18. Murder of any police officer (including federal officers and officers from other states) having the power to arrest for a felony under federal law or the law of the other state--1997;
19. Murder at the direction or order of one engaged in a continuing criminal enterprise--1997;
20. Murder of a pregnant woman with intent to involuntarily terminate the pregnancy--1997;
21. Murder of a person under age 14 by a person over age 21--1998. No qualifiers have been deleted.

[6] See Race and the Death Penalty, pages 38-43 of this report.

[7] Of the 131 persons sentenced to death between 1978 and 1997, only five--Frank Coppola, Derek Barnabei, Mario Murphy, Bobby Swisher and Russel Burket--were represented by lawyers who were not appointed by the state.

[8] Since 1973, 82 people have been released because of innocence from death rows in Florida, Georgia, North Carolina, South Carolina, New Mexico, Arizona, Louisiana, Indiana, Oklahoma, Pennsylvania, Illinois, Texas, California, Ohio, Maryland, Alabama, Mississippi, Washington State and Missouri. Virginia governors have stopped the executions of at least four men because of concerns about innocence. All had their sentences commuted to life and remain in prison. One of these, Earl Washington, was pardoned by Gov. James Gilmore on October 2, 2000 following DNA tests that exonerated him of the June 1982 rape and murder of a Culpeper woman. Washington, who spent 17 years on death row, remains in prison at this writing because of an unrelated burglary and assault conviction.

[9] Executed within five years of their sentencing were: Lance Chandler, sentenced in April, 1994 and executed in August 1998; Ronald Fitzgerald, sentenced in May 1994 and executed in October 1998; Kevin Cardwell, sentenced in August 1993 and executed in December 1998; Angel Breard, sentenced in August 1993 and executed in April 1998; Kenneth Wilson, sentenced in February 1994 and executed in November 1998; Tony Fry, sentenced in January 1995 and executed in February 1999; Marlon Williams, sentenced in October 1995 and executed in August 1999; Jason Joseph, sentenced in May 1994 and executed in October 1999; and Michael Clagett, sentenced in October of 1995 and executed in July 2000. Derek Barnabei, sentenced August 29, 1995 and executed September 14, 2000, died five years and seventeen days after his conviction.

[10] "Virginia has the most fair, balanced and carefully implemented death penalty system in the country"--Earley's spokesman, David Botkins. Frank Green, *Moratorium Urged on Va. Executions*, Richmond Times-Dispatch, April 15, 1999.

[11] Source: Death Penalty Information Center, Washington, D.C.

[12] Governors commuted the death sentences of Joseph Giarratano, Herbert Bassette, Earl Washington and Joseph Payne because of concerns about innocence. William Saunders, whose sentence was commuted by Governor George Allen, also urged innocence as a basis for clemency.

[13] Roger Coleman was executed in 1992 despite substantial evidence developed post-trial that implicated another person in the crime; Ronald Bennett, whose conviction was based on the testimony of his cousin and his former wife, was executed in 1996 despite a videotaped recantation in which the wife exonerated Bennett and implicated herself and the cousin instead. Subsequently, Mary Bennett Stroh recanted her recantation; Carl Chichester was executed in 1999 despite conflicting accounts of eyewitnesses, two of whom told police that it was Chichester's co-defendant, not Chichester, who killed a pizza store manager. One of those witnesses, Curtis Fruit, was not called by either side to testify at Chichester's trial.

In three Virginia cases, executions proceeded despite unresolved questions about DNA evidence. Joseph O'Dell was executed in 1997 in spite of the opinion of a U.S. District judge that DNA test results from a bloodstain on his jacket--said to match to blood of his victim--were "inconclusive." Michael Satcher was executed in 1997 despite the fact that a 1995 DNA analysis of his blood conflicted with an earlier state DNA analysis. Satcher's lawyers contended it would not have matched semen evidence from the crime scene. Russel Burket was executed August 30, 2000 despite a 1993 DNA analysis that closely matched DNA found on a washcloth at the crime scene to both Burket and his brother, Lester, who was an initial suspect in the crime. Burket's lawyers asked Gov. Jim Gilmore for a more sophisticated test that would show which Burket brother produced the DNA. Citing Russel Burket's confession, Gilmore refused the request. At the time of the murders, both adult Burket brothers -- Russel and Lester III--lived with their parents in a home next door to the home of the victims. An affidavit purportedly written by Burket's father but never signed, indicated that he (Burket's father) and William McGraw, a now-deceased lawyer hired by the elder Burket to represent both his sons when they became suspects, persuaded Russel Burket to plead guilty even though they were certain his brother had committed the crime. "McGraw and I discouraged Rusty from accusing Lester," the affidavit said. Burket was 100% disabled due to mental illness, could not read or write, had attempted suicide a number of times, and had a long history of required treatment with psychotropic medication.

PROSECUTORIAL DISCRETION

In Virginia, those convicted of capital murder face one of two sentences: life in prison or the death penalty. The decision to seek death in any given capital murder case is made by an individual prosecutor elected in the jurisdiction where the murder took place. There are no statewide standards to guide prosecutors, and there is no oversight agency to review their decisions. Local prosecutors could implement local standards, but this study was unable to find any jurisdiction that does so in any kind of formal or official manner. Asked how they decide to seek death, Virginia's prosecutors invariably insist they are guided by the state statute defining capital crimes.[1]

But there are clearly other factors. This study could identify no prosecutor who seeks the death penalty against every defendant charged with a capital crime. Nor should there be one. To seek mandatory death in every case would run counter to the constitutional underpinnings of capital punishment, which requires a unique, individualized sentencing for every capital defendant. Thus, it is inherently necessary in every capital case that the prosecutor use his or her discretion to decide whether the case warrants the penalty intended for "a very small number of extreme cases."[2]

However, in the absence of statewide or local standards, the decision whether to seek the death penalty against a defendant charged with a capital crime--and in many cases, whether to *charge* the defendant with a capital crime in the first place--is left to the complete and unquestioned discretion of individual prosecutors. This fact makes possible wide disparities between jurisdictions in usage of the death penalty. Prosecutors in some Virginia jurisdictions routinely seek the death penalty, while prosecutors in other jurisdictions never or almost never ask for it (see Appendix). No statewide records are kept on the frequency with which Virginia

prosecutors seek death. But records kept since 1990 on the number of capital murder indictments indicate significant disparities between jurisdictions.[3] If there is any rhyme or reason to these disparities, it is not immediately apparent.

The table below displays the eight Virginia jurisdictions that have exacted the death penalty for more than 10 percent of total capital murders between 1978 and 1997.[4]

Jurisdiction	Death Sentences*	Potential Capital Crimes	% Death Sentences
Prince William County	9	14	64%
Danville City	9	23	39%
Bedford County	3	9	33%
Arlington City	9	44	20%
Pittsylvania County	3	18	17%
Chesterfield County	8	50	16%
Hampton City	6	42	14%
Montgomery County	3	26	12%
Total:	**50**	**226**	

**Table does not include jurisdictions in which two or fewer death sentences have been handed down.*

Because of their aggressive use of the death penalty, these jurisdictions have accounted for about one-third of all Virginia death sentences from 1978 through 1997, even though they suffered only ten percent of the state's potentially capital murders during the same period (see Appendix). There are no obvious similarities among these aggressive users of capital punishment. They include cities from large to small and counties from highly urban to very rural.

There is no reason to believe that capital murders committed in jurisdictions that aggressively use the death penalty are more egregious than those committed in jurisdictions that have never imposed it. Apart from the inclination of the local prosecutor towards capital punishment,[5] there is no apparent or obvious explanation as to why some jurisdictions should

have so many death sentences and other jurisdictions, incurring just as many or more murders, should have none.

Prosecutorial discretion is a necessary element of all criminal cases, and an integral part of every prosecutor's duties. In terms of the administration of the death penalty in Virginia, however, it appears to impose a form of geographical arbitrariness unrelated to the heinousness of any given crime, or the incorrigibility of any given defendant.[6]

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[1] The statute, § 18.2-31, reads as follows:

> The following offenses shall constitute capital murder, punishable as a Class 1 felony:
>
> 1. The willful, deliberate, and premeditated killing of any person in the commission of abduction, as defined in § 18.2-48, when such abduction was committed with the intent to extort money or a pecuniary benefit or with the intent to defile the victim of such abduction;
>
> 2. The willful, deliberate, and premeditated killing of any person by another for hire;
>
> 3. The willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof;
>
> 4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery;
>
> 5. The 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;
>
> 6. The willful, deliberate, and premeditated killing of a law-enforcement officer as defined in § 9-169 (9) or any law-enforcement officer of another state or the United States having the power to arrest for a felony under the laws of such state or the United States, when such killing is for the purpose of interfering with the performance of his official duties;
>
> 7. The willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction;
>
> 8. The willful, deliberate, and premeditated killing of more than one person within a three-year period;
>
> 9. The willful, deliberate, and premeditated killing of any person in the commission of or attempted commission of a violation of § 18.2-248, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation;
>
> 10. The willful, deliberate, and premeditated killing of any person by another pursuant to the direction or order of one who is engaged in a continuing criminal enterprise as defined in subsection I of § 18.2-248;
>
> 11. The willful, deliberate and premeditated killing of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth; and
>
> 12. The willful, deliberate and premeditated killing of a person under the age of fourteen by a person age twenty-one or older.
>
> If any one or more subsections, sentences, or parts of this section shall be judged unconstitutional or invalid, such adjudication shall not affect, impair, or invalidate the remaining provisions thereof but shall be confined in its operation to the specific provisions so held unconstitutional or invalid.

[2] *Clark v. Commonwealth*, 220 Va. 201 (1979), 257 S.E 2d 784 at 791. (4th Circuit 1979).

[3] There are two sources of information available on capital indictments, but both are problematical. Since 1995, §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. Since 1990, this Board, which determines staffing and funding for the offices of Virginia's commonwealth's attorneys, has asked each commonwealth's attorney to report the number of capital cases initiated by his or her office annually. In consequence, it is possible to find out the number of capital murder indictments per jurisdiction per year, as reported by a given prosecutor. However, this information is not specific. The names of those indicted, whether or not the prosecutor sought the death penalty and the status and or eventual disposition of the cases is unavailable from this or any other source. 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.

[4] All calculations in this table are based on the FBI's Supplemental Homicide Reports and the Virginia State Police publication, *Crime in Virginia*. One or more murders committed by multiple offenders are treated as separate individual crimes. One or more death sentences involving a single victim are treated as separate death sentences.

This table excludes those jurisdictions that would statistically qualify as aggressive death penalty users, but that have imposed two or fewer death sentences. See Appendix for complete list.

[5] Many more people are indicted on capital murder charges than convicted of them. Prosecutors may choose to indict for capital murder and then seek a life sentence instead of a death sentence. Or they may indict for capital murder as a form of leverage--attempting to convince a defendant to plead guilty to first-degree murder rather than face a possible death sentence.

[6] This arbitrariness is apparently echoed in the administration of the federal death penalty in the federal court system's Eastern District of Virginia. According to a U.S. Justice Department study, prosecutors in the Eastern District of Virginia sought permission from the Justice Department to seek the death penalty in more cases than did any other federal district in the country (there are 96 districts altogether). From 1995 until mid-2000, Eastern District prosecutors brought capital charges against 66 people, the report showed. Of those 66 capital defendants, 59 were black, five were white and two Hispanic. Eastern District of Virginia prosecutors actually sought the death penalty against 21 defendants. Of these, 20 were black and one was Hispanic. *The Federal Death Penalty System: A Statistical Survey (1988-2000)*, September 12, 2000.

