

Broken Justice

The Death Penalty in Virginia



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FOREWORD

I write this foreword having just reviewed a remarkable bill that will be soon be recommended to the Virginia State Crime Commission. This bill, the product of hard work by key members of the state judiciary and the General Assembly, will abrogate the 21-Day Rule for the wrongfully convicted if they are able to prove their innocence with new evidence that could not have been discovered at the time of trial.

The measure falls short of the ideal – an innocent citizen who was convicted because his attorney failed to find proof of innocence that was available at the time of trial remains shut out of court. But this bill is an important step towards restoring truth to the criminal justice system. This bill will be passed by the Virginia General Assembly because it would be morally indefensible not to do so. This bill will become the law because every citizen of Virginia understands that a person’s innocence must always be the key to freedom.

The study that follows is an explanation of why the death penalty may one day meet the same fate in Virginia as the absurd rule that deems innocence meaningless in the criminal justice system 21 days after conviction. The administration of the death penalty in Virginia suffers from several systemic and fundamental failings. These failings raise doubts about whether the process is just and the results accurate. Without widespread reform in this system, support for the death penalty will continue to decline.

The most important lesson in this report – and it comes through loud and clear– is that Virginia’s criminal justice system is crippled by procedures that fail to ensure a reliable determination of guilt or innocence.

Steven D. Benjamin

For proponents of the death penalty, this report should serve as a primer on the reforms necessary to ameliorate concerns about the fairness of the system. But it is more than that. This report describes how the death penalty is administered in Virginia more completely than any study with which I am familiar. It should be studied carefully by any person, and certainly any political or civic leader, who seeks an informed and responsible position on this controversial subject.

Certainly not everyone will agree with each of the study’s conclusions or recommendations. What is the most vital aspect of this report, however, is not the idea that any particular set of reforms would resolve the question of whether the state should put people to death. The most important lesson in this report – and it comes through loud and clear – is that Virginia’s criminal justice system is crippled by procedures that fail to ensure a reliable determination of guilt or innocence.

For many people, this fact is the most compelling argument against the death penalty, and this study appropriately includes the fact of wrongful convictions in its discussion. These convictions are not just accidents. They are the foreseeable product of two factors presented here: prosecutorial misconduct and incompetent counsel. These factors are aggravated by insensible restrictions on discovery that permit trial by ambush.

These wrongful convictions are not caught or corrected by appellate or post-conviction review. They are preserved by unreasonably limited access to the courts, a topic that is covered very well.

It is constructive that the study discusses for the first time the uncomfortable subject of prosecutors who violate the law. A substantial number of these professionals simply do not understand their obligation to disclose exculpatory or impeachment information. Others just cheat deliberately. Whatever the reason, the result is that judges and juries are deprived of the information necessary to determine the truth of a criminal accusation reliably.

Some will say this report is too easy on those political leaders who have stood in the way of our learning the truth about Roger Coleman. Others will say that the DNA results in his case would add nothing to understanding the death penalty in Virginia and that the truth of his guilt or innocence is irrelevant to public confidence in the process that puts other citizens to death. Coleman's case, however, should receive more attention. It is a timely debate. Political leaders who do not trust citizens with the truth should be called to account. Until we cease to fear the truth in any case, and until we adopt a system of justice that better ensures conviction of the guilty and protection of the innocent, Virginians will question the reliability of the machinery of death.

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PREFACE

In April of 2000, the ACLU of Virginia published its first report on the status of the death penalty in Virginia. Since that time, a remarkable number of changes have taken place on this issue both in Virginia and throughout the country, which necessitated a second edition of the report. The first report examined four 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 the role of race. This report will look at those four areas and also add several other issues: the problem of prosecutorial misconduct in capital cases, the problem of executing mentally retarded offenders, the question of executing juvenile offenders and the danger of executing wrongfully convicted persons, as shown by the growing number of individuals who have been exonerated while on death row.

INTRODUCTION

Support for the death penalty remains constant in Virginia. The state ranks only second behind Texas in the number of people it has executed – 89 – since 1976. That was the year that the United States Supreme Court reinstated the death penalty after a four-year hiatus. This post-*Gregg* period is referred to as “the modern death penalty era.” On a per capita basis, Virginia has the fourth highest execution rate out of all thirty-eight death penalty states.

Public support for capital punishment is based on the belief that the punishment is rationally and fairly applied, and is reserved for the worst of the worst offenders. Yet there is much disturbing evidence that Virginians cannot rely on the current death penalty system to produce results that are either fair or accurate. Virginians cannot be assured that the people on death row are actually guilty, and if they are guilty, whether they should have been sentenced to death.

In 2000, Columbia University Professor James Lieberman and colleagues released a groundbreaking study. They meticulously examined every single death penalty prosecution since reinstatement of the death penalty in 1976. They calculated the number of times that death penalty cases were reversed and calculated the overall error rate in all cases and the error rate per state. The average national rate of reversal of either convictions or death sentences due to serious constitutional errors was sixty-seven percent. That means an astonishing two out of every three convictions or sentences is reconsidered. Americans should not assume that we have a fail-safe criminal justice system, and evidently they do not. A June 2000 CNN/USA Today/Gallup Poll found that eighty percent of Americans believe an innocent person has been executed in the United States in the past few years.¹

Unlike most states, however, Virginia’s error rate was only eleven percent. Virginia officials took credit for this low error rate, suggesting that it was due to the efficiency and effectiveness of Virginia courts. In actuality, the low error rate is due to a number of procedural hurdles that keep people from having their cases fairly reviewed in court. For example, the archaic and indefensible 21-day rule continues to bar people from raising claims of innocence that come to light more than twenty-one days after sentencing, even if there was no possible way the defendant could have had the evidence beforehand. No other state has such a punitive measure on its books. There may be innocent people in prison and on death row in Virginia, but they have no ability to demonstrate their innocence through the legal system. Other legal doctrines like procedural default and non-retroactivity (explained within) prevent appellate courts from examining important legal issues.

There are, in fact, many errors taking place in Virginia capital cases. The appellate courts simply are not reviewing them, and thus are not reversing convictions or sentences. Hence, the low error rate does not mean that errors aren’t occurring, just that Virginia courts aren’t correcting the errors that have been made. This report will make the case that current problems in the Virginia criminal justice system are so severe that Virginians cannot be sure that the people who end up on death row should be there.

We urge all who care about justice to join in the call for a moratorium – a temporary freeze – on executions in Virginia.

¹ CNN/USA Today Gallup Poll Release, June 30, 2000.

I. CONVICTING THE INNOCENT AND POSSIBLY INNOCENT

It is very difficult to know how many of the more than 850 people executed since 1976 may have been innocent. Attorneys and court officials generally do not continue investigation into claims of innocence after a person is put to death. There are, however, at least two cases where strong claims of innocence existed and the inmate was still put to death.

Like other death penalty jurisdictions, innocent people have been convicted and sentenced to death in Virginia. As of August 2003, 111 innocent people have been removed from death rows across the country during the modern era.² During this same time period, 876 people have been executed. This means that for every eight executions, an innocent person was wrongfully convicted and exonerated. With more than 3,500 people currently on death row, it is safe to assume a significant number are innocent. It is hard to imagine any other government program that would be allowed to put innocent lives at risk. Unfortunately, the only state that currently has in place a moratorium while making efforts to reform its system is Illinois. Virginia must follow that example.³

While only one of those 111 – Earl Washington – was from Virginia, there is disturbing evidence that Virginia has wrongfully convicted and sentenced to death at least six people: Washington was released; three others remain in prison serving life sentences; two were executed.

In October 2000, Virginia Governor Jim Gilmore granted Earl Washington absolute pardon, and he became the 89th person exonerated in the United States and the first death row inmate released in Virginia.

Proponents of the death penalty claim that the large number of people exonerated shows that “the system is working.” However, in many cases, it was good fortune rather than the criminal justice system that established innocence. In several cases, college or law school students investigated cases and unearthed essential evidence. DNA testing has also proven to be successful in helping death row inmates establish innocence. However, of the 111 innocent people released from death row during the modern era, only 12 have been exonerated by DNA evidence.

There are many factors that lead to wrongful convictions. Inadequate representation is one major problem. The quality of legal representation is notoriously abysmal for death row inmates at both the trial and appeals level. Many attorneys do not have the resources or experience required to try a capital case. Exacerbating this problem are issues of prosecutorial and police misconduct such as: relying on witnesses that have a strong motivation to fabricate testimony, keeping racial minorities off juries, neglecting to reveal mitigating evidence, coercing confessions and, at times, threatening witnesses.

In at least six cases⁴, Virginia governors have commuted death sentences to life sentences (and ultimately pardoned one person) out of concern that the person might be innocent and that the

² For a complete list of those exonerated from death row, please visit the Death Penalty Information Center at <http://www.deathpenaltyinfo.org/article.php?scid=6&did=110>.

³ Governor Parris Glendening had imposed a moratorium in Maryland for a brief period in 2002, but upon taking office in 2003, Governor Robert Ehrlich lifted it.

⁴ Another person with a possible innocence claim is William Ira Saunders. Sentenced to death in 1990 for the murder of Mervin Guill in Danville, Saunders was pardoned by Governor George Allen on September 15, 1997, on

claims of innocence were not heard by the court system. While the fear of executing an innocent person is a legitimate use of clemency power, Virginia governors should not be serving as the fail safe to prevent against executing innocent people because of an impenetrable court system that keeps claims of innocence from being heard. Governors are not using their clemency power for its traditional purpose, that of granting mercy. Those who are not innocent, but nevertheless should not be executed, are unlikely to be shown the mercy that they deserve because governors fear the political fallout of commuting a sentence unless there is a strong case of innocence.

A summary of Virginia cases where people were wrongfully convicted illustrates some of the problems that lead to innocent people ending up on death row.

Earl Washington

Earl Washington has an IQ of 69 and had been diagnosed as mentally retarded at an early age. He never completed school and worked as a day laborer. He was generally liked and had no history of violence.⁵ After he was arrested on a separate charge in 1983, police questioned him about the 1982 rape and murder of a Culpeper woman. Washington admitted to the rape and murder, along with a number of other rapes or assaults in the area. However, as police questioned Washington further, it became apparent that he did not know details of the crime. He said the victim was black when she was white. He said he stabbed her a couple of times when the killer stabbed her thirty-eight times. He gave an inaccurate description of the victim, saying she was short when she was tall. He claimed to have left behind a bloody shirt that no one who knew him had ever seen him wear.

Despite these glaring problems, the police, unaware and untrained in the proper procedures to be used when questioning mentally retarded suspects, continued questioning Earl until he had “confessed” to a crime he did not commit. Earl later recanted the statement. The “confession” became the sole piece of evidence against Earl, yet it was sufficient to convince a jury to convict him and sentence him to die.

Subsequent DNA tests confirmed that Washington did not rape the victim, who had lived long enough to tell police that there was only one perpetrator. The DNA results combined with the victim’s statement all but exonerated Washington. Shortly before leaving office in 1994, Governor Wilder commuted Washington’s sentence to life without the possibility of parole. In 2000, additional DNA tests were ordered and the results again excluded Washington as the rapist. In October 2000, Virginia Governor Jim Gilmore granted Earl Washington absolute pardon, and he became the 89th person exonerated in the United States and the first death row inmate released in Virginia.

Roger Coleman

Roger Coleman was convicted of raping and murdering his sister-in-law, Wanda McCoy, in 1981.⁶ McCoy was attacked inside her home. There was little sign of struggle and no indication that

the recommendation of the trial judge and the commonwealth’s attorney. Although their stated reason for recommending commuting Saunders’ sentence was that he was unfairly biased during the sentencing hearing, in fact there was some evidence, not disclosed by the prosecution before trial, to suggest that Saunders might have been innocent. During the appeals process, the state’s case began to unravel due to serious credibility problems with prosecution witnesses.

⁵ “Earl Washington, Jr.: An Innocent Man,” Petition for Executive Pardon, December 20, 1993.

⁶ See *supra* note 2, “Executed Despite Compelling Evidence of Innocence,” <http://www.deathpenaltyinfo.org/article.php?scid=6&did=111#ReleasedASK>.

the attacker forced his way into the house. Since Coleman had access to the house, he immediately became a suspect.

Coleman was defended by court-appointed lawyers who had never defended a murder case. The evidence used against him was largely circumstantial and weak: bits of hair, blood and semen that may or may not have been his. Blood and semen tests matched Coleman's, but were not unique to him. A jailhouse snitch, who was rewarded for his testimony, claimed that Coleman had confessed, but six other witnesses vouched for Coleman's alibi.

Considerable evidence developed post-trial suggesting Coleman was innocent. Most notably, a man with a history of violence and rape had stated that he had killed McCoy. However, because Coleman's lawyers filed a petition one day too late, the Supreme Court refused to hear his case. Due to so many "lingering uncertainties," Governor Douglas Wilder agreed to grant him clemency if he passed a polygraph test. Coleman failed the test on May 20, 1992, the date of his scheduled execution – when anxiety and nervousness were likely to affect the results – and was executed hours later. His last words were: "An innocent man is going to be murdered tonight. When my innocence is proven, I hope Americans will realize the injustice of the death penalty as all other civilized nations have."

The state opposed the testing [of Coleman's DNA] arguing that "... new tests would not contribute to public confidence in the application of the death penalty."

Since his death, improved DNA tests have become available that may establish once and for all if Coleman was the killer. Many would like the evidence re-tested; in 2002, a group of newspapers and Centurion Ministries, a New Jersey non-profit organization, offered to cover the cost of retesting Coleman's DNA. The state opposed the testing arguing that, "the paper did not have the legal standing to obtain and analyze the evidence and that new tests would not contribute to public confidence in the application of the death penalty."⁷

Joseph O'Dell

Joseph O'Dell was sentenced to death for raping and murdering Helen Schartner outside a Virginia Beach nightclub.⁸ O'Dell always maintained his innocence. At trial, the primary evidence against him was blood found on O'Dell's shirt and jacket that was consistent with the victim but could also have belonged to O'Dell. Without blood evidence, there was very little linking O'Dell to the crime. The state's expert serologist admitted that none of the blood samples could be identified as either O'Dell's or Ms. Schartner's, but reiterated repeatedly that they were "consistent."

Five years after trial, O'Dell was permitted to retest the bloodstains using DNA techniques far more powerful and accurate than those used at trial. The blood on O'Dell's shirt was conclusively not the blood of Mrs. Schartner. The blood on his jacket was found to be inconclusive. The vaginal and seminal fluids showed different enzymes.

Though the judge found that the DNA tests resulted in exclusion of that evidence, in addition to an inconclusive outcome for some of the blood, he refused to order a new trial because of O'Dell's "confession" to a jailhouse snitch. This snitch recanted his testimony, then recanted his recantation,

⁷ Eric Weiss, *DNA Testing by Media Barred*, RICHMOND TIMES DISPATCH, November 2, 2002; B01.

⁸ "Commonwealth v. Joe O'Dell and the Absence of Certainty," Petition for Executive Clemency, July 21, 1999.

then recanted again. His description of the statements made by O'Dell were vague, and did not address the details of the crime.

O'Dell's lawyers also had an affidavit claiming that another inmate executed in 1993, David Mark Pruett, had confessed to the crime. However, his conviction was upheld and his death sentence reinstated in 1996. The U.S. Supreme Court refused to review O'Dell's claims of innocence, although three Supreme Court justices said that they had serious doubt that O'Dell was in fact responsible for murdering Schartner.

O'Dell had raised a separate legal issue, as the jury had not been told that the alternative sentence to death was life in prison, but the courts held that the new rule requiring juries to be told if a defendant would never be eligible for parole was not retroactive to his case. Despite an international campaign to save his life that included appeals from Mother Teresa and Pope John Paul II, Joseph O'Dell was executed on July 23, 1997.

Joseph Giarratano

Joseph Giarratano was sentenced to death for the murders of Barbara "Toni" Kline and her daughter Michelle.⁹ In 1979, Giarratano woke up at his apartment from a drug-induced sleep to discover that his roommate and her daughter had been murdered. With no memory of the previous night, Giarratano feared that he had killed the two and turned himself over to the police.

New evidence, however, seemed to suggest Giarratano's innocence. Most notably, footprints and fingerprints discovered at the crime scene did not match his, and experts contended that a right-handed assailant stabbed the victims. Giarratano is left-handed. Giarratano's confessions also contradicted one another. Based on this evidence, Governor Douglas Wilder commuted his sentence to life in prison without the possibility of parole three hours before his scheduled execution in 1990. However, Virginia's Attorney General has repeatedly refused to agree to re-try Giarratano's case.

