

11-1-2021

## Disrupting Death: How Specialized Capital Defenders Ground Virginia's Machinery of Death to a Halt

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### Recommended Citation

Corinna B. Lain & Douglas A. Ramseur, *Disrupting Death: How Specialized Capital Defenders Ground Virginia's Machinery of Death to a Halt*, 56 U. Rich. L. Rev. 183 (2021).

Available at: <https://scholarship.richmond.edu/lawreview/vol56/iss1/12>

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# ESSAY

## DISRUPTING DEATH: HOW SPECIALIZED CAPITAL DEFENDERS GROUND VIRGINIA'S MACHINERY OF DEATH TO A HALT

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Virginia's repeal of capital punishment in 2021 is arguably the most momentous abolitionist event since 1972, when the United States Supreme Court invalidated capital punishment statutes nationwide.<sup>1</sup> In part, Virginia's repeal is momentous because it marks the first time a Southern state abolished the death penalty.<sup>2</sup> In

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\* S.D. Roberts and Sandra Moore Professor of Law, University of Richmond School of Law. Special thanks to the *University of Richmond Law Review* for partnering with us on this piece and, in particular, Tesia Kempinski for her superb work in ushering this piece through the publication process. Thanks also to Alyssa Thompson for her excellent footnote and research work, and Eric Berger, Will Berry, Dale Brumfield, John Douglass, Matthew Engle, Brandon Garrett, Jim Gibson, Alex Klein, Michael Meltsner, Jake McMahon, Michael Radelet, Scott Sundby, and Jerry Zarkin for helpful comments on a prior draft. We intentionally use gender-neutral pronouns. This piece is dedicated to Michael Meltsner, whose LDF advocacy in *Furman v. Georgia* inspired me to write in this field and whose friendship makes me better.

\*\* Adjunct Professor of Law, University of Richmond School of Law, and owner of The Ram Law Firm, P.L.L.C., in Richmond, Virginia. For further introduction and a discussion of Doug Ramsey's experience as a capital litigator, see *infra* text accompanying note 27, text following *infra* note 363, and text accompanying *infra* note 436.

1. See *Furman v. Georgia*, 408 U.S. 238, 239–40 (1972) (invalidating the death penalty as it was then administered).

2. This point was not lost on the media's coverage of the repeal. See Hailey Fuchs, *Virginia Becomes First Southern State to Abolish the Death Penalty*, N.Y. TIMES (Mar. 24, 2021), <https://www.nytimes.com/2021/03/24/us/politics/virginia-deathpenalty.html> [<https://perma.cc/45X5-ZUG6>]; Amanda Golden & Geoff Bennett, *Virginia Becomes First Southern State to Abolish Death Penalty as Governor Signs Law*, NBC NEWS (Mar. 24, 2021, 5:28 PM), <https://www.nbcnews.com/politics/politics-news/virginia-becomes-first-southern-state-abolish-death-penalty-governor-signs-n1261974> [<https://perma.cc/8LYP-PB9A>]; Laura Vozzella & Gregory S. Schneider, *Lawmakers Vote to Make Virginia First Southern State to Abolish Death Penalty*, WASH. POST (Feb. 22, 2021, 2:50 PM), <https://www.washingtonpost.com/>

part, it is momentous because even among Southern states, Virginia was exceptional in its zeal for capital punishment. No state executed faster once a death sentence was handed down.<sup>3</sup> And no state was more successful in defending death sentences, allowing Virginia to convert death sentences into executions at a higher rate than any other state in the Union.<sup>4</sup> Sure, Texas holds the record for the most executions in the modern era of capital punishment.<sup>5</sup> But Virginia was next in line with the second most executions in the modern era, and it holds the record for the most executions in the history of the United States, *period*.<sup>6</sup> Granted, Virginia had been executing people for over 400 years,<sup>7</sup> so it had a head start. But that just makes its repeal of the death penalty all the more remarkable. How did Virginia go from all-in on the death penalty to abolition?

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local/virginia-politics/virginia-death-penalty-ban/2021/02/22/742eed3e-7146-11eb-93be-c10813e358a2\_story.html [https://perma.cc/JZY6-G3SV]; Elizabeth Weill-Greenberg, *Virginia Becomes the First Southern State to Abolish the Death Penalty*, THE APPEAL (Mar. 24, 2021), https://theappeal.org/politicalreport/virginia-death-penalty/ [https://perma.cc/Q98W-62FJ].

3. See King Salim Khalfani & Stephen A. Northup, *Virginia and the Death Penalty: A Disturbing Legacy*, AM. FORUM OP. ED. (Mar. 7, 2012), https://amforumbacklog.blogspot.com/2012/03/virginia-and-death-penalty-disturbing.html?m=1 [https://perma.cc/7JF8-24Y7] (“The average time between conviction and execution in Virginia is less than eight years, by far the shortest in the nation.”). For a more detailed discussion of the point, see *infra* text accompanying notes 234–35.

4. See James S. Liebman, Jeffrey Fagan & Valerie West, *A Broken System: Error Rates in Capital Cases, 1973–1995*, COLUM. L. SCH., PUB. L. RSCH. PAPER NO. 15, at 14, 47, 53, 57 (2000). For a more detailed discussion of the point, see *infra* text accompanying notes 232–33.

5. See DEATH PENALTY INFO. CTR., EXECUTIONS BY STATE AND REGION SINCE 1976, https://deathpenaltyinfo.org/executions/executions-overview/number-of-executions-by-state-and-region-since-1976 [https://perma.cc/F86M-DMTY]. As of 2021, Texas has conducted 572 executions in the modern era; Virginia has the next highest number with 113. The modern era of capital punishment began in 1976, after the nation’s Supreme Court-ordered hiatus from capital punishment from 1972–1976. For a discussion of the modern era, see *infra* text accompanying notes 87–100.

6. Virginia’s 113 modern era executions and 1277 early era executions bring its total number of executions to 1390, far more than any other state. See DEATH PENALTY INFO. CTR., EXECUTIONS BY STATE AND REGION SINCE 1976, *supra* note 5; *History of the Death Penalty*, DEATH PENALTY INFO. CTR. [hereinafter *History of the Death Penalty*], https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/virginia [https://perma.cc/Y6AU-7GED].

7. Virginia’s first execution was in 1608. For details, see text accompanying *infra* notes 41–42.

Most obviously, Virginia's governing coalitions aligned in favor of repeal. The governor introduced the repeal measure, and his party had a majority in both chambers of the Virginia General Assembly.<sup>8</sup> A few Republicans joined in but, by and large, the vote was along party lines.<sup>9</sup> Democrats controlled the state legislative process, and that was the tipping point for legislative repeal.

