



EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS:

The Virginia Death Penalty Assessment Report

An Analysis of Virginia's Death Penalty Laws, Procedures, and Practices

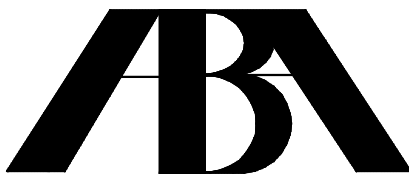


"A system that takes life must first give justice."

John J. Curtin, Jr., Former ABA President

August 2013

AMERICAN BAR ASSOCIATION



**Defending Liberty
Pursuing Justice**

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The American Bar Association Death Penalty Due Process Review Project (the Project) is pleased to present this publication, *Evaluating Fairness and Accuracy in State Death Penalty Systems: The Virginia Death Penalty Assessment Report*.

The Project expresses its great appreciation to all those who helped to develop, draft, and produce the Virginia Assessment Report. The efforts of the Project and the Virginia Death Penalty Assessment Team were aided by many lawyers, academics, judges, and others who presented ideas, shared information, and assisted in the examination of Virginia's capital punishment system. Only a few of them are named below.

Particular thanks must be given to Mark Pickett, Ryan Kent, Sarah Turberville, and Paula Shapiro, the Project's staff attorneys who spent countless hours researching, drafting, editing, and compiling this Report. The Project would also like to thank the American Bar Association Section of Individual Rights and Responsibilities for their contributions. In particular, we would like to thank Section Director Tanya Terrell, as well as Troy Burbank, Jaime Campbell, Patrice Payne, Ginna Anderson, Brittany Benowitz, Christopher "Kip" Hale, and Monika Mehta.

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Lastly, in this publication, the Project and the Assessment Team have attempted to note as accurately as possible information relevant to the Virginia death penalty. The Project would appreciate notification of any errors or omissions in this report so that they may be corrected in any future reprints.

MEMBERS OF THE VIRIGINA DEATH PENALTY ASSESSMENT TEAM

Professor John Douglass, Chair, is Professor of Law at the University of Richmond, where he served as Dean of the Law School from 2007–2011. He teaches Criminal Law, Evidence, Criminal Procedure, litigation skills and trial advocacy. His principal academic publications have focused on prosecution, the criminal trial process and the Confrontation Clause. Before joining the Richmond Law faculty in 1996, he practiced law for 15 years. He served as an Assistant United States Attorney in Baltimore from 1983–86 and was Chief of the Criminal Division of the United States Attorney’s Office in Richmond from 1992–96. He also served on the staff of Independent Counsel Lawrence Walsh in the Iran-Contra investigation. As a partner in a Richmond law firm, he specialized in commercial litigation, insurance defense, construction litigation and white collar criminal defense. He has been a faculty member of the Virginia State Bar’s Course in Professionalism, an instructor in trial advocacy and other litigation skills for the National Institute for Trial Advocacy, and a frequent lecturer at continuing legal education programs. He serves on the Virginia Indigent Defense Commission and on the Ethics Committee for Virginia Commonwealth University Hospitals and is former Chair of the Richmond City Charter Review Commission. Mr. Douglass serves as a mediator of commercial disputes through the McCammon Group in Richmond. He is a graduate of Dartmouth College and Harvard Law School.

Honorable Leslie M. Alden has nearly two decades of experience on the bench hearing civil and criminal cases, with nearly three decades of legal experience in all aspects of litigation. She served as a trial court judge in the Fairfax County, Virginia Circuit Court from 1996 until her retirement in 2012 and was a trial judge in a special jurisdiction court in the Fairfax County General District Court prior to that time. Judge Alden has been a frequent participant in international legal and judicial programs, having served as the President of the International Association of Women Judges, 2008–2010, and remains on the IAWJ Board of Managerial Trustees. She also served the National Association of Women Judges (US) as its International Director for 5 years, developing the award-winning judicial program *Beyond Borders: The Impact of International Law in U.S. Courts*. Before joining the bench, Judge Alden was a shareholder in the law firm Verner, Liipfert, Bernhard, McPherson & Hand in Washington, D.C., with a practice centered on commercial litigation and local government law. Judge Alden earned her J.D. in 1983 from George Mason University School of Law, and earned her B.S. (Business Administration) in 1978 from George Mason University. In 2001, she completed the Economics Institute for State Judges presented by the Law and Organizational Economics Center. In 2005, she completed the Sir Richard May Seminar on International Law and International Courts presented by the International Judicial Academy.

Craig Cooley is a practicing attorney in the Richmond, Virginia area. He is a past Chairman of the Criminal Law Section of the Virginia State Bar, past President of the Richmond Criminal Bar Association, a Substitute Judge, has served on the faculty of the Professionalism Curriculum Course of the Virginia Supreme Court, and served as an Adjunct Professor at the University of Richmond Law School. His 36 years of law practice include 70 capital murder representations, over 400 murder trials, and over 4,500 representations of indigent defendants. He has tried over 500 jury trials. Mr. Cooley served as co-lead counsel to Lee Boyd Malvo, the 17-year-old juvenile tried for capital murder as one of the two “D.C. Beltway Snipers.”

Mark L. Earley Sr. is a former Attorney General of the Commonwealth of Virginia. He served in the State Senate of Virginia for 10 years and also served as President and CEO of Prison Fellowship. He is currently the Founder and Principal of the Earley Legal Group, LLC.

Senator John S. Edwards served as United States Attorney for the Western District of Virginia from 1980 to 1981. He also served as a member of Roanoke City Council and as Vice-Mayor. He has represented the 21st District of Virginia since 1996. Sen. Edwards currently serves on the Commerce and Labor, Courts of Justice and Privileges and Elections Committees in the Virginia State Senate. He also serves on a number of board and commissions and he is Chairman of the Virginia Code Commission and serves on the Board of Governors of the Virginia Bar Association. Sen. Edwards practices law in Roanoke and is an adjunct professor of law at the University of Virginia Law School teaching trial advocacy.

Joseph Flood is a partner at Sheldon, Flood and Haywood, PLC since 2009 where his practice focuses on serious felony cases at trial, appeal, and in post-conviction, including death penalty cases. He is a former Capital Defender for Northern Virginia, and a nationally recognized death penalty expert. Following his clerkship for the Hon. Joseph W. Hatchet, of the Eleventh Circuit Federal Court of Appeals, Mr. Flood began representing death row inmates in Alabama. Subsequently, he worked for ten years as a trial lawyer defending individuals charged with capital crimes in New York. Since 2005, Mr. Flood has represented more than a dozen people facing the death penalty in Virginia. Mr. Flood is also a consulting attorney for the Mexican government through the Mexican Capital Legal Assistance Program. He received his undergraduate degree in history and psychology in 1988 and his law degree in 1992, both from the University of Wisconsin.

Michael Herring, a Richmond native, has been the Commonwealth's Attorney for the City of Richmond since January 3, 2006. Prior to his election as Commonwealth's Attorney, he was a partner at the law firm of Bricker & Herring where he practiced criminal law and medical malpractice law. In 2002, he joined the faculty at the University of Richmond School of Law as an adjunct professor. Mr. Herring served as the first African-American President of the Richmond Bar Association in 2005, was Chairman of the Board of Governors of the Criminal Law Section of the Virginia State Bar in 2004 and 2005, and is a past Chairman of the Third District Attorney Disciplinary Committee. Mr. Herring began his career as an associate at Hunton & Williams before joining the Office of the Commonwealth's Attorney in 1992, where he served as the head of the Narcotics Interdiction Team and as a senior felony trial attorney for Violent Crimes and Narcotics Offenses. He returned to the private sector in 1996 at the law firm of LeClair Ryan. As an attorney, he has mentored students through many Richmond Public Schools programs. He received his undergraduate degree in economics in 1987 and his law degree in 1990, both from the University of Virginia.

Gail Starling Marshall is an attorney in private practice in Orange County, Virginia. Ms. Marshall graduated Order of the Coif from the University of Virginia Law School in 1968 and taught on the faculty there from 1968 to 1972, when she joined the Washington, D.C. law firm of Hogan & Hartson (now Hogan & Lovells). After becoming partner in the Litigation Department,

she later left to become Deputy Attorney General of Virginia in Richmond, a post she held for eight years (1986–1994). Since 1994, Ms. Marshall has been in private practice and also serves as the town attorney in Rapidan, Virginia. She was awarded the Virginia State Bar’s Lewis F. Powell Jr. Pro Bono Award in 2011 and also serves on the Board of the Virginia Capital Representation Resource Center.

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EXECUTIVE SUMMARY

I. INTRODUCTION: GENESIS OF THE ABA'S DEATH PENALTY ASSESSMENTS PROJECT

Fairness and accuracy together form the foundation of the American criminal justice system. As the United States Supreme Court has recognized, these goals are particularly important in cases in which the death penalty is sought. Our system cannot claim to provide due process or protect the innocent unless it provides a fair and accurate system for every person who faces the death penalty.

Over the course of the past thirty years, the American Bar Association (ABA) has become increasingly concerned that capital jurisdictions too often provide neither fairness nor accuracy in the administration of the death penalty. In response to this concern, on February 3, 1997, the ABA called for a nationwide suspension of executions until serious flaws in the system are identified and eliminated. The ABA urges capital jurisdictions to (1) ensure that death penalty cases are administered fairly and impartially, in accordance with due process, and (2) minimize the risk that innocent persons may be executed.

In the autumn of 2001, the ABA, through the Section of Individual Rights and Responsibilities, created the Death Penalty Due Process Review Project (the Project).¹ The Project conducts research and educates the public and decision-makers on the operation of capital jurisdictions' death penalty laws and processes in order to promote fairness and accuracy in death penalty systems, both in the U.S. and abroad. The Project encourages legislatures, courts, administrative bodies, and state and local bar associations to adopt the ABA's Protocols on the Fair Administration of the Death Penalty; provides technical assistance to state, federal, international, and foreign stakeholders on death penalty issues; and collaborates with other individuals and organizations to develop new initiatives to support reform of death penalty processes.

To assist the majority of capital jurisdictions that have not yet conducted comprehensive examinations of their death penalty systems, the Project began in February 2003 to examine several U.S. jurisdictions' death penalty systems and preliminarily determine the extent to which they achieve fairness and minimize the risk of executing the innocent. To date, the Project has conducted assessments examining the administration of the death penalty in Alabama, Arizona, Florida, Georgia, Indiana, Kentucky, Missouri, Ohio, Pennsylvania, and Tennessee and released reports on these states' capital punishment systems in 2006, 2007, 2011, and 2012. In addition to this report on Virginia, the Project will also release a report on Texas.

The assessments are not designed to replace the comprehensive state-funded studies necessary in capital jurisdictions, but instead are intended to highlight individual state systems' successes and inadequacies. Past state assessment reports have been used as blueprints for state-based study commissions on the death penalty, served as the basis for new legislative and court rule changes on the administration of the death penalty, and generally informed decision-makers' and the public's understanding of the problems affecting the fairness and accuracy of their state's death penalty system.

¹ The Project was originally established as the "ABA Death Penalty Moratorium Implementation Project."

All of these assessments of state law and practice use as a benchmark the protocols set out in the ABA Section of Individual Rights and Responsibilities' 2001 publication, *Death without Justice: A Guide for Examining the Administration of the Death Penalty in the United States* (the Protocols). While the Protocols are not intended to cover exhaustively all aspects of the death penalty, they do cover seven key aspects of death penalty administration: defense services, procedural restrictions and limitations on state post-conviction and federal habeas corpus proceedings, clemency proceedings, jury instructions, an independent judiciary, racial and ethnic minorities, and mental retardation and mental illness. Additionally, the Project added five new areas to be reviewed as part of the assessments in 2006: preservation and testing of DNA evidence, law enforcement identification and interrogation procedures, crime laboratories and medical examiners, prosecution, and the direct appeal process and proportionality review.

Each assessment is conducted by a state-based assessment team. The teams are comprised of or have access to current or former judges, state legislators, current or former prosecutors, current or former defense attorneys, active state bar association leaders, law school professors, and anyone else whom the Project felt was necessary. Team members are not required to support or oppose the death penalty or a suspension of executions.

The findings of each assessment team provide information on how state death penalty systems are functioning in design and practice and are intended to serve as the bases from which a state can launch a comprehensive self-examination, impose reforms, or in some cases, impose a suspension of executions. Because capital punishment is the law in each of the assessment states and because the ABA takes no position on the death penalty *per se*, the assessment teams focused exclusively on capital punishment laws and processes and did not consider whether states, as a matter of morality, philosophy, or penological theory, should have the death penalty.

This executive summary consists of a summary of the findings and proposals of the Virginia Death Penalty Assessment Team. The body of this Report sets out these findings and proposals in more detail, followed by an Appendix. The conclusions drawn by the Virginia Assessment Team as to whether the Commonwealth is in compliance with each ABA Protocol were the product of consensus decision-making.

The Project and the Virginia Death Penalty Assessment Team have attempted to describe as accurately as possible information relevant to the Virginia death penalty. The Assessment Team recognizes that members of the Virginia legal and policy communities use the Virginia Reporter; however, to maintain consistency with past reports which cite regional reporters, this Report's citations to case law reference the Southeastern Reporter. The Project would appreciate notification of any factual errors or omissions in this Report so that they may be corrected in any future reprints.

II. HIGHLIGHTS OF THE REPORT

A. Overview of the Virginia Death Penalty Assessment Team's Work and Views

To assess fairness and accuracy in Virginia's death penalty system, the Virginia Death Penalty Assessment Team researched the twelve issues that the ABA identified as central to the analysis of the fairness and accuracy of a state's capital punishment system. The Virginia Death Penalty Assessment Report devotes a chapter to each of the following areas: (1) overview of the Commonwealth's death penalty; (2) law enforcement identification and interrogation procedures; (3) collection, preservation, and testing of DNA and other types of evidence; (4) crime laboratories and medical examiner offices; (5) prosecution; (6) defense services; (7) the direct appeal process and proportionality review; (8) state habeas corpus proceedings; (9) clemency; (10) jury instructions; (11) judicial independence; (12) treatment of racial and ethnic minorities; and (13) mental retardation and mental illness.² Chapters begin with an introduction to provide a national perspective of the issues addressed by each chapter, followed by a "Factual Discussion" of the relevant laws and practices in Virginia. The final section of each chapter, entitled "Analysis," examines the extent to which Virginia is in compliance with the ABA Protocols.

It is the Assessment Team's unanimous view that, as long as Virginia imposes the death penalty, it must be reserved for a narrow category of the worst offenders and offenses, ensure heightened due process, and minimize the risk of executing the innocent.

B. Recent Improvements to Fairness and Accuracy in Capital Cases

The Commonwealth has enacted some reforms in recent years that improve fairness and accuracy of capital proceedings. For example, some law enforcement agencies across the Commonwealth have adopted policies that improve the likelihood of accurate eyewitness identifications. Adherence to such policies both reduces the risk of wrongful conviction and improves the ability of law enforcement to identify the real perpetrators. The Virginia Department of Criminal Justice Services' *Model Policy on Eyewitness Identification* incorporates recent advancements in social scientific research, including specific policies consistent with the *ABA Best Practices* on conducting an in-person or photographic lineup. While the *Model Policy* is not mandatory for Virginia law enforcement agencies, many of the policies recommended have been widely adopted. In addition, in 2014, the Virginia Law Enforcement Professional Standards Commission's accreditation standards will require agencies seeking accreditation to develop a written policy for documenting line-up procedures and for conducting showups.³

Further, the reliability and timeliness of forensic investigation in death penalty cases in the Commonwealth is enhanced by accreditation of crime laboratories and medical examiner offices in the state, as well as certification of the professionals employed by those entities. Each of the four crime laboratories that comprise the Virginia Department of Forensic Science (DFS) has voluntarily obtained accreditation through the American Society of Crime Laboratory

² This report is not intended to cover all aspects of the Commonwealth's capital punishment system, and, as a result, it does not address a number of important issues, such as the treatment of death row inmates while incarcerated or method of execution.

³ A showup is an identification procedure in which the eyewitness directly confronts the suspect alone.

Directors/Laboratory Accreditation Board *International* Accreditation Program. DFS has also established guidelines for all law enforcement agencies on the collection, packaging, preservation, and transference of physical evidence to its laboratories. Virginia medical examiner offices have obtained voluntary accreditation through the National Association of Medical Examiners and the Commonwealth's Chief Medical Examiner is a forensic pathologist licensed to practice medicine and certified by the American Board of Pathology. Each of the medical examiner offices employ forensic pathologists who are similarly licensed and certified. The Commonwealth has also created two oversight commissions, the Virginia Scientific Advisory Committee and the Virginia Forensic Science Board, to review actions of the Commonwealth's crime laboratories and medical examiners to ensure the validity, reliability, and timely analysis of forensic evidence.

Finally, Virginia's establishment of Regional Capital Defender offices, staffed by attorneys and support staff specially qualified to represent capital defendants at trial, has significantly improved the quality of representation available to Virginia's indigent defendants in death penalty cases. These offices are also staffed with mitigation and investigative assistance—positions that are critical to defense of those facing the death penalty. Virginia also provides funding to the Virginia Capital Representation Resource Center to represent death row inmates in state habeas, federal habeas, and clemency proceedings. Because state and federal habeas claims in death penalty cases are often complex and require a special understanding of death penalty law, funding an organization specifically dedicated to capital post-conviction representation helps to ensure that death row inmates' claims are fully researched and developed.

Further, the Virginia Indigent Defense Commission also oversees numerous aspects of the provision of defense services in the Commonwealth, including the certification of attorneys providing representation to Virginia's indigent capital defendants and death row inmates, as well as the hiring and monitoring of the Capital Defenders.

C. Areas and Recommendations for Reform

Throughout its review, the Assessment Team identified several areas of concern. This section describes those areas viewed by the Team to be most in need of reform, followed by specific recommendations endorsed by the Assessment Team for that purpose. The Team's full list of areas for concern and recommendations for reform may be found throughout the main Assessment Report, organized by chapter.

Pretrial Areas for Reform

Eyewitness Identification Procedures (Chapter 2). Between 1989 and 2013, at least 18 people in Virginia whose convictions were based largely on eyewitness misidentifications have been exonerated of serious violent felonies following DNA testing or the discovery of new evidence. In one case, an innocent person remained in prison for 15 years for an offense he did not commit while the actual perpetrator remained free and committed an assault on another victim. While the Virginia Department of Criminal Justice Services (DCJS) has developed a *Model Policy on Eyewitness Identification*, a 2011 DCJS report found that a majority of law enforcement agencies in Virginia do not use double blind administration—in which both the officer and the witness are

unaware of the identity of the suspect during a lineup—despite the fact that the *Model Policy* has recommended this method since 2005. The DCJS report also found that 69% of the law enforcement agency policies it reviewed do not require documented lineup results. Moreover, only 10% of responding agencies’ policies indicated a preference for video- or audio-recording the procedure, rather than a written recordation of the procedure.

Recommendations
Virginia should require law enforcement agencies to adopt the Virginia Department of Criminal Justice Service’s (DCJS) <i>Model Policy on Eyewitness Identification</i> . Any new rule or law on eyewitness identification procedures should also include remedies for agencies’ noncompliance with the identification procedures. Such remedies need not mean an automatic exclusion of the eyewitness’s identification.
Virginia DCJS should also incorporate its <i>Model Policy on Eyewitness Identification</i> into its minimum training requirements for law enforcement officers.

Interrogation Procedures in Capital Cases (Chapter 2). Virginia does not require law enforcement agencies to electronically record a suspect’s interrogation and confession, nor has any Virginia agency developed a model policy on interrogation recording. The Northwestern University School of Law Center on Wrongful Convictions found that only nine Virginia law enforcement agencies record a majority of their interrogations.

Recommendations
Virginia should require law enforcement agencies to record interrogations and interviews with suspects and witnesses that take place in a law enforcement-controlled setting in any potential capital case. DCJS could assist with developing the statute, or Virginia could look to the several other states that have already implemented interrogation recording statutes, including the neighboring jurisdictions of Maryland, North Carolina, and the District of Columbia.
With respect to interrogations, recording should include the reading of <i>Miranda</i> rights, the <i>Miranda</i> waiver, all questioning by law enforcement, and the suspect’s final statement. Exceptions to the recording requirement should be permitted in the case of certain exigent circumstances, such as a sudden utterance by the suspect, a suspect’s unequivocally expressed desire not to be recorded, and cases in which the recording equipment fails and officers made a good faith attempt to record the interrogation. The statute must also provide defendants with a remedy if law enforcement failed to record the interrogation in violation of the statute; importantly, however, the remedy need not mean a total exclusion of all unrecorded statements.

Discovery in Capital Cases (Chapter 5). Virginia’s discovery rules are more restrictive than in other states and the federal system in providing capital defendants the basic information necessary to prepare and present a defense. By comparison, discovery rules governing civil cases are far more widely-encompassing than those required in a death penalty case in the Commonwealth.

While some prosecutors in capital cases provide more discovery than the rules require, when discovery conforms to Virginia’s rules, a capital defendant may go to trial without knowing who

will testify against him or her. She or he may face the prospect of cross-examining witnesses without access to written or recorded statements made by the witness at the time of the events. And a capital defendant may face the daunting task of preparing for trial without access to much of the record of the police investigation that gave rise to capital charges. Because capital cases bring particular focus on issues of mitigation, Virginia’s limited rules of discovery can also put the prosecutor in the difficult position of deciding for him or herself which evidence in a police file may support a sentence less than death. Despite prosecutors’ efforts to act in good faith, such a system makes *Brady* violations more likely and can result in extensive post-trial litigation, reversals, and retrials. Recently, two Virginia capital cases were reversed on appeal due to failures to disclose exculpatory evidence.

Recommendations

The Virginia Supreme Court should modify Rule 3A:11, for capital cases, to require prosecutors to disclose the identity and any prior statements of testifying witnesses at a time sufficient to allow adequate preparation for cross-examination and to allow discovery of police reports. In recognition of the sensitive issues regarding the cooperation and safety of witnesses, the rules should include a provision for protective orders to protect witness safety in appropriate cases. Importantly, such discovery contributes to earlier and better informed disposition of capital cases through guilty pleas. Because of the added costs and protracted nature of capital litigation, such dispositions likely would more than offset the minimal cost of providing broader discovery of information already in the hands of the Commonwealth.

All Commonwealth’s Attorneys should develop procedures to ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with the duty to disclose exculpatory evidence. Prosecutors should have in their possession a complete copy of the investigating agencies’ case file and must conduct a full inspection of the complete contents of the file.

All law enforcement officers should be required to receive training on the importance of divulging all evidence to the prosecutor in all criminal cases, including anything that might constitute *Brady* material, such as mitigating evidence in death penalty cases.

Capital Charging (Chapter 5). After a capital indictment, a Commonwealth’s Attorney may determine—in his or her discretion—that seeking the death penalty is not appropriate in a particular case. However, existing Virginia law does not explicitly provide for such circumstances and may even permit a court to impose a death sentence where the prosecutor does not seek it.

Recommendation

Virginia should enact a statutory change that authorizes the prosecutor to unilaterally withdraw the death penalty when the defendant has been charged with capital murder. Notably, this amendment would provide a cost savings to the Commonwealth as prosecutors would be able to seek a sentence less than death in a capital case, with the concomitant savings in capital litigation by the court, prosecution, and defense. It would also provide additional options to Commonwealth’s Attorneys in determining how to prosecute a capital case as new information relevant to the sentencing decision arises after indictment.

Post-Trial Areas for Reform

Biological Evidence Preservation (Chapter 3). Virginia requires automatic preservation of biological evidence in capital cases; however, the preservation of evidence which likely affects death-eligibility—such as evidence in non-capital cases—is not required to be preserved for as long as the defendant remains incarcerated. Further, the Virginia Code prohibits petitioners from seeking a writ of habeas corpus if the Commonwealth fails to preserve biological evidence—even in capital cases. Long-term preservation of biological evidence would not only improve the Commonwealth’s ability to identify wrongful convictions, but would also be an effective tool to assist in identifying and convicting actual perpetrators.

Recommendations

When biological evidence is collected in a felony case, Virginia should require long-term preservation of such evidence. The experience of the many other states that have enacted provisions, which call for blanket preservation of biological evidence in criminal cases, may prove instructive. In addition, the Commonwealth should provide notice to all parties whenever testing may consume the only available sample of evidence.

In order to encourage preservation and promote adherence to existing evidence preservation requirements, state law also should be amended to permit the Commonwealth’s failure to preserve evidence to serve as a basis for relief in state habeas corpus proceedings. Courts should not be prohibited, as they are under existing law, from exercising their discretion to determine if the circumstances surrounding lost or destroyed evidence warrant relief.

Access to Post-Conviction Testing of Biological Evidence (Chapter 3). Virginia’s post-conviction testing statute limits the ability of death row inmates to prove their innocence or otherwise demonstrate that they should not have been subject to the death penalty in several important respects. The law, for example, does not permit testing to prove that the inmate did not engage in aggravating conduct, which the judge or jury must consider before determining the sentence in a death penalty case. The statute also requires an inmate to prove by clear and convincing evidence that the results of DNA testing will prove his or her innocence. Virginia is one of the only states to require clear and convincing evidence of innocence, rather than a “reasonable probability” of favorable results, in order to be granted access to testing of biological evidence. It has been observed that this high burden “ensures that it is virtually impossible for a convict to be exonerated through DNA evidence since without access to the evidence he is unable to prove those things necessary to allow him access.” Further, the statute does not provide for testing based on suspected unreliability of a prior DNA test.

Recommendations

Virginia should amend its DNA testing statute to permit post-conviction testing on biological evidence if the testing requested was not available at the time of trial or there is credible evidence that prior test results or interpretation were unreliable. The Commonwealth should also ensure that Virginia law grants access to testing to an individual who is able to show that a *reasonable probability* exists that she or he is innocent of the offense *or* did not engage in aggravating conduct in a death penalty case.

Appellate Representation (Chapter 6). While Virginia should be commended for ensuring continuity of counsel in death penalty cases by assigning trial counsel to represent the defendant on direct appeal, this system does not ensure that a defendant receives high quality legal representation on appeal, which is the last stage that the defendant has a right to effective counsel. Trial counsel frequently are not possessed of the time or special skills required of appellate representation, which require thorough review of the trial record anew, as well as extensive brief-writing. This is in contrast to the appellate representation provided by the Office of the Attorney General on behalf of the prosecution in any appeals in death penalty cases in Virginia. Furthermore, compensation of counsel employed by the Attorney General to handle capital appeals is oftentimes far greater than that afforded to attorneys employed by the Regional Capital Defenders who undertake appellate representation.

Recommendation
Virginia should create a position for an appellate defender within the Regional Capital Defender Office in Richmond. If and when direct appellate representation in a capital case is required, the attorneys serving in this position will be specially trained to investigate and present the unique issues raised in capital appeals. In cases where an appellate defender cannot represent the defendant, Virginia must fully compensate counsel for actual time and services performed.

State Habeas Corpus Proceedings (Chapter 8). One of the biggest areas for concern in Virginia’s present death penalty system is the nature and timing of the Commonwealth’s state post-conviction process, known as state habeas corpus. In most respects, the state habeas process in Virginia emphasizes finality of convictions and death sentences over fairness. Importantly, many of the limitations placed on Virginia death row inmates petitioning for habeas relief are not imposed in other capital jurisdictions.

For example, Virginia imposes strict and limited time constraints on inmates filing state habeas petitions. Other capital jurisdictions provide death row inmates with a significantly longer period in which to file a petition for state post-conviction relief, or do not impose a specific deadline at all. Additionally, Virginia permits an execution date to be scheduled once a state habeas petition has been denied. This practice denies Virginia death row inmates the full-year for research, preparation, and filing of their federal petition that would otherwise be available. Because Virginia cannot impose this restriction on inmates *not* sentenced to death, this effectively provides less due process to those under a death sentence than that which is afforded to non-capital inmates in Virginia.

Furthermore, factual disputes in state habeas proceedings appear to be resolved based on review of affidavits submitted by the parties rather than through evidentiary hearings. This is particularly troublesome because many claims that are commonly presented in state habeas proceedings involve complex factual considerations that typically require the court to consider evidence that is not in the trial record and that cannot be fully developed in the absence of an evidentiary hearing. Only five capital habeas cases between 1995 and 2012 have been granted evidentiary hearings, and the courts ultimately dismissed the habeas petition following the hearing in four of these cases. During this same time period, no court has approved funding for mitigation, investigative, or expert assistance in a death row inmate’s case for state habeas relief. Instead, the Virginia Capital Representation Resource Center—the entity responsible for

representation of most death row inmates—must often request pro bono assistance from such service providers.

Recommendations

Virginia should

- Return original jurisdiction over capital state habeas claims to trial courts to ensure that the court in which the inmate was originally convicted has the first opportunity to correct any errors. This approach also affords more process to all parties involved, as the decision to grant or deny a hearing and the court's final order may then be appealed to the Supreme Court of Virginia;
- Increase the amount of time afforded to death row inmates for filing of their state habeas petitions, with an allowance for an extension of time upon a showing of good cause;
- Eliminate the practice of scheduling an execution date while an inmate's federal habeas proceedings are pending, and permit the setting of an execution date only after all state and federal remedies are exhausted; and
- Provide funding so that state habeas attorneys can hire mitigation specialists, investigators, and experts needed to fully develop and present their clients' claims.

Special Issue Areas

Capital Jury Instructions (Chapter 10). The Virginia Assessment Team recognizes the complexities inherent in designing capital jury instructions that are both comprehensible to laypersons and accurate statements of the law. As shown by the findings of the Capital Jury Project, however, a significant number of Virginia's capital jurors have failed to understand several aspects of Virginia's capital sentencing procedure. On some issues, a majority of surveyed jurors expressed understandings of the law that contradicted U.S. Supreme Court decisions. The Capital Jury Project found, for instance, that

- 77% of surveyed Virginia capital jurors erroneously believed that the jury had to be unanimous in order to consider evidence as mitigating;
- 53% did not realize that they could consider any evidence as mitigating evidence; and
- 51% believed that they were required to find mitigating evidence beyond a reasonable doubt.

Juror confusion on these issues was higher than average in Virginia among the thirteen states in which the Capital Jury Project conducted its study. Many Virginia jurors also misunderstood whether the death penalty was required in a particular case. An alarming 53% of surveyed Virginia capital jurors believed that the death penalty was required by law if they found that the murder was heinous, vile, or depraved, and 41% believed death was required if they found that the defendant would be dangerous in the future. In fact, however, a finding of aggravation is only a factor for the jury to *consider* in determining whether to sentence a defendant to death.

Since the abolition of parole in Virginia in 1995, capital jurors may also experience confusion in predicting whether the defendant “would commit criminal acts of violence that would constitute a continuing serious threat to society.” With the abolition of parole, this aggravating factor

requires the prosecution to prove that the defendant would pose a threat to others *during his or her life prison term*, not while in society at large.

Juror confusion is likely to persist unless Virginia's capital jury instructions are revised to enhance clarity, instructions are presented to jurors in a more organized and logical manner, and judges are more willing to respond to juror inquiries regarding questions of law.

Recommendations

Virginia capital jurors should be instructed that

- Jurors are never required to return a verdict of death. Jurors may return a life sentence, even in the absence of any mitigating factor and even when both aggravating factors have been established beyond a reasonable doubt, if they do not conclude that the defendant should receive the death penalty;
- Mitigating evidence does not need to be found beyond a reasonable doubt;
- A finding of mitigating evidence need not be unanimous;
- Any evidence presented during the guilt and sentencing phases of the trial may be considered as mitigating evidence; and
- Jurors must consider mitigating evidence if they find an aggravating factor.

In addition,

- Jurors should be instructed on individual mitigating factors when such an instruction is supported by the evidence and requested by the defendant; and
- In applicable cases in which jurors are considering whether the defendant poses a continuing threat to society, the instruction should make clear that jurors must consider the defendant's threat to others in light of his or her incarceration while serving a sentence of life in prison without the possibility of parole.

Persons with Mental Retardation/Intellectual Disability (Chapter 13). The Virginia statute detailing how intellectual functioning testing must be conducted for the purposes of determining whether a defendant has mental retardation seeks to ensure that only scientifically valid IQ tests are admissible. However, under Virginia law, a defendant must present an IQ score of 70 or below to prove that she or he has mental retardation. This is a requirement that has been expressly rejected by the American Association on Intellectual and Developmental Disabilities (AAIDD) and is contrary to the modern, scientific understanding of mental retardation.

Virginia law also requires the determination of whether a defendant has mental retardation to be made as part of the sentencing phase of a death penalty case. This is problematic because jurors hearing a mental retardation claim after the determination of guilt may be strongly influenced by evidence of future dangerousness or vileness. Additionally, determining mental retardation at the sentencing phase means that the Commonwealth may conduct a long, expensive, and ultimately unnecessary capital proceeding.

Recommendations

Virginia should amend its mental retardation statute such that it fully conforms to the AAIDD definition. The statute should not require a particular IQ score to prove mental retardation and should allow courts to take into account errors of measurement like the *Flynn effect* and *practice effect*. In addition, the statute should clearly provide that formal mental retardation testing administered before the age of 18 is not required to prove mental retardation.

Virginia should amend its statute to require the trial court make a pretrial determination of whether a capital defendant has mental retardation, and is thus ineligible for the death penalty, so long as the defendant can present some credible evidence that she or he has mental retardation. This should not, however, preclude the defendant from presenting a mental retardation claim in the sentencing phase of the trial in the event that a pretrial hearing is not granted or if the defendant does not prevail in the hearing.

There are distinct advantages to determining mental retardation in a pretrial hearing. If a defendant is determined to have mental retardation prior to commencement of trial, the Commonwealth is spared a long, expensive, and unnecessary capital proceeding. This frees the court, prosecution, and defense counsel to devote their limited resources to other matters. Several jurisdictions have already adopted these procedures.

Persons with Severe Mental Illness (Chapter 13). Virginia's rules and laws do not afford adequate protection of individuals with several mental disorders or illnesses in death penalty cases. For example, the Commonwealth does not prohibit death sentences or executions of persons who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior caused by a disability other than mental retardation, such as dementia or traumatic brain injury. Under this standard, a defendant who suffered a serious brain injury at age 18 or older would be eligible for the death penalty, even if, as a result of the injury, she or he exhibits every other characteristic of mental retardation. Furthermore, Virginia does not forbid execution of the severely mentally ill under any standard. Much as the AAIDD supports a ban on the execution of persons with mental retardation, several leading mental health groups and the American Bar Association support a prohibition of the death penalty for a narrow group of severely mentally ill individuals whose ability to control their conduct at the time of the offense was significantly impaired.

Recommendations

The diminished culpability of defendants with mental retardation arises from their intellectual and adaptive limitations, not the cause of these limitations. Accordingly, persons who suffer from these limitations should be afforded the same protection under the law, irrespective of the cause of the disability. Thus, Virginia should adopt a law prohibiting the application of the death penalty to anyone who, at the time of the offense, suffered from significant limitations in both their general intellectual functioning and adaptive behavior, whether resulting from mental retardation, *dementia, traumatic brain injury, or other disease or disability*. Under this standard, the defendant would have to prove that she or he suffers from the same intellectual functioning and adaptive behavior limitations as a person with mental retardation.

Recommendation

The law should also forbid death sentences and executions with regard to persons who, at the time of the offense, had a *severe* mental disorder or disability that significantly impaired the person's capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. The law should make explicit that a disorder manifested primarily by repeated criminal conduct, such as antisocial personality disorder, or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of exclusion from capital punishment.

This procedure would affect only a defendant's eligibility for the death penalty. Those defendants qualifying as having a severe mental disorder under this standard would still be eligible to stand trial.

Data Collection (Chapters 5, 7, & 12). Virginia has continued to expand the number and type of death penalty-eligible offenses since reinstatement of the death penalty. While, in 1975, an offender convicted of first-degree murder was only eligible for the death penalty if she or he was found guilty of one of three predicate offenses, this number rose to one out of fifteen separate predicate offenses by 2011. Of the many cases in which a death sentence could have been sought but was not because of a plea agreement, there often is no appeal and thus no official record of salient facts relative to the offense and the offender. A 2002 report by the Joint Legislative Audit and Review Commission (JLARC) of the Virginia General Assembly examined capital-eligible homicide cases in Virginia from 1995 to 1999. The JLARC report commented on the problems with respect to data collection on Virginia's death penalty and recommended that the Commonwealth create a searchable, publicly available tool on the charging and sentencing of all capital-eligible offenses.

Creation of a data collection tool would not only assist the Supreme Court of Virginia in reviewing the proportionality of death sentences imposed in the Commonwealth, but would also assist litigants in presenting claims on proportionality issues and aid prosecutors in making charging decisions. Obtaining accurate, reliable data on whether race, geography, or any other improper factor influences outcomes in capital cases is also essential to ensuring that the Commonwealth provides due process and equal protection of the law.

Recommendation

Virginia should designate an appropriate entity, such as the Virginia Sentencing Commission, to collect, analyze, and make publicly available salient facts on all death-eligible cases in Virginia, regardless of whether the case was resolved at trial or through a plea negotiation. It is imperative that the collection of this data be sanctioned by the Supreme Court of Virginia to ensure its reliability, trustworthiness, and admissibility. Other affected stakeholders, including prosecutors, capital defense counsel, and trial courts, should also be consulted in creation of such a database.

III. SUMMARY OF THE REPORT

Chapter One: Overview of Virginia's Death Penalty System

In this chapter, the Assessment Team examined the demographics of Virginia's death row, the statutory evolution of Virginia's death penalty scheme, and the general progression of a death penalty case through Virginia's capital punishment system from arrest to execution.

Chapter Two: Law Enforcement Identification and Interrogation Procedures

Eyewitness misidentifications and false confessions are two of the leading causes of wrongful convictions. In order to reduce the number of convictions of innocent persons and to ensure the integrity of the criminal justice process, the rate of eyewitness misidentifications and of false confessions must be reduced. In this Chapter, the Assessment Team reviewed Virginia's laws, procedures, and practices on law enforcement identifications and interrogations and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on law enforcement identification and interrogation procedures is illustrated in the following chart.

Law Enforcement Identification and Interrogation Procedures	
ABA Protocol	Compliance Level
Protocol #1: Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the <i>ABA Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures</i> .	Partial Compliance
Protocol #2: Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.	Partial Compliance
Protocol #3: Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.	Partial Compliance
Protocol #4: Video-record the entirety of custodial interrogations of suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where video-recording is impractical, audio-record the entirety of such custodial interrogations.	Partial Compliance
Protocol #5: Ensure adequate funding to ensure the proper development, implementation, and updating policies and procedures relating to identifications and interrogations.	Insufficient Information ¹
Protocol #6: Courts should have the discretion to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy.	Partial Compliance
Protocol #7: Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy. If, in relevant cases, the court finds a sufficient risk of misidentification based on cross-racial factors, judges should have available model jury instructions that inform juries that the cross-racial nature of the identification may affect the reliability of an eyewitness identification.	Partial Compliance
Protocol #8: Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.	Partial Compliance

¹ Insufficient information to determine statewide compliance.

Law Enforcement Identification and Interrogation Procedures (Cont'd)	
ABA Protocol	Compliance Level
Protocol #9: Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.	Partial Compliance

Nationwide, approximately 75% of wrongful convictions have involved an eyewitness misidentification, including at least eighteen cases in Virginia between 1989 and 2013.

The Virginia Department of Criminal Justice Services (DCJS) has developed a *Model Policy on Eyewitness Identification* that substantially comports with the *ABA Best Practices*, which incorporates recent advancements in social scientific research. Several of the procedures recommended in the model policy, such as sequential viewing of lineup participants and double blind administration, have been shown to substantially reduce the risk of eyewitness misidentification. However, the DCJS model policy is not mandatory, and as of 2011, only 46% of Virginia's law enforcement agencies had enacted policies "substantially similar" to DCJS's model policy. Law enforcement officers are also not required to receive training on the model policy. Some Virginia law enforcement agencies have also failed to enact policies on showups, a suggestive eyewitness identification procedure in which the witness directly confronts the suspect without any other participants.

Virginia courts have allowed expert testimony on factors affecting the accuracy of eyewitness identifications under "narrow circumstances." The Supreme Court of Virginia permits, but does not require, a trial court to instruct the jury on the factors to be considered in gauging the accuracy of an eyewitness identification.

In addition, false confessions have contributed to approximately 25% of wrongful convictions in the United States, including two high-profile murder cases in Virginia.

A video-recording of a suspect's interrogation may help the court, jury, and prosecutor to evaluate the credibility of a confession. Virginia, however, does not require law enforcement agencies to video-record a suspect's interrogation, nor has DCJS developed a model policy on this area. While some individual law enforcement agencies have implemented their own policies on the recording of interrogations, others have not. Moreover, some of the policies reviewed by the Assessment Team require only audio recording of the interrogation or do not require the entirety of the interrogation to be recorded. This practice can result in law enforcement electronically recording only the defendants' confessions but not the interrogations that preceded their final statements.

Chapter Three: Collection, Preservation, and Testing of DNA and Other Types of Evidence

DNA testing has proved to be a useful law enforcement tool to establish guilt as well as innocence. The availability and utility of DNA testing, however, depends on the state's laws and on its law enforcement agencies' policies and procedures concerning the collection, preservation, and testing of biological evidence. In this chapter, the Assessment Team examined Virginia's laws, procedures, and practices concerning not only DNA testing, but also the collection and

preservation of all forms of biological evidence, and we assessed whether the Commonwealth complies with the ABA’s policies.

A summary of Virginia’s overall compliance with the ABA’s policies on the collection, preservation, and testing of DNA and other types of evidence is illustrated in the following chart.²

Collection, Preservation, and Testing of DNA and Other Types of Evidence	
ABA Protocol	Compliance Level
Protocol #1: Preserve all biological evidence for as long as the defendant remains incarcerated.	Partial Compliance
Protocol #2: All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law. Jurisdictions should provide access to post-conviction DNA testing to comport, at a minimum, with the standards and procedures set forth in the <i>ABA Criminal Justice Standards on DNA Evidence</i> .	Partial Compliance
Protocol #3: Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.	Partial Compliance
Protocol #4: Provide adequate funding to ensure the proper preservation and testing of biological evidence.	In Compliance

Since the reinstatement of the death penalty in 1975, sixteen Virginia inmates, including one death row inmate, have been exonerated through post-conviction DNA testing.

In Virginia, the Department of Forensic Science (DFS) is solely responsible for collecting, preserving, and testing forensic evidence in criminal investigations. DFS operates pursuant to its *Evidence Handling and Laboratory Capabilities Guide*, which provides detailed instructions relating to the collection, storage, preservation, and testing of biological evidence. DFS is exclusively responsible for analyzing evidentiary material associated with criminal investigations for all state and local law enforcement agencies, which include 247 police departments and 124 sheriff organizations. DFS is also responsible for analyzing evidentiary material for all medical examiners and 130 prosecutorial agencies within the Commonwealth of Virginia.

In capital cases, Virginia law provides an automatic right to preservation of biological evidence and requires that such evidence be preserved “until the judgment is executed.” Virginia’s preservation requirements in non-capital cases, however, are subject to two critical limitations, both of which may affect the ability of those under a death sentence to prove wrongful conviction or that the person should not have been subject to the death penalty. First, the right to preservation is not automatic. The failure to provide for blanket preservation in criminal cases is an outlier practice among states that have codified preservation requirements. Second, the Virginia preservation statute includes a fifteen-year time limit on the preservation of DNA evidence in non-capital cases. Failure to provide for long-term preservation of biological evidence may result in the destruction of potentially exculpatory evidence prior to the discovery of advanced technological measures that could allow testing on previously untestable evidence.

² Where necessary, the recommendations contained in this chart and all subsequent charts were condensed to accommodate spatial concerns. The condensed recommendations are not substantively different from the recommendations contained in the “Analysis” section of each chapter.

The law also prohibits an inmate from seeking habeas corpus relief in the event that the Commonwealth fails to properly preserve biological evidence as required under the law.

With respect to testing of preserved biological evidence, the Virginia Code sets out a series of procedures that must be followed in order for a prisoner to obtain post-conviction DNA testing. With access to testing, an inmate may be able to obtain a “writ of actual innocence” from the Supreme Court of Virginia. The post-conviction testing statute, however, limits the ability of death row inmates to prove their innocence or otherwise demonstrate that the inmate should not have been subject to the death penalty in several important respects.

The law, for example, does not permit testing to prove that the inmate did not engage in aggravating conduct, which the judge or jury must consider before determining the sentence in a death penalty case. The statute requires an inmate to prove by clear and convincing evidence that the results of DNA testing will prove his/her innocence. Virginia is one of the only states to require clear and convincing evidence of innocence, rather than a “reasonable probability” of favorable results, in order to be granted access to testing of biological evidence. It has been observed that this high burden “ensures that it is virtually impossible for a convict to be exonerated through DNA evidence since without access to the evidence he is unable to prove those things necessary to allow him access.”

The statute also limits post-conviction testing to two sets of circumstances. First, testing may be permissible where the evidence was not known or available at the time the conviction became final. Second, testing may be allowed if the particular testing procedure was not available at the DFS at the time the conviction became final. The statute does not provide for testing based on suspected unreliability of a prior test absent either of the above criteria.

Chapter Four: Crime Laboratories and Medical Examiner Offices

With courts’ increased reliance on forensic evidence and the questionable validity and reliability of recent tests performed at a number of unaccredited and accredited crime laboratories across the nation, the importance of crime laboratory and medical examiner office accreditation, forensic and medical examiner certification, and adequate funding of these laboratories and offices cannot be overstated. In this chapter, the Assessment Team examined these issues as they pertain to Virginia and assessed whether Virginia’s laws, procedures, and practices comply with the ABA’s policies.

A summary of Virginia’s overall compliance with the ABA’s policies on crime laboratories and medical examiner offices is illustrated in the following chart.

Crime Laboratories and Medical Examiner Offices	
ABA Protocol	Compliance Level
Protocol #1: Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.	In Compliance
Protocol #2: Crime laboratories and medical examiner offices should be adequately funded.	Partial Compliance

Each of the four crime laboratories that comprise the Virginia Department of Forensic Science (DFS) has voluntarily obtained accreditation through the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) *International* Accreditation Program. Although DFS is required to conduct forensic testing for capital defendants and death row inmates in certain circumstances, DFS typically services state and local law enforcement agencies, medical examiners, and prosecutors. Indigent capital defense service providers in Virginia routinely send biological evidence to out-of-state private crime laboratories.

DFS has established guidelines for all law enforcement agencies on the collection, packaging, preservation, and transference of physical evidence to its laboratories. DFS has also created an extensive database of guidelines on the collection, testing, and preservation of biological evidence.

Virginia medical examiner offices have obtained voluntary accreditation through the National Association of Medical Examiners (NAME). Moreover, the Chief Medical Examiner is a forensic pathologist licensed to practice medicine and certified by the American Board of Pathology. Each of the medical examiner offices employ forensic pathologists who are similarly licensed and certified as well as medicolegal death investigators who have received certification through the American Board of Medicolegal Death Investigators.

The Commonwealth has created two oversight commissions, the Virginia Scientific Advisory Committee and the Virginia Forensic Science Board, to review actions of the Commonwealth's crime laboratories and medical examiners to ensure the validity, reliability, and timely analysis of forensic evidence.

Due to high demand, testing delays in the toxicology section of DFS have caused backlogs in some medical examiner cases. However, DFS has eliminated its backlog for biological testing and the Office of the Chief Medical Examiner appears to process cases quickly, aside from waiting for toxicology results. This suggests that funding for the two entities is mostly adequate, although additional funding appears necessary in order for DFS to hire additional toxicologists.

Chapter Five: Prosecution

The character, quality, and efficiency of the entire criminal justice system is shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers, especially in capital cases where prosecutors have enormous discretion deciding whether or not to seek the death penalty. Furthermore, prosecutors are held to a higher ethical standard than other attorneys and must balance their duty to protect the public with their duty to ensure that the rights of the accused are honored. In this Chapter, the Assessment Team examined Virginia's laws, procedures, and practices relevant to its prosecution of capital cases and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on the prosecution of criminal cases is illustrated in the following chart.

Prosecution	
ABA Protocol	Compliance Level
Protocol #1: Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.	Not in Compliance
Protocol #2: Each prosecutor's office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.	Not in Compliance
Protocol #3: Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.	Partial Compliance
Protocol #4: Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.	Insufficient Information
Protocol #5: Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.	Insufficient Information
Protocol #6: The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.	Insufficient Information

The Virginia Assessment Team faced limitations in obtaining information related to the analysis contained in this Chapter. The Assessment Team submitted a letter and survey to ten Commonwealth's Attorney Offices, which included the jurisdictions which have imposed six or more death sentences in Virginia since the reinstatement of capital punishment. The survey requested aggregate data on the application of the death penalty in the prosecutor's jurisdiction, as well as information on qualification and training requirements of prosecutors who handle capital cases, funding and budget limitations, and capital charging and discovery practices. As only one Commonwealth's Attorney Office responded to the Assessment Team's inquiry, the Assessment Team has relied on publicly available information on the training, discovery and charging practices, and discipline of Virginia's prosecutors, including statutory and case law, media reports, and studies conducted by other entities.

Virginia's Commonwealth's Attorneys have broad discretion in determining whether to seek the death penalty. Virginia's two aggravating factors—one of which must be found in order for a jury to sentence a defendant to death—appear to offer little guidance or clarity to prosecutors in determining when to seek the death penalty. As a result, the standards and policies governing the decision to seek the death penalty vary greatly among Virginia's prosecutors. One prosecutor, for example, has stated that he will seek the death penalty “even if it's questionable as [to] whether or not it fits” into one of the statutory capital-eligible offenses.

Problems exist in other areas as well. There have been a number of capital convictions in the Commonwealth that were later overturned due to uncorroborated eyewitness misidentifications, false confessions, and untruthful jailhouse informant testimony, underscoring the need for prosecutors to closely scrutinize cases when relying on these leading causes of wrongful conviction. For example, at least eighteen people have been exonerated of serious violent felonies in Virginia between 1989 and 2013 due to eyewitness misidentifications. False confessions have

led to a number of wrongful convictions in Virginia, including one case in which the defendant was sentenced to death.

Virginia's discovery rules are more restrictive than in other states and the federal system in providing capital defendants the basic information necessary to prepare and present a defense. Notably, the discovery rules governing civil cases are far more widely-encompassing than those required in a criminal—or even capital—case in Virginia. When discovery conforms to Virginia's uniquely-limited rules, a capital defendant may go to trial without knowing who will testify against him/her. S/he may face the prospect of cross-examining witnesses without access to written or recorded statements made by the witness at the time of the events. A capital defendant also may face the daunting task of preparing for trial without access to much of the record of the police investigation that gave rise to capital charges.

Because capital cases bring particular focus to issues of mitigation, Virginia's limited rules of discovery may place the prosecutor in the difficult position of deciding for him/herself which evidence in a police file may support a sentence less than death. Recent high profile wrongful conviction cases in Virginia also demonstrate instances of serious failures to comply with *Brady*. Despite prosecutors' efforts to act in good faith, such a system makes *Brady* violations more likely and can result in extensive post-conviction litigation, reversals and retrials.

Finally, it appears that Virginia prosecutors have rarely been investigated for their conduct leading to wrongful conviction or for otherwise contributing to an unfair proceeding against a capital defendant. The Center for Public Integrity's study of criminal appeals, which included both capital and non-capital cases from 1970 to June 2003, revealed 127 Virginia cases in which a defendant alleged prosecutorial error or misconduct. In twenty-two cases, the appellate court reversed or remanded the defendant's conviction, sentence, or indictment due to prosecutorial error that prejudiced the defendant.

While the Virginia State Bar's disciplinary process is meant to serve as a means to investigate and discipline the misconduct of all attorneys, it does not appear designed to effectively address allegations of prosecutorial error, negligence, or misconduct. Of the more than 500 public disciplinary orders issued by Virginia State Bar District Committees and the Disciplinary Board from 2008 to 2012, only three related to prosecutors.

Chapter Six: Defense Services

Effective capital case representation requires substantial specialized training and experience in the complex laws and procedures that govern a capital case, full and fair compensation to lawyers who undertake capital cases, and sufficient resources for investigators and experts. States must address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases as an integral part of a fair justice system. In this Chapter, the Assessment Team examined Virginia's laws, procedures, and practices relevant to defense services and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on defense services is illustrated in the following chart.

Defense Services	
ABA Protocol	Compliance Level
Protocol #1: Guideline 4.1 of the <i>ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)</i> —The Defense Team and Supporting Services	Partial Compliance
Protocol #2: Guideline 5.1 of the <i>ABA Guidelines</i> —Qualifications of Defense Counsel	Partial Compliance
Protocol #3: Guideline 3.1 of the <i>ABA Guidelines</i> —Designation of a Responsible Agency	Partial Compliance
Protocol #4: Guideline 9.1 of the <i>ABA Guidelines</i> —Funding and Compensation	Partial Compliance
Protocol #5: Guideline 8.1 of the <i>ABA Guidelines</i> —Training	Partial Compliance

Provision of Counsel

Virginia is now one of eleven states that provides representation to capital defendants through a statewide public defender system. The Commonwealth complies with several components of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases (ABA Guidelines)*. For example, Virginia guarantees the appointment of at least two attorneys at trial and on direct appeal for indigent defendants, and ensures the appointment of at least one attorney during state habeas corpus proceedings. The Commonwealth has also established four Regional Capital Defender offices (RCDs), which employ attorneys and support staff specially qualified to represent capital defendants at trial, and continues to fund a non-profit organization that provides capital defense representation during state habeas corpus proceedings. Furthermore, the Virginia Indigent Defense Commission (Commission) oversees numerous aspects of the provision of defense services in the Commonwealth, including the certification of attorneys providing representation to Virginia's indigent capital defendants and death row inmates, as well as the hiring and monitoring of the Capital Defenders. Virginia also has established minimum qualification standards applicable to capital trial, appellate, and state habeas counsel. Such steps have significantly improved the quality of representation available to Virginia's indigent defendants in death penalty cases.

Virginia's current delivery of defense services in death penalty cases, however, is not without problems. For example, the Commonwealth's qualification standards focus primarily on experiential requirements and do not include an assessment of counsel's skills in relation to death penalty cases, which the Assessment Team believes is essential to the provision of consistent, effective capital defense representation. Virginia does not require attorneys representing indigent defendants at a capital trial to successfully complete training on each of the areas required by the *ABA Guidelines*, and direct appeal and state habeas corpus counsel need no training prior to obtaining initial certification from the Commission.

Virginia also has not promulgated any standards for performance in death penalty cases, which is in stark contrast to the performance standards and oversight provided by the Commission in *non-capital* cases. No entity monitors the performance of all defense counsel to ensure that the capital client receives high quality legal representation, nor is Virginia able to ensure that corrective action is taken when complaints about counsel's performance arise. In addition, capital trial counsel is, at times, not appointed at the earliest stage of capital proceedings.

Additional quality control measures are needed to ensure that every attorney representing a capital defendant or death row inmate possesses the necessary skills and demonstrates a commitment to zealous advocacy.

Provision of Ancillary Services and Experts

The RCDs appear to be staffed with investigators and mitigation specialists to support the defense. Virginia has also adopted a new law recognizing the necessity of ex parte requests for expert assistance.

Virginia law, however, does not guarantee assignment of a mitigation specialist and investigator in each capital case, which can result in the wasteful practice of counsel having to perform these important functions. The appointment of experts and ancillary professional services is also left to the discretion of individual circuit court judges who may select experts based on the cost of services or prior work for the prosecution. In addition, Virginia has not adopted training requirements for non-attorney members of the capital defense team, nor does it appear that Virginia provides adequate funding for effective education and training of its non-attorney capital defense team members. Finally, courts do not grant funding for expert services, including experts trained to screen for mental and psychological disorders, to assist death row inmates in developing or presenting constitutional claims during capital state habeas proceedings.

Funding

The Commonwealth has funded four Regional Capital Defender offices, each of which employ attorneys, investigators, and mitigation specialists to provide capital representation at trial and direct appeal. Trial courts appear to authorize funding for expert, investigative, mitigation, and other ancillary services in cases where other court-appointed counsel represents a capital defendant. Virginia also provides periodic billing in death penalty cases for other court-appointed counsel and does not compensate trial counsel via flat fee or lump-sum contracts.

However, Virginia does not ensure funding for the full cost of high quality legal representation, including for the defense team and outside experts selected by counsel. It appears, for example, that the compensation rates for assistant RCDs are insufficient to recruit and retain experienced attorneys with the necessary skills to effectively represent clients facing the death penalty. The reimbursement rate for court-appointed counsel also differentiates between in and out-of-court time, which can provide a disincentive for counsel to advocate in the best interests of the client, which may include accepting a plea offer. The Virginia Supreme Court's Office of the Executive Secretary has also dramatically reduced the reimbursement amount provided to counsel in some capital cases without explanation, effectively denying payment to counsel for many hours worked on behalf of a capital client. In some cases, it has authorized only a flat fee to reimburse counsel for work performed on behalf of a death row inmate on direct appeal.

With respect to expert, investigative, mitigation, and other ancillary services, trial courts may limit the hours of work that these professionals may perform on behalf of an indigent capital defendant. Significant court and counsel time can also be diverted to resolution of funding questions and courts may be reticent to fully fund needed defense services in cases requiring

additional language services and extensive travel. Furthermore, since 1995, it appears that no Virginia court has provided funding for experts, investigators, and mitigation specialists during state habeas corpus proceedings or clemency proceedings.

Appellate Representation

Trial counsel are often appointed to represent a capital defendant on direct appeal. While this practice ensures continuity of counsel in death penalty cases, it does not ensure that a defendant receives high quality legal representation on direct appeal, which is particularly important given it is the last stage that the defendant has a right to effective counsel. Trial counsel frequently are not possessed of the time or special skills necessary for appellate representation, which requires thorough review of the trial record anew, as well as extensive brief-writing. This is in contrast to the appellate representation provided by the Office of the Attorney General on behalf of the prosecution in any appeals in death penalty cases in Virginia. Furthermore, compensation of counsel employed by the Attorney General to handle capital appeals is often far greater than that afforded to attorneys employed by the RCDs who undertake appellate representation.

Chapter Seven: The Direct Appeal and Proportionality Review

One important function of appellate review is to ensure that death sentences are not imposed arbitrarily or based on improper biases. Meaningful comparative proportionality review, the process through which a sentence of death is compared with sentences imposed on similarly-situated defendants to ensure that the sentence is not disproportionate, is the primary method to prevent arbitrariness and bias at sentencing. In this Chapter, the Assessment Team examined Virginia's laws, procedures, and practices and assessed whether they comply with the ABA's policies on the direct appeal process and proportionality review.

A summary of Virginia's overall compliance with the ABA's policies on the direct appeal process and proportionality review is illustrated in the following chart.

The Direct Appeal and Proportionality Review	
ABA Protocol	Compliance level
Protocol #1: In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision making process, direct appeal courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been but was not sought.	Partial Compliance

The Supreme Court of Virginia undertakes proportionality review in death penalty cases by comparing the death sentence in the case at bar to (1) previous cases in which a death sentence was imposed, and (2) previous cases in which a life sentence was imposed if the defendant, following the denial of his/her appeal by the Court of Appeals of Virginia, sought and received discretionary review of his/her case by the Supreme Court of Virginia. This review, however, excludes many relevant cases needed to better ensure proportionality and provide a check on arbitrary sentencing in death penalty cases. For example

- Proportionality review excludes many cases where the death penalty was sought but not imposed, and excludes all cases in which the death penalty could have been but was not sought;
- The Supreme Court of Virginia has held that the sentences of co-defendants are irrelevant in determining the validity of a death sentence. Therefore death sentences have been imposed and carried out on defendants for crimes in which a co-defendant received only a term of years; and
- The existing proportionality review typically offers minimal analysis of the similarities between the facts of the case at bar and previous cases in which a death sentence was imposed. While the Supreme Court of Virginia has reviewed the death sentences imposed in over one hundred cases since 1974 per this statutorily-mandated proportionality review, it never has vacated a death sentence on this ground.

A review that relies chiefly on cases in which the death penalty was imposed will inevitably increase the likelihood that a death sentence will be upheld, while potentially ignoring several factually similar cases that did not warrant a death sentence and providing little safeguard against arbitrariness in capital sentencing.

Finally, application of Virginia's death penalty laws must be sufficiently limited and definite that the Supreme Court of Virginia can reasonably conduct a meaningful proportionality review. Since reinstating the death penalty in 1975, the Virginia General Assembly has repeatedly expanded the number of predicate offenses eligible for the death penalty: from three in 1975 to fifteen in 2011.³ The ever-widening reach of the Virginia death penalty statute increases the importance that the Supreme Court of Virginia undertake a comprehensive and meaningful proportionality review in every death penalty case.

Chapter Eight: State Habeas Corpus Proceedings

The importance of state post-conviction proceedings—called habeas corpus in Virginia—to the fair administration of justice in capital cases cannot be overstated. Because capital defendants may receive inadequate representation at trial and on direct appeal, and because some constitutional violations are unknown or cannot be litigated at trial or on direct appeal, state post-conviction proceedings often provide the first real opportunity to establish meritorious constitutional claims. For these reasons, all post-conviction proceedings should be conducted in a manner designed to permit the adequate development and judicial consideration of all claims. In this Chapter, the Assessment Team examined Virginia's laws, procedures, and practices relevant to state habeas corpus proceedings, and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on state post-conviction proceedings is illustrated in the following chart.

³ The actual number of capital-eligible offenses is greater than fifteen as most of the predicate offenses described in the Virginia Code contain several death-eligible offenses. *See generally* VA. CODE ANN. § 18.2-31 (2013).

State Habeas Corpus Proceedings	
ABA Protocol	Compliance Level
Protocol #1: All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.	Not in Compliance
Protocol #2: The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.	Not in Compliance
Protocol #3: Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.	Not in Compliance
Protocol #4: When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.	Partial Compliance
Protocol #5: On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding, and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.	Not applicable
Protocol #6: When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding, and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.	Not in Compliance
Protocol #7: The state should establish post-conviction defense organizations, similar in nature to the capital resource centers defunded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.	Partial Compliance
Protocol #8: For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with the recommendations in the <i>ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases</i> . The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.	Partial Compliance
Protocol #9: State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.	Partial Compliance
Protocol #10: State courts should permit second and successive post-conviction proceedings in capital cases where counsels’ omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.	Not in Compliance
Protocol #11: In post-conviction proceedings, state courts should apply the harmless error standard of <i>Chapman v. California</i> , which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.	Not in Compliance
Protocol #12: During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.	Not Applicable

Virginia has adopted some laws and procedures that facilitate the development and consideration of state habeas corpus claims. For instance, the Commonwealth supports the Virginia Capital Representation Resource Center, an organization devoted to the representation of Virginia’s death row inmates in state and federal habeas proceedings.

In general, however, Virginia’s capital habeas procedure is structured in a manner that makes it difficult or, in some cases, impossible for a death row inmate to develop and present evidence essential to meaningful habeas review. As a result, the substance of habeas claims often go

unaddressed, death sentences are rarely overturned, and inmates are left with a limited record for federal courts to review in subsequent proceedings.

In contrast with most states, where post-conviction petitions are first reviewed by the trial court, Virginia statutory law grants the Supreme Court of Virginia original jurisdiction over state habeas petitions in death penalty cases. Thus, habeas petitions are never reviewed by the court where the inmate was originally tried, which is typically the court that is best able to evaluate errors in the case. While the Supreme Court of Virginia has the authority to order the trial court to hold an evidentiary hearing in capital habeas cases to resolve factual disputes, it has done so in only a small fraction of cases. Instead, the Court typically relies on affidavits and other documents, which are a poor substitute for an evidentiary hearing in which witnesses must appear, testify, and be cross-examined. Virginia law also imposes strict filing deadlines and procedural default rules on inmates in state habeas corpus proceedings, and does not permit successive habeas petitions under any circumstances.

Furthermore, Virginia law provides that *no* court has jurisdiction over a death row inmate's case until after his/her habeas petition is filed. Thus, an inmate cannot obtain the materials and resources needed to adequately research and present the claims in his/her petition. For instance, death row inmates have no right to discovery in capital habeas proceedings, because there is no court with the jurisdiction to grant it. Petitioners do not have access to documents that could contain evidence of prosecutorial misconduct or ineffective assistance of counsel. When questions of constitutional violations arise, Virginia habeas petitioners often must rely on the federal courts to obtain relief. Death row inmates are also unable to seek the appointment of mitigation specialists, investigators, and experts, who are often needed to fully develop state habeas claims.

Finally, Virginia law permits execution dates to be scheduled before an inmate's federal habeas proceedings have concluded. To avoid being executed, the inmate must often file his/her federal habeas petition earlier than is required under federal law. Collectively, these procedures appear designed to accelerate the rate at which capital habeas petitions are resolved, sometimes at the expense of a detailed and substantive review. Virginia stands apart from other U.S. death penalty jurisdictions in this regard. Virginia's non-capital habeas petitioners, for example, are not subjected to most of these limitations.

Chapter Nine: Clemency

Given that the clemency process is the final avenue of review available to a death row inmate, it is imperative that clemency decision-makers evaluate all of the factors bearing on the appropriateness of a death sentence without regard to constraints that may limit a court's or jury's decision-making. In this chapter, the Assessment Team reviewed Virginia's laws, procedures, and practices concerning the clemency process and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on clemency is illustrated in the following chart.

Clemency	
ABA Protocol	Compliance Level
Protocol #1: The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.	Insufficient Information
Protocol #2: The clemency decision-making process should take into account all factors that might lead the decision maker to conclude that death is not an appropriate punishment.	Insufficient Information
Protocol #3: Clemency decision-makers should consider as factors in their deliberations any patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death row inmate.	Insufficient Information
Protocol #4: Clemency decision-makers should consider as factors in their deliberations the inmate's mental retardation, mental illness, or mental competency, if applicable, the inmate's age at the time of the offense, and any evidence relating to a lingering doubt about the inmate's guilt.	Partial Compliance
Protocol #5: Clemency decision-makers should consider should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.	Insufficient Information
Protocol #6: In clemency proceedings, death row inmates should be represented by counsel and such counsel should have qualifications consistent with the <i>ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases</i> .	Partial Compliance
Protocol #7: Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.	Not in Compliance
Protocol #8: Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.	Not in Compliance
Protocol #9: If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with clemency petitioners.	Not Applicable
Protocol #10: Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.	Partial Compliance
Protocol #11: To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.	In Compliance

The Governor of Virginia has the sole power to commute a death sentence in the Commonwealth. A governor may, but is not required to, request that the Virginia Parole Board investigate and report to the Governor on any case in which clemency has been requested. Since Virginia reinstated the death penalty in 1975, five Governors have granted clemency to eight death row inmates.

Generally, it is difficult to determine the reasons for which Governors grant or deny pleas for clemency, or the process by which they make their decisions. Although the Governor is required to transmit his/her reasons for granting clemency to the General Assembly, frequently these reports convey little information beyond the mere fact that clemency has been granted. The Governor is not required to make known his/her reasons for denying clemency.

In some cases, Virginia Governors appear to have granted clemency due to lingering doubts of guilt, as well as concerns over an inmate's possible mental retardation or mental illness. However, it also appears that in some instances Virginia Governors were not fully informed or

did not fully understand the wide-ranging considerations for clemency, particularly when the courts did not reach the merits of a particular issue that was later presented in an application for clemency. In addition, death row inmates petitioning for clemency are not guaranteed counsel. Attorneys who do undertake clemency representation may have neither sufficient time nor resources to adequately develop clemency petitions on behalf of death row inmates. This may be due, in part, to Virginia’s practice of issuing an execution warrant before the exhaustion of legal remedies in the case.

Finally, Virginia has limited improper political influence on clemency decision-making. For example, Virginia Governors may serve only one consecutive term in office which may, to some extent, insulate the Governor from considerations of the political impact of his/her decision in a death penalty case.

Chapter Ten: Capital Jury Instructions

In capital cases, jurors possess the “awesome responsibility” of deciding whether another person will live or die. Due to the complexities inherent in capital proceedings, trial judges must present fully and accurately, through jury instructions, the applicable law to be followed. Sometimes, however, jury instructions are poorly written and poorly conveyed, leading to confusion among jurors as to the applicable law and the extent of their responsibilities. In this chapter, the Assessment Team reviewed Virginia’s laws, procedures, and practices on capital jury instructions and assessed whether they comply with the ABA’s policies.

A summary of Virginia’s overall compliance with the ABA’s policies on capital jury instructions is illustrated in the following chart.

Capital Jury Instructions	
ABA Protocol	Compliance Level
Protocol #1: Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.	Partial Compliance
Protocol #2: Jurors should receive written copies of “court instructions” (referring to the judge’s entire oral charge) to consult while the court is instructing them and while conducting deliberations.	Partial Compliance
Protocol #3: Trial courts should respond meaningfully to jurors’ requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors’ questions about applicable law.	Not in Compliance
Protocol #4: Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant’s request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors’ understanding of alternative sentences.	Not Applicable
Protocol #5: Trial courts should not place limits on a juror’s ability to give full consideration to any evidence that might serve as a basis for a sentence less than death.	Not in Compliance

Capital Jury Instructions (Cont'd)	
Protocol #6: Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.	Not in Compliance
Protocol #7: In states where it is applicable, trial courts should make clear in jury instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.	Not Applicable

As with many states, the sentencing process in Virginia is a complex, multi-step process. Jurors must make findings on aggravating factors, compare mitigating and aggravating evidence, and then decide whether to impose a sentence of life imprisonment or the death penalty. Perhaps due to this complexity, it appears that jurors in Virginia death penalty cases experience confusion regarding their roles and responsibilities in determining the sentence in the penalty phase of a capital case. The Capital Jury Project, in particular, has revealed that a substantial number of capital jurors in Virginia death penalty cases had several misconceptions about capital sentencing procedures. The Capital Jury Project found, for instance, that

- 77% of surveyed Virginia jurors erroneously believed that the jury had to be unanimous in order to consider evidence as mitigating;
- 53% did not realize they could consider any evidence as mitigating evidence; and
- 51% believed that they were required to find mitigating evidence beyond a reasonable doubt.

Juror confusion on these issues was higher than average in Virginia among the thirteen states in which the Capital Jury Project conducted its study. Many Virginia jurors also misunderstood whether the death penalty was required in a particular case. An alarming 53% of surveyed Virginia jurors believed that the death penalty was required by law if they found that the murder was heinous, vile, or depraved, and 41% believed death was required if they found that the defendant would be dangerous in the future. In fact, however, a finding of aggravation is only a factor for the jury to *consider* in determining whether to sentence a defendant to death.

A study of mock jurors in Virginia also demonstrated a high rate of confusion. In that study, 44% of mock jurors who received only the standard instruction believed that the vileness aggravating factor required the death penalty, and 46% believed the same about the “continuing serious threat to society” factor.

These juror misconceptions may be due, in part, to jury instructions that do not fully apprise jurors of their ability to consider any evidence that might serve as a basis for a sentence less than death. While the Virginia model instructions comport with decisions by the Supreme Court of Virginia, the instructions exclude significant explanatory legal rules and principles that might help jurors understand how mitigating evidence should be considered. For example, jurors are not instructed that mitigating evidence does not need to be found beyond a reasonable doubt. Nor are jurors instructed that a finding of mitigating evidence need not be unanimous or that any evidence may be considered as mitigating evidence. Moreover, while jurors receive specific

instructions on how to consider aggravating factors, they receive only a general description of mitigating evidence.

Since the abolition of parole in Virginia in 1995, capital jurors may also experience confusion in predicting whether the defendant “would commit criminal acts of violence that would constitute a continuing serious threat to society,” one of Virginia’s two aggravating circumstances. With the abolition of parole, this aggravating factor, commonly called “future dangerousness,” requires the prosecution to prove that the defendant would pose a threat to others *during his/her life prison term*, not while in society at large.

Virginia trial courts also do not appear to instruct jurors that they may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if they do not believe that the defendant should receive the death penalty.

Notwithstanding the confusion experienced by Virginia capital jurors, a review of capital cases in Virginia indicates that trial courts typically respond to juror questions, including questions of law, by instructing jurors to review the instructions already given.

Chapter Eleven: Judicial Independence and Vigilance

In some states, judicial elections, appointments, and confirmations are influenced by consideration of judicial nominees’ or candidates’ purported views of the death penalty or of judges’ decisions in capital cases. In addition, judges’ decisions in individual cases sometimes are, or appear to be, improperly influenced by electoral pressures. This increases the possibility that judges will be selected, elevated, and retained by a process that ignores the larger interests of justice and fairness, focuses narrowly on the issue of capital punishment, and undermines society’s confidence that individuals in court are guaranteed a fair hearing. In this chapter, the Assessment Team reviewed Virginia’s laws, procedures, and practices on the election of judges and on judicial decision-making processes and assessed whether they comply with the ABA’s policies.

A summary of Virginia’s overall compliance with the ABA’s policies on judicial independence is illustrated in the following chart.

Judicial Independence and Vigilance	
ABA Protocol	Compliance Level
Protocol #1: States should examine the fairness of their processes for the appointment and election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.	Partial Compliance
Protocol #2: A judge who has made any promise—public or private—regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.	In Compliance

Judicial Independence and Vigilance (Cont'd)	
Protocol #3: Bar associations and community leaders should speak out in defense of judges who are criticized for decisions in capital cases, educate the public concerning the roles and responsibilities of judges and lawyers in capital cases, and publicly oppose any questioning of candidates for judicial appointment or re-appointment concerning their decisions in capital cases. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.	In Compliance
Protocol #4: A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure defendant receives a proper defense.	Insufficient Information
Protocol #5: A judge who determines that prosecutorial misconduct or other unfair activity has occurred during a capital case should take immediate action to address the situation and to ensure the capital proceeding is fair.	Insufficient Information
Protocol #6: Judges should do all within their power to ensure that defendants are provided with full discovery in capital cases. Trial courts should conduct, at a reasonable time prior to a criminal trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under the applicable discovery rules, statutes, ethical standards, and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations.	Not in Compliance

Members of Virginia's judiciary at all levels are elected by a majority vote of each House of the General Assembly. In order to be eligible for election before the legislature, would-be candidates must be nominated to the Courts of Justice Committees by the local legislative delegation in which particular vacancies occur. State and local bar associations will also conduct interviews and submit questionnaires to judicial nominees.

Virginia's nearly distinctive approach to the selection of judges may protect the independence of the judiciary in several ways. Judicial candidates in Virginia, unlike judges elected through popular elections, need not stage donor-funded campaigns, which can encourage candidates to make promises about their prospective decisions. The nomination process, during which candidates are interviewed publicly by the Courts of Justice Committees of both legislative chambers, allows for meaningful public participation and coverage by the media of legislators' questions of candidates. Bar associations in Virginia have also made efforts to educate the public on the importance of an independent judiciary.

The Virginia State Bar, as well as state and local bar association questionnaires, do not elicit responses from judicial candidates regarding their views on issues to come before the court such as the death penalty. Judicial candidates may, however, be asked about their purported views on the death penalty before the Courts of Justice Committees in the General Assembly. However, the only records of judicial candidates' statements are media reports of judicial nominees' interviews with the Courts of Justice Committees as the hearings themselves are neither recorded nor transcribed.

Legislative election in Virginia does have the potential to interfere with the independence of the judiciary. Legislators have recently asked judges to defend, or otherwise comment on, their decisions in criminal cases even when such decisions are wholly consistent with Virginia Supreme Court jurisprudence. In addition, the effective functioning of the judiciary in Virginia is also threatened by judicial vacancies and budget reductions to the court system.

The structure of Virginia law obligates trial courts to take effective action to ensure a capital defendant receives a fair trial and to remedy unfair practices. Judges who may preside over capital cases may, for example, participate in a special course offered by the Supreme Court of Virginia. The occurrence of ineffective lawyering, prosecutorial misconduct, and trial court errors, however, has nonetheless affected the fairness of the proceedings in death penalty cases in the Commonwealth. Since 2000, eight of thirty-six Virginia death sentences imposed have been reversed due to ineffective assistance of counsel, prosecutorial misconduct, and/or trial court errors, excluding instances in which unfair practices occurred at trial and were deemed by an appellate court as improper, but were found to be harmless error not prejudicial to the outcome of the proceeding, or were procedurally barred from the appellate court's consideration.

As evidenced by the exoneration of many individuals in Virginia due to the revelation of exculpatory evidence that was never disclosed to the defense at trial, courts must be vigilant in ensuring compliance with any disclosure obligations to prevent future miscarriages of justice. No rule or law, however, requires Virginia trial courts to conduct a pretrial hearing to ensure that all parties are aware of their respective disclosure obligations, notwithstanding the limited disclosure permitted under the rules in the first instance.

Chapter Twelve: Treatment of Racial and Ethnic Minorities

To eliminate the impact of race in the administration of the death penalty, the ways in which race affects the system must be identified, and strategies must be devised to root out discriminatory practices. In this chapter, the Assessment Team examined Virginia's laws, procedures, and practices pertaining to the treatment of racial and ethnic minorities and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on racial and ethnic minorities and the death penalty is illustrated in the following chart.

Treatment of Racial and Ethnic Minorities	
ABA Protocol	Compliance Level
Protocol #1: Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.	Partial Compliance
Protocol #2: Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases. The data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.	Partial Compliance
Protocol #3: Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.	Partial Compliance
Protocol #4: Where patterns of racial discrimination are found in any phase of the death penalty's administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.	Not Applicable

Treatment of Racial and Ethnic Minorities (Cont'd)	
Protocol #5: Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce such a law, jurisdictions should permit defendants and inmates to establish prima facie cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a prima facie case is established, the State should have the burden of rebutting it by substantial evidence.	Not in Compliance
Protocol #6: Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of the death penalty's administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.	Partial Compliance
Protocol #7: Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during voir dire.	Partial Compliance
Protocol #8: Jurisdictions should require jury instructions stating that it is improper for jurors to consider any racial factors in their decision-making and that jurors should report any evidence of racial discrimination in jury deliberations.	Not in Compliance
Protocol #9: Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision-making could be affected by racially discriminatory factors.	In Compliance
Protocol #10: States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the state proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.	Not in Compliance

There has been one detailed examination of the effect of racial and ethnic discrimination on Virginia's capital punishment system since the reinstatement of the death penalty in the Commonwealth. The Joint Legislative Audit and Review Commission (JLARC) conducted a study, published in 2002, on several aspects of the Commonwealth's death penalty system. JLARC noted that "one of the most serious complaints is that the system is racially biased, systemically exposing black persons who are arrested for capital murders to the death penalty in larger percentages than their white counterparts." Consequently, a portion of the study examined whether decisions to seek the death penalty in capital-eligible cases are based on the race of the defendant or the race of the victim. JLARC analyzed prosecutorial discretion at two stages of the capital decision-making process: (1) whether prosecutors returned indictments for capital murder in capital-eligible cases; and (2) whether prosecutors "chose to actually seek the death penalty throughout the adjudication process."

JLARC found that "prosecutors were over three times more likely to seek the death penalty [in a capital-indicted case] if the victim is white." However, the authors noted that "when the character of the victim was accounted for in the regression model, the association between the race of the victim and[] whether the prosecutor sought the death penalty in the case lost its statistical significance."

Importantly, JLARC's review was confined to an analysis of sample cases occurring within the five-year period from 1995 through 1999. In addition, JLARC's examination of race and ethnicity focused on its impact on prosecutorial decision-making. The study was not designed to

address the effect race may have on a jury's decision to impose the death penalty, which is a crucial decision-making point in the progression of a capital case.

Current data reveal general patterns that race or ethnicity may be affecting the administration of the death penalty in Virginia. While these data are not conclusive evidence that racial discrimination affects death penalty case outcomes, they do suggest that the issue needs to be examined further. For example, since reinstating the death penalty through May 31, 2013, Virginia has carried out 110 executions. Of those, eighty-nine inmates were executed for the murder of a white victim. Four white offenders were executed for killing a black victim; by contrast, thirty-seven black offenders have been executed for killing a white victim. There is also evidence of potential racial bias in jury selection for capital murder cases. At least four black defendants have been sentenced to death by all-white juries since the death penalty was reinstated in Virginia.

Importantly, the unavailability of accurate and complete data affects the ability of the Commonwealth to undertake a comprehensive review of its death penalty system. JLARC researchers recounted the difficulty they encountered, reporting that “[s]electing a universe or sampling frame for the study was complicated by the unique data problems associated with this subject.” JLARC noted that “Virginia does not maintain a centralized database containing information on murder cases that can be prosecuted as capital cases.”

Some actors in the Virginia criminal justice system, including law enforcement and judges, receive mandatory education stressing that race should not be a factor in the administration of justice. However, prosecutors and defense counsel are not necessarily educated about these topics. For example, defense counsel training on developing and identifying racial discrimination claims and juror bias is offered to and completed by some capital counsel, but it is not required.

Chapter Thirteen: Mental Retardation and Mental Illness

Mental Conditions Generally

First, the Assessment Team reviewed Virginia's procedures and practices related to issues common to capital defendants and death row inmates with mental retardation and mental illness. Generally, these policies relate to the manner in which actors in the criminal justice system are trained and receive the resources necessary to recognize and understand mental retardation and mental illness in defendants and death row inmates.

A summary of Virginia's overall compliance with the ABA policies that relate to both mental retardation and mental illness is illustrated in the following chart.

Mental Retardation & Mental Illness	
ABA Protocol	Compliance Level
Protocol #1: All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.	Partial Compliance
Protocol #2: All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental illness in capital defendants and death row inmates.	Partial Compliance
Protocol #3: During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.	Partial Compliance
Protocol #4: During police investigations and interrogations, special steps should be taken to ensure that the <i>Miranda</i> rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.	Partial Compliance
Protocol #5: The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their clients' mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable), and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.	Partial Compliance
Protocol #6: The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their clients' mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable), and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.	Partial Compliance
Protocol #7: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against "waivers" that are the product of their mental disability.	Partial Compliance
Protocol #8: The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against "waivers" that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a "next friend" acting on a death row inmate's behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his/her capacity to make a rational decision.	Partial Compliance

Virginia law enforcement and corrections officers are required to receive some training relevant to recognizing and interacting with persons who have mental retardation or mental illness. However, law enforcement officers are not required to receive training or follow any special procedures with respect to the interrogation of a suspect with mental retardation or mental illness. Such training is important as studies have demonstrated that persons with mental retardation or mental illness face a special risk of falsely confessing to crimes. Moreover, innocent defendants in Virginia, including former death row inmate Earl Washington, were wrongly convicted after falsely confessing to a crime as a result of a mental disability or illness. Comprehensive training and improved procedures in this area could help reduce the risk of false confessions.

In addition, trial judges do not appear to receive any training on these issues, and prosecutor training is limited to litigation strategies for overcoming a defendant's claim of mental retardation. Comprehensive mental health training for trial judges and prosecutors is especially important because these persons must rule on and make charging decisions with respect to capital defendants.

Many Virginia capital defense attorneys, in particular those employed by the Regional Capital Defender offices, receive training relevant to recognizing and assessing mental retardation and mental illness. However, no such training is required by law. In particular, there is no requirement that defense counsel be trained to recognize in and litigate incompetency claims for their clients. Such training would be especially helpful in Virginia, as four death-sentenced defendants since 2000 have waived significant rights at some stage of their case, such as the right to counsel, to present mitigating evidence, or to appeal their conviction. Additionally, while trial-level defense counsel have access to investigators, mitigation specialists, and experts qualified to assess mental retardation, such assistance has not been funded by the Commonwealth in state habeas corpus proceedings. Thus, habeas counsel lack the resources necessary to effectively litigate a claim related to mental health.

Virginia has instituted some measures to protect defendants with mental retardation or mental illness from waivers of rights that are the product of their mental disability. However, the court is not required to conduct an evidentiary hearing before determining the defendant's competency, increasing the risk that relevant evidence on this issue will go unexplored. Furthermore, Virginia, unlike the federal courts, does not permit a "next friend" to file a habeas petition on a mentally ill death row inmate's behalf.

Mental Retardation

In *Atkins v. Virginia*, the U.S. Supreme Court held that it is unconstitutional to execute offenders with mental retardation. This holding, however, does not guarantee that individuals with mental retardation will not be executed, as each state has the authority to make its own rules for determining whether a capital defendant has mental retardation. In this section of Chapter Thirteen, the Assessment Team reviewed Virginia's laws, procedures, and practices pertaining to mental retardation in connection with the death penalty and assessed whether they comply with the ABA's policies.

A summary of Virginia's overall compliance with the ABA's policies on mental retardation is illustrated in the following chart.

Mental Retardation	
ABA Protocol	Compliance Level
Protocol #1: Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities. Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than seventy-five should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.	Partial Compliance

Mental Retardation (Cont'd)	
Protocol #2: For cases commencing after <i>Atkins v. Virginia</i> or the state's ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.	Not in Compliance
Protocol #3: Where the defense has presented a substantial showing that the defendant may have mental retardation, the burden of disproving mental retardation should be placed on the prosecution. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.	In Compliance

Virginia enacted a statute banning the execution of mentally retarded offenders following the U.S. Supreme Court's decision in *Atkins v. Virginia*. The statute comports with some elements of the modern, scientific understanding of mental retardation. Most notably, the law requires appropriate clinical testing to be used in determining whether a capital defendant has mental retardation. In addition, while the statute places the burden of proving mental retardation on the defendant, s/he is required to prove mental retardation by only a preponderance of the evidence.

Virginia's law on excluding persons with mental retardation from the death penalty, however, is lacking in other respects. The statute requires a defendant to present an IQ score of seventy or below to prove that s/he has mental retardation. The American Association of Intellectual and Developmental Disabilities (AAIDD) and other clinically-accepted definitions of mental retardation expressly reject a bright-line IQ score requirement. Virginia courts also will not consider some clinically-accepted phenomena that can influence or artificially inflate a person's IQ score, such as the *Flynn Effect*. Furthermore, in at least one case, the Supreme Court of Virginia interpreted the age of onset component of mental retardation to require *documentation* of the disability, not simply manifestation, before age eighteen. This requirement is inconsistent with the AAIDD definition and could prejudice defendants who were not properly tested as children or for whom records of such testing could not be found.

Finally, Virginia does not permit a capital defendant's claim of mental retardation to be determined as early as possible in capital proceedings. Instead, the determination must be made by the jury as part of the sentencing phase proceedings, after a defendant has been convicted of capital murder. However, there are clear advantages to allowing the determination to be made in a hearing prior to commencement of the guilt phase of a capital trial. Specifically, if the defendant is found to have mental retardation, the Commonwealth is spared the expense of a lengthy capital trial. Moreover, jurors often misunderstand mental retardation evidence, and the evidence may be especially confusing when presented in the same proceeding with mitigating and aggravating evidence.

Mental Illness

Finally, the Assessment Team reviewed Virginia's laws, procedures, and practices pertaining to mental illness in connection with the death penalty. Mental illness can affect every stage of a capital trial. It is relevant to the defendant's competence to stand trial, it may provide a defense to the murder charge, and it is often central to the defendant's mitigation case. Conversely, the risk of reversible error increases when the judge, prosecutor, and jurors are misinformed about the nature of mental illness and its relevance to the defendant's culpability and life experience.

A summary of Virginia’s overall compliance with the ABA’s policies on mental illness is illustrated in the following chart.

Mental Illness	
ABA Protocol	Compliance Level
Protocol #1: Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert’s prior status as a witness for the state. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert’s current or past status with the state.	Not in Compliance
Protocol #2: Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well-trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.	Partial Compliance
Protocol #3: Jurisdictions should forbid death sentences and executions for everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.	Partial Compliance
Protocol #4: The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one’s conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one’s conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.	Not in Compliance
Protocol #5: To the extent that a mental disorder or disability does not preclude imposition of a death sentence pursuant to a particular provision of law, jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant’s subsequent reliance on mental disorder or disability as a mitigating factor.	Not in Compliance
Protocol #6: Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant’s perceived demeanor, and that this should not be considered in aggravation.	Not in Compliance
Protocol #7: The jurisdiction should stay post-conviction proceedings where a prisoner under a sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner’s participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner’s sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner’s capacity to participate in post-conviction proceedings in the foreseeable future.	Not in Compliance
Protocol #8: The jurisdiction should provide that a death row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate’s own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction’s and death sentence’s validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.	Not in Compliance
Protocol #9: Jurisdictions should develop and disseminate to police officers, attorneys, judges, and other court and prison officials models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.	Partial Compliance

Virginia has taken some steps to protect the rights of individuals with mental disorders and disabilities in capital cases. For instance, Virginia has enacted statutory qualification standards for mental health experts in trial-level capital cases, and Virginia courts appear to have appointed qualified mental health experts to assist defense counsel in these cases. Virginia also has established a structure for the appointment and reasonable compensation of these experts at trial.

In other respects, however, Virginia's rules and laws do not afford adequate protection to individuals with several mental disorders or illnesses in death penalty cases. For example, the Commonwealth does not prohibit death sentences or executions of persons who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior caused by a disability other than mental retardation, such as dementia or traumatic brain injury. Under this standard, a defendant who suffered a serious brain injury at age eighteen or older would be eligible for the death penalty, even if, as a result of the injury, s/he exhibits every other characteristic of mental retardation. Furthermore, Virginia does not forbid execution of the severely mentally ill under any standard. Much as the AAIDD supports excluding persons with mental retardation from the death penalty, several leading mental health groups and the American Bar Association support a prohibition of the death penalty for a narrow group of severely mentally ill individuals whose ability to control their conduct at the time of the offense was significantly impaired.

Furthermore, Virginia's jury instructions fail to adequately explain how evidence of mental illness should be considered in a death penalty case. Jurors are not instructed on individual statutory mitigating factors, including factors relevant to mental illness. Nor are jurors instructed that a mental disorder or disability is a mitigating factor, not an aggravating factor; that they should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; or that they should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor. Jurors are also not instructed that any medication the defendant is receiving for a mental disorder or disability may affect his/her perceived demeanor and that this should not be considered in aggravation.

Finally, Virginia law does not adequately protect death row inmates whose mental disorders have rendered them incompetent. The Commonwealth does not permit an inmate's state habeas proceedings to be stayed, even if s/he suffers from a mental disorder or disability that significantly impairs his/her capacity to assist or communicate with counsel in those proceedings. Virginia also has not enacted any procedures for determining whether an inmate possesses a rational understanding of the nature and purpose of his/her death sentence and is, thus, competent to be executed. This is contrary to U.S. Supreme Court precedent, which expressly prohibits the execution of incompetent inmates.

CHAPTER ONE

AN OVERVIEW OF VIRGINIA'S DEATH PENALTY SYSTEM

I. DEMOGRAPHICS OF VIRGINIA'S DEATH ROW

A. *A Historical Perspective*

The Commonwealth of Virginia reinstated the death penalty on October 1, 1975.¹ Since then through June 1, 2013, Virginia has executed 110 inmates—the second highest number of executions by any capital jurisdiction in the United States.² During that same time period, Virginia has imposed 151 death sentences, giving the Commonwealth the highest ratio of executions to death sentences in the United States.³

The first execution in Virginia after reinstatement occurred on August 10, 1982.⁴ Ten Virginia death row inmates have “volunteered” for execution, each forgoing his right to seek further review of his death sentence.⁵ Three of the death row inmates executed were juveniles at the time they committed the crimes.⁶ Of the 110 inmates executed, fifty-six were white, fifty-one were black, two were Latino, and one was a Pakistani national.⁷

B. *A Current Profile of Virginia's Death Row*

As of March 1, 2013, eight inmates, convicted in six different counties, are under a sentence of death in Virginia.⁸ All eight of the death row inmates are male; three are black, four are white,

¹ 1975 Va. Acts cc. 14–15 (codified at VA. CODE § 18.2-32 (1975)).

² *Number of Executions by State and Region Since 1976*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/number-executions-state-and-region-1976> (last visited June 11, 2013). Since January 1, 1974, when Texas reinstated the death penalty, through October 1, 2011, Texas has executed 498 persons. *Executed Offenders*, TEX. DEP'T OF CRIM. JUSTICE, http://www.tdcj.state.tx.us/death_row/dr_executed_offenders.html (last visited June 11, 2013). Virginia, however, has carried out more executions in its history than any other state. J. LEGIS. AUDIT & REV. COMM'N, VA. ASSEMBLY: REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT, at 1 (2002).

³ *See Executions per Death Sentence*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/executions-death-sentence> (last visited June 11, 2013); *Virginia Capital Litigation Data*, Va. Capital Case Clearinghouse, <http://www.vc3.org/resources/page.asp?pageid=561> (last visited Aug. 19, 2013).

⁴ *See* NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), DEATH ROW U.S.A. 7 (Winter 2013), *available at* http://naacpldf.org/files/publications/DRUSA_Winter_2013.pdf [hereinafter NAACP, DEATH ROW USA]. Coppola was the fifth person executed after the U.S. Supreme Court permitted states to reinstate the death penalty. *Id.*

⁵ *See* Gleason v. Commonwealth, 166726 S.E.2d 351, 352 (Va. 2012); NAACP, DEATH ROW USA, *supra* note 4, at 6.

⁶ NAACP, DEATH ROW USA, *supra* note 4, at 6.

⁷ Kasi v. Commonwealth, 508 S.E.2d 57 (Va. 1998); NAACP, DEATH ROW USA, *supra* note 4, at 61.

⁸ *See Virginia Capital Litigation Data*, *supra* note 3; NAACP, DEATH ROW USA, *supra* note 4, at 61. Although the NAACP Report shows eleven inmates on death row, Robert Gleason was executed after the report was published and both Leon Winston and Justin Michael Wolfe have had their sentences reversed and are awaiting new sentencing hearings. *Id.*; Justin Jouvenal, *Va. Executes Convicted Killer Who Sought Death Penalty*, WASH. POST, Jan. 16, 2013, *available at* http://www.washingtonpost.com/local/va-executes-convicted-killer-who-sought-death-penalty/2013/01/16/89802e00-6015-11e2-9940-6fc488f3fed_story.html.

and one is Latino.⁹ Death row for male offenders is currently located at Sussex I State Prison, near Waverly, Virginia and female death row inmates are housed at Fluvanna Correctional Center for Women.¹⁰ Executions are carried out by either lethal injection or electrocution at Greensville Correctional Center in Jarratt.¹¹

⁹ NAACP, DEATH ROW USA, *supra* note 4, at 61.

¹⁰ Jim Iovino, *Facts About Virginia's Death Row: Final Hours Structured for Inmates*, NBC WASH., Nov. 10, 2009, <http://www.nbcwashington.com/news/local/Facts-About-Virginias-Death-Row-69644447.html> (last visited Aug. 19, 2013).

¹¹ VA. CODE ANN. § 53.1-234 (2013); Iovino, *supra* note 10.

II. THE STATUTORY EVOLUTION OF VIRGINIA’S DEATH PENALTY SCHEME

A. *Virginia’s Post-Furman Death Penalty Procedures*

In 1972, the U.S. Supreme Court held, in *Furman v. Georgia*, that the death penalty statutes in the various States constituted cruel and unusual punishment and therefore violated the Eighth and Fourteenth Amendments of the U.S. Constitution.¹² However, in 1974, the Supreme Court of Virginia, reasoning that *Furman* applied only to death penalty sentencing schemes which permitted discretion, upheld the imposition of a mandatory death sentence on an inmate who had been sentenced to death for the murder of a prison guard.¹³

When the U.S. Supreme Court later invalidated mandatory death penalty statutes in 1977,¹⁴ the Virginia General Assembly amended its capital punishment statutes to comport with the rulings of the U.S. Supreme Court.¹⁵ The Commonwealth eliminated the mandatory death penalty and gave jurors the option of imposing imprisonment for life for a capital offense.¹⁶ The constitutionality of the Commonwealth’s 1977 capital punishment statute was subsequently upheld by the Supreme Court of Virginia in 1978.¹⁷

Since the reinstatement of the death penalty in Virginia, the Commonwealth’s death penalty laws and procedures have undergone several modifications.¹⁸ In 1977, the Commonwealth amended trial procedures to require bifurcated capital trials with separate phases for the determination of guilt and punishment.¹⁹ Only in the event that the defendant was found guilty of capital murder would the second punishment or “sentencing” phase of the capital proceedings commence.²⁰ During the sentencing phase, the defendant was allowed to present evidence “as to any matter which the court deems relevant to the sentence,” including “the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense.”²¹ Under the statute, mitigating evidence included, but was not limited to, (1) the

¹² *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972).

¹³ *Jefferson v. Commonwealth*, 204 S.E.2d 258, 260 (Va. 1974). *See also* *Washington v. Commonwealth*, 217 S.E.2d 815, 820 (Va. 1975).

¹⁴ In *Roberts v. Louisiana* and *Woodson v. North Carolina* mandatory death penalties were declared to be a constitutionally impermissible response to *Furman*. *See* *Roberts v. Louisiana*, 428 U.S. 325 (1976); *Woodson v. North Carolina*, 428 U.S. 280 (1976). Simultaneously, the U.S. Supreme Court decided that *Furman* did not require that all sentencing discretion be eliminated if the statutory system provides adequate standards to guide the exercise of that discretion. *See* *Gregg v. Georgia*, 428 U.S. 153, 195 (1976) (where the Court upheld the constitutionality of capital punishment statutes which included bifurcated trials with separate stages for determining guilt/innocence and punishment, the use of mitigating and aggravating factors during the sentencing phase, and independent judicial review).

¹⁵ J. LEGIS. AUDIT & REV. COMM’N, *supra* note 2, at 1; *see* *Jurek v. Texas*, 428 U.S. 262 (1976); *Proffitt v. Florida*, 428 U.S. 242 (1976), and *Gregg v. Georgia*, 428 U.S. 153 (1976). *See also* VA. CODE §§ 19.2-264.2, -264.3, -264.4, -264.5 (Cum. Supp. 1977) (effective July 1, 1977).

¹⁶ VA. CODE § 18.2-10(a) (1977) (replacing the mandatory capital punishment provision with discretionary sentencing).

¹⁷ *Smith v. Commonwealth*, 248 S.E.2d 135, 146–49 (Va. 1978).

¹⁸ *See infra* notes 31–37 and accompanying text.

¹⁹ VA. CODE §§ 19.2-264.1–19.2-264.4 (1977).

²⁰ VA. CODE §§ 19.2-264.2(A), (C), 19.2-264.3(A) (1977).

²¹ VA. CODE § 19.2-264.3(B)(1977) (noting that admissible evidence was subject to the provisions of section 19.2-299, or any Rule of Court).

defendant had “no significant history of prior criminal activity”; (2) the crime was committed while the defendant was experiencing extreme mental or emotional disturbance; (3) the victim participated in the defendant’s conduct or consented to act; (4) at the time of the offense, the defendant’s ability to “appreciate the criminality of his[/her] conduct or to conform his[/her] conduct to the requirements of law was significantly impaired”; and (5) the age of the defendant at the time of the offense.²²

Under the new sentencing law, the death penalty could not be imposed unless the Commonwealth proved beyond a reasonable doubt one of two statutory factors. Specifically, the Commonwealth needed to prove either “that there is a probability based on the evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense . . . that [the defendant] would commit criminal acts of violence that would constitute a continuing serious threat to society,” or that the defendant’s “conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim.”²³

The law provided that if the jury unanimously agreed to fix the punishment at death, it must be in writing.²⁴ Before imposing the sentence announced by the jury, the trial court must “direct a probation officer of the court to thoroughly investigate upon the history of the defendant and any and all other relevant facts . . . to the end that the court may be fully advised as to whether the sentence of death is appropriate and just.”²⁵ The trial court may, upon reviewing the officer’s report, “and upon good cause shown,” set aside the sentence of death fixed by the jury and impose a life sentence.²⁶ If the jury was unable to agree on the penalty, the statute required the court to dismiss the jury and impose a sentence of life imprisonment.²⁷

The amended law also provided for an automatic review to be conducted by the Supreme Court of Virginia of any death sentence imposed by a Commonwealth circuit court.²⁸ The Court was now required to consider (a) trial errors outlined in the defendant’s appeal; (b) whether the death sentence was imposed due to passion, prejudice, or any other arbitrary factor; and (c) whether the death sentence was excessive or disproportionate in relation to other Commonwealth convictions, given both the crime and the defendant.²⁹ Upon review of the death sentence, the statute required the Supreme Court of Virginia to affirm the sentence of death, commute the

²² VA. CODE § 19.2-264.3(B)(1977).

²³ VA. CODE §§ 19.2-264.1(1), 19.2-264.2(C), 19.2-264.3(C), 19.2-264.4 (1977) (after consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life). *See also* J. LEGIS. AUDIT & REV. COMM’N, *supra* note 2, at 10 (“While the General Assembly offered no detailed definition of conduct that should be considered vile, the law stated the existence of either torture, evidence of depravity of mind, or aggravated battery were sufficient to support a finding of vileness and justification for imposition of the death penalty.”).

²⁴ VA. CODE §§ 19.2-264.1(2), 19.2-264.3(D) (1977) (written requirement).

²⁵ VA. CODE § 19.2-264.5 (1977).

²⁶ *Id.*

²⁷ VA. CODE § 19.2-264.3(E) (1977).

²⁸ VA. CODE §§ 19.2-264.4, 17-110.1(A) (1977).

²⁹ VA. CODE § 17-110.1(C) (1977). For its consideration, the Court “may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive.” VA. CODE § 17-110.1(E) (1977).

sentence to imprisonment for life, or remand the case for either a new sentencing hearing or a new trial.³⁰

B. Amendments to Virginia's Capital Sentencing Statutes, 1977–Present

Since the 1977 amendments, the Virginia General Assembly has adopted a number of additional changes to the Commonwealth's death penalty procedures. In 1990, the sentencing statute was revised to include mental retardation of the defendant as a mitigating factor.³¹ A 1998 revision permits victims to testify in the presence of the defendant regarding the impact of the offense during the sentencing phase.³² In 2000, the statute was again revised to include that, upon request by the defendant, the jury instructions should state that for all capital-eligible offenses committed after January 1, 1995,³³ there is no possibility of parole if the defendant is sentenced to life in prison.³⁴ Virginia also enacted, in 2001 and 2004, legislation that permits inmates to file petitions for writs of actual innocence based on biological and nonbiological evidence.³⁵

Virginia has also significantly expanded the number of offenses eligible for the death penalty since *Furman*. In 1975, for example, an offender was eligible for the death penalty if convicted of first-degree murder in conjunction with any of three separate offenses.³⁶ As of December 2011, an offender may be subject to the death penalty in Virginia if convicted of premeditated murder and any one of fifteen predicate offenses.³⁷

³⁰ VA. CODE § 17-110.1(D) (1977). *See also* J. LEGIS. AUDIT & REV. COMM'N, *supra* note 2, at 10.

³¹ VA. CODE § 19.2-264.4(b) (1990). Later, in 2002, the U.S. Supreme Court prohibited imposition of the death penalty on offenders with mental retardation, leading to Virginia's adoption of new procedural rules to determine if a capital defendant has mental retardation. *See infra* note 38 and accompanying text.

³² VA. CODE § 19.2-295.3 (1998).

³³ Those convicted and sentenced prior to 1995 remain eligible for parole. VA. CODE § 19.2-264.4(A) (2000). If the Parole Board denies a parole petition, they must provide specific reasons for the denial. VA. CODE ANN. § 53.1-136(6) (2013).

³⁴ VA. CODE § 19.2-264.4(a) (2000). In 2002, a new provision also required that “an accessory before the fact or principal in the second degree to a capital murder” involving “a killing pursuant to the direction or order of one who is engaged in the commission of or attempted commission of an act of terrorism . . . shall be indicted, tried, convicted and punished as though the offense were murder in the first degree.” VA. CODE § 18.2-18 (2002).

³⁵ *See* VA. CODE §§ 19.2-327.3 (2001) (writ of actual innocence based on biological evidence), 19.2-327.10 (2004) (writ of actual innocence based on nonbiological evidence).

³⁶ VA. CODE § 18.2-31 (1975) (codifying 1975 Va. Acts, ch. 14, 15). *See also* J. LEGIS. AUDIT & REV. COMM'N, *supra* note 2, at 5, 14. These included whether the first-degree murder was committed in conjunction with (1) abduction with the intent to extort money or pecuniary benefit; (2) murder for hire; (3) the murder was committed by an inmate in a penal institution. VA. CODE § 18.2-31 (1975).

³⁷ The actual number of capital-eligible predicate offenses is greater than fifteen as capital-eligible offenses under the Virginia Code may contain several different offenses under a single enumerated offense. Since 1975, Virginia has expanded the number of predicate offenses eligible for the death penalty to the following willful, deliberate, and premeditated killings: (1) Killing during the commission of an abduction when the abduction was committed *either* with the intent to extort money or pecuniary benefit (1975) *or* with the intent to defile the victim of such abduction (1996), VA. CODE § 18.2-31 (1975), VA. CODE § 18.2-31.1, .8 (1996); (2) killing for hire, VA. CODE § 18.2-31 (1975); (3) killing by an inmate who is in a correctional facility or in the custody of an employee of a correctional facility (1975), VA. CODE § 18.2-31 (1975); (4) killing during the commission of robbery or attempted robbery, VA. CODE § 18.2-31(d)–(e) (1976), VA. CODE § 18.2-31.4, .5 (1989) (prior to 1996, this predicate offense required use of a “deadly weapon” during the commission of a robbery or attempted robbery. VA. CODE § 18.2-31.4 (1996)); (5) killing during the commission of rape (1976), attempted rape (1989), sodomy or attempted sodomy (1991), or object

C. Restrictions on the Death Penalty

1. Mental Retardation

In 2003, the Supreme Court of the United States prohibited, in *Atkins v. Virginia*, the execution of offenders with mental retardation.³⁸ In response to *Atkins*, the Virginia General Assembly passed legislation banning the execution of mentally retarded offenders.³⁹ Under the new statute, if a defendant is found guilty of capital murder, s/he may present the issue of mental retardation to the trier of fact during the sentencing phase of the trial.⁴⁰ The capital defendant must prove by a preponderance of the evidence that s/he is mentally retarded, and the jury must indicate in its verdict, in writing, whether the defendant met his/her burden to prove mental retardation.⁴¹ If the jury finds the defendant is mentally retarded, it must impose a sentence of life imprisonment.⁴² If the jury does not find that the defendant is mentally retarded, the jury still may consider the defendant's sub-average intellectual functioning as mitigation.⁴³ A full discussion of Virginia's treatment of mentally retarded offenders is found in Chapter Thirteen on Mental Retardation and Mental Illness.

2. Age Restriction

In 2004, the Supreme Court of Virginia held that, in light of the U.S. Supreme Court ruling in *Stanford v. Kentucky*, the imposition of the death penalty on an offender who commits a capital

sexual penetration (1995), VA. CODE § 18.2-31(d)–(e) (1976), VA. CODE § 18.2-31.4, .5 (1989); VA. CODE § 18.2-31.5 (1991); VA. CODE § 18.2-31.5 (1995); (6) killing a “law enforcement officer . . . when such killing is for the purpose of interfering with the performance of his official duties,” VA. CODE § 18.2-31(f) (1977); (16) (i) killing a state or federal law enforcement officer with the power to make a felony arrest under any state or federal law, with “the purpose of interfering with the performance of his official duties,” (1997); (ii) killing a fire marshal or a deputy or assistant fire marshal when such persons have police powers, with “the purpose of interfering with the performance of his official duties,” (2010); and (iii) killing an auxiliary police officer or auxiliary deputy sheriff, with “the purpose of interfering with the performance of his official duties,” (2010); (7) killing “more than one person as a part of the same act or transaction,” VA. CODE § 18.2-31(g) (1981); (8) killing more than one person within a three-year period, VA. CODE § 18.2-31.8 (1996); (9) killing during the commission, or attempted commission, of a drug transaction, with the purpose of furthering the transaction, VA. CODE § 18.2-31.9 (1990); (10) killing pursuant to the direction or order of another “who is engaged in a continuing criminal enterprise,” VA. CODE § 18.2-31.10 (1997); (11) killing 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,” VA. CODE §§ 18.2-31.10, 18.2-31.11 (1998); (12) killing a person under the age of fourteen by a person age twenty-one or older, VA. CODE § 18.2-31.12 (1998); (13) killing during the commission or attempted commission of an act of terrorism, VA. CODE § 18.2-31.13 (2002); (14) killing a justice of the Supreme Court of Virginia, a judge of the Virginia Court of Appeals, a judge of a circuit court or district court, a retired judge sitting by designation or under temporary recall, or a substitute judge, with the purpose of interfering with the judge’s official duties, VA. CODE § 18.2-31.14 (2007); (15) killing any witness in a criminal case after a subpoena has been issued, with the purpose of interfering with the witness’s “duties in such case,” VA. CODE § 18.2-31.15 (2007).

³⁸ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

³⁹ VA. CODE §§ 19.2-264.3:1.1, 19.2-264.3:1.2 (2003) (applicable to future capital defendants). *See also* VA. CODE § 8.01-654.2 (2003) (applicable to death row inmates sentenced before April 29, 2003).

⁴⁰ VA. CODE § 8.01-654.2 (2003) (applicable to death row inmates sentenced before April 29, 2003).

⁴¹ VA. CODE ANN. § 19.2-264.3:1.1(C), (D) (2013).

⁴² VA. CODE ANN. § 19.2-264.3:1.1(C), (D) (2013).

⁴³ VA. CODE ANN. § 19.2-264.4(B) (2013).

offense at age sixteen or seventeen is not a violation of the Eighth Amendment.⁴⁴ However, the following year, the U.S. Supreme Court prohibited the execution of juvenile offenders as a violation of the Eighth Amendment of the U.S. Constitution.⁴⁵ In response, the Virginia General Assembly passed legislation in 2006 changing the minimum age for death penalty eligibility from sixteen to eighteen years.⁴⁶

⁴⁴ Johnson v. Commonwealth, 591 S.E.2d 47, 59–60 (Va. 2004), *cert. granted, judgment vacated sub nom*, Johnson v. Virginia, 544 U.S. 901 (2005).

⁴⁵ Roper v. Simmons, 543 U.S. 551, 578-579 (2005). Prior to 2005, Virginia executed three seventeen-year-olds, including Dwayne Wright (1998), Douglas Thomas (2000), and Steve Roach (2000). NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), DEATH ROW U.S.A. at 18, 20 (Fall 2009), *available at* http://www.naacpldf.org/files/publications/DRUSA_Fall_2009.pdf

⁴⁶ VA. CODE § 18.2–10(a) (2006), *codifying* S.B. 362, Ch. 733, 2006 Sess. (Va. 2006); *see also* Gray v. Commonwealth, 645 S.E.2d 448, 458 (Va. 2007) (where the Supreme Court of Virginia first acknowledges the Commonwealth's new statute imposing an increased age minimum for death penalty eligibility).

III. THE PROGRESSION OF A VIRGINIA DEATH PENALTY CASE FROM ARREST TO EXECUTION

A. *The Pretrial Process*

In Virginia, some capital prosecutions commence by issuance of a warrant.⁴⁷ An individual arrested for the commission of a crime must then be taken for an initial appearance and bail determination.⁴⁸ At the initial hearing, the judge must inform the accused of his/her right to counsel and allow the accused “reasonable opportunity to employ counsel.”⁴⁹ No hearing on the charges may be held until a court determines whether the defendant is indigent and, if so, the defendant must be assigned counsel and given a reasonable time and opportunity to consult with his/her counsel.⁵⁰ If a capital defendant is found to be indigent, the court must appoint at least two attorneys from a list of qualified counsel prepared by the Supreme Court of Virginia and the Virginia Indigent Defense Commission.⁵¹ Indigent defendants are entitled to appointed counsel at trial, and if sentenced to death, on appeal and during state habeas corpus proceedings.⁵²

An individual accused of a capital felony in Virginia has a right to be prosecuted upon a grand jury indictment or presentment.⁵³ When a grand jury indictment for capital murder is issued and the capital defendant is arrested, the clerk of the circuit court must file a certified copy of the indictment with the Supreme Court of Virginia to be maintained in a central file available to the public upon request.⁵⁴ If the capital defendant has been arrested prior to indictment, s/he is entitled to a preliminary hearing where the court will determine whether there is probable cause that the charged offense occurred and whether the defendant committed the charged offense.⁵⁵ The defendant is entitled to counsel at the preliminary hearing.⁵⁶

After the defendant is charged with a capital felony, the defendant will be formally arraigned.⁵⁷ The court must read to the accused the charges on which s/he will be tried and the defendant must enter a plea in response.⁵⁸ A defendant may plead not guilty, guilty, or nolo contendere,

⁴⁷ VA. CODE § 19.2-72 (2013) (issued if a judge finds “probable cause to believe the accused has committed an offense”).

⁴⁸ VA. CODE ANN. § 19.2-80 (2013).

⁴⁹ VA. CODE ANN. § 19.2-157 (2013).

⁵⁰ VA. CODE ANN. §§ 19.2-159, 19.2-159.1 (2013).

⁵¹ VA. CODE ANN. § 19.2-163.7 (2013).

⁵² VA. CODE ANN. § 19.2-163.7 (2013). For a full discussion of Virginia’s capital defense system, see Chapter Six on Defense Services.

⁵³ VA. CODE ANN. §§ 19.2-217, 19.2-221 (2013); VA. SUP CT. R. 3A:5. An indictment is a written accusation of a criminal offense prepared by the Commonwealth attorney and “returned ‘a true bill’ upon the oath or affirmation of a legally impaneled grand jury.” VA. CODE ANN. § 19.2-216 (2013). A presentment is a “written accusation of a crime prepared and returned by a grand jury from their own knowledge or observation, without any bill of indictment laid before them.” *Id.*

⁵⁴ VA. CODE ANN. § 19.2-217.1 (2013).

⁵⁵ VA. CODE ANN. § 19.2-218 (2013). The hearing may not be used for discovery purposes. *Williams v. Commonwealth*, 160 S.E.2d 781, 784–85 (Va. 1968). In Virginia, a defendant charged with a capital crime is entitled to a preliminary hearing in district court only if s/he was arrested prior to indictment. VA. CODE ANN. §§ 19.2-218, 19.2-232 (2013).

⁵⁶ VA. CODE ANN. §§ 19.2-157, 19.2-158 (2013).

⁵⁷ VA. CODE ANN. § 19.2-254 (2013). *See also* VA. CODE ANN. § 19.2-241 (2013) (time limit for trial after indictment).

⁵⁸ VA. CODE ANN. § 19.2-254 (2013). *See also* VA. CODE ANN. § 19.2-255 (2013).

and the court may refuse to accept a plea of guilty to any lesser offense included in the charge.⁵⁹

Once an indictment is filed, either party may initiate discovery.⁶⁰ Pursuant to the Rules of the Supreme Court of Virginia, a motion by the accused to inspect evidence in possession of the Commonwealth must be made in writing at least ten days before trial.⁶¹ The Rules permit discovery of (1) statements of the defendant; (2) forensic and scientific reports; and (3) inspection and copying of tangible items.⁶² Counsel is entitled to a reasonable opportunity to examine discovery material and prepare for its use at trial.⁶³ In addition, informal discovery may occur pursuant to an agreement between defense counsel and the Commonwealth's Attorney.⁶⁴

The prosecution and defense also may make motions or raise objections in the form of a written motion to dismiss or a motion to grant appropriate relief.⁶⁵ The trial court may defer a determination of a motion until trial or it may rule on the motion after holding a hearing.⁶⁶ In Virginia, some objections must be made prior to trial and others may be raised at any time before a verdict is issued.⁶⁷ Prior to trial, the court may permit, "[o]n motion of the Commonwealth [and] for good cause shown," the joinder of co-defendants; conversely, "[i]f the court finds that a joint trial would constitute prejudice to a defendant, the court shall order severance as to that defendant or provide such other relief justice requires."⁶⁸ The court also "may direct that an accused be tried at one time for all offenses then pending against him."⁶⁹ Finally, at least sixty days before trial, the defense must notify the Commonwealth if the defendant intends to raise an insanity defense and present testimony of an expert in support.⁷⁰

B. The Capital Trial

Trials are generally held in the circuit court of the county or city in which the criminal act was

⁵⁹ VA. CODE ANN. § 19.2-254 (2013).

⁶⁰ VA. SUP CT. R. 3A:11. The Virginia Constitution affords criminal defendants the right "to call for evidence in his favor." VA. CONST. art. I, § 8.

⁶¹ VA. SUP CT. R. 3A:11(d), 3A:9(b)(3) (although for good cause, the court may permit an oral motion).

⁶² VA. SUP CT. R. 3A:11(b)(1)–(2).

⁶³ See *Townes v. Commonwealth*, 362 S.E.2d 650, 659–60 (Va. 1987).

⁶⁴ *Knight v. Commonwealth*, 443 S.E.2d 165, 169 (Va. App. 1994) (court may enforce parties' written discovery stipulations); *United States v. Cole*, 857 F.2d 971, 976 (4th Cir. 1988).

⁶⁵ VA. CODE ANN. § 19.2-266.2(A)–(B) (2013); VA. SUP CT. R. 3A:9.

⁶⁶ VA. SUP CT. R. 3A:9(b)(4).

⁶⁷ VA. CODE ANN. § 19.2-266.2(A)–(B) (2013); VA. SUP CT. R. 3A:9(b)(1). For example, motions that raise defenses to bar prosecution, such as motions for speedy trial or double jeopardy, must be filed and notice given to opposing counsel at the time the objection arises or no later than seven days before trial. VA. CODE ANN. § 19.2-266.2(A)–(B) (2013); VA. SUP CT. R. 3A:9(b)(1). See also Chapters Seven and Eight on the Direct Appeal Process and State Habeas Corpus Proceedings, respectively.

⁶⁸ VA. CODE ANN. § 19.2-262.1 (1993); VA. SUP CT. R. 3A:10(a)–(b). Prior to 1993, capital defendants could elect to be tried separately "as a matter of right" and not subject to judicial discretion. *Burgess v. Commonwealth*, 297 S.E.2d 654, 656 (Va. 1982).

⁶⁹ See VA. SUP CT. R. 3A:10(c). Offenses may be joined in the event that "justice does not require separate trials" and one of two additional criterion is satisfied: (1) "the offenses [are based on the same act or transaction or on two or more acts or transactions that are connected or constitute parts of a common scheme or plan]," or (2) "the accused and the Commonwealth's attorney consent thereto." *Id.*

⁷⁰ VA. CODE ANN. § 19.2-168 (2013).

committed.⁷¹ Virginia bifurcates the capital trial into two phases: the first phase determines the guilt or innocence of the defendant, and, if the defendant is found guilty, the second phase will determine the defendant's sentence.⁷²

1. Guilt Phase

All individuals charged with a capital offense have a right to a trial by jury.⁷³ However, a defendant may waive the right to a jury trial provided the waiver is in writing and the defendant receives the consent of the court and the prosecution.⁷⁴ In the event the defendant waives his/her right to trial by jury, the court "shall have and exercise all the powers, privileges and duties given to juries by any statute relating to crimes and punishments."⁷⁵

Capital juries in Virginia are composed of twelve persons.⁷⁶ Both the prosecution and defense are entitled to four peremptory challenges, with an additional challenge given if alternate jurors are impaneled.⁷⁷ Each party, beginning with the attorney for the Commonwealth, must alternate in striking one juror each, until twelve jurors remain.⁷⁸ Co-defendants must share peremptory challenges, and if they cannot agree on which jurors to strike, the clerk of the trial court will choose out of a ballot box which jurors to excuse.⁷⁹

During the guilt phase, both parties have a right to conduct opening and closing statements.⁸⁰ The Commonwealth's Attorney must first present witnesses and other evidence to prove beyond a reasonable doubt the elements of the charged offense.⁸¹ The defendant may but is not required to present evidence.

A defendant cannot be subject to the death penalty unless the prosecution proves the defendant guilty, beyond a reasonable doubt, of a willful, deliberate, and premeditated killing, of

- (1) any person in the commission of abduction, 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) any person by another for hire;
- (3) any person by a prisoner confined in a state or local correctional facility, or while

⁷¹ VA. CODE § 19.2-244 (2013). Change of venue may be requested on motion of either party "for good cause." VA. CODE ANN. § 19.2-251 (2013).

⁷² VA. CODE ANN. § 19.2-264.3 (2013). *See also* VA. SUP CT. R. 3A:18 ("Except for good cause shown, the separate proceeding provided for in Section 19.2-264.3(C) shall commence as if it were a continuation of the original trial and continue from day to day until concluded.").

⁷³ VA. CONST. art. I, § 8; VA. CODE ANN. § 19.2-257(2013).

⁷⁴ VA. CONST. art. I, § 8; VA. CODE ANN. § 19.2-257 (2013).

⁷⁵ VA. CONST. art. I, § 8; VA. CODE ANN. § 19.2-257 (2013).

⁷⁶ VA. CODE ANN. § 19.2-262(B) (2013).

⁷⁷ VA. CODE ANN. §§ 19.2-262, 8.01-360 (2013).

⁷⁸ VA. CODE ANN. § 19.2-262(C) (2013).

⁷⁹ VA. CODE ANN. § 19.2-262(D) (2013).

⁸⁰ VA. CODE ANN. § 19.2-265 (2013) (opening statement); VA. SUP CT. R. 3A:16(a); *Fish v. Commonwealth*, 160 S.E.2d 576, 580–81 (Va. 1968) (defense counsel in a criminal case has an absolute right to make closing argument).

⁸¹ *In re Winship*, 397 U.S. 358 (1970); *Walker v. Commonwealth*, 183 S.E.2d 739, 740 (Va. 1971) ("every material and necessary element").

- in the custody of an employee thereof;
- (4) any person in the commission of robbery or attempted robbery;
- (5) any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration;
- (6) a law-enforcement officer, a fire marshal, or a deputy or an assistant fire marshal, when such fire marshal or deputy or assistant fire marshal has police powers, an auxiliary police officer, an auxiliary deputy, 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) more than one person as a part of the same act or transaction;
- (8) more than one person within a three-year period;
- (9) any person in the commission of or attempted commission of a violation of Virginia Code section 18.2-248 (“Manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute a controlled substance or an imitation controlled substance prohibited”) 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) any person by another pursuant to the direction or order of one who is engaged in a continuing criminal enterprise;
- (11) 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;
- (12) a person under the age of fourteen by a person age twenty-one or older;
- (13) any person by another in the commission of or attempted commission of an act of terrorism;
- (14) a justice of the Supreme Court, a judge of the Court of Appeals, a judge of a circuit court or district court, a retired judge sitting by designation or under temporary recall, or a substitute judge, when he is killing for the purpose of interfering with his official duties as a judge; and/or
- (15) any witness in a criminal case after a subpoena has been issued for such witness by the court, the clerk, or an attorney, when the killing is for the purpose of interfering with the person’s duties in such case.⁸²

The jury must announce its verdict unanimously and in open court.⁸³ The jury may render a verdict of guilty on the charged offenses or not guilty,⁸⁴ guilty of a lesser charge, or as an accessory after the fact.⁸⁵ If the jury is unable to reach a unanimous verdict, the court will declare a mistrial.⁸⁶

⁸² VA. CODE ANN. § 18.2-31 (2013); VA. SUP CT. R. 3A:17 (requiring unanimous verdicts in all criminal prosecutions).

⁸³ VA. SUP CT. R. 3A:17(a).

⁸⁴ VA. CODE ANN. § 19.2-283 (2013).

⁸⁵ VA. CODE ANN. § 19.2-286 (2013) ; VA. SUP CT. R. 3A:17(c).

⁸⁶ VA. CONST. art. I § 8 (stating that a criminal defendant cannot be found guilty without “unanimous consent” of a jury); VA. SUP CT. R. 3A:17(a).

At the close of the Commonwealth's case or at the conclusion of all the evidence, and upon motion of the defendant, the court must enter a judgment of acquittal if it finds the evidence insufficient, as a matter of law, to sustain a conviction.⁸⁷ If the court sets aside the verdict for any other reason, including trial error, it will grant a new trial.⁸⁸

2. Penalty Phase

If the jury finds the defendant guilty of one or more capital offenses, a separate proceeding is held "as soon as is practicable" to determine whether to impose the death penalty or a sentence of life imprisonment.⁸⁹ The penalty phase must be held before the same jury, "as if it were a continuation of the original trial and continue from day to day until concluded."⁹⁰

During the penalty phase, both parties are afforded opportunities to present and cross-examine witnesses and other evidence relevant to sentencing and to make opening and closing statements.⁹¹ Upon motion of the Commonwealth's attorney and consent of the victim, the victim also may testify on the impact of the offense.⁹² Admissible evidence includes the circumstances surrounding the offense, the history and background of the defendant, and mitigating circumstances including, but not limited to

- (1) the defendant has no significant history of prior criminal activity,
- (2) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance,
- (3) the victim was a participant in the defendant's conduct or consented to the act,
- (4) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his/her conduct or to conform his/her conduct to the requirements of law was significantly impaired,
- (5) the age of the defendant at the time of the commission of the capital offense, or
- (6) the sub-average intellectual functioning of the defendant.⁹³

Statements made by the defendant during evaluations of competency or sanity at the time of the offense may not be introduced against the defendant.⁹⁴

⁸⁷ VA. SUP CT. R. 3:A:15(c).

⁸⁸ *Id.*

⁸⁹ VA. CODE ANN. §§ 19.2-264.3(C), 19.2-264.4 (2013).

⁹⁰ VA. SUP CT. R. 3A:18; VA. CODE ANN. § 19.2-264.3(C) (2013).

⁹¹ VA. CODE ANN. § 19.2-264.4(B) (2013).

⁹² VA. CODE ANN. § 19.2-264.4(A)(1) (2013) (the court will limit the victim's statement to "(i) identify the victim, (ii) itemize any economic loss suffered by the victim as a result of the offense, (iii) identify the nature and extent of any physical or psychological injury suffered by the victim as a result of the offense, (iv) detail any change in the victim's personal welfare, lifestyle or familial relationships as a result of the offense, (v) identify any request for psychological or medical services initiated by the victim or the victim's family as a result of the offense, and (vi) provide such other information as the court may require related to the impact of the offense upon the victim."); VA. CODE ANN. § 19.2-299.1 (2013) (also listing crime victim's and witness's rights generally); *see also* Rock v. Commonwealth, 610 S.E.2d 314, 315 (Va. App. 2005) (permitting the brother of the victim to testify about the impact on him and his family).

⁹³ VA. CODE ANN. § 19.2-264.4(B) (2013).

⁹⁴ VA. CODE ANN. § 19.2-264.3:3 (2013).

A defendant may not be sentenced to death unless the Commonwealth proves beyond a reasonable doubt that

- (1) there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which s/he is accused that s/he would commit criminal acts of violence that would constitute a continuing serious threat to society (“dangerousness predicate”), or
- (2) the defendant’s conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim (“vileness predicate”).⁹⁵

The jury must be unanimous in finding that the Commonwealth has met their burden of proof with respect to the presence of either of the above aggravators.⁹⁶ Moreover, a verdict form will be “defective” should it “fail[] to explicitly set out the unanimity required in the jury finding of one or both of the aggravating factors beyond a reasonable doubt.”⁹⁷ A jury also must specify which aggravator it has found to support its recommendation of a death sentence.⁹⁸

If the jury finds that one or both aggravators have been proven beyond a reasonable doubt, it may nevertheless conclude that the defendant should not be sentenced to death.⁹⁹ If the jury cannot agree as to the penalty, “the court shall dismiss the jury and impose a sentence of imprisonment for life.”¹⁰⁰

If the jury sentences the defendant to death, before imposing the death sentence, the court must direct a probation officer to “thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just.”¹⁰¹ If the court determines that the death penalty is not

⁹⁵ VA. CODE ANN. § 19.2-264.4(C) (2013).

⁹⁶ *Prieto v. Commonwealth*, 682 S.E.2d 910, 935 (Va. 2009). Un-adjudicated prior conduct is admissible for determining future dangerousness. VA. CODE § 19.2-264.3:2 (2013); *Lovitt v. Commonwealth*, 537 S.E.2d 866, 879 (Va. 2000) (future dangerousness in society permitted even though only other sentencing option is life imprisonment with no parole); *see also* *Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (Va. 1999) (upholding the exclusion of prison-life evidence).

⁹⁷ *Prieto*, 682 S.E.2d at 935.

⁹⁸ *Prieto*, 682 S.E.2d at 935 (“[T]here is no language in [the] verdict forms . . . requiring the jury to find one or both aggravating factors ‘unanimously and beyond a reasonable doubt.’ In this case, it is impossible to discern from the verdict forms whether the jury unanimously found either or both aggravating factors beyond a reasonable doubt. This presents the troubling possibility that six or more of the jurors based their decision on the ‘future dangerousness’ factor, while the other six or fewer based their decision on the ‘vileness’ factor. This hypothetical result . . . would result in the jury sentencing [the defendant] to death based on a non-unanimous verdict in violation of the Virginia Constitution.”). *See also* *Prieto v. Commonwealth*, 721 S.E.2d 484, 490 (Va. 2012) (“After the presentation of aggravating and mitigating evidence, the jury unanimously *found both* aggravating factors . . .”) (emphasis added).

⁹⁹ *Prieto*, 682 S.E.2d at 931 (“Our decisions . . . make it clear that a verdict form must provide the jury with the explicit option of imposing a life sentence even if the jury finds one or both aggravating factors.”).

¹⁰⁰ VA. CODE ANN. § 19.2-264.4(D) (2013).

¹⁰¹ VA. CODE ANN. § 19.2-264.5 (2013). The post-sentence report is created by a probation officer of the Commonwealth, upon a thorough investigation of the defendant’s history and any relevant facts, so that “the court may be fully advised as to whether the sentence of death is appropriate and just.” VA. CODE ANN. § 19.2-264.5 (2013).

“appropriate or just,” the court may set aside the death sentence and sentence the defendant to life imprisonment.¹⁰²

C. Motion for a New Trial, Direct Appeal, Rehearings, and Review by the United States Supreme Court

1. Motion to Set Aside the Verdict and Petition for Writ of Actual Innocence

Judgments may only be modified by the trial court within twenty-one days after the date of entry.¹⁰³ During this time, the defendant may file a motion to set aside the verdict, which may be based on error committed during trial or the sufficiency of the evidence as a matter of law to sustain the conviction.¹⁰⁴ The defendant also may move for a new trial based on “newly discovered evidence” if four conditions are met:

- (1) the evidence is discovered subsequent to the trial;
- (2) the evidence could not, by the exercise of diligence, have been discovered before the trial terminated;
- (3) the evidence is not “merely cumulative, corroborative, or collateral”;
- (4) the evidence is material and “should produce opposite results on the merits at another trial.”¹⁰⁵

However, Supreme Court of Virginia Rule 1:1, known as the Commonwealth’s “21-Day Rule,” prevents defendants from introducing new evidence more than twenty-one days after the circuit court judge has imposed a death sentence.¹⁰⁶ The court must act on the motion within the twenty-one day period.¹⁰⁷

2. Direct Appeal and Automatic Review

If a defendant is convicted of a capital felony and sentenced to death, s/he may appeal directly to the Supreme Court of Virginia.¹⁰⁸ When setting its docket, the Supreme Court of Virginia must give priority to cases in which the death penalty has been imposed.¹⁰⁹ Proceedings from the

¹⁰² VA. CODE ANN. § 19.2-264.5 (2013).

¹⁰³ VA. SUP CT. R. 1:1.

¹⁰⁴ VA. SUP CT. R. 3A:15(b)

¹⁰⁵ Orndorff v. Commonwealth, 628 S.E.2d 344, 352 (Va. 2006) (stating the general rule, although exceptions may be recognized to prevent an erroneous judgment from becoming final).

¹⁰⁶ VA. SUP CT. R. 1:1. Notwithstanding the provisions of Rule 1:1, a death row inmate may file a writ of actual innocence based on biological or “previously unknown or unavailable” nonbiological evidence. See VA. CODE ANN. §§ 19.2-327.2 to -327.6, 19.2-327.10 to -327.11 (2013).

¹⁰⁷ See Super Fresh Food Markets of Va., Inc. v. Ruffin, 561 S.E.2d 734, 560 (Va. 2002) (“The running of the twenty-one day time period prescribed by Rule 1:1 may be interrupted only by the entry, within the twenty-one day time period, of an order modifying, vacating, or suspending the final judgment order. Neither the filing of post-trial or post-judgment motions, nor the trial court’s taking such motions under consideration, nor the pendency of such motions on the twenty-first day after final judgment, is sufficient to toll or extend the running of the twenty-one day time period of Rule 1:1.”) (citations omitted).

¹⁰⁸ VA. CODE ANN. §§ 17.1-313, 17.1-406 (2013). “Sentence review shall be in addition to appeals, if taken, and review and appeal may be consolidated.” VA. CODE ANN. § 17.1-313(F) (2013).

¹⁰⁹ VA. CODE ANN. § 17.1-313(G) (2013).

circuit court must be transcribed “as expeditiously as practicable” and the transcript and record filed in the Supreme Court of Virginia.¹¹⁰ Upon receipt, the clerk of the Supreme Court notifies the Attorney General of Virginia, counsel for the appellant, and the Director of the Department of Corrections of the date of receipt, known as the filing date.¹¹¹ In order to pursue an appeal, a death row inmate must file assignments of error, including “a designation of the parts of the record relevant to the review and to the assignments of error,” with the clerk of the Supreme Court of Virginia within thirty days of the filing date.¹¹² Within ten days of this filing, the appellee may file a “designation of the additional parts of the record that he wishes included as germane to the review or to the assignments of error.”¹¹³

Both the inmate and the Commonwealth are permitted “to submit briefs within time limits imposed by the court, either by or order, and to present oral argument.”¹¹⁴ The capital defendant must file his/her brief within sixty days of the filing date.¹¹⁵ The appellee must file his/her brief within 120 days of the filing date.¹¹⁶ Briefs for both parties may not exceed the longer of 100 pages or 17,500 words.¹¹⁷ The appellant must file a reply brief—which may not exceed the greater of fifty pages or 8,750 words—within 140 days of the filing date.¹¹⁸ There are no exceptions, except by permission of the Court, to these limitations.¹¹⁹ However, the Supreme Court of Virginia retains the right, “on motion in a particular case, [to] vary the procedure prescribed by this Rule in order to attain the ends of justice.”¹²⁰

On direct appeal, the Supreme Court of Virginia will consider “any errors in the trial enumerated by appeal.”¹²¹ Nevertheless, “[n]o ruling of the trial court . . . will be considered as a basis for reversal unless an objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable [the Supreme] Court [of Virginia] to attain the ends of justice.”¹²² The Court has elaborated on this standard, observing that “[w]hether the ends of justice provision should be applied involves two questions: (1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision

¹¹⁰ VA. CODE ANN. § 17.1-313(B) (2013). *See also* VA. SUP CT. R. 5:26(a) (direct appeal), 5:7(h) (state habeas).

¹¹¹ VA. SUP CT. R. 5:22(a).

¹¹² VA. SUP CT. R. 5:22(c).

¹¹³ VA. SUP CT. R. 5:22(c).

¹¹⁴ VA. CODE ANN. § 17.1-313(F) (2013).

¹¹⁵ VA. SUP CT. R. 5:22(e)(1).

¹¹⁶ VA. SUP CT. R. 5:22(e)(2).

¹¹⁷ VA. SUP CT. R. 5:22(e)(1).

¹¹⁸ VA. SUP CT. R. 5:22(e)(3). In addition, as with “all motions, petitions, and briefs” filed in the Supreme Court of Virginia, the parties’ briefs “must be in at least 14-point font, must use either Courier, Arial, or Verdana font, and must be printed on only one side of the page.” VA. SUP CT. R. (a)(2).

¹¹⁹ *Id.* The limitations on length of the briefs “do not include appendices, the cover page, table of contents, table of authorities, and certificate.” *Id.*

¹²⁰ VA. SUP CT. R. 5:22(g).

¹²¹ VA. CODE ANN. § 17.1-313(C); J. LEGIS. AUDIT & REV. COMM’N, *supra* note 2, at 67. “With respect to the sentence of death, it shall be a sufficient assignment of error to state that the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor or that the sentence is excessive or disproportionate to the penalty imposed in similar cases.” VA. SUP CT. R. 5:22(d).

¹²² VA. SUP CT. R. 5:25.

would result in a grave injustice.”¹²³ On other occasions, the Court has observed that an appellant’s argument, not having been presented to the trial court, will not be considered on appeal.¹²⁴ Errors properly preserved, by contrast, will be reviewed by the Court in accordance with the appropriate standard.¹²⁵

Regardless of whether the defendant appeals his/her sentence or conviction, the Supreme Court of Virginia must undertake an automatic review of the death sentence.¹²⁶ Specifically, the Court must determine

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and
- (2) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.¹²⁷

The Supreme Court of Virginia reviews the death sentence by comparing the instant case to other capital cases, giving “particular emphasis” to cases in which the death penalty was imposed.¹²⁸ The Court also may collect the “records of all capital felony cases tried” and then “consider such records as are available as a guide in determining whether the sentence of death imposed in the case under review is excessive.”¹²⁹

Upon review of the death sentence, the Court may (1) affirm the death sentence; (2) commute the sentence to imprisonment for life; or (3) remand to the trial court for a new sentencing proceeding.¹³⁰

3. Rehearings and Reconsideration

Once an order or opinion on direct appeal has been issued, the Supreme Court of Virginia, by motion of either party, may grant a rehearing prior to the opinion becoming final.¹³¹ A petition for rehearing must be filed within ten days after the date the opinion was issued, and it will be

¹²³ *Gheorghiu v. Commonwealth*, 701 S.E.2d 407, 413 (Va. 2010) (citing *Charles v. Commonwealth*, 613 S.E.2d 432, 433 (Va. 2005)).

¹²⁴ *See, e.g., Teleguz v. Commonwealth*, 643 S.E.2d 708, 716 (Va. 2007) (citing VA. SUP CT. R. 5:25, *Goins v. Commonwealth*, 470 S.E.2d 114, 128 (Va. 1996)).

¹²⁵ Cognizable issues on direct appeal may be limited by Court precedent. *See, e.g., Lenz v. Commonwealth*, 544 S.E.2d 299, 304 (Va. 2001) (“Claims raising ineffective assistance of counsel must be asserted in a habeas corpus proceeding and are not cognizable on direct appeal.” (citing *Johnson v. Commonwealth*, 529 S.E.2d 769, 781 (Va. 2000); *Roach v. Commonwealth* 468 S.E.2d 98, 105 n.4 (Va. 1996))).

¹²⁶ VA. CODE ANN. § 17.1-313(A) (2013) (“A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court” of Virginia).

¹²⁷ VA. CODE ANN. § 17.1-313(C) (2013).

¹²⁸ J. LEGIS. AUDIT & REV. COMM’N, *supra* note 2, at 69–70. *See, e.g., Peterson v. Commonwealth*, 302 S.E.2d 520, 529 (Va. 1983) (“[W]e have examined the records in all capital murder cases reviewed by this Court, with particular emphasis given to those cases in which the death sentences were based upon the probability that the defendants would be continuing threats to society [W]e conclude that juries generally in this jurisdiction impose the death sentence for conduct similar to that of Peterson.”) (emphasis in original).

¹²⁹ VA. CODE ANN. § 17.1-313(E) (2013).

¹³⁰ VA. CODE ANN. § 17.1-313(D) (2013).

¹³¹ VA. SUP CT. R. 5:37(b).

granted only if one of the Justices who decided the case adversely to the applicant determines that there is “good cause” for such rehearing.¹³² Neither party is permitted oral arguments on applications for rehearings.¹³³ If a rehearing is granted, the Court will determine if additional briefing or argument is necessary.¹³⁴

If either party intends to appeal for certiorari to the U.S. Supreme Court, the Supreme Court of Virginia may, upon motion filed within fifteen days after it issues its order deciding the case, “defer the issuance of its mandate until proceedings in the Supreme Court of the United States have been terminated.”¹³⁵

4. Discretionary Review by the U.S. Supreme Court

If the Supreme Court of Virginia affirms the death sentence on direct appeal, the defendant has ninety days in which to petition for a writ of certiorari with the U.S. Supreme Court.¹³⁶ If certiorari is granted, the U.S. Supreme Court will review the conviction for federal constitutional errors and misapplication of federal law.¹³⁷ The Court may affirm, modify, vacate, set aside, reverse, or remand the judgment.¹³⁸

D. State Post-Conviction Relief

1. State Habeas Corpus

After the Supreme Court of Virginia affirms a death sentence on direct appeal, a capital defendant may file a petition for state habeas corpus relief.¹³⁹ Prior to 1995, habeas corpus petitions in death penalty cases were reviewed by Virginia circuit courts; however, state habeas corpus petitions in death penalty cases must now be submitted directly to the Supreme Court of Virginia.¹⁴⁰ The petition must be filed “within sixty days after the earliest of” (1) the denial by the U.S. Supreme Court of a petition for a writ of certiorari following the judgment of the Supreme Court of Virginia on direct appeal; (2) an order of the U.S. Supreme Court affirming imposition of the sentence of death following the grant of a writ of certiorari; or (3) the expiration of the time period for filing a petition for a writ of certiorari.¹⁴¹

Indigent death row inmates will be appointed counsel to provide representation during state habeas corpus proceedings within thirty days of the decision of the Supreme Court of Virginia affirming the death penalty.¹⁴² Virginia statute provides that “notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus [as

¹³² VA. SUP CT. R. 5:37(b), (e). Rehearing proceedings must be in accordance with Code section 8.01-675.2. VA. SUP CT. R. 5:37(e).

¹³³ VA. SUP CT. R. 5:37(e).

¹³⁴ VA. SUP CT. R. 5:37(f).

¹³⁵ VA. SUP CT. R. 5:39.

¹³⁶ 28 U.S.C. § 1257 (2013).

¹³⁷ *Id.*

¹³⁸ 28 U.S.C. § 2106 (2013).

¹³⁹ VA. CONST. art VI § 1, § 16; VA. CODE ANN. § 8.01-654 (2013).

¹⁴⁰ J. LEGIS. AUDIT & REV. COMM’N, *supra* note 2, at 57; VA. CODE ANN. § 8.01-654(C)(1) (2013).

¹⁴¹ VA. CODE ANN. § 8.01-654.1 (2013); VA. SUP CT. R. 5:7A.

¹⁴² VA. CODE ANN. § 19.2-163.7 (2013) (prescribing how to formulate a list of eligible attorneys).

described above], an indigent prisoner may file such a petition within 120 days following appointment . . . of counsel to represent him.”¹⁴³

Petitions for habeas corpus must be completed in accordance with a form set forth in the Virginia Code and must include an enumerated list of the grounds for relief, all supporting facts upon which the petitioner relies, citations to relevant legal authorities, and a listing of all previous petitions and their dispositions.¹⁴⁴ A petition for writ of habeas corpus cannot exceed 100 pages or 17,500 words.¹⁴⁵ The petition must contain all allegations “known to [the] petitioner at the time of filing” and no writ will be granted “on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition.”¹⁴⁶ If the time limit for filing for state habeas corpus relief has not expired and a ruling on the merits of the petition has not been issued, a petitioner may move for leave of Court to substitute an amended petition.¹⁴⁷

Within thirty days of service of the petition, the Attorney General of Virginia must file a responsive pleading.¹⁴⁸ The responsive pleading may include a motion to dismiss and must state whether, in the opinion of the Attorney General of Virginia, the taking of additional evidence is necessary for the proper disposition of the petition.¹⁴⁹ The petitioner may file a reply within twenty days of the filing of the responsive pleading.¹⁵⁰

The Court may grant or deny the petition on the basis of the record, if “the allegations of illegality of the petitioner’s detention can be fully determined on the basis of recorded matters.”¹⁵¹ However, the petitioner may request an evidentiary hearing if s/he believes the taking of additional evidence is necessary.¹⁵² In death penalty cases, the Supreme Court of Virginia may, in its discretion, direct the circuit court that entered the original judgment to conduct an evidentiary hearing, where both the Commonwealth and the death row inmate are given the opportunity to present evidence.¹⁵³ At the evidentiary hearing, the petitioner may testify, and either party may call witnesses or may be permitted to read into evidence affidavits of witnesses.¹⁵⁴ If the petitioner alleges ineffective assistance of counsel as a ground for the illegality of his/her detention, s/he is deemed to waive attorney-client privilege “to the extent necessary to permit a full and fair hearing for the alleged ground.”¹⁵⁵

The circuit court must hold the evidentiary hearing within ninety days of issuance of the Supreme Court of Virginia’s order of a hearing.¹⁵⁶ The circuit court must report its findings of fact and recommend conclusions of law to the Supreme Court within sixty days of the conclusion

¹⁴³ VA. CODE ANN. § 8.01-654.1 (2013).

¹⁴⁴ VA. CODE ANN. §§ 8.01-654, 8.01-655 (2013); VA. SUP CT. R. 5:7A.

¹⁴⁵ VA. SUP CT. R. 5:7A(g).

¹⁴⁶ VA. CODE ANN. § 8.01-654(B)(2) (2013).

¹⁴⁷ VA. SUP CT. R. 5:7A(i).

¹⁴⁸ VA. SUP CT. R. 5:7A(c).

¹⁴⁹ *Id.*

¹⁵⁰ VA. SUP CT. R. 5:7A(d).

¹⁵¹ VA. CODE ANN. § 8.01-654(B)(4) (2013).

¹⁵² VA. SUP CT. R. 5:7A(b).

¹⁵³ VA. CODE ANN. § 8.01-654(C)(1) (2013).

¹⁵⁴ VA. CODE ANN. §§ 8.01-660, 8.01-661 (2013).

¹⁵⁵ VA. CODE ANN. § 8.01-654(B)(6) (2013).

¹⁵⁶ VA. CODE ANN. § 8.01-654(C)(3) (2013).

of the hearing.¹⁵⁷ Objections to the circuit court’s findings must be filed with the Supreme Court within thirty days after the circuit court’s report is filed.¹⁵⁸

The Supreme Court of Virginia will grant a writ of habeas corpus only if the petitioner shows probable cause that s/he is detained unlawfully.¹⁵⁹ If the Court grants a writ of habeas corpus, it must “discharge or remand” the inmate, or “admit him[/her] to bail.”¹⁶⁰ Upon denial or issuance of a writ by the Supreme Court of Virginia, parties may seek discretionary review of the decision by the U.S. Supreme Court.¹⁶¹

2. Petition for Actual Innocence

The defendant may also petition the Supreme Court of Virginia to issue a “writ of actual innocence based on biological evidence, notwithstanding any other provision of the law or rule of court.”¹⁶² In order for a writ to issue, a death row inmate must comport with several pleading requirements, including alleging under oath that s/he “is actually innocent of the crime for which [s/]he was convicted.”¹⁶³ The writ will only be granted if the petitioner proves all allegations contained in his/her motion by clear and convincing evidence and the court finds that no reasonable trier of fact could have found the defendant guilty beyond a reasonable doubt based on such evidence.¹⁶⁴ The court may then vacate the judgment, or modify the conviction accordingly.¹⁶⁵ The court may dismiss the petition if the capital defendant fails to establish facts sufficient to justify the writ.¹⁶⁶

Convicted persons who entered a plea of not guilty may also apply for a writ of actual innocence with respect to nonbiological evidence.¹⁶⁷ The Virginia Court of Appeals has the authority to issue writs of actual innocence based on nonbiological evidence, and “either party may appeal a final decision of the Court of Appeals to the Supreme Court of Virginia,” which also has the authority to issue such writs.¹⁶⁸

E. Federal Habeas Corpus

A petitioner wishing to challenge his/her conviction and sentence as a violation of federal law may file a petition for a writ of habeas corpus with the appropriate federal judicial district.¹⁶⁹ In

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ VA. CODE ANN. § 8.01-654 (2013).

¹⁶⁰ VA. CODE ANN. § 8.01-662 (2013).

¹⁶¹ 28 U.S.C. §§ 1257, 2101(c) (2013).

¹⁶² VA. CODE ANN. § 19.2-327.2 (2013).

¹⁶³ *See generally* VA. CODE ANN. § 19.2-327.3 (2013) (describing contents and form of a petition). For a discussion of Virginia’s writ of actual innocence, see Chapter Three on Preservation and Treatment of Evidence.

¹⁶⁴ VA. CODE ANN. §§ 19.2-327.5, 19.2-327.13 (2013).

¹⁶⁵ *Id.*

¹⁶⁶ *Id.*

¹⁶⁷ *See* VA. CODE ANN. § 19.2-327.10 (2013).

¹⁶⁸ *Id.* *See also* VA. CODE ANN. § 19.2-327.11 (2013) (describing the contents and form of a petition based on previously unknown or unavailable evidence of actual innocence).

¹⁶⁹ 28 U.S.C. §§ 2254, 2241(d) (2013); RULE 3(a) OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.; FED. R. APP. P. 22(a).

order to obtain relief on the petition for a writ of habeas corpus, the inmate must have raised all relevant federal claims in state court, as the failure to exhaust all state remedies available on direct appeal and state post-conviction is grounds to dismiss the petition.¹⁷⁰ Generally, an inmate under a death sentence imposed by a state court is permitted one year to file a petition for habeas corpus in federal court.¹⁷¹

Federal law imposes a number of procedural restrictions on the federal courts' ability to review a death-sentenced inmate's claims on the merits. For example, if the inmate challenges the state court's determination on a factual issue, s/he has the burden of rebutting, by clear and convincing evidence, the federal law presumption that state court factual determinations are correct.¹⁷² If the petitioner raises a claim that a Commonwealth court previously determined on the merits, the inmate will not be granted relief unless s/he proves that the state court's adjudication of the claim either: (1) resulted in a decision contrary to, or was an unreasonable application of, clearly established federal law, as determined by the U.S. Supreme Court; or (2) resulted in a decision based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding.¹⁷³

Furthermore, the federal district court may not hold an evidentiary hearing on a claim in which a petitioner failed to develop the underlying facts in the state court proceedings unless:

(A) the claim relies upon: (i) a new rule of constitutional law, made retroactive to cases on collateral review by the [U.S.] Supreme Court, that was previously unavailable or (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable fact finder would have found the applicant guilty of the underlying offense.¹⁷⁴

If the court decides that an evidentiary hearing is unnecessary, it will rule on the petition without additional evidence.¹⁷⁵ Based on the evidence presented, the judge may grant the petitioner a new trial, a new sentencing phase, or a new direct appeal; order the petitioner released from state custody; or deny relief altogether.¹⁷⁶

¹⁷⁰ 28 U.S.C. § 2254(b)(1) (2013). Under certain circumstances, a federal district court can stay a petition that raises both exhausted and unexhausted constitutional violations to allow the petitioner an opportunity to present his unexhausted claims in state court. *Rhines v. Weber*, 544 U.S. 269, 277–79 (2005).

¹⁷¹ The deadline for filing the petition is one year from any date on which (1) the judgment became final, (2) the state impediment that prevented the petitioner from filing was removed, (3) the U.S. Supreme Court recognized a new right and made it retroactively applicable to cases on collateral review, or (4) the underlying facts of the claim(s) could have been discovered through due diligence. 28 U.S.C. § 2244(d)(1) (2013).

¹⁷² 28 U.S.C. § 2254(e)(1) (2013).

¹⁷³ 28 U.S.C. § 2254(d) (2013).

¹⁷⁴ 28 U.S.C. § 2254(e)(2) (2013); *Williams v. Taylor*, 529 U.S. 420, 432 (2000) (“Under the opening clause of § 2254(e)(2), a failure to develop the factual basis of a claim is not established unless there is lack of diligence, or some greater fault, attributable to the prisoner or the prisoner’s counsel.”).

¹⁷⁵ RULE 8 OF THE RULES GOVERNING § 2254 CASES IN THE U.S. DIST. CT.

¹⁷⁶ 28 U.S.C. §§ 2241, 2243 (2013) (providing that a district court may, in granting the writ, “dispose of the matter as law and justice require”).

If an inmate seeks to appeal an adverse decision by the district court, s/he must request a certificate of appealability from either a federal district or circuit court judge.¹⁷⁷ A judge may issue a certificate of appealability only for those claims on which the petitioner has made a substantial showing of the denial of a constitutional right.¹⁷⁸

F. Clemency

A death row inmate may seek final review of his/her conviction and sentence by filing a petition for clemency with the Governor of the Commonwealth of Virginia.¹⁷⁹ The Governor has the sole power to commute a death sentence, grant a pardon, and/or issue a reprieve.¹⁸⁰ When deciding to commute capital punishment, the Governor may issue an order to the Director of the Virginia Department of Corrections to receive and confine the inmate according to the Governor's order.¹⁸¹ The Governor is required to communicate the "particulars" of every case of punishment commuted, with his/her reasons for doing so, at each regular session of the Virginia General Assembly.¹⁸²

In addition, the Governor may request the Virginia Parole Board (Parole Board) to "investigate and report" to him/her on cases in which executive clemency is sought.¹⁸³ In the event the Governor does not request the Parole Board's assistance, the Parole Board may nonetheless develop a report and present recommendations to the Governor on any case "in which it believes action on the part of the Governor is proper or in the best interest of the Commonwealth."¹⁸⁴ Any recommendation by the Parole Board is nonbinding on the Governor.¹⁸⁵

Since the reinstatement of the death penalty, Virginia Governors have granted clemency to eight death row inmates: Joseph Giarratano, Herbert Bassette, Earl Washington, Joseph Payne, William Saunders, Calvin Swann, Robin Lovitt, and Percy Walton.¹⁸⁶

G. Execution

The circuit court may schedule an execution thirty days after the death sentence is pronounced.¹⁸⁷ If the date fixed by the court passes without execution, the circuit court that pronounced the sentence will hold a hearing and fix a new date for execution.¹⁸⁸ Virginia law

¹⁷⁷ 28 U.S.C. § 2253(c)(1) (2013); FED. R. APP. P. 22(b)(3).

¹⁷⁸ 28 U.S.C. § 2253(c)(2) (2013).

¹⁷⁹ J. LEGIS. AUDIT & REV. COMM'N, *supra* note 2, at 1, xiii.

¹⁸⁰ VA. CONST. art. V, § 12 ("The Governor shall have power . . . to commute capital punishment."); VA. CODE ANN. § 53.1-229 (2013).

¹⁸¹ VA. CODE ANN. § 53.1-230 (2013).

¹⁸² VA. CONST. art. V, § 12.

¹⁸³ VA. CODE ANN. § 53.1-231 (2013).

¹⁸⁴ VA. CODE ANN. § 53.1-231 (2013); J. LEGIS. AUDIT & REV. COMM'N, *supra* note 2, at 80–81.

¹⁸⁵ VA. CODE ANN. §§ 53.1-229–53.1-231 (2013); *see generally* J. LEGIS. AUDIT & REV. COMM'N, *supra* note 2, at 83 (discussing the Governor's "complete discretion" to determine the clemency process).

¹⁸⁶ *Clemency: Commutations in Capital Cases on Humanitarian Grounds*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited Aug. 19, 2013). For a discussion on the grants of clemency and the Governor's issuance of clemency in each of these cases, see Chapter Nine on Clemency.

¹⁸⁷ VA. CODE ANN. § 53.1-232(A) (2013).

¹⁸⁸ VA. CODE ANN. § 53.1-232(B) (2013).

entitles a death row inmate to be represented by an attorney, but the inmate “need not be present” when the circuit court fixes the new date.¹⁸⁹ A copy of the order fixing the execution date must be presented by the circuit court clerk to the Director of the Virginia Department of Corrections (DOC), who must then deliver it to the inmate within ten days before the execution date, ensure it is explained to the inmate if the inmate is unable to read, and return it to the clerk.¹⁹⁰

The circuit court must set an execution date when it is notified by the Attorney General of Virginia, in writing, and the court finds that

- (1) the Supreme Court of Virginia has denied habeas corpus relief or the time for filing a timely habeas corpus petition in that Court has passed without such a petition being filed,
- (2) the Supreme Court of the United States has issued a final order disposing of the case after granting a stay to review the judgment of the Supreme Court of Virginia on habeas corpus,
- (3) the United States Court of Appeals has affirmed the denial of federal habeas corpus relief or the time for filing a timely appeal in that court has passed without such an appeal being filed, *or*
- (4) the Supreme Court of the United States has issued a final order after granting a stay in order to dispose of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals.¹⁹¹

The trial court will conduct a hearing within ten days of receiving notice and set the execution date for no later than sixty days after the proceeding.¹⁹² Once an execution date is fixed, the trial court or Supreme Court of Virginia may grant a stay of execution “only upon a showing of substantial grounds for habeas corpus relief.”¹⁹³ If a stay is not granted, the execution must occur at least thirty days after the sentence is pronounced.¹⁹⁴

If the fixed date passes without execution due to a reprieve from the Governor, the execution will be carried out on the day on which the reprieve expires.¹⁹⁵ Notice of a reprieve, writ of error from the Supreme Court of Virginia, or stay of execution must be given to the DOC Director, the warden or superintendent having custody over the inmate, and inmate.¹⁹⁶

All executions, whether by electrocution or lethal injection, are conducted within the Commonwealth’s permanent death chamber provided and maintained by the DOC Director.¹⁹⁷ The execution must be conducted by the Director or one or more designated assistants, in

¹⁸⁹ *Id.*

¹⁹⁰ *Id.*

¹⁹¹ VA. CODE ANN. § 53.1-232.1 (2013) (emphasis added).

¹⁹² *Id.*

¹⁹³ *Id.*

¹⁹⁴ VA. CODE ANN. § 53.1-232(A) (2013).

¹⁹⁵ VA. CODE ANN. § 53.1-232(C) (2013).

¹⁹⁶ VA. CODE ANN. § 53.1-232(D) (2013).