QUALITY OF COUNSEL

Whatever factors might legitimately go into sentencing someone to death, the quality of the defendant's court-appointed lawyer should not be one of them. A death sentence should be based on what *the defendant* has done, not on what his lawyer did. Providing capital defendants with good legal representation is in the best interest not only of defendants, but also of the public, of victims' families and of jurors. It eliminates the uncertainty, expense and delay caused by mistakes made at trial. For jurors, who must live with the consequences of sentencing another human being to death, it is fundamental to peace of mind.[1]

In the first decade after Virginia resumed capital punishment, the state took few, if any, steps to ensure that capital defendants received a quality defense. There were no standards by which attorneys were selected for appointment, and their fees were capped at $650.00 per case. In recent years, the General Assembly has addressed both these problems, with mixed results. To assist in the development of a qualified capital defense bar, the legislature now requires the Public Defender Commission to publish recommended qualifications for capital trial lawyers and to keep a list of lawyers who meet those requirements.[2]

These standards are relatively easy to meet. To qualify as lead counsel for a defendant charged with a capital crime, a lawyer must have five years of experience in criminal defense or prosecution, must have acted as primary counsel in at least five jury trials involving major violent felonies, must have six hours of specialized training in capital litigation within the previous two years, and must have experience either as lead counsel in a capital case within the past five years or as co-counsel in a capital case within the past seven years. These requirements are all concerned with past experience rather than past competence. The standards also require that counsel applying for inclusion on the Public Defender Commission's list "have

demonstrated proficiency and commitment to quality representation." So far as this study could determine, however, no lawyer has ever been denied a place on the list or removed from the list for failure to meet this undefined requirement. Thus it is not clear that the Public Defender Commission's list is able to distinguish between bad, but experienced lawyers and good lawyers.

While these standards are perhaps supposed to ensure that capital defendants are not represented by lawyers utterly lacking in experience in capital trials, they are not standards that exclude many lawyers from the pool of those eligible for appointment to capital cases. In addition, the Commission has no screening policy. Lawyers interested in representing capital defendants can join the list simply by completing and submitting a form identifying themselves as qualified according to the standards. The Commission does no independent verification of lawyers' claims. It simply compiles the list and distributes it to interested judges.

In any event, the statute that led to the promulgation of these standards specifically notes that judges are *not required* to appoint lawyers from the list. In a 1999 survey by the Virginia State Crime Commission, 18 percent of the participating judges said they had never appointed a lawyer from the list.[3] The Commission itself does not track capital appointments to determine whether judges actually use the list. Nor does it keep all past copies of the list. It is therefore impossible to discern, from the roster of lawyers who have represented capital defendants since the list was first assembled in 1992, how many were appointed from the list and how many were not.

Even so, lawyers whose names do appear on the list have not necessarily provided a quality defense. One of the attorneys appointed to represent Carl Chichester appears on the list at least three times. [4] But that did not prevent him from filing a brief on direct appeal to the Supreme Court of Virginia that was characterized as "a shameful disgrace" in a 1998 opinion by

U.S. District Judge Robert E. Payne.[5] Nor did it prevent the same attorney, when he was later appointed to represent capital defendant Lonnie Weeks, from filing Weeks' state habeas petition in the wrong court. In doing so, the attorney missed the deadline for filing a petition in the right court. As a result, all of Weeks' post-conviction claims were procedurally defaulted, and no court--state or federal--could consider them.[6]

Establishing standards for admission to the capital defense bar was a positive step. But the loose oversight with which Virginia's Public Defender Commission administers the list, and the fact that judges are free to select lawyers whose names do not appear on it, dilute its effectiveness in insuring that only qualified lawyers are appointed to death cases. [7]

The situation in Virginia with respect to attorney fees appears to have improved. In 1982, the legislature addressed the disincentives created by its fee cap of $650.00 per case by removing the cap and allowing individual judges to set and approve payment to capital defense lawyers. To determine whether trial courts now pay adequate fees, this study undertook to find and review the payment vouchers submitted by trial lawyers in Virginia capital cases between fiscal year 1996 and fiscal year 1999.[8]

The condition of these vouchers was, in a word, inadequate. In only eight of 37 cases did the voucher information appear to be complete. In very few cases did the vouchers include the attorneys' time records. Accordingly, any firm conclusion on the adequacy of the fees paid to appointed counsel is not possible.

Though incomplete, the voucher information at least suggests that attorney fees are not a limiting factor in the ability of appointed lawyers to provide a quality defense. Overall, the average number of hours expended by this group of court-appointed lawyers was 249 total hours per case. The average total fees approved by the courts were $29,800 per case. In 13 cases that

appear to have gone to trial, there were two appointed lawyers whose combined hours on the case averaged about 405. Records of eight of the trial cases appeared to be complete and showed an average of 561 hours worked by both attorneys, and $68,000 paid per case. Of those trials, however, only one did not result in the imposition of a death sentence.

Objective evidence on the performance of appointed counsel in capital trials is exceedingly difficult to obtain. In 1998, The Virginia Crime Commission conducted a study for the General Assembly seeking to assess the performance of lawyers appointed to represent indigent capital defendants. The Commission based its findings on a survey sent to the same Circuit Court judges who appoint the lawyers. The group had initially considered looking at the attorney payment vouchers, but decided against it when told it would be an extremely painstaking and time-consuming job.[9]

Trial judges responded to the Crime Commission's survey with assurances that the representation of indigent capital defendants in Virginia is "good to excellent." It should be noted, however, that trial judges have a legal obligation to appoint only lawyers who have shown proficiency in capital representation. Moreover, according to University of Virginia Law Professor and capital punishment expert Richard Bonnie:

> If a judge regarded trial representation as being systemically deficient, he or she would be obligated to take corrective measures. Indeed a judgment impugning the competence of defense counsel in capital cases would in itself raise grave doubts about any death sentence imposed by that judge.[10]

Thus, the reported satisfaction of trial judges with the performance of the lawyers they appoint is not necessarily the best evidence of quality representation. Further, judges see only the results of what lawyers actually do, and would be unaware of facts such lawyers failed to unearth or motions they failed to make.

Indeed, while the limited information from the Virginia Supreme Court vouchers suggests that fees do not prevent court-appointed attorneys from doing an adequate job,[11] it also contains at least one recent example in which the hours expended by the attorney appear inadequate to permit proper investigation of the case.

The case is that of Brandon Hedrick. In Hedrick's case, the sum total of hours spent by both appointed lawyers was 264.4. The trial consumed 74 of those hours, leaving only 189.6 hours for investigation and other preparation.[12]

Craig Cooley, a Richmond lawyer who has represented about 60 people on capital murder charges, gone to trial on 25 of those cases and had only one client sentenced to death,[13] says he spends between 250 and 350 hours preparing for a capital case. One hundred to 200 of those hours, says Cooley, are spent investigating his clients' backgrounds for mitigating evidence.

Failure to develop mitigation evidence--information about a defendant's background that demonstrates reasons for mercy--is common among capital defense trial lawyers in Virginia, according to Elisabeth Semel, director of the American Bar Association's Death Penalty Representation Project.

"There are exceptional cases where you can say that there is a legitimate reason for not putting on mitigation," says Semel. "But they are extraordinary in their exception, and that is not what is going on in Virginia. I can say this because I see these cases post-conviction. The wealth of information that is unearthed post-conviction is damning. And it's emblematic of the ineffective assistance of counsel in Virginia."

Lack of mitigation evidence means sentencing trials often take less than a day, and jurors must make life and death decisions with little information about the defendant. Later, when

appellate lawyers investigate the cases and backgrounds of those sentenced to death, they frequently unearth evidence of mental retardation, brain damage, mental illness, child abuse, extreme deprivation and other forms of brutalization. But once a death sentence is imposed, this information can have little impact in Virginia. In the case of Dwayne Allen Wright, executed in October 1998 for a murder committed when he was 17, jurors were not told that Wright was committed to a mental hospital at age 12 and diagnosed as psychotically depressed, brain-impaired and borderline mentally retarded. Two jurors--Pamela Stilton Rogers and one who wished to be anonymous--later said they would have voted for a life sentence had Wright's attorneys presented evidence that he was brain-damaged and retarded. Had only one juror voted for a life sentence at his trial, Wright would not have been sentenced to death.

In a similar case, jurors who sentenced Calvin Swann to death in Danville in 1993 never heard that Swann had been diagnosed as schizophrenic and psychotic and had spent the previous 25 years in state psychiatric institutions and prisons. Governor Jim Gilmore commuted Swanns's death sentence to life without parole in May of 1999.

Some lawyers simply may not understand the scope of investigation required in a capital case. Explaining his failure to interview any witnesses at all on behalf of his client, the lawyer appointed to represent Newport News defendant Walter Mickens said, "I talked to Walter. Walter didn't give me any individuals for this particular case, all right?"[14]

Just as the caliber of any given group of lawyers will be mixed, so too is the caliber of those appointed to represent defendants in capital trials. However, published statistics on attorney disciplinary actions indicate that the trial lawyers who represented the men on Virginia's death row are six times more likely to be the subject of bar disciplinary proceedings than are other lawyers.[15]

Only about one percent of all Virginia lawyers are publicly disciplined in any given year, and only one-tenth to one-fifth of those have their licenses revoked, suspended, or accepted in surrender with charges pending.[16] By comparison, nearly six percent of the attorneys appointed to represent men who were sentenced to death have been publicly disciplined, and over five percent have lost completely their right to practice law. In fact, in one of every ten trials resulting in a death sentence, the defendant was represented by a lawyer who would lose his license.[17] The fact that so many death sentences have been obtained in proceedings involving lawyers who would subsequently lose their licenses suggests serious lapses in the caliber of lawyers that are being selected to represent defendants on trial for their lives.

Federal district court judges reviewing the performance of trial lawyers in Virginia death cases have on occasion reached highly critical conclusions. In a 1998 opinion, District Court Judge Robert E. Payne characterized the brief on direct appeal to the Virginia Supreme Court filed on behalf of Carl Chichester as "a shameful disgrace." [18] In the case of Larry Stout, U.S. District Court Judge James C. Turk found that the "deficient performance" of Stout's attorney[19] "amounted to virtually a complete absence of representation."[20] Stout's trial attorney was later appointed to represent Tommy Strickler, who was also sentenced to death.[21]

U.S. District Court Judge James C. Cacheris found that the lawyer for Terry Williams, a Danville man indicted on capital murder charges in 1986, "failed to make any reasonable investigation on behalf of Williams…[He] did not even attempt to obtain Williams' juvenile records from Danville social services, not because he didn't believe these records would be important, but because he incorrectly believed that 'State law didn't permit it.'"[22]

As a result, noted Cacheris, Williams' jury did not hear evidence of Williams' borderline mental retardation, his background of neglect and abuse or his head injuries. It heard no

testimony from Williams' wife and daughter and no testimony from correctional officers who could have described commendations awarded to Williams for helping to break up a drug ring and for returning a guard's missing wallet.[23]

Soon after Williams' trial, his attorney was indefinitely suspended from the state bar for a mental disability. At the time of this suspension, the attorney's state bar record contained one private reprimand, one public reprimand, and one other suspension. Nevertheless, Williams' case was his second capital appointment. His first capital client was Johnny Watkins, executed March 3, 1994.

In all, U.S. District Court judges found that the performances of trial lawyers in four Virginia death cases did not meet the constitutional standard for effective representation.[24] In only one of these cases--that of James Clark--did the U.S. Court of Appeals for the Fourth Circuit affirm the finding of ineffectiveness. But this does not mean the others received a quality defense.