But the real story lies in developments long before the 2021 vote. Advocacy groups worked tirelessly on public information campaigns for decades, changing hearts and minds.<sup>10</sup> Family members of slain victims became outspoken voices against the death penalty.<sup>11</sup> Supreme Court decisions restricted the death penalty's use

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8. See *Virginia Legislators Poised to Attempt Death Penalty Repeal as Governor Sponsors Abolition Bill*, DEATH PENALTY INFO. CTR. (Jan. 15, 2021), <https://deathpenaltyinfo.org/news/virginia-legislators-poised-to-attempt-death-penalty-repeal-as-governor-sponsors-abolition-bill> [https://perma.cc/QM89-NSG5]; Dale Brumfield, *How Virginia's Death Penalty Finally Ended*, WASH. MONTHLY (May 7, 2021), <https://washingtonmonthly.com/people/dale-m-brumfield/> [https://perma.cc/WXH4-HY4R] (noting that Democrats controlled both chambers of the General Assembly for the first time since 1995).

9. Three Republicans in Virginia's House of Delegates voted for abolition; otherwise, the vote was entirely on party lines. See Madeline Carlisle, *Why It's So Significant Virginia Just Abolished the Death Penalty*, TIME (Mar. 24, 2021, 3:24 PM), <https://time.com/5937804/virginia-death-penalty-abolished/> [https://perma.cc/XKX6-5WA9].

10. Particularly prominent in this regard was the longstanding work of Virginians for Alternatives to the Death Penalty, Murder Victims' Families for Reconciliation, the Virginia Catholic Conference, and the Virginia ACLU. Dozens of individual activists likewise played leading roles, although we refrain from listing names here as any list would be incomplete. See Brumfield, *supra* note 8 (discussing coalition of advocacy groups against the death penalty and explaining "how a small group of activists helped turn the tide against capital punishment"); Michael Stone, *Virginia Abolishes the Death Penalty After 413 Years and 1,390 Executions*, VIRGINIANS FOR ALTS. TO DEATH PENALTY (2021), <https://www.vadp.org/virginia-abolishes-the-death-penalty-after-413-years-and-1390-executions/> [https://perma.cc/5GCL-G8QV] (noting lobbying work, information campaigns, and partnering with victims' family members, faith leaders, and civil rights advocates to end the death penalty in Virginia). For a discussion of the importance of the work that these advocacy groups did, see text accompanying *infra* note 515.

11. Whitney Evans, *Virginia Governor Signs Law Abolishing the Death Penalty, a 1st in the South*, NPR (Mar. 24, 2021, 2:50 PM), <https://www.npr.org/2021/03/24/971866086/virginia-governor-signs-law-abolishing-the-death-penalty-a-1st-in-the-south> [https://perma.cc/F8HN-9ZZQ] (noting that many victims' family members have taken a stand against the death penalty, saying that it actually makes healing more difficult, and quoting one such family member as saying, "There are many of us, and we have continually spoken out. This is not what we want"). For an excellent read, see generally TIM BUCKLEY & JANVIER SLICK, NOT IN OUR NAME: MURDER VICTIMS' FAMILIES SPEAK OUT AGAINST THE DEATH PENALTY (Oregonians for Alts. to Death Penalty eds., 2017). For an account of the abolition work in Virginia by Marie Deans, who founded Murder Victims' Families for Reconciliation after her mother-in-law was murdered, see generally TODD C. PEPPERS WITH MARGARET A. ANDERSON, A COURAGEOUS FOOL: MARIE DEANS AND HER STRUGGLE AGAINST THE DEATH PENALTY

over time,<sup>12</sup> and Virginia adopted the option of life without the possibility of parole.<sup>13</sup> Meanwhile, crime rates declined,<sup>14</sup> death-seeking prosecutors retired or lost elections,<sup>15</sup> and support for the death penalty in Virginia softened<sup>16</sup>—in part because high-profile death row exonerations shattered public confidence in capital convictions,<sup>17</sup> and in part because changing demographics shifted Virginia's party politics from reliably red to purplish blue, and that shifted the Commonwealth's death penalty politics, too.<sup>18</sup>

Then came 2020. Virginia's governor was fresh off the heels of a blackface scandal the year before, and criminal justice reform was his path to redemption.<sup>19</sup> The murder of George Floyd at the hands

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(2017).

12. See, e.g., *Atkins v. Virginia*, 536 U.S. 304, 321 (2002) (invalidating the death penalty for intellectually disabled offenders); *Roper v. Simmons*, 543 U.S. 551, 578–79 (2005) (invalidating the death penalty for juvenile offenders).

13. See VA. CODE ANN. § 18.2-31 (Repl. Vol. 2021).

14. The FBI's collection of data shows that the homicide rate in the United States has declined from 9 murders per 100,000 inhabitants in 1994 to 5 murders per 100,000 inhabitants in 2019. See FBI CRIME DATA EXPLORER, <https://crime-data-explorer.app.cloud.gov/pages/explorer/crime/crime-trend> [<https://perma.cc/JQM2-DC5Z>].

15. See Liliana Segura, *The Long Shadow of Virginia's Death Penalty*, INTERCEPT (Apr. 11, 2021, 8:20 AM), <https://theintercept.com/2021/04/11/virginia-death-penalty-abolition/> [<https://perma.cc/SK2Q-DVXC>] (discussing Virginia's election of numerous prosecutors who ran on promises of criminal justice reform, and the retirement of Paul Ebert, the elected prosecutor in one of the most death-sentencing counties in the nation). For a note on the progressive prosecutors who took their place, see *infra* text at notes 517–18.

16. A February 2021 poll conducted by Christopher Newport University found that fifty-six percent of registered voters in Virginia supported repeal of the death penalty. See *State of the Commonwealth*, CHRISTOPHER NEWPORT UNIV. WASON CTR. CIVIC LEADERSHIP (Feb. 2, 2021), <https://cnu.edu/wasoncenter/surveys/archive/2021-02-02.html> [<https://perma.cc/B9E4-RW8E>].

17. The exoneration of Virginia death row inmate Earl Washington is a prime example. For a discussion of the case, see *infra* notes 296–305. For a discussion of the effect of death row exonerations on public support for the death penalty more generally, see Corinna Barrett Lain, *Deciding Death*, 57 DUKE L.J. 1, 43–51 (2007).

18. A 2020 Gallup poll found that just 39% of Democrats support the death penalty, compared to 79% of Republicans. Support for the death penalty among both Democrats and Independents has dropped 7 to 8 percentage points since 2016, while support for the death penalty among Republicans has remained unchanged since 2016 and is only slightly lower than the 80% approval rating registered by Republicans between 2000 and 2010. See Jeffrey M. Jones, *U.S. Support for Death Penalty Holds Above Majority Level*, GALLUP (Nov. 19, 2020), <https://news.gallup.com/poll/325568/support-death-penalty-holds-above-majority-level.aspx> [<https://perma.cc/W5SU-SDLU>]. For data on Virginia's voting history since 1976 and, specifically, its shift from voting reliably Republican in national elections to voting reliably Democrat, see *Virginia*, 270 TO WIN, <https://www.270towin.com/states/virginia> [<https://perma.cc/ZLJ3-GKUQ>].