¹⁹⁷ VA. CODE ANN. §§ 53.1-233, 53.1-234 (2013). The death chamber must have “all the necessary appliances for the proper execution of prisoners by electrocution or by continuous intravenous injection of a substance or combination of substances sufficient to cause death.” VA. CODE ANN. § 53.1-233 (2013).

accordance with procedures developed by the DOC, in the presence of the DOC Director or an assistant, a DOC physician or his assistant, and at least six citizens who are not DOC employees.¹⁹⁸ The method is chosen by the inmate, unless s/he fails to make a choice within fifteen days of the execution, in which case s/he will be executed by lethal injection.¹⁹⁹ The inmate's counsel and clergyman may be present during the execution at his/her request.²⁰⁰ Virginia prohibits the release of information on the identities of "persons designated by the Director to conduct executions," and exempts execution personnel identifying information from the Freedom of Information Act.²⁰¹

After the execution, the physician in attendance will perform an examination to determine that death has occurred.²⁰² The Director will then certify that the execution occurred and submit his/her certification, along with the physician's death certification, to the clerk of the court that pronounced the death sentence for entry into the case record.²⁰³

¹⁹⁸ VA. CODE ANN. §§ 53.1-233, 53.1-234 (2013).

¹⁹⁹ VA. CODE ANN. § 53.1-234 (2013).

²⁰⁰ *Id.*

²⁰¹ VA. CODE ANN. § 53.1-233 (2013).

²⁰² VA. CODE ANN. § 53.1-235 (2013).

²⁰³ *Id.*

CHAPTER TWO

LAW ENFORCEMENT IDENTIFICATION AND INTERROGATION PROCEDURES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Among individuals proved innocent through DNA testing, eyewitness misidentification and false confessions have been two of the leading causes of wrongful convictions. When such persons are wrongfully convicted of murder, the injustice is twofold: an innocent person is incarcerated and possibly sentenced to death, and a guilty criminal remains free.¹ From 1989 to 2012, 416 previously convicted “murderers” were exonerated nationwide.² In about 27% of these cases, there was at least one eyewitness misidentification and 25% involved false confessions.³

Eyewitness Identifications

Studies have shown that the manner in which lineups and showups are conducted affects the accuracy of eyewitness identification.⁴ To decrease the risk of convicting the innocent, while increasing the likelihood of convicting the guilty, the American Bar Association promulgated best practices for promoting the accuracy of eyewitness identification.⁵ To avoid misidentification, these best practices recommend that the lineup or photospread include foils—participants in the lineup or photospread other than the suspect—chosen for their similarity to the eyewitness’s description.⁶ Moreover, the administering officer should be unaware of the suspect’s identity and should tell the eyewitness that the perpetrator may not be in the lineup. Law enforcement agencies also should video record identification procedures, including the eyewitness’s statement regarding his/her degree of confidence in the identification.

Law enforcement agencies should consider using a sequential lineup or photospread, rather than presenting everyone to the eyewitness simultaneously. In the sequential approach, the eyewitness views one person at a time and is not told how many persons s/he will see. The eyewitness thus is encouraged to compare the features of each person viewed with the eyewitness’s recollection of the actual perpetrator rather than comparing the faces of the various people in the lineup or photospread to one another in a quest for the “best match.” Caution in

¹ See, e.g., Richard E. Meyer, *A Tragic Conviction: How Justice System Can Go Wrong*, L.A. TIMES, Mar. 17, 1985, at 1 (detailing the case of Melvin Lee Reynolds, who falsely confessed to the murder of a child in Missouri and was sentenced to life in prison, allowing the actual perpetrator, serial killer Charles Ray Hatcher, to remain free and murder another victim).

² See Samuel R. Gross & Michael Shaffer, *Exonerations in the United States, 1989 – 2012* 18 (2012), available at http://www.law.umich.edu/special/exoneration/Documents/exonerations_us_1989_2012_full_report.pdf. This number includes manslaughter convictions. *Id.*

³ *Id.* at 40.

⁴ See, e.g., Steven Penrod, *Eyewitness Identification Evidence: How Well Are Witnesses and Police Performing?*, 18 CRIM. JUST. 36, 37 (2003).

⁵ ABA, BEST PRACTICES FOR PROMOTING THE ACCURACY OF EYEWITNESS IDENTIFICATION PROCEDURES, 2004 Ann. Mtg. (adopted Aug. 9–10, 2004), available at http://www.americanbar.org/content/dam/aba/migrated/moratorium/policy/2000s/2004_AM_111E.authcheckdam.pdf.

⁶ See C.A. Elizabeth Luus & Gary L. Wells, *Eyewitness Identification and the Selection of Distractors for Lineups*, 15 LAW & HUM. BEHAV. 43 (1991).

administering lineups and showups is especially important because flaws may easily taint later lineup and at-trial identifications.⁷

Custodial Interrogations

Of the 416 murder exonerations, 102 of the exonerees gave false confessions, some of which were the product of police coercion.⁸ Other reported reasons for false confessions include duress, deception, fear of physical harm, ignorance of the law, and lengthy interrogations.⁹ Researchers have also found a correlation between a suspect's age and mental health and the probability of a false confession, as these persons are more likely to be influenced by suggestive or coercive interrogation practices.¹⁰ One study of exonerated persons found that 42% of those who were under the age of eighteen at the time of the crime, and 69% of those who had mental retardation or a mental illness falsely confessed.¹¹ Innocent suspects also have confessed to crimes because law enforcement officers threatened them with the death penalty.¹²

Electronically recording interrogations from their outset—not just from the point at which the suspect has agreed to confess—can help avoid erroneous convictions. Complete recording is increasing in the United States and around the world. Law enforcement agencies that make complete recordings have found the practice beneficial to law enforcement.¹³ Complete recording may avert controversies about what occurred during an interrogation, deter law enforcement officers from using dangerous and/or prohibited interrogation tactics, and provide courts with the ability to review the interrogation and the confession. In addition, allowing a qualified expert witness to testify on factors that affect the validity of a confession may help judges and juries to evaluate the defendant's statements.

Officer Training

Initial training of law enforcement is likely to become dated rapidly, particularly due to advances in scientific and technical knowledge about effective and accurate law enforcement techniques. It is crucial, therefore, that officers receive ongoing, in-service training that includes review of previous trainings and instruction in new procedures and methods. Thoroughness in criminal investigations could also be enhanced by utilizing the training standards and disciplinary policies and practices of Peace Officer Standards and Training Councils,¹⁴ and other law enforcement

⁷ See BRIAN L. CUTLER, EYEWITNESS TESTIMONY: CHALLENGING YOUR OPPONENT'S WITNESSES 13–17, 42–44 (2002).

⁸ See Gross, *supra* note 2, at 41, 58.

⁹ *Id.* at 58. See also Steven A. Drizin & Richard A. Leo, *The Problem of False Confessions in the Post-DNA World*, 82 N.C. L. REV. 891, 963–74 (2004).

¹⁰ See Gross, *supra* note 2, at 59–60.

¹¹ *Id.* at 60.

¹² For instance, the Norfolk Four falsely confessed to a murder after they were told they would receive the death penalty if they did not cooperate. The case is discussed in the Analysis portion of this Chapter. See *infra* notes 218–241 and accompanying text.

¹³ See Thomas P. Sullivan, *Electronic Recording of Custodial Interrogations: Everybody Wins*, 95 J. CRIM. L. & CRIMINOLOGY 1127, 1127 (2005) (“In the past few years, the many benefits of complete audio or video recording of custodial interviews have become increasingly apparent to all parties.”).

¹⁴ Peace Officer Standards and Training Councils are state agencies that set standards for law enforcement training and certification and provide assistance to the law enforcement community.

oversight groups.¹⁵ Jurisdictions also should provide adequate opportunity for citizens and investigative personnel to report serious allegations of negligence or misconduct by law enforcement officers as well as forensic service providers.

¹⁵ Such organizations include the U.S. Department of Justice, which is empowered to sue police agencies under the Violent Crime Control and Law Enforcement Act of 1994. *See* 42 U.S.C. § 14141 (2011); Debra Livingston, *Police Reform and the Department of Justice: An Essay on Accountability*, 2 BUFF. CRIM. L. REV. 815 (1999). In addition, the Commission on Accreditation for Law Enforcement Agencies, Inc., (CALEA) is an independent peer group that has accredited law enforcement agencies in all fifty states. Similar, state-based organizations exist in many places, as do government-established independent monitoring agencies. *See generally* CALEA, <http://www.calea.org/> (last visited June 11, 2013).

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

A. Training, Accreditation, and Discipline of Virginia Law Enforcement

1. Training Standards

The Virginia Department of Criminal Justice Services (DCJS) is charged with establishing minimum training standards for law enforcement officers in Virginia and regulating Virginia's law enforcement training academies.¹⁶ Virginia defines a law enforcement officer as "any full-time or part-time employee of a police department or sheriff's office which is a part of or administered by the Commonwealth or any political subdivision thereof, and who is responsible for the prevention and detection of crime and the enforcement of the penal, traffic or highway laws of the Commonwealth."¹⁷

New law enforcement officers are required to comply with DCJS's compulsory minimum training standards within twelve months of receiving their appointment.¹⁸ The standards require officers to complete 480 hours of academy training on a variety of subjects including legal issues, patrol, investigations, and weapons use.¹⁹ Officers also must complete 100 hours of field training.²⁰ Detailed course requirements are published in the DCJS manual *Performance Outcomes for Compulsory Minimum Training for Law Enforcement Officers*.²¹

Virginia also requires existing law enforcement officers to complete forty hours of approved in-service training every two years.²²

2. Accreditation

a. Virginia Law Enforcement Professional Standards Commission

The Virginia Law Enforcement Professional Standards Commission (VLEPSC), a state agency managed by DCJS, is charged with "establish[ing] professional standards and administer[ing] the accreditation process by which Virginia [law enforcement] agencies can be systematically measured, evaluated, and updated."²³ Accreditation is not mandatory but, as of March 2013,

¹⁶ VA. CODE ANN. § 9.1-102(2), (4), (13) & (14) (2013).

¹⁷ VA. CODE ANN. § 9.1-101 (2013).

¹⁸ 6 VA. ADMIN. CODE § 20-20-40(A) (2013).

¹⁹ 6 VA. ADMIN. CODE § 20-20-21(B) (2013).

²⁰ 6 VA. ADMIN. CODE § 20-20-21(C) (2013).

²¹ See 6 VA. ADMIN. CODE § 20-20-21(A) (2013).

²² 6 VA. ADMIN. CODE § 20-30-40(A) (2013); 6 VA. ADMIN. CODE § 20-30-50(A)(3) (2013).

²³ *Overview & Benefits*, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcs.virginia.gov/accred/overview.cfm> (last visited Mar. 13, 2013). To obtain accreditation, agencies must complete a three-step process consisting of (1) application, (2) self-assessment, and (3) on-site assessment. Law enforcement agencies seeking to maintain accreditation must provide an annual report detailing specified topics as well as any major developments that may affect accreditation. VA. LAW ENFORCEMENT PROF'L STANDARDS COMM'N, PROCESS AND PROCEDURES 12 (2011), available at <http://www.dcs.virginia.gov/accred/documents/0912-VLEPSCProcessProcedures.pdf>.

VLEPSC has accredited eighty-seven of Virginia's 378 law enforcement agencies.²⁴ VLEPSC accreditation is a three step process requiring (1) enrollment in the program by submitting an application; (2) completion of a self-assessment to determine compliance with VLEPSC standards; and (3) an on-site assessment by DCJS staff.²⁵

b. Commission on Accreditation for Law Enforcement Agencies

The Commission on Accreditation for Law Enforcement Agencies (CALEA) is an independent accrediting authority established by the four major law enforcement membership associations in the United States.²⁶ Twenty-six law enforcement agencies in Virginia have been accredited by CALEA.²⁷ Similar to the VLEPSC application, a law enforcement agency seeking CALEA accreditation must (1) enroll in the program by completing an Agency Profile Questionnaire; (2) complete a self-assessment to determine whether the law enforcement agency complies with the accreditation standards and, if not, develop a plan for compliance; and (3) participate in an on-site assessment by CALEA.²⁸ After these steps have been completed, the Commission will hold a hearing to render a final decision on the agency's accreditation.²⁹ The CALEA standards are used to "certify various functional components within a law enforcement agency—Communications, Court Security, Internal Affairs, Office Administration, Property and Evidence, and Training."³⁰

3. Investigating and Reporting Officer Misconduct

a. Virginia Criminal Justice Services Board

The DCJS's Criminal Justice Services Board is charged with investigating and disciplining law enforcement officer misconduct at the state level.³¹ The Board is composed of twenty-eight

²⁴ *Accredited Agencies*, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/accred/agencies.cfm> (last visited Mar. 13, 2013); *Frequently Asked Questions*, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/accred/faqs.cfm> (last visited June 11, 2013) (noting that an advantage to accreditation is that it serves as the "best measure of an agency's compliance with professional law enforcement standards," but not stating that accreditation is required); Telephone Interview by Mark Pickett with Sam Hoffman, Standards, Policy, & Homeland Sec. Manager, Va. Dep't of Criminal Justice Servs. (May 9, 2013) (stating that there are 378 law enforcement agencies in Virginia).

²⁵ VA. LAW ENFORCEMENT PROF'L STANDARDS COMM'N, PROCESS AND PROCEDURES 6–7 (2011), *available at* <http://www.dcjs.virginia.gov/accred/documents/0912-VLEPSCProcessProcedures.pdf>.

²⁶ *The Commission*, CALEA, <http://www.calea.org/content/commission> (last visited Mar. 29, 2013) (noting that the Commission was established by the International Association of Chiefs of Police, National Organization of Black Law Enforcement Executives, National Sheriffs' Association, and Police Executive Research Forum).

²⁷ *CALEA Client Database*, CALEA, <http://www.calea.org/content/calea-client-database> (last visited Mar. 1, 2013) (using second search function and designating "US" and "VA" as search criteria to determine the number of agencies that have earned or are in the process of earning accreditation from CALEA's Law Enforcement Accreditation Program).

²⁸ *Steps in the Accreditation Process*, CALEA, <http://www.calea.org/content/steps-accreditation-process> (last visited Aug. 1, 2013).

²⁹ *Id.*

³⁰ COMM'N ON ACCREDITATION FOR LAW ENFORCEMENT AGENCIES, INC., STANDARDS FOR LAW ENFORCEMENT AGENCIES: THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM, at v (4th ed. 2001) [hereinafter CALEA STANDARDS].

³¹ See VA. CODE ANN. § 15.2-1707 (2013).

members, including representatives from law enforcement agencies, the judiciary, Commonwealth's Attorneys, and the Indigent Defense Commission.³² Sixteen members are appointed by the Governor to represent "the broad categories of state and local governments, criminal justice systems, and law-enforcement agencies."³³

b. Law Enforcement Discipline by Individual Agencies

Individual Virginia law enforcement agencies may also develop their own policies for investigating and disciplining officers who engage in misconduct. However, these disciplinary rules must comply with Virginia's Law-Enforcement Officers Procedural Guarantee Act.³⁴ The Act provides law enforcement officers with the right to notice of the nature of the misconduct investigation.³⁵ A disciplined officer is also entitled to a hearing in which s/he has the right to be represented by counsel and "present evidence, examine and cross-examine witnesses."³⁶

B. Laws and Procedures Governing Eyewitness Identifications

1. Federal Constitutional Law

Pretrial eyewitness identification procedures conducted by law enforcement officers, such as those taking place during lineups, must comport with the constitutional guarantee of due process.³⁷ In *Neil v. Biggers*, the U.S. Supreme Court held that a due process violation occurs and suppression of an out-of-court pretrial identification is required when (1) the identification procedure employed by law enforcement was unnecessarily suggestive; and (2) considering the totality of the circumstances, the suggestive procedure gave rise to a substantial likelihood of irreparable misidentification.³⁸

If a court finds that a pretrial identification procedure was unnecessarily suggestive, courts consider the following factors in determining whether there was a substantial likelihood of irreparable misidentification: (1) the opportunity of the eyewitness to view the criminal at the time of the crime; (2) the eyewitness's degree of attention; (3) the accuracy of the eyewitness's prior description of the criminal; (4) the level of certainty demonstrated by the eyewitness at the confrontation; and (5) the length of time between the crime and the confrontation.³⁹

2. Virginia Law

The Supreme Court of Virginia has adopted the *Biggers* standard for determining the admissibility of an eyewitness identification.⁴⁰ The Court has further held that the burden is on the defendant to prove that the identification was unreliable.⁴¹

³² VA. CODE ANN. § 9.1-108(A) (2013).

³³ *Id.*

³⁴ See VA. CODE ANN. §§ 9.1-500–9.1-507 (2013).

³⁵ VA. CODE § 9.1-501–9.1-502 (2013).

³⁶ VA. CODE § 9.1-504(A) (2013).

³⁷ See *Neil v. Biggers*, 409 U.S. 188, 196–99 (1972).

³⁸ *Biggers*, 409 U.S. at 196–99.

³⁹ *Id.* at 199–200.

⁴⁰ *Winston v. Commonwealth*, 604 S.E.2d 21, 37–38 (Va. 2004).

In addition, Virginia statutory law requires “[t]he Department of State Police and each local police department and sheriff’s office to establish a written policy and procedure for conducting in-person and photographic lineups.”⁴² As of 2011, 93% of Virginia’s law enforcement agencies reported that they had adopted written eyewitness identification policies as required by the statute.⁴³ The Virginia General Assembly also has directed DCJS to “[e]stablish training standards and publish a model policy for law-enforcement personnel involved in criminal investigations that embody current best practices for conducting photographic and live lineups.”⁴⁴

C. Laws and Procedures Governing Custodial Interrogations and Confessions

Custodial interrogations are governed by the Fifth and Sixth Amendments to the United States Constitution.⁴⁵ In *Miranda v. Arizona*, the U.S. Supreme Court held that the Fifth Amendment protection from self-incrimination requires law enforcement officers to inform a suspect of his/her right to remain silent and right to an attorney prior to a custodial interrogation.⁴⁶ Courts must consider the totality of the circumstances to determine whether a suspect is “in custody,” but “the ultimate inquiry is simply whether there is a ‘formal arrest or restraint on freedom of movement’ of the degree associated with a formal arrest.”⁴⁷ “Interrogation” is defined as “express questioning” as well as “any words or actions on the part of the police . . . that the police should know are reasonably likely to elicit an incriminating response.”⁴⁸ A suspect may waive his/her *Miranda* rights, provided that waiver is knowingly and intelligently made.⁴⁹ However, if an officer interrogates a suspect after that suspect effectively invokes his/her rights, or if the suspect is not informed of his/her rights, any statements made during the interrogation may be suppressed.⁵⁰ A related Sixth Amendment protection provides that once a defendant has been formally charged with a crime by way of indictment, arraignment, or the like, law enforcement officers and their agents, including informants, may not “deliberately elicit” incriminating information from that defendant regarding the charged crime.⁵¹

In addition, the constitutional guarantee of due process requires that, to be admissible, a defendant’s confession must be voluntary.⁵² The court must consider the totality of the circumstances to determine whether the defendant’s statements “were the product of his free and

⁴¹ *Id.* (citing *United States v. Wilkerson*, 84 F.3d 692, 695 (4th Cir.1996)).

⁴² VA. CODE ANN. § 19.2-390.02 (2013).

⁴³ VA. DEP’T OF CRIMINAL JUSTICE SERVS., REPORT ON THE LAW ENFORCEMENT LINEUP POLICY SURVEY AND REVIEW 4 (2012), available at <http://www.dcjs.virginia.gov/research/documents/12LawEnforceLineup.pdf>.

⁴⁴ VA. CODE ANN. § 9.1-102(54) (2013). The model policy is discussed further under Protocol #1, below.

⁴⁵ See *United States v. Gouveia*, 467 U.S. 180, 187–88 (1984); *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966). *Miranda*, 384 U.S. at 478–79.

⁴⁶ *Miranda*, 384 U.S. at 478–79.

⁴⁷ *California v. Beheler*, 463 U.S. 1121, 1125 (1983) (quoting *Oregon v. Mathiason*, 429 U.S. 492, 495 (1977)).

⁴⁸ *Rhode Island v. Innis*, 446 U.S. 291, 301 (1980).

⁴⁹ *Miranda*, 384 U.S. at 479.

⁵⁰ *Id.* at 478–79. But see *Berghuis v. Thompkins*, 130 S. Ct. 2250, 2264 (2010) (“[A] suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.”).

⁵¹ *Kuhlmann v. Wilson*, 477 U.S. 436, 457–58 (1986).

⁵² *Schneekloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

rational choice.”⁵³ However, “[c]oercive police activity is a necessary predicate to finding that a confession is not ‘voluntary’ within the meaning of the Due Process Clause.”⁵⁴ The court will consider such factors as the length and location of the interrogation, the number of law enforcement officers in attendance, the presence or absence of legal counsel, and whether the confession was written by the defendant when determining whether law enforcement used coercive tactics.⁵⁵

Virginia statutory and case law does not appear to impose any additional limitations upon custodial interrogations.

⁵³ *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968).

⁵⁴ *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

⁵⁵ *See id.* at 163–64 (discussing and providing examples of “the crucial element of police overreaching”).

II. ANALYSIS

Below are the ABA Benchmarks, or “Protocols,” used by the Assessment Team in its evaluation of Virginia’s death penalty system. Each Protocol is followed by the Assessment Team’s analysis of the Commonwealth’s compliance with the Protocol and, where appropriate, the Assessment Team’s recommendations for reform.

A. Protocol #1

Law enforcement agencies should adopt guidelines for conducting lineups and photospreads in a manner that maximizes their likely accuracy. Every set of guidelines should address at least the subjects, and should incorporate at least the social scientific teachings and best practices, set forth in the *American Bar Association Best Practices for Promoting the Accuracy of Eyewitness Identification Procedures (ABA Best Practices)* (which has been reproduced below, in relevant part and with slight modifications).

The U.S. Supreme Court has recognized that “the influence of improper suggestion upon identifying witnesses probably accounts for more miscarriages of justice than any other single factor—perhaps it is responsible for more such errors than all other factors combined.”⁵⁶ Furthermore, “a major factor contributing to the high incidence of miscarriage of justice from mistaken identification has been the degree of suggestion inherent in the manner in which the prosecution presents the suspect to witnesses for pretrial identification.”⁵⁷ The growing number of DNA exonerations has confirmed that there is a significant risk that an innocent person will be convicted because of an eyewitness misidentification. According to the Innocence Project, eyewitness misidentification has played “a role in nearly 75% of convictions overturned through DNA testing.”⁵⁸

Virginia is no exception to this problem. Between 1989 and 2013, at least eighteen people in Virginia whose convictions were based largely on eyewitness misidentifications have been exonerated of serious violent felonies following DNA testing or the discovery of new evidence.⁵⁹

⁵⁶ United States v. Wade, 388 U.S. 218, 229 (1967) (quoting PATRICK M. WALL, EYE-WITNESS IDENTIFICATION IN CRIMINAL CASES 26 (1965)).

⁵⁷ *Id.*, at 228.

⁵⁸ *Understanding the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Aug. 1, 2013).

⁵⁹ The exonerees are Marvin Anderson, Bennett Barbour, Victor Burnette, Jeffrey Cox, Calvin Wayne Cunningham, Willie Davidson, Garry Diamond, Russell Leroy Gray, Thomas Haynesworth, Edward Honaker, Troy Hopkins, Julius Ruffin, Walter Snyder, Teddy Thompson, Phillip Leon Thurman, John Tingle, Jr., Troy Webb, and Arthur Lee Whitfield. Marvin Anderson, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2995> (last visited Feb. 11, 2013); Bennett Barbour, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3929> (last visited Feb. 11, 2013); Victor Burnette, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3072> (last visited Feb. 11, 2013); Jeffrey Cox, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3128> (last visited Feb. 11, 2013); Calvin Wayne Cunningham, NAT’L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3143> (last visited Feb. 11, 2013);

The total number of wrongful convictions may be significantly higher. In 2005, Virginia Governor Mark Warner ordered DNA testing of a cache of newly discovered forensic files taken from Virginia criminal cases in the 1970s and 1980s.⁶⁰ A 2012 examination by the Urban Institute of these newly discovered files found that of the 250 convicted offenders for which DNA testing produced a probative outcome, “the convicted offender was eliminated as the source of DNA evidence,” in fifty-six of them, “and for 38 convictions that elimination supported exoneration.”⁶¹ It is not known how many of these convictions were the result of eyewitness testimony, but given the frequency of wrongful convictions based on this type of evidence, it is likely that at least some were the result of misidentifications.

Marvin Anderson, for example, served fifteen years in prison and four years on parole for a 1982 rape in Ashland, Virginia that he did not commit.⁶² The rapist in the case had told the victim, a white woman, that he had “had a white girl” before.⁶³ Anderson, who had no prior criminal record, was identified as a suspect by law enforcement based solely on the fact that he was one of the few black men in the area known to have a white girlfriend.⁶⁴

Willie	Davidson,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3153				(last visited Feb. 11, 2013);	
Garry	Diamond,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4120				(last visited Apr. 17, 2013);	
Russell	Leroy Gray,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3434				(last visited Feb. 11, 2013);	
Thomas	Haynesworth,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3872				(last visited Feb. 11, 2013);	
Edward	Honaker,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3304				(last visited Feb. 11, 2013);	Troy
Hopkins,		NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3305				(last visited Feb. 11, 2013);	
Julius	Ruffin,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3599				(last visited Feb. 11, 2013);	
Walter	Snyder,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3651				(last visited Feb. 11, 2013);	
Teddy	Thompson,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3686				(last visited Feb. 11, 2013);	
Phillip	Leon Thurman,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3689				(last visited Feb. 11, 2013);	John
Tingle,	Jr.,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4113				(last visited Feb. 11, 2013);	Troy
Webb,		NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3728				(last visited Feb. 11, 2013);	
Arthur	Lee Whitfield,	NAT'L	REGISTRY	OF	EXONERATIONS,
http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3738				(last visited Feb. 11, 2013).	

⁶⁰ Frank Green, *Case Raises Question of Effort*, RICHMOND TIMES-DISPATCH, Feb. 5, 2012.

⁶¹ JOHN ROMAN ET AL., POST-CONVICTION DNA TESTING AND WRONGFUL CONVICTION 5 (2012), *available at* <http://www.urban.org/UploadedPDF/412589-Post-Conviction-DNA-Testing-and-Wrongful-Conviction.pdf>. The Urban Institute attempted to exclude from this total those cases for which the results of the DNA test did not match the suspect, but for which a claim of wrongful conviction was *not* supported “due to the context of the case.” *Id.* at vi, 4–6. *See also* Frank Green, *DNA Tests Could Clear More*, RICHMOND TIMES-DISPATCH, June 19, 2012.

⁶² Frank Green, *An Innocent Man Cleared – At Last*, RICHMOND TIMES-DISPATCH, Aug. 22, 2002, at B1.

⁶³ Zinie Chen Sampson, *Police Lineup Rules Revamped*, DAILY PRESS (Newport News, Va.), July 6, 2012, at A2.

⁶⁴ *Id.*

The primary evidence against Anderson at trial was the testimony of the victim, who identified Anderson in both a photographic and in-person lineup.⁶⁵ The officer who administered both procedures was aware that Anderson was the suspect,⁶⁶ increasing the likelihood that the officer inadvertently communicated the suspect's identity to the witness.⁶⁷ Moreover, the victim identified Anderson in a photographic lineup in which all of the photographs, with the exception of the photograph of Anderson, were black-and-white mug shots.⁶⁸ Anderson was also the only person featured in both the photographic and in-person lineup, clearly identifying him as the suspect.⁶⁹

In 2001, state-ordered DNA testing excluded Anderson as the rapist, and he received a full pardon from the Governor.⁷⁰ While Anderson was in prison, the actual perpetrator, John Otis Lincoln, remained free and committed an assault on another victim.⁷¹ Lincoln had been included in the same photographic lineup as Anderson, but the victim was unable to identify him.⁷²

Improved eyewitness identification procedures, however, can significantly reduce the risk of misidentification.⁷³ As discussed in this Protocol, a number of law enforcement policies can help to avoid suggestive identification procedures.⁷⁴

Statutory Requirements

In 2005, the Virginia General Assembly enacted a statute requiring “[t]he Department of State Police and each local police department and sheriff’s office to establish a written policy and procedure for conducting in-person and photographic lineups.”⁷⁵ The statute was enacted after a 2005 study, conducted by the Virginia State Crime Commission, found that only 37% of Virginia’s law enforcement agencies had adopted written eyewitness identification policies.⁷⁶ However, the statute does not require agencies to adopt any particular eyewitness identification policies, nor does it provide a suspect with a legal remedy if the policy is violated.⁷⁷ In 2011, 93% of Virginia’s law enforcement agencies reported that they had adopted written eyewitness identification policies as required by statute.⁷⁸ The substantive components of various agencies’ written policies will be discussed throughout Protocol #1.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *See infra* notes 91–92 and accompanying text.

⁶⁸ Sampson, *supra* note 63.

⁶⁹ *Id.*

⁷⁰ Green, *supra* note 62.

⁷¹ Frank Green, *Eyewitness ID Fallibility Shown: Rape Victim ‘Picked An Innocent Guy’*, RICHMOND TIMES-DISPATCH, Mar. 16, 2003, at A1.

⁷² *Id.*

⁷³ Penrod, *supra* note 4.

⁷⁴ These specific best practices are discussed in the subsections to this Protocol.

⁷⁵ VA. CODE ANN. § 19.2-390.02 (2005).

⁷⁶ VA. STATE CRIME COMM’N, MISTAKEN EYEWITNESS IDENTIFICATION 16 (2005), *available at* [http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/cece4e476d79218985256ec500553c3b/\\$FILE/HD40.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/cece4e476d79218985256ec500553c3b/$FILE/HD40.pdf) (hereinafter CRIME COMM’N REPORT).

⁷⁷ *See* VA. CODE ANN. § 19.2-390.2

⁷⁸ VA. DEP’T OF CRIMINAL JUSTICE SERVS., REPORT ON THE LAW ENFORCEMENT LINEUP POLICY SURVEY AND REVIEW 4 (2012), *available at* <http://www.dcjs.virginia.gov/research/documents/12LawEnforceLineup.pdf> (hereinafter DCJS REPORT). The report was published in 2012 but was completed in 2011. *See id.* at 1, 3.

Department of Criminal Justice Services Model Policy

While Virginia statutory law does not expressly mandate that law enforcement agencies must adopt any specific eyewitness identification procedures, in 2005 the Virginia General Assembly directed the Department of Criminal Justice Services (DCJS), a state agency, to develop model best practices for law enforcement agencies to use in eyewitness identifications.⁷⁹

DCJS last updated its *Model Policy on Eyewitness Identification* on July 1, 2012 to incorporate the most recent advancements in social scientific research.⁸⁰ Leaders from Virginia's law enforcement community, the Innocence Project, and University of Virginia School of Law Professor Brandon Garrett—who has written extensively on the causes of wrongful convictions—assisted with drafting the policy.⁸¹ The model policy, however, is not binding on individual law enforcement agencies, and a defendant who is identified by an eyewitness using a procedure that violates the policy has no legal remedy.⁸² Specific provisions of the model policy are discussed in the subsections to the Protocol.

Accreditation Requirements

The Virginia Law Enforcement Professional Standards Commission (VLEPSC), a state agency managed by DCJS, is charged with “establish[ing] professional standards and administer[ing] the accreditation process by which Virginia [law enforcement] agencies can be systematically measured, evaluated, and updated.”⁸³ As of June 2013, VLEPSC has accredited eighty-seven of Virginia's 378 law enforcement agencies.⁸⁴ However, accreditation is not required by state law.⁸⁵

⁷⁹ Frank Green, *Law Officials Frustrated by Pace of Suspect-ID Reforms*, RICHMOND TIMES-DISPATCH, Nov. 17, 2011. DCJS's mission “is to provide leadership to improve the criminal justice system in Virginia's communities through effective training, partnerships, research, regulation, and support.” *About DCJS*, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/about/> (last visited June 12, 2013). The General Assembly officially empowered DCJS to “[e]stablish training standards and publish a model policy for law-enforcement personnel involved in criminal investigations that embody current best practices for conducting photographic and live lineups” in 2012. VA. CODE ANN. § 9.1-102(54) (2012). This provision became effective April 18, 2012. 2012 Va. Acts, ch. 827.

⁸⁰ See VA. DEP'T OF CRIMINAL JUSTICE SERVS., MODEL POLICY ON EYEWITNESS IDENTIFICATION (2012), available at <http://www.dcjs.virginia.gov/cple/sampleDirectives/> (hereinafter DCJS MODEL POLICY).

⁸¹ See *id.* at 2–3. See also *Garrett Helps Overhaul Virginia's Model Policy for Police Line-ups, Eyewitness Identification*, UNIV. OF VA. SCH. OF LAW, http://www.law.virginia.edu/html/news/2012_spr/garrett_eyewitness.htm (last visited June 12, 2013).

⁸² See DCJS MODEL POLICY, *supra* note 80.

⁸³ *Overview & Benefits*, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/accred/overview.cfm> (last visited June 12, 2013). To obtain accreditation, agencies must complete a three-step process consisting of (1) application, (2) self-assessment, and (3) on-site assessment. Law enforcement agencies seeking to maintain accreditation must provide an annual report detailing specified topics as well as any major developments that may affect accreditation. VA. LAW ENFORCEMENT PROF'L STANDARDS COMM'N, PROCESS AND PROCEDURES 6 (2011), available at <http://www.dcjs.virginia.gov/accred/documents/0912-VLEPSCProcessProcedures.pdf>.

⁸⁴ *Accredited Agencies*, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/accred/agencies.cfm> (last visited Mar. 13, 2013); Interview with Sam Hoffman, *supra* note 24.

⁸⁵ See *Frequently Asked Questions*, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/accred/faqs.cfm> (last visited June 11, 2013) (noting that an advantage to accreditation

Beginning on January 1, 2014, VLEPSC will require law enforcement agencies seeking accreditation to adopt a “written directive . . . for conducting photographic lineups and in-person lineups presented to eyewitnesses” that includes several provisions on the manner in which the procedure is conducted.⁸⁶ The specific requirements of these standards are discussed below. Prior to 2014, VLEPSC standards only required a written directive of some kind for conducting eyewitness identifications.⁸⁷

In addition, twenty-six law enforcement agencies in Virginia have obtained certification by the Commission on Accreditation for Law Enforcement Agencies (CALEA), a national, independent accrediting authority.⁸⁸ The CALEA standards, however, do not require the certified agencies to adopt specific guidelines for conducting lineups and photospreads.⁸⁹

Individual Law Enforcement Agencies

The Virginia Assessment Team also submitted surveys to twenty law enforcement agencies throughout the Commonwealth regarding training, policies, and practices during identifications.⁹⁰ Four agencies—the Virginia State Police, Arlington County Police, Danville Police, and Norfolk Police—responded to the survey and their policies are discussed under subsections to this Protocol, below.

is that it serves as the “best measure of an agency’s compliance with professional law enforcement standards,” but not stating that accreditation is required).

⁸⁶ Letter from Gary M. Dillon, Program Manager, Va. Law Enforcement Prof’l Standards Comm’n, to Va. Law Enforcement Prof’l Standards Comm’n Participating Agencies and Assessors (Jan. 15, 2013) (on file with author) (describing the new standards adopted by VLEPSC).

⁸⁷ VA. LAW ENFORCEMENT PROF’L STANDARDS COMM’N, PROGRAM MANUAL 25 (2012), *available at* <http://www.dcjs.virginia.gov/accred/documents/6th-EditionProgramManual-V6.pdf> (noting that this requirement went into effect in 2006).

⁸⁸ *See supra* note 27 and accompanying text.

⁸⁹ *See* CALEA STANDARDS, *supra* note 30, at 42-43.

⁹⁰ Surveys were submitted to the following law enforcement agencies and training entities: Arlington County Police Department; Chesterfield County Police Department; Chesterfield County Police Training Academy; Danville Police Department; Norfolk Police Department; Northern Virginia Criminal Justice Training Academy; Piedmont Regional Criminal Justice Training Academy; Prince William County Police Department; Prince William County Criminal Justice Academy; Richmond Police Department; Richmond Police Training Academy; Roanoke Police Department; Roanoke Police Department Training Academy; Virginia Beach Police Department; Virginia Beach Police Department Law Enforcement Training Academy; Virginia Department of Criminal Justice Services Division of Law Enforcement; Virginia Office of Public Safety; Virginia Sheriff’s Institute; Virginia State Police; Virginia State Police Training Division. A copy of the survey is reproduced in the Appendix to this Report, *infra*.

1. General Guidelines for Administering Lineups and Photospreads

- a. The guidelines should require, whenever practicable, that the person who conducts a lineup or photospread and all others present (except for defense counsel, when his/her presence is constitutionally required) should be unaware of which of the participants is the suspect.
- b. The guidelines should require that eyewitnesses should be instructed that the perpetrator may or may not be in the lineup; that they should not assume that the person administering the lineup knows who is the suspect; and that they need not identify anyone, but, if they do so, they will be expected to state in their own words how certain they are of any identification they make.

While a law enforcement officer may strive to avoid communicating the suspect's identity to the eyewitness during an identification procedure, s/he may unwittingly do so if s/he is personally aware which participant is the suspect.⁹¹ As the Virginia State Crime Commission has noted, "even when utilizing precautions to avoid any advertent body signals or cues to witnesses, inadvertent body signals or cues to witnesses do occur when the identity of the actual suspect is known to the individual conducting the identification procedure."⁹² Furthermore, when eyewitnesses are provided with the above cautionary instructions, they are less likely to feel as if they must identify someone, thereby reducing the likelihood that they will guess the identity of the suspect. By contrast, when law enforcement officers tell an eyewitness that the suspect is in the lineup or photospread, the eyewitness may feel pressure to identify someone, even if the actual perpetrator is not present.

To prevent officers from unwittingly revealing the suspect's identity, the *ABA Best Practices* recommend that the officer who conducts the eyewitness identification procedure should be unaware of which participant is the suspect. This is known as a "blind" or "double blind" lineup administration.⁹³ Some states require law enforcement officers to use a double blind method when conducting a lineup, either by state statute or by attorney general order.⁹⁴

Virginia recommends but does not mandate that law enforcement agencies use the double blind method when administering eyewitness identification procedures or that an eyewitness be instructed in a manner that comports with the *ABA Best Practices*.⁹⁵ DCJS's *Model Policy on Eyewitness Identification* states that, in conducting an in-person or photographic lineup, law enforcement officers should use a "blind administrator [who] must not know which member of the lineup is the 'true' suspect."⁹⁶ When a blind administrator is not available the policy recommends that law enforcement use a "'blinded' administrator . . . , namely an individual who knows the suspect's identity but is not in a position to see which members of the line-up are

⁹¹ Penrod, *supra* note 4, at 45.

⁹² CRIME COMM'N REPORT, *supra* note 76, at 10.

⁹³ DCJS MODEL POLICY, *supra* note 80, at 5–6.

⁹⁴ *Police lineups: Virginia Overhauling Eyewitness-ID Policy*, HOUSTON CHRON., July 10, 2012, at A14. North Carolina, Ohio, and Connecticut require a double blind administration under a state statute. *Id.* New Jersey and Wisconsin require the procedure according to an attorney general order. *Id.*

⁹⁵ DCJS MODEL POLICY, *supra* note 80, at 4–5.

⁹⁶ *Id.* at 9.

being viewed by the eyewitness.”⁹⁷ To accomplish this, the policy describes a technique known as the “Folder Shuffle Method” wherein the officer places photographs of the lineup participants in folders then shuffles them before presenting them to the suspect.⁹⁸ As previously noted, however, DCJS’s policy is not mandatory.

In addition, beginning on January 1, 2014, VLEPSC will require accredited law enforcement agencies to include “a [written] direction to the investigator conducting the photographic lineup or in-person lineup to avoid any conduct that might directly or indirectly influence the witness’ decision.”⁹⁹ While accreditation requirements also reference the DCJS model policy, they do not expressly require double blind administration.¹⁰⁰ VLEPSC-accredited agencies must also have adopted eyewitness identification policies that include instructions to be used by the investigator conducting the photographic lineup or in-person lineup to instruct the witness prior to the lineup.”¹⁰¹ The standard directs law enforcement agencies to review the DCJS model policy for “guidance,” but does not require any particular instructions.¹⁰² Moreover, Virginia law does not require VLEPSC accreditation.¹⁰³

A 2011 report by DCJS found that a majority of law enforcement agencies in Virginia do not use double blind administration despite the fact that DCJS’s model policy has recommended this method since 2005.¹⁰⁴ Virginia law enforcement agencies’ practices and policies concerning double-blind administration of identifications are described in Table 1, below.

Table 1

Double Blind Identifications & Witness Instruction				
	Double-blind?	Double-blind “when possible”?	Witness instructed that perpetrator may or may not be in lineup?	Written policy on avoidance of influence
<i>Model Policy and Accreditation</i>				
DCJS	Yes	--	Yes	--
VLEPSC	No	No	No	Yes
<i>DCJS Surveyed Agencies</i>				
Practices ¹⁰⁵	13% Yes	28% Yes	34% No ¹⁰⁶	--

⁹⁷ *Id.*

⁹⁸ *Id.* at 6.

⁹⁹ Letter from Gary Dillon, *supra* note 86.

¹⁰⁰ *Id.*

¹⁰¹ Letter from Gary Dillon, *supra* note 86.

¹⁰² *Id.*

¹⁰³ *See supra* note 85 and accompanying text.

¹⁰⁴ DCJS Report, *supra* note 78, at 5, 22.

¹⁰⁵ *Id.* (123 agencies responded to DCJS’s survey).

¹⁰⁶ DCJS REPORT, *supra* note 78, at 7. When DCJS issued this report in 2011, its model policy differed from the version currently in use, which was revised in 2012. Compare DCJS MODEL POLICY, *supra* note 80, at 7 with DCJS REPORT, *supra* note 78, at 24. However, the model policy in use in 2011 still recommended that witnesses be instructed “that the offender might or might not be among those in the photo array or live lineup, and therefore, the witness should not feel compelled to make an identification” and that “the procedure requires the investigator to ask the witness to state, in his/her own words, how certain he/she is of any identification.” DCJS REPORT, *supra* note 78, at 24.

Double Blind Identifications & Witness Instruction				
	Double-blind?	Double-blind “when possible”?	Witness instructed that perpetrator may or may not be in lineup?	Written policy on avoidance of influence
DCJS Surveyed Agencies				
Policies ¹⁰⁷	39% Yes	8% Yes	--	--
Assessment Survey Responses¹⁰⁸				
VSP	Yes	--	Yes*~	--
Arlington	No	No	Yes*	Yes ¹⁰⁹
Danville	No	No	Yes*	No
Norfolk	No	No	Yes*	No

*These agencies do not require an instruction to the witness that s/he should not to assume that the officer administering the lineup knows the identity of the suspect.¹¹⁰

~Virginia State Police officers must “ask the witness to state, in his/her own words, how certain he/she is of any identification.”¹¹¹

2. Foil Selection, Number, and Presentation Methods

- a. The guidelines should require that lineups and photospreads should use a sufficient number of foils to reasonably reduce the risk of an eyewitness selecting a suspect by guessing rather than by recognition.
- b. The guidelines should require that foils should be chosen for their similarity to the witness’s description of the perpetrator, without the suspect’s standing out in any way from the foils and without other factors drawing undue attention to the suspect.

Foil Number and Appearance

An adequate number of non-suspect participants—sometimes referred to “foils” or “fillers”—who resemble the suspect are necessary to ensure that suspect does not stand out and to reduce the risk that the witness picks the suspect at random. DCJS’s *Model Policy on Eyewitness Identification* recommends that officers “[i]nclude a minimum of five fillers . . . per photo identification procedure and a minimum of four fillers per live [in-person] lineup.”¹¹² The model policy also directs officers to “[c]reate a consistent appearance between the suspect and fillers so that the photos depict individuals who are reasonably similar in age, height, weight and general appearance, and are of the same sex and race.”¹¹³ But officers are also cautioned to “avoid using

¹⁰⁷ *Id.* (115 agencies’ policies reviewed).

¹⁰⁸ VA. DEP’T OF STATE POLICE, GENERAL ORDER OPR 8.13 (2010) (on file with author).

¹⁰⁹ ARLINGTON CNTY. POLICE DEP’T, ADMIN. WRITTEN DIRECTIVE 530.06 (2010) (on file with author). The Arlington County Police Department’s eyewitness identification policy recommends but does not mandate a double blind procedure, stating that “[u]tilizing an officer or detective unfamiliar with the case or suspect to present the lineup is acceptable and may remove a layer of suggestiveness, however this is not required.” *Id.*

¹¹⁰ VA. DEP’T OF STATE POLICE, GENERAL ORDER OPR 8.13 (2010) (on file with author); ARLINGTON CNTY. POLICE DEP’T, ADMIN. WRITTEN DIRECTIVE 530.06 (2010) (on file with author); DANVILLE POLICE DEP’T, GENERAL ORDER 163 (2011) (on file with author); NORFOLK POLICE DEP’T, PHOTOGRAPHIC LINE-UP PROCEDURES AND PHOTO IDENTIFICATION (on file with author).

¹¹¹ VA. DEP’T OF STATE POLICE, GENERAL ORDER OPR 8.13 (2010) (on file with author).

¹¹² DCJS MODEL POLICY, *supra* note 80, at 10.

¹¹³ *Id.*

fillers who so closely resemble the suspect that a person familiar with the suspect might find it difficult to distinguish the suspect from the fillers.”¹¹⁴

Although the DCJS model policy is not mandatory, most Virginia law enforcement agencies appear to have adopted procedures similar to the DCJS model policy with respect to foil number and selection. Table 2, below, describes Virginia law enforcement agencies policies with respect to use of foils in identifications.

Table 2

Foils or Fillers	
% of Agencies Requiring 5 or More Foils	% of Agencies Requiring Similar Appearance among Foils
100% ¹¹⁵	98% ¹¹⁶
All agencies responding to Assessment Team Survey: VSP; Arlington; Danville; and Norfolk ¹¹⁷	

Presentation of Suspect to the Identifying Witness

DCJS’s model policy also recommends that law enforcement agencies administer the lineup sequentially.¹¹⁸ In the sequential method, the lineup participants “are shown to the . . . witness one at a time, with an independent decision on each, before the next [participant] is shown.”¹¹⁹ DCJS recommends this method because social science research has found that eyewitnesses who view the suspects simultaneously are more likely to “assume the suspect is there and pick the one who looks the most like the person who did it,” even if the actual perpetrator is not in the lineup.¹²⁰

In 2014, Virginia law enforcement agencies participating in the VLEPSC accreditation program will be required to develop an eyewitness identification policy that includes “[m]ethod(s) of sequentially presenting the photographic lineup or in-person lineup.”¹²¹ However, it appears that the standards will not mandate that the law enforcement agency’s policy *require* a sequential presentation.¹²²

Use of the sequential method by Virginia’s law enforcement agencies has increased in recent years, but a significant number of agencies still use the simultaneous method. The Virginia State Crime Commission’s 2005 report found that only five out of 259 surveyed law enforcement agencies—about 1.9%—always use the sequential method when conducting photographic

¹¹⁴ *Id.*

¹¹⁵ CRIME COMM’N REPORT, *supra* note 76, at 16–17 (responding agencies used 6 or more foils). The report also noted that photographic lineups, not in-person lineups, are favored by most Virginia law enforcement agencies. *Id.* at 16.

¹¹⁶ DCJS REPORT, *supra* note 78, at 7 (describing results of 2011 study).

¹¹⁷ VA. DEP’T OF STATE POLICE, GENERAL ORDER OPR 8.13 (2010) (on file with author); ARLINGTON CNTY. POLICE DEP’T, ADMIN. WRITTEN DIRECTIVE 530.06 (2010) (on file with author); DANVILLE POLICE DEP’T, GENERAL ORDER 163 (2011) (on file with author); NORFOLK POLICE DEP’T, PHOTOGRAPHIC LINE-UP PROCEDURES AND PHOTO IDENTIFICATION (on file with author).

¹¹⁸ DCJS MODEL POLICY, *supra* note 80, at 5, 12.

¹¹⁹ *Id.* at 5.

¹²⁰ *Garrett Helps Overhaul Virginia’s Model Policy for Police Line-ups, Eyewitness Identification*, *supra* note 81.

¹²¹ Letter from Gary Dillon, *supra* note 86.

¹²² *Id.*

lineups.¹²³ Six years later, DCJS's 2011 report found that 67% of Virginia's law enforcement agencies require sequential lineups in their policies.¹²⁴ Three of the four law enforcement agencies that submitted survey responses to the Assessment Team use the sequential method, while the Norfolk Police Department "predominately use[s] [the] simultaneous" method.¹²⁵

Use of Showups

A showup is an identification procedure in which the eyewitness directly confronts the suspect alone. Showups clearly circumvent any policy regarding the selection and presentation of foils, as foils are not used in a showup. The suspect also may be in police custody or in handcuffs at the showup, suggesting to the eyewitness that s/he is looking at the person who law enforcement believe to be the "right man."

Social scientific research has demonstrated "clear evidence that show-ups are more likely to yield false identifications than are properly constructed lineups" because "they convey to the eyewitness which person is the suspect."¹²⁶ When showups are conducted while the suspect is in handcuffs or in a police car, or the witness is not informed that the suspect may or may not be the real culprit, the witness may feel compelled to make an identification, often under circumstances in which the witness feels his/her personal safety is threatened.

Other states have acted to limit the extent to which law enforcement officers are permitted to use showups to obtain an eyewitness identification. The Supreme Court of Wisconsin, for instance, has held that evidence obtained from showups is unreliable and inadmissible "unless, based on the totality of the circumstances, the showup was necessary."¹²⁷ Furthermore, "[a] showup will not be necessary . . . unless the police lacked probable cause to make an arrest or, as a result of other exigent circumstances, could not have conducted a lineup or photo array."¹²⁸ Some showups, however, are still permissible under the Wisconsin standard. For instance, if police stop a person "suspected of committing a crime, but the police do not have the requisite probable cause to arrest and then to conduct a lineup or photo array, a showup could be considered necessary."¹²⁹ The Supreme Court of Wisconsin reached this conclusion after a thorough review

¹²³ CRIME COMM'N REPORT, *supra* note 76, at 17. It is unclear how many agencies used the sequential method in combination with other methods. *Id.* However, 17.8% of agencies reported always using the simultaneous method. *See id.*

¹²⁴ DCJS REPORT, *supra* note 78, at 5. DCJS also surveyed law enforcement agencies on the type of presentation method used. *Id.* at 4. Of those agencies responding to the survey, 46% stated that they always use the sequential method, 24% stated that they use the sequential when possible, and 29% stated that they do not use the sequential method. *Id.*

¹²⁵ VA. DEP'T OF STATE POLICE, GENERAL ORDER OPR 8.13 (2010) (on file with author); ARLINGTON CNTY. POLICE DEP'T, ADMIN. WRITTEN DIRECTIVE 530.06 (2010) (on file with author); DANVILLE POLICE DEP'T, GENERAL ORDER 163 (2011) (on file with author); Norfolk Police Dep't Survey Response, provided by Captain Ed Ryan, Norfolk Police Dep't., to Mark Pickett, at 2 (Feb. 14, 2012) (on file with author).

¹²⁶ Gary L. Wells et al., *Eyewitness Identification Procedures: Recommendations for Lineups and Photospreads*, 22 LAW & HUM. BEHAV. 603, 631 (1998).

¹²⁷ *State v. Dubose*, 699 N.W.2d 582, 584 (Wis. 2005).

¹²⁸ *Id.* at 584-85.

¹²⁹ *Id.* at 594 n.11.

of recent social scientific research on identification procedures and instances of wrongful convictions based on unreliable showups.¹³⁰

The Supreme Court of New Jersey also recently reviewed its own state's identification procedures and held that, due to the heightened risk of misidentification, "showup administrators should instruct witnesses that the person they are about to view may or may not be the culprit and that they should not feel compelled to make an identification."¹³¹

Virginia law does not place any restrictions on the use of showups. Willie Davidson II, for instance, was wrongly convicted of a rape in Norfolk based on a showup identification by the victim.¹³² The victim had been raped in 1980 by a man wearing a stocking over his face who forced himself into her home.¹³³ A week later, police officers visited the victim in the hospital and showed her a photographic lineup that included Davidson, who was a neighborhood acquaintance of the victim.¹³⁴ The victim did not identify Davidson in the lineup.¹³⁵ After returning home, however, she contacted the police and told them she wished to see Davidson again.¹³⁶ The police brought the victim to the local jail to identify Davidson.¹³⁷ Without any lineup fillers present, an officer pulled a stocking over Davidson's head, and the victim identified him as her rapist.¹³⁸

Davidson was convicted at trial based on this identification and spent over ten years in prison.¹³⁹ In 2005, however, Virginia ordered testing of newly-discovered DNA evidence, and Davidson was exonerated.¹⁴⁰ He was subsequently pardoned by Governor Mark Warner.¹⁴¹

DCJS's model policy recommends that law enforcement officers use showups with "only in exigent circumstances that require the immediate display of a suspect to an eyewitness."¹⁴² The policy further advises law enforcement agencies to adopt a number of policies to reduce the suggestiveness of the showup.¹⁴³ For instance, "[t]he eyewitness should be transported to a neutral, non-law enforcement location where the suspect is being detained for the purposes of a show-up."¹⁴⁴ The policy further recommends that officers provide cautionary instructions to the eyewitness, similar to the instructions recommended for lineups.¹⁴⁵

¹³⁰ *Id.* at 591–95.

¹³¹ *Henderson*, 27 A.3d at 903.

¹³² Bill Geroux & Frank Green, *One of Two Men Cleared by DNA Identified: Lawyer Gives Name of Norfolk Man Falsely Convicted of Rape*, RICHMOND TIMES-DISPATCH, Dec. 16, 2005, at A1.

¹³³ *Id.*

¹³⁴ *Id.*

¹³⁵ *Id.*

¹³⁶ *See id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ *Id.*

¹⁴¹ Jamie Stockwell, *Warner Gives Full Pardons To 2 Cleared DNA Tests*, WASH. POST, Dec. 23, 2005, at A1.

¹⁴² DCJS MODEL POLICY, *supra* note 80, at 7.

¹⁴³ *See id.*

¹⁴⁴ *Id.*

¹⁴⁵ *Id.* at 7.

In addition, beginning in 2014, all VLEPSC-accredited law enforcement agencies will be required to develop a “written directive” for conducting showups.¹⁴⁶ The standard does not mandate any particular procedures, but accredited agencies will be required to include in their policy such elements as “[c]ircumstances when a show-up may be conducted” and “[l]imitations to reduce the suggestiveness of a show-up.”¹⁴⁷ The standard also states that agencies should refer to the DCJS model policy.¹⁴⁸

Of the four law enforcement agencies that submitted survey responses to the Assessment Team, only two have adopted policies related to showups. The Arlington County Police Department’s eyewitness identification policy warns officers that showups have an “inherent suggestiveness.” It further notes, however, that showups can be useful for “develop[ing] what is initially an investigative stop into probable cause when the person who is stopped reasonably matches the description provided by the victim/witness and is in close proximity in time and distance to the occurrence of the offense and the offense location.”¹⁴⁹ To improve the reliability of the showup, the agency requires officers to follow several procedures, including “[c]aution[ing] the witness that the person(s) he or she is about to look at may or may not be the offender” and “[b]e[ing] mindful about showing the suspect in handcuffs or surrounded by too many officers.”¹⁵⁰

Norfolk Police Department policy also warns that showups are “inherently suggestive” and states that “as a general rule,” showups should be used only “within one hour of the offense.”¹⁵¹ The Virginia State Police and Danville Police Department do not appear to have enacted any special procedures related to showups.¹⁵²

¹⁴⁶ Letter from Gary Dillon, *supra* note 86.

¹⁴⁷ *Id.* The full policy requires accredited law enforcement agencies to develop a showup policy that includes the following elements:

- a. Circumstances when a show-up may be conducted;
- b. Limitations to reduce the suggestiveness of a show-up;
- c. Standard instructions to be used by the investigator conducting the show-up to instruct the witness prior to the procedure;
- d. A direction to the investigator(s) conducting the show-up to avoid any conduct that might directly or indirectly influence the witness’ decision, and to avoid any comments or actions that suggest the witness did or did not identify the suspect when the show-up is completed;
- e. Discerning the level of confidence in an identification as expressed by the witness; and
- f. Documenting the procedure and outcome of the show-up, including noting the witness’ response and exact words.

Id.

¹⁴⁸ *Id.*

¹⁴⁹ ARLINGTON CNTY. POLICE DEP’T, ADMIN. WRITTEN DIRECTIVE 530.06 (2010) (on file with author).

¹⁵⁰ *Id.*

¹⁵¹ NORFOLK POLICE DEP’T, “SHOW-UP” & PHYSICAL LINE-UP PROCEDURES (on file with author).

¹⁵² DANVILLE POLICE DEP’T, GENERAL ORDER 163 (2011) (on file with author); VA. DEP’T OF STATE POLICE, GENERAL ORDER OPR 8.13 (2010) (on file with author).

3. Recording Procedures

- a. The guidelines should require that, whenever practicable, the police should videotape or digitally video record lineup procedures, including the witness's confidence statements and any statements made to the witness by the police.
- b. The guidelines should require that, absent videotaping or digital video recording, a photograph should be taken of each lineup and a detailed record made describing with specificity how the entire procedure (from start to finish) was administered, also noting the appearance of the foils and of the suspect and the identities of all persons present.
- c. The guidelines should require that, regardless of the fashion in which a lineup is memorialized, and for all other identification procedures, including photospreads, the police shall, immediately after completing the identification procedure and in a non-suggestive manner, request witnesses to indicate their level of confidence in any identification and ensure that the response is accurately documented.

When law enforcement officers video-record an eyewitness identification procedure, it allows the jury or judge to more easily assess the manner in which the procedure was administered and the level of confidence in the eyewitness's identification.¹⁵³ Similarly, requiring officers to request and document the eyewitness's level of confidence ensures that a complete, contemporaneous statement of belief is preserved for the factfinder.¹⁵⁴

DCJS's *Model Policy on Eyewitness Identification* states that officers should keep a detailed record of the lineup procedure.¹⁵⁵ When a photographic lineup is used, the photographs should be preserved in the record.¹⁵⁶ The policy also advises that "[f]or live lineups, a group photo should be taken of all persons in the lineup together to illustrate size differences among the lineup participants."¹⁵⁷ The model policy further recommends that officers request and document a confidence statement from the eyewitness in his/her own words.¹⁵⁸ Agencies are "encouraged to video record" the lineup or showup procedure, including the confidence statement of the eyewitness.¹⁵⁹ Furthermore, beginning in 2014, VLEPSC accreditation standards will require agencies to develop a written policy for "[d]ocumenting the procedure and outcome of the photographic lineup or in-person lineup, including noting the witness' response and exact words."¹⁶⁰

DCJS's 2011 report, however, found that only 69% of the law enforcement agency policies it reviewed require documented lineup results.¹⁶¹ Moreover, only 10% of responding agencies' policies indicated a preference for electronically recording the procedure.¹⁶²

¹⁵³ Wells et al., *supra* note 126, at 640.

¹⁵⁴ Penrod, *supra* note 4, at 46.

¹⁵⁵ DCJS MODEL POLICY, *supra* note 80, at 9, 11.

¹⁵⁶ *Id.* at 9.

¹⁵⁷ *Id.* at 11.

¹⁵⁸ *Id.* at 6, 12, 13.

¹⁵⁹ *Id.* at 8, 13, 14.

¹⁶⁰ Letter from Gary Dillon, *supra* note 86.

¹⁶¹ DCJS REPORT, *supra* note 78, at 7.

¹⁶² *Id.*

Of the law enforcement agencies that submitted a survey response to the Assessment Team, only the Danville Police Department requires that eyewitness identification procedures be electronically recorded. The policy states that “[i]f practical, the lineup administrator shall make a video record of a live lineup. If a video record is not practical, the lineup administrator shall document the reasons why, and an audio recording shall be made. If neither a video nor audio recording is practical, the lineup administrator shall document the reasons why, and the lineup administrator shall make a written record of the lineup.”¹⁶³ Regardless of the lineup procedure used, the officer is required to make a detailed record, which includes “the words used by the eyewitness to identify the suspect.”¹⁶⁴

Virginia State Police policy provides that officers “may use audio or video recording” during a lineup “if deemed appropriate and practical.”¹⁶⁵ The officer is, however, required to make a written record of the procedure, including the witness’s statement in his/her “own words.”¹⁶⁶ The Arlington County and Norfolk Police Departments do not require officers to video or audio record the eyewitness identification procedure.¹⁶⁷ Arlington County requires the officers “[r]ecord [in writing] both identification and non-identification results on the lineup sheet using the witness’ own words regarding how certain he/she is about the identification.”¹⁶⁸ The Norfolk Police Department imposes similar requirements.¹⁶⁹

4. Immediate Post-lineup or Photospread Procedures

- a. The guidelines should require that police and prosecutors should avoid at any time giving the witness feedback on whether he or she selected the “right man”—the person believed by law enforcement to be the culprit.**

When a law enforcement officer tells the eyewitness that s/he has chosen the “correct” suspect, the eyewitness often becomes much more confident in his/her choice.¹⁷⁰ While this increased confidence is not related to the actual accuracy of the identification, and may in fact be evidence of a false identification, it may be reflected in the eyewitness’s testimony at a trial or hearing as an indication of accuracy.¹⁷¹

DCJS’s *Model Policy on Eyewitness Identification* provides that officers should “[a]void saying anything to the witness that may influence the witness’ selection.”¹⁷² The model policy further instructs officers to “avoid reporting or confirming to the witness any information regarding the individual he or she has selected, until the entire process (including obtaining a confidence

¹⁶³ DANVILLE POLICE DEP’T, GENERAL ORDER 163 (2011) (on file with author).

¹⁶⁴ *Id.*

¹⁶⁵ VA. DEP’T OF STATE POLICE, GENERAL ORDER OPR 8.13 (2010) (on file with author).

¹⁶⁶ *Id.*

¹⁶⁷ Arlington Cnty. Police Dep’t Survey Response, provided by Captain Michelle R. Nuneville, Arlington Cnty. Police Dept., to Mark Pickett, in June 2012, at 2–3 (on file with author); NORFOLK POLICE DEP’T, “SHOW-UP” & PHYSICAL LINE-UP PROCEDURES (on file with author).

¹⁶⁸ ARLINGTON CNTY. POLICE DEP’T, ADMIN. WRITTEN DIRECTIVE 530.06 (2010) (on file with author).

¹⁶⁹ NORFOLK POLICE DEP’T, “SHOW-UP” & PHYSICAL LINE-UP PROCEDURES (on file with author).

¹⁷⁰ Wells et al., *supra* note 126, at 626.

¹⁷¹ *See id.*

¹⁷² DCJS MODEL POLICY, *supra* note 80, at 12.

statement and obtaining required signatures and paperwork) has been completed.”¹⁷³ This policy implies that it would be acceptable for an officer to provide feedback to the witness after the procedure is completed. Beginning in 2014, VLEPSC accreditation standards will require accredited agencies to develop a written directive “to the investigator conducting the photographic lineup or in-person lineup to avoid any conduct that might directly or indirectly influence the witness’ decision, and to avoid comments or actions that suggest the witness did or did not identify the suspect when the photographic lineup or in-person lineup is completed.”¹⁷⁴

DCJS’s 2011 report found that 65% of Virginia law enforcement agencies have enacted a policy requiring that the administrator “must not influence [the] witness.”¹⁷⁵ Of the four law enforcement agencies that submitted survey responses to the Assessment Team, all but the Norfolk Police Department have enacted policies prohibiting the officer from providing the witness with feedback.¹⁷⁶

Conclusion

Virginia DCJS’s *Model Policy on Eyewitness Identification* substantially comports with the *ABA Best Practices*. The model policy, drafted with the assistance of both law enforcement officials and experts on the causes of eyewitness misidentifications, recommends adherence to several practices that have been shown to substantially reduce the risk of wrongful conviction. However, the model policy is not mandatory and as DCJS’s 2011 report revealed, many law enforcement agencies’ policies do not conform to DCJS standards. While DCJS has found that law enforcement agencies’ policies have improved in recent years, only 46% of agencies had enacted policies “substantially similar” to DCJS’s model policy as of 2011.¹⁷⁷ Thus, there is still a substantial risk that eyewitnesses, in some Virginia jurisdictions, will misidentify a suspect, leading to the conviction of an innocent person while the perpetrator remains free.

VLEPSC—Virginia’s law enforcement accreditation agency—will require more stringent eyewitness identification procedures beginning in 2014. These new standards, however, do not fully comport with the *ABA Best Practices*. In many cases, the standards merely require the agency to adopt a policy relating to an aspect of the identification procedure without specifying what that policy must be. Moreover, VLEPSC accreditation is not mandated by Virginia law.

Accordingly, Virginia is in partial compliance with Protocol #1.

Recommendation

Virginia, through DCJS, has developed sound policies for reducing the risk of eyewitness misidentifications. However, because these policies are not mandatory, they have not been fully

¹⁷³ *Id.*

¹⁷⁴ Letter from Gary Dillon, *supra* note 86.

¹⁷⁵ DCJS REPORT, *supra* note 78, at 7.

¹⁷⁶ VA. DEP’T OF STATE POLICE, GENERAL ORDER OPR 8.13 (2010) (on file with author); ARLINGTON CNTY. POLICE DEP’T, ADMIN. WRITTEN DIRECTIVE 530.06 (2010) (on file with author); DANVILLE POLICE DEP’T, GENERAL ORDER 163 (2011) (on file with author); Norfolk Police Dep’t Survey Response, *supra* note 125.

¹⁷⁷ DCJS REPORT, *supra* note 78, at 7. A Virginia State Crime Commission study, conducted in 2010, found that 21% of agencies fully complied with DCJS’s model policy. *Id.*

adopted by many law enforcement agencies. As such, the Assessment Team recommends that Virginia require law enforcement agencies to adopt the DCJS *Model Policy on Eyewitness Identification*.¹⁷⁸

The Assessment Team notes that smaller Virginia law enforcement agencies have indicated that they do not have sufficient personnel to perform a double blind eyewitness identification procedure.¹⁷⁹ However, the “Folder Shuffle Method,” developed by DCJS, allows a law enforcement officer who is aware of the suspect’s identity to conduct a photographic lineup without knowing when the witness is viewing the suspect’s photograph.¹⁸⁰ Understanding the resource limitations faced by some law enforcement agencies in various parts of the Commonwealth, the Assessment Team recommends that law enforcement agencies use this method when traditional double blind administration is not possible.

Many agencies have also reported that they have difficulty obtaining photographs of persons who sufficiently resemble the suspect such that they can be used as foils in photographic lineups.¹⁸¹ To address this issue, the Virginia State Crime Commission recommended in 2005 that Virginia statutory law be amended to “designate the Virginia State Police, through their oversight of the Central Criminal Record Exchange, as a repository for all mug shots and queries for photographic lineups.”¹⁸² This statutory change appears to have been enacted,¹⁸³ but agencies continue to report a problem finding suitable photographs.¹⁸⁴ Accordingly, Virginia law enforcement agencies should consider adopting DCJS’s proposed solutions by (1) using Department of Motor Vehicle license photos; (2) obtaining scanners that allow photographs to be altered; (3) liaising with other law enforcement agencies in development of lineups, and (4) updating the Records Management Systems.¹⁸⁵

The new rule or law should also include remedies for agencies’ noncompliance with the identification procedures.¹⁸⁶ However, such remedies need not mean an automatic exclusion of the eyewitness’s identification. Remedies should include that (1) evidence of failure to comply with required procedures is admissible in support of claims of eyewitness misidentification, if otherwise admissible; (2) when evidence of compliance or noncompliance with the required identification procedures has been presented at trial, the court must instruct the jury that it may consider such evidence in determining the reliability of eyewitness identifications; and (3) failure

¹⁷⁸ In 2010, the Virginia General Assembly considered legislation that would have required Virginia’s law enforcement agencies to follow specific eyewitness identification procedures. H.B. 207, 2010 Sess., (Va. 2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?111+ful+HB207>. The required procedures appear to be based on the DCJS model policy and comport with many aspects of the *ABA Best Practices*. *Id.*

¹⁷⁹ DCJS REPORT, *supra* note 78, at 6.

¹⁸⁰ DCJS MODEL POLICY, *supra* note 80, at 6.

¹⁸¹ CRIME COMM’N REPORT, *supra* note 76, at 17.

¹⁸² *Id.* at 19.

¹⁸³ VA. CODE ANN. § 19.2-390(D) (2012).

¹⁸⁴ DCJS REPORT, *supra* note 78, at 6.

¹⁸⁵ *Id.*

¹⁸⁶ See, e.g., OHIO REV. CODE ANN. § 2933.83(C) (2013) (describing three remedies for failure to comply with Ohio’s eyewitness identification statute that do not require automatic exclusion); N.C. GEN. STAT. § 15A-284.52(d) (2013) (describing three remedies in North Carolina’s eyewitness identification statute that do not require automatic exclusion). See also H.B. 207, 2010 Sess., (Va. 2010), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?111+ful+HB207>.

to comply with the procedure can be considered by the court in adjudicating motions to suppress eyewitness identification.¹⁸⁷

Furthermore, the Team strongly recommends that Virginia law enforcement agencies adopt policies limiting the extent to and manner by which officers can use showups, similar to those policies enacted by the Arlington and Norfolk Police Departments described above.¹⁸⁸ Showups need not be completely prohibited, as law enforcement may need to use the procedure in situations where, for example, an identification is necessary to obtain probable cause for an arrest after the crime occurs. In the limited circumstances in which officers *are* permitted to conduct showups, they should follow procedures that minimize the suggestiveness of the identification.

Given Virginia’s documented history of misidentifications leading to wrongful convictions, adherence to the procedures described above are likely to guard against future miscarriages of justice due to outmoded methods of identification.

B. Protocol #2

Law enforcement officers and prosecutors should receive periodic training on how to implement the guidelines for conducting lineups and photospreads, as well as training on non-suggestive techniques for interviewing witnesses.

The Virginia Department of Criminal Justice Services (DCJS) is tasked with “[e]stablish[ing] compulsory minimum training standards subsequent to employment as a law-enforcement officer in (i) permanent positions, and (ii) temporary or probationary status, and establish[ing] the time required for completion of such training.”¹⁸⁹ A Virginia law enforcement officer who does not comply with DCJS training standards “shall forfeit his office.”¹⁹⁰ DCJS is also responsible for regulating law enforcement training academies.¹⁹¹

Eyewitness Identification Training

DCJS’s compulsory minimum training standards require law enforcement officers to be trained to conduct photographic lineups.¹⁹² Prospective officers must complete a course in which they assemble a photographic lineup based on the following factors and criteria:

¹⁸⁷ See *infra*, Protocol #7, notes 298–313 and accompanying text, on jury instructions on eyewitness identifications.

¹⁸⁸ See *supra* notes 149–152 and accompanying text. See also *State v. Henderson*, 27 A.3d 872, 903 (N.J. 2011) (noting that a special master appointed to examine the validity of New Jersey’s eyewitness identification practices stated that showups are a “‘useful—and necessary—technique when used under appropriate circumstances,’” but that they “‘carry their ‘own risk of misidentifications,’” and also that lineups are a preferred identification procedure).

¹⁸⁹ VA. CODE ANN. § 9.1-102(2) (2013).

¹⁹⁰ VA. CODE ANN. § 9.1-115(A) (2013). There are some narrow exemptions to the training requirements, including for “law-enforcement officers serving under permanent appointment on July 1, 1971.” VA. CODE ANN. § 9.1-113 (2013).

¹⁹¹ VA. CODE ANN. § 9.1-102(4), (13) & (14) (2013).

¹⁹² VA. DEP’T OF CRIM. JUSTICE SERVS., VIRGINIA CRIMINAL JUSTICE TRAINING REFERENCE MANUAL 151 (2012) [hereinafter DCJS TRAINING MANUAL].

1. Same sex;
2. Similar size, build, color, race, ethnic background;
3. Similar background in photo;
4. Using the number of photos specified in the reference “Eyewitness Evidence, a Guide for Law Enforcement” published by the U.S. Department of Justice,¹⁹³ present each photo individually in a sequential manner. Use either black/white photos for all or color photos for all;
5. Descriptors that victim or witnesses provide . . . [; and]
6. Do not use photos that reflect bias toward one person, i.e. mug shots for some and not all.¹⁹⁴

In addition, the prospective officer must be instructed on “[p]reparing a group of photographs for the witness to review and “[p]resenting each photograph individually to the witness.”¹⁹⁵

These training requirements incorporate some of the best practices for conducting eyewitness identifications discussed in Protocol #1. Officers must learn to present a sequential photographic lineup composed of similar participants such that the suspect does not stand out. However, no other photographic lineup training is required, and there is no required training on in-person lineups.

In addition, Virginia statutory law also mandates that DCJS establish “training standards . . . for law-enforcement personnel involved in criminal investigations that embody current best practices for conducting photographic and live lineups.”¹⁹⁶ As discussed in Protocol #1, DCJS has developed a model eyewitness identification policy that incorporates many of the best practices for conducting lineups. DCJS, however, has not incorporated the model policy into its minimum training requirements for Virginia law enforcement officers.¹⁹⁷

DCJS has held training sessions for law enforcement officers on the best practices for conducting lineups.¹⁹⁸ In addition, the University of Virginia School of Law, in collaboration with the Virginia Association of Chiefs of Police, held a symposium for law enforcement officers in 2013 on the DCJS model policy and other best practices for conducting lineups.¹⁹⁹ However, these training programs were not mandatory.²⁰⁰

¹⁹³ The U.S. Department of Justice manual recommends that five foils participate in a lineup in addition to the suspect. *Sample Lesson Plan: Identification*, NAT’L INST. OF JUSTICE, https://www.ncjrs.gov/nij/eyewitness/eyewitness_id.html (last visited Jul. 12, 2013).

¹⁹⁴ DCJS TRAINING MANUAL, *supra* note 192, at 151.

¹⁹⁵ *Id.*

¹⁹⁶ VA. CODE ANN. § 9.1-102(54) (2013).

¹⁹⁷ Telephone Interview by Mark Pickett with Donna Michaelis, Pub. Safety Training Manager, Va. Dep’t of Criminal Justice Servs. (Mar. 27, 2013) (on file with author).

¹⁹⁸ *Eyewitness Identification Training: Lineup Best Practices for Law Enforcement Officers*, VA. DEP’T OF CRIMINAL JUSTICE SERVS., <https://www.dcjs.virginia.gov/trainingevents/cple/eyewitnessidentificationtraining/> (last visited Mar. 27, 2013).

¹⁹⁹ *UVA Law Symposium Aims to Improve Police Eyewitness ID Procedures in Virginia*, VA. ASS’N OF CHIEFS OF POLICE, http://www.vachiefs.org/index.php/news/item/uva_law_symposium_aims_to_improve_police_eyewitness_id_procedures_in_virgi (last visited Aug. 1, 2013).

²⁰⁰ Interview with Donna Michaelis, *supra* note 197.

Witness Interview Training

DCJS's minimum training standards require law enforcement officers to be trained on several non-suggestive interviewing techniques for use in an investigation. Prospective officers must be taught to use "open-ended questions" and a "[p]rofessional demeanor" when interviewing a witness, victim, or complainant.²⁰¹ The course must also instruct that "[c]omplainants and witnesses should be interviewed separately and early in the case" and that the interview is conducted "under conditions that provide for no duress, threats, or promises."²⁰²

Conclusion

Virginia requires law enforcement officers to be trained to question witnesses in a non-suggestive manner. In addition, officers must receive some training on conducting photographic lineups. However, this training does not fully conform to established best practices for eyewitness identifications, and there is no required training on in-person lineups. Accordingly, Virginia is in partial compliance with Protocol #2.

Recommendation

Virginia, through DCJS, has already developed a comprehensive model policy on eyewitness identification procedures that could be used as a framework for training law enforcement officers. As such, the Assessment Team recommends that DCJS incorporate this model policy into its minimum training requirements for law enforcement officers.

C. Protocol #3

Law enforcement agencies and prosecutors' offices should periodically update the guidelines for conducting lineups and photospreads to incorporate advances in social scientific research and in the continuing lessons of practical experience.

As discussed in Protocol #1, the Virginia Department of Criminal Justice Services (DCJS) has developed a *Model Policy on Eyewitness Identification* that incorporates recent advancements in social scientific research.²⁰³ DCJS created the model policy in 2005, which was subsequently revised in 2011 and 2012.²⁰⁴ Virginia law enforcement officials, representatives from the Innocence Project, and experts on eyewitness misidentification consulted on the most recent revision of the policy.²⁰⁵ Moreover, DCJS has considered the practical needs of law enforcement agencies by developing and recommending procedures, such as the "Folder Shuffle Method," that allow agencies with limited staff and resources to administer non-suggestive lineups.²⁰⁶

²⁰¹ DCJS TRAINING MANUAL, *supra* note 191, at 228.

²⁰² *Id.*

²⁰³ See *supra* notes 79–82 and accompanying text.

²⁰⁴ See DCJS MODEL POLICY, *supra* note 80.

²⁰⁵ See *id.* See also Garrett Helps Overhaul Virginia's Model Policy for Police Line-ups, Eyewitness Identification, *supra* note 81.

²⁰⁶ DCJS MODEL POLICY, *supra* note 80, at 8–9.

However, the DCJS model policy is not mandatory and, as noted in Protocol #1, many Virginia law enforcement agencies have enacted eyewitness identification policies that do not conform to the DCJS policy, even with respect to policies that DCJS has promoted since 2005.²⁰⁷ There is no other law or policy requiring law enforcement agencies to periodically update their lineup guidelines.

Conclusion

Virginia has developed an eyewitness identification policy that has been regularly updated and incorporates advancements in social scientific research. The policy is not mandatory, however, and has not been adopted by a significant number of law enforcement agencies. Thus, Virginia is in partial compliance with Protocol #3.

Recommendation

As discussed in Protocol #1, the Assessment Team recommends that Virginia adopt measures to promote enforcement and adoption of the DCJS eyewitness identification policy, through either legislation or rulemaking. DCJS should continue its current practice of revising and updating its policy to reflect any further developments in social scientific research.

D. Protocol #4

Video-record the entirety of custodial interrogations of crime suspects at police precincts, courthouses, detention centers, or other places where suspects are held for questioning, or, where video-recording is impractical, audio-record the entirety of such custodial interrogations.

According to the Innocence Project, “[i]n about 25% of DNA exoneration cases [in the United States], innocent defendants made incriminating statements, delivered outright confessions or pled guilty.”²⁰⁸ Given the risk that an innocent person will confess to a crime, it is imperative for law enforcement officers to fully video-record a suspect’s interrogation, including any questioning that precedes the formal confession and the suspect’s waiver of *Miranda* rights. A video-recording provides the court, jury, and prosecutor with the best means to determine whether a confession is credible, including whether law enforcement engaged in any coercive tactics in obtaining a confession.

False Confessions in Virginia

A number of death penalty and death penalty-eligible cases in Virginia illustrate the risk and consequences of false confessions by suspects.

²⁰⁷ DCJS REPORT, *supra* note 78, at 8.

²⁰⁸ *False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Aug. 1, 2013).

Earl Washington

Earl Washington, who is mildly mentally retarded,²⁰⁹ was interrogated by police for two days regarding a 1982 rape and murder in Culpeper.²¹⁰ Washington eventually confessed, but only after rehearsing his statement with police several times.²¹¹ The only record of the confession was a typed statement, drafted by the police, that Washington signed but could not read.²¹² Moreover, several of the details he provided to the police were inconsistent with the facts of the crime.²¹³ For instance, one of the interrogating officers wrote in his notes that Washington said the victim was black and that he had stabbed her “once or twice.”²¹⁴ In fact, the victim was white and had been stabbed thirty-eight times.²¹⁵

Based largely on this confession, Washington was convicted and sentenced to death.²¹⁶ In 1993, however, DNA testing proved that Washington was innocent of the offense, and he eventually received a pardon.²¹⁷ Washington’s case is discussed in further detail in Chapter Thirteen on Mental Retardation and Mental Illness.

The Norfolk Four

The 1997 case of the “Norfolk Four” demonstrates that even persons who do not suffer from a mental illness or mental disability can be susceptible to false confessions when pressured by law enforcement.²¹⁸ Derek Tice, Danial Williams, Joseph J. Dick Jr., and Eric C. Wilson were convicted of raping and murdering Michelle Bosko in her apartment based largely on their confessions.²¹⁹ All four men confessed to the crime after police threatened them with the death penalty and falsely told them that they had failed polygraph tests.²²⁰ While law enforcement officers electronically recorded their final confessions, there was no audio or video record of the lengthy interrogations that preceded their final statements.²²¹

The four men were subsequently charged and convicted even though their statements were not consistent with the basic facts of the crime or with one another’s recounting of the crime during their respective confessions.²²² For instance, Williams, the first to confess, told police that he

²⁰⁹ Washington v. Buraker, 322 F. Supp. 2d 702, 713 (W.D. Va. 2004).

²¹⁰ *Earl Washington*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Earl_Washington.php (last visited June 12, 2013).

²¹¹ *Id.*

²¹² Brooke A. Masters, *Missteps On Road To Injustice; In Va., Innocent Man Was Nearly Executed*, WASH. POST, Dec. 1, 2000, at A1.

²¹³ *Earl Washington*, *supra* note 210.

²¹⁴ Masters, *supra* note 212.

²¹⁵ *Id.*

²¹⁶ Washington v. Buraker, 322 F. Supp. 2d 702, 707 (W.D. Va. 2004).

²¹⁷ *Id.*

²¹⁸ See *Frontline: The Confessions* (PBS television broadcast Nov. 9, 2010), available at <http://www.pbs.org/wgbh/pages/frontline/the-confessions/>.

²¹⁹ *Id.*

²²⁰ Ian Urbina, *Virginia Governor Sets Free 3 Sailors Convicted in Rape and Murder*, N.Y. TIMES, Aug. 7, 2009, at A9.

²²¹ Alan Berlow, *What Happened in Norfolk?*, N.Y. TIMES MAGAZINE, Aug. 19, 2007, at 36.

²²² Tice v. Johnson, No. 3:08CV69, 2009 WL 2947380, at *3–6 (E.D.Va. Sept. 14, 2009).

had beaten Bosko to death with a shoe, when in fact she had been stabbed.²²³ Moreover, DNA evidence taken from the crime scene did not match any of the four men.²²⁴ To explain the DNA evidence, police and prosecutors theorized that the men acted in concert with others, although the evidence did not indicate multiple perpetrators, and Williams stated in his initial confession that he acted alone.²²⁵ In subsequent police confessions, other men were implicated as well, but their DNA also did not match evidence collected at the crime scene.²²⁶

Several months after the crime, a woman reported to the Norfolk Police that she had received a threatening letter from Omar Ballard, who was already in prison for rape, in which he admitted to killing Bosko.²²⁷ A subsequent DNA test matched Ballard to samples taken from the crime scene.²²⁸ Ballard confessed shortly after police confronted him with the DNA evidence, and his confession included accurate details about the crime scene. He also told police he acted alone.²²⁹ In a later statement to police, however, Ballard implicated the four men shortly before accepting a plea agreement.²³⁰

Despite the contradictory confessions, lack of DNA evidence, strong evidence against Ballard, and changing police theories, the prosecution of the four men continued.²³¹ Williams and Dick pleaded guilty.²³² Wilson went to trial and was found guilty of rape.²³³ Tice was convicted of rape and murder at trial.²³⁴

Wilson completed his prison sentence and was released in 2005.²³⁵ After the four men were convicted, however, their lawyers continued to pursue their exonerations.²³⁶ By 2008, a group consisting of “30 former agents of the F.B.I. . . . [;] four former Virginia attorneys general; 13 jurors from two of the [] trials; 12 former state and federal judges and prosecutors; and a past president of the Virginia Bar Association” called for the four men to be pardoned.²³⁷ The following year, the Governor granted “conditional pardons” to the three men who were still in prison, citing “grave doubts” regarding their guilt.²³⁸ The same year, Tice was granted a new trial by a federal court based on a finding that his trial counsel had been ineffective for failing to move to suppress his confession.²³⁹ The Norfolk Commonwealth’s Attorney chose not to retry

²²³ Berlow, *supra* note 221.

²²⁴ Tice, 2009 WL 2947380, at *1–2.

²²⁵ See *id.* at *1–4.

²²⁶ *Id.* at *2.

²²⁷ *Id.* at *3.

²²⁸ *Id.*

²²⁹ *Id.*; Berlow, *supra* note 221.

²³⁰ Tice, 2009 WL 2947380, at *3.

²³¹ See *id.* at *3–6.

²³² *Id.* at *3.

²³³ Berlow, *supra* note 221.

²³⁴ Tice, 2009 WL 2947380, at *3.

²³⁵ Urbina, *supra* note 220.

²³⁶ See *id.*

²³⁷ *Id.*

²³⁸ *Id.* Under the terms of the conditional pardon, the men were released, but their convictions were not reversed. *Id.* As a result, they are required to register as sex offenders. *Id.*

²³⁹ Tice, 2009 WL 2947380, at *23.

Tice.²⁴⁰ In a 2010 television interview, Ballard stated that he acted alone in the murder, and that he implicated the other men to receive a favorable sentence.²⁴¹

Other Virginia capital cases demonstrate that recording of *all* law enforcement interviews, particularly with cooperating witnesses in serious felony cases, may prevent subsequent litigation over whether such informants testified falsely or received a benefit in exchange for their testimony.²⁴²

Virginia Laws and Policies on the Recording of Interrogations

Virginia law does not require law enforcement agencies to record interrogations or confessions. Moreover, Virginia's Department of Criminal Justice Services (DCJS), which developed a comprehensive model policy on eyewitness identification procedures discussed in Protocol #1, has not adopted a model policy on custodial interrogation recording.²⁴³ Virginia's non-mandatory accreditation agency, the Virginia Law Enforcement Professional Standards Commission, also does not require accredited agencies to develop policies on recording custodial interrogations.²⁴⁴

It appears that only some individual law enforcement agencies in Virginia require officers to electronically record interrogations. In 2009, the Northwestern University School of Law Center on Wrongful Convictions found that nine Virginia law enforcement agencies record a majority of their interrogations: the Alexandria Police Department, the Chesterfield County Police Department, the Clarke County Sheriff, the Fairfax Police Department, the Loudoun County Sheriff, the Norfolk Police Department, the Richmond Police Department, the Stafford County Sheriff, and the Virginia Beach Police Department.²⁴⁵

In addition, three of the four Virginia law enforcement agencies that submitted survey responses to the Assessment Team have enacted policies on the recording of custodial interrogations. Virginia State Police policy requires officers to video or audio-record custodial interrogations in several types of serious felony cases, including homicides.²⁴⁶ Noncustodial interrogations—in which the suspect has not been arrested—need not be recorded.²⁴⁷ While the policy states that the “entirety” of the interrogation must be recorded, officers are not required to record the suspect's *Miranda* waiver.²⁴⁸ The policy also includes exceptions to the recording requirement

²⁴⁰ Editorial, *A Partial Step toward Justice*, VIRGINIAN-PILOT & LEDGER STAR (Norfolk, Va.), Aug. 5, 2011, at 6.

²⁴¹ *Frontline: The Confessions*, *supra* note 218.

²⁴² See, e.g., *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 555-57 (E.D.Va. 2011) (reversing Justin Wolfe's capital conviction and death sentence); *Hash v. Johnson*, 845 F. Supp. 2d 711, 750 (W.D.Va. 2012) (reversing Michael Hash's capital conviction and life sentence).

²⁴³ See *Model Policies for Virginia Law Enforcement Agencies*, DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcls.virginia.gov/cple/sampleDirectives/index.cfm> (last visited Mar. 22, 2013) (not listing a model policy related to interrogations or confessions).

²⁴⁴ VA. LAW ENFORCEMENT PROF'L STANDARDS COMM'N, *supra* note 83, at 8.

²⁴⁵ *Departments that Currently Record a Majority of Custodial Interrogations*, NORTHWESTERN LAW BLUHM LEGAL CLINIC, <http://www.law.northwestern.edu/cwc/issues/causesandremedies/falseconfessions/PDDEPTLIST.pdf> (last visited Mar. 24, 2013).

²⁴⁶ VA. DEP'T OF STATE POLICE, GENERAL ORDER OPR 8.11 (2009) (on file with author).

²⁴⁷ *Id.*

²⁴⁸ *Id.*

due to “equipment failure, lack of suspect cooperation, or for other reasons deemed pertinent to successful interrogation by the” officer.²⁴⁹

The Arlington County Police Department’s custodial interrogation policy states that “[a]ll suspect and defendant interviews shall be recorded by CIS detectives on the iRecord system,” a digital video recording tool.²⁵⁰ The policy does not specify whether the entirety of the interrogation, including any waiver of rights must be recorded.²⁵¹ In response to the Assessment Team’s written survey questions, the department stated that video-recording of the suspect’s waiver of rights and confession is “encouraged but not mandatory.”²⁵²

The Norfolk Police Department’s interrogation policy states that “video recording shall be made” of interrogations in several types of violent felony cases, including murder.²⁵³ The policy does not state whether the entirety of the interrogation, including the suspect’s waiver of rights, must be recorded.²⁵⁴ In its response to the Assessment Team’s written survey questions, the department indicated that while the suspect’s waiver of rights and full confession is not required to be video recorded, a full recording is typically made absent “exigent circumstances.”²⁵⁵

The Danville Police Department has not adopted any policies relating to the recording of custodial interrogations, but stated in its written survey response that it video records interrogations “when possible.”²⁵⁶

Expert Testimony on Confessions in Virginia

As the Norfolk Four case demonstrates, jurors are not always able to accurately assess the veracity of a confession, even when portions of it are recorded. Jurors may have mistaken beliefs about the likelihood that a person will falsely confess to a crime, or may not understand what factors contribute to false confessions. For instance, one study of jury-eligible citizens in the United States found that only 43% of surveyed persons knew that a child is more likely to confess to a crime than an adult, and that only 54% knew that the “mentally impaired” are more likely to confess than other persons.²⁵⁷ In reality, persons under the age of eighteen and persons with mental retardation represent a disproportionate number of wrongful convictions based on false confessions.²⁵⁸ In addition, 73% of participants stated that an innocent person would confess only under “strenuous interrogation pressure” despite documented cases in which innocent persons have confessed with little pressure.²⁵⁹

²⁴⁹ *Id.*

²⁵⁰ ARLINGTON CNTY. POLICE DEP’T, CRIMINAL INVESTIGATIONS DIVISION STANDARD OPERATING PROCEDURES (2011) (on file with author).

²⁵¹ *See id.*

²⁵² Arlington Cnty. Police Dep’t Survey Response, *supra* note 167.

²⁵³ NORFOLK POLICE DEP’T, DETECTIVE DIVISION SOP (on file with author).

²⁵⁴ *See id.*

²⁵⁵ Norfolk Police Dep’t Survey Response, *supra* note 125.

²⁵⁶ Danville Police Dep’t Survey Response, provided by Captain Dennis L. Haley, Danville Police Dep’t., to Mark Pickett, at 4 (Feb. 5, 2012) (on file with author).

²⁵⁷ Danielle E. Chojnacki, Michael D. Cicchini & Lawrence T. White, *An Empirical Basis for the Admission of Expert Testimony on False Confessions*, 40 ARIZ. ST. L.J. 1, 27, 33 (2008).

²⁵⁸ Gross, *supra* note 2, at 60.

²⁵⁹ Chojnacki, *supra* note 257, at 40.

Expert testimony on factors that affect the validity of confessions can assist jurors in understanding how to determine whether a defendant's confession was false. The Supreme Court of Virginia has held that while an expert witness may not "opine on the truth of the statement at issue. . . an expert may testify to a witness's or defendant's mental disorder and the hypothetical effect of that disorder on a person in the witness's or defendant's situation."²⁶⁰ The court also noted that, as a general matter, "expert testimony is admissible if the area of expertise to which the expert will testify is not within the range of the common experience of the jury."²⁶¹

However, it appears that Virginia trial courts, in at least some cases, limit expert testimony on confessions to only those cases in which the defendant suffers from a mental disorder. In *Commonwealth v. Diaz*, for instance, the defendant requested funding to hire an expert psychologist who would have testified about "psychological pressures that can be placed on a suspect during interrogation."²⁶² The court denied the motion, stating that

[b]ecause [the defendant] seeks an expert to opine broadly concerning the reliability of police-rendered confessions in general as a means to attack the reliability of his confession, and because Diaz has not otherwise alleged a mental disorder which would allow for expert testimony regarding the hypothetical effects of such a disorder, Diaz has not met his burden for showing the need for expert assistance on this issue.²⁶³

Conclusion

Virginia does not require law enforcement agencies to electronically record a suspect's interrogation and confession, nor has any Virginia agency developed a model policy on interrogation recording. While some individual law enforcement agencies have implemented their own policies on the recording of interrogations, others have not. Moreover, some of the policies reviewed by the Assessment Team require only audio recording of the interrogation or do not require the entirety of the interrogation to be recorded.

Accordingly, Virginia is in partial compliance with Protocol #4.

Recommendation

Given the documented instances of false confessions and erroneous informant testimony in Virginia, as well as the resources that may be saved by recording, obviating the need for litigation on the admissibility of a confession, the Assessment Team recommends that Virginia adopt a statute requiring all law enforcement agencies to video-record the entirety of an interview with a suspect or cooperating witness in any potential capital case.

DCJS, which has developed Virginia's model eyewitness identification policy, could assist with developing the statute. In addition, Virginia could look to the several other states and

²⁶⁰ Pritchett v. Commonwealth, 557 S.E.2d 205, 208 (Va. 2002).

²⁶¹ *Id.* (citing Coppola v. Commonwealth, 257 S.E.2d 797, 803 (1979)).

²⁶² Commonwealth v. Diaz, No. FE-2011-1791, 2012 WL 7874397 at *1 (Va. Cir. Ct. June 19, 2012).

²⁶³ *Id.* at *2.

jurisdictions that have already implemented interrogation recording statutes, including the neighboring jurisdictions of Maryland,²⁶⁴ North Carolina,²⁶⁵ and the District of Columbia.²⁶⁶

Broadly, the statute should require Virginia law enforcement agencies to record interrogations and interviews with suspects *and witnesses* that take place in a law enforcement-controlled setting in any potential capital case. With respect to interrogations, this requirement should include that the reading of *Miranda* rights, the *Miranda* waiver, all questioning by law enforcement, and the suspect's final statement be recorded. Exceptions to the recording requirement should be permitted in the case of certain exigent circumstances, such as a sudden utterance by the suspect, a suspect's unequivocally expressed and written desire not to be recorded,²⁶⁷ and cases in which the recording equipment fails and officers made a good faith attempt to record the interrogation. These limited exceptions will ensure that the vast majority of interrogations are recorded while also protecting public safety in those cases where an immediate interrogation is required but recording equipment is not readily available.

In order to promote proper recording of the entirety of the custodial interview, the statute should also provide defendants with a remedy if law enforcement failed to record the interrogation in violation of the statute. The remedy need not be total exclusion of all unrecorded statements. For instance, North Carolina's interrogation recording statute provides that law enforcement's failure to comply with the statute "shall be *considered* by the court in adjudicating motions to suppress a statement of the defendant made during or after a custodial interrogation."²⁶⁸ In addition, noncompliance with the statute is "admissible in support of claims that the defendant's statement was involuntary or is unreliable."²⁶⁹ The statute also requires the court to instruct the jury "that it may consider credible evidence of compliance or noncompliance" with the statute in determining whether the defendant's confession was "voluntary and reliable."²⁷⁰

A model interrogation recording statute, proposed by attorneys Thomas P. Sullivan and Andrew W. Vail, would allow unrecorded confessions to be admitted into evidence but require a jury instruction on law enforcement's failure to comply with the statute.²⁷¹ Sullivan and Vail have extensively studied different jurisdictions' approach to recording custodial interrogations.²⁷² The authors developed this remedy after consulting with over 600 law enforcement officers on the issue.²⁷³

²⁶⁴ MD. CODE ANN., CRIM. PROC. § 2-402 (2013).

²⁶⁵ N.C. GEN. STAT. § 15A-211 (2013).

²⁶⁶ D.C. CODE § 5-116.01 (2013).

²⁶⁷ Law enforcement officers should be trained not to encourage suspects to request an unrecorded interview.

²⁶⁸ N.C. GEN. STAT. § 15A-211(f)(1) (2013).

²⁶⁹ N.C. GEN. STAT. § 15A-211(f)(2) (2013).

²⁷⁰ N.C. GEN. STAT. § 15A-211(f)(3) (2013).

²⁷¹ Thomas P. Sullivan & Andrew W. Vail, *The Consequences of Law Enforcement Officials' Failure to Record Custodial Interrogations as Required by Law*, 99 J. CRIM. L. & CRIMINOLOGY 215, 221 (2009).

²⁷² *Id.* at 221.

²⁷³ *Id.* at 220 n.24. The proposed Sullivan and Vail instruction reads as follows:

The law of this state required that the interview of the defendant by law enforcement officers which took place on [insert date] at [insert place] was to be electronically recorded, from beginning to end. The purpose of this requirement is to ensure that you jurors will have before you a complete, unaltered, and precise record of the circumstances under which the interview was conducted, and what was said and done by each of the persons present.

Adopting a remedy for failure to record along the lines of either the North Carolina or Sullivan and Vail model would provide a stronger incentive for officers to comply with the law, without risking automatic exclusion of any unrecorded custodial interrogation.

The Assessment Team further recommends that Virginia trial courts apply existing Virginia case law to permit expert witnesses to testify about factors affecting the validity of a confession, although the expert should not be permitted to opine on the ultimate question of whether the confession was truthful. Such testimony should not be limited to only those cases in which the defendant has mental retardation or suffers from a mental illness.

E. Protocol #5

Ensure adequate funding to ensure proper development, implementation, and updating policies and procedures relating to identifications and interrogations.

As discussed in Protocol #1, the Commonwealth of Virginia has, through the Department of Criminal Justice Services (DCJS), developed and updated a comprehensive model eyewitness identification policy.²⁷⁴ While DCJS has also developed policies for several other law enforcement functions,²⁷⁵ it is unclear whether it has the statutory authority to develop a policy for recording custodial interrogations, as many of DCJS's model policies were created in response to a specific statutory mandate.²⁷⁶ However, DCJS appears to be the agency best-equipped to develop and update a model custodial interrogation policy.

It is also unclear if Virginia's individual law enforcement agencies have the funding necessary to implement all of the best practices for conducting eyewitness identifications and interrogations. As discussed in Protocol #1, many law enforcement agencies have not adopted DCJS's model

In this case, the interviewing law enforcement agents failed to comply with that law. They did not make an electronic recording of the interview of the defendant. No justification for their failure to do so has been presented to the court. Instead of an electronic recording, you have been presented with testimony as to what took place, based upon the recollections of law enforcement personnel [and the defendant].

Accordingly, I must give you the following special instructions about your consideration of the evidence concerning that interview.

Because the interview was not electronically recorded as required by our law, you have not been provided the most reliable evidence as to what was said and done by the participants. You cannot hear the exact words used by the participants, or the tone or inflection of their voices.

Accordingly, as you go about determining what occurred during the interview, you should give special attention to whether you are satisfied that what was said and done has been accurately reported by the participants, including testimony as to statements attributed by law enforcement witnesses to the defendant.

Id. at 226.

²⁷⁴ See *supra* notes 79–82 and accompanying text.

²⁷⁵ See *Model Policies for Virginia Law Enforcement Agencies*, DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/cple/sampleDirectives/index.cfm> (last visited June 22, 2013) (not listing a model policy related to interrogations or confessions).

²⁷⁶ See, e.g., VA. CODE ANN. § 9.1-102(54) (2013) (requiring DCJS to develop a policy on eyewitness identification procedures).

eyewitness identification policy²⁷⁷ and it appears that insufficient funding to administer the DCJS policy is of concern to some law enforcement agencies in the Commonwealth.²⁷⁸

Conclusion

Virginia has established a state agency—DCJS—tasked with developing model policies for Virginia’s law enforcement agencies on identifications; however, it is not clear whether DCJS is statutorily authorized to develop an interrogation recording policy. It is also unclear whether Virginia’s individual law enforcement agencies currently have the necessary funding to implement improvements to their eyewitness identification and interrogation policies. Thus, the Assessment Team was unable to determine whether Virginia is in compliance with Protocol #5.

Recommendation

Virginia should ensure that individual law enforcement agencies have the funding necessary to implement the reforms to eyewitness identification and interrogation procedures discussed in this Chapter. The Team notes that many of these reforms—such as double blind administration of identifications and even recording of interrogations in the age of widespread availability of digital recording devices—could be implemented at little cost.

F. Protocol #6

Courts should have the discretion to allow a properly qualified expert to testify both pretrial and at trial on the factors affecting eyewitness accuracy.

As demonstrated by Virginia’s numerous wrongful convictions in cases based on eyewitness misidentifications, jurors and trial courts are often unable to assess the accuracy of eyewitness testimony.²⁷⁹ Jurors and other laypersons may lack the knowledge to understand the complicated biological and psychological factors that affect memory.²⁸⁰ Moreover, research has revealed that the factors that actually affect the accuracy of an eyewitness’s identification are often at odds with “common sense” beliefs.²⁸¹ For instance, while studies have found that “an eyewitness’ stated confidence is not a good predictor of identification accuracy,”²⁸² even the U.S. Supreme Court has held that “the level of certainty demonstrated by the witness” is a factor to be considered in determining whether an identification is reliable.²⁸³

A properly qualified psychologist or other expert could assist jurors and the court in understanding the complicated factors that influence eyewitness identification. One study found

²⁷⁷ DCJS REPORT, *supra* note 78, at 7.

²⁷⁸ See *supra* note 179 and accompanying text.

²⁷⁹ See *supra* note 59 and accompanying text.

²⁸⁰ See Henry F. Fradella, *Why Judges Should Admit Expert Testimony on the Unreliability of Eyewitness Testimony*, 2 FED. CTS. L. REV. 1, 5–12 (2006) (describing the many biological, psychological, and social factors that can influence an eyewitness’s memory).

²⁸¹ See Richard S. Schmechel, et al., *Beyond the Ken? Testing Jurors’ Understanding of Eyewitness Reliability Evidence*, 46 JURIMETRICS J. 177, 178 (2006).

²⁸² *Id.*

²⁸³ *Neil v. Biggers*, 409 U.S. 188, 199 (1972).

that expert testimony on the factors affecting eyewitness accuracy “improved juror knowledge, sensitized jurors to witnessing and identification conditions, and desensitized them toward witness confidence without promoting skepticism toward the eyewitness identification.”²⁸⁴

The Virginia Rules of Evidence permit expert testimony in criminal cases when the issue is “beyond the knowledge and experience of ordinary persons such that the jury needs expert opinion in order to comprehend the subject matter.”²⁸⁵ While the Supreme Court of Virginia has never ruled on the admissibility of eyewitness identification expert testimony, the Court of Appeals of Virginia has addressed the issue.

In *Rodriguez v. Commonwealth*, the defendant attempted to call a social psychologist to testify “as to unreliability of eyewitness identification[s] and the specific problems within this identification, not just the general inherent difficulties with regard to eyewitness identification.”²⁸⁶ For instance, the expert would have testified that “anything in a lineup or photo array that makes the suspect stand out as distinctive should be eliminated” and that “no correlation exists between an eyewitness’s confidence and the accuracy of his identification.”²⁸⁷ The trial court refused to allow the expert to testify, finding that “most of [the proffered testimony] is common sense.”²⁸⁸

On appeal, the Court of Appeals of Virginia was critical of expert testimony on the issue of eyewitness identifications, stating that “courts have consistently found that this type of testimony interferes with the jury’s role as fact finder and its duty to weigh the credibility of witnesses.”²⁸⁹ While the court held that “the decision whether to allow expert testimony concerning an eyewitness identification is a decision left to the sound discretion of the trial court,” it went on to explain that “expert testimony on this [eyewitness identification] issue may be appropriate” in only a limited number of cases.²⁹⁰

The Court of Appeals clarified its *Rodriguez* holding in *Currie v. Commonwealth*.²⁹¹ In *Currie*, the defendant called an expert on eyewitness identification at trial.²⁹² The trial court, however, limited the expert’s testimony to the general issues of “the theory of memory in the field of psychology (acquisition, retention and retrieval) . . . and the problems in cross-racial identifications.”²⁹³ Other testimony, including testimony “as to the specific identification in this case as to its reliability [and] as to its validity,” was forbidden.²⁹⁴ The Court of Appeals upheld

²⁸⁴ Steven Penrod & Brian Cutler, *Witness Confidence and Witness Accuracy: Assessing Their Forensic Relation*, 1 PSYCHOL. PUB. POL’Y & L. 817, 841 (1995).

²⁸⁵ VA. SUP. CT. R. 2:702(a)(ii).

²⁸⁶ *Rodriguez v. Commonwealth*, 455 S.E.2d 724, 725 (Va. App. 1995) (internal quotation marks omitted). When *Rodriguez* was decided, the Virginia Rules of Evidence articulated a slightly different standard for the admission of expert testimony than the standard currently in effect. See *id.* at 726.

²⁸⁷ *Id.*

²⁸⁸ *Id.*

²⁸⁹ *Id.* at 727.

²⁹⁰ *Id.* at 727–28.

²⁹¹ See *Currie v. Commonwealth*, 515 S.E.2d 335, 337–40 (1999).

²⁹² *Id.* at 337.

²⁹³ *Id.* at 338.

²⁹⁴ *Id.*

the trial court's decision on appeal, holding that testimony on the following issues was properly excluded as within the experience knowledge of an ordinary juror:

- (1) the correlation between eyewitness certainty and accuracy;
- (2) the effect of viewing time and stress on eyewitness accuracy;
- (3) the perpetrator's display of a weapon and its effect on eyewitness accuracy;
- (4) the effect that participating in preparing a composite sketch of a subject has on the accuracy of subsequent identifications; and
- (5) the concept of transference.²⁹⁵

Conclusion

The Court of Appeals of Virginia has held that the decision to admit expert testimony on the issue of factors affecting the accuracy of eyewitness identifications is within the discretion of the trial court. However, the court has also held that such testimony is appropriate only under "narrow circumstances," and that expert testimony on several factors is inappropriate.²⁹⁶ Thus, Virginia is in partial compliance with Protocol #6.

G. Protocol #7

Whenever there has been an identification of the defendant prior to trial, and identity is a central issue in a case tried before a jury, courts should use a specific instruction, tailored to the needs of the individual case, explaining the factors to be considered in gauging lineup accuracy. If, in relevant cases, the court finds a sufficient risk of misidentification based on cross-racial factors, judges should have available model jury instructions that inform juries that the cross-racial nature of the identification may affect the reliability of an eyewitness identification.²⁹⁷

Recent social scientific research demonstrates a number of factors that influence eyewitness identification accuracy, ranging from the length of time the eyewitness observed the suspect to the type of identification procedure used by law enforcement.²⁹⁸ When jurors are required to gauge the reliability of an eyewitness identification during deliberations, an instruction from the

²⁹⁵ *Id.* at 337–40. According to the expert's proffered testimony, transference occurs "when a witness picks a person from a line-up or photo spread based on the fact that they have seen the person previously, not because the person is the suspect at the scene of the crime." *Id.* at 339 n.2.

²⁹⁶ *Id.* at 338 (internal quotation marks omitted).

²⁹⁷ The ABA Criminal Justice Section's Committee on Rules of Criminal Procedure, Evidence, and Police Practices recommends a model jury instruction on cross-racial identification as follows:

In this case, the identifying witness is of a different race than the defendant. You may consider, if you think it is appropriate to do so, whether the fact that the defendant is of a different race that the witness has affected the accuracy of the witness' original perception or the accuracy of a later identification. You should consider that in ordinary human experience, some people may have greater difficulty in accurately identifying members of a different race than they do in identifying members of their own race.

See ABA, RECOMMENDATION 104D, 2008 Ann. Mtg., 4 available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08104d.authcheckdam.pdf.

²⁹⁸ See generally Penrod, *supra* note 4, at 37. See also *State v. Henderson*, 27 A.3d 872 (N.J. 2011).

court explaining these factors may help to guide their decision and ensure that it is well-informed. Such an instruction may include an explanation of “system variables,” which are those that are controlled by the state like those described in Recommendation #1, such as

1. Whether the law enforcement agency complied with written eyewitness identification procedures adopted pursuant to law;
2. Whether the eyewitness spoke to anyone besides the law enforcement agency about the identification; and
3. Whether the eyewitness made no choice or chose a different suspect or filler during an identification procedure.

Jurors may also be instructed on “estimator” variables, which are those beyond the control of the criminal justice system and may be based on the particular facts of the identification, such as

1. The length of time the witness had to observe the event;
2. The distance between the witness and the perpetrator;
3. The lighting conditions at the time of the event;
4. Whether the witness was under the influence of alcohol or drugs;
5. The age of the witness;
6. Whether the perpetrator was wearing a disguise;
7. Whether the suspect had different facial features at the time of the identification;
8. The length of time that elapsed between the crime and the identification;
9. The degree of attention the eyewitness paid to the perpetrator during the event; and
10. The accuracy of any descriptions of the suspect provided by the eyewitness before the identification procedure occurred.²⁹⁹

This research also indicates that cross-racial identifications are especially likely to be unreliable.³⁰⁰ As described by the ABA,

persons of one racial or ethnic group may have more difficulty distinguishing among individual faces of another group than among faces of their own group. An inaccurate identification due to this so-called “own race” effect may result in higher wrongful conviction rates when defendants are of different races than the witnesses who identify them.³⁰¹ Studies show that persons who primarily interact

²⁹⁹ State v. Henderson, 27 A.3d 872, 895, 925 (N.J. 2011).

³⁰⁰ See generally Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934 (1984).

³⁰¹ ABA, REPORT TO RECOMMENDATION 104D, 2008 Ann. Mtg., available at http://www.americanbar.org/content/dam/aba/publishing/criminal_justice_section_newsletter/crimjust_policy_am08_104d.authcheckdam.pdf (citing Elizabeth F. Loftus, James M. Doyle, and Jennifer E. Dysart, *Eyewitness Testimony: Civil and Criminal* 103 (4th ed. 2007) (“It is well established that there exists a comparative difficulty in recognizing individual members of a race different from one’s own”); Roy S. Malpass & Jerome Kravitz, *Recognition of Faces of Own and Other Race*, 13 J. PERSONALITY & SOC. PSYCHOL. 330, 333 (1969); Stephanie J. Platz & Harmon M. Hosch, *Cross-Racial/Ethnic Eyewitness Identification: A Field Study*, 18 J. APPLIED SOC. PSYCHOL. 972, (1988)).

within their own racial group, especially if they are in the majority group, will better perceive and process the subtlety of facial features of persons within their own racial group than persons of other racial groups.³⁰²

Whether the perpetrator is of a different race from the victim may be an additional estimator variable on which the jury may be instructed.

Because “science reveals that memory and eyewitness identification evidence present certain complicated issues,” it is the “court’s obligation to help jurors evaluate evidence critically and objectively to ensure a fair trial.”³⁰³

Jury Instructions on Gauging Eyewitness Identification Accuracy in Virginia

The Supreme Court of Virginia considered the appropriateness of such an instruction in *Daniels v. Commonwealth*.³⁰⁴ At trial, the defendant had requested a jury instruction that read as follows:

You have heard testimony of an identification of a person. Identification testimony is an expression of belief or impression by the witness. You should consider whether, or to what extent, the witness had the ability and the opportunity to observe the person at the time of the offense and to make a reliable identification later. You should also consider the circumstances under which the witness later made the identification.³⁰⁵

The trial court refused the instruction, ruling that it was “duplicative” with existing instructions on the burden of proof, reasonable doubt, and the general credibility of witnesses.³⁰⁶ On appeal, the Supreme Court of Virginia held that the trial court was within its discretion to refuse the proffered instruction.³⁰⁷ The Court noted that while it has “not adopted a rule . . . which requires a cautionary instruction on eyewitness identification in every case in which it is requested and the identification of the defendant is central to the prosecution’s case,” it also has not “opined that such an instruction would never be appropriate, nor that a court would abuse its discretion by granting such an instruction.”³⁰⁸

The model jury instructions promulgated by the Supreme Court of Virginia’s Model Instruction Committee provide only a general instruction on witness credibility.³⁰⁹ The instruction states that jurors

³⁰² *Id.* (citing Sheri Lynn Johnson, *Cross-Racial Identification Errors in Criminal Cases*, 69 CORNELL L. REV. 934, 934 (1984); Otto H. Maclin, *Racial Categorization of Faces*, 7 PSYCHOL. PUB. POL’Y & L. 98 (2001)).

³⁰³ *Henderson*, 27 A.3d at 924.

³⁰⁴ *Daniels v. Commonwealth*, 657 S.E.2d 84, 86–87 (Va. 2008).

³⁰⁵ *Id.* at 87.

³⁰⁶ *Id.* at 85.

³⁰⁷ *Id.* at 87.

³⁰⁸ *Id.* at 86.

³⁰⁹ VA. MODEL INSTRUCTION COMMITTEE, VIRGINIA MODEL JURY INSTRUCTIONS—CRIMINAL, Instruction No. 2.500 (2012) (on file with author). These model instructions are discussed further in Chapter Ten on Capital Jury Instructions.

may consider the appearance and manner of the witnesses on the stand, their intelligence, their opportunity for knowing the truth and for having observed the things about which they testified, their interest in the outcome of the case, their bias, and, if any have been shown, their prior inconsistent statements, or whether they have knowingly testified untruthfully as to any material fact in the case.³¹⁰

The model instruction does not reference any factors to be considered when assessing an eyewitness's testimony.³¹¹

Conclusion

The Supreme Court of Virginia permits, but does not require, a trial court to instruct the jury on the factors to be considered in gauging the accuracy of an eyewitness identification. As such, Virginia is in partial compliance with Protocol #7.

Recommendation

The Assessment Team recommends that, when appropriate in an individual case, Virginia courts instruct jurors on possible factors to consider in gauging the accuracy of an eyewitness identification, including system and estimator variables like those described above. In appropriate cases, if the court finds a sufficient risk of misidentification based on cross-racial factors, the court should also include the cross-racial nature of the identification as a factor for jurors to consider in determining the accuracy of the identification. The Supreme Court of Virginia's Model Jury Instruction Committee should draft a model instruction to assist courts in this regard.

Several other states have adopted jury instructions on general eyewitness identification accuracy.³¹² Some jurisdictions also permit jury instructions on the cross-racial nature of an

³¹⁰ *Id.*

³¹¹ *Id.*

³¹² States that use a cautionary instruction as to the reliability of eyewitness identification testimony include Alabama, *see* *Brooks v. State*, 380 So.2d 1012, 1014 (Ala. Crim. App. 1980) (“[a] requested identification instruction which deals realistically with the shortcomings and trouble spots of the identification process should be given where the principle has not been covered by the court’s oral charge”), California, *see* *People v. Hall*, 616 P.2d 826, 835 (Cal. 1980), *overruled on other grounds* *People v. Newman*, 981 P.2d 98, 104 n.6 (Cal. 1999) (refusal to give a requested instruction “deal[ing] with identification in the context of reasonable doubt” was error), Connecticut, *see* *State v. Ledbetter*, 881 A.2d 290, 318 (Conn. 2005) (requiring a cautionary jury instruction warning the jury of the risks of misidentification if certain conditions are met), Georgia, *see* *Brodes v. State*, 614 S.E.2d 766, 769 (Ga. 2005) (“[t]he creation of the pattern jury instruction regarding the assessment of reliability of eyewitness identification testimony reflects the studied conclusion that judicial guidance to the jury on the topic of eyewitness identification is warranted”), Kansas, *see* *State v. Warren*, 635 P.2d 1236, 1244 (Kan. 1981) (requiring a cautionary jury instruction warning the jury of the risks of misidentification if certain conditions are met), Massachusetts, *see* *Commonwealth v. Rodriguez*, 391 N.E.2d 889, 893 (Mass. 1979) (“a defendant who fairly raises the issue of mistaken identification might well be entitled to instructions [as to the possibility of mistaken identification]”), Michigan, *see* *People v. Storch*, 440 N.W.2d 14, 16 n.1 (Mich. Ct. App. 1989) (quoting approvingly a cautionary jury instruction warning the jury of the risks of misidentification), Minnesota, *see* *State v. Burch*, 170 N.W.2d 543, 553–54 (Minn. 1969) (“where requested by defendant’s counsel, we think the court should instruct on the factors the jury should consider in evaluating an identification and caution against automatic acceptance of such evidence”), Montana, *see* *State v. Hart*, 625 P.2d 21, 31 (Mont. 1981) (“[a] cautionary jury

identification as a factor to be considered in gauging eyewitness accuracy.³¹³ The Model Jury Instruction Committee should review these instructions in drafting its own eyewitness identification instruction.

instruction warning the jury of the risks of misidentification] may be proper, if not mandatory, in certain cases”), New Jersey, *see* *State v. Henderson*, 27 A.3d 872, 925–26 (N.J. 2011). (requesting the Criminal Practice Committee and the Committee on Model Criminal Jury Charges to draft proposed revisions to the current charge on eyewitness identifications and submit them to the state supreme court for its review), North Carolina, *see* *State v. Kinard*, 283 S.E.2d 540, 543 (N.C. Ct. App. 1981) (“[i]f the evidence strongly suggests the likelihood of irreparable misidentification, the identification issue would become a substantial feature of the case, and the trial judge is required, even in the absence of a request, to properly instruct the jury as to the detailed factors that enter into the totality of the circumstances relating to identification”), Pennsylvania, *see* *Commonwealth v. Washington*, 927 A.2d 586, 603–04 (Pa. 2007) (quoting approvingly a cautionary jury instruction warning the jury of the risks of misidentification), Utah, *see* *State v. Long*, 721 P.2d 483, 492 (Utah 1986) (“trial courts shall give [a cautionary jury] instruction whenever eyewitness identification is a central issue in a case and such an instruction is requested by the defense”). *See also* *State v. Smith*, No. 48-2009-CF-005719-O (Fl. Cir. Ct. Feb. 24, 2011) (order permitting cautionary jury instruction on gauging eyewitness identification accuracy) (on file with author).

³¹³ *See* CALJIC No. 2.92 (7th ed. 2003) (California) (including the cross-racial nature of an identification as part of a “laundry list” of factors to be considered by the jury in determining the believability of the eyewitness); *State v. Long*, 721 P.2d 483, 494–95, n.8. (Utah 1986) (instructing that “[i]dentification by a person of a different race may be less reliable than identification by a person of the same race.”); *New Jersey v. Cromedy*, 727 A.2d 457, 458–59 (N.J. 1999) (instructing the jury to consider the fact that an identifying witness is not of the same race as the perpetrator and whether that fact might have had an impact on the accuracy of the witness’ identification); *New Jersey Model Criminal Jury, Charges*, 2002 WL 32976451 (Rev. Oct. 1999) (same); *Commonwealth v. Hyatt*, 647 N.E.2d 1168, 1171 (Mass. 1995) (stating the jury may consider whether an identification of a person by a person of a different race may be less reliable than an identification of a person of the same race); *Commonwealth v. Engram*, 686 N.E.2d 1080, 1082 (Mass. App. Ct. 1997) (same).

H. Protocol #8

Every law enforcement agency should provide training programs and disciplinary procedures to ensure that investigative personnel are prepared and accountable for their performance.

Protocol #9

Ensure that there is adequate opportunity for citizens and investigative personnel to report misconduct in investigations.

Law Enforcement Discipline Procedures³¹⁴

Virginia statutory law provides that the Criminal Justice Services Board shall decertify a law enforcement officer who has (1) been convicted of a felony, a “Class 1 misdemeanor involving moral turpitude, a “misdemeanor sex offense,” or a domestic assault; (2) “failed to comply with or maintain compliance with mandated training requirements”; or (3) “refused to submit to a drug screening or has produced a positive result on a drug screening reported to the employing agency.”³¹⁵ A law enforcement officer is entitled to a decertification hearing before the Board, and his/her certification will be reinstated if s/he can demonstrate good cause for reinstatement by a preponderance of the evidence.³¹⁶

The disciplinary rules of individual law enforcement agencies must comply with Virginia’s Law-Enforcement Officers Procedural Guarantee Act.³¹⁷ The Act provides law enforcement officers with the right to notice of the nature of the misconduct investigation.³¹⁸ A disciplined officer is also entitled to a hearing before the agency in which s/he has the right to be represented by counsel and “present evidence, examine and cross-examine witnesses.”³¹⁹

The Assessment Team requested information from seventeen Virginia law enforcement agencies regarding their procedures on reporting and disciplining officers who engage in misconduct. The four agencies that responded—the Virginia State Police,³²⁰ the Arlington County Police

³¹⁴ The previously discussed Norfolk Four case demonstrates the need for officer misconduct to be fully investigated and disciplined. The lead investigator in the case had been demoted earlier in his career after he was accused of coercing confessions from juvenile suspects. Editorial, *The Norfolk Four*, WASH. POST, Nov. 21, 2010, at A20. While he was disciplined for this behavior, he was nonetheless tasked with leading a murder investigation in a case that relied almost exclusively on the suspects’ confessions. See Sabrina Tavernise, *Officer’s Extortion Conviction Prompts Calls for Full Exoneration of ‘Norfolk Four’*, N.Y. TIMES, Nov. 6, 2010, at A11. The investigator’s misconduct continued after the Norfolk Four investigation as well. In 2011, he was convicted and sentenced to over twelve years in prison for accepting bribes from criminals in exchange for favorable treatment. Tim McGlone, *Appeals Court Upholds Bribery Conviction of Ex-Norfolk Officer*, VA. PILOT & LEDGER-STAR (Norfolk, Va.), Apr. 4, 2012, at 2.

³¹⁵ VA. CODE ANN. § 15.2-1707 (2013).

³¹⁶ VA. CODE ANN. § 15.2-1708(B)–(C) (2013).

³¹⁷ See VA. CODE ANN. §§ 9.1-500–9.1-507 (2013).

³¹⁸ VA. CODE ANN. § 9.1-501–9.1-502 (2013).

³¹⁹ VA. CODE ANN. § 9.1-504(A) (2013).

³²⁰ VA. DEP’T OF STATE POLICE, GENERAL ORDER ADM 11.00 12.00, 12.02 (2009) (on file with author).

Department,³²¹ the Danville Police Department,³²² and the Norfolk Police Department³²³—have enacted policies for investigating and disciplining officers who engage in misconduct.

Citizen Protections

Virginia statutory law provides that “[s]tate, local, and other public law-enforcement agencies, which have ten or more law-enforcement officers” must enact certain policies with respect to misconduct complaints against law enforcement officers.³²⁴ These agencies must “ensure, at a minimum, that . . . [t]he general public has access to the required forms and information concerning the submission of [written] complaints.”³²⁵ The agencies are also required to “assist[] individuals in filing complaints” and ensure that “[a]dequate records are maintained of the nature and disposition” of such complaints.³²⁶

The Virginia State Police requires all department facilities to maintain citizen complaint forms and a brochure on the complaint process.³²⁷ The Arlington County Police Department requires all citizen complaints to be documented and investigated, and the complainant must be kept informed regarding the status of the complaint.³²⁸ The Danville³²⁹ and Norfolk³³⁰ Police Departments have enacted similar policies.

Conclusion

Virginia has established a state agency with the authority to discipline officers who engage in some types of misconduct. Moreover, Virginia law requires law enforcement agencies to assist citizens who seek to file a complaint against an officer. The four agencies that responded to the Assessment Team’s inquiry concerning procedures for investigating and disciplining officer misconduct report having enacted policies to address these important areas. However, the Assessment Team was unable to determine whether the other fourteen surveyed agencies possessed such policies. Accordingly, it appears Virginia is in partial compliance with Protocols #8 and #9.

³²¹ ARLINGTON CNTY. POLICE DEP’T, ADMIN. WRITTEN DIRECTIVE 551.02 (2005) (on file with author).

³²² Danville Police Dep’t Survey Response, *supra* note 256.125

³²³ Norfolk Police Dep’t Survey Response, *supra* note 125.

³²⁴ VA. CODE ANN. § 9.1-600(A) (2013).

³²⁵ VA. CODE ANN. § 9.1-600(B)(1) (2013).

³²⁶ VA. CODE ANN. § 9.1-600(B)(2)–(3) (2013).

³²⁷ VA. DEP’T OF STATE POLICE, GENERAL ORDER ADM 12.00 (2009) (on file with author).

³²⁸ ARLINGTON CNTY. POLICE DEP’T, ADMIN. WRITTEN DIRECTIVE 551.02 (2005) (on file with author).

³²⁹ *Police Frequently Asked Questions*, DANVILLE, <http://www.danville-va.gov/faq.aspx?TID=46> (last visited Aug. 1, 2013).

³³⁰ *Office of Professional Standard*, NORFOLK, <http://www.norfolk.gov/index.aspx?nid=378> (last visited Aug. 1, 2013).

CHAPTER THREE

COLLECTION, PRESERVATION, AND TESTING OF DNA AND OTHER TYPES OF EVIDENCE

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

DNA testing is a useful law enforcement tool that can help establish and confirm guilt. Furthermore, some wrongfully-convicted inmates may be able to prove their innocence through DNA testing and analysis. In 2000, the American Bar Association adopted a resolution urging federal, state, local, and territorial jurisdictions to ensure that all biological evidence¹ collected during a criminal investigation is preserved and made available to defendants and convicted persons seeking to establish their innocence.² Since then, all fifty states have adopted laws concerning post-conviction DNA testing, although many of these laws are limited in scope.³ In addition, standards for preserving biological evidence and allowing post-conviction DNA testing vary widely among jurisdictions.

In response to these varied standards, as well as reports of errors and misconduct in public and private DNA testing facilities, the ABA adopted the *ABA Criminal Justice Standards on DNA Evidence* in 2006.⁴ The standards provide a detailed procedure for procurement, testing, use, and preservation of and entitlement to biological evidence. When a defendant has been convicted of a murder, rape, or other serious offense, these standards require that any available biological material be retained in a manner that will preserve the DNA evidence for as long as the defendant remains incarcerated. At the post-conviction stage, the standards permit a person convicted of a serious crime to request testing or retesting of biological evidence, as long as the person meets certain pleading criteria. Once the testing is complete, the standards entitle the petitioner to a hearing to determine the available remedies based upon the test results. If the person is indigent and files for DNA testing, counsel should be appointed.

¹ “Biological evidence” is defined as evidence that is provided by specimens of a biological origin that are available in a forensic investigation. Such specimens may be found at the scene of a crime or on a person, clothing, or weapon. Some . . . come from the crime scene or from an environment through which a victim or suspect has recently traversed. Other biological evidence comes from specimens obtained directly from the witness or suspect, such as blood, semen, saliva, vaginal secretions, sweat, epithelial cells, vomitus, feces, urine, hair, tissue, bones, and microbiological and viral agents.

COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT’L RESEARCH COUNCIL OF THE NAT’L ACADS., *STRENGTHENING FORENSIC SCIENCE IN THE UNITED STATES: A PATH FORWARD* 128 (2009), *available at* <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [hereinafter NAS REPORT 2009].

² See ABA, RECOMMENDATION 115, 2000 Ann. Mtg. (adopted July 10–11, 2000), *available at* http://www.americanbar.org/content/dam/aba/migrated/moratorium/policy/2000s/2000_AM_115.authcheckdam.pdf.

³ *Post-conviction DNA Testing*, INNOCENCE PROJECT, <http://www.innocenceproject.org/Content/304.php> (last visited Aug. 19, 2013).

⁴ See ABA, ABA STANDARDS FOR CRIMINAL JUSTICE, DNA EVIDENCE 12 (3d ed. 2007) (Standard 16-6.1(a)–(b)), *available at* http://www.americanbar.org/content/dam/aba/publications/criminal_justice_standards/dna_evidence.authcheckdam.pdf.

Without the preservation of material evidence it is extremely difficult for a convicted inmate to prove his/her innocence. Every law enforcement agency should establish written procedures, made available to all personnel and designed to ensure compliance with best practices for collecting, preserving, and safeguarding biological evidence.⁵ Agencies should regularly update their procedures as new or improved techniques and methods are developed. The procedures should impose professional standards on all state and local officials responsible for handling or testing biological evidence, and should be enforceable through the agency's disciplinary process.⁶

Training should emphasize the risk of unjust legal consequences due to the loss or compromise of evidence. It also should acquaint law enforcement officers with actual cases where illegal, unethical, or unprofessional behavior led to the arrest, prosecution, or conviction of an innocent person.

⁵ See ABA, ABA STANDARDS FOR CRIMINAL JUSTICE, URBAN POLICE FUNCTION 1 (2d ed. 1979) (Standard 1-4.3) ("Police discretion can best be structured and controlled through the process of administrative rule making, by police agencies."); *id.* (Standard 1-5.1) (stating that police should be "made fully accountable" to their supervisors and to the public for their actions).

⁶ See *id.* (Standard 1-5.3(a)) (identifying "[c]urrent methods of review and control of police activities").

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

Since the reinstatement of the death penalty in 1975, sixteen Virginia inmates have been exonerated through post-conviction DNA testing.⁷ In 2001, the Virginia Legislature adopted provisions of the Virginia Code to provide mechanisms for inmates to challenge their convictions by filing post-conviction motions for DNA testing.⁸

A. Collection and Preservation of DNA Evidence

1. Collection of Evidence

The Department of Forensic Science (DFS) is solely responsible for collecting, preserving, and testing forensic evidence in criminal investigations.⁹ DFS operates pursuant to its *Evidence Handling and Laboratory Capabilities Guide*, which provides detailed instructions relating to the collection, storage, preservation, and testing of biological evidence.¹⁰ DFS is exclusively responsible for analyzing evidentiary material associated with criminal investigations for all state and local law enforcement agencies, which include 247 police departments and 124 sheriff organizations.¹¹ DFS is also responsible for analyzing evidentiary material for all medical examiners and 130 prosecutorial agencies within the Commonwealth of Virginia.¹² DFS maintains four regional laboratories: the Central Laboratory in Richmond, the Eastern Laboratory in Norfolk, the Western Laboratory in Roanoke, and the Northern Laboratory in

⁷ *Exonerations* by *State: Virginia*, INNOCENCE PROJECT, <http://www.innocenceproject.org/news/state.php?state=va> (last visited Aug. 19, 2013). One of the sixteen inmates exonerated by DNA testing, Earl Washington, was sentenced to death. *Earl Washington*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Earl_Washington.php (last visited Aug. 19, 2013). In 2004, then-Governor Mark Warner ordered a random audit of 31 old criminal cases after stores of biological evidence were discovered in the case files saved by state forensic serologists. Dahlia Lithwick, *The Exoneration of Bennett Barbour*, SLATE, Mar. 12, 2012. The testing of those 31 samples led to the exonerations of two convicted rapists, which led Warner to order that every sample obtained between 1973 and 1988 be retested. *Id.* The project was intended to take 18 months but is now in its eighth year. *Id.* It appears that the Commonwealth located approximately 800 samples, of which 214 were in condition to be retested. *Id.* Initial reports suggested there was “no pattern of procedural problems at the state’s forensic laboratory.” Michael D. Shear and Maria Glod, *Virginia Review Finds No Pattern of Problems*, WASH. POST, Sept. 17, 2005, at B1. More recent coverage of retesting, however, indicates that among the samples retested, more than 7 percent of inmates appear to have been excluded as perpetrators of a crime. *Id.*; see also *Exonerations Lead Virginia Governor to Call for Sweeping DNA Review*, WASH. POST, Dec. 15, 2005, available at <http://www.deathpenaltyinfo.org/node/1592> (quoting Peter Neufeld co-director of the Innocent Project, stating, “This is a 7 percent innocence rate—among people who never even asked for testing—that should give pause to people who think mistakes in our criminal justice system are flukes.”). Eight people have been exonerated since then-Governor Warner ordered re-testing in 2004. *Garry Diamond Exonerated by Supreme Court of Virginia*, MID-ATLANTIC INNOCENCE PROJECT, <http://www.exonerate.org/2013/garry-diamond-exonerated-by-supreme-court-of-virginia/> (last visited Aug. 19, 2013).

⁸ VA. CODE ANN. § 19.2-327.1 (2013).

⁹ OFFICE OF JUSTICE PROGRAMS, NAT’L INST. OF JUSTICE, DNA BACKLOG REDUCTION REPORT TO CONGRESS 102 (2012), available at <http://nij.gov/topics/forensics/lab-operations/evidence-backlogs/dna-backlog-reduction-report-to-congress-2011.pdf> [hereinafter DNA BACKLOG REDUCTION REPORT].

¹⁰ VA. DEP’T. OF FORENSIC SCI., EVIDENCE HANDLING AND LABORATORY CAPABILITIES GUIDE V-18 (2012), available at <http://www.dfs.virginia.gov/services/evidencehandling/EvidenceGuide.pdf> [hereinafter EVIDENCE HANDLING GUIDE].

¹¹ DNA BACKLOG REDUCTION REPORT, *supra* note 9.

¹² *Id.*

Manassas.¹³ DFS is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB).¹⁴

2. Preservation Requirements

The Virginia Code requires automatic preservation of biological evidence in capital cases and requires that such evidence be preserved “until the judgment is executed.”¹⁵ However, in non-capital cases, biological evidence is preserved only upon motion of a defendant.¹⁶ Moreover, in non-capital cases, there is a presumptive fifteen-year time limit on the preservation of DNA evidence which, as shown below, can have an impact on capital cases.¹⁷

B. *DNA Testing*

1. Pretrial DNA Testing

Virginia law provides that upon the request of any defendant or his or her attorney, DFS or the Division of Consolidated Laboratory Services must provide to the accused the results of any investigation that is related to a crime of which the person is accused.¹⁸ When a person accused of a crime or his/her attorney desires a scientific investigation, s/he must file a motion certifying in good faith that a scientific investigation may be relevant to the criminal charge.¹⁹ The court must hear the motion ex parte as soon as practicable and, if satisfied that the motion was correctly certified, order scientific investigation.²⁰

Notably, Virginia law requires that every person arrested for the commission or attempted commission of a violent felony must have a DNA sample taken, and that this sample be stored and maintained by DFS in a DNA data bank.²¹ If the charge for which the sample was taken is dismissed or the defendant is acquitted at trial, DFS must destroy the sample and all records thereof.²²

¹³ *Id.*

¹⁴ See ASCLD/LAB Accredited Laboratories, AM. SOC’Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., <http://www.ascl-d-lab.org/accredited-laboratory-index/> (last visited July 18, 2013).

¹⁵ VA. CODE ANN. § 19.2-270.4:1(B) (2013) (“In the case of a person sentenced to death . . . [t]he Department of Forensic Science shall store, preserve, and retain such evidence until the judgment is executed. If the person sentenced to death has his sentence reduced, then such evidence shall be transferred from the Department to the original investigating law-enforcement agency for storage as provided in this section.”).

¹⁶ *Id.* at § 19.2-270.4:1(A).

¹⁷ *Id.*

¹⁸ VA. CODE ANN. § 9.1-1104 (2013).

¹⁹ *Id.*

²⁰ *Id.*

²¹ VA. CODE ANN. § 19.2-310.2:1 (2013).

²² *Id.*

Use of DNA Evidence in Criminal Proceedings

The Virginia Code provides that in criminal proceedings, DNA testing “shall be deemed to be a reliable scientific technique and the evidence of a DNA profile comparison may be admitted to prove or disprove the identity of any person.”²³

Virginia law requires that any party intending to use biological evidence in a criminal proceeding must notify opposing counsel in writing at least twenty-one days before the proceeding and “provide or make available copies of the profiles and the report or statement to be introduced.”²⁴ If a party proffers DNA evidence without providing the requisite notice, the court has discretion to allow the opposing party a continuance or, “under appropriate circumstances,” bar presentation of the evidence.²⁵ If the opposing party intends to object to the use of biological evidence, s/he must do so in writing at least ten days before the proceeding.²⁶

In 2001, the Virginia legislature amended the Virginia Code to add the requirement that an attorney must have training in forensic evidence and DNA analysis to be qualified to represent defendants in capital cases.²⁷

2. Post-Conviction Motions for DNA Testing

Virginia law provides that any person convicted of a felony may apply for a new scientific investigation of biological evidence if such testing may prove his or her actual innocence.²⁸ Prior to 2013, the law applied only to defendants convicted of felonies; however, effective July 1, 2013, the statute was amended to cover persons who were adjudged delinquent of offenses that would be felonies if committed by adults.²⁹

An individual may seek post-conviction DNA testing by filing a motion at any time after s/he is placed in custody by the Department of Corrections.³⁰ The pleading requirements, legal standards, and possible dispositions of a petition for post-conviction DNA testing are discussed in Protocol #2 in the Analysis Section.³¹

²³ VA. CODE ANN. § 19.2-270.5 (2013).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Id.*

²⁷ H.B. 2580, Ch. 766, 2001 Sess. (Va. 2001) (approved March 26, 2001), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?ses=011&typ=bil&val=hb2580>.

²⁸ VA. CODE ANN. § 19.2-327.1 (2013).

²⁹ *Id.*

³⁰ *Id.*

³¹ *See infra* Protocol #2, notes 65–92 and accompanying text.

II. ANALYSIS

Below are the ABA Benchmarks, or “Protocols,” used by the Assessment Team in its evaluation of Virginia’s death penalty system. Each Protocol is followed by the Assessment Team’s analysis of the Commonwealth’s compliance with the Protocol and, where appropriate, the Assessment Team’s recommendations for reform.

A. Protocol #1

Preserve all biological evidence for as long as the defendant remains incarcerated.

The proper preservation of biological evidence not only protects the innocent from wrongful conviction but also serves as an important law enforcement tool for identifying the guilty. In 2001, Virginia enacted a preservation statute to better aid in the apprehension of the guilty and exoneration of the innocent. These enactments, however, have shortcomings that ultimately limit the effectiveness of the statute.

Prior to 2001, Virginia law provided that trial courts could “in any criminal case” order the donation or destruction of any or all exhibits received in evidence during the course of the trial, and did not include any preservation requirements specific to biological evidence.³² In felony cases, the court could order destruction of exhibits upon notice in the sentencing order or to the attorney for the Commonwealth and the defendant and his/her attorney of record. Such destruction could occur if more than one year had expired from exhaustion of appellate remedies or, in the case of no appeal, more than one year from the time for seeking appellate remedies has expired.³³ The Code further provided that the notice requirements did not apply to any case that concluded prior to July 1, 2005.³⁴

In 2001, Virginia codified requirements relating to the storage, preservation, and retention of biological evidence.³⁵ In capital cases, Virginia law provides an automatic right to preservation of biological evidence and requires that such evidence be preserved “until the judgment is executed.”³⁶ Virginia’s preservation requirements in non-capital cases, however, are subject to two critical limitations, both of which may affect the ability of those under a death sentence to prove wrongful conviction or that the person should not have been subject to the death penalty.

Limits on Evidence Preservation

In non-capital cases, the right to preservation is not automatic. A non-capital defendant convicted of a felony may file a motion for preservation of biological evidence in which s/he

³² Compare H.B. 354, Ch. 536, 1994 Va. Laws (Va. 1994) with S.B. 1366, Ch. 873, 2001 Va. Laws (Va. 2001).

³³ *Id.*

³⁴ *Id.*

³⁵ VA. CODE ANN. § 19.2-270.4:1 (2013).

³⁶ VA. CODE ANN. § 19.2-270.4:1(B) (2013) (“In the case of a person sentenced to death . . . [t]he Department of Forensic Science shall store, preserve, and retain such evidence until the judgment is executed. If the person sentenced to death has his sentence reduced, then such evidence shall be transferred from the Department to the original investigating law-enforcement agency for storage as provided in this section.”).

specifically identifies the evidence that is to be preserved.³⁷ Once a defendant files such a motion, the court “shall order” the storage, preservation, and retention of human biological evidence.³⁸ Because biological evidence is preserved in non-capital cases only if a defendant takes the affirmative step of filing a preservation motion, biological evidence is often destroyed shortly after arrest or conviction.³⁹ Virginia’s failure to provide for blanket preservation in criminal cases is an outlier practice among states that have codified preservation requirements.⁴⁰

Second, the Virginia preservation statute includes a fifteen-year time limit on the preservation of DNA evidence in non-capital cases.⁴¹ Although courts have discretion to extend (or shorten) this time limit,⁴² the absence of a statutory requirement that DNA evidence be preserved for as long as the defendant remains incarcerated may lead to the premature destruction of evidence. Failing to provide for long-term preservation of biological evidence also may result in the destruction of potentially exculpatory evidence prior to the discovery of advanced technological measures that could allow testing on previously untestable evidence.

For example, Virginia’s “Old Case Testing Project” has produced the exonerations of eight individuals since then-Governor Warner ordered re-testing in 2004.⁴³ Most recently, in March 2013, the Virginia Supreme Court granted Garry Diamond’s Petition for Writ of Actual Innocence based on DNA evidence.⁴⁴ Diamond was arrested for abduction with intent to defile in 1976 and served fifteen years in prison before DNA testing demonstrated he was not the perpetrator.⁴⁵ If the biological evidence that led to this exoneration had been destroyed pursuant to the presumptive fifteen-year limit, Diamond may have been precluded from proving his

³⁷ VA. CODE ANN. § 19.2-270.4:1(A) (2013); *Commonwealth v. Stevens*, 60 Va. Cir. 432, *10 (Va. Cir. Ct. 2002) (“[T]he Motion must specifically identify the human biological evidence that is to be preserved. However, upon filing of an amended Motion, the Movant may request a hearing for the limited purpose of specifically identifying what human biological evidence exists in the case if he is unable to establish this evidence with specificity from the record of the case.”).

³⁸ VA. CODE ANN. § 19.2-270.4:1(A) (2013) (emphasis added); *Neal v. Com. Attorney of Roanoke City*, 60 Va. Cir. 440, at *3–4 (Va. Cir. Ct. 2002) (noting that the court must order the storage, preservation, and retention of biological evidence upon a defendant’s motion). VA. CODE ANN. § 19.2-270.4:1(A) (2013) further provides that, upon granting a motion for preservation of DNA evidence, the court must order that all biological evidence be transferred to the Virginia Department of Forensic Science (DFS).

³⁹ Telephone Interview by Erica Knievel Songer and Kathryn Marshall with Shawn Armbrust, Exec. Dir., Mid-Atlantic Innocence Project (July 19, 2013) (on file with author).

⁴⁰ Kristin A. Dolan, *Creating the Best Practices in DNA Preservation: Recommended Practices and Procedures*, 49 NO. 2 CRIM. LAW BULL. (2013) (noting that of the thirty-four jurisdictions with laws governing preservation of biological evidence, thirty call for blanket preservation of such evidence, requiring the state to preserve all biological evidence regardless of whether preservation is specifically requested).

⁴¹ VA. CODE ANN. § 19.2-270.4:1(A) (2013).

⁴² *Id.* (“[T]he court may upon motion or upon good cause shown, with notice to the convicted person, his attorney of record and the attorney for the Commonwealth, modify the original storage order, as it relates to time of storage of the evidence or samples, for a period of time greater or less than that specified in the original order.”).

⁴³ *Garry Diamond Exonerated by Supreme Court of Virginia*, MID-ATLANTIC INNOCENCE PROJECT, <http://www.exonerate.org/2013/garry-diamond-exonerated-by-supreme-court-of-virginia/> (last visited Aug. 19, 2013); *Challenges Greet Panel Overseeing State Lab*, VIRGINIAN PILOT & LEDGER STAR, Nov. 28, 2005. The “Old Case Testing Project” began in 2005 when then-Governor Mark Warner ordered the DNA testing of thousands of forensic files from serious felony cases uncovered from the 1970s and 1980s. Maria Glod, *Va. DNA Project Is In Uncharted Territory*, WASH. POST, Aug. 17, 2008, at C1.

⁴⁴ *Id.*

⁴⁵ *Id.*

innocence. With respect to capital cases, the failure to preserve such evidence could preclude testing of evidence that led to imposition of a death sentence—such as evidence that constituted a predicate offense to first-degree murder during the guilt phase or evidence that constituted an aggravating circumstance at the sentencing phase of a capital trial.⁴⁶

Law Enforcement Practices

With respect to individual law enforcement policy procedures, the Virginia Assessment Team submitted surveys to twenty law enforcement agencies throughout the Commonwealth regarding training, policies, and practices relative to collection and preservation of evidence, among other issues.⁴⁷ Four agencies—the Virginia State Police, Arlington County Police, Danville Police, and Norfolk Police—responded to the survey. Responding agencies indicated varying policies concerning general retention of evidence. For example, Arlington County Police policy stipulates that DNA in homicide cases in which no arrest has been made will be kept “indefinitely,” while evidence in homicide cases where an arrest has been made will be kept until “the sentence has been completed.”⁴⁸ The Norfolk Police Department indicates that “evidence not introduced at trial is kept until all appeals are over.”⁴⁹

Failure to Preserve Evidence

It appears that despite maintaining guidelines and procedures pursuant to Virginia statutes on chain of custody, transferring, storing, preserving, and maintaining evidence,⁵⁰ there have been instances in capital cases on habeas review where counsel from the Virginia Capital Representation Resource Center (VCRRC) have sought physical evidence in the case and such evidence had not been properly stored, preserved, or could not be located.⁵¹

However, the Virginia statute related to post-conviction DNA testing provides expressly that “[a]n action under this section . . . shall not form the basis for relief in any habeas corpus

⁴⁶ Commission of first-degree murder becomes a capital-eligible offense if one of over fifteen “predicate” offenses is present. VA. CODE ANN. § 18.3-31 (2013). If convicted of a capital offense, a defendant may be sentenced to death if one of two aggravating factors is proved beyond a reasonable doubt. VA. CODE ANN. § 19.2-264.2 (2013).

⁴⁷ Surveys were submitted to the following law enforcement agencies and training entities: Arlington County Police Department; Chesterfield County Police Department; Chesterfield County Police Training Academy; Danville Police Department; Norfolk Police Department; Northern Virginia Criminal Justice Training Academy; Piedmont Regional Criminal Justice Training Academy; Prince William County Police Department; Prince William County Criminal Justice Academy; Richmond Police Department; Richmond Police Training Academy; Roanoke Police Department; Roanoke Police Department Training Academy; Virginia Beach Police Department; Virginia Beach Police Department Law Enforcement Training Academy; Virginia Department of Criminal Justice Services Division of Law Enforcement; Virginia Office of Public Safety; Virginia Sheriff’s Institute; Virginia State Police; Virginia State Police Training Division.

⁴⁸ ARLINGTON CNTY. POLICE DEP’T, ADMIN. WRITTEN DIRECTIVE 514.07 (2010) (on file with author).

⁴⁹ Norfolk Police Dep’t Survey Response, provided by Captain Ed Ryan, Norfolk Police Dep’t., to Mark Pickett, at 7 (Feb. 14, 2012) (on file with author).

⁵⁰ See VA. DEP’T OF FORENSIC SCI., STANDARDS AND GUIDELINES FOR THE METHOD OF CUSTODY, TRANSFER, AND RETURN OF EVIDENCE (VA. CODE § 19.2-270.4:1), *available at* <http://www.dfs.virginia.gov/services/forensicBiology/standardsGuidelines19.2-270.4.pdf> (last visited Aug. 19, 2013).

⁵¹ Telephone Interview with Robert E. Lee, Exec. Dir., VCRRC (Jun. 20, 2012) (on file with author).

proceeding or any other appeal.”⁵² Accordingly, Virginia courts routinely deny post-conviction petitions that challenge lower courts’ denials of DNA testing requests due to the failure of the Commonwealth to preserve biological evidence, even in capital cases.⁵³

For instance, Robin Lovitt was tried for capital murder and sentenced to death.⁵⁴ After the Virginia Supreme Court affirmed his conviction, the Chief Deputy Clerk at the trial court, without consulting with the Commonwealth Attorney’s office, the Attorney General’s office, the police department, Lovitt’s trial or habeas counsel, or any of the judges on the court, drafted an order authorizing the destruction of the exhibits from Lovitt’s trial, including biological evidence.⁵⁵ The court entered the order and the evidence was destroyed.⁵⁶ Lovitt filed a habeas petition arguing that the Commonwealth had violated his due process rights because he was deprived of an opportunity to seek new scientific testing of DNA evidence collected in his case, which was necessary for him to seek a writ of actual innocence.⁵⁷ The Virginia Supreme Court denied relief, affirming the circuit court’s finding that the Commonwealth did not act in bad faith when it destroyed the DNA evidence and holding that destruction of evidence does not provide grounds for habeas relief.⁵⁸ Because there is no remedy for the Commonwealth’s failure to comply with Virginia’s preservation statute, the effectiveness of the testing statute itself is undermined.⁵⁹

Consumption of Evidence at Testing

Finally, Virginia does not have any statutory provisions limiting the consumption of biological evidence during the testing procedure. Because initial testing of crime scene evidence may be completed prior to a defendant’s arrest or initial discovery proceedings, it is possible that an entire biological sample will be consumed before the defendant receives notice of the existence of the sample. The potential for error is further compounded in Virginia as state law permits entities to preserve only representative samples which may be wholly consumed by testing.⁶⁰ Given the significant advancements in forensic testing in the recent past, evidence deemed too degraded for sampling may now be highly probative in the future. As noncompliance with

⁵² VA. CODE ANN. § 19.2-327.1(G) (2013).

⁵³ See, e.g., *Harvey v. Warden of Coffeewood Correctional Center*, 597 S.E.2d 58, 58 (Va. 2004) (dismissing habeas petition challenging validity of DNA testing procedures and certificate based on § 19.2-327.1(G)); *Lovitt v. Warden*, 585 S.E.2d 801, 816–17 (Va. 2003) (declining to grant habeas relief where petitioner claimed that the Commonwealth destroyed biological evidence and thus failed to comply with the statutory preservation requirements, based on the court’s application of § 19.2-327.1(G)); *Gaston v. Commonwealth*, 585 S.E.2d 596, 597 (Va. 2003) (dismissing habeas petition challenging denial of post-conviction DNA testing for lack of jurisdiction based on VA. CODE ANN. § 19.2-327.1(G)).

⁵⁴ *Lovitt*, 585 S.E.2d at 805.

⁵⁵ *Id.* at 808–09.

⁵⁶ *Id.*

⁵⁷ *Id.* at 814.

⁵⁸ *Id.* at 816. The day before Lovitt was scheduled to be executed, then-Governor Mark Warner commuted his sentence to life imprisonment because of the Commonwealth’s improper destruction of evidence. Michael D. Shear and Maria Glod, *Warner Commutes Death Sentence*, WASH. POST, Nov. 30, 2005, at A1, available at <http://www.washingtonpost.com/wp-dyn/content/article/2005/11/29/AR2005112901054.html>.

⁵⁹ Interview with Shawn Armbrust, *supra* note 47.

⁶⁰ VA. CODE ANN. § 19.2-270.4:1(D) (2013). Virginia law permits courts to order the storage of “only representative samples” of biological evidence where that evidence is “of such a nature, size, or quantity that storage, preservation or retention of all of the evidence is impractical.” *Id.*

preservation and storage requirements does not provide a basis for appellate or habeas corpus relief, it is unlikely that Virginia courts would recognize a cause of action for partial storage or consumption of an entire biological sample during initial testing.⁶¹

Conclusion

Virginia requires automatic preservation of biological evidence in capital cases; however, the preservation of evidence which likely affects death-eligibility—such as evidence in non-capital cases—is not required to be preserved for as long as the defendant remains incarcerated. Further, the Virginia Code prohibits petitioners from seeking a writ of habeas corpus if the Commonwealth fails to preserve biological evidence—even in capital cases. Thus, Virginia is in partial compliance with Protocol #1.

Recommendation

The Virginia Assessment Team recommends that when biological evidence is collected in a felony case, Virginia should require long-term preservation of such evidence.⁶² The experience of the many other states that have enacted provisions which call for blanket preservation of biological evidence in criminal cases may prove instructive.⁶³ Long-term preservation of biological evidence would not only improve the Commonwealth's ability to identify wrongful convictions, but would also be an effective tool to assist in identifying and convicting actual perpetrators.

In addition, the Commonwealth should provide notice to all parties whenever testing may consume the only available sample of evidence.

Finally, in order to encourage preservation and promote adherence to existing evidence preservation requirements, the Assessment Team recommends that state law be amended to permit the Commonwealth's failure to preserve evidence to serve as a basis for relief in state habeas corpus proceedings. Courts should not be prohibited, as they are under existing law, from

⁶¹ VA. CODE ANN. § 19.2-327.1(G) (2013).

⁶² Notably, Virginia enacted a law requiring collection, testing, and preservation of a DNA sample from “[e]very person arrested for the commission or attempted commission of a violent felony . . . or a violation or attempt to commit a violation” of other specific crimes, such as burglary. VA. CODE ANN. § 19.2-310.2:1 (2013). The law further requires that “[t]he identification characteristics of the profile resulting from the DNA analysis shall be stored and maintained by the Department [of Forensic Science] in a DNA data bank and shall be made available as provided in § 19.2-310.5.” *Id.*

⁶³ See e.g., ALASKA STAT. § 12.36.200(a)(2) (2013); ARIZ. REV. STAT. ANN. § 13-4221(A) (2013); ARK. CODE ANN. § 12-12-104(a) (2013); CAL. PENAL CODE § 1417.9(a) (2013); COLO. REV. STAT. § 18-1-1103(2) (2013); D.C. CODE § 22-4134(a) (2013); FLA. STAT. § 925.11(4)(a) (2013); GA. CODE ANN. § 17-5-56(a) (2013); HAW. REV. STAT. § 844D-126(a) (2013); 725 ILL. COMP. STAT. § 5/116-4(a) (2013); IOWA CODE § 81.10(10) (2013); MD. CODE ANN. CRIM. PROC. § 8-201(j) (2013); MICH. COMP. LAWS § 770.16(12) (2013); MINN. STAT. § 590.10 (2013); MISS. CODE ANN. § 99-49-1(3)(a) (2013); MO. REV. STAT. § 650.056 (2013); MONT. CODE ANN. § 46-21-111(1)(a) (2013); NEB. REV. STAT. § 29-4125(1) (2013); NEV. REV. STAT. § 176.0912(1) (2013); N.H. REV. STAT. ANN. § 651-D:3(I) (2013); N.M. STAT. ANN. § 31-1A-2(L) (2013); N.C. GEN. STAT. § 15A-268(a1) (2013); OHIO REV. CODE ANN. § 2933.82(B)(1) (2013); OKLA. STAT. tit. 22, § 1372(A) (2013); S.B. 310(1), 75th Leg. Assemb., Reg. Sess. (Or. 2009); R.I. GEN. LAWS § 10-9.1-11(a) (2013); S.C. CODE ANN. § 17-28-320 (2013); TEX. CODE CRIM. PROC. ANN. § 38.43(c) (2013); WIS. STAT. § 165.81(3)(b) (2013).

exercising their discretion to determine if the circumstances surrounding lost or destroyed biological evidence warrant relief.⁶⁴

B. Protocol #2

All biological evidence should be made available to defendants and convicted persons upon request and, in regard to such evidence, such defendants and convicted persons may seek appropriate relief notwithstanding any other provision of the law. Jurisdictions should provide access to post-conviction DNA testing to comport, at a minimum, with the standards and procedures set forth in the *American Bar Association Criminal Justice Standards on DNA Evidence, Standard 6.1, Post-conviction Testing* (reproduced below, in relevant part, with slight modifications).

1. Availability of Post-conviction DNA Testing

- a. A person who has been convicted of a serious crime, including a person convicted based on a guilty plea, should be permitted to have DNA evidence in the possession of the prosecution or one of its agents tested or retested after conviction if:**
 - i. the testing requested was not available at the time of trial, there is credible evidence that prior test results or interpretation were unreliable, or the interests of justice require testing or retesting; and**
 - ii. the results of testing or retesting could create a reasonable probability that the person is innocent of the offense, did not have the culpability necessary to subject the person to the death penalty, or did not engage in aggravating conduct that caused a mandatory sentence or sentence enhancement.**

2. Procedure for Post-conviction DNA Testing

- a. When a person files an application for testing or retesting, the prosecution should be notified and, if the person is indigent and does not have counsel, counsel should be appointed.**
- b. The application should be denied unless the person, after consultation with counsel, files a sworn statement declaring that he or she is innocent of the crime, did not have the culpability necessary to be subjected to the death penalty, or did not engage in the aggravating conduct that caused a mandatory sentence or sentence enhancement.**
- c. If the person files the statement, a hearing should be held to determine whether the person has met the requirements of Section (1)(a) and, if there is a determination that the requirement of this standard has been met, the request for testing or retesting should be granted.**

⁶⁴ The Virginia statute related to post-conviction DNA testing currently provides that “[a]n action under this section . . . shall not form the basis for relief in any habeas corpus proceeding or any other appeal.” VA. CODE ANN. § 19.2-327.1(G) (2013).

- d. **After the results of any testing are reported to the parties, an applicant should be permitted to seek a second hearing to determine what relief, if any, is appropriate.**
- e. **An applicant should have the right to appeal or seek leave to appeal any adverse decision made pursuant to this standard.**

The Virginia Code sets out a series of procedures that must be followed in order for a prisoner to obtain post-trial DNA testing. If a prisoner is able to obtain testing, s/he may be able to obtain a “writ of actual innocence” from the Supreme Court of Virginia.⁶⁵

Post-Conviction DNA Testing

Virginia law provides that if certain enumerated criteria are met, “any person convicted of a felony . . . may . . . apply for a new scientific investigation of any human biological evidence” if such testing “may prove the actual innocence of the person convicted or adjudicated delinquent.”⁶⁶ The Virginia Code permits applications for new scientific investigations of biological evidence only where:

- (1) the evidence was not known or available at the time the conviction . . . became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at the Department of Forensic Science at the time the conviction . . . became final;
- (2) the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way;
- (3) the testing is materially relevant, noncumulative, and necessary and may prove the actual innocence of the convicted person . . . ;
- (4) the testing involves a scientific method employed by the Department of Forensic Science; and
- (5) the person convicted . . . has not unreasonably delayed in filing the petition after the evidence or the test for evidence became available at the Department of Forensic Science.⁶⁷

The post-trial testing statute, however, limits the ability of death row inmates to prove their innocence or otherwise demonstrate that the inmate should not have been subject to the death penalty in several important respects.