Herbert Bassette

Herbert Bassette was sentenced to death in 1980 for the murder of Albert Burwell, a gas station attendant, in Henrico County.¹⁰ During his first trial, Robinetta Wall testified that Tyrone Jackson had confessed to her that he, not Bassette, had killed Burwell. Neither the prosecutor nor defense attorney asked her during her testimony if she believed Jackson and she never indicated that she did not. After that trial ended in a mistrial, the state re-tried Bassette. This time during her testimony the prosecutor asked Wall if she believed Jackson's confession. She replied that she did not believe him because he was a braggart and she thought he was exaggerating to show off. There was no physical evidence tying Bassette to the crime and the prosecution's alleged eyewitnesses were all convicted felons and drug addicts. Even so, Bassette was convicted and sentenced to death, becoming the first defendant in Virginia sentenced to death solely on the testimony of accomplices.

During the appeals process, Bassette's new lawyers discovered an interview of Wall conducted by the Richmond Police – which had never been disclosed to Bassette's trial lawyer – in which she told them that Jackson had confessed to her. When they asked her if she believed him, she replied that she did because he had shot people before. Had this document been available to the defense to cross-examine Wall, Bassette may not have been convicted.

⁹ "Joseph M. Giarratano: Petition for Conditional Pardon by the Governor of the Commonwealth of Virginia."

¹⁰ "Herbert R. Bassette: A Compelling Case for Clemency."

One of the factors that the state relied on in arguing for and obtaining the death sentence against Bassette was that he had a conviction for a 1966 armed robbery in which he shot a person who was badly injured. Convicted by an all-white jury, Bassette served a lengthy sentence for that crime, but further investigation by his appellate counsel uncovered significant evidence that Bassette had not committed the robbery.

After expressing doubts about the conviction, Governor Douglas Wilder commuted Bassette's sentence to life imprisonment without the possibility of parole. Bassette, now in his sixties, remains in jail today.

Joseph Payne

Joseph Payne was sentenced to death in 1986 for the murder of David Wayne Durford, an inmate in the C1 block of Virginia's Powhatan Correctional Center.¹¹ Just before Sunday breakfast on March 3, 1985, someone padlocked Dunford's cell, splashed flammable liquid through the bars, and tossed in a lighted match. Dunford died nine days later without naming his murderer. While the jury was deliberating, the prosecution offered Payne a plea-bargain that would allow him to receive a sentence that would run concurrent to the sentence he was already serving; the offer was refused because Payne's attorneys thought he would be acquitted. Payne, however, was found guilty and ultimately sentenced to death. The main witness against him, Robert Smith, received a fifteen-year reduction in the sentence he was currently serving. Although defense attorneys knew of seventeen witnesses that could have testified on Payne's behalf, they only called one. Three hours before his execution, Governor George Allen commuted Payne's sentence to life imprisonment without the possibility of parole. In order to receive this sentence commutation, Payne had to sign away his right to appeal.

No one wants innocent people to be wrongfully convicted. The fact that Virginia boasts the second highest number of executions in the nation begs the question as to how many innocent individuals have already been put to death. Given the legal impediments in Virginia to prove innocence, it is almost certain that innocent people have been executed and sit on death row in Virginia today.

Recommendation

Until Virginians can be sure that no innocent person is sentenced to death, there should be a moratorium on all executions.

The number of innocence cases is like the canary in the coalmine. If our criminal justice systems are so flawed as to be convicting and executing innocent people, imagine all the other mistakes being made. Every mistake may not result in an innocent person being executed, but they can result in a person wrongly ending up on death row.

¹¹ "Petition for Executive Clemency of Joseph Patrick Payne, Sr.," October 22, 1996.

II. PROSECUTORS WHO DON'T FOLLOW THE LAW

As in many jurisdictions, prosecutorial misconduct is a widespread problem in Virginia. *Harmful Error*, a recent report on misconduct by the Center for Public Integrity,¹² found 131 cases of alleged prosecutorial misconduct in the state of Virginia, at least three of which involved the death penalty. The study identified a higher incidence of reported prosecutorial misconduct in Virginia than in both North Carolina (120 cases) and Maryland (103 cases).¹³

The *Harmful Error* report highlighted the conduct of one Virginia prosecutor who has prosecuted thirteen of Virginia's death penalty cases.¹⁴

In 1994, two Virginia prosecutors brought charges against Michael Wayne Williams for the capital murders of Elizabeth and Morris C. Keller.¹⁵ Sitting on the venire was a juror who had been married for 17 years to the deputy Sheriff who investigated the case and was the father of her four children.¹⁶ This same juror had been represented in her divorce by the second prosecutor. Both prosecutors knew of this juror's marriage to their witness.¹⁷ The prosecutor's trial notes stated

The court concluded, "All of the problems with the juror could have been avoided if only the two trial prosecutors had acted in accordance with their professional obligations. Their failure to do so resulted in the seating of a biased juror and deprived Williams of his right to a fair trial with an impartial jury."

"married to C. Meinhard." Prior to jury selection, the second prosecutor even asked the sheriff's deputy whether he thought the juror would harbor any ill will toward the prosecution's case as a result of the divorce. Although the second prosecutor was concerned about possible bias against the prosecution as a result of the juror's relationship with the sheriff's deputy, he apparently never considered the possibility of bias against the defense.

During *voir dire*, the judge read the names of all of the attorneys, and asked whether any of the venire members had ever been represented by any of the attorneys. The juror said nothing, and neither did the two prosecutors. The court also read the names of potential witnesses, including the sheriff's deputy, and asked whether any of the venire members were related to any of the potential witness. Again, the juror said nothing, and neither did the two prosecutors.

The juror was selected as foreperson. Only she, the sheriff's deputy and the two prosecutors knew that she had been married to the deputy and represented by one of the prosecutors. Michael Wayne Williams was convicted of capital murder and sentenced to death.

On direct appeal and state habeas, Virginia's court refused to provide an investigator for the defense team or grant the defense's discovery requests.¹⁸ Not only had the two prosecutors remained silent at trial, they had also failed to release any of the information regarding the juror for four years

¹² CENTER FOR PUBLIC INTEGRITY, *HARMFUL ERROR: INVESTIGATING AMERICA'S LOCAL PROSECUTORS* (2003), available at <http://www.publicintegrity.org/pm/>.

¹³ *Id.*

¹⁴ *Id.*

¹⁵ Frank Green, *Miscues Rule out Execution for Killer*, RICHMOND TIMES DISPATCH, April 21, 2003 at A1.

¹⁶ *Williams v. Netherland*, 181 F. Supp. 2d 604, 607 (E.D. Va. 2002).

¹⁷ *Id.* at 610.

¹⁸ *Williams v. Netherland*, 6 F. Supp. 2d 545, 547 (E.D. Va. 1998).

following the conviction. Only in the final stage of appeal, federal habeas, did William's lawyers hire an investigator, who stumbled upon information regarding the prior marriage and divorce proceedings while investigating another juror.¹⁹

Even after this information was revealed, federal courts were reluctant to order a new trial. The federal district court reasoned that a juror's lies had nothing to do with the question of Williams' guilt.²⁰ The Fourth Circuit affirmed this decision, finding that Williams' lawyers were to blame for not finding out about the relationship sooner.²¹ Michael Wayne Williams had eaten his last meal and was 50 minutes away from execution when the United States Supreme Court granted a stay and ordered an evidentiary hearing.²²

When the district court heard the evidence regarding the juror's prior relationships with the prosecutor and the prosecution witness, it threw out the conviction and sentence and ordered a new trial.²³ According to the court, "The prosecutors acted improperly and in violation of their prosecutorial obligations."²⁴ The Court went on to state, "rather than permitting the Court and defense counsel to make an independent assessment of the juror's fitness to serve as a juror, the prosecutors remained silent. In doing so, they usurped the Court's role."²⁵ The court concluded, "All of the problems with the juror could have been avoided if only the two trial prosecutors had acted in accordance with their professional obligations. Their failure to do so resulted in the seating of a biased juror and deprived Williams of his right to a fair trial with an impartial jury."²⁶

Less than a year after Williams' conviction was overturned, the prosecutor was again reprimanded and had another murder conviction overturned by a different judge on the Eastern District Court.²⁷ In that case, he withheld at least ten pieces of exculpatory evidence from the defense,²⁸ and the judge found that his conduct was a "monument to prosecutorial indiscretions."²⁹ This prosecutor continues to prosecute cases as chief deputy commonwealth's attorney.³⁰

The second prosecutor is now a general district judge. He continues to deny that he had any ethical duty to disclose the information regarding the juror.³¹

Recommendation

The Supreme Court of Virginia should publish in its opinions the names of prosecutors who it finds have engaged in prosecutorial misconduct. Furthermore, it should publish annually a list of the prosecutors and their violations, which should be made publicly available. All violations should be referred to the Virginia State Bar for appropriate sanctions.

¹⁹ Green, *supra* note 27.

²⁰ Williams, 6 F. Supp. 2d at 548.

²¹ Williams v. Taylor, 189 F.3d 421, 427 (4th Cir. 1999)

²² See Williams v. Taylor, 528 U.S. 960 (1999) (granting stay); Williams v. Taylor, 529 U.S. 420, 445 (2000) (remanding); see also Green, *supra* note 15.

²³ Williams v. Netherland, 181 F. Supp. 2d at 619 (E.D. Va. 2002).

²⁴ Id. at 611.

²⁵ Id. at 618.

²⁶ Id. at 617-18.

²⁷ Monroe v. Angelone, 2002 U.S. Dist. LEXIS 26309, at *6 (E.D. Va. Apr. 5, 2002).

²⁸ Monroe v. Angelone, 323 F.3d 286, 297 (4th Cir. 2003).

²⁹ Monroe, 2002 U.S. Dist. LEXIS 26309, at 5.

³⁰ Tom Campbell, *New Trial Ordered in '93 Slayings: U.S. Judge Cites Juror Conduct*, RICHMOND TIMES DISPATCH, January 26, 2002 at B2.

³¹ Williams, 181 F. Supp. at 610.

III. PROSECUTORIAL DISCRETION – DECIDING WHO GETS THE DEATH PENALTY

Even when prosecutors do not engage in blatant misconduct, their decisions and actions can unintentionally lead to unfair results. The decision to seek death in any given capital murder case is made by a single prosecutor elected in the jurisdiction where the murder took place. There are no 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 has done so.

Prosecutors are, of course, guided by the state capital crime statute.³² However, the statute itself does little to determine who will receive a death sentence. Instead, sentencing is frequently determined by arbitrary factors, such as geography and race.

Prosecutors in some Virginia jurisdictions routinely seek the death penalty, while prosecutors in other jurisdictions never or almost never ask for it.

³² The statute, VA. CODE ANN. § 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.
13. The willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism as defined in § 18.2-46.4.

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.

Geography

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 makes wide disparities between jurisdictions in usage of the death penalty possible.

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 individual Virginia prosecutors seek death sentences. But records kept from 1990 to 2000 on the number of capital murder indictments indicate significant disparities between jurisdictions.³³

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.

Data on Potentially Capital Cases

This study compiled data from the FBI supplemental homicide reports for the period between 1978 and 2001. We first developed a list of “potentially capital cases” – those homicides that could have been charged as capital murder.³⁴ For our purposes, potentially capital cases included those that involved at least one of four circumstances included in Virginia's death penalty statute.

Each county is considered a separate jurisdiction and each jurisdiction was ordered according to population density. Under this system, jurisdictions with a population density of less than about

³³ There are two sources of information available on capital indictments, but both are problematic. Since 1995, section 19.2-217.1 has required clerks of Virginia's circuit courts to send copies of all capital murder indictments to the clerk of the Virginia Supreme Court. Presently, four files of indictments exist, one for every year. However, these files are not complete. A review during the summer of 1999 revealed that the indictments of nine people currently on death row were missing.

The second source of information about capital indictments is the State Compensation Board, which determines staffing and funding for the offices of Virginia's commonwealth's attorneys. No agency in Virginia keeps track of the number of capital murder trials that take place within the state every year, or the number of such cases in which prosecutors ask for the death penalty.

³⁴ To determine the number and type of potentially capital crimes committed in each Virginia jurisdiction, this study analyzed data from the FBI supplemental homicide reports for 1978-2001. These reports are incident based and include information on the jurisdiction and circumstances of each incident involving at least one homicide. Each report also contains information about the age, race and sex of each victim and offender.

To narrow all the incidents to a list of incidents involving potentially capital crimes, we included only (a) those incidents whose circumstance was rape, robbery, or institutional killing (VA. CODE ANN. § 18.2-31(5), (4) and (3), respectively), and (b) those incidents with more than one victim (VA. CODE ANN. § 18.2-31(7)). We then excluded all incidents in which none of the offenders were age 16 or older (2000 Va. Ch. 361, amending VA. CODE ANN. §18.2-10).

Many incidents involved multiple victims and/or offenders. We used the number of victims to convert incidents into potentially capital crimes. We found that this approach was preferable to counting each incident as only one potentially capital crime, regardless of the number of victims, because multiple death sentences can and often are imposed for incidents involving more than one victim. We also found that this approach was preferable to counting each offender, or the product of offenders and victims, since Virginia law generally allows the death penalty only for the individual who directly caused the victim's death. Thus, under our approach, an incident involving three offenders and two victims would constitute two potentially capital crimes.

600 persons/square mile were low density, those with between about 600 and 3000 were medium density and those with more than 3000 were high density . (See appendix for a complete listing of each county and its classification). We compared cases in this manner because it was the methodology that the Joint Legislative Audit and Review Commission of the Virginia General Assembly, hereinafter JLARC, used for its “Review of Virginia’s System of Capital Punishment.”³⁵

A weakness of the JLARC study is that it did not compare all cases in all jurisdictions because that data was not readily available. To obtain their data, JLARC staff had to travel to each county and look through the court records. To save on time and money, they picked out selected jurisdictions instead of looking up each case. Thus their study is representative of the state but not a complete picture of the state. If data were regularly collected, JLARC could update its analysis on a regular basis without the need to go to such extraordinary lengths.

The results of this study revealed significant disparities between Virginia jurisdictions.

Population Density	Potentially Capital Cases	Death Sentences	Death Sentence Rate
Low	454	65	14%
Medium	431	79	18%
High	451	37	8%

The table above indicates that individuals who are arrested for potentially capital crimes in medium-density jurisdictions are over twice as likely to receive a death sentence than those in high-density jurisdictions.

These findings are corroborated by the recent study conducted by the JLARC study. It found that “local prosecutors do not consistently apply the death penalty statutes based on [statutory] factors. Cases that are virtually identical in terms of the premeditated murder and predicate offense, the associated brutality, the nature of the evidence and the presence of the legally required aggravators are treated differently by some Commonwealth’s Attorneys across the State.”³⁶

The JLARC study found that prosecutors are more than four times as likely to seek the death penalty in medium-density jurisdictions as in high-density ones.³⁷ The case examples on the following page, which are taken from the JLARC Study, are typical of the differences between jurisdictions.³⁸ The following table from the JLARC report gives an example of cases with similar fact patterns that were pursued as death cases in low and medium density jurisdictions, but not in a high-density jurisdiction.³⁹

³⁵ JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION OF THE VIRGINIA GENERAL ASSEMBLY, REVIEW OF VIRGINIA’S SYSTEM OF CAPITAL PUNISHMENT Table 4 (2000) (hereinafter JLARC STUDY).

³⁶ *Id.* at 28.

³⁷ *Id.* at 44.

³⁸ *Id.* at 50.

³⁹ See note 8 at VII.

Type of Jurisdiction	Low Density	Medium Density	High Density
Case Summary	A white male abducted a white woman from her place of work, took her to a remote location, raped her, slit her throat and left her in a river. She died as a result of wounds while crawling away from the river.	A white male raped his estranged wife and then stabbed and strangled her to death because he thought she was having a sexual affair with a black man. After she was dead, he defiled her body, and then asked a neighbor to call the police.	A black male raped and stabbed to death a white female in her home after one of the men he was with forced his way into her apartment.
Evidence of Guilt	When in custody, the defendant confessed to a law enforcement officer, DNA implicated him and there was a witness to the circumstances of the offense and a witness who heard him admit to the offense.	When in custody, the defendant confessed to a law enforcement officer, DNA implicated him and there was a witness who heard him admit to the offense.	When in custody, the defendant confessed to a law enforcement officer, DNA evidence implicated him and there was an eyewitness to his offense (co-defendant).
Evidence of Aggravation	The victim suffered sexual abuse and throat slashing. The defendant had no prior felony convictions.	The victim suffered sexual abuse, stab wounds and strangulation. The defendant had no prior violent felony convictions.	The victim suffered sexual abuse and multiple stab wounds. The defendant had a rape conviction at the time of his arrest for the instant offense.
Result	The local prosecutor argued for the death penalty	The local prosecutor argued for the death penalty	The local prosecutor entered into a plea agreement; the defendant pled guilty to capital murder with a life sentence.