19. In a 2021 interview, Governor Northam made the point explicitly. See Astead W.

of police added a sense of urgency to proposals already gaining momentum, creating a consensus for criminal justice reform almost overnight.<sup>20</sup> Even backlash to the Trump Administration's unseemly rush to execute in the waning days of his presidency may have played a role.<sup>21</sup> The more developments we name, the more we fear we have missed something along the way. Plenty of forces deserve plenty of credit. As the saying goes, it takes a village.<sup>22</sup>

Our focus is but one part of this larger story—the part that specialized capital defender offices played in ending Virginia's death penalty. A critical consideration in the abolition calculus was the fact that Virginia had not seen a new death sentence in ten years and had only two people left on death row.<sup>23</sup> The death penalty was dying on the vine, and that was in large part due to Virginia's specialized capital defenders, who literally worked themselves out of a job by litigating the death penalty to death. In a myriad of ways, these lawyers fundamentally changed the landscape of capital defense, gumming up the works of Virginia's well-oiled “machinery of

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Herndon, *Black Virginians Took Ralph Northam Back. Neither Has Forgotten*, N.Y. TIMES (June 14, 2021), <https://www.nytimes.com/2021/06/14/us/politics/ralph-northam-virginia.html?action=click&module=RelatedLinks&pgtype=Article> [https://perma.cc/P5DP-GPJT]. See also Segura, *supra* note 15 (“It didn’t hurt that the governor himself had something to prove when it came to his commitment to racial justice. Northam faced calls to resign in 2019 after a photo emerged from an old yearbook that appeared to show him in blackface.”).

20. See Evans, *supra* note 11 (discussing the impact of the murder of George Floyd on interest in criminal justice reform).

21. See Carlisle, *supra* note 9 (noting that the Trump Administration's execution spree of thirteen death row inmates in the last seven months of his presidency helped to create the “perfect storm” for support for repeal); Weill-Greenberg, *supra* note 2 (noting that the Trump Administration's spate of executions, which broke a de facto moratorium that had existed for seventeen years, showed that moratoriums are insufficient).

22. See *It Takes a Village To Change the World*, ADDITIVE AGENCY (Dec. 18, 2015), <https://theadditiveagency.com/it-takes-a-village-to-change-the-world/> [https://perma.cc/U5YT-CR4M] (“Many of us are familiar with the African proverb, ‘it takes a village to raise a child.’ The truth is, it ‘takes a village’ to achieve just about any meaningful change in our world.”). We return to this point in *infra* text preceding note 515.

23. The last death sentence handed down in Virginia was in 2011, and it was reversed on appeal. The defendant, Mark Lawlor, ultimately received a life sentence, leaving just two people on death row. For the story, see Tom Jackman, *Va. Man Sentenced to Death in 2011 Gets New Hearing, and New Prosecutor Agrees to Life Sentence*, WASH. POST (Mar. 12, 2020), <https://www.washingtonpost.com/crime-law/2020/03/12/va-man-sentenced-death-2011-gets-new-hearing-new-prosecutor-agrees-life-sentence/> [https://perma.cc/U49Q-BTW2]. For a discussion of the ruling that overturned his death sentence, see *infra* notes 120–24 and accompanying text.

death”<sup>24</sup> and grinding death sentences to a halt. They disrupted death.

We are not the first to recognize the role of Virginia’s specialized capital defenders in the decline of capital punishment in the Commonwealth. Professor Brandon Garrett’s work in 2017 compared transcripts of capital trials before and after Virginia’s newly formed capital defender offices started taking cases in 2004, documenting differences in the length of the sentencing phase of those cases and stark differences in the sentencing outcomes.<sup>25</sup> And Garrett’s excellent work followed excellent work from a colleague of ours in 2015. Examining capital murder indictments, Professor John Douglass documented a sharp decline in post-2004 cases going to trial, showing that after the capital defender offices started taking cases, the vast majority of capital charges were resolved by plea-bargaining instead.<sup>26</sup>

We view these data points as two sides of the same coin. One study showed the difference that specialized capital defenders were making at trial, while the other showed how specialized capital defenders were making a difference in whether those cases went to trial in the first place. The two impacts were not unrelated, but how were they happening? What is the story behind the stories that these studies tell?

That’s where we come in. One of us is a former capital defender with “boots on the ground” experience as to what was happening in the trenches and how those developments made a difference.<sup>27</sup>

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24. See *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (“I no longer shall tinker with the machinery of death.”).

25. See Brandon L. Garrett, *The Decline of the Virginia (and American) Death Penalty*, 105 GEO. L.J. 661 (2017).

26. See John G. Douglass, *Death as a Bargaining Chip: Plea Bargaining and the Future of Virginia’s Death Penalty*, 49 U. RICH. L. REV. 873, 873–74 (2015).

27. In addition to being an adjunct law professor, Doug Ramseur is founder of The Ram Law Firm, P.L.L.C., in Richmond, Virginia. He has practiced law for twenty-five years, eighteen of which he has spent specializing in capital defense, mostly in Virginia but also in Georgia and federal courts around the country. Doug has served as lead counsel for more than thirty people facing a death sentence without a single client being executed. In 2019, he was awarded the Bill Geimer Award by the Capital Case Clearinghouse at Washington and Lee University School of Law for his dedication and commitment to the defense of capital cases. Doug is also faculty with the National Capital Voir Dire Training Program, see *infra* note 436 and accompanying text. For a discussion of his work as a regional capital

One of us is a law professor who has written on the death penalty for over a decade.<sup>28</sup> Together, we tell the story behind the story—what the transcripts and plea deals don't show. This is the inside story as we know it, and we share it here both to better understand Virginia's journey and to serve as a resource for others still navigating theirs.

Before proceeding, a few points of clarification merit mention. First, our claim is not that Virginia's capital defender offices were solely, or even mostly, responsible for the repeal of the death penalty in the Commonwealth. As discussed above, a number of factors were clearly in play, and, as discussed below, even the drop in death sentencing can hardly be attributed *solely* to the capital defenders.<sup>29</sup> Other actors played a part as well.

Second, our discussion of how Virginia's capital defender offices made a difference is not to suggest that court-appointed counsel in capital cases was not superb, because it was—at times. This, too, is a point we discuss more fully below,<sup>30</sup> but here we simply note that both before the advent of specialized capital defender offices and after, other attorneys were also defending capital cases, and a number of them could easily be counted as among the best capital defenders in the Commonwealth.<sup>31</sup>

Third, although our focus is on the change that came with the advent of capital defender offices in Virginia, we pause to recognize that this change was related to another that came before it. Long

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defender, see *infra* text following note 362. For a note from Doug about his role in this project, see *infra* note 363 and accompanying text.