For example, the law does not permit testing to prove that the inmate did not engage in aggravating conduct, which the judge or jury must consider before determining the sentence in a death penalty case.⁶⁸ Moreover, unlike the *ABA Criminal Justice Standards on DNA Evidence*,

⁶⁵ See generally VA. CODE ANN. § 19.2-372.2 (2013).

⁶⁶ VA. CODE ANN. § 19.2-327.1(A)-(B) (2013), as amended by 2013 Va. Laws Ch. 170 (H.B. 1308) (approved Mar. 12, 2013). The petitioner must show that s/he is “actually innocent of the crime for which he was convicted” VA. CODE ANN. § 19.2-327.3(A)(ii) (2013).

⁶⁷ VA. CODE ANN. § 19.2-327.1(A)-(B) (2013),

⁶⁸ The case of John Thompson, prosecuted in 1985 for murder in New Orleans and sentenced to death, demonstrates the import of permitting testing of evidence relative to predicate offense or aggravating conduct in death penalty cases. See *Connick v. Thompson*, 131 S.Ct. 1350, 1371–76 (2011) (Ginsburg, J., dissenting) (recounting the facts and procedural history of Thompson’s case). One month before Thompson’s scheduled

the Innocence Project's *Model Statute for Obtaining Post-Conviction DNA Testing*, or the statutes of several other states, the Virginia statute does not allow defendants to request DNA testing and analysis to show that a reasonable probability exists that the defendant would not have been sentenced to death if testing and analysis produced favorable results.⁶⁹ Instead, to obtain DNA testing in post-conviction proceedings under Virginia law, an inmate must demonstrate by clear and convincing evidence that the biological evidence may prove his/her innocence.⁷⁰ Virginia is one of the only states to require clear and convincing evidence of innocence to grant access to testing of biological evidence. It has been observed that this high burden "ensures that it is virtually impossible for a convict to be exonerated through DNA evidence since without access to the evidence he is unable to prove those things necessary to allow him access."⁷¹

The statute also limits post-conviction testing to two sets of circumstances: First, testing may be permissible where the evidence was not known or available at the time the conviction became final;⁷² second, testing may be allowed if the particular testing procedure was not available at the Department of Forensic Science at the time the conviction became final.⁷³ The statute does not provide for testing based on suspected unreliability of a prior test absent either of the above criteria.

Finally, Virginia law expressly provides that nothing in the statute "shall constitute grounds to delay setting an execution . . . or to grant a stay of execution that has been set."⁷⁴ Thus, under the terms of the statute, a Virginia death row inmate may be executed notwithstanding existence of evidence that could exonerate the inmate of his/her conviction or death sentence.⁷⁵ In

execution, an investigator hired by Thompson's post-conviction counsel was permitted to search "[d]eep in the crime lab archives" of Orleans Parish; based on the investigator's findings and "a serendipitous series of events," Thompson's advocates discovered evidence that exculpated him from an earlier robbery conviction, which the prosecution had used to elevate the murder charge to a capital case. *Id.* at 1374–75. Subsequently, the Louisiana Court of Appeals reversed Thompson's murder conviction. *Id.* Thompson's defense presented the newly discovered evidence at his murder retrial in 2003, and, "[a]fter deliberating for only [thirty-five] minutes, the jury found Thompson not guilty." *Id.* at 1376.

⁶⁹ See INNOCENCE PROJECT, MODEL STATUTE FOR OBTAINING POST-CONVICTION DNA TESTING 2 (2010), available at http://www.innocenceproject.org/docs/2010/Access_to_Postconviction_DNA_Testing_%20Model_Bill_2010.pdf; MISS. CODE ANN. § 99-39-9(1)(d) (2013) (allowing testing to move for a "lesser sentence"); KAN. STAT. ANN. § 21-2512(c) (2013) (allowing testing if inmate can show he or she was "wrongly convicted or sentenced"); NEB. REV. STAT. § 29-4120(5) (2013) (same); WYO. STAT. ANN. § 7-12-303(c)(i) (2013) (allowing testing if the result is reasonably likely to diminish a sentencing enhancement or an aggravating factor in a capital case).

⁷⁰ *Neal v. Com. Attorney of Roanoke City*, 60 Va. Cir. 440, at *3 (Va. Cir. Ct. 2002).

⁷¹ *Id.*

⁷² VA. CODE ANN. § 19.2-327.1(A) (2013), as amended by 2013 Va. Laws Ch. 170 (H.B. 1308) (approved Mar. 12, 2013).

⁷³ VA. CODE ANN. § 19.2-327.1(A) (2013).

⁷⁴ VA. CODE ANN. § 19.2-327.1(F) (2013).

⁷⁵ Herman J. Hoying, *A Positive First Step: The Joint Legislative Audit and Review Commission's Review of Virginia's System of Capital Punishment*, 14 CAP. DEF. J. 349, 356 (2002) (noting that Virginia executes its death row inmates at more than twice the rate of any other state); see also *Virginia's Execution History*, VIRGINIANS FOR ALTERNATIVES TO THE DEATH PENALTY, <http://www.vadp.org/dp-info/virginias-execution-history/> (last visited Aug. 19, 2013).

addition, Virginia law does not permit an inmate to appeal a denial of a motion for DNA testing.⁷⁶

Writ of Actual Innocence Based on Biological Evidence

The Supreme Court of Virginia may issue writs of actual innocence to inmates who (1) pled not guilty but were convicted of felonies, or (2) regardless of the plea, were sentenced to death, or convicted of a Class 1 or Class 2 felony or a felony for which the maximum penalty is life imprisonment.⁷⁷

If the Court determines from a petition for a writ of actual innocence, any hearing on the petition, a review of records of the case (including the record of any hearing on a motion to test DNA evidence), or any response from the Attorney General that proper resolution of the case requires further factual development, the Court may order the circuit court to hold a hearing.⁷⁸ The order will state the specific purpose and evidence for which the hearing has been ordered.⁷⁹

The Supreme Court of Virginia may grant a writ of actual innocence if it determines that the petitioner has proven all of the elements for a petition by clear and convincing evidence, including that the petitioner or his/her attorney filed the petition within 60 days of obtaining the test results, that the evidence was not available for testing under section 9.1-1104 (for convictions or adjudications that became final after June 30, 1996), and finds that “no rational trier of fact would have found sufficient evidence beyond a reasonable doubt as to one or more of the elements of the offense for which the petitioner was convicted.”⁸⁰ Until July 1, 2013, the law provided that a petitioner must have proved the statutory elements by clear and convincing evidence such that “no rational trier of fact *could* have found sufficient evidence.”⁸¹ The new standard imposes a slightly lesser burden on defendants attempting to prove their actual innocence.⁸²

When the Court grants a writ of actual innocence, it forwards a copy of the writ to the circuit court, “where an order of expungement shall be immediately granted.”⁸³

In recent years, Virginia has come under scrutiny for failing to notify individuals who may have been wrongfully convicted.⁸⁴ In 2005, Virginia Governor Mark Warner ordered DNA testing of

⁷⁶ VA. CODE ANN. § 19.2-327.1(G) (2013).

⁷⁷ VA. CODE ANN. § 19.2-327.2 (2013), as amended by 2013 Va. Laws Ch. 170 (H.B. 1308) (approved Mar. 12, 2013).

⁷⁸ VA. CODE ANN. § 19.2-327.4 (2013) (stating that the hearing must be held within 90 days to certify findings of fact with respect to such issues as the Supreme Court of Virginia shall direct).

⁷⁹ *Id.*

⁸⁰ VA. CODE ANN. § 19.2-327.5 (2013) as amended by 2013 Va. Laws Ch. 170 (H.B. 1432) (approved Mar. 12, 2013); VA. CODE ANN. § 19.2-327.3 (2013), as amended by 2013 Va. Laws Ch. 170 (H.B. 1432) (approved Mar. 12, 2013).

⁸¹ H.B. 1432, Ch. 180, 2013 Sess. (Va. 2013) (emphasis added).

⁸² Interview with Shawn Armbrust, *supra* note 39.

⁸³ *Id.*

⁸⁴ *Virginia Fails to Notify Individuals Who May Have Been Wrongfully Convicted*, INNOCENCE PROJECT, Feb. 6, 2012, available at http://www.innocenceproject.org/Content/Virginia_Fails_to_Notify_Individuals_Who_May_Have_Been_Wrongfully_Convicted.php.

uncovered forensic files from the 1970s and 1980s after sample testing cleared two men who had been convicted of rape.⁸⁵ In 2012, DFS issued reports stating that, of the cases tested thus far, seventy-six convicted felons were excluded as the source of DNA.⁸⁶ Bennett Barbour, for instance, was convicted of rape in 1978 in Williamsburg based on an eyewitness identification.⁸⁷ He was sentenced to eighteen years in prison but was released on parole after serving four-and-a-half years.⁸⁸ In 2010, the Williamsburg Commonwealth's Attorney learned that Barbour had been cleared by DNA testing.⁸⁹ However, Barbour did not learn of the test results until eighteen months later, in 2012, when a volunteer lawyer assisting the Department of Forensic Science found him.⁹⁰

The DNA testing in Bennett Barbour's case also produced a match to the likely actual culprit, a convicted rapist.⁹¹ Barbour died from complications from cancer in 2013.⁹² In 2012, the Virginia General Assembly, "concerned that potential exonerations were not being adequately investigated, directed the [D]epartment [of Forensic Science] . . . to release the test results in cases where testing failed to find the convicted person's DNA."⁹³

Conclusion

Virginia is in partial compliance with Protocol #2. The Virginia Death Penalty Assessment Team commends the Commonwealth for ensuring that all motions for post-conviction testing are reviewed by a court. However, Virginia's imposition of a "clear and convincing" threshold determination that the biological evidence may prove innocence places a heavy burden on inmates in order to gain access to testing of biological evidence and also increases the likelihood that an innocent individual will be executed. In addition, the fact that post-conviction testing is available only where the evidence was previously unknown or unavailable, or where a particular testing procedure was not available at DFS at the time of conviction, is likely to result in denial of testing in cases where prior testing may have been unreliable. Finally, it does not appear post-conviction DNA testing is available to death row inmates seeking to prove that s/he should not have been sentenced to death.

Recommendation

The Virginia Assessment Team recommends that the Commonwealth amend its DNA testing statute to permit post-conviction testing on biological evidence if the testing requested was not available at the time of trial or there is credible evidence that prior test results or interpretation

⁸⁵ Frank Green, *Case Raises Question of Effort*, RICHMOND TIMES-DISPATCH, Feb. 5, 2012.

⁸⁶ *Id.*

⁸⁷ Frank Green, *New DNA Test Could Exonerate Man Convicted of 1978 Rape*, RICHMOND TIMES-DISPATCH, Feb. 5, 2012.

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ Green, *supra* note 85. The Williamsburg Commonwealth's Attorney stated that police attempted to notify Barbour in 2010, but they could not locate a correct address. *Id.* Barbour's address and phone number, however, were "readily available on the Internet." *Id.*

⁹¹ Frank Green, *DNA Tests Could Clear More*, RICHMOND TIMES-DISPATCH, June 19, 2012.

⁹² Frank Green, *Bennett S. Barbour Dies, 2 Months After Winning Right to Vote*, RICHMOND TIMES-DISPATCH, Jan. 11, 2013.

⁹³ Frank Green, *DNA Tests Could Clear More*, RICHMOND TIMES-DISPATCH, June 19, 2012.

were unreliable. The Commonwealth should also ensure that Virginia law grants access to testing to an individual who is able to show that a *reasonable probability* exists that s/he is innocent of the offense *or* did not engage in aggravating conduct in a death penalty case. Finally, the Commonwealth must adopt procedures for identifying and alerting convicted persons when potentially-exonerating evidence is discovered in their cases.

C. Protocol #3

Every law enforcement agency should establish and enforce written procedures and policies governing the preservation of biological evidence.

Initial collection of biological evidence is performed by local law enforcement agencies in the Commonwealth of Virginia. Agencies accredited by the Commission on the Accreditation of Law Enforcement Agencies (CALEA) must adopt written directives establishing procedures to be used in criminal investigations, including procedures regarding collecting, preserving, processing, and avoiding contamination of physical evidence.⁹⁴ Thirty-seven Virginia law enforcement agencies have been accredited or are in the process of obtaining accreditation by CALEA.⁹⁵ Similarly, the Virginia Law Enforcement Professional Standards Commission (VLEPSC) administers a state accreditation for Virginia law enforcement agencies.⁹⁶ As of August 2013, VLEPSC has accredited eighty-seven of Virginia's 378 law enforcement agencies.⁹⁷ The VLEPSC accreditation manual requires agencies under accreditation to possess written directives on "Property and Evidence Control."⁹⁸ However, CALEA and VLEPSC accreditation are both optional and neither process appears to directly address whether and how agencies should collect and preserve biological evidence.

Relative to the collection and storage of DNA evidence, the Danville Police Department retains a written policy which states that the "[c]ollection, processing and packaging of evidence shall follow standards set by DCJS and set down in the Division of Forensic Science, Evidence

⁹⁴ COMM'N ON ACCREDITATION OF LAW ENFORCEMENT AGENCIES, INC. (CALEA), STANDARDS FOR LAW ENFORCEMENT AGENCIES, THE STANDARDS MANUAL OF THE LAW ENFORCEMENT AGENCY ACCREDITATION PROGRAM 42.21, 83.2.1 (5TH ED. 2009) [HEREINAFTER CALEA STANDARDS].

⁹⁵ CALEA Client Database, CALEA, available at <http://www.calea.org/content/calea-client-database> (last visited Aug. 19, 2013) (using second search function and designating "US" and "VA" as search criteria to determine the number of agencies that have earned or are in the process of earning accreditation from CALEA's Law Enforcement Accreditation Program).

⁹⁶ Overview & Benefits, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/accred/overview.cfm> (last visited Aug. 19, 2013).

⁹⁷ Accredited Agencies, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/accred/agencies.cfm> (last visited Aug. 19, 2013); *Frequently Asked Questions*, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/accred/faqs.cfm> (last visited Aug. 19, 2013) (noting that an advantage to accreditation is that it serves as the "best measure of an agency's compliance with professional law enforcement standards," but not stating that accreditation is required); Telephone Interview by Mark Pickett with Sam Hoffman, Standards, Policy, & Homeland Sec. Manager, Va. Dep't of Criminal Justice Servs. (May 9, 2013) (stating that there are 378 law enforcement agencies in Virginia).

⁹⁸ Va. Law Enforcement Professional Standards Commission, VA. LAW ENFORCEMENT ACCREDITATION PROGRAM MANUAL 13 (2012), available at <http://www.dcjs.virginia.gov/accred/documents/6th-EditionProgramManual-V6.pdf> (last visited Aug. 19, 2013).

Handling manual.”⁹⁹ Similarly, the Norfolk Police Department indicated that its “forensic SOP” governs evidence collection and preservation.¹⁰⁰

The Department of Forensic Science also publishes an *Evidence Handling and Laboratory Capabilities Guide*, mentioned above in the Danville Police Department’s response to the Assessment Team’s survey, which provides guidance to Virginia law enforcement agencies on the collection, packaging, preservation, and transference of evidence, including DNA evidence, to DFS laboratories.¹⁰¹ DFS also has developed an extensive database of guidelines and training materials relating to the collection, testing, and preservation of biological evidence.¹⁰² Additionally, DFS has worked with the Supreme Court of Virginia to create model court orders granting post-conviction motions for scientific analysis of biological evidence, as well as motions for storage, preservation, and retention of human biological evidence in felony cases.¹⁰³

Furthermore, under Virginia statutory guidelines, the Director of DFS or his/her representative “shall complete and maintain on file a form indicating the name of the person whose sample is to be analyzed, the date and by whom the sample was received and examined, and a statement that the seal on the tube or envelope containing the sample had not been broken or tampered with.”¹⁰⁴ The Virginia Code further provides that the remainder of a sample submitted for analysis and inclusion in the DNA data bank may be divided and securely stored to ensure the integrity and confidentiality of the samples, and the remainder of the sample may be used “only (i) to create a statistical data base” or “(ii) for retesting by the Department to validate or update the original analysis.”¹⁰⁵

DFS is accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB), discussed at length in Chapter Four on Crime Laboratories and Medical Examiner Offices.¹⁰⁶ As a prerequisite to ASCLD/LAB accreditation, laboratories are required to adopt specific procedures relating to the preservation of evidence.¹⁰⁷

Conclusion

While the Assessment Team could not determine whether all law enforcement agencies responsible for collection of biological evidence retain written policies relative to collection and preservation of that evidence, the Virginia Assessment Team commends the Commonwealth for its establishment of written policies and procedures governing the collection, handling, testing,

⁹⁹ DANVILLE POLICE DEP’T, GENERAL ORDER 330 (on file with author).

¹⁰⁰ Norfolk Police Dep’t Survey Response, provided by Captain Ed Ryan, Norfolk Police Dep’t., to Mark Pickett, at 7 (Feb. 14, 2012) (on file with author).

¹⁰¹ EVIDENCE HANDLING GUIDE, *supra* note 10, at Ch. V.

¹⁰² *Laboratory and Forensic Services Manuals*, DEPT. OF FORENSIC SCI., <http://www.dfs.virginia.gov/manuals/forensicBiology/index.cfm?id=5&crumbs=4> (last visited Aug. 19, 2013).

¹⁰³ *Post-conviction DNA Issues: Model Court Orders*, DEPT. OF FORENSIC SCI., <http://www.dfs.virginia.gov/services/forensicBiology/dnaIssues.cfm> (last visited Aug. 19, 2013).

¹⁰⁴ VA. CODE ANN. § 19.2-310.4 (2013).

¹⁰⁵ *Id.*

¹⁰⁶ *See ASCLD/LAB Accredited Laboratories*, AM. SOC’Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., <http://www.ascl-d-lab.org/accredited-laboratory-index/> (last visited Aug. 19, 2013).

¹⁰⁷ AM. SOC’Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD., 2008 MANUAL 24–25 (2008) (on file with author) [hereinafter ASCLD/LAB-LEGACY 2008 MANUAL].

and transport of biological evidence. The Commonwealth is in at least partial compliance with Protocol #3.¹⁰⁸

Recommendation

It is unclear to what extent law enforcement agencies in Virginia are aware of and compliant with the statutory requirements and written policies governing preservation.¹⁰⁹ The Virginia Assessment Team recommends that Virginia institute mandatory and uniform training for law enforcement agencies to ensure that the best collection and preservation procedures are followed by each agency, as well as require that agencies promulgate written policies relative to the collection and preservation of biological evidence.

D. Protocol #4

Provide adequate funding to ensure the proper preservation and testing of biological evidence.

The Department of Forensic Science is responsible for the preservation and testing of biological evidence in Virginia.¹¹⁰ The department's budget is discussed at length in Chapter Four. Notably, DFS has received numerous federal grants specifically awarded for DNA testing. The National Institute of Justice's *DNA Backlog Reduction Program* has awarded DFS substantial funding in order to "reduce the forensic DNA case backlog and for capacity enhancement in its four Forensic Biology Sections."¹¹¹ Between 2004 and 2011, DFS received \$8,823,024 from the *Backlog Reduction Program*.¹¹² In 2008, DFS also received a *Kirk Bloodsworth Postconviction DNA Testing* grant in the amount of \$4,250,295 to assist the Governor-mandated post-conviction DNA testing in old cases.¹¹³ Two Virginia defendants, Thomas Haynesworth and Calvin Cunningham, have been exonerated through post-conviction DNA testing funded by the *Bloodsworth* grant.¹¹⁴

DFS uses a commercially available DNA typing kit known as PowerPlex® 16, which permits the examiner to test sixteen genetic areas of DNA simultaneously for comparison to a known

¹⁰⁸ See *supra* note 47 and accompanying texts on Virginia law enforcement agencies' responses to the Assessment Team's survey on law enforcement practices relative to death penalty cases.

¹⁰⁹ Interview with Shawn Armbrust, *supra* note 39.

¹¹⁰ VA. CODE ANN. §§ 19.2-270.4:1(A), 19.2-310 (2013).

¹¹¹ See *Backlog Reduction Funding Awards, 2004-2011*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/topics/forensics/lab-operations/evidence-backlogs/backlog-reduction-funding.htm> (last visited Aug. 19, 2013); *DNA Initiative Report to Congress: FY 2011*, NAT'L INST. OF JUSTICE, <http://nij.gov/topics/forensics/lab-operations/evidence-backlogs/fy11-report-to-congress.htm> (last visited Aug. 19, 2013).

¹¹² *Backlog Reduction Funding Awards, 2004-2011*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/topics/forensics/lab-operations/evidence-backlogs/backlog-reduction-funding.htm> (last visited Aug. 19, 2013).

¹¹³ *Awards Made for NIJ FY08 Postconviction DNA Testing Assistance Program*, NAT'L INST. OF JUSTICE, <http://grants.ojp.usdoj.gov:85/selector/title?solicitationTitle=NIJ%20FY08%20Postconviction%20DNA%20Testing%20Assistance%20Program&po=NIJ> (last visited Aug. 19, 2013).

¹¹⁴ *Postconviction DNA Testing Assistance Program Exonerations*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/nij/topics/forensics/postconviction/exonerations.htm> (last visited Aug. 19, 2013).

sample.¹¹⁵ If the DNA profile obtained from the evidence is consistent with the DNA profile obtained from the sample, the examiner will perform a statistical calculation to provide weight to the conclusion that the biological substance was deposited by a specific individual.¹¹⁶ DFS has the capacity to conduct all types of DNA testing, including Y-STR and mitochondrial DNA (mtDNA) testing.¹¹⁷ However, Y-STR and mtDNA testing are used only in a limited range of cases, such as body identification, missing persons or paternity cases.¹¹⁸ DFS also uses mtDNA testing “to aid serious felony investigations when other methods of DNA testing yielded limited to no results.”¹¹⁹

The DFS laboratory receives approximately 4,000 cases per year.¹²⁰ Survey data indicate that the testing backlog at DFS decreased by 31% between 2002 and 2005, from 1,752 cases in 2002 to 1,213 cases in 2005.¹²¹ This reduction resulted primarily from a decision by the Commonwealth to enter into a contract with a private laboratory to test backlogged convicted offender samples for three years between 1998 and 2001, as well as federal funding from the National Institute of Justice.¹²² The recently enacted “touch evidence” policy, under which DFS stipulated that it would not accept touch evidence for property crimes without a written request from the prosecutor’s office, also has helped to reduce the backlog.¹²³ DFS reports that there is currently no backlog on the in-house analysis of samples of convicted offenders or arrestees.¹²⁴

In addition, DFS runs the Forensic Science Academy to “provide advanced training to law-enforcement agencies in the location, collection, and preservation of evidence.”¹²⁵

Conclusion

Due to the availability of advanced DNA testing and the reduction in the backlog of cases, it appears that the Commonwealth is in compliance with Protocol #4.

¹¹⁵ EVIDENCE HANDLING GUIDE, *supra* note 10, at V-6.

¹¹⁶ *Id.*

¹¹⁷ *Id.*

¹¹⁸ *Id.*

¹¹⁹ *Id.*

¹²⁰ ICF INT’L, EVALUATION OF THE IMPACT OF THE FORENSIC CASEWORK DNA BACKLOG REDUCTION PROGRAM (2009), available at <https://www.ncjrs.gov/pdffiles1/nij/grants/225803.pdf>.

¹²¹ *Id.*

¹²² DNA Databank Statistics, VA. DEPT. OF FORENSIC SCI., <http://www.dfs.virginia.gov/statistics/> (last visited Aug. 19, 2013).

¹²³ *Id.*

¹²⁴ *Id.*

¹²⁵ VA. CODE ANN. § 9.1-1103 (2013).

CHAPTER FOUR

CRIME LABORATORIES AND MEDICAL EXAMINER OFFICES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

With the increased reliance on forensic evidence—including DNA, ballistics, fingerprinting, handwriting comparisons, and hair samples—it is vital that forensic service providers, such as crime laboratories, coroners, and medical examiner offices, provide expert and accurate results.

Despite the increased reliance on forensic evidence and those who collect and analyze it, the validity and reliability of work done by some unaccredited and accredited forensic analysts has been called into question.¹ While the majority of forensic service providers strive to do their work accurately and impartially, some laboratory technicians have been accused or convicted of: failing to properly analyze blood and hair samples; reporting results for tests that were never conducted; misinterpreting test results in an effort to aid the prosecution; testifying falsely; failing to preserve DNA samples; or destroying DNA or other biological evidence.² This has led to internal investigations into the practices of several prominent crime laboratories and technicians, independent audits of crime laboratories, and the reexamination of cases.³

In addition, the system of medico-legal death investigations throughout the United States is fragmented, sometimes relying on elected officials without any medical training to determine the cause and manner of sudden or unexplained deaths.⁴ Like other forensic service providers, many medical examiner and coroner offices suffer from inadequate funding, making it difficult to recruit and retain qualified death investigation personnel. Despite these concerns, pressure mounts on the forensic science community. Significant backlogs continue to plague publicly-funded crime laboratories attendant with a growing demand for their services.⁵

The need for accuracy and reliability in forensic science necessitates that jurisdictions allocate adequate resources to forensic service providers. In order to take full advantage of the power of

¹ COMM. ON IDENTIFYING THE NEEDS OF THE FORENSIC SCI. CMTY. ET AL., NAT'L RESEARCH COUNCIL OF THE NAT'L ACADS., *Strengthening Forensic Science in the United States: A Path Forward* 37–52 (2009), available at <http://www.ncjrs.gov/pdffiles1/nij/grants/228091.pdf> [hereinafter 2009 NAS REPORT].

² *Id.* at 42–45.

³ See, e.g., Martha Waggoner, *Report Blasts N.C. Crime Lab: Review Found that Agents Misrepresented Evidence, Kept Critical Notes from Attorneys*, CHARLESTON GAZETTE & DAILY MAIL, Aug. 19, 2010, at 5D; *Error-prone Detroit Crime Lab Shut Down*, USA TODAY, Sep. 25, 2008, http://www.usatoday.com/news/nation/2008-09-25-crime-lab_N.htm (reporting that a state audit found a ten percent error rate in 200 cases); Julie Bykowicz & Justin Fenton, *City Crime Lab Director Fired*, BALTIMORE SUN, Aug. 21, 2008 (reporting that several samples were contaminated by analysts own DNA); 2009 NAS REPORT, *supra* note 1, at 193 (describing the problems in the Houston Police Department Crime Laboratory, including “poor documentation, serious analytical and interpretive errors, the absence of quality assurance programs, inadequately trained personnel, erroneous reporting, the use of inaccurate and misleading statistics, and even . . . the falsification of scientific results”). See also *Wrongful Convictions Involving Invalidated or Improper Forensic Science that Were Later Overturned through DNA Testing*, INNOCENCE PROJECT, http://www.innocenceproject.org/docs/DNA_Exonerations_Forensic_Science.pdf (last visited Aug. 19, 2013) (“Of the first 225 wrongful convictions overturned by DNA testing, more than 50% (116 cases) involved invalidated or improper forensic science.”).

⁴ 2009 NAS REPORT, *supra* note 1, at 49–51.

⁵ *Id.* at 37.

forensic science to aid in the search for truth and to minimize its enormous potential to contribute to wrongful convictions, forensic service providers must be accredited, examiners and lab technicians must be certified, procedures must be standardized and published, and adequate funding must be provided.

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

A. Forensic Science Laboratories

1. Virginia Crime Laboratories

a. The Virginia Department of Forensic Science

Created in 2005, the Virginia Department of Forensic Science (DFS) is a statewide executive branch system comprised of four forensic laboratories located throughout the Commonwealth.⁶ DFS laboratories provide forensic laboratory services to “all state and local law enforcement agencies, medical examiners, and Commonwealth’s Attorneys in Virginia.”⁷ The laboratory system consists of four regional laboratories, including the “Central Laboratory” in Richmond, the “Northern Laboratory” located in Manassas, the “Western Laboratory” in Roanoke and the “Eastern Laboratory” in Norfolk.⁸ In addition to these laboratories, the Prince William County Police Department operates a local laboratory, the Forensic Services Bureau, in Manassas, Virginia serving law enforcement agencies in and around Prince William County.⁹

DFS is headed by a Director who is appointed by the Governor from a list of candidates from the Forensic Science Board (Board) and confirmed by the General Assembly, and who serves six year terms.¹⁰ The Director is authorized to exercise powers and perform duties conferred by the Governor and requested by the Board.¹¹

b. Independent and Non-Virginia Forensic Laboratories

The Virginia Capital Defender Offices—which represents the Commonwealth’s capital defendants at trial and on direct appeal—and the Virginia Capital Representation Resource Center (VCRRC)—which represents the Commonwealth’s death row inmates during state and federal habeas corpus and clemency proceedings—use DFS laboratories when necessary or out-of-state laboratories, such as Mitotyping in State College, Pennsylvania, for forensic testing.¹²

⁶ VA. CODE § 9.1-1100 (2005). DFS’s precursor was the Department of Criminal Justice Services’ Division of Forensic Science. *Id.*

⁷ VA. DEP’T OF FORENSIC SCI., <http://www.dfs.virginia.gov> (last visited Aug. 19, 2013).

⁸ *Regional Labs*, VA. DEP’T OF FORENSIC SCI., <http://www.dfs.virginia.gov/labs/index.cfm> (last visited Jan. 6, 2012).

⁹ *Forensic Services Bureau*, PRINCE WILLIAM CNTY. POLICE DEP’T, <http://www.pwcgov.org/government/dept/police/careers/Pages/Forensic-Services-Bureau.aspx> (last visited Aug. 19, 2013).

¹⁰ VA. CODE ANN. § 9.1-1100 (2013).

¹¹ *Id.*

¹² Telephone Interview by Mark Pickett with Ed Ungvarsky, Capital Defender North (June 1, 2012) (on file with author) (stating that his office typically uses either the Virginia Department of Forensic Science or Mitotyping Technologies in State College, Penn., and has used Bode Lab once); Interview by Paula Shapiro and Mark Pickett with Robert E. Lee, Exec. Dir., Va. Capital Representation Res. Ctr. (June 20, 2012) (on file with author). Mitotyping Technologies is accredited in Forensic Testing, Biology, by ASCLD/LAB-*International*. *Scope of Accreditation for Mitotyping Technologies, LLC*, ASCLD/LAB-INT’L PROGRAM (Nov. 21, 2011), available at <http://www.ascl-d-lab.org/cert/ALI-025-T.pdf>.

2. DFS Powers and Duties

DFS is responsible for providing forensic laboratory services, research, and scientific investigations to state or federal law enforcement, state medical examiners, Commonwealth's Attorneys and state agencies involved in criminal matters.¹³ Upon request, DFS will provide to any defendant or his/her attorney the testing results "of any investigation that has been conducted by it and that is related in any way to a crime for which the person is accused."¹⁴ DFS may also conduct a scientific investigation pursuant to a court's order upon motion of a convicted offender.¹⁵ It is also the responsibility of DFS to establish a DNA testing program.¹⁶

In addition to the forensic evaluation and analysis services, DFS forensic examiners interpret results, provide technical and training assistance and provide "expert testimony related to the full spectrum of physical evidence recovered from crime scenes."¹⁷ The Department also maintains secure facilities to ensure the protection of evidence, official samples, and all other samples submitted to the Department for analysis or examination.¹⁸

For more information on Virginia's procedures with respect to testing and preservation of evidence in criminal cases, see Chapter Three on the Collection, Preservation, and Testing of DNA and Other Types of Evidence.

3. Laboratory Accreditation

While Virginia does not currently require the accreditation of crime laboratories, "[a]ll of the Division's laboratories have been continuously accredited by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board [(ASCLD/LAB)] since 1989."¹⁹ The ASCLD/LAB-*International* Accreditation Program is based on standards developed by the International Organization for Standardization (ISO) and the International Electrotechnical Commission (IEC), collectively known as the ISO/IEC 17025:2005 (*International* program).²⁰ The *International* program is a voluntary accreditation program "in which any crime laboratory . . . may participate to demonstrate that its technical operations and overall management system meet ISO/IEC 17025:2005 requirements and applicable ASCLD/LAB-*International* supplemental requirements."²¹

¹³ VA. CODE ANN. § 9.1-1101(A)–(B)(1) (2013).

¹⁴ VA. CODE ANN. § 9.1-1104 (2013).

¹⁵ *Id.*

¹⁶ VA. CODE ANN. § 9.1-1101(B)(2)–(3),(C) (2013).

¹⁷ VA. DEP'T OF FORENSIC SCI., <http://www.dfs.virginia.gov/index.cfm> (last visited May 30, 2012).

¹⁸ VA. CODE ANN. § 9.1-1102(A)–(B) (2013).

¹⁹ Telephone Interview with Katya Herndon, Division Counsel, Dep't. of Forensic Services (on file with author).

²⁰ *ASCLD/LAB Accredited Laboratory Index*, ASCLD/LAB, <http://www.ascl-d-lab.org/accredited-laboratory-index/> (last visited Aug. 19, 2013); *Programs of Accreditation*, ASCLD/LAB, <http://www.ascl-d-lab.org/international-testing-program/> (last visited Aug. 19, 2013); ISO/IEC 17025, GENERAL REQUIREMENTS FOR THE COMPETENCE OF TESTING AND CALIBRATION LABORATORIES v (2d ed. 2005) (on file with author) [hereinafter ISO/IEC 17025: GENERAL REQUIREMENTS].

²¹ ASCLD/LAB, ASCLD/LAB-*INTERNATIONAL* PROGRAM OVERVIEW 3 (Sept. 11, 2010) (effective Oct. 1, 2010), available at <http://www.ascl-d-lab.org/documents/AL-PD-3041.pdf> [hereinafter ASCLD/LAB-*INTERNATIONAL* OVERVIEW].

Table 1, below, details the disciplines in which each state laboratory received *International* program accreditation.

Table 1

Forensic Laboratory²²	ASCLD/LAB <i>International</i> Certified Disciplines
Virginia Department of Forensic Science, Central Laboratory (Richmond, Virginia)	Controlled Substances; Toxicology; Biology; Trace Evidence; Firearms/Toolmarks; Latent Prints; Questioned Documents; Digital Evidence; and Other (Impression Evidence and Blood Stain Patterns) ²³
Virginia Department of Forensic Science, Eastern Laboratory (Norfolk, Virginia)	Controlled Substances, Toxicology; Biology; Trace Evidence; Firearms/Toolmarks; and Latent Prints ²⁴
Virginia Department of Forensic Science, Northern Laboratory (Manassas, Virginia)	Controlled Substances, Toxicology; Biology; Firearms/Toolmarks; and Latent Prints ²⁵
Virginia Department of Forensic Science, Western Laboratory (Roanoke, Virginia)	Controlled Substances; Toxicology; Biology; Trace Evidence; Firearms/Toolmarks; Latent Prints; Questioned Documents; and Other (Impression Evidence) ²⁶
Virginia Department of Forensic Science, Breath Alcohol Calibration (Richmond, Virginia)	Forensic Science Calibration: Toxicology ²⁷
Prince William County Police, Forensic Services Bureau (Manassas, Virginia)	Latent Prints and Crime Scene ²⁸

In addition, Mitotyping Technologies, LLC—an independent laboratory in State College, Pennsylvania that is used by the Capital Defender North—is accredited in the biology discipline of forensic testing under the ASCLD/LAB-*International* Program.²⁹ Bode Technologies, a forensic laboratory that is accredited by the ASCLD/LAB-*Legacy* Program in biology, has been used in at least one capital case in Virginia within the past five years.³⁰

²² *ASCLD/LAB Accredited Laboratories*, ASCLD/LAB, <http://www.ascl-d-lab.org/labstatus/accreditedlabs.html#va> (last visited June 28, 2013).

²³ *Scope of Accreditation for the Virginia Department of Forensic Science Central Laboratory*, ASCLD/LAB-INT'L PROGRAM (Sept. 12, 2009), available at <http://www.ascl-d-lab.org/cert/ALI-091-T.pdf>.

²⁴ *Scope of Accreditation for the Virginia Department of Forensic Science Eastern Laboratory*, ASCLD/LAB-INT'L PROGRAM (Sept. 12, 2009), available at <http://www.ascl-d-lab.org/cert/ALI-092-T.pdf>.

²⁵ *Scope of Accreditation for the Virginia Department of Forensic Science Northern Laboratory*, ASCLD/LAB-INT'L PROGRAM (Sept. 12, 2009), available at <http://www.ascl-d-lab.org/cert/ALI-093-T.pdf>.

²⁶ *Scope of Accreditation for the Virginia Department of Forensic Science Western Laboratory*, ASCLD/LAB-INT'L PROGRAM (Sept. 12, 2009), available at <http://www.ascl-d-lab.org/cert/ALI-094-T.pdf>.

²⁷ *Scope of Accreditation for the Virginia Department of Forensic Science Breath Alcohol Laboratory*, ASCLD/LAB-INT'L PROGRAM (Sept. 12, 2009), available at <http://www.ascl-d-lab.org/cert/ALI-003-C.pdf>.

²⁸ *Scope of Accreditation for the Prince William County Police Forensic Services Section*, ASCLD/LAB-INT'L PROGRAM (Sept. 17, 2011), available at <http://www.ascl-d-lab.org/cert/ALI-192-T.pdf>.

²⁹ *Scope of Accreditation for Mitotyping Technologies, LLC*, ASCLD/LAB-INT'L PROGRAM (Nov. 21, 2011), available at <http://www.ascl-d-lab.org/cert/ALI-025-T.pdf>.

³⁰ Interview by Mark Pickett with Ed Ungvarsky, *supra* note 12. Bode is accredited in Biology Forensic Testing. See ANSI/ASQ NATIONAL ACCREDITATION BOARD/FQS, SCOPE OF ACCREDITATION TO ISO/IEC 17025:2005 AND THE FBI QAS, (Feb. 7, 2013), available at <http://www.bodetech.com/wp-content/uploads/2013/02/BodeTechnologyScope-V003.pdf>.

4. Virginia Forensic Science Board

In 2005, the Virginia General Assembly passed legislation creating the Virginia Forensic Science Board (Board) to oversee DFS.³¹ The Board elects its chairman and vice-chairman and holds at least four meetings per year.³² By statute, the Board is authorized to fulfill certain responsibilities, including but not limited to

- (1) adoption of necessary administrative regulations and rules relating to the laboratories to fulfill their statutory purpose;
- (2) development or elimination of DFS programs and activities;
- (3) development of policies, fiscal programming, and priorities based on DFS needs;
- (4) ensuring "the development of long-range programs and plans for the incorporation of new technologies as they become available";
- (5) advising the Governor, General Assembly, and DFS Director on all matters pertaining to DFS and forensic science;
- (6) reviewing, amending and approving recommendations from the Scientific Advisory Committee;
- (7) monitoring the receipt, administration, and expenditure of all funds and appropriations, and promulgation of operational budgeting and appropriations requests;
- (8) overseeing and annually reporting on DFS grant applications;
- (9) "[m]onitor[ing] all contracts and agreements necessary or incidental to the performance of [DFS] duties"; and
- (10) recommending actions promoting coordination and cooperation between DFS and the entities it serves.³³

In addition, each year the Board is tasked with providing a review and recommendations "to the Chairmen of the House Committee on Appropriations, the Senate Committee on Finance, and the Crime Commission" concerning all of the responsibilities listed above.³⁴

³¹ VA. CODE § 9.1-1110 (2005). The Board is comprised of fifteen members: the Superintendent of the State Police, the Director of the Department of Criminal Justice, the Chief Medical Examiner, the Executive Director of the Virginia Board of Pharmacy, the Attorney General, the Executive Secretary of the Supreme Court of Virginia, the Chairman of the Virginia State Crime Commission, the Chairman of the Board of the Virginia Institute of Forensic Science and Medicine, two state legislators, two members of the Scientific Advisory Committee, one Commonwealth's Attorney, one defense attorney, and one law enforcement agent. VA. CODE ANN. § 9.1-1109(A) (2013).

³² VA. CODE ANN. § 9.1-1110(A)(1)–(11) (2013).

³³ VA. CODE ANN. § 9.1-1110(A)(1)–(11) (2013).

³⁴ VA. CODE § 9.1-1110(B) (2005).

5. Virginia Scientific Advisory Committee

The Virginia Scientific Advisory Committee (Committee), an executive branch advisory board, was created in 2005 to review the operations of the DFS laboratories and make recommendations on the quality and timeliness of its services.³⁵ The Committee consists of thirteen members who serve four year staggered terms.³⁶ The Committee meets at least twice a year in Richmond as directed by the Governor or the Forensic Science Board.³⁷ The Committee elects its own chairman and is staffed by DFS.³⁸

Upon request by the DFS Director, the Forensic Science Board, or the Governor, the Committee “review[s] analytical work, reports, and conclusions of scientists employed by the Department,” and will recommend to the Board “a review process for the Department to use in instances where there has been an allegation of misidentification or other testing error made by the Department during its examination of evidence.”³⁹ The Committee also reviews and makes recommendations on new or existing scientific programs, testing protocols, and scientist qualification standards.⁴⁰

B. Virginia’s Medicolegal Death Investigations System

Virginia instituted a centralized state medical examiner system as its system of medicolegal death investigation in 1946 when the General Assembly abolished the Office of Coroner’s Physician and appointed a Chief Medical Examiner.⁴¹ In 1950, the Office of the Chief Medical Examiner (OCME) became a division within the Virginia Department of Health.⁴²

Virginia has four OCME offices that serve the entire Commonwealth of Virginia.⁴³ The OCME Central Office, out of which the Chief Medical Examiner works, and its facilities are located in Richmond, Virginia, with three satellite offices and facilities located throughout the Commonwealth: Manassas (Northern District), Norfolk (Tidewater District), and Roanoke (Western District).⁴⁴ Each office and facility is staffed by “board certified forensic pathologists, death investigators, administrative and morgue personnel,” and possesses adequate physical

³⁵ VA. CODE ANN. § 9.1-1113(A) (2013).

³⁶ VA. CODE ANN. § 9.1-1111 (2013). Committee members include the DFS Director and twelve additional persons, each appointed by the Governor, who are forensic scientists, laboratory directors, and members of national and international forensic science institutions. *Id.*

³⁷ VA. CODE ANN. § 9.1-1112 (2013).

³⁸ *Id.*

³⁹ VA. CODE ANN. § 9.1-1113(C) (2013).

⁴⁰ VA. CODE ANN. § 9.1-1113(B) (2013).

⁴¹ U.S. DEP’T OF JUSTICE, OFFICE OF JUSTICE PROGRAMS, BUREAU OF JUSTICE STATISTICS SPECIAL REPORT ON MED. EXAM’RS AND CORONERS’ OFFICES, 2004 1 (June 2007), *available at* <http://www.bjs.gov/content/pub/pdf/meco04.pdf>.

⁴² VA. DEP’T OF HEALTH, OFFICE OF THE CHIEF MED. EXAM’R, OFFICE OF THE CHIEF MEDICAL EXAM’R’S ANNUAL REPORT, 2011, at 11 (Dec. 2011) [hereinafter OCME 2011 ANNUAL REPORT].

⁴³ *Office of the Chief Medical Examiner*, VA. DEP’T OF HEALTH, <http://www.vdh.state.va.us/medExam/AboutMedExaminer.htm> (last visited Aug. 19, 2013).

⁴⁴ VA. CODE ANN. § 32.1-277 (2013).

facilities for medicolegal death examinations and investigations.⁴⁵ In 2011, the OCME investigated 5,670 deaths, which is 9.4% of the “estimated total deaths in Virginia and sixty-eight percent of the total number of deaths reported to the OCME, 8,262.”⁴⁶

1. Qualifications and Appointment of Medical Examiners

Virginia requires the Commonwealth’s Chief Medical Examiner (CME), who is appointed by the Commissioner with the approval of the Board, to be a forensic pathologist licensed to practice medicine in the Commonwealth.⁴⁷ Assistant chief medical examiners who work in the OCME are also forensic pathologists licensed to practice medicine in Virginia.

The CME also appoints local medical examiners who must maintain a valid Virginia license as a doctor of medicine or osteopathy and a valid Virginia driver’s license or one from a contiguous state.⁴⁸ Each Virginia county or city will be appointed one or more local medical examiner.⁴⁹ There are more than 230 local medical examiners who conduct medicolegal death investigations and “serv[e] as the principal case investigators in their localities for deaths falling within their jurisdiction and statutory authority.”⁵⁰ Local medical examiners serve three-year terms of office beginning on October 1st of the appointment year; vacancies are filled by the CME to serve the remainder of the unexpired term.⁵¹

2. Powers and Duties of Medical Examiners

Local medical examiners receive initial notifications of death and determine whether the death falls under the jurisdiction of the medical examiner.⁵² Responsibilities of the local medical examiners include information gathering, external examinations of bodies, collection of toxicology samples, and signing certificates of death in medical examiner cases.⁵³ Local medical examiners, pursuant to “professionally established guidelines,” also “refer certain classes of cases for more intensive death investigation and medicolegal autopsy, which includes both an internal and external examination.”⁵⁴

⁴⁵ *District Offices/Contact us*, VA. DEP’T OF HEALTH, <http://www.vdh.state.va.us/medExam/ContactUs.htm> (last visited Aug. 19, 2013); VA. CODE ANN. § 32.1-277 (2013) (requiring “adequate professional, technical and medical investigative personnel and physical facilities”).

⁴⁶ OCME 2011 ANNUAL REPORT, *supra* note 42, at 21.

⁴⁷ VA. CODE ANN. § 32.1-278 (2013).

⁴⁸ VA. CODE ANN. §§ 32.1-280, 32.1-282(B) (2013); *Become a Local Medical Examiner*, VA. DEP’T OF HEALTH, <http://www.vdh.state.va.us/medExam/becomemedicalexaminer.htm> (last visited Aug. 19, 2013).

⁴⁹ VA. CODE ANN. §§ 32.1-280, 32.1-282(B) (2013). *See also* VA. CODE ANN. § 32.1-281 (2013) (authorizing the Chief Medical Examiner to employ additional qualified pathologists to assist in investigating any death or performing any autopsy).

⁵⁰ OCME 2011 ANNUAL REPORT, *supra* note 42, at 9; *Office of the Chief Medical Examiner*, VA. DEP’T OF HEALTH, <http://www.vdh.state.va.us/medExam/AboutMedExaminer.htm> (last visited Aug. 19, 2013).

⁵¹ VA. CODE ANN. § 32.1-282(A), (B), (D) (2013).

⁵² OCME 2011 ANNUAL REPORT, *supra* note 42, at 11.

⁵³ *Id.*

⁵⁴ *Id.*

A local medical examiner is required to be notified of any death of a person from

1. trauma, injury, violence, poisoning, accident, suicide or homicide, or
2. suddenly when in apparent good health, or
3. when unattended by a physician, or
4. in jail, prison, other correctional institution or in police custody, or
5. who is a patient or resident of a state mental health or mental retardation facility, or
6. suddenly as an apparent result of fire, or
7. in any suspicious, unusual or unnatural manner, or
8. the sudden death of any infant less than eighteen months [due to SIDS].⁵⁵

After receiving the body, the local medical examiner will fully investigate the surrounding facts and circumstances to determine the cause and manner of death and will promptly produce a written report to the OCME.⁵⁶ Such reports are confidential and are not “disclosed or made available for discovery pursuant to a court subpoena or otherwise, except” under certain circumstances, although the OCME may release the cause or manner of death and disclose reports or findings to the parties in a criminal case.⁵⁷ The Virginia Code mandates that the OCME is responsible for investigating and determining the cause and manner of all deaths “that occur in Virginia suddenly and unexpectedly, while unattended by a physician, violently, under suspicious circumstances, or in law enforcement custody.”⁵⁸

3. Accreditation of Medical Examiner Offices and Certification of Medical Examiners, and Medicolegal Death Investigators

Virginia does not require medical examiner offices to be accredited. However, each of the four offices of the Virginia Office of the Chief Medical Examiner has obtained voluntary accreditation through the National Association of Medical Examiners (NAME).⁵⁹ NAME is the primary accrediting entity for medical examiner offices.⁶⁰ As of June 2013, all four OCME offices have full accreditation.⁶¹ In addition, the OCME reports that its medical examiners are certified by the American Board of Pathology, and its investigators certified by the American Board of Medicolegal Death Investigators.⁶²

⁵⁵ VA. CODE ANN. § 32.1-283(A) (2013).

⁵⁶ VA. CODE ANN. § 32.1-282(B) (2013).

⁵⁷ VA. CODE ANN. § 32.1-282(B)–(C) (2013).

⁵⁸ OCME 2011 Annual Report, *supra* note 42 at 8; VA. CODE ANN. § 32.1-283 (2013)

⁵⁹ *Organization Directory Search Results, NAT’L ASS’N OF MED. EXAM’RS*, <https://netforum.avectra.com/eweb/DynamicPage.aspx?Site=NAME&WebCode=OrgSearch> (for “State/Territory” select “VA”; check “NAME Accredited” box; then follow “Search” hyperlink) (last visited June 26, 2013).

⁶⁰ 2009 NAS REPORT, *supra* note 1, at 258 (“Currently, the standard for quality in death investigation for medical examiner offices is accreditation by NAME”); *see also* NAT’L ASS’N OF MED. EXAM’RS, PRELIMINARY REPORT ON AMERICA’S MEDICOLEGAL OFFICES, NAT’L INST. OF JUSTICE FORENSIC SUMMIT 1 (May 18–19, 2004), *available at* <https://www.ncjrs.gov/pdffiles1/nij/grants/213421.pdf>.

⁶¹ *Organization Directory Search Results, NAT’L ASS’N OF MED. EXAM’RS*, <https://netforum.avectra.com/eweb/DynamicPage.aspx?Site=NAME&WebCode=OrgSearch> (for “State/Territory” select “VA”; check “NAME Accredited” box; then follow “Search” hyperlink) (last visited Aug. 19, 2013).

⁶² OCME 2011 Annual Report, *supra* note 42, at 11–12.

a. National Association of Medical Examiner Accreditation

NAME accreditation “attests that an office has a functional governing code, adequate staff, equipment, training, and a suitable physical facility and produces a forensically documented accurate, credible death investigation product.”⁶³ A NAME applicant must perform a self-inspection using the NAME Accreditation Checklist,⁶⁴ file an application, and undergo an external inspection to evaluate whether the facility meets the NAME Standards for Accreditation.⁶⁵

The external inspection is conducted by a NAME inspector, who “systematically examine[s] in detail each question on the Inspection Checklist with the chief medical examiner . . . or his or her representative.”⁶⁶ The checklist contains a series of questions designated as “essential” or “non-essential” criteria.⁶⁷ An inspector’s report concludes with a recommendation for full accreditation, provisional accreditation, or non-accreditation.⁶⁸ In order to obtain full accreditation, the applicant may not have more than fifteen “non-essential” criteria deficiencies and may not have any “essential” criteria deficiencies.⁶⁹ Full accreditation is conferred for a period of five years.⁷⁰

b. American Board of Medicolegal Death Investigators

The American Board of Medicolegal Death Investigators (ABMDI) is a voluntary, independent professional certification board.⁷¹ ABMDI’s certification program ensures that medicolegal death investigators “have proven knowledge and skills necessary to perform medicolegal death investigations as set forth in the National Institute of Justice 1999 publication *Death Investigation: A Guide for the Scene Investigator*.”⁷²

ABMDI has two certification levels: “Registry Diplomate” and “Board Certified Fellow.”⁷³ In order to obtain ABMDI certification, investigators must pass a multiple choice and a practical examination, as well as complete 640 hours of death investigations for Registry Diplomate Status

⁶³ *Id.*

⁶⁴ NAT’L ASS’N OF MED. EXAM’RS, NAME INSPECTION AND ACCREDITATION CHECKLIST, SECOND REVISION, 2, 4 (2009), available at http://thename.org/index.php?option=com_docman&task=cat_view&gid=45&Itemid=26 [hereinafter NAME ACCREDITATION CHECKLIST].

⁶⁵ NAT’L ASS’N OF MED. EXAM’RS, INSPECTION & ACCREDITATION POLICIES AND PROCEDURES MANUAL 61-66 (July 2009), available at http://thename.org/index.php?option=com_docman&task=cat_view&gid=45&Itemid=26 [hereinafter NAME MANUAL].

⁶⁶ *Id.* at 65.

⁶⁷ *Id.* at 57.

⁶⁸ *Id.* at 68.

⁶⁹ *Id.* at 69.

⁷⁰ *Id.*

⁷¹ AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php> (last visited Aug. 19, 2013). In 2005, ABMDI received accreditation from the Forensic Specialties Accreditation Board. FORENSIC SPECIALTIES ACCREDITATION BD., <http://www.thefsab.org/> (last visited Aug. 19, 2013).

⁷² AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php> (last visited Aug. 19, 2013). The Forensic Specialties Accreditation Board is “a mechanism whereby the forensic community can assess, recognize and monitor organizations or professional boards that certify individual forensic scientists or other forensic specialties.” *Id.*

⁷³ *Id.*

and 4,000 hours of death investigations to achieve Board Certified Fellow status.⁷⁴ Additionally, certified investigators must complete forty-five hours of approved continuing education each year.⁷⁵

Currently, thirty-seven Virginia medicolegal death investigators, only five of whom are *not* employed at the Virginia Office of the Chief Medical Examiner, have been certified as ABMDI Registry Diplomates and one investigator has obtained ABMDI Board Certified Fellow status.⁷⁶

⁷⁴ *Registry Certification (Basic)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=registry-certification-basic> (last visited June 28, 2013); *Board Certification (Advanced)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=board-certification-advanced> (last visited June 28, 2013).

⁷⁵ *Registry Certification (Basic)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=registry-certification-basic> (last visited June 28, 2013); *Board Certification (Advanced)*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=board-certification-advanced> (last visited June 28, 2013).

⁷⁶ *Registry Diplomates*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=registry-database> (under “Search by State” select “Virginia”; then follow “Search” hyperlink) (last visited June 26, 2013); *Board Certified Fellows*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://medschool.slu.edu/abmdi/index.php?page=board-diplomates> (under “Search by State” select “Virginia”; then follow “Search” hyperlink) (last visited June 26, 2013).

II. ANALYSIS

Below are the ABA Benchmarks, or “Protocols,” used by the Assessment Team in its evaluation of Virginia’s death penalty system. Each Protocol is followed by the Assessment Team’s analysis of the Commonwealth’s compliance with the Protocol and, where appropriate, the Assessment Team’s recommendations for reform.

A. Protocol #1

Crime laboratories and medical examiner offices should be accredited, examiners should be certified, and procedures should be standardized and published to ensure the validity, reliability, and timely analysis of forensic evidence.

Accreditation means “that a laboratory adheres to an established set of standards of quality and relies on acceptable practices within these requirements.”⁷⁷ As explained in the 2009 National Academy of Sciences *Report on Forensic Science (NAS Report)*, “[l]aboratory accreditation and individual certification of forensic science professionals should be mandatory” and all forensic laboratories should “establish routine quality assurance and quality control procedures to ensure the accuracy of forensic analyses and the work of forensic practitioners.”⁷⁸

Crime Laboratories

Virginia does not currently require the accreditation of crime laboratories; however, all four laboratories within the Virginia Department of Forensic Science (DFS) have voluntarily obtained accreditation by the American Society of Crime Laboratory Directors/Laboratory Accreditation Board (ASCLD/LAB) under its *International Accreditation Program*.⁷⁹

ASCLD/LAB accreditation requires formal written policies and procedures to ensure the validity, reliability, and timely analysis of forensic evidence, and it appears DFS maintains such guidelines. Specifically, the DFS laboratories have formal written procedures providing for the proper method of collecting and storing various biological evidence, as well as for maintaining the chain of custody and handling of such evidence.⁸⁰ Such guidelines and procedures exist for the initial collection and storage of evidence for criminal cases, as well as for post-conviction retention and preservation pursuant to the Virginia Code.⁸¹ DFS also has published written

⁷⁷ 2009 NAS REPORT, *supra* note 1, at 195 (also recognizing that “accreditation does not mean that accredited laboratories do not make mistakes, nor does it mean that a laboratory utilizes best practices in every case”).

⁷⁸ 2009 NAS REPORT, *supra* note 1, at 215.

⁷⁹ See *Accredited Laboratories*, AM. SOC’Y OF CRIME LAB. DIRS./LAB. ACCREDITATION BD. (ASCLD/LAB), <http://www.ascl-d-lab.org/accredited-laboratory-index/> (last visited Aug. 19, 2013).

⁸⁰ VA. DEP’T OF FORENSIC SCI., EVIDENCE HANDLING & LABORATORY CAPABILITIES GUIDE (Feb. 2010), available at <http://www.dfs.virginia.gov/services/evidencehandling/EvidenceGuide.pdf>; CONTROLLED SUBSTANCE: MANUALS, VA. DEP’T OF FORENSIC SCI., <http://www.dfs.virginia.gov/manuals/controlledSubstances/index.cfm?id=3&crumbs=4> (last visited Aug. 19, 2013); HUMAN BIOLOGICAL EVIDENCE, VA. DEP’T OF FORENSIC SCI. (2001), available at <http://www.dfs.virginia.gov/services/forensicBiology/inventoryOfBiologicalEvidenceInPossessionOfClerk.pdf>

⁸¹ See *Post-Conviction DNA Issues*, VA. DEP’T OF FORENSIC SCI., <http://www.dfs.virginia.gov/services/forensicBiology/dnaIssues.cfm> (last visited June 26, 2013).

procedures for the proper sterilization and calibration of equipment used during forensic testing, proper forensic testing techniques for biological and other types of evidence, and documentation requirements for all aspects of forensic analysis.⁸² In addition, DFS maintains and has published training manuals for each of the disciplines in which DFS provides forensic testing and analysis.⁸³

Virginia's crime laboratories should be commended for obtaining ASCLD/LAB-*International* accreditation. The ASCLD/LAB-*International* Program has no optional requirements for quality management systems and technical operations of laboratories. Instead, each requirement must be met for accreditation.⁸⁴ The *International* Program also requires an annual surveillance visit, during which "any issues that may have come to the attention of ASCLD/LAB and/or requirements selected by ASCLD/LAB are reviewed."⁸⁵

ASCLD/LAB accreditation uses a peer review system to determine whether to confer accreditation on a particular laboratory. The ASCLD/LAB Board of Directors, a group of fellow laboratory directors from other ASCLD/LAB-accredited laboratories, will make final accreditation decisions.⁸⁶ While a peer review system is not per se unreliable, an external state-based oversight commission could further ensure the impartiality of the accreditation process.⁸⁷

Additionally, all crime laboratory systems should be monitored by an independent external organization dedicated to ensuring the validity, reliability, and timely analysis of forensic evidence.⁸⁸ Virginia has created two oversight commissions that review actions of the Commonwealth's crime laboratories. For example, the Virginia Scientific Advisory Committee was created and authorized to, upon request, "review analytical work, reports, and conclusions of scientists employed by the Department," and recommend to the Virginia Forensic Science Board "a review process for the Department to use in instances where there has been an allegation of

⁸² See, e.g., VA. DEP'T OF FORENSIC SCI., CONTROLLED SUBSTANCES PROCEDURES MANUAL (Feb. 6, 2012), available at <http://www.dfs.virginia.gov/manuals/controlledSubstances/procedures/221-D100%20Controlled%20Substances%20Procedures%20Manual.pdf>; VA. DEP'T OF FORENSIC SCI., TOXICOLOGY PROCEDURES MANUAL (Sept. 19, 2011), available at <http://www.dfs.virginia.gov/manuals/toxicology/procedures/220-D100%20Toxicology%20Procedures%20Manual.pdf>.

⁸³ See, e.g., VA. DEP'T OF FORENSIC SCI., CONTROLLED SUBSTANCES TRAINING MANUAL (Feb. 2, 2009), available at <http://www.dfs.virginia.gov/manuals/controlledSubstances/training/221-D200%20Controlled%20Substances%20Training%20Manual.pdf>; VA. DEP'T OF FORENSIC SCI., TOXICOLOGY TRAINING MANUAL (Oct. 1, 2010), available at <http://www.dfs.virginia.gov/manuals/toxicology/training/220-D200%20Toxicology%20Training%20Manual.pdf>.

⁸⁴ ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 21, at 13–14.

⁸⁵ ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 21, at 24–25; 2009 NAS REPORT, *supra* note 1, at 199.

⁸⁶ See Janine Arvizu, *Shattering The Myth: Forensic Laboratories*, 21 CHAMPION 18 (2000). Furthermore, while Lead Assessors or Inspectors conducting the requisite site-assessments are usually ASCLD employees, occasionally the Lead Assessor may be a volunteer from the ASCLD/LAB Delegates Assembly, which is also comprised of the ASCLD/LAB-accredited laboratories' directors. *Id.* ("This peer-to-peer composition of ASCLD Inspectors creates the potential for conflicts in the close-knit forensic community. If an Inspector is perceived as being too rough on a laboratory, it could limit his or her career opportunities at sister laboratories. Or consider the fact that representatives from the laboratory that I audit today may show up on my doorstep next month to audit my laboratory."); ASCLD/LAB-*INTERNATIONAL* OVERVIEW, *supra* note 21, at 12–14.

⁸⁷ Arvizu, *supra* note 86, at 26.

⁸⁸ 2009 NAS REPORT, *supra* note 1, at 213.

misidentification or other testing error made by the Department during its examination of evidence.”⁸⁹

Finally, the 2009 *NAS Report* on forensic science also recommended that “[s]cientific and medical assessment conducted in forensic investigations should be independent of law enforcement efforts either to prosecute criminal suspects or even to determine whether a criminal act has indeed been committed.”⁹⁰ Although DFS’s mission is “to protect the public’s safety, support law enforcement and the judiciary, and advance the growth and understanding of forensic science,” and there are statutory requirements on capital defenders and death row inmates to obtain testing from the DFS in certain circumstances, DFS does not regularly serve the Commonwealth’s public defense or capital defense systems.⁹¹ Instead, DFS “serv[es] all state and local law enforcement agencies, medical examiners, and Commonwealth’s Attorneys in Virginia.”⁹² Indigent defense service providers in Virginia—for example, the Capital Defender Offices—routinely send biological evidence to out-of-state private crime laboratories, thereby expending additional state resources on forensic analysis.⁹³ In addition, the Prince William County forensic laboratory is operated by local law enforcement and employs commissioned law enforcement officers to conduct forensic analysis.⁹⁴

ASCLD/LAB Inspection of DFS Central Laboratory

In recent years, incidents have exposed major DFS errors that suggest problems with the Department’s testing and oversight procedures. For example, in the case of Earl Washington, who was sentenced to death and served seventeen years in prison for a rape and murder that evidence later demonstrated he did not commit, the laboratory’s leading DNA analyst incorrectly identified a phantom DNA profile, and the laboratory’s technical reviewer missed the error.⁹⁵ It was not until then-Governor Mark Warner ordered re-testing of DNA evidence over strong protests from the DFS Director that the error was discovered.⁹⁶ Notably, the analyst who committed the error was later promoted to become the Laboratory Director of DFS’s Central Lab.⁹⁷

⁸⁹ VA. CODE ANN. § 9.1-1113(C) (2013).

⁹⁰ 2009 NAS REPORT, *supra* note 1, at 23 (“Administratively, this means that forensic scientists should function independently of law enforcement administrators. The best science is conducted in a scientific setting as opposed to a law enforcement setting.”). *Id.*

⁹¹ VA. DEP’T OF FORENSIC SCI., STRATEGIC PLANNING REPORT (2010–2012), *available at* <http://vaperforms.virginia.gov/agencylevel/stratplan/spreport.cfm?AgencyCode=778&salist=none>.

⁹² *Home*, VA. DEP’T OF FORENSIC SCI., <http://www.dfs.virginia.gov/index.cfm> (last visited Aug. 19, 2012).

⁹³ Interview with Ed Ungvarsky, *supra* note 12.

⁹⁴ *See Forensic Services Bureau*, PRINCE WILLIAM CNTY. POLICE DEP’T, <http://www.pwcgov.org/government/dept/police/careers/Pages/Forensic-Services-Bureau.aspx> (last visited Aug. 19, 2013).

⁹⁵ *Historic Audit of Virginia Crime Lab Errors in Earl Washington Jr.’s Capital Case*, INNOCENCE PROJECT, *available at* http://www.innocenceproject.org/Content/Historic_Audit_of_Virginia_Crime_Lab_Errors_in_Earl_Washington_Jrs_Capital_Case.php (last visited Aug. 19, 2013).

⁹⁶ *Id.*

⁹⁷ *Contact Us*, VA. DEP’T. OF FORENSIC SCI., *available at* <http://www.dfs.virginia.gov/about/contact.cfm> (last visited Aug. 19, 2013).

Medical Examiners

Virginia does not require medical examiner offices to be accredited. However, all four of the district medical examiner offices, including the Office of the Chief Medical Examiner in the Central District, have voluntarily obtained accreditation through the National Association of Medical Examiners (NAME).⁹⁸

NAME accreditation requires all medical examiners to be board-certified pathologists by the American Board of Pathology. In addition Virginia requires its Chief Medical Examiner to be a forensic pathologist licensed to practice medicine and requires its assistant medical examiners to be licensed to practice medicine.⁹⁹

Further, all four medical examiner offices currently employ pathologists who are board-certified by the American Board of Pathology.¹⁰⁰ The OCME also employs forensic pathologists and medicolegal death investigators who are Registered Diplomates by the American Board of Medicolegal Death Investigators (AMBDI).¹⁰¹

Each of Virginia's medical examiner offices appear to have instituted the policies and procedures required by NAME to help ensure the validity, reliability, and timely analysis of forensic evidence. For example, in order to receive accreditation, each of the medical examiner offices must have an effective quality assurance program, maintain all files in both digital and hard copy, ensure that the pathologist who conducts the death investigation maintains the case throughout the legal process for consistency, and maintain policies and procedures for investigations of reportable deaths.¹⁰²

Conclusion

Virginia appears to be in full compliance with Protocol #1. While Virginia does not currently require its crime laboratories and medicolegal death investigation offices to be accredited, the Virginia Assessment Team commends all Virginia crime laboratories and medical examiner offices for obtaining voluntary accreditation. The General Assembly has also created an independent oversight board for crime laboratories and medical examiners.

⁹⁸ *Organization Directory Search Results*, NAT'L ASS'N OF MED. EXAM'RS, <https://netforum.avectra.com/eweb/DynamicPage.aspx?Site=NAME&WebCode=OrgSearch> (for "State/Territory" select "VA"; check "NAME Accredited" box; then follow "Search" hyperlink) (last visited Aug. 19, 2013).

⁹⁹ NAT'L ASS'N OF MED. EXAM'RS, FORENSIC AUTOPSY PERFORMANCE STANDARDS 10, *available at* <https://netforum.avectra.com/temp/ClientImages/NAME/eed6c85d-5871-4da1-aef3-abfc9bb80b92.pdf>; VA. CODE ANN. §§ 32.1-278, 32.1-282 (2013).

¹⁰⁰ Marge Weimer, *We're in good hands: Virginia's Medical Examiner sets nationwide standard*, RVA NEWS (Va.), Nov. 19, 2009, <http://rvanews.com/features/were-in-good-hands-virginia-medical-examiner-sets-nationwide-standard/23281> (last visited Aug. 19, 2013).

¹⁰¹ *Registry Diplomates*, AM. BD. OF MEDICOLEGAL DEATH INVESTIGATORS, <http://www.abmdi.org/?page=registry-database> (under "Search by State" select "Virginia"; then follow "Search" hyperlink) (last visited Aug. 19, 2013).

¹⁰² NAME ACCREDITATION CHECKLIST, *supra* note 64.

B. Protocol #2

Crime laboratories and medical examiner offices should be adequately funded.

Proper funding is needed to ensure that crime laboratories, medical examiner offices, and county coroner offices maintain the equipment needed to develop accurate and reliable results, and to hire and retain a sufficient number of competent forensic scientists and staff to timely analyze forensic evidence.

Sources of Crime Laboratory Funding

Virginia's Department of Forensic Science's primary source of funding is General Assembly appropriations. In 2012, DFS received \$35,816,108 from the General Assembly.¹⁰³ Table 2, below, lists Commonwealth appropriations to DFS since 2007.

Table 2¹⁰⁴

Year	Law Enforcement Scientific Support Services (TOTAL)	Biological Analysis Services	Chemical Analysis Services	Physical Evidence Services	Training and Standards Services	Administrative Services
2007	\$32,369,979	\$10,570,705	\$6,994,181	\$8,267,727	\$573,005	\$5,964,361
2008	\$33,861,990	\$10,285,115	\$6,994,181	\$8,267,727	\$573,005	\$7,741,962
2009	\$37,209,975	\$10,535,958	\$8,177,068	\$9,386,087	\$724,133	\$8,386,729
2010	\$40,088,957	\$12,056,253	\$8,375,043	\$9,386,087	\$724,133	\$9,547,441
2011	\$35,816,108	\$9,526,820	\$8,396,007	\$6,348,800	\$1,208,506	\$10,335,975
2012	\$35,758,586	\$9,526,820	\$8,338,833	\$6,348,800	\$1,208,506	\$10,335,627
2013	\$38,041,713	\$10,554,982	\$10,863,352	\$7,136,946	\$1,501,148	\$7,985,285
2014	\$37,757,875	\$10,563,330	\$10,871,931	\$6,836,757	\$1,501,148	\$7,984,709

In addition to state appropriations, federal grant programs provide funding to Virginia's DFS laboratories. Virginia has received funds from the NIJ's *Paul Coverdell Forensic Sciences Improvement Grant Program (Coverdell)* for distribution to DFS and the Office of the Chief Medical Examiner (OCME).¹⁰⁵ *Coverdell* is a federal program that seeks to improve the quality of, and reduce backlogs in, forensic evidence analysis.¹⁰⁶ In 2011, for example, Virginia received \$486,154 under *Coverdell*, which was used by DFS for "discipline specific training, software, equipment, and instrumentation to improve the quality and timeliness of forensic

¹⁰³ H.B. 1500, Item 396, 2010 Sess. (Va. 2010), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?111+bud+21-396+pdf>.

¹⁰⁴ H.B. 1500, Item 405, 2012 Sess. (Va. 2012), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?122+bud+21-405+pdf>; H.B. 1500, Item 396, 2010 Sess. (Va. 2010), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?111+bud+21-396+pdf>; H.B. 1500, Item 408, 2008 Sess. (Va. 2008), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?091+bud+21-408+pdf>; H.B. 1500, Item 402, 2006 Sess. (Va. 2006), available at <http://leg1.state.va.us/cgi-bin/legp504.exe?071+bud+21-402+pdf>.

¹⁰⁵ *FY2011 Paul Coverdell Forensic Science Improvement Grants Program Abstracts*, NAT'L INST. OF JUSTICE, available at <http://nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/fy2011-paul-coverdell-forensic-science-improvement-grant-abstracts.pdf> (last visited Aug. 19, 2013).

¹⁰⁶ 42 U.S.C. § 3797j; see also *Coverdell Forensic Science Improvement Grants Program*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/topics/forensics/lab-operations/capacity/nfsia/welcome.htm> (last visited Aug. 19, 2013); *Fiscal Year 2010 Report on the Paul Coverdell Forensic Science Improvement Grants Program*, NAT'L INST. OF JUSTICE, <http://www.nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2010-report.htm> (last visited Aug. 19, 2013).

services,” and the OCME “to increase the number of qualified trained forensic pathologists in Virginia and the United States to improve the quality, thoroughness, and timeliness of death investigation, . . . forensic autopsies, and evidence collection.”¹⁰⁷ Between 2006 and 2012, Virginia received over \$2.4 million in grants under the *Coverdell* program.¹⁰⁸

NIJ also provided the Commonwealth of Virginia with \$1,490,250 in 2004 under the Virginia Forensic Laboratory Improvement Program.¹⁰⁹ The Chesterfield County Police Department was also given \$86,315 by NIJ in 2008 to hire a forensics logistics technician, to provide training and continuing education, and to purchase two digital cameras.¹¹⁰ In 2006, the Fairfax County Police Department was awarded \$94,435 of federal funds “for computer equipment upgrades, software acquisition, and enhanced training opportunities.”¹¹¹ Federal grants for DNA backlog reduction have also been awarded to Virginia, discussed in Chapter Three of this Report.

Adequacy of Crime Laboratory Funding

More than twenty years ago, Virginia had 160,000 blood samples awaiting analysis.¹¹² Since then, the state’s DNA database has grown from about 26,000 samples to more than 300,000, and the state now averages about 700 hits a year against the database, according to state records.¹¹³ According to a report in 2009, Virginia, which was one of the first states to mandate arrestees to provide DNA samples, had “no arrestee sample backlog” due to DFS’s ability to “handle samples from wide swaths of the population where the arrestee samples are prioritized so they can be analyzed before a suspect is released.”¹¹⁴ As of 2012, there is reportedly no backlog of data bank samples.¹¹⁵

¹⁰⁷ *FY2011 Paul Coverdell Forensic Science Improvement Grants Program Abstracts*, *supra* note 105, at 72.

¹⁰⁸ The total grant funding from 2006–2012 was \$2,491,816.00. See *Backlog Reduction Funding Awards, 2004–2010*, NAT’L INST. OF JUSTICE, <http://nij.gov/nij/topics/forensics/lab-operations/evidence-backlogs/backlog-reduction-funding.htm> (last visited Aug 19, 2013); *FY2011 Paul Coverdell Forensic Science Improvement Grants Program Abstracts*, *supra* note 105 at 72; *FY2012 Paul Coverdell Forensic Science Improvement Grants Program Abstracts*, NAT’L INST. OF JUSTICE 44, available at <http://nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/fy2012-paul-coverdell-forensic-science-improvement-grant-abstracts.pdf>.

¹⁰⁹ *Fiscal Year 2004 Awards*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/nij/funding/awards/2004.htm> (last visited Aug. 19, 2013).

¹¹⁰ *FY2008 Coverdell Report to Congress—Funding Table*, NAT’L INST. OF JUSTICE, available at <http://nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/2008-funding-table.xls>.

¹¹¹ *FY2006 Coverdell Report to Congress—Funding Table*, NAT’L INST. OF JUSTICE, available at <http://nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/fy06-coverdell-funding.xls>.

¹¹² Dave Altamari & Matthew Kauffman, *Evidence on Hold*, HARTFORD COURANT (Conn.), Jan. 30, 2010, http://articles.courant.com/2010-01-30/news/hc-connecticut-dna-crime-lab-0130_1_dna-samples-dna-evidence-databank/2 (last visited Aug. 19, 2013).

¹¹³ *Id.*

¹¹⁴ Ben Protest & Emily Witt, *Law Enforcement Agencies Still Struggling to Reduce DNA Backlog*, *DNA Tracker: Crime Labs and Their DNA Backlog*, PROPUBLICA (Sept. 8, 2009), <http://www.propublica.org/special/dna-tracker-crime-labs-and-their-dna-backlog-724> (last visited Aug. 19, 2013).

¹¹⁵ *Id.* *Forensic DNA Backlog Reduction Program: Fiscal Year 2012 Awards and Abstracts*, U.S. DEP’T OF JUSTICE, 85 (2012), available at <http://www.nij.gov/nij/topics/forensics/lab-operations/evidence-backlogs/dna-backlog-reduction-abstracts-fy12.pdf>.

Since DFS laboratories have eliminated the backlog of DNA samples and are no longer seeking to increase the capacity of the laboratory system, it appears that the funding of the Commonwealth's DFS laboratories conducting biological forensic analysis is adequate.

Forensic toxicologists from the DFS Toxicology Section also assist the Commonwealth's medical examiners in the determination of cause and manner of death, including by "advis[ing] the Medical Examiners and trial courts on the significance of the substance in causing or contributing to the death."¹¹⁶ While there is no backlog of DNA samples, there is backlog at DFS laboratories comprised mostly of toxicology and drug cases.¹¹⁷ Virginia employs only four toxicologists and one trainee within DFS.¹¹⁸ When the U.S. Supreme Court ruled that toxicologists may be subpoenaed by defendants,¹¹⁹ toxicologists began spending more time in court and the backlog at DFS grew for cases involving drugs or alcohol.¹²⁰ New policies of consolidating days of testimony have helped relieve some of the burden, but the backlog of toxicology cases has "started to creep up again."¹²¹ Thus, it appears that funding for the toxicology sections of the Commonwealth's DFS laboratories is inadequate.

Medical Examiner Funding

Sources of Funding

The Office of the Chief Medical Examiner (OCME) is primarily supported by Virginia General Assembly biennial appropriations. Table 3, below, sets out the appropriations for fiscal years 2008 through 2014 for the OCME, listed by medical examiner and anatomical services.

Table 3¹²²

Virginia General Appropriations for OCME, in dollars			
Year	Anatomical Services	Medical Examiner Services	Total
2008	\$196,707	\$7,325,064	\$7,521,771
2009	\$210,785	\$8,022,571	\$8,233,356
2010	\$210,785	\$8,681,022	\$8,891,807
2011	\$450,000	\$9,536,075	\$9,986,075
2012	\$450,000	\$9,833,555	\$10,283,555
2013	\$451,431	\$9,977,487	\$10,428,918
2014	\$451,431	\$9,977,487	\$10,428,918

¹¹⁶ *Forensic Toxicology*, VA. DEP'T OF FORENSIC SCI., <http://www.dfs.virginia.gov/services/forensicToxicology/index.cfm> (last visited Aug. 19, 2013).

¹¹⁷ See Dena Potter & Larry O'Dell, *Va. Forensic Examiners Spending More Time in Court*, AP ALERT, Aug. 12, 2009; *DFS Update: Managing the Drug Case Workload*, Presentation by Linda Jackson, Chemistry Program Manager, Va. Dep't of Forensic Sci., to Va. State Crime Commission (Oct. 3, 2012), *available at* http://vscc.virginia.gov/documents/2012/dfs_update.pdf.

¹¹⁸ Potter and O'Dell, *supra* note 117.

¹¹⁹ See *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (2009).

¹²⁰ Potter and O'Dell, *supra* note 117.

¹²¹ Deborah Elkins, *Many Subpoenas, Few Court Appearances, Virginia Department of Forensic Science Says*, VA. LAWYERS WEEKLY, Oct. 5, 2012.

¹²² H.B. 1500, Item 291, 2012 Sess. (Va. 2012), *available at* <http://lis.virginia.gov/cgi-bin/legp604.exe?122+bud+21-291+pdf>; H.B. 1500, Item 282, 2010 Sess. (Va. 2010), *available at* <http://lis.virginia.gov/cgi-bin/legp604.exe?111+bud+21-282+pdf>; H.B. 1500, Item 291, 2008 Sess. (Va. 2008), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?091+bud+21-291+pdf>; H.B. 1500, Item 287, 2006 Sess. (Va. 2006), *available at* <http://leg1.state.va.us/cgi-bin/legp504.exe?071+bud+21-287+pdf>.

In addition, the 2012–2014 budget contemplates additional funds for capital projects that support the expansion of the Western Virginia Forensic Laboratory and Office of the Chief Medical Examiner Facility.¹²³

The OCME is also supported by funding from NIJ, including funds from the *Coverdell* Grant Program described above.¹²⁴ For example, the 2012 *Coverdell* Grant Program provided \$185,297 of funding to both DFS and the OCME, which used the funding “to improve the quality, thoroughness, and timeliness of death investigation by increasing the number of qualified trained forensic pathologists in Virginia and the United States. This also improves the competent performance of forensic autopsies and evidence collection.”¹²⁵

In addition, in 2008, the Virginia Institute for Forensic Science received \$981,178 from the Bureau of Justice Statistics to create a Forensic Pathology Fellowship Recruitment and Training Program that provided education and training on forensics and DNA.¹²⁶ In 2007, NIJ provided \$213,697 to the Virginia Institute of Forensic Science and Medicine to develop and implement web-based training for Virginia’s medicolegal death investigators.¹²⁷ In 2003, the Virginia Department of Criminal Justice Services, the entity which formerly housed OCME and DFS, received \$88,691 of federal funds to establish two fellowships to increase the number of qualified forensic examiners and pathologists available to perform medicolegal death investigations.¹²⁸

Adequacy of Funding

In 2011, the OCME investigated 5,670 deaths, as illustrated in Table 4, below.¹²⁹

Table 4

	Central	Northern	Tidewater	Western	Total
A. Deaths reported	2947	1785	1564	1966	8262
B. Cases accepted	1626	1287	1263	1494	5670
Retrospectives (handled separately)	14	12	28	92	146
C. Manner of death:					
Accident	667	555	467	652	2341
Homicide	116	38	113	78	345
Natural	520	384	424	428	1756
Suicide	297	271	207	292	1067
Undetermined	26	39	52	44	161

¹²³ H.B. 1500, Item C-39.05, 2012 Sess. (Va. 2012), available at <http://lis.virginia.gov/cgi-bin/legp604.exe?122+bud+22-39.05+pdf>.

¹²⁴ See *supra* notes 105–107 and accompanying text.

¹²⁵ *FY2012 Paul Coverdell Forensic Science Improvement Grants Program Abstracts*, NAT’L INST. OF JUSTICE, 44-45, available at <http://nij.gov/nij/topics/forensics/lab-operations/capacity/nfsia/fy2012-paul-coverdell-forensic-science-improvement-grant-abstracts.pdf>.

¹²⁶ *Fiscal Year 2008 Awards*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/funding/awards/2008-table.htm> (last visited Aug. 19, 2013).

¹²⁷ *Fiscal Year 2007 Awards*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/nij/funding/awards/2007.htm> (last visited Aug. 19, 2013).

¹²⁸ *Fiscal Year 2003 Awards*, NAT’L INST. OF JUSTICE, <http://www.nij.gov/nij/funding/awards/2003.htm> (last visited Aug. 19, 2013).

¹²⁹ OCME 2011 ANNUAL REPORT, *supra* note 42, at 20.

The OCME appears to have a backlog of cases due to the previously discussed delays in toxicology reports from DFS.¹³⁰ While the OCME appears to handle cases quickly, the offices must often wait for test results prior to determining a cause of death.¹³¹ However, since the OCME's backlog is not due to inadequate internal staffing or equipment, it appears that the funding for the OCME is adequate.

Conclusion

It appears that Virginia is in partial compliance with Protocol #2. While the funding for the *biological* section of DFS and for OCME appears adequate, there is still a backlog of cases for the OCME due to demands placed on the toxicology section of DFS. This is due to a shortage of DFS personnel needed to ensure timely toxicology reports while complying with subpoenas issued by defendants.

Recommendation

Virginia should increase DFS funding in order to employ additional qualified toxicologists. This would reduce the backlog of cases and decrease wait time for medical examiners to determine cause of death.

¹³⁰ See *supra* notes 116–121 and accompanying text.

¹³¹ Potter and O'Dell, *supra* note 117.

CHAPTER FIVE

PROSECUTION

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The prosecutor plays a critical role in the criminal justice system. Although the prosecutor operates within the adversarial system, the prosecutor's obligation is to protect the innocent as well as to convict the guilty, to guard the rights of the accused, and to enforce the rights of the public.

Because prosecutors are decision-makers on a broad policy level and preside over a wide range of cases, they are sometimes described as "administrators of justice". Each prosecutor has the responsibility for deciding whether to bring charges and, if so, what charges to bring against the accused. The prosecutor evaluates the quality of the evidence against the defendant and must also decide whether to prosecute or dismiss charges, or to take other appropriate actions in the interest of justice. Moreover, in cases in which capital punishment can be sought, prosecutors have enormous discretion in deciding whether or not to seek the death penalty. The character, quality, and efficiency of the whole system are shaped in great measure by the manner in which the prosecutor exercises his/her broad discretionary powers. A prosecutor exercising careful judgment serves as one of the most important checks against unfairness in death penalty cases.

Prosecutors also have an affirmative duty under the U.S. Constitution to disclose exculpatory and mitigating evidence to the defendant, including additional materials as required by state law.¹ These rules reflect the dual responsibilities of the prosecutor: while s/he must prosecute guilty criminals, s/he also has a duty to ensure that the defendant is treated fairly. A prosecutor must use careful judgment in determining what evidence must be disclosed or risk convicting the innocent or execution of those underserving of a death sentence under the law.

Instances of prosecutorial negligence, error, and misconduct can affect innocent lives and society at large. Nationwide, between 1970 and 2004, individual judges and appellate court panels cited prosecutorial misconduct as a factor when dismissing charges at trial, reversing convictions, or reducing sentences in at least 2,012 criminal cases, including both death penalty and non-death penalty cases.² In addition, lack of proper training, inadequate supervision, insufficient resources, and excessive workload affect the ability of prosecutors to carry out their duties and responsibilities.

Solutions to the problems facing prosecutors and the causes of wrongful convictions include adequate funding to prosecutor offices, adoption of standards to ensure manageable workloads for prosecutors, and requiring that prosecutors scrutinize cases that rely on eyewitness identifications, confessions, or testimony from witnesses who receive a benefit from the police or

¹ Brady v. Maryland, 373 U.S. 83, 87 (1963).

² STEVE WEINBERG, CTR. FOR PUB. INTEGRITY, BREAKING THE RULES: WHO SUFFERS WHEN A PROSECUTOR IS CITED FOR MISCONDUCT? (2003), *available at* <http://www.publicintegrity.org/2003/06/26/5517/breaking-rules>. Such statistics, however, underrepresent the actual extent of prosecutorial misconduct and error due to the doctrines of procedural default and harmless error.

prosecution. There must also be meaningful sanctions against prosecutors who engage in misconduct.³

³ See *Imbler v. Pachtman*, 424 U.S. 409, 428–29 (1976) (“We emphasize that the immunity of prosecutors from liability in suits under [section 1983] does not leave the public powerless to deter misconduct or to punish that which occurs . . . [a] prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”).

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

A. *Prosecution Offices*

1. Commonwealth's Attorneys

Each Virginia county and independent city elects its own Commonwealth's Attorney, who serves four-year terms.⁴ The duties of the Commonwealth's Attorney and his/her assistants include prosecuting felonies, misdemeanors, and certain other violations that occur in his/her jurisdiction.⁵ In general, Commonwealth's Attorneys have significant discretion to decide whether to charge a suspect with a crime, which offense to charge, and when to file charges.⁶

The Virginia General Assembly has also established the Commonwealth's Attorneys' Services Council (CASC) "to ensure the upgrading of criminal justice administration by providing and coordinating training, education and services for attorneys for the Commonwealth."⁷ CASC offers several training programs to Virginia's Commonwealth's Attorneys every year.⁸

2. Virginia Attorney General

The Virginia Office of the Attorney General represents the Commonwealth on capital criminal appeals and during habeas corpus proceedings, as well as other post-conviction litigation related to death penalty cases.⁹

B. *The Virginia Rules of Professional Conduct*

The Virginia State Bar, an administrative agency of the Supreme Court of Virginia, has established the Virginia Rules of Professional Conduct to address the professional and ethical responsibilities of all attorneys, including prosecutors.¹⁰ The comments to the Rules state that "[a] prosecutor has the responsibility of a minister of justice and not simply that of an advocate. This responsibility carries with it specific obligations to see that the defendant is accorded procedural justice and that guilt is decided upon the basis of sufficient evidence."¹¹

⁴ VA. CODE ANN. § 15.2-1626 (2013).

⁵ VA. CODE ANN. § 15.2-1627(B) (2013).

⁶ See *In re Horan*, 634 S.E.2d 675, 679 (Va. 2006).

⁷ VA. CODE ANN. § 2.2-2617(A) (2013).

⁸ *Training Programs, COMMONWEALTH'S ATT'YS' SERVS. COUNCIL*, <http://www.cas.state.va.us/trainingprograms.htm> (last visited Aug. 8, 2013).

⁹ *Responsibilities, ATT'Y GEN. OF VA.*, <http://www.oag.state.va.us/About%20the%20Office/Responsibilities.html> (last visited Aug. 8, 2013).

¹⁰ See generally VA. R. PROF'L CONDUCT. See also *Rules and Regulations*, VA. STATE BAR, <http://www.vsb.org/pro-guidelines/index.php> (last visited Aug. 8, 2013).

¹¹ VA. R. PROF'L CONDUCT 3.8 cmt. 1.

C. Other Rules and Laws Governing Prosecutors' Responsibilities and Conduct

1. Capital Charging Decisions

A Virginia prosecutor may seek the death penalty if s/he has probable cause to believe that the defendant committed capital murder.¹² The Supreme Court of Virginia has held that “[t]he discretion[ary authority] of the Commonwealth’s Attorney to choose the offense for which a defendant will be charged includes the discretion to decide whether to seek the death penalty when capital murder is the charged offense.”¹³ Over fifteen types of “willful, deliberate, and premeditated killing[s]” are defined as capital murder under Virginia statutory law.¹⁴ While a prosecutor may have good faith or probable cause to believe that the defendant or the offense meets an aggravator, there is no requirement that the prosecutor make a pretrial showing that the evidence supports a finding of an aggravating circumstance.

2. Discovery Obligations

a. Constitutional Discovery Obligations

Prosecutors have a constitutional duty to disclose to the defendant all exculpatory evidence in the state’s possession “where the evidence is material either to guilt or to [level of] punishment, irrespective of the good faith or bad faith of the prosecution.”¹⁵ This includes all material exculpatory, mitigating, and impeachment evidence, as well as “favorable evidence known to others acting on the government’s behalf in the case,” such as law enforcement officers.¹⁶ Evidence is considered material if there is a “reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”¹⁷

b. Discovery Rules Under Virginia Law

Criminal discovery rules in felony cases are governed by Virginia Supreme Court Rule 3A:11.¹⁸ The defendant, upon motion to the trial court, is entitled to

inspect and copy or photograph any relevant (i) written or recorded statements or confessions made by the accused . . . or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to the attorney for the Commonwealth, and (ii) written reports of autopsies, [other forensic and scientific tests], and written reports of a physical or mental examination of the accused or the alleged victim made in connection with

¹² See VA. CODE ANN. § 18.2-31 (2013); VA. R. PROF’L CONDUCT 3.8(a).

¹³ *In re Horan*, 634 S.E.2d 675, 679 (Va. 2006).

¹⁴ VA. CODE ANN. § 18.2-31 (2013).

¹⁵ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹⁶ *Kyles v. Whitley*, 514 U.S. 419, 421 (1995); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

¹⁷ *United States v. Bagley*, 473 U.S. 667, 682 (1985).

¹⁸ VA. SUP. CT. R. 3A:11(a). These rules also govern discovery for “any misdemeanor brought on direct indictment.” *Id.*

the particular case . . . that are known by the Commonwealth's attorney to be within the possession, custody or control of the Commonwealth.¹⁹

The defendant is further entitled to “inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof,” possessed by the Commonwealth if it is shown “that the items sought may be material to the preparation of [the] defense and that the request is reasonable.”²⁰ However, the Rule expressly prohibits discovery of “statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case.”²¹ The defendant's discovery motions must be made at least ten days before trial.²²

Upon motion of the Commonwealth, the prosecution is likewise entitled to discovery of forensic and scientific test results in the possession of the defense, provided that the defense “intends to proffer or introduce [it] into evidence at trial or sentencing” and discovery of such materials in the prosecution's possession was provided to the defense.²³ If the defendant intends to present an alibi defense, s/he must “disclose the place at which he claims to have been at the time of the commission of the alleged offense.”²⁴ Finally, if the defendant intends to present an insanity defense, s/he must disclose “any written reports of physical or mental examination of the [defendant] made in connection with the particular case.”²⁵

D. Investigation and Disciplining of Prosecutorial Misconduct

In accordance with the Virginia Rules of Professional Conduct, the Virginia State Bar investigates and disciplines all attorneys, including prosecutors, for alleged professional misconduct.²⁶

The disciplinary process begins when an individual files a complaint with the Virginia State Bar.²⁷ A Virginia State Bar attorney, known as bar counsel, then investigates the claim.²⁸ If bar counsel determines that the complaint alleges credible evidence of misconduct that “could reasonably be expected to support [the allegation] under a clear and convincing evidentiary standard,” bar counsel will refer the complaint to the District Committee, composed of lawyers and non-lawyers, for further investigation.²⁹ A subcommittee of the District Committee will then

¹⁹ VA. SUP. CT. R. 3A:11(b)(1).

²⁰ VA. SUP. CT. R. 3A:11(b)(2).

²¹ *Id.*

²² VA. SUP. CT. R. 3A:11(d).

²³ VA. SUP. CT. R. 3A:11(c)(1).

²⁴ VA. SUP. CT. R. 3A:11(c)(2).

²⁵ VA. SUP. CT. R. 3A:11(c)(3).

²⁶ See VA. R. PROF'L CONDUCT 9 (noting that the Council of the Virginia State Bar is empowered “to regulate the legal profession”). This discussion constitutes only a basic overview of Virginia's disciplinary procedures. The Virginia State Bar's website includes a more detailed, systematic guide to attorney discipline procedures in Virginia. See *Guide to Lawyer Discipline*, VA. STATE BAR, <http://www.vsb.org/site/regulation/lawyer-discipline> (last visited Aug. 18, 2013).

²⁷ VA. R. PROF'L CONDUCT 13-10. See also *Guide to Lawyer Discipline*, *supra* note 26.

²⁸ VA. R. PROF'L CONDUCT 13-10(A). See also *Guide to Lawyer Discipline*, *supra* note 26.

²⁹ VA. R. PROF'L CONDUCT 13-10(E)–(F). See also *Guide to Lawyer Discipline*, *supra* note 26.

decide if, based on the evidence, the complaint should be dismissed or referred to the District Committee for a hearing.³⁰ If, following the hearing, the District Committee finds that the attorney committed misconduct by clear and convincing evidence, it may sanction the attorney with a private admonition or public reprimand.³¹ Serious misconduct will be referred to the Disciplinary Board, which has the power to suspend an attorney's license.³²

³⁰ VA. R. PROF'L CONDUCT 13-15. *See also Guide to Lawyer Discipline, supra* note 26.

³¹ VA. R. PROF'L CONDUCT 13-16(X). *See also Guide to Lawyer Discipline, supra* note 26.

³² VA. R. PROF'L CONDUCT 13-6. *See also Guide to Lawyer Discipline, supra* note 26.

II. ANALYSIS

The Virginia Assessment Team faced limitations in obtaining information related to the analysis contained under this Chapter. The Assessment Team submitted a survey to ten Commonwealth's Attorney offices, which included the jurisdictions that have imposed six or more death sentences in Virginia since the reinstatement of capital punishment.³³ The survey requested aggregate data on the application of the death penalty in the prosecutor's jurisdiction, as well as information on qualification and training requirements of prosecutors who handle capital cases, funding and budget limitations, and capital charging and discovery practices.³⁴

However, the Virginia Association of Commonwealth's Attorneys (VACA), "the voluntary association of Virginia prosecutors representing their interests in political and social matters," responded in a letter stating that VACA, "as an organization, respectfully declines to participate in the assessment."³⁵ VACA's Board of Directors believes that "further study by, or on behalf of, the American Bar Association is not warranted and participation in the assessment is not in the best interest of VACA or those [it] serve[s]." While VACA stated that individual Commonwealth's Attorneys were free to respond to the Assessment Team's survey, the Assessment Team has received only one completed survey.³⁶ The letter from VACA is reproduced in the Appendix to this Report.

The Assessment Team has relied on publicly available information on the training, discovery and charging practices, and discipline of Virginia's prosecutors, including statutory and case law, media reports, and studies conducted by other entities. However, because the Assessment Team could not obtain sufficient information from individual Commonwealth's Attorneys, it was unable determine statewide compliance with some of the Protocols.

Below are the ABA Benchmarks, or "Protocols," used by the Assessment Team in its evaluation of Virginia's death penalty system. Each Protocol is followed by the Assessment Team's analysis of the Commonwealth's compliance with the Protocol and, where appropriate, the Assessment Team's recommendations for reform.

A. Protocol #1

Each prosecutor's office should have written policies governing the exercise of prosecutorial discretion to ensure the fair, efficient, and effective enforcement of criminal law.

³³ Surveys were submitted to the Commonwealth's Attorney Offices of the cities of Danville, Richmond, Roanoke, and Virginia Beach, as well as of the counties of Arlington, Chesterfield, Henrico, Norfolk, Pittsylvania, and Prince William. A survey was also submitted to the Commonwealth's Attorneys' Services Council. A copy of the survey is reproduced in the Appendix to this Report, *infra*.

³⁴ Prosecution Survey, sent from John Douglass, Chair, Va. Death Penalty Assessment Team, to Va. Commonwealth's Att'ys (Feb. 21, 2012), *infra* Appendix.

³⁵ Letter from David N. Grimes, President, Va. Ass'n of Commonwealth's Att'ys, to John Douglass, Chair, Va. Death Penalty Assessment Team (Apr. 23, 2012), *infra* Appendix.

³⁶ *See id.* The Richmond Commonwealth's Attorney submitted a completed survey to the Assessment Team. RICHMOND COMMONWEALTH'S ATTORNEY SURVEY (Apr. 1, 2013) (on file with author). The Richmond Commonwealth's Attorney, Michael Herring, is a member of the Virginia Death Penalty Assessment Team.

Statutory Limitations on the Prosecutor's Decision to Seek the Death Penalty³⁷

A crime constitutes capital murder under Virginia law if the defendant committed a “willful, deliberate, and premeditated killing” in one of several statutorily defined circumstances.³⁸ Since the reinstatement of the death penalty in Virginia, the number of circumstances, or predicate offenses, for which the death penalty can be sought has expanded from three in 1975 to over fifteen in 2011.³⁹ The Supreme Court of Virginia has held that a Commonwealth's Attorney has complete discretion to “decide whether to seek the death penalty when capital murder is the charged offense.”⁴⁰ Virginia has not established any other laws, rules, or guidelines regarding

³⁷ Given the wide array of instances in which a prosecutor may exercise his/her discretion, the Assessment Team's analysis contained under Protocol #1 is limited to a review of the exercise of discretion in seeking the death penalty.

³⁸ VA. CODE ANN. § 18.2-31 (2013). Capital murder is the “willful, deliberate, and premeditated killing” of

- (1) any person in the commission of abduction, 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) any person by another for hire;
- (3) any person by a prisoner confined in a state or local correctional facility, or while in the custody of an employee thereof;
- (4) any person in the commission of robbery or attempted robbery;
- (5) any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration;
- (6) a law-enforcement officer, a fire marshal, or a deputy or an assistant fire marshal, when such fire marshal or deputy or assistant fire marshal has police powers, an auxiliary police officer, an auxiliary deputy, 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) more than one person as a part of the same act or transaction;
- (8) more than one person within a three-year period;
- (9) any person in the commission of or attempted commission of a violation of Virginia Code section 18.2-248 (“Manufacturing, selling, giving, distributing, or possessing with intent to manufacture, sell, give, or distribute a controlled substance or an imitation controlled substance prohibited”) 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) any person by another pursuant to the direction or order of one who is engaged in a continuing criminal enterprise;
- (11) 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;
- (12) a person under the age of fourteen by a person age twenty-one or older;
- (13) any person by another in the commission of or attempted commission of an act of terrorism;
- (14) a justice of the Supreme Court, a judge of the Court of Appeals, a judge of a circuit court or district court, a retired judge sitting by designation or under temporary recall, or a substitute judge, when he killing is for the purpose of interfering with his official duties as a judge; and/or
- (15) any witness in a criminal case after a subpoena has been issued for such witness by the court, the clerk, or an attorney, when the killing is for the purpose of interfering with the person's duties in such case.

Id.

³⁹ See *id.*; see also VA. CODE § 18.2-31 (1975) (codifying 1975 Va. Acts, ch. 14, 15). These included whether the first-degree murder was committed in conjunction with (1) abduction with the intent to extort money or pecuniary benefit; (2) murder for hire; (3) the murder was committed by an inmate in a penal institution. VA. CODE § 18.2-31 (1975).

⁴⁰ Commonwealth v. Horan, 634 S.E.2d 675, 679 (Va. 2006). In *Horan*, the Supreme Court of Virginia held that a trial court interfered with the discretion of the Commonwealth's Attorney by granting a pretrial motion precluding the Commonwealth from seeking the death penalty against a foreign national. *Id.* at 676, 679–80. The trial court had concluded that the Commonwealth had violated the defendant's rights under the Vienna Convention on

the exercise of the prosecutor's discretion to seek the death penalty. Importantly, after a capital indictment, a Commonwealth's Attorney may determine—in his/her discretion—that seeking the death penalty is not appropriate in a particular case. However, existing Virginia law does not explicitly provide for such circumstances and may even permit a court to impose a death sentence where the prosecutor does not seek it.⁴¹

As noted in the Joint Legislative Audit and Review Commission of the Virginia General Assembly's 2002 report on the Virginia death penalty (JLARC Report), this framework grants "Commonwealth's Attorneys . . . a considerable amount of authority in determining whether to seek the death penalty in homicide cases that meet the statutory requirements of capital murder."⁴² Moreover, the scope of capital-eligible homicides is itself quite broad. The statute lists fifteen separate death penalty-eligible crimes, most of which include additional offenses within each delineated capital-eligible offense.⁴³

Furthermore, it appears that Virginia's two aggravating factors—one of which must be found in order for a jury to sentence a defendant to death—offer little guidance or clarity to prosecutors in determining when to seek the death penalty. The aggravating circumstances present the jury with subjective standards for determining whether the defendant is a "continuing threat to society" or committed the murder in an "outrageously or wantonly vile" manner.⁴⁴ Given the wide latitude afforded to Virginia's prosecutors in determining whether to seek the death penalty, it is especially important for them to exercise their discretion in a consistent and fair manner in all death penalty-eligible cases.

Policies and Practices of Individual Commonwealth's Attorney Offices

The Virginia Assessment Team was unable to obtain information on charging practices directly from Virginia's various Commonwealth's Attorney offices.⁴⁵ The Assessment Team did, however, review publicly-available information regarding the exercise of prosecutorial discretion in capital cases by some Commonwealth's Attorneys. Based on the available information reviewed by the Assessment Team, it appears that standards and policies governing the decision to seek the death penalty vary greatly among Virginia's prosecutors.

A 2003 report by the American Civil Liberties Union of Virginia (ACLU Report) stated that it was "unable to find any" Commonwealth's Attorney offices that had "implemented local

Consular Relations and Optional Protocol on Disputes, and that "the preclusion of the death penalty was an appropriate remedy for the violation of [these] rights." *Id.* at 676.

⁴¹ *Dubois v. Commonwealth*, 435 S.E.2d 636, 639 (Va. 1993) (finding that while "the Commonwealth's agreement not to seek the death penalty was a factor that the trial court was obliged to consider in determining Dubois's sentence, there is no dispute that the trial court was in no way bound to accept the Commonwealth's recommendation").

⁴² J. LEGIS. AUDIT & REV. COMM'N OF THE VA. GEN. ASSEMB., REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT 28 (2002), available at <http://jlarc.virginia.gov/reports/Rpt274.pdf> [hereinafter JLARC REPORT].

⁴³ VA. CODE ANN. § 18.2-31 (2013). *See, e.g.*, VA. CODE ANN. § 18.2-31(1) (2013) (providing that a capital offense includes the killing of "any person in the commission of abduction, 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." (emphasis added)).

⁴⁴ VA. CODE ANN. § 19.2-264.4(C) (2013).

⁴⁵ *See supra* notes 34–36 and accompanying text.

standards” on the exercise of discretion in death penalty-eligible cases.⁴⁶ At least one Commonwealth’s Attorney’s office appears to have enacted standards since publication of the 2003 report.⁴⁷

One Commonwealth’s Attorney has established a special “panel of staff members to consider, ‘in a deliberate way,’ whether to file capital charges in future cases.”⁴⁸ After the case is reviewed by this panel, the Commonwealth’s Attorney must be convinced of the defendant’s “unquestioned guilt” before seeking the death penalty.⁴⁹ The Commonwealth’s Attorney stated that she also considers the “heinousness of the crime and the background of the suspect” in making the charging decision.⁵⁰ By contrast, another Commonwealth’s Attorney was quoted as stating that he typically exercises his discretion in favor of seeking a death sentence, stating that he “usually charge[s] capital murder if it qualifies,” and that in many instances, he “charge[s] capital murder even if it’s questionable as whether or not it fits in that category.”⁵¹

In response to the Assessment Team’s survey, the Richmond Commonwealth’s Attorney stated that, “as a practical matter,” his office “will not seek the death penalty if the crime involves fewer than 2 adults, [or] unless a child or adult victim was killed in an exceptionally vile and heinous manner.”⁵² The Commonwealth’s Attorney also stated that

our decision to seek the death penalty turns on the facts and evidence (aggravators and mitigators). We advise families of our decisions, and we certainly listen to the families when they offer opinions on the sentence. But we are careful to inform them that the ultimate decision on whether to seek the death penalty is made by...the Commonwealth’s Attorney.⁵³

Furthermore, if defense counsel seeks consultation, the Richmond Commonwealth’s Attorney “whenever possible,” will “offer an alternative to seeking the death penalty.”⁵⁴ The office does not possess any written policy governing the capital charging decision-making process.⁵⁵

Disparity in Virginia’s Capital Charging Practices

Because of the discretion granted to Virginia’s Commonwealth’s Attorneys in deciding when to seek a death sentence, there is considerable geographic disparity in Virginia with respect to death penalty-eligible cases. The JLARC Report found that “[l]ocation, more than any other factor, impacted the probability that prosecutors would actually seek the death penalty for capital

⁴⁶ AM. CIVIL LIBERTIES UNION OF VA. ET AL., *BROKEN JUSTICE: THE DEATH PENALTY IN VIRGINIA* 8 (2003), available at http://www.aclu.org/files/FilesPDFs/broken_justice.pdf [hereinafter *BROKEN JUSTICE*].

⁴⁷ Scott McCaffrey, *Commonwealth’s Attorney to Tread Carefully on Capital Cases*, ARLINGTON SUN GAZETTE (Va.), Aug. 16, 2012.

⁴⁸ *Id.* (discussing Arlington County).

⁴⁹ *Id.*

⁵⁰ *Id.*

⁵¹ Frank Green, *‘Like They’re God’: Prosecutorial Discretion Called Awesome Power*, RICHMOND TIMES-DISPATCH, Feb. 5, 1998, at A1 (discussing Prince William County).

⁵² RICHMOND COMMONWEALTH’S ATTORNEY SURVEY, *supra* note 36, at 4.

⁵³ *Id.* at 5.

⁵⁴ *Id.*

⁵⁵ *Id.*

murder cases,” even though the report observed “no major differences in the types of capital cases that occur” in different parts of Virginia.⁵⁶ In fact, “[c]ases 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” depending on the jurisdiction in which the crime occurred.⁵⁷

The JLARC Report reviewed capital-eligible offenses committed in Virginia from 1995 to 1999.⁵⁸ Of these cases, prosecutors in urban jurisdictions with a high population density sought the death penalty in 16% of cases.⁵⁹ By contrast, in medium and low population density jurisdictions in Virginia, prosecutors sought the death penalty 45% and 34% of the time, respectively.⁶⁰ Thus, a prosecutor is approximately three times more likely to seek the death penalty for a capital-eligible defendant in a medium density jurisdiction than in a high density jurisdiction. The ACLU Report made similar findings with respect to death sentences, noting “that individuals who are arrested for potentially capital crimes [from 1978 to 2001] in medium-density jurisdictions are over twice as likely to receive a death sentence [as] those i[n] high-density jurisdictions.”⁶¹

Conclusion

Virginia prosecutors have considerable discretion in determining whether to seek a death sentence. Approaches to the exercise of discretion in potential capital cases appear to vary considerably among jurisdictions and Virginia law does not require Commonwealth’s Attorney offices to have written policies governing the exercise of prosecutorial discretion in capital cases. As the Assessment Team possesses no information indicating that Commonwealth’s Attorneys have such policies, and anecdotal information suggests no written policies guiding the charging decision in death penalty cases exist, it does not appear that Virginia is in compliance with Protocol #1.

Recommendation

Since Virginia reinstated the death penalty, it has continually broadened the array of offenses eligible for capital murder; the Commonwealth has not, however, more narrowly defined the aggravating factors for which the death penalty may be sought. The combination of an increasing number of capital-eligible offenses, without any related guidance by statute governing death eligibility, increases the likelihood that prosecutors will exercise discretion in favor of seeking capital punishment.

To better aid prosecutors in determining whether it is appropriate to seek the death penalty in a particular case, the Commonwealth should improve data collection on actual capital charging

⁵⁶ JLARC REPORT, *supra* note 42, at 29.

⁵⁷ *Id.* at 28.

⁵⁸ *Id.* at 16. The JLARC Report defines a “capital-eligible offense” as “[a]n arrest resulting in a capital murder indictment” or “[a]n arrest resulting in a first-degree murder indictment where all of the elements necessary to qualify the offense for a capital murder indictment were present.” *Id.* at 29.

⁵⁹ *Id.* at 39.

⁶⁰ *Id.*

⁶¹ BROKEN JUSTICE, *supra* note 46, at 10.

and sentencing practices. A data source containing the details of cases in which the death penalty was imposed, cases in which it was sought but not imposed, and cases in which it could have been sought but was not, would assist prosecutors in determining whether it is appropriate and proportionate to seek the death penalty in a particular case.⁶² Training for Commonwealth's Attorneys should incorporate dissemination of information about capital charging and sentencing in Virginia in order to assist prosecutors in the exercise of discretion in death penalty cases.

The Assessment Team also recommends that Virginia's Commonwealth's Attorneys, defenders, and judges convene to develop advisory or consultative guidelines regarding the exercise of charging discretion in capital-eligible cases.⁶³ Such advisory guidelines could better ensure statewide consistency, while also providing assistance to prosecutors when deciding whether there is a credible basis or good faith belief that a defendant meets the criteria for one of Virginia's two statutory aggravating factors.⁶⁴ A data source containing comprehensive information about capital charging and sentencing, as described above, would greatly aid the Commonwealth in development of such guidelines to reduce the likelihood of arbitrariness in capital cases.

Finally, Virginia should enact a statutory change that authorizes the prosecutor to unilaterally withdraw the death penalty when the defendant has been charged with capital murder. Notably, this amendment would provide a cost savings to the Commonwealth as prosecutors would be able to seek a sentence less than death in a capital case, with the concomitant savings in capital litigation by the court, prosecution, and defense. It would also provide additional options to Commonwealth's Attorney in determining how to prosecute a capital case as new information relevant to the sentencing decision arises after indictment.

⁶² See Chapter Seven on Direct Appeal. More robust proportionality review, as described in Chapter Seven—which encompasses cases not only cases in which the death penalty was imposed, but also cases in which the death penalty could have been but was not sought—would also serve as a better check on broad prosecutorial discretion afforded in Virginia capital cases.

⁶³ Other jurisdictions may provide useful examples as to what kind of information should be contained in written guidelines governing the exercise of discretion in capital cases. See, e.g., U.S. ATT'Y'S OFFICE, U.S. ATT'YS CRIMINAL RES. MANUAL 9-10.030 (June 2007), available at http://www.justice.gov/usao/eousa/foia_reading_room/usam/title9/10mcrm.htm#9-10.030 (Purposes of the Capital Case Review Process); OFFICE OF THE ILL. ATT'Y GEN. & ILL. STATE'S ATTORNEYS ASS'N, DEATH PENALTY DECISION GUIDELINES 2 (2006); NEW JERSEY CTY. PROSECUTOR ASS'N, PROSECUTORS' GUIDELINES FOR DESIGNATION OF HOMICIDE CASES FOR CAPITAL PROSECUTION (1989). Illinois repealed the death penalty in 2011; New Jersey repealed the death penalty in 2007.

⁶⁴ The aggravating factors are whether (1) the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society; or (2) the conduct was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim. VA. CODE ANN. § 19.2-264.2 (2013).

B. Protocol #2

Each prosecutor's office should establish procedures and policies for evaluating cases that rely upon eyewitness identification, confessions, or the testimony of jailhouse snitches, informants, and other witnesses who receive a benefit.

When a person is wrongfully convicted, an innocent person is incarcerated or possibly sentenced to death, and a guilty criminal may also remain free to commit more crimes. As such, it is especially important for prosecutors to establish procedures and policies for evaluating potentially unreliable evidence.

Eyewitness misidentifications, false confessions, and untruthful jailhouse informant testimony are among the most common types of evidence that lead to wrongful convictions in the United States. According to the Innocence Project, eyewitness identification has played “a role in more than 75% of convictions overturned through DNA testing,”⁶⁵ and “[i]n about 25% of DNA exoneration cases, innocent defendants made incriminating statements, delivered outright confessions or pled guilty.”⁶⁶ Moreover, “statements from people with incentives to testify—particularly incentives that are not disclosed to the jury—are [often] the central evidence in convicting an innocent person.”⁶⁷

While the Assessment Team was unable to obtain information from individual Commonwealth's Attorneys on policies related to the use of eyewitness identifications, confessions, and informant testimony,⁶⁸ several wrongful convictions in Virginia illustrate the importance of carefully evaluating evidence in cases relying on these frequent causes of wrongful conviction. In many of these cases, exonerating evidence was not uncovered until several years after the defendant was convicted.

While law enforcement procedures and practices are the first line of defense to protect against wrongful conviction, law enforcement operates independently of the prosecution in Virginia. Thus, Commonwealth's Attorneys must be especially vigilant in scrutinizing all evidence relating to the alleged guilt of the accused, as well as any evidence that may be used to support charging a case capitally.

⁶⁵ *Understanding the Causes: Eyewitness Misidentification*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Eyewitness-Misidentification.php> (last visited Aug. 8, 2013). For a discussion of issues related to eyewitness misidentification, see Chapter Two on Law Enforcement Identification and Interrogation Procedures.

⁶⁶ *False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Aug. 8, 2013).

⁶⁷ *Understanding the Causes: Informants*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/Snitches-Informants.php> (last visited Aug. 8, 2013) (stating that “[i]n more than 15% of wrongful conviction cases overturned through DNA testing, an informant testified against the defendant at the original trial”).

⁶⁸ See *supra* notes 34–36 and accompanying text.

Wrongful Convictions Based on Eyewitness Misidentifications and False Confessions

At least eighteen people have been exonerated between 1989 and 2013 of serious violent felonies in Virginia due to eyewitness misidentifications.⁶⁹ Although none of these cases was a capital murder prosecution, they demonstrate the need for Commonwealth's Attorneys to carefully review any prosecutions that are based primarily on eyewitness testimony, especially if the eyewitness identification procedure does not conform to best practices.⁷⁰ Furthermore, false confessions have led to a number of wrongful convictions in Virginia, including one case in which the defendant received the death penalty.⁷¹ In the "Norfolk Four" case, for instance, the

⁶⁹ The exonerees are Marvin Anderson, Bennett Barbour, Victor Burnette, Jeffrey Cox, Calvin Wayne Cunningham, Willie Davidson, Russell Leroy Gray, Thomas Haynesworth, Edward Honaker, Troy Hopkins, Julius Ruffin, Walter Snyder, Teddy Thompson, Phillip Leon Thurman, Troy Webb, and Arthur Lee Whitfield. *Marvin Anderson*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=2995> (last visited Aug. 8, 2013); *Bennett Barbour*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3929> (last visited Aug. 8, 2013); *Victor Burnette*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3072> (last visited Aug. 8, 2013); *Jeffrey Cox*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3128> (last visited Aug. 8, 2013); *Calvin Wayne Cunningham*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3143> (last visited Aug. 8, 2013); *Willie Davidson*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3153> (last visited Aug. 8, 2013); *Garry Diamond*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4120> (last visited Aug. 8, 2013); *Russell Leroy Gray*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3434> (last visited Aug. 8, 2013); *Thomas Haynesworth*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3872> (last visited Aug. 8, 2013); *Edward Honaker*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3304> (last visited Aug. 8, 2013); *Troy Hopkins*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3305> (last visited Aug. 8, 2013); *Julius Ruffin*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3599> (last visited Aug. 8, 2013); *Walter Snyder*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3651> (last visited Aug. 8, 2013); *Teddy Thompson*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3686> (last visited Aug. 8, 2013); *Phillip Leon Thurman*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3689> (last visited Aug. 8, 2013); *John Tingle, Jr.*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=4113> (last visited Aug. 8, 2013); *Troy Webb*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3728> (last visited Aug. 8, 2013); *Arthur Lee Whitfield*, NAT'L REGISTRY OF EXONERATIONS, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3738> (last visited Aug. 8, 2013).

⁷⁰ Details relating to the specific cases, as well as best practices for lineup, photo array, and other eyewitness identification procedures, are discussed in Chapter Two on Law Enforcement Identification and Interrogation Procedures.

⁷¹ Details relating to the specific cases, as well as best practices for interrogations, are discussed in Chapter Two on Law Enforcement Identification and Interrogation Procedures.

four defendants were convicted of raping and murdering the victim in her apartment based largely on their confessions.⁷² All four men confessed to the crime after police threatened them with the death penalty and falsely told them that they had failed polygraph tests.⁷³ While their final confessions were recorded, the interrogations preceding the confessions were not.⁷⁴ As these cases demonstrate, it is especially important for prosecutors to carefully examine cases that rest largely on a defendant's confession.

Wrongful Convictions Based on Jailhouse Informant Testimony

A notable capital case in Virginia demonstrates the risk of wrongful conviction based on the testimony of a jailhouse informant who received a benefit for his/her testimony, as well as underscores the need for prosecutors to exercise heightened scrutiny when relying on informant testimony. Michael Hash was convicted of capital murder and sentenced to life in prison for the murder of Thelma Scroggins in Culpeper.⁷⁵ Scroggins was shot to death in her home in 1996, when Hash was fifteen, but Hash was not initially arrested for the crime or considered as a suspect.⁷⁶ In the initial investigation immediately following the crime, police concluded that a single assailant committed the crime, but no one was arrested.⁷⁷

In 1999, under a new sheriff, Hash was eventually developed as a suspect based on three witnesses.⁷⁸ The first, Eric Weakley, testified that he, Hash, and a third person committed the crime.⁷⁹ The second, Hash's cousin, claimed that she had heard Hash and the two others discussing the crime.⁸⁰ Finally, Paul Carter, who was in jail with Hash before trial, testified that Hash confessed the murder to him in some detail.⁸¹

On cross-examination, "when asked if he had assisted [the] government [as an informant] on prior occasions, Carter testified that he had only done so on one prior occasion."⁸² When defense counsel asked if he was testifying to receive a potentially-reduced sentence, Carter responded, "Somewhat, yes"⁸³ "Nevertheless, on re-direct the [Commonwealth's Attorney] was able to rehabilitate Carter's testimony with Carter's answer that it was his understanding that his testimony in the state court proceedings against Hash did not have any impact on his [own] sentence."⁸⁴

⁷² Alan Berlow, *What Happened in Norfolk?*, N.Y. TIMES MAG., Aug. 19, 2007, at 36.

⁷³ *Id.*

⁷⁴ *Id.*

⁷⁵ Hash v. Johnson, 845 F. Supp. 2d 711, 715–16 (W.D.Va. 2012).

⁷⁶ *Id.* at 716, 718.

⁷⁷ *Id.* at 718.

⁷⁸ *Id.*

⁷⁹ *Id.*

⁸⁰ *Id.* at 718.

⁸¹ *Id.* 718–19.

⁸² *Id.* at 719.

⁸³ *Id.*

⁸⁴ *Id.*

Hash's defense relied on the inconsistency of the witness statements, as well as an alibi supported by several witnesses.⁸⁵ The jury, however, convicted Hash and he was sentenced to life in prison.⁸⁶

In state habeas proceedings, however, new evidence revealed that Carter had, in fact, received a substantial sentencing reduction in exchange for his testimony.⁸⁷ Carter, who was facing federal charges, had sent letters to a federal judge before he testified concerning his motion for a reduced sentence based on his assistance in the Hash prosecution.⁸⁸ This motion was later granted, reducing Carter's sentence by more than half—from 180 months to sixty months.⁸⁹ Moreover, contrary to his testimony that he had testified as an informant only once before, he had previously "provided information or testimony that implicated at least twenty people in at least three different federal prosecutions."⁹⁰

Further evidence uncovered in federal habeas proceedings indicated that Carter's history as an informant was known to authorities investigating Hash, and that they had agreed to support Carter's motion for a sentence reduction.⁹¹ Prior to Hash's trial, one of the investigators wrote a letter to Carter stating, "[I]f I'm ever asked by the U.S. Attorney in your case, I will tell him what you did."⁹² The Commonwealth's Attorney had also moved Hash to the same jail as Carter in order to expose Hash to the informant, although authorities had previously denied this.⁹³

Federal habeas proceedings also revealed that Weakley, Hash's co-defendant, negotiated a "deal" with prosecutors in exchange for his testimony.⁹⁴ This arrangement was never disclosed at trial.⁹⁵ Weakley has since recanted his testimony against Hash, and the investigator in the case has stated that he did not believe Weakley's story or the story told by Hash's cousin.⁹⁶

Based on this evidence, Hash was granted federal habeas relief in 2012.⁹⁷ He was released from prison, and the Commonwealth's Attorney chose to dismiss the charges.⁹⁸ Hash has since filed a civil suit against several Culpeper authorities seeking damages for his wrongful conviction.⁹⁹

⁸⁵ *Id.* at 719–20.

⁸⁶ *Id.* at 715.

⁸⁷ *Id.* at 720–22.

⁸⁸ *Id.* at 720.

⁸⁹ *Id.* at 721.

⁹⁰ *Id.* at 719 n.4.

⁹¹ *Id.* at 722–23.

⁹² *Id.* at 722.

⁹³ *Id.*

⁹⁴ *Id.* at 723. The terms of this deal are not clear. *Id.*

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ *Id.* at 752.

⁹⁸ Donnie Johnston, *Charges Against Michael Hash Nolle Prossed*, FREE LANCE-STAR (Fredericksburg, Va.), Aug. 20, 2012.

⁹⁹ Allison Brophy Champion, *Hash Suit: Jenkins, Close "Architects" of Wrongful Conviction*, CULPEPER STAR-EXPONENT (Va.), Jan. 4, 2013.

Conclusion

As described above, there are a number of documented instances of wrongful convictions in Virginia based on eyewitness misidentifications, false confessions, and inaccurate jailhouse informant testimony. In addition, the Assessment Team obtained no information indicating that Commonwealth's Attorneys have promulgated policies specifically aimed at addressing the most frequent causes of wrongful conviction.¹⁰⁰ Thus, it appears that Virginia is not in compliance with Protocol #2.

Recommendation

Given the occurrences of wrongful convictions in Virginia—many of which might have been prevented through heightened scrutiny by the Commonwealth's Attorney of the evidence presented in the case—the Virginia Assessment Team sets out the following recommendations:

- Prosecutors should ensure that eyewitness identification procedures comport with the best practices discussed in Chapter Two on Law Enforcement Identifications and Interrogations. Prosecutors could also base their policies on those adopted by the Virginia Department of Criminal Justice Services describing the manner in which eyewitness identifications should be conducted.¹⁰¹
- With respect to confessions, prosecutors should scrutinize the veracity of a confession in light of other known evidence in the case to consider whether any inconsistencies may make the confession unreliable. Even recorded confessions must be carefully examined. In the Norfolk Four case, for instance, the formal confessions of the defendants were recorded, but not their lengthy interrogations, possibly obfuscating evidence of coercion.¹⁰²
- Prosecutors need to adopt a mechanism for determining if a testifying witness has received a benefit.¹⁰³ Prosecutors should also carefully review a jailhouse informant's statement to ensure that, in light of other evidence available in the case, it is credible.
- All Virginia prosecutors should be required to receive training on how to evaluate the accuracy of eyewitness identifications, confessions, and jailhouse informant testimony.

¹⁰⁰ In response to the Assessment Team's survey, the Richmond Commonwealth's Attorney stated that his office has no policy relative to evaluating cases that primarily rely on eyewitness identifications, confessions, or informant testimony. RICHMOND COMMONWEALTH'S ATTORNEY SURVEY, *supra* note 36, at 8.

¹⁰¹ See Memorandum from John J. Farmer, Jr., Att'y Gen. of N.J. to N.J. Prosecutors & Law Enforcement (Apr. 18, 2001), available at <http://www.state.nj.us/lps/dcj/agguide/photoid.pdf>.

¹⁰² Alan Berlow, *What Happened in Norfolk?*, N.Y. TIMES MAG., Aug. 19, 2007, at 36.

¹⁰³ For example, the Ninth Circuit held that a county may be held liable if a prosecutor fails to realize that a jailhouse informant is unreliable in part because the district attorney "failed to create an index that includes information about benefits provided to jailhouse informants and other previous knowledge about the informants' reliability." *Goldstein v. City of Long Beach*, No.10-56787, 2013 WL 1896283, at *11 (9th Cir. May 8, 2013).

C. Protocol #3

Prosecutors should fully and timely comply with all legal, professional, and ethical obligations to disclose to the defense information, documents, and tangible objects and should permit reasonable inspection, copying, testing, and photographing of such disclosed documents and tangible objects.

Federal and Virginia Law Governing Discovery Practices

In *Brady v. Maryland*, the U.S. Supreme Court held that prosecutors have an affirmative duty to disclose exculpatory evidence to the defendant “where the evidence is material either to guilt or to [level of] punishment, irrespective of the good faith or bad faith of the prosecution.”¹⁰⁴ This includes all material exculpatory, mitigating, and impeachment evidence, as well as “favorable evidence known to the others acting on the government’s behalf in the case,” such as law enforcement officers.¹⁰⁵ “[E]vidence is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different.”¹⁰⁶ In accordance with *Brady*, the Virginia Rules of Professional Conduct provide that prosecutors have a special duty to disclose all exculpatory and mitigating evidence to the defendant.¹⁰⁷

A Virginia prosecutor’s other discovery obligations, as mandated by Virginia Supreme Court Rule 3A:11, are quite limited.¹⁰⁸ The defendant has an absolute right to discovery of only (1) “written or recorded statements or confessions made by the accused . . . or the substance of any oral statements or confessions made by the accused to any law enforcement officer, the existence of which is known to” the prosecutor and (2) “written reports of autopsies,” forensic tests, and mental exams “of the accused or the alleged victim made in connection with the particular case” that are known by or in the possession of the prosecutor.¹⁰⁹

In addition, Rule 3A:11 grants defendants the right to “inspect and copy or photograph designated books, papers, documents, tangible objects, buildings or places, or copies or portions thereof, that are within the possession, custody, or control of the Commonwealth,” provided the defendant can demonstrate to the trial court that “the items sought may be material to the preparation of his defense and that the request is reasonable.”¹¹⁰ However, the rule expressly *excludes* from discovery “statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case.”¹¹¹

¹⁰⁴ *Brady v. Maryland*, 373 U.S. 83, 87 (1963).

¹⁰⁵ *Kyles v. Whitley*, 514 U.S. 419, 421 (1995); *Giglio v. United States*, 405 U.S. 150, 154–55 (1972).

¹⁰⁶ *United States v. Bagley*, 473 U.S. 667, 682 (1985).

¹⁰⁷ VA. R. PROF’L CONDUCT 3.8(d).

¹⁰⁸ See VA. SUP. CT. R. 3A:11(b).

¹⁰⁹ *Id.* The rule specifically mentions “autopsies, ballistic tests, fingerprint analyses, handwriting analyses, blood, urine and breath tests, other scientific reports, and written reports of a physical or mental examination.” *Id.*

¹¹⁰ *Id.*

¹¹¹ *Id.*

Thus, police reports and statements made by witnesses are not discoverable under Virginia law.¹¹² Such limited rule-based discovery obstructs a defendant's ability to investigate his/her case and present a defense, and, more generally impedes upon the overall fairness of the proceedings. Furthermore, this rule stands in contrast to the discovery rules of many other states, which require witness statements and reports related to those statements to be disclosed to the defense.¹¹³

Discovery Policies and Practices of Individual Prosecutor Offices

A prosecutor may, as part of an agreement with defense counsel or by way of office policy, voluntarily disclose other materials to the defense that are not required to be disclosed by law. The Assessment Team was unable to obtain information from individual Commonwealth's Attorneys regarding information related to discovery procedures.¹¹⁴

It appears that at least some Commonwealth's Attorney offices have adopted "open file" discovery procedures, under which all or most of the prosecutor's file is shared with defense counsel before trial.¹¹⁵ A 2009 news report stated that "Commonwealth's attorneys for Pittsylvania, Halifax, Campbell, Bedford and Henry counties and in the city of Martinsville have moved toward open file discovery."¹¹⁶ The exact terms of these policies, as well as the meaning of "open file," are unclear. In response to the Assessment Team's survey, the Richmond Commonwealth's Attorney Office stated that it "definitely provides[s] exculpatory and mitigating statements; however, only in exceptional circumstances [does it] provide actual witness statements."¹¹⁷ The Richmond Office further stated that it has "meetings among trial team members to discuss discovery responses and tenders," in addition to conferences with the defense team.¹¹⁸

Discovery and Adherence to *Brady* in Virginia Cases

Two recent high-profile wrongful conviction cases in Virginia underscore the need for broader discovery requirements under Virginia law, as well as the need for prosecutors to provide

¹¹² *Id.*

¹¹³ *See, e.g.,* MD. R. CRIM. P. 4-263(d)(9) (granting Maryland defendants a right to discover "all written statements" of witnesses the prosecutor "intends to call to prove the State's case in chief or to rebut alibi testimony"); MO. SUP. CT. R. 25.03(A)(1) (granting Missouri defendants a right to the discovery of "[t]he names and last known addresses of persons whom the state intends to call as witnesses at any hearing or at the trial, together with their written or recorded statements, and existing memoranda, reporting or summarizing part or all of their oral statements"); N.C. Gen. Stat. § 15A-903(a)(1) (granting North Carolina defendants a right to discover "the complete files of all law enforcement agencies" including "witness statements [and] investigating officers' notes"); PA. R. CRIM. P. 573(B)(2)(a)(2) (permitting Pennsylvania trial courts to grant discovery of "[a]ll written or recorded statements, and substantially verbatim oral statements, of witnesses the prosecution intends to call at trial and of codefendants).

¹¹⁴ *See supra* notes 33–36 and accompanying text.

¹¹⁵ Matt Tomsic, *Commonwealth's Attorney Candidate Clarifies Open File Views*, DANVILLE REGISTER & BEE (Va.), Sept. 7, 2009.

¹¹⁶ *Id.*

¹¹⁷ RICHMOND COMMONWEALTH'S ATTORNEY SURVEY, *supra* note 36, at 7.

¹¹⁸ *Id.*

discovery to defendants, especially with respect to any evidence that might be considered exculpatory under *Brady*.

Michael Hash

In the Michael Hash case, previously discussed under Protocol #2, the Culpeper County Commonwealth's Attorney failed to disclose several pieces of evidence related to benefits given to prosecution witnesses in exchange for their testimony at trial.¹¹⁹ For instance, the prosecutor failed to disclose that the jailhouse informant, Paul Carter, had received a substantially reduced sentence in federal court in exchange for his testimony, and that Hash was intentionally placed in a jail with Carter so that Carter could serve as an informant.¹²⁰ Nor did the prosecutor inform defense counsel that he had negotiated a deal with Hash's co-defendant in exchange for his testimony.¹²¹ The fact that Hash's co-defendant and another witness had failed polygraph tests in which they implicated Hash was also withheld from defense.¹²²

None of this evidence was revealed until federal habeas proceedings, over a decade after Hash was convicted.¹²³ In its order granting habeas relief to Hash, the federal district court found that the Commonwealth's Attorney "engaged in a series of lies and failures to disclose exculpatory evidence to Hash's trial counsel. Without access to this information[,] Hash was denied the opportunity to effectively cross-examine the State's witnesses against him, in particular their motivation to falsify their testimony."¹²⁴

Justin Wolfe

Justin Wolfe was convicted of capital murder and sentenced to death for a murder-for-hire in Prince William County in 2002.¹²⁵ At trial, the Commonwealth's Attorney alleged that Wolfe, a marijuana dealer, hired his friend and fellow dealer, Owen Barber, to kill Wolfe's marijuana supplier, Daniel Petrole because Wolfe owed a large amount of money to Petrole.¹²⁶ As the U.S. Court of Appeals for the Fourth Circuit later noted in federal habeas proceedings, "Wolfe's conviction was primarily secured" by Barber's testimony.¹²⁷ "Barber was the prosecution's key witness in Wolfe's capital trial and the only witness to provide any direct evidence regarding the 'for hire' element of the murder offense and the involvement of Wolfe therein."¹²⁸ Wolfe, who testified in his own defense at trial, admitted that he was a drug dealer but denied any involvement in the murder.¹²⁹

¹¹⁹ See *supra* notes 75–99 and accompanying text.

¹²⁰ Hash v. Johnson, 845 F. Supp. 2d 711, 722 (W.D.Va. 2012).

¹²¹ *Id.*

¹²² *Id.*

¹²³ *Id.* at 716, 722.

¹²⁴ *Id.* at 751.

¹²⁵ Wolfe v. Johnson, 565 F.3d 140, 143–44 (4th Cir. 2009).

¹²⁶ *Id.* at 144–45.

¹²⁷ *Id.* at 144.

¹²⁸ *Id.*

¹²⁹ *Id.* at 146–47.

Subsequent federal habeas proceedings revealed several *Brady* violations.¹³⁰ The federal district court found that “[t]he prosecutors choreographed and coordinated witness testimony through a series of joint meetings with Owen Barber” and other witnesses who were used to corroborate Barber’s version of events.¹³¹ Moreover, the prosecution did not disclose a police report stating that during Barber’s interrogation, it was law enforcement, not Barber, who first suggested Wolfe was involved in the murder.¹³² The prosecution also withheld evidence that, some period after the murder, Barber confided to his roommate that he acted alone in killing Petrole.¹³³ Information suggesting that Barber himself owed Petrole money and that “Petrole had a hit out on Barber”—evidence that suggested Barber had his own motive for killing Petrole—was also withheld.¹³⁴ During these federal proceedings, Barber also recanted his trial testimony under oath and stated that he acted alone in killing Petrole.¹³⁵

The federal district court, in granting habeas relief to Wolfe, noted that “had the prosecution complied with its *Brady* obligations, Barber’s testimony would have been seriously undermined.”¹³⁶ As such, the court granted Wolfe a new trial in 2011.¹³⁷ In 2012, the same court ordered Wolfe’s release because the prosecution had failed to retry him within 120 days. However, the U.S. Court of Appeals for the Fourth Circuit overturned that decision one year later and ruled that Virginia may pursue a new trial.¹³⁸

The Wolfe case demonstrates the problems that can arise when prosecutors are granted too much discretion to determine what evidence must be disclosed to the defense under *Brady*. Describing why his office has not adopted an open file discovery policy that favors disclosure, the Prince William County Commonwealth’s Attorney said, “I have found in the past when you have information that is given to certain [defense] counsel and certain defendants, they are able to fabricate a defense around what is provided.”¹³⁹ Rather than being useful for fabricating a defense, however, the evidence withheld in Wolfe’s case proved to be unmistakably exculpatory.

Conclusion

Recent high profile wrongful conviction cases in Virginia demonstrate the consequences of serious failures to comply with *Brady*. Moreover, Virginia’s basic rules of discovery provide a defendant a minimal opportunity to investigate his/her case and prepare a defense. In death penalty cases, the disclosure obligations imposed by the Virginia rules are not broad or robust enough to ensure that exonerating and mitigating evidence is disclosed to defendants. Furthermore, instead of erring on the side of disclosure, the Virginia rules leave the prosecutor to

¹³⁰ Wolfe v. Clarke, 819 F. Supp. 2d 538 (E.D.Va. 2011).

¹³¹ *Id.* at 547, 550–51.

¹³² *Id.* at 548.

¹³³ *Id.* at 554.

¹³⁴ *Id.* at 548–49.

¹³⁵ *Id.* at 548.

¹³⁶ *Id.* at 565.

¹³⁷ *Id.* at 574. The decision was later affirmed by the U.S. Court of Appeals for the Fourth Circuit. Wolfe v. Clarke, 691 F.3d 410 (4th Cir. 2012).

¹³⁸ Matthew Barakat, *Appeals Court Allows Capital Retrial of Wolfe*, ASSOCIATED PRESS (Va.), May 22, 2013.

¹³⁹ Wolfe, 819 F. Supp. 2d at 567 n.24.

decide what and when evidence must be disclosed under *Brady*, thereby further contributing to error in capital cases.

While the Assessment Team was largely unable to obtain information on discovery practices from individual Commonwealth's Attorneys, available information suggests that at least some Commonwealth's Attorney offices have not complied with all legal, professional, and ethical obligations regarding disclosure to the defense. Virginia's extraordinarily limited discovery under Rule 3A:11 further impedes compliance with the Protocol. As such, Virginia is not in full compliance with Protocol #3.

Recommendation

Because "death is different," the U.S. Supreme Court has required heightened procedural protections to ensure fairness in capital cases and to avoid convicting the innocent.¹⁴⁰ In the area of defense services, Virginia has made important progress in recent years. But even the most capable defense counsel cannot function effectively without access to information. Unfortunately, when it comes to discovery, Virginia's rules are more restrictive than in other states and the federal system in providing capital defendants the basic information necessary to prepare and present a defense.

Some prosecutors in capital cases provide more discovery than the rules require. As a result, the quality and quantity of discovery can vary by jurisdiction. Nevertheless, when the discovery process conforms to Virginia's uniquely-limited rules, a capital defendant may go to trial without knowing who will testify against him. S/he may face the prospect of cross-examining witnesses without access to written or recorded statements made by the witness at the time of the events. Thus a capital defendant may face the daunting task of preparing for trial without access to some of the record of the police investigation that gave rise to capital charges.

Neither party owns the facts in a criminal case. An adversary system of criminal justice functions more fairly, and gets to the truth more effectively, when both sides have access to the facts. Fair and reasonable discovery can have special value to all parties and to the courts in capital cases. Because capital cases bring particular focus on issues of mitigation, Virginia's limited rules of discovery can put the prosecutor in the difficult position of deciding for him- or herself which evidence in a police file may support a sentence less than death.¹⁴¹

¹⁴⁰ *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976) (stating that since "the penalty of death is qualitatively different from a sentence of imprisonment . . . there is a corresponding difference in the need for reliability in the determination that death is . . . appropriate").

¹⁴¹ The Alabama discovery rules recognize, for example, "[t]he hovering death penalty is the special circumstance justifying broader discovery in capital cases." *Ex parte Monk*, 557 So.2d 832, 836–37 (Ala. 1989). *Monk* explains the special circumstances giving rise to expanded discovery in death penalty cases, stating that "[i]n a capital case the definition of 'favorable evidence' expands at the sentencing stage *far beyond what it is at any stage of any other type of criminal proceeding* This statutory mandate that a defendant shall be allowed to offer evidence of mitigating circumstances is another reason why broad discovery must be allowed. *The prosecutor cannot screen files for potential mitigating evidence to disclose to the defense counsel because '[w]hat one person may view as mitigating, another may not.'*" *Id.* at 837 (quoting *Dobbett v. Strickland*, 718 F.2d 1518, 1524 (11th Cir. 1983)) (emphasis added).

Despite prosecutors' efforts to act in good faith, the Virginia discovery system makes *Brady* violations more likely and can result in extensive post-trial litigation, reversals, and retrials. Discovery also contributes to earlier- and better-informed pretrial disposition of capital cases through guilty pleas. Due to the inherent additional costs and protracted nature of capital litigation, such pretrial dispositions likely would more than offset the minimal cost of providing broader discovery of information already in the hands of the Commonwealth.

While discovery is critical to fairness and accuracy in capital cases, it also raises sensitive issues regarding the cooperation and safety of witnesses. In a world where shared information can quickly find its way to the internet, prosecutors and police raise valid concerns that exposure may discourage some witnesses from coming forward and may otherwise endanger the safety of some witnesses. Any recommendation for discovery reform must take into account these important concerns.

The Assessment Team believes that careful discovery reform can provide the information essential to defend a capital case while protecting against premature disclosures that may harm or intimidate witnesses. The federal courts and the courts of most states operate under discovery rules more generous than Virginia's, including rules providing for disclosure of witnesses and witness statements.¹⁴² Of course, every trial ultimately requires witnesses to testify in public. Discovery rules that prohibit disclosure of witness statements even at the time of trial have little basis in concerns for witness safety.¹⁴³

Thus, the Assessment Team recommends that

- The Virginia Supreme Court should modify Rule 3A:11, for capital cases, to require prosecutors to disclose the identity and any prior statements of testifying witnesses at a time sufficient to allow adequate preparation for cross-examination and to allow discovery of police reports. In recognition of the sensitive issues regarding the cooperation and safety of witnesses, the rules should include a provision for protective orders to protect witness safety in appropriate cases. Importantly, such discovery contributes to earlier and better-informed pretrial disposition of capital cases through guilty pleas. Due to the inherent added costs and protracted nature of capital litigation, such pretrial dispositions likely would more than offset the minimal cost of providing broader discovery of information already in the hands of the Commonwealth.

¹⁴² 18 U.S.C. section 3432 provides for disclosure of prosecution witnesses in capital cases three days before trial. 18 U.S.C. section 3500 (the "Jencks Act") requires disclosure of witness statements at the time of direct examination at trial. Alternatively, North Carolina's discovery statute could serve as a model for amendments to Virginia's discovery rule. The statute requires disclosure of the "complete files of all law enforcement agencies, investigatory agencies, and prosecutors' offices" including "defendant's statements, investigating officers' notes, results of tests and examinations, or any other matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." N.C. GEN. STAT. § 15A-903(a)(1) (2013). A witness's identity can be withheld from discovery if the court finds there is a "substantial risk . . . of physical harm, intimidation, bribery, economic reprisals, or unnecessary annoyance or embarrassment." N.C. GEN. STAT. § 15A-908(a) (2013).

¹⁴³ *Bellfield v. Commonwealth*, 208 S.E. 2d 771, 774 (Va, 1974), holds that witness statements are not discoverable *even after the witness testifies*.

- All Commonwealth's Attorneys should develop procedures to ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with the duty to disclose exculpatory evidence. Prosecutors should have in their possession a complete copy of the investigating agencies' case file and must conduct a full inspection of the complete contents of the file.
- All law enforcement officers should be required to receive training on the importance of divulging all evidence to the prosecutor in all criminal cases, including anything that might constitute *Brady* material, such as mitigating evidence, in death penalty cases.

D. Protocol #4

Prosecutors should ensure that law enforcement agencies, laboratories, and other experts under their direction or control are aware of and comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence.¹⁴⁴

The U.S. Supreme Court has held that a prosecutor's constitutional duty to disclose material exculpatory evidence under *Brady* includes a duty to disclose "favorable evidence known to the others acting on the government's behalf in the case," such as law enforcement officers and crime laboratory technicians, even if the evidence is "known only to police investigators and not to the prosecutor."¹⁴⁵ Thus, to ensure that all *Brady* material is disclosed to the defense, Virginia Commonwealth's Attorneys must develop procedures to make certain that law enforcement agencies, laboratories, and experts inform prosecutors about potentially exculpatory or mitigating evidence. While law enforcement is not under the direction or control of the Commonwealth's Attorney in Virginia, Commonwealth's Attorneys have an obligation to actively seek this information from law enforcement and related entities.

The Assessment Team was unable to obtain information from most of the Commonwealth's Attorney offices it queried regarding discovery policies and practices. The Richmond Commonwealth's Attorney has stated that it is drafting a policy to ensure that law enforcement agencies divulge all potentially exculpatory evidence to the prosecution.¹⁴⁶ However, there are some Virginia cases in which *Brady* violations were, in part, attributable to law enforcement and other agents of the state. However, it is unclear whether the Commonwealth's Attorney offices in these cases were aware of these violations.

¹⁴⁴ In *Kyles v. Whitley*, 514 U.S. 419 (1996), the U.S. Supreme Court held that a prosecutor's constitutional duty to disclose material exculpatory evidence under *Brady* includes a duty to disclose "favorable evidence known to the others acting on the government's behalf in the case," such as law enforcement officers and crime laboratory technicians, even if the evidence is "known only to police investigators and not to the prosecutor." *Id.* at 437–38.

¹⁴⁵ *Kyles v. Whitley*, 514 U.S. 419, 437–38 (1995). See also *Workman v. Commonwealth*, 636 S.E.2d 368, 375–77 (Va. 2006) (finding *Brady* violation where prosecutor had no knowledge of material in possession of law enforcement that should have been disclosed to the defendant); *Tuma v. Commonwealth*, 726 S.E.2d 365, 375 (Va. Ct. App. 2012) (en banc) (reaffirming that "the law is clear that the prosecutor is charged with the clear and affirmative duty of disclosing all exculpatory evidence in the possession, custody, or control of the Commonwealth and its agents.").

¹⁴⁶ RICHMOND COMMONWEALTH'S ATTORNEY SURVEY, *supra* note 36, at 7–8.

In the Justin Wolfe case, previously discussed in Protocol #3, significant *Brady* material was withheld by law enforcement.¹⁴⁷ For instance, a police report stating that, during an interrogation, Wolfe's co-defendant implicated Wolfe in the murder only *after* police suggested Wolfe as an accomplice was never disclosed.¹⁴⁸

Law enforcement also failed to disclose information in the Earl Washington case that might have revealed that Washington's confession was false. Washington, while interrogated by police for two days, was told confidential details about the crime scene, which Washington then repeated back in his confession.¹⁴⁹ For instance, Washington stated in his confession that he had left a bloody shirt in a dresser drawer in the victim's home.¹⁵⁰ However, the officer did not disclose that he had previously told this information to Washington over the course of the interrogation.¹⁵¹

Conclusion

There are at least some cases in Virginia in which law enforcement officers and other state agencies did not comply with their obligation to inform prosecutors about potentially exculpatory or mitigating evidence. However, because the Assessment Team was unable to obtain information from most Commonwealth's Attorney offices on discovery policies, it is unclear whether Commonwealth's Attorneys have enacted any policies to prevent these errors. As such, the Assessment Team was unable to determine if Virginia is in compliance with Protocol #4.

Recommendation

Since the duty to seek out and disclose *Brady* material in the possession of *any* state actor ultimately falls on the prosecutor, prosecutors must make certain that they have access to all of the evidence in the case.

Therefore, the Assessment Team recommends that all Commonwealth's Attorneys develop procedures to ensure that law enforcement agencies, crime laboratories, experts, and other state actors are fully aware of and comply with the duty to disclose exculpatory evidence. Ultimately, prosecutors should have in their possession a complete copy of the investigating agencies' case file or must conduct a full inspection of the complete contents of the file. In addition, all law enforcement officers should be required to receive training on the importance of divulging all evidence to the prosecutor in all criminal cases, including anything that might constitute *Brady* material, such as mitigating evidence, in death penalty cases.

Enactment of such provisions will not only better prevent miscarriages of justice, such as wrongful conviction or execution, but also reduce the need to remedy failures to disclose during state and federal habeas corpus proceedings, thereby preserving judicial resources.

¹⁴⁷ See *supra* notes 125–139 and accompanying text.

¹⁴⁸ Wolfe v. Clarke, 819 F. Supp. 2d 538, 548 (E.D.Va. 2011).

¹⁴⁹ Zinie Chen Sampson, *Va. Jury Awards Exonerated Death-Row Inmate \$2.25 Million from Investigator's Estate*, ASSOCIATED PRESS, May 7, 2006.

¹⁵⁰ *Id.*

¹⁵¹ See *id.*

E. Protocol #5

Each jurisdiction should establish policies and procedures to ensure that prosecutors and others under the control or direction of prosecutors who engage in misconduct of any kind are appropriately disciplined, that any such misconduct is disclosed to the criminal defendant in whose case it occurred, and that the prejudicial impact of any such misconduct is remedied.

The Assessment Team recognizes that legal errors attributable to the prosecution in a death penalty cases may not, in many instances, rise to the level of “misconduct.” Sorting out “error” from “misconduct” is often challenging given the myriad decisions a Commonwealth’s Attorney must make in the prosecution of a capital case. The complex nature of the prosecutorial role is one of the reasons that prosecutors enjoy absolute immunity from civil suit for violations of the law. As described by the U.S. Supreme Court, without immunity “harassment by unfounded litigation would cause a deflection of the prosecutor’s energies from his public duties, and the possibility that he would shade his decisions instead of exercising the independence of judgment required by his public trust.”¹⁵²

Acknowledgement and correction of error, however, is critical in death penalty cases. For example, a study evaluating reversals of death penalty cases between 1973 and 1995 found that the second most common error discovered at the post-trial stage leading to reversal was “prosecutorial suppression of evidence that the defendant is innocent or does not deserve the death penalty.”¹⁵³ Furthermore, in the instances in which an individual prosecutor’s actions rise to the level of misconduct, such misconduct must be appropriately sanctioned.

In Virginia, the Center for Public Integrity’s study of criminal appeals, which included both capital and non-capital cases from 1970 to June 2003, revealed 127 Virginia cases in which a defendant alleged prosecutorial negligence, error, or misconduct.¹⁵⁴ In twenty-two cases, the appellate court reversed or remanded the defendant’s conviction, sentence, or indictment due to prosecutorial error that prejudiced the defendant.¹⁵⁵ Notably, however, these data can underrepresent the actual extent of prosecutorial negligence, error, and misconduct due to the doctrines of procedural default and harmless error.

Virginia State Bar Disciplinary Procedures

The U.S. Supreme Court has stated disciplinary authorities can ensure that a prosecutor “who violates his or her ethical obligations is subject to professional discipline, including sanctions, suspension, and disbarment.”¹⁵⁶ While the U.S. Supreme Court has held that prosecutors are immune from federal civil lawsuits alleging violations of constitutional rights,¹⁵⁷ the Court has

¹⁵² *Imbler v. Pachtman*, 424 U.S. 409, 423 (1976).

¹⁵³ James S. Liebman et al., *Capital Attrition: Error Rates in Capital Cases, 1973-1995*, 78 TEX. L. REV. 1839, 1850 (2000).

¹⁵⁴ *Nationwide Numbers*, CTR. FOR PUB. INTEGRITY, <http://www.iwatchnews.org/2003/06/26/5927/nationwide-numbers> (last visited Aug. 8, 2013).

¹⁵⁵ *Id.*

¹⁵⁶ *Connick v. Thompson*, 131 S. Ct. 1350, 1362–63 (2011).

¹⁵⁷ *Imbler v. Pachtman*, 424 U.S. 409, 430 (1976).

“emphasize[d] that the immunity of prosecutors from liability . . . does not leave the public powerless to deter misconduct or to punish that which occurs” because “a prosecutor stands perhaps unique, among officials whose acts could deprive persons of constitutional rights, in his amenability to professional discipline by an association of his peers.”¹⁵⁸

The Virginia State Bar, as an administrative agency of the Supreme Court of Virginia, is charged with investigating and disciplining all attorneys, including prosecutors, for alleged professional misconduct.¹⁵⁹ Ethical duties and disciplinary procedures are governed by the Virginia Rules of Professional Conduct.¹⁶⁰

These Rules include additional responsibilities that apply only to prosecutors.¹⁶¹ Under these Rules, a prosecutor must

- (a) not file or maintain a charge that the prosecutor knows is not supported by probable cause;
- (b) not knowingly take advantage of an unrepresented defendant;
- (c) not instruct or encourage a person to withhold information from the defense after a party has been charged with an offense;
- (d) make timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment, except when disclosure is precluded or modified by order of a court; and
- (e) not direct or encourage investigators, law enforcement personnel, employees or other persons assisting or associated with the prosecutor in a criminal case to make an extrajudicial statement that the prosecutor would be prohibited from making under [the Rules of Professional Conduct].¹⁶²

The Rules also state that a lawyer may not falsify evidence or advise their clients or witnesses to do so, may not make frivolous discovery requests, should also make reasonable efforts to comply with discovery requests, and should refrain from making personal statements about the credibility of witnesses or the guilt or innocence of the accused.¹⁶³

The Virginia State Bar’s disciplinary process begins when a person files a complaint with the Bar.¹⁶⁴ A Virginia State Bar attorney, known as bar counsel, then investigates the claim.¹⁶⁵ If bar counsel determines that the complaint alleges credible evidence of misconduct that “could reasonably be expected to support [the allegation] under a clear and convincing evidentiary standard,” s/he will refer the complaint to the District Committee, composed of lawyers and non-

¹⁵⁸ *Id.* at 429.

¹⁵⁹ See VA. R. PROF’L CONDUCT 9 (noting that the Council of the Virginia State Bar is empowered “to regulate the legal profession”).

¹⁶⁰ See generally VA. R. PROF’L CONDUCT.

¹⁶¹ VA. R. PROF’L CONDUCT 3.8.

¹⁶² VA. R. PROF’L CONDUCT 3.8.

¹⁶³ VA. R. PROF’L CONDUCT 3.4.

¹⁶⁴ VA. R. PROF’L CONDUCT 13-10. See also *Guide to Lawyer Discipline*, *supra* note 26.

¹⁶⁵ VA. R. PROF’L CONDUCT 13-10(A). See also *Guide to Lawyer Discipline*, *supra* note 26.

lawyers, for further investigation.¹⁶⁶ A subcommittee of the District Committee will then decide if, based on the evidence, the complaint should be dismissed or referred to the District Committee for a hearing.¹⁶⁷ If a hearing is held, bar counsel and the attorney under investigation may call witnesses and present evidence.¹⁶⁸ If the District Committee finds that the attorney committed misconduct by clear and convincing evidence, it may sanction the attorney with a private admonition or public reprimand.¹⁶⁹ Serious misconduct will be referred to the Disciplinary Board, which has the power to suspend an attorney's license.¹⁷⁰ The State Bar is not empowered to provide any direct remedy to the defendant who was harmed by the misconduct.

Utility of Bar Complaint System to Address Prosecutorial Misconduct

While the Virginia State Bar's disciplinary process is meant to serve as a means to investigate and discipline the misconduct of all attorneys, it does not appear designed to effectively address allegations of prosecutorial misconduct. There appears to have been few disciplinary actions imposed against Commonwealth's Attorneys and other prosecutors by the Virginia State Bar in recent years. Of the more than 500 public disciplinary orders issued by Virginia State Bar District Committees and the Disciplinary Board from 2008 to 2012, only three related to prosecutors.¹⁷¹ The nature of complaints not resulting in public discipline, as well as discipline imposed short of public reprimand, are confidential.¹⁷²

Defendants, defense attorneys, other prosecutors, and judges—the persons most likely to witness prosecutorial misconduct—may also be discouraged from filing a State Bar complaint because it could adversely affect their relationship with the prosecutor.¹⁷³ As a 2011 study of prosecutorial misconduct claims noted, “a bar complaint could itself negatively impact the outcome of ongoing litigation, if the prosecutor's need to defend against disciplinary proceedings, or simple resentment at being reported to the authorities, results in less favorable treatment of the defendant.”¹⁷⁴

¹⁶⁶ VA. R. PROF'L CONDUCT 13-10(E)–(F). *See also Guide to Lawyer Discipline*, *supra* note 26.

¹⁶⁷ VA. R. PROF'L CONDUCT 13-15. *See also Guide to Lawyer Discipline*, *supra* note 26.

¹⁶⁸ VA. R. PROF'L CONDUCT 13-16. *See also Guide to Lawyer Discipline*, *supra* note 26.

¹⁶⁹ VA. R. PROF'L CONDUCT 13-16(X). *See also Guide to Lawyer Discipline*, *supra* note 26.

¹⁷⁰ VA. R. PROF'L CONDUCT 13-6. *See also Guide to Lawyer Discipline*, *supra* note 26.

¹⁷¹ *Disciplinary System Actions*, VA. STATE BAR, <http://www.vsb.org/site/regulation/disciplinary-system-actions> (last visited Aug. 8, 2013).

¹⁷² These issues are not unique to Virginia. A 2011 review of prosecutorial discipline procedures found that many state bars “actively discourage complainants from filing allegations of misconduct.” David Keenan, Deborah Jane Cooper, David Lebowitz, & Tamar Lerer, *The Myth of Prosecutorial Accountability after Connick v. Thompson: Why Existing Professional Responsibility Measures Cannot Protect against Prosecutorial Misconduct*, 121 Yale L.J. Online 203, 236 (2011). Prosecutors in many other states who engage in misconduct are also rarely subject to state bar discipline. *Id.* at 220–21.

¹⁷³ *See id.* at 211.

¹⁷⁴ *Id.*

Furthermore, it appears that the State Bar's complaint system is oriented to manage complaints against retained counsel; thus, the public may not understand that State Bar proceedings are the appropriate disciplinary forum to pursue any disciplinary action against a prosecutor.¹⁷⁵

Recent Instances of Prosecutorial Negligence, Error, and Misconduct in Virginia

The extent to which Virginia prosecutors who have allegedly engaged in misconduct have been investigated and disciplined is not entirely clear, as the Virginia State Bar disciplinary process is confidential unless the attorney is publicly disciplined.¹⁷⁶

In the previously-discussed Michael Hash case,¹⁷⁷ the federal district court that granted habeas relief to Hash described the prosecution's behavior as "misconduct."¹⁷⁸ Shortly thereafter, the Commonwealth's Attorney who handled the case resigned.¹⁷⁹ However, it is unclear whether a bar complaint was filed in the case. With respect to Justin Wolfe,¹⁸⁰ one of Virginia's Regional Capital Defenders filed a Virginia State Bar complaint in 2011 against the Commonwealth's Attorney and Assistant Commonwealth's Attorney who prosecuted the case.¹⁸¹ The current status of that complaint is unknown.¹⁸²

Conclusion

The Virginia State Bar has established procedures by which a prosecutor, like any other attorney, can be investigated and sanctioned for a violation of the Rules of Professional Conduct. Only a small fraction—less than one percent—of the State Bar's public disciplinary orders address claims of prosecutorial misconduct. The Assessment Team, however, could not obtain information related to the disciplinary policies of individual Commonwealth's Attorney offices,¹⁸³ nor could it assess the sufficiency of confidential investigations conducted by the Virginia State Bar. The Assessment Team is unable to determine if known misconduct has been

¹⁷⁵ See *Inquiry Form*, VA. STATE BAR, http://www.vsb.org/inquiry_form.pdf (last visited Aug. 8, 2013). The State Bar's complaint form, for example, asks the complainant to list the "lawyer's law firm, if known," implying that the attorney is in private practice. *Id.* The section of the form that asks the complainant to "[d]escribe your relationship to the lawyer who is the subject of your Inquiry" does not include a category for prosecutors or Commonwealth's Attorneys. *Id.*

¹⁷⁶ See *Guide to Lawyer Discipline*, *supra* note 26.