Under the standard established by the U.S. Supreme Court for effective assistance of counsel, a defendant is entitled only to minimally competent performance.[25] Under this standard, lawyers who slept through their clients' capital trials in Texas and Georgia were not found ineffective.[26] A District Court finding of ineffectiveness, therefore, even if reversed on appeal, strongly suggests that the defendant did not have competent defense counsel.

Just as there are no enforceable requirements for lawyers appointed to represent capital defendants at trial, there are none for those who represent capital defendants *after* trial. As a result, the caliber of lawyers appointed post-conviction is also mixed. Six have missed deadlines to file habeas corpus pleadings in the Virginia Supreme Court.[27] In consequence, their clients' habeas claims were fatally defaulted and could never be reviewed by any federal court.

Determining filing deadlines is not complicated. The fact that this sort of error has occurred in more than one of every 18 cases in which state habeas petitions have been filed raises serious questions about the performance of appointed state habeas counsel where the more difficult practice of post-conviction law is concerned.

Experienced post-conviction attorneys are convinced that the quality of trial counsel can determine the difference between a life sentence and a death sentence in Virginia.

"It's more important than race, or the severity of the crime or the record of the defendant," says Gerald T. Zerkin, a Richmond lawyer who has worked on capital cases for 20 years. "In a state like this, where there is little opportunity for relief [from the courts], it is very hard to undo mistakes made at the trial level."

Records maintained by the Commonwealth make it virtually impossible to assess the performance of appointed lawyers in capital cases in any systematic manner. However, the available evidence suggests that, more than two decades after resuming capital punishment, Virginia continues to provide inadequate lawyers to those facing the ultimate penalty.

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[1] In recent years, a number of capital case jurors in Virginia have submitted affidavits saying they would not have imposed the death penalty had they known facts not presented at trial. In the case of Lance Chandler, two jurors submitted affidavits saying they would have voted for life had they known Chandler would be ineligible for parole. In the case of Carl Chichester, two jurors submitted affidavits saying they would not have convicted Chichester had they known that previous testimony from the state's main witness had implicated Chichester's co-defendant. In the case of Danny King, three jurors submitted affidavits saying they would have voted for a life sentence had they known that King would not be eligible for parole until age 70. In the case of Joseph Payne, five jurors swore they would have voted differently had they heard evidence that the state's main witness, not Payne, had committed the murder. In the case of Dwayne Allen Wright, two jurors said they would have voted for a life sentence if they had heard evidence of Wright's mental retardation and brain damage. Most recently, in the case of Bobby Lee Ramdass, four jurors said in letters or affidavits forwarded to Gov. Jim Gilmore that they would not have sentenced Ramdass to death had they been told he would never be eligible for parole.

[2] §19.2-163.7

[3] Report of the State Crime Commission, *Capital Representation of Indigent Defendants*. House Doc. No. 60. 1999.

[4] Manassas lawyer R. Randolph Willoughby.

[5] *Chichester v. Pruett*, 3:97cv155 (E.D. Va., Richmond Div., Apr. 4, 1998). Judge's Payne's opinion of the Chichester brief was echoed by prominent appellate expert and Harvard law professor Alan Dershowitz: "I have never read an appellate brief as incompetent, ineffective, and unprofessional as the one in *Chichester v. Virginia* . . ..

It is worse than any brief sent to me by an inmate, even those with no education. It is worse than any first-year student brief I have ever read." Chichester was executed April 13, 1999.

[6] *Weeks v. Angelone,* 176 F.3d 249 (4th Circuit1999). Weeks was executed March 16, 2000.

[7] Virginia remains notorious for its failures in regard to indigent defense. In a recent issue of the ABA Journal, Professor Timothy W. Floyd of Texas Tech School of Law wrote: "Despite the lofty rhetoric of the importance of counsel for the defense, many states, including Virginia, do not do an adequate job of insuring that competent, effective counsel are provided for capital defendants. Many states, including Virginia, do not have mandatory standards for the qualification of capital counsel." Timothy W. Floyd, *How Bad Must a Defense Lawyer Be for a Federal Court to Reverse in a Capital Case?* Vol. 1 ABA Journal, at 51 (1999).

[8] These vouchers are collected and stored at the Supreme Court of Virginia. The filing system used by the Court makes it impossible to collect every voucher submitted in the state's capital cases. The Court could produce vouchers only for attorneys whose names were provided. And since Virginia has no adequate general system for collecting information on capital trials--particularly when the defendant is *not* sentenced to death--this study was able to provide the names only of lawyers who had represented defendants condemned to death. Under these circumstances, vouchers for 37 capital cases conducted between fiscal year 1996 and 1999 were obtained. Vouchers submitted before this period were unavailable.

[9] According to Susan Williams, who headed the study, the commissioners chose to survey the judges because it was easier than finding the payment vouchers in the Virginia Supreme Court. "They [Court officials] told us what it would mean to pull the vouchers and I told them, 'I can't do this.' We only had four staff members," said Williams. "So that's when we decided to do the judicial survey".

[10] Letter from Richard J. Bonnie, John S. Battle Professor of Law, University of Virginia School of Law. August 17, 1999.

[11] In the case of Christopher Beck, two appointed lawyers submitted payment vouchers for 336 total hours. Of those hours, 71 were for trial, leaving 265 hours for investigation and other preparation.

[12] Here is some information on the maximum number of hours Brandon Hedrick's attorneys could have spent investigating the sentencing aspect of his case:

Case of Brandon Hedrick	Attorney 1	Attorney 2	Total
Total Hours	162.85	101.50	264.35
Hours in trial	34.00	40.00	74.00
Hours in non-investigative activities	40.15	17.75	57.90
Hours available for investigation	88.70	35.25	123.95

"Hours in non-investigative activities" consist of only those hours that could not conceivably be devoted to investigation, such as conferences with the prosecutor, review of correspondence from the court, clerk, or prosecutor, hearings in court, hours labeled as legal research or otherwise identified as related to the guilt phase or to trial procedure (such as preparation of jury instructions), and hours billed after the trial concluded. All other hours are assumed to be available for investigative activities. As it is a virtual certainty that not all other hours in fact are devoted to such investigation, this is an extremely conservative assumption.

The vouchers and timesheets in Hedrick's case therefore indicate that his attorneys could not have spent more than 124 hours investigating his case for both guilt and sentencing phases. Frequently, the defendant's guilt is not in question and there may be little need to investigate in preparation for the guilt phase of the trial. But even if that is

the case with respect to Hedrick, 124 hours is plainly inadequate for a thorough mitigation investigation. And the sentencing case must always be investigated.

It must be acknowledged that the court appears to have appointed Dr. Gary Hawk's group at University of Virginia to assist defense counsel in the case. The timesheets for attorney 2 also mention "Dr. Oxley," a state medical examiner, and "Durham" as having been consulted in the case. It is possible that the efforts of these persons and Dr. Hawk's group were devoted to the sentencing investigation. Obviously the hours they spent in such investigation are relevant to any conclusions to be drawn concerning the thoroughness and adequacy of the sentencing investigation in Hedrick's case. But in this regard two facts must be noted. First, a complete mitigation presentation always is concerned with facts and issues outside the fields of expertise of psychiatrists, psychologists, and physicians. Second, such experts seldom if ever conduct the sort of field investigation that is necessary to thoroughly investigate and adequately present the case in mitigation for a capital defendant. The appointment of such experts therefore is not a substitute for the attorney's involvement in the mitigation investigation. There is no indication in the vouchers or timesheets that any investigation was conducted by anyone other than the attorneys and the persons mentioned above. And as indicated above, the number of hours available to Hedrick's attorneys for mitigation investigation is very limited.

[13] These statistics were estimates by Cooley and were current in the fall of 1999.

[14] Deposition of Bryan L. Saunders, Esq. Dec. 3, 1998, Newport News, Va. Page 44. Saunders, who testified that the bulk of his caseload is court-appointed criminal work, agreed to represent Mickens despite the fact that he had been representing Mickens' victim, Timothy Hall, at the time of Hall's murder. Saunders was later appointed to represent Daryl Atkins in York County, who was convicted of capital murder and sentenced to death in February 1998. Atkins was granted a new sentencing hearing on appeal. Even though the Court noted that Saunders had not objected to the violation it found, Saunders represented Atkins again, and Atkins was again sentenced to death. Saunders recently represented Mark Bailey, who was sentenced to death in Hampton on October 5, 1999.

[15] This study requested public disciplinary information for every lawyer it could confirm had been appointed to represent a prisoner on death row. That amounted to 135 attorneys. Eight of those lawyers had been publicly disciplined. Four had seen their licenses revoked or had surrendered their licenses with charges pending. Three had been suspended from the bar altogether. None of these disciplinary actions stemmed from representation in a capital case, and three of the lawyers in this group had represented more than one capital defendant who was sentenced to death.

[16] The percentage of attorneys subject to public discipline in a given year and the percentage who lose their licenses are derived from a fax titled "*Historical Perspective*" that the Virginia State Bar provided for this study.

[17] Records provided by the state revealed 11 men convicted of 12 capital crimes whose trial lawyers would later lose their licenses through suspension, revocation or surrender with charges pending. The lawyers and the men they represented are:

E.L. Motley (lawyer): Terry Williams (defendant) once, Johnny Watkins (defendant) twice
Kevin Sheah (lawyer): Syvasky Poyner (defendant)
Robert Detrick (lawyer): Mickey Davidson (defendant)
Michael Arif (lawyer): Bobby Ramdass (defendant)
Sa'ad El Amin (lawyer): Herman Barnes (defendant)
Bryant Webb (lawyer): Lonnie Weeks (defendant), Carl Chichester (defendant)
Ian Rodway (lawyer): Richard Whitley (defendant)
John Henry Maclin (lawyer): Ronnie Hoke (defendant), Greg Beaver (defendant)

This report was able to identify 124 trials--through the case of Domica Winkler--in which a death penalty resulted. Thus in 12 of the 124 trials--or one in ten--that ended in a death sentence, the defendant was represented by a lawyer who would later lose his license.

[18] *Chichester v. Pruett*, 3:97cv155 (E.D. Va., Richmond Div., Apr. 4, 1998).

[19] Stout's attorney, Staunton Public Defender William Bobbitt, is included on the Public Defender Commission's list of qualified counsel.

[20] *Stout v. Thompson,* Civil Action No. 91-0719-R (W.D. Va., Roanoke Div., July 31, 1995).

[21] Stout was executed December 10, 1996. Strickler was executed July 21, 1999.

[22] *Williams v. Pruett*, CA-97-1527-A (E.D. Va., Alexandria Div., Apr. 4, 1998). Had Williams' lawyer, E. L. Motley, obtained Williams' juvenile record, he would have found a police investigation report, filed when Williams was one year of age. The report was filed by a Danville police officer sent to the Williams home to investigate complaints that Williams' parents were on the front porch "in such a state that they could not talk plain," and that their five children were inside the house, passed out from drinking some "intoxicating beverage." It describes dirty, half-naked children rendered unconscious from drinking whiskey in a house littered with trash, urine and human excrement. In the wake of the visit by police, Noah and Lula Williams were arrested and charged with five counts of child neglect, and five of their eleven children were hospitalized.

At Williams' federal habeas hearing, relatives testified that the children were later returned to their parents and that Williams' father routinely tied the young Williams to a bedpost and beat him with a belt. In addition, they testified, Williams' parents engaged in frequent fistfights that left the young Williams cowering "in the corner, shaking and crying," and that Williams was so afraid of his father as a child that he often stayed away from the family's home all night.