How Prosecutorial Decision-Making Leads to Racial Disparities

An analysis of criminal justice statistics in Virginia suggest that the race of the victim and of the defendant play a large role in whether or not the death penalty is imposed.

Overall, a death sentence was imposed in 13.5% of potentially capital cases between 1978 and 2001. In cases where the victim was white, a death sentence was imposed in 16.7% of the cases.

In cases where the victim was black, a death sentence was imposed in only 5.3% of the crimes. This suggests that a person arrested for a potentially capital crime was over three times as likely to be sentenced to death when the victim was white as when the victim was black.

The table below depicts the results of this study’s analysis of the relationship between race and the death penalty in Virginia. It displays the rate at which a death sentence was imposed for potentially capital crimes for each white-black racial combination.

Death Sentence Rate for Potentially Capital Crimes			
	White Offender	Black Offender	All Offenders
White Victim	14.5%	21.8%	16.7%
Black Victim	21.1%	4.9%	5.3%
All Victims	16.6%	11.2%	13.5%

The next table presents this discrepancy from another angle. It depicts, in italics, the percentage of potentially capital crimes committed with each racial combination, and, in bold letters, the percentage of capital crimes resulting in a death sentence with each racial combination.

Percentages of Potentially Capital Crimes and of Death Sentences						
	<i>Potentially Capital Crimes</i>	Death Sentences	<i>Potentially Capital Crimes</i>	Death Sentences	<i>Potentially Capital Crimes</i>	Death Sentences
	White Offender		Black Offender		All Offenders	
White Victim	<i>38.6%</i>	41.4%	<i>16.5%</i>	26.5%	<i>56.8%</i>	70.2%
Black Victim	<i>1.4%</i>	2.2%	<i>38.5%</i>	13.8%	<i>40.8%</i>	16.0%
All Victims	<i>40.5%</i>	49.7%	<i>56.1%</i>	46.4%	<i>100.0%</i>	100.0%

This table also indicates that race plays a substantial role in death sentences, but only in cases where the offender is black. Where the offender is white, the percentages remain relatively unchanged between potentially capital crimes and death sentences. But when the defendant is black, discrepancies based on the race of the victim become striking; white victims are vastly overrepresented, and black victims are vastly underrepresented.

These disparities are equally striking when specific categories of capital crime are studied. Considering only rape-murder or only robbery-murder reduces the effect of over- and under-inclusiveness inherent in a review of all cases. Limitations in the FBI’s coding system meant we had to limit “potential capital crimes” to those involving one of four types of circumstances: rape, robbery, multiple victims and institutional killing. While these circumstances formed the basis of 90% of death sentences, another 10% were based on other circumstances, such as murder for hire or order of a police officer.⁴⁰ Focusing on just one category of capital murders eliminates the effects of these additional circumstances.

⁴⁰ Of the 182 death sentences included in our study, eleven were based solely on murder of a police officer, seven were based solely on murder for hire, and one was based on the murder of more than one person within a three-year period.

The following two tables depict the same analysis displayed above, restricted to cases involving rape-murder and robbery-murder.

Death Sentence Rate for Potentially Capital Rape-Murders			
	White Offender	Black Offender	All Offenders
White Victim	64.7%	100.0% ⁴¹	74.4%
Black Victim	100.0% ⁴¹	28.6%	31.8%
All Victims	74.3%	63.3%	70.8%

Percentages of Potentially Capital Rape-Murders and of Death Sentences						
	<i>Potential Capital Crimes</i>	Death Sentences	<i>Potential Capital Crimes</i>	Death Sentences	<i>Potential Capital Crimes</i>	Death Sentences
	White Offender		Black Offender		All Offenders	
White Victim	52.3%	47.8%	13.8%	19.6%	66.2%	69.6%
Black Victim	1.5%	2.2%	32.3%	13.0%	33.8%	15.2%
All Victims	53.8%	56.5%	46.2%	41.3%	100.0%	100.0%

Death Sentence Rate for Potentially Capital Robbery-Murders			
	White Offender	Black Offender	All Offenders
White Victim	16.0%	19.0%	17.0%
Black Victim	15.4%	4.9%	5.3%
All Victims	18.3%	11.0%	13.0%

Percentages of Potentially Capital Robbery-Murders and of Death Sentences						
	<i>Potential Capital Crimes</i>	Death Sentences	<i>Potential Capital Crimes</i>	Death Sentences	<i>Potential Capital Crimes</i>	Death Sentences
	White Offender		Black Offender		All Offenders	
White Victim	24.7%	30.3%	25.5%	37.1%	52.6%	68.5%
Black Victim	1.9%	2.2%	41.6%	15.7%	44.5%	18.0%
All Victims	27.2%	38.2%	69.0%	58.4%	100.0%	100.0%

In cases of rape-murder, the data suggests that a defendant whose victim was white is 2.3 times more likely to receive the death penalty than one whose victim was black. In cases of robbery-murder, the data suggests that a defendant whose victim was white is 3.2 times more likely to receive

⁴¹ Due to underreporting and misclassification in the FBI Supplemental Homicide Reports, it is possible that not every interracial rape-murder has resulted in the death penalty. It should also be noted that only one reported rape-homicide involved a white offender and black victim.

the death penalty than one whose victim was black. These statistics demonstrate that the race of the victim plays a role in the charging and sentencing decisions of a large number of cases.

Race of the victim more important if the defendant is black

Further analysis suggests that the race of the victim is much more likely to play a role in these decisions if the defendant is black than if the defendant is white. While the death penalty was imposed in 70.8% of all potentially capital rape-murders, black defendants charged with raping and murdering a white victim were sentenced to death in nearly every case, while black defendants charged with raping and murdering a black victim were sentenced to death in only 28.6% of the cases. This suggests that a black defendant is 3.5 times more likely to receive the death penalty for the rape and murder of a white victim than for the same crimes against a black victim.

While the death penalty was imposed in 13.0% of all potentially capital robbery-murders, black defendants charged with robbing and murdering a white victim were sentenced to death in 19.0% of the cases, while black defendants charged with robbing and murdering a black victim were sentenced to death in only 4.9% of the cases. This suggests that a black defendant is 3.9 times more likely to receive the death penalty for the robbery and murder of a white victim than for the same crimes against a black victim.

Other statistics indicate that the government is capable of making sentencing decisions in capital cases that aren't overwhelmingly based on the race of the victim. For instance, the data suggest that a white defendant charged with robbery-murder is about as likely to receive the death penalty if the victim was white as if the victim was black. When the defendant is black however, the race of the victim seems to play a dominant role. A black defendant appears to be far more likely to receive the death penalty if the victim was white than if the victim was black.

These indications are corroborated by other studies that have examined race and the death penalty in Virginia. In "Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization,"⁴² Samuel Gross and Robert Mauro found that in Virginia, "the overall odds that an offender would receive the death penalty were much greater for killing a white victim than for killing a black victim."⁴³ The effect of the victim's race was not strong enough in all cases for the researchers to conclude that it was statistically significant. However, when researchers focused only on cases with a black suspect, the effect of the victim's race became stronger and obtained statistical significance.⁴⁴

Similarly, the JLARC study found that 70% of the capital-eligible cases in which the prosecutor sought the death penalty involved at least one white victim, while only 45% of those in which the prosecutor did not seek the death penalty involved at least one white victim. The JLARC study also found that while 21% of all defendants who were charged with a death-eligible crime in which all of the victims were black faced the death penalty, this percentage jumped to 44% when at least one of the victims was white. Finally, the statistics in the JLARC study "appear to indicate that prosecutors are over three times more likely to seek the death penalty if the victim is white."⁴⁵

⁴² Samuel R. Gross & Robert Mauro, *Patterns of Death: An Analysis of Racial Disparities in Capital Sentencing and Homicide Victimization*, 37 STAN. L. REV. 27 (1984)

⁴³ *Id.* at 96.

⁴⁴ *Id.* at 97, n. 187 (1984).

⁴⁵ JLARC STUDY, *supra* note 36, at 43.

Why the JLARC study is wrong

Despite the disturbing nature of these findings, the authors of the JLARC study claimed that these discrepancies actually had nothing to do with race. The authors asserted that data “revealed that black victims in death-eligible cases were more likely to be involved in illegal activities such as drug use, drug dealing, and prostitution.”⁴⁶ Some prosecutors believe this diminished their value as sympathetic victims, thereby decreasing the likelihood of a successful outcome in a capital murder case. Rather than risk losing in the sentencing phase of a capital murder trial, some prosecutors stated that they would either negotiate a plea agreement with the defendant’s lawyers or try the defendant for first-degree murder⁴⁷ (as opposed to capital murder).

This perfunctory conclusion is disappointing because it is based on subjective biases rather than objective variables. The authors of the study dismissed any racial disparities in Virginia with the conclusion that once the “character of the victim” was factored into the analysis, racial discrepancies lost their statistical significance. The authors made the extraordinary assumption that “black victims in death-eligible cases were more likely to be involved in illegal activities,”⁴⁸ and therefore, had weaker characters. They made this presumption without presenting statistical evidence to corroborate it. Thus, there is no way to judge the validity of the study’s conclusion that black victims of capital crime are far more likely to have “weaker characters” than their white counterparts.

Furthermore, the manner in which researchers decided whether particular victims had “solid character” was subjective and unreliable. After reporting a number of objective variables such as age, sex and race, researchers were asked to rate the character of each victim as one of six types: normal, prostitute, drug dealer, drug user/buyer, gang member, other negative or inmate. Other possible categories, such as “adulterer,” “spousal abuser” or “alcoholic,” were not included. Individual researchers classified the character of every victim based on these subjective labels with little apparent guidance.⁴⁹ Furthermore, these determinations were all made based on reviews of indictments and interviews with prosecutors. Prosecutors have virtually no reason to include negative information about the victim’s character in a murder indictment and every incentive to downplay weaknesses in the character of the victim in discussing the case.

Every defendant is entitled to due process and a fair trial, which includes the right to be free from charging and sentencing decisions that are substantially influenced by irrelevant factors such as the race of the victim.

Finally, information about the character of a victim is generally irrelevant and inadmissible in criminal cases, except in cases of self-defense.⁵⁰ The statutes defining murder and capital murder make no mention of the victim’s “character.” In many cases, the prosecutor might be able to successfully object to the admission of evidence that the victim was a prostitute, drug dealer/buyer or gang member.

⁴⁶ *Id.*

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ For instance, the form that researchers used does not indicate any standards for the source of such an allegation (a bald accusation by the defendant when arrested might suffice). Perhaps most importantly, the form does not require that the alleged prostitution, drug involvement or gang activity have anything at all to do with the murder.

⁵⁰ *Canipe v. Commonwealth*, 491 S.E.2d 747, 752 (Va. 1997).

Every defendant is entitled to due process and a fair trial, which includes the right to be free from charging and sentencing decisions that are substantially influenced by irrelevant factors such as the race of the victim. Additionally, the families of every murder victim are entitled to a charging decision that is not based on speculation about the victim's character. The memory of every victim, including prostitutes and drug dealers, is entitled to respect. In Virginia, race appears to play a role in who is more likely to be charged and sentenced to death.

Recommendations for Uniformity and Fairness

Every county attorney's office should keep statistics on every potentially capital case in Virginia including the race, ethnicity, gender and age of the victim and offender. The Attorney General should establish guidelines to use as recommendations for prosecutors to aid them in deciding which cases to pursue as capital cases. This should ensure more uniformity throughout the state.

IV. ACCESS TO THE COURTS

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, at least in theory, subject to extensive review by appeals courts after conviction and sentencing. Because the entire process takes time and can involve dozens of different judges, it is assumed that every capital defendant in the United States receives a fair and high-quality trial, and if he or she doesn't, an appellate court will correct that.

Unfortunately, this assumption is not valid in Virginia, where archaic and unfair procedural rules block access to the courts. As noted earlier, two governors have stopped the executions of four condemned prisoners because even though their cases passed through Virginia's judicial system serious doubts still existed concerning their actual guilt. In these cases, clemency, intended for the exercise of mercy, had to be invoked because of the danger that unfair results were not addressed by the courts. The reason: at every stage of review, Virginia courts are faced with a myriad of legal doctrines and practices that compel them to overlook exculpatory evidence and violations of a capital defendant's right to a fair trial.

Death penalty cases usually proceed through three phases of review. The first stage is direct appeal. In Virginia, a direct appeal to the state's highest court is automatic. The next phase is state collateral review. In most states, an inmate begins this process by filing a petition with the trial court, where the inmate may present new evidence, such as evidence of innocence, to be considered by the court before making the decision. In Virginia, the writ must be presented directly to the Virginia Supreme Court, which may refer the case to the trial court to hear evidence but usually denies the petition out of hand without a hearing. This is very unusual as most states routinely hold hearings on habeas petitions. The third and final stage is federal habeas corpus. This is a new civil lawsuit against the prison warden, alleging that the inmate's detention violates the law, but this petition is limited to questions of federal law. The petition is initially filed with a United States District Court. In Virginia, this is either the Eastern or Western district of Virginia, depending on where the trial took place. On appeal, it is reviewed by a United States Circuit Court of Appeals. For Virginia cases, this is always the Fourth Circuit. At the conclusion of each of these three phases, the case may be appealed to the United States Supreme Court, but chances that the Court will review the case are slim. The Court receives about 7,000 petitions in civil and criminal cases a year, and chooses to review only about 150 of them.⁵¹ Most years, it hears only three or four death penalty cases.

One of the most disturbing rules is the "21-Day Rule," which is desperately in need of reform. After trial, this rule prevents the trial court from considering new evidence more than 21 days after sentencing, no matter how conclusively the evidence proves that the defendant is innocent.

The 21-Day Rule

One of the most disturbing rules is the "21-Day Rule," which is desperately in need of reform. After trial, this rule prevents the trial court from considering new evidence more than 21 days after sentencing, no matter how conclusively the evidence proves that the defendant is innocent. Virginia's "21-Day Rule" imposes the shortest deadline in the country on death-sentenced defendants

⁵¹ <http://www.supremecourtus.gov/about/justicecaseload.pdf>.

who seek to introduce new evidence.⁵² In fact, 34 states have no time constraints at all for introducing new evidence of innocence. Others have time limitations of one to three years. Only three states – Virginia, Arizona and Missouri – require new evidence to be introduced within days of completing the trial.⁵³ 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,⁵⁴ Herbert Bassette and Joseph Payne—remain in prison for this reason.⁵⁵ Meanwhile, those with recently discovered evidence of innocence that the governor does not find persuasive or chooses to ignore are also without recourse.⁵⁶

After twenty-one days, courts are prevented from granting a new trial, regardless of the strength of the newly discovered evidence. Over the years, the Virginia Supreme Court and legislature have made attempts to amend this rule. In 2003, the Virginia State Crime Commission held a series of public meetings on the 21- Day Rule, but the solution proposed by the Commission is not adequate to fix the problem.

Progress was made in 2001 when the legislature carved out an exception to the 21-Day Rule for DNA evidence.⁵⁷ While this was a commendable first step toward ensuring that innocent people aren't executed, DNA is only one form of exculpatory evidence. In fact, it is frequently not a sufficient means of proving innocence because there is no physical evidence to test, the evidence has been destroyed or damaged, or because there were legitimate reasons to explain the presence of the person's DNA at the crime. For those cases in which the prosecution's key witness recants his testimony, another person credibly confesses to the crime, or a reliable alibi surfaces after trial, death row inmates in Virginia are still without recourse.

Virginia has a moral obligation to its citizens to see that justice is administered fairly, including considering new evidence that comes to light after trial. True justice will never be possible in Virginia until this rule is reformed.

Non-Retroactivity

While the 21-Day Rule bars the introduction of new factual evidence in a case, several doctrines forbid applying new legal doctrines in death cases, which sometimes leads to unfair results. Under the federal doctrine of non-retroactivity, federal courts that review state court decisions are not

⁵² “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 supersede as 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.” VA. SUP. CT. R. 1:1.

⁵³ “Post-Conviction Relief Mechanisms in Other States,” memorandum prepared for the 21- Day Rule Task Force of the Virginia Crime Commission, Appendix 1.

⁵⁴ 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*, WASH. POST, Feb 21, 1991, at B3.

⁵⁵ As noted previously, Earl Washington was exonerated by DNA evidence and pardoned by Governor Jim Gilmore in late 2000 and released in 2001.

⁵⁶ For more information about persons whose convictions and death sentences were later cast into doubt by exculpatory evidence, see Innocence section.