¹⁷⁷ See *supra* notes 75–99 and 119–124 and accompanying text.

¹⁷⁸ Hash v. Johnson, 845 F. Supp. 2d 711, 748–51 (W.D.Va. 2012).

¹⁷⁹ Donnie Johnston, 'Everything Is So New' As Free Man, THE FREE LANCE-STAR (Fredericksburg, Va.), Apr. 5, 2012.

¹⁸⁰ See *supra* notes 125–139 and accompanying text.

¹⁸¹ *Ethics Complaint Filed against Ebert*, VA. LAWYERS WEEKLY, July 20, 2011, <http://valawyersweekly.com/vlwblog/2011/07/20/ethics-complaint-filed-against-ebert/>.

¹⁸² The Commonwealth's Attorney and Assistant Commonwealth's Attorney remain in office. *Commonwealth's Attorney*, PRINCE WILLIAM CNTY., VA, <http://www.pwcgov.org/government/courts/ca/Pages/Commonwealth-Attorney.aspx> (last visited Aug. 8, 2013) (listing Paul Ebert as Commonwealth's Attorney); *Assistant Commonwealth's Attorneys*, PRINCE WILLIAM CNTY., VA, <http://www.pwcgov.org/government/courts/ca/Pages/Assistant-Commonwealths-Attorneys.aspx> (last visited Aug. 8, 2013) (listing Richard Conway as Assistant Commonwealth's Attorney).

¹⁸³ The Richmond Commonwealth's Attorney Office indicated that it has "no policies and procedures to discover misconduct." RICHMOND COMMONWEALTH'S ATTORNEY SURVEY, *supra* note 36, at 9.

disclosed to the criminal defendants in whose cases it occurred. Thus, the Assessment Team was unable to determine if Virginia is in compliance with Protocol #5.

Recommendation

The following recommendations seek to ensure that errors, even if unintentional, are consistently identified so that prosecutors, Commonwealth's Attorney offices, and the criminal justice system can learn from past errors and prevent future errors. The recommendations also seek to better ensure that there is investigation and, where appropriate, discipline of prosecutors who engage in misconduct.

Virginia defendants who have been convicted due to negligence, error, and misconduct in the past have often not received relief until several years after the misconduct occurred. Establishing internal policies, standards, and training could further encourage prosecutors to report and assist Commonwealth's Attorney offices in preventing future instances of negligence, error, and misconduct.

As the U.S. Supreme Court has implied, bar discipline—or the specter of discipline—may be the only way to enforce discovery rules and *Brady* obligations, as well adherence to the additional duties imposed on prosecutors through the Rules of Professional Conduct. To ensure that claims of prosecutorial misconduct receive the same level of review as other professional conduct violations such as financial malfeasance, the Virginia State Bar disciplinary counsel should initiate an investigation whenever there is an opinion by a state or federal judge indicating a finding of prosecutorial misconduct, whether or not the court found the error prejudicial. This entity should automatically begin an ethics investigation in any case in which a federal or Virginia court finds that a prosecutor knowingly violated *Brady* or otherwise acted unethically. A State Bar complaint should not be required. The State Bar's publicly-available materials on the complaint process should also be amended to make certain that individuals seeking to raise prosecutorial misconduct claims are not unduly discouraged.

Virginia should consider establishing professional responsibility units in the Commonwealth staffed by prosecutors and charged with investigating claims of negligence, error, and misconduct.¹⁸⁴

¹⁸⁴ See, e.g., *Office of Professional Responsibility (OPR) Home*, U.S. DEPT OF JUSTICE, <http://www.justice.gov/opr/> (last visited Aug. 8, 2013) (describing OPR's role to investigate allegations of misconduct involving Department attorneys). A similar unit was established by the Dallas County, Texas, District Attorney in 2007. Terri Moore, *Prosecutors Reinvestigate Questionable Evidence: Dallas Establishes "Conviction Integrity Unity"*, CRIM. JUST., Fall 2011, at 4.

F. Protocol #6

The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the prosecution team, including training relevant to capital prosecutions.

Attorneys licensed to practice law in Virginia, including Commonwealth's Attorneys, are required to complete twelve hours of continuing legal education (CLE) coursework every year, including two hours on ethics or professionalism.¹⁸⁵ There are no additional requirements for Commonwealth's Attorneys, including prosecutors who handle death penalty cases.

The Virginia General Assembly has established the Commonwealth's Attorneys' Services Council (CASC) "to ensure the upgrading of criminal justice administration by providing and coordinating training, education and services for attorneys for the Commonwealth."¹⁸⁶ While CASC offers several CLE courses, none of the scheduled courses, as of August 2013, appear to address death penalty issues.¹⁸⁷ Furthermore, a planned homicide training program, which might include training on capital litigation, is listed as "SUSPENDED PENDING FUNDING."¹⁸⁸ The Richmond Commonwealth's Attorney has also stated that its attorneys no longer attend some of the out-of-state training conferences due to budget constraints.¹⁸⁹

While some Virginia Commonwealth's Attorney offices may require their staff to attend additional trainings that address death penalty issues, or may have developed their own in-house capital litigation training programs, the Assessment Team was unable to obtain the information necessary to make this determination.¹⁹⁰ The Richmond Commonwealth's Attorney Office, however, states that prosecutors who handle capital cases are "encouraged but not required to attend" training programs offered by CASC and the Virginia Association of Commonwealth Attorneys.¹⁹¹

Conclusion

While CASC provides some training programs for Virginia's Commonwealth's Attorneys, it appears that funding for trainings relevant to death penalty prosecutions may be insufficient. The Assessment Team could not, however, determine if Commonwealth's Attorneys throughout Virginia require their staff to attend the CASC, VACA or other trainings, nor could the Assessment Team determine what, if any, in-house training requirements Commonwealth's Attorneys have imposed. Accordingly, the Team was unable to determine if Virginia is in compliance with Protocol #6.

¹⁸⁵ *Mandatory Continuing Legal Education Regulations*, VA. STATE BAR, <http://www.vsb.org/pro-guidelines/index.php/mcle-regs/> (last visited Aug 8, 2013). There are some exceptions to the CLE requirement, but they are not relevant to this discussion. *See id.*

¹⁸⁶ VA. CODE ANN. § 2.2-2617(A) (2013). Such an entity or entities could be housed within the Virginia State Bar.

¹⁸⁷ *Training Programs, COMMONWEALTH'S ATT'YS' SERVS. COUNCIL*, <http://www.cas.state.va.us/trainingprograms.htm> (last visited Aug. 8, 2013).

¹⁸⁸ *Id.*

¹⁸⁹ RICHMOND COMMONWEALTH'S ATTORNEY SURVEY, *supra* note 36, at 3.

¹⁹⁰ *See supra* notes 33–36 and accompanying text.

¹⁹¹ RICHMOND COMMONWEALTH'S ATTORNEY SURVEY, *supra* note 36, at 3.

Recommendation

Analogous to the special training required of defense counsel who handle capital cases, which is imposed by Virginia law, the Virginia Indigent Defense Commission, and individual capital defender offices, the Assessment Team strongly encourages Virginia to impose training requirements, accompanied by adequate funding to support participation in such trainings, for prosecutors on handling the special issues presented in death penalty cases, including training on the exercise of discretion as described under Protocol #1. In addition, given that federal courts have recently reversed two Virginia murder convictions because of *Brady* error, a component of the training must include specialized courses on disclosure duties under federal and state law. As described under Protocol #3, such trainings should be conducted in partnership or conjunction with capital defense counsel in order to offer insight on the varying forms of potential exculpatory and mitigating evidence that should be disclosed under *Brady*.

CHAPTER SIX

DEFENSE SERVICES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Defense counsel competency is perhaps the most critical factor determining whether an individual will receive the death penalty. Although anecdotes about inadequate defenses long have been part of trial court lore, a comprehensive 2000 study¹ showed definitively that poor representation has been a major cause of serious errors in capital cases as well as a major factor in the wrongful conviction and sentencing to death of innocent defendants.

Effective capital case representation requires substantial specialized training and some experience in the complex laws and procedures that govern a capital case in a given jurisdiction, as well as the resources to conduct a complete and independent investigation in a timely way. Full and fair compensation to the lawyers who undertake such cases also is essential, as is proper funding for experts.

Under current case law, a constitutional violation of the Sixth Amendment right to effective assistance of counsel is established by a showing that the representation was not only deficient but also prejudicial to the defendant—i.e., there must be a reasonable probability that, but for defense counsel's errors, the result of the proceeding would have been different.² The 2000 study found that between 1973 and 1995, state and federal courts undertaking reviews of capital cases identified sufficiently serious errors to require retrials or re-sentencing in 68 percent of the cases reviewed.³ In many of those cases, more effective trial counsel might have helped avert the constitutional errors at trial that ultimately led to relief.

In the majority of capital cases, however, defendants lack the means to hire lawyers with the knowledge and resources to develop effective defenses. In some jurisdictions, the lives of these defendants can sometimes rest with new or incompetent court-appointed lawyers or overburdened public defender services provided by the state.

Although lawyers and the organized bar have provided, and will continue to provide, pro bono representation in capital cases, most pro bono representation is limited to post-conviction proceedings. Only the jurisdictions themselves can address counsel representation issues in a way that will ensure that all capital defendants receive effective representation at all stages of their cases. Jurisdictions that authorize capital punishment therefore have the primary—and constitutionally mandated—responsibility for ensuring adequate representation of capital defendants through appropriate appointment procedures, training programs, and compensation measures.

¹ JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM: ERROR RATES IN CAPITAL CASES, 1973–1995* (2000), *available at* <http://www2.law.columbia.edu/instructionalservices/liebman>.

² *Strickland v. Washington*, 466 U.S. 668, 694 (1984).

³ Liebman, *supra* note 1, at 5–6.

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

When capital punishment was reinstated by the Virginia General Assembly in 1975, there was no formal appointment process nor were there standards governing the qualifications of counsel appointed to capital cases.⁴ As described by the U.S. Court of Appeals for the Fourth Circuit in 1991, “Virginia has not adopted any formal, centralized mechanism for the appointment of counsel to indigent criminal defendants; rather, it appears that the presiding judge simply contacts and appoints a member of the bar to represent an indigent defendant.”⁵ That same year, Virginia passed legislation instructing the Public Defender Commission (Commission) and the Virginia State Bar to promulgate “standards for attorneys admitted to practice law in Virginia who are qualified to represent defendants charged with capital murder or sentenced to death” at each stage of capital proceedings.⁶ In 1999, the Commission adopted qualification requirements promulgated by the Commission, the Virginia State Bar, and the Supreme Court of Virginia.⁷

In 2002, the Virginia General Assembly authorized the creation of four Regional Capital Defender offices (RCD) to provide representation at trial and direct appeal for the Commonwealth’s indigent capital defendants and death row inmates.⁸ Notably, prior to 2004, the year in which the RCDs began accepting appointments, Virginia tried 166 defendants at a capital trial since 1976, of which 140 were sentenced to death.⁹ This is a death-sentencing rate for cases that went to trial of approximately eighty-four percent.¹⁰ Subsequently, from 2005 through 2011, far fewer capital cases have resulted in death sentences. During this period, in the seventeen instances in which a capital case was brought to trial, a death sentence was imposed in eight of the cases, resulting in a death-sentencing rate of forty-seven percent.¹¹

A. *Virginia’s Indigent Legal Representation System*

Virginia’s current indigent defense representation system for capital defendants and death row inmates consists of four RCD offices, the Virginia Capital Representation Resource Center (VCRRC), and a list of private counsel eligible to be appointed by the courts at trial, on direct

⁴ VA. CODE § 18.2-32 (1975).

⁵ Poyner v. Murray, 964 F.2d 1404, 1422 (1991).

⁶ VA. CODE ANN. § 19.2-163.8(E) (2013). In 1991, Virginia also adopted legislation specifically providing “one or more attorneys” from a list of counsel to indigent defendants accused of a capital offense at trial, and if sentenced to death, on appeal and during state habeas corpus proceedings. VA. CODE ANN. §§ 19.2-163.7 (1991), 19.2-159(C) (1975) (general appointment of counsel to indigent criminal defendants statute).

⁷ Va. Indigent Def. Comm’n Survey Response, provided to Paula Shapiro by Jae K. Davenport, Standards of Practice Enforcement Att’y, Va. Indigent Def. Comm’n (Apr. 4, 2012) (on file with author) [hereinafter VIDC Survey Response].

⁸ SPANGENBERG GROUP, A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA 32 (2004) [hereinafter SPANGENBERG].

⁹ See *Virginia Capital Litigation Data*, VA. CAPITAL CASE CLEARINGHOUSE, <http://www.vc3.org/download/Capital%20Case%20Data%20Chart%20for%20Website.xls> (last visited July 29, 2013).

¹⁰ *Id.* Of these 140 cases in which a death sentence had been imposed, thirty were later removed from death row due to reversal of their death sentence on appeal (in which no death sentence was subsequently reimposed); pardon; commutation; death (non-execution); or suicide. *Id.*

¹¹ *Id.*

appeal, and during state habeas corpus proceedings.¹² The RCDs, as well as the Commonwealth's public defender offices, are overseen by the Virginia Indigent Defense Commission (formerly the Public Defender Commission).¹³ Annual appropriations by the Virginia General Assembly to the Commission and to the judiciary's Criminal Fund constitute the primary source of funding for capital indigent defense representation in Virginia.¹⁴

1. The Virginia Indigent Defense Commission

In 2004, the Virginia General Assembly established the Commission to fulfill the Commonwealth's constitutional obligation to provide counsel for indigent persons accused of crimes that carry a potential penalty of incarceration or death.¹⁵ The Commission is responsible for hiring Virginia's Capital Defenders and evaluating the performance of counsel employed by the RCDs.¹⁶ While the Commission does not appoint counsel to represent capital defendants or death row inmates,¹⁷ its responsibilities include overseeing the certification of all court-appointed attorneys who provide indigent criminal defense representation, including death penalty representation; maintaining a list of attorneys qualified to provide representation to indigent capital defendants; developing and enforcing the qualification standards required of capital and non-capital defense attorneys as well as the standards of practice for non-capital criminal cases; and providing or approving training programs to ensure attorneys meet the qualifications required to accept court appointments.¹⁸ The Commission also administers the budget to each of the RCDs.¹⁹

2. Court-appointed Counsel

Virginia law guarantees indigent capital defendants appointment of at least two attorneys from a list of certified counsel at trial and on direct appeal and at least one attorney from a list of certified counsel during state habeas corpus proceedings.²⁰

In 2002, the Virginia General Assembly authorized the creation of four Regional Capital Defender offices: Central, established in 2002, and North, Southeast, and Western, established in

¹² See VA. INDIGENT DEF. COMM'N, 2011 ANNUAL REPORT (Sept. 26, 2011), *available at* [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD2112011/\\$file/RD211.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD2112011/$file/RD211.pdf) [hereinafter VIDC 2011 Annual Report]; VA. CAPITAL REPRESENTATION RES. CTR., <http://www.vccrc.org/> (last visited July 29, 2013).

¹³ VA. CODE ANN. § 19.2-163.01(A)(7) (2013).

¹⁴ VIDC Survey Response, *supra* note 7, at 15; VA. CODE ANN. §§ 19.2-163, 53.1-40 (2013).

¹⁵ S.B. 330, Legis. 884 (Va. 2004), *codified at* VA. CODE ANN. § 19.2-163.01 (2004).

¹⁶ VA. CODE ANN. § 19.2-163.01(A)(8)–(9) (2013).

¹⁷ VIDC Survey Response, *supra* note 7, at 1, 5.

¹⁸ VA. CODE ANN. § 19.2–163.01(A)(1), (3)–(5); 53.1-40 (2013) (*italics added*); VIDC Survey Response, *supra* note 7, at 3; VA. CODE ANN. §§ 19.2-163, 53.1-40 (2013); *Home*, VA. INDIGENT DEF. COMM'N, <http://www.indigentdefense.virginia.gov/index.htm> (last visited July 28, 2013). See also Protocol #3, *infra* notes 199–240 and accompanying text, for detailed information on the responsibilities of the Commission in administering indigent defense services in death penalty cases.

¹⁹ VIDC Survey Response, *supra* note 7.

²⁰ VA. CODE ANN. § 19.2-163.7 (2013). The statute is unclear whether two attorneys are required to be assigned during state habeas corpus proceedings. *Id.* (“If the sentence of death is affirmed on appeal, the court shall, within 30 days after the decision of the Supreme Court of Virginia, appoint counsel from the same list, or such other list as the Supreme Court and the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding.”)

2003.²¹ When appointed by the court, the RCDs provide representation to capital defendants as lead counsel at trial and on direct appeal.²² Before the RCDs began accepting appointments by the court in 2004, public defenders from local Public Defender Offices and private counsel were appointed by the circuit courts to represent Virginia's indigent capital defendants at trial and on direct appeal.²³ From 1996 until 2010, capital defendants were represented on direct appeal by the statewide Appellate Defender, until that office closed due to insufficient funding.²⁴

3. Virginia Capital Representation Resource Center

The Virginia Capital Representation Resource Center (VCRRC) is a not-for-profit law firm operating since 1992 “dedicated to providing direct representation in death penalty cases in the Commonwealth of Virginia and assisting attorneys representing death-sentenced inmates or those facing possible death sentences.”²⁵ VCRRC provides representation during Virginia habeas corpus, federal habeas corpus, and state clemency proceedings.²⁶ VCRRC also provides training and continuing legal education seminars for appointed and pro bono counsel in capital cases, when feasible.²⁷

B. Appointment, Qualifications, Training, Compensation of, and Resources Available to Capital Attorneys at Trial, Direct Appeal, and State Habeas Corpus Proceedings

1. Appointment of Capital Counsel

For indigent defendants charged with a capital offense, upon request, the circuit court must appoint at least two attorneys from a list of qualified counsel maintained by the Commission.²⁸ Inclusion on the list is based on conformity with qualification standards for attorneys, determined by the Supreme Court of Virginia and the Commission, in conjunction with the Virginia State Bar.²⁹ Counsel appointed on or after July 1, 2004, is required by statute to include at least one Capital Defender.³⁰ The Virginia Code provides the circuit court judge the authority to “appoint counsel who is not included on the list, but who otherwise qualifies under the standards established and maintained by the Court and the Commission.”³¹

²¹ VIDC 2011 Annual Report, *supra* note 12, at 4–5.

²² VA. CODE ANN. § 19.2-163.4 (2013).

²³ Jeremy P. White, *Establishing a Capital Defense Unit in Virginia: A Proposal to Increase the Quality of Representation for Indigent Capital Defendants*, 13 CAP. DEF. J. 323, 349–50 (2001).

²⁴ Najah Farley, *Virginia Death Penalty and Appellate Defense*, HARVARD L. & POL’Y REV., Dec. 7, 2011; *see also* SPANGENBERG, *supra* note 8, at 7.

²⁵ VA. CAPITAL REPRESENTATION RES. CTR., <http://www.vccrrc.org/> (last visited July 29, 2013).

²⁶ Va. Capital Representation Res. Ctr. (VCRRC) Survey Response, provided by Robert E. Lee, Exec. Dir., VCRRC, to Paula Shapiro at 1, 7 (Apr. 5, 2012) (on file with author) [hereinafter VCRRC Survey Response]; Interview by Mark Pickett and Paula Shapiro with Robert E. Lee, Exec. Dir., VCRRC (Apr. 11, 2012) (on file with author) [hereinafter VCRRC Interview].

²⁷ VA. CAPITAL REPRESENTATION RES. CTR., <http://www.vccrrc.org/> (last visited July 29, 2013).

²⁸ VA. CODE ANN. § 19.2-163.7 (2013).

²⁹ VA. CODE ANN. § 19.2-163.8 (2013) (recommending that the standards consider certain factors). *See also* Statutory Authority and Qualifications, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/serving.htm> (last visited July 29, 2013). The qualification standards are discussed in more detail in Protocol #2, *infra* notes 163–198 and accompanying text.

³⁰ VA. CODE ANN. § 19.2-163.7 (2013).

³¹ VA. CODE ANN. § 19.2-163.8(C) (2013).

If a death sentence is imposed, the circuit court judge who presided over the capital trial will appoint two attorneys from the list or “qualified under the standards” to represent the defendant on direct appeal.³² Generally, trial counsel will be appointed to represent the death-sentenced defendant on direct appeal.³³

Within thirty days of the decision of the Supreme Court of Virginia affirming the death sentence on direct appeal, the circuit court is required to appoint an attorney from the list of certified counsel maintained by the Commission to represent the defendant during state habeas corpus proceedings.³⁴ Generally, the VCRRC, plus an additional private attorney, will be appointed to provide representation at this stage.³⁵ According to the VCRRC, state habeas counsel will also provide representation during federal habeas corpus proceedings and state clemency proceedings.³⁶

2. Qualifications and Certification of Capital Counsel

All capital counsel providing representation in Virginia must be active members in good standing of the Virginia State Bar or admitted to practice pro hac vice.³⁷ The Virginia State Bar requires all licensed attorneys to participate in a minimum of twelve hours of approved continuing legal education (CLE) every year.³⁸

All attorneys appointed to represent indigent capital defendants and death row inmates, including attorneys employed by the RCDs, as well as private counsel seeking appointment, must meet the qualification standards for capital defense representation.³⁹ The standards, adopted in 1999, do not apply to attorneys privately retained by a capital defendant or death row inmate.⁴⁰

The appointment criteria include experiential as well as training requirements.⁴¹ All attorneys seeking recertification for appointment to a death penalty case must complete the requisite ten hours of required training every two years.⁴² The Commission approves specialized courses to train attorneys for this purpose.⁴³

³² VA. CODE ANN. §§ 19.2-163.7, 19.2-163.8(C) (2013).

³³ VA. CODE ANN. § 19.2-163.7 (2013).

³⁴ *Id.*

³⁵ VCRRC Survey Response, *supra* note 26, at 1, 7.

³⁶ *Id.*; VCRRC Interview, *supra* note 26.

³⁷ VA. SUP. CT. R. 1A:4. Rule 1A:4 governs out-of-state lawyers admitted to practice pro hac vice.

³⁸ 15 VA. ADMIN. CODE § 5-70-20(A) (2013).

³⁹ VA. CODE ANN. § 19.2-163.8 (2013); *Home*, VA. INDIGENT DEF. COMM’N, <http://www.indigentdefense.virginia.gov/index.htm> (last visited July 29, 2013).

⁴⁰ VIDC Survey Response, *supra* note 7, at 3.

⁴¹ VA. CODE ANN. § 19.2-163.8(A) (2013). *See also Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited July 29, 2012); *Attorney Certification System (ACeS)*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/certapp.htm> (last visited July 29, 2013).

⁴² *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited July 29, 2013); *Attorney Certification System (ACeS)*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/certapp.htm> (last visited July 29, 2013).

⁴³ VA. CODE ANN. § 19.2-163.01(A)(2), (5) (2013); VIDC Survey Response, *supra* note 7, at 17.

3. Compensation and Additional Resources

The Virginia General Assembly provides funding for the provision of indigent defense services in the Commonwealth, including the cost of appointed counsel, expert services, and any other ancillary costs associated with the provision of capital defense.⁴⁴ In 1984, Virginia permitted fees for court-appointed attorneys to be set at the court's discretion.⁴⁵ Two years later, the maximum amount a capital defender could receive for representation in a death penalty case was \$650.⁴⁶ In 2000, the average compensation for defense counsel in capital cases was \$29,800.⁴⁷ Eventually, by 2002 and in light of a report issued by the Virginia General Assembly's Joint Legislative and Audit Review Commission finding the amount of compensation for a capital case to be inadequate, attorneys' fees for indigent capital defense increased to \$125 per hour, with no cap on total compensation.⁴⁸ Currently, court-appointed capital defense counsel are compensated at an hourly rate that should be "an amount deemed reasonable by the court," which cannot exceed \$200 per hour for in-court and \$150 for out-of-court services.⁴⁹

The General Assembly provides annual appropriations to the Commission, which in turn administers the funding to each of the four Regional Capital Defender offices.⁵⁰ RCD attorneys, mitigation specialists, and investigators receive salaries funded through each RCD's budget.⁵¹

The General Assembly also appropriates funding to the Commonwealth's "Criminal Fund," which supports payment of private, court-appointed counsel fees, as well as expert and ancillary services, including investigative and mitigation assistance, for indigent capital defendants.⁵² The Criminal Fund is administered by the Office of the Executive Secretary of the Supreme Court of Virginia.⁵³ Initial requests for payment of counsel's fees or ancillary and expert services must be made to the circuit court.⁵⁴

Annual appropriations from the General Assembly through the Virginia State Bar and federal Criminal Justice Act payments fund the VCRRC.⁵⁵ Courts have not authorized funding for investigative, mitigation, expert or other ancillary assistance to death row inmates for use during preparation or presentation of state habeas corpus claims.⁵⁶

⁴⁴ See *supra* note 14 and accompanying text.

⁴⁵ SPANGENBERG, *supra* note 8, at app. A-10.

⁴⁶ J. LEGIS. AUDIT & REV. COMM'N, VA. ASSEMB.: REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT 24 (2002) [hereinafter JLARC].

⁴⁷ ACLU of VA., UNEQUAL, UNFAIR AND IRREVERSIBLE: THE DEATH PENALTY IN VIRGINIA 14 (2000).

⁴⁸ SPANGENBERG, *supra* note 8, at appendix A-5, A-9.

⁴⁹ VA. CODE ANN. § 19.2-163(2) (2013); Telephone Interview by Paula Shapiro with John Rickman, Director of Fiscal Services, and Mary Gilbert, Executive Secretary Office, Sup. Ct. of Va. (Apr. 20, 2012) (on file with author).

⁵⁰ VIDC Survey Response, *supra* note 7, at 11-12; VIDC 2011 Annual Report, *supra* note 12, at 15.

⁵¹ VIDC Survey Response, *supra* note 7, at 11-12.

⁵² VA. CODE ANN. §§ 19.2-326, 17.1-606, 19.1-163 (2013).

⁵³ Interview with John Rickman and Mary Gilbert, *supra* note 49.

⁵⁴ VA. CODE ANN. § 19.2-163 (2013) ("The trial judge . . . shall have the sole discretion to fix the amount of compensation to be paid counsel appointed by the court to defend a felony charge that may be punishable by death."); VIDC Survey Response, *supra* note 7, at 2, 9.

⁵⁵ VCRRC Interview, *supra* note 26.

⁵⁶ *Id.*

C. Representation During Capital Federal Habeas Corpus Proceedings

Pursuant to 18 U.S.C. § 3599, an inmate under a death sentence imposed by a state court petitioning for a federal writ of habeas corpus in one of Virginia’s two federal judicial districts—Eastern or Western—is entitled to appointed counsel and other resources, if s/he “is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services.”⁵⁷ Staff attorneys from the VCRRC, along with other court-appointed attorneys, regularly represent the Commonwealth’s death row inmates in federal habeas corpus proceedings.⁵⁸

D. Appointment and Qualifications of Attorneys Representing Death Row Clemency Petitioners

Virginia has not promulgated any rules, regulations, laws, or procedures that require the appointment of counsel to Commonwealth death row inmates petitioning for clemency. VCRRC staff attorneys, however, regularly represent Virginia death row inmates at this stage.⁵⁹ Furthermore, in 2009, the U.S. Supreme Court clarified that 18 U.S.C. § 3599 permits, but does not require, “federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation.”⁶⁰ The United States Code also provides a death row inmate the right to funds for “investigative, expert, or other services upon a showing they are reasonably necessary for the representation of the defendant.”⁶¹

⁵⁷ 18 U.S.C. § 3599(a)(2) (2013).

⁵⁸ VCRRC Survey Response, *supra* note 26, at 7; VCRRC Interview, *supra* note 26.

⁵⁹ VCRRC Survey Response, *supra* note 26, at 7.

⁶⁰ 18 U.S.C. § 3599(e); *Harbison v. Bell*, 556 U.S. 180, 194 (2009) (stating that the petitioner’s “case underscores why it is ‘entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells.’”) (citing *Hain v. Mullin*, 436 F.3d 1168, 1175 (10th Cir. 2006) (en banc)).

⁶¹ 18 U.S.C. § 3599(f) (2013).

II. ANALYSIS

This Chapter relies heavily on the 2003 *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, which are recognized as the standard of care in the defense of death penalty cases.⁶² The *ABA Guidelines* are regularly cited by state and federal courts, including the U.S. Supreme Court, to assess counsel performance and ensure adequate funding and resources for defense services in death penalty cases. In addition, several states have formally adopted the *ABA Guidelines*, either through legislation or by court rule, along with numerous bar associations, defender organizations, and commissions.⁶³

The Virginia Assessment Team submitted surveys to various capital defender agencies in the Commonwealth regarding the training, qualifications, certification, and compensation of court-appointed capital defenders, the appointment process, access to resources, and other information relevant to the analysis in this Chapter.⁶⁴ Responses to the survey and the entities' policies are discussed below.

Below are the ABA Benchmarks, or "Protocols," used by the Assessment Team in its evaluation of Virginia's death penalty system. Each Protocol is followed by the Assessment Team's analysis of the Commonwealth's compliance with the Protocol and, where appropriate, the Assessment Team's recommendations for reform.

A. Protocol #1

In order to ensure high quality legal representation for all individuals facing the death penalty, each death penalty jurisdiction should guarantee qualified and properly compensated counsel at every stage of the legal proceedings—pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus, and clemency proceedings. Counsel should be appointed as quickly as possible prior to any proceedings. At minimum, satisfying this standard requires the following (as articulated in Guideline 4.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*)):

- a. At least two attorneys at every stage of the proceedings qualified in accordance with *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, Guideline 5.1 (reproduced below as Protocol #2), an investigator, and a mitigation specialist.**

⁶² See AM. BAR ASS'N, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 984–85 (2003) [hereinafter *ABA Guidelines*].

⁶³ For more information on the jurisdictions and entities that have adopted some or all of the *ABA Guidelines*, see ABA DEATH PENALTY REPRESENTATION PROJECT, *Implementation of the 2003 ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (Jan. 2012), available at http://www.americanbar.org/content/dam/aba/uncategorized/Death_Penalty_Representation/implementation_fact_sheet_01_2012.authcheckdam.pdf.

⁶⁴ Surveys were submitted to the four Regional Capital Defender Offices (RCDs), the Virginia Indigent Defense Commission, the Virginia Capital Case Clearinghouse, and the Virginia Capital Representation Resource Center. A copy of the survey is reproduced in the Appendix to this Report, *infra*.

The appointment of counsel, a mitigation specialist, and an investigator as early as possible in a potential death penalty case bears not only on the ability of the defense team to effectively prepare for trial, but may also prevent unnecessary litigation regarding the defendant's death penalty eligibility.⁶⁵ The *ABA Guidelines* anticipate that the "core members" of the capital defense team include two qualified attorneys, an investigator, and a mitigation specialist, because a capital case "requires skills and expertise not generally possessed by attorneys, most notably for the investigation of the offense and the extensive investigation of social history that must be done."⁶⁶

Virginia law guarantees indigent capital defendants appointment of at least two attorneys from a list of qualified counsel during pretrial proceedings, at trial, on direct appeal, and for all certiorari petitions, and at least one attorney from a list of qualified counsel during state habeas corpus proceedings.⁶⁷ No Virginia rule or law guarantees access to an investigator and mitigation specialist at any stage of a capital case. With respect to federal habeas corpus proceedings, federal law provides counsel and access to ancillary services to every Virginia death row inmate seeking federal habeas relief, and that counsel may, but is not required, to continue to provide representation during state clemency proceedings.⁶⁸ No provision of Virginia law guarantees appointment of counsel during clemency proceedings in death penalty cases. Virginia law does not address the qualifications of retained counsel in death penalty cases, including cases in which the defendant can afford only one attorney.

Timing of Appointment of Counsel

Pursuant to the Virginia Code, at least two capital-qualified attorneys are to be appointed by the circuit court at the time an indigent defendant is charged with a capital offense.⁶⁹ As of 2004, at least one attorney must be appointed from the local Regional Capital Defender office (RCD).⁷⁰ Typically, the circuit court judge will appoint counsel at arraignment.⁷¹ However, often the Commonwealth's Attorney will initially file a case "as some lower grade of homicide and the defendant will not get two [capital qualified] attorneys until either a warrant or indictment is filed alleging capital" charges.⁷²

⁶⁵ Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1120 (2003) ("Today, the defense team concept, in which clients are provided with two attorneys, a mitigation specialist, and an investigator, is well-established and has become the accepted 'standard of care' in the capital defense community.")

⁶⁶ Miller, *supra* note 65, at 1122–23 (discussing *ABA Guideline* 10.4(C)(2)(a)).

⁶⁷ VA. CODE ANN. § 19.2-163.7 (2013). It is unclear whether two attorneys are required to be assigned during state habeas corpus proceedings. *Id.* ("If the sentence of death is affirmed on appeal, the court shall, within 30 days after the decision of the Supreme Court of Virginia, appoint counsel from the same list, or such other list as the Supreme Court and the Commission may establish, to represent an indigent prisoner under sentence of death in a state habeas corpus proceeding.") According to the Virginia Capital Representation Resource Center (VCRRC), which provides representation in almost all capital state habeas cases arising in Virginia, "[i]n the past ten years or more, courts have been appointing more than one lawyer, usually with both being qualified under the list provided to the courts." VCRRC Survey Response, *supra* note 26, at 2.

⁶⁸ 18 U.S.C. § 3599(e) (2013); *McFarland v. Scott*, 512 U.S. 849, 856–57 (1994); *Harbison v. Bell*, 129 S.Ct. 1481, 1486 (2009).

⁶⁹ VA. CODE ANN. § 19.2-163.7 (2013).

⁷⁰ *Id.*

⁷¹ Qualifications of court-appointed capital counsel will be discussed below and under Protocol #2.

⁷² Capital Defender Office Central Survey Response, provided to Paula Shapiro by David Baugh, Capital Defender, RCD Central, at 3 (Apr. 4, 2012) (on file with author) [hereinafter RCD Central Survey Response].

The time of appointment may vary depending on the practice of the presiding circuit court judge and the time when capital charges are filed or an indictment returned.⁷³ In some cases, RCDs are able to request and obtain appointment as soon as it appears an arrest is likely in a potential capital case.⁷⁴ For example, an RCD may contact the circuit court when informed of a potential capital case in order to ensure it is appointed.⁷⁵ One RCD monitors the local news for potential cases and contacts the Commonwealth's Attorney to determine whether capital charges may be brought.⁷⁶ In such instances, the RCD will request appointment by the circuit court "even if [the case is] only filed as a first degree murder case at the time."⁷⁷ In other jurisdictions, judges typically appoint the local RCD automatically, even if no capital indictment has been filed.⁷⁸

Because counsel are to be appointed "by the circuit court," however, judges may preclude appointment of capital-qualified counsel in the general district court.⁷⁹ According to RCD North, appointment of capital-qualified counsel may occur as late as six months after arrest.⁸⁰ It appears, therefore, that counsel is not always appointed as quickly as possible prior to the commencement of capital proceedings.

Once a capital defendant is sentenced to death, the circuit court judge who presided over the capital trial will appoint counsel to provide representation on direct appeal.⁸¹ Capital defendants sentenced to death are typically represented by trial counsel on direct appeal, unless another qualified attorney is appointed.⁸² Within thirty days of the Supreme Court of Virginia affirming the death sentence on direct appeal, the circuit court judge must appoint counsel for representation during state habeas corpus proceedings.⁸³ In practice, according to VCRRC, its attorneys immediately begin working on an inmate's case upon the affirmation of a death sentence on direct appeal.⁸⁴

⁷³ Interview by Mark Pickett and Paula Shapiro with Ed Ungvarsky, Capital Defender, RCD North (Apr. 4, 2012) (on file with author).

⁷⁴ Interview with Ed Ungvarsky, *supra* note 73.

⁷⁵ Regional Capital Defender Southeast Survey Response, provided to Mark Pickett by Doug Ramseur, Capital Defender, RCD Southeast, at 2 (Mar. 19, 2012) (on file with author) [hereinafter RCD Southeast Survey Response]; Regional Capital Defender North Survey Response, provided to Paula Shapiro & Mark Pickett, by Ed Ungvarsky, Capital Defender, RCD North, at 2 (Apr. 4, 2012) (on file with author) [hereinafter RCD North Survey Response].

⁷⁶ RCD Central Survey Response, *supra* note 72, at 1 ("This office has never been required to await notice of intent to seek death prior to appointment.")

⁷⁷ RCD Central Survey Response, *supra* note 72, at 1.

⁷⁸ *Id.* at 1–3. The Central Regional Capital Defender reported that "sometimes if there is a potential, but unfiled, capital case, [RCD Central] can get itself appointed. In other cases this office has gotten into the case earlier." *Id.* at 3.

⁷⁹ VA. CODE ANN. § 19.2-163.7 (2013) ("... the judge of the circuit court, upon request for the appointment of counsel, shall appoint ...").

⁸⁰ Interview with Ed Ungvarsky, *supra* note 73. RCD North also states that the delay in appointment may occur in cases involving multiple co-defendants, in which case RCD North will "attempt to be appointed to the co-defendant most likely to get [a] death sentence." RCD North Survey Response, *supra* note 75, at 3.

⁸¹ RCD North Survey Response, *supra* note 75, at 1.

⁸² RCD Southeast Survey Response, *supra* note 75, at 23.

⁸³ VA. CODE ANN. § 19.2-163.7 (2013). Virginia law provides limited time for death row inmates to investigate and prepare a state habeas petition. VA. CODE ANN. § 8.01-654.1 (2012). For more information on capital state habeas corpus proceedings in Virginia, see Chapter Eight on State Habeas Corpus Proceedings.

⁸⁴ VCRRC Survey Response, *supra* note 26, at 2. In fact, the VCRRC has "assisted and filed materials in cases without formal appointment to the representation." *Id.*

Provision of Mitigation Specialists and Investigators

Attorneys appointed to represent an indigent capital defendant or death row inmate may have—but are not guaranteed—access to investigators and mitigation specialists at trial, on direct appeal, during state habeas corpus, federal habeas corpus, and clemency proceedings. Indigent capital defendants and death row inmates represented at trial or on direct appeal by one of the four RCDs have access to the representing office’s staff investigators and mitigation specialists.⁸⁵ Capital defendants represented solely by private court-appointed counsel or privately-retained counsel whose clients are financially unable to afford the cost of investigative, mitigation, or other expert assistance, must petition the circuit court for funding of such services at trial and direct appeal.⁸⁶ Thus, counsel may, but is not required to, seek appointment of mitigation specialists—whose presence on a capital defense team “often makes the difference between life or death for the client”—as well as investigators—who are “essential member[s] of the core team in capital cases.”⁸⁷ It is also left to the discretion of individual circuit court judges to approve funding for such services.

Death row inmates represented during state habeas corpus proceedings by at least one VCRRC attorney have access to that organization’s single staff investigator, who also provides mitigation investigation.⁸⁸ Since 1995, courts have not provided any investigative, mitigation, expert or other ancillary assistance to death row inmates for use during preparation or presentation of state habeas corpus claims.⁸⁹

- b. At least one member of the defense should be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments. Investigators and experts should not be chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state.**

Virginia does not require that counsel or other members of the capital defense team be qualified by training and experience to screen individuals for the presence of mental or psychological disorders or impairments.⁹⁰ By statute, however, Virginia provides capital defendants with access to mental health experts to evaluate the defendant’s history, character, or mental condition for sentencing and to assess whether the defendant is “mentally retarded.”⁹¹ The RCDs “usually to always” request the appointment of such mental health experts.⁹² It appears, therefore, that

⁸⁵ VIDC Survey Response, *supra* note 7, at 9.

⁸⁶ *Id.* at 2, 9. See also VA. CODE ANN. § 19.2-264.3:1(A) (2013) (permitting appointment of a “qualified mental health expert” to assist the defense if the court finds that “*the defendant is financially unable to pay for expert assistance . . .*”) (emphasis added); VA. CODE ANN. § 19.2-264.3:1.2 (2013) (same).

⁸⁷ Eric Freedman, *Introduction*, 31 HOFSTRA L. REV. 903, 908 (2003) (discussing Jill Miller, *The Defense Team in Capital Cases*, 31 HOFSTRA L. REV. 1117, 1120 (2003)).

⁸⁸ VCRRC Interview, *supra* note 26.

⁸⁹ *Id.*

⁹⁰ The Commission reported that “[t]here is no requirement that the attorney must specifically be trained on that [mental retardation and mental illness].” VIDC Survey Response, *supra* note 7, at 21.

⁹¹ VA. CODE ANN. §§ 19.2-264.3:1, -264.3:1.2 (2013). For more information on access to mental health experts, see Chapter Thirteen on Mental Retardation and Mental Illness.

⁹² RCD Central Survey Response, *supra* note 72, at 11.

Virginia's indigent capital defendants typically are screened for mental or psychological disorders and impairments at the outset by a mental health expert.

Each RCD stated that it seeks to hire staff investigators and mitigation specialists with a background in psychology or related mental health issues. According to RCD North, one member of the team is "almost always, but not necessarily" trained to screen for the presence of mental or psychological disorders or impairments.⁹³ RCD West and Central report that their staff mitigation specialists typically handle the task of screening for the presence of mental or psychological disorders.⁹⁴ The Commission's description of relevant qualifications for a staff mitigation specialist states that candidates are required to have a bachelor's degree in social work, psychology or a related degree in mental health/substance abuse.⁹⁵ It further states that the mitigation specialists' task is to generate "complete social history reports and review[] records to include but not limited to psychological, medical, and educational [information] related to client and client's family."⁹⁶ Investigators must also meet specific education and experience requirements, and typically have a psychology background.⁹⁷

While Virginia capital defendants may request the circuit court judge to appoint a specific mental health expert, Virginia law states that the "defendant shall not be entitled to a mental health expert of the defendant's own choosing or to funds to employ such an expert."⁹⁸ Appointment of an expert is left to the court's discretion.⁹⁹ Whether investigators and experts in Virginia death penalty cases are chosen on the basis of cost of services, prior work for the prosecution, or professional status with the state depends on the jurisdiction. Typically, RCD Central and RCD West report that their offices are permitted to select the expert of their choice, while, according to RCD Southeast, "[s]ome judges will accept counsel's recommendation and other judges will not."¹⁰⁰ We were unable to determine on what basis circuit court judges select experts, when the court appoints experts outside of the defense counsel's preference.¹⁰¹ The Assessment Team was also unable to determine whether all capital defendants represented by privately-retained or court-appointed private counsel are screened by qualified individuals for the presence of mental or psychological disorders.

⁹³ RCD North Survey Response, *supra* note 75, at 17.

⁹⁴ Regional Capital Defender West Survey Response, provided to Paula Shapiro by Steve Milani, Capital Defender, RCD West, at 18 (Apr. 2, 2012) (on file with author) [hereinafter RCD West Survey Response] ("[m]itigation specialists handle this task in most cases"); RCD Central Survey Response, *supra* note 72, at 20 (noting that the in-house mitigation specialist is trained to screen for the presence of mental or psychological disorders or impairments).

⁹⁵ Sentencing Advocates/Mitigation Specialists and Investigators, Sample Position Job Descriptions, as provided by the VIDC (Apr. 3, 2012) (on file with author).

⁹⁶ *Id.*

⁹⁷ *Id.* For more on training of Virginia's capital counsel, see Protocol #5, *infra*.

⁹⁸ VA. CODE ANN. § 19.2-264.3:1 (2013).

⁹⁹ RCD Southeast Survey Response, *supra* note 75, at 12–13; VIDC Survey Response, *supra* note 7, at 10.

¹⁰⁰ RCD Southeast Survey Response, *supra* note 75, at 12–13 (also noting that "[s]ometimes the judges prefer to appoint experts who they have experience with . . .").

¹⁰¹ *But see* RCD Southeast Survey Response, *supra* note 75, at 13 ("Most judges act as if the money for these experts is taken out of their personal paychecks. The funds [for experts] are normally extremely limited.").

With respect to capital state habeas proceedings, courts do not fund or appoint experts to screen a death row inmate for the presence of mental or psychological disorders or impairments.¹⁰² According to VCRRC, its staff attorneys and investigator/mitigation specialist receive some training on mental retardation and mental disorders, but generally do not receive formal training on screening death row inmates for the presence of mental or psychological disorders.¹⁰³ VCRRC seeks pro bono services and consultations from mental health experts in cases in which it believes mental health issues may be present.¹⁰⁴

- c. A plan for defense counsel to receive the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at every stage of the proceedings. The plan should specifically ensure provision of such services to private attorneys whose clients are financially unable to afford them.**
 - i. Counsel should have the right to seek such services through ex parte proceedings, thereby protecting confidential client information.**
 - ii. Counsel should have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds.**

The availability of qualified investigative, expert, and ancillary services is critical to the development and presentation of an effective defense.¹⁰⁵ “Consistent effective capital defense representation . . . involves not only identifying and compensating qualified lawyers, but also equipping the defense team with such fundamental resources as investigative, forensic and related services”¹⁰⁶ Furthermore, the availability of such services during state habeas proceedings—perhaps the final opportunity to present new evidence challenging a death sentence—is imperative “to verify or undermine the accuracy of all evidence presented” at trial and to determine whether the decision-makers at trial were properly informed of and were able to appropriately weigh all relevant evidence pertaining to each phase of the capital trial.¹⁰⁷

Access to Ancillary Professional Services at Trial

In 1996, the Supreme Court of Virginia expanded the right to experts to include non-mental health assistance if the defendant demonstrates that “the subject which necessitates the assistance

¹⁰² VCRRC Survey Response, *supra* note 26, at 3, 7; VCRRC Interview, *supra* note 26.

¹⁰³ VCRRC Interview, *supra* note 26.

¹⁰⁴ *Id.* Attorneys at VCRRC seek to raise up to \$1,000 to pay an expert to review mental health records. *Id.*

¹⁰⁵ See, e.g., ABA STANDARDS FOR CRIMINAL JUSTICE, PROVIDING DEFENSE SERVICES, ABA Standard 5-1.4 cmt. (3d ed. 1992) [hereinafter ABA STANDARDS] (“Quality legal representation cannot be rendered either by defenders or by assigned counsel unless lawyers have available other supporting services in addition to secretaries and investigators. Among these are access to necessary expert witnesses, as well as personnel skilled in social work and related disciplines to provide assistance at pretrial release hearings and sentencing. The quality of representation at trial, for example, may be excellent and yet unhelpful to the defendant if the defense requires the assistance of a psychiatrist or handwriting expert and no such services are authorized or available.”).

¹⁰⁶ Eric M. Freedman, *Add Resources and Apply Them Systematically: Governments’ Responsibilities Under the Revised ABA Capital Defense Representation Guidelines*, 31 HOFSTRA L. REV. 1097, 1102 (2003) (internal citations omitted).

¹⁰⁷ ABA Guidelines, *supra* note 62, at Guideline 1.1, cmt.

of the expert is ‘likely to be a significant factor in his defense.’”¹⁰⁸ Historically, however, Virginia capital defendants did not have the right to request funds for expert services through ex parte proceedings, thereby forcing disclosure of potential defense strategies, providing non-reciprocal, accelerated discovery to the prosecution, and failing to protect confidential client information.¹⁰⁹ Prior to the Commonwealth’s adoption of a statutory framework for requesting an ex parte hearing in 2010, many capital defense counsel were required to request funds for most expert and ancillary professional services during adversarial hearings.¹¹⁰ Often during these proceedings, the Commonwealth objected to the defense’s request for the provision of funds or services.¹¹¹

In 2005, Virginia also permitted capital defense counsel to “certify that in good faith he believes that a scientific investigation may be relevant to the criminal charge,” and receive an ex parte hearing for this purpose “as soon as practicable.”¹¹² Pursuant to this law, if the court is “satisfied as to the correctness of the certification,” it may order the testing to be performed by the Department of Forensic Science.¹¹³

Ex Parte Proceedings

Since 2010, however, capital defendants found to be “financially unable to pay for expert assistance” may request the appointment of experts for use prior to and at trial through an ex parte proceeding.¹¹⁴ Upon notice to the Commonwealth, the defense may request the circuit court to designate another judge in the same circuit to hear ex parte requests for the appointment of a qualified expert to assist the defense.¹¹⁵ The circuit court will only appoint a judge to consider ex parte requests if the defense demonstrates “a particularized need for confidentiality,” presented “in an adversarial proceeding before the trial judge.”¹¹⁶

¹⁰⁸ *Husske v. Commonwealth*, 476 S.E.2d 920, 925 (Va. 1996) (requiring a detailed showing that is more than an “undeveloped assertion” that the expert is necessary to the defense).

¹⁰⁹ Justin B. Shane, *Money Talks: An Indigent Defendant’s Right to an Ex Parte Hearing for Expert Funding*, 17 CAP. DEF. J. 347, 348 (2005) (“Forcing a defendant to decide whether an expert is necessary at such an early stage in the proceedings burdens his right to present a defense and places him at a major disadvantage when compared to monied defendants.”). Telephone Interview with Doug Ramseur, Capital Defender, RCD Southeast (Feb. 24, 2012) (on file with author); Interview with Ed Ungvarsky, *supra* note 73.

¹¹⁰ Shane, *supra* note 109, at 348 (“Virginia is one of the few capital jurisdictions in which statutory or case law does not permit defendants to apply ex parte for expert funding or in which judges do not routinely allow ex parte applications”); *Ex Parte Hearings Litigation Guide*, VA. CAPITAL CASE CLEARINGHOUSE, <http://www.vc3.org/exparte/> (last visited Apr. 20, 2012).

¹¹¹ Interview with Doug Ramseur, *supra* note 109; Interview with Ed Ungvarsky, *supra* note 73; Telephone Interview with David Bruck, Exec. Dir., Va. Capital Case Clearinghouse (Apr. 2012) (on file with author).

¹¹² VA. CODE ANN. § 9.1-1104 (2013).

¹¹³ *Id.*

¹¹⁴ VA. CODE ANN. § 19.2-264.3:1.3(A) (2013).

¹¹⁵ *Id.* This statute’s ex parte procedure does not apply to the request for a mental health expert which may be made directly to the trial court and for which the defendant need not show any particularized showing of necessity in order for the request to be granted. VA. CODE ANN. §§ 19.2-164.3:1, 164.3:1.2 (2013). Such requests are not made ex parte.

¹¹⁶ VA. CODE ANN. § 19.2-264.3:1.3(A) (2013). This proceeding will be transcribed as part of the record available for appellate and habeas corpus review. *Id.*

If the trial court appoints a designated ex parte judge, the capital defendant will have to again demonstrate a “particularized need for confidentiality” to the ex parte judge.¹¹⁷ If the ex parte judge finds that the defense met this burden, it may submit a written motion, filed under seal, to the designated judge who will hold an ex parte hearing “as soon as practicable.”¹¹⁸ If the judge finds, by clear and convincing evidence, “that the provision of the requested expert services would materially assist the defendant in preparing his defense and the lack of such confidential assistance would result in a fundamentally unfair trial,” the judge will appoint a qualified expert.¹¹⁹

It is the practice of some capital defense counsel to request, at the outset, a designated judge that will hold ex parte hearings on any and all requests for expert funding.¹²⁰ According to RCD Central, that office “has been very successful at winning the right to request the appointment of experts ex parte.”¹²¹ The overall impact of the 2010 ex parte statute appears to have generally changed the courts’ presumption concerning ex parte proceedings: for example, the existence of the law removes the assumption that ex parte proceedings are inappropriate in all cases and thus can encourage judges to grant ex parte hearings in cases in which the judges may have previously believed such proceedings to be impermissible.¹²²

Since 2012, however, there are at least “some judges [who] do not grant the right” to an ex parte judge.¹²³ Furthermore, even if an ex parte judge grants a request for expert funding, in some jurisdictions “funds are normally extremely limited.”¹²⁴ It is also worth noting that in order to make the requisite showing on the need for assignment of an ex parte judge, defense counsel must explain the need for confidentiality without also revealing the nature of the confidential information or defense strategy in the case.¹²⁵ Finally, the provision of mental health experts is specifically exempt from the application of the ex parte statute; therefore, defense counsel seeking approval of a mental health expert to examine the defendant must do so in open court without protection of confidential client information.¹²⁶

¹¹⁷ VA. CODE ANN. § 19.2-264.3:1.3(A)–(B) (2013).

¹¹⁸ VA. CODE ANN. § 19.2-264.3:1.3(B) (2013).

¹¹⁹ *Id.*

¹²⁰ Interview with Ed Ungvarsky, *supra* note 73; Interview with Doug Ramseur, *supra* note 109. *See, e.g.*, Order, Commonwealth v. Jephson, Frederick Cnty. Cir. Ct. (June 29, 2007) (on file with author).

¹²¹ RCD Central Survey Response, *supra* note 72, at 10.

¹²² *See, e.g.*, Muhammad v. Commonwealth, 611 S.E.2d 537 (Va. 2005).

¹²³ RCD Southeast Survey Response, *supra* note 75, at 13; Email from Meghan Shapiro to Sarah Turberville (Aug. 12, 2012) (on file with author) (describing defense counsel’s obligation to make a “particularized showing” to the trial court when requesting investigative assistance in a capital case, thereby revealing confidential client information).

¹²⁴ RCD Southeast Survey Response, *supra* note 75, at 13.

¹²⁵ *See* VA. CODE ANN. § 19.2-264.3:1.3(A) (2013).

¹²⁶ *See* VA. CODE ANN. § 19.2-264.3:1.3(D) (2013) (“This section does not apply to the appointment of a mental health expert pursuant to § 19.2-264.3:1 or 19.2-264.3:1.2.”).

Provision of Reasonably Necessary or Appropriate Ancillary and Expert Services

Indigent capital defendants receiving representation from one of the four Regional Capital Defender offices have access to that office's staff investigators and mitigation specialists.¹²⁷ As of March 2012, RCD North employs three mitigation specialists who also serve as investigators; RCD Central typically employs two full-time investigators and one full-time mitigation specialist; RCD Southeast employs one full-time investigator and two full-time mitigation specialists; and RCD West has one full-time mitigation specialist and two full-time staff investigators.¹²⁸

Court-appointed private counsel for indigent capital defendants must request funding for the assistance of investigative and mitigation services on a case-by-case basis from the circuit court.¹²⁹ All counsel for indigent defendants at trial—whether represented by a RCD or other appointed counsel—must seek court approval for expert assistance.¹³⁰ Capital defendants must demonstrate a need for ancillary and expert services and the decision to grant funding for such services remains within the circuit court's discretion.¹³¹ If the court approves funding for an investigator, mitigation specialist, or expert, capital counsel must then continue to seek court approval for additional hours or services performed, which may result in significant use of court's and counsel's time for resolution of funding issues.¹³²

RCD attorneys also may request from the court funding for additional investigative or mitigation assistance as needed.¹³³ RCD Central seeks funding for additional investigators “[o]n rare occasions” and requested funding in 2011 for a mitigation specialist due to the staff specialist being unavailable; on this occasion, the court “immediately appointed and paid” for an outside mitigation specialist.¹³⁴ By contrast, RCD North reports that it is common practice to request additional mitigation and investigation assistance in almost every capital case assigned to the office.¹³⁵ Capital defendants who have retained private counsel and who are unable to afford

¹²⁷ VIDC Survey Response, *supra* note 7, at 2, 9–10; RCD West Survey Response, *supra* note 94, at 6–8; Daniel L. Payne, *Building the Case for Life: A Mitigation Specialist as a Necessity and a Matter of Right*, 16 CAP. DEF. J. 43, 59–60 (2003) (see Affidavits of John B. Boatwright, III, Leonard R. Piotrowski, and Joseph A. Migliozi, Jr., lead attorneys for the Central Virginia, Northern Virginia, and Southeastern Virginia Capital Defender Units).

¹²⁸ RCD North Survey Response, *supra* note 75, at 7; RCD Central Survey Response, *supra* note 72, at 7; RCD Southeast Survey Response, *supra* note 75, at 8, 10; RCD West Survey Response, *supra* note 94, at 6–8.

¹²⁹ VA. CODE ANN. § 19.2-164.3:1.3(A) (2013); *Husske v. Commonwealth*, 476 S.E.2d 920, 924 (Va. 1996); VIDC Survey Response, *supra* note 7, at 2; RCD Southeast Survey Response, *supra* note 75, at 12; VIDC Survey Response, *supra* note 7, at 9–10; RCD Central Survey Response, *supra* note 72, at 11–12 (“Often the efficiency of the appointment and compensation is more a reflection of the degree of effort put into the request by counsel.”).

¹³⁰ VA. CODE ANN. § 19.2-264.3:1.3(A) (2013).

¹³¹ VA. CODE ANN. § 19.2-264.3:1.3 (2013). When asked whether Virginia requires expert, investigative, or other ancillary services to be assigned at every stage of the proceedings, the Commission stated “No. Any case assigned to a capital defender will have an investigator [a sentencing advocate] on staff. Any case assigned solely to court appointed counsel must petition the court.” VIDC Survey Response, *supra* note 7, at 2, 10.

¹³² Email from Meghan Shapiro, *supra* note 122.

¹³³ As of March 2012, attorneys from RCD Southeast request funding for additional investigative services once every few years, but have not requested additional funding for mitigation assistance. RCD Southeast Survey Response, *supra* note 75, at 12. To date, RCD West has not had the need to request additional investigative or mitigation assistance. RCD West Survey Response, *supra* note 94, at 9.

¹³⁴ RCD Central Survey Response, *supra* note 72, at 10.

¹³⁵ RCD North Survey Response, *supra* note 75, at 9.

expert services are also permitted to request the appointment of expert and ancillary defense services from the circuit court, although it is unclear whether trial courts across Virginia, in practice, authorize additional funding under these circumstances.¹³⁶ The RCDs and other court-appointed counsel may also need additional funding to support investigative and mitigation assistance in cases where “there is a language barrier or representation requires international travel.”¹³⁷ In these cases, however, trial courts may be reticent to approve such funding.¹³⁸

Because there is no guarantee of the assistance of investigators, mitigation specialists, and other experts for capital defense representation in Virginia, it is left to individual attorneys to decide whether to seek ancillary professional and expert services to assist in representation of a client who may be sentenced to death. According to RCD Central, “[t]here is an issue with retained attorneys or attorneys appointed prior to the filing of capital charges not insisting on investigators or mitigation specialist. [RCD Central] encourages attorneys to move for appointment of support, however, it is the usual practice not to appoint support personnel until a capital indictment or warrant is filed.”¹³⁹

A 2009 survey of 1,573 court-appointed attorneys and public defenders, conducted by the Survey and Evaluation Research Laboratory at Virginia Commonwealth University, asked attorneys about their success rates in requesting expert and ancillary services in their cases within the last three years.¹⁴⁰ Of the 392 attorneys who responded, 16.9% of respondents had handled a capital case.¹⁴¹ In the three years considered in the report, attorneys requested a mitigation specialist in thirty-five cases and were granted a specialist in thirty cases, mostly in capital cases.¹⁴² Table 1, below, describes the instances in which the respondents’ requests for expert and ancillary services were requested, granted, and denied in capital cases.¹⁴³

¹³⁶ VA. CODE ANN. § 19.2-264.3:1(A) (2013) (requiring only “a finding by the court that the defendant is financially unable to pay for expert assistance”).

¹³⁷ VIDC Survey Response, *supra* note 7, at 9; RCD Southeast Survey, *supra* note 75, at 12.

¹³⁸ Email from Meghan Shapiro, *supra* note 122.

¹³⁹ RCD Central Survey Response, *supra* note 72, at 3.

¹⁴⁰ VA. LAW FOUND. & VA. BAR ASS’N REPORT: RESOURCES AND EXPERTS AVAILABLE TO COURT-APPOINTED COUNSEL AND PUBLIC DEFENDERS 5–6, 8 (Mar. 2010) (on file with author). Of the 392 attorneys who responded, 66% were court-appointed, 26% were public defenders, and 5% were both. *Id.*

¹⁴¹ *Id.* at 38.

¹⁴² *Id.* at 11.

¹⁴³ *Id.* at 47.

Table 1

Number of Cases Each Resource or Expert Requested, Granted, and Denied in Capital Cases			
Type of Expert	Requested	Granted	Denied
Investigator	50	42	8
Forensic Psychologist	47	37	10
DNA Expert	9	7	2
Fingerprint Expert	3	1	2
Blood Spatter Expert	1	0	1
Forensic Toxicologist	1	0	1
Court Reporter	30	29	1
Physician or Health Care Provider	106	77	29
Social Worker	6	2	4
Forensic Scientist	12	9	3
Mitigation Specialist	35	30	5
Other Expert	4	2	2
TOTAL	304	236	68

Despite the recent successes of RCD-represented capital defendants in obtaining expert, investigative and mitigation services, there are recent capital cases where requests for investigative or mitigation assistance were denied at trial. For example:

- In a 2011 case, the Regional Capital Defender office was dismissed by the capital client, and when newly-appointed counsel requested an investigator and mitigation specialist to assist the defense, the circuit court appointed a single individual for both roles and limited the hours and compensation available for the appointed investigator/mitigation specialist;¹⁴⁴
- In a 2004 case, a private, court-appointed lawyer in a death penalty case was permitted by the trial court to retain an “investigator for the defense”; however, the defense’s motion to fund a mitigation specialist and special expert on corrections were denied.¹⁴⁵ The defendant is currently on death row.¹⁴⁶
- In another case, the trial court rejected defense counsel’s request for an expert “on the operation and classification of inmates in the Virginia prison system,” informing the defense that “the services of the expert were ‘expensive’ and that the information petitioner sought was available from persons who were in Virginia and who could ‘tell you better how it’s done.’”¹⁴⁷ The defendant was executed in 2006.¹⁴⁸
- At a 2002 capital trial, a circuit court refused a defendant’s request for appointment of an investigator, which was subsequently upheld by the Supreme Court of Virginia because

¹⁴⁴ Email from Doug Ramseur to Paula Shapiro (June 12, 2012) (on file with author) (case of Charles Evans, Jr., March 2011).

¹⁴⁵ *Juniper v. Commonwealth*, 626 S.E.2d 383, 403–04 (Va. 2006). The appellant also asserted that he had requested appointment of a forensic expert—a request on which the trial court never ruled. *Id.* at 398. The Supreme Court of Virginia found that the appellant was procedurally barred from raising this claim on appeal. *Id.*

¹⁴⁶ See *VC3 Capital Sentencing Spreadsheet*, *supra* note 9.

¹⁴⁷ *Lenz v. Warden of Sussex I State Prison*, 593 S.E.2d 292, 304 (Va. 2004) (holding that defense counsel’s failure to raise the necessity of the expert for the “future dangerousness” question at sentencing did not constitute ineffective assistance of counsel).

¹⁴⁸ See *VC3 Capital Sentencing Spreadsheet*, *supra* note 9.

the defendant failed to demonstrate sufficient “particularized need for the services of an expert.”¹⁴⁹ The defendant was executed in 2008.¹⁵⁰

In the 2002 case described above, the Supreme Court of Virginia reaffirmed that “a defendant does not have an absolute right to the assistance of an investigator, even when charged with capital murder.”¹⁵¹

Finally, whenever counsel is denied appointment of ancillary services, such as an investigator, it results in counsel having to perform investigative functions at a much greater cost to the Commonwealth than if an investigator were hired to assist the defense. It may also place the lawyer in the position of becoming a witness on behalf of the defense, causing the attorney to withdraw from the case.

Access to Professional Services During Collateral Proceedings and Clemency

Since the Supreme Court of Virginia was granted exclusive jurisdiction over state habeas corpus proceedings in death penalty cases in 1995, no mitigation specialist, investigator, or expert has been funded or appointed by the courts to assist in the investigation and presentation of a death row inmate’s claims.¹⁵² In fact, it appears that no entity in the Commonwealth is responsible for appointing expert services to assist in the claim development stage of state habeas corpus proceedings.¹⁵³ Virginia circuit courts, which appoint counsel in capital state habeas proceedings, do not have the statutory authority to hear motions for or to appoint expert services in these proceedings, and thus cannot appoint mitigation specialists, investigators, or experts for use at this stage of capital proceedings.¹⁵⁴ However, once a habeas petition has been filed with the Supreme Court of Virginia, the Supreme Court has jurisdiction to appoint or fund “reasonably necessary” investigators, mitigation specialists, and other ancillary expert services, in its discretion.¹⁵⁵

¹⁴⁹ *Green v. Commonwealth*, 580 S.E.2d 834, 840–41 (Va. 2003). The Supreme Court of Virginia also dismissed the assignment of error for failure to appoint a mitigation specialist or jury expert because, “[a]lthough Green moved the court to appoint an investigator, he never asked for a mitigation specialist or a jury expert. Thus, he is now barred from raising any claim on appeal regarding the court’s failure to appoint those two experts.” *Id.* (citing *Va. Sup. Ct. R.* 5:25).

¹⁵⁰ NAT’L ASS’N FOR THE ADVANCEMENT OF COLORED PEOPLE, *DEATH ROW U.S.A.* 32 (Winter 2012), *available at* http://www.naacpldf.org/files/publications/DRUSA_Winter_2012.pdf.

¹⁵¹ *Green v. Commonwealth*, 580 S.E.2d 834, 840 (Va. 2003) (citing *Bailey v. Commonwealth*, 529 S.E.2d 570, 578 (Va. 2000)).

¹⁵² VCRRC Survey Response, *supra* note 26 at 3, 7. *See, e.g., Juniper v. Warden of Sussex I State Prison*, 707 S.E.2d 290, 311 (Va. 2011) (“Upon consideration thereof, petitioner’s ‘motion for leave to depose the department of forensic science,’ ‘motion for funds to hire a psychologist or psychiatrist,’ ‘motions for appointment of a DNA expert and discovery of electronic data,’ ‘motion for discovery,’ and motion for an evidentiary hearing are denied.”); *Elliott v. Warden of Sussex I State Prison*, 652 S.E.2d 465, 489 (Va. 2007) (“Upon consideration whereof, petitioner’s motions for . . . an order releasing physical evidence for examination and authorization to retain a DNA expert, a crime scene reconstruction expert, a blood spatter expert, and a fingerprint expert; for leave to conduct depositions of witnesses; for leave to amend his habeas corpus petition with a recently discovered due process claim and to conduct discovery; and for oral argument are denied.”).

¹⁵³ VCRRC Interview, *supra* note 26.

¹⁵⁴ *See* VA. CODE ANN. § 19.2-163.7 (2013); VCRRC Interview, *supra* note 26; Telephone Interview by Paula Shapiro with Doug Robelen, Chief Deputy Clerk, Sup. Ct. of Va., on May 10, 2012 (on file with author).

¹⁵⁵ Interview with Doug Robelen, *supra* note 154.

However, death row inmates represented by the VCRRC during state habeas proceedings have access to that organization's lone investigator, who also serves as the mitigation specialist for all of the organization's capital habeas cases.¹⁵⁶ This investigator may also assist VCRRC attorneys handling state clemency applications.¹⁵⁷ Notably, during federal habeas corpus proceedings, federal law provides appointed counsel the assistance of ancillary defense services, which may be extended through state clemency proceedings.¹⁵⁸

Because Virginia does not guarantee the provision of reasonably necessary or appropriate expert, investigative, and other ancillary professional services to provide high quality legal representation at every stage of capital proceedings, Virginia is in partial compliance with this portion of Protocol #1.¹⁵⁹

iii. Counsel should have the right to have such services provided by persons independent of the government.

Whether appointed experts are independent of the government varies across Virginia. RCD Central, for example, reports that “usually expert[s] are from outside independent sources.”¹⁶⁰ By contrast, RCD Southeast states that capital defendants in its jurisdiction do not have the right to have expert, investigative, and ancillary services provided by persons independent of the government, and judges in that jurisdiction sometimes “prefer to appoint experts who they have experience with.”¹⁶¹ Counsel providing representation during capital state habeas proceedings have no right to expert services.

Conclusion

Virginia is in partial compliance with the *ABA Guidelines* described in Protocol #1. A summary of the Virginia Assessment Team's findings and recommendations relative to this Protocol are found in the final section of this Chapter, entitled “Final Conclusions and Recommendations.”

B. Protocol #2

Qualified Counsel (Guideline 5.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases):

1. The jurisdiction should develop and publish qualification standards for defense counsel in capital cases. These standards should be construed and applied in

¹⁵⁶ VCRRC Survey Response, *supra* note 26, at 6; VCRRC Interview, *supra* note 26.

¹⁵⁷ VCRRC Interview, *supra* note 26.

¹⁵⁸ See *Harbison v. Bell*, 556 U.S. 180, 193–94 (2009) (authorizing, but not requiring, federally-appointed counsel to represent death row inmates in state clemency proceedings, pursuant to 18 U.S.C. § 3599).

¹⁵⁹ For illustration of the importance of investigative and mitigation assistance at trial and state habeas corpus proceedings, see the description of the Michael Wayne Williams case in Chapter Eight on State Habeas Corpus Proceedings. See also *Williams v. Netherland*, 6 F. Supp. 2d 545, 547 (E.D. Va. 1998) (noting that on direct appeal and state habeas, Virginia's courts refused to provide an investigator for the defense team); Frank Green, *Miscues Rule out Execution for Killer*, RICHMOND TIMES-DISPATCH, Apr. 21, 2003, at A1.

¹⁶⁰ RCD Central Survey Response, *supra* note 72, at 12. RCD West also said that there is a right to have services provided by persons independent of the government. RCD West Survey Response, *supra* note 94, at 10.

¹⁶¹ RCD Southeast Survey Response, *supra* note 75, at 13.

- such a way as to further the overriding goal of providing each client with high quality legal representation.
2. In formulating qualification standards, the jurisdiction should ensure:
- a. That every attorney representing a capital defendant has:
 - i. Obtained a license or permission to practice in the jurisdiction;
 - ii. Demonstrated a commitment to providing zealous advocacy and
 - iii. high quality legal representation in the defense of capital cases; and
 - iv. Satisfied the training requirements set forth in Guideline 8.1.¹⁶²
 - b. That the pool of defense attorneys as a whole is such that each capital defendant within the jurisdiction receives high quality legal representation.

Accordingly, the qualification standards should ensure that the pool includes sufficient numbers of attorneys who have demonstrated:

- a. Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
- b. Skill in the management and conduct of complex negotiations and litigation;
- c. Skill in legal research, analysis, and the drafting of litigation documents;
- d. Skill in oral advocacy;
- e. Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- f. Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- g. Skill in the investigation, preparation, and presentation of mitigating evidence; and
- h. Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

According to the *ABA Guidelines*, “the responsibilities of defense counsel in a death penalty case are uniquely demanding, both in the knowledge that counsel must possess and in the skills he or she must master.”¹⁶³ Therefore, it is imperative that the attorneys representing capital clients “be qualified by training and experience to undertake such representation and provide high quality advocacy.”¹⁶⁴

In 1991, Virginia enacted legislation requiring the Supreme Court of Virginia, the Virginia Indigent Defense Commission (Commission), and the Virginia State Bar (VSB) to establish standards for the appointment of counsel in capital cases at trial, on direct appeal, and during

¹⁶² Training requirements are discussed in Protocol #5, *infra* notes 432-468 and accompanying text..

¹⁶³ *ABA Guidelines*, *supra* note 62, at Guideline 1.1, cmt.; *see also ABA Guidelines*, *supra* note 62, at Guideline 5.1, cmt. (“[T]he abilities that death penalty defense counsel must possess in order to provide high quality legal representation differ from those required in any other area of law.”)

¹⁶⁴ Miller, *supra* note 65, at 1124.

state habeas corpus proceedings in Virginia.¹⁶⁵ The minimum qualifications standards must “take into consideration, to the extent practicable, the following criteria: (i) license or permission to practice law in Virginia; (ii) general background in criminal litigation; (iii) demonstrated experience in felony practice at trial and appeal; (iv) experience in death penalty litigation; (v) familiarity with the requisite court system; (vi) current training in death penalty litigation; and (vii) demonstrated proficiency and commitment to quality representation.”¹⁶⁶ Virginia’s standards, which were required by statute to take effect July 1, 1992 and apply to all appointed counsel providing indigent defense representation to capital defendants and death row inmates, were adopted in 1999.¹⁶⁷

Virginia’s qualification standards for capital defense counsel to become certified to undertake capital representation at trial, on direct appeal, and during state habeas corpus proceedings are reproduced and discussed below.

Qualification Standards for Pretrial and Trial Counsel in Death Penalty Cases

All attorneys certified to accept appointments as Lead Counsel in death penalty cases must:

1. Be an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice;
2. have at least five years of criminal litigation practice (defense or prosecution) within the past seven years;
3. have experience as defense counsel in at least five jury trials, tried to verdict, involving violent crimes with maximum penalties of at least 20 years or more;
4. have served as lead counsel in the defense of at least one capital case within the past five years *or* served as co-counsel in the defense of at least two capital cases within the past seven years;
5. have had, within the past two years, at least six hours of specialized training in capital litigation, plus at least four hours of specialized training required by section 19.2-163.8(A)(vii) of the Code of Virginia of 1950, as amended.¹⁶⁸

In addition to being an active member in good standing of the Virginia State Bar or admitted to practice pro hac vice, all attorneys seeking appointment as co-counsel in death penalty trials must:

¹⁶⁵ VA. CODE § 19.2-163.8(A), (E) (1991), codifying S.B. 852, Ch. 664 (Va. 1991); 6 VA. ADMIN. CODE 30-10-10 (2013); *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited July 29, 2013). In 1991, the Commission was known as the Public Defender Commission. S.B. 852, Ch. 66 (Va. 1991).

¹⁶⁶ VA. CODE § 19.2-163.8(A) (1991). In 2001, Virginia included an additional criterion to be considered in the qualification standards, “current training in the analysis and introduction of forensic evidence, including deoxyribonucleic acid (DNA) testing and the evidence of a DNA profile comparison to prove or disprove the identity of any person,” which became the new section vii of the statute. H.B. 2580, Ch. 766, 2001 Sess. (Va. 2001), codified at VA. CODE § 19.2-163.8(A)(vii) (2001).

¹⁶⁷ VA. CODE § 19.2-163.8(F) (1991); VIDC Survey Response, *supra* note 7, at 3.

¹⁶⁸ *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited July 29, 2013); VA. CODE ANN. § 19.2-163.8(A)(vii) (2013) (requiring “current training in the analysis and introduction of forensic evidence, including deoxyribonucleic acid”).

1. have at least five years of criminal litigation practice (defense or prosecution) within the past seven years;
2. have served as lead or primary defense counsel in at least five jury trials, tried to verdict, involving violent crimes with a maximum penalty of twenty years or more; [and]
3. have had, within the past two years, at least six hours of specialized training in capital litigation, plus at least four hours of specialized training required by section 19.2-163.8(A)(vii) of the Code of Virginia of 1950, as amended.¹⁶⁹

According to the Commission, as of March 30, 2012, 112 attorneys were certified as lead counsel and 178 were certified as co-counsel in capital trials.¹⁷⁰ Certified counsel includes private attorneys licensed to practice law in Virginia as well as capital defenders employed in Virginia's four Regional Capital Defender offices (RCD).¹⁷¹

Qualification Standards for Appellate Counsel in Death Penalty Cases

In order to be certified to accept appointments to provide capital representation on direct appeal, in addition to being an active member in good standing of the Virginia State Bar or admitted to practice in Virginia pro hac vice, appellate attorneys must meet both of the following requirements:

1. Have, within the past five years, briefed and argued the merits, after writs have been granted, in:
 - a. At least three felony cases in an appellate court; or
 - b. The appeal of a case in which the death penalty was imposed by the trial court [and];
2. Be thoroughly familiar with the rules and procedures of appellate practice.¹⁷²

As of March 2012, there were fifty-four attorneys in Virginia certified to provide capital representation on direct appeal.¹⁷³

Qualification Standards for Virginia Habeas Corpus Counsel in Death Penalty Cases

Virginia requires state habeas corpus counsel to satisfy only one of the following requirements:

1. Possess experience as counsel of record in Virginia or federal post-conviction proceedings involving attacks on the validity of one or more felony convictions, as well as a working knowledge of state and federal habeas corpus practice through specialized

¹⁶⁹ *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM'N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited July 29, 2013).

¹⁷⁰ Telephone Interview by Paula Shapiro with Jae K. Davenport, Standards of Practice Enforcement Att'y, Va. Indigent Def. Comm'n (Mar. 30, 2012) (on file with author).

¹⁷¹ *Id.*

¹⁷² *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM'N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited July 29, 2013).

¹⁷³ Interview with Jae K. Davenport, *supra* note 170.

training in the representation of persons with death sentences, including the training required by §19.2.163.8(A)(vii) of the Code of Virginia of 1950, as amended;

2. Have served as counsel in at least one capital habeas corpus proceeding in Virginia and/or federal courts during the past three years; or
3. Have at least seven years civil trial and appellate litigation experience in the Courts of Record of the Commonwealth and/or federal courts.¹⁷⁴

As of March 26, 2012, forty-two attorneys throughout Virginia were certified as qualified to provide capital representation to death row inmates during state habeas corpus proceedings.¹⁷⁵ Of these, four are employed at the Virginia Capital Representation Resource Center.¹⁷⁶

Federal Habeas Corpus and Clemency Counsel

Pursuant to federal law, to provide representation in capital federal habeas corpus proceedings, “at least one of the attorneys appointed must have been admitted to practice in the court of appeals for not less than five years, and must have had not less than three years experience in the handling of appeals in felony cases in the court,” and “at least one of the attorneys appointed must be knowledgeable in the law applicable to capital cases.”¹⁷⁷ The federal presiding judge, however, “for good cause, may appoint an attorney who may not qualify under 18 U.S.C. § 3599(b) or (c), but who has the background, knowledge, and experience necessary to represent the defendant properly in a capital case, giving due consideration to the seriousness of the possible penalty and the unique and complex nature of the litigation.”¹⁷⁸

Counsel during federal habeas corpus proceedings are also permitted to continue to represent death row inmates during state clemency proceedings.¹⁷⁹ Virginia does not, however, guarantee counsel during state clemency proceedings and has not adopted any qualification standards that apply to counsel in Virginia providing representation during clemency. Attorneys from the VCRRC usually provide representation to Virginia’s death row inmates during federal habeas corpus and clemency proceedings.¹⁸⁰

¹⁷⁴ *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited July 29, 2013).

¹⁷⁵ Interview with Jae K. Davenport, *supra* note 170.

¹⁷⁶ VCRRC Interview, *supra* note 26. The fifth VCRRC attorney does not appear to be certified as of Mar. 30, 2012. Interview with Jae K. Davenport, *supra* note 170 (on file with author).

¹⁷⁷ 18 U.S.C. § 3599(c); U.S. COURTS, 7 GUIDE TO JUDICIARY POLICY § 620.60.20 (rev. June 3, 2011), available at http://www.uscourts.gov/FederalCourts/AppointmentOfCounsel/CJAGuidelinesForms/vol7PartA/vol7PartAChapter6.aspx#620_60 (appointment of counsel After judgment) [*hereinafter* U.S. COURTS GUIDE TO JUDICIARY POLICY].

¹⁷⁸ U.S. COURTS GUIDE TO JUDICIARY POLICY § 620.60.30, *supra* note 177, (addressing attorney qualification waivers).

¹⁷⁹ 18 U.S.C. § 3599(e); *Harbison v. Bell*, 556 U.S. 180, 193–94 (2009) (stating that the petitioner’s “case underscores why it is ‘entirely plausible that Congress did not want condemned men and women to be abandoned by their counsel at the last moment and left to navigate the sometimes labyrinthine clemency process from their jail cells’”) (citing *Hain v. Mullin*, 436 F.3d 1168 (10th Cir. 2006) (en banc)).

¹⁸⁰ VCRRC Interview, *supra* note 26; VCRRC Survey Response, *supra* note 26, at 7.

Discussion

Virginia's qualification standards meet some, but not all, of the requirements set forth by the *ABA Guidelines* on Qualified Counsel.¹⁸¹ Furthermore, Virginia has not adopted any standards for counsel providing representation during capital clemency proceedings, nor has the Commonwealth adopted qualification standards applicable to privately-retained counsel.

Virginia's Emphasis on Experiential Qualifications

The Virginia standards are similar to the *ABA Guidelines* "in that they both emphasize that two attorneys are needed in every capital case, and that those attorneys must meet certain levels of experience, training, and familiarity with criminal law, felony cases, and jury trials."¹⁸² Virginia's qualification standards, however, focus almost exclusively on an attorney's experience in criminal and capital litigation.¹⁸³ While Virginia's emphasis on experience of attorneys may, in some instances, serve as a proxy for demonstration of some of the skills required by the *ABA Guidelines*, the standards' exclusive emphasis on experience fails to address whether counsel is competent to accept appointments.¹⁸⁴

Virginia's standards do not require that every attorney appointed in a capital case demonstrate a commitment to providing zealous advocacy or high quality legal representation.¹⁸⁵ The *ABA Guidelines* acknowledge that "quantitative measures of experience are not a sufficient basis to determine an attorney's qualifications for the task" of representing capital clients.¹⁸⁶ Specifically, "[a]n attorney with substantial prior experience in the representation of death penalty cases, but whose past performance does not represent the level of proficiency or commitment necessary for the adequate representation of a client in a capital case, should not be placed on the appointment roster."¹⁸⁷

As one capital punishment expert has noted, "[s]tandards for the appointment of counsel, which are defined in terms of number of years in practice and number of trials, do very little to improve the quality of representation since many of the worst lawyers are those who have long taken criminal appointments and would meet the qualifications."¹⁸⁸ Such qualification standards may

¹⁸¹ Compare *ABA Guidelines*, *supra* note 62, with *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM'N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited Aug. 7, 2013).

¹⁸² Robert H. Robinson, Jr., *Improving Process in Virginia Capital Cases*, 12 CAP. DEF. J. 363, 369 (2000).

¹⁸³ See generally *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM'N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited Aug. 7, 2013).

¹⁸⁴ VA. CODE ANN. § 19.2-163.8 (2013); JLARC, *supra* note 46, at 38. Indeed, the statutory authority for the qualification standards recommends, as one of the possible criteria the standards should consider is "demonstrated proficiency and commitment to quality representation."

¹⁸⁵ VIDC Survey Response, *supra* note 7, at 3. When asked "How does the VIDC ensure the quality of representation provided by certified attorney eligible for court appointments in death penalty cases?," RCD Central Capital Defender stated "[m]ostly assumption, but I believe the VIDC expects the individual RCD to monitor performance." RCD Central Survey Response, *supra* note 72, at 7.

¹⁸⁶ *ABA Guidelines*, *supra* note 62, at Guideline 5.1, cmt.

¹⁸⁷ *Id.*

¹⁸⁸ Stephen B. Bright, *Counsel for the Poor: The Death Sentence Not for the Worst Crime but for the Worst Lawyer*, 103 YALE L.J. 1835, 1871 n.209 (1994).

“guarantee no more than experienced incompetence.”¹⁸⁹ A 2002 study published by Virginia’s Joint Legislative and Review Commission (JLARC) also found that “[t]here is a concern that the standards promulgated by the Commission and its list of ‘qualified attorneys’ do not adequately distinguish good attorneys from those who met the standards but do not properly represent their clients.”¹⁹⁰ Attorneys who meet Virginia’s current standards and have obtained certification from the Commission may include counsel whose past performance indicates a lack of zealous advocacy and less than high quality legal representation.

Finally, Virginia has not promulgated qualification standards applicable to privately-retained counsel in death penalty cases, nor do qualification standards exist for counsel in Virginia clemency proceedings.

Insufficient Training Prerequisites

Virginia’s qualification standards also do not ensure that capital attorneys providing representation at any stage of capital proceedings have satisfied the training requirements set forth in *ABA Guideline 8.1*. According to Virginia’s qualification standards, attorneys seeking to receive appointments as lead counsel or co-counsel in capital trials must have successfully completed ten hours of specialized training.¹⁹¹ However, to initially become certified as capital appellate or state habeas counsel, there are no training requirements.¹⁹² Additionally, the Virginia qualification standards’ emphasis on familiarity with DNA and forensic science is important; however, it overlooks the other skills that are equally or even more critical to skillful and zealous advocacy in death penalty cases, like those described in Protocol #2.¹⁹³

Sufficiency of Pool of Attorneys to Ensure High Quality Representation

It is unclear whether Virginia’s standards ensure that the pool of defense counsel as a whole includes sufficient numbers of attorneys who have demonstrated each of the qualifications in Protocol #2.¹⁹⁴ While Virginia’s current standards do not comport with those set out in Protocol #2, the counsel certification list may not also reflect the practical availability of certified counsel to undertake death penalty representation in a particular region, making it difficult to determine if a sufficient pool of lawyers exists to ensure high quality legal representation throughout the Commonwealth. The roster, for example, lists the Northern Virginia Capital Defender as

¹⁸⁹ Jeremy P. White, *Establishing a Capital Defense Unit in Virginia: A Proposal to Increase the Quality of Representation for Indigent Capital Defendants*, 13 CAP. DEF. J. 323, 344 (2001).

¹⁹⁰ JLARC, *supra* note 46, at 37. While the study explored the issue of quality of capital representation, it determined that the issue “could not be adequately addressed by this review.” *Id.* at 27.

¹⁹¹ *Capital Trial Counsel: Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited Aug. 7, 2013).

¹⁹² Interview with Jae K. Davenport, *supra* note 170; *Att’y Certification System (ACeS)*, VA. INDIGENT DEF. COMM’N, <http://www.indigentdefense.virginia.gov/certapp.htm> (last visited Aug. 7, 2013) (maintaining certification).

¹⁹³ White, *supra* note 189, at 358 (Virginia “must redirect the focus of the qualifications from the experience and knowledge of the attorney toward the abilities and performance of the attorney.”).

¹⁹⁴ As previously stated, as of March 2012, there were 112 attorneys certified as lead counsel and 178 certified as co-counsel in capital trials, fifty-four attorneys certified to provide representation on direct appeal proceedings, and forty-two certified for capital habeas representation. Email from Jae K. Davenport, Standards of Practice Enforcement Attorney, Va. Indigent Def. Comm’n to Paula Shapiro (Mar. 30, 2012) (on file with author).

available capital trial lead counsel in Southeast, Southwest, and Northern Virginia.¹⁹⁵ As Prince William County in Northern Virginia is the most active death penalty jurisdiction in Virginia, this does not accurately reflect the Northern Virginia Capital Defender's availability for appointment to death penalty cases. Another attorney whose office is located in Big Stone Gap, Virginia, for example, is listed as qualified capital trial lead counsel in regions as far away as Fairfax and Norfolk, Virginia.¹⁹⁶

The Assessment Team also notes that the availability of counsel with the requisite experience for certification in death penalty cases pursuant to the *ABA Guidelines* may be affected by the attrition rate in the Virginia public defender system as a whole. According to a 2010 Bureau of Justice Statistics Report (BJS Report) on State Public Defender Programs, out of the nineteen states with state public defender programs, Virginia has the highest attrition rate (24%) and one of the lowest averages for assistant public defender's length of service, which is approximately three years.¹⁹⁷ Because the appointment of two capital qualified counsel is only required when a defendant is charged with capital murder, and because Virginia prosecutors are not required to file a notice of intent to seek the death penalty and often initially charge capital cases as a lesser offense, non-capital public defenders or private counsel certified by the Commission to provide felony representation may initially represent a defendant facing the death penalty.¹⁹⁸ These defenders, however, typically do not possess the requisite qualifications for representation of a capital client.

On a related note, the existing standards do not ensure verification of applicants' assertions regarding their experience, nor do the standards promote sufficient monitoring of certified counsel in order to assess counsel's commitment to zealous advocacy and high quality legal representation. This issue is discussed in greater detail under Protocol #3, below.

Conclusion

Based on the foregoing, the Commonwealth of Virginia is in partial compliance with Protocol #2. A summary of the Virginia Assessment Team's findings and recommendations relative to this Protocol are found in the final section of this Chapter, entitled "Final Conclusions and Recommendations."

¹⁹⁵ See, e.g., *Counsel Lookup*, VA. INDIGENT DEFENSE COMM'N, <https://epm.virginiainteractive.org/ACeS/defend/> (last visited Aug. 7, 2013) (indicating that Edward Ungvarsky is qualified lead counsel in District 4 (Norfolk), District 19 (Fairfax), and District 30 (Southwest Virginia)).

¹⁹⁶ See *id.* (indicating that Gregory Kallen is qualified lead counsel in District 4 (Norfolk), District 19 (Fairfax), and District 30 (Southwest Virginia)).

¹⁹⁷ U.S. BUREAU OF JUSTICE STATISTICS, CENSUS OF PUBLIC DEFENDER OFFICES, 2007, SPECIAL REPORT: STATE PUBLIC DEFENDER PROGRAMS, 2007 18 (Sept. 2010), available at <http://www.bjs.gov/content/pub/pdf/spdp07.pdf> [hereinafter BJS REPORT].

¹⁹⁸ See generally Interview with Ed Ungvarsky, *supra* note 73.

C. Protocol #3

The selection and evaluation process should include:

1. A statewide independent appointing authority, not comprised of judges or elected officials, consistent with the types of statewide appointing authority proposed by the ABA (see, American Bar Association Policy Recommendations on Death Penalty Habeas Corpus, paragraphs 2 and 3, and Appendix B thereto, proposed section 2254(h)(1), (2)(I), reprinted in 40 Am. U. L. Rev. 1, 9, 12, 254 (1990), or ABA Guideline 3.1, Designation of a Responsible Agency), such as:
 - a. A defender organization that is either:
 - i. A jurisdiction-wide capital trial office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or
 - ii. A jurisdiction-wide capital appellate and/or post-conviction defender office, relying on staff attorneys, members of the private bar, or both to provide representation in death penalty cases; or
 - b. An “Independent Authority,” that is, an entity run by defense attorneys with demonstrated knowledge and expertise in capital representation.

The ABA Guidelines require a statewide agency “independent of the judiciary” to be responsible for the provision of high quality legal representation for a state’s capital defendants and death row inmates.¹⁹⁹

In 2004, the Virginia General Assembly established the Virginia Indigent Defense Commission (Commission) as the supervisory state agency responsible for the oversight and certification of all court-appointed attorneys providing indigent capital and non-capital defense services, including the public and capital defender offices located throughout Virginia.²⁰⁰ Circuit court judges, however, hold the sole responsibility and authority to appoint and select capital counsel at trial, on direct appeal, and during state habeas corpus proceedings.²⁰¹ Judges may appoint attorneys certified by the Commission, but may also “appoint counsel who is not included on the list, but who otherwise qualifies under the standards established and maintained by” the Commission.²⁰²

The Commission is comprised of fourteen members, including the Chairmen of the House and Senate Committees for Courts of Justice, the chairman of the Virginia State Crime Commission, the Executive Secretary of the Supreme Court of Virginia, or their designees.²⁰³ Other appointments are made by the Governor, the Virginia State Bar, the Speaker of the House of Delegates, and the state Senate Committee on Rules.²⁰⁴ The Commission, like its predecessor the Public Defender Commission, develops initial training courses, qualification standards, and standards of practice for court-appointed counsel and public defenders, as well as maintains a list

¹⁹⁹ ABA Guidelines, *supra* note 62, at Guideline 3.1.

²⁰⁰ VA. CODE ANN. § 19.2-163.01 (2013); VA. INDIGENT DEF. COMM’N, 2011 ANNUAL REPORT 7 (Sept. 26, 2011), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD2112011/\\$file/RD211.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD2112011/$file/RD211.pdf).

²⁰¹ VA. CODE ANN. § 19.2-163.7 (2013).

²⁰² VA. CODE ANN. § 19.2-163.8(C) (2013).

²⁰³ VA. CODE ANN. § 19.2-163.02 (2013).

²⁰⁴ *Id.*

of attorneys certified as qualified to accept court appointments in capital and non-capital cases, among other duties.²⁰⁵ The Commission is also responsible for hiring Virginia’s four Capital Defenders, each of whom serve as chief administrator of one of the four Regional Capital Defender offices (RCD), and who, in turn, are responsible for appointing and hiring assistant capital defenders and other RCD personnel.²⁰⁶

While the Commission—as the authority responsible for the selection and evaluation of attorneys to represent indigent capital defendants—may be comprised of some judges and elected officials, its composition must include at least three attorneys “in private practice with a demonstrated interest in indigent defense issues.”²⁰⁷ Virginia, therefore, is in partial compliance with this portion of Protocol #3.

- 2. Development and maintenance, by the statewide independent appointing authority, of a roster of eligible lawyers for each phase of representation.**
- 3. The statewide independent appointing authority should perform the following duties:**
 - a. Recruit and certify attorneys as qualified to be appointed to represent defendants in death penalty cases;**

The *ABA Guidelines* require the independent appointing authority to “assess the qualifications of attorneys who wish to represent capital defendants, conducting a meaningful review of each request for inclusion on the roster of qualified counsel.”²⁰⁸ The Commission certifies attorneys as qualified to accept appointment to represent capital defendants and death row inmates at trial, on direct appeal, and during state habeas corpus proceedings, based on the qualification standards drafted by the Commission, Supreme Court of Virginia, and the Virginia State Bar.²⁰⁹ The Commission does not, however, recruit attorneys to accept appointments to capital cases.²¹⁰

To become certified, the Commission requires interested attorneys to complete an application form, available on the Commission’s website.²¹¹ The form requires applicants to “certify that they have met the requirements that are set forth in the application and must list the training received.”²¹² Applicants must also describe his/her education and litigation experience, including experience providing capital representation at every stage of a capital proceeding.²¹³

²⁰⁵ VA. CODE ANN. § 19.2-163.01 (2013); *Home*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/index.htm> (last visited Aug. 7, 2013) (established to carry out “the Commonwealth’s constitutional obligation to provide attorneys for indigent persons accused of crimes that carry a potential penalty of incarceration or death”).

²⁰⁶ VA. CODE ANN. § 19.2-163.01(A)(8)–(9) (2013)

²⁰⁷ VA. CODE ANN. § 19.2-163.02 (2013).

²⁰⁸ *ABA Guidelines*, *supra* note 62, at Guideline 3.1, cmt.

²⁰⁹ VA. CODE ANN. § 19.2-163.8(A), (B), (E) (2013) (charging those entities with developing “standards for attorneys admitted to practice law in Virginia who are qualified to represent defendants charged with capital murder or sentenced to death”).

²¹⁰ VIDC Survey Response, *supra* note 7, at 5.

²¹¹ *Attorney Certification System (ACeS)*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/certapp.htm> (last visited Aug. 7, 2013).

²¹² VIDC Survey Response, *supra* note 7, at 4.

²¹³ *Attorney Certification System (ACeS)*, VA. INDIGENT DEF. COMM’N, <http://www.indigentdefense.virginia.gov/certapp.htm> (last visited Aug. 7, 2013).

The application will be reviewed by the Commission's two "Standards of Practice Enforcement" attorneys, who ensure each attorney seeking inclusion on the certification list is a lawyer in good standing with the Virginia Bar who has completed the Standards' training requirements.²¹⁴ Regarding the other qualification standards, applicants who assert that s/he possesses the requisite qualifications will be certified.²¹⁵ The Commission does not independently verify the claims of the attorneys seeking court appointments; instead, it "simply compiles the list and distributes it to interested judges."²¹⁶

Virginia has acknowledged that the lack of credential verification affects the quality of counsel afforded to capital defendants and death row inmates. A 1999 report by the Virginia State Crime Commission, in conjunction with the Office of the Executive Secretary of the Supreme Court, the Virginia State Bar, the Virginia Bar Association, and the Indigent Defense Commission, recommended, after an evaluation of the Commonwealth's system of representation for indigent capital defendants and death row inmates, that Virginia "revise the standards for qualification as court appointed counsel with the purpose of enhancing the caliber of attorneys available for appointment in capital cases."²¹⁷ Similarly, a 2003 report on Virginia's system of capital punishment found that Virginia employs "inadequate standards for appointment" of capital defense counsel, "little or no verification of lawyers' credentials," as well as instances of "attorneys filing documents late or in the wrong court."²¹⁸ Since issuance of this 2003 Report, the Commonwealth has established four RCDs; however, there have been no amendments to the appointment standards or adoption of credential verification procedures in death penalty cases.

No entity is vested with the authority to oversee and certify the qualifications of privately-retained counsel or to require privately-retained counsel to obtain certification.

Thus, it appears Virginia is only in partial compliance with this portion of Protocol #3.

- b. Draft and periodically publish rosters of certified attorneys;**
- c. Draft and periodically publish certification standards and procedures by which attorneys are certified and assigned to particular cases;**

By statute, the Commission maintains "a list of attorneys admitted to practice law in Virginia who are qualified to represent defendants charged with capital murder or sentenced to death."²¹⁹ This roster lists attorneys certified by the Commission to accept appointments to capital cases, including attorneys employed at the RCDs, VCRRC, Virginia public defenders, and private local

²¹⁴ VIDC Survey Response, *supra* note 7, at 4.

²¹⁵ Interview with Jae K. Davenport, *supra* note 170. RCD North reported that a former assistant capital defender employed by that office wrote a note to the Commission asking to be certified as appellate counsel, despite the attorney's failure to meet the appellate experiential requirements, and the Commission certified the attorney. Interview with Ed Ungarsky, *supra* note 73.

²¹⁶ UNEQUAL, UNFAIR AND IRREVERSIBLE, *supra* note 47, at 13.

²¹⁷ VA. STATE CRIME COMM'N, EXEC. SUMMARY REPORT: CAPITAL REPRESENTATION OF INDIGENT DEFENDANTS, H. Doc. No. 60 (1999), available at <http://leg2.state.va.us/dls/h&sdocs.nsf/execsummaryreport/HD601999>.

²¹⁸ ACLU OF VA., ET AL., BROKEN JUSTICE: THE DEATH PENALTY IN VIRGINIA 31 (Nov. 2003), available at http://www.aclu.org/files/FilesPDFs/broken_justice.pdf [hereinafter BROKEN JUSTICE].

²¹⁹ VA. CODE ANN. § 19.2-163.8(B) (2013). Virginia's qualification standards for representation in capital cases, and its compliance with the standards set out by the ABA *Guidelines*, are discussed at length in Protocol #2, *supra* notes 166-198.

attorneys.²²⁰ The Commonwealth's qualification standards, together with certification procedures and instructions, are published and available on the Commission's website.²²¹ The names of all attorneys certified as meeting the qualification standards at each stage of capital proceedings also are published on the Commission's website, searchable by county and stage of the proceeding.²²²

Aside from the statute requiring that the court appoint counsel from the list of certified attorneys maintained by the Commission, no entity has promulgated written or published procedures by which attorneys are assigned to particular cases.²²³ The assignment of counsel, or appointment process, is discussed below.

d. Assign the attorneys who will represent the defendant at each stage of every case, except to the extent that the defendant has private attorneys;

The *ABA Guidelines* specify that the responsible agency should possess the sole authority to appoint counsel in death penalty cases, "not the judiciary or elected officials."²²⁴

Appointment of Counsel during Pretrial Proceedings and at Trial

Counsel must be appointed when an indigent defendant is charged with a capital offense.²²⁵ The Virginia judiciary is responsible for assigning two attorneys to represent any indigent defendant charged or convicted of a capital offense at trial, on direct appeal, and during state habeas corpus proceedings.²²⁶ Capital indigent defendants will be appointed "at least" two attorneys from the list of certified counsel maintained by the Commission for representation at trial, and, if convicted and sentenced to death, on direct appeal and for any certiorari petitions.²²⁷ Virginia statute states that at least one of the two attorneys appointed on or after July 1, 2004 must be from a Regional Capital Defender office.²²⁸

²²⁰ VA. CODE ANN. § 19.2-163.8 (2013).

²²¹ See *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM'N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited Aug. 7, 2013); *Attorney Certification System (ACeS)*, VA. INDIGENT DEF. COMM'N, <http://www.indigentdefense.virginia.gov/certapp.htm> (last visited Aug. 7, 2013).

²²² *Certified Counsel List: Counsel Lookup*, VA. INDIGENT DEF. COMM'N, <https://epm.virginiainteractive.org/ACeS/defend/> (last visited Aug. 7, 2013).

²²³ VA. CODE ANN. § 19.2-163.7 (2013).

²²⁴ *Id.*; Ronald J. Tabak, *Why an Independent Appointing Authority Is Necessary to Choose Counsel for Indigent People in Capital Punishment Cases*, 31 HOFSTRA L. REV. 1105, 1105 (2003) (noting that "lawyers whom judges have appointed in capital punishment cases have frequently been of far lower quality that could have been selected.").

²²⁵ The timing of the appointment process in Virginia capital cases is discussed in Protocol #1, *supra*.

²²⁶ VIDC Survey Response, *supra* note 7, at 2; see also Protocol #1, *supra* notes 65-161 and accompanying text, on the timing of capital appointments.

²²⁷ VA. CODE ANN. § 19.2-163.7 (2013).

²²⁸ *Id.* ("In all cases where counsel is appointed under this section after July 1, 2004, one of the attorneys appointed shall be from a capital defense unit maintained by the Indigent Defense Commission.").

Typically, RCDs serve as lead counsel in appointed cases.²²⁹ Co-counsel may be an attorney employed in one of the RCDs or the appointed RCD may request the circuit court to appoint a specific private, certified attorney as co-counsel.²³⁰ Depending on the jurisdiction, the circuit court judge may accept the RCD's recommendation for co-counsel while judges in other jurisdictions may appoint an attorney of the court's choosing, notwithstanding the RCD's recommendation.²³¹ RCDs may also contact the local capital defense community to see who is available to provide representation at the time and request their presence in the courtroom during arraignment to better ensure appointment of that attorney to the case.²³²

Notably, Virginia's capital statute permits circuit court judges to, "[n]otwithstanding the requirements of [section] 19.2-163.7, . . . appoint counsel who is not included on the list, but who otherwise qualifies under the standards established and maintained by" the Commission.²³³ The statute further prohibits a defendant from pursuing a claim of ineffective assistance of counsel based on any failure to appoint qualified counsel from the list.²³⁴ This exception empowers judges to appoint any attorney to provide capital representation at any stage of the proceedings who meets, in the court's view and however tenuously, the qualification standards.²³⁵ Indeed, according to the JLARC report in 2002, "[c]omplaints have . . . been raised about the practice of some judges who routinely appoint attorneys to defend in capital cases who are not on the list maintained by the Commission."²³⁶ It appears that, in some instances, Virginia judges have exercised their discretion to appoint attorneys not included on the list of certified capital defense counsel.²³⁷

There have also been instances in which the circuit court appoints two attorneys, neither of which is from the local RCD.²³⁸ This may occur for a number of reasons, including because counsel was appointed prior to the filing of capital murder charges. Recently, a RCD was not

²²⁹ Interview with Ed Ungvasky, *supra* note 73; RCD Central Survey Response, *supra* note 72, at 6 (noting RCD Central is always appointed lead counsel).

²³⁰ RCD Central Survey Response, *supra* note 72, at 3 ("Sometimes the judges do not agree with our suggestion and continues with the earlier appointed counsel or appoints some qualified attorney of the court's choosing.").

²³¹ RCD Central Survey Response, *supra* note 72, at 3.

²³² Interview with Doug Ramseur, *supra* note 109.

²³³ VA. CODE ANN. § 19.2-163.8(C) (2013).

²³⁴ VA. CODE ANN. § 19.2-163.8(D) (2013) ("Noncompliance with the requirements of this article shall not form the basis for a claim of error at trial, on appeal, or in any habeas corpus proceeding."). See also Kelly Reissman, *"Our System is Broken": A Study of the Crisis Facing the Death-Eligible Defendant*, 23 N. ILL. U. L. REV. 43, 72 (2002); Reissman, *supra*, at 71–72 (citing a similar statute in Utah, UTAH R. CRIM. P. 8(f) (2002) and VA. CODE ANN. § 19.2-163.8(D) (2013)) ("Though the promulgation of these rules and statutes shows a concern for the performance of counsel, the standards are rendered virtually meaningless by a provision [stating] that noncompliance with the statute or court rule mandating the standards for counsel cannot be a ground for establishing ineffective assistance of counsel at trial.").

²³⁵ VA. CODE ANN. § 19.2-163.8(D) (2013).

²³⁶ JLARC, *supra* note 46, at 37–38.

²³⁷ RCD Southeast Survey Response, *supra* note 75, at 2.

²³⁸ VIDC Survey Response, *supra* note 7, at 1; RCD West Survey Response, *supra* note 94, at 1 ("There have been cases where the Capital Defender was not appointed[, and] my office has contacted the Court in such instances and requested appointment."). In addition in one recent case, RCD Central "was asked to co-counsel with another Regional Capital Defender when conflicts prevented appointment of private local counsel." RCD Central Survey Response, *supra* note 72, at 4.

appointed because the judge was unaware of the statute requiring the local RCD to be appointed.²³⁹ According to the Central Capital Defender, in 2011,

[e]arlier last year there was a case in Colonial Heights, Virginia wherein this office was appointed by the lower court for preliminary hearing. Following indictment the Circuit Court judge appointed two private attorneys. This office contacted the Circuit Court judge and informed him that, under the statute, this office had to be appointed. The judge informed me, in open court, he had never heard of such a statute. Following [him] being given a copy of the code, he changed his mind and appointed the Office of the Capital Defender.²⁴⁰

Appointment of Counsel on Direct Appeal

If a capital defendant is sentenced to death in Virginia, the circuit court judge who presided over the trial will appoint “at least” two capital-qualified counsel, including the RCD, to provide representation on direct appeal to the Supreme Court of Virginia.²⁴¹

In practice, circuit court judges appoint trial counsel to provide representation on direct appeal.²⁴² This practice, however, does not ensure that a death-sentenced defendant receives high quality legal representation on direct appeal—which is the last stage of a capital proceeding in which a defendant is constitutionally entitled to counsel. For example, appointment of new counsel for representation on appeal permits such counsel to “perceive issues from the transcript which trial counsel may miss, due to closeness and familiarity with the case.”²⁴³ On a practical note, “the brief-writing skills required of appellate counsel may not always be possessed by trial attorneys.”²⁴⁴ Furthermore, requiring trial counsel with numerous trial preparation commitments in death penalty cases to also provide representation on direct appeal may impose an unreasonable burden on the attorney’s time.²⁴⁵ Notably, Virginia is one of a few states without an appellate defender to handle appeals in death penalty cases; by contrast, Virginia’s Office of the Attorney General, not individual Commonwealth’s Attorneys, defends the state on any appeals in death penalty cases.²⁴⁶

Appointment of Counsel during State Habeas Corpus and Clemency Proceedings

Virginia requires the circuit court to appoint state habeas counsel from the certification list maintained by the Commission within thirty days of affirming a sentence of death on appeal.²⁴⁷

²³⁹ RCD Central Survey Response, *supra* note 72, at 2.

²⁴⁰ *Id.*

²⁴¹ VA. CODE ANN. § 19.2-163.7 (2013).

²⁴² RCD Southeast Survey Response, *supra* note 75, at 23 (“If we handled the case during the trial, we would continue representation during the direct appeal.”); RCD West Survey Response, *supra* note 94, at 19 (“Generally, trial counsel represents defendants on direct appeal.”).

²⁴³ ABA, STANDARDS FOR CRIMINAL JUSTICE, Standard 5-6.2 cmt. 83 (3d ed. 1993).

²⁴⁴ *Id.* at 84.

²⁴⁵ *Id.*

²⁴⁶ *Responsibilities*, ATT’Y GEN. OF VA., <http://www.oag.state.va.us/About%20the%20Office/Responsibilities.html> (last visited Aug. 7, 2013).

²⁴⁷ VA. CODE ANN. § 19.2-163.7 (2013).

It is unclear whether the appointment of more than one attorney is required under the statute.²⁴⁸ Nonetheless, according to VCRRC, “[i]n the past ten years or more, courts have been appointing more than one lawyer, usually with both being qualified under the [certification] list provided to the courts.”²⁴⁹ Per the statute, the Attorney General has “no standing to object to the appointment of counsel” to represent the death row inmate during habeas corpus proceedings.²⁵⁰

Virginia does not require the assignment of counsel to death row inmates during clemency proceedings, although VCRRC attorneys also regularly represent Virginia’s death row inmates at this stage of capital proceedings.²⁵¹

Finally, we note that Virginia has not adopted any standards, guidelines, or rules governing capital cases in which a capital defendant has retained private counsel. This permits capital defendants and death row inmates to hire a single, unqualified attorney without co-counsel to undertake representation in the extraordinarily demanding circumstances surrounding capital litigation.

Because Virginia vests circuit courts, rather than an independent appointing authority, with the responsibility for appointment of counsel during all stages of a capital case, Virginia is not in compliance with this portion of Protocol #3.

e. Implement mechanisms to ensure that the workload of defense attorneys in death penalty cases enables counsel to provide each client with high quality legal representation consistent with the ABA Guidelines;

Virginia has implemented some mechanisms to ensure that the workload of its capital defenders enables counsel to provide high quality legal representation in death penalty cases, as is consistent with the *ABA Guidelines*.²⁵² The Commission, however, has not published any standards governing acceptable caseloads for attorneys undertaking death penalty representation.

Caseload Data

The U.S. Department of Justice’s Bureau of Justice Statistics (BJS) reported that Virginia public defender agencies had the fifth greatest number of capital-eligible felony cases out of eleven statewide public defender programs in capital jurisdictions that were examined in its 2010 study.²⁵³ According to the BJS Report, in 2007, Virginia’s public defender agencies undertook

²⁴⁸ *Id.* (“If the sentence of death is affirmed on appeal, the court shall, within 30 days after the decision of the Supreme Court of Virginia, appoint counsel from the same list . . .”).

²⁴⁹ VCRRC Survey Response, *supra* note 26, at 2.

²⁵⁰ VA. CODE ANN. § 19.2-163.7 (2013).

²⁵¹ VCRRC Survey Response, *supra* note 26, at 7.

²⁵² VIDC Survey Response, *supra* note 7, at 7; VA. INDIGENT DEF. COAL., PROGRESS REPORT: VIRGINIA’S PUBLIC DEFENSE SYSTEM 1–2 (Mar. 2003), *available at* <http://www.ncids.org/Systems%20Evaluation%20Project/Resources/Evaluating/vidc%20report%20card%20supplement%203.pdf> [hereinafter VA. PROGRESS REPORT].

²⁵³ BJS REPORT, *supra* note 197, at 11 (including 2007 caseload data for all of Virginia’s public defender agencies).

representation in sixteen death penalty cases.²⁵⁴ In fiscal year 2011, RCD North was assigned to provide representation in two capital cases, RCD Southeast was assigned to three, RCD Central to four, and RCD West was assigned to the most cases at six.²⁵⁵

At each stage of capital proceedings in Virginia, it is the responsibility of each court-appointed capital defender to maintain manageable caseloads.²⁵⁶ Capital Defenders “are empowered to turn down appointments if their caseload exceeds their ability to provide quality representation.”²⁵⁷ Across the Commonwealth, none of the four Regional Capital Defenders surveyed consider current caseloads too high or burdensome.²⁵⁸ According to RCD Southeast, the office “strive[s] to maintain our caseload at a manageable level and would attempt to refuse appointment if [the Capital Defender] believed that our caseload was unmanageable.”²⁵⁹ At RCD Central, while there are four attorneys employed at the office with an average case load “between four and six active cases at any one time over the past four years,” “two attorneys, the assistant capital defenders, are primarily responsible for motion and research.”²⁶⁰ There are no mechanisms to ensure that the caseloads of non-RCD attorneys are manageable. Notably, the two states that have limited caseloads for capital attorneys by statute, Washington and Indiana, limit capital defense counsel to representation in no more than one open capital case at a time.²⁶¹

The Commission has taken some steps to reduce caseloads. For example, in 2011, after closing the Appellate Defender in 2009 and in consideration of the National Center for State Court’s recent Caseload Study, the Commission lifted a three-year hiring freeze and permitted the Regional Capital Defender offices to hire staff in previously vacant positions.²⁶²

f. Conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases;

Virginia statutes grant the Commission sole authority and responsibility to develop initial training courses for public defenders and attorneys who wish to serve as court-appointed counsel

²⁵⁴ *Id.* In 2007, Virginia received a total of 95,340 cases, out of which thirty-four were capital felony cases, 36,280 were felony non-capital cases, 48,280 were misdemeanors, 9,420 were juvenile related, and 1,340 were appeals. *Id.* at 10. The National Center for State Court (NCSC) 2009 Caseload Statistics ranked Virginia second in most incoming criminal caseloads out of seventeen states with two-tiered court systems, reporting a total of 14,570 cases per 100,000 person population in Virginia when the median for two-tiered systems was 6,673 cases per 100,000 persons. NCSC, EXAMINING THE WORK OF STATE COURTS: AN ANALYSIS OF 2009 STATE COURT CASELOADS 21 (2009).

²⁵⁵ VIDC 2011 Annual Report, *supra* note 12, at 14, 21 (“The VIDC counts cases by the number of clients represented, rather than by the number of charges defended.”). No capital cases were handled by attorneys in public defender offices, although we were unable to determine how many cases were handled by private, court-appointed counsel.

²⁵⁶ VIDC Survey Response, *supra* note 7, at 7.

²⁵⁷ *Id.*

²⁵⁸ RCD North Survey Response, *supra* note 75, at 6; RCD Central Survey Response, *supra* note 72, at 7; RCD West Survey Response, *supra* note 94, at 6.

²⁵⁹ RCD Southeast Survey Response, *supra* note 75, at 8; RCD Central Survey Response, *supra* note 72, at 8.

²⁶⁰ RCD Central Survey Response, *supra* note 72, at 7.

²⁶¹ Christopher Dupont & Larry Hammond, *Capital Case Crisis in Maricopa County, Arizona: A Response from the Defense*, JUDICATURE (Mar./Apr. 2012), at 217. Indiana permits representation in one open capital case and up to twenty other felony cases. *Id.*

²⁶² VIDC 2011 Annual Report, *supra* note 12, at 18.

and “to review and certify legal education courses that satisfy the continuing requirements” for these attorneys seeking court appointments.²⁶³ Although the Commission does not provide any capital defense training, the Commission fulfills its responsibility by approving specialized capital defense trainings provided by outside entities that meet Virginia’s training requirements for certification and recertification.²⁶⁴ The Commission, however, conducts non-capital defense representation workshops and trainings that are available to capital and non-capital defenders.²⁶⁵

g. Establish minimum standards for performance of all counsel in death penalty cases;

The Commission is required by statute to “establish official standards of practice for court-appointed counsel and public defenders to follow in representing their clients.”²⁶⁶ While the Commission promulgated the *Standards of Practice for Indigent Defense Counsel in Non-capital Criminal Cases at the Trial Level (Non-capital Standards)*, which are applicable to all court-appointed counsel providing representation in juvenile, misdemeanor and (non-capital) felony cases,²⁶⁷ the Commission has not adopted any standards for performance of court-appointed defense attorneys in death penalty cases.²⁶⁸

h. Monitor the performance of all attorneys providing representation in capital proceedings;

i. Periodically review the roster of qualified attorneys and withdraw certification from any attorney who fails to provide high quality legal representation consistent with the ABA Guidelines;

Monitoring of Performance

The *ABA Guidelines* contemplate that an effective monitoring system for capital counsel performance would go “considerably beyond” investigating and maintaining records of complaints, which is one of the tasks assigned to the independent appointing authority under the *Guidelines*.²⁶⁹ Such a system would require “[t]he performance of each assigned lawyer [to] be subject to systematic review based upon publicized standards and procedures.”²⁷⁰ The Virginia Assessment Team acknowledges the difficulty in creating a workable mechanism that provides meaningful review. As noted in the commentary to *ABA Guideline 7.1*, “[a]dmittedly, this is not an easy task and there obviously are difficulties present in having third parties scrutinize the

²⁶³ VA. CODE ANN. § 19.2-163.01(A)(2), (5) (2013).

²⁶⁴ VIDC Survey Response, *supra* note 7, at 17.

²⁶⁵ *Training*, VA. INDIGENT DEF. COMM’N, <http://www.indigentdefense.virginia.gov/training.htm> (last visited Aug. 7, 2013). For more on the training of Virginia’s capital counsel, see Protocol #5, *infra*.

²⁶⁶ VA. CODE ANN. § 19.2-163.01(A)(4) (2013).

²⁶⁷ COMMONWEALTH OF VA., STANDARDS OF PRACTICE FOR INDIGENT DEFENSE COUNSEL 2 (June 2006), available at <http://www.indigentdefense.virginia.gov/PDF%20documents/Standards%20of%20Practice%20120315.pdf>. The Commission adopted the Standards of Practice with an effective date of April 1, 2007, after receiving feedback from local bar associations, General Assembly members, and the Virginia Crime Commission. *Id.*

²⁶⁸ VIDC Survey Response, *supra* note 7 at 5–6. All four Capital Defenders and the Executive Director of the VCRRC have stated that they are aware of and strive to meet the performance standards in the *ABA Guidelines*. RCD Southeast Survey Response, *supra* note 75, at 7; RCD North Survey Response, *supra* note 75, at 5 (“My office treats the *ABA Guidelines* as minimum standards of practice . . .”).

²⁶⁹ *ABA Guidelines*, *supra* note 62, at Guideline 7.1, cmt. See also section 3.vii, *infra*.

²⁷⁰ *Id.*

judgments of private counsel. On the other hand, the difficulty of the task should not be an excuse for doing nothing.”²⁷¹

Virginia’s Capital Defenders may internally monitor the performance of their assistant capital defenders on staff. For example, RCD Southeast conducts yearly performance reviews and conducts informal reviews during other periods of the year.²⁷² RCD Southeast also notes that although the office has not adopted the *ABA Guidelines*, the office “strive[s] to meet the *ABA Guidelines* as well as [its] own personal and professional standard of care.”²⁷³ The Commission also undertakes some evaluation of attorneys employed by the RCDs through its “periodic employment evaluations.”²⁷⁴ However, no RCD possesses written policies governing the monitoring of the performance of its capital defense attorneys.²⁷⁵

Virginia has not, however, implemented a mechanism to monitor the performance of all attorneys certified by the Commission to undertake capital representation. A 1999 Virginia Crime Commission Report concluded that “[t]he Public Defender Commission does not currently evaluate attorneys on the basis of whether they have demonstrated ‘proficiency and commitment to quality representation’ as required by the standards,” and must do so in order to ensure “that all attorneys who are available for appointment to capital cases are competent to represent capital defendants.”²⁷⁶ Since issuance of this report, the Commission has not promulgated any performance standards and states that it does not possess the authority to ensure the quality of representation provided by certified attorneys.²⁷⁷

While well-qualified and high-performing private attorneys are undoubtedly appointed to represent many capital defendants, there is no assurance that such attorneys will be appointed. According to RCD West, for example, “there have been a few times where co-counsel,” appointed by the court to represent a capital defendant along with the RCD, “was either not involved or appeared to be operating at cross purposes.”²⁷⁸ When asked whether there have been cases in which the RCD “was appointed to a case with unqualified, negligent, or ineffective co-counsel,” RCD Southeast responded that “[i]t happens far too often. Since we don’t control the

²⁷¹ *Id.* (citing ABA, STANDARDS FOR CRIMINAL JUSTICE, Standard 5-2.3 cmt. (3d ed. 1993)).

²⁷² RCD Southeast Survey Response, *supra* note 75, at 7 (also noting that the RCD Southeast is “a small office and I have regular and constant contact with all the members of the office. We work in a team environment and I monitor the performance of all team members.”).

²⁷³ *Id.*

²⁷⁴ RCD Central Survey Response, *supra* note 72, at 6.

²⁷⁵ Commentary to the *ABA Guidelines* notes that counsel has a duty to monitor and direct the work of the capital defense team, which includes an investigator, mitigation specialist, and any other experts that may be required. *ABA Guidelines*, *supra* note 62, at Guideline 4.1, cmt.

²⁷⁶ *Id.* (noting that this does not mean that “local bar associations [are required] to act as peer review groups for court appointed attorneys”). See VA. STATE CRIME COMM’N, CAPITAL REPRESENTATION OF INDIGENT DEFENDANTS: A REPORT TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA (1999), available at [http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/939776fb00eb48198525676000606490/\\$FILE/HD60_1999.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/fc86c2b17a1cf388852570f9006f1299/939776fb00eb48198525676000606490/$FILE/HD60_1999.pdf).

²⁷⁷ VIDC Survey Response, *supra* note 7, at 6. A 2003 evaluation of Virginia’s indigent defense representation system found that the system has “no way to evaluate performance, or to remove poor quality lawyers from the list of qualified attorneys, so long as they meet the objective, experiential and training criteria.” VA. PROGRESS REPORT, *supra* note 252, at 7.

²⁷⁸ RCD West Survey Response, *supra* note 94, at 2.

appointment process, we are regularly burdened with attorneys who do not live up to the standards set by the *ABA Guidelines*. It is one of the biggest problems that this office faces.”²⁷⁹

Withdrawal of Certification

The Commission is required by statute to establish “guidelines for the removal of an attorney from the official list of those qualified to receive court appointments and to notify the Office of the Executive Secretary of the Supreme Court of any attorney whose name has been removed from the list.”²⁸⁰ However, the Commission does not periodically remove from the list or withdraw certification for attorneys who fail to provide high quality legal representation consistent with the *ABA Guidelines*.²⁸¹ Instead, once an attorney is on the list, the Commission only “monitors the Virginia State Bar’s disciplinary actions for compliance with requirements of being a member of the bar in good standing,” and removes attorneys from the list who fail to maintain good standing or who fail to complete the requisite ten hours of training every two years.²⁸²

Notably, with respect to staff attorneys employed at each of the RCDs, Commission policy requires assistant capital defenders to bring any complaint filed against him/her “to the attention of the capital defender,” who may, in the capital defender’s discretion, report the complaint to the Commission.²⁸³ Investigation of the complaint may lead to termination of the offending RCD attorney.²⁸⁴

By contrast, as the Commission has developed standards of practice in *non*-capital cases, it has also adopted guidelines for the removal of an attorney who violates the standards of practice as well as procedures through which to enforce the guidelines and remove those attorneys who fail to meet those standards.²⁸⁵ Furthermore, because Virginia law permits circuit court judges to appoint uncertified attorneys “who otherwise qualif[y] under the standards established and maintained by the [Supreme Court of Virginia] and the Commission,” removal from the certification list does not guarantee that the attorney will not be appointed to a capital case.²⁸⁶

In addition, because Virginia does not require certification of *all* attorneys providing representation in death penalty cases, including privately-retained counsel, the Commonwealth cannot ensure the quality of capital defense representation afforded to all Virginia capital defendants and death row inmates.

²⁷⁹ RCD Southeast Survey Response, *supra* note 75, at 3.

²⁸⁰ VA. CODE ANN. § 19.2-163.01(A)(4) (2013).

²⁸¹ VIDC Survey Response, *supra* note 7, at 5.

²⁸² *Id.* at 6.

²⁸³ VIDC Policy 3.10 (on file with author); VIDC Survey Response, *supra* note 7, at 7.

²⁸⁴ VIDC Policy 3.10 (on file with author); VIDC Survey Response, *supra* note 7, at 7.

²⁸⁵ VIDC 2011 Annual Report, *supra* note 12, at 10; VA. CODE ANN. § 19.2-163.01A(4) (2013); *supra* note 267 and accompanying text. The Commission formed a working committee of representatives from the Virginia Bar Association, the Virginia State Bar (Criminal Law section and Ethics Counsel), the Virginia Association of Criminal Defense Lawyers, the Virginia Trial Lawyers Association, the Office of the Attorney General, the Commonwealth Attorneys Services Council, the Supreme Court of Virginia, private bar members, and public defenders to develop the guidelines for removing an attorney from the certified list. VIDC 2011 Annual Report, *supra* note 12, at 10.

²⁸⁶ VA. CODE ANN. § 19.2-163.8(C) (2013).

The importance of certification can be illustrated by a number of cases in which those sentenced to death were later exonerated, or had their convictions reversed, due to the ineffective assistance of counsel received at trial. While these cases pre-date creation of the RCDs, the existing lack of meaningful oversight of the performance of capital defense counsel could result in capital defendants receiving representation by such ill-equipped or unqualified attorneys in future death penalty cases.

- Earl Washington, Jr., was exonerated in 2000 for a rape and murder he did not commit.²⁸⁷ At trial, Washington’s defense counsel “did not appreciate the significance” of DNA testing results disclosed to defense counsel prior to trial—results which excluded Washington as the possible contributor of the DNA material.²⁸⁸
- A 2001 capital murder conviction in which the defendant was sentenced to life without parole was overturned in early 2012 by the U.S. District Court for the Western District of Virginia due to ineffective assistance of counsel, which was described by the district court as a “miscarriage of justice.”²⁸⁹ Pursuant to Virginia law, the defendant, Michael Hash, was appointed two capital-qualified attorneys and given “the higher budget that comes with a capital case. And still, these two lawyers failed to conduct an ‘independent investigation’ or simply retrieve what was in a court file.”²⁹⁰ Due to his attorneys’ failure to conduct any investigation into his case, Michael Hash spent twelve years in prison before exoneration. Notably, since Virginia death row inmates “spend the shortest time on death row prior to execution—on average, just 7.1 years—compared to a national average of just over 14 years for those executed in 2009,” had Hash been sentenced to death, he likely would have been executed before being exonerated.²⁹¹
- The 2001 death sentence of William Morrisette was reversed and remanded by the Supreme Court of Virginia due to ineffective assistance of counsel.²⁹² Four months prior to the scheduled re-sentencing, the Commonwealth’s Attorney and defendant reached a plea agreement permitting Morrisette to accept a sentence of life without parole.²⁹³ According to Morrisette’s defense counsel at re-sentencing, the new sentencing hearing

²⁸⁷ Know the Cases: Earl Washington, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Earl_Washington.php (last visited Aug. 7, 2013).

²⁸⁸ Locke E. Bowman, *Lemons out of Lemonade: Can Wrongful Convictions Lead to Criminal Justice Reform?*, 98 J. CRIM. L. & CRIMINOLOGY 1501, 1513 (2008) (“... Washington’s trial counsel ‘did not appreciate the significance’ of the semen evidence, which the Commonwealth had turned over in pre-trial discovery. This is an understatement. There could be no serious dispute that a single attacker had committed the crime and that, therefore, the lack of a match had enormous, if not decisive, exonerative effect.”) (internal citation omitted).

²⁸⁹ Hash v. Johnson, 845 F. Supp. 2d 711, 727 (W.D. Va. 2012).

²⁹⁰ John S. Martin, *Virginia’s ‘miscarriage of justice,’* RICHMOND TIMES-DISPATCH, Apr. 1, 2012, <http://www2.timesdispatch.com/news/commentary/2012/apr/01/tdcomm01-virginias-miscarriage-of-justice-ar-1807707/> (last visited Aug. 7, 2013).

²⁹¹ Frank Green, *Path to execution swifter, more certain in Va.*, RICHMOND TIMES-DISPATCH, Dec. 4, 2011, <http://www2.timesdispatch.com/news/news/2011/dec/04/tdmain01-path-to-execution-swifter-more-certain-in-ar-1512219/> (last visited Aug. 7, 2013); *STUDIES: Virginia Leads the Country in Death Sentences Resulting in Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/studies-virginia-leads-country-death-sentences-resulting-executions> (last visited Aug. 7, 2013).

²⁹² Morrisette v. Warden of Sussex I State Prison, 613 S.E.2d 551, 563 (Va. 2005). Morrisette was tried in 2001 for the 1980 murder and rape of Dorothy White. *Morrisette*, 613 S.E.2d at 553.

²⁹³ Peter Dujardin, *Death sentence taken off the table in 1980 Hampton slaying*, DAILY PRESS (Va.), Feb. 13, 2011, http://articles.dailypress.com/2011-02-13/news/dp-nws-deathpenalty-side-0213-20110213_1_hampton-slaying-william-w-morrisette-iii-lonnie-white (last visited Aug. 7, 2013).

“was going to last for weeks. [Defense counsel] were going to get experts, witnesses from his past, from his present,” in contrast to the initial sentencing hearing, which “lasted less than an hour.”²⁹⁴

- j. Investigate and maintain records concerning complaints about the performance of attorneys providing representation in death penalty cases and take appropriate corrective action without delay.**

Investigation and Complaint Process in Death Penalty Cases

The Virginia State Bar (VSB), an agency of the Supreme Court of Virginia, is responsible for investigating allegations of attorney misconduct and disciplining attorneys licensed to practice law in the Commonwealth, including attorneys undertaking capital representation.²⁹⁵ The VSB discipline process is applicable to attorneys who have violated the ethical rules governing attorney conduct or to attorneys who have been convicted of a crime.²⁹⁶ Poor performance by defense counsel in a capital case, however, cannot be remedied through bar disciplinary proceedings, unless such performance rises to the level of ethical misconduct.²⁹⁷ The Virginia Bar counsels potential claimants that “[i]f you believe that your lawyer represented you poorly, your remedy may be to file a civil malpractice action, or, in a criminal case, a petition for a writ of habeas corpus, which addresses claims of ineffective assistance of counsel. These cases must be filed in a court of law, not with the Virginia State Bar.”²⁹⁸ The conduct of attorneys constituting poor representation of clients facing the death penalty is not, in most cases, tantamount to violation of a rule of professional conduct or ethics.

There is no other Virginia entity responsible for investigating and maintaining records concerning complaints about the performance of attorneys providing representation in death penalty cases and for taking appropriate corrective action without delay. The Commission states it “has no authority in this area” regarding the quality of representation and performance of capital counsel, does not keep records of ineffective assistance of counsel claims in death penalty cases, and does not have a formal complaint process for capital cases.²⁹⁹ Commission policy does permit, however, Capital Defenders to report to the Commission any complaint—whether filed with the VSB, as an allegation of ineffective assistance of counsel in a habeas corpus petition, or any other form of complaint—concerning the performance of an assistant capital

²⁹⁴ *Id.*

²⁹⁵ See generally VA. SUP. CT. R. Part 6 § 4, para. 13; *Guide to Lawyer Discipline*, VA. STATE BAR, <http://www.vsb.org/site/regulation/lawyer-discipline> (last visited Aug. 7, 2013). See also CANONS OF JUD. CONDUCT FOR THE STATE OF VA., CANON 3D(2) (requiring judges to take “appropriate action and report to the Virginia State Bar any information about a likely violation of the Code or knowledge of a Code violation raising doubt about the lawyer’s honesty, trustworthiness or fitness as a lawyer in other respects”).

²⁹⁶ See VA. SUP. CT. R. Part 6 § 4, para. 13.1 (“Definitions”) (violations of the Rules of Professional Conduct).

²⁹⁷ *How to file a Misconduct Inquiry About a Lawyer*, VA. STATE BAR, <http://www.vsb.org/site/regulation/inquiry> (last visited Aug. 7, 2013). Bar disciplinary proceedings relating to ethical misconduct do not bear upon whether an attorney’s client has received “ineffective assistance counsel.” See generally *Strickland v. Washington*, 466 U.S. 668 (1984).

²⁹⁸ *How to file a Misconduct Inquiry About a Lawyer*, VA. STATE BAR, <http://www.vsb.org/site/regulation/inquiry> (last visited Aug. 7, 2013).

²⁹⁹ VIDC Survey Response, *supra* note 7, at 6. The Virginia Assessment Team was unable to identify any other entity investigating or maintaining records on ineffective assistance of counsel cases.

defender.³⁰⁰ According to the Commission, a “valid complaint regarding the performance of counsel at any stage of the proceeding may lead to termination of employment of capital defenders or of removal from the list of qualified attorneys to handle capital cases.”³⁰¹

As of March 2012, the Commission confirms that it has not received or investigated any complaints regarding RCD representation.³⁰² Furthermore, the Assessment Team is unaware of any response taken by the Commission, the VSB, or any other Virginia entity, to investigate complaints about defense attorney performance in death penalty cases.

However, there appear to be instances of cases warranting investigation as to whether counsel should be able to continue representation of those facing the death penalty in Virginia. According to a 2001 study, for example, “[r]egarding the disciplinary action taken by the Virginia State Bar, 26 percent of the defense attorneys in the JLARC study sample who handled capital murder cases in the last five years have been disciplined by the Virginia State Bar,” although “[n]one of the disciplinary action was related to the performance of counsel in a capital murder trial.”³⁰³ Of the attorneys currently certified to accept appointments to capital cases, as of August 2013, it appears eleven of those have been reprimanded or disciplined by the VSB in some manner.³⁰⁴ The number of uncertified attorneys appointed to capital cases who have been disciplined by the VSB is unknown. A 2003 report also noted that attorneys who have represented Virginia’s death row inmates “are six times more likely to be the subject of bar disciplinary proceedings than are other lawyers,” and “[i]n one of every ten trials resulting in a death sentence, the defendant was represented by a lawyer who would later lose his license.”³⁰⁵ The report found that “[r]ecords 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.”³⁰⁶

³⁰⁰ VIDC Policy 3.10 (on file with author).

³⁰¹ VIDC Survey Response, *supra* note 7, at 7.

³⁰² *Id.* RCD West noted that “[t]here have been one or two instances where clients have filed bar complaints, these were dismissed.” RCD West Survey Response, *supra* note 94, at 11. A single bar complaint filed against an attorney in RCD Central within the last four years was “monitored by [the Capital Defender] and was summarily dismissed.” RCD Central Survey Response, *supra* note 72, at 8.

³⁰³ JLARC, *supra* note 46, at 39.

³⁰⁴ See *Attorney Records Search*, VA. STATE BAR, <http://www.vsb.org/attorney/attSearch.asp?S=D> (last visited Aug. 7, 2013). The list of eleven certified capital defense attorneys that have been reprimanded in some manner by the VSB is on file with the ABA Death Penalty Due Process Review Project.

³⁰⁵ BROKEN JUSTICE, *supra* note 218, at 35–36 n.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 case, and three of the lawyers in this group had represented more than one capital defendant who was sentenced to death.”).

³⁰⁶ BROKEN JUSTICE, *supra* note 218, at 36 n.141 and accompanying text. E.L. Motley represented Terry Williams, a death row inmate whose death sentence was reversed by the U.S. Supreme Court due to ineffective assistance of counsel, permitting Williams to later plead guilty in exchange for a plea to life without parole. *Id.* See also *Williams v. Taylor*, 529 U.S. 362 (2000). Motley also twice provided representation at trial to death row inmate Johnny Watkins, who was executed on March 3, 1994. BROKEN JUSTICE, *supra* note 218, at 36 n.141. Motley’s status with the VSB is “Disabled Not In Good Standing,” (last updated August 2, 2013). Kevin Shea, who was disciplined for his conduct in representation of two separate criminal cases in 2005, had also previously represented death row inmate Syvasky Poyner. *In re: Kevin Peter Shea*, Nos. 04-010-1311 and 04-010-2610, DISCIPLINARY BD. OF THE VA. STATE BAR, (Nov. 18, 2005). Poyner was executed on March 18, 1993. Shea’s status with the VSB is

Corrective Action by the Courts

Courts of appeal serve as a safeguard against poor lawyering in death penalty cases. Historically, Virginia's rate of reversal of death sentences through the appellate process is much lower than in other capital jurisdictions.³⁰⁷ A nine-year study of capital murder cases nationwide by the Columbia University School of Law in 2000 revealed that from the mid-1970s through 1995, 18% of Virginia death cases were reversed by appellate courts, compared to 68% of death penalty cases nationally.³⁰⁸ A follow up study "also found—as did Virginia's Joint Legislative Audit Review Commission—that strict adherence to procedural rules limiting the review of death cases by appeals courts [in Virginia] may have let stand the convictions of people who did not get fair trials."³⁰⁹

In some cases, defense counsel's performance has garnered criticism from federal and state court judges.³¹⁰ In one case, for example, the death sentence of Terry Williams was affirmed on direct appeal and state habeas corpus proceedings by the Supreme Court of Virginia, but the sentence was later reversed by the U.S. Supreme Court due to ineffective assistance of counsel.³¹¹ In that case, trial counsel had failed to investigate and present substantial mitigating evidence to the jury.³¹² In another case, a federal district court judge in Virginia characterized a brief filed on behalf of death row inmate Carl Chichester on direct appeal as "a shameful disgrace."³¹³ In yet

"Active In Good Standing," (last updated August 2, 2013). As of 2003, the following attorneys were also disciplined for various reasons: Robert Detrick, who represented Mickey Davidson, executed on October 19, 1995; Michael Arif represented Bobby Ramdass who executed on October 10, 2000. Arif is currently listed as Certified Capital Trial lead Counsel in Judicial District 19. *See, e.g., Counsel Lookup*, VIRGINIA INDIGENT DEFENSE COMM'N, <https://epm.virginiainteractive.org/ACeS/defend/> (last visited Aug. 2 2013). Sa'ad El-Amin had represented Herman Barnes who was executed on November 13, 1995 (license to practice surrendered); Bryant Webb represented Lonnie Weeks, who was executed on March 16, 2000, and Carl Chichester, who was executed on April 13, 1999 (license to practice surrendered); Ian Rodway represented Richard Whitley, who was executed on July 6, 1987. Rodway's status with the VSB is "Active In Good Standing," (last updated August 2, 2013). John Henry Maclin, who represented Ronnie Hoke, executed on December 16, 1996, and Greg Beaver, executed on December 3, 1996. *BROKEN JUSTICE*, *supra* note 213, at 36 n.141; *VC3 Capital Sentencing Spreadsheet*, *supra* note 9.

³⁰⁷ *See, e.g.,* Welsh S. White, *Litigating in the Shadow of Death: Defense Attorneys in Capital Cases* (2005), available at <http://www.press.umich.edu/pdf/0472099116-ch2.pdf> ("In Virginia . . . it was almost impossible for a death row inmate to obtain relief on the ground of ineffective assistance of counsel."); *BROKEN JUSTICE*, *supra* note 213, at 31 ("Regardless of the magnitude of the error, case law and court doctrine make it nearly impossible for capital defendants [in Virginia] to prove that they received ineffective assistance of counsel."); SPANGENBERG, *supra* note 8, at 53 ("In Virginia, unlike many other states, a claim of ineffective assistance of counsel is not permitted on direct appeal. It may only be raised in state habeas, or post-conviction, proceedings.").

³⁰⁸ Frank Green, *Path to execution swifter, more certain in Va.*, RICHMOND TIMES-DISPATCH, Dec. 4, 2011.

³⁰⁹ *Id.*

³¹⁰ *BROKEN JUSTICE*, *supra* note 218, at 35, 45.

³¹¹ *Williams v. Taylor*, 529 U.S. 362, 397-99 (2000) (noting that "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.'"); *Williams v. Commonwealth*, 360 S.E.2d 361, 371 (Va. 1987).

³¹² *Williams v. Taylor*, 529 U.S. 362, 398-99 (2000).

³¹³ *UNEQUAL, UNFAIR AND IRREVERSIBLE*, *supra* note 47, at 20 n.5. According to another report, "Carl Chichester was executed in 1999 despite conflicting accounts of eyewitnesses, at least one of whom told police that it was Chichester's co-defendant, not Chichester, who killed a pizza store manager. Appointed attorneys for Chichester said they had been unable to locate this eyewitness despite the fact that the local telephone directory contained the eyewitness' name, address and telephone number." *Id.* at 37.

another case, a federal court judge decried that the “deficient performance” of a capital defendant’s attorney “amounted to virtually a complete absence of representation.”³¹⁴ The attorneys for the latter two cases went on to represent other capital defendants.³¹⁵

In other death penalty cases, appointed counsel either voluntarily represented or were required to continue representation despite an apparent conflict of interest.³¹⁶ For example, one capital defendant, Walter Mickens, was appointed trial counsel who was the same attorney who had, only three days earlier, been representing the victim Mickens was accused and later convicted of murdering.³¹⁷ Trial counsel had also been “so convinced Mickens would be acquitted,” that he did not prepare for the penalty phase until after a guilty verdict had been returned.³¹⁸ The same trial counsel represented Mickens on direct appeal and during state habeas corpus proceedings until another attorney undertook representation during federal habeas corpus proceedings.³¹⁹ Mickens’ federal habeas counsel only inadvertently learned about the conflict of interest because the court clerk mistakenly provided counsel with the victim’s juvenile case file, which is confidential and only produced pursuant to court order, despite the trial counsel’s duty to disclose the conflict to the court.³²⁰ The federal district court denied an ineffective assistance of counsel claim, a decision that was affirmed both by the U.S. Court of Appeals for the Fourth Circuit and the U.S. Supreme Court.³²¹ Walter Mickens was executed on June 12, 2002.³²²

Similarly, in another Virginia case, death row inmate Dana Edmond’s habeas counsel learned, upon investigating the background of the inmate’s former girlfriend and prosecution witness, Laverne Coles, that Edmond’s trial attorney failed to disclose he was currently representing Coles in an unrelated criminal case during the time of the inmate’s capital trial.³²³ During cross-examination of his own client, Edmond’s attorney failed to elicit information regarding Coles’ diagnosed schizophrenia and delusions and failed to call Coles as a defense witness.³²⁴ The federal district court declared that it

would like to make it clear that it believes Dana Ray Edmonds did not receive effective assistance of counsel. The court believed this to be the case when it granted habeas relief in August of 1992, and it is even more apparent to the court

³¹⁴ Stout’s attorney was Staunton Public Defender William Bobbitt. *Stout v. Thompson*, Civil Action No. 91-0719-R (W.D. Va., Roanoke Div., July 31, 1995).

³¹⁵ *BROKEN JUSTICE*, *supra* note 213, at 35. Stout’s attorney, Staunton Public Defender William Bobbitt, had been included on the Public Defender Commission’s list of qualified counsel. *UNEQUAL, UNFAIR AND IRREVERSIBLE*, *supra* note 47, at 18, 22.

³¹⁶ VA. R. OF PROF’L CONDUCT 1.7 (“[A] lawyer shall not represent a client if the representation involves a concurrent conflict of interest.”).

³¹⁷ *Mickens v. Greene*, 74 F. Supp. 2d 586, 599–601 (E.D. Va. 1999).

³¹⁸ Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel’s Ethical Duty to the Capital Defendant*, 31 *HOFSTRA L. REV.* 1181 (2003) (stating that trial counsel “failed Walter Mickens completely in the penalty phase of the trial”).

³¹⁹ *Id.* at 1182.

³²⁰ *Id.*

³²¹ *Mickens v. Greene*, 74 F. Supp. 2d 586, 599–601 (E.D. Va. 1999).

³²² VC3 Capital Case Spreadsheet, *supra* note 9.

³²³ *Edmonds v. Jabe*, 874 F. Supp. 730, 733 (W.D. Va. 1995).

³²⁴ *Id.* at 734.

today. There cannot be a more blatant conflict of interest than the one that existed in the present case.³²⁵

Nonetheless, the federal district court denied relief noting that it was “bound by case precedent and the enigmatic doctrine of procedural default.”³²⁶ Edmonds was executed two days after issuance of this opinion, on January 25, 1995.³²⁷

Furthermore, the U.S. Supreme Court has repeatedly emphasized that capital defense “counsel has a duty to make reasonable investigations or to make a reasonable decision that makes particular investigations unnecessary. In any ineffectiveness case, a particular decision not to investigate must be directly assessed for reasonableness in all the circumstances, applying a heavy measure of deference to counsel’s judgments.”³²⁸ Despite a number of capital cases where the defense counsel failed to conduct meaningful, if any, investigation into the defendant’s background, the Supreme Court of Virginia has rarely identified such conduct as ineffective assistance of counsel.

For example, in *Williams v. Taylor*, the U.S. Supreme Court found that the Supreme Court of Virginia had applied a more stringent standard for determining whether the defendant received ineffective assistance of counsel than is permitted by the U.S. Constitution and reversed the inmate’s death sentence.³²⁹ Consequently, potentially valid claims of ineffective assistance of counsel by death row inmates, made prior to the *Williams* decision, were decided under the wrong standard and thus went uncorrected by the Supreme Court of Virginia.³³⁰

Conclusion

Poor performance by capital defense counsel, unless it constitutes ethical misconduct, cannot be remedied through the VSB disciplinary process. The Commission also does not investigate and maintain records concerning complaints about the performance of *non*-RCD attorneys in death penalty cases. Thus, Virginia is in partial compliance with Protocol #3.³³¹ A summary of the Virginia Assessment Team’s findings and recommendations relative to this Protocol are found in the final section of this Chapter, entitled “Final Conclusions and Recommendations.”

³²⁵ *Id.* at 738. Edmond’s death sentence had previously been overturned by the federal district court for trial counsel’s failure to request the circuit court judge recuse himself at resentencing; the death sentence was subsequently reinstated by the Court of Appeals for the Fourth Circuit because Edmonds failed to raise this issue in his first petition for state or federal habeas corpus relief. *Id.* at 733, *cert. denied* 513 U.S. 1137 (1995); Edmonds v. Jabe, 1995 WL 26690 (4th Cir. 1995); *see also* Edmonds v. Thompson, 1994 WL 47745, at *1 (4th Cir. Feb. 13, 1994) (unpublished disposition).

³²⁶ *Edmonds*, 874 F. Supp. at 738.

³²⁷ VC3 Capital Case Spreadsheet, *supra* note 9.

³²⁸ *Wiggins v. Smith*, 539 U.S. 510, 521–22 (2003) (citing *Strickland v. Washington*, 466 U.S. 668, 690–91 (1984)).

³²⁹ *Williams v. Taylor*, 529 U.S. 362, 397 (2000).

³³⁰ Because the Supreme Court of Virginia issued summary dismissals of ineffective assistance of counsel claims in many state habeas cases leading up to the *Williams* decision, it is unknown whether and in how many cases the Supreme Court of Virginia used the same inappropriate standard in death penalty appeals heard before *Williams*.

³³¹ The Commission “does not have a formal complaint process for capital cases.” VIDC Survey Response, *supra* note 7, at 6.

D. Protocol #4

Compensation for Defense Team (Guideline 9.1 of the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*):

- 1. The jurisdiction should ensure funding for the full cost of high quality legal representation, as defined by *ABA Guideline 9.1*, by the defense team and outside experts selected by counsel.**³³²

According to the *ABA Guidelines*, “[i]t is critically important . . . that each jurisdiction authorize sufficient funds to enable counsel in capital cases to conduct a thorough investigation for trial, sentencing, appeal, post-conviction and clemency, and to procure and effectively present the necessary expert witnesses and documentary evidence.”³³³

Virginia’s indigent capital defense system is funded through a number of sources, including appropriations from the Virginia General Assembly to the Virginia State Bar, the Virginia Indigent Defense Commission (Commission), and the judiciary. In addition, Virginia capital defense attorneys undertaking representation of Virginia death row inmates during federal habeas corpus proceedings are entitled to compensation from the federal court system.³³⁴ According to the 2010 BJS Report on Statewide Public Defender Systems, Virginia is one of three states out of thirteen capital jurisdictions with statewide public defender systems that “spent more than \$2 million each to provide capital case representation of indigent defendants in 2007,” with expenditures totaling more than \$2,600,000.³³⁵

Virginia Indigent Defense Commission and Regional Capital Defender Offices

The Commission is primarily funded through Virginia General Assembly appropriations.³³⁶ Each Capital Defender makes an annual request for funding to the Commission, which is the entity that ultimately determines the amount to request from the Virginia General Assembly for each of the four RCDs.³³⁷ Budgets cover salaries for the attorneys, investigators, and mitigation specialists for each office, office space rental, training for staff members, and most of the other ancillary costs associated with the provision of capital indigent defense services at trial and on direct appeal.³³⁸ Allocations of appropriated funds to the RCDs are determined by the

³³² In order for a jurisdiction to ensure funding for the “full cost of high quality legal representation,” it must be responsible for “paying not just the direct compensation of members of the defense team, but also the costs involved with the requirements of the[] Guidelines for high quality representation (e.g., Guideline 4.1 [Protocol #1], Guideline 8.1 [Protocol #5]).” See *ABA Guidelines*, *supra* note 62, 984–85.

³³³ *ABA Guidelines*, *supra* note 62, at Guideline 4.1, cmt.

³³⁴ 18 U.S.C. § 3599(g)(1) (2013).

³³⁵ BJS REPORT, *supra* note 197, at 11.

³³⁶ VIDC Survey Response, *supra* note 7, at 11.

³³⁷ RCD West Survey Response, *supra* note 94, at 11–12.

³³⁸ Budget Documents provided by the Va. Indigent Def. Comm’n for all four Regional Capital Defenders, Apr. 20, 2012 (on file with author). Due to budget cuts, the office of the Appellate Defender was eliminated in 2009. See *Bring back office of Appellate Defender*, VA. LAW. WKLY., Jan. 30, 2012.

Commission.³³⁹ Once funds are allocated to each RCD, each Capital Defender “ha[s] some discretion as to spending, [but] the bulk of the budget is used for salary and rent.”³⁴⁰

Table 2, below is a table listing the budgets for each of the four Regional Capital Defender offices since the RCDs’ inception in 2004.³⁴¹

Table 2

Capital Defender Office Budget Funding from General Assembly, FY 2004 – FY 2012, in dollars³⁴²									
Office	2004	2005	2006	2007	2008	2009	2010	2011	2012
Central	\$492,859	\$482,130	\$489,990	\$537,992	\$846,412	\$716,690	\$712,050	\$679,927	\$890,941
North	\$588,832	\$529,110	\$542,470	\$615,448	\$937,000	\$913,370	\$840,652	\$754,245	\$778,249
Southeast	\$477,850	\$486,370	\$496,330	\$543,785	\$870,652	\$835,210	\$721,583	\$675,928	\$913,609
Western	\$303,956	\$477,260	\$487,220	\$539,579	\$867,342	\$843,030	\$771,223	\$757,251	\$787,490
Total	\$1,863,497	\$1,974,870	\$2,016,010	\$2,236,804	\$3,521,406	\$3,308,300	\$3,045,508	\$2,867,351	\$3,370,289

Throughout Virginia, there were statewide salary increases from 2004 to 2006.³⁴³ In 2007, the Commission requested additional funds from the Virginia General Assembly as part of “several steps [taken by the Commonwealth] to improve both public defender and private court appointed indigent defense funding and services.”³⁴⁴ According to the Commission, “[t]he request was for all [four] offices and included 24% salary increases for attorneys, increases for staff salaries and [two] additional positions (attorney and mitigation specialist) for each office.”³⁴⁵ Funding for the requested salary increase and establishment of additional staff positions—in addition to the 4% salary increase received by all state employees—were received in 2007 (FY08).³⁴⁶

Private Court-Appointed Capital Defense Counsel

Appropriations provided by the Virginia General Assembly to the Supreme Court of Virginia’s Criminal Fund cover much of the remaining costs of providing representation to Virginia’s indigent capital defendants and death row inmates.³⁴⁷ The Criminal Fund, administered by the Office of the Executive Secretary of the Supreme Court of Virginia, finances the compensation of all private counsel appointed by the circuit courts to provide representation at trial, on direct appeal, or during state habeas corpus proceedings, as well any investigator, mitigation specialist,

³³⁹ RCD West Survey Response, *supra* note 94, at 11–12.

³⁴⁰ *Id.*

³⁴¹ The four offices began operation July 1, 2004 (FY2005), funds provided for initial start up and employment in FY 2004. VIDC Survey Response, *supra* note 7, at app. Q35D.

³⁴² Amounts listed are appropriations approved for each office by the Commission, with the exception of 2011, which reflects the actual funding received. Fiscal years run July 1 through June 30. *Id.*

³⁴³ *Id.* Also in 2007, due to the flailing economy, the Governor and General Assembly required a return of appropriated funds, requiring an annual reversion of \$544,000 per year from the Commission. As a result, “some of the new positions allocated to the capital defender offices in 2007 remained vacant in order to generate savings toward the payment of the Reversion.” VIDC Annual 2011 Report, *supra* note 12, at 16–17.

³⁴⁴ VIDC 2011 Report to the General Assembly, *supra* note 12, at 15–16.

³⁴⁵ VIDC Survey Response, *supra* note 7, at 11.

³⁴⁶ *Id.*

³⁴⁷ Interview with John Rickman and Mary Rickman, *supra* note 49; VA. CODE ANN. § 19.2-163 (2013); *see also* RCD Central Survey Response, *supra* note 72, at 16; SUP. CT. OF VA., COURT-APPOINTED COUNSEL MANUAL, 5-1, available at <http://www.courts.state.va.us/courtadmin/aoc/djs/resources/manuals/ctapptatty/toc.pdf>.

or other professional expert appointed by the court.³⁴⁸ Criminal Fund expenditures, if approved by the circuit court, may also cover reimbursement for other costs associated with court-appointed representation, including travel expenses, clerical, postal, photographic, printing and copying services.³⁴⁹ Table 3, below, includes the total Criminal Fund expenditures by the Supreme Court of Virginia’s Fiscal Services Department for the administration of the capital defense services from 2007 to 2011.³⁵⁰

Table 3

Criminal Fund Capital Murder Expenditures by Fiscal Year, in dollars	
<u>Fiscal Year</u>	<u>Total Expenditures in Dollars</u>
2007	\$3,011,297.75
2008	\$2,304,123.89
2009	\$2,254,829.78
2010	\$2,263,884.40
2011	\$2,478,576.68

According to the Director of Fiscal Services at the Supreme Court of Virginia, the total funding spent from the Criminal Fund by the judiciary on indigent capital defense services from fiscal year 2007 through fiscal year 2011 is \$12,312,712.³⁵¹

Virginia Capital Representation Resource Center

The Virginia Capital Representation Resource Center (VCRRC) employs five attorneys who provide representation to Virginia’s death row inmates during state and federal habeas corpus proceedings and state clemency proceedings, along with private, court-appointed co-counsel.³⁵² The VCRRC is funded primarily through Virginia General Assembly appropriations to the Virginia State Bar, which receives funding for the VCRRC as a line item.³⁵³ In addition, VCRRC attorneys receive payment from the federal courts for representation in federal habeas corpus proceedings, which comprises approximately 30 to 40% of VCRRC’s budget.³⁵⁴ In 2007, the Virginia Law Foundation of the Virginia State Bar also granted the VCRRC funding totaling \$25,000 “to create a comprehensive database related to all past and present capital cases in Virginia.”³⁵⁵

³⁴⁸ VCRRC Interview, *supra* note 26; VIDC Survey Response, *supra* note 7, at 15–17. The Criminal Fund does not fund the RCDs, nor does it fund the VCRRC.

³⁴⁹ Email and Chart from John Rickman, Director, Fiscal Services Dep’t, Sup. Ct. of Va., to Paula Shapiro (Apr. 19, 2012) (on file with author).

³⁵⁰ *Id.*

³⁵¹ *Id.*

³⁵² VCRRC Interview, *supra* note 26.

³⁵³ *Id.* See also VA. STATE BAR, 2011–12 CHAIRS HANDBOOK, Ch. 4, 40 (2013), available at <http://www.vsb.org/docs/ch-budget-finance.pdf> (describing permitted VSB expenditures).

³⁵⁴ VCRRC Interview, *supra* note 26 (noting that the attorneys turn over the fees to be included in the VCRRC budget). Federal law also permits, but does not require, counsel appointed to represent indigent death row inmates under a state-imposed death sentence in federal habeas corpus proceedings “to represent their clients in state clemency proceedings and entitles them to compensation for that representation.” *Harbison v. Bell*, 56 U.S. 180, 194 (2013).

³⁵⁵ *Law Foundation Announces Grant Awards*, VA. STATE BAR, May 16, 2007, <http://www.vsb.org/site/news/item/law-foundation-announces-grant-awards> (last visited Aug. 2, 2013).

It does not appear, however, that all appointed counsel are compensated for their time expended on representation of a capital defendant or death row inmate. This issue is discussed below.

Experts

The availability of funding for the full cost of outside experts to assist the defense at trial varies across the Commonwealth. For example, RCD Central states that “[u]sually, cost is not the factor in determining the need or the expert requested [T]here has not been an issue with access to experts”³⁵⁶ By contrast, RCD Southeast reports that trial court approval of funding for experts is “normally extremely limited.”³⁵⁷ A 2004 report by the Spangenberg Group, under the auspices of the American Bar Association, explained that “some attorneys said they barely get an expert in a capital case for DNA. One Richmond public defender told us a judge denied her request for a DNA expert in a 7-year old homicide case from Norfolk where DNA was the only remaining evidence,” and that, in this instance, “the [C]ommonwealth [A]ttorney successfully argued that the expert was too much of an expense to the state.”³⁵⁸ With respect to state habeas proceedings, the Commonwealth does not provide funding for experts during this stage of a death penalty case.³⁵⁹

As described above, Virginia has improved and increased the availability of funding for capital defense services, most notably through creation and funding of the Regional Capital Defender offices that represent capital defendants at trial. The Commonwealth, however, does not ensure adequate funding for high quality legal representation and funding for experts at all stages of a capital case—particularly during state habeas corpus proceedings. Virginia, therefore, is in partial compliance with this portion of Protocol #4.

- 2. Counsel in death penalty cases should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the extraordinary responsibilities inherent in death penalty representation.**
 - a. Attorneys employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**

Salaried Capital Defenders

Both the Regional Capital Defender offices (RCD) and the VCRRC provide annual salaries to staff attorneys who represent capital defendants and death row inmates.³⁶⁰ Currently, RCD attorneys providing capital representation at trial and direct appeal earn at least \$76,887 and up to \$129,992.³⁶¹ Table 4, below, provides the annual salaries of RCD attorneys as of March 2012.

³⁵⁶ See RCD Central Survey Response, *supra* note 72, at 12.

³⁵⁷ See RCD Southeast Survey Response, *supra* note 75, at 13.

³⁵⁸ SPANGENBERG, *supra* note 8, at 65.

³⁵⁹ See Protocol #1, *supra* notes 152–159 and accompanying text; VCRRC Interview, *supra* note 26.

³⁶⁰ VIDC Survey Response, *supra* note 7, at 12; VCRRC Survey Response, *supra* note 26, at 6.

³⁶¹ Table: Capital Defenders Salary and Years as CD, provided by Jae K. Davenport, VIDC (Apr. 3, 2012) (on file with author).