[23] Id. Although Cacheris' opinion was overturned by the U.S. Court of Appeals for the Fourth Circuit, the Fourth Circuit's opinion was then reversed by the U.S. Supreme Court on April 18, 2000 in *Williams v. Taylor*, 120 S. Ct.1495 (2000). In overturning *Williams*, the Supreme Court found, for the first time in the modern era of death penalty jurisprudence, that a lawyer for a capital defendant did not meet the minimal requirements outlined by *Strickland v. Washington*, 466 U.S. 668 (1984). Wrote the Court: "The record establishes that counsel failed to prepare for [sentencing] until a week before the trial. They failed to conduct an investigation that would have uncovered extensive records graphically describing Williams' nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. Had they done so, the jury would have learned that Williams' parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents' incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents' custody...Counsel failed to introduce available evidence that Williams was borderline mentally retarded and did not advance beyond sixth grade in school. They failed to seek prison records recording Williams' commendations for helping to crack a prison drug ring and for returning a guard's missing wallet, or the testimony of prison officials who described Williams as among the inmates 'least likely to act in a violent, dangerous or provocative way.' Counsel failed even to return the phone call of a certified public accountant who had offered to testify that he had visited Williams frequently when Williams was incarcerated as part of a prison ministry program, that Williams 'seemed to thrive in a more regimented and structured environment,' and that Williams was proud of the carpentry degree he earned while in prison." *Williams* at 1513, 1514.

In the wake of the Supreme Court's decision in his case, Terry Williams was allowed to plead guilty in exchange for a sentence of life without parole.

[24] U.S. District Court judges have found ineffectiveness of counsel in the cases of James T. Clark, Terry Williams, Larry Stout and Dana Edmonds.

[25] *Strickland v. Washington*, 466 U.S. 668 (1984). In this case, the U.S. Supreme Court established a two-part test for ineffectiveness of counsel. To meet this test, a defendant appealing on the issue of ineffective assistance of counsel must first prove that his lawyer's performance was deficient and second, prove that the deficient performance prejudiced his case. In a subsequent case, *Burger v. Kemp*, the Court ruled that the strategic decisions of lawyers, no matter how ill-advised, cannot be the basis of an ineffective assistance claim.

[26] The defense lawyer was found to have slept through a capital trial in *Harrison v. Zant,* No. 88-V-1640, Order at 2 (Super Ct. Butts County, Ga., Oct. 5, 1990). A Houston judge, responding to a capital defendant's complaints that his court-appointed lawyer slept through his trial, said: "The Constitution does not say that the lawyer has to be awake." John Makeig, "Asleep on the Job; Slaying Trial Boring, Lawyer Said," Houston Chronicle, Aug. 14, 1992.

[27] The condemned Virginia prisoners whose petitions were not timely filed in state habeas proceedings are Roger Coleman, Joseph O'Dell, Joe Wise, Tony Mackall, Mario Murphy and Lonnie Weeks. State habeas petitions are now filed directly in the Supreme Court. However, as Weeks' case illustrates, this particular form of negligence still occurs.

JUDICIAL REVIEW IN VIRGINIA

The American system of justice is based on the premise that guilt, degree of guilt and appropriate punishment can be reliably determined only by a fair trial. Because of the severity and finality of the death penalty, capital trials are subject to extensive review by appeals courts after conviction and sentencing. This process, conceived in the wake of the U.S. Supreme Court's 1972 conclusion that the death penalty had been applied in an arbitrary and capricious manner, is supposed to prevent arbitrariness and discrimination by filtering out cases in which defendants had unfair trials. In Virginia, that process has broken down.

Under the process of review for capital cases currently operating in Virginia, the Virginia Supreme Court automatically reviews all of the state's death sentences. If the court affirms a conviction and sentence, the condemned prisoner can then petition the U.S. Supreme Court to review the case.[1] After that, the prisoner may go back to the Virginia Supreme Court and file a habeas corpus petition. When that petition is denied--the Virginia Supreme Court has never granted a petition for habeas corpus in a capital case--the prisoner can again ask the U.S. Supreme Court to consider the case.

Since the U.S. Supreme Court rarely chooses to review a case following state post-conviction proceedings, and since the Virginia Attorney General routinely asks the trial judge to schedule an execution date at this point, the prisoner's next step is to file a petition for review of his claims in federal court, where he is entitled to an automatic stay of execution. Should the federal court deny relief, the prisoner can appeal to the U.S. Court of Appeals for the Fourth Circuit. When the Fourth Circuit denies relief--as it has in all but two Virginia cases since 1977[2]--the prisoner is entitled to one more opportunity to ask the U.S. Supreme Court to consider his case. But chances that the Court will review any such case are slim. The Court receives

about 6,500 petitions in civil and criminal cases a year, and chooses to review only 75 to 100 of them. Most years, it hears only three or four death cases.

Because the entire process takes time and can involve dozens of different judges, it is assumed to constitute a guarantee that every capital defendant in Virginia receives a fair and high-quality trial. But this has not been the case. In Virginia, governors have stopped the executions of four condemned prisoners whose cases went through the process but whose guilt remained in doubt even after all appeals had been exhausted.[3] This is because certain legal doctrines allow courts to overlook violations of a capital defendant's right to a fair trial. These are the doctrines of procedural default and non-retroactivity and the standards relating to claims based on ineffective assistance of counsel. In addition, the Anti-Terrorism and Effective Death Penalty Act (which took effect in 1996) severely limits the ability of the federal courts to overlook these doctrines in the interest of justice. Finally, Virginia's "21-Day Rule" prevents state courts from ordering new trials based on newly discovered evidence of innocence. Although these doctrines are not specific to Virginia, they are zealously enforced here.

The Doctrine of Procedural Default

The doctrine of procedural default operates both on direct appeal to the Virginia Supreme Court and in all proceedings that follow.[4] It applies when the defendant complains of an error in his trial that his lawyer did not identify or object to at the earlier proceeding. Under this doctrine, a defendant's lawyers must renew every one of their client's complaints in every step of the appeals process. If the lawyers fail to do so, any violation or error they missed is forever barred from consideration by any court. In this way, defendants with no knowledge of the law, no say in the selection of their lawyers and no control over their lawyers' actions, must literally die because of the mistakes of those lawyers.

In the case of Thomas Royal, a Hampton man sentenced to death for murdering a police officer, the courts used the doctrine of procedural default as a basis for their refusal to consider the fact that a state trooper had planted evidence at the murder scene. Prosecutors did not inform Royal of one piece of tainted evidence--a .380 caliber gun planted to corroborate a statement made by one of Royal's co-defendants--until *after* Royal had entered a guilty plea. They did not inform him of a second piece of evidence--a .25 caliber cartridge planted to cement the case against Royal's co-defendant--until *after* he had filed his direct appeal.

Royal claimed in his state and federal habeas appeals that the state illegally withheld information about the planted evidence from him--an act known as a Brady violation.[5] But the issue was procedurally defaulted in both courts because Royal's lawyer had failed to include it in his direct appeal to the Virginia Supreme Court. Royal then appealed to the Fourth Circuit, which held that the claim remained defaulted because Royal had not proved that the tainted evidence "prejudiced" the outcome of his case. Even if the state *had* committed a Brady violation, the Court went on to say, the fact that the evidence was tainted was not "material" to Royal's guilt or punishment.[6]

Royal appealed to the U.S. Supreme Court, which declined to review his case. He was executed November 9, 1999.

Finally, the case of Arthur Ray Jenkins is instructive. Jenkins, who had an IQ of 65 and was taken from his home at age seven because family members were sexually abusing him, killed the uncle he said had molested him and the uncle's friend. Among those testifying at Jenkins' trial was Robert A. Clendenen, Jr., administrator of the Washington County Jail where Jenkins had been locked up until shortly before the murders. Jenkins, Clendenen testified, showed no sign of mental illness or drug use. A federal grand jury subsequently indicted

Clendenen on charges that he embezzled money and gave inmates drugs in exchange for sex. The sex and drug charges were eventually dropped in return for Clendenen's guilty plea on the embezzlement charge.[7]

Questioned by an investigator for his post-conviction lawyers, Jenkins described his life in Clendenen's jail. Clendenen, he said, gave the prisoners beer, whiskey, marijuana and needles in exchange for sex in the jail's laundry room and records office. When Jenkins complained to Clendenen that his prescribed anti-psychotic medication interfered with his sexual performance, the jailer let him stop taking it.

Jenkins' lawyers included claims related to Clendenen in Jenkins' federal habeas petition. A U.S. District Court judge ruled that the claims were procedurally barred because they had not been made in state court.[8] In a footnote to the case, U.S. District Judge Richard Williams commented, "The claims concerning Clendenen cry out for further inquiry. But this court is prohibited under the law from heeding these claims…This impresses the Court as a significant gap in the law."[9] The Fourth Circuit had no such qualms.[10] Jenkins was executed in April, 1999.

The doctrine of procedural default allows the state to escape responsibility for violations of the defendant's rights during trial, not because the violations did not happen or are inconsequential, but because his lawyer made a mistake. This undermines the idea that post-conviction review ensures that death sentences are the result of fair trials of appropriate quality. Although a number of states ignore procedural default in the interest of justice, its application is commonplace in Virginia and strictly enforced.[11] Procedural default is the basis for decision of at least some claims in the published opinions concerning every condemned prisoner in the state's post-*Furman* history.

The Doctrine of Non-Retroactivity

When the U.S. Supreme Court announces a new rule of criminal procedure, that rule applies to the case in which the rule originated and to all other cases in the direct-review pipeline. But it does not apply retroactively to prisoners who completed direct review before the rule was announced. This is the doctrine of non-retroactivity.

An example of the application of this doctrine comes from the case of Coleman Gray, a Suffolk man sentenced to death in 1986 for killing a convenience store clerk. Before trial, the prosecution stated its intention to offer evidence at sentencing that Gray had participated in another murder--the unsolved and highly publicized murder of a woman and her infant daughter Gray was never charged with this crime. The evidence to be offered, the prosecution promised, would consist only of testimony from Gray's accomplice in the capital crime for which he was on trial. The accomplice would testify that Gray told him he killed the woman and her child. Based on this information, Gray's lawyers prepared for trial. Their plan was to emphasize to the jurors that the accomplice was lying in order to look better than Gray.

But at Gray's sentencing, the prosecution broke its promise. In addition to the testimony of Gray's accomplice, it presented the testimony of the detective who had investigated the double murder and a great deal of other evidence relating to the crime. The prosecution did not ask the detective whether there were any other suspects in the crime. But another suspect did exist: the husband of the woman, who had secured an insurance policy on her life shortly before the murder.

The U.S. District Court concluded that the prosecution's conduct deprived Gray of a fair sentencing trial and ordered a new one. The state appealed. Although the Fourth Circuit did not disagree with the conclusion that Gray received an unfair sentencing trial, it found that the rule

the prosecution had violated was a *new rule.* And because this determination was not made until *after* the state post-conviction proceedings, the doctrine of non-retroactivity barred Gray from deriving any benefit from it. The Fourth Circuit reversed the order for a new trial. The U.S. Supreme Court affirmed this decision.[12] Gray was executed Feb. 26, 1997.

As Gray's case demonstrates, the doctrine of non-retroactivity can result in a defendant being executed even though a court finds he has had an unfair trial. Like the doctrine of procedural default, the doctrine of non-retroactivity undermines the widely-held assumption that judicial review ensures that the state only executes those who have received fair trials.

The Legal Standards for Ineffective Assistance of Counsel

The third legal doctrine that belies the filtering role of the appellate courts arises from the legal standards applicable to claims of ineffective assistance of counsel. Although a poor defendant is entitled to an appointed lawyer, the right is an empty one unless the lawyer actually performs as a lawyer. When the lawyer does not, the U.S. Supreme Court has ruled, the defendant has been effectively denied the effective assistance of counsel envisioned by the Constitution. Accordingly, a defendant who demonstrates that his appointed attorney rendered "ineffective assistance" is entitled to relief in the form of a new trial or sentencing.