28. See, e.g., Lain, *supra* note 17; Corinna Barrett Lain, Furman *Fundamentals*, 82 WASH. L. REV. 1 (2007); Corinna Barrett Lain, *Lessons Learned from the Evolution of "Evolving Standards,"* 4 CHARLESTON L. REV. 661 (2010); James Gibson & Corinna Barrett Lain, *Death Penalty Drugs and the International Moral Marketplace*, 103 GEO. L. J. 1215 (2015); Corinna Barrett Lain, *The Politics of Botched Executions*, 49 U. RICH. L. REV. 825 (2015); Corinna Barrett Lain, *Madison and the Mentally Ill: The Death Penalty for the Weak, Not the Worst*, 31 REGENT U. L. REV. 209 (2019); Corinna Barrett Lain, *Three Observations about the Worst of the Worst, Virginia-Style*, 77 WASH. & LEE L. REV. ONLINE 469 (2021) [hereinafter Lain, *Three Observations about the Worst of the Worst, Virginia Style*].

29. See *supra* notes 8–21 and accompanying text (discussing numerous factors); *infra* section III.A (recognizing the role of other factors that almost certainly had an impact on the drop in death sentencing).

30. See *infra* notes 280–88 and accompanying text.

31. Here again, we refrain from listing names, lest we inadvertently leave someone off the list.



before the capital defender offices were a twinkle in Virginia's legislative eye, the Virginia Capital Case Clearinghouse ("VC3"), housed at Washington and Lee University School of Law, provided high-end support for aggressive capital representation by court-appointed lawyers.<sup>32</sup> It provided consultations, trainings, and comprehensive litigation guides, and it published the *Capital Defense Journal*, providing a wealth of research on capital defense-related issues.<sup>33</sup> To the extent we can pinpoint the origin of high-quality capital defense in Virginia, it is here with VC3.<sup>34</sup> Indeed, when the capital defender offices started taking cases in 2004, VC3 supported them, too. "Those offices had a lot to learn, too. They were new to this," said David Bruck, who directed VC3 after its founder, Bill Geimer, retired.<sup>35</sup> All this is to say that although our focus is on the difference that specialized capital defender offices made, we recognize that they stood on the shoulders of giants.

Fourth and finally, we would be remiss without recognizing the other giant in Virginia capital defense: the Virginia Capital Representation Resource Center ("VCRRC").<sup>36</sup> The VCRRC provided post-conviction representation that tied capital cases in knots for years, obtaining reversals and retrials under notoriously unfavorable appellate review conditions.<sup>37</sup> Its work was what created the

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32. The VC3 was established in the 1987–88 academic year, and remained open until 2021, when it disbanded—"a victim of its own success in many ways." Jeff Hanna, *Farewell to the VC3* (Aug. 23, 2021), <https://columns.wlu.edu/farewell-to-the-vc3/> [https://perma.cc/F3QB-AWTA]. For the VC3 website, see <https://www.vc3.org/about/> [https://perma.cc/N6QV-J2NS].

33. Indeed, we cite to the *Capital Defense Journal* on numerous occasions in the pages that follow. See generally *Capital Defense Journal*, WASH. & LEE, <https://scholarlycommons.law.wlu.edu/wlucdj/> [https://perma.cc/4YRC-KMA3]. For a particularly prescient article arguing for the creation of a specialized capital defender unit, see 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 (2001).

34. See Hanna, *supra* note 32 (quoting David Bruck as explaining, "For the most part, it was amateur hour on the defense side in case after case . . . In the years before I got there, I think VC3 helped establish what you could call a standard of care for capital defense in Virginia that hadn't been there").

35. *Id.*

36. For a history of the VCRRC, which was initially established as a federal death penalty resource center in 1992 and is the only former federal resource center in the country to keep its doors open after the elimination of federal funding, see *History of the Virginia Resource Center*, VA. CAPITAL REPRESENTATION RESOURCE CTR., <https://vccrc.org/history>.

37. For a discussion of Virginia's appellate review in the capital context, see *infra* Part I.B.3.

risk of reversal on appeal that capital defenders used as leverage to take death off the table at trial.<sup>38</sup> Moreover, to the extent that capital defenders had favorable law to lean on in capital trials, it was often the work of the VCRRC that created it. Here again, all this is to say that while our story focuses on the difference that the capital defender offices made, we recognize that those offices did not make a difference alone. Their work was in tandem with other capital defense representation targeting other parts of the machinery of death. It did not exist in a vacuum.

This brings us more pointedly to what *is* our focus—explaining the dynamics that were driving the difference that specialized capital defender offices made. We know empirically that the advent of capital defender offices made a difference in Virginia, both in the percentage of capital cases that went to trial and what happened once they were there.<sup>39</sup> We also know empirically that the same impact has occurred elsewhere—states that created capital defender offices experienced faster declines in death sentencing than states that didn't, controlling for a range of other factors.<sup>40</sup> In short, what happened in Virginia was not unrepresentative. But *why* did it happen? That is the story we tell, some of which is intuitive but most of which is not, with much going in the category of unintended consequences.

To set the stage, we start with what capital defenders were up against: Virginia's longstanding commitment to capital punishment. Part I begins with a brief account of the early era of capital punishment in Virginia, then turns to the death penalty in the modern era, explaining how Virginia's capital punishment system worked. We do this not only to show what an incredible feat Virginia's repeal was, but also to create a record for posterity—to preserve an account of what the most lethal death penalty in the country looked like and how it actually operated.

Part II marks a turn, both in our analysis and in Virginia's machinery of death. We start with the concerns that precipitated Virginia's creation of four regional capital defender offices in 2002. We

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38. See *infra* notes 460–62 and accompanying text.

39. See *supra* notes 25–26 and accompanying text.

40. See Ankur Desai & Brandon L. Garrett, *The State of the Death Penalty*, 94 NOTRE DAME L. REV. 1255 (2019).

then turn to the difference that having capital defender offices made in the trial, pretrial, and (most importantly) plea-bargaining context. Readers also will find a shout-out to the talented and hard-working mitigation specialists and investigators who were part of the capital defender offices here.

Part III concludes with the qualifications and implications of our analysis. We first qualify our account by circling around to other players who made a difference in the trenches of capital litigation. We then pause to reflect on what we see as the takeaways of our analysis. The full account of Virginia's repeal of capital punishment is much larger than the piece we provide here, but the story of how specialized capital defenders ground the most well-oiled machinery of death in the country to a halt is a story that deserves to be told. We now turn to telling it.

## I. VIRGINIA'S LONG LOVE AFFAIR WITH DEATH

Virginia is for lovers, and we begin our journey by recounting Virginia's longstanding love affair with death. Our discussion starts in section A with a brief account of the early era of the death penalty in Virginia, from its colonial start to its status on the eve of the modern death penalty era. We continue in section B with a discussion of the structure and workings of Virginia's capital punishment scheme in the modern era. In section C, we step back to provide a big picture view of the challenging context in which capital defenders were operating, presenting data points that attest to Virginia's unwavering commitment to death. As we will see, there is a reason why Virginia was notoriously prolific in getting death sentences, and notoriously efficient in carrying them out: every aspect of its statutory scheme was unambiguously skewed towards death.