Table 4

Compensation of Capital Defenders and Assistant Capital Defenders (As of 3/31/12)³⁶²			
<u>Position</u>	<u>Annual Salary</u>	<u>Hire Date</u>	<u>Years as CD</u>
Capital Defender Central	\$118,810	08-03-01	4
Capital Defender Western	\$125,379	90-05-01	8
Capital Defender Southeast	\$118,810	09-10-05	2
Capital Defender North ³⁶³	\$129,992	09-10-05	2
Deputy CD Central	\$86,661	98-02-17	8
Deputy CD Western	\$87,150	05-01-10	0
Deputy CD Southeast	\$86,661	12-03-10	0
Deputy CD North	\$89,190	10-03-10	2
Senior Assistant CD Central	\$76,877	07-05-10	0
Senior Assistant CD Central	\$76,877	90-08-06	4
Senior Assistant CD Western	\$76,877	06-08-10	1
Senior Assistant CD Western	\$76,877	09-03-10	3
Senior Assistant CD Southeast	\$76,877	10-03-10	2
Senior Assistant CD Southeast	\$76,877	05-08-30	0
Senior Assistant CD North	\$76,877	Begin April 2012	Unable to determine
Senior Assistant CD North	\$76,877	Begin April 2012	Unable to determine

We were unable to obtain information on the salaries of attorneys employed at the VCRRC.

Capital Defender and Prosecutor Salary Parity

The *ABA Guidelines* require that attorneys employed by defender organizations be compensated at a rate that is commensurate with salary scale of the prosecutor's office in the jurisdiction.³⁶⁴ Capital cases in Virginia are prosecuted at trial by Commonwealth's Attorneys and Assistant Commonwealth's Attorneys.³⁶⁵ On appeal and during state habeas corpus proceedings, the Commonwealth is represented by the Virginia Attorney General's Office of Criminal Appeals.³⁶⁶ The salaries of Virginia's Commonwealth's Attorneys are determined by the estimated population of the county or city s/he serves.³⁶⁷ Entry-level Assistant Commonwealth's Attorneys earn annual salaries between \$45,000 and \$69,305, while elected Commonwealth's Attorneys earn up to \$135,882.³⁶⁸ Table 5, below, describes the salaries for Commonwealth's Attorneys by jurisdiction population for fiscal year 2011.

³⁶² *Id.*

³⁶³ Virginia provides a salary differential in the area of Northern Virginia. VIDC Survey Response, *supra* note 7, at app. Q3.

³⁶⁴ *ABA Guidelines*, *supra* note 62, at Guideline 9.1(B)(2).

³⁶⁵ VA. ATT'Y GEN., THE APPELLATE PROCESS FOR A VIRGINIA CAPITAL MURDER CONVICTION 1, *available at* http://www.ag.virginia.gov/Programs%20and%20Resources/Victim_Notification/capmurder.pdf.

³⁶⁶ *Id.*

³⁶⁷ VA. COMP. BD., FY11 COMMONWEALTH'S ATTORNEY POLICIES AND PROCEDURES MANUAL 11 (2011), *available at* <http://www.scb.state.va.us/policy/FY11CA.pdf>.

³⁶⁸ *Employment*, VA. COMMONWEALTH'S ATT'Y'S SERVS. COUNCIL, <http://www.cas.state.va.us/employment.htm> (last visited Aug. 7, 2013).

Table 5

Population-based Salaries for Virginia Commonwealth's Attorneys, Fiscal Year 2011³⁶⁹		
<i>Population</i>	<i>July 1, 2010 to June 30, 2011</i>	<i>July 1, 2011 to June 30, 2012</i>
Less than 10,000	\$51,706	\$51,706
10,000 to 19,999	\$57,458	\$57,458
20,000 to 34,999	\$63,202	\$63,202
35,000 to 44,999	\$113,760	\$113,760
45,000 to 99,999	\$126,397	\$126,397
100,000 to 249,999	\$131,139	\$131,139
250,000 or more	\$135,882	\$135,882

Salaries of Commonwealth's Attorneys, however, are often supplemented by additional funding from the local jurisdiction.³⁷⁰ For example, the Richmond Commonwealth Attorney reports that prosecutors who serve as first chair in criminal cases in that jurisdiction earn between \$95,000 and \$185,000 in salary.³⁷¹ Based on the salaries identified above, it appears that there is general parity among the highest level of management between the four Capital Defenders, the Attorney General, and elected Commonwealth's Attorneys, although the annual salary of the four Capital Defenders, which range from \$118,810 to \$129,990, is less than Virginia's Attorney General, who receives an annual salary of \$150,000,³⁷² and is also slightly less than the salaries of Commonwealth's Attorneys in larger cities and counties. Notably, however, deputy capital defenders, whose counterpart may be the elected Commonwealth's Attorney in many capital cases, earn considerably less than the elected prosecutor in some counties. On a related note, it appears that salaries for assistant RCD attorneys are far below market rates, which does not promote retention of highly-qualified, experienced lawyers and instead leads to high turnover in employment in the RCDs.

Because there is approximate parity between some capital defenders and prosecutors in the Commonwealth, it appears that Virginia is in partial compliance with this portion of Protocol #4.

³⁶⁹ VA. COMP. BD., FY11 COMMONWEALTH'S ATTORNEY POLICIES AND PROCEDURES MANUAL 11 (2011), available at <http://www.scb.state.va.us/policy/FY11CA.pdf>.

³⁷⁰ See, e.g., Will Jones, *Council Backs Salary Supplements for Prosecutors*, RICHMOND TIMES-DISPATCH, May 13, 2011 (describing Richmond City Council's approval of \$100,000 for additional funding to support prosecutors' salaries in Richmond in 2012).

³⁷¹ Richmond Commonwealth's Attorney Survey Response, provided by Michael Herring, Commonwealth's Attorney for the City of Richmond, at 4 (Apr. 1, 2013) (on file with author). Mr. Herring is also a member of the Virginia Death Penalty Assessment Team.

³⁷² Virginia State Government Salary, SUNSHINE REV., http://sunshinereview.org/index.php/Virginia_state_government_salary (last visited Apr. 12, 2012). See also *Data Center: Salaries of Virginia state employees 2010*, RICHMOND TIMES-DISPATCH, <http://datacenter.timesdispatch.com/databases/salaries-virginia-state-employees/> (last visited Aug. 2, 2013).

- b. Flat fees, caps on compensation, and lump-sum contracts are improper in death penalty cases.**
- c. Appointed counsel should be fully compensated for actual time and service performed at an hourly rate commensurate with the prevailing rates for similar services performed by retained counsel in the jurisdiction, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.**

Private attorneys appointed by Virginia courts to undertake representation for indigent capital defendants or death row inmates at trial, on direct appeal, and during state habeas corpus proceedings are compensated at an hourly rate that is distinguished by whether work is performed in or out of court.³⁷³

The hourly rate available to appointed counsel should be “an amount deemed reasonable by the court,” which cannot exceed \$200 per hour for in-court and \$150 per hour for out-of-court representation.³⁷⁴ Judges may, in their discretion, set lower hourly rates on a case-by-case basis.³⁷⁵ Courts also have discretion to approve the number of hours and the amount of funds provided for capital representation.³⁷⁶ Because the trial judge has “the sole discretion to fix the amount of compensation to be paid counsel appointed by the court,” rates of compensation for counsel appointed to represent indigent capital defendants may vary significantly.³⁷⁷ According to a report in 2001, for example, “[t]he total amount awarded to appointed capital counsel ranges from \$10,000 to over \$100,000.”³⁷⁸ According to estimates in 2012, “capital trials require, on average, 3,557 hours of attorney time.”³⁷⁹

Periodic billing and payment is available to court-appointed counsel in death penalty cases.³⁸⁰ Appointed counsel may submit a monthly bill, including a statement of all costs incurred and fees charged in the case during that month, to the circuit court when the fees and costs incurred during that month exceed \$1,000.³⁸¹ If the court deems such charges reasonable, then the court will direct that payment be made from the Criminal Fund.³⁸² Court-appointed counsel must submit to the court, within thirty days of the completion of capital representation, “a detailed accounting of the time expended for that representation.”³⁸³

³⁷³ VA. CODE ANN. § 19.2-163(2) (2013).

³⁷⁴ *Id.*; Interview with John Rickman and Mary Gilbert, *supra* note 49.

³⁷⁵ Interview with John Rickman and Mary Gilbert, *supra* note 49; RCD West Survey Response, *supra* note 94, at 14. The Supreme Court of Virginia had previously made the rates described above the “suggested” compensations rated for capital counsel. Interview with John Rickman and Mary Gilbert, *supra* note 49.

³⁷⁶ Interview with John Rickman and Mary Gilbert, *supra* note 49.

³⁷⁷ VA. CODE ANN. § 19.2-163(2) (2013); White, *supra* note 23, at 358.

³⁷⁸ White, *supra* note 23, at 338 (citing Telephone Interview with Overton P. Pollard, Exec. Dir., Va. Pub. Defender Comm’n (Feb. 15, 2001)).

³⁷⁹ Dupont & Hammond, *supra* note 261, at 217.

³⁸⁰ VA. CODE ANN. § 19.2-163(2) (2013).

³⁸¹ COURT-APPOINTED COUNSEL MANUAL, *supra* note 347, at 5-5.

³⁸² *Id.*

³⁸³ VA. CODE ANN. § 19.2-163(2) (2013).

Table 6, below, provides the amount of funding from the Criminal Fund expended on capital defense attorney services from fiscal year 2007 through fiscal year 2011.³⁸⁴

Table 6

Criminal Fund Expenditures for Attorney Services in Capital Murder Cases	
<u>Fiscal Year</u>	<u>Expenditures, in dollars</u>
2007	\$2,377,215.11
2008	\$1,852,923.55
2009	\$1,984,724.93
2010	\$1,727,951.28
2011	\$1,984,490.06

Virginia’s maximum hourly rates are comparable to the amount provided by the federal government to court-appointed capital counsel providing representation during federal habeas corpus and clemency proceedings.³⁸⁵ However, as the American Bar Association has recently pointed out, this authorized rate “is usually much less than what counsel can charge other clients in other kinds of cases.”³⁸⁶ Moreover, the Assessment Team is unable to determine the actual hourly rates approved by trial courts across the Commonwealth for compensation of private counsel appointed to undertake representation of a capital defendant or death row inmate.

While the current hourly rates cannot exceed the \$200 in-court and \$150 out-of-court maximums, trial courts across the Commonwealth may approve varying compensation rates.³⁸⁷ Furthermore, the distinction between compensation for in- and out-of-court time is not only in contravention of the *ABA Guidelines*, but may also discourage appointed counsel from zealously advocating on behalf of their client, which may include negotiation and acceptance of a plea to avoid a capital trial.³⁸⁸ In direct appeal cases, however, the Supreme Court of Virginia may

³⁸⁴ Email from John Rickman, *supra* note 350.

³⁸⁵ 18 U.S.C. § 3599 (providing \$178 an hour). The federal rate does not distinguish between in and out of court services. *Id.*

³⁸⁶ *Id.*; see also Letter from Wm. (Bill) T. Robinson III, ABA President, to Samuel W. Phelps, U.S. Court of Appeals for the Fourth Circuit, on Comments of the American Bar Association to Proposed Special Procedures for Reviewing Attorney Compensation Requests in Death Penalty Cases (Jan. 30, 2012), *available at* http://www.americanbar.org/content/dam/aba/uncategorized/GAO/2012jan30_attycompensationdeathpenalty.authcheckdam.pdf (“The Association’s 25 years of experience recruiting and training defense counsel for death penalty cases has demonstrated the already very difficult task of recruiting skilled and experienced counsel to accept capital cases at the CJA rate of \$178/hour. That is because the authorized rate is usually much less than what counsel can charge other clients in other kinds of cases.”)

³⁸⁷ Previously, when the Supreme Court of Virginia’s hourly rates were suggested amounts and not compensation caps, circuit court judges from jurisdictions throughout the Commonwealth permitted counsel fees that ranged from \$100 to \$400 per hour. Telephone Interview with Joseph Flood, Va. Cap. Def. Att’y and Va. Death Penalty Assessment Team member (June 7, 2012) (noting that the current hourly cap is in response to that variance).

³⁸⁸ Similarly, Philadelphia compensates counsel at disparate rates for in and out of court work in death penalty cases. Lead counsel receives a flat “preparation fee” of \$2,000, which includes the first half-day of trial. Report and Recommendations in *Commonwealth v. McGarrell*, 77 EM 2011, CP–51–CR–0014623–2009, 10 (Pa. Feb. 21, 2012). Over the course of the remaining trial, counsel receives \$200 for half days, \$400 for full days, and a \$1,700 fee for the penalty phase of a case. *Id.* For cases disposed of before trial, no additional compensation is provided and, if a case is concluded before the trial date for any reason, lead counsel’s preparation fee is reduced by one-third to \$1333.00. *Id.* The Pennsylvania Supreme Court characterized this fee structure as

completely inconsistent with how competent trial lawyers work, particularly in cases such as these which typically involve enormous preparation time and are frequently best resolved by a non-trial disposition. Capital defendants and their court appointed counsel are ill-served by a compensation system which favors the longest

authorize payments for representation through a flat fee. For example, in one recent capital case, the Virginia Supreme Court authorized payment of \$5,000 as the “total fee [] to be shared by all appointed counsel in the case”³⁸⁹ A separate problem relates to the reduction of reimbursement amounts ultimately approved for payment by the Supreme Court of Virginia’s Office of the Executive Secretary. On a number of occasions, circuit court judges have approved compensation orders for court-appointed defense counsel in capital cases, which were then reduced—on one occasion by 80%—by the Supreme Court of Virginia’s Office of the Executive Secretary without explanation.³⁹⁰

Furthermore, no entity in Virginia keeps track of the hourly rates requested by counsel, approved by the trial court, and ultimately approved for reimbursement by the Office the Executive Secretary. Accordingly, there is no mechanism to determine if compensation levels for court-appointed private counsel are consistent across the Commonwealth or if the rates are commensurate with similar services performed by retained counsel in the jurisdiction.³⁹¹

Virginia, therefore, is in partial compliance with this portion of Protocol #4.

- 3. Non-attorney members of the defense team should be fully compensated at a rate that is commensurate with the provision of high quality legal representation and reflects the specialized skills needed by those who assist counsel with the litigation of death penalty cases.**
 - a. Investigators employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale of the prosecutor’s office in the jurisdiction.**
 - b. Mitigation specialists and experts employed by defender organizations should be compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector.**
 - c. Members of the defense team assisting private counsel should be fully compensated for actual time and service performed at an hourly rate**

possible trial over the most comprehensive and intensive negotiations. Moreover, such a system also ignores the interest of victims’ families, the prosecutor and the court in obtaining dispositions which are both fair and efficient.

Id. at 11 (concluding that the compensation scheme of court-appointed counsel in death penalty cases in Philadelphia is “grossly inadequate.”).

³⁸⁹ See, e.g., Letter from Patricia L. Harrington, Clerk, Sup. Ct. of Va., to Meghan Shapiro *in re* Mark Eric Lawlor v. Commonwealth, No. 120481 (Jul. 6, 2012) (“For all appeals filed with the Court, there is a lump sum attorney’s fee awarded to appointed counsel.”) (on file with author). In another case, counsel was offered a flat fee of \$2,500 for the 250 hours of representation of a capital defendant on direct appeal. Email from Jonathan Shapiro to Sarah Turberville (Aug. 13, 2012) (on file with author) (estimating that three attorneys expended 250 hours representing John Allen Muhammed on direct appeal).

³⁹⁰ See Rosenfield’s Petition for En Banc Reconsideration, *Porter v. Kelly*, Record No. 091615 (filed with the Supreme Court of Virginia) (on file with author) (“request[ing] [] the *en banc* Court to reconsider a decision of a panel of this Court to reduce court-appointed counsel’s fee and costs [for habeas representation] by 80% without explanation and without recourse”).

³⁹¹ On a separate, but related, note, fee caps imposed for representation of a non-capital defendant in Virginia “are at or near the lowest in the nation.” Locke E. Bowman, *Lemonade Out of Lemons: Can Wrongful Convictions Lead to Criminal Justice Reform?*, 98 J. CRIM. L. & CRIMINOLOGY 1501, 1516, n.24 (2008). See also VA. CODE ANN. § 19.2-163 (2013) (attorneys may receive maximum compensation of \$1,235 for representing a client who might receive more than twenty years in prison, with an additional \$850 permitted in special circumstances).

commensurate with prevailing rates paid by retained counsel in the jurisdiction for similar services, with no distinction between rates for services performed in or out of court. Periodic billing and payment should be available.

Non-attorney staff members of Virginia’s capital defense teams are compensated by salary if employed by an RCD or the VCRRC. Non-attorney members of the defense team appointed by the courts are compensated at hourly rates set by Virginia courts and paid out of the Criminal Fund.

Funding for Non-Attorney Member of Defense Team—RCDs and VCRRC

RCD budgets from the Commission must cover the cost of compensating staff investigators and mitigation specialists employed at each office, who assist in the provision of capital defense services.³⁹² Table 7, below, provides the current salaries of non-attorney members of the defense team employed by the RCDs.³⁹³

Table 7

Salaries of Non-Attorney Members of Defense Team Employed at RCDs, Fiscal Year 2011		
<i>RCD North</i>	<i>Salary (hired prior to 7/1/10)</i>	<i>Salary (hired after 7/1/10)</i>
Investigator	\$50,592	\$48,183
Mitigation Specialist	\$53,061	\$50,534
<i>RCD Central, RCD Southeast, RCD West</i>		
Investigator	\$46,890	\$44,658
Mitigation Specialist	\$48,124	\$45,833

There are no provisions for salary increases for RCD investigators and mitigation specialists based on length of service.³⁹⁴ In addition, no RCD possesses funding to support hiring of additional expert, investigative, or mitigation services for use in capital trials.³⁹⁵

RCD attorneys, however, may petition the court for funding to support payments for additional expert services, including for investigators and mitigation specialists.³⁹⁶ If the court denies the RCD attorney’s request for payment of expenses, the RCD may submit to the Commission’s Executive Director, within thirty days of the court’s order denying payment, a request for approval of funding “prior to any commitment for the expenditure being made and prior to incurring such expenses.”³⁹⁷ In order to obtain reimbursement, RCDs “must demonstrate an extraordinary need and show that the presiding judge has refused a formal motion for the

³⁹² VIDC Survey Response, *supra* note 7, at 12; RCD Southeast Survey Response, *supra* note 75, at 12–13; Interview with Doug Ramseur, *supra* note 109.

³⁹³ *Table: Non-Attorney Salaries*, provided by Jae K. Davenport, Standards & Practice Enforcement Att’y, Va. Indigent Def. Comm’n (Apr. 3, 2012) (on file with author).

³⁹⁴ RCD West Survey Response, *supra* note 94, at 13.

³⁹⁵ *Id.* at 8–9; RCD Southeast Survey Response, *supra* note 75, at 11; RCD North Survey Response, *supra* note 75, at 8; RCD Central Survey Response, *supra* note 72, at 11.

³⁹⁶ VIDC Survey Response, *supra* note 7, at 12; RCD West Survey Response, *supra* note 94, at 12.

³⁹⁷ VIDC Policy Section 10.5.

funds.”³⁹⁸ Commission approval for reimbursement is discretionary and, historically, the Commission has not possessed any additional funding available for this purpose.³⁹⁹

Due to case volume and limited resources, RCD Southeast reports that “once every few years,” it must request funds from the circuit court to obtain additional investigative assistance.⁴⁰⁰ RCD Central has also requested the court to fund a private mitigation specialist due to the unavailability of RCD Central’s staff.⁴⁰¹ RCD West reports that it has never requested funding for the appointment of private mitigation specialists or investigators.⁴⁰² RCD North reports that its office must request additional mitigation specialists and investigators in almost every capital case assigned to it.⁴⁰³ Also, each RCD reports that it regularly requests the court to provide funding for mental health experts, pursuant to the Virginia Code.⁴⁰⁴

The VCCRRC budget must cover the cost of any investigative, mitigation, mental health or other expert assistance that may be provided by that office to Virginia’s death row inmates during state habeas corpus or clemency proceedings.⁴⁰⁵ No Virginia court has ever granted funding to the VCCRRC to support payment of expert or ancillary capital defense services for use during state habeas proceedings.⁴⁰⁶

Supreme Court of Virginia Expenditures on Non-Attorney Members of the Defense Team

When private counsel is appointed by the court to represent an indigent capital defendant, payment for ancillary and expert services related to this representation is made out of the Criminal Fund, administered by the Supreme Court of Virginia Fiscal Services Division.⁴⁰⁷ Court-appointed capital counsel, as well as privately-retained capital defense attorneys whose clients are unable to afford expert services, must seek circuit court approval for the appointment and compensation of any experts, investigators, and mitigation specialists.⁴⁰⁸ In addition, as described above, RCD attorneys may also request funds for experts from the Virginia courts.⁴⁰⁹

³⁹⁸ VIDC Policy Section 10.5(B)(i).

³⁹⁹ VIDC Survey Response, *supra* note 7, at 13 (“[T]he determination of whether the VIDC will pay for case costs that the Court denies is linked to available funding, which has not been available,” since “[t]he VIDC Budget is not created with the intent that case related costs (beyond routine travel) will be covered by the agency.”); VIDC Policy Section 10.5. However, when asked if the Commission provides any funds for expert services, all four Capital Defenders responded no.

⁴⁰⁰ RCD Southeast Survey Response, *supra* note 75, at 12. RCD Southeast has not yet petitioned the circuit courts for funding of mitigation specialists for use in capital trials. *Id.*

⁴⁰¹ RCD Central Survey Response, *supra* note 72, at 11.

⁴⁰² RCD West Survey Response, *supra* note 94, at 9.

⁴⁰³ RCD North Survey Response, *supra* note 75, at 9.

⁴⁰⁴ VA. CODE ANN. §§ 19.2-264.3:1, 19.2-264.3:1.2 (2013); RCD West Survey Response, *supra* note 94, at 9; RCD Central Survey Response, *supra* note 72, at 11; RCD Southeast Survey Response, *supra* note 75, at 12; RCD North Survey Response, *supra* note 75, at 9.

⁴⁰⁵ VCCRRC Interview, *supra* note 26.

⁴⁰⁶ *Id.* (noting that this is since the Supreme Court of Virginia obtained exclusive jurisdiction in 1995).

⁴⁰⁷ Interview with John Rickman and Mary Gilbert, *supra* note 49; VA. CODE ANN. § 19.2-332 (2013).

⁴⁰⁸ VIDC Survey Response, *supra* note 7, at 13; RCD West Survey Response, *supra* note 94, at 14.

⁴⁰⁹ VA. CODE ANN. § 19.2-264.3:1.3(A)–(B) (2013).

Table 8, below, describes payments made from the Criminal Fund in fiscal years 2007—2011 for the assistance of investigators, mitigation specialists and other experts in capital trials.⁴¹⁰

Table 8

Criminal Fund Capital Murder Payments on Ancillary and Expert Services, in dollars⁴¹¹					
<u>Type of Service</u>	<u>FY2007</u>	<u>FY2008</u>	<u>FY2009</u>	<u>FY2010</u>	<u>FY2011</u>
Specified Per Diem Payments ⁴¹²	\$284,0402	\$150,827	\$109,508	\$129,010	\$222,834
Medical Services ⁴¹³	\$100,005	\$2,775	\$24,530	\$90,005	\$29,521
Skilled Services ⁴¹⁴	\$106,999	\$96,474	\$24,037	\$53,816	\$78,679
Public Info. & PR Services ⁴¹⁵	\$12,621	\$35,482	\$17,182	\$40,005	\$40,986
Total	\$503,666	\$285,558	\$175,257	\$312,836	\$372,020

As illustrated above, Criminal Fund expenditures supporting ancillary and expert services in death penalty trials vary greatly by year. There are no maximum fees or compensation caps for expert services in capital cases, and hourly rates and total funding are left to the discretion of each circuit court judge.⁴¹⁶ According to RCD North, investigators and mitigation specialists appointed by the circuit court judges in its jurisdiction are compensated at approximately \$85 an hour.⁴¹⁷ RCD Central reports that experts are compensated at “fair” hourly rates.⁴¹⁸ Periodic billing and payment is available for court-appointed expert and other ancillary services, including investigators, mitigation specialists and other experts.⁴¹⁹

As previously discussed, however, the Commonwealth does not provide funds for investigators, mitigation specialists, and other experts for use in capital defense representation during state habeas corpus proceedings.⁴²⁰ There is one investigator/mitigation specialist at the VCRRC who assists in the representation of all Virginia death row inmates during this stage of proceedings.⁴²¹

⁴¹⁰ Email from John Rickman, *supra* note 349; Interview with John Rickman and Mary Gilbert, *supra* note 49. The Fiscal Services Department is required to track capital case funding by “state-wide” categories, which are described in Table 7. Interview with John Rickman and Mary Gilbert, *supra* note 49. However, the precise cost of each prescribed category may vary depending upon how the Court’s seven reimbursement specialists elect to code an approved expense; thus, costs associated with expert services in one case may be coded differently than incurred expenses in another case. *Id.*

⁴¹¹ Amounts are rounded up to the nearest dollar.

⁴¹² Specified Per Diem Payments fund various types of expert services. Interview with John Rickman and Mary Gilbert, *supra* note 49.

⁴¹³ Medical Services include costs associated with use of medical experts. *Id.*

⁴¹⁴ Skilled services costs are typically compensation for mitigation specialists, private investigators, and sometimes other experts. *Id.*

⁴¹⁵ Public Information and Public Relation Services are costs associated with private investigators. *Id.*

⁴¹⁶ *Id.*

⁴¹⁷ RCD North Survey Response, *supra* note 75, at 8.

⁴¹⁸ RCD Central Survey Response, *supra* note 72, at 10.

⁴¹⁹ RCD Southeast Survey Response, *supra* note 75, at 11; RCD Central Survey Response, *supra* note 72, at 10, 16 (“All of our expert appointment order permit periodic billing and payment.”); Interview with John Rickman and Mary Gilbert, *supra* note 49.

⁴²⁰ See Protocol #1, *supra*.

⁴²¹ VCRRC Interview, *supra* note 26.

Prosecution and Privately-Retained Counsel's Ancillary Costs

Virginia prosecutors' budgets include costs for employment of non-lawyer staff to assist in prosecution of capital cases, but need not include the cost of investigative services provided by law enforcement agencies, such as local and state police, sheriff's offices, the Department of Forensic Science or Division of Consolidated Laboratory Services, or the statewide medical examiner's office. The Assessment Team, however, was unable to confirm the compensation of investigators employed by Virginia's prosecutors to assist in death penalty cases. The Assessment Team was also unable to determine whether compensation for mitigation specialists employed by the RCDs or funding granted by circuit courts for compensation of non-attorney defense team members are commensurate with the salary scale for comparable expert services in the private sector.

4. Additional compensation should be provided in unusually protracted or extraordinary cases.

RCD and VCRRC attorneys, as salaried employees, do not receive additional compensation in protracted or extraordinary cases. Court-appointed private attorneys, investigators, mitigation specialists, and other expert non-attorney members of a capital defense team may receive, subject to the discretion of the circuit court judge, additional compensation in unusually protracted or extraordinary capital cases.⁴²² The Assessment Team notes, however, that even in protracted or extraordinary cases, the hourly rate paid to capital counsel, as well as the full amount of reimbursement received for the attorney's services, are subject to approval by the trial court and Supreme Court of Virginia, which is in contravention of the *ABA Guidelines*.

5. Counsel and members of the defense team should be fully reimbursed for reasonable incidental expenses.

All capital counsel appointed by the courts to provide representation at trial or on direct appeal are permitted to request reimbursement for reasonable incidental expenses, subject to approval by the presiding circuit judge.⁴²³ Trial judges have the discretion to pay expenses incurred by capital defense counsel if the judge "deems [payment] appropriate under the circumstances of the case."⁴²⁴ In most instances, RCD attorneys and non-attorney staff members are fully reimbursed by the Commission for reasonable incidental expenses incurred, although there may "occasionally" be some out-of-pocket costs for which RCD attorneys are not reimbursed.⁴²⁵ According to the Director of the Fiscal Services Department for the Supreme Court of Virginia,

⁴²² *Id.* In practice, "[c]ourts usually authorize a set dollar amount for those providing services and counsel may make requests for further funding by motion to the court." RCD West Survey Response, *supra* note 94, at 8.

⁴²³ RCD West Survey Response, *supra* note 94, at 15.

⁴²⁴ White, *supra* note 23, at 338 (citing VA. CODE ANN. § 19.2-163(2) (2013)); Interview with John Rickman and Mary Gilbert, *supra* note 49.

⁴²⁵ VIDC Survey Response, *supra* note 7, at 13; RCD West Survey Response, *supra* note 94, at 12; Telephone Interview by Sarah Turberville, with Michael Siem, Principle, Fish & Richardson P.C. (July 5, 2012) (describing Siem's 2007 representation of a capital defendant on direct appeal in which no incidental expenses were reimbursed to counsel).

on rare occasions, the Supreme Court has provided funding for “unique” or unusual expenses to the RCDs, although never for costs associated with attorney compensation.⁴²⁶

Requests for payment of fees for travel or other related expenses submitted “by special justices . . . court-appointed counsel, court-appointed experts, substitute judges, retired judges and others must be submitted no later than thirty (30) days after the service or the travel is completed or, in the case of court-appointed counsel, within thirty (30) days of the completion of all proceedings in the court for which the request is being submitted.”⁴²⁷

The Office of the Executive Secretary of the Supreme Court of Virginia maintains a separate account for funding and reimbursement requests for costs associated with capital and non-capital indigent defense representation during state habeas corpus proceedings.⁴²⁸ In 2011, the Court spent \$92,896 on defense representation in state habeas cases.⁴²⁹ In order to be reimbursed, court-appointed habeas counsel must provide itemized expense reports, attach receipts, and include the number of miles traveled.⁴³⁰ However, VCRRC attorneys, who are salaried employees, do not receive reimbursement for reasonable incidental costs associated with representation of death row inmates during state habeas proceedings.⁴³¹ We were unable to determine whether non-VCRRC court-appointed counsel providing representation during state habeas proceedings receive reimbursement for reasonable incidental expenses.

Conclusion

Virginia’s funding of the costs associated with providing legal representation for capital defendants and death row inmates at trial, on direct appeal, and during capital post-conviction proceedings is in partial compliance with Protocol #4 (*ABA Guideline 9.1*). A summary of the Virginia Assessment Team’s findings and recommendations relative to this Protocol are found in the final section of this Chapter, entitled “Final Conclusions and Recommendations.”

⁴²⁶ Interview with John Rickman and Mary Gilbert, *supra* note 49.

⁴²⁷ OFFICE OF THE EXEC. SEC’Y OF THE SUP. CT. OF VA., POLICY REQUIRING TIMELY SUBMISSION OF VOUCHERS AND PAYMENT REQUESTS (effective Nov. 1, 2009), *available at* http://www.courts.state.va.us/courtadmin/aoc/fiscal/scv_pol_voucher_pymt_requ.pdf (hereinafter *SOCV Policy on Payment Requests*); *see* VA. CODE ANN. § 19.2-163 (2013).

⁴²⁸ Interview with John Rickman and Mary Gilbert, *supra* note 49.

⁴²⁹ *Id.*

⁴³⁰ COURT-APPOINTED COUNSEL MANUAL, *supra* note 347, at 5-6.

⁴³¹ Interview with Ed Ungvarsky, *supra* note 73; VCRRC Interview, *supra* note 26.

E. Protocol #5

Training (Guideline 8.1 of the ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases)

1. The jurisdiction should provide funds for the effective training, professional development, and continuing education of all members of the defense team.

The ABA Guidelines, acknowledging the “unique skills” required to provide high quality capital defense representation, emphasize that capital jurisdictions must provide “comprehensive” and specialized training to all attorney and non-attorney members of a capital defense team.⁴³²

Virginia’s Funding for Training of the Capital Defense Team

RCD budgets must support, in addition to the various expenses discussed in Protocol #4, the costs of any training provided to RCD staff.⁴³³ Typically, annual fiscal year budgeting for training and continuing education, which includes registration and travel, for all eight capital defense staff members in each RCD, is, on average, between \$2,200 and \$3,400.⁴³⁴ The Commission acknowledges that its appropriations are inadequate for the effective training, professional development, and continuing education of all members of capital defense teams in Virginia.⁴³⁵ Virginia Capital Defenders have also stated that their offices do not receive “proper funding and resources to adequately train its capital defenders in all aspects of litigation.”⁴³⁶

RCD capital counsel are encouraged to use Commission funding for internal trainings conducted by members of the Virginia State Bar or the local capital defense community, rather than for participation in out-of-state or national defender training programs.⁴³⁷ According to one RCD, until 2011, the Commission had imposed a ban on the use of funds for out-of-state travel for RCD attorneys and non-attorneys to attend outside trainings.⁴³⁸ RCD North states that there is insufficient funding to adequately train its capital defenders, mitigation specialists, and investigators, and there are not enough funds to send staff to national trainings.⁴³⁹ The

⁴³² ABA Guidelines, *supra* note 62, at Guideline 8.1, cmt.

⁴³³ VIDC Survey Response, *supra* note 7, at 17, 22. Each office may request additional funding from the court or apply for additional funds from the Commission, which previously has been unable to provide additional funding. *Id.* at 12.

⁴³⁴ Interview with Doug Ramseur, *supra* note 109 (noting that this is the line item budget for training for fiscal year 2012, that includes \$1,200 for registration fees and \$2,200 for travel expenses); RCD North Survey Response, *supra* note 75, at 17 (stating that the total training budget is \$2,200).

⁴³⁵ VIDC Survey Response, *supra* note 7, at 22 (noting that the RCDs are limited in terms of the availability of funds, not the availability of appropriate training programs).

⁴³⁶ RCD Central Survey Response, *supra* note 72, at 19; RCD Southeast Survey Response, *supra* note 75, at 23 (“This office could benefit from increased amounts of funding for training.”); RCD North Survey Response, *supra* note 75, at 16 (“not enough money to send staff to national trainings”). However, the RCD West considers the funding adequate for the effective training of all members of his defense team. RCD West Survey Response, *supra* note 94, at 19.

⁴³⁷ RCD Central Survey Response, *supra* note 72, at 13; Interview with Doug Ramseur, *supra* note 109 (noting a previous ban on out-of-state travel expenditures).

⁴³⁸ Interview with Doug Ramseur, *supra* note 109.

⁴³⁹ RCD North Survey Response, *supra* note 75, at 16–17 (noting each office’s training budget is \$2,200 per year).

Commission asserts that the ability of RCD staff to attend national training sessions “depends on the costs of the programs and the availability of funding.”⁴⁴⁰

The Commission approves specialized training programs for attorneys seeking eligibility to receive appointments to capital cases.⁴⁴¹ It does not, however, offer attorneys any training on capital defense representation, nor does it provide funding for the training of court-appointed private counsel, mitigation specialists, or investigators during any stage of capital proceedings.⁴⁴²

Other Entities Providing Training to Capital Defense Counsel

While Virginia does not provide funding designated specifically for training of capital defense counsel in the Commonwealth, since 1992 the Criminal Law Section of the Virginia Bar Association has sponsored an annual, two-day Capital Defense Workshop (Workshop).⁴⁴³ The Virginia Law Foundation (VLF), a private non-profit organization, has provided grants to the Criminal Law Section to subsidize participation of capital defenders in the Workshop.⁴⁴⁴ This Workshop is the only educational program available in the Commonwealth that satisfies the Commission’s training requirements for lawyers wishing to qualify for appointment to a capital case.⁴⁴⁵ Each Capital Defender reported that their staff attorneys attend the annual Workshop and out-of-state trainings when funds are available.⁴⁴⁶

In 2009, the Supreme Court of Virginia’s Educational Services Department cosponsored with the National Judicial College (College) a joint training on “best practices in death penalty cases” available to Virginia judges and attorneys.⁴⁴⁷ Funding for this training, which was attended by a select group of approximately forty judges, prosecutors, and capital defense attorneys, was provided by the College through a grant from the U.S. Department of Justice’s Bureau of Justice Assistance (BJA).⁴⁴⁸ Topics included in the two-day program focused on negotiations and the appointment of counsel, jury selection, discovery obligations, mental health and mental retardation, future dangerousness, trends in mitigation and aggravation, case management, and perspectives on capital punishment.⁴⁴⁹

The VCRRC also has conducted capital litigation training, including the Virginia Death Penalty College, and is planning a “Bring Your Own Case” workshop for the Virginia capital defense

⁴⁴⁰ VIDC Survey Response, *supra* note 7, at 23.

⁴⁴¹ *Id.* at 17.

⁴⁴² *Id.* at 8, 17.

⁴⁴³ Telephone Interview by Paula Shapiro with Sharon K. Tatum, Exec. Dir., Va. Law Found. (April 18, 2012) (on file with author). Each year, approximately 200 to 250 capital defense attorneys, mostly public defenders, attend the event for a VLF subsidized rate of \$65 per person. *Id.*

⁴⁴⁴ *Id.* (totaling approximately \$288,800 since 1992).

⁴⁴⁵ *Id.* See also VA. CODE ANN. § 19.2-163.8(A)–(B) (2013); *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/serving.htm> (last visited Aug. 2, 2013).

⁴⁴⁶ RCD West Survey Response, *supra* note 94, at 15; Interview with Ed Ungvasky, *supra* note 73; RCD Southeast Survey Response, *supra* note 75, at 19; RCD Central Survey Response, *supra* note 72, at 17.

⁴⁴⁷ Telephone Interview by Paula Shapiro with Caroline Kirkpatrick, Dir., Education Dep’t, Sup. Ct. of Va. (Apr. 20, 2012) (on file with author).

⁴⁴⁸ *Id.*

⁴⁴⁹ SUP. CT. OF VA. OFFICE OF EXEC. SEC’Y & NAT’L JUDICIAL COLL., AGENDA: BEST PRACTICES IN DEATH PENALTY CASES: A WORKSHOP FOR JUDGES AND ATTORNEYS (Feb. 2–3, 2009) (on file with author).

community to assist on active capital cases.⁴⁵⁰ This training is supported by a grant received from the BJA.⁴⁵¹ The Virginia Capital Case Clearinghouse (VC3), maintained by the Washington and Lee University School of Law, provides a capital defense resource guide for pretrial and trial proceedings that is available to capital defense attorneys who register for access.⁴⁵² Finally, Virginia CLE, a non-profit educational division of the VLF, publishes a resource manual entitled *Trial of Capital Murder Cases in Virginia*.⁴⁵³

Because the Commonwealth does not provide funding to ensure that all members of the defense team, at every stage of a capital case, receive effective training and continuing professional education, Virginia is not in compliance with this portion of Protocol #5.

- 2. Attorneys seeking to qualify to receive appointments should be required to satisfactorily complete a comprehensive training program, approved by the independent appointing authority, in the defense of capital cases. Such a program should include, but not be limited to, presentations and training in the following areas:**
 - a. Relevant state, federal, and international law;**
 - b. Pleading and motion practice;**
 - c. Pretrial investigation, preparation, and theory development regarding guilt/innocence and penalty;**
 - d. Jury selection;**
 - e. Trial preparation and presentation, including the use of experts;**
 - f. Ethical considerations particular to capital defense representation;**
 - g. Preservation of the record and of issues for post-conviction review;**
 - h. Counsel's relationship with the client and his/her family;**
 - i. Post-conviction litigation in state and federal courts;**
 - j. The presentation and rebuttal of scientific evidence, and developments in mental health fields and other relevant areas of forensic and biological science.**
- 3. Attorneys seeking to remain on the roster or appointment roster should be required to attend and successfully complete, at least once every two years, a specialized training program approved by the independent appointing authority that focuses on the defense of death penalty cases.**

The Virginia Code directs the Supreme Court of Virginia and the Commission, in conjunction with the VSB, to promulgate qualification standards for attorneys seeking appointments to represent an indigent capital defendant or death row inmate.⁴⁵⁴ The Code specifies that the

⁴⁵⁰ VCCRRC Interview, *supra* note 26.

⁴⁵¹ *Id.*

⁴⁵² *Welcome to VC3.org*, VA. CAPITAL CASE CLEARINGHOUSE, <http://www.vc3.org/overview/> (last visited Aug. 2, 2013). In addition, the VC3 Executive Director provides free consultations on Virginia capital case and third-year Washington and Lee law students are available through the VC3 “to assist with legal research, drafting motions and legal memoranda, interviewing potential witnesses, reviewing and summarizing records, and other services.” *Id.*

⁴⁵³ *About Us*, VA. CLE, <http://www.vacle.org/aboutus-pg23.aspx> (last visited Aug. 2, 2012); Interview Sharon Tatum, *supra* note 443; *see also Trial of Capital Murder Cases in Virginia*, VA. CLE, <http://www.vacle.org/product.aspx?zpid=1011> (last visited Aug. 2, 2013).

⁴⁵⁴ VA. CODE ANN. § 19.2-163.8(A) (2013).

qualification standards must “take into consideration, to the extent practicable . . . current training in death penalty litigation [and] current training in the analysis and introduction of forensic evidence, including deoxyribonucleic acid (DNA) testing and the evidence of a DNA profile comparison to prove or disprove the identity of any person.”⁴⁵⁵

Accordingly, in order to become certified for appointment as lead counsel or co-counsel in a capital trial, Virginia’s qualification standards require counsel to have obtained, “within the past two years, at least six hours of specialized training in capital litigation, plus at least four hours of specialized training” in forensic science as described in the Virginia Code.⁴⁵⁶ Attorneys initially seeking to obtain certification to represent a death row inmate on appeal or during state habeas corpus proceedings, however, are not required to complete any capital training; instead, counsel at these stages must attend the requisite ten hours of training only every two years to maintain certification.⁴⁵⁷

The training requirements in the Virginia qualification standards, however, do not ensure that capital counsel at each stage of the proceedings satisfactorily complete a comprehensive training program on all of the areas covered by the *ABA Guidelines*. According to the Commission, while the approved specialized training courses “generally cover the topics” required in the *ABA Guidelines*, the Commission “does not specifically require that an attorney be trained in each of the specific topics that are mentioned.”⁴⁵⁸ There are also no training requirements for privately-retained capital counsel at any stage of Virginia capital proceedings.

Each RCD has the discretion to require its staff attorneys to complete additional training outside of the ten hours required by the Commission. RCD North, for example, “conduct[s] in-house training on intellectual disabilities and mental health issues,” as well as training on special jury selection issues pertinent to death penalty cases.⁴⁵⁹ By contrast, RCD Southeast does not require additional training outside of the ten hours required by the qualification standards, although the office “strive[s] to meet the *ABA Guidelines* . . . [,] train[s] on the requirements of the *ABA Guidelines*[,] and also regularly subject[s its] efforts to peer-review and critique.”⁴⁶⁰ RCD West responded that it does not provide additional training to its capital defense attorneys.⁴⁶¹ Finally, the VCRRC stated that it seeks to provide additional training to its staff attorneys, either in house, or, more frequently, by outside experts.⁴⁶²

⁴⁵⁵ VA. CODE ANN. § 19.2-163.8(A)(vi)–(vii), (B) (2013).

⁴⁵⁶ *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/serving.htm> (last visited Aug. 2, 2013). When asked what specific issues must be addressed in the “specialized” training required in the qualification standards, the Commission responded that “[t]he topic must specifically address capital defense litigation.” VIDC Survey Response, *supra* note 7, at 18.

⁴⁵⁷ Interview with Jae K. Davenport, *supra* note 170; *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM’N, <http://www.publicdefender.state.va.us/serving.htm> (last visited Aug. 2, 2013). All attorneys admitted to the Virginia State Bar are required to complete a minimum of twelve hours of approved continuing legal education (CLE) every year, which must include at least two hours on legal ethics and professionalism, unless expressly exempt. MANDATORY CONTINUING LEGAL ED. REG. 102(a) (2011).

⁴⁵⁸ VIDC Survey Response, *supra* note 7, at 18.

⁴⁵⁹ RCD Southeast Survey Response, *supra* note 75, at 21.

⁴⁶⁰ RCD Central Survey Response, *supra* note 72, at 7, 17 (italics added).

⁴⁶¹ RCD West Survey Response, *supra* note 94, at 15–16.

⁴⁶² VCRRC Interview, *supra* note 26.

In past years, the VBA's Capital Defense Workshop, described above, included lectures on a number of different topics identified in the *ABA Guidelines*. For example, the 2011 workshop trained on ethical considerations in the representation of capital clients, death penalty investigation techniques, penalty phase presentation, intellectual disabilities in capital clients, updates in state and federal death penalty law, and DNA and other forensic science issues.⁴⁶³

Because Virginia requires attorneys to attend a specialized training program on representation in the death penalty cases, which may include training on some of the issues described by the *ABA Guidelines*, it is in partial compliance with this portion of Protocol #5.

4. The jurisdiction should ensure that all non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise.

The Commonwealth does not require nor provide any training for non-attorney capital defense team members appropriate to their areas of expertise in death penalty cases. While the Commission offers training to non-attorney members of criminal defense teams, such as investigators, this training is not specific to capital case representation.⁴⁶⁴

Each of the Capital Defenders asserts that one of the most significant problems relating to capital defense is the lack of training programs available for capital mitigation specialists and investigators.⁴⁶⁵ RCD Central states, for example, that “[n]on attorney support staff needs a training program,” and “[t]he investigators need more training in more areas”; however, “funds are limited to nonexistent for outside training.”⁴⁶⁶ In 2011, the RCDs were permitted to send their capital investigators and mitigation specialists to attend the VBA's annual Capital Defense Workshop, which is typically only reserved for capital defense counsel.⁴⁶⁷ When funding permits, Virginia's Capital Defenders also may send their investigators and mitigation specialists to national capital defense trainings, such as *Life in the Balance*.⁴⁶⁸

The Assessment Team was unable to determine whether court-appointed mitigation specialists, investigators, or other ancillary experts providing assistance in capital defense litigation receive any continuing professional education appropriate to their areas of expertise.

⁴⁶³ VA. BAR ASS'N, 19TH ANNUAL CAPITAL DEFENSE WORKSHOP AGENDA, Nov. 17–18, 2011 (on file with author).

⁴⁶⁴ *Training*, VA. INDIGENT DEF. COMM'N, <http://www.publicdefender.state.va.us/training.htm> (last visited Aug. 2, 2013) (stating the Commission sponsors training conferences for investigators and sentencing advocates); VIDC Survey Response, *supra* note 7, at 8 (responding “No.” when asked whether it “provide[s] any additional training . . . to non-attorney members of the [capital] defense team . . . appropriate to their areas of expertise?”).

⁴⁶⁵ RCD North Survey Response, *supra* note 75, at 10;

⁴⁶⁶ RCD Central Survey Response, *supra* note 72, at 19, 13.

⁴⁶⁷ Interview with Doug Ramseur, *supra* note 109.

⁴⁶⁸ *Id.*; Interview with Ed Ungvarsky, *supra* note 73; 2012 *Life in the Balance*, NAT'L LEGAL AID & DEFENDER ASS'N, http://www.nlada.org/Training/Train_Defender/Train_Defender_Balance (last visited Aug. 2, 2013).

Conclusion

Based on the foregoing, Virginia is in partial compliance with Protocol #5. A summary of the Virginia Assessment Team's findings and recommendations relative to this Protocol are found in the final section of this Chapter, entitled "Final Conclusions and Recommendations."

* * *

Final Conclusions and Recommendations

In any criminal trial, the effective assistance of counsel is essential to the preservation of all other constitutional rights. In a capital case, however, the quality of counsel can determine whether a capital defendant or death row inmate will live or die. In Virginia, creation of RCDs, staffed by attorneys and support staff specially qualified to represent capital defendants at trial, as well as the continued funding of a non-profit organization providing capital defense representation during state habeas corpus proceedings, have significantly improved the quality of representation available to Virginia's indigents in death penalty cases. Further, the Virginia Indigent Defense Commission (Commission) oversees numerous aspects of the provision of defense services in the Commonwealth, including the certification of attorneys providing representation to Virginia's indigent capital defendants and death row inmates, as well as the hiring and monitoring of the Capital Defenders.

Since the establishment of the RCDs, which became fully operational in 2005, there has been a notable decrease in the rate of death-sentencing in the Commonwealth. Capital trials have occurred in far fewer cases than in previous years, and fewer death sentences have been imposed in cases which have gone to trial. For example, there were fifteen capital trials, six of which resulted in death sentences, between 2005 and 2011.⁴⁶⁹ By contrast, in the six years leading up to the implementation of the RCDs, defendants were sentenced to death in thirty-eight of fifty-two capital trials that took place during that period of time.⁴⁷⁰ Furthermore, a much greater number of capital cases have been resolved prior to trial, saving unknown costs to the Commonwealth.

Virginia's current delivery of defense services in death penalty cases, however, is not without problems. Indeed, problems may persist in part because they are shielded by the successes the Commonwealth has made in the last decade. The Virginia Assessment Team has, therefore, identified areas in need of additional reform and funding in order to ensure that capital defendants and death row inmates receive the kind of zealous, effective legal representation required in death penalty cases.

The provision of high quality legal representation in death penalty cases requires that many of the duties described throughout this Chapter be undertaken by an entity possessed of an understanding of the complexity and unique nature of capital case representation. Thus, the Virginia Assessment Team recommends that the Commission consult with the Regional Capital Defender offices and the Virginia Capital Representation Resource Center in carrying out the Recommendations described below. These entities are specially equipped with an understanding

⁴⁶⁹ See VC3 Capital Sentencing Spreadsheet, *supra* note 9.

⁴⁷⁰ See *id.*

of the complexity and unique nature of capital case representation and the standard of care to which capital defense counsel must adhere.

Provision of Counsel and Qualification Standards in Death Penalty Cases

The *ABA Guidelines* advise that “jurisdictions that wish to have a death penalty must bear the full costs of providing such a defense.”⁴⁷¹ The *Guidelines* accordingly call on governments, which bear a constitutional duty to provide capital defendants—who “require[] vastly more resources” than in non-capital representation—with effective defense representation, to establish systemic structures to ensure necessary resources are available in each capital case.⁴⁷²

In this regard, Virginia has made extraordinary improvements in the quality of representation available to indigents in death penalty cases. The Commonwealth should be commended for establishing the RCDs, guaranteeing the appointment of at least two attorneys at trial and on direct appeal for indigent defendants, and ensuring appointment of at least one attorney during state habeas corpus proceedings. The Virginia Assessment Team also applauds the Commonwealth for establishing minimum qualification standards applicable to capital trial, appellate, and state habeas counsel.

Nonetheless, areas in need of improvement have been identified. Virginia’s qualification standards do not fully comport with the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (*ABA Guidelines*). The standards focus primarily on experiential requirements and do not include an assessment of counsel’s skills in relation to death penalty cases, which the Assessment Team believes is essential to the provision of consistent, effective capital defense representation. Furthermore, Virginia has not adopted specific qualification standards for attorneys handling death penalty cases during state clemency proceedings. Capital trial counsel is, at times, not appointed at the earliest stage of capital proceedings. Furthermore, while Virginia’s qualification standards require counsel, every two years, to successfully complete a ten-hour specialized training program on capital defense representation, Virginia does not require these attorneys to successfully complete training on each of the areas required by the *ABA Guidelines*, and direct appeal and state habeas corpus counsel need no training prior to obtaining initial certification from the Commission. The competence of privately-retained counsel may also fall far below that provided to fully indigent capital defendants.

Thus, in order to better ensure that counsel possess the necessary skills required of the complex and unique demands of a death penalty case, and to guarantee that each capital defendant is afforded the highest quality legal representation, the Assessment Team recommends that Virginia

- Guarantee that every capital defendant or death row inmate be appointed a qualified capital defense team, consisting of two attorneys, a mitigation specialist, and an investigator, at every stage of the proceedings, including state habeas and clemency;

⁴⁷¹ Freedman, *supra* note 106, at 1102.

⁴⁷² *Id.* at 1101–03.

- Ensure appointment of a defense team at the earliest stage of the proceedings, including permitting appointment in the general district court; and
- Establish rigorous qualification standards for counsel seeking eligibility to represent any indigent capital client at any stage of the proceedings, in addition to those currently required in Virginia, as called for by *ABA Guideline 5.1* (found in Protocol #2). Such standards should not focus primarily on the experience of applicants, but should also incorporate an assessment of counsel’s relevant skills and commitment to zealous advocacy.⁴⁷³ The standards should also ensure that prerequisite training include, at least, the topics covered in *ABA Guideline 8.1* (Protocol #5).

Application and Vetting of Applicants for Certification

The Commission reviews applications for certification to ensure that applicant-attorneys are in good standing with the Virginia State Bar and possess the requisite training credentials required of certified counsel in death penalty cases. Additional quality control measures must be implemented, however, to ensure that every attorney appointed to represent a capital defendant or death row inmate at any stage of the proceedings possesses needed skills and demonstrates a commitment to zealous advocacy. At a minimum, Virginia should

- Incorporate objective and subjective measures of qualification evaluation in order to determine if an applicant-attorney should be included on the list,⁴⁷⁴ including requiring applicants to submit
 - Information on capital cases in which the attorney has served as defense counsel, including the names and contact information of the judge, co-counsel, and prosecuting attorney(s) in the case(s), as well as the outcome of each case;
 - Writing samples of legal attorney work product, including analysis of complex legal issues, as well as copies of written materials filed on behalf of previous capital (or other) clients in actual cases;

⁴⁷³ See, e.g., LA. PUB. DEFENDER BD. (LPDB), *Capital Defense Guidelines* (effective May 20, 2010), adopted pursuant to LA. REV. STAT. ANN. 15:148(f)(10) (requiring LPDB to “[c]reat[e] separate performance standards and guidelines for attorney performance in capital case representation . . .”). LPDB’s adopted certification standards “seek to insure . . . that every capital defendant” possess at least the requisite skills outlined in Protocol #2, *supra* note 162 and accompanying text. LA. PUB. DEFENDER BD., *Capital Defense Guidelines* § 915 (A)–(B), available at [http://lpdb.la.gov/Supporting%20Practitioners/Capital%20Defense/txtfiles/pdf/Rule%20\(Capital%20Defense%20Guidelines\),%20promulgated%20May%20202010.pdf](http://lpdb.la.gov/Supporting%20Practitioners/Capital%20Defense/txtfiles/pdf/Rule%20(Capital%20Defense%20Guidelines),%20promulgated%20May%20202010.pdf); *In the Matter of Adopting a Plan for Review of Appointed Counsel*, Sup. Ct. Maricopa Cty., Order No. 2012-008 (“To be qualified for assignment to capital cases, the attorney must demonstrate that he or she . . . possesses the requisite qualifications set forth in Guideline 5.1 of the ABA Guidelines [and that] the attorney has a demonstrated history of practice, and can be expected to continue to practice, in accordance with the performance and practice standards set forth in Guidelines 10.1 through 10.13 of the ABA Guidelines.”); OHIO SUP. CT. R. 20.01(A) (requiring that every “attorney representing a capital defendant” possess the qualifications described in ABA Guideline 5.1).

⁴⁷⁴ Examples of designation of counsel as capital-certified, as well as monitoring of counsel’s performance can be found at LA. PUB. DEFENDER BD., *Capital Defense Guidelines* § 915 (F) (“Consideration of Certification Applications”); *In the Matter of Adopting a Plan for Review of Appointed Counsel*, Sup. Ct. Maricopa Cty., Order No. 2012-008 (“Evaluation Process” and “Re-evaluation”); and N.C. GEN. STAT. § 7A-498, App. 2A.2(b) (delineating required submission by applicant seeking appointment as lead or associate counsel in a capital case).

- Contact information of trial judges (or appellate or state habeas judges, depending on certification sought), defense attorneys, and prosecuting attorneys familiar with the attorney's work;
 - Active complaints pending against the applicant before the Virginia State Bar;
 - Information on current and foreseeable caseload; and
 - Any other information counsel believes relevant to establish his/her qualifications, including non-capital and appellate experience, and any extensive training or research in the field of capital defense.⁴⁷⁵
- Review all contents and declarations made by the applicant and assess whether the applicant meets the qualification standards set out by *ABA Guideline 5.1*.

Monitoring of Counsel's Performance

Virginia has not promulgated any standards for performance in death penalty cases, which is in stark contrast to the performance standards and oversight provided by the Commission in *non-capital* cases. While the Commission monitors, to some extent, the performance of attorneys employed by the RCDs, no entity monitors the performance of all defense counsel to ensure that the capital client receives high quality legal representation, nor is Virginia able to ensure that corrective action is taken when complaints about counsel's performance arise. Thus, Virginia should

- Promulgate standards of performance for counsel in death penalty cases, analogous to the guidelines found in *ABA Guideline 10*, and similar to the *Standards of Practice* developed by the Commission for the performance of counsel in non-capital cases. These criteria should include caseload standards governing acceptable workloads for attorneys undertaking death penalty representation⁴⁷⁶ and specific topics on which capital counsel must be trained prior to appointment in any capital case in conformance with *ABA Guideline 8.1*;
- Implement monitoring mechanisms of the performance of certified counsel, like those described in *ABA Guideline 7.1*. These mechanisms should include
 - Periodic review of the list of certified counsel to ensure that these attorneys remain capable of providing high quality legal representation;⁴⁷⁷
 - Requiring certified counsel to undergo performance reviews by the Commission following a course of representation;⁴⁷⁸

⁴⁷⁵ See, e.g., LA. PUB. DEFENDER BD., *supra* note 474, at § 915 (C) (describing the information that must be included on an application for certification); *In the Matter of Adopting a Plan for Review of Appointed Counsel*, *supra* note 474.

⁴⁷⁶ See, e.g., LA. PUB. DEFENDER BD., *supra* note 474 at § 919 ("Workload"); OHIO R. SUP. CT. 20(III)(B) ("Workload of appointed counsel").

⁴⁷⁷ See, e.g., *In the Matter of Adopting a Plan for Review of Appointed Counsel*, *supra* note 474 (requiring the Capital Defense Review Commission to "re-evaluate attorneys at intervals of not more than three years," and to "re-evaluate an attorney at any time . . . when there is reason to believe that the attorney has not met or may not meet the applicable" qualification and performance standards).

⁴⁷⁸ See, e.g., LA. PUB. DEFENDER BD., *supra* note 474 at § 921 (C)(1)-(2) (requiring a briefing from counsel whenever a capital case has been closed at trial, appellate, state post-conviction, federal post-conviction, or clemency level and requiring the appointing authority to convene a case review committee "whenever a death sentence is imposed, affirmed, post-conviction relief is denied or a defendant is executed.").

- Establishment of a regular public procedure for investigating and resolving any complaints made by judges, clients, attorneys, or others that defense counsel failed to provide high quality legal representation; and
- Removal of any attorney from the certification list whenever counsel has failed to represent a client consistent with the *ABA Guidelines*, subject to the attorney's right to object and appeal a decision to remove him/her from the list.⁴⁷⁹

Appointment of Counsel

Prior to making any appointment in a capital case, Virginia should require trial courts to consult with the RCD in order to obtain its recommendation(s) for appointment of a capital defense team to a case pending before the court, in addition to obtaining information on certified counsel available for appointment from the Commission.

Provision of Ancillary Services and Experts

Investigators are “indispensable to discovering and developing the facts that must be unearthed at trial or in post-conviction proceedings,”⁴⁸⁰ and mitigation specialists “possess clinical and information-gathering skills and training that most lawyers simply do not have.”⁴⁸¹ Virginia should be commended for its efforts to staff each RCD with these professionals to support the defense. Furthermore, the Assessment Team applauds Virginia for recognizing the necessity of ex parte requests for expert assistance through its adoption of Virginia Code section 19.2-264.3:1.3.⁴⁸²

Virginia law, however, does not guarantee assignment of a mitigation specialist and investigator in each capital case, which can result in the wasteful consequence of counsel performing these important functions. The appointment of experts and ancillary professional services is also left to the discretion of individual circuit court judges who may select experts based on the cost of services or prior work for the prosecution. In addition, Virginia has not adopted training requirements for non-attorney members of the capital defense team, nor does it appear that Virginia provides adequate funding for effective education and training of its non-attorney capital defense team members. Finally, courts do not grant funding for expert services, including experts trained to screen for mental and psychological disorders, to assist death row inmates in developing or presenting constitutional claims during capital state habeas proceedings.

In order to ensure high quality legal representation for every capital defendant and death row inmate in the Commonwealth, Virginia should

- Guarantee counsel has access to the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high

⁴⁷⁹ See, e.g., N.C. R. OF THE COMM’N ON INDIGENT DEFENDER SERVS., Part 2, App. 2A.2(e) (providing that if an attorney is removed from the capital case appointment roster, the attorney “may make a written request for a review” of the removal decision to a designated committee of the indigent defense commission.).

⁴⁸⁰ ABA, *Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 958 (2003).

⁴⁸¹ *Id.* at 959.

⁴⁸² VA. CODE ANN. § 19.2-264.3:1.3 (2013).

- quality legal representation at every stage of the proceedings, including state habeas and clemency proceedings;
- Encourage trial courts to consider defense counsel's requests for expert and ancillary support services through ex parte proceedings and amend the Virginia Code to permit counsel to request mental health professional services through an ex parte proceeding (Va. Code. § 19.2-264.3:1.3(D)); and
 - Ensure at least one member of the defense team is trained to screen capital clients for mental and psychological disorders.

Funding

Because the quality of representation often suffers when adequate compensation is not available, Virginia should be commended on its general compensation scheme for the capital defense team at trial. The Commonwealth has funded four RCDs, each of which employ attorneys, investigators, and mitigation specialists to provide capital representation at trial and direct appeal. Trial courts also appear to authorize funding for expert, investigative, mitigation, and other ancillary services in cases where other court-appointed counsel represents a capital defendant. Virginia also provides periodic billing in death penalty cases for other court-appointed counsel, and does not compensate trial counsel via flat fee or lump-sum contracts.

However, Virginia does not ensure funding for the full cost of high quality legal representation, as defined by *ABA Guideline 9.1*, for the defense team and outside experts selected by counsel. It appears, for example, that the compensation rates for assistant RCDs are insufficient to recruit and retain experienced attorneys with the necessary skills to effectively represent clients facing the death penalty. The reimbursement rate for court-appointed counsel also differentiates between in and out-of-court time, which can provide a disincentive for counsel to advocate in the best interests of the client, which may include accepting a plea offer. The Virginia Supreme Court's Office of the Executive Secretary has also dramatically reduced the reimbursement provided to counsel in some capital cases without explanation, effectively denying payment to counsel for many hours worked on behalf of a capital client. In some cases, it has authorized only a flat fee to reimburse counsel for work performed on behalf of a death row inmate on direct appeal. Finally, as no entity tracks the hourly rates requested by counsel and ultimately approved for reimbursement, there is no mechanism to determine if compensation levels for court-appointed counsel are consistent across the Commonwealth or if the rates are commensurate with similar services performed by retained counsel in the jurisdiction.

With respect to providing funding for expert, investigative, mitigation, and other ancillary services, trial courts may limit the hours of work that these professionals may perform on behalf of an indigent capital defendant. Significant court and counsel time can also be diverted to resolution of funding questions and courts may be reticent to fully fund needed defense services in cases requiring additional language services and extensive travel. Furthermore, since 1995, no Virginia court has provided funding for experts, investigators, and mitigation specialists during state habeas corpus proceedings or clemency proceedings.

In order to ensure a sufficient pool of qualified attorneys is available and willing to be appointed to represent a capital defendant or death row inmate, and to ensure that all counsel are able to provide high quality legal representation to those facing the death penalty, Virginia should

- Remove the distinction between compensation for in and out-of-court attorney services. Flat fees should be prohibited and counsel should be compensated for actual time and service performed;
- Ensure that the compensation rate provided to counsel is reasonable and reflects the competency of the lawyer's performance, including providing similar compensation for trial and appellate capital defense representation;
- Provide funding for compensation of investigative, expert, and other ancillary services needed to ensure the provision of high quality legal representation during all stages of the proceedings, including state habeas corpus;
- Provide funding to ensure all capital counsel meet the designated training requirements, as well as to ensure that non-attorneys wishing to be eligible to participate on defense teams receive continuing professional education appropriate to their areas of expertise;
- Provide a detailed explanation in cases where counsel's reimbursement request is reduced or denied and establish a meaningful right to appeal a denial or reduction of payment; and
- Implement uniform accounting measures of payment of counsel, ancillary, and expert services in death penalty cases and promote greater transparency regarding the cost of death penalty cases, including publication of reimbursement rates of appointed counsel throughout the Commonwealth, as well as fees paid for ancillary and expert services.

Appellate Representation

While Virginia should be commended for ensuring continuity of counsel in death penalty cases by assigning trial counsel to represent the defendant on direct appeal, this system does not ensure that a defendant receives high quality legal representation at this stage of the capital case (which is also the last stage that the defendant has a right to effective counsel). Trial counsel frequently do not possess the time or special skills required of appellate representation, which requires thorough review of the trial record anew, as well as extensive brief-writing. This is in contrast to the appellate representation provided by the Office of the Attorney General on behalf of the prosecution in any appeals in death penalty cases in Virginia. Furthermore, compensation of counsel employed by the Attorney General to handle capital appeals is, oftentimes, far greater than that afforded to attorneys employed by the RCDs who undertake appellate representation. Thus, Virginia should

- Create a position for an appellate defender within the Regional Capital Defender Office in Richmond that is specially trained to investigate and present the unique issues raised in capital appeals, to represent all capital defendants sentenced to death on direct appeal;⁴⁸³ and
- In cases where an appellate defender cannot represent the defendant, ensure that appointed counsel is fully compensated for actual time and services performed.

⁴⁸³ For example Kentucky, Maryland, and Missouri are capital jurisdictions with a specialized unit to handle capital trials and a separate statewide defender to handle appeals of capital convictions and sentences.

CHAPTER SEVEN

THE DIRECT APPEAL AND PROPORTIONALITY REVIEW

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

States provide for at least one level of appeal (“direct review”) in capital cases. In most states, the direct review process also includes proportionality review, the process through which a death sentence is compared with sentences imposed on similarly situated defendants to ensure that the sentence is not disproportionate.¹ Meaningful comparative proportionality review helps to ensure that the death penalty is being administered in a rational, non-arbitrary manner; provide a check on broad prosecutorial discretion; and prevent discrimination from playing a role in the capital decision-making process.

Meaningful comparative proportionality review can be an important method of protecting against arbitrariness in capital sentencing. In most capital cases, juries determine the sentence, yet they do not have the information necessary to evaluate the propriety of that sentence in the case before them in light of sentences in similar cases.² In the relatively small number of cases in which the trial judge determines the sentence, proportionality review still is important, as the judge may be unaware of statewide sentencing practices or be affected by public or political pressure. Regardless of who determines the sentence, dissimilar results are virtually ensured without the equalizing force of proportionality review exercised at the state level.

A court conducting proportionality review ought to analyze the similarities and differences between past decisions and the case before it. By weighing the appropriateness of a death sentence from a statewide perspective, a reviewing court achieves the important ends of proportionality review while leaving to local prosecutors and juries the decisions, in the first instance, of whether the death penalty ought to be sought and whether it ought to be imposed.

Finally, for proportionality review to be truly effective in ensuring the rational, non-arbitrary application of the death penalty, it must include not only cases in which a death sentence was imposed but also cases in which the death penalty was sought but not imposed and cases in which the death penalty could have been but was not sought.³

Because of the role that meaningful comparative proportionality review can play in eliminating arbitrary and excessive death sentences, states that do not engage in the review, or that do so

¹ *Gregg v. Georgia*, 428 U.S. 153, 206 (1976) (opinion of White, J.) (Burger, C.J., & Rehnquist, J., concurring) (finding that proportionality review “serves as a check against the random or arbitrary imposition of the death penalty”); *see also* *Pulley v. Harris*, 465 U.S. 37, 71 (1984) (Brennan, J., dissenting) (noting that, in 1984, over thirty states required, either by statute or case law, some form of comparative proportionality review).

² *Gregg*, 428 U.S. at 206 (opinion of White, J.) (Burger, C.J., & Rehnquist, J., concurring).

³ *See, e.g., Walker v. Georgia*, 129 S.Ct. 453, 454–55 (2008) (Stevens, J., on the denial of certiorari) (noting that Georgia’s approach to proportionality review, in which Georgia asserted that the state supreme court compared “not only similar cases in which death was imposed, but similar cases in which death was not imposed” . . . seemed judicious because, quite obviously, a significant number of similar cases in which death was not imposed might well provide the most relevant evidence of arbitrariness in the sentence before the court”) (citing *Zant v. Stephens*, 462 U.S. 862, 880 n.19 (1983)).

only superficially, substantially increase the risk that their capital punishment systems will function in an arbitrary and discriminatory manner.

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

Virginia statutory law provides that when a defendant is sentenced to death, s/he is entitled to (1) an automatic review of the death sentence,⁴ and (2) a direct appeal of the sentence and conviction.⁵ The Supreme Court of Virginia has exclusive jurisdiction over the automatic review and the direct appeal of a death sentence,⁶ and the two proceedings may be consolidated into a single procedure.⁷ The Court, however, must undertake an automatic review of the death sentence irrespective of whether the defendant chooses to pursue a direct appeal.⁸ When setting its docket, the Supreme Court is required to give priority to cases in which the death penalty was imposed.⁹

A. *Automatic Review of the Death Sentence*

In all cases in which a defendant is sentenced to death, the Supreme Court of Virginia is required, by statute, to review the propriety of the death sentence.¹⁰ Unlike the right to direct appeal, automatic review cannot be waived by the defendant, as “the purpose of the [automatic] review process is to assure the fair and proper application of the death penalty statutes . . . and to instill public confidence in the administration of justice.”¹¹ If the defendant waives his/her direct appeal, the Supreme Court of Virginia will order the defendant’s appointed counsel to “file a brief limited to the issues to be considered under the statutorily mandated review of [the] death sentence.”¹² The Court will then publish an opinion limited to the automatic review issues.¹³

The automatic review statute requires the Court to determine

- (1) Whether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor; and
- (2) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.¹⁴

If the Court finds that the death sentence was improper based on one or both of the statutory considerations, it may “[c]ommute the sentence of death to imprisonment for life” or “[r]emand to the trial court for a new sentencing proceeding.”¹⁵

⁴ VA. CODE ANN. § 17.1-313(A) (2013).

⁵ VA. CODE ANN. § 17.1-406(B) (2013).

⁶ VA. CODE ANN. §§ 17.1-313(A), 17.1-406(B) (2013).

⁷ VA. CODE ANN. § 17.1-313(F) (2013).

⁸ VA. CODE ANN. § 17.1-313(A) (2013) (“A sentence of death, upon the judgment thereon becoming final in the circuit court, shall be reviewed on the record by the Supreme Court.”).

⁹ VA. CODE ANN. § 17.1-313(G) (2013).

¹⁰ VA. CODE ANN. § 17.1-313(A) (2013).

¹¹ *Akers v. Commonwealth*, 535 S.E.2d 674, 677 (Va. 2000).

¹² *Id.*

¹³ *See id.*

¹⁴ VA. CODE ANN. § 17.1-313(C) (2013).

¹⁵ VA. CODE ANN. § 17.1-313(D)(2)–(3) (2013).

1. Influence of Passion, Prejudice, or Other Arbitrary Factor

In the first part of its automatic death sentence review, the Supreme Court of Virginia must determine “[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.”¹⁶ In making this determination, the Court examines the trial record to determine whether the jury “failed to give fair consideration to all the evidence both in favor and in mitigation of the death sentence, or was otherwise improperly influenced in favor of imposing the death penalty.”¹⁷

2. Proportionality

In the second part of its automatic death sentence review, the Supreme Court of Virginia must determine “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”¹⁸ The Court’s proportionality test is “whether ‘juries in [Virginia] generally approve the supreme penalty for comparable or similar crimes.’”¹⁹ The purpose of proportionality review “is to reach a reasoned judgment regarding what cases justify the imposition of the death penalty.”²⁰

a. Scope of Review of “Similar Cases”

For the purpose of aiding in its proportionality review, Virginia statutory law states that the Supreme Court “may accumulate the records of all capital felony cases tried within such period of time as the court may determine.”²¹ The Court must “consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive.”²²

Pursuant to this statute, the Supreme Court of Virginia “accumulate[s] the records of capital murder cases reviewed by [the Supreme] Court, including not only those cases in which the death penalty was imposed, but also those cases in which the trial court or jury imposed a life sentence and the defendant petitioned [the Supreme] Court for an appeal.”²³ The Court considers this same set of cases in conducting its proportionality view.²⁴ Accordingly, the Supreme Court’s proportionality review will include (1) all capital cases in which a death sentence was

¹⁶ VA. CODE ANN. § 17.1-313(C)(1) (2013).

¹⁷ *Elliot v. Commonwealth*, 593 S.E.2d 270, 291 (Va. 2004). *See also* *Pruett v. Commonwealth*, 351 S.E.2d 1, 12 (Va. 1986) (upholding the defendant’s death sentence because the trial record was “free from any indication that the jury was motivated by untoward influences in deciding to fix [defendant’s] punishment at death”). If the defendant waived his/her right to a jury determination of his/her sentence and was sentenced to death by the trial court, the Supreme Court will consider whether the trial court was influenced by an arbitrary factor. *Stout v. Commonwealth*, 376 S.E.2d 288, 294 (Va. 1989) (noting that the sentencing court “stated that it considered ‘all the evidence in this case’” before sentencing the defendant to death).

¹⁸ VA. CODE ANN. § 17.1-313(C) (2013).

¹⁹ *Lewis v. Commonwealth*, 593 S.E.2d 220, 226 (Va. 2004) (quoting *Wolfe v. Commonwealth*, 576 S.E.2d 471, 490 (Va. 2003)).

²⁰ *Orbe v. Commonwealth*, 519 S.E.2d 808, 817 (Va. 1999).

²¹ VA. CODE ANN. § 17.1-313(E) (2013).

²² *Id.*

²³ *Bell v. Commonwealth*, 563 S.E.2d 695, 719 (Va. 2002).

²⁴ *Green v. Commonwealth*, 580 S.E.2d 834, 850 (Va. 2003) (noting that the Court’s proportionality review “includes all capital murder cases presented to this Court for review and is not limited to selected cases”).

imposed, as the Supreme Court automatically reviews such cases;²⁵ and (2) those capital cases in which a life sentence was imposed and the defendant, following the denial of his/her appeal by the Court of Appeals of Virginia, sought and received discretionary review of his/her case by the Supreme Court.²⁶ To assist the Court in finding and reviewing similar cases, the Clerk of the Court maintains an index that includes all capital cases appealed directly to the Supreme Court, as well those capital cases that are reviewed by the Supreme Court after being reviewed by the Court of Appeals.²⁷

b. Method of Comparing Similar Cases

The Supreme Court of Virginia has not described a precise methodology for selecting “similar cases” and comparing them to the case on appeal. The Court, however, has stated that it gives “special attention to those [cases] in which the underlying felony, the penalty predicate, and the facts and circumstances surrounding the commission of the crime are fairly comparable” to the case on appeal.²⁸ In addition, the Court frequently selects cases based upon common statutory aggravating factors.²⁹

B. Direct Appeal

In addition to automatic death sentence review, a death-sentenced defendant is entitled to a direct appeal to the Supreme Court of Virginia.³⁰ In the direct appeal, the Court will review trial court errors alleged by the defendant.³¹ A defendant may, however, waive his/her right to direct appeal if the waiver is “voluntarily and intelligently” given.³²

1. Direct Appeal Procedure³³

In order to pursue a direct appeal, a death-sentenced defendant must file assignments of error with the Supreme Court of Virginia within thirty days of the date the trial transcript and record on appeal are received by the Court.³⁴ Within ten days of this filing, the defendant may file a

²⁵ VA. CODE ANN. §§ 17.1-313(A), 17.1-406(B) (2013).

²⁶ See VA. CODE ANN. § 17.1-406(A) (2013) (noting that the Court of Appeals of Virginia has appellate jurisdiction over “any final conviction in a circuit court of a traffic infraction or a crime, except where a sentence of death has been imposed”); VA. SUP. CT. R. 5:14–5:16 (describing the procedure for filing an appeal from the Court of Appeals to the Supreme Court).

²⁷ See J. LEGIS. AUDIT & REV. COMM’N OF THE VA. GEN. ASSEMB., REVIEW OF VIRGINIA’S SYSTEM OF CAPITAL PUNISHMENT 67 (2002), available at <http://jlarc.virginia.gov/reports/Rpt274.pdf> [hereinafter JLARC REPORT].

²⁸ Williams v. Commonwealth, 472 S.E.2d 50, 53 (Va. 1996) (quoting Stockton v. Commonwealth, 402 S.E.2d 196, 211 (Va. 1991)).

²⁹ For example, when conducting proportionality review, the Supreme Court of Virginia has considered cases in which the jury has found both aggravating circumstances. See, e.g., Green v. Commonwealth, 580 S.E.2d 834, 850 (Va. 2003); Lenz v. Commonwealth, 544 S.E.2d 299, 310 (Va. 2001); Vinson v. Commonwealth, 522 S.E.2d 170, 178 (Va. 1999).

³⁰ VA. CODE ANN. § 17.1-406(B) (2013).

³¹ See generally Elliot v. Commonwealth, 593 S.E.2d 270 (Va. 2004).

³² Akers v. Commonwealth, 535 S.E.2d 674, 677 (Va. 2000).

³³ For more information on Virginia’s direct appeal procedures, see Chapter One.

³⁴ VA. SUP. CT. R. 5:22(c).

“designation of the additional parts of the record that he wishes included as germane to the review or to the assignments of error.”³⁵

Both the defendant and the Commonwealth are permitted “to submit briefs within time limits imposed by the [Supreme Court] . . . and to present oral argument.”³⁶ The defendant must file his/her brief within sixty days of the date the trial transcript and record on appeal are received by the Court.³⁷ The Commonwealth must file his/her brief within 120 days of the same date.³⁸ Briefs for both parties may not exceed the longer of 100 pages or 17,500 words.³⁹ The defendant must file a reply brief, which may not be more than fifty pages or 8,750 words, whichever is greater, within 140 days of the date the trial transcript and record on appeal are received by the Court.⁴⁰ There are no exceptions, except by permission of the Court, to these limitations.⁴¹

2. Standard of Review on Direct Appeal

On direct appeal, the Supreme Court of Virginia will consider “errors in the trial enumerated by appeal.”⁴² However, the Court will not consider an alleged error “unless an objection was stated with reasonable certainty at the time of the ruling [by the trial court], except for good cause shown or to enable [the Supreme] Court to attain the ends of justice.”⁴³ “Whether the ends of justice provision should be applied involves two questions: (1) whether there is error as contended by the [defendant]; and (2) whether the failure to apply the ends of justice provision would result in a grave injustice.”⁴⁴ Errors properly preserved at trial will be reviewed by the Court in accordance with the appropriate standard.⁴⁵

³⁵ VA. SUP. CT. R. 5:22(c).

³⁶ VA. CODE ANN. § 17.1-313(F) (2013) .

³⁷ VA. SUP. CT. R. 5:22(e)(1).

³⁸ VA. SUP. CT. R. 5:22(e)(2).

³⁹ VA. SUP. CT. R. 5:22(e)(1), 5:22(e)(2).

⁴⁰ VA. SUP. CT. R. 5:22(e)(3).

⁴¹ VA. SUP. CT. R. 5:22(e). The limitations on length of the briefs “do not include appendices, the cover page, table of contents, table of authorities, and certificate.” *Id.*

⁴² VA. CODE ANN. § 17.1-313(C) (2013).

⁴³ VA. SUP. CT. R. 5:25.

⁴⁴ *Gheorghiu v. Commonwealth*, 701 S.E.2d 407, 413 (Va. 2010) (citing *Charles v. Commonwealth*, 613 S.E.2d 432, 433 (Va. 2005)).

⁴⁵ Cognizable issues on direct appeal may be limited by Court precedent. *See, e.g., Lenz v. Commonwealth*, 544 S.E.2d 299, 304 (Va. 2001) (“Claims raising ineffective assistance of counsel must be asserted in a habeas corpus proceeding and are not cognizable on direct appeal.” (citing *Johnson v. Commonwealth*, 529 S.E.2d 769, 781 (Va. 2000); *Roach v. Commonwealth* 468 S.E.2d 98, 105 n.4 (Va. 1996))).

II. ANALYSIS

Below are the ABA Benchmarks, or “Protocols,” used by the Assessment Team in its evaluation of Virginia’s death penalty system. Each Protocol is followed by the Assessment Team’s analysis of the Commonwealth’s compliance with the Protocol and, where appropriate, the Assessment Team’s recommendations for reform.

A. Protocol #1

In order to (1) ensure that the death penalty is being administered in a rational, non-arbitrary manner, (2) provide a check on broad prosecutorial discretion, and (3) prevent discrimination from playing a role in the capital decision-making process, direct appeal courts should engage in meaningful proportionality review that includes cases in which a death sentence was imposed, cases in which the death penalty was sought but not imposed, and cases in which the death penalty could have been but was not sought.

Scope of Virginia’s Proportionality Review

Virginia’s automatic death sentence review statute directs the Supreme Court of Virginia to determine “[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”⁴⁶ While the statute requires the Court to consider the “records of all capital felony cases” it has collected when determining whether a death sentence is disproportionate, the Court has complete discretion regarding which capital felony records it chooses to collect.⁴⁷ The Court has stated that, in conducting a proportionality review, it collects and reviews “the records of capital murder cases reviewed by [the Supreme] Court, including not only those cases in which the death penalty was imposed, but also those cases in which the trial court or jury imposed a life sentence and the defendant petitioned [the Supreme] Court for an appeal.”⁴⁸ Accordingly, the Supreme Court of Virginia’s proportionality review may include some cases in which a sentence less than death was imposed.

The Supreme Court’s review, however, excludes many cases where the death penalty was sought but not imposed, and cases in which the death penalty could have been sought but was not. Only capital murder cases in which a death sentence is actually imposed are automatically reviewed by the Supreme Court.⁴⁹ In cases where a defendant is convicted of capital murder but sentenced to life in prison—whether because the prosecution did not seek the death penalty, the defendant was ineligible for the death penalty, or the jury elected to impose a life sentence—the trial court conviction is appealed to the Court of Appeals of Virginia.⁵⁰ While the Supreme Court of Virginia may review these cases following disposition by the Court of Appeals, such review is

⁴⁶ VA. CODE ANN. § 17.1-313(C)(2) (2013).

⁴⁷ VA. CODE ANN. § 17.1-313(E) (2013) (stating that the Court “*may* accumulate the records of all capital felony cases tried within such period of time *as the court may determine*”) (emphasis added).

⁴⁸ Bell v. Commonwealth, 563 S.E.2d 695, 719 (Va. 2002) (emphasis added); *see also* Green v. Commonwealth, 580 S.E.2d 834, 850 (Va. 2003).

⁴⁹ *See* VA. CODE ANN. §§ 17.1-313(A), 17.1-406(B) (2013).

⁵⁰ VA. CODE ANN. § 17.1-406(A) (2013).

discretionary and some cases resulting in life sentences may therefore never reach review by the Supreme Court of Virginia.⁵¹ Thus, while the Supreme Court may compare the death penalty case to previous cases in which a life sentence was imposed, this comparison will only include life sentence cases that the Supreme Court itself has reviewed.⁵²

In addition, because the Supreme Court collects only the records of cases in which the defendant was convicted of *capital* murder, its proportionality review excludes cases in which the death penalty could have been sought but was not. The Court's review will also exclude those cases where a death penalty-eligible defendant avoided the death penalty through a plea agreement, which is a particularly large swath of relevant capital cases for comparison.⁵³

By limiting its proportionality review to capital cases it has reviewed, the Supreme Court of Virginia's analysis favors cases in which a death sentence has been imposed. A 2002 study on capital punishment, conducted by the Virginia Joint Legislative Audit and Review Commission, similarly found that "in 45 percent of all death sentence cases reviewed by the Court since 1977, the Supreme Court appears to have determined whether the sentences were excessive by comparing the cases only to other in which a death sentence was imposed."⁵⁴ In the instances when life and death sentences were reviewed by the Court during proportionality review, the Court has stated its proportionality review gives "particular emphasis" to cases in which the death penalty was imposed.⁵⁵

A review that relies chiefly on cases in which the death penalty was imposed will inevitably increase the likelihood that a death sentence will be upheld, while potentially ignoring several factually similar cases that did not warrant a death sentence and providing little safeguard against arbitrariness in capital sentencing.

Perhaps due to this narrow proportionality analysis, the Supreme Court of Virginia has never reversed a death sentence on proportionality grounds.⁵⁶ In some instances, the Court may not have considered several factually similar cases because those cases were never appealed to the Supreme Court. In *Jackson v. Commonwealth*, for example, the Court reviewed the sentence of sixteen-year-old Chauncey Jackson, who received the death penalty for a murder during a

⁵¹ VA. SUP. CT. R. 5:14–5:16.

⁵² *See Bell*, 563 S.E.2d at 719.

⁵³ *See, e.g.*, SEAN ROSENMERKEL, MATTHEW DUROSE, & DONALD FAROLE, JR., BUREAU OF JUSTICE STATISTICS, FELONY SENTENCES IN STATE COURTS, 2006—STATISTICAL TABLES 24 (2009), *available at* <http://bjs.ojp.usdoj.gov/content/pub/pdf/fssc06st.pdf> (noting that in 2006, 94% of all felony convictions and 61% of all murder convictions in state courts were resolved by a guilty plea).

⁵⁴ JLARC REPORT, *supra* note 27, at 68.

⁵⁵ *Peterson v. Commonwealth*, 302 S.E.2d 520, 528 (Va. 1983) (“[W]e have examined the records in all capital murder cases reviewed by this Court, with particular emphasis given to those cases in which *the death sentences* were based upon the probability that the defendants would be continuing threats to society . . .”). *See also* JLARC REPORT, *supra* note 27, at 68.

⁵⁶ By contrast, from 1989 through 2003, the Florida Supreme Court, for example, reversed thirty-seven death sentences on proportionality grounds. *See* Phillip L. Durham, *Review in Name Alone: The Rise and Fall of Comparative Proportionality Review of Capital Sentences by the Supreme Court of Florida*, 17 ST. THOMAS L. REV. 299, 311 (2004).

robbery.⁵⁷ While Jackson argued on appeal that the death penalty was a disproportionate punishment for a sixteen-year-old, the Court upheld the sentence, citing several other capital murder cases “in which robbery or attempted robbery was the underlying felony and [in which] the death penalty was based only on the ‘future dangerousness’ predicate.”⁵⁸

In a dissenting opinion, however, one Justice argued that Jackson’s death sentence was disproportionate and noted that “[s]ince 1987, ten 16-year-old offenders have been convicted of capital murder, and only one defendant, Chauncey J. Jackson, has been sentenced to death.”⁵⁹ The dissent cited five of these cases.⁶⁰ However, because juries imposed life sentences in these cases, they were appealed to the Court of Appeals of Virginia, and therefore were not included in the Supreme Court’s proportionality review.⁶¹ If these cases had been considered in the Court’s proportionality review, a different outcome might have resulted from the review of Jackson’s death sentence.⁶²

Thoroughness of Virginia’s Proportionality Review

Irrespective of the scope of cases considered in proportionality review, it is also imperative that the review be thorough or meaningful. The reviewing court should conduct an in-depth analysis of the case, comparing specific facts about the crime and the defendant to those of other cases to determine whether a death sentence is warranted. The Supreme Court of Virginia, however, has generally limited the extent of its proportionality review. Frequently, the Court’s analysis is restricted to a comparison of other cases based on shared predicate capital felonies or aggravating circumstances, with little examination of the attendant facts surrounding the crime or the defendant’s life.⁶³ Given that jurors must find only one of two available aggravating circumstances beyond a reasonable doubt in order to sentence a defendant to death, a simple

⁵⁷ Jackson v. Commonwealth, 499 S.E.2d 538, 543, 555 (Va. 1998). The Court reviewed Jackson’s sentence seven years before the U.S. Supreme Court declared the death penalty for persons under age eighteen to be unconstitutional in *Roper v. Simmons*, 543 U.S. 551 (2005).

⁵⁸ Jackson, 499 S.E.2d at 554.

⁵⁹ Id. at 555 (Hassell, J., dissenting).

⁶⁰ Id. at 555–56 (Hassell, J., dissenting) (citing Novak v. Commonwealth, 457 S.E.2d 402, 406 (1995); Owens v. Commonwealth, No. 2259–95–1, 1996 WL 666739 (Va. App. Nov. 19, 1996); Reid v. Commonwealth, No. 1175–95–1, 1996 WL 363568 (Va. App. July 2, 1996); Rea v. Commonwealth, 421 S.E.2d 464, 465 (1992); Tross v. Commonwealth, 464 S.E.2d 523 (1995)).

⁶¹ See id.

⁶² Jackson’s conviction was reversed and he was granted a new trial by the Supreme Court of Virginia in state habeas proceedings due to lack of jurisdiction. Jackson v. Warden, 529 S.E.2d 587, 587 (2000). Jackson subsequently pleaded guilty to the murder and was sentenced to life in prison with the possibility of parole. Matthew Dolan, *Seven-Year Murder Case Saga Draws to Close with Guilty Plea*, VA. PILOT & LEDGER-STAR, Nov. 29, 2001, at A1.

⁶³ See, e.g., Porter v. Commonwealth, 661 S.E.2d 415, 448–49 (Va. 2008) (providing a string citation of capital murder conviction and death sentences imposed for murder of a law enforcement officer); Lewis v. Commonwealth, 593 S.E.2d 220, 226 (Va. 2004) (providing a string citation of cases where the death penalty was based on murder for hire); Winston v. Commonwealth, 604 S.E.2d 21, 54 (Va. 2004) (providing a string citation of cases where the “killing took place in the commission of a robbery or attempted robbery, and where the death penalty was given based upon the aggravating factors of vileness and future dangerousness,” along with a string citation of capital murder convictions based on the commission of a robbery where the defendant did not receive the death penalty); Bell v. Commonwealth, 563 S.E.2d 695, 719 (Va. 2002) (providing a string citation of capital murder convictions for murder of a law enforcement officer and use of a firearm in the commission of murder).

comparison of the case at bar to cases in which an identical aggravating circumstance was found is of little value in preventing the disproportionate imposition of the death penalty. Similar cases are also often mentioned in a string citation, with no discussion of the circumstances of the compared cases or the life of the defendant.⁶⁴

In *Lewis v. Commonwealth*, for instance, the Court upheld the death sentence of Teresa Lewis, who had conspired with two men to kill her husband and son in order to profit from a life insurance policy.⁶⁵ Lewis argued that her death sentence was disproportionate because both of her accomplices, who were the actual triggermen, received life sentences at trial.⁶⁶ In addition, Lewis did not have a violent criminal history,⁶⁷ and her IQ of seventy-two placed her in the “borderline range of mental retardation.”⁶⁸ The Supreme Court of Virginia, however, held that the death sentence was proportionate after citing several other capital cases in which “the death penalty was based upon murder for hire.”⁶⁹ The Court did not compare Lewis’s intelligence, prior criminal history, or other specific facts to the cited cases.⁷⁰ With respect to the life sentences received by Lewis’s co-defendants, the Court held that sentences “received by confederates” were not to be considered in proportionality review.⁷¹ Lewis was executed on September 23, 2010.⁷²

In other cases, the Court has upheld death sentences on proportionality review for classes of defendants for whom the death penalty was later deemed unconstitutional cruel and unusual punishment by the U.S. Supreme Court. For instance, in 2005, the U.S. Supreme Court held in *Roper v. Simmons* that it is unconstitutional cruel and unusual punishment to execute persons for crimes committed before the age of eighteen.⁷³ The Court noted that a “national consensus against the death penalty for juveniles” had developed.⁷⁴ As previously noted in the discussion of the *Jackson* case, this consensus appeared to have existed in Virginia as well, as the vast majority of sixteen-year-old capital murder defendants in Virginia did not receive the death penalty by 1998.⁷⁵ Prior to *Roper*, however, the Supreme Court of Virginia upheld the death sentences of five defendants who were juveniles when they committed the crime.⁷⁶ In two of these cases, the age of the defendant was not discussed by the Court in its proportionality review.⁷⁷ Three of these five defendants were later executed.⁷⁸ The Court’s assessment of

⁶⁴ *See id.*

⁶⁵ *Lewis*, 593 S.E.2d at 222–25, 229.

⁶⁶ *Id.* at 225.

⁶⁷ *Id.*

⁶⁸ *Lewis v. Commonwealth*, 593 S.E.2d 220, 221 (Va. 2004).

⁶⁹ *Id.* at 226.

⁷⁰ *See id.*

⁷¹ *Id.* at 227.

⁷² *Virginia executes first woman in nearly 100 years*, MSNBC, Sept. 24, 2010, http://www.msnbc.msn.com/id/39328896/ns/us_news-crime_and_courts/ (last visited Mar. 29, 2013).

⁷³ *Roper v. Simmons*, 543 U.S. 551 (2005).

⁷⁴ *Id.* at 564.

⁷⁵ *Jackson v. Commonwealth*, 499 S.E.2d 538, 543, 555–56 (Va. 1998) (Hassell, J., dissenting).

⁷⁶ *Thomas v. Commonwealth*, 419 S.E.2d 606, 612, 620–21 (Va. 1992) (upholding the death sentence of a seventeen-year-old); *Wright v. Commonwealth*, 427 S.E.2d 379, 383, 394 (Va. 1993) (upholding the death sentence of a seventeen-year-old); *Roach v. Commonwealth*, 468 S.E.2d 98, 113–114 (Va. 1996) (upholding the death sentence of a seventeen-year-old); *Jackson*, 499 S.E.2d at 554 (upholding the death sentence of a sixteen-year-old); *Johnson v. Commonwealth*, 529 S.E.2d 769 (Va. 2000) (upholding the death sentence of a sixteen-year-old).

⁷⁷ *Thomas*, 419 S.E.2d at 620–21; *Wright*, 427 S.E.2d at 394.

proportionality in these cases might have been different had it given a more thorough consideration to the ages of the defendants.

Influence of Passion, Prejudice, or Other Arbitrary Factor

In addition to examining the proportionality of the sentence, the Supreme Court of Virginia also must determine in its automatic review “[w]hether the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor.”⁷⁹ As with proportionality review, however, the Court’s examination is often limited. The Court will uphold the death sentence unless evidence in the trial record demonstrates that the death sentence was imposed for an improper reason.⁸⁰ Even if jurors were presented with inadmissible evidence or improper argument at trial, the Supreme Court will presume that the jurors ignored it in rendering their verdict if the trial court gave a “prompt, explicit curative instruction.”⁸¹

In *Yarborough v. Commonwealth*, for example, defense counsel stated in the penalty phase closing argument that “if the defendant were sentenced to life imprisonment, he would remain in prison for life with ‘[n]o chance of ever seeing the outside world.’”⁸² In rebuttal, the prosecutor improperly argued, “[W]e used to have parole eligibility, and then a few years ago the legislature decided to abolish that What [defense counsel] is asking you to do is take a pair of dice and roll them and hope that the law doesn’t change again.”⁸³ The prosecutor continued, “I don’t know what is worse[,] the fear that he gets out[,] or the fear of what he is going to do with nothing to lose for the rest of his life.”⁸⁴ However, because the record indicated that the trial court instructed the jury to disregard the prosecutor’s comments, the Supreme Court of Virginia held that the death sentence was not improperly imposed.⁸⁵

Expansive Application of Virginia’s Death Penalty

Finally, Virginia has continually expanded the number and type of death penalty-eligible offenses since reinstatement of the death penalty. In 1975, an offender convicted of first-degree murder was eligible for the death penalty only if s/he was also found guilty of any one of three separate predicate offenses.⁸⁶ By the end of 2011, an offender may be subject to the death penalty in Virginia if convicted of premeditated murder and one of *fifteen* predicate offenses.⁸⁷ Moreover, the actual number of capital-eligible offenses is greater than fifteen as most of the predicate offenses described in the statute contain several separate death-eligible offenses.⁸⁸

⁷⁸ *Juvenile Offenders Executed, by State, 1976–2005*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/juvenile-offenders-executed-state-1976-2005> (last visited Aug. 19, 2013).

⁷⁹ VA. CODE ANN. § 17.1-313(C)(1) (2013).

⁸⁰ *Morva v. Commonwealth*, 683 S.E.2d 553, 567 (Va. 2009).

⁸¹ *Yarborough v. Commonwealth*, 551 S.E.2d 306, 311 (Va. 2001).

⁸² *Id.* at 310.

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Id.* at 311.

⁸⁶ VA. CODE ANN. § 18.2-31 (1975) (codifying 1975 Va. Acts, ch. 14, 15). These included (1) murder committed in conjunction with abduction with the intent to extort money or pecuniary benefit; (2) murder for hire; and (3) murder by an inmate in a penal institution. VA. CODE ANN. § 18.2-31 (West 1975).

⁸⁷ See generally VA. CODE ANN. § 18.2-31 (2013).

⁸⁸ See, e.g., VA. CODE ANN. § 18.2-31(4) (2013) (killing during the commission of robbery *or* attempted robbery)

The ever-widening application of the Virginia death penalty makes it more important for the Supreme Court of Virginia to undertake a comprehensive and thorough proportionality review in every death penalty case. The Virginia General Assembly's expansion of the death penalty demands that proportionality review include an equally broad universe of capital-eligible cases.

Conclusion

The Supreme Court of Virginia's proportionality review considers prior capital cases that it has previously reviewed on appeal. This scope of review greatly favors those cases in which the death penalty was actually imposed, as only cases which result in a death sentence are automatically reviewed by the Supreme Court. A large number of capital murder cases resulting in a life sentence are excluded. This review also excludes those death penalty prosecutions where the jury does not return a death sentence and cases in which the death penalty could have been sought but was not. Proportionality review, therefore, excludes a particularly large swath of cases, especially when one considers the expansive nature of Virginia's death penalty-eligible offenses. The Court also has frequently engaged in a limited comparison of the reviewed cases by examining only the crime of conviction and the aggravating factors found by a jury, without consideration of other important factors such as the circumstances of the offense and the background of the defendant. Therefore, Virginia is in partial compliance with Protocol #1.

Recommendation

As the highest court in the Commonwealth, the Supreme Court of Virginia is in a unique position to ensure that a death sentence was justified when compared to other cases. Thus, proportionality review should include all capital murder convictions reviewed by any appellate court in Virginia, irrespective of whether it was reviewed by the Court of Appeals or the Supreme Court of Virginia.⁸⁹ The review should also encompass a meaningful comparison to co-defendants' or co-participants' cases, including those cases that resulted in a sentence less than death.⁹⁰ Finally, it is imperative for the Court to thoroughly compare the facts of the similar cases it selects in its proportionality review, including the specific facts surrounding the crime and the life and mental state of the defendant, in order to produce a robust and accurate analysis

(emphasis added); VA. CODE ANN. § 18.2-31(9) (2013) (killing during the commission, *or* attempted commission, of a drug transaction, with the purpose of furthering the transaction) (emphasis added); VA. CODE ANN. § 18.2-31(6) (2013) (killing a state *or* federal law enforcement officer with the power to make a felony arrest under any state or federal law, killing a fire marshal *or* a deputy or assistant fire marshal when such persons have police powers, *or* killing an auxiliary police officer *or* auxiliary deputy sheriff, with "the purpose of interfering with the performance of his official duties") (emphasis added).

⁸⁹ See, e.g., *Jackson v. Commonwealth*, 499 S.E.2d 538, 543, 555–56 (Va. 1998) (Hassell, J., dissenting) (discussing the proportionality of the death sentence by comparing the case at bar to cases reviewed by the Court of Appeals of Virginia).

⁹⁰ The Supreme Courts of Florida and Georgia, by comparison, perform an additional review for culpability in cases involving codefendants or co-participants. *Brooks v. State*, 918 So.2d 181, 208 (Fla. 2005) ("In cases where more than one defendant is involved, the [Florida Supreme] Court performs an additional analysis of relative culpability guided by the principle that 'equally culpable co-defendants should be treated alike in capital sentencing and receive equal punishment.'") (quoting *Shere v. Moore*, 830 So.2d 56, 60 (Fla. 2002)); *Gissendaner v. State*, 532 S.E.2d 677, 690 (Ga. 2000) ("When applicable, our 'proportionality review of death sentences includes special consideration of the sentences received by co-defendants in the same crime.'") (quoting *Allen v. State*, 321 S.E.2d 710 (1984)).

of the appropriateness of a death sentence in a given case.⁹¹ Given that many capital murder convictions in Virginia result in a sentence less than death, particular emphasis should not be given to cases that resulted in a death sentence.⁹²

With respect to the many cases in which a death sentence could have been but was not sought because of a plea agreement, there often is no appeal and thus no official record available for use in proportionality review. Including these cases in proportionality review is important, given the number of capital cases resolved through plea agreements. Inclusion of these cases, however, is not currently practicable and is representative of the need for better, modernized data collection on capital charging practices in the Commonwealth.

A 2002 report by the Joint Legislative Audit and Review Commission (JLARC) of the Virginia General Assembly examined capital-eligible homicide cases in Virginia from 1995 to 1999.⁹³ The Assessment Team echoes JLARC's comments on the problems with respect to data collection on Virginia's death penalty. JLARC noted that its review was "complicated by the unique data problems associated with this subject," and that "[c]urrently, Virginia does not maintain a centralized database containing information on murder cases that can be prosecuted as capital cases."⁹⁴ Indeed, in order to obtain the data necessary to conduct its limited five-year review, JLARC had to examine files maintained by State Police and the Sentencing Commission, review indictments for persons arrested for murder, interview local prosecutors, and consult other sources.⁹⁵ With respect to the more limited class of cases in which juries imposed life sentences, but the cases were not appealed, JLARC had to match data contained by the Virginia Sentencing Commission against cases in the Supreme Court of Virginia's database.⁹⁶

The Virginia Assessment Team, therefore, recommends that the Commonwealth create a searchable, publicly available tool on the charging and sentencing of all capital-eligible offenses. To achieve this end, Virginia should designate an appropriate entity, such as the Virginia Sentencing Commission, to collect, analyze, and make publicly available salient facts on all death-eligible cases in Virginia, regardless of whether the case was resolved at trial or through a plea negotiation. A sample of a similar tool employed by JLARC to collect such data is found in the Appendix to this Report.⁹⁷ It is imperative that the collection of this data be sanctioned by the Supreme Court of Virginia to ensure its reliability, trustworthiness, and admissibility.⁹⁸

⁹¹ See, e.g., *Shere*, 830 So.2d at 60 (stating that the "[t]he death penalty is reserved for 'the most aggravated and unmitigated of most serious crimes . . .'" (quoting *Clark v. State*, 609 So.2d 513, 516 (Fla.1992)); *Gissendaner v. State*, 532 S.E.2d 677, 691 (Ga. 2000) ("[T]he special individual characteristics of an appellant are appropriate for consideration.")).

⁹² JLARC REPORT, *supra* note 27, at 17 (noting that of the forty-six Virginia cases that resulted in in a capital murder conviction between 1995 and 1999, twenty-four death sentences were imposed).

⁹³ *Id.* at 19–23.

⁹⁴ *Id.*

⁹⁵ *Id.* at 20.

⁹⁶ *Id.* at 71.

⁹⁷ JLARC REPORT, *supra* note 27, at Appendix G.

⁹⁸ See, e.g., *In re Proportionality Review Project*, 735 A.2d 528 (N.J. 1999) (establishing a standing master of the New Jersey Supreme Court to oversee determination of the universe of cases for proportionality review and the two factored test of "frequency analysis" and "precedent-seeking review" to be used by the Court when conducting proportionality review). Trial court reports, often used by appellate courts in other jurisdictions in conducting proportionality review is an example of a mechanism Virginia could also implement in order to promote more

Other affected stakeholders, including prosecutors, capital defense counsel, and trial courts, should also be consulted.

Prior study commissions also have made recommendations to improve the collection of data: a 2007 report by the Supreme Court of Virginia recommended that Virginia “[e]quip[] courts of record with computer assisted transcription capability to produce text transcripts that can be searched and transmitted electronically and include links to evidence.”⁹⁹ As noted above, JLARC obtained similar data on capital eligible cases from 1995 to 1999. Notably, Virginia already has in place some statutory mechanisms to support enforcement of better data collection.¹⁰⁰ For instance, in cases where a defendant has been sentenced to death, Virginia law states that “the [trial] court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just.”¹⁰¹ Washington and Lee University School of Law’s Virginia Capital Case Clearinghouse also makes publicly available data on capital trial outcomes throughout the Commonwealth.¹⁰²

Creation of a data collection tool would not only assist the Supreme Court of Virginia in conducting proportionality review, but would also assist litigants in presenting claims on proportionality issues to the Court, aid prosecutors in making charging decisions, and provide a mechanism through which the Commonwealth could determine whether race, geography, or any other improper factor influences outcomes in capital cases.

Finally, the Assessment Team notes that a more thorough proportionality review no more usurps the discretion of local prosecutors and juries in determining capital case outcomes than the existing review. The U.S. Supreme Court recognized long ago, in *Gregg v. Georgia*, the important ends that proportionality review serves.¹⁰³ Broadening that review to include presentation and consideration of additional, relevant cases will only strengthen Virginia’s ability to produce a more robust proportionality review.

thorough proportionality review. *See, e.g.*, MO. REV. STAT. 565.035.6 (2013), MO. REV. STAT. 565.035.1 (2013) (requiring the Supreme Court of Missouri to accumulate all records of cases in which a sentence of death or life without parole was imposed and requiring the trial court to submit to the Supreme Court a report on the capital case).

⁹⁹ SUP. CT. OF VA., COMMISSION ON VIRGINIA COURTS IN THE 21ST CENTURY: TO BENEFIT ALL, TO EXCLUDE NONE 40 (2007), *available at* http://www.courts.state.va.us/courtadmin/aoc/judpln/reports/final_report.pdf. The Court also recommended several other technological improvements that would “increase the access, convenience and ease of use of the courts for all citizens, and [] enhance the quality of justice by increasing the courts’ ability to determine facts and reach a fair decision.” *Id.* at 39–40.

¹⁰⁰ *See* VA. CODE ANN. § 17.1-313 (E) (2013) (“The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.”); VA. CODE ANN. § 19.2-217.1 (2013) (“Upon the return by a grand jury of an indictment for capital murder and the arrest of the defendant, the clerk of the circuit court in which such indictment is returned shall forthwith file a certified copy of the indictment with the clerk of the Supreme Court of Virginia. All such indictments shall be maintained in a single place by the clerk of the Supreme Court, and shall be available to members of the public upon request.”).

¹⁰¹ VA. CODE ANN. § 19.2-264.5 (2013).

¹⁰² *See generally Virginia Capital Litigation Data*, VA. CAPITAL CASE CLEARINGHOUSE, <http://www.vc3.org/resources/page.asp?pageid=561> (last visited Mar. 29, 2013).

¹⁰³ *See Gregg v. Georgia*, 428 U.S. 153, 198 (1976).

CHAPTER EIGHT

STATE HABEAS CORPUS PROCEEDINGS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

The availability of state post-conviction, sometimes known as “state habeas,” and federal habeas corpus relief through collateral review of state court judgments is an integral part of the capital punishment review process. Significant percentages of capital convictions and death sentences have been set aside in such proceedings as a result of ineffective assistance of counsel claims, claims made possible by the discovery of crucial new evidence, claims based upon prosecutorial misconduct, claims based on unconstitutional racial discrimination in jury selection, and other meritorious constitutional bases.

Collateral review is critically important to the fair administration of justice in capital cases. Because some capital defendants receive inadequate counsel at trial and on direct appeal, and because it is often impossible to uncover prosecutorial misconduct or other crucial evidence until after direct appeal, state post-conviction proceedings often provide the first opportunity to establish meritorious constitutional claims. Moreover, exhaustion and procedural default rules require the defendant to present such claims in state court before they may be considered in federal habeas corpus proceedings.

Securing relief on meritorious federal constitutional claims in state post-conviction proceedings or federal habeas corpus proceedings has become increasingly difficult in recent years because of more restrictive state procedural rules and practices and more stringent federal standards and time limits for review of state court judgments. Federal restrictions include a one-year statute of limitations on federal habeas claims and, in some circumstances, a requirement that federal courts defer to state court rulings that the Constitution has not been violated, even if the federal court concludes that the state court’s ruling was erroneous. Federal law also places, absent a convincing claim of innocence, tight restrictions on evidentiary hearings with respect to facts not presented in state court—no matter the justification for the omission.¹

In addition, decisions by the U.S. Supreme Court and passage of the Antiterrorism and Effective Death Penalty Act of 1996 have greatly limited the ability of a death row inmate to return to federal court a second time. The frequent invocation of the harmless error doctrine also has limited grants of federal habeas corpus relief.

These limitations on post-conviction relief, as well as the federal government’s defunding of resource centers for federal habeas proceedings in capital cases, have been justified as necessary to discourage frivolous claims in federal courts. These changes, however, also have resulted in an inability of death row inmates to have valid claims heard or reviewed on the merits in federal court.

State courts and legislatures could alleviate some of the unfairness these developments have created by making it easier for state courts to review valid claims of constitutional error on the

¹ See 28 U.S.C. §§ 2244, 2254 (2013).

merits. Under current collateral review procedures, a “full and fair judicial review” often does not include reviewing the merits of the inmate’s constitutional claims.

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

Virginia statutory law permits an inmate, following the denial of his/her direct appeal, to challenge his/her conviction or sentence in a state post-conviction proceeding known as petition for a writ of habeas corpus ad subjiciendum, or “state habeas.”² In 1995, the Supreme Court of Virginia was granted “exclusive jurisdiction to consider and award writs of habeas corpus” in death penalty cases.³ Prior to that year, the Virginia circuit courts possessed original jurisdiction over state habeas petitions in death penalty cases, which could then be appealed to the Supreme Court of Virginia.⁴

A. *State Habeas Procedure*

After the Supreme Court of Virginia affirms a death row inmate’s conviction and death sentence on direct appeal, the circuit court must appoint state habeas counsel to represent the inmate within thirty days.⁵ Virginia law requires the inmate to file his/her habeas petition within sixty days after the U.S. Supreme Court denies his/her petition for a writ of certiorari on direct appeal.⁶

An additional statutory provision states that “notwithstanding the time restrictions otherwise applicable to the filing of a petition for a writ of habeas corpus, an indigent prisoner may file such a petition within 120 days following appointment . . . of counsel to represent him.”⁷ In practice, however, there are typically more than 120 days between the appointment of counsel and the date the habeas petition must be filed.⁸ The inmate’s petition cannot exceed 100 pages or 17,500 words,⁹ and must contain all allegations “known to petitioner at the time of filing.”¹⁰ If the filing deadline has not passed and the Court has not yet ruled on the merits of the petition, the inmate may request to file an amended petition.¹¹

Within thirty days of service of the petition, the Attorney General of Virginia must file a responsive pleading with the Supreme Court of Virginia.¹² The inmate may then file a reply within twenty days of the filing of the responsive pleading.¹³

² See VA. CONST. art XIII, § 16; VA. CODE ANN. § 8.01-654 (2013).

³ VA. CODE § 8.01-654(C)(1) (1995); S.B. 969, 1995 Virginia Laws Ch. 503 (Va. 1995).

⁴ J. LEGIS. AUDIT & REV. COMM’N, VA. ASSEMB.: REVIEW OF VIRGINIA’S SYSTEM OF CAPITAL PUNISHMENT 88 (2002).

⁵ VA. CODE ANN. § 19.2-163.7 (2013).

⁶ VA. CODE ANN. § 8.01-654.1 (2013). If the U.S. Supreme Court grants the writ of certiorari but then affirms the sentence, the habeas petition must be filed within sixty days of the U.S. Supreme Court’s decision. *Id.* If the inmate does not file a petition for a writ of certiorari to the U.S. Supreme Court, the habeas petition must be filed within sixty days of “the expiration of the period for filing a timely petition for certiorari.” *Id.*

⁷ *Id.*

⁸ See Interview by Mark Pickett & Paula Shapiro with Robert E. Lee, Exec. Dir., Va. Capital Representation Resource Ctr. (VCRRC) (Apr. 11, 2012) (on file with author) [hereinafter VCRRC Interview].

⁹ VA. SUP. CT. R. 5:7A (g). The Court may, in its discretion, grant a motion to extend this limit. *Id.*

¹⁰ VA. CODE ANN. § 8.01-654(B)(2) (2013).

¹¹ VA. CODE ANN. § 8.01-654.1 (2013).

¹² VA. SUP. CT. R. 5:7A(c).

¹³ VA. SUP. CT. R. 5:7A(d).

The Court may grant or deny the petition without holding an evidentiary hearing, if “the allegations of illegality of the petitioner’s detention can be fully determined on the basis of recorded matters.”¹⁴ The petitioner may request an evidentiary hearing if s/he believes the taking of additional evidence is necessary.¹⁵ The Supreme Court of Virginia may then, in its discretion, order the circuit court to conduct the hearing.¹⁶ The subject matter of the hearing must be limited to the issues enumerated in the Supreme Court’s order.¹⁷

The circuit court must “conduct the [evidentiary] hearing within 90 days after the order of the Supreme Court has been received.”¹⁸ At the evidentiary hearing, the petitioner may testify, and either party may call witnesses or read into evidence affidavits of witnesses.¹⁹ If the inmate’s petition alleges ineffective assistance of counsel, s/he is deemed to have waived attorney-client privilege “with respect to communications . . . to the extent necessary to permit a full and fair hearing for the alleged ground.”²⁰ The circuit court must “report its findings of fact and recommend conclusions of law to the Supreme Court within 60 days after the conclusion of the hearing.”²¹ Any objections to these findings must be filed with the Supreme Court within thirty days after the report is filed.²²

The Supreme Court of Virginia will grant a writ of habeas corpus only if the petitioner shows probable cause that s/he is detained unlawfully.²³ If the Court grants a writ of habeas corpus, it must “discharge or remand” the inmate, or “admit him to bail.”²⁴

B. Types of Claims Reviewable in State Habeas

1. Cognizable Claims Generally

Virginia statutory law provides that state habeas proceedings are the proper forum for an inmate to challenge the legality of his/her sentence.²⁵ The Supreme Court of Virginia has further explained that only “jurisdictional” issues can be raised in a state habeas petition.²⁶ In practice, this means that the court will not consider errors that could or should have been raised at trial or on direct appeal—i.e., errors that are not apparent from the trial transcript or other appellate records—in state habeas proceedings.²⁷ “Non-jurisdictional” claims of trial error, on the other

¹⁴ VA. CODE ANN. § 8.01-654(B)(4) (2013).

¹⁵ VA. SUP. CT. R. 5:7A(b).

¹⁶ VA. CODE ANN. § 8.01-654(C)(1) (2013). The hearing is conducted by the circuit court in which the inmate was originally sentenced to death. *Id.*

¹⁷ VA. CODE ANN. § 8.01-654(C)(2) (2013).

¹⁸ VA. CODE ANN. § 8.01-654(C)(3) (2013).

¹⁹ VA. CODE ANN. §§ 8.01-660, 8.01-661 (2013).

²⁰ VA. CODE ANN. § 8.01-654(B)(6) (2013).

²¹ VA. CODE ANN. § 8.01-654(C)(3) (2013).

²² *Id.*

²³ VA. CODE ANN. § 8.01-654 (2013). The petitioner has the burden of proving by a preponderance of the evidence that his confinement is illegal. *Whitlock v. Superintendent of Va. State Penitentiary*, 192 S.E.2d 802 (Va. 1972).

²⁴ VA. CODE ANN. § 8.01-662 (2013).

²⁵ *See* VA. CODE ANN. § 8.01-654 (2013).

²⁶ *See* *Teleguz v. Warden*, 688 S.E.2d 865, 872 (Va. 2010) (citing *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974)).

²⁷ *See id.*

hand, are only reviewable on direct appeal and will not be considered by the Supreme Court of Virginia in state habeas proceedings.²⁸ The Supreme Court has also held that claims of actual innocence cannot be considered in state habeas proceedings.²⁹ Virginia has, however, enacted separate statutory procedures for an inmate to prove his/her innocence through DNA testing³⁰ or, provided the inmate did not plead guilty at trial, through other means.³¹

Finally, absent “a new constitutional mandate or change in the law,” second or successive habeas petitions are prohibited.³²

2. Ineffective Assistance of Counsel

Claims of ineffective assistance of trial and appellate counsel are frequently raised in state habeas petitions.³³ The Supreme Court of Virginia has adopted the standard for evaluating ineffective assistance of counsel claims first established by the U.S. Supreme Court in *Strickland v. Washington*.³⁴ In applying this standard, the Court has held that the inmate must (1) “show that ‘counsel’s representation fell below an objective standard of reasonableness’” and (2) establish that “there is a reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.”³⁵ In order “[t]o prove that counsel’s conduct fell outside the range of reasonable professional assistance, a petitioner must overcome the presumption that under the particular circumstances of the case, the challenged actions may be considered sound trial strategy.”³⁶

²⁸ See *Teleguz v. Warden*, 688 S.E.2d 865, 872 (Va. 2010) (citing *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974)).

²⁹ *Lovitt v. Warden*, 585 S.E.2d 801, 827 (Va. 2003) (declining to consider death row inmate’s innocence claim, stating that his guilt was determined at trial).

³⁰ VA. CODE ANN. § 19.2-327.1(A) (2013).

³¹ VA. CODE ANN. § 19.2-327.10 (2013) (establishing a writ of actual innocence based on nonbiological evidence).

³² VA. CODE ANN. § 8.01-663 (2013).

³³ See, e.g., *Teleguz*, 688 S.E.2d 865 (enumerating several ineffective assistance of counsel claims).

³⁴ *Yarbrough v. Warden*, 609 S.E.2d 30, 38 (Va. 2005) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)).

³⁵ *Id.* at 37–38 (citing *Strickland*, 466 U.S. 668).

³⁶ *Id.* at 37 (citing *Strickland*, 466 U.S. at 689).

II. ANALYSIS

Below are the ABA Benchmarks, or “Protocols,” used by the state assessment team in its evaluation of its state’s death penalty system. Each Protocol is followed by the Assessment Team’s analysis of the Commonwealth’s compliance with the Protocol and, where appropriate, the Assessment Team’s recommendation(s) for reform.

A. Protocol #1

All post-conviction proceedings at the trial court level should be conducted in a manner designed to permit adequate development and judicial consideration of all claims. Trial courts should not expedite post-conviction proceedings unfairly; if necessary, courts should stay executions to permit full and deliberate consideration of claims. Courts should exercise independent judgment in deciding cases, making findings of fact and conclusions of law only after fully and carefully considering the evidence and the applicable law.

The analysis of this Protocol will consider state habeas proceedings as they are conducted before the Supreme Court of Virginia, as all state habeas petitions in Virginia death penalty cases are filed directly with this court.³⁷ As described below, Virginia falls far short from ensuring adequate presentation and consideration of claims raised during collateral proceedings.

Insufficient Time and Space to Adequately Present State Habeas Claims

Virginia law places strict filing deadlines on state habeas petitions in death penalty cases. After an inmate’s death sentence is affirmed on direct appeal by the Supreme Court of Virginia, the circuit court must appoint counsel to represent the inmate within thirty days.³⁸ In practice, however, attorneys from the Virginia Capital Representation Resource Center, who represent the vast majority of Virginia’s death row inmates in state and federal habeas proceedings, begin working on an inmate’s case as soon as his/her death sentence is affirmed on direct appeal.³⁹ The death row inmate must then file his/her state habeas petition “within sixty days after the earliest of” the following:

- (1) Denial by the [U.S.] Supreme Court of a petition for a writ of certiorari [following] the judgment of the Supreme Court of Virginia on direct appeal;
- (2) A decision by the [U.S.] Supreme Court affirming imposition of the sentence of death when such decision is in a case resulting from a granted writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal; or
- (3) The expiration of the period for filing a timely petition for certiorari [with the U.S. Supreme Court] without a petition being filed.⁴⁰

³⁷ VA. CODE ANN. § 8.01-654(C)(1) (2013).

³⁸ VA. CODE ANN. § 19.2-163.7 (2013).

³⁹ VCRRC Interview, *supra* note 8.

⁴⁰ VA. CODE ANN. § 8.01-654.1 (2013).

These deadlines afford an inmate limited time to investigate and prepare his/her state habeas petition. If the inmate chooses not to file a petition for a writ of certiorari with the U.S. Supreme Court, his/her attorney will have a maximum of 150 days from the date the inmate's direct appeal is denied in which to prepare and file the state habeas petition.⁴¹ On the other hand, if the inmate chooses to file a petition for a writ of certiorari, s/he will have, at most, eight to eleven months before the state habeas petition is due, depending on when the U.S. Supreme Court denies the certiorari petition.⁴²

Post-conviction claims in capital cases often include factual and research-intensive issues, such as claims of ineffective assistance counsel and prosecutorial misconduct, which are not readily apparent from a review of the trial record and take significant time to fully prepare. In Virginia, the process of preparing a habeas petition is especially challenging because discovery is not permitted to assist inmates in development of their claims, nor is funding for expert assistance in state habeas proceedings provided. Thus, habeas counsel must complete their work and uncover any claims of constitutional error with limited resources.⁴³ Virginia's limited state habeas timeframe also may not provide habeas counsel adequate time to prepare a complete, fully-developed state habeas petition. Notably, other capital jurisdictions, including states bordering Virginia and several states previously assessed by the ABA Death Penalty Due Process Review Project, provide death row inmates with a significantly longer period, or do not impose a specific deadline at all, in which to file for post-conviction relief in a death penalty case.⁴⁴

⁴¹ The inmate has ninety days from the date his direct appeal is denied before the time period for petitioning the U.S. Supreme Court for a writ of certiorari expires, followed by the sixty days to file his/her state habeas petition. 28 U.S.C. § 1257 (2013). *See also* Va. Capital Representation Resource Ctr. (VCRRC) Survey Response, provided by Robert E. Lee, Exec. Dir., VCRRC, to Paula Shapiro, at 2–3 (Apr. 5, 2012) (on file with author) [hereinafter VCRRC Survey Response].

⁴² VCRRC Interview, *supra* note 8.

⁴³ For a discussion of discovery and access to experts in Virginia state habeas cases, see Protocol #2 and Protocol #8, respectively.

⁴⁴ ALA. R. CRIM. P. 32.2(c) (providing that an Alabama death row inmate must file his/her post-conviction petition within one year after the Court of Criminal Appeals issues the certificate of judgment affirming his/her conviction); FLA. R. CRIM. P. 3.851(d)(1) (stating that a death row inmate must file for post-conviction relief within one year of the disposition of his/her petition for writ of certiorari to the U.S. Supreme Court); O.C.G.A. § 9-14-42(c) (2013) (providing no set time limit for Georgia death row inmates to file for post-conviction relief); IND. R. OF P. FOR POST-CONVICTION REMEDIES 1, § 1(a) (stating that Indiana inmates may file for post-conviction relief “at any time.”); KY. R. CRIM. P. 11.42(10) (providing Kentucky death row inmates three years from the date the judgment becomes final to file for post-conviction relief); MD. CRIM. PROC. CODE § 7-201(a)–(b) (2013) (providing that Maryland death row inmates must file their post-conviction petition within 210 days after the disposition of his/her petition for writ of certiorari to the U.S. Supreme Court on direct appeal or within 210 days after the expiration of the time for which to seek review by the U.S. Supreme Court, if no writ of certiorari is filed, with an extension permitted for good cause), n.b., Maryland repealed its statutes related to the death penalty in 2013.; N.C. GEN. STAT. § 15A-1415(a) (2013) (providing that a North Carolina death row inmate's post-conviction motion must be filed within 120 days after the disposition of his/her petition for writ of certiorari to the U.S. Supreme Court on direct appeal); 42 PA. CONS. STAT. § 9545(b)(1) (2013); PA. R. CRIM. P. 901(A) (stating that Pennsylvania death row inmates must file their post-conviction motions within one year of final judgment on direct appeal); TENN. CODE ANN. § 40-30-102(a) (2013) (providing a death row inmate with one year following the disposition of his/her direct appeal to file for post-conviction relief). Federal law also grants petitioners one year to file a federal habeas petition from the date the direct appeal is final, which will be tolled while the state habeas petition is pending. 28 U.S.C. 2244(d)(1)–(2) (2013).

Virginia capital habeas petitioners are also subject to 100-page and 17,500 word limitations on their filings, even though petitions must contain all allegations known to the petitioner at the time of filing.⁴⁵ As described by the *ABA Guidelines*, state habeas counsel “should seek to litigate all issues, whether or not previously presented, that are arguably meritorious under standards applicable to high quality capital defense representation.”⁴⁶ As a result of the limitations placed on Virginia petitioners, habeas counsel may instead have to curtail or even omit inclusion of claims of constitutional defect, regardless of the significance or viability of the claims.⁴⁷ Other jurisdictions—including those with a higher volume of capital cases than Virginia—do not impose such limitations.⁴⁸

Finally, the limitations described above can increase the likelihood of procedural default by Virginia capital petitioners in federal habeas proceedings. Virginia petitioners will be subject to procedural default and preclusion of federal courts’ ability to review their claims of constitutional error when these petitioners have failed to adequately develop and preserve those claims due to inadequate time, as well as page and word limitations, imposed during the state proceedings.⁴⁹

Lack of Evidentiary Hearings

Virginia statutory law provides that the Supreme Court of Virginia may, in its discretion, order the circuit court to conduct an evidentiary hearing in a capital state habeas case.⁵⁰ The subject

⁴⁵ VA. CODE ANN. § 8.01-654(B)(2) (2013) (requiring the petition to “contain all allegations the facts of which are known to petitioner at the time of filing”); VA. SUP. CT. R. 5:7A(g) (describing page and character limitations imposed in habeas corpus petitions filed in death penalty cases). Until 2010, this page limitation was set at fifty pages. VA. SUP. CT. R. 5:7A(g) (2006); *Amendments to Rules of the Supreme Court of Virginia*, VA.’S JUDICIAL SYS., <http://www.courts.state.va.us/courts/scv/amend.html> (last visited Mar. 13, 2013). Before 2010, capital habeas counsel’s requests for page extensions were frequently denied. Email from Robert E. Lee, Exec. Dir., Va. Capital Representation Res. Ctr. (VCRRC) to Sarah Turberville (Mar. 13, 2013) (on file with author) [hereinafter VCRRC Email]. Since the increase of the page limit to 100 pages, VCRRC has requested an extension in only one case in which it requested an extension to file a 150-page brief and was granted an extension to 120 pages. *Id.* (describing the Alfred Prieto case).

⁴⁶ ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 1079 (2003) (Guideline 10.15.1(C)).

⁴⁷ This issue was particularly problematic when capital habeas petitioners were limited to only fifty pages. In the Justin Wolfe case, for example, the VCRRC reports that the initial state habeas petition was 149 pages and had to be reduced to fifty pages, resulting in omission of several claims. VCRRC Email, *supra* note 45. VCRRC further notes that the fifty-page limitation resulted in claims being “pled more thinly with facts, law, or background/context eliminated. In some instances this has been a tortured exercise. In most instances, it has consumed significant time to just whittle down an argument to squeeze into the page limits. This is distinguished from editing that makes the brief more efficient and well-written.” *Id.*

⁴⁸ For example, Texas, which has executed more death row inmates than any other capital jurisdiction in the United States, does not impose any page or character limitation on state habeas corpus applications in death penalty cases. *See* TEX. R. CRIM. P. 11.071.

⁴⁹ VCRRC Email, *supra* note 45 (noting that when the limitation was fifty pages, habeas counsel included the claims omitted from the state petitions due to the page limitation in the federal petition, “but they were always deemed to be defaulted”). For further discussion on the impact of Virginia’s procedural default rules, see Protocol #6, below.

⁵⁰ VA. CODE ANN. § 8.01-654(C)(1) (2013). The hearing is conducted by the circuit court in which the inmate was originally sentenced to death. *Id.*

matter of the hearing must be limited to the issues enumerated in the Supreme Court's order.⁵¹ The circuit court must "conduct the hearing within 90 days after the order of the Supreme Court has been received," and must "report its findings of fact and recommend conclusions of law to the Supreme Court within 60 days after the conclusion of the hearing."⁵² Objections to these findings must be filed with the Supreme Court within thirty days after the report is filed.⁵³

In practice, however, evidentiary hearings have rarely been granted, and the Virginia statute does not provide guidance as to when an evidentiary hearing should be granted. Since the Supreme Court of Virginia gained exclusive jurisdiction over capital habeas cases in 1995, it has granted evidentiary hearings in only five cases, a small fraction of the total number of capital habeas petitions it has reviewed.⁵⁴ The Court did not explain why it ordered hearings in only these cases, nor does there appear to be a common issue that distinguishes these five cases from the cases in which hearings were not granted.⁵⁵ In two of the cases, the evidentiary hearing was limited to the issue of whether trial counsel were ineffective for failing to investigate mitigating evidence;⁵⁶ however, this claim is frequently raised in capital habeas cases. The Court ordered more expansive hearings in the other three cases.⁵⁷ In four of the five cases, the Court dismissed the habeas petition following the hearing.⁵⁸

Trial courts are accustomed to resolving factual disputes through evidentiary hearings. As discussed, many claims that are commonly presented in state habeas proceedings involve complex factual considerations that typically require the court to consider evidence that is not in the trial record and that cannot be fully developed in the absence of an evidentiary hearing, such as claims of ineffective assistance of counsel and prosecutorial misconduct. With respect to ineffective assistance of counsel claims, the U.S. Supreme Court has held that trial counsel in a capital case have a duty to fully investigate mitigating evidence related to their client's social history, including evidence of childhood abuse.⁵⁹ For this reason, it is especially important for trial courts in habeas cases to carefully consider allegations of inadequate mitigation

⁵¹ VA. CODE ANN. § 8.01-654(C)(2) (2013).

⁵² VA. CODE ANN. § 8.01-654(C)(3) (2013).

⁵³ *Id.*

⁵⁴ *Lewis v. Warden*, 645 S.E.2d 492, 495 (Va. 2007) (granting evidentiary hearing "limited to claims alleging counsel's failure to investigate and present mitigation evidence"); *Yarbrough v. Warden*, 609 S.E.2d 30, 32 (Va. 2005) (granting evidentiary hearing on allegation that trial counsel was ineffective for failing to investigate mitigating evidence); *Lovitt v. Warden*, 585 S.E.2d 801, 805 (Va. 2003) (granting evidentiary hearing on all issues raised in the petition); *Lenz v. Warden*, 579 S.E.2d 194, 195 (Va. 2003) (granting evidentiary hearing "limited to certain issues"); *Hedrick v. Warden*, 570 S.E.2d 840, 862 (Va. 2002) (granting evidentiary hearing on claim of ineffective assistance of counsel). *See also* VCRRC Interview, *supra* note 8. According to the VCRRC, since July 1, 1995, every one of the approximately one hundred state habeas petitioners has requested an evidentiary hearing. *See* VCRRC Email, *supra* note 45.

⁵⁵ Similarly, in some cases in which no evidentiary hearing was ordered, the Court has denied the inmate's request for a hearing without explanation in its order dismissing the habeas petition. *See, e.g., Juniper v. Warden*, 707 S.E.2d 290, 311 (Va. 2011); *Teleguz v. Warden*, 688 S.E.2d 865, 879 (Va. 2010).

⁵⁶ *Lewis*, 645 S.E.2d at 495; *Yarbrough*, 609 S.E.2d at 32.

⁵⁷ *Lovitt*, 585 S.E.2d at 805 (Va. 2003); *Lenz*, 579 S.E.2d at 195; *Hedrick*, 570 S.E.2d at 862.

⁵⁸ In *Lenz*, the Supreme Court of Virginia granted the inmate a new sentencing hearing because "he was denied effective assistance of counsel because trial counsel failed to object to" a verdict form that "failed to inform the jury that it could sentence petitioner to life imprisonment even if the jury found petitioner guilty of both aggravating factors beyond a reasonable doubt." *Lenz*, 579 S.E.2d at 196, 199.

⁵⁹ *Wiggins v. Smith*, 539 U.S. 510, 535–36 (2003).

investigation. Such claims are best considered following an evidentiary hearing, in which the mitigation witnesses can testify and the court can more accurately assess the extent of the allegations and the credibility of the witnesses.

In Virginia, however, factual disputes in state habeas proceedings appear to be resolved based on the Supreme Court's review of affidavits submitted by the parties.⁶⁰ In *Elliot v. Warden*, a death row inmate alleged that the prosecution had failed to disclose the exculpatory statements of a group of eyewitnesses, who allegedly saw someone other than the defendant flee the scene of the murder.⁶¹ The Court, however, found that "[t]he record, including affidavits by the [prosecutors] involved in the case, demonstrates that neither the police nor [the prosecutors] had any knowledge of any exculpatory statements made by the" eyewitnesses.⁶² The Court provided little explanation for this finding.⁶³ By contrast, the Court questioned the accuracy of the eyewitness statements in the affidavits provided by Elliot as based on "hearsay information."⁶⁴

In another case, *Juniper v. Warden*, the death row petitioner claimed that the prosecution failed to disclose that it had threatened to charge a witness with capital murder if he did not testify against the defendant.⁶⁵ The petitioner alleged that after the witness "invoked his Fifth Amendment right [to silence] and refused to testify, [the witness] was removed from the courtroom and the prosecutor threatened [him] by telling him that if he did 'not testify as instructed' he would be charged with capital murder and would face the death penalty."⁶⁶ The Court rejected this allegation without ordering an evidentiary hearing.⁶⁷ Instead, the Court based its findings on "the trial transcript and the affidavits of the prosecutor and the detective."⁶⁸ The Court did not explain its rationale for adopting the factual claims in the police and prosecutor affidavits without holding a hearing. The accuracy of these statements would have been more fairly assessed in an evidentiary hearing, during which witnesses must testify in court and be subject to cross examination.

By making findings of fact and conclusions of law without the benefit of an evidentiary hearing, and instead through review of affidavits, the Court prevents adequate development of habeas claims and limits its own ability to accurately assess the claims presented during capital habeas proceedings.⁶⁹ As such, cognizable claims may not be uncovered until federal habeas proceedings, if at all.

In the Justin Wolfe case, for instance, the Supreme Court of Virginia refused to order an evidentiary hearing and denied Wolfe's habeas petition, despite evidence of prosecutorial misconduct that would eventually lead a federal court to vacate Wolfe's conviction and death

⁶⁰ See, e.g., *Juniper*, 707 S.E.2d at 297; *Teleguz*, 688 S.E.2d at 865.

⁶¹ *Elliott v. Warden*, 652 S.E.2d 465, 471 (Va. 2007).

⁶² *Id.*

⁶³ *Id.*

⁶⁴ *Id.*

⁶⁵ *Juniper*, 707 S.E.2d at 297.

⁶⁶ *Id.*

⁶⁷ *Id.*

⁶⁸ *Id.*

⁶⁹ The Supreme Court of Virginia also places strict limits on the types of claims that are reviewable in state habeas proceedings. See *supra* Protocol # 6 and accompanying text.

sentence.⁷⁰ At trial, Wolfe, a marijuana dealer, was convicted and sentenced to death for allegedly hiring an acquaintance, Owen Barber, to murder another marijuana dealer, Daniel Petrole, to whom Wolfe owed approximately \$60,000.⁷¹ Barber, “the prosecution’s key witness in Wolfe’s capital trial and the only witness to provide any direct evidence” of Wolfe’s involvement, testified against Wolfe in exchange for immunity from the death penalty.⁷²

In his state habeas petition, Wolfe argued that the prosecution had violated its duty to disclose evidence favorable to the defendant as required by the U.S. Supreme Court’s decision in *Brady v. Maryland*.⁷³ Specifically, “Wolfe . . . alleged that the prosecution had failed to disclose multiple deals it had made with its witnesses, and that certain of those witnesses got materially better deals from the prosecutors than had been represented to Wolfe and his counsel during the trial proceedings.”⁷⁴ Wolfe also alleged that the prosecution withheld statements from a witness who “told [the prosecution] that Barber had confessed [to his roommate, Jason Coleman,] that he acted alone in the murder.”⁷⁵ He further claimed that the prosecution withheld police notes and other materials indicating that Barber’s statements to police were inconsistent with his in-court testimony.⁷⁶

In 2005, the Supreme Court of Virginia denied Wolfe’s habeas petition without ordering an evidentiary hearing.⁷⁷ The Court’s order devoted two paragraphs to Wolfe’s *Brady* claims, dismissing them as “conclusional” and “speculative.”⁷⁸

In subsequent federal habeas proceedings in which the district court held an evidentiary hearing, however, several *Brady* violations were revealed.⁷⁹ The federal district court concluded that the prosecution had failed to disclose that it had arranged joint meetings with witnesses to correct inconsistencies in their testimony.⁸⁰ The prosecution also withheld a detective’s report of an interview with Barber, “during which [the detective] implicated Wolfe as being involved in the murder before Barber mentioned his involvement.”⁸¹ In addition, “[p]rosecutors withheld evidence of Barber’s personal dealings with the victim, including a claim that Barber owed Petrole money, a claim that Petrole had a hit out on Barber, and a claim that Barber and Petrole had recently associated with each other socially.”⁸² “[E]vidence indicating that Barber told his roommate, Jason Coleman, that he acted alone on the night of Petrole’s murder” also was suppressed.⁸³ Barber himself testified in the hearing he acted alone when he committed the murder, and that he had testified against Wolfe in the original trial to avoid the death penalty.⁸⁴

⁷⁰ Wolfe v. Johnson, 565 F.3d 140, 150 (4th Cir. 2009).

⁷¹ *Id.* at 145.

⁷² *Id.* at 144, 144 n.1.

⁷³ *Id.* at 149–50 (citing *Brady v. Maryland*, 373 U.S. 83 (1963)).

⁷⁴ *Id.* at 149.

⁷⁵ *Id.* at 150.

⁷⁶ *Id.*

⁷⁷ *See id.*

⁷⁸ *Id.* at 27–28.

⁷⁹ Wolfe v. Clarke, 819 F. Supp. 2d 538, 551–65 (E.D. Va. 2011).

⁸⁰ *Id.* at 547.

⁸¹ *Id.* at 548.

⁸² *Id.* at 548–49.

⁸³ *Id.* at 554.

⁸⁴ *Id.* at 548 n.9. The court found several other *Brady* violations, as well. *See id.* at 551–65.

In 2011, the federal district court vacated Wolfe's conviction and death sentence, finding that the prosecution's failure to disclose exculpatory evidence and use of Barber's false testimony violated Wolfe's constitutional right to due process.⁸⁵ Had the Supreme Court of Virginia ordered an evidentiary hearing to fully explore Wolfe's *Brady* claims, these errors could have been corrected much sooner. While the exculpatory evidence was eventually revealed, Virginia should not continue to rely on federal courts to correct constitutional errors in state death penalty cases, especially when there is evidence that the inmate may be innocent. When there are legitimate factual disputes, it is the best practice to hold an evidentiary hearing, to ensure that all claims and allegations are fully and carefully scrutinized.⁸⁶

Execution Dates Set Prior to Initiation or Completion of Federal Habeas Proceedings

The convicting trial court sets the execution date of a death row inmate in Virginia.⁸⁷ Virginia statutory law does not require the trial court to set an execution date until "the Supreme Court of Virginia has denied habeas corpus relief" to the inmate.⁸⁸ While the trial court may set an execution date "under circumstances other than those specified" in the statute,⁸⁹ no Virginia court has scheduled an execution before an inmate's state habeas petition was denied.⁹⁰

However, once an inmate's state habeas petition has been denied, Virginia law requires an execution date to be scheduled if requested by the Attorney General or "the attorney for the Commonwealth."⁹¹ This requirement significantly reduces the amount of time an inmate is permitted to research and prepare his/her federal habeas petition, and denies Virginia death row inmates the process they would otherwise be entitled to in federal court.⁹² Ordinarily, under federal statutory law, death row inmates are granted one year to file a federal habeas petition from the date the direct appeal is final.⁹³ This one-year statute of limitations is tolled while the inmate's state habeas petition is pending.⁹⁴

⁸⁵ Wolfe v. Clarke, 819 F. Supp. 2d 538, 574 (E.D. Va. 2011). The U.S. Court of Appeals for the Fourth Circuit subsequently affirmed the district court's order. Wolfe v. Clarke, 691 F.3d 410, 426 (4th Cir. 2012). After this decision, however, the prosecution announced plans to retry Wolfe for the murder. Bonnie Hobbs, *No Bail for Wolfe; He'll Be Retried in October By Fairfax County's Head Prosecutor*, CENTRE VIEW (Chantilly, Va.), Sept. 20, 2012.

⁸⁶ See, e.g., Hash v. Johnson, 845 F. Supp. 2d 711, 720 n.1 (W.D. Va. 2012) (describing an evidentiary hearing in Hash's state habeas proceedings and characterizing the Supreme Court of Virginia as having "carefully reviewed the [habeas trial court] record" in 2009, and stating that the federal court has consequently "borrowed heavily from [the Supreme Court of Virginia's] cogent fact section."). Hash, who was fifteen at the time of the offense, was convicted of capital murder at his original trial in 2001 and was sentenced to life imprisonment; thus, his case did not fall under Virginia's more restrictive rules governing state habeas proceedings in death penalty cases. *Id.* at 715. In 2012, the federal district court reviewed Hash's case following state habeas proceedings and "ultimately conclude[d] that the Virginia Supreme Court's legal conclusions were incorrect." *Id.* at 711 n.1.

⁸⁷ VA. CODE ANN. § 53.1-232.1 (2013).

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ VCCRRC Survey Response, *supra* note 41, at 7.

⁹¹ VA. CODE ANN. § 53.1-232.1 (2013).

⁹² The U.S. Court of Appeals for the Fourth Circuit has held that this requirement does not violate a Virginia death row inmate's right to equal protection. Sheppard v. Early, 168 F.3d 689, 693 (4th Cir. 1999).

⁹³ 28 U.S.C. § 2244(d)(1) (2012).

⁹⁴ 28 U.S.C. § 2244(d)(2) (2012).

Virginia's statute, however, requires the trial court to hold a hearing "within ten days after receiving the written notice from the Attorney General or the attorney for the Commonwealth" that the death row inmate's state habeas petition has been denied.⁹⁵ The trial court must then schedule an execution date "no later than sixty days after the date of" the hearing.⁹⁶ Once the execution date is set, federal statutory law permits the inmate to obtain a stay of execution in federal court, but the stay "shall terminate no later than 90 days after [federal habeas] counsel is appointed or the application for appointment of counsel" is denied.⁹⁷ Thus, irrespective of the actual time remaining to file the federal habeas petition under federal law, the inmate must file his/her federal habeas petition within ninety days, or another execution date will be set.⁹⁸

As with state habeas petitions, the research involved in the preparation of a federal habeas petition is arduous and the claims are often factually intensive. By shortening the period of time available to prepare and file a petition for habeas corpus in federal court, Virginia further increases the likelihood that claims will not be litigated or adequately presented. This practice is particularly troubling because it provides Virginia death row inmates with less time to prepare federal habeas petitions than is provided to Virginia inmates *not* sentenced to death. Virginia inmates who are not sentenced to death receive a full year to file their petitions in federal court, as the Commonwealth cannot set an execution date to reduce the length of time available to the inmate to seek federal relief.⁹⁹ Thus, death row inmates, who typically have the most complex federal habeas claims, have the least amount of time to prepare their petitions.

The Virginia statute also requires an execution date to be set after "the United States Court of Appeals has affirmed the denial of federal habeas corpus relief," or the U.S. Supreme Court "has issued a final order after granting a stay in order to dispose of the petition for a writ of certiorari to review the judgment of the United States Court of Appeals."¹⁰⁰ This reduces the time normally available to pursue a writ of certiorari from the U.S. Supreme Court.¹⁰¹ Furthermore, this practice may also limit an inmate's time to file a successive federal habeas petition if new evidence or legal claims arise in his/her case.¹⁰²

Conclusion

Virginia provides death row inmates with a right to post-conviction review through state habeas proceedings. However, several aspects of this system limit a death row inmate's ability to adequately research and present claims of constitutional error. In most respects, the state habeas

⁹⁵ VA. CODE ANN. § 53.1-232.1 (2013).

⁹⁶ *Id.*

⁹⁷ 28 U.S.C. § 2251(a)(3) (2013).

⁹⁸ See VA. CODE ANN. § 53.1-232.1 (2013). See also VCRRC Survey Response, *supra* note 41, at 7.

⁹⁹ 28 U.S.C. § 2244(d)(1) (2012) ("A 1-year period of limitation shall apply to an application for a writ of habeas corpus by a person in custody pursuant to the judgment of State court.").

¹⁰⁰ VA. CODE ANN. § 53.1-232.1 (2013).

¹⁰¹ Sheppard v. Early, 168 F.3d 689, 691–92 (4th Cir. 1999).

¹⁰² By requiring execution dates to be set so frequently, the amount of time between an inmate's death sentence and execution is greatly reduced. Virginia inmates spend approximately seven years on death row before they are executed, the least amount of time any death penalty jurisdiction in the country. See *STUDIES: Virginia Leads the Country in Death Sentences Resulting in Executions*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/studies-virginia-leads-country-death-sentences-resulting-executions> (last visited July 23, 2013).

process in Virginia emphasizes finality convictions and death sentences over fairness. Thus, Virginia is not in compliance with Protocol #1.

Recommendation

The Assessment Team recommends that Virginia adopt several reforms to promote adequate development, presentation, and judicial consideration of claims during capital state habeas proceedings, including the following:

- Return original jurisdiction to Virginia trial courts over capital state habeas claims to ensure that the court in which the inmate was originally convicted has the first opportunity to correct any errors. This approach also affords more process to all parties involved, as the decision to grant or deny a hearing and the court's final order may then be appealed to the Supreme Court of Virginia;
- Increase the amount of time afforded to death row inmates for filing of their state habeas petitions, with an allowance for an extension of time upon a showing of good cause;
- Provide an evidentiary hearing on any cognizable issue for which there is a genuine dispute of fact, thereby ensuring that factual findings are made after a careful consideration of the facts and law and not made solely by reference to affidavits;
- Permit extension of page and word limitations on capital habeas petitioners for good cause; and
- Eliminate the practice of scheduling an execution date while an inmate's federal habeas proceedings are pending, and permit the setting of an execution date only after all state and federal remedies are exhausted.

Legislatures and courts have long recognized that, given the gravity of the sentence involved, capital cases are different from other criminal cases in the justice system. Importantly, these reforms will decrease the likelihood of costly errors in subsequent proceedings and better ensure fairness and minimize the risk of wrongful execution. Finally, current trends regarding the use of the death penalty in Virginia also suggest that the resources required to implement these recommendations should not be significant.¹⁰³

¹⁰³ See, e.g., Larry O'Dell, *Virginia's Death Row Population Down to 8*, ASSOCIATED PRESS, Mar. 8, 2013 (noting there are only eight inmates under a sentence of death in Virginia as of March 8, 2013).

B. Protocol #2

The state should provide meaningful discovery in post-conviction proceedings. Where courts have discretion to permit such discovery, the discretion should be exercised to ensure full discovery.

C. Protocol #3

Trial judges should provide sufficient time for discovery and should not curtail discovery as a means of expediting the proceedings.

Virginia does not permit any discovery in capital state habeas proceedings before the inmate's state habeas corpus petition is filed.¹⁰⁴ In fact, no Virginia court has the jurisdiction or authority to grant pre-petition discovery in capital habeas cases. As previously discussed, the Supreme Court of Virginia has exclusive jurisdiction over capital habeas petitions.¹⁰⁵ However, the Court has held that its jurisdiction over those cases does not begin until after the inmate's habeas petition is filed; thus, it is unable to grant discovery to assist the inmate in the development of the inmate's claims, irrespective of the validity of those claims.¹⁰⁶

In addition, habeas petitioners may not obtain discovery through use of the Commonwealth's Freedom of Information Act, as Virginia's prosecutors are exempt from the Act's provisions.¹⁰⁷

The only instance in which any discovery is permitted is in the context of an evidentiary hearing. If the Supreme Court of Virginia orders the circuit court to hold an evidentiary hearing in a state habeas corpus proceeding, some discovery may be permitted on matters relevant to the hearing.¹⁰⁸ However, as discussed in Protocol #1, the Supreme Court of Virginia has ordered evidentiary hearings in only five cases since it gained exclusive jurisdiction over capital habeas cases in 1995.¹⁰⁹ Thus, there has been no discovery of any kind in most capital state habeas cases in recent years.

Moreover, even when an evidentiary hearing is granted, the scope of this discovery is typically quite narrow. For instance, in *Hedrick v. Warden*, the Supreme Court of Virginia ordered the circuit court to conduct an evidentiary hearing before ruling on the habeas petition.¹¹⁰ Prior to the hearing, the inmate's counsel sought discovery of the prosecutor's files. The Supreme Court of Virginia, however, held that counsel were not entitled to discovery of these files because the Court had ordered that the evidentiary hearing be limited to the issue of ineffective assistance of

¹⁰⁴ VCRRC Interview, *supra* note 8. VA. SUP. CT. R. 3A:11 on discovery in criminal cases, although quite limited, does not apply in state habeas proceedings. VA. SUP. CT. R. 3A:11 (a) ("This Rule applies to any prosecution for a felony in a circuit court and to any misdemeanor brought on direct indictment.").

¹⁰⁵ VA. CODE ANN. § 8.01-654(C)(1) (2013).

¹⁰⁶ See Order Denying Motion for Pre-Petition Jurisdiction, *In re Gleason* (Va. Oct. 17, 2012) (on file with author). The trial court is empowered only to appoint counsel in these cases. VA. CODE ANN. § 19.2-163.7 (2013).

¹⁰⁷ *Connell v. Kersey*, 547 S.E.2d 228, 231–32 (Va. 2001).

¹⁰⁸ VCRRC Interview, *supra* note 8.

¹⁰⁹ See *supra* note 54 and accompanying text.

¹¹⁰ *Hedrick v. Warden*, 570 S.E.2d 840, 862 (Va. 2002)

counsel.¹¹¹ The Court further held that “a habeas corpus petitioner is not allowed to embark upon a ‘fishing expedition’” of the prosecutor’s files.¹¹²

The timeframe for reviewing any discovery that might be permitted in an evidentiary hearing is also quite limited. Virginia statutory law provides that the circuit court must “conduct the hearing within 90 days after the order of the Supreme Court [granting the hearing] has been received,” and must “report its findings of fact and recommend conclusions of law to the Supreme Court within 60 days after the conclusion of the hearing.”¹¹³

The near absence of discovery during Virginia capital habeas proceedings, as demonstrated in the Justin Wolfe case, prevents petitioners from obtaining the necessary evidentiary materials to effectively develop and present claims and demonstrate grounds for relief. Discovery can be limited prior to a capital trial in Virginia and trial counsel may have failed to seek all discoverable material. The prosecution may have failed to disclose exculpatory material that would undermine confidence in the verdict or death sentence. A petitioner without knowledge of or access to the Commonwealth’s records simply would not be able to challenge his/her sentence and conviction, no matter the gravity of the constitutional violation that occurred at trial. Absent full and meaningful discovery during state habeas review, it is often impossible to determine whether all valid claims and defenses have been raised by the defense, as well as whether all exculpatory material has been disclosed.

In the previously discussed Justin Wolfe case, for example, several instances of prosecutorial misconduct were undiscovered until the federal habeas proceedings, despite the fact that Wolfe first raised the issues during state habeas.¹¹⁴ Had Wolfe been granted discovery in state habeas, these errors might have been found and corrected earlier.

Conclusion

Virginia law effectively bars discovery in most capital state habeas proceedings. This general prohibition means that a death-sentenced inmate may not be able to establish that a serious constitutional violation occurred at trial because the information needed to establish the claim is undiscoverable. In the few proceedings where discovery has been permitted, it has been granted in the context of an evidentiary hearing; in these instances, however, it is often confined to a narrow issue. Finally, Virginia law provides limited time to review any discovery that might be granted in the context of the evidentiary hearing. Thus, Virginia is not in compliance with Protocol #2 or Protocol #3.

¹¹¹ See *id.*

¹¹² *Id.*

¹¹³ VA. CODE ANN. § 8.01-654(C)(3) (2013).

¹¹⁴ See *supra* notes 70–85 and accompanying text. See also *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 552 (E.D. Va. 2011) (“In this case, the evidence was favorable to Wolfe in that it would have impeached the key witness’ testimony and possibly established an alternative motive for the crime. It was withheld from the Petitioner during trial as established by the fact that it was only submitted to Wolfe in the discovery ordered by this Court in its habeas inquiry as well testimony at the evidentiary hearing.”).

Recommendation

The Virginia Assessment Team recommends that Virginia law and court rules be amended to ensure that death-sentenced inmates are able to fully develop the factual bases of any claim regarding the validity of their conviction or sentence. The Assessment Team is aware of concerns that discovery during state habeas proceedings may be characterized as a “fishing expedition,” however, other jurisdictions, including the federal courts, have recognized that “a habeas petitioner is not required to show that the requested discovery would ‘unquestionably lead to a cognizable claim for relief’ in order to obtain discovery.”¹¹⁵

Thus, in order to promote confidence in the integrity of the justice system—particularly when a life is at stake—the Assessment Team recommends that Virginia require comprehensive discovery in all capital state habeas proceedings. Such discovery should include the complete files of trial and appellate counsel, as well as prosecutor and law enforcement files, which would be made available to the petitioner prior to the filing of his/her state habeas petition. It should also provide for the protection of witness information where appropriate.¹¹⁶ The Assessment Team notes that North Carolina’s statute, which provides for broad discovery in capital post-conviction cases, might serve as a model in this regard. The statute provides as follows:

In the case of a defendant who is represented by counsel in post[-]conviction proceedings in superior court, the defendant’s prior trial or appellate counsel shall make available to the defendant’s counsel their complete files relating to the case of the defendant. The State, to the extent allowed by law, shall make available to the defendant’s counsel the complete files of all law enforcement and prosecutorial agencies involved in the investigation of the crimes committed or the prosecution of the defendant. If the State has a reasonable belief that allowing inspection of any portion of the files by counsel for the defendant would not be in the interest of justice, the State may submit for inspection by the court those portions of the files so identified. If, upon examination of the files, the court finds that the files could not assist the defendant in investigating, preparing, or presenting a [post-conviction petition], the court in its discretion may allow the State to withhold that portion of the files.¹¹⁷

Meaningful discovery, coupled with the grant of an evidentiary hearing on any cognizable claim for which there is a genuine dispute of fact, would also assist the courts in determining thorough and reliable findings of fact and conclusions of law during capital state habeas proceedings.

Furthermore, as previously discussed in Chapter Five on Prosecution, Virginia should adopt broader discovery rules at trial, including required disclosure of law enforcement reports and witness statements as is required under the criminal discovery rules in many other states. By allowing full discovery at the earliest stage of the case, Virginia will substantially decrease the chance of error, and reduce the volume of additional discovery during state habeas proceedings.

¹¹⁵ Simmons v. Simpson, 2009 WL 4927679, at *5 (W.D. Ky. Feb. 12, 2009) (citing Keenan v. Bagley, 262 F. Supp. 2d 826, 838 (N.D. Ohio 2003)).

¹¹⁶ N.C. GEN. STAT. § 15A-1415(f) (2012).

¹¹⁷ *Id.*

The Assessment Team also notes that the Indigent Defense Task Force of the Virginia State Bar has recommended several changes to the Virginia’s trial-level discovery rules, including encouraging parties to “agree in writing to a disclosure of more information” than required under Rule 3A:11.¹¹⁸

D. Protocol #4

When deciding post-conviction claims on appeal, state appellate courts should address explicitly the issues of fact and law raised by the claims and should issue opinions that fully explain the bases for dispositions of claims.

Virginia statutory law requires the reviewing court to “give findings of fact and conclusions of law following a determination on the record or after hearing” in a state habeas proceeding.¹¹⁹ However, the law does not specify how detailed these findings and conclusions are required to be.¹²⁰

Historically, it appears that the Supreme Court of Virginia often dismissed habeas petitions with little discussion of the actual claims presented. In the 1997 case *Goins v. Warden*, for instance, the Court dismissed all of the petitioner’s habeas claims in a two-page order.¹²¹ Claims that were discussed in the order were referred to in a brief description, then summarily dismissed.¹²² For example, the petitioner’s ineffective assistance of counsel claims were found to have “no merit” and dismissed following a citation to *Strickland v. Washington*, the seminal U.S. Supreme Court opinion of ineffective assistance of counsel.¹²³ In recent years, the Supreme Court of Virginia has issued more detailed orders when dismissing habeas petitions in death penalty cases. These orders typically explain the legal reasoning behind the Court’s decision.¹²⁴ When deciding questions of fact, however, the Court’s orders often have not fully explained the bases for their findings. As discussed in Protocol #1, the Supreme Court of Virginia often relies on the witness affidavits provided by the parties to make findings of fact in capital state habeas cases, rather than ordering the trial court to hold an evidentiary hearing.¹²⁵ When the affidavits of the parties’ witnesses conflict, the Court will often choose which version of events it finds to be more believable without conducting further inquiry.¹²⁶

Conclusion

In recent orders, the Supreme Court of Virginia has discussed the inmate’s claims individually and explained the legal rationale for its dispositions. However, the Court’s explanation of its

¹¹⁸ See *VSB Indigent Defense Task Force Requests Comments for Proposed Amendments to Virginia Supreme Court Rule 3A:11*, VA. STATE BAR, <http://www.vsb.org/docs/prop-rule-3A11-102612.pdf> (last visited July 23, 2013). It does not appear, however, that the proposed rule change addresses discovery in state habeas proceedings.

¹¹⁹ VA. CODE ANN. § 8.01-654(B)(5) (2013).

¹²⁰ See *id.* In addition, it is unclear from the statute whether this requirement only applies to the circuit court’s findings in a non-capital state habeas proceeding, or if it applies to the Supreme Court of Virginia as well. *Id.*

¹²¹ *Goins v. Warden*, No. 962477 (Va. May 5, 1997) (on file with author).

¹²² *Id.*

¹²³ *Id.*

¹²⁴ See, e.g., *Porter v. Warden*, 722 S.E.2d 534 (Va. 2012).

¹²⁵ See *supra* notes 60–64 and accompanying text.