But the legal standard for reversing a death sentence because the defendant's lawyer did a poor job is extraordinarily difficult to meet. The U.S. Constitution entitles an indigent defendant to an attorney, but it does not entitle him to a good attorney. In fact, it entitles him to no more than a minimally competent one. Numerous examples demonstrate that the level of minimum competence found acceptable by Virginia's courts is not at all high.

Virginia's courts, for example, have rejected a claim that a trial lawyer was ineffective when he advised the defendant to accept a plea bargain in which the defendant received

essentially nothing in return for pleading guilty to capital murder.[13] They have rejected the claim that a trial lawyer was ineffective when he neither investigated the defendant's history nor offered any evidence at the sentencing trial.[14] They have rejected the claim that a trial lawyer was ineffective for relying wholly on the defendant to identify mitigation witnesses for the sentencing trial.[15] The Virginia Supreme Court has never upheld an ineffective assistance claim in a death case.[16] Only once has the Fourth Circuit upheld an ineffective assistance claim in a Virginia capital case. This was the 1986 case of James T. Clark.[17]

The assurance of adequate representation is further hampered by a rule that insulates strategic legal decisions from review. Under the law governing claims for ineffective assistance of counsel, a lawyer's decision cannot be a basis for a finding of ineffectiveness if the lawyer says the decision was strategic. This is true no matter how disastrous the strategy or decision and no matter how poor the judgment informing it. Combined with the generally low standards to which appointed capital defense lawyers are held, this insulation from review virtually obliterates the constitutional promise of effective counsel.

Reversals of Capital Convictions and Sentences

Finally, the nature and practices of the courts that review death sentences in Virginia provide another reason why appellate and post-conviction proceedings cannot be counted on to guarantee fair and high quality trials to the state's capital defendants.

Between 1978 and 1997 Virginia meted out 131 death sentences.[18] Of those sentences, the Supreme Court of Virginia reversed exactly 11, almost all on direct appeal.[19] According to a study of post-sentencing judicial outcomes between 1973 and 1995, conducted by Professor James Liebman of Columbia University Law School, "the Virginia Supreme Court found error in capital cases less often than any other state high court in the nation (8 percent of the time,

compared to a national average of 47 percent.)" Texas, the only state with more executions than Virginia, reverses 28 percent of its cases, Liebman found.

Not only does the Virginia Supreme Court uphold death sentences more than any other state court; it is extremely restrictive when it comes to enabling defense lawyers to discover potentially exculpatory information in the files of prosecutors and police. Under Virginia law, the work product of attorneys for the Commonwealth and their agents is privileged. Unless a petitioner can prove that exculpatory information exists, therefore, the court will not allow any disclosure beyond what was disclosed before trial. As a result, exculpatory material does not generally come to light until a case reaches the lower federal court. By then, because of the rule of procedural default, it is almost impossible to do anything about it.

One example of this is Ronald Hoke, convicted in 1986 of the rape and murder of a Petersburg woman. The U.S. District Court found that the Petersburg police committed a Brady violation[20] by withholding interview notes with men whose consensual sexual encounters with the victim were similar to the encounter described by Hoke. The U.S. Court of Appeals for the Fourth Circuit reversed this ruling, saying the issue was procedurally barred and the claim without merit.[21]

Another such case is that of Tommy Strickler, sentenced to die for the 1990 murder of a James Madison University student. A U.S. District Court ordered a new trial based on the fact that prosecutors withheld from Strickler's defense lawyer eight documents showing that their main eyewitness had told contradictory stories to police. The Fourth Circuit reversed, saying the claim was procedurally barred, and that Strickler's lawyers had not proved that the documents would have made a difference in the outcome of the trial. The U.S. Supreme Court reversed the

application of the procedural bar. Ultimately, however, the justices agreed with the Fourth Circuit that the undisclosed evidence would not have changed the outcome of the trial.

Virginia's state supreme court has the lowest reversal rate on direct appeal in death cases in the country. Virginia also has a federal appeals court with the lowest reversal rate of all federal appeals courts in the country when it comes to capital habeas cases. Nationwide, Liebman found, federal appeals courts grant new hearings to death row inmates in about 40 percent of cases. The rate for Virginia's highest federal appeals court, the U.S Court of Appeals for the Fourth Circuit, is nine percent overall and four percent in Virginia cases alone.[22]

"In cases from Virginia," reports Liebman, "the condemned prisoner's overall likelihood of reversal by either the state supreme court or federal habeas courts was 14 percent, compared to the national rate of 68 percent."[23]

According to David Botkins, spokesman for state attorney general Mark Earley, Virginia's reversal rate is abnormally low because "Virginia has some of the best state and federal judges in the country who are very thorough and deliberative in their decisions; Virginia prosecutors do a good job of trying their cases with few errors; [and] Virginia's capital statutes are well written and narrowly defined." [24] Liebman disagrees.

"It's a combination of things," he says.[25] "Virginia, in my view, has the broadest death penalty statute in the country. It has a court system in which representation is poorly funded and post-trial review is very limited. It's got a conservative bench, both at trial level and at Supreme Court level. And then it has the Fourth Circuit. When it comes to getting and keeping death sentences, the planets are just really aligned over Virginia."

Because other states within the jurisdiction of the Fourth Circuit Court of Appeals have much higher reversal rates, many of their death penalty cases never reach the Fourth Circuit.

Maryland, according to the Liebman study, has a 50 percent state court reversal rate. South Carolina's is 52 percent, while North Carolina's is 64 percent. In this way, the supreme courts of those states act as essential filters, identifying and correcting errors on a state level so that flawed cases never reach the Fourth Circuit. Not so in Virginia.[26]

The Anti-Terrorism and Effective Death Penalty Act

In April of 1996, President Bill Clinton signed into law The Anti-Terrorism and Effective Death Penalty Act (AEDPA). The AEDPA requires federal courts to give extreme deference to state court rulings in death cases. Under the AEDPA, all federal habeas petitions must be denied except in cases where the state courts have made an "unreasonable" interpretation of federal law or an "unreasonable" determination of the facts. Federal courts must assume, however, that factual determinations by state courts are correct.

The case of Michael Williams, sentenced to death for the murder of a Cumberland County couple, provides an example of the way the Fourth Circuit applies the AEDPA in Virginia. Williams was sentenced to death by a jury whose forewoman was the ex-wife of the deputy sheriff who testified in the case. Although the couple had been married 17 years and produced four children, neither the juror nor the deputy told the court of their relationship.[27] The prosecutor, who had represented the deputy in the divorce, was also silent.

Williams' state habeas lawyer asked the Virginia Supreme Court for an investigator to help him locate and examine witnesses and records, but his request was denied. Williams' federal habeas lawyers were also refused an investigator, but hired one anyway at their own expense.[28] As a result of that investigator's efforts, the information about the juror, the deputy and the prosecutor came to light. A U.S. District Judge granted a hearing on the matter, but the Fourth Circuit--at the request of Virginia Attorney General Mark Earley--issued an emergency

stay to prevent the hearing. The Fourth Circuit then ordered the district judge to apply a section of the AEDPA, stipulating that a federal court may hold a hearing only if a claim is based on facts that could not have been previously discovered "through the exercise of due diligence," and only if, by those facts, a petitioner can demonstrate actual innocence.

The divorce records of the juror and the deputy "had been a matter of public record since…(the) divorce became final in 1979," the Fourth Circuit later reasoned. "Indeed, because Williams' federal habeas counsel located those documents, there is little reason to think that his state habeas counsel could not have done so as well."[29] Furthermore, noted the Court, knowledge of the relationships of the juror, witness and prosecutor would not have prevented "a reasonable factfinder" from convicting Williams of capital murder. Under the Fourth Circuit's interpretation of the AEDPA, Williams' claims were barred from review. Williams's execution, scheduled for October 28, 1999, was postponed the same day when the U.S. Supreme Court announced it would review his case.[30]

The 21-Day Rule

Finally, Virginia has no mechanism through which the state's courts can consider evidence of innocence that surfaces more than 21 days after a defendant's final sentencing in Circuit Court.[31] As a result, even someone with evidence of innocence strong enough to persuade the governor to commute his death sentence and free him from death row is not entitled to a new trial. To date, three such men--Joseph Giarratano,[32] Herbert Bassette and Joseph Payne--remain in prison for this reason.[33] Meanwhile, those with recently-discovered evidence of innocence that the governor does not find persuasive or chooses to ignore are also without recourse. In recent years, condemned prisoners have gone to their deaths despite inconsistent or

incomplete DNA evidence, witness recantations and evidence that the crime for which they were condemned was committed by another person entirely.[34]

The unwillingness of the Virginia State Supreme Court to sufficiently and seriously scrutinize claims in death cases, in combination with the federal doctrines of procedural default, retroactivity and the AEDPA, creates a significant likelihood that Virginia is executing people whose trials have been conducted unfairly. A system in which the results of unfair trials are allowed to stand cannot correctly and justly distinguish between those who deserve to die and those who do not.

Although the Constitution requires only minimal standards of fairness, Virginia has a moral obligation to its citizens to see that justice is administered fairly, and to review cases in which fairness is at issue. When it comes to capital punishment, the state has abdicated this responsibility, choosing instead to defend every death penalty it obtains.

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[1] However, the U.S. Supreme Court is not required to review any such cases, and customarily only does so if the case provides an opportunity to address an issue of compelling legal importance.

[2] The Fourth Circuit granted relief in the cases of James Clark and Dennis Stockton. Although a Fourth Circuit panel of three judges recently granted relief in the case of Walter Mickens (See *Mickens v. Taylor*, 227 F.3d 203), the Fourth Circuit then vacated the opinion and decided to hear the case en banc, or as a full court. Arguments in the case took place on December 5, 2000. At this writing, no opinion has yet been issued.

[3] Joseph Giarratano, Herbert Bassette, Earl Washington and Joseph Payne. All four men had their death sentences commuted to life sentences. Nationally since 1973, 82 people have been released because of innocence from death rows in Florida, Georgia, North Carolina, New Mexico, Arizona, Ohio, Indiana, Oklahoma, Illinois, Louisiana, South Carolina and Texas. All were legally tried, convicted and sentenced.

[4] Generally speaking, the purpose of the doctrine as applied on direct appeal is to require asserted errors and violations to be raised at a time when the trial court can correct them. But the doctrine also applies in federal court to errors and violations that were not raised properly in state court. As applied in federal court, the doctrine seeks to achieve a balance between the federal court's duty to enforce a defendant's constitutional rights and the federal court's obligation to respect the judgments of state courts.

[5] *Brady v. Maryland,* 373 U.S. 83 (1963). In this case, the U.S. Supreme Court ruled that, because the government must "do justice" rather than merely secure a conviction, it must reveal certain exculpatory evidence in a timely manner.

[6] *Royal v. Taylor*, 188 F 3d 239 (4th Circuit 1999)

[7] *Jenkins v. Angelone*, 168 F.3d 482 (4th Circuit 1999). Unpublished.

[8] Although Jenkins did, of course, know of Clendenon's activities while his case was being reviewed in the Virginia Supreme Court, he did not mention it to his lawyers because it did not occur to him that it was relevant to his case.

[9] *Jenkins v. Angelone*, U.S. District Court opinion.