⁵⁷ 2001 Va. Ch. 874, creating VA. CODE ANN. 19.2-270.4:1, 19.2-327.1-6

permitted to apply new laws that have developed since the time of the trial and conviction. Many federal courts are flexible and do not follow the rule strictly if doing so would create an injustice. However, federal courts in Virginia are notorious for following the strict letter of this rule, regardless of the result.

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.⁵⁸ 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 United States 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 United State Supreme Court affirmed this decision.⁵⁹ Gray was executed Feb. 26, 1997.⁶⁰

The doctrine of non-retroactivity also operates in a second, entirely distinct way to deprive death row inmates of their constitutional rights. Not only are federal habeas courts restricted to verifying that existing law was applied correctly in the individual’s case, but they must only consider the law existing at the time direct review became final.

An example of the unfair consequences of this rule is the Lonnie Weeks case. Lonnie Weeks was accused of the shooting death of a Virginia police officer and charged with capital murder.⁶¹ The Court determined that Weeks was indigent and appointed him counsel. His attorney asked for the appointment of ballistics and pathology experts, which Weeks could not afford on his own. The trial court denied these requests without a hearing. In 1996, the Virginia Supreme Court held in *Husske v. Commonwealth* that that the 14th Amendment requires that Virginia appoint experts to assist indigent defendants if “the services of an expert would materially assist him in the preparation of his defense and . . . the denial of such services would result in a fundamentally unfair trial.”⁶² On Federal Habeas, the Fourth Circuit held that because *Husske* announced a “new rule,” it was not applicable to

⁵⁸ *Gray v. Thompson*, 58 F.3d 59 (4th Cir. 1995).

⁵⁹ *Gray v. Netherland*, 518 U.S. 152 (1996).

⁶⁰ Bob Piazza, *Gray Executed For Slaying Store Manager*, RICHMOND TIMES DISPATCH, February 27, 1997 at B1.

⁶¹ *Weeks v. Angelone*, 176 F.3d 249 (4th Cir. 1999).

⁶² *Husske v. Commonwealth*, 252 Va. 203, 212 (Va. 1996).

Weeks' case.⁶³ Despite the fact that he was denied expert assistance without the opportunity to show that he needed the experts, Lonnie Weeks was executed on March 16, 2000.⁶⁴

The doctrine of non-retroactivity in Virginia has had the most far-reaching effect in cases where the defendant sought to tell the jury that, if he is sentenced to life imprisonment, he will never be eligible for parole. In Virginia, in order to impose a death sentence, the jury must first find either (a) that the crime involved vileness or (b) that the defendant will pose a future danger to society if not executed.⁶⁵ Until recently, when juries considered the issue of future dangerousness, defense attorneys were not allowed to tell them that the defendant would never be eligible for parole.⁶⁶

In some cases, prosecutors exploited this rule by suggesting to jurors that unless they sentenced the defendant to death, he would get out of jail later and commit more crimes, even though they knew that the defendant serving a life sentence would never leave prison. In the case of Joseph O'Dell, discussed previously, the prosecutor noted that O'Dell had been convicted of robbery by a

As these cases demonstrate, the doctrine of non-retroactivity can result in a person being executed even when he was sentenced by rules the United States Supreme Court found to be unconstitutional.

Florida court and was later released on parole. He stated, "You may still sentence him to life in prison, but I ask you ladies and gentlemen . . . All the times he has committed crimes before and been before other juries and judges, no sentence ever meted out to this man has stopped him. Nothing has stopped him, and nothing ever will except the punishment that I now ask you to impose."⁶⁷ In fact, the prosecutor knew that if sentenced to life, O'Dell would never get out of jail.

In other cases, judges refused to tell the jury about the defendant's parole ineligibility even after jurors specifically asked about the issue. In the sentencing phase of Richard Townes' trial, the jury forewoman told the judge "there seems to be some question as to parole eligibility requirements in a life sentence."⁶⁸ The judge responded, "The question relating to parole eligibility is not a matter appropriate for consideration by the jury. You must base your verdict on the matters that are before you and the ranges of sentence that are set forth in the Court's instruction. I regret that I can't give you any more answer than that."

The Virginia Supreme Court repeatedly upheld the practice⁶⁹ until 1994, when, in *Simmons v. South Carolina*, the United State Supreme Court put a stop to this policy, holding that where future dangerousness is at issue the jury must be informed if the defendant is ineligible for parole.⁷⁰

At the time *Simmons* was decided, numerous Virginia death row inmates had been sentenced to death by juries operating under the misimpression that a death sentence was the only way to assure that the defendant would not be released. However, in Joseph O'Dell's case, the United State

⁶³ *Weeks*, 176 F.3d at 266.

⁶⁴ Frank Green, *Weeks Dies by Injection*, RICHMOND TIMES DISPATCH, March 17, 2000 at B1.

⁶⁵ VA. CODE ANN. § 19.2-264.2.

⁶⁶ *Williams v. Commonwealth*, 234 Va. 168, 179 (1987).

⁶⁷ *O'Dell v. Netherland*, 521 U.S. 151, 169 (1997).

⁶⁸ *Townes v. Murray*, 68 F.3d 840, 847 (4th Cir. 1995).

⁶⁹ See, e.g. *Eaton v. Commonwealth*, 240 Va. 236, 248 (1990); *Watkins v. Commonwealth*, 238 Va. 341, 351 (1989); *Turner v. Commonwealth*, 234 Va. 543, 551 (1988); *O'Dell v. Commonwealth*, 234 Va. 672, 701 (1988); *Williams*, 234 Va. at 179 (1987); *Poyner v. Commonwealth*, 229 Va. 401, 432 (1985).

⁷⁰ *Simmons v. South Carolina*, 512 U.S. 154, 171 (1994).

Supreme Court held that *Simmons* announced a “new rule” that could not be applied retroactively.⁷¹ Joseph O’Dell, Dennis Eaton, Dawud Mu’Min, Richard Townes and Everett Mueller were all executed post- *Simmons*, even though the juries that imposed the death sentences never heard about their parole ineligibility.⁷² As these cases demonstrate, the doctrine of non-retroactivity can result in a person being executed even when he was sentenced by rules the United States Supreme Court found to be unconstitutional.

Procedural Default

In criminal trials, lawyers are expected to object in various situations that may unfairly disadvantage their clients. When the lawyer objects, the claim is “preserved,” so that the appellate court can consider the claim later on if the person is convicted. If the lawyer fails to object, the issue is deemed “waived,” and the lawyer cannot raise it on appeal. Sometimes, however, the lawyer’s failure to object was obviously wrong and substantially affected their clients’ rights. In those cases – called “plain error” – courts will usually consider the merits of a legal issue even if the objection has not been properly preserved.⁷³ While this standard is a tough one to meet, “plain-error review” guarantees that criminal defendants are not forced to pay the price of their lawyer’s mistakes. Courts in most states regularly invoke the plain-error doctrine to avoid injustices.

In Virginia, however, courts do not follow the “plain-error” doctrine. Virginia Supreme Court Rule 5:25⁷⁴ establishes a different test – for good cause shown or to attain the ends of justice – and the court has *never* invoked this exception during the modern death penalty era.

The procedural default doctrine is an extension of the rule that lawyers must object or they will waive their clients’ rights. With procedural default, a lawyer who properly objects at trial, but then fails to raise the objection on appeal, may not raise the issue in any subsequent post-conviction proceedings.

This doctrine was first raised in the case of *Slayton v. Parrigan*.⁷⁵ A Virginia Statute extends the rule even further, providing that any claim that is not raised in an initial habeas petition may not be raised in any subsequent petitions.⁷⁶ If a lawyer fails to raise the issue in any of the various procedures, then the client is waived from having that issue reviewed later on. At each step of the way, Virginia courts create hurdles making it difficult to review legal issues.

After direct appeal and state post-conviction, the defendant finally gets a chance to bring his claim in federal court. But when federal courts review state court decisions on habeas, the United States Supreme Court’s decision in *Coleman v. Thompson*, applies, which prevents federal courts from reviewing state court cases that have been dismissed on procedural grounds.

Roger Coleman, whose case was discussed in the opening section on innocence, was convicted of raping and murdering his sister-in-law, Wanda McCoy, in 1981. The case against him was largely circumstantial and weak and his lawyers had never represented anyone in a murder case.

⁷¹ *O’Dell*, 521 U.S. at 166.

⁷² *O’Dell*, 234 Va. at 701; *Eaton*, 240 Va. at 248; *Mu’Min v. Pruett*, 125 F.3d 192, 199 (4th Cir. 1997); *Townes*, 68 F.3d at 847; *Mueller v. Murray*, 252 Va. 356, 366 (1996).

⁷³ FED. R. CRIM. PRO. 52(b).

⁷⁴ VA. SUP. CT. R. 5:25.

⁷⁵ *Slayton v. Parrigan*, 215 Va. 27 (1974).

⁷⁶ VA. CODE ANN. § 8.01-654(B)(2) (“No writ shall be granted on the basis of any allegation of facts of which petitioner had knowledge at the time of filing any previous petition.”)

Post-trial evidence – including DNA – developed suggesting Coleman was innocent.⁷⁷ Coleman raised the new issues in circuit court, but was denied relief. He appealed to the Virginia Supreme Court, but because his appeal was filed three days late, the Virginia Supreme Court refused to hear it. Coleman then brought his case to federal court, which refused to consider the merits of Coleman’s claims because the Virginia Supreme Court had dismissed his appeal on the procedural grounds that he had filed it three days late. Coleman appealed this decision to the United State Supreme Court, which affirmed the district court’s ruling. Because Coleman’s lawyer filed his petition three days late, no federal or appellate court ever considered the merits of Coleman’s innocence.⁷⁸ The state of Virginia executed Coleman on May 20, 1992, despite substantial doubts about his guilt.⁷⁹

Slayton, Coleman, Rule 5:25 and the Virginia habeas statute combine to form one very simple rule for capital defendants in Virginia: their lawyers must object to every conceivable error at trial and must renew every one of their clients’ complaints at each step of the appeals process.⁸⁰ If the lawyer fails to do so, any violation or error 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 die because of their lawyers’ mistakes.

Putting form over substance – Other cases of injustice

Earl Bramblett

Earl Bramblett was arrested and charged with the 1994 murders of four members of the Hodges family.⁸¹ He was convicted and sentenced to death based on evidence that was, with one exception, entirely circumstantial. The only direct evidence offered against Bramblett was the testimony of Tracy Turner, a jailhouse informant who shared a cell with Bramblett after his arrest.

The district court denied the hearing, finding that even if [the informant’s] testimony was a complete lie and even if the prosecutors intentionally used perjured testimony, Bramblett was not entitled to relief because the claims were procedurally defaulted due to Bramblett’s failure to raise them on direct appeal. Earl Bramblett was executed on April 9, 2003.

At trial, Turner testified that Bramblett told him that he had committed the murder, but later testified that a special agent of the Virginia State Police fed him the details of the murder from which he manufactured a confession that he attributed to Bramblett. On federal habeas, Bramblett’s lawyers argued that the government knowingly elicited perjured testimony during the trial and requested a hearing. The district court denied the hearing, finding that even if Turner’s testimony was a complete lie and even if the prosecutors intentionally used perjured testimony, Bramblett was not entitled to relief because the claims were procedurally defaulted due to Bramblett’s failure to raise them on direct appeal.⁸² Earl Bramblett was executed on April 9, 2003.

⁷⁷ *Coleman v. Thompson*, 501 U.S. 722 (1991).

⁷⁸ Peter Applebome, *Virginia Executes Inmate Despite Claim of Innocence*, N.Y. TIMES, May 21, 1992, at A20.

⁷⁹ For more information on Coleman’s case, see *infra* p. 5.

⁸⁰ Because claims of ineffective assistance of counsel are not addressed on direct appeal, the failure to raise such a claim on direct does not subject the claim to procedural default. *Walker v. Mitchell*, 224 Va. 568, 570 (1983).

⁸¹ *Bramblett v. True*, 59 Fed. Appx. 1 (4th Cir. 2003).

⁸² *Id.*

Ronald Hoke

Ronald Hoke was convicted in 1986 of the rape and murder of a Petersburg woman after police unlawfully withheld interview notes with men whose sexual encounters with the victim corroborated Hoke's defense.⁸³ The United States District Court recognized the error but the United States Court of Appeals for the Fourth Circuit reversed, holding that the issue was procedurally barred and the claim lacked merit.⁸⁴ Ronald Hoke was executed on December 16, 1996.

Tommy Strickler

Another such case is that of Tommy Strickler,⁸⁵ sentenced to die for the 1990 murder of a James Madison University student. Prosecutors failed to disclose eight documents showing that their main eyewitness had told contradictory stories to police. The Fourth Circuit refused to order a new trial, citing the procedural default rule.⁸⁶ Tommy Strickler was executed on July 21, 1999.

Dana Edmonds

On July 22, 1983, Dana Edmonds was arrested for the murder of a Danville grocer. The state appointed him a lawyer. Three months later, Edmonds' former girlfriend, Laverne Coles, was arrested and charged with assaulting her 10-year-old son. The same lawyer appointed to represent Edmonds accepted an appointment to represent Coles, even though he knew that Coles would likely testify against Edmonds. On the second day of Edmonds' trial, Coles testified that Edmonds made incriminating statements. Edmonds' attorney limited cross-examination, which failed to reveal that Coles had been diagnosed as a paranoid schizophrenic who was prone to abusive behavior and delusions, and that she had at least two prior convictions for battery, in addition to the pending assault charge. Coles' credibility would have also been relevant at sentencing, since three assault convictions in Edmonds' prior record were based on allegations made by Coles. The federal district court held that procedural default precluded granting relief on Edmonds' conflict-of-interest claim. The court, however, did recognize the absurdity of a doctrine that compels such a result:

Wholly apart from the goal of attaining reliable determinations of guilt and innocence, our judicial system should operate in such a manner that defendants are assured of receiving their constitutional protections before the state exacts punishment for the violation of its laws. It is the opinion of the court that the system failed to provide Mr. Edmonds these protections. As a result, this court was left to perform an arguably speculative examination of *what would have happened if Edmonds had received his constitutional right to conflict-free representation.*

Nevertheless, bound by case precedent and the enigmatic doctrine of procedural default, the court must deny the Petitioner's motions for stay of execution and writ of habeas corpus. Edmonds' claim that his 6th Amendment rights were violated is procedurally barred from a collateral review on the merits. An appropriate order shall be entered this day.⁸⁷

The Fourth Circuit affirmed, withholding comment on the district court's insights. Edmonds was executed on January 25, 1995.

⁸³ *Brady v. Maryland*, 373 U.S. 83 (1963), cross-reference to prosecutorial misconduct section.

⁸⁴ *Hoke v. Netherland*, 92 F.3d 1350 (1996).

⁸⁵ *Strickler v. Pruett*, 149 F.3d 1170 (4th Cir. 1998) (unpublished opinion available at 1998 U.S. App. LEXIS 12805; 1998 WL 340420).

⁸⁶ *Strickler v. Greene*, 527 U.S. 263, 296 (1999).

⁸⁷ *Edmonds v. Jabe*, 874 F. Supp. 730, 738 (1995).

Arthur Ray Jenkins

Arthur Jenkins, who had an IQ of 65 and was taken from his home at age seven because family members were sexually abusing him, killed an uncle he said had molested him and the uncle's friend.⁸⁸ Among those testifying at Jenkins' trial was Robert A. Clendenen, Jr., administrator of the Washington County Jail where Jenkins had been incarcerated 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.

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. When Jenkins complained to Clendenen that his prescribed anti-psychotic medication interfered with his sexual performance, the jailer let him stop taking it.

In a footnote to the case, United States District Judge Richard Williams commented, "The claims concerning [the jail official] 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." The Fourth Circuit had no such qualms. Jenkins was executed in April 1999.

Jenkins' lawyers included claims related to Clendenen in Jenkins' federal habeas petition. A United States District Court judge ruled that the claims were procedurally barred because they had not been made in state court.⁸⁹ In a footnote to the case, United States 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."⁹⁰ The Fourth Circuit had no such qualms.⁹¹ Jenkins was executed in April 1999.

50-Page Limit

Another rule that impacts the procedural default rule is the 50-page limit on briefs to the Virginia Supreme Court.⁹² While page limits are not uncommon, what is uncommon is the Court's extreme reluctance to grant requests to extend the page limitation, a common practice in other states. This reluctance is particularly striking in death penalty cases, where the importance of adjudications that are free from all constitutional error is paramount. As a result, lawyers for those who have been sentenced to death must pick and choose between competing claims. These page limitations have a

⁸⁸ *Jenkins v. Angelone*, 168 F.3d 482 (4th Cir. 1999) (unpublished opinion available at 1999 U.S. App. LEXIS 342; 1999 WL 9944).

⁸⁹ Although Jenkins did, of course, know of Clendenen'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.

