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Virginia's Capital Murder Sentencing Proceeding: A Defense Perspective

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VIRGINIA'S CAPITAL MURDER SENTENCING PROCEEDING: A DEFENSE PERSPECTIVE

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Capital murder trials present a unique challenge to defense counsel. Many capital defendants are demonstrably guilty of heinous crimes, and a single-minded defense concentrating solely on acquittal in the face of overwhelming evidence of guilt will often alienate the jury. The lawyer who focuses entirely on the guilt stage without attending to the sentencing stage[1] may be consigning his client to the electric chair. This article deals with the sentencing phase of a capital murder trial, where life imprisonment, the jury's only alternative to the death penalty,[2] represents a victory for the defense.

Guilt of a capital crime is not, by itself, legally sufficient to warrant the death penalty; the prosecution must also prove at least one aggravating circumstance, as defined by statute, beyond a reasonable doubt.[3] The defense may offer any arguably mitigating evidence[4] that raises a question about the propriety of a death sentence. The defendant is constitutionally entitled to introduce this mitigating evidence at the sentencing hearing despite the fact that such evidence would not be admissible under state evidentiary rules,[5] and despite the fact that it does not relate to any of the statutory mitigating circumstances.[6] On the other hand, the prose-

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1. VA. CODE ANN. § 19.2-264.3 (Repl. Vol. 1983) (the sentencing stage follows immediately upon a verdict of guilty of an offense punishable by death). Capital murder offenses are defined at VA. CODE ANN. § 18.2-31 (Repl. Vol. 1982 & Supp. 1983).

2. VA. CODE ANN. § 19.2-264.4 (Repl. Vol. 1983).

3. *Id. See also* Bullington v. Missouri, 451 U.S. 430 (1981); Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980).

4. *See* Lockett v. Ohio, 438 U.S. 586 (1978). *See also* Eddings v. Oklahoma, 455 U.S. 104 (1982); Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980).

5. Green v. Georgia, 442 U.S. 95 (1979) (vacating and remanding death sentence in murder trial where defendant was denied opportunity to put on hearsay evidence indicating that another was the triggerman).

6. Lockett v. Ohio, 438 U.S. 586 (1978).

cution's evidence in the penalty phase is limited to the aggravating circumstances enumerated by statute.[7]

The extraordinary burdens placed on the prosecution at the penalty phase are the direct result of the United States Supreme Court's view of the uniqueness of the death penalty. The Court has said that "death as a punishment is unique in its severity and irrevocability,"[8] and, thus, requires "a greater degree of reliability."[9] The procedure "must channel the sentencer's discretion by 'clear and objective standards' that provide 'specific and detailed guidance,' and that 'make rationally reviewable the process for imposing a sentence of death.' "[10] In short, the Court has stated, "[a] capital sentencing scheme must provide a 'meaningful basis' for distinguishing the few cases in which [the penalty] is imposed from the many cases in which it is not."[11]

Virginia's statutory scheme is patterned after the Georgia and Texas statutes upheld in *Gregg v. Georgia*[12] and *Jurek v. Texas*[13] and is designed to bridle the sentencer's discretion within constitutionally permissible bounds.[14]

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7. Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980). *See also* J. CARROLL, D. BALSKE, I. BURNIM, S. ELLMAN, M. DEES, JR., TRIAL OF THE PENALTY PHASE (1981) (published by The Southern Poverty Law Center) [hereinafter cited as TRIAL]. *But see* Zant v. Stephens, 103 S. Ct. 2733 (1983) (indicating that there is no constitutional right to restrict the factfinder to statutorily defined aggravating circumstances).

8. Gregg v. Georgia, 428 U.S. 153, 187 (1976).

9. Lockett v. Ohio, 438 U.S. 586, 604 (1978). *See also* Beck v. Alabama, 447 U.S. 625 (1980) (holding that the greater degree of reliability required is applicable to the guilt stage as well as the penalty stage).

10. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (footnotes omitted).

11. *Id.* at 427.

12. 428 U.S. 153 (1976).

13. 428 U.S. 262 (1976).

14. *See generally* Comment, Godfrey v. Georgia: *Possible Effects on Virginia's Death Penalty Law*, 15 U. RICH. L. REV. 951 (1981). The Virginia Supreme Court has upheld the constitutionality of Virginia's death penalty law many times. *See, e.g.*, Mason v. Commonwealth, 219 Va. 1091, 254 S.E.2d 116, *cert. denied*, 444 U.S. 919 (1979); Waye v. Commonwealth, 219 Va. 683, 251 S.E.2d 202 (1979); Smith v. Commonwealth, 219 Va. 455, 248 S.E.2d 135 (1978). However, constitutional attacks, both facially and as applied, will continue, often on narrow procedural grounds. For example, the California Supreme Court held that state's statutory vileness predicate to be unconstitutionally vague. People v. Superior Court of Santa Clara County, 31 Cal. 3d 797, 647 P.2d 76, 183 Cal. Rptr. 800 (1982).