### A. *The Early Years*

Established in 1607, Virginia was the first (and, for a time, only) colony in North America, and it wasted no time getting to what would be the first execution in the New World, which came the

following year in 1608.<sup>41</sup> (For trivia buffs, the condemned was Captain George Kendall, an alleged Spanish spy who was shot rather than hanged, a mercy reserved for those with rank or status).<sup>42</sup> For the early colonists, the death penalty was a way of life—in part because it was what they knew from England, in part because they had no way to imprison serious offenders, and in part because abiding by society’s rules was viewed as necessary for their survival.<sup>43</sup> In a world where survival was already hanging by a thread, rule-breaking was more than an indiscretion. It was an existential threat.

So it came to be that the colonists brought with them all of England’s capital crimes, and then added a number of their own. Virginia’s earliest criminal code—the aptly named *Laws Divine, Moral and Martial*—was devised sometime around 1609 and listed fifty-four capital offenses, many of which made little sense without an appreciation for just how precarious a position the colonists were in at the time.<sup>44</sup> Boat-stealing was a capital offense because it would have left the colonists stranded.<sup>45</sup> Hog-stealing was a capital offense because hogs were, well, hogs and could provide sustenance for a population on the brink of starvation.<sup>46</sup> Pocket-picking, price-gouging, buoy-sinking, and returning-from-banishment were

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41. *History of the Death Penalty*, *supra* note 6.

42. *See id.* For the story, see Natasha Frost, *Was the Colonies’ First Death Penalty Handed to a Mutineer or Spy?* HIST. (Aug. 24, 2018), <https://www.history.com/news/death-penalty-jamestown-virginia-colony> [<https://perma.cc/6QHM-WRNB>]. Apparently, Kendall’s high rank spared him from death by hanging. *Id.* *See also* 1610: HENRY PAINE: SHIP-WRECKED MUTINEER, <https://www.executedtoday.com/tag/jamestown/> (quoting contemporary account of Henry Paine’s execution in 1610, noting that Paine had been condemned to be “instantly hanged” but “he earnestly desired, being a gentleman, that he might be shot to death” instead).

43. *See* STUART BANNER, *THE DEATH PENALTY: AN AMERICAN HISTORY* 7–8 (2002) (discussing the death penalty in early colonial Virginia).

44. *See* Richard A. Rutyna, *The Capital Laws of Virginia: An Historical Sketch* 2–3 (1973), <https://rga.lis.virginia.gov/Published/1973/RD1/PDF> [<https://perma.cc/7YB7-UXCE>] (discussing code and noting, “[I]ncluded among these [provisions] were a number of offenses which a modern reader—not understanding just how desperate and precarious the situation in the colony was at the time—would regard as much too trivial to warrant the death penalty.”).

45. *See id.* at 8.

46. *See id.* at 13 (noting, in addition, that “[t]he hog only was ‘something of an institution’ in colonial Virginia, and as such was the subject of special, protective legislation”).

also illustrative of the offenses deemed death-worthy in colonial Virginia.<sup>47</sup>

Then there were the religious offenses, which tended to be more forgiving. Crimes in this category included taking God's name in vain, breaking the Sabbath, failing to attend divine services, and speaking against the Holy Trinity, the Bible, or "known Articles of the Christian Faith."<sup>48</sup> While some of these offenses called for death on the first violation, others were considered capital only upon the second or even third offense.<sup>49</sup> Religion and authority were intertwined in the colonial period, and an affront to one was considered an affront to the other. Neither could be tolerated.

By the late 1690s, capital offenses had begun to reflect the existence of slavery in the Commonwealth, and as the enslaved population in Virginia grew, so did its slave-specific capital offenses.<sup>50</sup> By 1750, enslaved people comprised nearly *half* the population of Virginia.<sup>51</sup> With that demographic, it is hard to overestimate the role of Virginia's death penalty as a tool of racial control. Enslaved people were already captive, already doing forced labor, and already subjected to a baseline of abject cruelty.<sup>52</sup> Their lives were one of the few things they had left. Typical of the offenses in this category was Virginia's 1748 law making it a capital crime for enslaved people to prepare or administer medicine without the taker's consent,

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47. *See id.* at 22–23, 25. Interestingly, Virginia's capital crimes resulted in relatively few executions in the 1600s, suggesting that they may have had more bark than bite. For a list of executions in Virginia and other colonies in the 1600s, see DEATH PENALTY INFO. CTR., EXECUTIONS IN THE U.S. 1608-2002: THE ESPY FILE, <https://files.deathpenaltyinfo.org/legacy/documents/ESPYyear.pdf> [<https://perma.cc/PZ7J-28Q9>] (listing just seven executions in Virginia between 1608 and 1658).

48. *See id.* at 10, 24–26.

49. *See id.*

50. *See id.* at 29–30 ("With respect to slaves, it should be noted that by the 1690s a dual legal system—which would be expanded and elaborated further—had clearly begun to emerge in Virginia.")

51. *See* BANNER, *supra* note 43, at 8.

52. *See id.* at 9. For an excellent discussion of how slave executions acclimated Southern Whites to the brutality of the death penalty, preventing the abolitionist conversations and movement taking hold in the North from getting even a toe hold in the South, see *id.* at 142–43. For a famous account of the death penalty in response to Nat Turner's slave rebellion in the 1830s, see generally Alfred L. Brophy, *The Nat Turner Trials*, 91 N.C. L. REV. 1817 (2013).

an obvious reflection of the fear that servants might try to poison their masters.<sup>53</sup>

Even after the revolution of 1776, when Virginia celebrated its newfound independence with a full-scale revision of its criminal code that limited the death penalty to murder, the reform was explicitly reserved for crimes committed by non-enslaved people.<sup>54</sup> Virginia's slave codes remained. "Conceptions of appropriate punishment were changing," historian Stuart Banner writes, "but in the South they changed only so far. The problem of managing large numbers of captives—in Virginia, nearly half the population—prevented further reform."<sup>55</sup>

By the mid-1850s, Virginia had a long list of slave-specific capital crimes—sixty-six by one count<sup>56</sup>—and one of them was a catch-all provision that authorized the death penalty for any offense that would carry a sentence of three years or more when committed by a free person.<sup>57</sup> Virginia did not hesitate to put these provisions to use. In the antebellum period from 1790 to 1865, Virginia executed more than 730 slaves—just over eighty-five percent of all slave executions in the country during that time.<sup>58</sup>

By the mid-1850s, Virginia's criminal code also accounted for the prospect of "free Blacks." For example, it made rape a capital crime

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53. See Rutyna, *supra* note 44, at 30 (discussing offense); BANNER, *supra* note 43, at 9 (also discussing offense).

54. The revision work began in 1776 and was led by Thomas Jefferson, but when it was finally ready for consideration in 1785, Jefferson was traveling abroad and unable to usher it through. The reform measure ultimately passed in 1796. For a more detailed discussion, see BANNER, *supra* note 43, at 95–96; Rutyna, *supra* note 44, at 31, 33. Within ten years of the reform measure's passage, treason and arson were re-added to the list of Virginia's capital offenses. See Rutyna, *supra* note 44, at 33.