⁹⁰ Peter Carlson, *The Dead-End Kid*, WASH. POST, April 20, 1999, at C1.

⁹¹ *Jenkins*, 168 F.3d 482. "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." 1999 U.S. App. LEXIS 342, at *8-9, 1999 WL 9944, at *3. 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.

⁹² VA. SUP. CT. R. 5:26(a) (direct appeal); VA. SUP. CT. R. 5:7(h) (state habeas).

devastating impact when the doctrine of procedural default is applied. The Fourth Circuit Court of Appeals has held that even if a defendant's lawyers were prepared to make a claim but were prevented from doing so because the Virginia Supreme Court refused to extend the page-limitation, that claim is still procedurally defaulted and can't be presented on federal habeas.⁹³

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; in Virginia, it is strictly enforced.⁹⁴

Proportionality Review

Another policy intended to ensure fairness is proportionality review. Passed in 1977, the legislature enacted a law requiring the Supreme Court of Virginia to review all death sentences to assure that the death sentence is not "excessive or disproportionate to the penalty imposed in similar cases."⁹⁵ The purpose of this law is to ensure some degree of fairness in determining who is sentenced to death.

According to the law, this review must take place "on the record."⁹⁶ In order to perform this function, the law provides that "[t]he Supreme Court may accumulate the records of all capital felony

⁹³ *Weeks v. Angelone*, 176 F.3d at 270-72 (4th Cir. 1999) (direct appeal); *Orbe v. True*, 233 F. Supp. 2d 749, 763-64 (E.D.Va. 2002) (state habeas).

⁹⁴ Angel Breard, a citizen of Paraguay, arrived in the United States in 1986 when he was 20 years old. Four years later, he was arrested and charged with attempted rape and capital murder. The Vienna Convention on Consular Relations, a multilateral treaty signed and ratified by the United States, provides that foreign nationals who are arrested have a right to communicate with their consular office and that the state must inform them of that right. Vienna Convention on Consular Relations, April 24, 1963, 21 U.S. T. 77, T.I.A.S. No. 6820, art. 36(1). The United States Constitution provides that treaties are on par with the Constitution as the "supreme law of the land." U.S. CONST. Art. VI, cl. 2. Virginia officials failed to inform Breard of his right to contact the consulate prior to trial. Breard raised this claim in his federal habeas petition, but the federal district court dismissed it because Breard had failed to raise it in state court. The Fourth Circuit affirmed and the United State Supreme Court granted certiorari. By this time Breard's case had taken on international dimensions. Paraguay had instituted a lawsuit in federal court against Virginia, seeking to stay the execution and order a new trial. Paraguay also sued the United States in the International Court of Justice at The Hague. The International Court of Justice ordered the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision in these proceedings." Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 ICJ Rep. 11 (Order of Apr. 9), available at <http://www.icj-cij.org/icjwww/idocket/ipaus/ipausframe.htm>. Finally, United States Secretary of State Madeleine Albright sent a letter to the Governor of Virginia requesting that he stay Breard's execution. The Supreme Court, relying on Virginia's procedural default rule, refused to stay the execution, as did the governor. Breard's execution made headlines around the world. But a spokesperson for the Fairfax County Police, following that Supreme Court's decision to dismiss Breard's petition on procedural default grounds, said that learning about suspects' consular rights "isn't a real concern for our officers at the street level." T.R. Goldman, *Treaty is no Match for Death Penalty, but Paraguayan's Case Could Leave Mark on U.S. Law Enforcement*, LEGAL TIMES, April 20, 1998, at 10.

While well-publicized internationally, Breard's experience is not unique. Less than seven months after Breard was arrested, Mario Murphy, a citizen of Mexico, was arrested by the Virginia Beach Police and charged with capital murder. *Murphy v. Netherland*, 116 F.3d 97 (4th Cir. 1997). The police never informed Murphy of his right to contact the Mexican consulate. When he raised this claim on appeal, the district court refused to consider it on procedural default grounds. The Fourth Circuit affirmed.

⁹⁵ VA. CODE ANN. § 17.1-313(C)(2).

⁹⁶ *Id.* § 17.1-313(A).

cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive.”⁹⁷

In the 26 years since the legislature first mandated proportionality review, the Virginia Supreme Court has never found a death sentence to be excessive or disproportionate.⁹⁸ This is most likely because the court is not conducting the review as intended by the legislature.

The law requires that the Court consider both the crime and the defendant,⁹⁹ both aggravating and mitigating evidence.¹⁰⁰ Despite this clear instruction, the Court almost always fails to consider mitigation evidence.¹⁰¹ In the case of *Ramdass v. Commonwealth*¹⁰² the court reviewed Ramdass’ prior criminal record, past probation violations, the length of previous prison sentences, the fact that police found him sleeping with a loaded revolver beside the bed, the period of time that Ramdass had been released before committing another crime, the malice involved in prior crimes and the atrociousness of the capital crime. However, the court did not compare the facts of Ramdass’ case to similar cases, nor did it consider any mitigating factors such as the fact that Ramdass had been abused by his mother’s boyfriend as a child.¹⁰³ In short, the court did not evaluate enough information to determine if Ramdass’ sentence was proportional to other similarly situated defendants.

The failure to conduct meaningful proportionality review is most apparent in juvenile cases. Chauncey Jackson was convicted and sentenced to death when he shot a man three times in the chest after attempting to rob him.¹⁰⁴ In reviewing the death sentence, the Supreme Court conducted its typical proportionality review: it repeated the facts of the crime (“Jackson killed Bonney in cold blood simply because Bonney had refused to comply with Jackson's demand for money”), then maintained that, on these facts, the death penalty must be proportionate.¹⁰⁵ The Court downplayed, however, the fact that Jackson was only sixteen years old when the crime was committed. As Justice Koontz noted in dissent, ten 16-year-old offenders had been convicted of capital murder in the previous eleven years, but only Jackson had been sentenced to death.¹⁰⁶ Justice Koontz then proceeded to recount some of the other cases: “Shawn Novak, age 16, killed two young boys, but he was not sentenced to death. Stephen Rea, age 16, killed three people, including a teenager, but he was not sentenced to death. Marvin Owens, age 16, killed four persons, but he was not sentenced to death. Dwayne Reid, who committed crimes substantially similar to Jackson's crimes, was not sentenced to death.”¹⁰⁷ The majority, in its proportionality analysis, had failed to mention any other case involving a 16-year-old offender.

⁹⁷ *Id.* § 17.1-313(E).

⁹⁸ Kelly E.P. Bennett, *Symposium: A Quarter Century of Death: A Symposium on Capital Punishment in Virginia Since Furman v. Georgia: Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103, 107 (1999).

⁹⁹ VA. CODE ANN. § 17.1-313(C)(2).

¹⁰⁰ Bennett, *supra* note 98, at 119.

¹⁰¹ Cynthia M. Bruce, *Proportionality Review: Still Inadequate, But Still Necessary*, 14 CAP. DEF. J. 265, 271-72 (2002).

¹⁰² *Ramdass v. Commonwealth*, 246 Va. 413, 426 (1993).

¹⁰³ Brooke A. Masters, *Va. Man Executed in '92 Slaying*, WASH. POST, October 11, 2000, at B3.

¹⁰⁴ *Jackson v. Commonwealth*, 255 Va. 625 (1998)

¹⁰⁵ *Id.* at 651.

¹⁰⁶ *Id.* at 652.

¹⁰⁷ *Id.* at 655.

Another problem with the Virginia Supreme Court's proportionality review is that its comparison sample is biased. The statute requires the court to consider whether the death penalty is "excessive or disproportionate" in comparison to *all* capital felony cases tried within a certain period of time,¹⁰⁸ but the Virginia Supreme Court only accumulates the records of capital felony cases it has reviewed.¹⁰⁹ Since many of the cases where the jury or judge imposed life imprisonment are not appealed to the Virginia Supreme Court, those cases are not considered as part of the proportionality review.¹¹⁰ Since the universe of cases almost always result in death sentences, it is not surprising that the Supreme Court's proportionality reviews do not result in findings that a sentence is disproportion or excessiveness.

The solution to this problem is simple: the Supreme Court should collect, from circuit courts, the records of all capital cases, regardless of whether the death penalty was imposed and regardless of whether the case resulted in an appeal to the Virginia Supreme Court. Until those cases are collected, the Virginia Supreme Court will not be in compliance with the intention of the legislature.

Anti-terrorism and Effective Death Penalty Act (AEDPA)

In April of 1996, President Bill Clinton all but suspended the Writ of Habeas Corpus when he signed into law The Anti-Terrorism and Effective Death Penalty Act (AEDPA). Although not a state law, the AEDPA, meant to streamline death penalty cases, has particularly dramatic consequences in Virginia because it compounds all of the other restrictions on accessing the courts. Enshrined in Article I of the United States Constitution, the Writ of Habeas Corpus is the means in which a person who has been wrongfully imprisoned can access to the courts. It has traditionally been the means for people imprisoned in state courts to seek review of federal constitutional violations. It is an important individual right and a necessary check on executive power. The AEDPA erodes the power of the writ by requiring federal courts to give extreme deference to state court rulings in death cases.

Under the AEDPA, federal courts no longer independently review federal constitutional questions but consider only whether the decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." Erroneous factual determination can only form the basis for federal habeas relief if they are "unreasonable." Because the Virginia Supreme Court dismisses nearly every state habeas petition in summary fashion without a written opinion, federal courts reviewing the decision are simply unable to determine whether the Virginia Supreme Court applied the correct law in a reasonable fashion. Their only options are either to (a) conduct their own, independent review of the claim without deferring to the Virginia Supreme Court ("de novo" review), or (b) ask whether the Virginia Supreme Court *could have* reached its decision by applying the correct law in a reasonable fashion, a standard of review far more deferential than even the AEDPA mandates.

Other federal circuits have opted to apply *de novo* review. This should encourage state courts to conduct an analysis on the record, because if they do not, the higher courts will subject their decisions to greater scrutiny. It also means that capital defendants are more likely to have their cases thoroughly and fairly reviewed.

¹⁰⁸ VA. CODE ANN. § 17.1-313(C)(2), (E) (emphasis added).

¹⁰⁹ Bennett, *supra* note 98, at 108; *see also* Bruce, *supra* note at 101, at 266-67; *but see* JLARC STUDY, *supra* note 36 at 67 (stating that the Virginia Supreme Court has collected capital cases from the Virginia Court of Appeals since 1986).

¹¹⁰ Bennett, *supra* note 98, at 109.

The Fourth Circuit initially adopted a *de novo* review approach in *Cardwell*,¹¹¹ but subsequently changed its position, mandating that lower courts apply a deferential standard of review, even to summary orders.¹¹² Unless the United States Supreme Court overrules this or the General Assembly or the Virginia Supreme Court requires an on-the-record analysis of state habeas petitions, federal district courts in Virginia are nothing more than a rubberstamp to the inadequate state court review process.

Why Virginia has such low reversal rates

Given the numerous obstacles to meaningful appellate review in Virginia, it is not surprising that Virginia has the lowest reversal rate in the country. As previously mentioned, Professor Liebman's study found that Virginia Courts have the lowest reversal rate of capital convictions or death sentences in the country. On direct appeal, the Virginia Supreme Court reversed only seven percent of the cases it heard, compared to a national average of forty-one percent. The rate of reversal on state habeas was three percent, compared to a national average of forty-seven percent, and on federal habeas, six percent, compared to a national average of forty percent.¹¹³

Much of Virginia's extremely low reversal rate is attributable to the Fourth Circuit Court of Appeals, which reverses just four percent of the cases it hears from Virginia. The Fourth Circuit also hears capital cases from Maryland, North Carolina and South Carolina. But those states' supreme courts all have a higher than average reversal rate, so many of their death penalty cases never reach

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the Fourth Circuit. Maryland, according to the Liebman study, has a fifty percent state court reversal rate. South Carolina's is fifty-two percent, while North Carolina's is sixty-four 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 seldom reach the Fourth Circuit. With a state court reversal rate of only ten percent, this is not so in Virginia.¹¹⁴

According to David Botkins, spokesman for former 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."¹¹⁵ Liebman disagrees.

The reasons, posits Liebman, include such factors as: (1) enforcing the region's (and nation's) strictest procedural default doctrine; (2) often appointing substandard trial attorneys to represent the indigents who make up ninety-seven percent of the state's death row; (3) applying a very strict test for reversing capital judgments based on incompetent lawyering; (4) limiting

¹¹¹ *Cardwell*, 152 F.3d at 339.

¹¹² *Bell v. Jarvis*, 236 F.3d 149, 160 (4th Cir. 2000).

¹¹³ JAMES S. LIEBMAN, A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973-1995 (2000), section VIII tables 4, 6, and 7.

¹¹⁴ *Id.*

¹¹⁵ Frank Green, *In Virginia's Court System, Death Means Death*, RICHMOND TIMES DISPATCH, May 23, 1998, at A1.

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 or funding for assistance to indigent (meaning nearly all) capital prisoners 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.

"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."¹¹⁶

How these policies all work together – The case of Joseph Giarratano

Joseph Giarratano, whose case was discussed earlier in the section on innocence, was convicted in 1979 of the murders of a mother and daughter with whom he had been living.¹¹⁷ The daughter had also been raped. The key witness against Giarratano was Giarratano himself. The day after the bodies were discovered, he sought out a Jacksonville police officer and confessed to the crime. He was convicted based on this confession. The minimal amount of physical evidence linking Giarratano to the victim's house was equivocal because he had lived there.

After the trial, evidence came to light that seriously undermined Giarratano's "confession." He had been subjected to constant sexual, physical and psychological abuse by his mother and stepfather. He had run away repeatedly but was always returned to his mother's custody. This abuse was so severe that by age eleven, Giarratano turned to drugs, which were readily available in his home. An investigation of Giarratano's childhood revealed that he had developed serious mental disabilities and had been conditioned to believe that anything bad that occurred around him was his fault.¹¹⁸ His lawyers also learned that police had discovered another man's driver's license at the scene of the crime, evidence that had not been previously disclosed.¹¹⁹ DNA evidence recovered at the scene was destroyed after trial by the Norfolk Police Department.¹²⁰ This raised the chilling possibility that Giarratano was in fact innocent.

Giarratano's efforts to obtain a new trial were largely prevented by the 21-Day Rule, which absolutely prevented him from bringing forward new evidence of his innocence.¹²¹ Because he was unable to raise the new evidence, his lawyers attempted to challenge the conviction on the grounds that Giarratano had been incompetent to stand trial. But the Virginia courts ruled that this issue was procedurally defaulted. On federal habeas, the courts deferred to the state court determinations.

Because the courts refused to intervene, the Governor of Virginia was forced to intervene. Governor L. Douglas Wilder commuted Giarratano's death sentence to life imprisonment and

¹¹⁶ Interviews with James Liebman, Oct. 7, 1999, Nov. 16, 1999.

¹¹⁷ *Giarratano v. Commonwealth*, 220 Va. 1064, 1066 (1980).

¹¹⁸ "In re Joseph M. Giarratano: Petition for Conditional Pardon By the Governor of the Commonwealth of Virginia," at 3-28.

¹¹⁹ *Id.* at 59-62.

¹²⁰ Tim McGlone, *Destroyed Evidence Still Crucial Years Later*, VIRGINIAN-PILOT, January 2, 2003, at B1.

¹²¹ *Id.* at 62-73, see also *Giarratano v. Proconier*, 891 F.2d 483, 486-87 (4th Cir. 1989).

strongly suggested that he be granted a new trial.¹²² The Commonwealth's Attorney, however, has failed to follow that suggestion and Giarratano remains in prison.¹²³

These policies severely limit access to the courts in Virginia and call into question the fairness of the convictions and death sentences obtained.

Recommendations

- Eliminate the 21-Day Rule;
- Improve the quality of state habeas corpus proceedings by: requiring fact finding hearing to be developed on the record; giving defendants broader access to discovery and access to prosecutor's files; allowing attorneys to hire expert witnesses; eliminating the 50-page limit on briefs; providing hearings for habeas petitions;
- Require the Virginia Supreme Court or other governmental body to keep a database of all potentially capital cases – those where the death penalty is imposed and those where it is not – to use as a basis of comparison for proportionality reviews and statistical analysis; and
- Require judges in state habeas proceedings to provide written opinions explaining their legal reasoning.
- Until access to the courts is improved by implementing these changes, a moratorium – a temporary freeze – on all executions should be imposed.

¹²² *Va. Inmate is Spared Execution*, THE RECORD, February 20, 1991, at A1.

¹²³ Maria Glod, *Va. Inmate Seeks DNA Evidence Left from 1979 Killings*, WASH. POST, December 9, 2002, at B1.