I. THE AGGRAVATING CIRCUMSTANCES

The Virginia Code provides:

> The penalty of death shall not be imposed unless the Commonwealth shall prove 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, or 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.[15]

These aggravating circumstances divide conceptually into: (1) future dangerousness and (2) vileness. Justification of a death penalty verdict requires jury unanimity on at least one of these two aggravating circumstances.

Both the statutorily prescribed jury instruction and verdict form describe the two aggravating circumstances in the alternative.[16] How could one determine from such a verdict form whether the jury was unanimous on a finding? A jury so instructed could well split on one predicate or the other, while other jurors could find both. This problem was raised in *Quintana v. Commonwealth*,[17] but the majority sidestepped the issue finding "*affirmative ratification* of the verdict form by the defendant."[18] The dissent, written by Justice Poff, argued that such errors are not subject to waiver and that due process required commutation of the sentence.[19]

Both "future dangerousness" and "vileness" are terms of art, which have received judicial gloss that must be understood in order for counsel to properly assess a client's case.

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15. VA. CODE ANN. § 19.2-264.4(C) (Repl. Vol. 1983).

16. *Id.* § 19.2-264.4(D). *See also* VIRGINIA MODEL JURY INSTRUCTIONS I-435 (Supp. 4, 1983). *Cf. id.* I-437 (attempting to solve problem by having the jury "cross out any paragraph, word or phrase which you do not find beyond a reasonable doubt").

17. 224 Va. 127, 295 S.E.2d 643 (1982), *cert. denied*, 103 S. Ct. 1280, *reh'g denied*, 103 S. Ct. 2113 (1983).

18. *Id.* at 148 n.6, 295 S.E.2d at 653-54 n.6.

19. *Id.* at 152, 295 S.E.2d at 656-57.

A. *Future Dangerousness*

Future dangerousness apparently may be proven either by prior convictions of violent crime or by "circumstances surrounding the commission of the offense."[20] Both possibilities present problems.

The original sentencing statute referred to a defendant's "past criminal record" as a basis for establishing future dangerousness.[21] This was "designed to focus the fact-finder's attention on prior criminal conduct. . . . If the defendant has been previously convicted of 'criminal acts of violence,' i.e., serious crimes against the person committed by intentional acts of unprovoked violence, there is a reasonable 'probability' . . . that he would commit similar crimes in the future."[22] Subsequently, "prior history" was substituted for "past criminal record"[23] in section 19.2-264.4 of the Virginia Code, but a related section retained the phrase "past criminal record."[24]

Did the legislature intend to broaden the type of evidence that might show future dangerousness? If so, what beyond past convictions could be used to show one's past history for violence? Rumor, speculation and innuendo will remain inadmissible, leaving past convictions as the main prosecutorial tool to prove a defendant's past violent history. Due process concerns will prevent the introduction of unreliable evidence, but it is conceivable that some well-documented instances of past violent behavior not resulting in a conviction may be held admissible. For example, details of a prior violent crime, beyond the bare record of conviction, are admissible under the statute as amended.[25] Likewise, a defendant's admission to others of having committed serious violent crimes has been properly received under the party admissions exception to the hearsay rule.[26]

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20. VA. CODE ANN. § 19.2-264.4(C) (Repl. Vol. 1983).

21. See *id.* § 19.2-264.2 where the "past criminal record" language is retained. This does not render the statutory scheme unconstitutionally vague. LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 271 (1983).

22. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967 (1979).

23. VA. CODE ANN. § 19.2-264.4(C) (Repl. Vol. 1983).

24. *Id.* § 19.2-264.2.

25. Stamper v. Commonwealth, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980).

26. Quintana v. Commonwealth, 224 Va. 127, 295 S.E.2d 643 (1982) (defendant's statements concerning crimes committed while residing in Cuba made to fellow inmate following his arrest).

Despite this adverse precedent, counsel should argue that evidence of a defendant's "prior history" should be regarded as legally insufficient to support a finding of future dangerousness unless it includes a record of convictions for serious crimes against the person committed by intentional acts of unprovoked violence. In other words, the dangerousness circumstance should not be predicated solely on historical evidence which is of questionable reliability.

Counsel should emphasize that reliance on such historical evidence raises serious constitutional questions. For example, the Georgia Supreme Court has held that a trial court finding of an aggravating circumstance based on a murder "committed by a person who has a substantial history of [assault] convictions" was unconstitutionally vague.[27] Furthermore, the United States Supreme Court has repeatedly emphasized the need for reliability in the administration of the death sentence and precision in the definition and proof of aggravating circumstances. The Court has recently stated that "an aggravating circumstance must genuinely narrow the class of persons eligible for the death penalty" and that "statutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition [by] circumscrib[ing] the class of persons eligible for the death penalty."[28] Thus, in any case in which a death sentence is predicated upon a finding of future dangerousness, and in which this finding is not supported by evidence of a prior record of convictions for serious crimes against the person, the imposition of the death penalty is constitutionally suspect.