55. BANNER, *supra* note 43, at 99.

56. See *id.* at 141.

57. See *id.* at 112–13.

58. See Brumfield, *supra* note 8. Records show that a number of these executions included juveniles, including a slave named Rebecca, who was eleven or twelve when she executed in 1825. See *id.* As Stuart Banner notes, these numbers do not fully communicate the extent to which the death penalty was used to control enslaved people, in part because the official count does not include the number of condemned slaves that were sold abroad, largely because owners of executed slaves were entitled to compensation from the government upon execution. Nearly 900 condemned slaves were transported out of Virginia between 1801–1858. See BANNER, *supra* note 43, at 142.

when committed by a free Black against a White.<sup>59</sup> Free Blacks were viewed as especially dangerous in states with bulging slave populations like Virginia, and Virginia used the death penalty to try to control them, too.

Then came the Civil War. On the backside, Virginia no longer had slaves, but it had a massive former-slave population that, for Southern Whites, posed a threat of its own. Virginia quickly began restoring the death penalty for crimes like burglary, armed robbery, rape, and attempted rape.<sup>60</sup> This time, however, it added a provision making the death penalty discretionary, which meant that all-White juries and judges could decide who would receive it.<sup>61</sup>

The numbers speak for themselves. From 1908 (when Virginia centralized its executions, as well as its record-keeping system tracking them)<sup>62</sup> to 1972 (the end of the early era of capital punishment), forty-one of the forty-one people executed for rape were Black; fourteen of the fourteen people executed for attempted rape were Black; and five of the five people executed for armed robbery were Black.<sup>63</sup> Apparently, no one was executed for burglary during this time (at least not officially), but if there had been executions for burglary, everything we know suggests that the people executed would have been Black.

Murder was a different story, but only slightly. Of the 176 people executed for murder in Virginia during this time, 34 (20%) were

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59. See K.M.M. & A.J.S., *Capital Punishment in Virginia*, 58 VA. L. REV. 97, 103–04 (1972) (discussing VA. CODE ch. 200, §§ 1, 4, vol. II at 753 (1849)).

60. See Rutyna, *supra* note 44, at 33.

61. See K.M.M. & A.J.S., *supra* note 59, at 106.

62. See *id.* at 112 (discussing why most reliable data begins in 1908). For an excellent account of Virginia's 1908 switch from local executions by hanging to centralized executions by the electric chair, driven both by progressive reformers searching for a more humane execution method and segregationists, who wanted to prevent the Black community from congregating to celebrate the condemned as martyrs, see DALE M. BRUMFIELD, *RAILROADED: THE TRUE STORIES OF THE FIRST 100 PEOPLE EXECUTED IN VIRGINIA'S ELECTRIC CHAIR* (2020).

63. See K.M.M. & A.J.S., *supra* note 59, at 142 (providing table of executions by race for all capital offenses since 1908). These figures are a conservative estimate. See *History of the Death Penalty*, *supra* note 6 (noting that forty-eight of the forty-eight people executed in Virginia for rape were Black, twenty of the twenty people executed for attempted rape were Black, and all five of the five people executed for armed robbery were Black).

White, and 142 (80%) were Black.<sup>64</sup> Murder was a crime for which White people were being executed, but as was true of Virginia's other capital offenses, the death penalty for murder was, by and large, reserved for Black offenders.

Not included in this tally were lynchings in Virginia, which peaked between the late nineteenth and early twentieth centuries and served as a separate, unofficial form of capital punishment that augmented the formal practice.<sup>65</sup> As Stuart Banner notes in his discussion of lynching in the post-civil war period, the line between official and unofficial executions was remarkably thin. Capital trials of Black defendants were perfunctory events that happened "astonishingly fast"—a mere fifty minutes in one case from the time the jury was sworn to the time the defendant was hanged—and lynch mobs were all too often led by the same people who, in their official capacity, worked in the criminal justice system.<sup>66</sup> The two worked in tandem, Banner writes, noting that "[a] culture that carried out so much unofficial capital punishment could hardly be squeamish about the official variety."<sup>67</sup>

Understanding the close connection between official and unofficial executions provides some perspective on Virginia's seemingly progressive move as the first state in the Union to pass an anti-lynching law in 1928 (incredibly, efforts to pass such legislation at the federal level remain stalled, despite attempts as late as 2020).<sup>68</sup> "There is no excuse for lynching in a State where the enforcement of the law in cases likely to provoke mob violence has been prompt and rigorous," Virginia's governor at the time stated in support of the measure,<sup>69</sup> *almost* saying the quiet part out loud. As author

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64. See JOINT LEGIS. AUDIT & REV. COMM'N VA. GEN. ASSEMBLY, REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT at 6 (2002), [hereinafter 2002 JLARC STUDY] <https://larc.virginia.gov/pdfs/reports/Rpt274.pdf> [<https://perma.cc/A8HT-KJYV>].

65. See BANNER, *supra* note 43, at 229.

66. See *id.*

67. *Id.*

68. See Brumfield, *supra* note 8 (discussing Virginia's landmark anti-lynching law). For the status of current efforts, see John Wagner & Mike DeBonis, *Sen. Paul Acknowledges Holding Up Anti-lynching Bill, Says He Fears It Would Be Wrongly Applied*, WASH. POST (June 3, 2020), [https://www.washingtonpost.com/powerpost/sen-paul-acknowledges-holding-up-anti-lynching-bill-says-he-fears-it-would-be-wrongly-applied/2020/06/03/29b97330-a5bf-11ea-b619-3f9133bbb482\\_story.html](https://www.washingtonpost.com/powerpost/sen-paul-acknowledges-holding-up-anti-lynching-bill-says-he-fears-it-would-be-wrongly-applied/2020/06/03/29b97330-a5bf-11ea-b619-3f9133bbb482_story.html) [<https://perma.cc/56AD-DHW5>].

69. Brumfield, *supra* note 8 (quoting then-Governor Harry Byrd).



and activist Dale Brumfield has noted, “Platitudes such as ‘let the law take its course’ and ‘justice will prevail’ were correctly interpreted by mobs [to mean] ‘the courts will do the lynching for you, legally.’”<sup>70</sup> (And, apparently, they did.)

In light of this history, it is not *quite* right to say, as some have, that the death penalty in Virginia was “a direct descendant of . . . lynching.”<sup>71</sup> To be sure, some capital crimes—attempted rape is one example—were explicitly justified on the notion that if the law did not impose the death penalty, lawless mobs would.<sup>72</sup> But capital statutes existed long before lynching became a feature of Virginia’s cultural landscape, and, if anything, the rise of lynching was in response to the demise of slave codes, reflecting an impatience with the post-Civil War death penalty statutes designed to take their place.<sup>73</sup> In short, Virginia’s death penalty was not “birthed out of lynching,” nor was it “lynching’s stepchild”<sup>74</sup>—although the two are clearly close relatives, so perhaps we are just splitting hairs. Indeed, the two were so intimately interconnected that perhaps incestuous is a better way to describe their relationship (at least if we’re sticking with the family tree analogy).