V. 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 or did not do. Providing capital defendants with good legal representation 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.

Experienced death penalty litigators 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."

Since our 2000 report, the Virginia legislature has enacted a law to improve the quality of lawyers appointed in capital cases. That law, 2001 Va. Ch. 873 (amending 19.2-163.2, 7), charges the Public Defender Commission with the duty to establish four regional capital defense units by the end of fiscal year 2004. By July 1, 2004, in each capital case in which counsel is appointed, at least one attorney must be from one of these units.

Regardless of the magnitude of the error, case law and court doctrine make it nearly impossible for capital defendants to prove that they received ineffective assistance of counsel.

Criminal defense attorneys must acquire years of experience trying murder and other serious felony cases, as well as extensive experience assisting in capital cases, before they are able to provide quality representation. Not only are the stakes higher in capital cases, the law is more complex. In order to be effective, capital defense lawyers must not only be intimately familiar with the fields of state capital criminal law and federal constitutional law, but must devote substantial time and energy to investigating the background of each capital defendant. Additionally, due to the strictly enforced doctrine of procedural default, lawyers must object to every possible violation of their clients' rights at trial. In order to provide representation that meets this level of quality, the regional capital defense units will require substantial funding and staffing. While three of the four public defender units are currently in operation – and a fourth person has been hired and should be operational by the end of 2003 – it is still too early to evaluate their effectiveness in providing indigent defendants with qualified counsel.

Virginia's current system of providing trial attorneys to individuals facing a death sentence has many other problems, including inadequate standards for appointment, little or no verification of lawyers' credentials and attorneys filing documents late or in the wrong court. Regardless of the magnitude of the error, case law and court doctrine make it nearly impossible for capital defendants to prove that they received ineffective assistance of counsel.

We will briefly discuss some of the areas that will require the most work.

Strickland Standard

Although an indigent defendant is entitled to an appointed lawyer, the right is an empty one unless the lawyer is at least minimally competent. However, as numerous appellate decisions make clear, the standard for competency is low and it is extraordinarily difficult to establish ineffective assistance of counsel. Under *Strickland v. Washington*,¹²⁴ the “defendant must show that counsel's representation fell below an objective standard of reasonableness and that, but for counsel's unprofessional errors, the result of the proceeding would have been different.”¹²⁵

Furthermore, a lawyer’s decision, no matter how flawed, is not considered incompetent if it was made for strategic reasons. This is true no matter how disastrous the strategy or decision and no matter how poor the judgment informing it.

What this means is that in order for a defendant to show that his constitutional right to counsel was violated he must show that: the lawyer acted in a non-strategic manner, that the lawyer’s action did not meet professional standards (which are either non-existent or very low) and that the act prejudiced the outcome of the case. These standards insulate lawyers from being found ineffective and obliterate the constitutional promise of effective counsel.

It is extremely difficult to determine how the Virginia Supreme Court applies the *Strickland* standard, because ineffective assistance claims can only be brought on state habeas, and when ruling on these cases, the Virginia Supreme Court almost always issues one-paragraph orders without giving any explanation.

In 1997, in the case of Terry Williams, the Virginia Supreme Court issued what it acknowledged to be its first published opinion in a state habeas case.¹²⁶ The opinion revealed that the Virginia Supreme Court had added an additional requirement to the *Strickland* test: that the defendant needed to show that the proceedings were fundamentally unfair or unreliable.

Alerted to this error, the United States Supreme Court reversed the ruling in the Williams’ case.¹²⁷ 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.’” The Supreme Court’s observation in *Williams* raised the possibility that the Virginia Supreme Court had 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.

Lack of Mitigation Evidence

Some lawyers are notorious for their failure to present mitigating evidence on behalf of their clients at sentencing. A good lawyer will spend hundreds of hours preparing a death penalty case for trial and sentencing. 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

¹²⁴ *Strickland v. Washington*, 466 U.S. at 687 (1984).

¹²⁵ *Id.*

¹²⁶ *Williams v. Commonwealth*, 234 Va. 168 (1987).

¹²⁷ *Williams v. Taylor*, 529 U.S. 362, 397 (2000).

death,¹²⁸ says he spends between 250 and 350 hours preparing for a capital case. Most of that time, says Cooley, is spent investigating his clients' backgrounds for mitigating evidence. The purpose of the mitigation investigation is so that the jury truly understands the defendant's background before deciding whether to impose a death sentence.

In the recent *Wiggins* decision, the Supreme Court stated that capital defense lawyers have a duty to conduct an investigation that is "reasonable under prevailing professional norms," which includes an obligation to thoroughly investigate the defendant's background.¹²⁹ Unfortunately, numerous cases suggest that lawyers appointed by Virginia courts fall well short of this standard.

U.S. District Court Judge James C. Cacheris found that the lawyer for Terry Williams, "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.'"¹³⁰ 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. Jurors 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.¹³¹

¹²⁸ These statistics were estimates by Cooley and were current in the fall of 1999.

¹²⁹ *Wiggins v. Smith*, 123 S. Ct. 2527 (2003). *Wiggins* did not announce a "new rule," but rather recognized that a "reasonable" and "thorough" investigation of a capital defendant's history has been required under the "clearly established precedent" of *Strickland v. Washington*, 466 U.S. 668 (1984).

¹³⁰ *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.

¹³¹ *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*. 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

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. Williams' case was his second capital appointment. His first capital client was Johnny Watkins, executed March 3, 1994.

In the case of Dwayne Allen Wright, who was 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 remain anonymous—later said they would have voted for a life sentence had Wright's attorneys presented evidence that he was brain-damaged and retarded.

Similarly, 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 Swann's death sentence to life without parole in May of 1999.

Lack of mitigating 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, the information can have little impact in Virginia.

Conflicts of Interest

Lawyers confronting situations that even appear to present a possible conflict of interest, should only proceed if all parties knowingly and intelligently consent to continued representation. Appointed counsel in several Virginia capital cases, however, have labored under striking conflicts of interests.

In 1992, Bryan Saunders was appointed to represent Timothy Hall on assault and concealed weapons charges.¹³² When Hall was discovered dead, the judge dismissed the charges against him and then a week later appointed Saunders to represent Walter Mickens who was the person charged with murdering Hall. Saunders failed to disclose the fact that he had represented the victim as a juvenile on assault and concealed weapons charges.¹³³ Because juvenile records are confidential, Mickens' new federal habeas lawyers had no way of knowing about the conflict of interest; they learned about the conflict only because a court clerk mistakenly gave them the victim's file. Mickens' habeas lawyers included an ineffective assistance of counsel claim, based on the conflict, but the federal district court denied it, finding that the claim did not meet the strict prejudice prong of

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.

¹³² *Mickens v. Taylor*, 535 U.S. 162, 164-65 (2002).

¹³³ *Mickens v. Taylor*, 535 U.S. 162, 164-65 (2002).

Strickland.¹³⁴ Both the Fourth Circuit and the United States Supreme Court affirmed the decision.¹³⁵ Walter Mickens was executed on June 12, 2002.

As mentioned earlier, Dana Edmonds' attorney had also been appointed to represent Laverne Coles, Edmonds' former girlfriend, in an unrelated criminal trial. He continued to represent Edmonds even after Coles was called to testify against Edmonds. In cross-examining his own client, Edmonds' lawyer failed to elicit information regarding the witness' diagnosed schizophrenia and delusions. Dana Edmonds was executed on January 25, 1995.

Guilty Pleas

Capital defense attorneys have a duty to safeguard their client's interests. They should recommend a guilty plea only if the client receives something in return – such as a reduction in charges from capital murder to first degree murder – that makes it worth foregoing the right to a trial. However, attorneys representing individuals charged with capital crime in Virginia have on numerous occasions recommended that their clients plead guilty to capital charges while acquiring virtually nothing in return.¹³⁶ Defendants placed in this situation are no better off than if they had been denied the appointment of a lawyer altogether.

Some of these mistakes made by Virginia defense attorneys in capital cases have been so serious that they have drawn censure from judges and justices. 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."¹³⁷ In the case of Larry Stout, U.S. District Court Judge James C. Turk found that the "deficient performance" of Stout's attorney¹³⁸ "amounted to virtually a complete absence of representation."¹³⁹ Both Chichester's and Stout's attorneys went on to represent other capital defendants.

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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.¹⁴⁰ In one of every ten trials resulting in a death sentence, the defendant was represented by a lawyer who would later lose his license.¹⁴¹

¹³⁴ *Mickens v. Greene*, 74 F. Supp. 2d 586, 615 (1999).

¹³⁵ *Mickens v. Taylor*, 240 F.3d 348 (4th Cir. 2001); *Mickens*, 535 U.S. 162.

¹³⁶ *Stout v. Netherland*, 95 F.3d 42, available at 1996 U.S. App. LEXIS 23158 (4th Cir. 1996); *Beaver v. Thompson*, 93 F.3d 1186 (4th Cir. 1996).

¹³⁷ *Chichester v. Pruett*, 3:97cv155 (E.D. Va., Richmond Div., Apr. 4, 1998).

¹³⁸ Stout's attorney was Staunton Public Defender William Bobbitt.

¹³⁹ *Stout v. Thompson*, Civil Action No. 91-0719-R (W.D. Va., Roanoke Div., July 31, 1995).

¹⁴⁰ 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

The Herndon lawyer who represented Justin Wolfe, a twenty-two-year old Chantilly drug dealer accused of ordering the murder of one of his associates was later suspended from practicing law for two and a half years for repeatedly mishandling the cases of other clients. Wolfe was sentenced to death in May of 2002. He remains on Virginia's death row.¹⁴²

Recommendations

The state should require all capital defense lawyers to take part in ongoing training and be subjected to written tests before they are appointed counsel in capital cases; improve the process for determining the qualified counsel list used by the courts for making appointments by such things as: including affidavits from experienced lawyers, requiring self-reporting of instances of ineffective assistance and eliminating the practice of selecting lawyers from each county; fully fund the capital resource units and mandate the reporting of ineffective and unethical representation to the Virginia Bar Association and if appropriate, discipline or suspend attorneys. Also, the list of all examples of ineffectiveness should be kept in a database and made available to the public and incorporated within the list that courts use for appointing counsel.

case, and three of the lawyers in this group had represented more than one capital defendant who was sentenced to death.

¹⁴¹ 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)

¹⁴² Tom Jackman and Josh White, *Virginia Lawyer Suspended for Mishandling Practice*, THE WASHINGTON POST; METRO, March 27, 2003

VI. JUVENILES

The law prohibits people under eighteen from voting, serving in the military and on juries, marrying, entering into contracts, making medical decisions and purchasing tobacco and alcohol products because adolescents are less mature than adults and less able to make decisions in their own interest. However, in some states, they can be executed for crimes they committed before the age of majority. The United States Supreme Court prohibits execution for crimes committed at the age of fifteen or younger; twenty-two states have laws permitting the execution of persons who committed crimes at the age of sixteen or older. Virginia is one of them.

Since 1973, 226 juvenile death sentences have been imposed. Twenty-one juvenile offenders have been executed and 78 remain on death row.¹⁴³ Of the 21 juvenile executions carried out, only three states have executed more than one juvenile offender – Oklahoma, Texas and Virginia.¹⁴⁴

Adolescent Brain Development

Recent medical studies have confirmed what parents have known all along: adolescents are unable to make rational decisions in the same way as adults. Studies by the Harvard Medical School, the National Institute of Mental Health and the UCLA's Department of Neuroscience found that the frontal and pre-frontal lobes of the brain, which regulate impulse control and judgment, are not fully developed in adolescents.¹⁴⁵ Development was not completed until somewhere between 18 and 22 years of age. These findings confirmed what every parent knows – adolescents generally have a greater tendency towards impulsivity, making unsound judgments or reasoning, and are less aware of the consequences of their actions.

Because of their immaturity, juveniles are also more likely to be coerced by adults and are sometimes the pawns for more sophisticated criminals. They are also more likely to be taken advantage of during the investigation of a criminal case. Because they are often intimidated by adults and authority figures, they are more likely to be subjected to coerced confessions, which are often false, and less likely to request legal representation.

Most importantly, the goals of the death penalty do not apply to juveniles. Retribution aims to give the harshest punishment to the worst offender. Juveniles are the most likely to be capable of rehabilitation. Given their emotional immaturity and lessened culpability, they are by definition not the “worst of the worst.”

Public Opinion in the United States

Public opinion in the United States increasingly opposes the execution of juvenile offenders. According to a 2002 Gallup Poll, 69 percent of the people polled opposed the death penalty for

¹⁴³ Streib, V., “The Juvenile Death Penalty Today: Death Sentences and Executions for Juvenile Crimes, January 1, 1973 – December 31, 2002,” available at <http://www.law.onu.edu/faculty/streib>.

¹⁴⁴ Mirchandani, Sapna, “Human Rights, Human Wrongs: Sentencing Children to Death,” National Coalition to Abolish the Death Penalty, March 2003.

¹⁴⁵ Yurgelun-Todd, D., “Functional Magnetic Resonance Imaging of Facial Affect Recognition in Children and Adolescents,” *American Academy of Child and Adolescent Psychiatry*, 1999, 38:195-199.

juveniles; only 22 percent supported the execution of juvenile offenders, while 5 percent offered no opinion.¹⁴⁶

There is an emerging consensus among professional organizations that the juvenile death penalty should be ended. In October 2000, the American Academy of Child and Adolescent Psychiatry released a report on juvenile justice reform and strongly opposed the use of the death penalty for juveniles. Other organizations that have adopted formal positions opposing the juvenile death penalty are: The American Psychiatric Association, the Child Welfare League of America, the National Education Association and the National Mental Health Association. Both the American Medical Association and the American Psychological Association support ratification of the United Nations Convention on the Rights of the Child, which prohibits executing juvenile offenders.¹⁴⁷

International Public Opinion

Internationally, the execution of juveniles is largely considered inhumane, anachronistic and in direct conflict with fundamental principles of justice. Of the 123 countries that currently use the death penalty, only the United States and Iran impose death sentences on juveniles.¹⁴⁸ In the fall of 2003, however, Iran's judiciary began drafting a bill that will raise the minimum age for death sentences from fifteen to eighteen. The bill will also exclude those under eighteen from receiving life-terms or lashing as punishment.¹⁴⁹

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Ironically, many of the countries that the United States government regularly criticizes for human rights abuses have abolished the practice of executing juveniles. For example, between 1994 and 2000, Yemen, Zimbabwe, China and Pakistan all amended their laws to prohibit the execution of juvenile offenders.¹⁵⁰ Following the appeal of the international community, the Democratic Republic of Congo commuted the sentences of four juvenile offenders after executing a juvenile offender in January of 2000. Other countries, such as Saudi Arabia and Nigeria, which have yet to explicitly outlaw the death penalty for juvenile offenders, have not executed a juvenile offender since the mid-1990s. In continuing what is universally viewed as a barbaric and uncivilized practice, the United States has, over the past decade, executed more juvenile offenders than every other nation in the world combined.¹⁵¹

¹⁴⁶ Gallup Poll News Service, May 20, 2003, available at <http://www.pollingreport.com/crime.htm#Death>.

¹⁴⁷ "Human Rights Human Wrongs: Sentencing Children to Death," National Coalition to Abolish the Death Penalty, March 2003 at 10-11.

¹⁴⁸ "Juveniles and the Death Penalty: Executions Worldwide Since 1990," Amnesty International, ACT 05/11/98, available at <http://www.web.amnesty.org/ai.nsf/index/ACT500111998>;

¹⁴⁹ Reuters, *Iran to Stop Executions of 15-18 year-olds*, THE NEW ZEALAND HERALD, September 29, 2003.

¹⁵⁰ De la Vega, C., *et al.*, "Update On Death Penalty Cases Using International Human Rights Laws," available at <http://www.aclu.org/library/iclr/2001/iclr20018.pdf>.

¹⁵¹ "Children and the Death Penalty: Executions Worldwide Since 1990," Amnesty International, December 14, 2000, available at <http://www.amnesty.org>.

Racial Bias in the Juvenile Death Penalty

Race plays a role in the imposition of the juvenile death penalty. While 55 percent of all offenders currently on death row are persons of color, the ratio for juvenile offenders is sixty-seven percent. Of juvenile offenders currently on death row, almost half are African-American, a group that makes up only slightly more than 12 percent of the US population. Of the 21 juvenile offenders executed during the modern era, 57 percent were African-American or Latino; of the total number of offenders executed during the modern era, 44 percent were from these racial groups.¹⁵²

While the sampling of juvenile offenders on death row in Virginia may be too small to draw any definitive conclusions, it is noteworthy that three of the five juvenile offenders sentenced to death were African-American; the other two were white. However, four out of the five victims of these crimes were white.