Circumstances surrounding the offense can likewise prove dangerousness, but something more is required other than the fact of the homicide itself. Some homicides by their nature indicate that they are a part of a series to follow. For example, a hired killer may kill one of two targets in a murder-for-hire contract before being caught. In one case, the slaying of a second person shortly after a capital murder was introduced along with defendant's prior criminal record and threats of future harm to others to prove future dangerousness.[29] In *Evans v. Commonwealth*,[30] evidence that the defendant came to Virginia in custody, ostensibly to testify,

27. Arnold v. State, 236 Ga. 534, ____, 224 S.E.2d 386, 392 (1976).
28. Zant v. Stephens, 103 S. Ct. 2733, 2742-43 (1983).
29. Giarratano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980).
30. 222 Va. 766, 284 S.E.2d 816 (1981), *cert. denied*, 455 U.S. 1038 (1982).

but actually with a plan to escape and to kill any person who attempted to prevent his escape, was admitted along with defendant's prior criminal record for violence to show future dangerousness.

How far can the prosecution go in raising surrounding circumstances as proof of future dangerousness where there is no prior history of violent behavior? Defense counsel should be prepared in such circumstances to argue that the evidence of a capital crime, without more, is insufficient proof, and that the jury should not be instructed on future dangerousness absent previous convictions for "serious crimes against the person committed by intentional acts of unprovoked violence."[31] The prosecution will, if the evidence permits, point to other violent acts or threats against others which are related to the underlying capital crime. The court must then determine whether these other acts are sufficiently related and are sufficiently predictive of future violence to be admissible.

B. *Vileness*

The vileness predicate focuses the fact-finder's attention on the circumstances of the offense, specifically on those aspects of the defendant's conduct which set the crime apart from the other premeditated homicides defined as capital offenses.[32] Standing alone, the language of the statute — "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 aggravated battery to the victim"[33] — is exceedingly vague and requires further definition. The United States Supreme Court conceded as much in 1976 when it considered a vagueness challenge to the Georgia statute from which this language is drawn, and stated that "[i]t is, of course, arguable that any murder involves depravity of mind or an aggravated battery. But this language need not be construed in this way, and there is no reason to assume that the Supreme Court of Georgia will adopt such an open-ended construction."[34] Although the Court upheld the Georgia statute on its face, the Court clearly contemplated that the Georgia Supreme Court

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31. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967 (1979).

32. *See* VA. CODE ANN. § 18.2-31 (Repl. Vol. 1982 & Supp. 1983).

33. *Id.* § 19.2-264.4(C) (Repl. Vol. 1983).

34. Gregg v. Georgia, 428 U.S. 153, 201 (1976) (plurality opinion), *reh'g denied*, 429 U.S. 875 (1976).

and the high courts of other states with similar aggravating circumstances statutes would adopt objectifying and clarifying definitions.[35]

The Virginia Supreme Court has not yet construed the element of torture in the vileness provision. The Florida Supreme Court, however, construed an analogous "cruelty" requirement to mean that the defendant's conduct "was designed to inflict a high degree of pain with utter indifference to, or even enjoyment of, the suffering [of the victim]."[36]

"Aggravated battery" has been defined by the Virginia Supreme Court as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder."[37] One wonders whether this language is sufficiently precise to provide adequate guidance to the finder of fact regarding the conduct required to distinguish aggravated battery from the injurious conduct inherent in any premeditated murder. In *Godfrey v. Georgia*,[38] the United States Supreme Court noted with apparent approval a Georgia Supreme Court decision which limited "aggravated battery" to serious physical injury to or dismemberment of the victim prior to the death-dealing blow.[39] However, the Virginia Supreme Court, noting that this was not the *ratio decidendi* of *Godfrey*, has left open the possibility that a post-murder battery could be admitted to prove "aggravated battery."[40] Whether such evidence will establish "aggravated battery" under Virginia law or under the constitutional rulings remains an open question.

"Depravity of mind" generates the most serious vagueness concerns. The phrase defies precise analysis. In fact, in 1977, the Georgia Supreme Court stated, that "the depravity of mind contemplated by the statute is that which results in torture or aggravated battery to the victim. . . ."[41] It thus appears that the Georgia

35. *Id.* at 198.

36. State v. Dixon, 283 So. 2d 1, 9 (Fla. 1973) *cert. denied*, 416 U.S. 943 (1974). The Arizona Supreme Court has adopted a similar construction. State v. Knapp, 114 Ariz. 531, 562 P.2d 704 (1977), *cert. denied*, 435 U.S. 908 (1978).

37. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert denied*, 441 U.S. 967 (1979).

38. 446 U.S. 420 (1980).

39. *Id.* at 431-32 & n.13.

40. Whitley v. Commonwealth, 223 Va. 66, 79, 286 S.E.2d 162, 169-70, *cert. denied*, 103 S. Ct. 181 (1982), *reh'g denied*, 103 S. Ct. 771 (1983).