This brings us *almost* to the end of the early era of capital punishment in Virginia, but for two additional points. One is that Virginia continued to add to its list of capital statutes throughout the mid-twentieth century, even as the national trend by the 1960s

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70. *Id.*

71. See Dakin Andone, *Why Virginia’s Abolition of the Death Penalty Is a Big Deal for the State and the US*, CNN (Mar. 29, 2021), <https://www.cnn.com/2021/03/29/us/virginia-death-penalty-abolition-significance/index.html> [<https://perma.cc/H5Y2-QZZN>] (quoting one advocate as saying, “Capital punishment is a direct descendant of slavery, lynching and Jim Crow”).

72. See K.M.M. & A.J.S., *supra* note 59, at 107 (noting “the General Assembly authorized the death penalty for attempted rape because of fears that failure to do so would risk the lynching of persons accused of that crime”). See also BANNER, *supra* note 43, at 229 (noting argument that without capital punishment, Southerners would result to more lynching in an effort to satisfy their desire for retribution for crime).

73. Here, too, attempted rape is a prime example. Attempted rape was a capital offense both for slaves and free Blacks before the civil war. See K.M.M. & A.J.S., *supra* note 59, at 108.

74. Andone, *supra* note 71 (quoting advocate saying that capital punishment was “birthed out of lynching”); *Virginia Abolishes the Death Penalty*, EQUAL JUST. INITIATIVE (Mar. 24, 2021), <https://ej.org/news/virginia-death-penalty-abolition/> [<https://perma.cc/SMK9-CUNL>] (calling the death penalty “lynching’s stepchild”).

was going the opposite way.<sup>75</sup> Documenting the point, a study of Virginia's death penalty in 1972 noted that, "[c]ompared with other states that continue to authorize the death penalty, Virginia authorizes its use for an extremely high number of crimes."<sup>76</sup> At the time, only three other states had as many as ten capital offenses.<sup>77</sup> Virginia had eleven, and it was an outlier in the type of offenses that were death-eligible in several ways.<sup>78</sup> Virginia was one of only four states in the country to make arson a capital crime, and the same was true of burglary.<sup>79</sup> Virginia was also the only state in the Union to make attempted rape a capital crime, along with some random offenses like use of a machine gun or sawed-off shotgun in a crime of violence, and entering a bank with intent to commit larceny while armed with a deadly weapon.<sup>80</sup> As the 1972 study of Virginia's death penalty noted, other states were in the midst of abolishing or at least limiting their death penalty, while Virginia was repeatedly expanding it.<sup>81</sup>

The second point goes to these statutes' application. While most of the crimes on Virginia's prodigious list of capital offenses did not produce an execution in the early era, those offenses that *did* produce executions did so in an unequivocally racialized way. As noted above, executions for nonmurder capital offenses in the early era were reserved *exclusively* for Black offenders, while executions for murder in the early era were reserved *predominantly* for Black offenders.<sup>82</sup> All told, Virginia executed 236 people between 1908 and 1972, and 202 of them—85%—were Black.<sup>83</sup>

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75. For a discussion of state legislative trends on the death penalty in the 1960s, see Lain, Furman *Fundamentals*, *supra* note 28, at 22–24.

76. K.M.M. & A.J.S., *supra* note 59, at 99.

77. *See id.* at 99–100.

78. *See id.* ("Only three crimes which are currently punishable by death in Virginia are capital offenses in a majority of the states: murder, kidnapping, and treason. For the remainder of the eleven offenses which Virginia considers capital, only a small minority of the states permit the death penalty.")

79. *See id.* at 100.

80. *See id.* For most of these capital crimes, the study could find no explanation for Virginia's deviation from the norm. *See id.* at 11.

81. *See id.* at 98. For a list of Virginia's capital statutes and when they were added, see Rutyna, *supra* note 44, at 34.

82. *See supra* text accompanying notes 63–64.

83. *See* K.M.M. & A.J.S., *supra* note 59, at 142. For an extended discussion of Virginia's racially charged death penalty in the early era, *see id.* at 112–22.

If those numbers did not speak volumes, Virginia's notorious execution of the "Martinsville Seven" in 1951 did. The case concerned seven Black men who were accused of raping a White woman and sentenced to death by all-White, all-male juries in trials that lasted less than a day each.<sup>84</sup> Their mass execution marked the largest mass execution for rape in United States history, and the largest mass execution in Virginia history.<sup>85</sup> The message was loud and clear: Virginia was fiercely committed to its racial mores and would not hesitate to use the death penalty to enforce them. (In 2021, Virginia's governor issued posthumous pardons for all seven.)<sup>86</sup>

That brings us to the end of the early era of capital punishment in Virginia, and this much was undeniably true: Virginia was all-in on its death penalty, and its death penalty was doing work as a tool of racial control. The two were not unrelated, and neither was new. The question was what, if anything, would change when Virginia was forced to start anew in the modern era.

### B. *The Modern Era*

In this section, we turn to Virginia's death penalty in the modern era of capital punishment. We begin by briefly explaining how the early era ended and how the modern era of the death penalty in Virginia began. We then document what Virginia's machinery of death looked like and how it worked in practice. First, we examine Virginia's modern era capital punishment statute, explaining the ways that it worked to maximize death sentences. Then we examine Virginia's post-conviction capital case review process,

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84. See *History of the Death Penalty*, *supra* note 6. For an in-depth account of the case and its backstory, see ERIC W. RISE, *THE MARTINSVILLE SEVEN: RACE, RAPE, AND CAPITAL PUNISHMENT* (1998).

85. See *History of the Death Penalty*, *supra* note 6. Virginia executed four of the seven men in one day, adding another execution from an unrelated case to bring its one-day tally to five, and then executed the three remaining men three days later. See Eric W. Rise, *Race, Rape, and Radicalism: The Case of the Martinsville Seven, 1949-1951*, 58 J. SOUTHERN HIST. 461, 487-88 (1992).

86. See DEATH PENALTY INFO. CTR., '*Martinsville 7*' Granted Posthumous Pardons 70 Years After Their Executions (Sept. 3, 2021), <https://deathpenaltyinfo.org/news/martinsville-7-granted-posthumous-pardons-70-years-after-their-executions> [https://perma.cc/B4LU-8PFZ].

explaining the ways that it worked to turn death sentences into executions.