[10] *Jenkins v. Angelone,* 168 F.3d 482 (4th Circuit 1999). "Because Jenkins did not make this argument in any state court, it is procedurally defaulted and Jenkins is barred from raising it for the first time during a habeas proceeding in federal court unless he can show 'cause for his failure'" to develop the facts in state-court proceedings and actual prejudice resulting from that failure." There was no evidence that Jenkins had engaged in sex with Clendenen, the court ruled. And if he had, the Commonwealth did not violate the rule against failing to disclose exculpatory evidence to the defense because Jenkins already knew how Clendenen ran his jail.

[11] This is true despite the fact that Rule 5:25 of the Virginia Rules Annotated allows the Virginia Supreme Court to relax the doctrine of procedural default in order "to attain the ends of justice." Va. Rule 5:25. P171. (1999 edition). One of Virginia's most notorious applications of the procedural default doctrine occurred in the case of Roger Keith Coleman. In that case, the U.S. Supreme Court agreed with the Fourth Circuit that Coleman could not go forward with any of his claims because his lawyers missed a filing deadline by three days.

[12] *Gray v. Netherland*, 518 U.S. 152 (4th Circuit 1996).

[13] *Beaver v. Commonwealth*, 232 Va. 521 (1987)*; Stout v. Commonwealth,* 237 Va. 126 (1989).

[14] *Wise v. Commonwealth*, 230 Va. 322 (1985).

[15] *Saunders v. Commonwealth*, 242 Va. 107 (1991).

[16] Recently, in *Williams v. Taylor*, 120 S. Ct. 1495 (2000), the U.S. Supreme Court pointed out that the Virginia Supreme Court had applied an incorrect and unconstitutional legal standard to Terry Williams' claim of ineffective assistance of counsel. The Virginia Supreme Court's understanding of "clearly established" federal law was not only wrong, said the Court, but "diametrically opposed" to the actual federal standard. Wrote the Court: "the state Supreme Court mischaracterized at best the appropriate rule...for determining whether counsel's assistance was effective within the meaning of the Constitution...It follows that the Virginia Supreme Court rendered a decision that was 'contrary to, or involved an unreasonable interpretation of, clearly established federal law.'" Id. at 1515, 1516.

The Supreme Court's observation in *Williams* raised the possibility that the Virginia Supreme Court used the same wrong standard in all 36 capital cases involving ineffective assistance claims that it has decided since the Court began hearing direct capital case appeals on July 1, 1995. Alerted to the possibility that the Court might have applied the erroneous standard to the case of Russel Burket, Burket's lawyers petitioned for an emergency stay of execution in June 2000. In an unpublished order issued on June 21, 2000 the Court refused to grant the stay on procedural default grounds. Justice Leroy Rountree Hassell wrote separately to say that the Court had not used an incorrect standard in Burket's case. "I also observed that Burket's contention that this court applied an erroneous standard of review to his claim of ineffective assistance of counsel is without merit," wrote Hassell. He was joined was joined by Justice Lawrence L. Koontz, Jr. Hassell's statement raised the additional possibility that the Court applies different legal standards in different cases. At this writing, 22 of the 36 Virginia capital defendants whose claims of ineffective assistance of counsel were reviewed by the Virginia Supreme Court since it was possible to formulate and apply the erroneous standard have been executed.

[17] *Clarke v. Townley*, 85-6601 (4th Circuit, June 5, 1986). In September 2000, a Fourth Circuit panel of three judges reversed a U.S. District Court ruling and found that the trial attorney for Walter Mickens, had a conflict of interest because he had represented Mickens' victim at the time the victim was murdered. That opinion was vacated in October 2000 when Fourth Circuit decided to rehear the case as a full court (or "en banc"). Arguments in the case took place December 5, 2000.

[18] This number is accurate as of April 1, 2000. Since then, more defendants have been sentenced to death. In addition, a number of defendants among the 131 received multiple death sentences.

[19] These were: *Justus v. Commonwealth* and *Martin v. Commonwealth*, for failure to strike jurors who believed that the defendant must produce evidence of innocence; *Patterson v. Commonwealth* for failure to strike a juror who could not consider giving a life sentence; *Evans v. Commonwealth* for the admission of flawed conviction records; *Cheng v. Commonwealth, Johnson v. Commonwealth* and *Rogers v. Commonwealth*, because the defendants were not triggermen; *Frye v. Commonwealth* because of the post-trial decision of the U.S. Supreme Court in *Caldwell v. Mississippi; Mickens v. Commonwealth* because of the U.S. Supreme Court's post-trial decision in *Simmons v. North Carolina; Atkins v. Commonwealth* because of the use of a flawed jury form; and *Yarbrough v. Commonwealth*

because of the trial judge's failure to instruct the jury on parole eligibility. Recently, in 2000, the Virginia Supreme Court reversed *Jackson v. Commonwealth* because Chauncy Jackson's father was not notified of Juvenile Court proceedings in which Jackson was certified to be tried as an adult. Jackson was 16 years old when he was charged with capital murder in 1994. Jackson is scheduled to be retried on January 16, 2001.

[20] See 5, supra.

[21] *Hoke v. Netherland*, 92 F 3d 1350 (1996).

[22] The Fourth Circuit Court of Appeals also hears cases from Maryland, North Carolina, South Carolina and West Virginia. West Virginia has no death penalty.

[23] James S. Liebman, *Life After Death: The Fate of Capital Sentences After Imposition at Trial.* Copyright James S. Liebman, June 2, 1999, revised 6/15/99.

[24] Frank Green, "In Virginia's Court System, Death Means Death," Richmond Times-Dispatch, May 23, 1998.

[25] Interviews with James Liebman, Oct. 7, 1999, Nov. 16, 1999.

[26] The reason, posits Liebman, lies in "the unusual extent to which the Virginia courts limit review of capital judgments: (1) enforcing the region's (and nation's) strictest procedural default doctrine (the rule permitting even egregious error to be ignored on appeal if it was not objected to at trial); (2) often appointing substandard trial attorneys to represent the indigents who make up 97 percent of the state's death row; (3) applying a very strict test for reversing capital judgments based on incompetent lawyering (until the Supreme Court overturned Virginia's test [*Williams v. Taylor]* earlier this year); (4) limiting defendants' ability to petition for a new trial based on innocence to a 21-day period following conviction, the shortest time frame in the region (and nation); and (5) failing to provide legal assistance to indigent (meaning nearly all) capital prisoners or funds for it at the post-conviction phase, thus limiting the capacity of that second inspection (which has proved so important in Maryland, North Carolina and South Carolina) to detect and correct serious error. These questions bear further study." James S. Liebman, *A Broken System: Error Rates in Capital Cases, 1973-1995*, Ch. IX at 3. Columbia University School of Law, 2000. However, since 1991, Virginia Code §19.2-163.7 has allowed for the appointment of post-conviction counsel to indigent capital defendants upon request. Appointment of counsel is not automatic.

[27] The juror, Bonnie Stinnett, did not disclose her former marriage to Deputy Sheriff Claude Meinhard when the jurors were asked whether they were related to any witnesses in the case.

[28] While state judges tend to appoint solo practitioners or lawyers from small firms to represent capital defendants, federal judge often call on larger, resource-rich firms. The fact that such firms can afford to hire their own investigators and experts is one reason why much new information often comes to light during federal habeas.

[29] *Williams v. Taylor*, 189 F 3d 421 (4th Circuit 1999).

[30] On April 18, 2000, the U.S. Supreme Court affirmed in part, reversed in part and remanded for a hearing the case of Michael Williams, *Williams v. Taylor*, 120 S. Ct. 1479 (2000). The Court ruled that Williams was, in fact, entitled to a hearing on his claims of juror bias and prosecutorial conduct because his failure to discover evidence connected to those claims in a timely fashion was not caused by lack of diligence on the part of his lawyers. Wrote the Court: "The Commonwealth misconceives the inquiry mandated by the opening clause of § 2254(e)(2) [the AEDPA]. The question is not whether the facts could have been discovered but instead whether the prisoner was diligent in his efforts." Id. at 1490. Noting that Williams' investigator found out about Stinnett's marriage to Meinhard only because two other jurors, in passing, referred to her as "Bonnie Meinhard," the Court said: "We should be surprised, to say the least, if a district court...were to hold that in all cases diligent counsel must check public records containing personal information pertaining to each and every juror." Id. at 1494. An evidentiary hearing on Williams' claims of prosecutorial misconduct and juror bias took place before U.S. District Judge James R. Spencer on October 4, 2000. At this writing, Spencer has not issued an opinion.

[31] This is because of Virginia Supreme Court Rule 1.1 Finality of Judgments, Orders and Decrees, also known as "The 21-Day Rule." This rule imposes the shortest deadline in the country on death-sentenced defendants who seek to introduce new evidence. It reads:

> All final judgments, orders and decrees, irrespective of terms of court, shall remain under the control of the trial court and subject to be modified, vacated, or suspended, for twenty-one days after the date of entry, and no longer. But notwithstanding the finality of the judgment, in a criminal case the trial court may postpone execution of the sentence in order to give the accused an opportunity to apply for a writ of error and supersedeas; such postponement, however, shall not extend the time limits hereinafter prescribed for applying for a writ of error. The date of entry of any final judgment, order or decree shall be the date the judgment, order or decree is signed by the judge.

On October 13, 2000, the Virginia Supreme Court proposed to eliminate The 21-Day Rule and to impose in its stead a standard excluding from consideration by the Court any new evidence that was known by the prisoner or his lawyer at the time of trial and that does not establish "a substantial likelihood" that the prisoner is innocent of the crime for which the death sentence was imposed. In a letter delivered to the Court on November 8, 2000, Virginia Attorney General Mark Earley opposed the new standard, telling the Court he thought it "very well may be unconstitutional." Brooke A. Masters, *Top Lawyer Defends Va. Rule on Evidence*, The Washington Post, Nov. 10, 2000, P. B1.

[32] In Giarratano's case, Gov. L. Douglas Wilder commuted Giarratano's death sentence in February of 1991, and indicated that he should have a new trial. However, then-Attorney General Mary Sue Terry announced that Giarratano "was not entitled" to a new trial, and refused to initiate proceedings to procure one. John F. Harris, "Terry Rules Out New Trial for Pardoned Killer; Attorney General Certain of Giarratano's Guilt," Washington Post, Feb 21, 1991.

[33] As noted previously, Earl Washington was exonerated by DNA evidence and pardoned by Gov. Jim Gilmore in late 2000. However, he too remains in prison because of an unrelated conviction.

[34] Joseph O'Dell was executed in 1997 despite the opinion of a U.S. District judge that DNA test results from a bloodstain on his jacket--said to match to blood of his victim-- were "inconclusive." Michael Satcher was executed in 1997 despite the fact that a 1995 DNA analysis of his blood conflicted with an earlier state DNA analysis and therefore could not have matched semen evidence from the crime scene.

Roger Coleman was executed in 1992 although there was substantial evidence developed post-trial indicating that someone other than Coleman raped and murdered Coleman's sister-in-law. Dennis Stockton was executed in 1995 even though Randy Bowman, the prosecution's key witness in Stockton's case, told a reporter that he lied on the witness stand when he testified that he heard Stockton agree to murder the victim for $1,500. Ronald Bennett, whose conviction was based on the testimony of his cousin and his former wife, was executed in 1996 despite a videotaped recantation in which Bennett's ex-wife exonerated Bennett and implicated herself and the cousin instead. Subsequently, Mary Bennett Stroh recanted her recantation. Carl Chichester was executed in 1999 despite conflicting accounts of eyewitnesses, at least one of whom told police that it was Chichester's co-defendant, not Chichester, who killed a pizza store manager. Appointed attorneys for Chichester said they had been unable to locate this eyewitness despite the fact that the local telephone directory contained the eyewitness' name, address and telephone number. Also in 1999, Tommy Strickler was executed for the murder of a James Madison University sophomore despite evidence that a key prosecution witness lied on the stand during Strickler's trial. According to the office of the Virginia Attorney General, the evidence--a letter sent by the witness to her husband-- was a forgery.