41. Blake v. State, 239 Ga. 292, 299, 236 S.E.2d 637, 643, *cert. denied*, 434 U.S. 960 (1977).

court was sufficiently concerned about the vagueness of this concept to conclude that "depravity of mind" is not an independent ground for finding aggravating circumstances but is dependent upon proof of aggravated battery or torture. As the United States Supreme Court put it, the Georgia Supreme Court had concluded that "depravity of mind" comprehended "only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim."[42] It was this interpretation that gave rise to the problem presented to the United States Supreme Court in *Godfrey*. The defendant in *Godfrey* shot and instantly killed his mother-in-law and wife, and then informed police that he had "done a hideous crime [and that he had been] thinking about it for eight years [and would] do it again."[43] The defendant and his wife had been experiencing considerable marital discord, and the defendant had come to believe that his mother-in-law was responsible for his wife's decision not to reconcile the marriage. After Godfrey had been convicted of murder, the proceeding moved into the sentencing phase where the prosecution relied solely on the "vileness" provision to establish the predicate for the death penalty. The prosecution conceded that no torture had occurred, and argued instead that the case involved aggravated battery. The jury returned the death sentence and Godfrey appealed.

The Georgia Supreme Court upheld the death sentence;[44] however, the United States Supreme Court reversed on the ground that the Georgia Supreme Court had not consistently applied its previous law regarding the meaning of "vileness."[45] The Court noted that the evidence did not establish aggravated battery as that term previously had been construed by the Georgia Supreme Court because neither of Godfrey's victims suffered "any physical injury preceding their deaths."[46] Moreover, as was noted above, the Georgia Supreme Court had earlier stated that the phrase "depravity of mind" comprehended only the kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim.[47]

In *Godfrey*, the United States Supreme Court, reconciling Geor-

42. *Godfrey*, 446 U.S. at 431.
43. *Id.* at 425-26.
44. *Id.* at 420.
45. *Id.* at 428-29.
46. *Id.* at 432.
47. Blake v. State, 239 Ga. 292, 236 S.E.2d 637, *cert. denied*, 434 U.S. 960 (1977).

gia case law, held that under Georgia law "torture," "depravity of mind," and "aggravated battery" must be construed *in pari materia*.[48] The Court held that the Georgia Supreme Court and the trial court had decided the case incorrectly under Georgia law, and that the state court's failure to apply consistently its own law violated the eighth and fourteenth amendments to the United States Constitution. In announcing this substantive standard, the Court relied on the same cases which the Virginia Supreme Court relied on in construing the same terms.[49] However, the Virginia Supreme Court has held that "depravity of mind can exist independently of the presence of torture or aggravated battery and may alone support a finding of vileness as a basis for a sentence of death."[50] Since the Virginia Supreme Court did not define "depravity of mind," the scope of this aggravating circumstance remains vague.

The United States Supreme Court concluded in *Godfrey* that the defendant's "crimes [could not] be said to have reflected a consciousness materially more 'depraved' than that of any person guilty of murder."[51] This suggests that even if the term "depravity of mind" has independent content under state law, the Court will impose constitutional limitations on the meaning of the phrase. This issue has not yet been squarely posed in Virginia; the Virginia Supreme Court has thus far distinguished *Godfrey* either because torture or an aggravated battery has been involved or because the dangerousness predicate has established the basis for the death penalty.[52] Recent cases indicate that the Virginia Supreme Court will narrowly confine *Godfrey* to its facts;[53] however, this should not deter counsel from raising the issue where appropriate.

II. Mitigating Circumstances

The Virginia Code enumerates several "facts in mitigation" which may be asserted by a defendant:

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48. *Godfrey*, 446 U.S. at 430.

49. Smith v. Commonwealth, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967 (1979).

50. Bunch v. Commonwealth, 225 Va. 423, 442, 304 S.E.2d 271, 282 (1983).

51. *Godfrey*, 446 U.S. at 433.

52. *See, e.g.*, Whitley v. Commonwealth, 223 Va. 66, 286 S.E.2d 162, *cert. denied*, 103 S. Ct. 181 (1982), *reh'g denied*, 103 S. Ct. 771 (1983); Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981).

53. *See, e.g.*, Bunch v. Commonwealth, 225 Va. 423, 304 S.E.2d 271 (1983); Peterson v. Commonwealth, 225 Va. 289, 302 S.E.2d 520 (1983).

> Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense. Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, or (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, or (iii) the victim was a participant in the defendant's conduct or consented to the act, or (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, or (v) the age of the defendant at the time of the commission of the capital offense.[54]

Facts in mitigation are not limited to those mentioned in the statute, and the defense may introduce any arguably mitigating evidence.[55] This implies that the defendant is entitled to an instruction that lists any other possibly mitigating circumstances. For example, assume a case involved provocation that was insufficient to reduce the grade of the offense to manslaughter. Even though the statute does not mention it, the provocation could be viewed as a mitigating circumstance, and defense counsel should argue for a jury instruction including that point.[56]

The defendant may also be constitutionally entitled to introduce hearsay or other matters not permitted under state evidentiary rules.[57] However, not everything imaginable by counsel will be admitted. For example, evidence of the effect of defendant's incarceration on defendant's relatives is not admissible.[58] Likewise, evidence that codefendants received life imprisonment is inadmissible.[59]

The use of witnesses such as eyewitnesses to an execution or Christian ethicists — who testify to the cruelty, immorality or dis-

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54. VA. CODE ANN. § 19.2-264.4(B) (Repl. Vol. 1983).