Virginia Case Studies

The following are the juveniles who have been sentenced to death during the modern era. What is striking is the randomness of the sentences. Other juveniles, who seem to have committed more egregious offenses, were not sentenced to death. Also, like others on death row, some were not adequately represented nor got a fair trial or sentencing hearing.

Chauncey Jacob Jackson

Chauncey Jacob Jackson was sentenced to death in 1997 for the 1994 robbery and murder of Ronald Gene Bonney, Jr., which he committed when he was sixteen. Bonney was sitting in his car when Jackson and two friends decided to rob him. Jackson shot Bonney three times after he refused to give them money. At trial, Jackson's grandmother testified that Jackson had been a good child until he got involved with the wrong crowd. Jackson was subsequently sentenced to death. Jackson's conviction was subsequently overturned and the district attorney decided not to seek another death sentence. Jackson is now serving a life sentence.

Dwayne Allen Wright

Dwayne Allen Wright was sentenced to death in 1992 for the 1989 murder, robbery and attempted rape of a Virginia woman. Though there was no issue of Wright's guilt, there were serious questions as to whether he should have been sentenced to death.

Wright was raised in a low-income area of Washington, DC, plagued by drugs and crime. At age four, his father was imprisoned, and at age 10, he witnessed his brother being shot to death, an experience that devastated him emotionally. Throughout his most crucial developmental years, Wright suffered from severe depression. At twelve, he underwent hospitalization and surgery for a brain infection. One year later, he experienced an acute psychotic episode and was committed to a psychiatric hospital where doctors determined that he suffered from organic brain damage and evaluated his verbal ability as retarded.

During the sentencing phase of Wright's trial, defense attorneys neglected to mention his long history of mental illness and hospitalization. Instead, the jury was explicitly informed that Wright was neither mentally ill nor suffered from brain damage. After five hours of deliberation, the jury sentenced him to death. After the trial two jurors admitted that they would not have voted for a

¹⁵² See note 146 at 13.

death sentence had they known of Wright's bouts with mental illness. In addition, Wright's defense attorney admitted to making critical mistakes during the trial by neglecting to hire an independent mental health expert to evaluate his history of mental illness.

During his years imprisoned, Wright worked hard to manage his mental illness and reform his life. However, on October 14, 1998, at the age of twenty-six, the State of Virginia executed Wright by lethal injection. Wright became the first juvenile executed in the State of Virginia since the death penalty was reinstated.

Douglas Christopher "Chris" Thomas

In 1990, at the age of 17, Thomas met and fell in love with Jessica Wiseman. Their relationship was serious, but her parents did not approve, as Wiseman was only 14. Wiseman's parents pressured her to break off the relationship; however, she was unwilling to do so. When Wiseman became angry with her parents, she told Thomas she wanted them killed.

According to Thomas' confession, on the night of the murders he had smoked some marijuana before arriving at Wiseman's house. Wiseman helped him into the window and scattered drugs on the floor to make it look like an attempted robbery. Thomas expressed doubts about killing her parents, but Wiseman insisted. Thomas shot both parents while they slept. Wiseman's father was killed instantly, but not her mother. When Wiseman observed her mother still alive, she ordered Thomas to shoot her again. It is unclear if Thomas fired the additional, fatal shot or if Wiseman did.

Due to media attention, defense attorneys moved for a change of venue, but their request was denied. At trial, mental health experts confirmed Thomas' inability to make informed decisions based on the fact that he was developmentally immature and at the lower end of intellectual functioning. Thomas' confession was ruled admissible despite the fact that he gave it while impaired by drugs and without an adult present.

Despite evidence of Wiseman's involvement, Thomas' attorneys did not present any forensic witnesses to show that he may not have fired the shot that killed Wiseman's mother. The jury found Thomas guilty of capital murder and sentenced to death.

Shortly before his execution, witnesses came forward stating that Wiseman admitted that she had fired the fatal shot that killed her mother. However, appellate courts denied Thomas' appeal, and on January 10, 2000, he was executed. Wiseman was released from state custody when she was 23.

Steven Roach

Steven Roach was seventeen when he confessed to murdering his elderly neighbor, Mary Ann Hughes, in December 1993. Hughes, a widow who lived next door, frequently paid him to do chores for her. Roach also played board games with her.¹⁵³ After shooting Hughes, Roach stole 60 dollars from her purse, along with a credit card and her car. Three days later, after fleeing to North Carolina, Roach returned to Virginia and surrendered to police. Although Roach never explained why he committed the murder, he was willing to take responsibility for the crime.

In a letter to Governor James Gilmore requesting clemency, Amnesty International Secretary General Pierre Sane said, "We in no way seek to excuse that crime or belittle the suffering it has

¹⁵³ "Watching Steve Roach Die: Report From the Virginia Death Chamber," APB News, January 17, 2000.

caused. We seek only Virginia’s compliance with international law and global standards of justice.” However, clemency was denied, and Roach was executed on January 13, 2000.

Shermaine Ali Johnson

On July 11, 1994, the body of Hope Denise Hall, a twenty-two-year-old mother and a part-time associate producer at a television station, was found on the bedroom floor of her Virginia apartment. Hall had been stabbed fifteen times and had her throat slit. After blood and semen found in Hall’s apartment was linked to Johnson by a DNA database computer search, police arrested him for rape and capital murder. Although Johnson was only sixteen-years-old at the time of the crime, he was tried as an adult and sentenced to death.

Upon appeal, Johnson’s defense attorneys claimed that the death sentence imposed was disproportionate and excessive when compared to the penalties imposed on other sixteen-year-olds who have committed similar offenses. However, Johnson’s extensive violent criminal history, which included five rapes within a seven-month period, along with the nature of the crime, led the Court to reject the appeal.

In addition to the death sentence, Johnson is serving a 100-year sentence for the rape of two other women. Johnson is currently the only juvenile offender on Virginia’s death row.

Proportionality Review of Juvenile Cases

Proportionality review requires the Court to determine whether a death sentence is excessive or disproportionate to the penalty imposed in similar cases, taking into consideration both the nature of the crime and defendant. In his dissent in Chauncey Jackson’s case, Justice Hassell pointed out that Jackson’s sentence was not proportional to others that had been recently imposed.¹⁵⁴

There does not appear to be any rational reason why Owens, Novak, Reid and Rea received life sentences while the others did not. Since the Virginia Supreme Court did not conduct thorough, on-the-record proportionality reviews, it is impossible to understand their rationale.

For example, a Virginia Beach jury refused to sentence sixteen-year-old Shawn Paul Novak to death even though he stabbed two young boys, ages seven and nine, to death with a knife.¹⁵⁵ Novak repeatedly slashed the seven-year-old in the neck until he was almost decapitated; the nine-year-old also had multiple slash wounds on his neck. However, Novak received a sentence of life imprisonment.

Another example is 16-year-old Marvin T. Owens, who was convicted of shooting four people to death with a pistol, including a 14-year-old boy.¹⁵⁶ Like many of the cases mentioned before, Owens had an extensive criminal history, including charges for conspiracy to distribute cocaine, possession of cocaine with the intent to distribute and possession of cocaine. However, Owens received a life sentence.

Dwayne M. Reid was with a group of boys when two men in a truck approached them and asked them if they had any “rock,” meaning crack cocaine. One of the boys threw a rock through the window and a struggle ensued in which Reid shot Tommy Runyon in the head. Although only 16,

¹⁵⁴ *Jackson v. Virginia*, 255 Va. 625, 652, 499 S.E.2d 538, 555 (1998).

¹⁵⁵ *Novak v. Commonwealth*, 20 Va. App. 272, 382, 457 S.E. 2d 402, 406 (1995)

¹⁵⁶ *Owens v. Commonwealth*, No. 2259-95-1, Va. Ct. App. November 19, 1996.

Reid had been convicted of two counts of armed robbery and two offenses of using a firearm during a robbery. At a judge trial, Reid was convicted and sentenced to life in prison.

Stephen Rea was convicted of three counts of capital murder for shooting to death three people, including a seventeen-year-old boy. Rea had an extensive juvenile criminal history and was on probation at the time of the offense. Rea was sentenced to life in prison.

There does not appear to be any rational reason why Owens, Novak, Reid and Rea received life sentences while the others did not. Since the Virginia Supreme Court did not conduct thorough, on-the-record proportionality reviews, it is impossible to understand their rationale.

Recommendation

Abolish the juvenile death penalty in Virginia.

VII. MENTAL RETARDATION

The law in the area of mental retardation changed drastically in 2002, when the United States Supreme Court struck down the case of *Atkins v. Virginia*,¹⁵⁷ in which the court held that it was a violation of the Eighth Amendment's prohibition against cruel and unusual punishment to execute mentally retarded people. The Court held that "evolving standards of decency" made executing mentally retarded people socially unacceptable.

To support its holding, the Court pointed to the fact that since 1986, the year it had last considered this issue, eighteen state legislatures had passed laws prohibiting the execution of mentally retarded offenders. "The practice, therefore, has become truly unusual, and it is fair to say that a national consensus has developed against it,"¹⁵⁸ the Court said. It also pointed to the nearly universal condemnation of executing mentally retarded offenders:

Mentally retarded defendants may be less able to give meaningful assistance to their counsel and are typically poor witnesses, and their demeanor may create an unwarranted impression of lack of remorse for their crimes. . . . Mentally retarded defendants in the aggregate face a special risk of wrongful executions.¹⁵⁹

Although the court ruled that executing mentally retarded offenders was prohibited, it left it up to the states to determine who was mentally retarded and how that decision would be determined. This loophole left states scrambling to bring their laws into compliance with *Atkins*. When the Court remanded the *Atkins* case back to the state of Virginia to re-sentence Darrell Atkins, it also required the state to establish standards for making future determinations of retardation.

Although the court ruled that executing mentally retarded offenders was prohibited, it left it up to the states to determine who was mentally retarded and how that decision would be determined.

During the 2003 session, the General Assembly discussed several mental retardation sentencing bills, ultimately passing HB 1923 and SB 1239, which became law on May 1, 2003, codified as VA Acts ch. 1040.

One of the major issues of dispute during deliberations was the question of when, and by whom, the determination of mental retardation should be made. Advocates for mentally retarded people wanted the determination to be made pre-trial by a judge, a position that makes sense for fiscal reasons and fairness. If the judge determines that a person is not eligible for a death sentence, it saves the state the extra time and expense of putting on a death penalty trial with its extra prosecutors, defense attorneys, expert witnesses and appeals. Furthermore, the judge would make the decision based on the person's documented background of retardation, not the crime.

Prosecutors argued for juries to decide the issue after the person had been convicted but before imposition of the sentence. This enabled prosecutors to obtain "death qualified juries" (in all death penalty cases, only people who say they are capable of imposing a death sentence can sit on the

¹⁵⁷ 528 U.S. 304 (2002)

¹⁵⁸ *Id.* at 315.

¹⁵⁹ *Id.* at 20.

jury, which means that most people who oppose the death penalty as a matter of principle are disqualified from serving) and it meant that the jury would be making the decision about whether the person was mentally retarded after it had already convicted him or her of a capital crime, at a time when the jury was naturally more prejudiced against the defendant. The legislature sided with the prosecutors and permitted post-conviction determination of mental retardation.

There are other concerns with the mental retardation bill – the definition is unduly narrow; the burden of proving mental retardation is on the defendant, not the state; and there are no state procedures established for applying the law retroactively.

The most famous case of mental retardation in Virginia is that of Earl Washington, Jr., previously mentioned in the innocence section. Washington's case exemplifies the special challenges that mentally retarded defendants face of being highly susceptible to police coercion and having a difficult time assisting their attorneys with their defense.

Calvin Swann

Calvin Swann was sentenced to death in 1993 for the murder of Conway Richter, a 62-year-old Danville resident. Swann suffered from mental retardation; he often spoke to animals and sometimes spoke only in numbers.¹⁶⁰ At the time of the murder, Swann was receiving Social Security disability benefits because of his schizophrenia. Swann was also found to be incompetent to stand trial two times in the State of Virginia. Swann had been involuntarily committed to psychiatric hospitals at least 16 times before he was arrested for Richter's murder. During trial, the jury heard virtually nothing about Swann's mental health record. State employees had diagnosed Swann as having schizophrenia at least 41 times, described him as psychotic at least 31 times and regularly medicated him with eight anti-psychotic drugs. No competency hearing was set for Swann and the trial judge refused Swann's attorney's request to have a psychiatrist assist him. Psychiatrists only testified after Swann was sentenced to death. After the trial, prosecutor William Fuller voiced concerns about Swann's mental health and admitted that if he had been given the option of true life without parole, he would have opted for that. On May 12, 1999, Governor Jim Gilmore commuted Swann's death sentence to life in prison.

Terry Williams

Terry Williams, mentioned in the section on quality of counsel, was sentenced to death for the murder of Harris Stone in Danville, Virginia. Stone was found dead outside his home in 1985 with a blood-alcohol count measured at 0.41, more than five times the legal limit.¹⁶¹ The police concluded that Stone had died of alcohol poisoning. However, eight months later, the police received an anonymous letter from Terry Williams explaining that he had hit Stone in the chest with a gardening tool and robbed him of three dollars. The police eventually traced the letter back to Williams and arrested him. Williams confessed to the crime, later recanted, and confessed again. He explained to his lawyers that the letter he wrote, along with his confession, had been about a dream he had. Despite the strange circumstances surrounding Stone's death, Williams was charged with capital murder.

¹⁶⁰ Hunt, Spencer, "Standard of Sanity at Issue: Inmates With Mental Illness Executed," the Cincinnati Enquirer, April 22, 2001.

¹⁶¹ See *supra* note 127.

Terry Williams has an I.Q. of 69 and was born with fetal alcohol syndrome. During trial, Williams' attorney mentioned nothing to the jury about his mental retardation and refused to call a witness to testify about Williams' history of mental illness. Defense counsel also told the jury in his closing arguments that Williams' alleged crime "defies logic" and he could not think of "any great, earth-shattering, moving reason" why the jury should spare Williams' life.¹⁶² The jury obliged and sentenced him to death. Ultimately, the United States Supreme Court overturned Williams' conviction based on claims of ineffective counsel and his history of mental illness. To avoid a re-sentencing trial and the imposition of another death sentence, Williams pled guilty and accepted a sentence of life imprisonment without the possibility of parole.

William Joseph Burns

William Joseph Burns was convicted of the capital murder of his mother-in-law, Tersey Elizabeth Cooley, in the commission of rape, statutory burglary and forcible sodomy.¹⁶³ Throughout Burns' life, he struggled with mental illness. As a child, he endured constant physical and sexual abuse. His I.Q. was 77 (in the low-normal range) and he took medication to deal with chronic depression. Burns was also judged incompetent to stand trial for a previous offense. DNA testing conducted before trial implicated Burns as the murderer. Burns was found guilty and sentenced to death without the jury taking into consideration his mental health history. During appeal, Burns' attorneys argued that the sentence of death in his case was disproportionate because of his borderline range of intellectual functioning, the physical and sexual abuse that he suffered as a child, his incompetence to stand trial, his continued need for medications during trial and his depression. However, the court rejected these claims based on its determination that Burns posed a threat of future dangerousness to the community. The Supreme Court of Virginia affirmed his convictions and death sentence in March of 2001. Burns is currently on Virginia's death row; a date has not yet been set for his execution.

Darrick Demorris Walker

In September 1998, Darrick Demorris Walker was sentenced to death for the capital murders of Stanley Roger Beale and Clarence Threat. Beale was killed in November 1996 and Threat in June 1997. Under Virginia's capital murder statute, a defendant may be sentenced to death for the killing of more than one person within a three-year period. Walker has always maintained his innocence.

Walker's trial was beset by errors from the beginning. His counsel failed to object to the joining of the trial with two wholly unrelated murders; failed to put on an adequate defense, including a failure to challenge highly questionable scientific evidence; and failed to do an adequate investigation in preparation for the sentencing phase, which included a failure to determine Walker's mental retardation. The whole trial, including jury selection, the guilt phase, jury deliberations and sentencing, lasted only two days.

Although trial counsel did not raise the issue, Walker has a long documented history of mental retardation. In the third grade he was placed in special education by the Norfolk public school system and by the age he should have completed grade school, he was still reading at a third grade level. When he was eleven, a specialist evaluated him and found his performance on a standardized test to be "similar to what would be expected of the typical 6-year-old child...and individuals who are mentally retarded." His most recent test showed him having an IQ of 61.

¹⁶² *Id.*

¹⁶³ *Burns v. Commonwealth*, 261 Va. 307, 541 S.E. 2d 872, 2001.