¹²⁶ *Id.*

factual findings remains quite limited, often relying on one party's affidavit when issues of fact are in dispute. Thus, Virginia is in partial compliance with Protocol #4.

Recommendation

The Assessment Team reemphasizes that Virginia should adopt the recommendations in Protocols #1, #2, and #3 of this Chapter to permit adequate development and judicial consideration of all claims through a more robust process in state habeas cases. This will also better equip the Supreme Court of Virginia to fully explain the findings of fact and conclusions of law in its decisions.

E. Protocol #5

On the initial state post-conviction application, state post-conviction courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not preserved properly at trial or on appeal.

Protocol #5 is not applicable to Virginia.

The Supreme Court of Virginia has original jurisdiction over all state habeas proceedings in death penalty cases. As such, the Assessment Team will examine the court's application of a knowing, understanding, and voluntary standard to waivers of constitutional error in state habeas cases under Protocol #6, below.

F. Protocol #6

When deciding post-conviction claims on appeal, state appellate courts should apply a “knowing, understanding and voluntary” standard for waivers of claims of constitutional error not raised properly at trial or on appeal and should liberally apply a plain error rule with respect to errors of state law in capital cases.

Waiver of Claims in State Habeas Proceedings

Virginia places strict limits on the types of claims that are reviewable in state habeas proceedings. The Supreme Court of Virginia has repeatedly held that claims of trial error that could have been raised at trial and on direct appeal are “not cognizable in a petition for a writ of habeas corpus.”¹²⁷ This rule bars the Court from considering any trial error claims during state habeas proceedings, irrespective of whether the claim was actually raised at trial or on direct appeal.¹²⁸ The Court has held, for instance, that allegations of error related to indictment defects,¹²⁹ jury selection,¹³⁰ and admissibility of evidence are claims of trial error that cannot be

¹²⁷ *Teleguz v. Warden*, 688 S.E.2d 865, 872 (Va. 2010) (citing *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974)).

¹²⁸ *See Slayton*, 205 S.E.2d at 682 (“A petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error.”).

¹²⁹ *Morrisette v. Warden*, 613 S.E.2d 551, 554 (Va. 2005).

¹³⁰ *Teleguz*, 688 S.E.2d at 874.

raised in habeas proceedings.¹³¹ Thus, the Court will not apply any standard for waivers of claims not properly raised at trial or on appeal, as these types of claims will never be considered in state habeas proceedings under any circumstances.

The Supreme Court of Virginia has also held that claims of actual innocence cannot be considered in state habeas proceedings.¹³² Under this rule, even an inmate with conclusive proof of innocence would not be able to have his/her claim reviewed by the Court.¹³³ While Virginia has enacted statutes that allow an inmate to establish his/her innocence in court by other means, these procedures are limited to cases in which the inmate can prove his/her innocence through biological evidence testing¹³⁴ and to cases in which the inmate did not plead guilty at trial.¹³⁵

Waiver in Direct Appeal Proceedings¹³⁶

Virginia also places strict procedural limitations on the types of claims that can be considered on direct appeal. The Supreme Court of Virginia will not consider an alleged trial error on direct appeal “unless an objection was stated with reasonable certainty at the time of the ruling [by the trial court], except for good cause shown or to enable [the Supreme] Court to attain the ends of justice.”¹³⁷

This rule requires the defendant to properly preserve a trial error for appeal by contemporaneously objecting to the alleged error when it occurs at trial and stating the specific legal grounds for the objection.¹³⁸ Otherwise, the trial error is considered waived. In one death penalty case, for instance, the Supreme Court of Virginia declined to consider fifteen trial errors alleged by the defendant on direct appeal.¹³⁹ The defendant had represented himself at trial,¹⁴⁰ and was likely unaware of the objection procedure and the legal bases for objections. In fact, in five of the fifteen alleged errors, the defendant raised an objection at the time the alleged trial error was made, but he failed to state the proper grounds for the objection; thus, the Court held that the claims were waived, and they were never considered on the merits.¹⁴¹

In some cases, a defendant has been found to have waived a claim of trial error even when s/he did properly object at trial. In *Rogers v. Commonwealth*, a capital case in which the jury did not impose the death penalty, the defendant argued on direct appeal that the prosecution had made

¹³¹ *Slayton*, 205 S.E.2d at 682.

¹³² *Lovitt v. Warden*, 585 S.E.2d 801, 827 (Va. 2003) (declining to consider death row inmate’s innocence claim, stating that his guilt was determined at trial).

¹³³ *See id.*

¹³⁴ VA. CODE ANN. § 19.2-327.1(A) (2013). For further discussion of Virginia’s biological evidence testing statute, see Chapter Three on Collection, Preservation, and Testing of DNA and Other Types of Evidence.

¹³⁵ VA. CODE ANN. § 19.2-327.10 (2013).

¹³⁶ While this issue may be more appropriately addressed under Chapter Seven on Direct Appeal Proceedings, Chapter Seven addresses only the issue of meaningful proportionality review of a death sentence on appeal.

¹³⁷ VA. SUP. CT. R. 5:25.

¹³⁸ *O’Dell v. Commonwealth*, 364 S.E.2d 491, 494 (Va. 1988).

¹³⁹ *Id.* at 494–95.

¹⁴⁰ *Id.* at 494.

¹⁴¹ *Id.* at 495.

several improper statements during closing arguments regarding the victim's time of death.¹⁴² Although trial counsel objected to the argument and moved for a mistrial, the Court of Appeals of Virginia dismissed the claims as procedurally defaulted.¹⁴³ The court held that because the motion for mistrial was not made contemporaneously with the objection, the claim of error was not properly preserved.¹⁴⁴ The function of a strict procedural rule such as this is unclear. Litigants are required to object at trial to give the trial court the first opportunity to correct an error, thereby promoting judicial economy and preventing litigants from intentionally ignoring errors. Additional requirements, such as those described in *Rogers*, elevate procedure over substance.

The Virginia Supreme Court Rules permit an alleged error that is not properly preserved to be considered on direct appeal “for good cause shown or to enable the Court to attain the ends of justice;”¹⁴⁵ however, this exception has rarely been applied. The Court has held that “[w]hether the ends of justice provision should be applied involves two questions: (1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a grave injustice.”¹⁴⁶ While the meaning of “grave injustice” is unclear, it appears that, based on a review of Virginia appellate cases, the Court has never reversed a death penalty case on direct appeal for an error that was not properly preserved at trial. The “ends of justice” exception has rarely been applied in non-capital cases, as well. In recent cases, Virginia courts have applied the exception when the prison term imposed on the defendant was several years longer than the maximum sentence permitted by law,¹⁴⁷ when the “the evidence clearly and affirmatively show[ed] that an element of [grand larceny] . . . did not occur,”¹⁴⁸ and when a trial court revoked the defendant's suspended sentences despite no longer having the statutory authority to do so.¹⁴⁹ Thus, it appears that the exception applies only in cases in which the defendant's conviction or sentence is plainly in violation of Virginia law.

Conclusion

The Supreme Court of Virginia—on direct appeal and in state habeas proceedings—has restricted its review of errors that were not properly preserved at trial. Thus, Virginia is not in compliance with Protocol #6.

Recommendation

Some procedural default rules are necessary to ensure that, in most circumstances, the lower court had an opportunity to rule on an alleged error before it is reviewed by a court of appeal.

¹⁴² *Rogers v. Pearson*, No. 1:11CV1281, 2012 WL 3691085, at *10 (E.D. Va. Aug. 27, 2012). The cited case is the subsequent federal habeas petition, which references the Court of Appeals of Virginia's opinion on direct appeal. *See id.* The Court of Appeals opinion was not published.

¹⁴³ *Id.* (quoting *Rogers v. Commonwealth*, No. 2954-06-4, at *6 (Va. Ct. App. Aug. 9, 2007)).

¹⁴⁴ *Id.* *See also* *Yeatts v. Commonwealth*, 410 S.E.2d 254, 264 (Va. 1991).

¹⁴⁵ VA. SUP. CT. R. 5:25.

¹⁴⁶ *Gheorghiu v. Commonwealth*, 701 S.E.2d 407, 413 (Va. 2010) (citing *Charles v. Commonwealth*, 613 S.E.2d 432, 433 (Va. 2005)).

¹⁴⁷ *Hines v. Commonwealth*, 721 S.E.2d 792, 798 (Va. App. 2012).

¹⁴⁸ *Ali v. Commonwealth*, 701 S.E.2d 64, 68 (Va. 2010).

¹⁴⁹ *Keen v. Commonwealth*, No. 1787-09-3, 2010 WL 2650374, at *3 (Va. App. July 6, 2010).

Virginia's strict procedural default rules, however, make it nearly impossible for any claim not properly raised in the first instance to be reviewed on the merits, irrespective of the strength of the claim or the egregiousness of the alleged error.¹⁵⁰ Defaulted claims would likely not be reviewable in federal court either, where courts are generally prohibited from considering claims of error that were not reviewed in state court.¹⁵¹ In a death penalty case, an inmate could be executed without having had several alleged errors reviewed by any court, simply because his/her lawyer failed to properly object to an error at trial.

Virginia must ensure that death row inmates receive full and fair consideration of their claims of error on the merits. Accordingly, on direct appeal, the Supreme Court of Virginia should reexamine the application of the "ends of justice" exception in order to provide meaningful review of unpreserved claims of error in death penalty appeals.¹⁵²

G. Protocol #7

The states should establish post-conviction defense organizations, similar in nature to the capital resource centers defunded by Congress in 1996, to represent capital defendants in state post-conviction, federal habeas corpus, and clemency proceedings.

Protocol #8

For state post-conviction proceedings, the state should appoint counsel whose qualifications are consistent with the recommendations in the *ABA Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases*. The state should compensate appointed counsel adequately and, as necessary, provide sufficient funds for investigators and experts.

Representation of Capital State Habeas Petitioners

Virginia statutory law provides that, within thirty days of the date an inmate's death sentence is affirmed on direct appeal, the trial court must appoint counsel to represent the inmate in state habeas proceedings.¹⁵³ Although that statute is unclear regarding the number of attorneys that must be appointed, courts have regularly appointed two attorneys in recent years.¹⁵⁴ Virginia,

¹⁵⁰ The 2002 Joint Legislative Audit and review Commission similarly found "that appellate review for death row inmates in Virginia has been expedited by the courts and that many claims raised by these inmates are not considered on their merits through application of the doctrine of procedural default." J. LEGIS. AUDIT & REV. COMM'N, VA. ASSEMBLY: REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT 78 (2002).

¹⁵¹ 28 U.S.C. § 2254(b)(1).

¹⁵² See, e.g., KY. R. CRIM. P. 10.26 ("A palpable error which affects the substantial rights of a party may be considered by the court on motion for a new trial or by an appellate court on appeal, even though insufficiently raised or preserved for review, and appropriate relief may be granted upon a determination that manifest injustice has resulted from the error."); *Perdue v. Commonwealth*, 916 S.W.2d 148, 164 (Ky. 1995) (finding reversible error due to prosecutor's argument during the penalty phase of a capital case, notwithstanding defense counsel's failure to object).

¹⁵³ VA. CODE ANN. § 19.2-163.7 (2013).

¹⁵⁴ VCRRC Interview, *supra* note 8.

however, does not guarantee the assistance of two qualified counsel and ancillary and expert assistance through clemency proceedings in Virginia death penalty cases.

All but one Virginia death row inmate with a pending state habeas, federal habeas, or clemency claim is represented by one attorney from Virginia Capital Representation Resource Center (VCRRC).¹⁵⁵ VCRRC, founded in 1992, is a non-profit law firm dedicated to representing Virginia's death row inmates in post-conviction and clemency proceedings.¹⁵⁶ In addition to the VCRRC attorney, the trial court will typically appoint a private bar attorney as co-counsel.¹⁵⁷ As with the VCRRC attorney, this lawyer will usually continue to represent the inmate through federal habeas and state clemency proceedings.¹⁵⁸

The Assessment Team also notes that, in light of the U.S. Supreme Court's 2012 decision in *Martinez v. Ryan*, VCRRC attorneys may be unable to effectively represent death row inmates in all aspects of both state and federal habeas proceedings.¹⁵⁹ In *Martinez*, the Court held that an inmate may raise procedurally defaulted ineffective assistance of counsel claims in federal habeas proceedings if the attorney who failed to raise the claim in state post-conviction proceedings also was ineffective.¹⁶⁰

Funding of State Habeas Counsel

While VCRRC is not a state agency, it receives most of its funding from the Virginia State Bar.¹⁶¹ The State Bar, in turn, receives funding to support VCRRC from the Commonwealth's annual budget.¹⁶² In exchange for this funding, VCRRC has not charged the Commonwealth for work and expenses incurred during the representation of Virginia death row inmates in state habeas proceedings.¹⁶³ VCRRC also receives payment if appointed by the federal courts to represent indigent petitioners in federal habeas proceedings.¹⁶⁴

Private counsel appointed to represent death row inmates during state habeas proceedings are compensated at a rate determined by the court.¹⁶⁵ The hourly rate available to counsel cannot exceed \$200.00 per hour for in-court and \$150.00 for out-of-court service and judges may, in

¹⁵⁵ *Id.* The one remaining inmate is represented by a former VCRRC attorney who continued to represent the inmate after she left VCRRC. *Id.* Although VCRRC currently represent clients in state and federal habeas proceedings, a 2012 U.S. Supreme Court decision may require different attorneys to be appointed to represent inmates in federal habeas proceedings. *Id.* In *Martinez v. Ryan*, the U.S. Supreme Court held that an inmate may raise procedurally defaulted ineffective assistance of counsel claims in federal habeas proceedings if the attorney who failed to raise the claim in state post-conviction proceedings was ineffective. *Martinez v. Ryan*, 132 S.Ct. 1309, 1320 (2012).

¹⁵⁶ VCRRC Interview, *supra* note 8.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ VCRRC Email, *supra* note 45.

¹⁶⁰ *Martinez v. Ryan*, 132 S.Ct. 1309, 1315 (2012).

¹⁶¹ VCRRC Interview, *supra* note 8.

¹⁶² *Id.*

¹⁶³ *Id.*

¹⁶⁴ *Id.*; VCRRC Email, *supra* note 45.

¹⁶⁵ VA. CODE ANN. § 19.2-163(2) (2011).

their discretion, set lower hourly rates on a case-by-case basis.¹⁶⁶ Courts also approve the number of hours and the amount of funds available for reimbursement in capital representation.¹⁶⁷

*Qualifications of State Habeas Counsel*¹⁶⁸

Virginia has adopted statutory qualifications for court-appointed counsel in capital cases, including counsel representing death row inmates during state habeas corpus proceedings.¹⁶⁹ The standards, however, fall short of those recommended by the *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines).

Attorneys from the VCRRC, who work almost exclusively on state and federal capital habeas cases in Virginia, have more capital experience and training than is required by Virginia law. However, VCRRC has not enacted any formal qualification or training standards for its attorneys.¹⁷⁰ Moreover, typically only one of the two attorneys appointed to represent a death row inmate in state habeas proceedings is employed with VCRRC.¹⁷¹ Thus, irrespective of a VCRRC attorney's expertise, there is a significant risk that an attorney who does not qualify under the ABA Guidelines as possessing the relevant skills and commitment to zealous advocacy will be appointed to represent a capital habeas petitioner.

When such counsel undertake representation, it increases the risk that a potential claim will be ignored or that a procedural error will cause an inmate to default on his/her claims. In the case of Lonnie Weeks, for instance, Weeks's appointed attorney erroneously filed the initial state habeas petition in the circuit court, not knowing that the Supreme Court of Virginia had exclusive jurisdiction over state habeas proceedings in death penalty cases.¹⁷² While the attorney eventually filed a petition with the Supreme Court, it was deemed untimely.¹⁷³ As a result, Weeks's ineffective assistance of trial counsel claims were procedurally defaulted, and thus never considered on the merits in state or federal court.¹⁷⁴

Availability and Funding of Mitigation Specialists, Investigators, and Experts¹⁷⁵

Since the Supreme Court of Virginia was granted exclusive jurisdiction over state habeas proceedings in death penalty cases in 1995, no court has approved funding to support mitigation, investigative, or expert services in a death row inmate's case.¹⁷⁶ As with the power to grant

¹⁶⁶ *Id.*; Telephone Interview by Paula Shapiro with John Rickman, Dir. of Fiscal Servs., and Mary Gilbert, Exec. Sec'y Office, Sup. Ct. of Va. (Apr. 20, 2012) (on file with author).

¹⁶⁷ Interview with John Rickman and Mary Gilbert, *supra* note 166. See Chapter Six on Defense Services for a full discussion of compensation of capital defense counsel in Virginia.

¹⁶⁸ For further discussion of the qualifications of capital defense counsel, see Chapter Six on Defense Services.

¹⁶⁹ VA. CODE ANN. § 19.2-163.8(A)–(E) (2013).

¹⁷⁰ VCRRC Survey Response, *supra* note 41, at 4.

¹⁷¹ VCRRC Interview, *supra* note 8.

¹⁷² Weeks v. Angelone, 176 F.3d 249, 257 (4th Cir. 1999).

¹⁷³ *Id.*

¹⁷⁴ *Id.* at 272–73.

¹⁷⁵ For further discussion on funding and resources for capital defense counsel, see Chapter Six on Defense Services.

¹⁷⁶ VCRRC Survey Response, *supra* note 41, at 7.

discovery, it appears that there is no court or other entity in Virginia with the jurisdiction or authority to approve such funding. The Supreme Court of Virginia routinely denies requests for expert funding in its final order denying state habeas relief.¹⁷⁷ The circuit courts, which appoint counsel in capital state habeas proceedings, do not have the statutory authority to perform any other functions in these proceedings, and thus cannot appoint mitigation specialists, investigators, or experts.¹⁷⁸

Accordingly, VCRRC itself must cover the costs associated with the hiring of mitigation specialists, investigators, and experts in capital state habeas cases.¹⁷⁹ VCRRC's budget, however, is not sufficient to cover the costs associated with hiring all needed ancillary services in capital habeas cases. The organization employs one staff mitigation specialist who also serves as the investigator for all of VCRRC's pending cases, which include nearly all Virginia capital cases currently in state habeas, federal habeas, and clemency proceedings.¹⁸⁰ VCRRC does not have any other investigators or experts on staff.¹⁸¹ When expert services are necessary, VCRRC often requests the expert, such as a mental health specialist, to perform his/her services pro bono.¹⁸²

The lack of available investigative expert services makes it is extremely difficult for a death row inmate to discover and develop many state habeas claims, which often rely on complex facts that are not readily found in the trial record. For instance, in the case of Michael Wayne Williams, the prosecutor improperly failed to disclose juror bias: the forewoman had been married to a deputy sheriff, who was a prosecution witness in the case.¹⁸³ Moreover, the elected Commonwealth's Attorney had represented the forewoman in divorce proceedings.¹⁸⁴ Williams was sentenced to death at trial, and Williams's counsel did not discover the evidence of juror bias until federal habeas proceedings.¹⁸⁵ In its habeas order, the federal district court held that Williams's inability to obtain expert assistance in state habeas proceedings effectively prevented him from developing his claims.¹⁸⁶ The court noted that "[t]he state courts [] denied Williams the opportunity to develop the necessary facts by denying all of Williams' requests for discovery, expert assistance, and investigative funds, and by refusing to hold any hearing to take evidence outside of the trial record."¹⁸⁷ Although the federal district court denied Williams's habeas petition for procedural reasons,¹⁸⁸ the U.S. Supreme Court later remanded the case for a hearing on the issue, noting that counsel's inability to obtain an investigator in state habeas proceedings

¹⁷⁷ VCRRC Interview, *supra* note 8. See, e.g., *Juniper v. Warden*, 707 S.E.2d 290, 311 (Va. 2011) ("Upon consideration thereof, petitioner's . . . 'motion for funds to hire a psychologist or psychiatrist,' [and] 'motions for appointment of a DNA expert . . . ,' are denied"); *Teleguz v. Warden*, 688 S.E.2d 865, 879 (Va. 2010) ("Upon consideration whereof, petitioner's motions for the appointment of a risk assessment expert, [and] for the appointment of a cultural expert . . . are denied.")

¹⁷⁸ See VA. CODE ANN. § 19.2-163.7 (2013).

¹⁷⁹ VCRRC Survey Response, *supra* note 41, at 7.

¹⁸⁰ *Id.* at 1.

¹⁸¹ *Id.*

¹⁸² VCRRC Interview, *supra* note 8.

¹⁸³ Frank Green, *Miscues Rule out Execution for Killer*, RICHMOND TIMES-DISPATCH, April 21, 2003, at A1.

¹⁸⁴ *Id.*

¹⁸⁵ *Id.*

¹⁸⁶ See *Williams v. Netherland*, 6 F. Supp. 2d 545, 547 (E.D. Va. 1998).

¹⁸⁷ *Id.*

¹⁸⁸ See *id.*

“depriv[ed] [Williams] of a further opportunity to investigate” his claims.¹⁸⁹ Following the federal district court hearing, Williams was granted a new trial.¹⁹⁰ He was subsequently sentenced to life in prison pursuant to a plea agreement with the prosecution.¹⁹¹

This lack of funding for mitigation specialists, investigators, and experts may be viewed as a cost saving measure, but it likely increases the total cost of litigation. When defense attorneys do not have adequate access to mitigation specialists and investigators, they are often forced to conduct the investigations themselves, at a much higher hourly rate. This also creates a potentially time-consuming conflict of interest, as an attorney who served as an investigator in his/her own case would be unable to testify without withdrawing from representation, thereby requiring the court to find a replacement attorney. Furthermore, as demonstrated by the Williams case, denial of funding in state court may simply delay the discovery of an error until federal habeas proceedings, at which point the state must correct an error it could have resolved much earlier had adequate resources been provided.

Conclusion

The Commonwealth of Virginia provides some funding to VCRRC, a non-profit law firm that represents death row inmates in state habeas, federal habeas, and clemency proceedings. However, while Virginia has established some qualifications for counsel in capital state habeas proceedings, these requirements are not consistent with the *ABA Guidelines*. Moreover, Virginia does not allow for the appointment of mitigation specialists, investigators, or experts in capital state habeas proceedings under any circumstances. VCRRC does not receive adequate funding to hire support mitigation specialists, investigators, and experts. Accordingly, Virginia is in partial compliance with Protocols #7 and #8.

Recommendation

The Assessment Team applauds Virginia for providing some funding to VCRRC to represent death row inmates in state habeas, federal habeas, and clemency proceedings. Because state and federal habeas claims in death penalty cases are often complex and require a special understanding of death penalty law, funding an organization specifically dedicated to capital post-conviction representation helps to ensure that death row inmates’ claims are fully researched and developed. In order to improve the quality of post-conviction representation in Virginia, however, the Assessment Team recommends that Virginia provide funding so that VCRRC attorneys and other state habeas attorneys can hire the mitigation experts, investigators, and experts needed to fully develop and present their clients’ claims.

Most importantly, the Assessment Team recommends that Virginia adopt a mechanism that allows for the appointment of mitigation specialists, investigators, and experts in capital state habeas cases. Furthermore, as with the need to permit discovery in capital habeas cases, this would require Virginia law to grant a court jurisdiction over capital habeas cases before the inmate’s petition is filed. Under Virginia’s current statute, expert and ancillary services cannot

¹⁸⁹ Williams v. Taylor, 529 U.S. 420, 442 (2000).

¹⁹⁰ Williams v. Netherland, 181 F. Supp. 2d 604, 619 (E.D. Va. 2002).

¹⁹¹ Green, *supra* note 183.

be provided because no court is empowered to grant them. Without the assistance of these ancillary services, state habeas claims are likely to go overlooked and underdeveloped in cases where the petitioner is to be executed. Counsel cannot be expected to adequately present a claim related to mental illness or mental retardation, for instance, without the assistance of an expert psychologist or psychiatrist.

In addition, as discussed in Chapter Six on Defense Services, the Team recommends that Virginia adopt qualification standards consistent with the *ABA Guidelines* for counsel appointed to represent death row inmates in state habeas proceedings.

H. Protocol #9

State courts should give full retroactive effect to U.S. Supreme Court decisions in all proceedings, including second and successive post-conviction proceedings, and should consider in such proceedings the decisions of federal appeals and district courts.

Retroactivity in Initial State Habeas Proceedings

The Supreme Court of Virginia may consider the retroactivity of a U.S. Supreme Court decision that is decided after a defendant receives a death sentence but before his/her state habeas petition is filed.¹⁹² In such cases, the Supreme Court of Virginia will apply the retroactivity test adopted by the U.S. Supreme Court in *Teague v. Lane*.¹⁹³ Under the *Teague* standard, a new U.S. Supreme Court decision regarding constitutional criminal procedure will only apply retroactively if (1) the decision places “certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe”; or (2) the decision involves “those procedures that . . . are ‘implicit in the concept of ordered liberty.’”¹⁹⁴

In practice, however, it appears that the Supreme Court of Virginia has only once considered the retroactivity of a U.S. Supreme Court decision since the death penalty was reintroduced in 1976 through 2012. In *Mueller v. Murray*, a death row inmate argued that the U.S. Supreme Court’s decision in *Simmons v. South Carolina*, which was decided after he received the death penalty but before his state habeas proceedings commenced, should retroactively apply to his case.¹⁹⁵ In *Simmons*, the U.S. Supreme Court held that when the defendant’s “future dangerousness” is at issue, “and the only available alternative sentence to death is life imprisonment without possibility of parole, due process entitles the defendant to inform the capital sentencing jury . . . that he is parole ineligible.”¹⁹⁶

¹⁹² See *Mueller v. Murray*, 478 S.E.2d 542 (Va. 1996). *Mueller* was decided under an older state habeas procedure, when the Supreme Court of Virginia did not have exclusive jurisdiction over state habeas petitions in death penalty cases. However, *Mueller* is the most recent case in which the Supreme Court of Virginia considered retroactivity.

¹⁹³ *Id.* at 546 (citing *Teague v. Lane*, 489 U.S. 288 (1989)). *Teague*, however, is not binding on state courts, which may apply a more liberal retroactivity standard. See *State v. Whitfield*, 107 S.W.3d 253, 267 (Mo. banc 2003) (rejecting the application of the *Teague* standard in Missouri courts and applying a more liberal retroactivity standard).

¹⁹⁴ *Teague*, 489 U.S. at 311 (internal quotations omitted).

¹⁹⁵ *Mueller*, 478 S.E.2d at 545.

¹⁹⁶ *Simmons v. South Carolina*, 512 U.S. 154, 178 (1994).

The Supreme Court of Virginia, however, held that the *Simmons* decision did not apply retroactively.¹⁹⁷ The Court held that the first *Teague* exception did not apply to Mueller's case "because *Simmons* does not place any conduct outside the scope of the criminal law, nor does it shield a particular class of persons from the imposition of the death penalty."¹⁹⁸ With respect to the second exception, the Court held that "the rule in *Simmons* is [not] such a groundbreaking rule 'implicit in the concept of ordered liberty.'"¹⁹⁹ In its decision, the Supreme Court of Virginia considered a similar case in which the U.S. Court of Appeals for the Fourth Circuit refused to apply the *Simmons* rule retroactively.²⁰⁰

Only those Virginia defendants tried after the *Simmons* decision was announced are entitled to a jury instruction stating the capital defendant is not parole eligible. In *Yarbrough v. Commonwealth*, for instance, a case in which the defendant was tried *after* the *Simmons* decision, the Supreme Court of Virginia reversed the death sentence of a defendant because the trial court failed to instruct the jury that he would not be parole eligible.²⁰¹ Thus, because of a rule prohibiting the retroactive application of a court decision, the cases of two Virginia death row inmates with identical substantive claims were decided differently.

Retroactivity in Second and Successive State Habeas Proceedings

As discussed under Protocol #10, below, Virginia does not permit second or successive state habeas proceedings in death penalty cases. Accordingly, the Supreme Court of Virginia has never considered, under any circumstances, the retroactivity of U.S. Supreme Court decisions arising after the state habeas proceedings are final. In 2003, for example, the U.S. Supreme Court held in *Atkins v. Virginia* that the death penalty is unconstitutional as applied to mentally retarded persons.²⁰² Despite this clear decision from the U.S. Supreme Court, however, mentally retarded death row inmates in Virginia whose state habeas claims had already been exhausted could not obtain relief in Virginia courts and instead had to rely on the federal courts.²⁰³

Conclusion

Although the Supreme Court of Virginia will *consider* giving retroactive effect to new U.S. Supreme Court cases that are decided before a death row files his/her state habeas petition, it has never retroactively applied any such cases in practice. Moreover, because Virginia law does not permit second or successive state habeas petitions in death penalty cases, the Supreme Court of Virginia has never considered the retroactivity of the large number of U.S. Supreme Court cases that are decided between the time a death row inmate's initial state habeas petition is filed and the date of his/her execution. Thus, Virginia is in partial compliance with Protocol #9.

¹⁹⁷ *Mueller*, 478 S.E.2d at 546.

¹⁹⁸ *Id.* at 549.

¹⁹⁹ *Id.*

²⁰⁰ *Id.* at 549 (citing *O'Dell v. Netherland*, 95 F.3d 1214, 1238 (4th Cir. 1996)).

²⁰¹ *Yarbrough v. Commonwealth*, 519 S.E. 2d 602, 616–17 (Va. 1999).

²⁰² *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁰³ VA. CODE ANN. § 8.01-654.2 (2013).

I. Protocol #10

State courts should permit second and successive post-conviction proceedings in capital cases where counsels' omissions or intervening court decisions resulted in possibly meritorious claims not previously being raised, factually or legally developed, or accepted as legally valid.

There are no Virginia statutes, rules, or court decisions that allow for second or successive state habeas petitions to be considered.²⁰⁴ In *Hawks v. Cox*, the Supreme Court of Virginia held that successive habeas corpus petitions were prohibited “[a]bsent a change of circumstances” such as a “new constitutional mandate or change in the law.”²⁰⁵ While this decision would appear to allow successive state habeas petitions in certain instances, subsequent statutorily-imposed filings deadlines for capital habeas cases effectively prohibit second or successive habeas petitions when the death penalty is imposed.²⁰⁶

Virginia law now provides that “[a]ny [state habeas] judgment entered of record shall be conclusive, unless the same be reversed, except that the petitioner shall not be precluded from bringing the same matter in question in an action for false imprisonment.”²⁰⁷ For instance, after the U.S. Supreme Court held the death penalty to be unconstitutional as applied to mentally

²⁰⁴ The Supreme Court of Virginia previously recognized one exception that permitted a successive habeas petition to be considered in a capital case. In cases in which a juvenile was sentenced to death, the Court held that an inmate would be entitled to relief in a successive petition if the inmate could demonstrate that the trial court never had jurisdiction over the case because “attempts had not been made to notify both of [his/her] parents of his[her] arrest, as [] required under state law.” Matthew Dolan, *Seven-Year Murder Case Saga Draws to Close with Guilty Plea*, VA. PILOT & LEDGER-STAR, Nov. 29, 2001, at A1; *Jackson v. Warden*, 529 S.E.2d 587, 587 (Va. 2000). In a 2001 case, however, the Supreme Court of Virginia abrogated this exception. *Nelson v. Warden*, 552 S.E.2d 73, 78 (Va. 2001). The statute in question was subsequently amended to require only one parent to be notified of a juvenile’s arrest. VA. CODE ANN. § 16.1-263(A) (2013). Finally, in 2005, the U.S. Supreme Court held that it unconstitutional to impose capital punishment on persons who were under the age of eighteen when the crime was committed. *Roper v. Simmons*, 543 U.S. 551 (2005).

²⁰⁵ *Hawks v. Cox*, 175 S.E.2d 271, 274 (Va. 1970).

²⁰⁶ See, e.g., VA. CODE ANN. § 8.01-654.1 (2013) (providing that the Supreme Court of Virginia may consider a habeas petition only if it is filed “within 120 days following appointment . . . of counsel to represent him.”). If counsel are not appointed, the death row inmate is also prohibited from filing a second or successive state habeas petition:

No petition for a writ of habeas corpus filed by a prisoner held under a sentence of death shall be considered unless it is filed within sixty days after the earliest of: (i) denial by the United States Supreme Court of a petition for a writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, (ii) a decision by the United States Supreme Court affirming imposition of the sentence of death when such decision is in a case resulting from a granted writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, or (iii) the expiration of the period for filing a timely petition for certiorari without a petition being filed.

VA. CODE ANN. § 8.01-654.1 (2013). Because Virginia statutory law provides for automatic appointment of counsel, however, it is unclear when this provision would apply. See VA. CODE ANN. § 19.2-163.7 (2012) (stating that “the court *shall* . . . appoint counsel” in capital state habeas cases) (emphasis added).

²⁰⁷ VA. CODE ANN. § 8.01-663 (2013). Virginia statute now provides that the Supreme Court of Virginia may consider a habeas petition only if it is filed “within 120 days following appointment . . . of counsel to represent him.” VA. CODE ANN. § 8.01-654.1 (2013). Counsel may be appointed to represent a death row inmate only once, within thirty days after the inmate’s death sentence is affirmed by the Supreme Court of Virginia on direct appeal. VA. CODE ANN. § 19.2-163.7 (2013).

retarded offenders,²⁰⁸ Virginia enacted a statute that provided the procedure for death-sentenced defendants and inmates to present claims of mental retardation.²⁰⁹ While the statute allowed an inmate whose direct appeal or habeas petition was pending at the time the statute was enacted to file for relief, the statute further provides that if the inmate “has completed both a direct appeal and a [state] habeas corpus proceeding . . . , he shall not be entitled to file any further habeas petitions in the Supreme Court [of Virginia] and his sole remedy shall lie in federal court.”²¹⁰

Conclusion

Virginia law does not permit second or successive state habeas petitions in death penalty cases under any circumstances. Accordingly, Virginia is not in compliance with Protocol #10.

Recommendation

The Assessment Team recognizes that some procedural restrictions on habeas petitioners can prevent unnecessary delay caused by the filing of frivolous claims. Courts should not be required to expend time and resources by reconsidering claims that have already been fully litigated. As Virginia itself has recognized in *non*-capital habeas cases, however, some exceptions are necessary to ensure that, for instance, an inmate is able to litigate a claim that was not recognized under the law when his/her original habeas petition was filed.²¹¹ Death row inmates, who have received the most severe punishment permitted under the law should, at the very least, be afforded the same procedural protections as non-capital offenders.

The Virginia Assessment Team recommends that the Commonwealth enact a rule or law permitting second and successive post-conviction proceedings in cases where there is, as the Supreme Court of Virginia previously recognized in *Hawks v. Cox*, a change in circumstances such as a new constitutional mandate or change in the law.²¹² This narrow exception will ensure that death row inmates receive full consideration of their claims without burdening the Supreme Court of Virginia with redundant petitions. Such a provision would also better ensure that claims based on new constitutional procedural and substantive rights are not denied to some petitioners while being made available to others.

J. Protocol #11

In post-conviction proceedings, state courts should apply the harmless error standard of *Chapman v. California*, 386 U.S. 18 (1967), which requires the prosecution to show that a constitutional error is harmless beyond a reasonable doubt.

In *Chapman v. California*, the U.S. Supreme Court held that “before a federal constitutional error can be held harmless, the [appellate] court must be able to declare a belief that it was harmless

²⁰⁸ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁰⁹ VA. CODE ANN. § 8.01-654.2 (2013).

²¹⁰ *Id.*

²¹¹ *Hawks v. Cox*, 175 S.E.2d 271, 274 (Va. 1970).

²¹² See *supra* note 204 and accompanying text.

beyond a reasonable doubt.”²¹³ Under this standard, the prosecution must “prove that there was no injury” to the inmate as a result of the error.²¹⁴

The Supreme Court of Virginia applies the *Chapman* standard to alleged constitutional trial errors on direct appeal.²¹⁵ However, the Court does not consider trial errors in state habeas proceedings;²¹⁶ as such, it has not applied the *Chapman* standard in these proceedings. Claims based on ineffective assistance of counsel and the prosecution’s failure to disclose exculpatory evidence—both constitutional errors—form the majority of alleged errors considered by the Supreme Court of Virginia in state habeas proceedings. The Court does not apply the *Chapman* standard to either of these types of errors. In fact, both claims place the burden on the inmate to prove that s/he was prejudiced by the error.

With respect to claims of ineffective assistance of counsel, the Court will only grant relief if the inmate can prove that, as a result of counsel’s inadequate performance, s/he “suffered prejudice sufficient to undermine confidence in the outcome” of the proceeding.²¹⁷ For instance, in *Yarbrough v. Warden*, death row inmate Yarbrough alleged in his state habeas petition that his trial counsel was ineffective for failing to conduct a mitigation investigation into his family background.²¹⁸ Trial counsel had failed to discover and present to the jury that, among other things, Yarbrough’s mother was a crack cocaine addict who had often neglected her children.²¹⁹ In state habeas proceedings, the Supreme Court of Virginia held that, irrespective of whether trial counsel’s performance was ineffective, Yarbrough could not prove that “there is a reasonable probability” that the jury would not have sentenced to death had his counsel conducted a proper mitigation investigation.²²⁰ Accordingly, his death sentence was upheld.²²¹

To obtain relief on a claim that the prosecutor failed to disclose exculpatory evidence, the inmate must prove that the undisclosed evidence was “material.”²²² Similar to the ineffective assistance of counsel requirement that counsel’s deficient performance must have prejudiced the inmate; undisclosed evidence will not be deemed material unless the inmate can prove that its nondisclosure “undermine[d] the confidence in the outcome of the trial.”²²³

²¹³ *Chapman v. California*, 386 U.S. 18, 24 (1972).

²¹⁴ *Id.*

²¹⁵ *Lilly v. Commonwealth*, 523 S.E.2d 208, 209 (Va. 1999) (applying the *Chapman* standard to determine whether the admission of codefendant statements in violation of the Sixth Amendment was harmless beyond a reasonable doubt).

²¹⁶ *Teleguz v. Warden*, 688 S.E.2d 865, 872 (Va. 2010) (citing *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974)).

²¹⁷ *Yarbrough v. Warden*, 609 S.E.2d 30, 38 (Va. 2005) (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). While this standard was endorsed by the U.S. Supreme Court in *Strickland*, the Supreme Court of Virginia is not required to adopt this standard.

²¹⁸ *Id.*

²¹⁹ *Id.* at 40.

²²⁰ *Id.*.

²²¹ *Id.*

²²² *Gray v. Warden*, 707 S.E.2d 275, 281 (Va. 2011) (citing *Brady v. Maryland*, 373 U.S. 83, 83 (1983)).

²²³ *Id.*

Conclusion

Virginia does not apply the *Chapman* standard in state habeas proceedings. Accordingly, the Commonwealth is not in compliance with Protocol #11.

K. Protocol #12

During the course of a moratorium, a “blue ribbon” commission should undertake a review of all cases in which individuals have been either wrongfully convicted or wrongfully sentenced to death and should recommend ways to prevent such wrongful results in the future.

Because Recommendation #12 is predicated on the implementation of a moratorium, it is not applicable to Virginia at this time.

CHAPTER NINE

CLEMENCY

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Under a state's constitution or clemency statute, the Governor or entity established to handle clemency matters is empowered to pardon an individual's criminal offense or commute an individual's death sentence. In death penalty cases, the clemency process traditionally was intended to function as a final safeguard to evaluate (1) the fairness and judiciousness of the penalty in the context of the circumstances of the crime and the individual, and (2) whether a person should be put to death. The clemency process can only fulfill this critical function when the exercise of the clemency power is governed by fundamental principles of justice, fairness, and mercy.

The clemency process should provide a safeguard for claims that have not been considered on the merits, including claims of innocence and claims of constitutional deficiency. Clemency also can be a way to review important sentencing issues that were barred in state and federal courts. Because clemency is the final avenue of review available to a death row inmate, the state's use of its clemency power is an important measure of the fairness of the state's justice system as a whole.

While elements of the clemency process, including criteria for filing and considering petitions and inmates' access to counsel, vary significantly among states, some minimal procedural safeguards are constitutionally required. "Judicial intervention might, for example, be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process."¹

From 1976, when the Court authorized states to reinstate capital punishment, through May 2013, clemency has been granted on humanitarian grounds 273 times in twenty-one capital jurisdictions in the United States.² Notably, 167 of these were granted by former Illinois Governor George Ryan in 2003 out of concern that the justice system in Illinois could not ensure that an innocent person would not be executed.³ Another fifteen of these clemency grants occurred in Illinois when Governor Pat Quinn commuted the death sentences of the remaining men on death row to life without parole upon that state's repeal of its death penalty statute in 2011.⁴

Due to restrictions on the judicial review of meritorious claims, the need for a meaningful clemency power is more important than ever. As a result of these restrictions, clemency can be

¹ Ohio Adult Parole Auth. v. Woodard, 523 U.S. 272, 289 (1998) (O'Connor, J., concurring).

² See *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited May 31, 2013). This figure includes states that authorized capital punishment at any time during this period.

³ *Id.* There have been five additional broad grants of clemency.

⁴ 725 ILL. COMP. STAT. 5/119-1 (2011) (amending the Illinois Code of Criminal Procedure to abolish the death penalty); Christopher Wills, *Illinois Abolishes Death Penalty*, WASH. POST, Mar. 10, 2011, at A9.

the state's final opportunity to address miscarriages of justice, even in cases involving actual innocence. A clemency decision-maker may be the only person or body that has the opportunity to evaluate all of the factors bearing on the appropriateness of the conviction and/or death sentence without regard to constraints that may limit a court's or jury's decision-making. Yet as the capital punishment process currently functions in many jurisdictions, meaningful review frequently is not obtained, and clemency too often has not proven to be the critical final check against injustice in the criminal justice system.

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

A. Clemency Decision-Makers

1. Governor of Virginia

The Governor of Virginia has the sole power to grant “reprieves and pardons” or “to commute capital punishment” under Article V, Section 12 of the Virginia Constitution.⁵ The Governor may, but is not required to, request that the Virginia Parole Board (Board) investigate and report to the Governor on any case in which clemency has been requested.⁶ In cases where the Governor has not requested a report and where the Board believes commutation by the Governor would be “proper or in the best interest of the Commonwealth,” the Board may also independently investigate and report its recommendation to the Governor.⁷ In neither case, however, are the Board’s findings binding on the Governor.⁸

If a Governor grants a pardon or commutation, the Virginia Constitution requires that s/he communicate her/his reasons for doing so to the General Assembly.⁹ If s/he denies clemency, there is no requirement that his/her reasons for doing so be communicated. The Governor’s reports to the General Assembly are publicly available through Virginia’s Legislative Information System.¹⁰ Other clemency documents, such as clemency petitions, are considered part of the Governor’s working papers and, therefore, need not be made available to the public.¹¹

⁵ VA. CONST. art. V, § 12. *See also* VA. CODE ANN. § 53.1-229 (2013) (codifying VA. CONST. art. V, § 12). The governor may grant three types of clemency: a simple pardon, a conditional pardon, or an absolute pardon. A simple pardon “is a statement of official forgiveness.” Generally, a person will apply for a simple pardon only after his/her release from prison. *Pardons*, VA SEC’Y OF THE COMMONWEALTH, <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/pardons.cfm> (last visited May 31, 2013). A conditional pardon “is available only to people who are currently incarcerated. It is usually granted for early release and involves certain conditions.” *Id.* An absolute pardon “is rarely granted because it is based on the belief that the petitioner was unjustly convicted and is innocent. An absolute pardon is the only form of executive clemency that would allow [a person] to petition the court to have that conviction removed from [his/her] criminal record.” *Id.*

⁶ VA. CODE ANN. § 53.1-231 (2013).

⁷ *Id.*

⁸ VA. PAROLE BD., VIRGINIA PAROLE BOARD POLICY MANUAL 25 (October 1, 2006), *available at* <http://www.vadoc.state.va.us/vpb/manuals/pb-policymanual-1006.pdf> (noting, “The power to grant pardons, reprieves, and commutations rests exclusively with the governor.”).

⁹ VA. CONST. art. V, § 12. *See, e.g.*, OFFICE OF GOV. ROBERT F. McDONNELL, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. No. 2 (Jan. 17, 2012 through Jan. 16, 2013), *available at* [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/SD22013/\\$file/SD2.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/SD22013/$file/SD2.pdf).

¹⁰ VIRGINIA’S LEGISLATIVE INFO. SYSTEM, <http://leg1.state.va.us/> (last visited June 17, 2013).

¹¹ VA. CODE ANN. § 2.2-3705.7(2) (“‘Working papers’ means those records prepared by or for an above-named public official for his personal or deliberative use.”). Leona D. Jochnowitz, *Public Access To State Clemency Petitions*, 44 NO. 2 CRIM. L. BULL. ART. 2, 16 (2008).

2. Virginia Parole Board¹²

Virginia has authorized the Virginia Parole Board to investigate and report on any request for commutation, pardon, reprieve or remission of a fine or penalty at the request of the Governor.¹³ Alternatively, “[i]n any other case in which it believes action on the part of the Governor is proper or in the best interest of the Commonwealth,” the Board may independently investigate and make a recommendation to the Governor.¹⁴

The Virginia Parole Board consists of up to five members, at least one of whom must be a representative of a victims’ organization or a victim of crime.¹⁵ Board members are appointed by the Governor for staggered terms of four years, subject to confirmation by the General Assembly.¹⁶ The Governor designates one member of the Board as Chairman, who must be a full-time state employee.¹⁷ No more than two other members may be designated as full-time employees of the state.¹⁸ Members of the Board “serve at the pleasure of the Governor.”¹⁹

B. Applying for and Obtaining Clemency

1. Applications for Clemency

While there is no specific application process for those requesting commutation of a death sentence in Virginia, the Governor’s Office provides guidelines for petitioning for conditional and absolute pardons. To petition for a conditional pardon, an inmate or his/her family members or attorney must write a letter to the Governor containing specific information on the petitioner’s identity and procedural history of his/her case. In addition, the petition must contain a complete statement of details for each conviction and an explanation of why the Governor should grant a pardon.²⁰

To apply for an absolute pardon, the inmate must also have entered a plea of not guilty throughout the entire judicial process and must have exhausted all other avenues for relief,

¹² Although the Virginia Assembly abolished parole in 1995, parole is still available to inmates who committed felonies before January 1, 1995. *Community Corrections*, VA. DEP’T OF CORR., <http://www.vadoc.state.va.us/community/> (last visited May 31, 2013) (“Parole was abolished in Virginia for felonies committed on or after January 1, 1995. The parole decision function and supervision is provided to offenders who committed felonies before that date.”).

¹³ VA. CODE ANN. § 53.1-231 (2013); VA. CODE ANN. § 53.1-136(5) (2013) (The Board shall “Make investigations and reports with respect to any commutation of sentence, pardon, reprieve or remission of fine or penalty when requested by the Governor).

¹⁴ VA. CODE ANN. § 53.1-231 (2013).

¹⁵ VA. CODE ANN. § 53.1-134 (2013).

¹⁶ VA. PAROLE BD., VIRGINIA PAROLE BOARD POLICY MANUAL 1 (October 1, 2006) *available at* <http://www.vadoc.state.va.us/vpb/manuals/pb-policymanual-1006.pdf>; VA. CODE ANN. § 53.1-134 (2013).

¹⁷ VA. CODE ANN. § 53.1-135 (2013).

¹⁸ *Id.*

¹⁹ VA. CODE ANN. § 53.1-134 (2013).

²⁰ *Conditional Pardons*, SEC’Y OF THE COMMONWEALTH, <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/conditionalPardon.cfm> (last visited May 31, 2013)

including an appeal to the courts for a Writ of Actual Innocence.²¹ The inmate must show that the court rejected the claim of actual innocence, or explain why an appeal for a Writ of Actual Innocence is not appropriate in his/her case.²²

2. Legal Representation During Clemency

Virginia has no rule, regulation, or law providing counsel to represent death row inmates during clemency proceedings. However, the United States Supreme Court has held that § 3599 of Title 18 of the United States Code permits, although does not require, “federally appointed counsel to represent their clients in state clemency proceedings and entitles them to compensation for that representation.”²³

3. Clemency Decisions

Virginia Governors have announced their decisions to grant or deny clemency in capital cases at various times. For example, Governor McDonnell’s office indicates that it has a policy of notifying inmates of his decision at least five business days before the scheduled execution.²⁴ However, other Governors, such as former Governor Wilder, have waited until the day of the execution before informing the inmate of his decision to grant or deny clemency.²⁵

Since Virginia reinstated the death penalty in 1975, five Governors have granted clemency to eight death row inmates.²⁶ Former Governor Douglas Wilder commuted the sentences of Herbert Russell Bassette, Joseph M. Giarratano, and Earl Washington, Jr.²⁷ Former Governor George Allen commuted the sentences of Joseph Payne and William Aristede Saunders.²⁸ Former Governors James Gilmore, Mark Warner, and Timothy Kaine commuted the death sentences of Calvin Swann, Robin Lovitt, and Percy Walton, respectively.²⁹

²¹ *Absolute Pardons and Writ of Actual Innocence*, SEC’y OF THE COMMONWEALTH, <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/absolutePardon.cfm> (last visited May 21, 2012).

²² *Id.*

²³ *Harbison v. Bell*, 556 U.S. 180, 194 (2009) (authorizing federally-appointed counsel, pursuant to 18 U.S.C. § 3599, to represent death row inmates in state clemency proceedings).

²⁴ Laurence Hammack, *Governor Denies Clemency for Convicted Killer*, ROANOKE TIMES, Sept. 18, 2010, Metro edition.

²⁵ Todd E. Pettys, *Killing Roger Coleman: Habeas, Finality, and the Innocence Gap*, 48 WM. & MARY L. REV. 2313, 2358–59 (2007) (Denying Roger Coleman’s petition for clemency on the day of the execution). Michael L. Radelet & Barbara A. Zsembik, *Executive Clemency in Post-Furman Capital Cases*, 27 U. RICH. L. REV. 289, 306 (1993) (Governor Wilder granted Herbert Bassette’s petition for clemency a mere ten hours before he was scheduled to be executed.).

²⁶ *Commutations in Capital Cases On Humanitarian Grounds*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited May 31, 2013).

²⁷ *Death Sentences Commuted in Virginia*, RICH. TIMES-DISPATCH, Nov. 15, 1998, at A17.

²⁸ *Id.*

²⁹ *Commutations in Capital Cases On Humanitarian Grounds*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited May 15, 2012). Since 1975, Virginia has executed 109 inmates. *State by State Database*, DEATH PENALTY INFO. CTR., http://www.deathpenaltyinfo.org/state_by_state (last visited May 31, 2013).

II. ANALYSIS

Below are the ABA Benchmarks, or “Protocols,” used by the Assessment Team in its evaluation of Virginia’s death penalty system. Each Protocol is followed by the Assessment Team’s analysis of the Commonwealth’s compliance with the Protocol and, where appropriate, the Assessment Team’s recommendations for reform.

A. Protocol #1

The clemency decision-making process should not assume that the courts have reached the merits on all issues bearing on the death sentence in a given case; decisions should be based upon an independent consideration of facts and circumstances.

The Commonwealth of Virginia does not require the Governor, who possesses sole authority to grant or deny clemency, or the Virginia Parole Board, to independently consider any specific facts or circumstances when making decisions regarding clemency.³⁰ The Governor is required to report his/her reasons for granting clemency to the Virginia General Assembly, but is not required to give his/her reasons for denying clemency.³¹ Thus, the Governor has broad powers to grant or deny clemency and “may do so at his discretion.”³² This discretion allows each Governor to promulgate his/her own guidelines and policies for evaluating clemency petitions.³³

The Governor may also request that the Parole Board investigate a clemency petition and make a recommendation, or the Board may do so independently.³⁴ It is unclear how frequently the Virginia Parole Board has advised Governors on clemency petitions, and it appears that interactions between the Parole Board and the Governor’s office have varied across administrations. For example, petitions for clemency under former Governor Warner were usually processed by both the Secretary of the Commonwealth’s Office and the Virginia Parole Board.³⁵ The two offices would then present their recommendations to the Governor’s counselor, who would review the recommendations and the request for clemency before briefing the Governor on the case.³⁶ In the case of petitioner Robin Lovitt, for example, Governor Warner’s counsel, the Virginia Parole Board, and outside counsel reviewed his petition for

³⁰ VA. CONST. art. V, § 12. *See also* VA. CODE ANN. § 53.1-229 (2013).

³¹ VA. CONST. art. V, § 12.

³² *Clemency*, SEC’Y OF THE COMMONWEALTH,

<http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/clemency.cfm> (last visited May 31, 2013).

³³ *Id.*

³⁴ VA. CODE ANN. § 53.1-136(5) (2013) (The Board shall “Make investigations and reports with respect to any commutation of sentence, pardon, reprieve or remission of fine or penalty when requested by the Governor); VA. CODE ANN. § 53.1-231 (2013) (“In any other case in which it believes action on the part of the Governor is proper or in the best interest of the Commonwealth, the Board may investigate and report to the Governor with its recommendations.”).

³⁵ Frank Green, *Warner Facing Tough Decision on Clemency*, RICH. TIMES-DISPATCH, Nov. 22, 2005, at A1.

³⁶ *Id.*

clemency.³⁷ In contrast, former “Governor Wilder . . . requested a recommendation from the Board on all pardon requests *except* those requesting a commutation of the death sentence.”³⁸

Virginia Governors have granted clemency in eight cases since 1976.³⁹ Generally, it is difficult to determine the reasons for which Governors grant or deny pleas for clemency, or the process by which they make their decisions. Although the Governor is required to transmit his/her reasons for granting clemency to the General Assembly, frequently these reports convey little information beyond the mere fact that clemency has been granted.⁴⁰ Moreover, the Governor is not required to make known his/her reasons for denying clemency.⁴¹ Therefore, it is not clear in many cases whether clemency decision-makers have considered the merits of a petition irrespective of the courts’ previous rulings on the matter.

The Secretary of the Commonwealth’s website notes that “usually Virginia governors are reluctant to substitute their judgment for that of the courts. However, if an individual feels able to provide substantial evidence of [] exceptional circumstances, he or she may submit a petition for pardon to the governor.”⁴² As an illustration, in the case of Ronald Lee Hoke, Sr., Governor Allen concluded that “the various issues raised by Hoke’s counsel in his clemency petition ha[d] been litigated thoroughly.”⁴³ The Governor, therefore, denied Hoke’s plea for clemency and Hoke was executed on December 16, 1996.⁴⁴

It appears many Governors have relied on the fact that courts’ previously reviewed the case as their rationale for denying clemency. Former Governor Gilmore denied clemency to Dennis

³⁷ Michael Sluss, *Warner Grants Clemency Request*, ROANOKE TIMES, November 30, 2005, at A1.

³⁸ Walter A. McFarlane, *The Clemency Process in Virginia*, 27 U. RICH. L. REV. 241, 251 (1992–1993) (emphasis added).

³⁹ *Clemency*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited May 31, 2013).

⁴⁰ VA. CONST. ART. V, § 12; *Reports to the General Assembly*, VA.’S LEGISLATIVE INFO. SYS., available at <http://leg2.state.va.us/DLS/h&sdocs.nsf/Search+All/?SearchView&SearchOrder=4&query=pardons>; e.g. OFFICE OF GOVERNOR GEORGE ALLEN, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. NO. 2 (1997) (stating only that “On November 8, 1996, the Governor commuted the sentence of death for the murder conviction to life imprisonment without the possibility of parole” and additional conditions of the commutation); e.g. OFFICE OF GOVERNOR JAMES S. GILMORE, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S.DOC. NO. 2 (2000) (stating, “On May 12, 1999, the Governor commuted the sentence of death [of Calvin Swann] for the murder conviction to life imprisonment without the possibility of parole. The commutation is based upon a thorough review of the Petition for Clemency, the legal decisions issued in the case, numerous other records, and the circumstances of this matter.”); e.g. OFFICE OF GOVERNOR L. DOUGLAS WILDER, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. NO. 2 (1992) (stating, “In view of the facts and circumstances surrounding [Joseph M. Giarratano’s] arrest and conviction, numerous judicial appeals, and the evidence presented by the Attorney General and defense counsel, the Governor commuted the sentence of death”); Governor Wilder’s report of Earl Washington’s commutation and Governor Kaine’s report of Percy Levar Walton’s commutation are notable exceptions to this rule. Both reports discuss at length the specific reasons for granting clemency and the process by which the Governor arrived at that conclusion. OFFICE OF GOV. L. DOUGLAS WILDER, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. NO. 2 (1994); GOVERNOR TIMOTHY KAINE, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. NO. 2, 24 – 27 (2009).

⁴¹ VA. CONST. art. V, § 12.

⁴² *Pardons*, SEC’Y OF THE COMMONWEALTH, <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/pardons.cfm> (last visited May 31, 2013).

⁴³ *Va. Executes Md. Man for 1985 Rape, Murder*, DAILY PRESS (Newport News, Va.), Dec. 17, 1996, at A2.

⁴⁴ *Id.*

Wayne Eaton and Dwayne Allen Wright after noting that the appellate courts had repeatedly upheld Eaton's sentence and that "after a review of [Wright's] material, . . . the Governor found no issues that had not been considered during the trial and appeals."⁴⁵ Wright's petition for clemency presented numerous mental health issues that he argued had not been presented to the jury at trial.⁴⁶ Governor Gilmore disagreed, stating that the "questions regarding Wright's mental deficiencies were thoroughly investigated, presented to the jury, and ultimately resolved at trial."⁴⁷ Eaton was executed on June 18, 1998,⁴⁸ and Wright's execution was carried out on October 14, 1998.⁴⁹

Most recently, Governor Robert McDonnell declined to commute the death sentence of Teresa Lewis, saying, "Lewis's guilty plea, verdict, and sentence have been reviewed by state and federal courts. The Supreme Court of Virginia, the United States District Court for the Western District of Virginia, and the United States Court of Appeals for the Fourth Circuit have unanimously upheld the sentence in this case."⁵⁰

Conversely, several Governors appear to have made independent evaluations of the facts presented by a death row inmate's clemency petition. For example, former Governor Wilder said of new DNA evidence in the case of Earl Washington, Jr., "I am of the opinion that the newly discovered evidence interjects an important element into the case which neither the jury that tried the case nor the courts which have reviewed it" considered.⁵¹ Governor Wilder commuted Washington's death sentence.⁵²

Former Governor Warner also commuted the death sentence of Robin Lovitt after a state employee destroyed evidence from Lovitt's trial before his appeals were completed.⁵³ Governor Warner said, "I believe clemency should only be exercised in the most extraordinary circumstances. Among these are circumstances in which the normal and honored processes of our judicial system do not provide adequate relief – circumstances that, in fact, require executive intervention to reaffirm public confidence in our justice system."⁵⁴

⁴⁵ *Eaton, Murderer of 4, Executed After Gilmore Denies Clemency*, VIRGINIAN PILOT AND LEDGER-STAR, June 19, 1998, at B9; *Virginia Executes Man Who Killed in 1989 When He Was 17*, N.Y. TIMES, Oct. 15, 1998, at A19. The Fourth Circuit Court of Appeals held that a mental health expert testified at trial that "Wright possessed a borderline I.Q. and that he suffered from many mental and emotional problems," and that "Wright's jury was fully informed of Wright's brother's early death, his absent father, his trouble in school, his depression, and his borderline intelligence through the testimony of Dr. Samenow [the expert] and his mother." *Wright v. Angelone*, 151 F.3d 151, 162 (4th Cir. 1998).

⁴⁶ *Young Offender Faces Death, And State Is Urged to Halt It*, N.Y. TIMES, Oct. 15, 1998, at A14; An Application For Executive Clemency For Dwayne Allen Wright, 1, 10–13, 17–19. Included in Wright's petition for clemency was an affidavit from a juror stating that the trial jury was never informed of Wright's brain damage. *Virginia Executes Man Who Killed in 1989 When He Was 17*, *supra* note 45.

⁴⁷ *Virginia Executes Man Who Killed in 1989 When He Was 17*, *supra* note 45.

⁴⁸ *Eaton, Murderer of 4, Executed After Gilmore Denies Clemency*, *supra* note 45.

⁴⁹ *Virginia Executes Man Who Killed in 1989 When He Was 17*, *supra* note 45.

⁵⁰ Press Release, Gov. Bob McDonnell, Statement of Governor McDonnell on the Scheduled Execution of Teresa Lewis (Sept. 19, 2010) available at <http://www.governor.virginia.gov/News/viewRelease.cfm?id=388>.

⁵¹ *Death Sentences commuted in Virginia*, *supra* note 27.

⁵² *Id.*

⁵³ Green, *supra* note 35.

⁵⁴ Michael Sluss, *Warner Grants Clemency Request*, ROANOKE TIMES, Nov. 30, 2005, at A1.

Finally, in a candid statement about the clemency decision-making process, former Governor Kaine explained his reasons for commuting the sentence of Percy Levar Walton:

In issuing its ruling, the Fourth Circuit properly limited its consideration to psychiatric evaluations and other evidence pertaining to Walton's mental state during the period from 1997 to 2003. By the time I first reviewed this matter, shortly before Walton's scheduled execution in June 2006, three years had passed since the evidence on his mental competence was presented to the court.

Due to the history of judicial concern about his mental status, I determined that it was important to have current and independent information about Walton's mental condition in order to comply with the law forbidding execution of a mentally incompetent person. Accordingly, I delayed Walton's June 2006 execution date until December 8, 2006, for the purpose of conducting an independent evaluation of his mental condition and competence.

During that six-month period, I was provided with current and independent information pertaining to Walton's mental state from a number of sources including a thorough review of records maintained by the Department of Corrections, updated evaluations by psychiatrists, and information provided by persons who had interacted with Walton on a regular basis over a period of years.

In reaching the conclusion to commute Walton's sentence to life in prison without possibility of parole, I recognize and respect the inherent obligation of each branch of government has to afford each to the others the dignity accorded by our separation of powers. Nonetheless, Article V, Section 12 of the Constitution of Virginia confers the extraordinary power of clemency on the Governor which the ends of justice call for the discharge of such duty, particularly where the exercise of that extraordinary power is, in my view, mandated by the Constitution of the United States of America.⁵⁵

While some of the statements Governors have made in various cases have specifically referenced the Governor's independent evaluation of the facts and circumstances, in many other instances minimal record regarding the Governor's consideration is available. For this reason, the Assessment Team is unable to determine whether the Commonwealth is in compliance with Protocol #1.

⁵⁵ Gov. TIMOTHY KAINE, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. NO. 2, 24-27 (2009).

B. Protocol #2

The clemency decision-making process should take into account all factors that might lead the decision-maker to conclude that death is not an appropriate punishment.

Protocol #2 requires clemency decision-makers to consider “all factors” that might lead the decision-maker to conclude that death is not the appropriate punishment. These factors include, but are not limited to

- (1) constitutional claims that were not considered on the merits because of procedural default, statutes of limitations, limits on retroactivity, or the abuse-of-the-writ doctrine, or because the federal courts showed deference to possibly erroneous, but not unreasonable, state court rulings;
- (2) constitutional claims that were found to have merit but did not involve errors that were deemed sufficiently prejudicial to warrant judicial relief;
- (3) lingering doubts of guilt (as discussed in Protocol #4);
- (4) facts that no fact-finder ever considered during judicial proceedings, where such facts could have affected determinations of guilt or sentence or the validity of constitutional claims;
- (5) patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction (as discussed in Protocol #3);
- (6) the inmate’s mental retardation, mental illness, and mental competency (as discussed in Protocol #4); and
- (7) the inmate’s age at the time of the offense (as discussed in Protocol #4).⁵⁶

Given that the Virginia Governor has broad discretion to grant or deny clemency, the process used to evaluate requests for clemency is largely unknown and may or may not include all of the factors listed above. Governors have publicly relied on at least one of the factors listed above to explain their reasons for granting or denying clemency, specifically lingering doubts of guilt and an inmate’s mental retardation, mental illness, and mental competency, as discussed later.⁵⁷ Former Governor Tim Kaine, for instance, said he would only use the governor’s clemency power when there was substantial doubt regarding a person’s guilt.⁵⁸ As described in Protocol #1, Governors have also considered claims that were never considered by the courts or that merited examination outside of the courts.

Several Virginia Governors have also considered factors other than those listed above, such as input from the public and others involved in the case. The opinion of the prosecutor in the case appears to be particularly influential. In fact, former Governor James Gilmore said, “[t]he opinion of the prosecutor who tried the case is important to my consideration of what is just in a

⁵⁶ AM. BAR ASS’N, *DEATH WITHOUT JUSTICE: A GUIDE FOR EXAMINING THE ADMINISTRATION OF THE DEATH PENALTY IN THE UNITED STATES* (2002).

⁵⁷ See *infra* Protocol #4, notes 90–131 and accompanying text.

⁵⁸ *Hot on the Campaign Trail—Today’s Focus: The Politics of the Death Penalty*, DAILY PRESS (Newport News, Va.), Oct. 20, 2005, at C1.

particular case.”⁵⁹ In the case of death row inmate Calvin Eugene Swann, Commonwealth’s Attorney William H. Fuller III publicly said that, had a “true life sentence” been available at the time of Swann’s trial, he would not have pursued the death penalty.⁶⁰ Governor Gilmore commuted Swann’s sentence.⁶¹ Likewise, former Governor Allen commuted William Aristede Saunders’ sentence to life without parole on the recommendation of the Commonwealth’s Attorney, the sentencing judge, and the chief of police.⁶² In another prominent case, support for Robin Lovitt’s clemency petition garnered wide, bipartisan support from notable members of the Virginia and national legal community. Kenneth Starr represented Lovitt in his clemency proceedings, and Mark Earley, former Democratic Governor Warner’s opponent in the 2001 gubernatorial election, and attorney John W. Whitehead, founder and president of the Rutherford Institute, were among Lovitt’s public supporters.⁶³

In several instances, members of the victim’s family supported the inmate’s plea for clemency. However, it appears in only one such case was clemency granted.⁶⁴ Therefore it is difficult to determine to what degree Governors consider the opinions of the family members of the victim. The family of Timothy Dale Bunch’s victim opposed his execution, stating that they had forgiven him for his crime.⁶⁵ “When [Bunch] killed my sister, they were both too young – no brain, no heart,” the victim’s brother said, “Ten years later, he’s still in jail. That’s enough. He’s got a brand new brain and a brand new heart. . . . We forget it. The electric chair is too bad.”⁶⁶ Governor Wilder, however, declined to commute his sentence, and Bunch was executed on December 10, 1992.⁶⁷ Similarly, the family of Lonnie Weeks, Jr.’s victim supported his plea for clemency.⁶⁸ However, Governor Gilmore denied Week’s clemency petition.⁶⁹ Weeks’ execution took place on March 16, 2000.⁷⁰ In the case of Dennis Wayne Eaton, the victim’s sister was a vocal supporter of commuting Eaton’s sentence.⁷¹ In addition, Eaton’s trial attorney was not allowed to tell the jury that Eaton would not be eligible for parole if given a life sentence.⁷² In the time between Eaton’s trial and execution, the Supreme Court ruled that juries in capital cases must be informed when life without the possibility of parole is an alternative to a death sentence.⁷³ That decision, however, was not retroactive.⁷⁴ Governor Gilmore also denied

⁵⁹ Frank Green, *Gilmore Grants Swann Clemency, Sentence Commuted to Life Without Parole*, RICH. TIMES-DISPATCH, May 13, 1999, at A1.

⁶⁰ *Id.*

⁶¹ *Id.*

⁶² *Death Sentences Commuted in Virginia*, *supra* note 27.

⁶³ Green, *supra* note 35.

⁶⁴ Among the four inmates discussed here, Timothy Dale Bunch, Lonnie Weeks, Jr., Dennis Wayne Eaton, and Joseph Patrick Payne, only Payne was granted clemency.

⁶⁵ Robert Davis, *Unlikely Execution-Eve Plea Victim’s Family Says Killer Has “Brand New Heart,”* USA TODAY, Dec. 10, 1992, at 04A.

⁶⁶ *Id.*

⁶⁷ *Executed in Virginia*, RICH. TIMES-DISPATCH, July 6, 2009, at A8.

⁶⁸ *Victim’s Children Seek Clemency for Killer*, VIRGINIA PILOT AND LEDGER-STAR, Sept. 1, 1999, at B6.

⁶⁹ *Executed in Virginia*, *supra* note 67

⁷⁰ *Id.*

⁷¹ Tom Beyerlein, *Anti-Death Penalty Tour Comes to Valley*, DAYTON DAILY NEWS, Sept. 29, 2003, at B1.

⁷² Frank Green, *Trooper’s Killer Dies By Injection, Dennis Wayne Eaton Took 4 Lives During 1989 Rampage*, RICH. TIMES-DISPATCH, June 19, 1998, at B1.

⁷³ *Simmons v. South Carolina*, 512 U.S. 154, 156 (1994) (“We hold that where the defendant’s future dangerousness is at issue, and state law prohibits the defendant’s release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible.”).

Eaton's petition for clemency.⁷⁵ Finally, the victim's mother asked for clemency in the case of Joseph Patrick Payne because she doubted whether Payne was her son's killer.⁷⁶ Payne's sentence was commuted, but it is unclear what part the victim's mother's opinion played in the Governor's decision.⁷⁷

Finally, in at least one case, a Virginia Governor considered, but ultimately rejected, issues related to violations of the Vienna Convention on Consular Relations when making decisions regarding clemency.⁷⁸ Angel Francisco Breard, a Paraguayan citizen, was not advised of his right to consular access after Virginia authorities arrested him for murder.⁷⁹ After failing to find relief in American courts, Breard sought a ruling from the International Court of Justice (ICJ).⁸⁰ The ICJ ordered the United States to "take all measures at its disposal to ensure that Angel Francisco Breard is not executed pending the final decision" of the court.⁸¹ In response, then-Secretary of State Madeleine Albright supported commuting Breard's sentence, stating that to go forward with the execution would "limit our ability to insure that Americans are protected when living or travelling abroad."⁸² Governor Gilmore, though, rejected the authority of the ICJ over Virginia's criminal justice system and denied Breard's request for clemency.⁸³ Governor Gilmore stated that the U.S. Department of Justice, "together with Virginia's attorney general, ma[d]e a compelling case that the International Court of Justice has no authority to interfere with [Virginia's] criminal justice system."⁸⁴ Breard was executed on April 14, 1998.⁸⁵

While it appears that Virginia Governors have considered some of the above factors, among others, when making decisions regarding clemency, the absence of statements giving the reasons for granting or denying petitions for clemency prevents a full evaluation of the factors governors consider. Therefore, the Virginia Assessment Team cannot determine whether Virginia is in compliance with Protocol #2.

⁷⁴ O'Dell v. Netherland, 521 U.S. 151, 153 (1997).

⁷⁵ Eaton, *Murderer of 4, Executed After Gilmore Denies Clemency*, *supra* note 45

⁷⁶ Peter Finn, *Va. Woman Asks Clemency for Inmate Convicted of Killing Her Son*, WASH. POST, Oct. 31, 1996, at D01.

⁷⁷ *Death Sentences Commuted in Virginia*, *supra* note 27

⁷⁸ See generally Vienna Convention on Consular Relations, Apr. 24, 1963, 596 U.N.T.S. 261.

⁷⁹ Application of the Republic of Paraguay, (Para. v. U.S.), 1998 I.C.J. 248 (Apr. 3).

⁸⁰ *Id.*

⁸¹ Vienna Convention on Consular Relations (Para. v. U.S.), Provisional Measures, 1998 I.C.J. 248, 258 (Apr. 9).

⁸² Asha Rangappa, *The Power to Pardon, the Power to Gain*, N.Y. TIMES, Feb. 3, 2001, at A13.

⁸³ *Id.*

⁸⁴ Frank Green and Jamie C. Ruff, *Breard Executed Despite Pleas from U.S., U.N. Supreme Court Denied Request for Stay*, RICH. TIMES-DISPATCH, Apr. 15, 1998, at A1.

⁸⁵ *Executed in Virginia*, *supra* note 67.

C. Protocol #3

Clemency decision-makers should consider as factors in their deliberations any patterns of racial or geographic disparity in carrying out the death penalty in the jurisdiction, including the exclusion of racial minorities from the jury panels that convicted and sentenced the death row inmate.

Although several inmates have presented issues of racial discrimination in their clemency petitions, it does not appear that any petition for clemency in Virginia has been granted based on racial or geographic disparity in the application of the death penalty. For example, one African-American inmate, Johnny Watkins, Jr., was sentenced to death in Danville County for the murders of two white convenience store clerks.⁸⁶ The two juries that sentenced him to death were both composed of all-white jurors.⁸⁷ In his clemency petition, Watkins argued that “Danville never has sentenced to death any white person,” and that Watkins “was sentenced to die by juries from which all black citizens had been systematically excluded.”⁸⁸ However, former Governor George Allen, in denying Watkins’ plea for clemency, did not provide detailed reasons for his decision, so it is unclear whether the Governor considered patterns of racial disparity in his evaluation of the petition.⁸⁹ The Virginia Assessment Team is, therefore, unable to determine if the Commonwealth is in compliance with Protocol #3.

D. Protocol #4

Clemency decision-makers should consider as factors in their deliberations the inmate’s mental retardation, mental illness, or mental competency, if applicable, the inmate’s age at the time of the offense, and any evidence relating to a lingering doubt about the inmate’s guilt.

Considerations of Mental Retardation, Mental Illness, or Mental Competency

While neither the Governor nor the Virginia Parole Board is required to consider an inmate’s mental retardation, mental illness, or mental competency when making clemency decisions, on several occasions Virginia Governors have taken such factors into account.

Death row inmate Calvin Eugene Swann was granted clemency in 1999 by former Governor James Gilmore, the only instance in which Governor Gilmore commuted a death sentence.⁹⁰ Swann’s long history of schizophrenia and evidence that he was not taking his medications when he committed the crime persuaded Governor Gilmore to grant Swann clemency.⁹¹ Governor

⁸⁶ Bob Piazza, *Watkins Executed for Two Slayings Governor Refused Plea for Clemency*, RICH. TIMES-DISPATCH, Mar. 4, 1994, at B1.

⁸⁷ Frank Green, *Clemency Petition Says Racism Tainted Process Allen Asked To Spare Danville Killer’s Life*, RICH. TIMES-DISPATCH, Feb. 24, 1994, at B5.

⁸⁸ *Id.*

⁸⁹ Piazza, *supra* note 86 (“Allen studied Watkins’ clemency petition for a week and concluded the case didn’t warrant his intervention, said Allen spokesman Ken Stroupe.”).

⁹⁰ *Commutations in Capital Cases on Humanitarian Grounds*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited June 7, 2013).

⁹¹ Elizabeth Rapaport, *Straight Is the Gate: Capital Clemency in the United States from Gregg to Atkins*, 33 N.M. L. REV. 349, note 75 (Spring 2003); Green, *supra* note 59.

Gilmore said Swann's behavior "was nothing short of bizarre and totally devoid of rationality."⁹² Moreover, the Governor noted Swann's jury had been misinformed of Swann's competency to stand trial.⁹³

Just one year before granting Swann clemency, Governor Gilmore had denied clemency for another death row inmate, Dwayne Allen Wright, who had also presented issues of mental competency in his clemency petition. In his plea for clemency, Wright's attorneys detailed numerous mental health issues, including brain damage at birth and that Wright had been committed to a mental hospital at age thirteen.⁹⁴ The request for clemency also claimed that evidence of Wright's mental health had not been presented to the jury.⁹⁵ Governor Gilmore, however, concluded that the "questions regarding Wright's mental deficiencies were thoroughly investigated, presented to the jury, and ultimately resolved at trial."⁹⁶

Former Governor Timothy Kaine has also granted clemency based on the mental health of a death row inmate. In 2008, the Governor commuted Percy Levar Walton's death sentence because serious mental illness rendered Walton incompetent to be executed.⁹⁷ Explaining his decision, Governor Kaine said, "[o]ne cannot reasonably conclude that Walton is fully aware of the punishment he is about to suffer and why he is to suffer it."⁹⁸ Then-Attorney General Robert McDonnell, though, opposed Kaine's decision, saying that the courts had determined Walton to be mentally competent, and that "evidence of an inmate's competency is more effectively evaluated by a judicial officer."⁹⁹

Considerations of Age at the Time of the Offense

Several Virginia Governors have taken an inmate's age at the time of the offense into consideration when deciding to grant or deny clemency.

Former Governor Gilmore considered Dwayne Allen Wright's petition for clemency based in part on the fact that Wright was seventeen at the time he committed the crime.¹⁰⁰ Ultimately, Governor Gilmore rejected Wright's petition. "Today [Wright] is 26. He is not a child, nor is he a model prisoner."¹⁰¹ Wright was the first juvenile offender executed in Virginia since the Commonwealth reinstated the death penalty.¹⁰²

⁹² Green, *supra* note 59.

⁹³ *Id.*

⁹⁴ *Young Offender Faces Death, And State Is Urged to Halt It*, *supra* note 46; An Application For Executive Clemency For Dwayne Allen Wright, 1, 10–13.

⁹⁵ An Application For Executive Clemency For Dwayne Allen Wright, 13, 17–19.

⁹⁶ *Virginia Executes Man Who Killed in 1989 When He Was 17*, *supra* note 45.

⁹⁷ *Commutations in Capital Cases on Humanitarian Grounds*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/clemency> (last visited June 7, 2013).

⁹⁸ Jerry Markon, *Va. Governor Commutes Death Sentence*, WASH. POST, June 10, 2008, at B1.

⁹⁹ *Id.* Frank Green, *Triple murderer spared from execution by Kaine*, RICH. TIMES-DISPATCH, June 10, 2008.

¹⁰⁰ *Virginia Executes Man Who Killed in 1989 When He Was 17*, *supra* note 45.

¹⁰¹ Rapaport, *supra* note 91 at 360.

¹⁰² *Virginia Executes Man Who Killed in 1989 When He Was 17*, *supra* note 45; Wright was both sentenced and executed before the Supreme Court decided *Roper v. Simmons*. 543 U.S. 551 (2005). Since Wright's execution, Virginia has executed two other men convicted of crimes committed as juveniles. Douglas Christopher Thomas was executed on January 10, 2000, and Steven Roach was executed three days later on January 13, 2000. Both were

Former Governor Kaine also took Percy Levar Walton's age into account when deciding to grant his plea for clemency. Although Walton's mental health, and not his age, at the time of his crime was the determining factor in commuting his sentence, Governor Kaine did note that "the [Supreme] Court has ruled that the Constitution forbids executing an individual who . . . commits a capital crime under the age of 18 years old. . . . In this instance, Walton committed these murders less than two months past his eighteenth birthday."¹⁰³

Lingering Doubt of Guilt

Lingering doubt about a death row inmate's guilt appears to be the single most determinative factor in predicting whether an inmate's plea for clemency will be granted or denied. The Joint Legislative Audit and Review Commission found that between 1977 and 2001, thirty-eight percent of Virginia clemency petitions for capital crimes presented claims of innocence.¹⁰⁴ Of those petitions, seventeen percent were granted, in comparison to five percent of petitions granted that presented claims other than innocence.¹⁰⁵

In at least four cases since Virginia reinstated the death penalty, Governors have granted clemency based on evidence that the inmate may not have committed capital murder. The first, Joseph M. Giarratano, confessed to two murders which he had no memory of committing.¹⁰⁶ His attorneys argued that the evidence at the scene and Giarratano's contradictory confessions pointed to someone else as the killer.¹⁰⁷ Former Governor Wilder granted Giarratano a conditional pardon in 1991, but, "[w]hile sparing Giarratano's life, Wilder said the prison inmate must continue to serve his term until he is eligible for parole . . . or seek a retrial" from then-Attorney General Mary Sue Terry.¹⁰⁸ Terry elected not to retry him.¹⁰⁹ While Governor Wilder did not explain his reasons for granting Giarratano clemency in detail, the Governor's report to the General Assembly listed "the facts and circumstances surrounding [Giarratano's] arrest and conviction, his numerous judicial appeals, and the evidence presented by the Attorney General and defense counsel" as compelling reasons for commuting the sentence.¹¹⁰

Giarratano's case also received widespread support from the public. Governor Wilder's office received over 500 letters a day supporting clemency and at one point, the Governor's office had

seventeen at the time they committed their crimes. *Execution of Juveniles in the U.S. and other Countries*, DEATH PENALTY INFO. CTR., <http://www.deathpenaltyinfo.org/execution-juveniles-us-and-other-countries>, (last visited Sept. 10, 2012).

¹⁰³ GOV. TIMOTHY KAINE, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. NO. 2, 26 (2009).

¹⁰⁴ J. LEGIS. AUDIT & REV. COMM'N, VA. ASSEMB.: REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT, at 119, 122 (2002).

¹⁰⁵ *Id.* at 123.

¹⁰⁶ *Death Sentences Commuted in Virginia*, *supra* note 27

¹⁰⁷ *Id.*

¹⁰⁸ *Id.*; Tyler Whitley, *Pardon Thought to Get Wilder Off Political Hot Seat*, RICH. TIMES-DISPATCH, Feb. 20, 1991, at 7. Joseph Giarratano's case is also notable as the landmark Supreme Court case providing that inmates are not entitled to counsel when seeking post-conviction relief. *Murray v. Giarratano*, 492 U.S. 1 (1989).

¹⁰⁹ *Death Sentences Commuted in Virginia*, *supra* note 27.

¹¹⁰ GOV. L. DOUGLAS WILDER, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. NO. 2 (1992).

received 5,475 letters supporting Giarratano and only sixty-one letters in favor of carrying out his death sentence.¹¹¹

Governor Wilder also commuted the sentence of death row inmate Herbert Russell Bassette due to doubts about Bassette's guilt.¹¹² Bassette's attorneys presented the Governor with evidence that several witnesses had lied when they testified that Bassette was the gunman, and that no physical evidence connected Bassette to the murder.¹¹³ In light of this evidence, Governor Wilder stated that he "could not in good conscience erase the presence of a reasonable doubt and fail to employ the powers vested in him as Governor to intervene."¹¹⁴

In 1994, Governor Wilder commuted the death sentence of Earl Washington, Jr.¹¹⁵ New DNA testing completed after Washington's conviction raised doubts of his guilt.¹¹⁶ The Governor reported to the Virginia Legislature that he

was of the opinion that the newly discovered evidence interjected an important element into the case which neither the jury that tried the case nor the courts which have reviewed it since the trial have had the opportunity to consider. Had that opportunity arose, the Governor was of the opinion that their opinions as to the appropriate conclusion may have been different.¹¹⁷

However, the Governor said he was not completely convinced of Washington's innocence.¹¹⁸ Governor Wilder offered Washington two choices. The first was a commutation of his sentence to life in prison.¹¹⁹ However, this option would have precluded Washington from continuing to pursue his claim of innocence under a new evidence procedure specifically for death row inmates.¹²⁰ The second option was to stay on death row and continue his appeals based on his claim of actual innocence.¹²¹ Washington chose the commutation.¹²²

Later, in 2000, former Governor Gilmore granted Washington a pardon for his murder conviction.¹²³ While the pardon guaranteed Washington's release from prison, it did not erase

¹¹¹ Warren Fiske, *Wilder Ponders Lonely Decision of Life or Death; Politics Plays No Part in This, Governor Says*, VIRGINIAN PILOT AND LEDGER-STAR, Feb. 17, 1991, at A10.

¹¹² GOV. L. DOUGLAS WILDER, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. NO. 2 (1993); Larry O'Dell, *Wilder Grants Inmate Clemency: Death Sentence Reduced to Life*, DAILY PRESS (Newport News, Va.), Jan. 24, 1992, at C1.

¹¹³ Arthur Hodges, *Bassette Escapes His Date With Death*, RICH. TIMES-DISPATCH, Jan. 24, 1992, at A1.

¹¹⁴ GOV. L. DOUGLAS WILDER, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. NO. 2 (1993); O'Dell, *supra* note 112.

¹¹⁵ *Death Sentence Is Commuted*, N.Y. TIMES, Jan. 16, 1994.

¹¹⁶ Alan Cooper, *Odds For Killer Don't Look Good; Only Unequivocal Pleas of Innocence Have Succeeded*, RICH. TIMES-DISPATCH, July 5, 1992, at A1.

¹¹⁷ GOVERNOR L. DOUGLAS WILDER, LIST OF PARDONS, COMMUTATIONS, REPRIEVES AND OTHER FORMS OF CLEMENCY, S. DOC. NO. 2 (1994).

¹¹⁸ Peter Baker, *Death-Row Inmate Gets Clemency; Agreement Ends Day of Suspense*, WASH. POST, Jan. 15, 1994, at A01.

¹¹⁹ *Id.*

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² *Id.*

¹²³ Eric M. Freedman, *Earl Washington's Ordeal*, 29 HOFSTRA L. REV. 1089, 1112 (2001).

the conviction from his record.¹²⁴ Ultimately, Governor Kaine granted Washington an absolute pardon in 2007.¹²⁵ An audit of Virginia's crime lab found errors in the analysis of DNA evidence used against Washington and that the DNA evidence actually identified another person as the perpetrator.¹²⁶ Governor Kaine said, "[i]t is now evident that Mr. Washington was and is innocent of the crimes against Mrs. Williams. I have decided it is just and appropriate to grant this revised absolute pardon that reflects Mr. Washington's innocence."¹²⁷

Finally, former Governor George Allen granted clemency to Joseph Patrick Payne, Sr. in 1996.¹²⁸ Although Governor Allen said he did not believe Payne was innocent, he commuted the death sentence to life without parole because of doubts raised about the accuracy of the evidence used to convict Payne.¹²⁹ After the trial, it was discovered that the witness central to the case may have perjured himself in testifying against Payne, and that inmates who had wished to testify on Payne's behalf had not been called at trial.¹³⁰ Allen conditioned the commutation on Payne's agreement not to seek a new trial.¹³¹

Although there is no requirement that Virginia's clemency decision-makers consider such factors as mental health, age at the time of the offense, or lingering doubts of guilt, several Governors have taken these factors into account. It appears Virginia is largely in compliance with Protocol #4. Nevertheless, it is troubling that in all but one case where clemency has been granted based on doubts of guilt, Governors have imposed conditions that hinder the inmate from further pursuing his claim of actual innocence.

E. Protocol #5

Clemency decision-makers should consider as factors in their deliberations an inmate's possible rehabilitation or performance of significant positive acts while on death row.

Because the Governor is not required to take any specific factors into account when making his/her decision to grant or deny clemency, and because of the opaque nature of the clemency decision-making process, it is unclear whether Virginia Governors consider an inmate's rehabilitation while on death row. Nevertheless, in at least three instances, inmates have sought clemency based in part on rehabilitation or positive acts while incarcerated. Two of these inmates, Teresa Lewis and Wilbert Lee Evans, were denied clemency.¹³² The other, William Aristede Saunders, was granted a commutation.¹³³

¹²⁴ Michael Felberbaum, *US Governor Proclaims Innocence of Former Death Row Inmate*, AP, July 7, 2007.

¹²⁵ *Id.*

¹²⁶ Christina Nuckols, *Coalition Asks Warner to Order DNA Retests for Death Row Cases*, VIRGINIAN PILOT AND LEDGER-STAR, June 23, 2005, at 1.

¹²⁷ Felberbaum, *supra* note 124.

¹²⁸ Mike Allen, *Virginia Prisoner Receives Rare Mercy on Death Row*, N.Y. TIMES, Nov. 10, 1996, at 20.

¹²⁹ *Id.*

¹³⁰ *Death Sentences Commuted in Virginia*, *supra* note 27.

¹³¹ *Id.*

¹³² Hammack, *supra* note 24. Joe Jackson, *Two Who Were Executed: Wilbert Lee Evans*, VIRGINIAN PILOT AND LEDGER-STAR, June 27, 1994, at A5..

¹³³ *Death Sentences Commuted in Virginia*, *supra* note 27.

Teresa Lewis had been sentenced to death in 2003.¹³⁴ Fluvanna Correctional Center chaplains and other inmates noted that, while incarcerated, Lewis had become a mentor to many women in prison and had started an unofficial ministry for inmates.¹³⁵ Former Fluvanna Chaplain Lynn Litchfield wrote to Governor McDonnell asking him to commute Lewis' sentence because of her positive acts towards other incarcerated women, stating "many women would report to me how sweet [Lewis] was, how helpful she was, how she listened, and how she pointed them in the right directions with their own faith journeys."¹³⁶ Governor McDonnell denied Lewis' petition for clemency, and she was executed on September 23, 2010.¹³⁷ Governor McDonnell noted several reasons for refusing to grant clemency, although no mention was made of whether the Governor considered her positive acts while incarcerated.¹³⁸ Therefore, it is difficult to determine what part Lewis' positive acts played in the Governor's determination.

While Wilbert Lee Evans was incarcerated on death row at Mecklenburg Correctional Center, other inmates staged the largest escape from a prison death row in U.S. history.¹³⁹ During the breakout, Evans protected twelve prison guards and two nurses from the escapees, who were armed with knives.¹⁴⁰ Despite Evans' actions, former Governor Wilder declined to grant him clemency, and his execution was carried out on October 17, 1990.¹⁴¹

Former Governor Allen, however, granted clemency to William Aristede Saunders.¹⁴² In a letter to Governor Allen, Saunders' prosecuting attorney, William Fuller, noted Saunders' clean prison record since his sentencing,¹⁴³ and Saunders' sentencing judge wrote to Allen that it would be "in the best interest of justice" to commute Saunders' sentence in light of his nonviolent behavior in prison.¹⁴⁴ However, Fuller also recommended Allen commute Saunders' sentence because of the unique circumstances that led him to qualify for the death sentence in the first place.¹⁴⁵ After conviction, Saunders' sentencing hearing was delayed and, while waiting for his hearing, he had two altercations with prison guards.¹⁴⁶ The sentencing judge used the two incidents to demonstrate future dangerousness, one of the factors that qualifies a defendant for the death penalty.¹⁴⁷ Fuller wrote to Allen that, had Saunders been sentenced as originally scheduled, the altercations would not have occurred and there would have been insufficient evidence of future

¹³⁴ Hammack, *supra* note 24.

¹³⁵ Maria Glod, *Woman Who Plotted Deaths of Husband, Stepson Executed*, VIRGINIAN PILOT AND LEDGER-STAR, Sept. 24, 2010, at 1.

¹³⁶ *Clemency Urged for Woman with Low IQ on Death Row*, DAILY RECORD (Morristown, N.J.), Sept. 21, 2010.

¹³⁷ Steve Doane, *Teresa Lewis Executed for Role in 2002 Double Shooting*, DANVILLE REGISTER & BEE, Sept. 24, 2010.

¹³⁸ The Governor's statement details Lewis' crime, procedural history, and mental health history. Statement of Governor McDonnell on the Scheduled Execution of Teresa Lewis, *available at* <http://www.governor.virginia.gov/News/viewRelease.cfm?id=388>.

¹³⁹ Jackson, *supra* note 132.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Death Sentences Commuted in Virginia*, *supra* note 27.

¹⁴³ *Id.*

¹⁴⁴ Justin M. Norton, *Virginia Gov. Commutes Death Sentence; Colorado Gov. Denies Clemency*, AP ONLINE, Sept. 15, 1997.

¹⁴⁵ *Death Sentences Commuted in Virginia*, *supra* note 27.

¹⁴⁶ *Id.*

¹⁴⁷ *Id.*

dangerousness to warrant a death sentence.¹⁴⁸ Because information about the factors governors use to evaluate clemency petitions is largely undisclosed, it is difficult to determine whether Saunders was granted clemency because of his rehabilitation on death row or for other reasons.

The Assessment Team is unable to determine whether Virginia is in compliance with Protocol #5 because of the lack of information available on the clemency decision-making process. While rehabilitation is clearly presented as an issue in death row inmates' clemency petitions, whether it has bearing on the Governor's decision to grant or deny clemency in death penalty cases is uncertain.

F. Protocol #6

In clemency proceedings, death row inmates should be represented by counsel and such counsel should have qualifications consistent with the *American Bar Association Guidelines on the Appointment and Performance of Defense Counsel in Death Penalty Cases* (ABA Guidelines).

Protocol #7

Prior to clemency hearings, death row inmates' counsel should be entitled to compensation and access to investigative and expert resources. Counsel also should be provided sufficient time both to develop the basis for any factors upon which clemency might be granted that previously were not developed and to rebut any evidence that the State may present in opposing clemency.

There is no right to counsel in Virginia clemency proceedings. While Virginia inmates represented by federally-appointed counsel during federal habeas proceedings may be represented by federally-appointed counsel in subsequent state clemency proceedings, such representation is not required or guaranteed.¹⁴⁹ In practice, attorneys from the Virginia Capital Representation Resource Center (VCRRC) frequently continue to represent many death row inmates through clemency proceedings.¹⁵⁰ VCRRC attorneys, who specialize in post-trial investigation of and representation in capital cases, may possess many of the necessary skills required of effective clemency representation;¹⁵¹ however, Virginia has not adopted any standards regarding qualifications for attorneys during clemency proceedings.

Compensation of Clemency Counsel

VCRRC attorneys who represent death row inmates during clemency proceedings are salaried employees.¹⁵² Death row inmates represented through their clemency proceedings by attorneys

¹⁴⁸ *Id.*

¹⁴⁹ See generally *Harbison v. Bell*, 129 S.Ct. 1481 (2009).

¹⁵⁰ Va. Capital Representation Resource Ctr. (VCRRC) Survey Response, provided by Robert E. Lee, Exec. Dir., VCRRC, to Paula Shapiro, 1, 7 (Apr. 5, 2012) (on file with author) [hereinafter VCRRC Survey Response]; Interview by Mark Pickett and Paula Shapiro with Robert E. Lee, Exec. Dir., VCRRC (Apr. 11, 2012) (on file with author) [hereinafter VCRRC Interview].

¹⁵¹ VCRRC Survey Response, *supra* note 150, at 7; VCRRC Interview, *supra* note 150.

¹⁵² VCRRC Interview, *supra* note 150. The current compensation rate for attorneys appointed for federal habeas proceedings is \$178 per hour. 18 U.S.C. § 3599 (providing \$178 an hour).

from VCRRC have access to that organization's single investigator, who also serves as its mitigation specialist in all capital cases handles by VCRRC.¹⁵³

As described above, federal law also permits, but does not require, counsel appointed to represent indigent death row inmates under a state-imposed death sentence in federal habeas corpus proceedings “to represent their clients in state clemency proceedings”¹⁵⁴ If such counsel is able to continue representing their client through clemency proceedings, counsel is entitled to access to experts and investigators to prepare for those proceedings.¹⁵⁵

Timing of Clemency Investigation and Presentation

In several instances, it appears that counsel for death row inmates in Virginia struggled to find sufficient time to prepare clemency petitions.¹⁵⁶ For instance, the Virginia Coalition on Jails and Prisons (VCJP)—which voluntarily undertook representation of some death row inmates at clemency until it closed in 1994¹⁵⁷—had great difficulty recruiting counsel to represent Edward Benton Fitzgerald.¹⁵⁸ Fitzgerald found himself without representation six months before his scheduled execution when his attorney resigned from the public defenders' office to go into private practice.¹⁵⁹ VCJP located two attorneys willing to take on the case only sixteen days before Fitzgerald's execution.¹⁶⁰ One of Fitzgerald's attorneys, Barry Weinstein, said, “[t]here wasn't any law firm in the entire Virginia community that was willing to represent Mr. Fitzgerald.”¹⁶¹ Fitzgerald's new attorneys asked the Virginia Attorney General's Office to postpone the execution to give them more time to prepare his clemency petition.¹⁶² It appears that request was not granted¹⁶³ and Fitzgerald was executed on July 23, 1992.¹⁶⁴

In 1998, attorneys for death row inmate Dwayne Allen Wright also noted the limited time they had to devote to Wright's case. In the preface to Wright's clemency petition, the attorneys explained that

¹⁵³ VCRRC Interview, *supra* note 150. See Chapter Eight on State Habeas Corpus Proceedings for a description of the lack of investigative, mitigation, and expert services available during capital habeas proceedings in Virginia.

¹⁵⁴ *Harbison v. Bell*, 556 U.S. 180, 193 (2009).

¹⁵⁵ See *id.* at 183–84.

¹⁵⁶ In 1992, the Virginia state attorney general's office stated that “no death row inmate ha[d] gone to the electric chair without the services of an attorney” since Virginia reinstated the death penalty. Peter Bacque, *Next Walk Down Death Row Started 12 Years Ago*, RICH. TIMES-DISPATCH, July 5, 1992, at A6. However, it is unclear whether this statement encompasses representation through clemency proceedings, or whether counsel was provided by the state or by an outside organization.

¹⁵⁷ Frank Green, *Death Penalty Foes Endure Rough Season, Financial, Political Climates Unwelcoming*, RICH. TIMES-DISPATCH, Mar. 27, 1994, at B1.

¹⁵⁸ Bacque, *supra* note 156.

¹⁵⁹ Mike Allen, “Flat-Out Mercy” May Be Last Plea, Attorneys to Take Death-Penalty Case, RICH. TIMES-DISPATCH, July 8, 1992, at B1.

¹⁶⁰ *Id.*

¹⁶¹ *Id.*

¹⁶² *Id.*

¹⁶³ See *id.*; see also *Rapist-Murderer Executed in Virginia*, S.F. CHRON., July 24, 1992, at E7 (“A man was executed in Virginia's electric chair last night.”).

¹⁶⁴ *Rapist-Murderer Executed in Virginia*, *supra* note 163.

Counsel for Dwayne have been extremely limited in their ability to provide to the Governor a comprehensive and meaningful statement to assist the Governor in his clemency review. Dwayne's lead attorney, Douglas Fredericks of Norfolk, has been representing a client appointed to him by the federal court in a federal capital murder trial since the beginning of September and has been unable to assist in the development of clemency at all. . . . Co-counsel Rob Lee of the Capital Resource Center in Richmond has been directly involved in the representation of four inmates scheduled for execution since the end of July and unable until recently to devote adequate time to Dwayne's clemency. Professor Charles J. Ogletree of Harvard Law School in Cambridge, Massachusetts, who formerly practiced with the D.C. Public Defender's office where attorneys once represented Dwayne as a juvenile, became involved in the case only last week."¹⁶⁵

The time constraints placed on counsel representing an inmate at clemency may be due, in part, to the statutory framework governing when execution dates may be scheduled in the Commonwealth. Once an inmate's state habeas petition has been denied, for example, Virginia law requires an execution date to be scheduled if requested by the Attorney General.¹⁶⁶ While this requirement significantly reduces the amount of time an inmate is permitted to research and prepare his/her federal habeas petition, it may also contribute to uncertainty regarding the timing of the clemency decision. In addition, it may divert resources and attention away from presentation of issues for clemency because the federal appeal must be quickly assembled and filed.¹⁶⁷

Finally, there are indications that counsel representing inmates during the clemency process are not compensated for their work. In the case of Herbert Bassette, his attorney estimated that his firm had spent over \$200,000 worth of billable hours on the case.¹⁶⁸ The firm covered most of that cost on a pro bono basis.¹⁶⁹

While Virginia inmates may be represented by the VCRRC, such representation is not guaranteed. The Commonwealth of Virginia is, therefore, in partial compliance with Protocol #6. Furthermore, it appears that attorneys may have neither sufficient time nor sufficient resources to adequately develop clemency petitions on behalf of death row inmates—a result which may be caused, in part, by Virginia's practice of issuing an execution warrant before the exhaustion of legal remedies in the case. Thus, Virginia is not in compliance with Protocol #7.

¹⁶⁵ An Application for Executive Clemency for Dwayne Allen Wright, 2 (on file with author).

¹⁶⁶ VA. CODE ANN. § 53.1-232.1 (2013).

¹⁶⁷ On the other hand, if the clemency petition is assembled prior to the conclusion of all federal proceedings, it may be an incomplete representation of issues to be addressed by the Governor.

¹⁶⁸ Hodges, *supra* note 113.

¹⁶⁹ *Id.*

G. Protocol #8

Clemency proceedings should be formally conducted in public and presided over by the Governor or other officials involved in making the clemency determination.

The Governor of Virginia is the ultimate decision-maker on any petition for clemency from a death row inmate.¹⁷⁰ The Virginia Constitution requires the Governor to communicate his/her reasons for granting clemency to the General Assembly,¹⁷¹ which are available through Virginia's Legislative Information System.¹⁷² Other clemency documents, such as clemency petitions, are considered part of the Governor's working papers, which need not be made available to the public.¹⁷³ Others involved in the case, such as defense attorneys, however, may disseminate documents in their possession at their discretion.¹⁷⁴

Virginia law does not require the Governor to conduct clemency proceedings in public and the Governor is not required to meet with the clemency petitioner.¹⁷⁵ Notably, the Commonwealth's website discussing conditional and absolute pardons warns inmates to be sure to provide all relevant information in their petitions for clemency because "the petition process does not include any hearing, meeting or conference with the petitioner or persons on the petitioner's behalf."¹⁷⁶

In some instances, Virginia Governors have met with a petitioner's lawyers, while in other cases, Governors have only met with those parties opposed to clemency. For example, Angel Francisco Breard's clemency petition suggests that his attorneys met with former Governor Gilmore's legal counsel.¹⁷⁷ Edward Benton Fitzgerald's attorneys met with former Governor Wilder's legal counsel for ninety minutes before the Governor made a decision regarding clemency,¹⁷⁸ and Walter Milton Correll, Jr.'s lawyers met with members of former Governor Allen's staff to

¹⁷⁰ VA. CONST. art. V, § 12; VA. CODE ANN. § 53.1-29 (2013) (codifying VA. CONST. art. V, § 12).

¹⁷¹ VA. CONST. art. V, § 12.

¹⁷² VIRGINIA'S LEGISLATIVE INFO. SYSTEM, <http://leg1.state.va.us/> (last visited June 17, 2013)

¹⁷³ VA. CODE ANN. § 2.2-3705.7(2) ("Working papers" means those records prepared by or for an above-named public official for his personal or deliberative use."). Jochnowitz, *supra* note 11, at 16.

¹⁷⁴ VA. CODE ANN. § 2.2-3705.7(2) ("Working papers" means those records prepared by or for an above-named public official for his personal or deliberative use."). Jochnowitz, *supra* note 11, at 16.

¹⁷⁵ The Virginia Parole Board has a policy that "inmates initially eligible for parole consideration shall be given a personal interview with a parole board member or other representative designated by the board to conduct such interview," VA. PAROLE BD. POLICY MANUAL, 2(B)(C) (October 1, 2006). It is uncertain, however, whether this policy applies to a death row inmate seeking clemency, who is not eligible for parole. VA. CODE ANN. § 53.1-151(B) (2012) ("Persons sentenced to die shall not be eligible for parole."). It also does not appear that the Board has interviewed an inmate seeking clemency in practice, either at the request of a Governor or under its own authority. VA. CODE ANN. § 53.1-231 (2013); VA. CODE ANN. § 53.1-136(5) (2013); VA. CODE ANN. § 53.1-231 (2013).

¹⁷⁶ *Conditional Pardons, SEC'Y OF THE COMMONWEALTH*, <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/conditionalPardon.cfm> (last visited June 12, 2013)

¹⁷⁷ The petition is prefaced by the statement that "Enclosed are five copies of a Petition for Reprieve on behalf of Angel Breard for the Governor's consideration. We are looking forward to our meeting this evening." ALEXANDER H. SLAUGHTER, WILLIAM G. BROADDUS, DOROTHY C. YOUNG, AND MICHELE J. BRACE, PETITION FOR EXECUTIVE CLEMENCY OF ANGEL FRANCISCO BREARD (April 9, 1998).

¹⁷⁸ *Wilder Refuses to Halt Execution of Machete Killer*, VIRGINIAN PILOT AND LEDGER-STAR, July 21, 1992, at D5.

discuss commutation.¹⁷⁹ In at least one case where clemency was requested, a Governor met with the prosecutor and other individuals opposed to granting clemency, but not with the inmate himself.¹⁸⁰ After Roger Keith Coleman requested clemency, former Governor Wilder's top aide met with Thomas R. Scott Jr., the prosecutor who helped convict Coleman, and the widower of Coleman's victim.¹⁸¹ There is no indication the Governor's Office met with Coleman or his attorneys.

Because clemency proceedings are not held in public and because Virginia law does not guarantee an in-person meeting with the clemency decision-maker, Virginia is not in compliance with Protocol #8.

H. Protocol #9

If two or more individuals are responsible for clemency decisions or for making recommendations to clemency decision-makers, their decisions or recommendations should be made only after in-person meetings with clemency petitioners.

Because the Governor of Virginia has sole discretion to grant clemency in Virginia death penalty cases, and because the Assessment Team knows of no case in which the Governor authorized the Parole Board to make a recommendation to the Governor regarding an application for clemency in a capital case, Protocol #9 is not applicable to the Commonwealth of Virginia.

I. Protocol #10

Clemency decision-makers should be fully educated, and should encourage education of the public, concerning the broad-based nature of clemency powers and the limitations on the judicial system's ability to grant relief under circumstances that might warrant grants of clemency.

Virginia Governors have taken a variety of factors into account, in particular doubts of guilt, when deciding to grant or deny clemency in death penalty cases.¹⁸² While it appears that Governors and their counsel have taken steps to educate themselves, there is no indication that a formal process exists to educate Governors or their staff on the clemency process.¹⁸³ This means that education about the clemency process may change from one gubernatorial administration to another.

¹⁷⁹ Todd Jackson, *Roanoke Murderer's Execution Set Tonight*, ROANOKE TIMES, Jan. 4, 1996, at C1.

¹⁸⁰ Cooper, *supra* note 116.

¹⁸¹ *Id.*

¹⁸² *See supra* Protocol #4.

¹⁸³ For example, Walter McFarlane, Chief Policy Advisor and Chief Counsel to Governor Wilder, described his first experience evaluating a clemency petition, saying, "When I was appointed by the governor, one of my first assignments was evaluating a plea for clemency. I quickly recognized that I lacked the requisite knowledge of this area of the law." McFarlane, *supra* note 38. McFarlane stated that he then educated himself by speaking to staff members of past Governors' administrations, supplemented by law review articles and treatises. *Id.* "Slowly," he said that he "began to appreciate the law and past case precedent" that allowed him "to draft procedures for future clemency petitions [he] believed to be appropriate for recommendation to Governor Wilder Governor Wilder reviewed [the] draft, made additions, modifications, and deletions and the procedures for handling clemency petitions during his tenure were implemented." *Id.*

Finally, as discussed previously, the public is provided little information on the clemency process in Virginia. As a result of the lack of transparency surrounding clemency decisions, the public is uninformed both of the power the Governor possesses to grant or deny clemency and of the limitations on the courts to grant relief under some circumstances where clemency may be appropriate.¹⁸⁴

For the foregoing reasons, the Commonwealth of Virginia is in partial compliance with Protocol #10.

J. Protocol #11

To the maximum extent possible, clemency determinations should be insulated from political considerations or impacts.

Virginia Parole Board

The Virginia Constitution gives the Governor ultimate authority to make decisions regarding clemency.¹⁸⁵ Although the Virginia Parole Board is also authorized to evaluate clemency petitions and make recommendations to the Governor, such recommendations are not binding.¹⁸⁶ However, because the Governor is not bound to follow a recommendation from the Parole Board to deny clemency, this may give the Governor greater freedom to independently review clemency petitions.

Board members, however, serve “at the pleasure of the Governor” and, therefore, may not be fully insulated from political considerations or impacts.¹⁸⁷ Members of the Board are appointed by the Governor, subject to approval by the legislature, and are not subject to any qualifying criteria aside from the requirement that at least one member be a victim of crime or a representative of a crime victim’s advocacy group.¹⁸⁸

¹⁸⁴ While the Virginia Parole Board may also be involved in evaluating some clemency petitions, Virginia does not require Board members to have specific qualifications or knowledge of the clemency process. It requires only that at least one member of the Board be a representative of a crime victims’ organization or a victim of crime. VA. CODE ANN. § 53.1-134 (2013). To the best of the Assessment Team’s knowledge, Board members do not receive training on clemency for death row inmates after they have been confirmed, and neither the Virginia Parole Board Policy Manual nor the Virginia Parole Board Administrative Process Manual offers guidance as to the factors to be used to evaluate pleas for clemency in death penalty cases. The Policy Manual, however, provides factors to guide the Board in determining whether an individual should be released on parole. VA. PAROLE BD., VA. PAROLE BOARD POLICY MANUAL, 2–5 (October 1, 2006), *available at* <http://www.vadoc.state.va.us/vpb/manuals/pb-policymanual-1006.pdf>. These factors include “mental condition,” “the probability that the individual will lead a law-abiding life,” and whether the inmate availed him/herself of educational and vocational training opportunities while incarcerated. *Id.* at 2, 3.

¹⁸⁵ VA. CONST. art. V, § 12. *See also* VA. CODE ANN. § 53.1-229 (2013).

¹⁸⁶ VA. CODE ANN. § 53.1–231 (2013); VA. PAROLE BD., VIRGINIA PAROLE BOARD POLICY MANUAL 25-26 (October 1, 2006), *available at* <http://www.vadoc.state.va.us/vpb/manuals/pb-policymanual-1006.pdf>.

¹⁸⁷ VA. CODE ANN. § 53.1-134 (2013).

¹⁸⁸ VA. CODE ANN. § 53.1-134 (2013); VA. PAROLE BD., VIRGINIA PAROLE BOARD POLICY MANUAL 1 (October 1, 2006) *available at* <http://www.vadoc.state.va.us/vpb/manuals/pb-policymanual-1006.pdf>. VA. CODE ANN. § 53.1-134 (2013).

Governor of Virginia

The Governor must report his/her reasons for granting clemency to the Virginia General Assembly.¹⁸⁹ The Governor is only required to explain his/her reasons for granting clemency, but not for denying it.¹⁹⁰ As the Governor is the sole decision-maker in clemency cases, it may limit—to some extent—improper political influence on clemency decision-making. Every Virginia Governor since 1990, regardless of party, has granted clemency at least once; although at the time of publication of this Report, Governor Robert McDonnell has not granted clemency in any capital case.¹⁹¹

Virginia Governors are also limited to one consecutive term in office.¹⁹² Term limits may, to some extent, insulate the Governor from considerations of the political impact of his/her decision in a case, although most Virginia Governors elected after the Commonwealth reinstated the death penalty have later campaigned and been elected to another political post.¹⁹³ It does not appear, however, that these Governors' decisions to grant or deny clemency have been raised as important issues in their subsequent campaigns for a new elected position.

For the foregoing reasons, it appears that the Commonwealth is in compliance with Protocol #11.

* * *

Recommendations

There have been eight grants of clemency in Virginia which, in every case, appear to have been made after thoughtful deliberation by the decision-maker. The Assessment Team recognizes that

¹⁸⁹ VA. CONST. art. V, § 12.

¹⁹⁰ See *supra* note 40; VA. CONST. art. V, § 12.

¹⁹¹ Virginia reinstated the death penalty in 1975 and the Commonwealth's first execution in the modern death penalty era was in 1982. See NAT'L ASS'N FOR THE ADVANCEMENT OF COLORED PEOPLE (NAACP), DEATH ROW U.S.A. 6 (Winter 2011), available at http://naacpldf.org/files/publications/DRUSA_Winter_2011.pdf [hereinafter NAACP, DEATH ROW USA]. Governors Gerald Baliles and Charles Robb permitted executions to proceed during their respective terms and did not commute any death sentence; all other Virginia Governors have commuted at least one death sentence. See *supra* notes 26-29 and accompanying text.

¹⁹² VA. CONST. art. V, § 1.

¹⁹³ Charles Robb, Virginia Governor from 1982 to 1986, was later the United States Senator from Virginia from 1989 to 2001. Robb, *Charles Spittal*, (1939 –), BIOGRAPHICAL DIRECTORY OF THE U.S. CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=R000295> (last visited Sept. 17, 2012). Douglas Wilder, Governor from 1990 to 1994, was later the Mayor of Richmond from 2004 to 2008. Will Jones, *Wilder Has Hits, Misses As Richmond Mayor*, RICH. TIMES-DISPATCH, Dec. 28, 2008. George Allen, Governor from 1994 to 1998, was later elected to Virginia's seat in the United States Senate in 2001. Allen, *George*, (1952 –), BIOGRAPHICAL DIRECTORY OF THE UNITED STATES CONGRESS, <http://bioguide.congress.gov/scripts/biodisplay.pl?index=A000121> (last visited Sept. 17, 2012). James Gilmore, Governor from 1998 to 2002, ran for Senate in 2008 but lost to another former Virginia Governor, Mark Warner (2002 to 2006). *Biography*, MARK R. WARNER, <http://www.warner.senate.gov/public/index.cfm/biography> (last visited Sept. 17, 2012). Finally, Tim Kaine, Governor from 2006 to 2010, was elected to Virginia's 2012 United States Senate seat. See Wesley Hester, *A Post Election Q&A with Tim Kaine*, RICH. TIMES-DISPATCH, Nov. 25, 2012. Only former Governors John Dalton (1977 to 1981) and Gerald Baliles (1986 to 1990) have not pursued political office beyond their terms as Governor. See *John Dalton, 55, Dies; Ex-Virginia Governor*, N.Y. TIMES, July 31, 1986; Suzanne Seurattan, *Gov. Gerald Baliles Named 2012 Hunter B. Andrews Fellow*, NEWS & EVENTS, WILLIAM & MARY, (Apr. 3, 2012), <http://www.wm.edu/news/stories/2012/gov.-gerald-baliles-named-2012-hunter-b.-andrews-distinguished-fellow123.php>, (last visited June 17, 2013).

clemency is a process that should be flexible and that calling for unlimited transparency in the clemency decision-making process could make such proceedings more, rather than less, susceptible to undue political influence. The Assessment Team also notes that it is difficult to find a model or best practice for clemency as the clemency decision-making is, in many jurisdictions, shrouded in secrecy or over-politicized.

However, it appears that in some instances Virginia Governors were not fully informed or did not fully understand the wide-encompassing considerations for clemency, particularly when the courts did not reach the merits of a particular issue that was later presented in an application for clemency. In addition, death row inmates petitioning for clemency are not guaranteed counsel. Attorneys who do undertake clemency representation may have neither sufficient time nor resources to adequately develop clemency petitions on behalf of death row inmates. This deprivation may be due, in part, to Virginia's practice of issuing an execution warrant before the exhaustion of legal remedies in the case. Thus, Virginia can undertake some reforms to improve the fairness of clemency proceedings and better ensure that all those involved in the process are fully informed of their roles and responsibilities.

Counsel

The clemency process “plays a particularly important role in death penalty cases, as it ‘provides the [government] with a final, deliberative opportunity to reassess this irrevocable punishment.’”¹⁹⁴ In addition, the U.S. Supreme Court has applied due process protection to clemency proceedings.¹⁹⁵ Given these two imperatives, clemency counsel must assemble “the most persuasive possible record” for the Governor’s review, while also carefully examining “the possibility of . . . legal claims asserting the right to a fuller and fairer process.”¹⁹⁶ Thus, the Assessment Team recommends that Virginia

- Guarantee the timely appointment of counsel for representation at clemency in death penalty cases;
- Adequately compensate such counsel and ensure adequate resources for investigative, mitigation, and expert services needed to effectively present a clemency petition; and
- Promulgate standards regarding qualifications of clemency counsel.¹⁹⁷

Timing of Execution Warrant

Importantly, clemency is the last opportunity available to evaluate claims that may not have been presented to or decided by the courts, in addition to an evaluation of the judiciousness of the death sentence imposed. Thus, Virginia’s practice of setting an execution date prior to the expiration of time available for filing for state and federal relief—and before all legal

¹⁹⁴ ABA, *ABA Guidelines for the Appointment and Performance of Defense Counsel in Death Penalty Cases*, 31 HOFSTRA L. REV. 913, 936 (2003), [hereinafter *ABA Guidelines*].

¹⁹⁵ See, e.g., *Ohio Adult Parole Auth. v. Woodard*, 523 U.S. 272 (1998).

¹⁹⁶ *ABA Guidelines*, 31 HOFSTRA L. REV., at 937.

¹⁹⁷ *ABA Guidelines*, Guideline 10.15.2, 31 HOFSTRA L. REV., at 1088.

proceedings have concluded—increases the likelihood that petitions for clemency will not be adequately researched and presented. Thus, the Commonwealth should adopt a provision that an execution warrant should not be issued until all available legal proceedings have concluded, or the time available for filing claims has elapsed. Furthermore, no execution warrant should issue until the Governor has had an opportunity to evaluate and rule on the petition for clemency.

Statement of Reasons for Grant or Denial of Clemency

Finally, the Virginia Assessment Team believes that it would improve transparency, without jeopardizing independent review, if the Governor set forth in detail his/her reasons for granting or denying a request for clemency in death penalty cases. In every case, the statement of reasons should set out the materials reviewed and individuals interviewed prior to the Governor's decision, as well as a detailed explanation of the Governor's rationale for his/her decision. Issuance of a public statement of reasons in a capital clemency case would also serve to better educate the public on the broad-based nature of clemency powers, including the limitations on the judicial system's ability to grant relief under circumstances that might warrant clemency. Public access to the materials reviewed, as well as a full explanation of the basis for a denial or grant of clemency, would also assist future gubernatorial administrations in making educated clemency determinations.

CHAPTER TEN

CAPITAL JURY INSTRUCTIONS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

In virtually all jurisdictions that authorize capital punishment, jurors in capital cases have the “awesome responsibility” of deciding whether another person will live or die.¹ Jurors, prosecutors, defendants, and the general public rely upon state trial judges to present fully and accurately, through jury instructions, the applicable law to be followed in jurors’ decision-making. Sometimes, however, jury instructions are poorly written and conveyed. As a result, instructions may tend to confuse jurors, rather than communicate.²

It is important that trial judges impress upon jurors the full extent of their responsibility to decide whether the defendant will live or die or to make their advisory recommendation on sentencing. Some trial court instructions may lead jurors to misunderstand their responsibility or to believe that reviewing courts independently will determine the appropriate sentence. In some cases, jurors may conclude that their decisions are not vitally important in determining whether a defendant will live or die.

Furthermore, courts must ensure that jurors do not act based on serious misimpressions, such as a belief that a sentence of “life without parole” does not ensure that the offender will remain in prison for the rest of his/her life. Jurors holding this or other mistaken beliefs may vote to impose a death sentence because they erroneously assume any lesser sentence eventually will result in the release of the offender within some number of years.

Jurors also must understand the meaning of mitigation as well as their ability to bring mitigating factors to bear when considering capital punishment. Unfortunately, jurors can confuse mitigation with aggravation, or they may believe that they cannot consider evidence as mitigating unless it is proved beyond a reasonable doubt to the satisfaction of every member of the jury.³

¹ *Caldwell v. Mississippi*, 472 U.S. 320, 341 (1985) (internal quotation marks omitted).

² See William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law’s Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51 (2003); see also James Luginbuhl, *Comprehension of Judges’ Instructions in the Penalty Phase of a Capital Trial*, 16 LAW & HUM. BEHAV. 203, 204 (1992) (listing past research “demonstrat[ing] jurors’ inadequate comprehension of judges’ instructions”).

³ See Bowers & Foglia, *supra* note 2, at 68.

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

A. *General Provisions on the Selection and Timing of Instructions*

Virginia Supreme Court Rules provide that, in a criminal jury trial, the court must “instruct the jury before [closing] arguments of counsel to the jury.”⁴ In felony trials, the instructions must also be “reduced to writing.”⁵ The rules further provide that “the parties may submit proposed instructions at the conclusion of all the evidence.”⁶ The Supreme Court of Virginia has held that “[i]f a proffered instruction finds any support in credible evidence, its refusal is reversible error.”⁷

The court must also give the parties an opportunity to object to the instructions before the jury is charged.⁸ To properly preserve an alleged error in jury instruction for appeal, the defendant must object to the instruction at the time it is proffered.⁹

B. *Applicable Guilt Phase Instructions in a Capital Trial*

1. Instruction on Capital Murder

Virginia statutory law defines several types of “willful, deliberate, and premeditated killing[s]” as capital murder offenses, all of which are eligible for the death penalty.¹⁰ The Virginia model instructions, promulgated by the Model Instruction Committee, provides for jurors to be instructed on the elements of the offense charged.¹¹ The instructions further state that

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt each of the above elements of the crime as charged, then you shall find the defendant guilty and shall not fix the punishment until your verdict has been returned and further evidence is heard by you.

If you find that the Commonwealth has failed to prove beyond a reasonable doubt any one or more of the elements of the crime, then you shall find the defendant not guilty of capital murder.¹²

⁴ VA. SUP. CT. R. 3A:16(a).

⁵ *Id.*

⁶ VA. SUP. CT. R. 3A:16(b). In addition, “[i]f directed by the court the parties shall submit proposed instructions to the court at such reasonable time before or during the trial as the court may specify.” *Id.*

⁷ McClung v. Commonwealth, 212 S.E.2d 290, 293 (Va. 1975).

⁸ VA. SUP. CT. R. 3A:16(c).

⁹ Breard v. Commonwealth, 445 S.E.2d 670, 679 (Va. 1994) (citing VA. SUP. CT. R. 5:25).

¹⁰ See VA. CODE ANN. § 18.2-31 (2013). For a full list of these offenses, see Chapter One.

¹¹ Virginia Model Jury Instructions—Criminal, No. G33.100 (2012) (on file with author). The model instructions, while not mandatory, have been favorably cited by the Supreme Court of Virginia and the Court of Appeals of Virginia in several cases. See, e.g., Osman v. Osman, 737 S.E.2d 876, 882 (Va. 2013); Pryor v. Commonwealth, 661 S.E.2d 820, 821 (Va. 2008).

¹² *Id.*

2. Instruction on Lesser-Included Offenses

The U.S. Supreme Court has held that in a capital case, the trial court must instruct the jury on any lesser-included homicide offense that is supported by the evidence.¹³ First and second degree murder are lesser included offenses of capital murder under Virginia law.¹⁴

C. Applicable Penalty Phase Instructions in a Capital Trial

1. Mental Retardation¹⁵

In accordance with the U.S. Supreme Court decision prohibiting the execution of persons with mental retardation,¹⁶ the model penalty phase instructions address cases in which the defendant raises the issue of mental retardation.¹⁷

2. Instruction on Sentencing Determination

In those capital cases in which the prosecution is seeking the death penalty based on both of Virginia's statutory aggravating factors, the Virginia model instructions provide as follows:

You have convicted the defendant of a crime which may be punished by death. [If you find that the defendant has failed to prove by a preponderance of the evidence that he is mentally retarded,] (Y)ou must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than \$100,000. Before the penalty can be fixed at death, the Commonwealth must prove beyond a reasonable doubt at least one of the following aggravating circumstances:

- (1) That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing serious threat to society; or
- (2) That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt both of these circumstances, then you may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at:

¹³ Schad v. Arizona, 501 U.S. 624, 648 (1991).

¹⁴ See VA. CODE ANN. § 18.2-32 (2013).

¹⁵ For a discussion of mental retardation issues as they relate to capital punishment, see Chapter Thirteen on Mental Retardation and Mental Illness.

¹⁶ Atkins v. Virginia, 536 U.S. 304 (2002).

¹⁷ Virginia Model Jury Instructions—Criminal, Nos. P33.120, P33.121 (2012) (on file with author).

- (1) Imprisonment for life; or
- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.

If you find from the evidence that the Commonwealth has proved beyond a reasonable doubt either of these circumstances, then you may fix the punishment of the defendant at death. But if you nevertheless believe from all the evidence, including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at:

- (1) Imprisonment for life; or
- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.

If the Commonwealth has failed to prove beyond a reasonable doubt at least one of these circumstances, then you shall fix the punishment of the defendant at:

- (1) Imprisonment for life; or
- (2) Imprisonment for life and a fine of a specific amount, but not more than \$100,000.

Any decision you make regarding punishment must be unanimous.¹⁸

The model instructions for cases in which only one aggravating factor is submitted to the jury are similar.¹⁹

3. Mitigating Evidence

The model instructions also provide the following additional statement on mitigating evidence:

If you find that the Commonwealth has proved beyond a reasonable doubt the existence of an aggravating circumstance, in determining the appropriate punishment you shall consider any mitigation evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment.²⁰

4. Meaning of “Imprisonment for Life”

Virginia statutory law requires that “[u]pon request of the defendant, a jury shall be instructed that” in capital murder cases, “a defendant shall not be eligible for parole if sentenced to imprisonment for life.”²¹ As such, the model instructions on life in prison in capital cases states

¹⁸ Virginia Model Jury Instructions—Criminal, No. P33.122 (2012) (on file with author).

¹⁹ See Virginia Model Jury Instructions—Criminal, No. P33.125 (2012) (on file with author).

²⁰ Virginia Model Jury Instructions—Criminal, No. P33.127 (2012) (on file with author).

²¹ VA. CODE ANN. § 19.2-264.4(A) (2013).

that “[t]he words ‘imprisonment for life’ mean imprisonment for life without possibility of parole.”²²

²² Virginia Model Jury Instructions—Criminal, No. P33.126 (2012) (on file with author).

II. ANALYSIS

Below are the ABA Benchmarks, or “Protocols,” used by the state assessment team in its evaluation of its state’s death penalty system. The Protocols are followed by the Assessment Team’s analysis of the Commonwealth’s compliance with the Protocols and, where appropriate, the Assessment Team’s recommendation(s) for reform.

A. Protocol #1

Each capital punishment jurisdiction should work with attorneys, judges, linguists, social scientists, psychologists, and jurors themselves to evaluate the extent to which jurors understand capital jury instructions, revise the instructions as necessary to ensure that jurors understand applicable law, and monitor the extent to which jurors understand the revised instructions to permit further revision as necessary.

As with many states, the sentencing process in Virginia is a complex, multi-step process. Jurors must make findings on aggravating factors, compare mitigating and aggravating evidence, and then decide whether to impose a sentence of life imprisonment or the death penalty.²³ Perhaps due to this complexity, capital jurors can misunderstand and misapply the law during sentencing deliberations.²⁴ However, capital jury instructions that clearly explain the applicable law in plain English that laypersons can understand may help to reduce juror misunderstanding.

Virginia’s Capital Jury Instructions

While Virginia law does not mandate that any particular instructions be given to the jury in a capital case,²⁵ Virginia’s Model Instruction Committee, whose members are appointed by the Chief Justice of Virginia,²⁶ has developed model jury instructions for use in criminal proceedings, including death penalty cases.²⁷ Although the model instructions are not mandatory,²⁸ they have been favorably cited by the Supreme Court of Virginia and the Court of Appeals of Virginia in several cases.²⁹

²³ See VA. CODE ANN. § 19.2-264.2–.4 (2013).

²⁴ See, e.g., William J. Bowers et al., *Jurors’ Failure to Understand or Comport with Constitutional Standards in Capital Sentencing: Strength of the Evidence*, 46 CRIM. L. BULL. 1147, 1151–52 (2010) (summarizing certain findings of the Capital Jury Project, including that that jurors “[f]ail[] to understand sentencing requirements” and “[m]istakenly believ[e] the death penalty is required by law”); Luginbuhl, *supra* note 2, at 204 (listing “[p]ast research . . . demonstrat[ing] jurors’ inadequate comprehension of judges’ instructions”).

²⁵ The only exception is that “[u]pon request of the defendant, a jury shall be instructed that for all [capital murder] offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life.” VA. CODE § 19.2-264.4(A) (2012).

²⁶ *Virginia Model Jury Instructions—Criminal*, LEXISNEXIS, <http://www.lexisnexis.com/store/catalog/booktemplate/productdetail.jsp?pageName=relatedProducts&prodId=6572#> (last visited Apr. 10, 2013).

²⁷ Virginia Model Jury Instructions—Criminal, Nos. G33.100, P33.120–P33.127 (2012) (on file with author).

²⁸ VA. CODE ANN. § 19.2-263.2 (2013) (“A proposed jury instruction submitted by a party, which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with model jury instructions.”)

²⁹ See, e.g., *Osman v. Osman*, 737 S.E.2d 876, 882 (Va. 2013); *Pryor v. Commonwealth*, 661 S.E.2d 820, 821 (Va. 2008); *Gaines v. Commonwealth*, 574 S.E.2d 775, 777 (Va. App. 2003); *Saunders v. Commonwealth*, 523 S.E.2d 509, 510 (Va. App. 2000). But see *Turman v. Commonwealth*, 667 S.E.2d 767, 771 (Va. 2008) (noting that

The Chief Justice of Virginia appoints the members of the Model Instruction Committee to four year terms.³⁰ Traditionally, the committee has consisted of five judges and five practicing attorneys.³¹ One judicial member is an appellate judge, and the remaining four are circuit judges.³² The attorney members include both criminal and civil litigators with “extensive jury trial experience.”³³ In addition, “[t]wo law professors also advise the committee and are present at the meetings, along with a [publisher] representative, a staff attorney with the Supreme Court of Virginia and a non-voting attorney from the Office of the Attorney General.”³⁴

The committee meets annually to review the criminal instructions.³⁵ Committee members are “assigned a number of chapters [of the instructions to review] prior to the meeting.”³⁶ Individual members are “then responsible for reviewing each instruction and updating it in light of changes to statutes, case law and making any other suggestions.”³⁷ The committee also considers “suggestions forwarded to it by members of the bar and of the judiciary.”³⁸

In drafting and updating its instructions, the committee states that it “is mindful of the need to make instructions comprehensible to non-lawyers.”³⁹ In particular, the committee reviews Virginia appellate and trial court cases in which jury instruction confusion was an issue at trial and considers “whether a change to the instruction is warranted.”⁴⁰ However, the committee does not consult with non-attorneys such as linguists, social scientists, psychologists, or former jurors when drafting and revising its instructions, nor does it conduct any field testing of the instructions to determine if they are comprehensible before being formally implemented.⁴¹

Juror Confusion in Virginia Cases

It appears that jurors in Virginia death penalty cases experience confusion regarding their roles and responsibilities in determining the sentence in the penalty phase of a capital case. The Capital Jury Project has revealed that a substantial number of jurors in Virginia capital cases have several misconceptions about capital sentencing procedures.⁴² The Capital Jury Project

the model instructions “suffer[] from a significant defect” with respect to the instruction on flight from a crime scene as evidence of guilt).

³⁰ Email Interview by Mark Pickett with Judge Stephen R. McCullough, Chair, Va. Model Instruction Comm. (Apr. 15, 2013) (on file with author).

³¹ *See id.*

³² *Id.* As of 2013, the judicial members are Stephen R. McCullough (Chair), Stephen Mahan, Melvin Hughes, Charles Dorsey and Mary Grace O’Brien. *Id.*

³³ *Id.* As of 2013, the attorney members are Monica Monday, Molly Priddy, Robert Mitchell, Jonathan Fletcher, and Eric Theissen. *Id.*

³⁴ *Id.*

³⁵ Email Interview with Judge Stephen R. McCullough, *supra* note 30.

³⁶ *Id.* Each member is assigned a different set of chapters before each meeting to ensure that the same member is not reviewing the same instructions each time. *Id.*

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Email Interview with Judge Stephen R. McCullough, *supra* note 30.

⁴² Bowers & Foglia, *supra* note 2, at 55; *What is the Capital Jury Project?*, *supra* note 43.

conducts three- to four-hour interviews with jurors who have served in capital trials.⁴³ Since 1991, it has interviewed 1,198 jurors who have served in 353 capital trials in fourteen states, including Virginia.⁴⁴

The Project found, for instance, that 77% of surveyed Virginia jurors erroneously believed that the jury had to be unanimous in order to consider evidence as mitigating.⁴⁵ Moreover, 53% did not realize they could consider any evidence as mitigating evidence, and 51% did not know that they were not required to find mitigating evidence beyond a reasonable doubt.⁴⁶

Many Virginia jurors also misunderstood whether the death penalty was required in a particular case. In accordance with the U.S. Supreme Court's decision in *Woodson v. North Carolina*,⁴⁷ Virginia law provides that the commission of a particular crime or the existence of a particular aggravating factor is not sufficient to mandate imposition of the death penalty.⁴⁸ However, 53% of surveyed Virginia jurors believed that the death penalty was required by law if they found that the murder was heinous, vile, or depraved, and 41% believed death was required if they found that the defendant would be dangerous in the future.⁴⁹ In reality, these findings are merely aggravating factors for jurors to consider when determining whether to sentence the defendant to death.⁵⁰ More information about juror confusion in Virginia capital cases can be found in Protocols #3 through #6 of this Chapter.

Conclusion

The Virginia Model Instruction Committee includes judges and lawyers from diverse areas of practice, and the committee consults with law professors in developing its instructions. The committee also updates its instructions annually based on new legal developments. However, the committee does not consult with non-lawyers such as linguists, social scientists, psychologists, and former jurors. Accordingly, Virginia is in partial compliance with Protocol #1.

⁴³ *What is the Capital Jury Project?*, UNIV. AT ALBANY, <http://www.albany.edu/scj/13189.php> (last visited Jan. 12, 2012).

⁴⁴ Bowers & Foglia, *supra* note 2, at 55; *What is the Capital Jury Project?*, *supra* note 43.

⁴⁵ Bowers & Foglia, *supra* note 2, at 68.

⁴⁶ *Id.*

⁴⁷ *See* *Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

⁴⁸ *See* VA. CODE ANN. § 19.2-264.2 (2013) (noting that a death sentence cannot be imposed unless the jury recommends a death sentence following the finding of an aggravating factor).

⁴⁹ Bowers & Foglia, *supra* note 2, at 73.

⁵⁰ VA. CODE ANN. § 19.2-264.2 (2013). The statute provides as follows:

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim; and (2) recommend that the penalty of death be imposed.

Id.

Recommendation

The Virginia Assessment Team recognizes the complexities inherent in designing capital jury instructions that are both comprehensible to laypersons and accurate statements of the law. As shown by the findings of the Capital Jury Project, however, a significant number of Virginia's capital jurors have failed to understand several aspects of Virginia's capital sentencing procedure. On some issues, a majority of surveyed jurors expressed understandings of the law that contradicted U.S. Supreme Court decisions.⁵¹

Thus, the Assessment Team recommends that the Virginia Model Instruction Committee revise its capital jury instructions with respect to issues clearly identified as problematic by the Capital Jury Project. While revised instructions may not eliminate all misunderstanding and confusion experienced by capital jurors, revisions to the linguistic formulation of instructions—in addition to expanding the content of the instructions in some areas—may improve juror comprehension in many death penalty cases.⁵²

In addition, the Assessment Team recommends that the Model Instruction Committee survey Virginia circuit court judges regarding the type and frequency of questions that trial courts have received from deliberating jurors in death penalty cases. These responses may then be used by the Committee to devise improved linguistic formulations of existing instructions, additional instructions and definitions of legal terms, and amendments to the logical presentation of the instructions provided to capital jurors.

Finally, because the committee currently includes a non-voting representative from the Virginia Attorney General's office, it also should include a representative from the Virginia Indigent Defense Commission and/or a certified capital defense attorney to ensure that there is representation from the capital defense community.

B. Protocol #2

Jurors should receive written copies of “court instructions” (referring to the judge’s entire oral charge) to consult while the court is instructing them and while conducting deliberations.

Jurors are often better able to understand the court's instructions and correctly apply the law when provided with written copies of the court's instructions.⁵³ Written instructions are

⁵¹ See Bowers & Foglia, *supra* note 2, at 68.

⁵² A study on juror comprehension in capital cases in California found that “psycholinguistically improved instructions that were put in to place in 2006” improved comprehension “somewhat” and that “comprehension can be moderately improved even more by using instructions that provide jurors with thematic and case-specific examples, presented in a relevant and concrete matter.” DAN SIMON, IN DOUBT: THE PSYCHOLOGY OF THE CRIMINAL JUSTICE PROCESS 190 (2012).

⁵³ The Honorable B. Michael Dann, “*Learning Lessons*” and “*Speaking Rights*”: *Creating Educated and Democratic Juries*, 68 IND. L. J. 1229, 1259 (1993); Judge Roger M. Young, *Using Social Science to Assess the Need for Jury Reform in South Carolina*, 52 S.C. L. REV. 135, 177–78 (2000) (noting that 69% of the judges polled thought that juror comprehension would be aided by giving written instructions after the judge charged the jury and most believed that it would aid juror comprehension to have the instructions with them during deliberations).

particularly helpful in death penalty cases, as capital jurors are often confused by complex capital sentencing procedures.⁵⁴

Virginia Supreme Court Rules state that “[i]n a felony case, the [court’s jury] instructions shall be reduced to writing.”⁵⁵ The rules do not expressly provide that the written instructions must be given to jurors.⁵⁶ In practice, however, it appears that in capital murder and other serious felony trials, the court typically provides the jury with written copies of instructions after it has instructed them orally.⁵⁷

Conclusion

Virginia trial courts typically provide jurors with copies of written instructions to consult with during deliberations. Thus, Virginia is in partial compliance with Protocol #2.

Recommendation

As the entire jury may be provided with only one copy of the court’s instructions, the Assessment Team recommends that each juror be provided with a copy of the instructions prior to deliberations.

C. Protocol #3

Trial courts should respond meaningfully to jurors’ requests for clarification of instructions by explaining the legal concepts at issue and meanings of words that may have different meanings in everyday usage and, where appropriate, by directly answering jurors’ questions about applicable law.

As discussed, national studies have shown that capital jurors often have difficulty understanding jury instructions.⁵⁸ This confusion can be attributed to a number of factors, such as the use of complex legal concepts and unfamiliar words without sufficient definitions.⁵⁹ When trial courts respond to jurors’ questions about capital jury instructions with substantive answers that clarify the applicable law, juror comprehension of those instructions often improves.

⁵⁴ See *supra* notes 45–50 and accompanying text.

⁵⁵ VA. SUP. CT. R. 3A:16(a).

⁵⁶ See VA. SUP. CT. R. 3A:16.

⁵⁷ Email from Joseph Flood, Senior Partner, Sheldon & Flood, to Mark Pickett, Apr. 26 & 29, 2013 (on file with author). Mr. Flood is also a member of the Virginia Death Penalty Assessment Team.

⁵⁸ Susie Cho, *Capital Confusion: The Effect of Jury Instructions on the Decision to Impose Death*, 85 J. CRIM. L. & CRIMINOLOGY 532, 549–551 (1994) (discussing juror comprehension, or lack thereof, of jury instructions); Shari Seidman Diamond & Judith N. Levi, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224, 225 (1996).

⁵⁹ James Luginbuhl & Julie Howe, *Discretion in Capital Sentencing Instructions: Guided or Misguided?*, 70 IND. L. J. 1161, 1169–1170 (1995); Peter Meijes Tiersma, *Dictionaries and Death: Do Capital Jurors Understand Mitigation?*, 1995 UTAH L. REV. 1, 7 (discussing jurors’ understanding of the concept of mitigating evidence, including the scope, applicable burden of proof, and the requisite number of jurors necessary to find the existence of a mitigating circumstance).

In one study, for instance, 154 persons in Virginia were selected to participate in mock death penalty deliberations.⁶⁰ The mock jurors were presented with a factual outline of a capital murder case and instructed on the law.⁶¹ The study found that a follow-up clarifying instruction corrected the misunderstanding of 40% of the mock jurors who erroneously believed that they were required to impose the death penalty if an aggravating factor was found.⁶² By contrast, “simply directing the jurors to reread the pattern instruction did nothing to improve their comprehension.”⁶³

Juror Questions in Virginia Capital Cases

As a matter of general principle, “[j]uries are presumed to follow their instructions” in Virginia.⁶⁴ The Supreme Court of Virginia has not determined whether and in what manner a trial court must respond to a jury’s request for a clarification of instructions.⁶⁵ However, a review of capital cases in Virginia indicates that trial courts typically respond to juror questions by instructing jurors to review the instructions already given, or by directing them to review a specific instruction.⁶⁶

In *Prieto v. Commonwealth*, for instance, the jury submitted the following question to the trial court during penalty phase deliberations: “Your Honor, regarding the first aggravating circumstance: ‘constitute a continuing serious threat to society,’ are we to consider that he is already never likely to leave prison or should we consider the possibility of him walking the street as a free man?”⁶⁷ Defense counsel requested that the court refer the jurors to a specific instruction that read “[t]he words ‘imprisonment for life’ means imprisonment for life without possibility of parole.”⁶⁸ Instead, the court responded with a note that read, “I refer you back to

⁶⁰ Stephen P. Garvey, Sheri Lynn Johnson & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 633–35 (2000).

⁶¹ *Id.*

⁶² *Id.* at 639. The clarifying instruction stated, “Even if you find that the State has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison.” *Id.* at 635.

⁶³ *Id.* at 638.

⁶⁴ *Green v. Young*, 571 S.E.2d 135, 139 (Va. 2002) (quoting *Zafiro v. United States*, 506 U.S. 534, 540 (1993)) (a non-capital case).

⁶⁵ The Court of Appeals of Virginia has, however, held that “[i]t is proper for a trial court to fully and completely respond to a jury’s inquiry concerning its duties.” *Marlowe v. Commonwealth*, 347 S.E.2d 167, 171 (Va. App. 1986).

⁶⁶ *See, e.g., Weeks v. Angelone* 528 U.S. 225, 229 (2000) (instructing jurors, in a Virginia case, to review the “second paragraph of Instruction # 2”); *Prieto v. Commonwealth*, 682 S.E.2d 910, 917 (Va. 2009) (responding to a juror question with a note that read “I refer you back to the evidence that has been admitted and the instructions of law”); *Wolfe v. Commonwealth*, 576 S.E.2d 471, 486 (Va. 2003) (“[t]he circuit court instructed the jury that it must proceed on the instructions that the jury had already received from the court”); *Bell v. Commonwealth*, 563 S.E.2d 695, 716 (Va. 2002) (instructing jurors that they “would have to rely on the evidence that they heard, and the instructions already presented in deciding the punishment”);

⁶⁷ *Prieto*, 682 S.E.2d at 917.

⁶⁸ *Id.* at 917 n.3.

the evidence that has been admitted and the instructions of law.”⁶⁹ The jury subsequently sentenced the defendant to death.⁷⁰

In *Weeks v. Angelone*, the U.S. Supreme Court considered whether a Virginia trial court’s response to the jury’s question in a capital case was appropriate.⁷¹ In the penalty phase of the trial, the prosecution sought to prove both aggravating circumstances available under Virginia law.⁷² During deliberations, the jury submitted the following question to the court:

If we believe that [defendant] Lonnie Weeks, Jr. is guilty of at least 1 of the alternatives [i.e. aggravating circumstances], then is it our duty as a jury to issue the death penalty? Or must we decide (even though he is guilty of one of the alternatives) whether or not to issue the death penalty, or one of the life sentences? What is the Rule? Please clarify?⁷³

The trial court’s response to the question, however, merely directed the jurors to review the relevant instruction.⁷⁴ Two hours later, the jury returned a verdict sentencing the defendant to death.⁷⁵ The U.S. Supreme Court upheld the sentence, noting that “[a] jury is presumed to follow its instructions.”⁷⁶

As discussed in Protocol #1, the findings of the Capital Jury Project indicate that the question raised by jurors in *Weeks* is a common area of confusion for capital jurors in Virginia: 53% of surveyed Virginia jurors erroneously believed that the death penalty was required by law if they found that the murder was heinous, vile, or depraved, and 41% erroneously believed death was required if they found that the defendant would be dangerous in the future (i.e., a continuing serious threat to society).⁷⁷

Relatedly, the model instructions do not include definitions for several legal terms central to the decision to sentence the defendant to death or life in prison. The model instructions do not

⁶⁹ *Id.*

⁷⁰ *Id.* at 913. On direct appeal, the Supreme Court of Virginia declined to consider the issue, stating that it had not been preserved for review. *Id.* at 918.

⁷¹ *Weeks v. Angelone*, 528 U.S. 225, 227 (2000). While the issue was also raised on direct appeal, the Supreme Court of Virginia summarily dismissed the claim. *See Weeks v. Commonwealth*, 450 S.E.2d 379, 390 (Va. 1994) (“In conclusion, defendant raises a number of miscellaneous issues dealing with evidence, jury instructions, and inquiries by the jury during its deliberations. We have considered all the arguments in support of those issues and conclude that none has any merit.”)

⁷² *Id.* at 228.

⁷³ *Id.* at 229. The jury also submitted a question regarding the meaning of life in prison. *Id.* at 228. This issue is discussed in Protocol #4, below.

⁷⁴ *Id.* The instruction read as follows:

If you find from the evidence that the Commonwealth has proved, beyond a reasonable doubt, either of the two alternatives, and as to that alternative, you are unanimous, then you may fix the punishment of the defendant at death, or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at imprisonment for life, or imprisonment for life with a fine not to exceed \$100,000.

Id.

⁷⁵ *Id.* at 230.

⁷⁶ *Id.* at 234 (citing *Richardson v. Marsh*, 481 U.S. 200, 211 (1987)).

⁷⁷ *Bowers & Foglia*, *supra* note 2, at 73.

define the meaning of “aggravating” for the jury.⁷⁸ Nor do the instructions define terms constituting aggravation, such as the definition of a “probability” that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society,⁷⁹ or legal terms contained in the second aggravator, such as “depravity of mind,” “torture,” or “outrageously or wantonly vile.”⁸⁰ The model instructions do, however, define “mitigating evidence” as “evidence presented of circumstances which do not justify or excuse the offense but which in fairness or mercy may extenuate or reduce the degree of moral culpability and punishment.”⁸¹

Conclusion

It appears that Virginia trial courts do not respond to jurors’ requests for clarification of instructions by explaining legal concepts and terms or by directly answering questions about the applicable law. Instead, courts typically tell jurors to review the instructions they have already received, which often does little to improve comprehension of instructions.⁸² Accordingly, Virginia is not in compliance with Protocol #3.

Recommendation

The Assessment Team acknowledges that some juror inquiries present a difficult task for the trial court, as an incorrect or incomplete response to jurors’ inquiries could result in a reversal on appeal. Nevertheless, there may be instances where trial courts can provide more direct answers to juror questions. This is particularly important in instances in which jurors—like those in the *Weeks* case above—express confusion over applicable law, such as whether the jury is required to sentence the defendant to death. Trial judges should be encouraged to respond meaningfully to jurors’ inquiries about the applicable law in the case.

As discussed in Protocol #1, however, Virginia capital jurors have frequently failed to understand many aspects of capital sentencing law. Thus, juror questions and confusion are likely to persist unless Virginia’s capital jury instructions are revised to enhance clarity, jurors are instructed in a more logical presentation of alternatives, and judges are more willing to respond to juror inquiries regarding questions of law. Indeed, clearer instructions in the first instance may help reduce the persistence of many questions of law that would otherwise arise.

⁷⁸ Bowers & Foglia, *supra* note 2, at 73.

⁷⁹ *Porter v. Commonwealth*, 661 S.E.2d 415, 447 (Va. 2008) (stating that the definition of “probability” as “a reasonable ‘probability’, i.e., a likelihood substantially greater than a mere possibility, that [the defendant] would commit similar crimes in the future, but holding that the trial court is not required to provide this definition, or any other definition of “probability,” to the jury).

⁸⁰ Virginia Model Jury Instructions—Criminal, No. P33.122 (2012) (on file with author).

⁸¹ *Id.*

⁸² Garvey, *supra* note 60, at 638.

D. Protocol #4

Trial courts should instruct jurors clearly on applicable law in the jurisdiction concerning alternative punishments and should, at the defendant's request during the sentencing phase of a capital trial, permit parole officials or other knowledgeable witnesses to testify about parole practices in the state to clarify jurors' understanding of alternative sentences.

Virginia statutory law provides that life in prison without parole is the only alternative to a death sentence for a defendant convicted of capital murder.⁸³ Furthermore, “[u]pon request of the defendant, a jury shall be instructed that” in capital murder cases, “a defendant shall not be eligible for parole if sentenced to imprisonment for life.”⁸⁴ Because parole is not available in Virginia capital cases, the Assessment Team did not examine the Virginia system in light of Protocol # 4.

E. Protocol #5

Trial courts should not place limits on a juror's ability to give full consideration to any evidence that might serve as a basis for a sentence less than death.

The U.S. Supreme Court has held that, in capital sentencing, mitigating evidence is defined as “any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”⁸⁵ As such, it is critically important that trial courts not place limitations on capital jurors' ability to give full consideration to mitigating evidence.

Inadequate Jury Instructions on Mitigating Evidence

The Capital Jury Project's findings found that a substantial number of interviewed capital jurors in Virginia did not understand several important concepts related to mitigating evidence. It found that 77% of surveyed Virginia jurors erroneously believed that the jury had to be unanimous in order to consider evidence as mitigating, 53% did not realize they could consider any evidence as mitigating evidence, and 51% did not know that they were not required to find mitigating evidence beyond a reasonable doubt.⁸⁶ Juror confusion on these issues was higher than average in Virginia among the thirteen states in which the Capital Jury Project conducted its study.⁸⁷ These misconceptions may be due, in part, to jury instructions that do not fully apprise

⁸³ VA. CODE ANN. § 19.2-264.4(A) (2013).

⁸⁴ *Id.* The Supreme Court of Virginia first held that a capital defendant was entitled to an instruction that “life in prison” means “imprisonment for life without possibility of parole” in 1999. *Yarbrough v. Commonwealth*, 519 S.E.2d 602, 616 (Va. 1999). Previously, in accordance with U.S. Supreme Court precedent, such an instruction was only required when the prosecution was relying on the “continuing serious threat to society” aggravating factor. *See id.* at 611–12 (citing *Simmons v. South Carolina*, 512 U.S. 154 (1994)).

⁸⁵ *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

⁸⁶ *Bowers & Foglia*, *supra* note 2, at 68.

⁸⁷ *Id.* Of all the jurors surveyed, 66.5% of surveyed Virginia jurors erroneously believed that the jury had to be unanimous in order to consider evidence as mitigating, 44.6% did not realize they could consider any evidence as mitigating evidence, and 49.2% did not know that they were not required to find mitigating evidence beyond a reasonable doubt. *Id.*

jurors of their ability to consider any evidence that might serve as a basis for a sentence less than death.

While the Virginia model instructions comport with decisions by the Supreme Court of Virginia,⁸⁸ the instructions exclude significant explanatory legal rules and principles that might help jurors understand how mitigating evidence should be considered. For example, jurors are not instructed that mitigating evidence does not need to be found beyond a reasonable doubt. Nor are jurors instructed that a finding of mitigating evidence need not be unanimous or that any evidence may be considered as mitigating evidence. Moreover, while Virginia statutory law describes six specific mitigating factors,⁸⁹ the model instructions do not provide for jurors to be instructed on these factors, even if they are supported by the evidence. Thus, while jurors receive specific instructions on how to consider specific aggravating factors, they receive only a general description of mitigating evidence.⁹⁰

Lack of Instruction on Residual Doubt

Residual doubt—that is, lingering doubt of the defendant’s guilt—has been found by the Capital Jury Project to be among “the most powerful mitigating” factors for capital jurors.⁹¹ A Capital Jury Project in South Carolina found that 60% of surveyed jurors said that “lingering doubt over the defendant’s guilt” would make them “much less likely” to impose a death sentence.⁹²

Virginia jurors, however, may be unaware that they can consider residual doubt during sentencing deliberations. The Supreme Court of Virginia has held that “a defendant is not entitled to an instruction permitting a sentencing jury to consider residual doubt.”⁹³ Moreover, a defendant is prohibited from even “argu[ing] residual doubt in the sentencing phase.”⁹⁴

⁸⁸ *Morrisette v. Commonwealth*, 569 S.E.2d 47, 56 (Va. 2002) (rejecting claim that capital jury instructions did not “provide meaningful guidance to the jury because the instructions do not inform the jurors that they have a duty to consider mitigating evidence, do not provide any standard of proof regarding mitigating evidence, do not state that the death penalty can be imposed only if the jury is convinced beyond a reasonable doubt that aggravating factors outweigh mitigating ones, do not advise jurors that they are free to give mitigating evidence the weight and effect that each juror believes is appropriate, do not list the statutory examples of mitigating evidence, and do not define the terms ‘fairness’ and ‘mercy’”); *George v. Commonwealth*, 411 S.E.2d 12, 23 (1991) (holding that a jury instruction which would have instructed jurors on individual mitigating factors was properly rejected by the trial court); *Gray v. Commonwealth*, 356 S.E.2d 157, 178 (Va. 1987) (noting that “informing the jury that its decision on mitigating factors need not be unanimous could create confusion in the jurors’ minds because they are instructed that unanimity is required to impose the death penalty”).

⁸⁹ VA. CODE ANN. § 19.2-264.4(B) (2013).

⁹⁰ See Virginia Model Jury Instructions—Criminal, No. P33.122 (2012) (on file with author).

⁹¹ See Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998) (internal quotation marks omitted) (finding, from Capital Jury Project interviews with South Carolina jurors who had served in capital trials, that “[r]esidual doubt’ over the defendant’s guilt [wa]s the most powerful ‘mitigating’ fact”).

⁹² *Id.* at 1559.

⁹³ *Stockton v. Commonwealth*, 402 S.E.2d 196 (Va. 1991).

⁹⁴ *Id.* at 207. In prohibiting counsel to argue residual doubt in the sentencing phase, the Virginia Supreme Court relied, in part, on the U.S. Supreme Court’s decision in *Franklin v. Lynaugh* in which the Court held that the U.S. Constitution “in no way mandates reconsideration by capital juries, in the sentencing phase, of their ‘residual doubts’ over a defendant’s guilt.” *Franklin*, 487 U.S. 164, 174 (1988). See also *Frye v. Commonwealth*, 345 S.E.2d 267, 283 (1986) (finding that the trial court did not abuse its discretion in instructing defense counsel to cease its

Confusion Regarding Aggravating Factors

Incorrect Belief that the Law Requires Death Penalty

Jurors laboring under the misapprehension that the finding of an aggravating factor requires imposition of the death penalty may foreclose *any* consideration of mitigating evidence, so long as one aggravating factor is present in the case.⁹⁵ As the finding of an aggravating factor can never *require* imposition of a death sentence,⁹⁶ the two aggravating factors found in Virginia law are factors for the jury to *consider* in determining whether to sentence a defendant to death.⁹⁷

As discussed in Protocols #1 and #3, significant percentages of surveyed Virginia capital jurors believed that the death penalty was required if either aggravating factor was present.⁹⁸ A study of mock jurors in Virginia also demonstrated a high rate of confusion.⁹⁹ In that study, 44% of mock jurors who received only the standard instruction believed that the vileness aggravating factor required the death penalty, and 46% believed the same about the “continuing serious threat to society” factor.¹⁰⁰

This confusion may be due to unclear jury instructions. The instructions on aggravating factors used in the mock juror study are nearly identical to the Virginia model instructions.¹⁰¹ The study

argument that “the jury should consider the finality of the death sentence and the possibility that additional evidence might later demonstrate Frye’s innocence of the crime for which it had convicted him” during the sentencing phase).

⁹⁵ As previously discussed in Protocol #1, capital jurors also frequently misinterpret Virginia’s aggravating factors as mandating the imposition of the death penalty. *See supra* notes 47–50 and accompanying text.

⁹⁶ *See Woodson v. North Carolina*, 428 U.S. 280, 301 (1976).

⁹⁷ *See* VA. CODE ANN. § 19.2-264.2 (2013).

⁹⁸ Bowers & Foglia, *supra* note 2, at 73.

⁹⁹ *See supra* notes 60–63 and accompanying text.

¹⁰⁰ Garvey, *supra* note 60, at 638.

¹⁰¹ The relevant instructions provided to the mock jurors read as follows:

You have convicted the defendant of an offense which may be punished by death. You must decide whether the defendant shall be sentenced to death or to imprisonment for life or to imprisonment for life and a fine of a specific amount, but not more than \$100,000.00. Before the penalty can be fixed at death, the State must prove beyond a reasonable doubt at least one of the following alternatives:

1. That, after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society; or
2. That his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved depravity of mind or aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder.

If you find from the evidence that the State has proved beyond a reasonable doubt either of the two alternatives, and as to that alternative you are unanimous, then you may fix the punishment of the defendant at death or if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for life and a fine of a specific amount, but not more than \$100,000.00.

If the State has failed to prove beyond a reasonable doubt at least one of the alternatives, then you shall fix the punishment of the defendant at life imprisonment or imprisonment for life and a fine of a specific amount, but not more than \$100,000.00.

Id. at 652–53. The Virginia model instructions conform to these instructions almost verbatim. The only substantive difference is that the model instructions state, “But if you nevertheless believe from all the evidence, *including evidence in mitigation*, that the death penalty is not justified, then you shall fix the punishment of the defendant at”

found that juror comprehension of aggravating factors improved significantly when jurors were read an additional clarifying instruction that stated, “Even if you find that the State has proved one or both of the aggravating factors beyond a reasonable doubt, you may give effect to the evidence in mitigation by sentencing the defendant to life in prison.”¹⁰² Of the mock jurors who received this instruction, only 29% believed that a death sentence was mandatory in the presence of the vileness aggravating factor, and only 24% believed that death was required if they found the “continuing serious threat to society” factor.¹⁰³

Continuing Threat to Society

Since the abolition of parole in Virginia in 1995, capital jurors may also experience confusion in predicting whether the defendant “would commit criminal acts of violence that would constitute a continuing serious threat to society.”¹⁰⁴ With the abolition of parole, this aggravating factor, commonly called “future dangerousness,” requires the prosecution to prove that the defendant would pose a threat to others *during his/her life prison term*, not while in society at large.

Conclusion

Virginia’s standard capital jury instructions limit the jury’s ability to consider evidence in support of a sentence less than death in a variety of ways. Jurors are not instructed that mitigating evidence does not need to be found beyond a reasonable doubt, that a finding of mitigating evidence need not be unanimous, or that any evidence may be considered as mitigating evidence. Jurors also do not receive instructions on individual mitigating factors that are supported by the evidence.

Moreover, Virginia’s jury instructions have led many jurors to incorrectly believe that a finding of an aggravating factor *requires* the death penalty. These jurors may feel compelled to sentence a defendant to death even in the face of compelling mitigating evidence. Finally, the “continuing serious threat to society” aggravating factor is inaccurately worded and findings in support of this factor may be based on dubious science, further distracting jurors from relevant sentencing considerations. Accordingly, Virginia is not in compliance with Protocol #5.