55. Eddings v. Oklahoma, 455 U.S. 104 (1982); Lockett v. Ohio, 438 U.S. 586, 604 (1978).

56. See *infra* text accompanying notes 85-90 for the arguments for and against jury instructions on mitigating circumstances.

57. *See* Green v. Georgia, 442 U.S. 95 (1979) (vacating and remanding death sentence in murder trial where defendant was denied opportunity to put on hearsay evidence indicating that another was the triggerman).

58. Coppola v. Commonwealth, 220 Va. 243, 253, 257 S.E.2d 797, 804 (1979), *cert. denied*, 444 U.S. 1103 (1980).

59. *Id.* at 254, 257 S.E.2d at 804-05.

criminatory impact of the death penalty — has been controversial, with a split of authority among the courts that have confronted such issues.[60] The testimony of an ethicist or minister is more likely to be admissible if the witness meets with and counsels the defendant before trial.

III. Defense Tactics for the Penalty Stage

It is beyond the scope of this article to address all the possible defense tactics for the penalty stage of a capital murder case.[61] However, a few comments are in order.

A. *Proof of Aggravating Circumstances*

Since a death verdict cannot be justified without proof of at least one aggravating circumstance, it behooves counsel to determine what the prosecution will offer to establish the existence of such circumstances. The circumstances surrounding the crime will be generally known to counsel. Defendant's past criminal record is easily obtainable from most police or sheriff's departments upon proper authorization by the defendant. However, facts underlying the "vileness" predicate may not be immediately apparent; informal discovery through conversations with the prosecution and its witnesses may not suffice.

Unfortunately, in Virginia there is no statutory right to force disclosure of evidence relating to aggravating circumstances. However, the Supreme Court of Virginia has stated that "the preferred practice is to make known to [the defendant] before trial the evidence that is to be adduced at the penalty stage if he is found guilty."[62] Such circumstances are arguably a part of the charge reachable by a bill of particulars under rule 3A:8 of the Rules of the Supreme Court of Virginia. Also, one can argue that the lack of any aggravating circumstances is exculpatory (in the sense that it tends to lessen the degree of the offense) and, thus is discoverable by a *Brady* motion.[63]

Neither argument has succeeded in the one circuit court opinion

60. Trial, *supra* note 7.

61. For an excellent discussion of defense strategies in capital cases, see Balske, *New Strategies for the Defense of Capital Cases*, 13 Akron L. Rev. 331 (1979).

62. Peterson v. Commonwealth, 225 Va. 289, 298, 302 S.E.2d 520, 526 (1983).

63. Brady v. Maryland, 373 U.S. 83 (1963).

of which the author is aware.[64] Thus, although formal discovery may serve to educate opposing counsel, such discovery should be actively pursued where the facts suggest an absence of aggravating circumstances. In such a case, the motion is justified in order to educate the factfinder concerning the Commonwealth's burden to prove more than the *elements* of capital murder in order to condemn a man to death. Such a motion can provide an excellent springboard for discussion of *Godfrey* and its effect on Virginia jurisprudence.[65] Ultimately, defense counsel may persuade the court to deny or modify jury instructions and lay the basis for a later motion to strike the Commonwealth's evidence offered at the sentencing stage.

Counsel should attempt, on the record, to prevent jury instructions and any argument concerning aggravating circumstances for which there is no evidence. The defense should stress that the Commonwealth must prove each alleged aggravating circumstance and must cite cases which narrowly define each such circumstance. Counsel should argue that the jury would be misled by instructions on matters which do not come within the cited definitions, noting that a death verdict requires a greater degree of reliability than is required for other sentencing decisions.[66] Moreover, the defense should prepare instructions with favorable definitions of the aggravating circumstances. However, the giving of such instructions is discretionary; the court is not required under Virginia decisions to give any definitions of the aggravating circumstances to the jury,[67] although this practice is constitutionally questionable.

Occasionally, the state will charge capital murder in a case devoid of aggravating circumstances. This is possible because aggravating circumstances are not, strictly speaking, a part of the crime itself — they only become relevant at the sentencing phase after the elements of capital murder have been established. If unchallenged, this works to the prosecution's advantage in proving guilt. The ostensible death penalty case carries with it the concomitant

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64. Commonwealth v. Smith, No. 1179-1185 (Cir. Ct. Essex County Feb. 4, 1983) (Foster, J.). However, this opinion predates *Peterson* (*see* text accompanying note 2). Thus, the *Peterson* dicta should be argued if this issue arises.

65. *See* Comment, Godfrey v. Georgia: *Possible Effects on Virginia's Death Penalty Law*, 15 U. RICH. L. REV. 951 (1981).

66. *See* Beck v. Alabama, 447 U.S. 625 (1980); *Lockett v. Ohio*, 438 U.S. 586 (1978).