Walker appealed his capital murder conviction to the Supreme Court of Virginia, but was denied relief. A federal judge only recently blocked the Commonwealth from setting an execution date of August 20, 2003, citing that even after the Atkins decision, the Commonwealth is acting recklessly in regard to executing the mentally retarded. Walter's ineffective representation at trial and mental retardation warrant a new trial, or at the very least, a life sentence.

Recommendation

We recommend that a process be put in place to review people with upcoming execution dates who may have claims of mental retardation. We also recommend that the legislature revisit the mental retardation law next session and put in place additional safeguards to ensure that no one who is mentally retarded ends up on death row.

VIII. CONCLUSION AND RECOMMENDATIONS

Virginians want a criminal justice system that is fair and effective. We remain skeptical that the unfairness that has plagued the death penalty in Virginia, and other death penalty states, for so long can ever completely be eliminated. But as long as the death penalty remains public policy, basic decency requires all citizens of good will to try.

We urge the Virginia legislature, the courts and the Governor to consider the following recommendations:

1. Impose a moratorium – a temporary freeze – on all executions in Virginia at least until the recommendations of this report are in effect. During the moratorium, the state should undertake an exhaustive study of the death penalty in Virginia. It should be conducted by an independent commission appointed by the legislature, with members from the legislative, executive and judicial branches with experts from the criminal justice system, defense attorneys and prosecutors, judges, members of the legislature, members of non-governmental organizations with expertise in criminal justice, members of the religious community and family members of murder victims and people on death row.
2. Statistics should be kept on every potentially capital case in Virginia, including the race, ethnicity, gender and age of the victim and offender. To ensure more uniformity, the attorney general should establish guidelines to aid prosecutors in deciding which cases to pursue as capital cases.
3. The Virginia Supreme Court should record and publish all examples of prosecutorial misconduct and should report them to the Virginia State Bar for appropriate discipline.
4. The 21-Day Rule should be eliminated.
5. Improve the state habeas process by: removing restraints on identifying, developing and presenting facts on the record; eliminating the 60-day time rule; giving defendants access to prosecutor's files and generally broaden defendants' ability to obtain discovery; allowing attorneys to hire expert witnesses without having to justify beforehand why they need them; eliminating the 50-page limit on briefs and providing hearings for habeas petitions.
6. The Virginia Supreme Court should keep a database of all murder convictions – those where the death penalty was imposed and those where it was not – to use for proportionality reviews.
7. Increase the quality of capital representation by requiring all attorneys to take part in ongoing training and to take written tests before they are appointed counsel in capital cases; improving the process for determining the qualified counsel list used by the courts for making appointments by such things as: including affidavits from experienced lawyers, requiring self-reporting of instances of ineffective assistance and eliminating the practice of selecting lawyers from each county; fully funding the capital resource units; mandating the reporting of ineffective and unethical representation to the Virginia State Bar and if appropriate, discipline or suspend attorneys. The state should collect all examples of ineffectiveness and keep them in a database available to the public, and eliminate ineffective attorneys from the list that courts use for appointing counsel.

8. The Virginia General Assembly should abolish the juvenile death penalty.
9. Establish a process to review inmates with upcoming executions dates who may have claims of mental retardation. Also, the legislature should revisit the mental retardation issue next session and put in place additional safeguards to ensure that no one who is mentally retarded ends up on death row.

APPENDIX

To determine the number and type of potentially capital crimes committed in each Virginia jurisdiction, this study analyzed data from the FBI supplemental homicide reports for 1978-2001. These reports are incident-based and include information on the jurisdiction and circumstances of each incident involving at least one homicide. Each report also contains information about the age, race and sex of each victim and offender.

To narrow the list of incidents to those involving potentially capital crimes, we included only (a) those incidents whose circumstance was rape, robbery or institutional killing, and (b) those incidents with more than one victim. We then excluded all incidents in which none of the offenders was 16 or older.

Many incidents involved multiple victims and/or offenders. We used the number of victims to convert incidents into potentially capital crimes. We found that this approach was preferable to counting each incident as only one potentially capital crime, regardless of the number of victims, because multiple death sentences can and often are imposed for incidents involving more than one victim. We also found that this approach was preferable to counting each offender, or the product of offenders and victims, since Virginia law generally allows the death penalty only for the individual who directly caused the victim's death. Thus, under our approach, an incident involving three offenders and two victims would constitute two potentially capital crimes.

Many of our calculations focused on race. In calculations limited to the race of the victim, we included only those potentially capital crimes in which the race of the victim was known. Although the FBI reports allow for separate reporting of ethnicity, Virginia does not provide information on ethnicity and reports the race of Latinos as Hispanic. Thus, crimes in which the victim was reported as Hispanic were excluded from calculations limited to the race of the victim. Because the victim was the unit of analysis, each potentially capital crime corresponded to exactly one victim.

The same approach was taken with calculations limited to the race of the offender. Because our unit of analysis was the victim, some potentially capital crimes involved more than one offender. These crimes were included in calculations limited to the race of the offender only where the race of each offender was known and the same. Thus, an incident involving a black victim and four white offenders was counted as one crime with a black victim and a white offender, while an incident involving a white victim, two white offenders and two black offenders was counted as one crime with a white victim but not included in calculations limited to either white or black offenders.

We also analyzed every death sentence imposed in the modern era. We excluded sentences imposed for crimes committed after 2001, resulting in a total of 181 death sentences during the study period. This number is higher than the number of persons sentenced to death for two reasons. First, some defendants received more than one death sentence. Second, some defendants received only one death sentence for incidents involving more than one victim. In cases where the defendant was convicted of capital murder based, either exclusively or alternatively, on the killing of more than one person in the same transaction, we counted each victim's murder as a separate death sentence. In cases where the basis for convicting the defendant of capital murder did not include the killing of more than one person in the same transaction, we counted only one death sentence and included victim information only for the victim whose murder formed the basis of the capital murder conviction.

These approaches resulted in the following definitions:

Potentially Capital Crime: the murder of one victim by a person or group of persons that included at least one offender who was over the age of 16, in an incident reported as involving rape, robbery, an institutional killing or the killing of more than one person.

Death Sentence: All death sentences plus those murders that formed the basis of a capital murder conviction under the multiple victim provision and which resulted in a death sentence.

Our analysis had significant limitations. The conclusions were based on unadjusted figures, and we did not conduct regression analysis or account for multiple factors when considering discrepancies.

The Supplemental Homicide Reports, which we used to create a database of potential capital crimes, is not comprehensive since not all homicides are reported. The race of the victim and, less often, the offender, is sometimes not reported. As we conducted our analysis, it became clear that the circumstances of some homicides were not coded accurately. In the City of Richmond, for instance, courts have imposed six death sentences for rape-murder, but only one rape-homicide was reported in the Supplemental Homicide Reports.

Only four of the 13 circumstances that allow a murder to be charged as capital murder are reported in the Supplemental Homicide Reports. While these four circumstances form the basis of 90% of capital convictions resulting in the death sentence, other circumstances that have resulted in the imposition of the death sentence are not included. Finally, the Supplemental Homicide Reports do not include information about premeditation, vileness or the future dangerousness of the offender. Premeditation is a requirement of capital murder; and either vileness or the future dangerousness of the defender must also be proved.

We nevertheless relied on the Supplemental Homicide Reports because there is no centralized collection of homicide cases in Virginia. Furthermore, when a prosecutor decides not to seek the death penalty, he has no obligation to indicate whether he could have sought the death penalty. Attempting to determine, on a case-by-case basis, which cases are potentially capital requires that each case be reviewed by a number of experienced lawyers, since premeditation, vileness and future dangerousness are extremely complex requirements that are difficult to judge. As a result, there is simply no way for us, JLARC, the Virginia Supreme Court, the General Assembly or anyone else to determine which cases could have been charged as capital murder, short of visiting over 100 courthouses to conduct an in-depth legal analysis of thousands of cases. No one has attempted such an undertaking in Virginia.

The substantial racial and geographic discrepancies indicated by this and other studies strongly suggest that such an analysis is necessary; information about all murder cases, and the potential of each to be capital, should be reported to a state agency and made public.

The following two sets of tables represent the results of our analysis in raw numbers. All of the tables and findings were based on these two sets of findings:

Death Sentences by Jurisdiction

Jurisdiction	City/County	Population Density	Population Density Classification	Potential Capital Crimes	Death Sentences	Death Sentence Rate
Accomack	County	84.1	Low	3	1	33%
Albemarle	County	109.7	Low	7	0	0%
Alexandria	City	8452	High	21	1	5%
Alleghany	County	29.1	Low	4	2	50%
Amelia	County	32	Low	0	0	N/A
Amherst	County	67.1	Low	13	4	31%
Appomattox	County	41.1	Low	2	1	50%
Arlington	County	7323.3	High	32	10	31%
Augusta	County	67.6	Low	6	3	50%
Bath	County	9.5	Low	0	0	N/A
Bedford	County	80	Low	10	4	40%
Bland	County	19.2	Low	2	0	0%
Botetourt	County	56.2	Low	3	0	0%
Bristol	City	1346.4	Medium	1	0	0%
Brunswick	County	32.5	Low	2	1	50%
Buchanan	County	53.5	Low	6	1	17%
Buckingham	County	26.9	Low	3	0	0%
Buena Vista	City	929.5	Medium	0	1	N/A
Campbell	County	101.2	Low	10	0	0%
Caroline	County	41.5	Low	2	0	0%
Carroll	County	61.4	Low	6	0	0%
Charles City	County	37.9	Low	2	0	0%
Charlotte	County	26.3	Low	0	0	N/A
Charlottesville	City	4389.7	High	7	0	0%
Chesapeake	City	584.6	Low	26	2	8%
Chesterfield	County	610.5	Medium	27	11	41%
Clarke	County	71.6	Low	3	0	0%
Clifton Forge	City	1387.5	Medium	0	0	N/A
Colonial Heights	City	2260.3	Medium	0	0	N/A
Craig	County	15.4	Low	0	0	N/A
Culpeper	County	89.9	Low	7	1	14%
Cumberland	County	30.2	Low	4	2	50%
Danville	City	1124.2	Medium	14	9	64%
Dickinson	County	49.4	Low	6	0	0%
Dinwiddie	County	48.7	Low	1	0	0%
Essex	County	38.8	Low	4	0	0%
Fairfax County	County	2454.8	Medium	56	6	11%
Fauquier	County	84.9	Low	2	1	50%
Floyd	County	36.4	Low	1	0	0%
Fluvanna	County	69.8	Low	0	0	N/A
Franklin County	County	68.3	Low	6	2	33%
Frederick	County	142.8	Low	3	0	0%
Fredericksburg	City	1833	Medium	3	0	0%

Jurisdiction	City/County	Population Density	Population Classification	Potential Capital Crimes	Death Sentences	Death Sentence Rate
Giles	County	46.6	Low	4	0	0%
Gloucester	County	160.6	Low	4	0	0%
Goochland	County	59.3	Low	2	0	0%
Grayson	County	40.5	Low	4	0	0%
Greene	County	97.4	Low	6	1	17%
Greensville	County	39.1	Low	3	0	0%
Halifax	County	45.6	Low	12	1	8%
Hampton	City	2828	Medium	39	10	26%
Hanover	County	182.6	Low	13	0	0%
Henrico	County	1101.8	Medium	53	5	9%
Henry	County	151.5	Low	16	0	0%
Highland	County	6.1	Low	0	0	N/A
Hopewell	City	2182.3	Medium	3	0	0%
Isle of Wight	County	94.1	Low	3	0	0%
King George	County	93.4	Low	3	0	0%
King William	County	47.7	Low	2	0	0%
Lancaster	County	86.9	Low	4	0	0%
Lee	County	54	Low	5	0	0%
Loudoun	County	326.2	Low	3	0	0%
Louisa	County	51.5	Low	5	0	0%
Lunenburg	County	30.5	Low	4	1	25%
Lynchburg	City	1321.5	Medium	14	0	0%
Madison	County	39	Low	3	0	0%
Martinsville	City	1407.1	Medium	8	0	0%
Mathews	County	107.5	Low	0	0	N/A
Mecklenburg	County	51.9	Low	11	3	27%
Middlesex	County	76.2	Low	2	2	100%
Montgomery	County	215.4	Low	14	4	29%
Nelson	County	30.6	Low	3	0	0%
New Kent	County	64.2	Low	0	0	N/A
Newport News	City	2637.9	Medium	55	5	9%
Norfolk	City	4362.8	High	178	4	2%
Northampton	County	63.1	Low	6	1	17%
Northumberland	County	63.7	Low	0	0	N/A
Nottoway	County	50	Low	4	0	0%
Orange	County	5.7	Low	4	0	0%
Page	County	74.5	Low	2	1	50%
Patrick	County	40.2	Low	0	1	N/A
Petersburg	City	1474.6	Medium	20	3	15%
Pittsylvania	County	63.6	Low	12	3	25%
Portsmouth	City	3032.7	High	51	5	10%
Powhatan	County	85.6	Low	4	1	25%
Prince Edward	County	55.9	Low	6	0	0%
Prince George	County	124.4	Low	2	2	100%

Jurisdiction	City/County	Population Density	Population Density Classification	Potential Capital Crimes	Death Sentences	Death Sentence Rate
Prince William	County	831.3	Medium	8	11	138% ¹⁶⁴
Pulaski	County	109.6	Low	3	1	33%
Radford	City	1615.2	Medium	0	0	N/A
Rappahannock	County	26.2	Low	0	0	N/A
Richmond	City	3292.6	High	162	17	10%
Richmond County	County	46	Low	1	0	0%
Roanoke	City	2213.2	Medium	42	1	2%
Roanoke County	County	341.9	Low	11	5	45%
Rockbridge	County	34.7	Low	5	0	0%
Rockingham	County	79.6	Low	12	0	0%
Russell	County	63.9	Low	0	0	N/A
Salem	City	1696.4	Medium	4	0	0%
Scott	County	43.6	Low	2	0	0%
Shenandoah	County	68.5	Low	2	1	50%
Smyth	County	73.2	Low	8	4	50%
Southampton	County	29.2	Low	17	1	6%
Spotsylvania	County	225.2	Low	5	0	0%
Stafford	County	341.9	Low	3	0	0%
Staunton	City	1210.3	Medium	3	1	33%
Suffolk	City	159.2	Low	19	1	5%
Surry	County	24.5	Low	0	0	N/A
Sussex	County	25.5	Low	3	0	0%
Tazewell	County	85.5	Low	8	0	0%
Virginia Beach	City	1712.7	Medium	71	11	15%
Warren	County	147.8	Low	4	2	50%
Washington	County	90.8	Low	6	0	0%
Waynesboro	City	1270.8	Medium	3	0	0%
Westmoreland	County	72.9	Low	7	0	0%
Williamsburg	City	1404.1	Medium	5	4	80%
Winchester	City	2526.7	Medium	2	1	50%
Wise	County	99.3	Low	13	0	0%
Wythe	County	59.6	Low	8	0	0%
York	County	532.9	Low	7	4	57%
Total				1336	181	14%

¹⁶⁴ These anomalies are most likely due to underreporting and miscoding in the Supplemental Homicide Reports.

Death Sentences by Qualifying Circumstance and Race

Total Capital Crimes

	White Offender	Black Offender	All Offenders
White Victim	516	220	759
Black Victim	19	515	545
All Victims	541	749	1336

Total Death Sentences

	White Offender	Black Offender	All Offenders
White Victim	75	48	127
Black Victim	4	25	29
All Victims	90	84	181

Potentially Capital Rape-Murders

	White Offender	Black Offender	All Offenders
White Victim	34	9	43
Black Victim	1	21	22
All Victims	35	30	65

Death Sentences for Rape-Murder

	White Offender	Black Offender	All Offenders
White Victim	22	9	32
Black Victim	1	6	7
All Victims	26	19	46

Potentially Capital Robbery-Murders

	White Offender	Black Offender	All Offenders
White Victim	169	174	359
Black Victim	13	284	304
All Victims	186	471	683

Death Sentences for Robbery-Murder

	White Offender	Black Offender	All Offenders
White Victim	27	33	61
Black Victim	2	14	16
All Victims	34	52	89

Potentially Capital Multiple Victim Murders

	White Offender	Black Offender	All Offenders
White Victim	334	54	395
Black Victim	4	234	242
All Victims	341	290	651

Death Sentences for Multiple Victim Murder

	White Offender	Black Offender	All Offenders
White Victim	25	2	29
Black Victim	0	5	5
All Victims	28	7	38

Potentially Capital Institutional Killings

	White Offender	Black Offender	All Offenders
White Victim	1	1	2
Black Victim	1	2	3
All Victims	2	3	5

Death Sentences for an Institutional Killing

	White Offender	Black Offender	All Offenders
White Victim	1	1	2
Black Victim	0	0	0
All Victims	3	1	4