Russel Burket was executed August 30, 2000 despite a 1993 DNA analysis of semen found at the crime scene that closely matched the DNA of both Burket and his brother, an initial suspect in the crime. Burket's lawyers asked Gov. Jim Gilmore for a more sophisticated test that would show which brother produced the DNA. Citing Russel Burket's confession, Gilmore refused the request. At the time of the murders, both adult Burket brothers lived with their parents in a home next door to the home of the victims. An affidavit purportedly written by Burket's father but never signed, indicated that he (Burket's father) and William McGraw, a now-deceased lawyer hired by the elder Burket to represent both his sons when they became suspects, persuaded Russel Burket to plead guilty even though his brother had committed the crime. "McGraw and I discouraged Rusty from accusing Lester," the affidavit said. Burket was 100% disabled due to mental illness, could not read or write, and had attempted suicide a number of times. In addition, he had a long history of psychotropic medication.

RACE AND THE DEATH PENALTY IN VIRGINIA

Virginia no longer imposes 90 percent of its death sentences on black defendants as it did in the era before the U.S. Supreme Court decided *Furman v. Georgia.* Still, race continues to be a significant factor in capital sentencing here. [1]

Although most victims of capital murders in Virginia are black, only a small percentage of murders of blacks have resulted in death penalties during the post-*Furman* era. Between 1978 and 1997, nearly 58 percent of Virginia's murder victims were African-American. According to the FBI's *Supplemental Homicide Reports* for those years, 41 percent of victims of apparently capital crimes were black. Yet of the 131 crimes for which a death sentence was imposed during the same period, only 20% of the victims were black. Thus, when a black person is the victim of a capital crime in Virginia, the defendant is far less likely to be sentenced to death than when a white person is the victim.[2]

Examining two categories of capital murder--rape-murder and robbery-murder--the data show that black offenders who kill white victims in Virginia are significantly more likely to be sentenced to death than white offenders or black offenders who kill black victims.

Echoing the pre-*Furman* era,[3] black offenders are still far more likely to be sentenced to death for raping and murdering white women than are white offenders. Between 1978 and 1997, 28 death sentences were handed down for rape-murder, including one for attempted rape-murder. Eleven of those death sentences were delivered to black defendants, 15 to white defendants, and one to a Hispanic defendant.

The offender-to-victim breakdown for death sentences imposed for rape-murder convictions from 1978-1997 is as follows:[4]

Death Sentences For Rape-Murder 1978 to 1997

Race of Death-Sentenced Offender	White Victim	Black Victim
White	14	1
Black	7	4

Between 1978 and 1997, as the above numbers illustrate, there were 21 death sentences handed down for the rape-murders of white victims, while only five death sentences were handed down for the same crime against black victims. This sentencing gap can be explained in part by the fact that more whites than blacks were the victims of rape-murder. However, other troubling disparities are displayed in the next table.

Inter-Racial Rape-Murders by Race of Victim 1978 to 1997

Race of Victim	Rape-murders	Death-sentenced rape-murders	% Death Sentenced
White	51	21	42%
Black	27	5	19%

In rape-murder incidents involving whites or blacks, the probability that the offender will be sentenced to death in Virginia is about 19% if the victim is black. If the victim is white, the probability is 42%--over two times greater.

Furthermore, as the following table shows, black offenders who rape and murder white victims in Virginia are over four times more likely to be sentenced to death than those who rape and murder black victims--70% versus 15%.

Rape-Murders by Race of Offender and Race of Victim 1978 to 1997

Race of Offender	Race of Victim	Total rape-murders	Death-sentenced rape-murders	% Death Sentenced
Black	White	10	7	70%
White	White	41	14	34%
White	Black	1	1	100%
Black	Black	26	4	15%

The picture is similar with respect to robbery-murders. Over the two-decade period, there were 64 death sentences for robbery-murder in Virginia. Forty-one of those death sentences were issued to black defendants, 20 were issued to white defendants, and three were issued to defendants of other races.

The offender-to-victim breakdown for death sentences imposed for robbery-murder in Virginia during 1978-1997 is as follows:

Death Sentences For Robbery-Murder 1978 to 1997

Race of Death-Sentenced Offender	White Victim	Black Victim
White	18	1
Black	29	11

Between 1978 and 1997, as the above numbers illustrate, 47 death sentences were issued for the robbery-murder of white victims, while only 12 death sentences were issued for the same crime against black victims. Again, additional disparities lurk beneath the surface as the following table demonstrates:

Inter-Racial Robbery-Murders by Race of Victim 1978 to 1997

Race of Victim	Robbery- murders	Death-sentenced Robbery-murders	% Death Sentenced
White	553	47	8.5%
Black	485	12	2.5%

In robbery-murder incidents involving both white or black offenders, the probability that the offender will be sentenced to death is about 2.5% if the victim is black. If the victim is white, the probability is about 8.5%--over three times greater.

The table below shows that a black offender who robs and murders a white person is four times more likely to be sentenced to death than a black offender who robs and murders a black person.

Robbery-Murders by Race of Offender and Race of Victim 1978 to 1997

Race of Offender	Race of Victim	Total robbery-murders	Death-sentenced robbery-murders	% Death Sentenced
Black	White	285	29	10.1%
White	White	268	18	6.7%
White	Black	23	1	4.4%
Black	Black	462	11	2.4%

Thus, both the race of the offender and the race of the victim continue to be significant factors in terms of who receives the death penalty in Virginia.

Many decisional and statutory reforms of the last few decades have aimed to eliminate race as a factor in the criminal justice system. But as the above statistics demonstrate, these reforms have not succeeded. One important difference is that the practice of racism has become more covert since the pre-*Furman* era. Racism today is often more subtle than it was in the past, and perhaps not even always conscious or deliberate.

In 1986, in the Virginia death penalty case *Turner v. Murray*, the U.S. Supreme Court authorized defense lawyers to question potential jurors about racial bias in cases involving interracial crime. "A juror who believes that blacks are violence prone or morally inferior might well be influenced by that belief," wrote Justice White. "More subtle, less consciously held racial attitudes could influence a decision….Fear of blacks, which could easily be stirred up by the violent facts of the petitioner's crime, might incline a juror to favor the death penalty."[5]

Just as a juror may be influenced by such bias, so may a judge. So may a prosecutor in deciding whether to seek the death penalty.[6] Or the police in deciding how much time and effort

to put into the investigation of certain cases. Even for a defense lawyer, cultural differences or lack of familiarity may influence the extent of an investigation or inquiry into a client's background.

One year after *Turner*, the U.S. Supreme Court decided a Georgia death penalty case, *McCleskey v. Kemp.*[7] In that case, the justices were confronted with statistics, also gleaned from the FBI's Supplemental Homicide Reports, indicating that those who killed whites in Georgia were 22 times more likely to be sentenced to death than those who killed blacks. The Court did not dispute the evidence, but found that it showed only "a discrepancy that appears to correlate with race." Apparent disparities, wrote the Court, "are an inevitable part of our criminal justice system."

The decision to impose death in the face of such disparities, the Court wrote, belongs not to the U.S. Supreme Court, but to "the legislatures, the elected representatives of the people… that are constituted to respond to the will and consequently the moral values of the people."[8]

But no legislature can respond to the will or moral values of its constituents while simultaneously keeping those citizens in the dark. For that reason, Virginia must provide its citizens with more and accurate information about how the state administers the death penalty. The FBI statistics indicate that, in Virginia, race discrimination is a significant factor in terms of which murderers are sentenced to death and which are not. But because of the state's minimal and haphazard record keeping, it is impossible to discern at what level this discrimination takes place.

Southern Christian Leadership Conference President Dr. Joseph E. Lowery once noted that, "By reserving the death penalty for black defendants, or for the poor, or for those convicted

of killing white persons, we perpetrate the ugly legacy of slavery--teaching our children that some lives are inherently less precious than others."[9]

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[1] The city of Danville is the best documented example. Of the 108 murders that took place in Danville between 1978 and 1997, 23 met the requirements for capital murder at the time they were committed. By his own account, using his discretion Danville Commonwealth's Attorney William Fuller charged 18 defendants with capital murder during that time and sought the death penalty for 16 of them. The two defendants for whom Fuller did *not* seek the death penalty were white. The remaining 16, for whom he *did* seek it, were African-American. Of those, juries sentenced nine to death.

Thus, Danville, with a 1990 census population of 53,056, has both the highest per capita death sentence rate in the state (68.88 per 1,000 residents - see Appendix) and the distinction of sentencing only African-Americans to death.

[2] All calculations in this section are based on the FBI's Supplemental Homicide Reports and Virginia State Police publication, "Crime in Virginia". One or more murders committed by multiple offenders are treated as separate individual crimes. One or more death sentences against a single victim are treated as separate death sentences.

[3] During the documented pre-Furman era, 50 death sentences were imposed for the crime of rape. All were imposed on African-Americans whose victims had been white.

[4] This breakdown is restricted to non-Hispanic whites and non-Hispanic blacks. It excludes the one Hispanic defendant because the race of Hispanics can vary.

[5] *Turner v. Murray,* 476 U.S. 106 (1986).

[6] A study by Professor Jeffrey Pokorak of St. Mary's University School of Law examined data on the race and gender of officials who make decisions about whether to seek the death penalty in the 38 states that impose it. Pokorak found that only 1 percent of these officials (usually chief local prosecutors) are black and 1 percent are Hispanic. The remaining 97.5 percent are white and almost all are male. In Virginia, Pokorak found, there are 113 white commonwealth's attorneys and eight black commonwealth's attorneys. Jeffrey Pokorak, *Probing The Capital Prosecutor's Perspective: Race and Gender of the Discretionary Actors*, 83 Cornell L. Rev. 1811. (1998).

[7] *McCleskey v. Kemp*, 481 U.S. 279 (1987).

[8] Id.

[9] Testimony of Rev. Dr. Joseph E. Lowery, President, Southern Christian Leadership Conference, before the Senate Judiciary Committee, Oct. 2, 1998.

CAPITAL CASE RECORDS IN VIRGINIA

Virginia's record keeping systems for capital cases are so rudimentary, incomplete, and inaccessible, there is no efficient way to thoroughly compile objective data about the death penalty here.

The state has no central repository for information about the way it administers the death penalty and no enforceable or reliable method for compiling data about capital prosecutions. Even the number of capital indictments in the post-*Furman* era is not known.[1] Thus, while the residents of death row are easily identified, the names of those capital defendants sentenced to life imprisonment cannot be systematically cataloged, making comparisons between the two groups difficult.

The Virginia Sentencing Commission is unable to provide information about capital convictions, whether the sentence is life or death. The Department of Corrections maintains a database of information about its prisoners, but claims that most of the information is privileged. Consequently, any public information must be extracted by DOC technicians at prohibitive cost.

Quality of counsel, hard to measure in any circumstances, is almost impossible to assess using the few records and reports the state requires.[2] Indeed, a legislative committee attempting to examine the issue of quality of capital defense counsel recently compared data compiled by the Virginia Sentencing Commission,[3] the State Compensation Board (which pays prosecutors), and the Supreme Court of Virginia and found that the data did not match and could not be relied upon.[4]

Race is easier to track, but only because local law enforcement agencies report information about every murder in the state (including the race, if known, of both the victim and

the accused) to the Federal Bureau of Investigation (FBI). Virginia itself keeps no statistics on race in regard to the death penalty.