67. *See* Bunch v. Commonwealth, 225 Va. 423, 304 S.E.2d 271 (1983); Clark v. Commonwealth, 220 Va. 201, 257 S.E.2d 784 (1979), *cert. denied*, 444 U.S. 1049 (1980). *See also* Westbrook v. Zant, 704 F.2d 1477 (11th Cir. 1983).

right to cull the venire of jurors who are so opposed to the death penalty that they cannot abide by their oaths to consider the death penalty;[68] this yields a jury that is willing to find guilt and condemn a man to die.[69] Defense counsel should resist this by filing a pretrial motion to dismiss the capital charge or to prevent opposition to the death penalty from being a basis for jury qualification.[70] Counsel should argue that the advantage gained by death qualifying the jury panel where there is no possibility of a legitimate death verdict violates due process. This argument can also be used to bolster a motion for individual sequestered voir dire.[71] Such jury-probing can palliate the adverse effects of death qualifying the venire. While there is no guarantee of success, there is little to lose and much to gain.

Such motions may fail, yet they bring important collateral benefits in instructing the jury, in a possible later motion to strike the death penalty portion of the trial, or to overturn a death verdict. Furthermore, the record will be preserved for later attacks in the federal courts. Preparing the record for habeas corpus appeals is a legitimate and important part of counsel's task in death penalty

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68. Adams v. Texas, 448 U.S. 38, 43-45 (1980); Lockett v. Ohio, 438 U.S. 586, 596 (1978).

69. *See* Hovey v. Superior Court of Alameda City, 28 Cal. 3d 1, 616 P.2d 1301, 168 Cal. Rptr. 128 (1980) (citing studies with statistical data). *See also* Grigsby v. Mabry, 483 F. Supp. 1372 (E.D. Ark.), *aff'd in part, modified in part*, 637 F.2d 525 (8th Cir. 1980). The argument that death qualified juries—those culled of individuals who so vehemently oppose the death penalty that they would be unable to consider its imposition as a punishment—violate due process by being guilt prone was rejected in Virginia in Justus v. Commonwealth, 222 Va. 667, 283 S.E.2d 905 (1981) on the ground that use of statistics from other states is of little relevance in assessing Virginia juries and because, as is noted in *Hovey* concerning California, Virginia courts must exclude jurors prone to the death penalty. *See* Patterson v. Commonwealth, 222 Va. 653, 283 S.E.2d 212 (1981). This factor was not accounted for in the studies cited in *Hovey*. Recent, not-yet published studies show that such juries remain guilt-prone regardless of the exclusion of death penalty prone jurors. *See* J. Kadane, *After* Hovey: *Taking Account of the Automatic Death Penalty Jurors* (unpublished manuscript available from Dept. of Statistics, Carnegie-Mellon University). The National Association for the Advancement of Colored People Legal Defense Fund can assist counsel in locating the post-*Hovey* studies necessary to maintain the due process attack in light of *Justus*, and local psychologists may be available to meet the objection that the studies were conducted in states other than Virginia. It is important to continue to make a good record on this issue because it is doubtful that the Virginia Supreme Court will be the last word on the subject.

70. *See* Koblitz, Hertz, Amsterdam, The Witherspoon Manual 2d: Suggested Trial Strategies, Objections and Canned Briefs for Defense Attorneys in Capital Cases Where the Prosecution Undertakes to Death Qualify the Jury (Apr. 1979) (distributed by the NAACP Legal Defense Fund).

71. *Cf.* McConquodale v. Balkcom, 705 F.2d 1553 (11th Cir. 1983). *Contra* Turner v. Commonwealth, 221 Va. 513, 273 S.E.2d 36 (1980), *cert. denied*, 451 U.S. 1011 (1981).

cases.

The one thing that is certain in the event of a death sentence is that there will be an appeal, and that appeal may ultimately succeed on the basis of a ground that may have seemed, in the heat of trial battle, insignificant. It is extremely important that counsel preserve facial constitutionality claims at every possible stage, lest these issues be deemed to have been waived.[72]

B. *Developing a Case in Mitigation*

Counsel must do more than merely bring out the statutorily approved mitigating circumstances. Counsel should look for, and attempt to prove, anything that will dispose the jury toward life imprisonment. Finances permitting, consultations with a juristic psychologist can aid in discovering and honing arguments as well as in picking the jury.[73]

Many capital crimes trigger a defense inquiry into the defendant's sanity at the time of the offense or competency to stand trial. The use of psychiatrists, psychologists, and other mental health professionals for these purposes is familiar to most criminal defense practitioners. However, the use of such witnesses in the sentencing phase of capital cases differs from their use in the sentencing of other serious felonies.[74]

Capital defendants may introduce evidence of their extreme emotional disturbance or lack of capacity to control conduct as a mitigating circumstance,[75] even though such evidence would fall short of proving insanity.[76] This right would be rendered nugatory without a concomitant right to a professional evaluation by a forensic specialist who is willing to testify at sentencing. Thus, the capital murder sections should be read *in pari materia* with the general code sections providing for psychiatric evaluations in criminal cases.[77] This implied statutory right to a pretrial evaluation for capital sentencing purposes "should be viewed as essential to

72. An excellent checklist of possible motions and arguments may be found in *Motions for Capital Cases* (1981) (published by The Southern Poverty Law Center).