Recommendation

The Assessment Team recommends the following changes to Virginia’s capital jury instructions to improve juror understanding of the manner in which aggravating and mitigating factors must be considered. First, Virginia capital jurors should be instructed that (1) mitigating evidence does not need to be found beyond a reasonable doubt; (2) a finding of mitigating evidence need not be unanimous; (3) any evidence presented during the guilt and sentencing phases of the trial may be considered as mitigating evidence; and (4) they must consider mitigating evidence if they find an aggravating factor.

life in prison or life in prison and a fine. Virginia Model Jury Instructions—Criminal, No. P33.122 (2012) (on file with author) (emphasis added).

¹⁰² Garvey, *supra* note 60, at 639, 655.

¹⁰³ *Id.* at 639.

¹⁰⁴ See VA. CODE ANN. § 19.2-264.4(C) (2013) (emphasis added).

Second, as jurors are instructed on individual aggravating factors supported by the evidence, jurors should also be instructed on individual mitigating factors when such an instruction is supported by the evidence and requested by the defendant. Third, Virginia should improve and expand upon the instruction on aggravating factors to ensure that jurors do not falsely believe that a finding of an aggravating factor mandates the death penalty.

The Assessment Team also notes that there is far more evidence of wrongful conviction in criminal cases—including those in which the death penalty was sought and imposed—than when the Supreme Court of Virginia issued its pronouncement in 1991 that counsel may not raise lingering or “residual doubt” about the defendant’s guilt during the sentencing phase of a death penalty case.¹⁰⁵ Indeed, as of June 18, 2013, over 300 people have been exonerated by post-conviction DNA testing and over 140 death row inmates have been exonerated due to evidence of innocence.¹⁰⁶ Thus, the Team recommends that, given the accumulating evidence of wrongful conviction and exoneration over the last two decades, counsel should be permitted to argue that the defendant’s possible innocence or lingering doubt of the defendant’s guilt constitutes mitigation.

Finally, a significant percentage of Virginia capital jurors believe that a finding that the defendant presents a continuing threat to society requires them to sentence the defendant to death. This confusion may be attributable, to some degree, to the assumption that a jury can accurately predict whether the defendant would pose such a threat—an assumption that is belied by a wealth of social scientific research.¹⁰⁷ Perhaps recognizing that predictions of future dangerousness are speculative and unreliable, only five other states—Idaho, Oklahoma, Oregon, Texas, and Wyoming—include future dangerousness as part of their capital sentencing framework.¹⁰⁸ Furthermore, the advent of life without parole in 1995 ensures that a defendant sentenced to this alternative punishment will not pose a threat to society as a whole.

Accordingly, the Assessment Team recommends that jury instructions should clarify the proper meaning of “society” since the abolition of parole in the Commonwealth. In applicable cases in which jurors are considering whether the defendant poses a continuing threat to society, the instruction should make clear that jurors must consider the defendant’s threat to others during his/her incarceration while serving a sentence of life in prison without the possibility of parole.

¹⁰⁵ See *Stockton v. Commonwealth*, 402 S.E.2d 196 (Va. 1991).

¹⁰⁶ See *DNA Exonerations Nationwide*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/DNA_Exonerations_Nationwide.php (last visited Aug. 15, 2013).

¹⁰⁷ See, e.g., Michael L. Radelet & James W. Marquart, *Assessing Nondangerousness During Penalty Phases of Capital Trials*, 54 ALB. L. REV. 845, 848–49 (1990) (using data from Texas to show that “dangerousness is vastly over-predicted, and that predictions of nondangerousness are far more accurate than are predictions of dangerousness”); Christopher Slobogin, *Dangerousness and Expertise*, 133 U. PA. L. REV. 97 (1984); Thomas J. Reidy, Mark D. Cunningham & Jonathan R. Sorensen, *From Death to Life: Prison Behavior of Former Death Row Inmates in Indiana*, 28 CRIM. JUST. & BEHAV. 62 (2001).

¹⁰⁸ IDAHO CODE § 19-2515(9)(i) (2012); 21 OKLA. STAT. § 701.12(7) (2012); OR. REV. STAT. § 163.150(1)(b)(B) (2012); TEX. CODE CRIM. PROC. art. 37.071, § 2(b)(1) (2012); WYO. STAT. § 6-2-102(h)(xi) (2012).

F. Protocol #6

Trial courts should instruct jurors that a juror may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if the juror does not believe that the defendant should receive the death penalty.

Virginia’s capital sentencing scheme provides that, even in the presence of an aggravating factor, a defendant cannot be sentenced to death unless the jury “recommend[s] that the penalty of death be imposed.”¹⁰⁹ The jury is not required to find or even consider any mitigating evidence before it sentences a defendant to life in prison.¹¹⁰ Thus, the jury has absolute discretion to impose a life sentence, even in the absence of any evidence to support that sentence.

Virginia’s jury instructions, however, do not clearly articulate this principle to the jury. The model instruction provides that jurors should be instructed as follows: “But if you nevertheless believe from *all the evidence* [after finding an aggravating factor], including evidence in mitigation, that the death penalty is not justified, then you shall fix the punishment of the defendant at” life in prison or life in prison and a fine.¹¹¹ Standing alone, this instruction inaccurately implies that some evidence is necessary to impose a life sentence.

The Supreme Court of Virginia has also held that it is proper for the trial court to deny a proffered instruction stating that the jury “could return a verdict for a life sentence even though it found aggravating circumstances but no mitigating factor.”¹¹² The court has also held that it is not error to refuse to instruct the jury that it may “consider pity, sympathy, and mercy” in its sentencing deliberations.¹¹³

Conclusion

Virginia trial courts are not required and do not appear to instruct jurors that they may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if they do not believe that the defendant should receive the death penalty. Accordingly, Virginia is not in compliance with Protocol #6.

Recommendation

The Assessment Team recommends that Virginia’s capital sentencing instructions be clarified to explain that jurors are never required to return a verdict of death and may return a life sentence, even in the absence of any mitigating factor and even where an aggravating factor has been established beyond a reasonable doubt, if they do not believe that the defendant should receive the death penalty.

¹⁰⁹ VA. CODE ANN. § 19.2-264.2 (2013).

¹¹⁰ *Id.* (placing no conditions on the imposition of a life sentence).

¹¹¹ Virginia Model Jury Instructions—Criminal, No. P33.122 (2012) (emphasis added).

¹¹² *Turner v. Commonwealth*, 364 S.E.2d 483, 489–90 (1988).

¹¹³ *Frye v. Commonwealth*, 345 S.E.2d 267, 283–84 (Va. 1986).

G. Protocol #7

In states where it is applicable, trial courts should make clear in juror instructions that the weighing process for considering aggravating and mitigating factors should not be conducted by determining whether there are a greater number of aggravating factors than mitigating factors.

Virginia has been described as a “nonweighing state” by federal courts.¹¹⁴ Accordingly, Protocol #7 is inapplicable to Virginia.

¹¹⁴ *E.g.*, *Tuggle v. Netherland*, 79 F.3d 1386, 1389 (4th Cir. 1996). In capital jurisdictions known as “weighing states,” “after a jury has found a defendant guilty of capital murder and found the existence of at least one statutory aggravating factor, it must weigh the aggravating factor or factors against the mitigating evidence.” *Stringer v. Black*, 503 U.S. 222, 229 (1992). By contrast, in “nonweighing states,” “the jury must find the existence of one [statutory] aggravating factor before imposing the death penalty, but [statutory] aggravating factors as such have no specific function in the jury’s decision whether a defendant who has been found to be eligible for the death penalty should receive it under all the circumstances of the case.” *Id.* at 229–30. Virginia does not require the jury to weigh the aggravating factor or factors against the mitigating evidence. *See* VA. CODE ANN. § 19.2-264.2 (2013). Accordingly, Virginia is a nonweighing jurisdiction.

CHAPTER ELEVEN

JUDICIAL INDEPENDENCE AND VIGILANCE

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Our justice system relies on the independence of the judicial branch to ensure that judges decide cases to the best of their abilities without bias—political or otherwise—and notwithstanding official and public pressure. However, judicial independence is increasingly undermined by judicial elections, appointments, and confirmation proceedings that are affected by nominees' or candidates' purported views on controversial issues, including the death penalty, or by their decisions in capital cases.¹

During judicial election campaigns, voters often expect candidates to assure them that they will be “tough on crime,” that they will impose the death penalty whenever possible, and, if they are seeking an appellate judgeship, that they will uphold death sentences. In reelection campaigns, judges are asked to defend decisions in capital cases and sometimes are defeated because of their unpopular decisions, regardless of whether these decisions are reasonable or binding applications of the law, or reflect the predominant view of the Constitution. Prospective and actual nominees for judicial appointments often are subjected to scrutiny on these same bases. Generally, when this scrutiny occurs, the discourse is not about the constitutional doctrine in a case but rather about the specifics of the crime.

All of this increases the possibility—or, at least, the perception—that judges will decide cases not on the basis of their best understanding of the law, but on the basis of how their decisions might affect their careers. These circumstances also may make it less likely that judges will be viewed by the public as sufficiently vigilant against prosecutorial misconduct and incompetent representation by defense counsel. Ultimately, judges must remain cognizant of their obligation to take corrective measures both to remedy the harms of prosecutorial misconduct and defense counsel incompetence, and to prevent such harms from occurring in the future.

¹ See, e.g., *Breaking the Most Vulnerable Branch: Do Rising Threats to Judicial Independence Preclude Due Process in Capital Cases?*, 31 COLUM. HUM. RTS. L. REV. 123 (1999).

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

The Virginia judiciary is divided into four levels: the Supreme Court, the Court of Appeals, the Circuit Courts, and General District Courts.² The circuit courts are courts of original jurisdiction for serious criminal offenses, including death penalty-eligible cases.³ Death penalty cases are afforded mandatory direct review in the Supreme Court, bypassing the usual appellate jurisdiction of the court of appeals.⁴ In addition to the conviction itself, the Supreme Court reviews death sentences for proportionality and excessiveness.⁵ The Supreme Court also has exclusive jurisdiction over petitions for habeas corpus in capital cases and may order the Circuit Court to conduct an evidentiary hearing on such petitions.⁶

Seven justices currently serve on the Supreme Court of Virginia.⁷ Supreme Court justices serve twelve-year terms, while judges of the Courts of Appeals and Circuit Courts serve eight-year terms.⁸ All judicial nominees must have been admitted to the Virginia State Bar for at least five years to be eligible for judicial selection.⁹

A. Judicial Selection

1. Legislative Election of Judges

Virginia is one of only two states in which judges are elected by the state legislature.¹⁰ Judicial nominees, including judges seeking re-election, are submitted by members of the General Assembly to the Courts of Justice Committees of the House of Delegates and the State Senate.¹¹ The Committees evaluate the candidates' qualifications, conduct criminal background checks, investigate attorney and, if applicable, judicial disciplinary records, and conduct interviews that are open to the public and the media.¹² The result of the Committees' deliberations is a determination of whether or not each candidate is "qualified" for election to the judicial position.¹³ Qualified candidates are then submitted for election by the House of Delegates and Virginia Senate, with a simple majority of each House required for election.¹⁴

² VA. CODE ANN. § 17.1-500 (2013).

³ VA. CODE ANN. § 17.1-500 (2013).

⁴ VA. CODE ANN. § 17.1-313. *See also* VA. CODE ANN. § 17.1-406(B) (2013) ("[A]ppeals lie directly to the Supreme Court from a conviction in which a sentence of death is imposed [or] from a final decision, judgment or order of a circuit court involving a petition for a writ of habeas corpus.").

⁵ VA. CODE ANN. § 17.1-313(A), (C) (2013).

⁶ VA. CODE ANN. § 8.01-654(C)(1) (2013).

⁷ VA. CONST. art. VI, § 2.

⁸ VA. CONST. art. VI, § 7.

⁹ VA. CONST. art. VI, § 7.

¹⁰ South Carolina also elects judges through the state legislature. *See Judicial Selection in the States: South Carolina*, AM. JUDICATURE SOC'Y, http://www.judicialselection.us/judicial_selection/index.cfm?state=SC (last visited July 23, 2012).

¹¹ Email Interview by Will Bush with Mary Kate Felch, Sr. Research Assoc., Div. of Legislative Servs. (July 26, 2012) (on file with the author).

¹² *Id.* *See also* Ray Reed, *Judgeship candidate questioned again*, THE NEWS & ADVANCE, Mar. 7, 2012, available at <http://www.wsls.com/story/20853634/judgeship-candidate-questioned-again> (describing interview of a judicial candidate who did not receive qualification certification by Senate Courts of Justice Committee).

¹³ Interview with Mary Kate Felch, *supra* note 11.

¹⁴ VA. CONST. art. VI, §7.

While the method of electing judges is prescribed by the state constitution, the procedure for nominating candidates for election is decided within the Courts of Justice Committees.¹⁵ The procedures are not published or otherwise promulgated in any official government document.¹⁶

For Circuit and District Court judgeship vacancies, members of the General Assembly where the judicial vacancy is located are responsible for submitting judicial candidates for review by the House and Senate Courts of Justice Committees.¹⁷ Statewide judicial vacancies, for which there is by definition no “local” legislative delegation, may be nominated by any member of the House or Senate.¹⁸ As with lower court judgeships, the Courts of Justice Committees receive nominations, interview and investigate candidates, and present the names of selected candidates to the House and Senate for election.¹⁹

The Rules of the House of Delegates require that judicial candidates who have not been interviewed and certified as qualified by the House Courts of Justice Committee may not stand for election before the House of Delegates.²⁰ The Senate rules specify a different procedure, but in practice, all candidates must be certified as qualified by the Senate Courts of Justice Committee before election in the Senate.²¹

In addition to the legislative delegation, the Virginia State Bar, along with state, local and special-interest bar associations, disseminate surveys and conduct confidential interviews of judicial candidates.²² While some bar associations release lists of recommended candidates,

¹⁵ Interview with Mary Kate Felch, *supra* note 11.

¹⁶ *Id.*

¹⁷ *Id.* The Chairperson of each Committee solicits nominations from the local legislative delegation by e-mail. *Id.* An alternative process, by which local bar associations nominated candidates to fill local judicial vacancies, was discontinued approximately twenty-five years ago, when the volume of applicants proved unmanageable. *Id.*

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ Va. Rules of the House of Delegates, Rule 1 (Jan. 11, 2012), *available at* <http://hodcap.state.va.us/publications/20122013HouseRulesText.pdf> (“[a]t the election of any judgeship . . . no nominee shall be offered to the House unless that nominee has been interviewed by the House Courts of Justice Committee and subsequently certified as qualified for election.”). The Rules of the Senate specify that certification by the Senate Courts of Justice committee is only required for a candidate to stand for election if that candidate’s nomination is not affirmed by a majority of “Senators, all or part of whose Senate Districts are within the Circuit or District for which a Judge is to be elected . . .” but do specify that if a majority of Senators do support a candidate’s nomination, that person must be “qualified,” which may refer to the same standards applied by the Courts of Justice Committee. Va. Rules of the Senate, Rule 18(c) (Jan. 11, 2012) *available at* <http://hodcap.state.va.us/publications/SenateRules.pdf>.

²¹ Interview with Mary Kate Felch, *supra* note 11. *See also* Rules of the Va. Senate, Rule 18(c) (Jan. 11, 2012), *available at* <http://hodcap.state.va.us/publications/SenateRules.pdf>. The Rules of the Senate specify that certification by the Senate Courts of Justice committee is only required for a candidate to stand for election if that candidate’s nomination is not affirmed by a majority of “Senators, all or part of whose Senate Districts are within the Circuit or District for which a Judge is to be elected . . .” but do specify that if a majority of Senators support a candidate’s nomination, that person must be “qualified,” which may refer to the same standards applied by the Courts of Justice Committee.

²² *See, e.g.,* VA. STATE BAR, STATEWIDE AND SPECIALTY BARS JUDICIAL NOMINATIONS PROCESS (Jan. 1, 2012) *available at* http://www.vsb.org/docs/VSB_JNC_bar-contacts_010212.pdf (last visited July 27, 2013); Bylaws of the Va. Beach Bar Ass’n, Art. XI, § 4(c) (“The list of nominees considered, the interviews of the candidates, and the deliberations and votes of the [Judicial Recommendation] Panel shall be and shall remain confidential.”) (on file with the author); Richmond Bar Ass’n, *Plan for the Endorsement of Judicial Candidates for Judicial Office*,

these recommendations are not binding on any of the formal election proceedings within the Courts of Justice Committees or the General Assembly.²³ Several statewide voluntary bar associations also interview nominees for statewide office.²⁴

In 2002, the Virginia Code was amended to require the Supreme Court of Virginia to “establish and maintain a judicial performance evaluation program that will provide a self-improvement mechanism for judges and a source of information for the reelection process.”²⁵ Under the new rule, judicial evaluations on judges whose terms were to soon expire were to be submitted to the Courts of Justice Committees.²⁶ In 2009, however, the General Assembly eliminated funding for the program.²⁷

2. Participation in the Elections Process by Sitting Judges

Sitting judges may participate in the nomination of candidates for judicial office “by cooperating with appointing authorities and screening committees seeking names for consideration, and by responding to official inquiries concerning a person being considered for judgeship.”²⁸ Such cooperation must be in response to an official inquiry and the Judicial Ethics Advisory Committee has stated that “calling or writing a member or committee of the General Assembly on behalf of a judicial candidate at the request of the candidate is[. . .] improper.”²⁹

3. Temporary Appointment of Judges

The Governor of Virginia may appoint Circuit and Court of Appeals judges, as well as Supreme Court Justices for judgeships not filled during the legislative session or vacancies that occur out of session.³⁰ General District Court judgeships not filled by the legislature or which become

Art. III, § 2, *available at* http://www.richmondbar.org/judicial_plan.pdf (providing that the committee will interview all candidates, and that deliberations will be confidential).

²³ See, e.g., Paul Fletcher, *Virginia Beach Bar Make Judicial Recommendations*, VA. LAWYERS WKLY. BLOG, January 21, 2010, <http://valawyersweekly.com/vlwblog/2010/01/21/virginia-beach-bar-make-judicial-recommendations/#more-2703> (rating candidates for judicial vacancies as “highly recommended” or “recommended”) (last viewed July 27, 2013), *Judicial Recommendation Panel Results 2012*, VA. BEACH BAR ASS’N, <http://www.vbbarassoc.com/judicial-recommendation-panel-results-2012/> (last viewed July 27, 2013).

²⁴ *Old Dominion Bar Plans Judicial Interviews*, VA. LAWYERS WKLY. BLOG, Jan. 23, 2012, <http://valawyersweekly.com/vlwblog/2012/01/23/old-dominion-bar-plans-judicial-interviews/> (last visited July 27, 2013).

²⁵ VA. CODE ANN. 17.1-100 (2013).

²⁶ *Id.*

²⁷ VIRGINIA’S JUDICIAL SYSTEM, 2009, <http://www.courts.state.va.us/> (last visited July 24, 2012). See also Hon. Leroy Rountree Hassell, Sr., Chief Justice, *2009 Virginia State of the Judiciary Address*, VIRGINIA’S JUDICIAL SYSTEM, *available at* http://www.courts.state.va.us/courts/scv/state_of_the_judiciary_address.html. Questions regarding the confidentiality of the judicial evaluations completed and submitted to the General Assembly under the Judicial Performance Evaluation Program were also raised by both members of the legislature and judiciary, but this issue was rendered moot when funding for the program was eliminated. *Id.*

²⁸ VA. CANONS OF JUDICIAL CONDUCT, Canon 2(B), Commentary (2004), *available at* http://www.courts.state.va.us/agencies/jirc/canons_of_judicial_conduct.pdf.

²⁹ Com. Of Va. Judicial Ethics Advisory Comm. Op. 03-2, July 18, 2003, *available at* http://www.courts.state.va.us/agencies/jirc/opinions/2003/03_2.html.

³⁰ VA. CONST. art. VI, § 7.

vacant out of session are appointed by the Circuit Court judges in the district where the vacancy exists.³¹ Judges appointed through either process serve terms that expire thirty days after the beginning of the next legislative session.³²

B. Conduct Requirements for Selected Judges

1. General Provisions

Conduct of the Virginia judiciary is governed by the Virginia Canons of Judicial Conduct.³³ There are no separate conduct requirements for judicial candidates, but elected judges who have not yet taken their seats are bound by the Canons.³⁴

2. Impartiality and Political Activity

Virginia judges and justices are prohibited from engaging in political activity that is incompatible with their judicial duties. Members of the judiciary, for example, may not make payments or contributions to political organizations, candidates, or campaigns, purchase tickets for political events, or attend such events.³⁵ A judge also may not “act as a leader or hold any office in a political organization [or] make speeches for a political organization or publicly endorse or oppose a candidate for public office.”³⁶ The commentary to the Canons specifies that a judge may, however, vote in a primary election “that is open to all registered voters qualified to vote. . . because there is no registration by political affiliation, no loyalty or political party oath required to vote, and no pledge of support for any person or political group.”³⁷

A judge who becomes a political candidate must resign his or her judicial office.³⁸ The Virginia Constitution specifically bars justices or judges from seeking or accepting any non-judicial elected office, as well as “hold[ing] any other office or public trust, or engag[ing] in any other incompatible activity.”³⁹ Justices and judges also may not practice law while in office.⁴⁰

³¹ VA. CODE ANN. § 16.1-69.9:2 (2013).

³² VA. CONST. art. VI § 7 (setting term limit for Supreme Court Justices and judges of courts of record appointed by Governor); VA. CODE ANN. § 16.1-69.9:2 (2013) (setting term limits for appointed General District Court judges).

³³ VA. CANONS OF JUD. CONDUCT, Preamble.

³⁴ VA. CANONS OF JUD. CONDUCT, Canon 6(D) (permitting exceptions to the rule to allow a judicial selectee to “arrange his or her affairs to be in compliance with these Canons . . . and to wind down his or her practice prior to taking the oath of office.”).

³⁵ VA. CANONS OF JUD. CONDUCT, Canon 5(A)(1)(c).

³⁶ VA. CANONS OF JUD. CONDUCT, Canon 5(A)(1)(a)–(b).

³⁷ VA. CANONS OF JUD. CONDUCT, Canon 5(A)(3), Commentary.

³⁸ VA. CANONS OF JUD. CONDUCT, Canon 5(A)(2) (stating, however, that a judge “may continue to hold his judicial office while being a candidate for election to or serving as a delegate in a state constitutional convention, if he is otherwise permitted by law to do so”).

³⁹ VA. CONST. art. VI, § 11.

⁴⁰ *Id.*; see also VA. CODE ANN. 17.1-102 (2013); VA. CANONS OF JUD. CONDUCT, Canon 4(G). The Judicial Ethics Advisory Committee has issued an opinion that a judge *may* serve as a reserve officer in the Judge Advocate General Corps of the U.S. military, as the legal duties of such service “do not come within [the canons’] concept of practicing law.” Va. Judicial Ethics Advisory Comm. Op. 03-4 (May 21, 2004). A narrower prohibition on appearing in court on behalf of a client applies to retired judges, and can make retired judges ineligible for retirement benefits. See generally *Thompson v. Walker*, 758 F.2d 1004 (4th Cir. 1985).

3. Rules for Recusal

Under the Canons of Judicial Conduct, “[a] judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including but not limited to situations involving personal or economic conflicts of interest as well as instances where. . . [t]he judge has a personal bias or prejudice concerning a party or a party’s lawyer.”⁴¹ The Virginia Supreme Court has stated that in making recusal decisions, a judge should be guided not only by “the true state of his impartiality, but also by the public perception of his fairness, in order that public confidence in the integrity of the judiciary be maintained.”⁴²

The Supreme Court of Virginia has stated that biases sufficient to require recusal must be extrajudicial—i.e. that the bias or appearance of bias must arise from some source outside what the judge has learned from his/her participation in the case at bar.⁴³ Appellate courts review recusal decisions on an abuse-of-discretion standard.⁴⁴

C. Complaints and Disciplinary Actions Against Judges

1. Judicial Inquiry and Review Commission

The Virginia Constitution empowered the General Assembly to “create a Judicial Inquiry and Review Commission consisting of members of the judiciary, the bar, and the public, and vested with power to investigate charges which would be the basis for retirement, censure, or removal of a judge.”⁴⁵

Complaints against judges are investigated by this Commission (JIRC).⁴⁶ JIRC is composed of seven members, including three judges (one each from the circuit court, general district court, and juvenile and domestic relations court), two lawyers, and two non-lawyers.⁴⁷ Citizens who believe they have witnessed judicial misconduct may complete a form provided by the Virginia Supreme Court and submit a complaint to JIRC.⁴⁸ Credible complaints that may constitute a violation of the Canons of Judicial Conduct are elevated in status to “Inquiries,” and are subject to preliminary investigation by JIRC counsel.⁴⁹ Upon review of the preliminary investigation

⁴¹ VA. CANONS OF JUD. CONDUCT, Canon 3(E)(1)(a).

⁴² *Wilson v. Commonwealth*, 630 S.E.2d 326, 331 (Va. 2006) (quoting *Stamper v. Commonwealth*, 228 Va. 707, 714 (Va. 1985)). The Virginia Canons of Judicial Conduct do not require a judge to explain his/her reason for recusal in a case. *See generally* VA. CANONS OF JUD. CONDUCT.

⁴³ *See Prieto v. Commonwealth*, 721 S.E.2d 484, 494 (Va. 2012) (holding that the use of “emotional language” in a sentencing order, including statements that the accused had “executed” and “slaughtered” the victims and characterization of the young adult victims as “children,” did not indicate bias because the judge was required by law to consider “the vileness of the crime”).

⁴⁴ *Wilson*, 630 S.E.2d at 331, 272 (quoting *Stamper v. Commonwealth*, 228 Va. 707, 714 (1985)).

⁴⁵ VA. CONST. art. VI, § 10.

⁴⁶ *Id.*

⁴⁷ VA. CODE ANN. § 17.1-901 (2013). The judicial members of the JIRC must be actively serving judges; the lawyer members of the commission must not be judges, and have practiced law in Virginia for at least 15 years. The non-lawyer members of the Commission must never have been licensed attorneys or served as judges. *Id.*

⁴⁸ Sup. Ct. of Va., Complaint, available at http://www.courts.state.va.us/agencies/jirc/jirc_complaint_form.pdf (last viewed July 27, 2013).

⁴⁹ R. JUDICIAL INQUIRY & REV. COMM’N 3(A)(4–5) (2012).

results, JIRC may dismiss the Inquiry.⁵⁰ If, however, JIRC finds that the complaint has merit, the matter becomes a “charge,” and “the Commission may direct further investigation or propose an informal conference with the judge.”⁵¹

Following its investigation, if JIRC determines that the charge is “well founded and of sufficient gravity to constitute the basis for retirement, censure or removal, it shall file a complaint against the judge in the Supreme Court of Virginia.”⁵² Charges that are similarly well-founded but fall below the disciplinary or removal threshold are removed from JIRC’s docket after a conference with the judge, and the matter may be relevant to investigations of future disciplinary proceedings involving that judge.⁵³ In this situation, JIRC may, with the judge’s consent, impose a supervision period subject to terms and conditions determined by JIRC and violations of the agreed upon conditions serve as “grounds for a new charge of failure to cooperate with the Commission.”⁵⁴ If a judge is facing reelection in the next legislative session, records and evidence relating to alleged misconduct must be sent to the House and Senate Courts of Justice Committees for their review, in addition to any member of either body who asks for such information.⁵⁵ Records of cases not referred to the Supreme Court of Virginia are kept confidential and destroyed upon the judge’s death, resignation, or retirement.⁵⁶

Though these sanctions remain available and any person may file a complaint,⁵⁷ most accusations of misconduct are not formally investigated. In 2012, out of the 1446 complaints filed with JIRC, only twenty-four prompted an investigation.⁵⁸ Twenty-three of these were ultimately dismissed.⁵⁹ The Supreme Court has reviewed six complaints filed by JIRC since 2002, none of which involved a judge’s conduct in a capital case.⁶⁰

⁵⁰ R. JUDICIAL INQUIRY & REV. COMM’N 3(A)(6) (2012).

⁵¹ R. JUDICIAL INQUIRY & REV. COMM’N 3(B)(1) (2012).

⁵² R. JUDICIAL INQUIRY & REV. COMM’N 15(A)(2) (2012).

⁵³ R. JUDICIAL INQUIRY & REV. COMM’N 15(A)(3) (2012).

⁵⁴ R. JUDICIAL INQUIRY & REV. COMM’N 15(A)(4) (2012).

⁵⁵ VA CODE ANN. § 17.1-918(B) (2013).

⁵⁶ R. JUDICIAL INQUIRY & REV. COMM’N 16(C) (2012).

⁵⁷ *About the Judicial Inquiry and Review Commission*, VIRGINIA’S JUDICIAL SYSTEM (2009) <http://courts.state.va.us/agencies/jirc/about.html> (last visited July 27, 2013).

⁵⁸ 2012 JUDICIAL INQUIRY & REV. COMM’N ANN. REP. at 2, available at [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD622013/\\$file/RD62.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD622013/$file/RD62.pdf).

⁵⁹ *See id.*

⁶⁰ *See generally* Judicial Inquiry & Rev. Comm’n v. Waymack, 284 Va. 527 (2012) (holding that judge sending personal text messages to court employee did not violate canons); Judicial Inquiry & Rev. Comm’n v. Taylor, 279 Va. 699 (2009) (holding that juvenile court judge violated judicial canons by ruling that an order was not appealable); Judicial Inquiry & Rev. Comm’n v. Shull, 274 Va. 657 (2007) (holding that judge who twice ordered litigant to lower her pants in the courtroom violated judicial canons); Judicial Inquiry & Rev. Comm’n v. Elliott, 272 Va. 97 (2006) (holding that judge’s agreement to be supervised by Commission in exchange for Commission not filing report with Supreme Court was valid); Judicial Inquiry & Rev. Comm’n v. Peatross, 269 Va. 428 (2005) (holding that judge did not violate judicial canons for removing an attorney from a case and later communicating with Supreme Court justice regarding resignation from Judicial Council pending JIRC charges); Judicial Inquiry & Rev. Comm’n v. Lewis, 264 Va. 401 (2002) (censuring juvenile court judge for attempting to enforce an order that had been stayed by the circuit court).

2. Judicial Ethics Advisory Committee

In 1999, the Virginia Supreme Court established a Judicial Ethics Advisory Committee “to render advisory opinions concerning the compliance of proposed future conduct with the Canons of Judicial Conduct.”⁶¹ The Committee is composed of nine members and issues opinions either in response to inquiries from judges or on its own initiative.⁶² Committee opinions are advisory and are not binding on JIRC, but “[JIRC] and the Supreme Court may in their discretion consider compliance with an advisory opinion by the requesting individual to be evidence of a good faith effort to comply with the Canons of Judicial Conduct.”⁶³

The Committee issues formal and informal opinions. Formal opinions are submitted to the individual who requested them, as well as to all members of the Committee.⁶⁴ Currently, all Committee opinions are available online to the general public.⁶⁵ Informal opinions are issued when the opinion “is not inconsistent with prior formal opinions and Counsel finds that the subject is not of general substantial interest and continuing concern to the judiciary or the public.”⁶⁶ Informal opinions are not published.⁶⁷

⁶¹ VA. SUP. CT. R. pt. 6 § 3 CJC Order (1999).

⁶² *Id.* The Committee is composed of five active or retired judges, two attorneys, and two non-attorneys. *Id.* Members serve staggered terms. *Id.* The Chief Justice of the Supreme Court appoints all members to the Committee. *Id.*

⁶³ *Id.*

⁶⁴ VA. SUP. CT. R. pt. 6 § 3(42) CJC Order (1999).

⁶⁵ See generally *Judicial Ethics Advisory Opinions*, VIRGINIA’S JUDICIAL SYS., <http://www.courts.state.va.us/agencies/jirc/opinions.html> (last visited July 27, 2013).

⁶⁶ VA. SUP. CT. R. pt. 6 § 3(36) CJC Order (1999).

⁶⁷ VA. SUP. CT. R. pt. 6 § 3(41) CJC Order (1999).

II. ANALYSIS

Below are the ABA Benchmarks, or “Protocols,” used by the Assessment Team in its evaluation of Virginia’s death penalty system. Each Protocol is followed by the Assessment Team’s analysis of the Commonwealth’s compliance with the Protocol and, where appropriate, the Assessment Team’s recommendations for reform.

A. Protocol # 1

States should examine the fairness of their processes for the appointment and election of judges and should educate the public about the importance of judicial independence to the fair administration of justice and the effect of unfair practices in compromising the independence of the judiciary.

Operation of Judicial Selection in Virginia

It appears that Virginia’s system of the election of judges carries both unique attributes to support the independence of the judiciary, as well as possible challenges to the impartiality and fair administration of justice in the Commonwealth.

Members of Virginia’s judiciary at all levels are elected by a majority vote of each House of the General Assembly.⁶⁸ In the event that a judicial seat is vacant at the close of the legislative session, the Governor may also appoint a temporary judge or justice to the vacancy.⁶⁹ In order to be eligible for election before the legislature, would-be candidates must be nominated to the Courts of Justice Committee by the local legislative delegation in which particular vacancies occur.⁷⁰ Candidates for the Court of Appeals and the Supreme Court of Virginia must be nominated to the Committees by a member of the appropriate chamber of the General Assembly.⁷¹

The length of judicial term may provide some measure of protection of the independence of the judiciary in Virginia, particularly in comparison to other death penalty jurisdictions with shorter judicial terms.⁷² Moreover, Virginia’s nearly distinctive approach to the selection of judges seems to protect the independence of the judiciary in several ways. For example, judicial candidates in Virginia, unlike judges elected through popular elections, need not stage donor-funded campaigns, which can encourage candidates to make promises about their prospective decisions. The nomination process, during which candidates are interviewed publicly by the Courts of Justice Committees of both legislative chambers, allows for meaningful public

⁶⁸ See VA. CONST. art VI, § 7 (specifying election procedures for members of the Supreme Court and other courts of record).

⁶⁹ *Id.*

⁷⁰ Interview with Mary Kate Felch, *supra* note 11.

⁷¹ *Id.*

⁷² Virginia appellate judges are elected to a twelve-year term, circuit court judges are elected to an eight-year term. VA. CONST. art. VI, § 7. In neighboring North Carolina, by contrast, all judges, including appellate judges, are elected to an eight-year term. *Judicial Selection in the States: Appellate and General Jurisdiction Courts*, AM. JUDICATURE SOC’Y (2004) (on file with author). In South Carolina—the only jurisdiction with a comparable method of judicial selection to that of Virginia—the Legislature appoints lower court judges to a six-year term and Supreme Court judges to a ten-year term. *Id.*

participation and media coverage of legislators' questioning of candidates. These procedures help to ensure the selection of judges is based on their qualifications for judicial office. Finally, "Virginia has an approximate retention rate of 97% for judges of all court levels standing for reelection," indicating that judicial decision-making while on the bench is well-insulated from political impacts.⁷³

Legislative election in Virginia does, however, have the potential to interfere with the independence of the judiciary. Relative to criminal cases, one issue that has emerged in recent judicial interviews by the House and Senate Courts of Justice Committees are judicial candidates' views on the propriety of *Hernandez* rulings, which allow judges to suspend a conviction. Such questioning of judicial candidates followed a decision by the Virginia Supreme Court in *Commonwealth v. Hernandez*,⁷⁴ in which the Court held that judges have the authority to defer judgments in criminal cases.⁷⁵ Reactions of sitting judges who have faced questions about so-called *Hernandez* rulings have varied, with some candidates demurring to legislators' skepticism of such exercises of judicial discretion.⁷⁶ Judicial candidates have, for the most part, resisted questions about their decisions in accordance with the *Hernandez* case in public hearings before the Courts of Justice Committees.⁷⁷

In addition, the effective functioning of the judiciary in Virginia is threatened by judicial vacancies and budget reductions to the court system.⁷⁸

Education of the Public on Judicial Independence

The Virginia State Bar, the official regulatory agency of the Virginia Supreme Court, has urged bar associations to work to educate the public about the importance of a truly independent judiciary that is "not an agency of the legislative or executive branch."⁷⁹ Leadership of statewide bar associations has also publicly criticized efforts in the legislature to question incumbent judicial candidates about their decisions to delay or defer judgments in criminal cases, as permitted under *Hernandez*. The Presidents of the Virginia Bar Association and Virginia Trial Lawyers' Association, for example, stated that this "warning from legislators to

⁷³ Email from Mary Kate Felch to Sarah Turberville (Apr. 23, 2013) (on file with author). In addition, "Virginia has anywhere from 45 to 62 judges standing for reelection each year. Over the course of the last 20 years or so, [Virginia] ha[s] fired an average of 1.5 judges each year." *Id.*

⁷⁴ 707 S.E.2d 273 (Va. 2011).

⁷⁵ See Ray Reed, *Legislators Interview 3 Candidates for Judgeship*, NEWS ADVANCE (Lynchburg, Va.) Mar. 5, 2012, available at <http://www.wsls.com/story/20853104/legislators-interview-3-candidates-for-judgeship> (describing the interviews of three judicial candidates who were asked "whether they would defer a guilty judgment for a defendant in a criminal case").

⁷⁶ See Deborah Elkins, *House Certifies Judicial Candidates*, VA. LAWYERS WKLY. BLOG, March 9, 2012, available at <http://valawyersweekly.com/vlwblog/2012/03/09/house-certifies-judge-candidates/#more-6578> ("Kimberly Irving, who has applied for a seat on the 31st General District Court Bench . . . offered a thorough and studied explication of the issues, concluding with the observation that a judicial exercise of discretion could impinge on the governor's right to pardon.").

⁷⁷ See Protocol # 3, *infra* notes 88–92.

⁷⁸ Nancy M. Reed, *Local Bars Should Defend the Independence of Judges*, 59 VA. LAWYER 54 (Dec. 2010), available at <http://www.vsb.org/docs/valawyermagazine/vl1210-clba.pdf>.

⁷⁹ *Id.*; see also Irving M. Blank, *It's Time to Thaw the Judicial Hiring Freeze*, 59 VA. LAWYER 10 (Dec. 2010), available at <http://www.vsb.org/docs/valawyermagazine/vl1210-president.pdf> (addressing lack of funding for independent judiciary).

judges seeking re-election to the bench places unacceptable pressure on them to compromise their independence.”⁸⁰ Representatives of the Virginia State Bar have also written that an independent judiciary is threatened by the “judicial hiring freeze and budget cutbacks.”⁸¹

Conclusion

Overall, the historical record suggests that Virginia has done an admirable job of protecting the independence of its judiciary. The Virginia State Bar and voluntary bar associations in the Commonwealth have also made efforts to educate the public about the importance of an independent judiciary and problems that may compromise the courts’ independence. The ABA Protocol, however, also calls for jurisdictions to examine the fairness of their judicial selection process; thus, the Commonwealth is in partial compliance with Protocol #1.

B. Protocol # 2

A judge who has made any promise—public or private—regarding his/her prospective decisions in capital cases that amounts to prejudgment should not preside over any capital case or review any death penalty decision in the jurisdiction.

The Virginia Canons of Judicial Conduct govern the extent to which judges may comment on matters pertaining to their judicial duties. The Canons provide that a judge “shall abstain from public comment about a pending or impending proceeding in any court.”⁸² The prohibition on public comment extends to litigation currently under appeal, as well as mandamus proceedings where the judge is a litigant in his or her official capacity.⁸³

The Assessment Team notes that the only records of candidates’ statements relative to Protocol #2 are media reports of judicial nominees’ interviews with the Courts of Justice Committees in the General Assembly. Such reporting may be incomplete and the hearings themselves are neither recorded nor transcribed by Committee staff.⁸⁴ While the Assessment Team is unaware of instances in which judges or justices in Virginia have made public comments about their prospective decisions in capital cases, it appears that judicial nominees may be subject to questioning on their views on the death penalty by Courts of Justice Committee members.⁸⁵ Judicial candidates responses to questionnaires, statements made in interviews with bar associations, and deliberations of the various bar association committees are also typically

⁸⁰ Lucia Anna Trigiani & Edward L. Allen, Op-Ed., *Unacceptable Pressure*, VIRGINIA-PILOT, June 15, 2011.

⁸¹ Nancy M. Reed, *Local Bars Should Defend the Independence of Judges*, 59 VA. LAWYER 54 (Dec. 2010), available at <http://www.vsb.org/docs/valawyeremagazine/vl1210-clba.pdf>.

⁸² VA. CANONS OF JUD. CONDUCT, Canon 3(B)(9).

⁸³ VA. CANONS OF JUD. CONDUCT, Canon 3(B)(9), cmt.

⁸⁴ See Interview with Mary Kate Felch, *supra* note 11 (noting that the Committee does not create a record or transcript of the public hearings). See also Vivian Page, *The Wrong Way to Appoint Judges*, VIRGINIA-PILOT, Dec. 14, 2011 (noting that in a 2011 hearing on judicial candidates, “nowhere in the official documents for the meeting were even the names of the judicial panel listed).

⁸⁵ Interview by Sarah Turberville and Mark Pickett with Mark Earley (May 3, 2013) (describing instances from 1987–1997 in which some judicial nominees were questioned about whether they would be willing to impose a death sentence in a capital case in which the defendant had waived a jury trial).

confidential.⁸⁶ State and local bar association questionnaires, however, appear to elicit responses from judicial candidates regarding their legal and other professional experiences, malpractice and criminal history, as well as biographical data.⁸⁷ These questionnaires do not solicit candidates' views on issues to come before the Court.

Conclusion

Because public records indicate that judicial candidates have not made statements tantamount to prejudgment regarding their prospective decisions in capital cases, it appears that Virginia is in compliance with Protocol #2.

Recommendation

In order to ensure an accurate historical record of the judicial election process is maintained and to encourage merit-based selection of judges, the Virginia Assessment Team recommends that the Courts of Justice Committees create a record of its public interviews of all judicial candidates.

⁸⁶ See, e.g., Bylaws of the Va. Beach Bar Ass'n, art. XI, § 4(c) ("The list of nominees considered, the interviews of the candidates, and the deliberations and votes of the [Judicial Recommendation] Panel shall be and shall remain confidential") (on file with the author), Richmond Bar Ass'n, *Plan for the Endorsement of Judicial Candidates for Judicial Office*, art. III, § 2 (Mar. 1, 2007), available at http://www.richmondbar.org/judicial_plan.pdf (providing that the committee will interview all candidates, and that deliberations will be confidential).

⁸⁷ See, e.g., *Judicial Selection Questionnaire*, VA. STATE BAR, available at http://www.vsb.org/docs/VSB_JNC_Questionnaire_010412.doc. See also VA. STATE BAR, *Statewide and Specialty Bars Judicial Nominations Process*, Jan. 1, 2012, available at http://www.vsb.org/docs/VSB_JNC_bar-contacts_010212.pdf (indicating that state and local bar associations use the Virginia State Bar questionnaire in their nomination processes).

C. Protocol #3

Bar associations and community leaders should speak out in defense of sitting judges who are criticized for decisions in capital cases, particularly when the judges are unable, pursuant to standards of judicial conduct, to speak for themselves.

- a. **Bar associations should educate the public concerning the role and responsibilities of judges and lawyers in capital cases, particularly concerning the importance of understanding that violations of substantive constitutional rights are not “technicalities” and that judges and lawyers are bound to protect those rights of all defendants.**
- b. **Bar associations and community leaders publicly should oppose any questions of candidates for judicial appointment or re-appointment concerning the percentages of capital cases in which they upheld the death penalty. Purported views on the death penalty or on habeas corpus should not be litmus tests or important factors in the selection of judges.**

As described under Protocol #2, publicly available information regarding Virginia’s judicial nomination and election process does not reveal instances of criticism of candidates or sitting judges for their decisions in capital cases.⁸⁸

The efforts of bar associations to oppose the practice of asking judges to defend, or otherwise comment on decisions that are consistent with Virginia Supreme Court jurisprudence should be commended. In June 2011, for example, the presidents of the Virginia Bar Association and the Virginia Trial Lawyers Association published an op-ed in the *Virginian-Pilot* criticizing state legislators who had recently sent a letter to circuit court judges facing reelection in the General Assembly.⁸⁹ The legislators’ letter asked judges to compile and disclose to the Assembly’s Courts of Justice Committee information about cases in which the judges had delayed or deferred judgments against criminal defendants.⁹⁰ The bar association and trial lawyers association leaders’ response pointed out that “[w]hen one branch of government is dependent for its funding from the other two, and members of that branch are also elected or appointed by the other two, it is difficult to view that branch as fully ‘co-equal,’ notwithstanding constitutional imperatives.”⁹¹ “[I]t would be difficult for any judge who received this letter to interpret the message as anything other than an attempt to influence his or her decisions between the time of the letter and re-election.”⁹²

Although Virginia’s relatively unique method of judicial selection makes it difficult to determine whether or not particular views on the death penalty serve as important factors in the judicial selection process, the Assessment Team uncovered no public instance in which

⁸⁸ See *supra* notes 82–86 and accompanying text. It appears, however, that judicial nominees may be questioned about their views on the death penalty by Courts of Justice Committee members. *Id.*

⁸⁹ Lucia Anna Trigiani & Edward L. Allen, Op-Ed., *Unacceptable Pressure*, *VIRGINIA-PILOT*, June 15, 2011, <http://epilot.hamptonroads.com/Olive/ODE/VirginianPilot/LandingPage/LandingPage.aspx?href=VmlyZ2luaWFuUGlsb3QvMjAxMS8wNi8xNQ..&pageno=MTk.&entity=QXIwMTkwMA..&view=ZW50aXR5>.

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

purported views on the death penalty or on habeas corpus served as a litmus test in the election of judges in Virginia. When a related instance arose of legislators' questioning judges' decisions to defer or delay judgments in criminal cases, as authorized by Virginia common law, bar associations spoke out in defense of judges for their decision-making in such cases. Thus, the Commonwealth appears to be in compliance with Protocol # 3.

D. Protocol # 4

A judge who observes ineffective lawyering by defense counsel should inquire into counsel's performance and, where appropriate, take effective actions to ensure that the defendant receives a proper defense.

Protocol # 5

A judge who determines that prosecutorial misconduct or other activity unfair to the defendant has occurred during a capital case should take immediate action authorized in the jurisdiction to address the situation and to ensure that the capital proceeding is fair.

Applicable Virginia Law on Judicial Roles and Responsibilities

The Canons of Judicial Conduct provide that “[a] judge who receives reliable information indicating a substantial likelihood that a lawyer has committed a violation of the Code of Professional Responsibility should take appropriate action.”⁹³ The comments define “[a]ppropriate action” to include “direct communication with the . . . lawyer who has committed the violation, other direct action if available, and reporting the violation to the appropriate authority or other agency or body.”⁹⁴ The Virginia State Bar’s Rules of Professional Conduct also require “timely disclosure to counsel for the defendant, or to the defendant if he has no counsel, of the existence of evidence which the prosecutor knows tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.”⁹⁵ It follows that violations of the rule announced in *Brady v. Maryland*⁹⁶ would trigger the reporting requirement of the judicial conduct rule.

The trial court’s responsibilities under Virginia law may also be reinforced by the training available to Virginia judges. Judicial training on the special issues that may arise in capital cases can assist trial courts in identifying ineffective lawyering or prosecutorial misconduct when it occurs, as well as inform judges of the varying remedies that may be applied to ensure that a capital defendant receives a fair trial.

Virginia judges are provided with a variety of mandatory and optional training materials overseen by the Supreme Court. Mandatory training may cover issues relative to capital cases, such as topics on “Recognizing Bias,” “Sentencing Philosophy,” evidence, and the exercise of

⁹³ VA. CANONS OF JUD. CONDUCT, Canon 3(D)(2).

⁹⁴ VA. CANONS OF JUD. CONDUCT, Canon 3(D)(2), cmt.

⁹⁵ *Va. R. Prof'l Conduct* 3.8(d) (2009).

⁹⁶ 373 U.S. 83 (1963).

judicial discretion.⁹⁷ However, in recent years, the low number of new judges has resulted in some key seminars on criminal law and criminal procedure not being offered.⁹⁸

While no mandatory training specifically addresses capital cases,⁹⁹ however, judges who may preside over these cases may participate in a special course offered by the Supreme Court of Virginia. This course includes an overview of federal and state law, as well as a “more specific session focusing on capital case management and the issues that may arise from pretrial through the penalty phase.”¹⁰⁰ The program was last held in February of 2013.¹⁰¹ While it was offered annually from 2005-2010, “there was no program held between 2010 and 2012 due to a freeze on filling judicial vacancies.” Issues related to *Brady* disclosures were last covered by judicial educational resources at a voluntary program co-developed by the National Judicial College in February 2009.¹⁰²

While the structure of Virginia law calls upon judges to ensure a fair proceedings and effective counsel in all criminal cases, anecdotal information on the outcomes in capital cases indicate varying levels of vigilance on the part of trial courts to guard against unfair conduct or ineffective assistance of counsel in death penalty cases.¹⁰³ Since 2000, eight of thirty-six Virginia death sentences imposed have been reversed due to ineffective assistance of counsel, prosecutorial misconduct, and/or trial court errors.¹⁰⁴ Notably, instances in which misconduct was found by an appellate court, but was found to be harmless error or not prejudicial to the outcome of the proceeding, or was procedurally barred are not included in the above data.

Conclusion

The Virginia Canons of Judicial conduct and other case law obligates trial courts to take effective action to ensure a capital defendant receives a fair trial and to remedy unfair practices, nevertheless the occurrences of ineffective lawyering, prosecutorial misconduct, and trial court errors has affected the fairness of the proceedings in death penalty cases in the Commonwealth. Given the breadth of Protocols #4 and #5, however, the Assessment Team is unable determine the level of compliance in Virginia.

⁹⁷ VA. SUP. CT., PRE-BENCH ORIENTATION CURRICULUM (on file with the author).

⁹⁸ *Id.*

⁹⁹ *Id.*

¹⁰⁰ Email from Caroline Kirkpatrick, Dir. of Educational Servs., Office of the Exec. Sec’y, Sup. Ct. of Va., to Sarah Turberville (Apr. 26, 2013) (on file with author).

¹⁰¹ Telephone interview with Caroline Kirkpatrick, Dir. of Educational Servs., Office of the Exec. Sec’y, Sup. Ct. of Va., (July 24, 2012). The session, which judges attend at state expense, is offered whenever a class of 12–20 judges is available. In recent years, judicial seat funding issues have prevented a full class from forming.

¹⁰² Va. Sup. Ct. & Nat’l Judicial Council, Agenda, Best Practices in Death Penalty Cases: A Workshop for Judges and Attorneys, February 2–3, 2009, Richmond, Va. (on file with the author).

¹⁰³ For example, the rarely invoked “plain error” doctrine was used by the Virginia Supreme Court in *Andrews v. Commonwealth*, 699 S.E.2d 237, 276 (Va. 2010) to invalidate a judge’s decision to permit the prosecution to make certain arguments. *See also* Chapter Five on the Prosecution and Chapter Six on Defense Services for a detailed description of the practices of prosecutors and defense counsel in Virginia death penalty cases.

¹⁰⁴ *See* Virginia Death Sentences on Appeal, 2000–2012, Appendix. Three of the thirty-six inmates cited above dies or committed suicide before their appeals expired. *Id.*

Recommendation

Given the complex legal issues presented in capital cases and the high stakes of such litigation, trial court judges must be especially vigilant in taking steps to ensure that defendants are represented effectively and that effective action is taken whenever any activity unfair to the defendant occurs in a capital trial. Thus, the Virginia Assessment Team recommends that capital case training and management be required of all judges who oversee capital trials. Such training should cover at least the areas described in the 2009 and 2010 capital case judicial trainings sponsored by the Supreme Court of Virginia, including jury selection, mental illness, rules and limitations on closing arguments, and penalty phase issues and juror instruction issues. This training should also inform judges of and encourage judges to use appropriate remedies whenever they observe conduct that may undermine the fairness and reliability of a death penalty proceeding.

E. Protocol # 6

Judges should do all within their power to ensure that all defendants are provided with full discovery in all capital cases. Trial courts should conduct, at a reasonable time prior to a criminal trial, a conference with the parties to ensure that they are fully aware of their respective disclosure obligations under the applicable discovery rules, statutes, ethical standards, and the federal and state constitutions and to offer the court's assistance in resolving disputes over disclosure obligations.

The rules governing criminal trial procedure promulgated by the Virginia Supreme Court permit limited discovery by defendants. The rules, for example, “do not authorize the discovery or inspection of statements made by Commonwealth witnesses or prospective Commonwealth witnesses to agents of the Commonwealth or of reports, memoranda or other internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case.”¹⁰⁵ No rule or law exists to require Virginia trial courts to conduct a pretrial hearing to ensure that all parties are aware of their respective disclosure obligations, notwithstanding the limited disclosure permitted under the rules in the first instance.

The need for improved discovery procedures and disclosure obligations, as discussed in previous Chapters, is clear.¹⁰⁶ Several defendants in Virginia have been exonerated after the discovery of exculpatory evidence that was never disclosed to the defense at trial. In the case of Jeffery Cox, convicted of first-degree murder, several pieces of new evidence emerged after the defendant was convicted. One eyewitness relied on by the prosecution lied about his felony convictions on the stand and another eyewitness faced criminal charges that were dismissed after he testified, which was not revealed to the defense.¹⁰⁷ Cox was convicted in 1991 and, after a grant of habeas relief by the Supreme Court of Virginia, released from prison in 2001.¹⁰⁸ Similarly, in the cases of Brian McCray and Beverly Monroe, prosecutors suppressed evidence,

¹⁰⁵ VA. SUP. CT. R. 3A:11(b)(2).

¹⁰⁶ See, e.g., Chapter Five on Prosecution and Chapter Eight on State Habeas Corpus Proceedings.

¹⁰⁷ NAT'L REG'Y OF EXONERATIONS, *Jeffery Cox*, <http://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3128> (last visited July 27, 2013).

¹⁰⁸ *Id.*

including, in the latter case, medical determinations that the victim may have committed suicide.¹⁰⁹

A particularly egregious example is the case of Michael Hash.¹¹⁰ Hash was convicted of capital murder in 2001 and sentenced to life imprisonment without the possibility of parole.¹¹¹ He was granted federal habeas relief in 2012, based in large part on the prosecution's improper concealment of agreements made with various witnesses in exchange for their testimony.¹¹² The recent case of Justin Wolfe—sentenced to death in 2002—provides another example of the need for greater judicial vigilance to better ensure compliance with discovery and *Brady* obligations. A federal district court, in granting Wolfe a new trial in 2011, noted that “had the prosecution complied with its *Brady* obligations,” the testimony of the prosecution's key witness, Owen Barber, “would have been seriously undermined.”¹¹³ The federal district court found that the prosecution (1) had “choreographed and coordinated” witness testimony; (2) did not disclose a police report revealing that it had been law enforcement—not Barber—who had first suggested Wolfe was involved in the murder;¹¹⁴ (3) withheld evidence that Barber confided to his roommate that he acted alone in killing the victim;¹¹⁵ and (4) withheld other evidence suggesting that Barber had his own motive for killing the victim.¹¹⁶

Additional problems may arise during the sentencing portion of a capital case. While the prosecution is required by law to disclose prior bad acts it intends to present in aggravation of punishment,¹¹⁷ the defense should be afforded adequate time to investigate and rebut such evidence. In the case of Joshua Andrews, for example, the trial court ordered the prosecution to provide the defense with notice of its intent to offer any “unadjudicated criminal conduct” during the sentencing phase of the capital trial “no later than December 1, 2006.”¹¹⁸ The prosecution provided notice of unadjudicated conduct it intended to introduce at the sentencing hearing on January 3, 2007, filed an amended notice four months later, and then on June 14, 2007, twenty-five days prior to trial, “the prosecution filed a second amended notice alleging three new violent crimes, including two that were alleged to have occurred in prison. . . . Significantly, the newly-noticed crimes were all alleged to have occurred prior to December of 2006, long before the prosecution's initial notice was due.”¹¹⁹ When defense counsel moved to exclude the new allegations of unadjudicated criminal conduct, the trial court denied the motion

¹⁰⁹ *Id.*

¹¹⁰ Hash v. Johnson, 845 F. Supp. 2d 711 (W.D. Va. 2012).

¹¹¹ *Id.* at 716.

¹¹² *Id.* at 722–23 (describing intentional transfer of Hash to a correctional facility in order to expose him to a known informant, as well as the concealment of a deal made with another witness, who later recanted his testimony).

¹¹³ Wolfe v. Clarke, 819 F. Supp. 2d 538, 565 (E.D.Va. 2011).

¹¹⁴ *Id.* at 548.

¹¹⁵ *Id.* at 554.

¹¹⁶ *Id.* at 548–49. During these federal proceedings, Barber also recanted his trial testimony under oath and stated that he acted alone in killing the victim. *Id.* at 548.

¹¹⁷ VA. CODE ANN. § 19.2-264.3:2 (2013).

¹¹⁸ Brief of Petitioner-Appellant at 54–55, 2010 WL 5795302, Andrews v. Commonwealth, 699 S.E.2d 237 (Va. 2010),

¹¹⁹ *Id.*

and also denied defense counsel's "motion for a continuance to investigate the new allegations."¹²⁰

While these incidents suggest that Virginia's rules for evidence disclosure at trial are insufficient to protect against wrongful conviction and unfair proceedings in death penalty cases, it is also apparent that courts must be vigilant in ensuring compliance with any discovery and *Brady* obligations to prevent future miscarriages of justice.

Conclusion

The Virginia rules related to discovery in criminal cases are relatively limited, thus, courts are constrained in their ability to compel any greater discovery than what is currently provided under the Virginia rules. No rule exists to compel Virginia's judges to conduct a pretrial conference in capital cases to ensure that counsel are aware of their disclosure obligations. Thus, in light of the limited nature of discovery in Virginia, coupled with evidence of past failures by counsel to uphold their disclosure obligations in capital cases, the Commonwealth of Virginia is not in compliance with Protocol #6.

Recommendation

The Assessment Team emphasizes, as it has in other Chapters included in this Report, that Virginia's disclosure obligations in criminal cases—particularly when a defendant's life is at stake—must be made more meaningful, timely, and robust in order to prevent wrongful convictions and to correct past miscarriages of justice.¹²¹ However, it is also the court's role to monitor disclosure of *Brady* and other material, particularly given the history of failures of disclosure in Virginia, as well as the gravity of the proceedings in a death penalty case. In the interest of accuracy, fairness, and judicial economy, it is far better for meaningful discovery to occur at the original trial, rather than during subsequent state or federal habeas proceedings.

Thus, the Virginia Assessment Team believes that an important procedural means to give effect to an improved discovery process would be a pretrial conference, on the record and in which the defendant is present, to better inform the parties of their respective disclosure obligations. Notably, in civil cases, Virginia's rules of procedure permit a court, in its discretion, to conduct a pretrial conference to review a range of issues related to discovery.¹²²

¹²⁰ *Id.* The Petitioner's death sentence was subsequently overturned by the Supreme Court of Virginia on other grounds. *Andrews v. Commonwealth*, 699 S.E.2d 237, 253–54 (Va. 2010) (vacating petitioner's death sentence renders moot several issues raised by the petitioner, including "whether the circuit court erred in permitting the Commonwealth to present evidence of unadjudicated criminal conduct to be used during the penalty-determination phase of the trial . . . for which notice had been given after the deadline set in the court's discovery order and denying Andrews' motion for a continuance on that ground").

¹²¹ See Chapter Five, Prosecution, Protocol #3, for more detailed information on the Virginia Assessment Team's recommendations on improved discovery in criminal and capital cases.

¹²² See, e.g., Va. R. Civ. P. 4:13. (the pretrial conference may include review of a plan for schedule of discovery, limitations on the scope and methods of discovery, and issues "relating to the preservation of potentially discoverable information."). The Court must then "make an order which recites the action taken at the conference . . . the agreements made by the parties as to any of the matters considered" and such order "controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice." *Id.*

The purpose of the conference is multifaceted. The conference would provide a mechanism for detailed review of the defendant's discovery and *Brady* request, and the prosecution's response to the request, for preservation on the record. The conference would provide an opportunity for a detailed review of every *Brady* request and a more complete record of the prosecution's response to disclosure requests. A pretrial conference would also permit the trial court to offer its assistance in resolving disputes over disclosure. The court, for example, can define for the parties the kind of material that is *Brady* and therefore must be disclosed, which can be individualized to the circumstances of the specific case at bar. The Court can also distill the nature of any disclosure issues on the record. Analogous to a similar provision available under the Virginia's civil rules, the trial court should also create a schedule for disclosure for better enforcement of timely compliance with discovery and *Brady* obligations. Finally, the use of such a conference could later assist appellate courts in determining whether the prosecution had knowledge of the existence of discoverable or *Brady* material, yet failed to disclose it.

Importantly, courts should aggressively monitor discovery in death penalty cases and implement effective remedies when there is untimely disclosure of *Brady* or other material that should have been disclosed under the Virginia rules.¹²³ When violations occur, the court should consider sanctions in order to encourage timely disclosure in the future. Other remedies, such a grant of continuance, may also be needed to ensure a fair trial.

¹²³ As discussed at length in Chapter Five, Prosecution, Protocol #3, the Virginia Supreme Court Rule 3A:11, which governs discovery in felony cases, must be amended to require broader disclosure by the prosecution in felony cases.

CHAPTER TWELVE

TREATMENT OF RACIAL AND ETHNIC MINORITIES

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

In the past twenty-five years, numerous studies evaluating decisions to seek and to impose the death penalty have found that race is too often a major explanatory factor. Nationwide, most of the studies have found that, after controlling for other factors, the death penalty is sought and imposed significantly more often when the murder victim is white than when the victim is black. Studies also have found that the death penalty has been sought and imposed more frequently in cases involving black defendants than in cases involving white defendants and that the death penalty is most likely to be imposed in cases in which the victim is white and the perpetrator is black.

In 1987, the Supreme Court of the United States held in *McCleskey v. Kemp*¹ that even if statistical evidence revealed systemic racial disparity in capital cases, this showing would not amount to a federal constitutional violation in and of itself. At the same time, the Court invited legislative bodies to adopt legislation to deal with situations in which there is systematic racial disparity in the death penalty's implementation.²

The pattern of racial disparity reflected in *McCleskey* and discussed below persists today in many jurisdictions, in part because actions by prosecutors, defense lawyers, trial judges, and juries may improperly introduce race into capital trials. These include intentional or unintentional prosecutorial bias when selecting cases in which to seek the death penalty, ineffective defense counsel who fail to object to systemic discrimination or to pursue discrimination claims, and discriminatory use of peremptory challenges during jury selection.

There is no dispute about the need to eliminate any form of racial or ethnic discrimination in the administration of the death penalty.³ To accomplish this goal, however, society must identify the various ways in which race affects the administration of the death penalty and devise solutions to eliminate discriminatory practices.

¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

² *Id.* at 319. “McCleskey’s arguments are best presented to the legislative bodies[. . . as they are] better qualified to weigh and “evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.” *Id.* citing *Gregg v. Georgia*, 428 U.S. 153, 186 (1976).

³ In the interest of simplifying the language of this Chapter, the Assessment Team will use the phrase “racial discrimination” interchangeably with the phrase “racial and ethnic discrimination.” The Assessment Team recognizes, however, that the concepts of race and ethnicity are distinct. See CYNDI BANKS, CRIMINAL JUSTICE ETHICS 79 (2d ed. 2008) (describing the distinction between the concepts of race and ethnicity).

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

A. *Race and the History of Virginia's Death Penalty*

Prior to the U.S. Supreme Court's reinstitution of the death penalty in 1976, which began the modern death penalty era, the Court had found the application of the death penalty unconstitutional in *Furman v. Georgia*.⁴ Racial disparities in the application of the death penalty—in Virginia and elsewhere—in addition to other concerns about the unfettered discretion afforded to juries in determining outcomes in death penalty cases, led to the invalidation of existing capital punishment statutes in 1972.⁵ Notably, during the fifty-four year period preceding the *Furman* decision, Virginia's executions were associated with “stark racial disparities.”⁶ Specifically, in Virginia

[o]f the 236 persons who were executed from 1908 to 1972, 86 percent were black []. Moreover, executions for the capital crimes of rape, attempted rape, and armed robbery, appear to have been reserved exclusively for the punishment of blacks. In particular, of the 41 persons executed for rape, none were white. Yet, over this same time period, 45 percent of all persons who were incarcerated for rape were white []. Additionally, each of the 14 persons executed for attempted rape was black. Finally, all five armed robbery cases that resulted in executions involved black defendants.⁷

B. *Race in the Modern Death Penalty Era*

After *Furman*, the Virginia General Assembly amended the Commonwealth's capital punishment statutes to comport with the rulings of the U.S. Supreme Court,⁸ and the constitutionality of the Commonwealth's 1977 capital punishment statute was subsequently upheld by the Supreme Court of Virginia in 1978.⁹ Several of the death-eligible offenses which appeared to be reserved, in practice, for black offenders before *Furman*—such as rape, attempted rape, and robbery—are no longer punishable by death.¹⁰

⁴ *Furman v. Georgia*, 408 U.S. 238 (1972).

⁵ *Id.* at 364 (Marshall, J., concurring) (noting that, from 1930 to 1972, of the 3,859 persons executed 2,066 were black, and that of the 455 persons executed for non-homicide rape 405 were black). *See also id.* at 256–57 (Douglas, J., concurring) (stating that “these discretionary statutes . . . are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on ‘cruel and unusual’ punishments”).

⁶ J. LEGIS. AUDIT & REV. COMM'N OF THE VA. GEN. ASSEMB., REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT 5 (2002), available at <http://jlarc.virginia.gov/reports/Rpt274.pdf> (last visited Jun. 5, 2013) [hereinafter JLARC REPORT].

⁷ *Id.*, at 5–7.

⁸ *See* VA. CODE ANN. §§ 19.2-264.2, -264.3, -264.4, -264.5 (2013).

⁹ *Smith v. Commonwealth*, 248 S.E.2d 135 (Va. 1978). Since the reinstatement of the death penalty in Virginia, the Commonwealth's death penalty laws and procedures have undergone several modifications. These are discussed in detail in Chapter One of this Report.

¹⁰ *See, e.g., Coker v. Georgia*, 433 U.S. 584 (1977) (prohibiting the execution offenders convicted of rape that did not result in the death of the victim).

After *Furman*, the issue of racial and ethnic discrimination in the administration of capital punishment was brought to the forefront by the U.S. Supreme Court's decision in *McCleskey v. Kemp*.¹¹ Relying on a study conducted by David Baldus, Charles Pulaski, and George Woodworth, McCleskey challenged the constitutionality of Georgia's capital sentencing process by arguing that it was applied in a racially discriminatory manner.¹² Specifically, after controlling for 230 variables, the Baldus study showed that blacks convicted of killing whites faced the greatest likelihood of receiving the death penalty, while whites convicted of killing blacks were rarely sentenced to death.¹³ The Court rejected McCleskey's claims, finding that the data showing racial discrepancies in the administration of the death penalty generally did not prove the existence of intentional racial discrimination in McCleskey's case.¹⁴

The *McCleskey* decision invited legislatures to develop remedies for eliminating race from the capital sentencing process.¹⁵ While Virginia has not enacted any legislation specifically addressing racial discrimination or disparity in capital sentencing, the Commonwealth has conducted a review of its modern death penalty system—published in 2002—part of which examined whether race affected prosecutors' decisions to seek the death penalty.¹⁶ This is discussed in greater detail, under Protocol #3 in the Analysis section of this Chapter.¹⁷

¹¹ *McCleskey v. Kemp*, 481 U.S. 279 (1987).

¹² *Id.* at 286.

¹³ *Id.* at 286–87, 291–92.

¹⁴ *Id.* at 297–98. Notably, the author of the five-to-four majority opinion in *McCleskey*, Justice Lewis F. Powell, Jr., was later asked in retirement whether, given the chance, he would change his vote in any case. Justice Powell replied: ““Yes, *McCleskey v. Kemp*.”” JOHN C. JEFFRIES, JR., JUSTICE LEWIS F. POWELL: A BIOGRAPHY 451 (2d ed. 2001).

¹⁵ *McCleskey*, 481 U.S. at 319 (“McCleskey's arguments are best presented to the legislative bodies.”).

¹⁶ JLARC REPORT, *supra* note 6, at 43.

¹⁷ See *infra* notes 48–76 and accompanying text.

II. ANALYSIS

Below are the ABA Benchmarks, or “Protocols,” used by the Assessment Team in its evaluation of Virginia’s death penalty system. Each Protocol is followed by the Assessment Team’s analysis of the Commonwealth’s compliance with the Protocol and, where appropriate, the Assessment Team’s recommendations for reform.

A. Protocol #1

Jurisdictions should fully investigate and evaluate the impact of racial discrimination in their criminal justice systems and develop strategies that strive to eliminate it.

Racial Discrimination in Death Penalty Cases

Two reviews of the effect of racial and ethnic discrimination on Virginia’s capital punishment system have been conducted since the reinstatement of the death penalty in 1975. The first was conducted in 2000 by the American Civil Liberties Union of Virginia and concluded that, in capital cases, “death sentences in Virginia continue to be influenced by the location of the crime, the poverty of the defendant and the race of the victim.”¹⁸ The Joint Legislative Audit and Review Commission (JLARC) conducted a second, more detailed study in 2002. JLARC’s final report, while recognizing that those accused of killing whites received the death penalty more than those accused of killing blacks,¹⁹ ultimately concluded that race was not a significant factor in prosecutors’ decisions to seek a death sentence once researchers controlled for additional factors.²⁰ These studies are discussed in detail under Protocol #3.²¹

Current data reveal general patterns that race or ethnicity may be affecting the administration of the death penalty in Virginia. While these data are not conclusive evidence that racial discrimination affects death penalty case outcomes, they do suggest that the issue needs to be examined further. For example, since reinstating the death penalty through May 31, 2013, Virginia has carried out 110 executions.²² As illustrated in Table 1, below, of those 110 executions, eighty-nine inmates were executed for the murder of a white victim. Four white offenders were executed for killing a black victim; by contrast, thirty-seven black offenders have been executed for killing a white victim:

¹⁸ AM. CIVIL LIBERTIES UNION OF VA., *UNEQUAL, UNFAIR AND IRREVERSIBLE: THE DEATH PENALTY IN VIRGINIA* 5 (2000) [hereinafter ACLU Report].

¹⁹ JLARC REPORT, *supra* note 6, at 43 (“Specifically, 44 percent of all defendants who were charged with death-eligible crime in which at least one of the victims was white faced a death prosecution [citation omitted]. This rate was over 100 percent greater than the death prosecution rate of 21 percent faced by defendants who were charged with a death-eligible crime in which the victims were black.”).

²⁰ *Id.*

²¹ See *infra* note 48 and accompanying text.

²² CRIMINAL JUSTICE PROJECT OF THE NAACP LEGAL DEFENSE & EDUC. FUND, *DEATH ROW U.S.A. WINTER 2013*, 8, available at http://www.naacpldf.org/files/publications/DRUSA_Winter_2013.pdf [hereinafter DEATH ROW U.S.A.]. The Assessment Team was unable to determine race of the defendant and victim for all capital cases in Virginia, such as cases in which a defendant was sentenced to death but not executed due to a commuted sentence, vacated death sentence, reversed conviction, or suicide or other death (non-execution) while on death row.

Table 1
Virginia Executions by Race of Offender/Race of Victim (as of April 25, 2013)²³

		Race of Victim					Total
		White	Black	Hispanic	Asian	Other	
Race of Executed Offender	White	49	4	—	1	2	56
	Black	37	13	—	—	—	50
	Hispanic	2	—	—	—	—	2
	Asian	1	—	—	—	—	1
	Other	—	1	—	—	—	1
	Total	89	18	0	1	2	110

According to 2010 census data, blacks appear to be overrepresented among Virginia's executed inmates: although only 20.7% of Virginia's population,²⁴ blacks constitute 45.5% of the state's executions.²⁵ In general, minorities are also overrepresented among the current death row population in comparison to their population in the Commonwealth: four of the ten inmates on death row in Virginia are black and one is Latino.²⁶

Jury Selection

There is also evidence of potential racial bias in jury selection for capital murder cases. At least four black defendants have been sentenced to death by all-white juries since the death penalty was reinstated in Virginia.²⁷ One of those defendants, Johnny Watkins, Jr., was sentenced to death in Danville for the murder of two white convenience store clerks and both juries that sentenced him to death were comprised of all-white jurors.²⁸ In his clemency petition, Watkins argued he "was sentenced to die by juries from which all black citizens had been systematically excluded."²⁹ He stated that "[t]he six defendants sentenced to death by Danville juries have been black and only five of the 72 jurors involved in seven trials were black."³⁰ In Danville,

²³ *Id.*

²⁴ *The Black Population: 2010*, U.S. CENSUS BUREAU, <http://www.census.gov/prod/cen2010/briefs/c2010br-06.pdf> (last visited May 31, 2013).

²⁵ *See* DEATH ROW U.S.A., *supra* note 22.

²⁶ *Id.* at 63. Racial disparities in the Virginia death penalty system are most apparent in the City of Danville. Between 1978 and 1997, there were 108 murders in Danville of which twenty-three were eligible to be prosecuted as capital cases. ACLU Report, *supra* note 18, at 45 n.1. Eighteen of the murders were charged as capital murder and the death penalty was sought in sixteen of those cases. *Id.* The defendants in the sixteen murder cases for which the death penalty was sought were black while the two capital defendants for whom the death penalty was not sought were white.²⁶ During that time period, nine capital murder charges resulted in death sentences for seven different defendants, all of whom were black. *Id.* Danville has since sentenced one white defendant to death in 2001 and he was executed in 2008. *Id.*

²⁷ *Satcher v. Commonwealth*, 421 S.E.2d 821 (Va. 1992); Donald P. Baker, *Gilmore Stops Execution for First Time; Mental Illness Of Inmate Cited*, WASH. POST, May 13, 1999, at A1 (case of Calvin Swann); Peter Baker, *Va.'s Execution of Double Murderer May be Last for its Electric Chair; State Plans to Allow Death by Lethal Injection Starting in July*, WASH. POST, Mar. 4, 1994, at D6 (case of Johnny Watkins, Jr.); *Killer of Portsmouth Store Manager Loses High Court Appeal*, VA. PILOT AND LEDGER-STAR, May 29, 1991, at D5 (case of Coleman Gray).

²⁸ Bob Piazza, *Watkins Executed for Two Slayings Governor Refused Plea for Clemency*, RICHMOND TIMES-DISPATCH, Mar. 4, 1994, at B1.

²⁹ Frank Green, *Clemency Petition Says Racism Tainted Process, Allen Asked to Spare Danville Killer's Life*, RICHMOND TIMES-DISPATCH, Feb. 24, 1994, at B5.

³⁰ Piazza, *supra* note 28.

where until 2001 only black defendants had been sentenced to death, blacks comprised 6.9% of jurors in those cases while blacks comprise 48.6% of the city's population.³¹

Other Areas of the Criminal Justice System

It does not appear that any entity in Virginia has undertaken a review of whether racial or ethnic discrimination is affecting the criminal justice system at large.³²

Conclusion

Commendably, entities in Virginia have examined the effect of race on prosecutorial discretion to seek a capital murder indictment and to seek the death penalty. However, Virginia has not fully investigated the impact of racial discrimination in the criminal justice system as a whole. Thus, the Commonwealth of Virginia is in partial compliance with Protocol #1.

³¹ *State & County Quick Facts: Danville City, Virginia*, U.S. CENSUS BUREAU, <http://quickfacts.census.gov/qfd/states/51/51590.html> (last visited May 31, 2013).

³² Other capital jurisdictions, by contrast, have sponsored examinations of the treatment of racial and ethnic minorities in their criminal justice systems. For example, Florida has undertaken three initiatives to explore the impact of racial discrimination in its criminal justice system. See Fla. Su. Ct. Racial & Ethnic Bias Comm'n, *Executive Summary: Reports and Recommendations of the Florida Supreme Court Racial and Ethnic Bias Commission* (Deborah Hardin ed., 1990–91), available at http://www.floridasupremecourt.org/pub_info/documents/racial.pdf; Frank P. Scruggs, II et al., *Preliminary Assessment: A First Look at Reporting on Implementation Progress and Identifying Issues That Require Additional Action* (2000), available at http://www.flcourts.org/gen_public/family/diversity/bin/bias_study2.pdf. The third initiative was the Governor's Task Force on Capital Cases, established to "study evidence of discrimination, if any, in the sentencing of defendants in capital cases, including consideration of race, ethnicity, gender." See Fla. Exec. Order No. 2000-1 (2000); see also Sydney P. Freedberg & William Yardley, *Lethal Injection Approved*, ST. PETERSBURG TIMES, Jan. 7, 2000. In addition, Tennessee has sponsored at least two initiatives to investigate and evaluate the impact of racial discrimination in its criminal justice system and to strive to eliminate any such discrimination. See Tenn. Comm'n on Racial & Ethnic Fairness, *Final Report of the Tennessee Commission on Racial and Ethnic Fairness to the Supreme Court of Tennessee* (1997), available at http://www.tsc.state.tn.us/sites/default/files/docs/report_from_commission_on_racial_ethnic_fairness.pdf; Tenn. Comm. to Implement the Recommendations of the Racial & Ethnic Fairness Comm'n and the Gender Fairness Comm'n, *Implementing Fairness: The Report of the Committee to Implement the Recommendations of the Racial and Ethnic Fairness Commission and the Gender Fairness Commission* (2000), available at http://www.tsc.state.tn.us/sites/default/files/docs/report_of_committee_to_implement_racial_ethnic_gender_fairness.pdf.

B. Protocol #2

Jurisdictions should collect and maintain data on the race of defendants and victims, on the circumstances of the crime, on all aggravating and mitigating circumstances, and on the nature and strength of the evidence for all potential capital cases (regardless of whether the case is charged, prosecuted, or disposed of as a capital case). This data should be collected and maintained with respect to every stage of the criminal justice process, from reporting of the crime through execution of the sentence.

Several Virginia agencies collect and maintain data on some of the areas described in Protocol #2.

Since 1974, the Department of State Police has maintained a uniform crime reporting system “for the purpose of receiving, compiling, classifying, analyzing and publishing crime statistics of offenses known, persons arrested, and persons charged and other information pertaining to the investigation of crime and the apprehension of criminals.”³³ The uniform crime reporting system collects data on the race, age, and gender of victims and offenders; however, the data is listed in aggregate, and does not include a separate category for capital offenses.

In addition, Virginia law requires the clerk of the circuit court in which a capital indictment is returned to file a certified copy of the indictment with the clerk of the Supreme Court of Virginia that is to be “maintained in a single place . . . and . . . available to members of the public upon request.”³⁴ While this requirement covers all capital cases, it does not include cases in which the Commonwealth could have but chose not to charge the offense as a capital offense. Furthermore, the type of information included in an indictment may relate to the circumstances of the crime, but is unlikely to include data on race or aggravating and mitigating circumstances. The Supreme Court of Virginia also maintains a database that includes records of all appeals in capital cases where a death or life sentence was imposed since 1978, and all capital cases that resulted in a sentence of life imprisonment that were first appealed in the Virginia Court of Appeals beginning in 1986.³⁵ The types of data available from appellate opinions, however—such as information on the defendant or victim’s race and the circumstances of the offense—vary with each case.

Virginia law also states that “the [trial] court shall, before imposing a sentence, direct a probation officer . . . to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just.”³⁶ The specific content of post-sentence reports is unknown because the reports are sealed after sentencing and available only by court order.³⁷ However, they are made

³³ VA. CODE ANN. § 52-25 (2013).

³⁴ VA. CODE ANN. § 19.2-217.1 (2013).

³⁵ See JLARC REPORT, *supra* note 6, at 67.

³⁶ VA. CODE ANN. § 19.2-264.5 (2013).

³⁷ VA. CODE ANN. § 19.2-299 (2013).

available “at any time to any criminal justice agency...[and] to any agency where the accused is referred for treatment by the court or by probation and parole services.”³⁸

Furthermore, Washington and Lee University School of Law’s Virginia Capital Case Clearinghouse (VC3) has also voluntarily collected data on capital trials throughout the Commonwealth, including “the defendant’s name, race, sex, case citation, aggravating factor, predicate felony, race and sex of the victim, county of conviction, and current status.”³⁹ This information, while not complete in each case, is available to the public on VC3’s website.⁴⁰

Importantly, the unavailability of accurate and complete data affects the ability of the Commonwealth to undertake a comprehensive review of its death penalty system. JLARC researchers who conducted such a review recounted the difficulty they encountered, reporting that “[s]electing a universe or sampling frame for the study was complicated by the unique data problems associated with this subject.”⁴¹ JLARC researchers noted that “Virginia does not maintain a centralized database containing information on murder cases that can be prosecuted as capital cases.”⁴² Thus the researchers had to examine files maintained by State Police and the Sentencing Commission, match data from the Sentencing Commission against cases in the Supreme Court of Virginia’s database, review indictments for persons arrested for murder, interview local prosecutors, and consult other sources in order to complete their review of death penalty cases that was released in 2002.⁴³ Additionally, staff visits were required in order to compile the necessary information on each case included in the study.⁴⁴ Perhaps due in large part to the difficulty of obtaining the necessary data to conduct a comprehensive review of the capital punishment system, JLARC limited the scope of its review to a sample of localities in the Commonwealth during a five-year period (1995-1999).⁴⁵

Conclusion

Some data on the race of defendants and victims, the circumstances of the crime, and aggravating and mitigating circumstances is collected and maintained by various Commonwealth entities. However, this information is not maintained in a centralized database and may not include important and relevant data for each case. Therefore, the Commonwealth of Virginia is in partial compliance with Protocol #2.

Recommendation

Virginia should develop and maintain a centralized database that contains detailed information about all cases that can be prosecuted as capital cases. To achieve this end, Virginia should designate an appropriate entity to collect, analyze, and make publicly available salient facts on

³⁸ *Id.*

³⁹ See generally VA. CAPITAL CASE CLEARINGHOUSE, *Virginia Capital Litigation Data*, <http://www.vc3.org/resources/page.asp?pageid=561> (last visited April 5, 2013).

⁴⁰ See *id.*

⁴¹ JLARC REPORT, *supra* note 6, at 19.

⁴² *Id.* at 19–20, 71.

⁴³ *Id.*

⁴⁴ See *id.* at 19–20.

⁴⁵ *Id.* at 19.

all death-eligible cases in Virginia, regardless of whether the case was resolved at trial or through a plea negotiation.⁴⁶ As discussed in Chapter Seven on Proportionality Review, it is imperative that the collection of this data be sanctioned by the Supreme Court of Virginia to ensure its reliability, trustworthiness, and admissibility.

While JLARC noted the challenges it faced in data collection of its 2002 study on capital cases, prior study commissions also have made recommendations to improve the collection of data: a 2007 report by the Supreme Court of Virginia recommended that Virginia “[e]quip[] courts of record with computer assisted transcription capability to produce text transcripts that can be searched and transmitted electronically and include links to evidence.”⁴⁷ Creation of a data collection tool would provide a mechanism through which the Commonwealth could determine whether race or ethnicity inappropriately influences outcomes in capital cases.

C. Protocol #3

Jurisdictions should collect and review all valid studies already undertaken to determine the impact of racial discrimination on the administration of the death penalty and should identify and carry out any additional studies that would help determine discriminatory impacts on capital cases. In conducting new studies, states should collect data by race for any aspect of the death penalty in which race could be a factor.

Jurisdictions and independent researchers confront considerable difficulty in isolating race of the defendant or victim from other variables that may affect outcomes in death penalty cases. As a general matter, investigations and evaluations into the impact of racial discrimination in a criminal justice system vary in scope, specificity, and reliability. These investigations may, for example, encompass several decades or only a handful of years.⁴⁸ Some may select a sample size for analysis while others rely on statewide data.⁴⁹ The explanatory power of a study depends largely on the depth of statistical analysis. In their more basic forms, studies might only compare the percentages of capitally-convicted persons sentenced to death across racial

⁴⁶ For further discussion, see Chapter Seven on the Direct Appeal Process and Proportionality Review.

⁴⁷ SUP. CT. OF VA., COMMISSION ON VIRGINIA COURTS IN THE 21ST CENTURY: TO BENEFIT ALL, TO EXCLUDE NONE 40 (2007), available at http://www.courts.state.va.us/courtadmin/aoc/judpln/reports/final_report.pdf (last visited Mar. 29, 2013). The Court also recommended several other technological improvements that would “increase the access, convenience and ease of use of the courts for all citizens, and [] enhance the quality of justice by increasing the courts’ ability to determine facts and reach a fair decision.” *Id.* at 39–40.

⁴⁸ Compare MICHAEL LENZA ET AL., THE PREVAILING INJUSTICES IN THE APPLICATION OF THE MISSOURI DEATH PENALTY (1978 TO 1996), 32 SOC. JUST. 151, 151 (2005) (examining eighteen years’ worth of capital sentencing data), with J. LEGIS. AUDIT & REV. COMM’N OF THE VA. GEN. ASSEMB., REVIEW OF VIRGINIA’S SYSTEM OF CAPITAL PUNISHMENT 19 (2002), available at <http://jlarc.virginia.gov/reports/Rpt274.pdf> [hereinafter JLARC Report] (examining five years’ worth of capital sentencing data).

⁴⁹ Compare THOMAS J. KEIL & GENARO F. VITO, RACE AND THE DEATH PENALTY IN KENTUCKY MURDER TRIALS: AN ANALYSIS OF POST-GREGG OUTCOMES, 7 JUST. Q. 189, 194 (1990) (analyzing a statewide dataset of capital cases), with JLARC REPORT, *supra* note 6, at 19–23 (examining a geographically representative dataset of capital cases).

categories; alternatively, they might control for a wide variety of non-racial factors that could explain variances in capital case outcomes in an effort to isolate the effect of racial factors.⁵⁰

Existing Studies

In 2000, the American Civil Liberties Union of Virginia undertook a review of the Commonwealth's capital punishment system, including an examination of race and the death penalty.⁵¹ The report analyzed murders and death sentences over a twenty-year period using the FBI's Supplemental Homicide Reports, and found that "41 percent of victims of apparently capital crimes in Virginia were black" and "that of the 131 crimes for which a death sentence was imposed during that same period, only 20 percent involved black victims."⁵² The report summarized:

In rape-murder incidents involving whites or blacks, the probability that the offender will be sentenced to death in Virginia is about 19% if the victim is black. If the victim is white, the probability is 42%—over two times greater In robbery-murder incidents involving both white or black offenders, the probability that the offender will be sentenced to death is about 2.5% if the victim is black. If the victim is white, the probability is about 8.5%—over three times greater.⁵³

The 2000 report represents an important step in examining the intersection between race and the death penalty in the modern death penalty era in the Commonwealth; however, the study did not attempt to isolate the effect of race by controlling for other factors that may influence whether a defendant will be sentenced to death.⁵⁴

⁵⁰ Compare JOHN F. GALLIHER & DAVID KEYS, REPORT TO THE OFFICE OF THE MISSOURI PUBLIC DEFENDER ON PROPORTIONALITY IN SENTENCING IN DEATH ELIGIBLE CASES 130–55 (1994) (comparing capital case outcomes for black and white defendants), with JLARC REPORT, *supra* note 6, at 34 (using multiple-regression statistical analysis to isolate the presence of racial discrimination in capital cases).

⁵¹ ACLU Report, *supra* note 18:

This study analyzed a database containing two decades of FBI Supplemental Homicide Reports for Virginia. These reports compile information reported by Virginia law enforcement agencies about each murder that has taken place in every city and county in the state for the 20-year period. The age, race and/or ethnic origin of each victim and each known offender is tracked, as well as certain circumstances surrounding each murder, the kind of weapon used and the relationship between the victim and offender. Because certain crimes, such as rape-murder and robbery-murder are coded, it is possible to identify most, but not all, of the murders that are potentially capital according to Virginia's statute. The evolution of the statute—from six definitions of capital murder in 1977 to twenty in 1997 [currently fifteen in 2013]—cannot be fully taken into account. The FBI coding system picks up four categories of potentially capital murders: 1) rape-murder; 2) robbery-murder; 3) murder by an incarcerated convict and 4) murder of more than one person in the same transaction. Use of these codes raises issues of both under inclusion and over inclusion. With respect to under inclusion, these codes do not represent all statutorily defined capital crimes. Murder of a police officer and murder for hire are examples of capital crimes not picked up by any code in the FBI coding system. With respect to over inclusion, attempted rape-murder and attempted robbery murder did not become capital crimes until the 1980s."

⁵² ACLU REPORT, *supra* note 18, at 46.

⁵³ *Id.* at 38, 40.

⁵⁴ See discussion of JLARC study, *infra* notes 55–69.

JLARC Review of Capital Cases in Virginia in 2002

In 2002, the Joint Legislative Audit and Review Commission (JLARC) examined a number of areas related to the administration of capital punishment in Virginia. JLARC's study was undertaken partly "[i]n response to concerns about . . . the use of prosecutorial discretion by Commonwealth Attorneys in the application of the State's death penalty statutes; and the fairness of the judicial review process for persons who have been sentenced to die."⁵⁵

JLARC noted that "one of the most serious complaints is that the system is racially biased, systemically exposing black persons who are arrested for capital murders to the death penalty in larger percentages than their white counterparts."⁵⁶ Consequently, a portion of the study examined whether decisions to seek the death penalty in capital-eligible cases are based on the race of the defendant or the race of the victim. JLARC analyzed prosecutorial discretion at two stages of the capital decision-making process: whether prosecutors returned indictments for capital murder in capital-eligible cases, and whether prosecutors "chose to actually seek the death penalty throughout the adjudication process."⁵⁷

JLARC used the following variables to assess prosecutorial discretion in seeking a capital murder indictment: type of jurisdiction; presence of aggravators; whether the offense involved rape; presence of forensic evidence (DNA, fingerprints, and/or ballistics); presence of witnesses; existence of a confession to any or all elements of the offense; violent infractions the defendant committed while incarcerated; number of pieces of evidence accumulated; race, sex, and age of defendant; race, sex, and age of victim; relationship between defendant and victim; and the "character" of the victim.⁵⁸ Specifically, JLARC characterized each victim as having "[n]ormal" character or, instead, "negative" characteristics: "Prostitute," "Drug Dealer," "Drug User/Buyer," "Gang Member," "Other negative," and/or "Inmate."⁵⁹

JLARC also examined prosecutorial discretion by comparing "capital-eligible cases in which the prosecutor sought the death penalty throughout the adjudication process" to "those capital-eligible cases in which they did not."⁶⁰ In determining whether race of the defendant or victim affected the prosecutor's decision to continue to seek the death penalty throughout the adjudication process, JLARC controlled for the following variables: type of jurisdiction; whether the offense involved rape; presence of forensic evidence (DNA, fingerprints, and/or ballistics); presence of witnesses; existence of a confession to any or all elements of the offense; violent infractions the defendant committed while incarcerated; accumulation of evidence; race, sex, and age of defendant; race, sex, and age of victim; relationship between defendant and victim; and the character of the victim.⁶¹

⁵⁵ JLARC REPORT, *supra* note 6, at Preface.

⁵⁶ *Id.* at I.

⁵⁷ *Id.* at 29.

⁵⁸ *Id.* at app. C-2 to -3. JLARC characterized each victim as being "of solid character" or "of not solid character." *Id.* at G-5.

⁵⁹ *Id.* at G-5.

⁶⁰ *Id.* at 34.

⁶¹ *Id.* at app. F-2 to -3.

After controlling for these factors, the study's general conclusions were that gender of the victim and the type of locality in which the offense was committed were significant factors in determining whether prosecutors sought capital indictments.⁶² Specifically, JLARC noted that "if the defendant was charged with a capital murder in which at least one of the victims was female, their odds of being indicted for capital murder were, on average, more than six times greater than for those defendants whose alleged victims were all male."⁶³ As for locality, the "defendants committing offenses in medium-density localities were most likely to face the death penalty." "[T]he odds that prosecutors in high-density areas would seek the death penalty in any given case were only twelve percent of the odds for prosecutors in medium-density localities," and in low-density localities "only twenty-four percent of the odds" of medium-density localities."⁶⁴ Regarding the difference in capital murder indictment rates between high-density and low- and medium-density localities, JLARC offered the following as a possible explanation:

[Commonwealth's Attorneys] noted that in capital cases, urban jurors are generally reluctant to vote in favor of an execution and will sometimes impose a much higher burden of proof on the prosecution. As a result, these prosecutors indicated that they generally prefer to seek a conviction for first-degree murder.⁶⁵

JLARC also found that "prosecutors were over three times more likely to seek the death penalty [in a capitally-indicted case] if the victim is white."⁶⁶ However, the authors noted that "when the character of the victim was accounted for in the regression model, the association between the race of the victim and[] whether the prosecutor sought the death penalty in the case lost its statistical significance."⁶⁷ Regarding its findings on the effect of race on prosecutorial discretion to seek the death penalty throughout the adjudication process, JLARC stated that

[a]n analysis of the bivariate association between the race of the victims and whether local prosecutors pursued the death penalty did initially reveal statistically significant death prosecution rates based on the race of the victim. Specifically, 44 percent of all defendants who were charged with death-eligible crime in which at least one of the victims was white faced a death prosecution. This rate was over 100 percent greater than the death prosecution rate of 21 percent faced by defendants who were charged with a death-eligible crime in which the victims were black. However, when the character of the victim was accounted for in the regression model, the association between the race of the victim and whether the prosecutor sought the death penalty in the case lost its statistical significance.

This finding was explained by data which 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. Some prosecutors believe this diminished

⁶² *Id.* at 34. The issue of prosecutorial decision-making in capital cases is discussed at length in Chapter Five on Prosecution.

⁶³ *Id.* at 34.

⁶⁴ *Id.* at 43. Geographic disparity is discussed at greater length in Chapter Five on Prosecution, Protocol #1.

⁶⁵ *Id.* at 31.

⁶⁶ *Id.* at 43.

⁶⁷ *Id.*

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 murder.⁶⁸

In short, JLARC stated that lack of sympathy for victims thought to have been involved with illegal activity might explain why prosecutors were three times more likely to seek the death penalty for defendants who killed at least one white victim than for defendants who killed non-white victims.⁶⁹

Future Studies

Importantly, JLARC's review was confined to an analysis of sample cases occurring within the five-year period from 1995 through 1999—fourteen years ago. In addition, JLARC's examination of race and ethnicity focused on its impact on prosecutorial decision-making.⁷⁰ The study was not designed to address the effect race may have on a jury's decision to impose the death penalty, which is a crucial decision-making point in the progression of a capital case.

With the benefit of better data collection, future studies not only may examine statewide data encompassing all capital cases in Virginia since the death penalty's reinstatement, but they also may attempt to isolate the effect of race or ethnicity by controlling for different and additional variables than those examined by JLARC.⁷¹ For example, the JLARC review attempted to isolate the factor of race by controlling for the victim's character.⁷² This approach is in contrast to the methodology of researchers who have conducted similar studies in other capital jurisdictions and a future study may determine that this is an unhelpful or unsuitable control variable.⁷³

Any future reviews of the Commonwealth's death penalty system should attempt to address these limitations of the 2002 JLARC report. An examination of the factors affecting jury decision-making might also explain why, from 1995 through 1999, forty-six individuals were convicted of capital murder but only twenty-four of these defendants received a death sentence.⁷⁴

⁶⁸ *Id.* (citations omitted).

⁶⁹ *Id.*

⁷⁰ *Id.* at Preface.

⁷¹ For example, the Baldus Study examined by the courts in *McCleskey v. Kemp* controlled for 230 variables. *See* *McCleskey v. Kemp*, 481 U.S. 279, 325 (1987) (Brennan, J., dissenting).

⁷² JLARC REPORT, *supra* note 6, at F-5.

⁷³ For example, a study published in 2006 by the National Institute of Justice found that, when controlling for variables such as "heinousness of the crime" or the presence of "aggravating and mitigating factors," there was "no evidence of racial bias in either USAO recommendations or the AG decisions to seek the death penalty." The study does not appear to have controlled for "character of the victim" or sympathy. *See* Stephen P. Klein, Richard A. Berk, & Laura J. Hickman, RACE AND THE DECISION TO SEEK THE DEATH PENALTY IN FEDERAL CASES (Rand 2006), executive summary available at <https://www.ncjrs.gov/pdffiles1/nij/grants/214729.pdf>.

⁷⁴ JLARC REPORT, *supra* note 6, at Report Summary II.

Conclusion

The commission of the JLARC study is an important recognition of the need to ferret out and eliminate any discrimination that may still exist in the current operation of the Commonwealth's capital punishment system.⁷⁵ The JLARC review, however, was limited to only a sample of cases between 1995 and 1999; furthermore, this review did not examine whether race or ethnicity affects a jury's decision to impose a death sentence. Thus, the Commonwealth is in partial compliance with Protocol #3.

Recommendation

Obtaining accurate, reliable data on the effect of race on capital cases and determining whether racial discrimination affects the criminal justice system—and death penalty cases in particular—is essential to ensuring that the Commonwealth provides due process and equal protection of the law. In order for Virginia to determine whether race or ethnicity of the defendant and/or victim affects the outcome of death penalty cases, a revised and updated study is necessary to provide an accurate assessment of the Commonwealth's current capital punishment system, especially in light of the dramatic changes that have occurred in capital charging and sentencing in the Commonwealth over the last decade. Thus, Virginia should undertake a contemporary and comprehensive review of the effect of race on death penalty proceedings. Virginia should consult with social scientists who have collected relevant data and undertaken similar examinations in determining how to carry out this review of whether race or ethnicity affects death penalty case outcomes.⁷⁶

Furthermore, by creating and maintaining a centralized database of capital cases, as discussed in Protocol #2, Virginia would significantly reduce the burden on any entity undertaking any future review or analysis of Virginia's death penalty system.

⁷⁵ See *id.* at Report Summary I (“This review comes at a time when serious questions are being raised about the State’s use of the death penalty. One of the most serious complaints is that the system is racially biased, systematically exposing black persons who are arrested for capital murder to the death penalty in larger percentages than their white counterparts.”).

⁷⁶ For example, in its 1990 review of twenty-eight studies conducted at the national, state, and local levels as to whether race was a factor influencing death penalty sentencing, the U.S. General Accounting Office “surveyed 21 criminal justice researchers and directors of relevant organizations whose work relates to death penalty sentencing to identify additional research.” See U.S. GEN. ACCOUNTING OFFICE, DEATH PENALTY SENTENCING: RESEARCH INDICATES PATTERN OF RACIAL DISPARITIES 2 (1990).

D. Protocol #4

Where patterns of racial discrimination are found in any phase of the death penalty's administration, jurisdictions should develop, in consultation with legal scholars, practitioners, and other appropriate experts, effective remedial and prevention strategies to address the discrimination.

Within the scope of its examination, JLARC found no statistically significant patterns of racial discrimination in prosecutor's decisions to seek the death penalty.⁷⁷ In addition, since the completion and release of the JLARC study in 2002, the Assessment Team is unaware of any additional efforts to comprehensively examine whether patterns of racial discrimination exist in the administration of Virginia's capital punishment system. Accordingly, the Commonwealth of Virginia has collaborated with legal scholars, practitioners, and other experts to develop remedial and preventative strategies to address any identified racial discrimination in the administration of the death penalty. Therefore, Protocol #4 is inapplicable to the Commonwealth of Virginia.

E. Protocol #5

Jurisdictions should adopt legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. To enforce such a law, jurisdictions should permit defendants and inmates to establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns. If such a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.

The Commonwealth of Virginia has not adopted nor introduced legislation explicitly stating that no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim. Therefore, Virginia is not in compliance with Protocol #5.

Recommendation

In order for Virginia to develop an effective remedy to ameliorate discrimination in death penalty cases, the Commonwealth must first determine whether race of the victim and/or defendant affects capital case outcomes in Virginia as discussed at length under Protocols #2 and #3. In order to ameliorate any identified discrimination, Virginia should adopt legislation explicitly stating that

- no person shall be put to death in accordance with a sentence sought or imposed as a result of the race of the defendant or the race of the victim;
- defendants and inmates can establish *prima facie* cases of discrimination based upon proof that their cases are part of established racially discriminatory patterns; and
- if such a *prima facie* case is established, the State should have the burden of rebutting it by substantial evidence.

⁷⁷ JLARC REPORT, *supra* note 6, at 43.

The Assessment Team recognizes that this is a complex area of law.⁷⁸ However, in *McCleskey*, the U.S. Supreme Court invited states to address the issue via legislation⁷⁹ and—notably—the burden-shifting model suggested by this Recommendation has proved workable in other contexts.⁸⁰

F. Protocol #6

Jurisdictions should develop and implement educational programs applicable to all parts of the criminal justice system to stress that race should not be a factor in any aspect of the death penalty’s administration. To ensure that such programs are effective, jurisdictions also should impose meaningful sanctions against any state actor found to have acted on the basis of race in a capital case.

The principal actors in the criminal justice system are law enforcement officers, prosecutors and defense counsel, and judges. The first part of Protocol #6 requires that these actors be educated on the inappropriate consideration of race in administering the death penalty; the second part pertains to the sanctions actors face for carrying out his/her duties on the basis of racial considerations.

Actors at every level of the Virginia criminal justice system should be meaningfully educated about the inappropriateness of considering race in the administration of justice and, in particular, the seriousness of the implications that such considerations have in death penalty proceedings. This is especially important given the pervasiveness of implicit bias and the harmful ways it can manifest itself in criminal cases.⁸¹ Implicit bias “leaves open the possibility that even those dedicated to the principles of a fair justice system may, at times, unknowingly make crucial decisions and act in ways that are unintentionally unfair.”⁸² While actors in the criminal justice system may be aware that race in an inappropriate consideration in criminal proceedings, grappling with implicit bias requires serious attention and instruction.⁸³

⁷⁸ See, e.g., N.C. GEN. STAT. § 15A-2010 (2011) (repealed [in substantial part] in 2013); see also S.B. 461, 2009 REG. SESS., GEN. ASS. (N.C. 2009) (“No person shall be subject to or given a sentence of death or shall be executed pursuant to any judgment that was sought or obtained on the basis of race.”), available at <http://www.ncleg.net/Sessions/2009/Bills/Senate/PDF/S461v6.pdf>. See also Michael Mannheimer, *Kentucky Racial Justice Act: Workable Remedy or Window Dressing?*, LEX LOCI, Dec. 2009, at 18–19.

⁷⁹ *McCleskey v. Kemp*, 481 U.S. 279, 319 (1987) (“Legislatures [] are better qualified to weigh and ‘evaluate the results of statistical studies in terms of their own local conditions and with a flexibility of approach that is not available to the courts.’” (quoting *Gregg v. Georgia*, 428 U.S. 153, 186 (1976))).

⁸⁰ *Id.* at 352 (Blackmun, J. dissenting) (noting, in a portion of his dissent joined by three other justices, that in *Batson* cases “[o]nce the defendant establishes a prima facie case, the burden shifts to the prosecution to rebut that case”).

⁸¹ PAMELA M. CASEY ET AL., *HELPING COURTS ADDRESS IMPLICIT BIAS: RESOURCES FOR EDUCATION* (National Center for State Courts, 2012), available at http://www.ncsc.org/~media/Files/PDF/Topics/Gender%20and%20Racial%20Fairness/IB_report_033012.ashx (analyzing various states’ attempts to address implicit bias in the criminal justice system).

⁸² *Id.* at 2.

⁸³ Studies have shown that “simply knowing about implicit bias and its potentially harmful effects on judgment and behavior may prompt individuals to pursue corrective action.” *Id.* at app. G-5.

Law Enforcement Officers

The Virginia Department of Criminal Justice Services (DCJS) is charged with establishing minimum training standards for law enforcement officers in Virginia and regulating Virginia's law enforcement training academies.⁸⁴ DCJS publishes the *Virginia Criminal Justice Training Reference Manual*, which provides "compulsory minimum entry-level, in-service and advanced training standards for criminal justice officers and certified training academies."⁸⁵ The training standards state that a trainee must be tested on "identify[ing] factors that may contribute to biased policing."⁸⁶ The manual also requires that officers be trained to identify the consequences of bias-based policing and of impartial law enforcement, and to "identify methods that an officer may use to prevent bias from determining a law enforcement intervention."⁸⁷ DCJS also has published a *Model Policy on Bias Reduction*, which was last revised in 2010.⁸⁸ The policy states that law enforcement officers

[S]hall exercise [their] sworn duties, responsibilities, and obligations in a manner that does not discriminate on the basis of race, sex, gender, national origin, ethnicity, age, or religion Officers shall not stop, detain, arrest, search, or attempt to search anyone based solely upon the person's race, sex, sexual orientation, gender, national origin, ethnicity, age, or religion.⁸⁹

The policy also includes specific recommendations for training: "Officers . . . and all personnel shall receive ongoing training in interpersonal communications skills, cultural, racial, and ethnic diversity, and courtesy."⁹⁰

With respect to sanctions, the policy provides, "Actions prohibited by this order shall be cause for disciplinary action, up to and including dismissal."⁹¹ The model policy, however, is not required to be adopted by individual law enforcement agencies.⁹²

In addition, the Virginia Law Enforcement Professional Standards Commission (VLEPSC) requires that accredited law enforcement agencies possess "[a] written directive prohibit[ing] officers from engaging in bias-based policing," which must include

- a. A definition of bias-based policing;
- b. A requirement that all sworn employees receive initial and on-going proactive training in cultural diversity; and

⁸⁴ VA. CODE ANN. § 9.1-102(2), (4), (13), (14) (2013). The issue of law enforcement training is also in Chapter Two on Law Enforcement Identifications and Interrogations.

⁸⁵ VCJTRM p. 1 of PDF (letter).

⁸⁶ *Id.* at 169.

⁸⁷ *Id.* at 98.

⁸⁸ *The Model Policies for Virginia Law Enforcement Agencies*, VA. DEP'T OF CRIMINAL JUSTICE SERVS. (2010) available at <http://www.dcjs.virginia.gov/cple/sampleDirectives/> (follow hyperlink for "Bias Reduction/Cultural Diversity").

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.*

⁹² *Id.*

- c. A requirement that all complaints of bias-based policing shall be thoroughly investigated through the agency's internal affairs process.⁹³

While state law does not require VLEPSC accreditation,⁹⁴ as of May 2013, VLEPSC has accredited eighty-four of Virginia's 378 law enforcement agencies.⁹⁵

Prosecutors and Defense Counsel

All attorneys licensed to practice law in Virginia, including prosecutors and defense counsel, must complete twelve hours of approved continuing legal education (CLE) each year, including at least two hours in the area of legal ethics or professionalism.⁹⁶ While it is possible that Virginia offers CLE programs stressing that race should not be a factor in any aspect of the administration of justice, there is no requirement that attorneys attend such programs.⁹⁷ The *Principles of Professionalism*, published by the Virginia State Bar Commission on Professionalism, direct attorneys to "avoid all bigotry, discrimination, or prejudice."⁹⁸ However, the *Principles* do not serve as a basis for disciplinary action or civil liability.⁹⁹

Defense counsel appointed to represent indigent capital defendants and death row inmates through the Virginia Indigent Defense Commission (VIDC) must complete ten hours of required training every two years, but no training is required specifically on educating attorneys about the impermissible use of race in the administration of justice.¹⁰⁰ However, attorneys employed by the Regional Capital Defender offices may, through required training on jury selection, receive training on identifying biased jurors during voir dire.¹⁰¹

Commonwealth's Attorneys, including prosecutors who handle death penalty cases, do not have any additional CLE requirements beyond the ten hours required of all attorneys in Virginia.¹⁰² It

⁹³ VA. LAW ENFORCEMENT ACCREDITATION PROGRAM MANUAL ADM.02.05 8 (2010).

⁹⁴ See *Frequently Asked Questions*, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/accred/faqs.cfm> (last visited May 16, 2013) (noting that an advantage to accreditation is that it serves as the "best measure of an agency's compliance with professional law enforcement standards," but not stating that accreditation is required).

⁹⁵ *Accredited Agencies*, VA. DEP'T OF CRIMINAL JUSTICE SERVS., <http://www.dcjs.virginia.gov/accred/agencies.cfm> (last visited May 16, 2013).

⁹⁶ MANDATORY CONTINUING LEGAL EDUCATION REGULATIONS (VA. STATE BAR) (2011), <http://www.vsb.org/pro-guidelines/index.php/mcle-regs> (last visited on May 16, 2013).

⁹⁷ For the summer of 2013, only one course of the more than 500 Virginia State Bar approved CLE courses appeared to address bias or prejudice directly. See *Course List Live and Pre-recorded Group Video programs 05/17/13—07/31/13*, VA. STATE BAR, <http://www.vsb.org/docs/courses-live-051713-073113.pdf>; *Course List Telephone Webcast 05/17/13—07/31/13*, VA. STATE BAR, <http://www.vsb.org/docs/courses-phone-051713-073113.pdf> (course was entitled "Bias and Discrimination in the Legal Profession").

⁹⁸ *Principles of Professionalism*, VA. STATE BAR COMM'N ON PROFESSIONALISM, http://www.vsb.org/pro-guidelines/index.php/main/print_view (last visited May 16, 2013).

⁹⁹ *Id.*

¹⁰⁰ *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM'N, <http://www.indigentdefense.virginia.gov/serving.htm> (last visited May 16, 2013).

¹⁰¹ See Protocol #7 for more information about defense counsel training on racial and ethnic discrimination claims.

¹⁰² *Mandatory Continuing Legal Education Regulations*, VA. STATE BAR, <http://www.vsb.org/pro-guidelines/index.php/mcle-regs/> (last visited Feb. 21, 2013) (requiring that all licensed attorneys in Virginia

also does not appear that any recent course offerings by the Commonwealth's Attorneys' Services Council have addressed the impermissible use of race in the administration of justice.¹⁰³ While it is possible that some Commonwealth's Attorneys offices may require their staff to attend trainings on this issue, the Assessment Team was unable to obtain the necessary information to make this determination.¹⁰⁴

Judges

Conduct of the Virginia Judiciary is governed by the Virginia Canons of Judicial Conduct.¹⁰⁵ The Canons require that judges perform their "duties without bias or prejudice" and prohibit judges from manifesting, or allowing court officials to manifest, any such "bias or prejudice based upon race."¹⁰⁶ In addition, judges are responsible for prohibiting any persons appearing in court "from manifesting, by words or conduct, bias or prejudice based upon race" except for "legitimate advocacy" when race is an "issue[] in the proceeding."¹⁰⁷ The commentary to the Canons specifies that, in addition to oral communication, judges' facial expressions and body language can give parties, lawyers, and jurors "an appearance of judicial bias."¹⁰⁸

Although Commonwealth judges are not required to complete any CLE hours pertaining to the impermissible use of racial considerations in the criminal justice system, the Supreme Court oversees a variety of mandatory and optional judicial trainings. In past years, mandatory trainings covered topics such as "Recognizing Bias" and "Sentencing Philosophy,"¹⁰⁹ though trainings on some important issues have not been offered recently due to the lack of new judges.¹¹⁰ Additionally, a special course, while not mandatory, is offered to judges who may preside over capital cases.¹¹¹ The course focuses on relevant law and addresses distinct issues that may affect a capital case.¹¹² It is not clear whether this course includes training that relates to recognizing and protecting against racial bias in death penalty proceedings.

The Commonwealth has established some sanctions for judges who are accused of misconduct. The Judicial Inquiry and Review Commission is "vested with the power to investigate charges which would be the basis for retirement, censure, or removal of a judge."¹¹³ The Commission is

complete twelve hours of continuing legal education (CLE) coursework every year, including two hours on legal ethics or professionalism).

¹⁰³ *Training Programs, COMMONWEALTH'S ATT'YS' SERVS. COUNCIL*, <http://www.cas.state.va.us/trainingprograms.htm> (last visited May 16, 2013).

¹⁰⁴ Surveys on the prosecution of death penalty cases were submitted to the Commonwealth's Attorney Offices of the cities of Danville, Richmond, Roanoke, and Virginia Beach, as well as of the counties of Arlington, Chesterfield, Henrico, Norfolk, Pittsylvania, and Prince William. Only one office returned a completed survey to the Assessment Team. See Analysis, Chapter Five on Prosecutorial Professionalism.

¹⁰⁵ VA. CANONS OF JUD. CONDUCT, Preamble.

¹⁰⁶ *Id.* at Canon 3(B)(5).

¹⁰⁷ *Id.* at Canon 3(B)(6).

¹⁰⁸ *Id.* at Canon 3(B)(6), Commentary.

¹⁰⁹ Va. Sup. Ct., Pre-Bench Orientation Curriculum (on file with the author).

¹¹⁰ *Id.*

¹¹¹ *Id.*

¹¹² E-mail from Caroline Kirkpatrick, Caroline E. Kirkpatrick, Educational Services Dir., Office of the Executive Secretary, to Sarah Turberville (Apr. 26, 2013) (on file with author).

¹¹³ VA. CONST. art. VI, § 10; VA. CODE ANN. § 17.1-901 (2013).

authorized to conduct a preliminary investigation regarding any complaints of misconduct filed against a Commonwealth judge.¹¹⁴ This extends to accusations that a judge has violated one of the Canons of Judicial Conduct.¹¹⁵ Any person may file a complaint, and the Commission is authorized to conduct hearings and subpoena witnesses and documents to determine if the complaint is “well-founded.”¹¹⁶ If the Commission decides that the complaint is “well-founded,” it may file a formal complaint with the Supreme Court, who may censure or remove the judge from office if the court finds that the judge has “engaged in misconduct while in office” or “engaged in conduct prejudicial to the proper administration of justice.”¹¹⁷

Conclusion

Some actors in the Virginia criminal justice system, including law enforcement and judges, receive mandatory education stressing that race should not be a factor in the administration of justice. However, prosecutors and defense counsel are not necessarily educated about these topics. Furthermore, it appears that only judges will face meaningful sanctions for acting on the basis of racial bias or prejudice in the administration of justice. Thus, the Commonwealth of Virginia partially complies with Protocol #6.

Recommendation

The Assessment Team recommends that law enforcement, prosecutors, defense counsel, and judges receive mandatory instruction and training about relevant developments in the area of racial bias. Defense counsel should receive mandatory education on how to identify and develop claims of racial discrimination that occur during jury selection; in particular, this should be required for capital certification of defense counsel representation at trial, appeal, state habeas, and clemency proceedings.¹¹⁸ Training and education of all actors in the criminal justice system should also address the ways in which implicit bias may affect important decision-making in criminal and capital cases.

Furthermore, individual law enforcement agencies should adopt the DCJS’s *Model Policy on Bias Reduction* or implement their own functional equivalent.

¹¹⁴ VA. CONST. art. VI, § 10.

¹¹⁵ It does not appear that any judges have been sanctioned for violating Canon 3(B)(5) or 3(B)(6) specifically, but judges have, on occasion, been investigated by the Review Commission and sanctioned by the Supreme Court for violating other Canons and other sections of Canon 3. *See, e.g.,* Judicial Inquiry & Rev. Comm’n of Va. v. Taylor, 685 S.E.2d 51 (Va. 2009).

¹¹⁶ VA. CONST. art. VI, § 10; VA. CODE. ANN. § 17.1-903 (2013).

¹¹⁷ VA. CONST. art. VI, § 10; VA. CODE. ANN. § 17.1-903 (2013).

¹¹⁸ This issue is discussed in detail in Protocol #7, *infra*, notes 119–127.

G. Protocol #7

Defense counsel should be trained to identify and develop racial discrimination claims in capital cases. Jurisdictions also should ensure that defense counsel are trained to identify biased jurors during voir dire.

All attorneys appointed to represent indigent capital defendants and death row inmates, including attorneys employed by the Regional Capital Defender (RCD) offices, the Virginia Capital Representation Resource Center (VCRRC), as well as private counsel seeking appointment, must meet the qualification requirements for capital defense representation established by the Virginia Indigent Defense Commission (VIDC), the Supreme Court of Virginia, and the Virginia State Bar.¹¹⁹ All attorneys seeking recertification for appointment to a death penalty case must complete ten hours of required training every two years.¹²⁰ The qualification requirements, however, do not require that capital trial, appellate, or state habeas counsel obtain training on identifying and developing claims of racial discrimination or identifying biased jurors during voir dire.¹²¹

Individual RCD offices, however—including the Central, North, and Western RCDs—state that their attorneys are “skill[ed] in trial advocacy, such as jury selection,” which may include skills in identifying biased jurors during voir dire.¹²² Furthermore, the North and Western RCDs state that their attorneys receive “training on trial advocacy, including jury selection and *Batson* issues,” which would cover identifying biased jurors.¹²³

During state habeas proceedings, most death row inmates are represented by VCRRC, a non-profit law firm dedicated to representing Virginia’s death row inmates in post-conviction and clemency proceedings.¹²⁴ Although VCRRC attorneys possess the necessary post-conviction experience under the VIDC requirements, VCRRC has not enacted any formal training standards for its attorneys, such as requiring that counsel obtain training in the areas described in Protocol #7.¹²⁵

¹¹⁹ VA. CODE ANN. § 19.2-163.7 (2013); *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM’N, <http://www.indigentdefense.virginia.gov/serving.htm> (last visited Mar. 8, 2013).

¹²⁰ *Id.*

¹²¹ *Id.*

¹²² See RCD Central Survey Response, provided by David Baugh, fmr. Capital Defender, to Paula Shapiro on March 6, 2012, at 5 (on file with author); RCD North Survey Response, provided by Ed Ungvarsky, Capital Defender, to Paula Shapiro on March 6, 2012, at 4 (on file with author) [hereinafter RCD North Survey Response]; RCD West Survey Response, provided by Steve Milani, Capital Defender, to Paula Shapiro on March 6, 2012, at 4 (on file with author) [hereinafter RCD West Survey Response].

¹²³ See RCD North Survey Response at 16; RCD West Survey Response at 17.

¹²⁴ See Interview by Mark Pickett & Paula Shapiro with Robert E. Lee, Exec. Dir., Va. Capital Representation Resource Ctr. (VCRRC), on Apr. 11, 2012 (on file with author). All but one Virginia death row inmate with a pending state habeas, federal habeas, or clemency claim is represented by one attorney from VCRRC. The one remaining inmate is represented by a former VCRRC attorney who continued to represent the inmate after she left VCRRC. See also *Mission Statement*, VA. CAPITAL REPRESENTATION RES. CTR., <http://www.vcrcc.org> (last visited March 8, 2013).

¹²⁵ See Va. Capital Representation Resource Ctr. (VCRRC) Survey Response, provided by Robert E. Lee, Exec. Dir., VCRRC, to Paula Shapiro, 4 (Apr. 5, 2012) (on file with author).

With respect to available training for capital counsel, the VIDC-approved list of Continuing Legal Education (CLE) programs for maintaining indigent defense certification includes one program sponsored by VIDC entitled “Effective Voir Dire: Winning Every Jury Trial,” that may address identifying biased jurors during voir dire or developing other racial discrimination claims.¹²⁶ The Criminal Law Section of the Virginia Bar Association also sponsors an annual, two-day Capital Defense Workshop, although it does not appear that recent workshops in 2010, 2011, or 2012 have included specific programs on developing and identifying racial discrimination claims or juror bias.¹²⁷

Conclusion

Training on developing and identifying racial discrimination claims and juror bias is offered to and completed by some capital counsel, but it is not required. Therefore, the Commonwealth of Virginia is in partial compliance with Protocol #7.

Recommendation

All attorneys seeking recertification for appointment to a death penalty case should receive mandatory training on identifying and developing claims of racial discrimination or identifying biased jurors during voir dire. In addition, approved CLE courses that include instruction on these topics should be offered to all indigent defense counsel.

H. Protocol #8

Jurisdictions should require jury instructions stating that it is improper for jurors to consider any racial factors in their decision-making and that jurors should report any evidence of racial discrimination in jury deliberations.

Instruction that racial bias or prejudice should not affect juror decision-making is particularly important in capital cases, where defendant-specific considerations such as “future dangerousness” play an important role.

The Virginia Model Instruction Committee promulgates many of the jury instructions used in civil and criminal cases.¹²⁸ While the instructions are not mandatory,¹²⁹ they have been

¹²⁶ See *MCLE Approved Continuing Legal Educ. Programs Certified by the Va. Indigent Def. Comm’n for Maintaining Indigent Def. Certification*, VA. INDIGENT DEF. COMM’N, <http://www.indigentdefense.virginia.gov/PDF%20documents/Approved%20CLE%20for%20Certification%20Feb%2026-13%20-%202009%20Co.pdf> (last visited March 8, 2013). See also VA. CODE ANN. § 19.2-163.01(A)(2), (5) (2013).

¹²⁷ See *20th Annual Capital Def. Workshop Agenda*, VA. BAR ASS’N, <http://www.vba.org/associations/11069/files/2012CDWAgenda.pdf> (last visited March 8, 2013); *19th Annual Capital Def. Workshop Agenda*, THE VA. BAR ASS’N, <http://www.vba.org/associations/11069/files/2011CDWAgenda.pdf> (last visited March 8, 2013); *18th Annual Capital Def. Workshop Agenda*, THE VA. BAR ASS’N, <http://vba.org/associations/11069/files/CapDef-10%20BF.pdf> (last visited March 8, 2013).

¹²⁸ See *Virginia Model Jury Instructions—Criminal*.

¹²⁹ “A proposed jury instruction submitted by the party, which constitutes an accurate statement of the law applicable to the case, shall not be withheld from the jury solely for its nonconformance with the model jury instructions.” VA. CODE ANN. § 19.2-263.2 (2013).

favorably cited by the Supreme Court of Virginia and the Court of Appeals of Virginia in several cases.¹³⁰ However, in none of the criminal model instructions are jurors instructed that it is improper for them to consider race or ethnicity in their deliberations.¹³¹ In particular, the model jury instructions for both the guilt and penalty phase of a capital murder trial do not discuss racial bias or prejudice.¹³²

Conclusion

Virginia does not require that jurors be instructed that it is improper for them to consider any racial factors when deliberating. Therefore, the Commonwealth is not in compliance with Protocol #8.

Recommendation

Virginia should develop and deliver a model instruction to jurors that bias or prejudice should not affect their decision-making.

I. Protocol #9

Jurisdictions should ensure that judges recuse themselves from capital cases when any party in a given case establishes a reasonable basis for concluding that the judge's decision-making could be affected by racially discriminatory factors.

Virginia Law on Judicial Recusal

The Virginia Code provides that when a trial court judge in a criminal proceeding “is so situated in respect to the case as in his opinion to render it improper that he should preside at the trial...he shall enter the fact of record...and another judge shall be appointed.”¹³³ The Virginia Canons of Judicial Conduct state that “a judge shall disqualify himself or herself in a proceeding in which the judge’s impartiality might reasonably be questioned, including where . . . [t]he judge has a personal bias or prejudice concerning a party or a party’s lawyer.”¹³⁴ While parties may waive other grounds for disqualification, disqualification on the basis of personal prejudice or bias concerning a party may not be waived.¹³⁵ The Canons also mandate that “[a] judge shall not hold membership in any organization that practices invidious discrimination on the basis of race, sex, religion[,] or national origin,” because such membership “gives rise to perceptions that the judge’s impartiality is impaired.”¹³⁶

¹³⁰ See, e.g., *Osman v. Osman*, 737 S.E.2d 876, 882 (Va. 2013); *Pryor v. Commonwealth*, 661 S.E.2d 820, 821 (Va. 2008); *Gaines v. Commonwealth*, 575 S.E.2d 775, 777 (Va. App. 2003); *Saunders v. Commonwealth*, 523 S.E.2d 509, 510 (Va. App. 2000). But see *Turman v. Commonwealth*, 667 S.E.2d 767, 771 (Va. 2008) (noting that the model instructions “suffer[] from a significant defect” with respect to the instruction on flight from a crime scene as evidence of guilt).

¹³¹ See *Virginia Model Jury Instructions—Criminal*.

¹³² *Id.* at Nos. G33.100, P33.120–P33.127.

¹³³ VA. CODE ANN. § 19.2-153 (2013).

¹³⁴ VA. CANONS OF JUDICIAL CONDUCT 3(E)(1)(a) (2013).

¹³⁵ *Id.* at 3(F).

¹³⁶ *Id.* at 2(C).

The Supreme Court of Virginia has stated that “a judge must exercise reasonable discretion in determining whether he or she possesses such bias or prejudice that would deny a litigant a fair trial. [T]he judge must be guided not only by the true state of his impartiality, but also by the public perception of his fairness.”¹³⁷ Furthermore, it has stated that “the Canons of Judicial Conduct are instructive, although not determinative in our review of a judge’s recusal decision.”¹³⁸ If the motion to recuse is denied by the trial judge, the Supreme Court of Virginia will review the decision under an abuse of discretion standard.¹³⁹

The Assessment Team found no instance in which the Supreme Court of Virginia addressed the issue of judicial recusal based on racially discriminatory factors.¹⁴⁰

Judicial Inquiry and Review Commission

In addition to judicial review of motions to recuse, a person who suspects a judge has failed to disqualify him/herself in a proceeding in which impartiality reasonably might be questioned may submit a complaint to the Judicial Inquiry and Review Commission (Commission), which will investigate the complaint, and if necessary, take disciplinary action.¹⁴¹ If the Commission finds the charges against the judge to be well founded and of sufficient gravity to constitute the basis for retirement, censure or removal, it will file a complaint against the judge in the Supreme Court of Virginia.¹⁴² None of the complaints filed by the Commission in the Supreme Court of Virginia, however, have dealt with judicial recusal.¹⁴³ The Commission also submits an annual report on its activities to the Virginia General Assembly, which includes the number of inquiries

¹³⁷ Wilson v. Commonwealth, 630 S.E.2d 326, 331 (Va. 2006).

¹³⁸ *Id.*

¹³⁹ *Id.*

¹⁴⁰ In 2004, Judge Ralph B. Robertson of the Richmond General District Court voluntarily retired “because of remarks he made on an Internet message board that he acknowledged would be interpreted as racist.” Judge Robertson did not preside over capital cases. Alan Cooper, *Judge Quits Over Racist Talk The Longtime Jurist Quickly Retires And Apologizes After Online Remarks About Blacks*, RICH. TIMES-DISPATCH, March 5, 2004 at A1.

¹⁴¹ See *About the Judicial Inquiry and Review Commission*, VA. JUDICIAL INQUIRY & REV. COMM’N, <http://www.courts.state.va.us/agencies/jirc/about.html> (last visited March 8, 2013). The Judicial Inquiry and Review Commission was created in 2001 to investigate charges of judicial misconduct, or serious mental or physical disability. The Commission has seven members consisting of three judges, two lawyers, and two citizens who are not lawyers. The members are elected by the Virginia General Assembly for four-year terms.

¹⁴² VA. CODE ANN. JUDICIAL INQUIRY & REV. COMM’N R. 15(A)(2) (2013).

¹⁴³ See generally *Judicial Inquiry & Rev. Comm’n v. Taylor*, 279 Va. 699 (2009) (holding that juvenile court judge violated judicial canons by ruling that an order was not appealable); *Judicial Inquiry & Rev. Comm’n v. Shull*, 274 Va. 657 (2007) (holding that judge who twice ordered litigant to lower her pants in the courtroom violated judicial canons); *Judicial Inquiry & Rev. Comm’n v. Peatross*, 269 Va. 428 (2005) (holding that judge did not violate judicial canons for removing an attorney from a case and later communicating with Supreme Court justice regarding resignation from Judicial Council pending JIRC charges); *Judicial Inquiry & Rev. Comm’n v. Lewis*, 264 Va. 401 (2002) (censuring juvenile court judge for attempting to enforce an order that had been stayed by the circuit court).

based on “bias or prejudice”; however the reports do not elaborate on the specific types of complaints encompassed by that phrase.¹⁴⁴

Conclusion

As the Assessment Team found no instance in which a judge failed to recuse him/herself, Virginia appears to be in compliance with Protocol #9.

J. Protocol #10

States should permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences at any stage of judicial proceedings, notwithstanding any procedural rule that otherwise might bar such claims, unless the State proves in a given case that a defendant or inmate has knowingly and intelligently waived the claim.

Virginia places strict procedural limitations on the types of claims that can be considered on direct appeal and in state habeas proceedings. The Supreme Court of Virginia will not consider an alleged trial error on direct appeal “unless an objection was stated with reasonable certainty at the time of the ruling [at trial], except for good cause shown or to enable [the Supreme] Court to attain the ends of justice.”¹⁴⁵ The Court has held that “[w]hether the ends of justice provision should be applied involves two questions: (1) whether there is error as contended by the appellant; and (2) whether the failure to apply the ends of justice provision would result in a grave injustice.”¹⁴⁶ This ends of justice exception has rarely been applied.¹⁴⁷

With respect to state habeas proceedings, the Supreme Court of Virginia has held that claims of trial error that could have been raised at trial and on direct appeal are “not cognizable in a petition for a writ of habeas corpus.”¹⁴⁸ Under this rule, no claim can be raised in state habeas proceedings if it relates to a trial error that should have been objected to at trial.¹⁴⁹

¹⁴⁴ See *Report to the Va. Gen. Assembly*, VA. JUDICIAL INQUIRY & REV. COMM’N, [http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD622013/\\$file/RD62.pdf](http://leg2.state.va.us/dls/h&sdocs.nsf/By+Year/RD622013/$file/RD62.pdf) (last visited March 8, 2013) (annual report on the activities of the Commission for the prior year including the number of complaints filed; the number of complaints originating from attorneys, judges, court employees, or the general public; the number of complaints dismissed based on (i) failure to fall within the jurisdiction of the Commission, (ii) failure to state a violation of the Canons of Judicial Conduct, or (iii) failure of the Commission to reach a conclusion that the Canons were breached; the number of complaints for which the Commission concluded that the Canons of Judicial Conduct were breached; and the number of cases from which the staff or any member of the Commission recused himself due to an actual or possible conflict).

¹⁴⁵ VA. SUP. CT. R. 5:25.

¹⁴⁶ *Gheorghiu v. Commonwealth*, 701 S.E.2d 407, 413 (Va. 2010) (citing *Charles v. Commonwealth*, 613 S.E.2d 432, 433 (Va. 2005)).

¹⁴⁷ For a discussion of the limited application of the ends of justice exception, see Chapter Eight on State Habeas Corpus Proceedings, Protocol #6.

¹⁴⁸ *Teleguz v. Warden*, 688 S.E.2d 865, 872 (Va. 2010) (citing *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974)).

¹⁴⁹ See *Slayton v. Parrigan*, 205 S.E.2d 680, 682 (Va. 1974) (“A petition for a writ of habeas corpus may not be employed as a substitute for an appeal or a writ of error.”).

The Supreme Court of Virginia has not recognized any exceptions to these rules based on claims of unconstitutional racial discrimination. For example, in the case of *Buck v. Commonwealth*, the defendant was sentenced to forty years for possession of cocaine with intent distribute after the prosecution used peremptory challenges at trial to strike two of the three African Americans from the jury panel.¹⁵⁰ When asked to give their reasons for the strike, the prosecution stated that one stricken juror was “relatively young when compared with the rest of the venire and did not have children,” while the other was “wearing a college athletic jacket” and was from an area that had “a significant drug problem.”¹⁵¹ A subsequent review revealed that another juror who was not stricken was also “relatively young” and had no children, and that the juror stricken for his residence was actually from a different town than the prosecution stated.¹⁵² However, the Supreme Court would not consider whether the reasons offered were pretextual because the defendant had failed to adequately preserve the issue at trial.¹⁵³ In another case, the Court expressly rejected the argument that “because racial discrimination in the selection of grand jurors is prohibited by the Fourteenth Amendment, the right to object to it at any time cannot be waived.”¹⁵⁴

Conclusion

Because Virginia does not permit defendants or inmates to raise directly claims of racial discrimination in the imposition of death sentences, notwithstanding procedural rules that otherwise bar such claims, Virginia is not in compliance with Protocol #10.

Recommendation

Virginia should permit a narrow exception to its procedural default rules that would permit a death-sentenced defendant to raise a claim of racial discrimination in the imposition of the death penalty, notwithstanding any procedural default rules. In particular, the Supreme Court of Virginia should reexamine the application of the “ends of justice” exception, which could provide a means for the court to consider such claims of racial discrimination. A death sentence imposed based on racial considerations of either the defendant or the victim constitutes the sort of “grave injustice” contemplated by this exception.

¹⁵⁰ *Buck v. Commonwealth*, 443 S.E.2d 414, 415 (Va. 1994).

¹⁵¹ *Id.*

¹⁵² *See id.* (Noting that “[n]othing in [the defendant’s] statement informed the trial court that [he] believed that the reasons advanced were pretextual.”).

¹⁵³ *See id.*

¹⁵⁴ *Prieto v. Commonwealth*, 721 S.E.2d 484, 504 (Va. 2012).

CHAPTER THIRTEEN

MENTAL RETARDATION AND MENTAL ILLNESS

INTRODUCTION TO THE ISSUE: A NATIONAL PERSPECTIVE

Mental Retardation¹

In *Atkins v. Virginia*,² the U.S. Supreme Court held that the application of the death penalty to persons with mental retardation violates the Eighth Amendment's prohibition on cruel and unusual punishment. However, *Atkins* did not define the parameters of mental retardation, nor did the decision explain what process capital jurisdictions should employ to determine if a capital defendant or death row inmate has mental retardation. Without a sound definition and clear procedures, the execution of persons with mental retardation could occur.

In an effort to assist capital jurisdictions in determining who meets the criteria of mental retardation, the ABA adopted a resolution opposing the execution or sentencing to death of any person who, at the time of the offense, "had significant limitation in both their intellectual functioning and adaptive behavior, as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or traumatic brain injury."³ The ABA policy reflects language adopted by the American Association on Intellectual and Developmental Disabilities and the American Psychiatric Association's *Diagnostic and Statistical Manual of Mental Disorders*.⁴

Some states, however, do not define mental retardation in accordance with these commonly accepted definitions. Moreover, some states impose upper limits on the intelligence quotient

¹ While "intellectual disability" is the preferred term to describe the same condition known as mental retardation, the ABA Assessment Reports will continue to use the term mental retardation for reader comprehension. "Mental retardation" is the term used in death penalty jurisprudence in such definitive decisions as *Atkins v. Virginia*, 536 U.S. 304 (2002), as well as in current Virginia statutory and case law. Furthermore, ABA policy refers explicitly to mental retardation in its long-standing opposition to the execution of people with this condition, and use of the term mental retardation maintains consistency with previous reports authored by the ABA and its jurisdictional assessment teams on the death penalty. See also *FAQ on Intellectual Disability*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/content_104.cfm (last visited June 27, 2012).

² *Atkins*, 536 U.S. 304.

³ ABA, RECOMMENDATION 122A, 2006 Ann. Mtg., 4 (adopted Aug. 7–8, 2006), available at http://www.americanbar.org/content/dam/aba/directories/policy/2006_am_122a.authcheckdam.pdf. See AM. ASS'N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYS. OF SUPPORTS 13 (10th ed. 2002); AM. PSYCHIATRIC ASS'N, DIAGNOSTIC & STATISTICAL MANUAL OF MENTAL DISORDERS 49 (text rev. 4th ed. 2000) [hereinafter DSM]. The American Association on Mental Retardation (AAMR) later changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD). *About Us*, AM. ASS'N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/content_2383.cfm?navID=2 (last visited Sept. 14, 2012).

⁴ For example, the AAIDD defines mental retardation as "a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills[, and which] originates before the age of 18." *FAQ on Intellectual Disability*, *supra* note 1. The DSM defines a person as mentally retarded if, before the age of eighteen, s/he exhibits "significantly subaverage intellectual functioning and concurrent deficits or impairments in present adaptive functioning." DSM, *supra* note 3, at 39.

score necessary to prove mental retardation that are lower than the range that is commonly accepted in the field (approximately seventy to seventy-five or below). In addition, lack of sufficient knowledge and resources often precludes defense counsel from properly raising and litigating claims of mental retardation. In some jurisdictions, the burden of proving mental retardation is not only placed on the defendant, but also requires proof greater than a preponderance of the evidence. Accordingly, considerable additional work is required to make the intent of the *Atkins* holding a reality.

The ABA resolution also encompasses dementia and traumatic brain injury, disabilities functionally equivalent to mental retardation but which typically manifest after age eighteen. While these disabilities are not expressly covered in *Atkins*, the ABA opposes the application of the death penalty to any person who suffered from significant limitations in intellectual functioning and adaptive behavior at the time of the offense, regardless of the cause of the disability.

Mental Illness

In *Atkins*, the Court held that mentally retarded offenders are less culpable than other offenders because of their “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”⁵ This same reasoning must logically extend to persons suffering from a severe mental disability or disorder that significantly impairs their cognitive or volitional functioning at the time of the capital offense.

In 2006, the ABA adopted a policy opposing imposition of the death penalty on persons who, at the time of the offense, suffered from a severe mental disability or disorder that affected (1) their capacity to appreciate the nature, consequences or wrongfulness of their conduct; (2) their ability to exercise rational judgment in relation to their conduct; or (3) their capacity to conform their conduct to the requirements of the law.⁶

Mental Illness after Sentencing

Concerns about a prisoner’s mental competence and suitability for execution also arise long after the prisoner has been sentenced to death. Almost 13% of all prisoners executed in the modern death penalty era have been “volunteers,” or prisoners who elected to forgo all available appeals.⁷ When a prisoner seeks to forgo or terminate post-conviction proceedings, jurisdictions should implement procedures that will ensure that the prisoner fully understands the consequences of that decision, and that the prisoner’s decision is not the product of his/her mental illness or disability.

Given the irreparable consequences that flow from a death row inmate’s decision to waive his/her appeals, the ABA also opposes execution of prisoners whose mental disorders or disabilities significantly impair their capacity (1) to make rational decisions with regard to post-

⁵ *Atkins*, 536 U.S. at 318.

⁶ ABA, *supra* note 3.

⁷ John Blume, *Killing the Willing: “Volunteers,” Suicide and Competency*, 103 MICH. L. REV. 939, 959 (2005).

conviction proceedings; (2) to assist counsel in those proceedings; or (3) when facing an impending execution, to appreciate the nature and purpose of the punishment or reason for its imposition.

Regardless of a state's law on the application of the death penalty to offenders with mental retardation or mental illness, these disabilities and disorders can affect every stage of a capital trial. Evidence of mental illness is relevant to the defendant's competence to stand trial, it may provide a defense to the murder charge, and it can be the centerpiece of the mitigation case. Conversely, when the judge, prosecutor, defense attorney, or jury is uninformed about the nature of mental illness and its relevance to the defendant's culpability and life experience, tragic consequences often follow for the defendant.

Unfortunately, jurors often treat mental illness as an aggravating factor rather than a mitigating factor in capital cases. States, in turn, have failed to provide jurors with a clear vehicle for considering mental illness as a mitigating factor. For example, a state's capital sentencing statute may provide a list of mitigating factors that implicate mental illness, such as whether the defendant was under "extreme mental or emotional disturbance" or whether the defendant had the capacity to "appreciate the criminality (wrongfulness) of his conduct" at the time of the offense. However, these factors are read to jurors without further explanation or without any discussion of their relationship to mental illness.⁸ One study specifically found that jurors' consideration of "extreme mental or emotional disturbance" in capital cases correlated positively with decisions to impose death sentences.⁹

Mental illness particularly weighs against a capital defendant when it is considered in the context of determining "future dangerousness," a criterion for imposing the death penalty in some jurisdictions. One study showed that a judge's instructions on future dangerousness led mock jurors to believe that the death penalty was *mandatory* for mentally ill defendants. This perception unquestionably affects decisions in capital cases. In addition, the medication some mentally ill defendants receive during trial often causes them to appear detached and unremorseful. This, too, can lead jurors to impose a sentence of death.

⁸ State death penalty statutes based upon the Model Penal Code list three mitigating factors that implicate mental illness: (1) whether the defendant was under "extreme mental or emotional disturbance" at the time of the offense; (2) whether "the capacity of the defendant to appreciate the criminality (wrongfulness) of his conduct or to conform his conduct to the requirements of law was impaired as a result of mental disease or defect or intoxication;" and (3) whether "the murder was committed under circumstances which the defendant believed to provide a moral justification or extenuation of his conduct." MODEL PENAL CODE § 210.6(1)(f) (1962). In 2009, the American Law Institute formally withdrew all Model Penal Code provisions related to the imposition of capital punishment. Adam Liptak, *Group Gives Up Death Penalty Work*, N.Y. TIMES, Jan. 5, 2010, at A11.

⁹ David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1688–89 (1998) (noting, in Table 6, that submission of a defendant's "extreme emotional disturbance" as a mitigating circumstance increased the likelihood of a death sentence in capital cases in Philadelphia from 1983 to 1993).

I. FACTUAL DISCUSSION: VIRGINIA OVERVIEW

A. *Mental Retardation in Death Penalty Cases*

In 2002, the U.S. Supreme Court held, in *Atkins v. Virginia*, that executing persons with mental retardation violates the Eighth Amendment's prohibition on cruel and unusual punishment.¹⁰ The Court, however, allowed individual states to determine the procedure for deciding whether an offender is a person with mental retardation.¹¹

Shortly after the *Atkins* decision, the Virginia General Assembly enacted legislation prohibiting the application of the death penalty to those with mental retardation.¹² Virginia law defines mental retardation as

a disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.¹³

1. Determinations of Mental Retardation at Trial

A capital defendant must provide notice to the prosecution of his/her intent to raise mental retardation as a bar to the death penalty at least twenty-one days before trial.¹⁴ If the defendant fails to provide proper notice, "then the court may, in its discretion, upon objection of the [prosecution], either allow the [prosecution] a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence."¹⁵

Following a motion by the defendant and a finding by the trial court that the defendant is financially unable to pay for expert assistance, "the court shall appoint one or more qualified mental health experts to assess whether or not the defendant is mentally retarded and to assist the defense in the preparation and presentation of information concerning the defendant's mental retardation."¹⁶ The expert, who is appointed by the court, must be

- (1) A psychiatrist, a clinical psychologist or an individual with a doctorate degree in clinical psychology;
- (2) Skilled in the administration, scoring and interpretation of intelligence tests and measures of adaptive behavior; and

¹⁰ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

¹¹ *See id.*

¹² VA. CODE ANN. § 18.2-10(a) (2013).

¹³ VA. CODE ANN. § 19.2-264.3:1.1(A) (2013).

¹⁴ VA. CODE ANN. § 19.2-264.3:1.2(E) (2013).

¹⁵ *Id.*

¹⁶ VA. CODE ANN. § 19.2-264.3:1.2(A) (2013).

- (3) Qualified by experience and by specialized training, approved by the Commissioner of Behavioral Health and Developmental Services, to perform forensic evaluations.¹⁷

Under the Virginia rules, “[t]he defendant shall not be entitled to a mental health expert of the defendant’s own choosing or to funds to employ such expert.”¹⁸ The court must appoint a similarly-qualified expert to assist the prosecution at the prosecution’s request.¹⁹

Whether a defendant is mentally retarded “shall be determined by the jury as part of the sentencing proceeding” of the capital trial.²⁰ Similarly, if the trial is before a judge, the judge will determine whether the defendant is mentally retarded as part of the sentencing proceeding.²¹ There is no provision that allows mental retardation to be determined in a pretrial hearing. The defendant “bear[s] the burden of proving that he is mentally retarded by a preponderance of the evidence.”²²

2. Determinations of Mental Retardation in Appellate and State Habeas Proceedings

Only a limited number of persons sentenced to death in Virginia have been permitted by law to present claims of mental retardation in state appellate and habeas proceedings. Specifically, any death row inmate whose direct appeal or state habeas petition was pending as of April 29, 2003, the date of enactment of the Commonwealth’s statute excluding those with mental retardation from the death penalty, was permitted to present his/her claim of mental retardation to the Supreme Court of Virginia in his/her direct appeal brief or habeas petition, respectively.²³ If the Supreme Court determined that the mental retardation claim was “not frivolous,” it was required to remand the case to the trial court.²⁴ If the case was before the Supreme Court on direct appeal, the trial court was required to empanel a new jury to determine the issue of mental retardation.²⁵ If the claim was remanded in state habeas proceedings, the trial court made the determination in a hearing.²⁶ Otherwise, the trial-level procedure for determining mental retardation governed these proceedings.²⁷

The statute provides, however, that if the defendant had “completed both a direct appeal and a habeas corpus proceeding” as of April 29, 2003, s/he was not entitled to have his/her mental retardation claim considered and the person’s “sole remedy shall lie in federal court.”²⁸

¹⁷ *Id.*

¹⁸ *Id.*

¹⁹ VA. CODE ANN. § 19.2-264.3:1.2(F)(1) (2013).

²⁰ VA. CODE ANN. § 19.2-264.3:1.1(C) (2013).

²¹ *Id.*

²² *Id.*

²³ VA. CODE ANN. § 8.01-654.2 (2013).

²⁴ *Id.*

²⁵ *Id.*

²⁶ *See id.*

²⁷ *Id.*

²⁸ *Id.*

B. Mental Illness and Disability as Mitigating Evidence

The U.S. Supreme Court has held that the trier of fact in the sentencing phase of a capital trial must be permitted to consider “as a mitigating factor, any aspect of a defendant’s character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death.”²⁹ Accordingly, Virginia law permits a capital defendant to present evidence related to his/her “history, character, or mental condition” during the sentencing phase of the trial.³⁰

Virginia law also enumerates six statutory mitigating factors, three of which relate to the defendant’s mental state or mental capacity: (1) “the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance”; (2) “at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired”; and (3) “even if [Virginia’s mental retardation statute] is inapplicable as a bar to the death penalty, the subaverage intellectual functioning of the defendant.”³¹ However, Virginia trial courts are not required to instruct the jury on these individual factors, regardless of whether the defendant proffers evidence to support them.³²

A Virginia statute, nearly identical to the statute that permits the appointment of mental retardation experts, requires the appointment of mental health experts to determine

(i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant’s mental condition at the time of the offense.³³

C. Mental Illness and Disability as Evidence of the Defendant’s Continuing Serious Threat to Society

If an expert is appointed to assist a capital defendant in evaluating the defendant’s mental condition, the prosecution is entitled to have an expert appointed to determine “the existence or absence of mitigating circumstances relating to the defendant’s mental condition at the time of the offense.”³⁴ However, once appointed, this expert’s evaluation and subsequent testimony is not limited to the presence of mitigating evidence.³⁵ The expert may also testify regarding the defendant’s continuing serious threat to society.³⁶ The question of whether the defendant is a

²⁹ Lockett v. Ohio, 438 U.S. 586, 604 (1978).

³⁰ VA. CODE ANN. § 19.2-264.3:1(A) (2013). See also VA. CODE ANN. § 19.2-264.4(B) (2013).

³¹ VA. CODE ANN. § 19.2-264.4(B) (2013).

³² Buchanan v. Angelone, 103 F.3d 344, 347–48 (4th Cir. 1996).

³³ VA. CODE ANN. § 19.2-264.3:1(A) (2013).

³⁴ VA. CODE ANN. § 19.2-264.3:1(F)(1) (2013).

³⁵ Stewart v. Commonwealth, 427 S.E.2d 394, 407–08 (Va. 1993).

³⁶ *Id.*

continuing serious threat to society is one of Virginia's two statutory aggravating factors, one of which must be found by the jury in order to sentence the defendant to death.³⁷

D. Competency

1. Competency to Stand Trial

In *Dusky v. United States*, the U.S. Supreme Court held that a defendant is mentally incompetent and thus cannot be tried for a criminal offense if s/he lacks "sufficient present ability to consult with [counsel] with a reasonable degree of rational understanding," or does not have "a rational as well as factual understanding of the proceedings."³⁸ In accordance with this decision, Virginia statutory law provides that if, at any time before trial,

the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant . . . lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed by at least one psychiatrist or clinical psychologist who is qualified by training and experience in forensic evaluation.³⁹

The expert appointed to perform the evaluation is required to submit a report on the defendant's competency to the court.⁴⁰ After receiving the report, the court must "promptly" determine whether the defendant is competent.⁴¹ An evidentiary hearing on the issue "is not required unless one is requested by the attorney for the Commonwealth or the attorney for the defendant, or unless the court has reasonable cause to believe the defendant will [require inpatient hospitalization to restore his/her competency.]"⁴² If a hearing is held, the party alleging the defendant is incompetent bears the burden of proving the incompetency by a preponderance of the evidence.⁴³

A defendant who is found incompetent must be ordered to "receive treatment to restore [] competency on an outpatient basis or, if the court specifically finds that the defendant requires inpatient hospital treatment, at a hospital designated by the Commissioner of Behavioral Health and Developmental Services."⁴⁴ If the facility treating the defendant's incompetency believes

³⁷ VA. CODE ANN. § 19.2-264.4(C) (2013). This aggravating factor requires the jury to find, beyond a reasonable doubt, that "there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society." *Id.*

³⁸ *Dusky v. United States*, 362 U.S. 402, 402 (1960) (per curiam).

³⁹ VA. CODE ANN. § 19.2-169.1(A) (2013).

⁴⁰ VA. CODE ANN. § 19.2-169.1(D) (2013).

⁴¹ VA. CODE ANN. § 19.2-169.1(E) (2013).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ VA. CODE ANN. § 19.2-169.2(A) (2013).

his/her competency has been restored, it must send a report to the court, and the court must again rule on the defendant's competency as previously described.⁴⁵

Virginia's competency statutes also include provisions for dismissing charges against a defendant who is "unrestorably incompetent."⁴⁶ However, Virginia law provides that when a defendant is charged with capital murder "the charge shall not be dismissed and the court having jurisdiction over the capital murder case may order that the defendant receive continued treatment . . . without limitation."⁴⁷

2. Other Competency Issues

Virginia courts will also consider a defendant's mental illness or mental disability as a factor in determining whether s/he is competent to waive other rights, including *Miranda* rights, the right to trial, and the right to direct appeal.⁴⁸

E. Mental Conditions Affecting Criminal Liability

1. Not Guilty by Reason of Insanity

Virginia courts have held that a defendant is not guilty by reason of insanity if the defendant can prove to the jury (1) that at the time of the offense, the defendant "was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong"; or (2) that the defendant's "mind has become so impaired by disease that he is totally deprived of the mental power to control or restrain his act."⁴⁹

If a defendant intends to introduce evidence of insanity at trial s/he must "give notice in writing to the attorney for the Commonwealth, at least 60 days prior to his trial."⁵⁰ If proper notice is not given, "then the court may in its discretion, either allow the Commonwealth a continuance or, under appropriate circumstances, bar the defendant from presenting such evidence."⁵¹

2. Diminished Capacity

Some states permit a defendant to present evidence of mental illness or mental disability to prove that s/he was incapable of specific intent or premeditation.⁵² If such a defense is successful, a

⁴⁵ VA. CODE ANN. § 19.2-169.2(B) (2013).

⁴⁶ VA. CODE ANN. § 19.2-169.3 (2013).

⁴⁷ VA. CODE ANN. § 19.2-169.3(F) (2013).

⁴⁸ For further discussion on the manner in which these competency determinations are made, see Mental Retardation and Mental Illness Protocols #3 and #4, *infra* notes 104–116, and Protocols #7 and #8, *infra* notes 176–198, and accompanying text.

⁴⁹ *Morgan v. Commonwealth*, 646 S.E.2d 899, 902 (Va. Ct. App. 2007). These standards are known as the M'Naghten Rule and the irresistible impulse test, respectively. *Id.*

⁵⁰ VA. CODE ANN. § 19.2-168 (2013). "However, if the period between indictment and trial is less than 120 days, the [defendant] shall give such notice no later than 60 days following indictment." *Id.*

⁵¹ *Id.*

⁵² See, e.g., *State v. Walkup*, 220 S.W.3d 748, 750–51 (Mo. 2007) (en banc).

capital murder defendant will be convicted of a lesser offense that does not require proof of premeditation, such as second-degree murder.⁵³ Virginia courts, however, do not allow evidence of mental illness or mental disability to be used for this purpose.⁵⁴

⁵³ *See id.*

⁵⁴ *Stamper v. Commonwealth*, 324 S.E.2d 682, 688 (Va. 1985).

II. ANALYSIS: MENTAL RETARDATION AND MENTAL ILLNESS

Below are the ABA Benchmarks, or “Protocols,” used by the Assessment Team in its evaluation of Virginia’s death penalty system. Each Protocol is followed by the Assessment Team’s analysis of the Commonwealth’s compliance with the Protocol and, where appropriate, the Assessment Team’s recommendations for reform.

While “intellectual disability” is the preferred term to describe the same condition formerly known as mental retardation, the ABA Assessment Reports use the term “mental retardation” for improved readability.⁵⁵ Mental retardation, for example, is the term used by the U.S. Supreme Court in *Atkins v. Virginia*,⁵⁶ as well as in current Virginia statutory and case law.⁵⁷

A. Protocol #1

All actors in the criminal justice system, including police, court officers, defense attorneys, prosecutors, judges, jailers, and prison authorities, should be trained to recognize mental retardation in capital defendants and death row inmates.

B. Protocol #2

All actors in the criminal justice system, including police officers, court officers, prosecutors, defense attorneys, judges, jailers, and prison authorities, should be trained to recognize mental illness in capital defendants and death row inmates.

Mental retardation and mental illness can have a profound impact on a capital case. The defendant’s mental state may affect his/her eligibility for the death penalty, presentation of mitigating evidence, and competency to stand trial. Furthermore, as discussed in more detail in Protocols #3 and #4 below, defendants with mental retardation or mental illness are much more likely to falsely confess to a crime.⁵⁸ For these reasons, all actors in the Virginia criminal justice system should be trained to recognize and appropriately address the limitations of persons with mental retardation or mental illness.

Law Enforcement Officer Training⁵⁹

The Virginia Department of Criminal Justice Services (DCJS) is empowered to “[e]stablish compulsory minimum training standards” for Virginia law enforcement officers.⁶⁰ DCJS’s training standards require officers to be trained to identify “specific audiences that may require an officer to adjust [his/her] manner of communication” including “persons with mental

⁵⁵ See *FAQ on Intellectual Disability*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aadd.org/content_104.cfm (last visited June 27, 2012).

⁵⁶ *Atkins v. Virginia*, 536 U.S. 304 (2002).

⁵⁷ ABA policy refers explicitly to mental retardation in its long-standing opposition to the execution of people with this condition, and use of the term mental retardation maintains consistency with previous reports authored by the ABA and its jurisdictional assessment teams on the death penalty.

⁵⁸ See *infra* notes 80–103 and accompanying text.

⁵⁹ For further discussion on law enforcement training in Virginia, see Chapter Two on Law Enforcement Identifications and Interrogations.

⁶⁰ VA. CODE ANN. § 9.1-102(2) (2013). See also 6 VA. ADMIN. CODE § 20-20-20 (2013).

retardation.”⁶¹ Officers are further trained to “[i]dentify behaviors that may indicate possible mental illness or other maladaptive and/or dangerous speech or actions that require law enforcement intervention.”⁶²

In addition, some of the individual law enforcement agencies the Assessment Team surveyed reported some training related to recognizing mental retardation.⁶³ The Virginia State Police has adopted a plan for training officers to “recogniz[e] and efficiently manag[e] interactions with individuals having a mental illness.”⁶⁴ The plan includes guidelines for recognizing mental retardation.⁶⁵ The Danville Police Department has implemented a general order related to “handling the mentally ill,” but the order does not specifically mention persons with mental retardation.⁶⁶ The Norfolk Police Department indicated that it has implemented a similar order.⁶⁷

Defense Counsel Training⁶⁸

Defense counsel training on issues related to mental retardation is discussed in Mental Retardation Protocol #3.

Prosecutor Training⁶⁹

Virginia law does not require Virginia prosecutors to receive any specialized training beyond the continuing legal education courses that all Virginia attorneys must complete. The Virginia General Assembly has established the Commonwealth’s Attorneys’ Services Council (CASC) “to ensure the upgrading of criminal justice administration by providing and coordinating training, education and services for attorneys for the Commonwealth.”⁷⁰ While CASC offers some training programs related to mental retardation and other mental health issues, these programs are limited to training on methods for *opposing* mental health claims by the defendant.⁷¹ For instance, a training on mental retardation would address strategies for successfully opposing a capital defendant’s mental retardation claim, rather than how to recognize mental retardation in a defendant.⁷²

⁶¹ VA. DEP’T OF CRIMINAL JUSTICE SERVS., PERFORMANCE OUTCOMES, TRAINING OBJECTIVES, CRITERIA AND LESSON PLAN GUIDES FOR COMPULSORY MINIMUM TRAINING STANDARDS FOR LAW ENFORCEMENT OFFICERS, 3-23 (1997), *available at* <http://www.dcjs.virginia.gov/standardsTraining/documents/performanceOutcomes/entireManual.pdf>.

⁶² *Id.* at 4-23.

⁶³ For a complete list of the Virginia law enforcement agencies that responded to the Assessment Team’s survey, see Chapter Two on Law Enforcement Identifications and Interrogations.

⁶⁴ Va. Dep’t of State Police Survey Response, provided by Capt. Lenmuel S. Terry, Training Dir., to Mark Pickett, 6 (Feb. 13, 2012) (Attachment #11 and on file with author).

⁶⁵ *Id.*

⁶⁶ CITY OF DANVILLE POLICE DEP’T, GENERAL ORDER OPR.117 (1998) (on file with author).

⁶⁷ City of Norfolk Police Dep’t Survey Response, provided by Capt. Ed Ryan, to Mark Pickett, 5 (Feb. 14, 2012) (on file with author).

⁶⁸ For further discussion on the training of defense counsel, see Chapter Six on Defense Services.

⁶⁹ For further discussion on the training of prosecutors, see Chapter Five on Prosecutorial Professionalism.

⁷⁰ VA. CODE ANN. § 2.2-2617(A) (2013).

⁷¹ Telephone Interview by Mark Pickett with Robert Q. Harris, Dir., Commonwealth’s Att’ys Servs. Council (June 6, 2012) (on file with author).