Virginia's legislature is responsible to its citizens for the way the state administers the death penalty. But when the state does not accurately document its administration of the death penalty, it can neither inform its citizens nor defend its practices.

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[1] There are two sources of information available on capital indictments, both incomplete. Since 1995, §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 is the State Compensation Board. Since 1990, this Board, which determines staffing and funding for the offices of Virginia's commonwealth's attorneys, has asked each commonwealth's attorney to report the number of capital cases initiated by his or her office annually. In consequence, it is possible to find out the number of capital murder indictments per jurisdiction per year, as reported by a given prosecutor. However, this information is not specific. The names of those indicted, whether or not the prosecutor sought the death penalty and the status and or eventual disposition of the cases is unavailable from this or any other source. 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.

[2] Appointed defense attorneys in capital cases are required to submit detailed vouchers for reimbursement. Such vouchers should be a fertile source of information about the activities of defense counsel. A review of them, however, showed that there are no standards exist by which defense counsel must account for their activities. Moreover, the Supreme Court of Virginia cannot readily identify or produce such vouchers.

[3] Information provided to the Crime Commission by the Virginia Sentencing Commission was taken from the Department of Corrections' Presentence Investigation Database.

[4] Report of the State Crime Commission, "Capital Representation of Indigent Defendants." House Document No. 60. 1999.

RECAP OF PRINCIPAL FINDINGS

- An analysis of Virginia murders and death sentences between 1978 and 1997 indicates that race remains a controlling factor in the way the death penalty is administered here. According to the FBI's *Supplemental Homicide Reports* for those years, 41 percent of victims of apparently capital crimes in Virginia were black. Yet of the 131 crimes for which a death sentence was imposed during the same period, only 20 percent involved black victims.

- In robbery-murder incidents involving both white or black offenders in Virginia, FBI statistics show, the probability that the offender will be sentenced to death is about 2.5 percent if the victim is black. If the victim is white, the probability is about 8.5 percent--over three times greater. A black offender who robs and murders a white person in Virginia is four times more likely to be sentenced to death than a black offender who robs and murders a black person.

- In rape-murder incidents involving whites or blacks, the probability that the offender will be sentenced to death in Virginia is about 19 percent if the victim is black. If the victim is white, the probability is 42 percent--over two times greater. Black offenders who rape and murder white victims in Virginia are over four times more likely to be sentenced to death than those who rape and murder black victims--70 percent versus 15 percent.

- Virginia has no enforceable means of ensuring that competent lawyers are appointed to represent indigent capital defendants. Despite this, or perhaps because of it, 97 percent of those Virginia has sentenced to death since 1977 have been too poor to afford their own lawyers.

- Published statistics on attorney disciplinary actions indicate that trial attorneys appointed to represent the men who ended up on Virginia's death row are six times more likely to be the subject of bar disciplinary proceedings than are other lawyers.

- Virginia's appellate courts rarely correct errors that occur in the state's capital trials. In the 22 years since the current death penalty statute was enacted, the Supreme Court of Virginia has reversed eight percent of the death sentences it has considered. In contrast, the national average reversal rate by state supreme courts is 40 percent. Texas, the only state with more executions than Virginia, reverses 28 percent of its cases.

- The U.S. Court of Appeals for the Fourth Circuit, usually the court of last resort for Virginia's condemned, has granted relief in only one of 131 cases between 1978 and 1997.

- Virginia governors have stopped more executions than the governors of any other state. In almost all cases, the governor's action was the result of significant doubts about guilt--doubts raised by evidence that juries never heard, and that higher courts believed they could not consider.

- There are wide disparities between jurisdictions in usage of the death penalty in Virginia. Prosecutors in some jurisdictions routinely seek the death penalty, while prosecutors in other

jurisdictions never or almost never ask for it. As a result, the geography plays a significant role in the allocation of the death penalty in Virginia.

- Between 1978 and 1997, eight jurisdictions have imposed one third of Virginia's death penalties. However, those jurisdictions suffered only 10 percent of the state's potentially capital murders.

- Virginia's record keeping systems for capital cases are so rudimentary, incomplete, and inaccessible, there is no efficient way to thoroughly compile objective data about the death penalty.

APPENDIX

The following list of all Virginia jurisdictions expresses the death sentences as a percentage of the crimes that were potentially capital crimes at the time they were committed. See pages 5-6, footnote 5, for description of potential capital crimes.

Jurisdiction	City/County	Population	Death Sentences	Potential Capital Crimes	% Death Sentences
Accomack	County	31,703	0	4	0.00%
Albemarle	County	68,172	0	11	0.00%
Alexandria	City	111,182	1	36	2.78%
Alleghany	County	12,969	2	2	100.00%
Amelia	County	8,787	0	0	N/A
Amherst	County	28,578	1	24	4.17%
Appomattox	County	12,298	0	3	0.00%
Arlington	County	170,897	9	44	20.45%
Augusta	County	54,677	1	8	12.50%
Bath	County	4,799	0	0	N/A
Bedford	City	6,177	0	2	0.00%
Bedford County	County	45,552	3	9	33.33%
Bland	County	6,514	0	4	0.00%
Botetourt	County	24,992	0	6	0.00%
Bristol	City	18,426	0	0	N/A
Brunswick	County	15,987	0	5	0.00%
Buchanan	County	31,333	1	8	12.50%
Buckingham	County	12,873	0	6	0.00%
Buena Vista	City	6,406	0	0	N/A
Campbell	County	47,572	0	16	0.00%
Caroline	County	19,217	0	4	0.00%
Carroll	County	26,565	0	9	0.00%
Charles City	County	6,282	0	2	0.00%
Charlotte	County	11,688	0	0	N/A
Charlottesville	City	40,475	0	6	0.00%
Chesapeake	City	151,982	2	50	4.00%
Chesterfield	County	209,564	8	50	16.00%
Clarke	County	12,101	0	3	0.00%
Clifton Forge	City	4,679	0	0	N/A
Colonial Heights	City	16,064	0	0	N/A
Covington	City	7,198	1	3	33.33%
Craig	County	4,372	0	0	N/A
Culpeper	County	27,791	1	15	6.67%
Cumberland	County	7,825	2	7	28.57%
Danville	City	53,056	9	23	39.13%
Dickinson	County	17,620	0	6	0.00%
Dinwiddie	County	22,319	0	4	0.00%
Emporia	City	5,479	0	2	0.00%
Essex	County	8,689	0	5	0.00%
Fairfax	City	19,894	0	5	0.00%
Fairfax County	County	818,358	5	66	7.58%
Falls Church	City	9,522	0	1	0.00%
Fauquier	County	48,860	1	5	20.00%
Floyd	County	11,965	0	2	0.00%
Fluvanna	County	12,429	0	0	N/A
Franklin	City	9,864	0	6	0.00%
Franklin County	County	39,549	1	11	9.09%
Frederick	County	45,723	0	3	0.00%
Fredericksburg	City	19,027	0	5	0.00%
Galax	City	6,699	0	0	N/A
Giles	County	16,366	0	8	0.00%
Gloucester	County	30,131	0	9	0.00%
Goochland	County	14,163	1	4	25.00%
Grayson	County	16,278	0	6	0.00%
Greene	County	10,297	1	5	20.00%

(continued)

Jurisdiction	City/County	Population	Death Sentences	Potential Capital Crimes	% Death Sentences
Greensville	County	8,630	0	1	0.00%
Halifax	County	36,030	1	19	5.26%
Hampton	City	133,811	6	42	14.29%
Hanover	County	63,306	0	18	0.00%
Harrisonburg	City	30,707	0	5	0.00%
Henrico	County	217,849	4	89	4.49%
Henry	County	56,942	0	24	0.00%
Highland	County	2,635	0	0	N/A
Hopewell	City	23,101	0	2	0.00%
Isle of Wight	County	25,053	0	6	0.00%
James City	County	34,970	0	6	0.00%
King & Queen	County	6,289	0	2	0.00%
King George	County	13,527	0	2	0.00%
King William	County	10,913	0	2	0.00%
Lancaster	County	10,896	0	2	0.00%
Lee	County	24,496	0	8	0.00%
Lexington	City	6,959	0	0	N/A
Loudoun	County	86,129	0	7	0.00%
Louisa	County	20,325	0	6	0.00%
Lunenburg	County	11,419	1	1	100.00%
Lynchburg	City	66,049	0	14	0.00%
Madison	County	11,949	0	3	0.00%
Manassas	City	27,957	0	0	N/A
Manassas Park City	City	6,734	0	0	N/A
Martinsville	City	16,162	0	5	0.00%
Mathews	County	8,348	0	0	N/A
Mecklenburg	County	29,241	2	11	18.18%
Middlesex	County	8,653	1	4	25.00%
Montgomery	County	73,913	3	26	11.54%
Nelson	County	12,778	0	6	0.00%
New Kent	County	10,445	0	4	0.00%
Newport News	City	171,439	5	94	5.32%
Norfolk	City	261,250	4	315	1.27%
Northampton	County	13,061	1	7	14.29%
Northumberland	County	10,524	0	0	N/A
Norton	City	4,247	0	0	N/A
Nottoway	County	14,993	0	7	0.00%
Orange	County	21,421	0	16	0.00%
Page	County	21,690	0	2	0.00%
Patrick	County	17,473	1	1	100.00%
Petersburg	City	37,027	2	44	4.55%
Pittsylvania	County	55,672	3	18	16.67%
Poquoson	City	11,005	0	2	0.00%
Portsmouth	City	103,910	4	61	6.56%
Powhatan	County	15,328	1	8	12.50%
Prince Edward	County	17,320	0	11	0.00%
Prince George	County	27,394	1	4	25.00%
Prince William	County	215,677	9	14	64.29%
Pulaski	County	34,496	0	9	0.00%
Radford	City	15,940	0	0	N/A
Rappahannock	County	6,622	0	0	N/A
Richmond	City	202,798	12	338	3.55%
Richmond County	County	7,273	0	1	0.00%
Roanoke	City	96,509	1	60	1.67%
Roanoke County	County	79,294	2	19	10.53%
Rockbridge	County	18,350	0	3	0.00%
Rockingham	County	57,482	0	8	0.00%
Russell	County	28,667	0	0	N/A
Salem	City	23,797	0	2	0.00%
Scott	County	23,204	0	4	0.00%

(continued)

Jurisdiction	City/County	Population	Death Sentences	Potential Capital Crimes	% Death Sentences
Shenandoah	County	31,636	0	2	0.00%
Smyth	County	32,370	2	8	25.00%
South Boston	City	6,997	0	1	0.00%
Southampton	County	17,550	1	10	10.00%
Spotsylvania	County	57,403	0	9	0.00%
Stafford	County	61,236	0	3	0.00%
Staunton	City	24,461	1	5	20.00%
Suffolk	City	52,143	1	30	3.33%
Surry	County	6,145	0	0	N/A
Sussex	County	10,248	0	2	0.00%
Tazewell	County	45,960	0	15	0.00%
Virginia Beach	City	393,089	8	118	6.78%
Warren	County	26,142	2	8	25.00%
Washington	County	45,887	0	5	0.00%
Waynesboro	City	18,549	0	6	0.00%
Westmoreland	County	15,480	0	4	0.00%
Williamsburg	City	11,409	1	2	50.00%
Winchester	City	21,947	0	0	N/A
Wise	County	39,573	0	12	0.00%
Wythe	County	25,471	0	7	0.00%
York	County	42,434	1	4	25.00%
	Total:	**6,198,194**	**131**	**2127**	