73. *See, e.g.*, Frederick, *Jury Behavior: A Psychologist Examines Jury Selection*, 5 OHIO N.U.L. REV. 571 (1978).

74. *See* Bonnie, *Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 VA. L. REV. 167 (1980).

75. VA. CODE ANN. § 19.2-264.4(B) (Repl. Vol. 1983).

76. Bonnie, *supra* note 74 at 182-85.

77. VA. CODE ANN. § 19.2-168 to -169.7 (Repl. Vol. 1983).

the effective assistance of counsel."[78]

Martin v. Commonwealth,[79] which held that an indigent has no constitutional right to a court appointed psychiatrist, predates the present sections governing proceedings on the question of insanity.[80] These sections clearly contemplate an independent forensic examination at the state's expense, with an attendant right, after notice of intention to present evidence of insanity, for the prosecution to seek a second opinion. One can argue that there is a constitutional right to a forensic evaluation to develop mitigating circumstances.[81] Defense counsel should argue vigorously for the right to an examination to explore the availability of mitigating evidence for the capital sentencing procedure, whether or not the defendant's legal sanity is at issue. This examination should be performed by a person "who is qualified by training and experience,"[82] that is, a specially-trained forensic scientist.[83] If the *Final Report of the Task Force on the Insanity Defense*[84] is adopted by the Virginia legislature, the implied rights outlined here will be made explicit.

Several pitfalls must be avoided in using this type of testimony. The present statute provides no guidance on the use of mitigating evidence. Defense counsel should proffer jury instructions listing and explaining any mitigating circumstances raised by the evidence and advising the jury that they need not impose the death penalty. But such instructions may be refused or modified by the court. As a result, one author has opined that "it is possible that a defendant's attempt to establish mitigating circumstances [by] introducing evidence of an emotional or personality disorder could actually increase the likelihood of a death sentence."[85]

The United States Supreme Court's emphasis on permitting evi-

78. Bonnie, *supra* note 74 at 186.

79. 221 Va. 436, 271 S.E.2d 123 (1980).

80. VA. CODE ANN. §§ 19.2-168 to -169.7 (Repl. Vol. 1983).

81. Westbrook v. Zant, 704 F.2d 1477, 1487 (11th Cir. 1983).

82. VA. CODE ANN. §§ 19.2-169.1(A), -169.5(A) (Repl. Vol. 1983).

83. Forensic training and certification is provided by contract to the Department of Mental Health and Mental Retardation by Blue Ridge Hospital at the Institute of Law, Psychiatry and Public Policy at the University of Virginia. *See* 2 DEVELOPMENTS IN MENTAL HEALTH LAW 16 (1982).

84. Final Report of the Task Force on the Insanity Defense (Nov. 30, 1982) (submitted to the Honorable Joseph L. Fisher, Secretary of Human Resorces, Commonwealth of Virginia).

85. JOINT COMMITTEE ON CONTINUING LEGAL EDUCATION, VA. ST. BAR & VA. BAR ASS'N, DEFENDING CRIMINAL CASES IN VIRGINIA 61 (1981).

dence of all arguably mitigating circumstances[86] strongly supports the right of the defendant to some form of explanatory instruction to the jury on any mitigating circumstances fairly presented by the evidence. The Virginia Supreme Court has hinted that instructions singling out mitigating circumstances may be improper.[87] However, circuit courts generally give an instruction enumerating aggravating circumstances as set forth in the statute.[88] Presumably, a carefully worded instruction tracking the mitigating circumstances set forth in the Code[89] would be permissible. Additionally, a strong constitutional argument can be made that "jury instructions must 'describe the nature and functions of mitigating circumstances' and 'communicate to the jury that the law recognizes the existence of facts or circumstances which, though not justifying or excusing the offense, may properly be considered in determining whether to impose the death sentence.' "[90]

Additionally, a well-trained forensic psychiatrist or psychologist will ordinarily be able to advise defendant's attorney on the best use of such testimony. While caution is advisable in using any expert consultant or witness, the failure to at least consider the use of forensic testimony at the sentencing phase may be tantamount to malpractice.

C. *Fifth and Sixth Amendment Concerns*

The prosecution may attempt to introduce psychiatric testimony based on interviews with the defendant to establish future dangerousness.[91] The ability of clinicians to predict future dangerousness is suspect, and "a strong case can be made . . . that the prosecution should not be permitted to offer clinical testimony on the defendant's dangerousness unless the defendant has already done so."[92]

The United States Supreme Court has held that such evidence does not violate the Constitution.[93] Defense counsel should attack

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86. *See, e.g.*, Eddings v. Oklahoma, 455 U.S. 104 (1982); Green v. Georgia, 442 U.S. 95 (1979); Lockett v. Ohio, 438 U.S. 586 (1978).