⁷² *Id.*

While it is possible that some Virginia prosecutors have attended other training programs relevant to recognizing mental retardation, the Assessment Team could not determine the extent to which such trainings are attended.⁷³

Judicial Training

The Educational Services Department of the Office of the Executive Secretary of the Supreme Court of Virginia is responsible for organizing “yearly continuing education opportunities and training for all Virginia court system employees,” including judges.⁷⁴ The Department does not, however, offer any judicial training programs relevant to recognizing mental retardation or mental illness.⁷⁵

Prison Authority Training

As with law enforcement officers, training for Virginia correctional officers is regulated by DCJS.⁷⁶ DCJS minimum training standards require correctional officers to receive training on the identification of “mentally disturbed inmates.”⁷⁷ Officers are trained to recognize mental illnesses and mental disabilities, including mental retardation, and report what they observe to on-staff mental health professionals.⁷⁸ Additional training is required for officers assigned to mental health units.⁷⁹

Conclusion

Some actors in the Virginia criminal justice system, including law enforcement and corrections officers, receive training relevant to recognizing mental retardation and mental illness in capital defendants and death row inmates. However, Virginia judges, including circuit judges who hear capital cases, do not receive any training on recognizing mental retardation or other disabilities. Additionally, Virginia prosecutor training appears to be limited to litigation strategies on mental retardation issues. Accordingly, Virginia is in partial compliance with Protocols #1 and #2.

Recommendation

The Assessment Team recommends that Virginia require all relevant actors in the criminal justice system to be educated on issues related to mental retardation and mental illness. Circuit judge education, most importantly, should include programs related to recognizing and

⁷³ See Letter from David N. Grimes, President, Va. Ass’n of Commonwealth’s Att’ys, to John Douglass, Chair, Va. Assessment Team on the Death Penalty (Apr. 23, 2012), *infra* Appendix (declining to respond to a survey submitted by the Assessment Team to several elected Commonwealth’s Attorneys in Virginia).

⁷⁴ *Education Services*, VA.’S JUDICIAL SYS., <http://www.courts.state.va.us/courtadmin/aoc/ed/home.html> (last visited June 11, 2012).

⁷⁵ Telephone Interview by Mark Pickett with Caroline Kirkpatrick, Dir., Educ. Servs. Dep’t of the Office of the Exec. Sec’y of the Supreme Court of Va. (June 6, 2012) (on file with author).

⁷⁶ 6 VA. ADMIN. CODE § 20-100-20 (2013).

⁷⁷ *Id.*

⁷⁸ Telephone Interview by Mark Pickett with David Rogers, Assistant Training Manager, Va. Dep’t of Corr. Acad. for Staff Dev. (May 21, 2012).

⁷⁹ *Id.*

understanding the effects of mental retardation and other mental disabilities. Virginia's trial judges may be called upon to assess the admissibility of evidence in mental retardation claims, determine a defendant's capacity to stand trial, and rule on other issues related to mental health. As such, a trial judge's understanding of mental retardation and other mental health issues is critically important to the functioning of Virginia's criminal justice system. In addition, prosecutors should receive training on recognizing mental retardation and mental illness in defendants, witnesses, and other persons. While training on strategies for opposing mental retardation claims may be important, prosecutors also must be able to assess how a defendant's intellectual capacity and mental condition might affect his/her eligibility for the death penalty, as well as other aspects of the case.

C. Protocol #3

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally retarded person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

Protocol #4

During police investigations and interrogations, special steps should be taken to ensure that the *Miranda* rights of a mentally ill person are sufficiently protected and that false, coerced, or garbled confessions are not obtained or used.

Mental Retardation

The Risk of False or Coerced Confessions

The U.S. Supreme Court has observed that “[m]entally retarded defendants . . . face a special risk of wrongful execution” because of the possibility that they will confess to crimes they did not commit.⁸⁰ Social scientific research on the topic confirms this observation. One study, for instance, found that 50% of mildly mentally retarded study participants “could not correctly paraphrase *any* of the five *Miranda* components,” compared to less than 1% of the general population.⁸¹ Moreover, because mentally retarded persons are more likely to “change accounts in response to suggestive questioning” and “possess less confidence in their own memories and beliefs,” these individuals are more likely to falsely confess to a crime.⁸²

False confessions are a common cause of wrongful convictions in the United States. According to the Innocence Project, in approximately 25% of DNA exoneration cases (both capital and non-capital), “innocent defendants made incriminating statements, delivered outright confessions or pled guilty.”⁸³

⁸⁰ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002).

⁸¹ Saul M. Kasin et al., *Police-Induced Confessions: Risk Factors and Recommendations*, 34 LAW & HUM. BEHAV. 3, 21 (2010) (emphasis in original) (citing Michael J. O’Connell et al., *Miranda Comprehension in Adults with Mental Retardation and the Effects of Feedback Style on Suggestibility*, 29 LAW & HUM. BEHAV. 359 (2005)).

⁸² William C. Follette, Deborah Davis & Richard A. Leo, *Mental Health Status and Vulnerability to Police Interrogation Tactics*, 22 CRIM. JUST. 42, 48–49 (2007).

⁸³ *False Confessions*, INNOCENCE PROJECT, <http://www.innocenceproject.org/understand/False-Confessions.php> (last visited Jan. 2, 2012).

In Virginia, the case of Earl Washington demonstrates the increased risk that a mentally retarded person will falsely confess to a crime. Washington, who is mildly mentally retarded,⁸⁴ was interrogated by police for two days regarding the 1982 rape and murder of Rebecca Lynn Williams and other unrelated offenses.⁸⁵ Washington eventually confessed to the rape and murder, although several of the details he provided to police were inconsistent with the facts.⁸⁶ For instance, he told police that he had stabbed Williams two or three times, when in fact she had thirty-eight stab wounds.⁸⁷ Based largely on this confession, Washington was convicted and sentenced to death.⁸⁸ In 1993, however, DNA testing proved that Washington was innocent of the offense, and Governor Douglas Wilder commuted his sentence to life in prison.⁸⁹ Following additional DNA testing, Governor James Gilmore granted Washington a full pardon and he was released in 2000 after serving seventeen years in prison for a crime he did not commit.⁹⁰ Governor Tim Kaine formally declared Washington's "actual innocence" in 2007.⁹¹ After his release, Washington was awarded \$2.25 million by a jury in a federal civil rights lawsuit related to his wrongful conviction; upon further negotiations with the Commonwealth, Washington received a \$1.9 million settlement.⁹²

While Washington was on death row for a murder he did not commit, the actual perpetrator remained at large and free to commit more violent crimes. The DNA testing that exonerated Washington also implicated another man, Kenneth Maurice Tinsley, in Rebecca Williams' murder.⁹³ In 2007, Tinsley pleaded guilty to Williams' rape and murder and was sentenced to life in prison.⁹⁴ Tinsley, however, was already serving two life sentences for a rape he committed in 1984, two years after he murdered Williams.⁹⁵ Had Tinsley been apprehended and convicted instead of Washington, the 1984 rape would not have occurred.

Persons with mental retardation or other mental impairments have falsely confessed in non-capital cases in Virginia as well. In 1997, Ricky Cullipher was convicted of shooting his friend Danny Caldwell in the head and seriously injuring him.⁹⁶ Cullipher, who suffered from a learning disability, had confessed to the crime.⁹⁷ A subsequent newspaper investigation, however, revealed numerous problems with the case, including the fact that "Caldwell was [] recorded on a grainy videotape laughing with a friend about how he had actually shot himself

⁸⁴ Washington v. Buraker, 322 F. Supp. 2d 702, 713 (W.D. Va. 2004).

⁸⁵ *Earl Washington*, INNOCENCE PROJECT, http://www.innocenceproject.org/Content/Earl_Washington.php (last visited May 22, 2012).

⁸⁶ *Id.*

⁸⁷ *Id.*

⁸⁸ *Washington*, 322 F. Supp. 2d at 707.

⁸⁹ *Id.*

⁹⁰ *See id.*

⁹¹ Maria Gold, *Former Death-Row Inmate Officially Declared Innocent*, WASH. POST, Jul. 7, 2007.

⁹² Email from Steve D. Rosenfield, Att'y for Earl Washington, to Joseph Flood (Jan. 31, 2013) (on file with author).

⁹³ Frank Green, *Tinsley Pleads Guilty in '82 Death: Two Life Terms Imposed in the Attack for which Earl Washington Was Exonerated*, RICHMOND TIMES-DISPATCH, Apr. 12, 2007, at B1.

⁹⁴ *Id.*

⁹⁵ *Id.*

⁹⁶ Holly Roberson & Kimberly Lenz, *Ricky Free: Judge Says Cullipher Deserves New Trial; Prosecutor Drops Case*, DAILY PRESS (Newport News, Va.), May 25, 2001, at A1.

⁹⁷ *Id.*

while playing Russian roulette.”⁹⁸ In 2001, Cullipher’s conviction was overturned by a federal judge who found several errors in the case, and prosecutors subsequently dismissed the case.⁹⁹ Cullipher had explained that “he told the officers what he thought they wanted to hear so they would leave him alone.”¹⁰⁰

In another Virginia case, David Vasquez pleaded guilty to the rape and murder of a woman in 1984.¹⁰¹ Vasquez, who had an IQ below seventy, confessed to the crime after police falsely told him that his fingerprints were found at the scene of the crime.¹⁰² After spending nearly four years in prison, however, DNA testing implicated another man in the crime, and Vasquez was pardoned by the Governor.¹⁰³

Protection from Miranda Waivers

In *Miranda v. Arizona*, the U.S. Supreme Court held that the Fifth Amendment’s protection from self-incrimination requires law enforcement officers to inform a suspect of his/her right to remain silent and right to an attorney prior to a custodial interrogation.¹⁰⁴ A suspect, however, may waive his/her *Miranda* rights if the waiver is knowingly and intelligently made.¹⁰⁵ The Supreme Court of Virginia has held that the test for the validity of a *Miranda* waiver is “whether the statement is the product of an essentially free and unconstrained choice by its maker, or whether the maker’s will has been overborne and his capacity for self-determination critically impaired.”¹⁰⁶ In making this determination, the court will “examine the totality of the circumstances, which include the defendant’s background and experience as well as the conduct of the police in obtaining the waiver of *Miranda* rights and confession.”¹⁰⁷

While the court will consider evidence of mental retardation or mental illness as part of this determination, such a defendant may still waive his/her *Miranda* rights and is not entitled to any additional protections to ensure that his/her *Miranda* waiver is valid.¹⁰⁸ In the Earl Washington case, for instance, the Supreme Court of Virginia held that Washington’s *Miranda* waiver was valid despite his mental retardation because he was familiar with the criminal justice system and

⁹⁸ Peter Dujardin, *A Prosecutor Reflects*, DAILY PRESS (Newport News, Va.), Feb. 5, 2012, at A1.

⁹⁹ Roberson & Lenz, *supra* note 96.

¹⁰⁰ *Id.*

¹⁰¹ Donald P. Baker & Dana Priest, *Va. Senate Allows Compensation for Innocent Man*, WASH. POST, Feb. 14, 1990, at F5.

¹⁰² *Id.*; Jim Mason, *Vasquez Was ‘Brainwashed’ into Guilty Plea, Mother Says*, RICHMOND TIMES-DISPATCH, Jan. 6, 1989, at 5.

¹⁰³ Baker & Priest, *supra* note 101.

¹⁰⁴ *Miranda v. Arizona*, 384 U.S. 436, 478–79 (1966).

¹⁰⁵ *Id.* at 479.

¹⁰⁶ *Jackson v. Commonwealth*, 590 S.E. 2d 520, 527 (Va. 2004) (quoting *Jenkins v. Commonwealth*, 423 S.E.2d 360, 366 (Va. 1992)) (internal quotation marks omitted).

¹⁰⁷ *Id.* The U.S. Supreme Court has clarified that “a suspect who has received and understood the *Miranda* warnings, and has not invoked his *Miranda* rights, waives the right to remain silent by making an uncoerced statement to the police.” *Berghuis v. Thompkins*, 130 S.Ct. 2250, 2264 (2010). The suspect must affirmatively invoke the right to silence by telling police s/he does not wish to be questioned. *Id.* at 2260.

¹⁰⁸ *Washington v. Commonwealth*, 323 S.E.2d 577, 585–86 (Va. 1984).

there was no evidence that he was “subjected to physical or psychological coercion of any kind.”¹⁰⁹

Protection from False Confessions

In addition to the requirement that the defendant’s *Miranda* waiver be knowing and voluntary, the confession itself must be voluntary to be admissible.¹¹⁰ The U.S. Supreme Court has held that a court must consider the totality of the circumstances to determine whether the defendant’s statements “were the product of his free and rational choice.”¹¹¹ However, the Court held in *Colorado v. Connelly* that “coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary.’”¹¹² The Court of Appeals of Virginia, in adopting the *Connelly* standard, has held that while the “mental condition of the defendant is surely relevant to [his] susceptibility to police coercion . . . , evidence of coercive police activity is a necessary predicate to the finding that a confession is not ‘voluntary.’”¹¹³

The Supreme Court of Virginia has held, however, that a mentally retarded defendant is entitled to have expert witnesses testify on the reliability of his/her confession.¹¹⁴ In *Pritchett v. Commonwealth*, a capital case in which the defendant was sentenced to life imprisonment at trial, the trial court refused to permit the testimony of two mental health experts who would have testified that the defendant’s mental retardation made him prone to false confessions.¹¹⁵ On appeal, however, the Supreme Court of Virginia held that such testimony is admissible “so long as the expert does not opine on the truth of the statement at issue” because mental retardation is not within the range of common experience of the average juror.¹¹⁶

Mental Illness

As with persons with mental retardation, the mentally ill also face an increased risk of falsely confessing to a crime because they often lack confidence in their own memories and are more susceptible to coercive interrogation tactics.¹¹⁷ Curtis Moore, for instance, who suffered from schizophrenia,¹¹⁸ was convicted of the rape and murder of an elderly woman in 1975 in Emporia, Virginia.¹¹⁹ Police officers, who were aware that Moore had been hospitalized for mental

¹⁰⁹ *Id.*

¹¹⁰ *Schneckloth v. Bustamonte*, 412 U.S. 218, 225–26 (1973) (quoting *Culombe v. Connecticut*, 367 U.S. 568, 602 (1961)).

¹¹¹ *Greenwald v. Wisconsin*, 390 U.S. 519, 521 (1968) (per curiam).

¹¹² *Colorado v. Connelly*, 479 U.S. 157, 167 (1986).

¹¹³ *Commonwealth v. Peterson*, 424 S.E.2d 722, 723 (Va. Ct. App. 1992) (quoting *Connelly*, 479 U.S. at 164) (internal quotations omitted).

¹¹⁴ *Pritchett v. Commonwealth*, 557 S.E.2d 205, 207–08 (Va. 2002).

¹¹⁵ *Id.*

¹¹⁶ *Id.* at 208.

¹¹⁷ Follette, *supra* note 82, at 48–49.

¹¹⁸ Frank Green, *Arrest Made in ‘75 Slaying: DNA Leads to New Suspect in Killing of Emporia Teacher; Man Now Dead Was Convicted*, RICHMOND TIMES-DISPATCH, Aug. 12, 2008, at A1.

¹¹⁹ *Moore v. Ballone*, 488 F. Supp. 798, 800 (E.D. Va. 1980). The Supreme Court of Virginia affirmed Moore’s conviction without opinion. *Id.* at 802. Moore was sentenced to life imprisonment at trial. *Meet the Exonerated: Virginia*, NORTHWESTERN LAW BLUHM LEGAL CLINIC: CTR. ON WRONGFUL CONVICTIONS, <http://www.law.northwestern.edu/wrongfulconvictions/exonerations/vaIndex.html> (last visited Jan. 31, 2013).

disorders, questioned him about the crime after receiving “several complaints about his suspicious behavior.”¹²⁰ After being interrogated for several hours at the police station, Moore made “[s]everal inconsistent but incriminating statements.”¹²¹ “The police [then] escorted [Moore] to the victim’s home, where . . . he made further statements placing himself at the victim’s home on the night of the murder.”¹²² Moore was subsequently convicted of the offense based largely upon this confession.¹²³

In 1980, however, the U.S. District Court for the Eastern District of Virginia granted Moore’s habeas petition, finding that “there was an insufficient showing of a waiver of [his] *Miranda* rights” and noting that Moore was “surely mentally disoriented” during his interrogation.¹²⁴ Moore was not retried for the offense.¹²⁵ In 2008, DNA testing revealed that another man, Thomas Pope, had committed the rape and murder.¹²⁶ Although Pope was subsequently convicted of the offense,¹²⁷ the delay in his apprehension gave him the opportunity to commit additional crimes: in 1991, he was convicted of abducting and forcibly sodomizing a nine-year-old girl.¹²⁸

Virginia Law Enforcement Practices

Virginia law enforcement officers receive some training relevant to recognizing and communicating with persons who have mental retardation and mental illness.¹²⁹ The extent to which this training incorporates special steps to be taken while interrogating a person who may have mental retardation or a mental illness, however, is less clear. The Virginia State Police indicates that it “does not disseminate information on techniques of interview and interrogation,” including information related to the interrogation of the mentally retarded and the mentally ill.¹³⁰ While the Danville Police Department has some policies related to “handling the mentally ill,” none of these policies relate specifically to interrogation techniques.¹³¹ The Norfolk Police Department has not promulgated special policies for interrogating the mentally retarded and mentally ill, but it states that it is “common practice” for any indication of mental impairment or disability “to be noted in statement or notes.”¹³² Similarly, the Arlington County Police Department stated that it does not have guidelines regarding the interrogation of persons with

¹²⁰ *Moore*, 488 F. Supp. at 800.

¹²¹ *Id.* at 800–01.

¹²² *Id.* at 801.

¹²³ *See id.*

¹²⁴ *Id.* at 808. The order was subsequently affirmed by the U.S. Court of Appeals for the Fourth Circuit. *Moore v. Ballone*, 658 F.2d 218 (4th Cir. 1981).

¹²⁵ *Green*, *supra* note 118.

¹²⁶ *Id.*

¹²⁷ Frank Green, *Second Conviction in '75 Emporia Murder Leaves Many Pleased*, RICHMOND TIMES-DISPATCH, Mar. 26, 2010.

¹²⁸ *Green*, *supra* note 118.

¹²⁹ *See supra* notes 60–67 and accompanying text.

¹³⁰ Va. Dep’t of State Police Survey Response, *supra* note 65, at 5.

¹³¹ CITY OF DANVILLE POLICE DEP’T, GENERAL ORDER OPR.117 (1998) (on file with author).

¹³² City of Norfolk Police Dep’t Survey Response, provided by Capt. Ed Ryan, to Mark Pickett, 5 (Feb. 14, 2012) (on file with author).

mental retardation or mental illness, but that officers are required to “advise the magistrate” if they believe that the suspect is mentally ill.¹³³

Conclusion

Virginia provides some measures to ensure that the *Miranda* rights of a mentally retarded or mentally ill person are sufficiently protected and that false or coerced confessions are not obtained or admitted into evidence. In particular, Virginia law permits expert testimony on mental health factors that might affect the validity of a confession. Virginia courts will also consider a defendant’s mental retardation or mental illness when determining whether a *Miranda* waiver or confession was voluntary. However, Virginia does not require law enforcement officers to follow any special procedures when interrogating a suspect with mental retardation or mental illness. Accordingly, Virginia is in partial compliance with Protocols #3 and #4.

Recommendation

As past cases demonstrate, there is a legitimate and serious risk that suspects with mental retardation or mental illness will falsely confess to crimes in Virginia, even in the case of capital prosecutions. Therefore, the Assessment Team recommends that Virginia adopt policies and procedures to ensure that all law enforcement officers are trained to identify these suspects and employ appropriate interrogation techniques that are not likely to lead to false confessions.

For instance, social scientific research has demonstrated that suspects with mental retardation “are more susceptible to interrogation techniques such as ‘maximization’ (statements such as ‘if you do not waive now, you will get the death penalty’) and ‘minimization’ (statements such as ‘I just need to go over some formalities’).”¹³⁴ As such, officers should be trained to avoid these techniques when interrogating a suspect who exhibits signs of mental retardation. Officers should also ask suspects to explain the *Miranda* warning in their own words to gauge comprehension and to ensure that the suspect’s waiver is knowingly made.¹³⁵ To ensure that the confession matches what law enforcement knows about the crime scene, officers should ask suspects detailed questions about the crime that would not be known to the general public. Any discrepancies should be scrupulously noted by the officer.¹³⁶

Finally, fully recording police interrogations would provide courts with a better means to assess whether a confession was false or coerced.¹³⁷

¹³³ Arlington Cnty. Police Dep’t Survey Response, provided by Capt. Michelle Nuneville, to Mark Pickett, 5 (June 2012) (on file with author).

¹³⁴ Andrew Guthrie Ferguson, *The Dialogue Approach to Miranda Warnings and Waiver*, 49 AM. CRIM. L. REV. 1437, 1461 (2012).

¹³⁵ *Id.* at 1468–75 (explaining a standard for assessing *Miranda* comprehension).

¹³⁶ In the Earl Washington case, the interrogating officer told Washington specific details about the crime scene; Washington then repeated these details back to the officer in his own confession, creating the false appearance that Washington knew detailed facts about the murder. Zinie Chen Sampson, *Va. Jury Awards Exonerated Death-Row Inmate \$2.25 Million from Investigator’s Estate*, ASSOCIATED PRESS, May 7, 2006.

¹³⁷ This issue is discussed further in Chapter Two on Law Enforcement Identifications and Interrogations, Protocol #4.

D. Protocol #5

The jurisdiction should have in place policies that ensure that persons who may have mental retardation are represented by attorneys who fully appreciate the significance of their client's mental limitations. These attorneys should have training sufficient to assist them in recognizing mental retardation in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers and investigators) to determine accurately and prove the mental capacities and adaptive skills deficiencies of a defendant who counsel believes may have mental retardation.

Protocol #6

The jurisdiction should have in place policies that ensure that persons who may have mental illness are represented by attorneys who fully appreciate the significance of their client's mental disabilities. These attorneys should have training sufficient to assist them in recognizing mental disabilities in their clients and understanding its possible impact on their clients' ability to assist with their defense, on the validity of their "confessions" (where applicable) and on their initial or subsequent eligibility for capital punishment. These attorneys should also have sufficient funds and resources (including access to appropriate experts, social workers, and investigators) to determine accurately and prove the disabilities of a defendant who counsel believes may have mental disabilities.

Defense Counsel Training¹³⁸

Virginia does not require capital defense counsel to receive any special training on recognizing or assessing mental retardation or other mental health issues in their clients.¹³⁹ However, the Virginia Indigent Defense Commission (Commission), which oversees indigent defense counsel qualification standards,¹⁴⁰ requires all attorneys seeking recertification to provide capital representation at trial, on direct appeal, or during state habeas corpus proceedings to receive ten hours of capital defense training every two years.¹⁴¹ Capital defense counsel may obtain training on issues related to mental retardation and mental illness as part of this requirement.

Attorneys at each of Virginia's four Regional Capital Defender Offices (RCDs), whose attorneys represent most capital defendants at trial and on direct appeal, may have received training on issues related to mental retardation and mental illness irrespective of the Commission

¹³⁸ For further discussion on training of defense counsel, see Chapter Six on Defense Services.

¹³⁹ Va. Indigent Def. Comm'n Survey Response, provided by Jae K. Davenport, Standards of Practice Enforcement Attorney, Va. Indigent Def. Comm'n, to Paula Shapiro, 21, (Apr. 4, 2012) (on file with author) [hereinafter VIDC Survey Response]. The Commission reported that "[t]here is no requirement that the attorney must specifically be trained on [mental retardation and mental illness]." *Id.*

¹⁴⁰ See VA. CODE ANN. § 19.2-163.01(A) (2013).

¹⁴¹ *Statutory Authority and Qualifications*, VA. INDIGENT DEF. COMM'N, <http://www.publicdefender.state.va.us/serving.htm#CAPITALTRIALCOUNSEL> (last visited Jan. 30, 2012); *Attorney Certification System (ACeS)*, VA. INDIGENT DEF. COMM'N, <http://www.publicdefender.state.va.us/certapp.htm> (last visited Feb. 22, 2012).

requirements. With respect to mental retardation, RCD West states that its staff attorneys are “trained to look for deficits in adaptive functioning [through] family interviews” and to examine “school/mental health records that may document formal IQ testing.”¹⁴² RCD Southeast reports that it “conduct[s] in-house training on intellectual disabilities and mental health issues relevant to [its] work.”¹⁴³ RCD North also indicates that its attorneys are trained on mental retardation issues.¹⁴⁴ In April 2012, RCD Central indicated that its attorneys are not trained on issues related to mental retardation.¹⁴⁵ In addition, staff attorneys for the Virginia Capital Representation Resource Center (VCRRC), the non-profit organization which represents most Virginia death row inmates in state and federal habeas proceedings, receive some training on mental retardation and mental disorders, but generally do not receive formal training on screening death row inmates for the presence of mental or psychological disorders.¹⁴⁶

However, capital defense counsel training on mental retardation and other issues may be limited by funding constraints. The Commission has acknowledged that its appropriations may be inadequate for the effective training, professional development, and continuing education of capital defense counsel and other members of the defense team.¹⁴⁷ Virginia Capital Defenders have also stated that their offices do not receive “proper funding and resources to adequately train its capital defenders in all aspects of litigation.”¹⁴⁸

Some capital defendants in Virginia have waived significant constitutional rights during their capital proceedings. Of the thirty-five defendants sentenced to death in Virginia since 2000, four have waived one or more constitutional rights, such as the right to counsel, right to trial, or right to direct appeal, at some stage of their respective cases.¹⁴⁹

The Robert Gleason case, for example, illustrates the need for capital defense counsel in Virginia to be trained to recognize and present potential mental illness claims. Gleason was serving a life

¹⁴² Capital Defender Office West Survey Response, provided by Steve Milani, Capital Defender, RCD West to Paula Shapiro, 17–18 (Apr. 2, 2012) (on file with author) [hereinafter RCD West Survey Response].

¹⁴³ Capital Defender Office Southeast Survey Response, provided by Doug Ramseur, Capital Defender, RCD Southeast to Mark Pickett, 21 (Mar. 19, 2012) (on file with author) [hereinafter RCD Southeast Survey Response].

¹⁴⁴ Capital Defender Office North Survey Response, provided by Ed Ungvasky, Capital Defender, RCD North to Paula Shapiro & Mark Pickett, 7 (Apr. 4, 2012) (on file with author) [hereinafter RCD North Survey Response].

¹⁴⁵ Capital Defender Office Central Survey Response, provided by David Baugh, Capital Defender, RCD Central to Paula Shapiro, 19 (Apr. 4, 2012) (on file with author) [hereinafter RCD Central Survey Response].

¹⁴⁶ Interview by Mark Pickett and Paula Shapiro with Robert E. Lee, Exec. Dir., VCRRC (Apr. 11, 2012) (on file with author) [hereinafter VCRRC Interview Apr. 2012].

¹⁴⁷ VIDC Survey Response, *supra* note 139, at 22 (noting that the RCDs are limited in terms of the availability of funds, not the availability of appropriate training programs).

¹⁴⁸ RCD Central Survey Response, *supra* note 145, at 19; RCD Southeast Survey Response, *supra* note 143, at 23 (“This office could benefit from increased amounts of funding for training.”); RCD North Survey Response, *supra* note 144, at 16 (“not enough money to send staff to national trainings”). However, the Capital Defender West considers the funding adequate for the effective training of all members of his defense team. RCD West Survey Response, *supra* note 142, at 19.

¹⁴⁹ In addition to the Gleason case discussed after this footnote, David Overton waived his right to trial, requested a death sentence from the trial judge, and later waived direct appeal. *Overton v. Commonwealth*, 539 S.E.2d 421 (Va. 2000). Thomas Akers waived his right to trial, pleaded guilty, waived his right to present mitigating evidence, waived direct appeal, and waived state habeas proceedings. *Akers v. Commonwealth*, 535 S.E.2d 674, 676–77 (Va. 2000); *Akers ex rel. Lee v. Angelone*, 147 F. Supp. 2d 447 (W.D.Va. 2001). John Allen Muhammad waived his right to counsel during a portion of his capital trial. *Muhammad v. Kelly*, 575 F.3d 359, 370–71 (4th Cir. 2009).

sentence for murder when he killed two fellow inmates by strangulation in separate incidents in 2009 and 2010.¹⁵⁰ During trial court proceedings for the 2009 murder, Gleason admitted to committing the crime and told the court that he wanted to receive the death penalty.¹⁵¹ He further explained that he “already had a few [other] inmates lined up, just in case [he] didn’t get the death penalty, that [he] was gonna take out.”¹⁵² Because his defense counsel were attempting to negotiate a plea agreement for a life sentence, Gleason dismissed them.¹⁵³ Despite Gleason’s clearly-stated desire to receive a death sentence, and although the issue of his competence to stand trial had been raised, his attorneys did not object to the dismissal or take issue with Gleason’s competence to represent himself.¹⁵⁴ Gleason subsequently pleaded guilty and was sentenced to death.¹⁵⁵ He also waived his right to direct appeal and was executed in 2013.¹⁵⁶

Access to Investigators and Experts¹⁵⁷

Trial

While Virginia law does not require the appointment of a mitigation specialist or of investigators to a capital defense team, capital defendants represented at trial or on direct appeal by one of the four RCDs have access to the representing office’s staff investigators and mitigation specialists.¹⁵⁸ The Commission states that RCD staff mitigation specialists are required to have a bachelor’s degree in social work, psychology or a related degree in mental health or substance abuse.¹⁵⁹ In addition, each RCD states that it seeks to hire staff investigators and mitigation specialists with a background in psychology or related mental health issues. According to RCD North, one member of the defense team is “almost always, but not necessarily” trained to screen for the presence of mental or psychological disorders or impairments.¹⁶⁰ RCD West and Central report that their staff mitigation specialists typically handle the task of screening for the presence

¹⁵⁰ Gleason v. Commonwealth, 726 S.E.2d 351, 352 (Va. 2012).

¹⁵¹ *Id.*

¹⁵² *Id.* In a later telephone interview, Gleason explained that he did not seek the death penalty because of a desire to die. Michael Owens, *Gleason: ‘People Think I’m Doing This Because I Want To Die’*, BRISTOL HERALD COURIER (Va.), May 7, 2012. Rather, he said that a death sentence is “the only way he can keep a promise made to ‘someone close’ not to hurt any prison guards.” *Id.* Gleason did not, however, identify this person. *Id.*

¹⁵³ Owens, *supra* note 152.

¹⁵⁴ Trial Transcript of Pretrial Motions Hearing, Commonwealth v. Gleason, No. F09-279 (Wise Cnty., Va Cir. Ct. May 28, 2010) (on file with author). The U.S. Supreme Court has held that a defendant who has been found competent to stand trial may nonetheless be incompetent to represent him/herself at trial. *Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

¹⁵⁵ *Gleason*, 726 S.E.2d at 353.

¹⁵⁶ *Id.*; Justin Jouvenal, *Va. Executes Convicted Killer Who Sought Death Penalty*, WASH. POST, Jan. 16, 2013, available at http://www.washingtonpost.com/local/va-executes-convicted-killer-who-sought-death-penalty/2013/01/16/89802e00-6015-11e2-9940-6fc488f3fed_story.html.

¹⁵⁷ For further discussion on access to investigators and experts for defense counsel, see Chapter Six on Defense Services.

¹⁵⁸ VIDC Survey Response, *supra* note 139, at 9.

¹⁵⁹ Sentencing Advocates/Mitigation Specialists and Investigators, Sample Position Job Descriptions, as provided by the VIDC (Apr. 3, 2012) (on file with author).

¹⁶⁰ RCD North Survey Response, *supra* note 144, at 17.

of mental disorders.¹⁶¹ Capital defendants represented solely by private court-appointed counsel or privately-retained counsel whose clients are financially unable to afford the cost of investigators and mitigation specialists must petition the trial court for funding.¹⁶²

With respect to experts on mental retardation, Virginia statutory law provides that upon a finding by the trial court that the defendant is financially unable to pay for expert assistance, “the court shall appoint one or more qualified mental health experts to assess whether or not the defendant is mentally retarded and to assist the defense in the preparation and presentation of information concerning the defendant’s mental retardation.”¹⁶³ The defendant is not entitled to choose his/her own expert under this statute.¹⁶⁴ The expert selected by the court must be

- (1) A psychiatrist, a clinical psychologist or an individual with a doctorate degree in clinical psychology;
- (2) Skilled in the administration, scoring and interpretation of intelligence tests and measures of adaptive behavior; and
- (3) Qualified by experience and by specialized training, approved by the Commissioner of Behavioral Health and Developmental Services, to perform forensic evaluations.¹⁶⁵

The RCDs state that they regularly request and receive the appointment of mental health experts pursuant to this statute.¹⁶⁶

Virginia law governing the provision of experts on mental illness in capital cases is similar to the law governing the provision of mental retardation experts.¹⁶⁷ Upon a motion by the defendant and a finding by the trial court that the defendant is unable to afford expert assistance,

the court shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant’s history, character, or mental condition, including (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense; (ii) whether the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was significantly impaired at the time of the offense; and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant’s mental condition at the time of the offense.¹⁶⁸

¹⁶¹ RCD West Survey Response, *supra* note 142, at 18 (“Mitigation specialists handle this task in most cases.”); RCD Central Survey Response, *supra* note 145, at 20 (noting that the in-house mitigation specialist is trained to screen for the presence of mental or psychological disorders or impairments).

¹⁶² VIDC Survey Response, *supra* note 139, at 2, 9.

¹⁶³ VA. CODE ANN. § 19.2-264.3:1(A) (2013).

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

¹⁶⁶ RCD West Survey Response, *supra* note 142, at 9; RCD Central Survey Response, *supra* note 145, at 11; RCD Southeast Survey Response, *supra* note 143, at 12; RCD North Survey Response, *supra* note 144, at 9.

¹⁶⁷ See *supra* notes 163–166 and accompanying text.

¹⁶⁸ VA. CODE ANN. § 19.2-264.3:1(A) (2013).

The expert, who is selected by the court, must be “(i) a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training as approved by the Commissioner of Behavioral Health and Developmental Services and (ii) qualified by specialized training and experience to perform forensic evaluations.”¹⁶⁹ As with mental retardation experts, the RCDs state that they regularly request the court to appoint mental health experts pursuant to this statute.¹⁷⁰ However, there is no provision for the appointment of experts on direct appeal.

State Habeas Proceedings

Since the Supreme Court of Virginia was granted exclusive jurisdiction over state habeas proceedings in death penalty cases in 1995, it has not authorized appointment of any mitigation specialist, investigator, or expert to assist in the case of a death row inmate petitioning for state habeas relief, including inmates with claims of mental retardation or mental illness.¹⁷¹ VCRRC must instead cover the costs associated with the hiring of mitigation specialists and investigators. State funds appropriated to the agency cannot be used for this purpose.¹⁷² As a result, the organization currently employs only one staff mitigation specialist who serves as the mitigation specialist and investigator for all its pending cases, which includes the vast majority of Virginia capital cases currently in state habeas, federal habeas, and clemency proceedings.¹⁷³ VCRRC does not have any other investigators or experts on staff.¹⁷⁴ When expert services are necessary, VCRRC often requests the expert, such as a mental health specialist, to perform his/her services pro bono.¹⁷⁵

Conclusion

Many Virginia capital defense attorneys receive training relevant to recognizing and assessing mental retardation. However, this training is not required, and it appears that at least some attorneys have not received training in this area. Moreover, while trial-level defense counsel have access to investigators, mitigation specialists, and experts qualified to assess mental retardation, such assistance is not provided by the Commonwealth in state habeas proceedings. Thus, Virginia is in partial compliance with Protocols #5 and #6.

Recommendation

Given the likelihood of waiver in defendants with mental illness and mental retardation, as well as the prevalence of such waivers in Virginia capital cases, it is especially important for counsel to be fully trained to recognize and litigate competency issues. Thus, to ensure that mental retardation and mental illness are recognized and effectively litigated at all stages of a capital

¹⁶⁹ *Id.*

¹⁷⁰ RCD West Survey Response, *supra* note 142, at 9; RCD Central Survey Response, *supra* note 145, at 11; RCD Southeast Survey Response, *supra* note 143, at 12; RCD North Survey Response, *supra* note 144, at 9.

¹⁷¹ Interview with Robert E. Lee, *supra* note 146.

¹⁷² *Id.*

¹⁷³ *Id.*; VCRRC Survey Response, provided by Robert E. Lee to Paula Shapiro and Mark J. Pickett, 7 (Apr. 5, 2012) (on file with author); Email from Robert E. Lee to Sarah Turberville (Mar. 13, 2013) (on file with author).

¹⁷⁴ *Id.*

¹⁷⁵ *Id.*

case, the Assessment Team recommends that Virginia amend its capital defense counsel qualification standards, applicable to all counsel seeking appointment to a death penalty case, to guarantee at least one member of the defense team is trained to screen capital clients for mental retardation and mental illnesses. In particular, capital defense counsel should be trained to recognize and litigate specific incompetency claims, including competence to stand trial, represent oneself, waive mitigation, waive direct appeal, and waive state habeas proceedings.

In addition, Virginia should provide for the appointment of investigators, mitigation specialists, and mental health experts in state habeas proceedings.

E. Protocol #7

The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of mentally retarded persons are protected against “waivers” that are the product of their mental disability.

Protocol #8

The jurisdiction should have in place mechanisms to ensure that, during court proceedings, the rights of persons with mental disorders or disabilities are protected against “waivers” that are the product of a mental disorder or disability. In particular, the jurisdiction should allow a “next friend” acting on a death row inmate’s behalf to initiate or pursue available remedies to set aside the conviction or death sentence, where the inmate wishes to forego or terminate post-conviction proceedings but has a mental disorder or disability that significantly impairs his or her capacity to make a rational decision.

The U.S. Supreme Court has noted that capital defendants with mental retardation “face a special risk of wrongful execution” because they are less able “to make a persuasive showing of mitigation in the face of prosecutorial evidence” and “less able to give meaningful assistance to their counsel” at trial.¹⁷⁶ When a defendant with mental retardation waives his/her rights, such as the right to counsel or the right to present mitigating evidence, these risks are magnified, because his/her poor decision-making and communication skills are no longer buffered by the aid of attorneys. Accordingly, defendants with mental retardation should be protected against waivers that are the result of their disability.

Similarly, there is a risk that the mentally ill will waive their rights due to their mental illness.¹⁷⁷ A study conducted in 2005 found that, of the 106 death row inmates in the United States who had waived their appeals and volunteered for the death penalty, at least 77% suffered from a mental illness.¹⁷⁸ Thus, it is important for the mentally ill to be protected from waivers that are caused by their disability rather than by a rational choice.

¹⁷⁶ Atkins v. Virginia, 536 U.S. 304, 320–21 (2002).

¹⁷⁷ See *supra* note 176 and accompanying text.

¹⁷⁸ Blume, *supra* note 7, at 962.

Right to Counsel

In *Faretta v. California*, the U.S. Supreme Court held that a criminal defendant has the constitutional right to waive his/her right to counsel and proceed pro se, provided the defendant's waiver is "knowingly and intelligently" made.¹⁷⁹ The Court held in *Indiana v. Edwards*, however, that a trial court may deny a defendant's request for self-representation and insist upon appointment of counsel for defendants who "suffer from severe mental illness to the point where they are not competent to conduct trial proceedings by themselves."¹⁸⁰

The Supreme Court of Virginia has held that, for a defendant's waiver of his/her right to counsel to be valid, it must be "timely, clear, and unequivocal, and . . . must be voluntarily, knowingly, and intelligently made."¹⁸¹ The validity of the waiver must be demonstrated by "clear, precise and unequivocal evidence."¹⁸² Trial courts will typically conduct colloquies with defendants to determine whether they understand the nature and potential hazards of their decisions to represent themselves.¹⁸³ Virginia does not, however, require the trial court "to put the defendant through any particular ritual" to determine whether the waiver of counsel is valid.¹⁸⁴ For instance, in the previously discussed Robert Gleason case, the defendant was permitted to dismiss his attorneys and proceed pro se without the trial court conducting an evidentiary hearing.¹⁸⁵

For the waiver to be considered voluntary, knowing, and intelligent, the trial court must ensure that the defendant is aware "of the dangers and disadvantages of self-representation, so that the record will establish that he knows what he is doing."¹⁸⁶ The court also must consider "the particular circumstances of [the] case, including the defendant's background, experience, and conduct."¹⁸⁷ However, it is not clear the extent to which a Virginia court will consider a defendant's mental retardation or mental illness when determining whether the decision to waive counsel is voluntary, knowing, and intelligent.

Right to Trial

Virginia case law permits a defendant to waive his/her right to a trial and plead guilty if the trial court determines that the plea was "made freely and voluntarily following full consultation with counsel."¹⁸⁸ If a capital defendant pleads guilty and the prosecution intends to seek the death

¹⁷⁹ *Faretta v. California*, 422 U.S. 806, 835 (1975) (internal quotations omitted).

¹⁸⁰ *Indiana v. Edwards*, 554 U.S. 164, 178 (2008).

¹⁸¹ *Thomas v. Commonwealth*, 539 S.E.2d 79, 82 (Va. 2000) (citing *United States v. Frazier-El*, 204 F.3d 553, 558 (4th Cir. 2000)). A defendant's motion to represent him/herself is "timely" if it is made before "meaningful trial proceedings have commenced." *Id.*

¹⁸² *Church v. Commonwealth*, 335 S.E.2d 823, 827 (Va. 1985) (quoting *White v. Commonwealth*, 560, 203 S.E.2d 443, 444 (Va. 1974)).

¹⁸³ *See Thomas*, 539 S.E.2d at 83.

¹⁸⁴ *Church*, 335 S.E.2d at 828.

¹⁸⁵ *See supra* notes 150–156 and accompanying text.

¹⁸⁶ *Edwards v. Commonwealth*, 644 S.E.2d 396, 402 (Va. Ct. App. 2007) (quoting *Iowa v. Tovar*, 541 U.S. 77, 89 (2004)).

¹⁸⁷ *Church*, 335 S.E.2d at 828.

¹⁸⁸ *Royal v. Commonwealth*, 458 S.E.2d 575, 576 (Va. 1995). This standard was first adopted by the U.S. Supreme Court in *Boykin v. Alabama*, 395 U.S. 238 (1969).

penalty, the defendant “must [also] waive his right to have a jury determine his sentence.”¹⁸⁹ The trial court will instead conduct the sentencing hearing and determine whether to sentence the defendant to death or life in prison.¹⁹⁰

The trial court will typically conduct a plea colloquy with the defendant before making this determination, although it does not appear that Virginia law requires the court to follow any particular format.¹⁹¹ The Court of Appeals of Virginia has stated that it is “standard” for the trial court to ask the defendant whether s/he “understood the charges, entered the pleas voluntarily, . . . discussed [the plea] with his[her] lawyer . . . [and] comprehended the maximum sentences.”¹⁹² The Virginia Supreme Court Rules also provide a form with “suggested questions” for the trial court to ask the defendant.¹⁹³

The extent to which the trial court must consider evidence of mental retardation or mental illness in determining whether a guilty plea is freely and voluntarily made is unclear. In *Lewis v. Commonwealth*, a capital case, the trial court “considered a competency assessment” made by a psychiatrist before determining that the defendant, Teresa Lewis, was competent to plead guilty.¹⁹⁴ While Lewis’s IQ of seventy-two placed her in the “borderline range of mental retardation,” the psychiatrist “opined that [she] had the capacity to enter pleas of guilty to charges of capital murder and had the ability to understand and appreciate the possible penalties that might result from her pleas.”¹⁹⁵ However, a trial court is not required to order such an assessment before determining whether a defendant who may have mental retardation is competent to plead guilty.

Right to Direct Appeal

Virginia law permits a defendant to waive his/her right to direct appeal.¹⁹⁶ As with other waivers previously discussed, the trial court in which the defendant was convicted must determine whether the waiver was “knowingly, voluntarily, and intelligently” made.¹⁹⁷ In some cases in which the defendant was sentenced to death, the Supreme Court of Virginia has ordered the trial court to conduct an evidentiary hearing to determine if the defendant’s waiver is valid, although there is no rule or law requiring that such a hearing be held.¹⁹⁸

¹⁸⁹ Gray v. Warden, 707 S.E.2d 275, 284 (Va. 2011).

¹⁹⁰ See *id.*

¹⁹¹ See, e.g., Lewis v. Commonwealth, 593 S.E.2d 220, 221 (Va. 2004); Coleman v. Commonwealth, 657 S.E.2d 164, 166 (Va. Ct. App. 2008).

¹⁹² Hughes v. Commonwealth, No. 1003-07-1, 2008 WL 2019498, at *4 (Va. Ct. App. May 13, 2008).

¹⁹³ VA. SUP. CT. R. 3A, Form 6.

¹⁹⁴ Lewis, 593 S.E.2d at 221.

¹⁹⁵ *Id.*

¹⁹⁶ Hudson v. Commonwealth, 590 S.E.2d 362, 364 (Va. 2004).

¹⁹⁷ *Id.*

¹⁹⁸ E.g., Zirkle v. Commonwealth, 553 S.E.2d 520, 522 (Va. 2001); Akers v. Commonwealth, 535 S.E.2d 674, 677 (Va. 2000).

If the defendant is sentenced to death, however, the Supreme Court of Virginia is required by statute to conduct an automatic review of the death sentence—a right which cannot be waived by the defendant.¹⁹⁹

Right to State Habeas Proceedings and Next Friend Petitions

Virginia's state habeas procedure is structured in a manner that prevents any Virginia court from having the jurisdiction over a claim that a death row inmate is incompetent to waive the right to state habeas proceedings.²⁰⁰ While the Supreme Court of Virginia has exclusive jurisdiction over all capital habeas petitions,²⁰¹ this jurisdiction does not begin until after the inmate's substantive habeas petition is filed.²⁰² Until that filing is made, no court has jurisdiction over the case. Thus, there is no court available for an inmate's counsel to litigate a claim that the inmate is not competent to waive post-conviction proceedings.²⁰³

In other states and in federal court, "next friend" petitions provide a means to protect a mentally ill or disabled inmate from waiving his/her post-conviction rights. Under federal law, for instance, a third party may have standing as a next friend to file a post-conviction petition for federal habeas corpus relief if the purported next friend can demonstrate that (1) the inmate is incompetent and unable to make a rational decision as to whether to seek post-conviction relief; and (2) s/he is "truly dedicated to the best interests of the person on whose behalf [s/]he seeks to litigate."²⁰⁴ It is in the federal court's discretion as to whether a next friend may be appointed to pursue post-conviction relief on behalf of the incompetent death row inmate.²⁰⁵

Virginia, however, has no procedure by which a next friend can be permitted to pursue post-conviction remedies on a death row inmate's behalf if the inmate has a mental disorder or disability that impairs his/her capacity to make a rational decision.

Thomas Akers, for instance, was sentenced to death for a robbery and murder in 1999 after waiving several of his rights.²⁰⁶ Akers waived his right to trial, pleaded guilty, and instructed his attorneys not to present any evidence during his sentencing hearing.²⁰⁷ He also told the trial court that he had "no sympathy or remorse" for what he did, and that he wished to receive a death sentence.²⁰⁸ He later waived his right to direct appeal.²⁰⁹ When Akers attempted to waive

¹⁹⁹ VA. CODE ANN. § 17.1-313(A) (2013). For further discussion of Virginia's automatic review procedure, see Chapter Seven on the Direct Appeal and Proportionality Review.

²⁰⁰ For further discussion of state habeas in Virginia, See Chapter Eight on State Habeas Corpus Proceedings.

²⁰¹ VA. CODE § 8.01-654(C)(1) (2013).

²⁰² See Order Denying Motion for Pre-Petition Jurisdiction, *In re Gleason* (Va. Oct. 17, 2012) (on file with author).

²⁰³ For this reason, death row inmates are also unable to litigate other pre-petition claims, such as requests for discovery. See *id.*

²⁰⁴ See *Whitmore v. Arkansas*, 495 U.S. 149, 163–64 (1990); see also *Harper v. Parker*, 177 F.3d 567, 569 (6th Cir. 1999).

²⁰⁵ *Whitmore*, 495 U.S. at 166 ("We therefore hold that [a would-be next friend], having failed to establish that [an inmate] is unable to proceed on his own behalf, does not have standing to proceed as "next friend" of [the inmate]"); see also *Rees v. Peyton*, 384 U.S. 312, 314 (1966).

²⁰⁶ *Akers v. Commonwealth*, 535 S.E.2d 674, 675–76 (Va. 2000).

²⁰⁷ *Id.* at 676.

²⁰⁸ *Id.*

²⁰⁹ *Id.* at 677.

state habeas review, his court-appointed counsel filed a state habeas brief on his behalf, and “requested an evidentiary hearing to determine Akers’ competence to waive further litigation.”²¹⁰ The Supreme Court of Virginia, however, dismissed the petition without holding a hearing.²¹¹ Akers was executed in 2001.²¹²

It is not clear whether Akers should have been found incompetent to waive his right to habeas review. While he had previously been found competent to waive other rights following a psychiatric evaluation,²¹³ there was also significant evidence that he suffered from mental disorders and disabilities.²¹⁴ Furthermore, his IQ of fifty-nine was well-within the mentally retarded range.²¹⁵ While Akers refused to meet with mental health experts hired by the defense, their review of his medical records indicated that Akers may have been psychotic and that there was a “high probability [his] ability to make a rational choice [was] impaired.”²¹⁶ Given this evidence, Akers’ competence to waive state habeas proceedings would have been better assessed following an evidentiary hearing.

Conclusion

Virginia has instituted some measures to protect defendants with mental retardation or mental illness from waivers that are the product of their mental disability. Typically, the trial court must determine whether a waiver of the right to counsel or the right to trial was voluntarily, knowingly, and intelligently made, which will include consideration of the defendant’s intellectual deficiencies and mental condition. However, the court is not required to conduct an evidentiary hearing before making this determination.

With respect to a death row inmate who wishes to forego state habeas proceedings but has a mental disorder or disability that significantly impairs his/her capacity to make a rational decision, Virginia does not permit a next friend to act on a death row inmate’s behalf to initiate or pursue available remedies to set aside the conviction or death sentence. Nor has Virginia enacted any other procedures that would allow a death row inmate’s counsel to raise a claim that the inmate is incompetent to waive state habeas proceedings. Thus, the Commonwealth is in partial compliance with Protocols #7 and #8.

Recommendation

Because a capital defendant may be considered competent to waive his/her right to counsel or right to present evidence, it is possible that no evidence of the defendant’s mental retardation or

²¹⁰ Akers *ex rel.* Lee v. Angelone, 147 F. Supp. 2d 447, 448 (W.D. Va. 2001).

²¹¹ *Id.*

²¹² Kimberly O’Brien, *Killer’s Spiritual Adviser Would Give Counsel Again: ‘I Care For People. I Couldn’t Say No’*, ROANOKE TIMES (Va.), Mar. 3, 2001, at A1.

²¹³ Akers v. Commonwealth, 535 S.E.2d 674, 675–76 (Va. 2000).

²¹⁴ Matt Chittum, *Killer Fights for Chance to Die, Meanwhile, 2 Lawyers Fight Equally Hard to Stop His Execution*, ROANOKE TIMES (Va.), Feb. 26, 2001, at A1.

²¹⁵ *Id.*

²¹⁶ Frank Green, *Murderer Fights Push For Stay His Competence Is In Question, Attorneys Say*, RICHMOND TIMES-DISPATCH, Feb. 19, 2001, at B1.

mental illness, however abundant, would be presented to the trial court in the first instance or in subsequent state habeas proceedings.

Accordingly, there should be a greater opportunity to develop a factual record when a capital defendant or death row inmate attempts to waive his/her constitutional rights. The Virginia Assessment Team recommends that when a capital defendant or death row inmate attempts to waive any constitutional right—including the right to counsel, right to trial, right to present mitigating evidence, right to direct appeal, and right to habeas review—the court should hold an evidentiary hearing on the matter, provided there is plausible doubt of the defendant’s or inmate’s competence. With respect to state habeas proceedings, Virginia should grant trial courts original jurisdiction over capital habeas claims.²¹⁷ The trial court should have jurisdiction over the case *before* the petition is filed to ensure that there is a proper venue to consider a claim that the inmate is incompetent to waive state habeas proceedings.

In addition, Virginia should enact a procedure that allows a next friend to file a state habeas petition on behalf of a death row inmate who has waived the right to habeas proceedings. This procedure would ensure that there is a mechanism for a Virginia court to review potential errors in the case of a death row inmate who may have waived his/her rights due to a mental disorder.

The federal next friend system could serve as a model for this procedure. To prevent frivolous next friend petitions, an attorney would be required to demonstrate (1) that the inmate’s decision to forego habeas proceedings is the result of a mental disorder or disability that significantly impairs his/her capacity to make a rational decision; and (2) that s/he is truly dedicated to the inmate’s best interests. If the court makes these findings, the attorney would then be empowered to file a substantive habeas petition on the inmate’s behalf. VCRRC would be empowered to act as a next friend in these cases.

²¹⁷ This recommendation is discussed further under Chapter Eight on State Habeas Corpus Proceedings, Protocol #1.

III. ANALYSIS: MENTAL RETARDATION

A. Protocol #1

Jurisdictions should bar the execution of individuals who have mental retardation, as that term is defined by the American Association on Intellectual and Developmental Disabilities (AAIDD).²¹⁸ Whether the definition is satisfied in a particular case should be based upon a clinical judgment, not solely upon a legislatively prescribed IQ measure, and judges and counsel should be trained to apply the law fully and fairly. No IQ maximum lower than seventy-five should be imposed in this regard. Testing used in arriving at this judgment need not have been performed prior to the crime.

In 2002, the U.S. Supreme held in *Atkins v. Virginia* that the application of the death penalty to persons with mental retardation violates the Eighth Amendment's ban on cruel and unusual punishment, but left to the individual states the manner by which to determine if an individual is mentally retarded.²¹⁹ In response to the *Atkins* decision, the Virginia General Assembly enacted a statute prohibiting the death penalty for any defendant "determined to be mentally retarded" at trial.²²⁰ The General Assembly also banned the execution of death row inmates with mental retardation, but only under certain circumstances.²²¹

Definition of Mental Retardation

Both the American Association on Intellectual and Developmental Disabilities (AAIDD) and Virginia definitions of mental retardation are divided into three components: age of onset, intellectual functioning, and adaptive behavior. The AAIDD defines mental retardation, now referred to as "intellectual disability," as "a disability characterized by significant limitations both in intellectual functioning (reasoning, learning, problem solving) and in adaptive behavior, which covers a range of everyday social and practical skills[, and that] originates before the age of 18."²²²

For the purposes of determining eligibility for the death penalty, Virginia statutory law defines mental retardation as

a disability, originating before the age of 18 years, characterized concurrently by
(i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard

²¹⁸ The American Association on Mental Retardation (AAMR) changed its name to the American Association on Intellectual and Developmental Disabilities (AAIDD) in 2007. *About Us*, *supra* note 3. The AAIDD, which has a membership of over 5,000 people "in the United States and in 55 countries worldwide," is "the oldest and largest interdisciplinary organization of professionals and citizens concerned about intellectual and developmental disabilities." *Id.*

²¹⁹ See *Atkins v. Virginia*, 536 U.S. 304 (2002).

²²⁰ VA. CODE ANN. § 18.2-10(a) (2013).

²²¹ See VA. CODE ANN. § 8.01-654.2 (2013).

²²² *FAQ on Intellectual Disability*, *supra* note 1.

deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.²²³

Intellectual Functioning Component

The AAIDD definition of mental retardation does not require a particular intelligence quotient (IQ) test score to demonstrate a significant limitation in intellectual functioning. While the AAIDD notes that “limitations in intellectual functioning are generally thought to be present if an individual has an IQ test score of approximately 70 or below[,] IQ scores must always be considered in light of the standard error of measurement, appropriateness, and consistency with administration guidelines.”²²⁴ Specifically, “[s]ince the standard error of measurement for most IQ tests is approximately 5, the ceiling may go up to 75.”²²⁵ Moreover, evaluation of persons with mental retardation is too complex an issue to rely on a single IQ score.²²⁶

Other factors may also decrease the reliability of an individual IQ test score. The Flynn Effect is a phenomenon recognized by the AAIDD whereby average scores on an IQ test artificially increase over time.²²⁷ For example, while the average score on an IQ test known as the WAIS-III was 100 when the test was developed in 1995, the average score increased to 103 in 2005.²²⁸ Thus, a person who scored a seventy-three on this test in 2005 might have an actual IQ of seventy.²²⁹ According to the AAIDD, “best practices require recognition of a potential Flynn Effect when older editions of an intelligence test . . . are used in the assessment or interpretation of an IQ score.”²³⁰ Another phenomenon, the practice effect, causes an “artificial increase in IQ scores when the same [test] is re[-]administered within a short time interval.”²³¹ The AAIDD states that it is “established clinical practice” to “avoid administering the same intelligence test within the same year to the same individual because it will often lead to an overestimate of the

²²³ VA. CODE ANN. § 19.2-264.3:1.1(A) (2013).

²²⁴ *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, http://www.aaidd.org/content_185.cfm (last visited June 27, 2012).

²²⁵ *Id.*

²²⁶ See James W. Ellis, *Mental Retardation and the Death Penalty: A Guide to State Legislative Issues*, 27 MENTAL & PHYSICAL DISABILITY L. REP. 11, 20 n.22 (2003) (noting that “relevant professional organizations have long recognized the importance of clinical judgment in assessing general intellectual functioning, and the inappropriateness and imprecision of arbitrarily assigning a single IQ score as the boundary of mental retardation”); AM. ASS’N ON MENTAL RETARDATION, MENTAL RETARDATION: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 5 (9th ed. 1992) (“Mental retardation is characterized by significantly subaverage intellectual capabilities or ‘low intelligence.’ If the IQ score is valid, this will generally result in a score of approximately 70 to 75 or below. This upper boundary of IQs for use in classification of mental retardation is flexible to reflect the statistical variance inherent in all intelligence tests and the need for clinical judgment by a qualified psychological examiner.”); AM. ASS’N ON MENTAL DEFICIENCY, CLASSIFICATION IN MENTAL RETARDATION 11 (Herbert J. Grossman ed., 8th ed. 1983) (“This upper limit is intended as a guideline; it could be extended upward through IQ 75 or more, depending on the reliability of the intelligence test used. This particularly applies in schools and similar settings if behavior is impaired and clinically determined to be due to deficits in reasoning and judgment.”); DSM, *supra* note 3 (“[I]t is possible to diagnose Mental Retardation in individuals with IQs between 70 and 75 who exhibit significant deficits in adaptive behavior.”).

²²⁷ AM. ASS’N ON INTELLECTUAL & DEVELOPMENTAL DISABILITIES, INTELLECTUAL DISABILITY: DEFINITION, CLASSIFICATION, & SYSTEMS OF SUPPORTS 37 (11th ed. 2010) [hereinafter INTELLECTUAL DISABILITY].

²²⁸ *Id.*

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ *Id.* at 38.

examinee's true intelligence."²³² Finally, the AAIDD states that, for an IQ test to be considered a valid measure of intellectual functioning, it must be "an individually administered, standardized instrument," as opposed to "[s]hort forms of screening tests" or group-administered IQ exams.²³³

In contrast with the AAIDD definition, Virginia imposes a bright-line IQ score requirement of seventy or lower for a defendant to prove that s/he is mentally retarded. While the Virginia mental retardation statute does not expressly call for a particular IQ to prove significantly subaverage intellectual functioning, it does require a score "on a standardized measure of intellectual functioning" that is "at least two standard deviations below the mean."²³⁴ The Supreme Court of Virginia has interpreted this to mean that "the maximum score for a classification of mental retardation is an I.Q. score of 70."²³⁵ The Court has not permitted consideration of measurement errors, the Flynn Effect, or other phenomena that affect the reliability of an individual score.

In *Winston v. Warden*, for instance, death row inmate Leon Winston argued that his trial counsel was ineffective for "fail[ing] to present evidence of [his] mental retardation, including [his] school record diagnosing his mental defects and evidence of the 'Flynn Effect.'"²³⁶ As a child, Winston had scored a seventy-seven, seventy-six, and seventy-three "on three administrations of the Wechsler Intelligence Scale for Children-Revised," an IQ test.²³⁷ He had also been described as "'mildly mentally retarded' for the purposes of special education eligibility."²³⁸ Winston argued that his three IQ tests had overestimated his intelligence due to the Flynn Effect.²³⁹ The Supreme Court of Virginia, however, did not consider the Flynn Effect in its analysis, and held Winston could not have been prejudiced by his trial counsel's performance because he could not produce an IQ score of seventy or lower.²⁴⁰

²³² *Id.*

²³³ *Id.* at 41.

²³⁴ See VA. CODE ANN. § 19.2-264.3:1.1(A) (2013).

²³⁵ *Winston v. Warden*, No. 052501, 2007 WL 678266, at *15 (Va. Mar. 7, 2007) (citing *Johnson v. Commonwealth*, 591 S.E.2d 47, 59 (2004), *vacated on other grounds*, 544 U.S. 901 (2005)).

²³⁶ *Id.* While Winston's attorneys presented some evidence of his intellectual disability at trial, it appears that it was presented as mitigating evidence, and not as a claim that he had mental retardation and was thus ineligible for the death penalty. *Winston v. Kelly*, 624 F. Supp. 2d 478, 511-12 (W.D. Va. 2008) (noting that Winston did not "did not raise this [mental retardation] claim at trial or on appeal").

²³⁷ *Id.*

²³⁸ *Id.* at 513.

²³⁹ *Id.* at 514.

²⁴⁰ *Winston v. Warden*, No. 052501, 2007 WL 678266, at *15 (Va. Mar. 7, 2007). In subsequent federal habeas proceedings, defense counsel discovered that Winston had scored a 66 on a fourth childhood IQ test. *Winston v. Kelly*, 784 F. Supp. 2d 623, 625-26 (W.D. Va. 2011). Based on this new evidence, the U.S. District Court granted Winston a new hearing on the issue of mental retardation. *Id.* at 635. The U.S. Court of Appeals for the Fourth Circuit affirmed this decision in 2012. *Winston v. Pearson*, 683 F.3d 489, 507 (4th Cir. 2012). In 2013, the U.S. Supreme Court denied the Commonwealth's petition for a writ of certiorari, effectively affirming the Fourth Circuit's decision. *Pearson v. Winston*, No. 12-492, 2013 WL 656182, at *1 (U.S. Feb. 25, 2013). The Lynchburg Commonwealth's Attorney subsequently decided he would not seek the death penalty at the re-sentencing hearing. See Dave Thompson, *Prosecutors Won't Seek Resentencing in 2002 Lynchburg Homicides*, NEWS & ADVANCE (Mar. 1, 2013), available at http://www.newsadvance.com/news/local/article_02342df2-81c6-11e2-b2c3-001a4bcf6878.html.

The Virginia mental retardation statute also describes the manner by which the intellectual functioning testing must be conducted. It provides that “[a]ssessment of intellectual functioning shall include administration of at least one standardized measure generally accepted by the field of psychological testing and appropriate for administration to the particular defendant being assessed, taking into account cultural, linguistic, sensory, motor, behavioral and other individual factors.”²⁴¹ The testing must “be carried out in conformity with accepted professional practice, and whenever indicated, . . . include information from multiple sources.”²⁴² Finally, the statute directs the Commissioner of the Virginia Department of Behavioral Health and Developmental Services (DBHDS) to “maintain an exclusive list of standardized measures of intellectual functioning generally accepted by the field of psychological testing.”²⁴³

Commendably, this portion of the statute seeks to ensure that only scientifically valid IQ tests are admissible in determining whether a defendant is mentally retarded. The “exclusive list” of standardized IQ tests maintained by the DBHDS Commissioner was developed by a panel of mental health professionals, along with the participation of the Virginia Office of the Attorney General and capital defense counsel.²⁴⁴ Until 2007, the list included some of the less reliable short-form, group-administered IQ tests.²⁴⁵ However, the list has since been updated, and now only includes types of “individually administered comprehensive tests of intelligence” recommended by the AAIDD.²⁴⁶

Adaptive-Behavior Component

In addition to intellectual limitations, the AAIDD definition of mental retardation requires “significant limitations in . . . adaptive behavior, which covers a range of everyday social and practical skills.”²⁴⁷ Whereas the intellectual-functioning component of mental retardation relates to a person’s academic skills, the adaptive-behavior component reflects one’s capacity to perform everyday tasks and to conform to social norms.²⁴⁸ Because adaptive behavior is a separate component of mental retardation, a person with an IQ below seventy might not be considered mentally retarded if s/he does not also exhibit deficiencies in adaptive skills. The current AAIDD definition divides adaptive behavior skills into three categories:

²⁴¹ VA. CODE ANN. § 19.2-264.3:1.1(B)(1) (2013).

²⁴² *Id.*

²⁴³ *Id.*

²⁴⁴ *Minutes of Meeting: Commissioner’s Standardized Measures of Intellectual Functioning Review Panel*, VA. DEP’T OF BEHAVIORAL HEALTH & DEVELOPMENTAL SERVS. (Aug. 15, 2007), available at <http://www.dbhds.virginia.gov/documents/OLD/oyo-SMIFRP-20070822minutes.pdf>.

²⁴⁵ For instance, the Beta III is a group-administered IQ test, described by its publisher as useful for “[o]btain[ing] a quick assessment of adults’ nonverbal intellectual abilities” and “for screening large numbers of people for whom administering comprehensive test batteries would be time-consuming and costly.” *Beta III*, PEARSON ASSESSMENTS, <http://www.pearsonassessments.com/HAIWEB/Cultures/en-us/Productdetail.htm?Pid=015-8685-202&Mode=summary> (last visited May 16, 2012). The AAIDD states that screening tests such as this are “not recommended” for assessing mental retardation. INTELLECTUAL DISABILITY, *supra* note 227, at 41.

²⁴⁶ See *Minutes of Meeting: Commissioner’s Standardized Measures of Intellectual Functioning Review Panel*, *supra* note 244.

²⁴⁷ *FAQ on Intellectual Disability*, *supra* note 1.

²⁴⁸ INTELLECTUAL DISABILITY, *supra* note 227, at 43–44. For a more detailed explanation of adaptive functioning, see *id.* at 43–55.

Conceptual skills—language and literacy; money, time, and number concepts; and self-direction

Social skills—interpersonal skills, social responsibility, self-esteem, gullibility, naïveté (i.e., wariness), social problem solving, and the ability to follow rules, obey laws, and avoid being victimized

Practical skills—activities of daily living (personal care), occupational skills, healthcare, travel/transportation, schedules/routines, safety, use of money, use of the telephone²⁴⁹

Under AAIDD standards, a person suffers from significant limitations in adaptive behavior if s/he performs “at least 2 standard deviations below the mean of either (a) one of the [aforementioned] three types of adaptive behavior . . . , or (b) an overall score on a standardized measure of conceptual, social, and practical skills.”²⁵⁰

The Virginia statute conforms to the AAIDD definition of mental retardation with respect to this component of the disability, as it requires the defendant to demonstrate “significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.”²⁵¹ The statute further provides that “[a]ssessment of adaptive behavior shall be based on multiple sources of information, including clinical interview, psychological testing and educational, correctional and vocational records.”²⁵² The adaptive-behavior assessment must include “at least one standardized measure generally accepted by the field of psychological testing for assessing adaptive behavior and appropriate for administration to the particular defendant being assessed, unless not feasible.”²⁵³

Age of Onset Component

The AAIDD definition of mental retardation states that the disability must “originate[] before the age of 18.”²⁵⁴ According to the AAIDD, “[t]he purpose of the age of onset criterion is to distinguish [mental retardation] from other forms of disability that may occur later in life,” such as brain damage due to malnutrition.²⁵⁵ The AAIDD, however, specifically warns that mental retardation “does not necessarily have to have been formally identified” before age eighteen for a diagnosis to be valid.²⁵⁶ Mental retardation might go unnoticed in childhood for a variety of reasons. For instance, a person with mental retardation from an underprivileged background or

²⁴⁹ *FAQ on Intellectual Disability*, *supra* note 1.

²⁵⁰ *Frequently Asked Questions on Intellectual Disability and the AAIDD Definition*, *supra* note 224.

²⁵¹ VA. CODE ANN. § 19.2-264.3:1.1(A) (2013).

²⁵² VA. CODE ANN. § 19.2-264.3:1.1(B)(2) (2013).

²⁵³ *Id.* The statute further states that “[i]n reaching a clinical judgment regarding whether the defendant exhibits significant limitations in adaptive behavior, the examiner shall give performance on standardized measures whatever weight is clinically appropriate in light of the defendant’s history and characteristics and the context of the assessment.” *Id.*

²⁵⁴ *FAQ on Intellectual Disability*, *supra* note 1.

²⁵⁵ INTELLECTUAL DISABILITY, *supra* note 227, at 27.

²⁵⁶ *Id.*

from a foreign country might not have access to the mental health screening or educational resources needed to document mental retardation at a young age.²⁵⁷

Virginia's mental retardation statute is identical to the AAIDD definition of mental retardation with respect to the age of onset component, requiring the defendant's mental retardation to have "originate[d] before the age of 18."²⁵⁸ The statute does not require evidence that the defendant's mental retardation was diagnosed in childhood. In fact, the statute states that "[a]ssessment of developmental origin shall be based on multiple sources of information generally accepted by the field of psychological testing . . . , recognizing that valid clinical assessment conducted during the defendant's childhood may not have conformed to current practice standards."²⁵⁹ This provision appears to recognize that a mentally retarded defendant may not have been properly diagnosed in childhood. In one death penalty case, however, the Supreme Court of Virginia stated that the "legal definition of mental retardation established by the legislature" requires the defendant to prove "that he was *diagnosed* as being mentally retarded before the age of 18."²⁶⁰ It is unclear whether Virginia courts have applied this diagnosis requirement in other cases.

Limitations on Post-conviction Determinations of Mental Retardation

Despite the U.S. Supreme Court's decision in *Atkins* that execution of the mentally retarded violates the Eighth Amendment's ban on cruel and unusual punishment, Virginia statutory law does not provide any means for a death row inmate to prove that s/he is mentally retarded if his/her state habeas petition was denied before April 29, 2003.²⁶¹ In the wake of *Atkins*, the Virginia General Assembly enacted a statute outlining the proper procedure for a death-sentenced inmate to present a claim of mental retardation.²⁶² Under the statute, if an inmate's direct appeal or state habeas petition was pending as of April 29, 2003, the inmate was permitted to "file an amended petition containing his claim of mental retardation."²⁶³ If the Supreme Court of Virginia found that the inmate's claim was "not frivolous," it was required to "remand the claim to the circuit court for a determination of mental retardation."²⁶⁴

The same statute, however, states that if an inmate alleging mental retardation "has completed both a direct appeal and a [state] habeas corpus proceeding . . . , he shall not be entitled to file any further habeas petitions in the Supreme Court and his sole remedy shall lie in federal court."²⁶⁵ Thus, in effect, Virginia law never banned the application of the death penalty to mentally retarded persons whose state habeas proceedings were completed before April 29, 2003. In *Walker v. True*, the U.S. Court of Appeals for the Fourth Circuit considered whether

²⁵⁷ John H. Blume et al., *Of Atkins and Men: Deviations from Clinical Definitions of Mental Retardation in Death Penalty Cases*, 18 CORNELL J. L. & PUB. POL'Y 689, 730 (2009) (noting that such "tests are not performed for charitable reasons, for instance where institutions do not want to stigmatize a child, or financial reasons, if institutions do not want to pay benefits or have responsibility").

²⁵⁸ VA. CODE ANN. § 19.2-264.3:1.1(A) (2013).

²⁵⁹ VA. CODE ANN. § 19.2-264.3:1.1(B)(3) (2013).

²⁶⁰ *Winston v. Warden*, No. 052501, 2007 WL 678266, at *15 (Va. Mar. 7, 2007) (emphasis added). Age of onset was not central to the mental retardation issue raised in this case. See *id.*

²⁶¹ VA. CODE ANN. § 8.01-654.2 (2013).

²⁶² *Id.*

²⁶³ *Id.*

²⁶⁴ *Id.*

²⁶⁵ *Id.*

death row inmate Darick Walker was entitled to a hearing on his claim of mental retardation in a Virginia state court.²⁶⁶ Walker, whose state habeas proceedings were completed before April 29, 2003, argued that the Virginia statute “violate[s] the Equal Protection clause of the Fourteenth Amendment because there is no rational basis for treating petitioners who have completed their state habeas proceedings differently than those who have not.”²⁶⁷ While the court held that the Virginia scheme was constitutional,²⁶⁸ one judge dissented, noting that the Virginia statute denies certain death row inmates the right to a jury trial on the issue of mental retardation, “despite being identically situated” to other death row inmates.²⁶⁹

Conclusion

While Virginia law requires appropriate clinical testing to be used in determining whether a capital defendant has mental retardation, Virginia’s definition of mental retardation is inconsistent with the AAIDD. The Supreme Court of Virginia has held that a defendant must present an IQ score of seventy or below to prove that s/he has mental retardation, a requirement that the AAIDD has expressly rejected and is contrary to the modern, scientific understanding of mental retardation. Virginia courts also will not consider phenomena that can influence or artificially inflate a person’s IQ score, such as the Flynn Effect. Finally, the Court indicated in one case that a defendant alleging mental retardation must provide documentation that the disability was *diagnosed* before age eighteen. This is not only inconsistent with the AAIDD definition, but can also lead to the sentencing to death of persons with mental retardation simply because they were not properly tested as a youth or because records of such testing were not maintained or could not be found. Thus, Virginia is in partial compliance with Protocol #1.

Recommendation

The Assessment Team recommends that the Virginia General Assembly amend its mental retardation statute to fully conform to the AAIDD definition. The statute should not require a particular IQ score to prove mental retardation and should allow courts to take into account errors of measurement like the Flynn Effect and practice effect. In addition, the statute should clearly provide that formal mental retardation testing administered before the age of eighteen is not required to prove mental retardation.

²⁶⁶ Walker v. True, 399 F.3d 315, 324–25 (4th Cir. 2005).

²⁶⁷ *Id.* at 325.

²⁶⁸ *Id.* The court held that “Virginia’s differentiation is reasonably related to the state’s interest of efficient utilization of its judicial resources.” *Id.* The court did, however, grant Walker an evidentiary hearing on the issue of mental retardation in federal district court. *Id.* at 327.

²⁶⁹ *Id.* at 328 (Gregory, J., dissenting).

B. Protocol #2

For cases commencing after the United States Supreme Court’s decision in *Atkins v. Virginia*²⁷⁰ or the State’s ban on the execution of the mentally retarded (the earlier of the two), the determination of whether a defendant has mental retardation should occur as early as possible in criminal proceedings, preferably prior to the guilt/innocence phase of a trial and certainly before the penalty stage of a trial.

Virginia statutory law provides that, “[i]n any case in which the offense may be punishable by death and is tried before a jury, the issue of mental retardation . . . shall be determined by the jury as part of the sentencing proceeding.”²⁷¹ Similarly, if the defendant waives his/her right to a jury and the case is tried before a judge, “the issue of mental retardation . . . shall be determined by the judge as part of the sentencing proceeding.”²⁷² This is problematic because jurors hearing a mental retardation claim after the determination of guilt may be strongly influenced by evidence of future dangerousness or vileness.

In *Prieto v. Commonwealth*, the Supreme Court of Virginia affirmed that the issue of mental retardation must be decided at the penalty stage of the trial.²⁷³ In *Prieto*, the trial court “trifurcated the trial into three phases: guilt or innocence, mental retardation, and sentencing.”²⁷⁴ However, based on a finding of juror misconduct, the court declared a mistrial during mental retardation deliberations.²⁷⁵ In the retrial, the court declined to trifurcate the trial; instead “the issue of Prieto’s mental retardation was determined by the jury as part of the sentencing proceeding in his bifurcated trial.”²⁷⁶ On direct appeal, Prieto argued that “to assure that his mental retardation claims would be considered on the merits without the taint from evidence of future dangerousness, evidence of vileness, or victim impact evidence,” the retrial should have been trifurcated in the same manner as the first trial or the trial court should have made the mental retardation determination in a pretrial hearing.²⁷⁷ The Supreme Court of Virginia, however, held that “the issue of mental retardation is not to be separated from the issue of punishment, but is to be determined by the jury as part of the sentencing phase of the bifurcated trial.”²⁷⁸

Conclusion

Under Virginia law, trial courts must determine whether a capital defendant has mental retardation during the sentencing phase of the trial. Accordingly, Virginia is not in compliance with Protocol #2.

²⁷⁰ *Atkins v. Virginia*, 536 U.S. 304 (2002).

²⁷¹ VA. CODE ANN. § 19.2-264.3:1.1(C) (2013).

²⁷² *Id.*

²⁷³ *Prieto v. Commonwealth*, 682 S.E.2d 910 (Va. 2009).

²⁷⁴ *Id.* at 914.

²⁷⁵ *Id.*

²⁷⁶ *Id.* at 916.

²⁷⁷ *Id.* at 923.

²⁷⁸ *Id.*

Recommendation

The Assessment Team recommends that Virginia amend its statute to require a pretrial determination of whether a capital defendant has mental retardation, so long as the defendant can present some credible evidence that s/he is mentally retarded. This should not, however, preclude the defendant from presenting a mental retardation claim in the sentencing phase of the trial, in the event that a pretrial hearing is not granted or the defendant does not prevail in that hearing.²⁷⁹

The Assessment Team notes that there are distinct advantages to determining mental retardation in a pretrial hearing. If a defendant is determined to have mental retardation prior to commencement of trial, the Commonwealth is spared a long, expensive, and unnecessary capital proceeding. This frees the court, prosecution, and defense counsel to devote their limited resources to other matters.²⁸⁰ Several jurisdictions have already adopted these procedures.²⁸¹

C. Protocol #3

Where the defense has presented a substantial showing that the defendant may have mental retardation, the burden of disproving mental retardation should be placed on the prosecution. If, instead, the burden of proof is placed on the defense, its burden should be limited to proof by a preponderance of the evidence.

Virginia statutory law provides that, in a capital trial, “[t]he defendant shall bear the burden of proving that he is mentally retarded by a preponderance of the evidence” and thus ineligible for the death penalty.²⁸² Accordingly, Virginia is in compliance with Protocol #3.

²⁷⁹ A capital defendant may be constitutionally entitled to present his/her claim of mental retardation before a jury, irrespective of whether a pretrial hearing is permitted, as a result of the U.S. Supreme Court’s decision in *Ring v. Arizona*, which provides that a capital defendant is entitled to a jury determination of factors necessary to sentence a defendant to death. *Ring v. Arizona*, 536 U.S. 584, 609 (2002). This issue, however, has not yet been addressed by the U.S. Supreme Court.

²⁸⁰ Allowing pretrial determinations of mental retardation may also encourage parties to resolve cases through a plea agreement when there is compelling evidence of mental retardation.

²⁸¹ See, e.g., ARIZ. REV. STAT. § 13-753 (2011) (providing that Arizona capital defendants who score seventy-five or below on a pretrial IQ test are entitled to a pretrial hearing on mental retardation); KY. REV. STAT. ANN. § 532.135(1)–(2) (2011) (providing that when a Kentucky capital defendant raises the issue of mental retardation, the trial court “shall determine whether or not the defendant is a seriously mentally retarded defendant” at least ten days before the beginning of the trial); *State v. Lott*, 779 N.E.2d 1011, 1015 (Ohio 2002) (holding that the question of whether an Ohio capital defendant is mentally retarded should be decided by the trial court “in a manner comparable to a ruling on competency”); FLA. R. CRIM. P. 3.203 (stating that a Florida capital defendant is entitled to a pretrial determination of mental retardation following the proper defense motion and an examination by at least one qualified expert).

²⁸² VA. CODE ANN. § 19.2-264.3:1.1(C) (2012).

IV. ANALYSIS: MENTAL ILLNESS

A. Protocol #1

Prosecutors should employ, and trial judges should appoint, mental health experts on the basis of their qualifications and relevant professional experience, not on the basis of the expert's prior status as a witness for the State. Similarly, trial judges should appoint qualified mental health experts to assist the defense confidentially according to the needs of the defense, not on the basis of the expert's current or past status with the State.

Defense Experts

Virginia statutory law provides for the appointment of mental retardation and mental illness experts by the trial court in capital cases.²⁸³ While the expert is selected by the trial court, the appointment statute includes qualifications standards.²⁸⁴ The Assessment Team is not aware of any recent cases in which the trial court appointed a defense expert who was not qualified in a capital case. Although some of the Regional Capital Defender Offices reported that trial courts did not always appoint the expert of their choice, none indicated that unqualified experts had been appointed.²⁸⁵

Prosecution Experts

The prosecution is entitled to the appointment of its own mental health expert if the capital defendant provides notice of its intent to present expert testimony “to support a claim in mitigation relating to the defendant’s history, character or mental condition.”²⁸⁶ If the defendant does not cooperate with this appointed expert, “the court may admit evidence of such refusal or, in the discretion of the court, bar the defendant from presenting his expert evidence.”²⁸⁷ The qualification standards for this expert are identical to the standards for the expert appointed to the defense.²⁸⁸

The Assessment Team could not determine what factors Virginia prosecutors consider when requesting the appointment of mental health experts in capital cases.²⁸⁹ However, in the

²⁸³ See *supra* notes 163–170 and accompanying text.

²⁸⁴ See *id.*

²⁸⁵ RCD Central Survey Response, *supra* note 145, at 12 (stating that defense counsel are typically able to select the expert of their choice); RCD Southeast Survey Response, *supra* note 143, at 12–13 (stating that defense counsel’s ability to select their own expert “varies” based on the judge, but not reporting any problems with unqualified experts); RCD North Survey Response, *supra* note 144 (not reporting any problems with unqualified experts); RCD West Survey Response, *supra* note 142, at 10 (stating that defense counsel are “usually” able to select their own experts).

²⁸⁶ VA. CODE ANN. § 19.2-264.3:1(E)–(F) (2013).

²⁸⁷ VA. CODE ANN. § 19.2-264.3:1(F)(2) (2013).

²⁸⁸ VA. CODE ANN. § 19.2-264.3:1(F)(1) (2013); see *supra* notes 167–170 and accompanying text. Similar provisions provide for the appointment of a prosecution expert on the issue of mental retardation. See VA. CODE ANN. § 19.2-264.3:1.2(E)–(F) (2013).

²⁸⁹ The Assessment Team attempted to survey several of Virginia’s Commonwealth’s Attorneys to determine, among other things, the manner by which prosecution experts are requested and appointed, but the prosecutors

overwhelming majority of capital cases reviewed by the Assessment Team, it appears that prosecution experts have been selected based on their qualifications, and not based on the expert's current or past status with the Commonwealth.

Conclusion

Virginia has enacted statutory qualification standards for mental health experts in capital cases. Moreover, Virginia courts appear to have appointed qualified mental health experts to assist defense counsel and prosecutors in these cases. Accordingly, Virginia is in compliance with Protocol #1.

B. Protocol #2

Jurisdictions should provide adequate funding to permit the employment of qualified mental health experts in capital cases. Experts should be paid in an amount sufficient to attract the services of those who are well trained and who remain current in their fields. Compensation should not place a premium on quick and inexpensive evaluations, but rather should be sufficient to ensure a thorough evaluation that will uncover pathology that a superficial or cost-saving evaluation might miss.

A Virginia capital defendant at the trial-level is entitled to the appointment of mental health experts upon a finding that s/he is unable to afford expert assistance.²⁹⁰ These experts are selected by the trial court.²⁹¹ Virginia does not place any caps on fees or hourly rates paid to these experts.²⁹² The amount paid and any limitations on hours are left to the discretion of the trial judge.²⁹³ One of the Regional Capital Defender Offices surveyed by the Assessment Team reported that compensation for experts is typically “fair.”²⁹⁴ Virginia also allows experts to be reimbursed for “reasonable” travel expenses.²⁹⁵ Periodic billing and payment is available for court-appointed investigators, mitigation specialists, and other experts.²⁹⁶

Virginia does not, however, allow for the appointment of any experts during state habeas proceedings.²⁹⁷ Experts are especially important during state habeas proceedings, as this is the only opportunity for a Virginia inmate to present claims of ineffective assistance of counsel in

declined to complete the survey. See Letter from David N. Grimes, President, Va. Ass’n of Commonwealth’s Att’ys, to John Douglass, Chair, Va. Assessment Team on the Death Penalty (Apr. 23, 2012), *infra* Appendix.

²⁹⁰ See *supra* notes 163–170 and accompanying text. For further discussion on the appointment and compensation of experts, see Chapter Six on Defense Services.

²⁹¹ See *id.*

²⁹² Interview by Paula Shapiro with John Rickman, Director of Fiscal Services, and Mary Gilbert, Executive Sec’y Office, Sup. Ct. of Va. (Apr. 20, 2012) (on file with author).

²⁹³ *Id.*

²⁹⁴ RCD Central Survey Response, *supra* note 145, at 10.

²⁹⁵ Interview with John Rickman and Mary Gilbert, *supra* note 292.

²⁹⁶ RCD Southeast Survey Response, *supra* note 143, at 11; RCD Central Survey Response, *supra* note 145, at 10 (“All of our expert appointment order permit periodic billing and payment.”); Interview with John Rickman and Mary Gilbert, *supra* note 292.

²⁹⁷ See *supra* notes 171–175 and accompanying text.

state court.²⁹⁸ A claim that trial counsel was ineffective for failing to present evidence of mental retardation or mental illness will require the opinion of an expert to prove that the inmate is, in fact, mentally retarded or mentally ill. Without experts to assist the defense claims related to the defendant's mental retardation, mental illness, or incompetency to be executed may go unlitigated or unnoticed.

Conclusion

Virginia has established a structure for the appointment and reasonable compensation of mental health experts at the trial stage. However, there is no allowance of the appointment or compensation of any experts on direct appeal or during state habeas proceedings. Thus, Virginia is in partial compliance with Protocol #2.

Recommendation

The Assessment Team reiterates the need for Virginia to establish a procedure for the appointment and compensation of experts during state habeas proceedings in capital cases. The current system by which mental health experts are appointed in capital cases at the trial level could serve as a model in this regard.

C. Protocol #3

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had significant limitations in both intellectual functioning and adaptive behavior as expressed in conceptual, social, and practical adaptive skills, resulting from mental retardation, dementia, or a traumatic brain injury.

While Virginia has enacted legislation prohibiting the application of the death penalty to persons with mental retardation,²⁹⁹ the Commonwealth does not prohibit the application of the death penalty for persons whose intellectual disabilities are very similar to mental retardation but which manifest after age eighteen, including those caused by dementia and traumatic brain injury.³⁰⁰ Thus, a Virginia defendant who suffered brain damage after the age of eighteen would still be eligible for the death penalty, even if s/he suffered from intellectual and adaptive behavior limitations that would otherwise qualify as mental retardation.³⁰¹

Conclusion

Virginia does not prohibit the application of the death penalty to persons who suffer from significant limitations in both intellectual functioning and adaptive behavior which onset after the age of eighteen. Accordingly, Virginia is in partial compliance with Protocol #3.

²⁹⁸ *Lenz v. Commonwealth*, 544 S.E.2d 299, 304 (Va. 2001) (“Claims raising ineffective assistance of counsel must be asserted in a habeas corpus proceeding and are not cognizable on direct appeal.”)

²⁹⁹ See *supra* notes 220–269 and accompanying text.

³⁰⁰ ABA, *supra* note 3. See also INTELLECTUAL DISABILITY, *supra* note 227, at 27.

³⁰¹ VA. CODE ANN. § 19.2-264.3:1.1(A) (2013).

Recommendation

The diminished culpability of defendants with mental retardation arises from their intellectual and adaptive limitations, not the cause of these limitations.³⁰² Accordingly, persons who suffer from these limitations should be afforded the same protection under the law, irrespective of the cause of the disability.

The Assessment Team, therefore, recommends that Virginia adopt a law prohibiting the application of the death penalty to anyone who, at the time of the offense, suffered from significant limitations in both their general intellectual functioning and adaptive behavior, whether resulting from mental retardation, dementia, traumatic brain injury, or other disease or disability. The defendant would have to prove that s/he suffers from the same intellectual functioning and adaptive behavior limitations as a person with mental retardation.

D. Protocol #4

The jurisdiction should forbid death sentences and executions with regard to everyone who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. A disorder manifested primarily by repeated criminal conduct or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of this recommendation.

Following the U.S. Supreme Court's decision in *Atkins v. Virginia* banning the application of the death penalty to persons with mental retardation,³⁰³ the ABA adopted a policy calling for the prohibition of the execution of persons who suffer from severe mental disorders.³⁰⁴ Much as the ban on executing persons with mental retardation was supported by the American Association on Intellectual and Developmental Disabilities, this proposal is supported by three leading mental health groups: the American Psychiatric Association,³⁰⁵ the American Psychological Association,³⁰⁶ and the National Institute on Mental Illness.³⁰⁷

This Protocol, based on ABA policy, is carefully drawn to ensure that the exemption would apply only to a narrow class of the severely mentally ill. The mental disorder must be "severe,"

³⁰² See *Atkins v. Virginia*, 536 U.S. 304, 318 (2002) (holding that mentally retarded defendants' "deficiencies . . . diminish their personal culpability").

³⁰³ *Id.*

³⁰⁴ ABA, *supra* note 3.

³⁰⁵ *Position Statement on Diminished Responsibility in Capital Sentencing*, AM. PSYCHIATRIC ASS'N, http://www.psychiatry.org/File%20Library/Advocacy%20and%20Newsroom/Position%20Statements/ps2005_DiminishedResponsibility.pdf (last visited Dec. 18, 2012).

³⁰⁶ ABA, *supra* note 3, at 3 (citing Am. Psychological Ass'n, Excerpt from the Council of Representatives 2005 Meeting Minutes (Feb. 18–20, 2005); Excerpt from the Council of Representatives 2006 Meeting Minutes (Feb. 17–19, 2006)).

³⁰⁷ *Criminal Justice and Forensic Issues*, NAT'L ALLIANCE ON MENTAL ILLNESS, http://www.nami.org/Template.cfm?Section=NAMI_Policy_Platform&Template=/ContentManagement/ContentDisplay.cfm&ContentID=41302 (last visited Dec. 18, 2012).

meaning a serious psychotic disorder such as schizophrenia, mania, major depressive disorder, or a dissociative disorder that causes “delusions (fixed, clearly false beliefs), hallucinations (clearly erroneous perceptions of reality), extremely disorganized thinking, or very significant disruption of consciousness, memory and perception of the environment.”³⁰⁸ The disorder must “significantly impair cognitive or volitional functioning at the time of the offense” and therefore “only applies to offenders less culpable and less deterrable than the average murderer.”³⁰⁹ Moreover, the exemption would not apply to persons with disorders, such as antisocial personality disorder and other Axis II personality disorders, which manifest primarily by repeated criminal conduct or are attributable solely to the acute effects of voluntary use of alcohol or other substances.

This position extends the logic of the U.S. Supreme Court’s decisions in *Atkins*—prohibiting the execution of those with mental retardation—and *Roper v. Simmons*—prohibiting the execution of juvenile offenders—to those with severe mental illnesses because the application of the death penalty in those cases is “inconsistent with both the retributive and deterrent functions of the death penalty.”³¹⁰ Like persons with mental retardation, persons suffering from these severe mental illnesses or disorders possess “diminished capacities to understand and process information, to communicate, to abstract from mistakes and learn from experience, to engage in logical reasoning, to control impulses, and to understand the reactions of others.”³¹¹ For these reasons, the execution of those with a severe mental illness similarly does not serve the death penalty’s deterrent and retributive purposes.³¹²

Virginia Law on the Application of the Death Penalty to Persons with Severe Mental Disorders

Virginia law does not prohibit the application of the death penalty to persons who suffer from severe mental disorders or mental disabilities other than mental retardation.³¹³

Virginia does permit a criminal defendant to prove that s/he is not guilty by reason of insanity.³¹⁴ Criminal insanity can be demonstrated in one of two ways: (1) by proving that, at the time of the offense, the defendant “was labouring under such a defect of reason, from disease of the mind, as not to know the nature and quality of the act he was doing; or, if he did know it, that he did not know he was doing what was wrong”; or (2) by proving that his/her “mind has become so impaired by disease that [s/]he is totally deprived of the mental power to control or restrain his[/her] act.”³¹⁵ Virginia’s two insanity tests differ significantly from the severe mental illness standard articulated in this Protocol.

³⁰⁸ ABA, *supra* note 3, at 6.

³⁰⁹ *Id.* at 6–7.

³¹⁰ *Id.* at 5. See also *Roper v. Simmons*, 543 U.S. 551, 578 (2005); *Atkins v. Virginia*, 536 U.S. 304, 320–321 (2003).

³¹¹ *Atkins*, 536 U.S. at 318. See also *Roper*, 543 U.S. at 551 (“Retribution is not proportional if the law’s most severe penalty is imposed on one whose culpability or blameworthiness is diminished, to a substantial degree, by reason of youth and immaturity.”).

³¹² ABA, *supra* note 3, at 6.

³¹³ See *Juniper v. Warden*, 707 S.E.2d 290, 310–11 (Va. 2011) (noting that there was no “controlling authority” to support the argument that executing the seriously mentally ill is unconstitutional).

³¹⁴ *Morgan v. Commonwealth*, 646 S.E.2d 899, 902 (Va. Ct. App. 2007).

³¹⁵ *Id.* (internal quotation marks omitted). These standards are known as the M’Naghten Rule and the irresistible impulse test, respectively. *Id.*

Conclusion

Virginia law does not forbid the execution of persons who were severely mentally impaired as described in this Protocol. Thus, Virginia is not in compliance with Protocol #4.

Recommendation

The Assessment Team recommends that Virginia enact a law forbidding death sentences for and executions of persons who, at the time of the offense, had a severe mental disorder or disability that significantly impaired the capacity (a) to appreciate the nature, consequences or wrongfulness of one's conduct, (b) to exercise rational judgment in relation to conduct, or (c) to conform one's conduct to the requirements of the law. The law should make explicit that a disorder manifested primarily by repeated criminal conduct, such as antisocial personality disorder, or attributable solely to the acute effects of voluntary use of alcohol or other drugs does not, standing alone, constitute a mental disorder or disability for purposes of exclusion from capital punishment.

This procedure only would affect a defendant's eligibility for the death penalty. Those defendants qualifying as having a severe mental disorder under this standard would still be eligible to stand trial. If found guilty of capital murder, the defendant would be sentenced to life in prison without parole in accordance with Virginia law.

E. Protocol #5

To the extent that a mental disorder or disability does not preclude imposition of a death sentence pursuant to a particular provision of law (see Protocols #3–4 as to when it should do so), jury instructions should communicate clearly that a mental disorder or disability is a mitigating factor, not an aggravating factor, in a capital case; that jurors should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a future danger to society; and that jurors should distinguish between the defense of insanity and the defendant's subsequent reliance on mental disorder or disability as a mitigating factor.

As the U.S. Supreme Court has noted, capital defendants suffering from disabilities such as mental retardation face a special risk of wrongful execution because the disability “can be a two-edged sword that may enhance the likelihood that the aggravating factor of future dangerousness will be found by the jury.”³¹⁶ Moreover, empirical studies have found that jurors are more likely to impose a death sentence when a defendant is mentally ill or emotionally disturbed, irrespective of whether the evidence of mental illness is offered as a mitigating factor.³¹⁷

³¹⁶ *Atkins*, 536 U.S. at 321.

³¹⁷ See, e.g., David Baldus et al., *Racial Discrimination and the Death Penalty in the Post-Furman Era: An Empirical and Legal Overview, with Recent Findings from Philadelphia*, 83 CORNELL L. REV. 1638, 1688–89 (1998) (noting, in Table 6, that submission of a defendant's “extreme emotional disturbance” as a mitigating circumstance increased the likelihood of a death sentence in capital cases in Philadelphia between 1983 and 1993). See also Phoebe C. Ellsworth et al., *The Death-Qualified Jury and the Defense of Insanity*, 8 LAW & HUM. BEHAV. 81 (1984).

Accordingly, it is important for jurors to be fully and adequately instructed on the manner by which a defendant's mental disorders and disabilities must be considered.

Virginia has not adopted mandatory capital jury instructions.³¹⁸ Thus, apart from instructions mandated by the U.S. Supreme Court or the Supreme Court of Virginia in individual decisions, instructions are left to the discretion of the trial court.³¹⁹ The trial court is not required to instruct the jury that a mental disorder is a mitigating, not aggravating, factor. Nor must the court inform jurors that they should not rely upon the factor of a mental disorder or disability to conclude that the defendant represents a continuing serious threat to society.

In addition, Virginia does not require jurors to be instructed in the penalty phase that they should distinguish between the affirmative defense of insanity—raised by the defendant during the guilt phase—and the defendant's subsequent reliance on a mental disorder or disability as a mitigating factor. The insanity defense is a complete defense to a crime that, if successful, results in a not guilty verdict.³²⁰ By contrast, evidence of mental disability or disorder presented in the penalty phase of a capital trial serves as evidence that defendant should be sentenced to life in prison rather than death.³²¹ Jurors who were presented with, but rejected, evidence of insanity in the guilt phase may not understand that similar evidence presented in the punishment phase should be evaluated under a different standard.

Finally, while Virginia's death penalty statute includes three statutory mitigating factors that relate to the defendant's mental state,³²² the trial court is not required to instruct the jurors on these individual factors.³²³ Furthermore, the trial court is not required to instruct the jurors on individual, non-statutory mitigating factors that are supported by evidence.³²⁴ In *Buchanan v. Angelone*, for example, the defendant presented evidence at trial that he was "under the influence of extreme mental or emotional disturbance" at the time of the offense, which was a statutory mitigating factor at the time.³²⁵ The trial court, however, rejected the defendant's request that the jury be instructed on any individual mitigating factor.³²⁶ Instead, the court instructed the jury that "[i]f you believe from all the evidence that the death penalty is not justified, then you shall

³¹⁸ See VA. CODE ANN. § 19.2-264.4 (2013) (requiring only that the jury be instructed that "for all Class 1 felony offenses committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life").

³¹⁹ See *Justus v. Commonwealth*, 266 S.E.2d 87, 92 (Va. 1980) (noting that the trial court properly rejected instructions offered by the defendant).

³²⁰ *Morgan v. Commonwealth*, 646 S.E.2d 899, 902 (Va. Ct. App. 2007).

³²¹ See VA. CODE ANN. § 19.2-264.4 (2013).

³²² The three relevant mitigating factors are (1) "the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance"; (2) "at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired"; and (3) "even if [Virginia's definition of mental retardation] is inapplicable as a bar to the death penalty, the subaverage intellectual functioning of the defendant." VA. CODE ANN. § 19.2-264.4(B) (2013).

³²³ *Buchanan v. Angelone*, 103 F.3d 344, 347–48 (4th Cir. 1996).

³²⁴ *Id.*

³²⁵ *Id.*; VA. CODE ANN. § 19.2-264.3(b) (1977).

³²⁶ *Buchanan*, 103 F.3d at 347.

fix the punishment of the defendant at life imprisonment.”³²⁷ The U.S. Court of Appeals for the Fourth Circuit later held that this instruction was permissible.³²⁸

Conclusion

Because Virginia law does not require capital juries to be instructed on any of the factors described in Protocol #5, Virginia is not in compliance with this Protocol.

Recommendation

The Assessment Team recommends that Virginia trial courts instruct capital juries that a mental disorder or disability is a mitigating factor, not an aggravating factor; that jurors should not rely upon the factor of a mental disorder or disability as a basis for recommending a death sentence; and that jurors should distinguish between the defense of insanity and the defendant’s subsequent reliance on a mental disorder or disability as a mitigating factor.

In addition, trial courts should be empowered to instruct jurors on individual mitigating factors, both statutory and non-statutory, that are supported by the evidence and offered by the defendant. These measures will help to ensure that jurors understand complex capital sentencing procedures and give full consideration to each mitigating factor when deciding whether to sentence the defendant to death or life in prison.

F. Protocol #6

Jury instructions should adequately communicate to jurors, where applicable, that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant’s perceived demeanor, and that this should not be considered in aggravation.

The U.S. Supreme Court has observed that the courtroom demeanor of capital defendants who have a mental disability such as mental retardation “may create an unwarranted impression of lack of remorse for their crimes,” thereby increasing the chance that they will receive the death penalty.³²⁹ Likewise, a mentally ill defendant’s demeanor may be affected if s/he is taking prescription medication that has mood-altering side effects. Lithium, for instance, which is used

³²⁷ *Id.*

³²⁸ *Id.* at 348.

³²⁹ *Atkins v. Virginia*, 536 U.S. 304, 321 (2002). Some jurisdictions allow the trial court to instruct the jury that, because of the defendant’s mental condition, s/he is being administered a prescription medication that may affect his/her courtroom demeanor. *See, e.g.*, FLA. BAR, FLA. STANDARD JURY INSTRUCTIONS IN CRIMINAL CASES § 3.6(c) (7th ed. 2010) (allowing Florida trial courts to instruct that “(Defendant) currently is being administered psychotropic medication under medical supervision for a mental or emotional condition. Psychotropic medication is any drug or compound affecting the mind or behavior, intellectual functions, perception, moods, or emotion and includes anti-psychotic, anti-depressant, anti-manic, and anti-anxiety drugs.”); *State v. Hayes*, 389 A.2d 1379, 1382 (N.H. 1978) (requiring New Hampshire trial courts to instruct jurors “about the facts relating to the defendant’s use of medication” when a criminal defendant is forcibly medicated before trial).

to treat bipolar disorder, may cause “[c]onfusion, poor memory, or lack of awareness” in some patients.³³⁰

Virginia law, however, does not require capital jurors to be instructed that, if the defendant is receiving medication for a mental disorder or disability, this affects the defendant’s perceived demeanor, and therefore the defendant’s demeanor should not be considered in aggravation.

Conclusion

For the reasons stated above, Virginia is not in compliance with Protocol #6.

Recommendation

The Assessment Team recommends that, when supported by the facts in a particular case, Virginia trial courts should instruct jurors that the defendant is receiving medication for a mental disorder or disability, that this affects the defendant’s perceived demeanor, and that this should not be considered in aggravation of punishment.

G. Protocol #7

The jurisdiction should stay post-conviction proceedings where a prisoner under sentence of death has a mental disorder or disability that significantly impairs his or her capacity to understand or communicate pertinent information, or otherwise to assist counsel, in connection with such proceedings and the prisoner’s participation is necessary for a fair resolution of specific claims bearing on the validity of the conviction or death sentence. The jurisdiction should require that the prisoner’s sentence be reduced to the sentence imposed in capital cases when execution is not an option if there is no significant likelihood of restoring the prisoner’s capacity to participate in post-conviction proceedings in the foreseeable future.

Virginia law does not permit state habeas proceedings to be stayed in capital cases for any reason. After an inmate’s death sentence is affirmed on direct appeal by the Supreme Court of Virginia, the circuit court must appoint counsel to represent the inmate within thirty days.³³¹ The death row inmate must then file his/her state habeas petition “within sixty days after the earliest of” the following:

- (1) denial by the [U.S.] Supreme Court of a petition for a writ of certiorari [following] the judgment of the Supreme Court of Virginia on direct appeal
- (2) a decision by the [U.S.] Supreme Court affirming imposition of the sentence of death when such decision is in a case resulting from a granted writ of certiorari to the judgment of the Supreme Court of Virginia on direct appeal, or

³³⁰ *Lithium (Oral Route): Side Effects*, Mayo Clinic, <http://www.mayoclinic.com/health/drug-information/DR600869/DSECTION=side-effects> (last visited August 9, 2013).

³³¹ VA. CODE ANN. § 19.2-163.7 (2013).

- (3) the expiration of the period for filing a timely petition for certiorari [with the U.S. Supreme Court] without a petition being filed.³³²

There is no exception that permits this filing period to be stayed, tolled, or excused for any reason, including in instances when the inmate is unable to assist counsel in connection with such proceedings due to a mental disorder or disability.

Conclusion

Because Virginia does not permit a death row inmate's state habeas proceedings to be stayed, Virginia is not in compliance with Protocol #7.

Recommendation

The Assessment Team recommends that Virginia provide for the stay of post-conviction proceedings in a death penalty case upon a finding that the inmate has a mental disorder or disability that significantly impairs his/her capacity to communicate with counsel or understand the proceedings. The determination of whether a prisoner is competent to proceed with state habeas proceedings should be made following a full evidentiary hearing on the matter.

H. Protocol #8

The jurisdiction should provide that a death row inmate is not “competent” for execution where the inmate, due to a mental disorder or disability, has significantly impaired capacity to understand the nature and purpose of the punishment or to appreciate the reason for its imposition in the inmate’s own case. It should further provide that when such a finding of incompetence is made after challenges to the conviction’s and death sentence’s validity have been exhausted and execution has been scheduled, the death sentence shall be reduced to the sentence imposed in capital cases when execution is not an option.

The U.S. Supreme Court has held that it is unconstitutional cruel and unusual punishment to execute a death row inmate who does not have a rational understanding of the reason s/he is to be executed.³³³ Furthermore, an inmate raising such a claim is entitled to a full judicial hearing on the matter.³³⁴ Thus, it is imperative for a state to develop procedures to determine whether an inmate is incompetent to be executed because of a mental disorder or disability.

³³² VA. CODE ANN. § 8.01-654.1 (2013).

³³³ *Panetti v. Quarterman*, 551 U.S. 930, 959–60 (2007); *Ford v. Wainwright*, 477 U.S. 399, 409–10 (1986). In *Ford*, the U.S. Supreme Court held that the Eighth Amendment prohibits the execution of an “insane” offender who is not aware of his/her impending execution and the reasons for it. *Id.* In *Panetti*, the U.S. Supreme Court clarified that a determination of competency to be executed requires an inquiry into whether the death row inmate has a *rational* understanding of the reasons s/he will be executed. *Panetti*, 551 U.S. at 959–60.

³³⁴ *Panetti*, 551 U.S. at 960–62 (emphasis added).

Contrary to this constitutional mandate, however, Virginia has not enacted any laws or procedures for determining whether an inmate is competent to be executed.³³⁵ Virginia death row inmates not competent for execution must instead rely on the federal courts or a grant of clemency from the Governor for the required relief. The U.S. District Court for the Western District of Virginia has stated that, by failing to establish a procedure to determine an inmate's competency to be executed, Virginia "has precluded post-conviction review of [a] viable, fundamentally important and basic constitutional question[] forcing plenary review by a federal habeas court."³³⁶

Calvin Swann, for instance, was convicted and sentenced to death for a robbery and murder in 1992.³³⁷ Before the murder, Swann had been involuntarily committed to state mental hospitals at least sixteen times due to his schizophrenia, and had been found incompetent to stand trial in two previous proceedings.³³⁸ "At the time of the murder he was receiving Social Security disability benefits because of his schizophrenia", and state employees had diagnosed him as schizophrenic "at least 41 times, described him as psychotic at least 31 times and regularly medicated him with eight different antipsychotic drugs."³³⁹ He was not, however, receiving proper medication when he committed the murder.³⁴⁰ A forensic psychiatrist who examined Swann after his conviction stated that of the thousands of people he had evaluated, he had "only ever seen one person [he] would classify as exhibiting a more devastating pathology than Calvin Swann."³⁴¹

However, because Virginia does not have a procedure to determine competency to be executed, this issue was never considered by a Virginia court. It was not addressed by the Supreme Court of Virginia on direct appeal.³⁴² Although Swann presented a competency claim in his state habeas petition, the Court dismissed the petition in an unpublished summary order.³⁴³ In 1999, just four hours before the scheduled execution, Governor James Gilmore commuted Swann's sentence to life in prison without parole, noting the "compelling and extraordinary circumstances" and that Swann's behavior was "nothing short of bizarre and totally devoid of rationality."³⁴⁴ Swann's response to the Governor's decision illustrates the depths of his illness: when told by his lawyers that his sentence had been commuted, "he nodded, then resumed pacing [in his cell] and mumbling."³⁴⁵

In another case, Virginia death row inmate Percy Walton was granted clemency by Governor Tim Kaine in 2008.³⁴⁶ Walton had been sentenced to death for three murders that he committed

³³⁵ See *Walton v. Johnson*, 306 F. Supp. 2d 602, 603 (W.D. Va. 2004) (noting that, in a federal habeas corpus proceeding, the Commonwealth "necessarily conceded that Virginia has no procedure to review [an inmate's] claim that he is incompetent to be executed.")

³³⁶ *Id.*

³³⁷ *Swann v. Commonwealth*, 441 S.E.2d 195, 198 (Va. 1994).

³³⁸ *Id.* at 203. Frank Green, *Gilmore Grants Swann Clemency; Sentence Commuted to Life Without Parole*, RICHMOND TIMES-DISPATCH, May 13, 1999, at A1.

³³⁹ Green, *supra* note 338.

³⁴⁰ *Id.*

³⁴¹ *Id.*

³⁴² See *Swann*, 441 S.E.2d 195.

³⁴³ *Swann v. Taylor*, No. 98-20, 1999 WL 92435, at *1, *16 (4th Cir. Feb. 18, 1999).

³⁴⁴ Green, *supra* note 338.

³⁴⁵ *Id.*

³⁴⁶ *Death Row Inmate Escapes Death*, DANVILLE REG. & BEE, June 10, 2008.

in 1996.³⁴⁷ Following the trial, however, evidence arose indicating that Walton had schizophrenia.³⁴⁸ Although a federal court found him competent to be executed in 2006,³⁴⁹ the Governor stated that Walton's "mental state had deteriorated since 2003, the most recent information the [federal] courts had to consider."³⁵⁰ Walton had expressed inconsistent statements about the meaning of the death penalty, having said that execution is "the end" but also stating that he planned to go to Burger King and ride a motorcycle after being executed.³⁵¹ As with Swann, Walton never received a state court hearing on the issue of competency to be executed.

Conclusion

Contrary to a constitutional mandate, Virginia has not enacted any procedures for determining whether an inmate is competent to be executed. Virginia death row inmates, irrespective of the severity of their mental illness or mental disability, must instead rely on federal courts or the Governor to grant relief. The Commonwealth, therefore, is not in compliance with Protocol #8.

Recommendation

The Assessment Team recommends that Virginia adopt a procedure for determining whether an inmate is competent to be executed. The procedure should allow for a full evidentiary hearing and expert witness testimony. The law or procedure should specify that an inmate is incompetent if s/he has a significantly impaired capacity to understand the nature and purpose of the death sentence or to appreciate the reason for its imposition in his/her own case. While Virginia Governors have demonstrated a willingness to commute the death sentences of inmates who may be incompetent, this system is an inadequate substitute for a true competency hearing.

I. Protocol #9

Jurisdictions should develop and disseminate to police officers, attorneys, judges, and other court and prison officials models of best practices on ways to protect mentally ill individuals within the criminal justice system. In developing these models, jurisdictions should enlist the assistance of organizations devoted to protecting the rights of mentally ill citizens.

As discussed in Mental Retardation and Mental Illness Protocols #1 and #2, Virginia has offered training materials to some actors in the criminal justice system on methods for protecting mentally ill inmates in the criminal justice system.³⁵² In particular, law enforcement officers and corrections officials must receive some training in recognizing and communicating with the

³⁴⁷ Walton v. Commonwealth, 501 S.E.2d 134, 135–37 (Va. 1998).

³⁴⁸ Frank Green, *Kaine Spares Inmate's Life: Walton's Sentence Commuted Over Mental-health Concerns*, RICHMOND TIMES-DISPATCH, June 10, 2008, at A1.

³⁴⁹ Walton v. Johnson, 440 F.3d 160, 178 (4th Cir. 2006) (en banc). Six judges dissented from the opinion. *Id.* at 182–91.

³⁵⁰ Green, *supra* note 348.

³⁵¹ *Death Row Inmate Escapes Death*, *supra* note 346.

³⁵² See *supra* notes 58–79 and accompanying text.

mentally ill. However, no such training is offered to judges, and prosecutor training is limited to training on opposing mental health claims raised by the defendant.³⁵³

Conclusion

For the reasons stated, Virginia is in partial compliance with Protocol #9.

Recommendation

The Virginia Assessment Team recommends that the Commonwealth's Attorneys' Services Council and the Educational Services Department of the Office of the Executive Secretary of the Supreme Court of Virginia work with the Virginia Department of Behavioral Health and Developmental Services to develop training programs for prosecutors and judges on recognizing, communicating with, and protecting mentally ill individuals in the criminal justice system.

³⁵³ See *supra* notes 69–75 and accompanying text.

**AMERICAN BAR ASSOCIATION
Virginia Assessment Team
on the Death Penalty**

Below is a set of questions related to law enforcement policies, procedures, and practices within the Commonwealth of Virginia. Please answer each question as thoroughly and accurately as possible, attaching additional pages if necessary. If you would prefer an electronic copy of this survey, or if you would prefer to discuss the questions, please contact Mark Pickett at (202) 662-1869 or at mark.pickett@americanbar.org. We sincerely appreciate your cooperation.

Responses may be mailed or e-mailed to

Mark Pickett
American Bar Association
740 15th Street NW
Office 960
Washington DC, 20005
mark.pickett@americanbar.org

VIRGINIA LAW ENFORCEMENT SURVEY

Name and Title of Respondent: _____

Agency: _____

Date: _____

Eyewitness Identification Procedures

- (1) Please identify and describe all authorities—for example, state statutes or internal guidelines—governing eyewitness identification procedures. If your agency has adopted written guidelines regarding those procedures, **please provide a copy of those written guidelines with your response or e-mail a copy to mark.pickett@americanbar.org.**

A. General Guidelines for Administering Lineups or Photospreads

- (2) *Officer knowledge.* Are officers who administer lineups or photospreads prohibited by state law or other authority—for example, internal guidelines—from knowing the identity of a suspect present in a lineup or photospread?

Statements made to eyewitnesses. Are officers who administer lineups or photospreads required to inform an eyewitness that

- (3) S/he should assume that the officer does not know which individual is the suspect?

- (4) A suspect may or may not be present in the lineup or photospread?
- (5) S/he need not identify anyone in the lineup or photospread?
- (6) *Requirements of eyewitnesses.* Upon making an identification—whether during a lineup, photospread, or showup procedure—is an eyewitnesses required to state, in his/her own words, how confident s/he is in his/her identification?

If the answer to any of the above is “yes,” please note or provide a copy of the authority that establishes each requirement.

B. Foil Selection, Number of Suspects, and Presentation Method

- (7) *Number of foils.* Are officers who administer lineups or photospreads required by state law or other authority—for example, internal guidelines—to include a specific or minimum number of foils in a lineup or photospread?
- (8) *Resemblance of foils to suspect.* Are the foils participating in a lineup or included in a photospread required to bear a certain degree of similarity to the suspect? Please describe those requirements.
- (9) *Number of suspects.* Are officers who administer lineups or photospreads required to limit the number of suspects participating in a lineup or appearing in a photospread?
- (10) *Presentation method.* Are officers who administer lineups or photospreads required to conduct a specific type of lineup or photospread, such as a sequential or simultaneous lineup or photospread? Please describe those requirements.

If the answer to any of the above is “yes,” please note or provide a copy of the authority that establishes each requirement.

C. Recording Procedures

- (11) *Videotape or digital recording.* Are officers who administer lineups, photospreads, or showups required by state law or other authority—for example, internal guidelines—to videotape or digitally record those procedures?

- (12) *Audio recording.* If the answer to (11) is “no” for some cases, are officers who administer lineups, photospreads, or showups required to audio record those procedures?
- (13) *Detailed report.* If the answers to (11) and (12) are “no” for some cases, are officers who administer lineups, photospreads, or showups required to prepare detailed reports as to how the procedures were administered? Specifically, are officers who administer lineups required to take a photograph of the lineup?
- (14) *Eyewitnesses’ statements.* Are officers who administer lineups, photospreads, or showups required to videotape or digitally record an eyewitness’s identification of a suspect?
- (15) If the answer to (14) is “no” for some cases, how do officers who administer lineups, photospreads, or showups document an eyewitness’s statements?

If the answer to any of the above is “yes,” please note or provide a copy of the authority that establishes each requirement.

D. Immediate Post-Identification Procedures

- (16) Are officers who administer lineups or photospreads prohibited by state law or other authority—for example, internal guidelines—from giving eyewitnesses feedback on whether they selected the “right man” during a lineup or photospread procedure?

If the answer to (16) is “yes,” please note or provide a copy of the authority that establishes this requirement.

E. Enforcement

- (17) How are the requirements for conducting lineups, photospreads, and showups enforced?

F. Updating Internal Guidelines

- (18) Are agency internal guidelines for conducting lineups, photospreads, and showups regularly updated? If so, what bases are used to determine when and how these guidelines will be updated?

Suspect Interrogation Procedures

- (19) Please identify and describe all authorities—for example, state statutes or internal guidelines—governing suspect interrogation procedures. If your agency has adopted written guidelines regarding those procedures, **please provide a copy of the guidelines with your response or e-mail a copy to mark.pickett@americanbar.org.**

A. General Guidelines for Interrogating Suspects

- (20) Are officers who interrogate suspects discouraged or prohibited from using certain tactics while interrogating a suspect? Specifically, are officers limited in the length of time they may spend interrogating a suspect? Please describe those limitations.

If the answer to (20) is “yes,” please note or provide a copy of the authority that establishes these requirements.

B. Recording Procedures

- (21) *Videotape or digital recording.* Are officers who interrogate suspects required by state law or other authority—for example, internal guidelines—to video record any part of those interrogations? Specifically, must the advisement of rights be video recorded?
- (22) Must a suspect’s waiver of rights be video recorded?
- (23) Must a suspect’s confession be video recorded?
- (24) *Audio recording.* If the answers to (21) through (23) are “no” for some cases, are officers who interrogate suspects required to audio record any part of those interrogations? Specifically, must the advisement of rights be audio recorded?
- (25) Must a suspect’s waiver of rights be audio recorded?
- (26) Must a suspect’s confession be audio recorded?

If the answer to any of the above is “yes,” please note or provide a copy of the authority that establishes each requirement.

C. Mental Retardation and Mental Illness

- (27) Are officers required by state law or other authority—for example, internal guidelines—to take any special measures during an interrogation of a mentally retarded or mentally ill suspect? Please describe those requirements.

If the answer to (27) is “yes,” please note or provide a copy of the authority that establishes this requirement.

D. Enforcement

- (28) How are the requirements for conducting suspect interrogations enforced?

Other Agency Policies

A. Training Requirements for Law Enforcement

- (29) Please identify and describe all authorities—for example, state statutes, state regulations, or internal guidelines—governing the training of law enforcement. It would be particularly helpful to know whether your agency has adopted written guidelines regarding training requirements. **Please provide a copy of those written guidelines with your response or e-mail a copy to mark.pickett@americanbar.org.**

It also would be particularly helpful to know whether and to what extent the training undertaken by law enforcement addresses the following issues:

- (30) *Eyewitness identification procedures.* Does any training for law enforcement cover eyewitness identification procedures? Please describe that coverage.
- (31) *Suspect interrogation procedures.* Does any training for law enforcement cover suspect interrogation procedures? Please describe that coverage.
- (32) *Recognizing mental retardation and mental illness.* Does any training for law enforcement cover assessing whether a suspect has mental retardation or mental illness. Please describe that coverage.

- (33) *Recordkeeping.* Are records kept of each individual law enforcement officer's completion of the training described above?

If the answer to any of the above is "yes," please note or provide a copy of the authority that establishes each requirement.

B. Procedures for Reporting Misconduct

- (34) Please identify and describe all authorities—for example, state statutes or internal guidelines—providing procedures for private citizens and law enforcement officers alike to report misconduct by law enforcement officers. It would be particularly helpful to know whether your agency has adopted written guidelines regarding those procedures. **Please provide a copy of those written guidelines with your response or e-mail a copy to mark.pickett@americanbar.org.**
- (35) Please identify and describe all authorities that establish procedures for the disciplining of law enforcement officers who have been found to have engaged in misconduct. **Please provide a copy of any written agency guidelines with your response or e-mail a copy to mark.pickett@americanbar.org.**

C. Guidelines on Race and Ethnicity

- (36) Recognizing that race and ethnicity may legitimately play a role in the investigation of a capital case—for example, an eyewitness may identify the perpetrator of a crime by referring, in part, to the perpetrator's race or ethnicity—has the Commonwealth of Virginia, generally, or your agency, specifically, developed and implemented educational programs for prospective and current law enforcement officials that stress that race and ethnicity should not play an illegitimate role in the investigation and prosecution of capital cases? Please describe those programs in detail.

D. Detention or Arrest of Foreign Nationals

- (37) Please identify and describe all authorities—for example, state statutes or internal guidelines—outlining the specific procedures that must be followed in the event that a suspect who may be a foreign national is detained or arrested by your agency. It would be particularly helpful to know whether your agency has adopted written guidelines regarding those procedures. **Please provide a copy of those written guidelines with your response or e-mail a copy to mark.pickett@americanbar.org.**

- (38) *Training.* Are law enforcement officers specifically trained to notify the appropriate consular office of a suspect who has been detained or arrested and who may be a foreign national?

If the answer to 0 is “yes,” please note or provide a copy of the authority that establishes this requirement.

Collection and Preservation of Biological and Other Forensic Evidence

Note: Portions of this section may be inapplicable to your agency. In that event, please direct us to the appropriate agency in your response(s).

A. Evidence Collection

- (39) Please identify and describe all authorities—for example, state statutes, internal guidelines, accreditation prerequisites—governing the collection of forensic evidence. If your agency has adopted written guidelines that impose specific collection requirements on your agency or an affiliated crime laboratory, **please provide a copy of those written guidelines with your response or e-mail a copy to mark.pickett@americanbar.org.**
- (40) *Evidence collectors, training and certification.* Please identify who, in general, is responsible for and/or involved in collecting forensic evidence at crime scenes in your jurisdiction. Do these individuals receive any kind of training or certification specific to collecting forensic evidence? If so, which entities provide this certification?

B. Evidence Preservation

- (41) Please identify and describe all authorities—for example, internal guidelines or accreditation prerequisites—governing the preservation of biological and other forensic evidence. **Please provide a copy of any written guidelines with your response or e-mail a copy to mark.pickett@americanbar.org.**
- (42) *Preservation period—requirements.* If your agency is required by state statutes or internal guidelines to preserve, for a specified period of time, biological and other forensic evidence collected in the course of an investigation, please describe those requirements.

- (43) *Preservation period—actual practice.* Apart from the state statutes and internal guidelines addressed in (42), for how long in actual practice is evidence preserved? Does this preservation include all evidence collected in capital cases or, instead, is it limited to certain kinds of evidence (for example, only evidence introduced at trial is preserved)?
- (44) *Evidence available for testing.* Please identify and describe all authorities regarding how biological evidence is made available to defendants and convicted persons who seek to have that evidence tested. If your agency has adopted written guidelines regarding the processing and treatment of those requests, **please provide a copy of those written guidelines with your response or e-mail a copy to mark.pickett@americanbar.org.**

* * *

Thank you once again for completing this survey regarding law enforcement policies, procedures, and practices within the Commonwealth of Virginia. We welcome any additional information not specifically addressed by the questions included in this survey.

AMERICAN BAR ASSOCIATION
Virginia Death Penalty Assessment Team

Below is a list of questions related to the provision of prosecutorial services in capital cases in the Commonwealth of Virginia. Please answer each question as thoroughly and accurately as possible, attaching additional pages if necessary. If you prefer an electronic copy of this survey or would prefer to discuss the questions over the telephone, please email or call Staff Attorney Mark Pickett at paula.shapiro@americanbar.org, (202) 662-1596. You may also mail your responses to Mark Pickett, American Bar Association – 740 15th Street NW, Washington, DC, 20005.

Name: _____

District: _____

Date: _____

Training, Qualifications, & Compensation of Prosecutors who Handle Capital Cases

1. How do you determine which prosecutors in your office handle capital cases? Please describe any minimum qualifications.
2. Please list the prosecutors in your office currently screened to handle capital cases, along with the following information: (1) number of years each prosecutor has practiced law; (2) years of experience each has as a prosecutor; and (3) total number of prior capital cases handled by each prosecutor.
3. Are there policies, practices, or procedures governing the caseload of prosecutors in your office who handle capital cases? Please describe these policies, practices, or procedures.
 - a. Are there a minimum number of prosecutors assigned to each capital case? If so, what is that number and what is the procedure for determining whether a capital case receives a second-chair prosecutor?
 - b. How many active capital cases is each of your capital prosecutors currently assigned to?

- c. What are the overall caseloads (capital and non-capital) of attorneys in your office who handle capital cases?
 - d. What, if any policies limit the number of active *non*-capital cases that your capital prosecutors are assigned to?
- 4. What is your office's current total budget?
 - a. Has your office's budget changed over the last five years? If so, how?
 - b. Have budget limitations required you to assign your capital prosecutors higher caseloads than you would prefer? If so, please describe what you believe your capital prosecutors' caseloads *should* be if you had a larger budget.
- 5. Does your office receive funding specifically earmarked for capital cases?
 - a. If so, how much funding has your office received that is specifically earmarked for capital cases each year since you became Commonwealth's Attorney and what are the sources of that funding?
 - b. If not, how does your office allocate funds to capital cases?
- 6. What resources does your office use to train prosecutors to handle capital cases?
 - a. Do you feel these resources are adequate? Why or why not?
 - b. What kinds of capital training programs, either in-house or through an outside organization, are offered?

- c. Are assistant prosecutors who handle capital cases required to attend these training programs? If not, how do you determine which prosecutors attend the trainings?
 - d. Are there any capital training programs that your prosecutors are no longer able to attend due to budget constraints? If so, please describe.
 - e. Do your capital prosecutors receive any special training relevant to the treatment of racial and ethnic minorities in capital cases? If so, please describe.
7. What are the current salaries for prosecutors in your office who handle capital cases?
8. If your office employs investigators, what are the current salary scales for the investigators in your office?

Decision to Seek the Death Penalty

1. Please describe your policies, practices, or procedures for determining whether to seek the death penalty in a case.
- a. Does your office require any particular type of evidence be present in the case before deciding to seek a capital indictment? For instance, is physical evidence tying the defendant to the crime necessary?
 - b. Does your office consult with the victim's family members before deciding to pursue a capital indictment *or* to seek the death penalty at sentencing after a capital conviction? If so, how does their opinion factor into your decision?
 - c. Does your office consult with defense counsel before deciding to pursue a capital indictment *or* to seek the death penalty at sentencing after a capital conviction?
 - i. If so, does your office typically seek the consultation, or is the consultation at the request of defense counsel?

- ii. What sort of information does your office seek from defense counsel to help inform its decision (if applicable)?
 - d. Who in your office is responsible for making the ultimate decision to seek the death penalty (whether at capital indictment or to move forward with the penalty phase after conviction of a capital offense)?
 - e. Does your office have a written policy that governs the decision-making process to seek the death penalty? If so, please provide a copy of that policy.
2. Please describe how your office determines, after capital indictment, not to continue to seek the death penalty.
- a. If applicable, provide the names and dates of the cases in which you elected not to seek the death penalty after a capital indictment was returned and provide an explanation as to why.
 - b. If not applicable, (e.g. your office has sought the death penalty at trial and through the sentencing phase in every case indicted capitally), please explain.

Plea Agreements

1. What policies, practices, or procedures are in place to determine whether to make a plea offer in capital or potentially-capital cases?
- a. Who makes the ultimate decision as to whether to make a plea offer?
 - b. What factors are considered in making this determination?
2. Are there any circumstances in which your office prohibits plea offers? If so, what are those situations?

3. In your judicial district, how many plea bargains were offered in capital cases and how many of those offers were accepted in the last three years?

Discovery

1. Please describe your office's policies, practices, and procedures relevant to discovery in trial-level capital cases.
 - a. How does your office identify and disclose evidence favorable to the defense?
 - b. Do you provide prior statements of witnesses to the defense? If so, how long before trial do you do so?
2. How do you ensure that the prosecutors in your office are meeting their discovery obligations?
3. What policies and procedures does your office have in place to ensure that other law enforcement agencies (police, crime laboratories, medical examiners, other experts employed by the state) divulge all potentially exculpatory evidence in a case to your office?
4. Explain your office's policies, practices, or procedures on providing discovery in capital post-conviction cases?
 - c. What kind of discovery do you provide to the defense in capital post-conviction cases?
 - d. Do you require defense counsel to request specific discovery or do you accept a general discovery request in capital post-conviction cases?

Policies Relevant to Interrogations, Eyewitness Identifications, Informant Testimony

1. Does your office have any policies for evaluating the quality of the evidence in cases that primarily rely upon (1) eyewitness identifications, (2) confessions, or (3) the testimony of jailhouse informants and other witnesses who receive a benefit for their testimony? If so please describe.
2. Please describe any policies your office has in place regarding the manner which line-ups, show-ups, and photographic arrays should be administered to eyewitnesses.

Policies Relevant to the Treatment of the Mentally Ill and Mentally Retarded

1. Please describe any policies your office for assessing whether a confession made by a suspect who is mentally ill or mentally retarded was false or coerced, and whether that suspect fully understood his/her *Miranda* rights.
2. What criteria and qualifications does your office consider in selecting mental health experts to testify in a capital case?
3. Do your capital prosecutors receive any special training to help them recognize mental retardation, mental illness, and other mental health disorders in defendants, witnesses, or victims? If so, please describe the type of training they receive.
4. Does your office have any other policies relevant to the treatment of mentally ill or mentally retarded offenders in capital or potentially capital cases? If so, please describe.

Misconduct

1. Please describe any procedures and policies your office has in place to discover and appropriately discipline any misconduct by prosecutors in your office.
2. Have any of the prosecutors in your office been disciplined for prosecutorial misconduct in the last five years? If so, please describe.

General Information about the Death Penalty in Your Jurisdiction

1. In how many cases has your office filed a notice to seek the death penalty since you became the Commonwealth's Attorney in your district?
2. How many capital cases are currently pending in your office?
3. How many capital cases have been brought to a capital trial since you became the Commonwealth's Attorney?
4. How many capital cases have you personally tried (as first or second chair) in your capacity Commonwealth's Attorney or Assistant Commonwealth's Attorney? Please list dates, defendants' name, and dispositions. Please also include any other relevant experience, such as experience as a capital defense lawyer, you may have.

Additional Information

1. What have been some of the most difficult challenges you or your office have faced in prosecuting capital cases?
2. Are there any other aspects of the capital punishment in Virginia that you believe the Assessment Team should focus on? If there are issues relevant to capital prosecutions that you believe were not covered in this survey, please do not hesitate to identify them.

Attached, please find a copy of the full ABA Recommendations for the chapter on prosecutors. If you have any additional comments with respect to the recommendations, please feel free to include them.

Please do not hesitate to contact us if you have any questions or need clarification. We also welcome any additional comments or feedback you may have.

David N. Grimes, President
Pittsylvania County

Michael R. Doucette, President Elect
City of Lynchburg

Kim S. White, Vice-President
Halifax County

Raymond F. Morrogh, Secretary/Treasurer
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Raymond F. Morrogh
Fairfax County



Virginia Association of Commonwealth's Attorneys

April 23, 2012

Prof. John Douglass, Chair,
American Bar Association
Virginia Assessment Team on
the Death Penalty
740 15th Street, NW
Washington, DC 20005-1022

re: Virginia Death Penalty Assessment

Dear Professor Douglas:

I write to respond to your letter of February 21, 2012 with apologies for the delay. Although the letter was addressed to me as Chairman of the Commonwealth's Attorneys' Services Council, I also serve as President of the Virginia Association of Commonwealth's Attorneys (VACA). The Council is the state agency responsible for training Virginia's prosecutors. VACA is the voluntary association of Virginia prosecutors representing their interests in political and social matters. It is in the latter position and my individual elected capacity that I respond.

As you know, each of Virginia's 120 elected commonwealth's attorneys serves an individual locality as well as the commonwealth at large. Each answers to the voters of that locality and is autonomous in making prosecution decisions within the framework of state and federal law. Virginia's prosecutors function in offices ranging from a single attorney (not all are yet full-time) to dozens of full-time prosecutors, serving jurisdictions ranging from a few thousand to more than a million citizens. Each elected commonwealth's attorney to whom you sent the ABA assessment request will decide the extent to which to participate.

David N. Grimes:
P.O. Box 1068
Chatham, Virginia 24531
(434) 432-7900 Fax (434) 432-7903

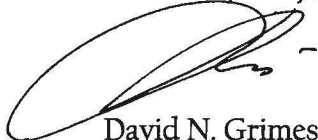
General Correspondence:
Post Office Box 3549
Williamsburg, Virginia
23187-3549

The Virginia Association of Commonwealth's Attorneys, as an organization, respectfully declines to participate in the assessment. Our Board has discussed the matter and the consensus of opinion is that the Virginia system of law and procedure applicable to charging and prosecuting death penalty eligible murders has been, and continues to be, studied and examined by our general assembly and the state and federal judiciary, as well as by both the prosecution and defense bars. We believe the current level of scrutiny has served well to protect the legitimate interests of victims, defendants and all the citizens of the commonwealth. Our position as a group is that further study by, or on behalf of, the American Bar Association is not warranted and participation in the assessment is not in the best interest of VACA or those we serve. Although the ABA has enlisted for the Virginia assessment a truly admirable and distinguished team, whose members we respect, our position frankly derives in part from our lack of confidence in the neutrality of the ABA regarding the death penalty.

Year after year, and case after case, every death eligible murder case is closely scrutinized from the moment it is indicted. Every death verdict in Virginia since the reinstatement of the death penalty has undergone close state appellate review, including mandated review of proportionality, and then the several levels of direct appellate and habeas consideration. Our general assembly frequently considers issues involved in death penalty charging and trial as well. If we doubted the present framework for charging and trying death eligible murders in Virginia we would enthusiastically participate in further examination of that framework. We do not suffer such a lack of confidence.

With kindest regards, I am,

Yours very truly,

A handwritten signature in black ink, appearing to read "D. Grimes", with a large, sweeping loop at the end.

David N. Grimes

QUESTIONNAIRE: DEFENSE SERVICES

From: Paula Shapiro, Staff Attorney, ABA Death Penalty Moratorium Implementation Project

To: David Baugh, Capital Defender (Central)
Ed Ungvarsky, Capital Defender (North)
Doug Ramseur, Capital Defender (Southeast)
Steve Milani, Capital Defender (Western)

Date: March 6, 2012

Thank your assistance with this questionnaire. Below is a list of questions related to the provision of defense services in capital cases, particularly at the trial level, in Virginia. Please answer each question as thoroughly as possible, attaching any additional pages if necessary. If written policies exist for any of the information, please include those as well. Similar versions of this document will be provided to each of the four Capital Defenders and to the Indigent Defense Commission. If any question is unclear, or you have any other questions or concerns please feel free to call me at 202-662-1596, Sarah Turberville at 202-662-1595, or Mark Pickett at 202-662-1869. Please email your responses to paula.shapiro@americanbar.org, ideally by March 19, 2012. Thank you for your assistance with our Virginia Death Penalty Assessment Report.

AUTHORITY TO APPOINT, CERTIFY, AND MONITOR COUNSEL IN DEATH PENALTY CASES

Assignment of Counsel

1. Please describe how the appointment process pursuant to Va. Code § 19.2-163.7 works in practice.
 - a. Who or what entity assigns the attorneys who will represent an indigent defendant at **each stage of the proceedings** [pretrial (including arraignment and plea bargaining), trial, direct appeal, all certiorari petitions, state post-conviction and federal habeas corpus, and clemency proceedings]]?
 - b. Are you aware of cases in your jurisdiction where the Capital Defender was not appointed?
2. Is there always one capital defender and one court-appointed certified capital counsel from the list published by VIDC?
 - a. If not, why not? Please list any reasons.

- b. What steps, if any, do you take to be appointed to a case (one where you wouldn't conflict out)
3. How do judges determine which certified member of the local bar to appoint in addition to a capital defender?
 - a. Do you know of any cases in your jurisdiction where any certified capital counsel was not appointed to represent a capital defendant? If yes, please list the names, dates, and details.
 - b. How do you work with judges to ensure qualified applicants who provide quality representation are appointed as co-counsel?
 - c. Have there been cases in which a member of your capital staff was appointed to a case with unqualified, negligent, or ineffective co-counsel? If so, please explain.
4. How does your office internally decide who gets appointed to a case?
5. Does Virginia require for *all* indigent defendants (including those represented by privately retained counsel but unable to afford needed expert, investigation, and other services):
 - a. At least two attorneys to be assigned at **every stage of the proceedings?**
 - b. An investigator to be assigned to the case at **every stage of the proceedings?**
 - c. A mitigation specialist to be assigned to the case at **every stage of the proceedings?**
6. At what point in the proceedings is capital-qualified counsel appointed after a death penalty-eligible defendant is arrested (i.e. does your office need to wait until the prosecution notices intent to seek the death penalty, or can a capital defender be appointed immediately)? Please provide any relevant statute, procedure, or policy.
 - a. Is the attorney appointed always certified to provide capital representation?

7. Do you know of any capital cases where the defendant was pro se at trial within the last 10 years? If yes, please list.
 - a. In any of these cases, were attorneys from your office appointed as standby counsel?
 - b. Does your office have any policies on serving as standby counsel in capital cases?
8. How does your office handle cases with co-defendants?
 - a. Has your office adopted a conflict of interest policy? If so, please attach.
 - b. Do attorneys from your office ever take cases in other Capital Defender Office jurisdictions in the event of a conflict?

Qualifications and Certification of Capital Defenders

9. We are aware of the statutory requirements (Va. Code § 19.2-163.8) and the *qualification standards* on the VIDC website.
 - a. Do all of your attorneys meet these *qualifications requirements*?
 - b. Who developed these *qualification requirements*? When were they adopted?
 - c. Are there any differences in the *qualification requirements*, including continuing legal education requirements, for attorneys in the capital defenders versus court-appointed private bar counsel?
10. Do these *qualification requirements* ensure that every attorney representing a capital defendant has:
 - a. Obtained a license or permission to practice in the jurisdiction;
 - b. Demonstrated a commitment to providing zealous advocacy and high quality legal representation in the defense of capital cases; and
 - c. Satisfied the training requirements set forth in *ABA Guideline 8.1* (attached)?

11. Do you ensure that each of your assistant capital defenders has each of the qualifications listed below?

- a. Substantial knowledge and understanding of the relevant state, federal and international law, both procedural and substantive, governing capital cases;
- b. Skill in the management and conduct of complex negotiations and litigation;
- c. Skill in legal research, analysis, and the drafting of litigation documents;
- d. Skill in oral advocacy;
- e. Skill in the use of expert witnesses and familiarity with common areas of forensic investigation, including fingerprints, ballistics, forensic pathology, and DNA evidence;
- f. Skill in the investigation, preparation, and presentation of evidence bearing upon mental status;
- g. Skill in the investigation, preparation, and presentation of mitigating evidence; and
- h. Skill in the elements of trial advocacy, such as jury selection, cross-examination of witnesses, and opening and closing statements.

12. Please provide any written policies that your Capital Defender Office may have on the qualifications and/or certification of assistant capital defenders.

- a. Are each of your assistant capital defenders in your Capital Defender Office certified by the VIDC?

13. Are any attorneys from the public defender offices certified to provide representation in capital cases? If yes, are such attorneys ever appointed?

Monitoring Capital Counsel: Minimum Standards of Performance

14. There do not appear to be specific *standards for performance* for counsel (as opposed to *qualification* standards, discussed above) in death penalty cases in Virginia. Is this correct?

- a. Has Virginia, the VIDC, or any specific Capital Defender Office, adopted, by reference, the *ABA Guidelines*, or specifically, Guideline 5.1 on the Qualifications of Counsel?
 - b. If not, how does your Office ensure the high quality performance of your capital defenders (i.e., to what performance standards are your capital defenders held, other than rules of professional conduct applying to all attorneys in Virginia)?
 - c. Does Virginia's *Standards of Practice for Indigent Defense Counsel* apply attorney performance in capital-eligible cases and capital trials?
15. Please describe the process by which you monitor the performance of all capital defenders in your office?
- a. How are Capital Defender staff held accountable for performance during capital cases/hearings?
16. Does your office monitor or provide any oversight of the performance of court-appointed private counsel providing capital representation in your jurisdiction? If so please describe. Please also include any written policies or procedures that may exist.
17. How does the VIDC ensure the quality of representation provided by certified attorneys eligible for court appointments in death penalty cases?

CAPITAL DEFENDER OFFICES

Office Overview

18. How many attorneys in your office are certified by the VIDC to provide representation during a capital trial?
- a. Are there any uncertified trial attorneys employed at your Capital Defender?
 - b. Do all of these attorneys actively provide representation in capital cases?
19. How many mitigation specialists does your office employ for use in capital trials? Are they part-time or full-time? How many hours a week do they work?

20. Does your office employ any part-time attorneys? If so, please explain their role, caseload, hours, compensation, and certification status.

Caseloads

21. What is the current caseload of each capital defender in your office?
- a. How has caseloads changed in the last five years (increases, decreases?)
 - b. Do you believe that current caseloads are too high? Please explain.
22. How many capital cases does each staff mitigation specialist work on at a time?
23. How many capital cases does each staff investigator work on at any given time?
24. Does your office have policies to ensure that the workload of capital defenders enables them to provide each client with high quality legal representation? If yes, please describe.
- a. If not, has any entity within the Commonwealth implemented such rules, policies, or standards limiting capital caseloads?

Grievances & Ineffective Assistance of Counsel Claims

25. Does the VIDC handle complaints by a capital defendant against Capital Defender counsel?
- a. If yes, how does the VIDC handle complaints? Please provide any written policies or procedures.
 - b. Does VIDC investigate, maintain records, and take action on complaints filed about the performance of attorneys in death penalty cases?
 - c. Please describe any cases since 2004 where a capital defendant or death row inmate filed a complaint against his court-appointed counsel and/or his capital defender, and what, if any, response was given by your office or the VIDC?

26. Has your office adopted any internal policies or procedures for handling claims of ineffective assistance of counsel or any other complaints regarding the performance of counsel at trial made by a capital defendant? If so, please describe. If the procedures are in writing, please provide.
- a. Has your office established any remedies for a capital defendant if s/he makes a valid complaint regarding the performance of counsel? If yes, please describe.
 - b. Has Virginia or any entity therein established procedures for handling complaints and claims of IAC and remedies for valid complaints? If yes, please state which entity and describe the procedures and remedies.
27. Does your office or any other entity in the Commonwealth keep record of ineffective assistance of counsel claims in death penalty cases? If yes, please provide any information related to such claims.
- a. If no, what entity does keep record of such claims?

RESOURCES AVAILABLE TO CAPITAL COUNSEL

Investigators and Mitigation Specialists

28. How many staff investigators does your office employ for use in capital trials? Are any investigators part-time or full-time? How many hours a week do they work?
29. What is the process for court-appointed counsel requesting expert and ancillary services, and how long does that process typically take? Please distinguish between capital defenders and court-appointed counsel, if applicable.
- a. To whom are requests made, to the court, to the Capital Defender, or to the VIDC?
 - b. Who receives the funding – the attorney or the expert providing the services?
30. At what rate are investigators, mitigation specialists, and other appointed expert compensated?
- a. To your knowledge, are the court-appointed non-attorney members (investigators, mitigation specialists, experts) compensated according to a salary scale that is

commensurate with the compensation provided to prosecutor experts and investigators?

- b. Is periodic billing and payment available for court-appointed investigators, mitigation specialists, and other defense experts?
 - c. Is additional compensation provided in unusually protracted or extraordinary capital cases for non-attorney members of the defense team? Please be specific and provide rates and, if possible, amounts for recent cases.
31. Are there any funds through the Capital Defender Office's budget for the hiring of additional expert or ancillary services (e.g., investigators, mitigation specialists) for use at capital trials?
- a. Does Virginia have a plan to ensure that defense counsel receives the assistance of all expert, investigative, and other ancillary professional services reasonably necessary or appropriate to provide high quality legal representation at **trial**? If yes, please provide the relevant statutes, rules, procedures, policies or other authority.
 - b. Does Virginia ensure provision of such ancillary services to privately-retained attorneys whose clients are financially unable to afford them (despite being able to afford retained counsel)? If yes, please provide the relevant statutes, rules, procedures, policies or other authority.
 - c. Does the office have any funds available to support non-staff investigators, mitigation specialists, experts from its budget? If yes, how much?
 - d. Does the VIDC provide any funds for expert services?
 - e. Does your office ever need to request additional investigative or mitigation specialist services due to burdensome caseloads of on-staff investigators and mitigation specialists?
 - f. How often do capital defenders in your office request funding for additional investigators?

- g. How often do capital defenders in your office request funding for mitigation specialists?
 - h. How often do capital defenders in your office request funding for mental health experts?
32. What is the level of access to those resources in each of those categories (experts, investigators, mitigation specialists, etc.) at trial?
- a. Must requests for expert services (mental health, ballistics, other) be made on a case-by-case basis for each capital trial?
33. How are investigators, mitigation specialists, and other experts (mental health, ballistics, and other) selected to assist the defense?
- a. Are capital defense counsel typically able to pick the expert of their choice?
 - b. Is there a roster of experts available to defense counsel?
 - c. Does your Capital Defender Office have mental health experts (psychologists or psychiatrists) that it typically works with? If yes, how many and what are their names?
 - d. How is the cost of such services considered in the court's decision to provide expert and ancillary services?
 - e. Is an expert's prior work for the prosecution or professional status with the state a consideration when selecting expert services?
 - f. Does counsel have the right to seek such services through *ex parte* proceedings, thereby protecting confidential client information? Please provide the relevant statutes, rules, procedures, and/or policies.

- g. Does defense counsel have the right to have such services provided by persons independent of the government? Please provide the relevant statutes, rules, procedures, policies or other authority.
- h. Does defense counsel have the right to protect the confidentiality of communications with the persons providing such services to the same extent as would counsel paying such persons from private funds? Please provide the relevant statutes, rules, procedures, policies or other authority.

Qualifications and Training of Investigators & Mitigation Specialists

Are there any *qualification requirements* or *standards of practice* for capital defender investigators and mitigation specialists?

- 34. What type of training or experience in investigation does one typically have to possess in order to work for your Capital Defender Office as
 - a. an investigator?
 - b. as a mitigation specialist?
- 35. Does the VIDC or any other entity in Virginia provide any additional training, professional development, and continuing education to non-attorney members of the defense team (either capital defender staff or court-appointed investigators and mitigation specialists) appropriate to their areas of expertise? If yes, please describe these trainings.
 - a. Who is performing the training, if there is any training?
 - b. How often is training available?
 - c. What is involved in the training?
- 36. Does your Capital Defender office or the VIDC provide funds for out-of-state training (e.g. at national capital defender conferences) for capital investigators and mitigation specialists (both court-appointed and staff)?

DEFENSE SERVICES FUNDING & COMPENSATION

Virginia General Assembly Appropriations & VIDC Budgeting

37. Please describe the budget process for your Capital Defender Office.

- a. Do each of the Capital Defender Offices request and receive funding from VIDC?
- b. Who in your office determines the amounts of funding to request?
- c. How is funding allocated to the four Capital Defender Offices?
- d. Who sets the budget for the each of the four capital defender offices?
- e. If possible, please provide a copy of your Capital Defender Office budget for the last five years.

38. What amount of funding has your Capital Defender Office requested and received each year since 2004?

- a. Who determines the amount of funding to request the Virginia General Assembly for the VIDC and each Capital Defender Office each budget cycle?

39. Does the Capital Defender Offices' budget support employment of staff investigators, mitigation specialists, and social workers for capital cases?

- a. Does it cover all incidentals (travel costs, copying, etc.) necessary to provide representation?
 - a. Are there ever out of pocket costs that Capital Defender attorneys are not reimbursed for?
- b. Does it cover any costs for other expert services (mental health, ballistic, etc) necessary to provide high quality legal representation?

40. Has your Capital Defender Office or the VIDC ever received any federal grant funding for capital defense litigation, services, training or other costs associated with the provision of capital defense services? (i.e., BJS funding initiatives) If yes, please list the grants received since 2004.

Compensation for Court-appointed Capital Counsel, Capital Defender Office attorneys & Non-attorney Members of the Defense Team

41. What is the salary for each of the four Capital Defenders?
42. What is the current salary range for an entry-level assistant capital defender?
- a. How do salaries for assistant capital defenders increase with experience, seniority, etc.? If there are applicable pay scales, please provide.
 - c. If possible, please provide the salary information for all capital defenders and assistant capital defenders, along with how long they have been employed as a capital defender in Virginia.
43. Is there a cap on the expenses a capital defender or assistant capital defender can incur during the capital representation (at any stage of the proceedings)?
44. What is the current salary scale for capital investigators at your Capital Defender Office? Please provide the scales for entry-level investigators, those with five years of experience, and those with ten or more years of experience.
- a. To your knowledge, are the investigators employed by the capital defender offices compensated according to a salary scale that is commensurate with the salary scale of investigators in the prosecutor's office in the jurisdiction?
 - b. To your knowledge are the investigators compensated according to a salary scale that is commensurate with the salary scale for comparable investigator services in the private sector?
45. What is the current salary scale for mitigation specialists at your Capital Defender Office? Please provide the scales for entry-level investigators, those with five years of experience, and those with ten or more years of experience.

- a. To your knowledge, are mitigation specialists and other experts employed by defender organizations compensated according to a salary scale that is commensurate with the salary scale for comparable expert services in the private sector?

46. If you know the compensation rates for prosecutors (any age stage of capital proceedings) and their investigators handling capital cases, or know how we could find this information, please let us know.

Court-appointed trial counsel

47. Does your office handle any payment for non-Capital Defender staff court-appointed capital defender attorneys?

48. Please describe the compensation scheme for court-appointed counsel at trial.

- a. What is the maximum fee that may be incurred by counsel at trial?
- b. Is there an hourly rate for court-appointed counsel? Please describe.
- c. Is the fee split by lead counsel and co-counsel?
- d. Who determines the amount of compensation for court-appointed counsel?
- e. Is there a distinction between rates for services performed in or out of court?
- f. Is periodic billing and payment available to court-appointed counsel?
- g. What is the source of the funding available for compensating court-appointed defense counsel?
- h. Is the compensation for court-appointed counsel commensurate with the prevailing rates for similar services performed by retained counsel throughout Virginia?

- i. Does the fee cover expenses incurred during the course of capital representation (such as experts, investigators, mitigation specialists, etc.)?
 - j. Is additional compensation provided in unusually protracted or extraordinary capital cases during trial for court-appointed counsel? Please be specific and provide rates and amounts for recent cases.
49. Please provide information on the compensation for court-appointed counsel prior to 2007. If you have information relevant to all stages of capital proceedings, please include.
- a. Please describe the pre-2007 compensation scheme.
 - b. If possible, please describe how compensation levels for court-appointed counsel have changed since 1976 (i.e., increases and/or decreases on total amount authorized for capital defense counsel).
50. Are court-appointed counsel fully reimbursed for reasonable incidental expenses at all stages of capital proceedings?

DEFENSE SERVICES TRAINING

51. What training do assistant capital defenders receive that qualifies as the “specialized training in capital litigation, plus at least four hours of specialized training” on forensic science that is required by the *qualification requirements* every two years?
- a. What issues and topics must be included in the training?
 - b. Does your office require any additional training outside of these ten required hours? If yes, please describe in detail.
 - c. Who provides this training?
52. Does your Capital Defender Office conduct, sponsor, or approve specialized training programs for attorneys representing defendants in death penalty cases?

53. What training is offered by the Capital Defender Office for new attorneys seeking eligibility for representation in capital cases?

a. Please tell us what specific trainings, including the issues covered, on capital defense representation have been provided in Virginia within the past five years.

b. Who conducts the in house training sessions?

54. Does your capital defender office employ attorneys or staff who conduct training for your office capital defense teams?

55. Does the training provided to capital defense counsel in order to qualify for capital certification by the VIDC and the training your office requires, if any, ensure that attorneys providing capital representation include:

d. Training on state law, federal, international law, both procedural and substantive law, related to capital cases?

e. Workshops and training associated with the drafting of litigation documents, legal research of capital cases and analysis of capital cases?

f. Oral advocacy workshops?

g. Training on pre-trial issues such as investigation, preparation, theory development, guilt/ innocence, and penalty issues?

h. Training on ethical issues particular to capital punishment?

i. Training on preserving the issues and record for appeal?

j. Training on the counsel's relationship with the client and his or her family members?

k. Training on the use of expert witnesses?

- l. Training on the use of forensic science (i.e., fingerprints, ballistics, Forensic Pathology, and DNA Evidence) that includes training on the presentation and rebuttal of scientific evidence and current developments in biological science, forensics and/or the mental health field?
 - m. Management and conduct training involved in the complex negotiations and litigation of capital trials?
 - n. The use of mitigation evidence, including investigating/recognizing it, preparing it, and presenting it?
 - o. Training on trial advocacy, including jury selection and *Batson* issues, cross-examination of witnesses, and opening and closing statements?
56. Do you feel that the office has the proper funding and resources to adequately train its capital defenders in all aspects of capital litigation?
- a. If not, what additional training would you like to see implemented?
57. Are capital defenders trained on the Colorado Method (aka Wymore Method) of jury selection in capital cases?

Training Related to Mental Retardation and Mental Illness

Please answer the following questions with respect to trial, appellate, and state habeas counsel, including capital defenders and/or court-appointed counsel.

58. Do your assistant capital defenders receive training:
- a. On the investigation, preparation, and presentation of mental retardation and mental illness (MR/MI)? If yes, what specific issues are addressed during MR/MI training?
 - b. On how to recognize MR/MI in capital defendants and/or in death row inmates?
 - i. If so, please describe in detail.
 - ii. If not, is at least **one member of the defense team** in capital cases trained to screen for the presence of mental or psychological disorders or impairments?

- c. Instruct counsel on how MR/MI might impact their client's ability to assist with the defense?
 - d. Instruct counsel on how MR/MI may impact the validity of confessions (where applicable)?
 - e. On the use and/or choice of mental health expert witnesses?
59. Are all staff capital defenders and court-appointed private counsel required to take this training?
60. Does the VIDC provide training on MR/MI issues for private defense attorneys?
61. Is there or do you know of any non-VIDC/outside training provided on MR/MI issues for any other criminal justice actors within Virginia? (e.g., provided by or for prosecutors, police, corrections officers, court employees, judges, etc.) If yes, please describe.

Funding for Training

62. What is the annual amount of VIDC's training, professional development, and/or continuing legal education budget for capital defenders and court-appointed counsel? Please include documentation, if available.
- a. Does the training budget distinguish between attorneys providing representation at **each stage of the proceedings**? (i.e., are there separate budgets for attorneys providing representation at trial, on direct appeal, and/or during state post-conviction proceedings)?
 - b. Do each of the Capital Defender Offices have their own budgets for training, professional development, and continuing legal education? If yes, please include.
 - c. Who or what entity determines the budget amount that is available for capital defense training and continuing education?
 - d. How are budget determinations made?

63. Does the VIDC fund any training for court-appointed counsel and/or capital defenders provided by Virginia entities?

64. Does VIDC provide funding for capital defenders and/or court-appointed counsel to attend (non-VIDC) national trainings? If so, what is the budget?

a. How often are court-appointed counsel and/or capital defenders able to attend national training sessions?

65. Would you consider the amount of funding adequate for the effective training, professional development, and continuing education of all members of the defense team?

Direct appeal, State Habeas Corpus, Federal Habeas Corpus, Clemency Proceedings

66. Under any circumstances, do capital trial attorneys from your office represent the defendant on direct appeal?

a. Who or what entity provides representation during the direct appeal to death row inmates in Virginia? Please list the attorneys, firms, and/or nonprofit organizations that you aware provide representation during this stage of capital proceedings.

67. Under any circumstances, do capital trial attorneys from your office represent the defendant during state habeas corpus proceedings?

a. Who or what entity provides representation during state habeas corpus proceedings to death row inmates in Virginia? Please list the attorneys, firms, and/or nonprofit organizations that you aware provide representation during this stage of capital proceedings.

b. Before the appellate defender closed two years ago, they took all cases throughout state on direct appeal?

68. Under any circumstances, do capital trial attorneys from your office represent the defendant during federal habeas corpus proceedings?

- a. Who or what entity provides representation during federal habeas corpus proceedings to death row inmates in Virginia? Please list the attorneys, firms, and/or nonprofit organizations that you aware provide representation during this stage of capital proceedings.
69. Please describe the level of interaction and what specific interactions you (defense counsel, mitigation specialists, investigators) have with capital attorneys working on later stages of a capital case.
 - a. What are your interactions with attorneys working on direct appeal?
 - b. What are your interactions with attorneys working on state habeas corpus proceedings?
 - c. What are your interactions with attorneys working on federal habeas corpus proceedings?
 - d. What are your interactions with attorneys working on clemency proceedings?
70. Who or what entity provides representation to death row inmates during clemency proceedings up to execution? Please list.
 - a. Is counsel guaranteed at this stage? Please include authority.
 - b. Are death row inmates' counsel providing representation during clemency petitions entitled to compensation and access to investigative and expert resources from the state?
 - i. Please describe the access to investigative and expert resources.
 - c. Are you aware of any cases of the defense counsel of death row inmates being permitted to meet with the Virginia Governor to discuss clemency?

Please list other persons that you believe we should get in touch with in order to get a full picture of capital defense services in Virginia.

Other issues on our Radar

Please note that we are developing questions relevant to other chapters of the report and will likely have some follow up questions. We appreciate your assistance.

71. Do judges ever override a jury's decision to impose death and instead impose LWOP (section 19.2-264.5)? If yes, please list and describe specific cases.
72. It appears there is no right to discovery of witness names or statements (Rule 3A:11). Please describe the effect this has on cases in your jurisdiction.
73. In your jurisdiction, have you ever had a case where the capital defendant was sentenced to death twice, once for the rape aggravator and the next for the murder? If yes, how often? Please provide case names and citations.
74. Do trial courts typically allow defense counsel to employ the Colorado Method (aka Wymore Method) during capital jury selection? In general, do you believe trial courts afford adequate time for jury selection in capital cases? Please elaborate if necessary.

If there are any other issues with Virginia's death penalty system you think we should be aware of, please let us know. Thanks for your assistance.