87. LeVasseur v. Commonwealth, 225 Va. 564, 304 S.E.2d 644 (1983).

88. VIRGINIA MODEL JURY INSTRUCTIONS I-439 (1983).

89. VA. CODE ANN. § 19.2-264.4(B) (Repl. Vol. 1983).

90. Westbrook v. Zant, 704 F.2d 1477, 1503 (11th Cir. 1983) (quoting Spivey v. Zant, 661 F.2d 464, 470 (5th Cir. 1981)).

91. Giarrantano v. Commonwealth, 220 Va. 1064, 266 S.E.2d 94 (1980).

92. Bonnie, *supra* note 74 at 176.

93. Barefoot v. Estelle, 103 S. Ct. 3383 (1983).

this type of evidence on state evidentiary grounds. The American Psychiatric Association (APA) views such evidence as unreliable. Scientifically unreliable evidence is not admissible in Virginia or elsewhere.[94] Thus, a sustained attack on the reliability of such evidence, using defense experts, reference to scholarly journals, the APA, and extensive voir dire of the prosecution expert, may result in excluding this type of evidence.

What are the limits on prosecutorial use of defendant's statements made to a psychiatrist or opinions derived from those statements? Defendant's privilege against self-incrimination and sixth amendment right to counsel are violated where the prosecution introduces psychiatric testimony at the penalty phase based on defendant's uncounseled pretrial statement to a court appointed psychiatrist.[95] Disclosure of statements made by the defendant during a competency or sanity evaluation is prohibited by statute "except on the issue of his mental condition at the time of the offense after he raises the issue pursuant to [s]ection 19.2-168."[96]

Capital sentencing evaluations for emotional disturbance or lack of capacity should be governed by the same principles. The Task Force on the Insanity Defense[97] has proposed clarifying legislation which would prevent disclosure to the prosecution of defendant's statements to the mental health evaluators appointed at defendant's behest to determine defendant's mental or emotional condition for capital sentencing purposes. Under this proposal, the prosecution will only be informed of the evaluator's conclusions; if defense counsel gives notice of an intent to use such testimony at sentencing, the prosecution will be permitted to seek a second evaluation. If the defendant refuses to cooperate, the court would be authorized to disclose such fact to the jury.

Defense counsel should be prepared to argue that the above is already the law under the present statutes. The right to the effective assistance of counsel at sentencing means little if defendant cannot obtain a confidential mental evaluation from a competent mental health professional to assist in the sentencing phase. Mitigating evidence of emotional disturbance can only be ferreted out effectively if procedures similar to those proposed by the Task

94. *E.g.*, Skinner v. Commonwealth, 212 Va. 260 (1971); *see also* Frye v. United States, 293 F. 1013 (D.C. Cir. 1923); McCormick, Evidence § 203, (3d ed. 1984).

95. Estelle v. Smith, 451 U.S. 454 (1981).

96. Va. Code Ann. § 19.2-169.7 (Repl. Vol. 1983).

97. *See supra* note 84.

Force are adopted.

D. *Should the Defendant be Executed?*

Humanize the defendant. Have his family present; let them testify. Bring out the reason, however horrible, for your client's actions; then put the reason into a proper perspective given your client's background. Attend to the defendant's appearance, and try to project a sincere concern for your client as a human being without condoning his actions. The more human you can make your client, the less likely a jury will be able to return a death verdict.

Counsel should be more conscious of the desirability of having the defendant take the witness stand than might ordinarily be the case. Obviously, no *per se* rule can be adopted that the defendant should always testify; however, the defendant may have little to lose at the sentencing stage. When all else fails, counsel should attack the propriety of any death penalty.[98]

Nonetheless counsel must anticipate the possibility of an adverse verdict. Many prosecutors only bring capital charges in the most egregious circumstances where they have the greatest possibility of success. Lesser cases tend to be plea bargained.

Do not give up hope in the face of an adverse verdict. Even if there is some evidence of aggravation, and the jury has returned a death verdict, all is not lost. Trial and appellate courts cannot review such a verdict under the traditional "error of law" criterion, but must independently evaluate the propriety of the sentence.[99] Arguments that aggravating circumstances have not been proven beyond a reasonable doubt, or are outweighed by mitigating circumstances, are germane and appropriate. However, counsel still must overcome the usual reluctance of judges to overturn a jury verdict.

IV. Conclusion

Anthony Amsterdam, who is perhaps the most proficient appellate capital murder defense advocate, speculates that "great lawyering at the right time would save virtually everybody who is going

98. Trial, supra note 7 (contains many arguments and ideas that can be adapted to virtually any case).

99. Va. Code Ann. § 17-110.1(C) (Repl. Vol. 1982), § 19.2-264.5 (Repl. Vol. 1983). *See also* Proffit v. Florida, 428 U.S. 242 (1976); Gregg v. Georgia, 428 U.S. 153 (1976).

to be executed."[100] The penalty stage is singularly difficult. Sentencing advocacy comes on the heels of an emotionally draining trial and guilty verdict. One can never adequately prepare oneself for an adverse verdict regardless of its likelihood on the facts. Fortunately, most lawyers can be effective.

This effective advocacy, however, demands preparation. The extreme preparation that is required in capital cases may well limit the number of death sentences imposed and will help defense counsel lay the groundwork for appeal.

100. Anderson, *An Eye for an Eye*, TIME, Jan. 24, 1983, at 39.