### 1. Getting to the Modern Era

In 1972, the Supreme Court in *Furman v. Georgia* invalidated death penalty statutes nationwide, ending the early era of the death penalty by forcing the entire country to take a time-out on capital punishment.<sup>87</sup> In *Furman*, the Justices ruled that the death penalty as it was then administered was arbitrary and capricious (and “pregnant with discrimination,” at least in the minds of three of the five majority Justices).<sup>88</sup> For the ultimate penalty to be “so wantonly and so freakishly imposed,”<sup>89</sup> the Justices concluded, was a violation of the Eighth Amendment’s “cruel and unusual punishments” clause.<sup>90</sup> The root of the problem, the Justices explained, was that judges and juries had unfettered discretion in deciding death.<sup>91</sup> They could do whatever they wanted, and that was fundamentally incompatible with the rule of law.

If the problem was unfettered discretion, Virginia had a solution: it would simply make the death penalty *mandatory*, removing discretion altogether. And that’s what it did, enacting a mandatory death penalty in 1975 for first-degree murder when committed

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

88. *Id.* at 257 (Douglas, J., concurring); see also *id.* at 309–10 (Stewart, J., concurring) (“[I]f any basis can be discerned for the selection of these few to be sentenced to die, it is the constitutionally impermissible basis of race.”); *id.* at 365–66 (Marshall, J., concurring) (“It is also evident that the burden of capital punishment falls on the poor, the ignorant, and the underprivileged members of society.”).

89. *Id.* at 310 (Stewart, J., concurring) (“I simply conclude that the Eighth and Fourteenth Amendments cannot tolerate the infliction of a sentence of death under legal systems that permit this unique penalty to be so wantonly and so freakishly imposed.”).

90. *Id.* at 239–40 (per curiam) (“The Court holds that the imposition and carrying out of the death penalty in these cases constitute cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.”); *id.* at 309–10 (Stewart, J., concurring) (“[T]he petitioners are among a capriciously selected random handful upon whom the sentence of death has in fact been imposed.”); *id.* at 293 (Brennan, J., concurring) (“[I]t smacks of little more than a lottery system.”).

91. *Id.* at 253 (Douglas, J., concurring) (“[W]e deal with a system of law and of justice that leaves to the uncontrolled discretion of judges or juries the determination whether defendants committing these crimes should die or be imprisoned. Under these laws no standards govern the selection of the penalty. People live or die, dependent on the whim of one man or of 12.”).

under one of six specified circumstances.<sup>92</sup> Three of the six made murder a capital crime when committed in the course of committing another felony. Rape, robbery, and abduction were the ancillary offenses in this category.<sup>93</sup> The other three made murder a capital crime based on the circumstances of the murder itself. Murder for hire, murder by an inmate in a penal institution, and murder of a police officer were the capital offenses in this category.<sup>94</sup>

A year later, in 1976, the Supreme Court reconsidered the death penalty in light of states' new and improved capital statutes. In *Gregg v. Georgia* and its companion cases, the Court upheld three "guided discretion" statutes that purported to eliminate arbitrary death sentencing by guiding the death-sentencing decision in some way.<sup>95</sup> But in *Woodson v. North Carolina* and its companion case, the Court invalidated two state statutes that had eliminated discretion entirely by making the death penalty mandatory for select crimes.<sup>96</sup> Mandatory death penalties exceeded "the limits of civilized standards," a plurality of the Justices wrote,<sup>97</sup> saving words like "abhorrent" and "monster" for their closed conference discussions.<sup>98</sup> The Justices explained that society had evolved away from such draconian punishments, and it had done so largely because juries that did not want to impose the death penalty were simply refusing to convict, which added an arbitrariness of its own.<sup>99</sup> In short, the problem with mandatory death penalties was not only that they were anachronistic, but also that they were ineffectual in solving the arbitrariness problem. States that had rewritten their capital punishment statutes to provide for mandatory death

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92. See 2002 JLARC STUDY, *supra* note 64, at 9 (discussing statute).

93. See *id.*

94. See *id.*

95. See *Gregg v. Georgia*, 428 U.S. 153, 207 (1976); accord *Proffitt v. Florida*, 428 U.S. 242, 259–60 (1976); *Jurek v. Texas*, 428 U.S. 262, 276–77 (1976).

96. See *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

97. *Id.* at 288.

98. See THE SUPREME COURT IN CONFERENCE (1940–1985) 621 (Del. Dickson ed., 2001) (quoting Justice Stevens in conference after the *Woodson* oral arguments as saying, "To have created a monster like North Carolina, which increases the incidence of the penalty, is abhorrent").

99. See *Woodson*, 428 U.S. at 290–93 (discussing history of mandatory death penalties).

penalties—and there were ten of them, including Virginia<sup>100</sup>—would need to try again. And that is exactly what Virginia did.

## 2. Virginia’s Modern-Era Death Penalty Statute: How to Get Death

In 1977, the year after *Woodson*, Virginia again revamped its death penalty statute.<sup>101</sup> In this version, Virginia kept its six capital offenses, but replaced its mandatory death penalty with a discretionary one, guiding discretion by requiring the jury to find one of two aggravating circumstances before a death sentence could be imposed. One of these copied an aggravating circumstance that the Supreme Court of the United States had upheld in 1976 in a companion case to *Gregg*. In *Jurek v. Texas*, the Court validated the Texas guided-discretion statute, which essentially asked juries to determine whether the defendant posed “a continuing threat to society.”<sup>102</sup> Virginia copied the wording of the Texas “future dangerousness”<sup>103</sup> aggravator nearly verbatim, requiring the jury to find that the defendant posed a “continuing serious threat to society” before imposing a sentence of death.<sup>104</sup> But where Texas would go

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100. *See id.* at 313 (Rehnquist, J., dissenting) (“The plurality concedes, as it must, that following *Furman* 10 States enacted laws providing for mandatory capital punishment.”).

101. *See* VA. CODE ANN. §§ 19.2-264.2; 19.2-264.4(c) (Cum. Supp. 1977).

102. *See Jurek v. Texas*, 428 U.S. 262 (1976) (discussing and quoting TEX. CODE CRIM. PROC., art. 37.071 (Supp. 1975–1976)). Technically, the jury was required to answer three questions: (1) whether the defendant’s conduct was deliberate and with the reasonable expectation that death would result; (2) whether the defendant constitutes a continuing threat to society; and (3) whether the defendant’s conduct was unreasonable if in response to provocation by the victim. *See id.* The answer to the first and third questions will always be yes for first-degree murder, so the second question is the essence of the determination. Under the Texas scheme, the death penalty would be imposed if the jury answered all three questions in the affirmative, and that made it much closer to a mandatory death penalty than the other guided discretion statutes. *See id.*; *see also Woodson*, 428 U.S. at 315 (Rehnquist, J., dissenting) (“The Texas system much more closely approximates the mandatory North Carolina system which is struck down today.”).

103. For a history and critique, see Lara D. Gass, *Virginia’s Redefinition of the “Future Dangerousness” Aggravating Factor: Unprecedented, Unfounded, and Unconstitutional*, 70 WASH. & LEE L. REV. 1887 (2013). The text of both Virginia Code sections is reproduced in *id.* at 1906.

104. VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4(c) (Repl. Vol. 2008); *see Smith v. Commonwealth*, 219 Va. 455, 473, 248 S.E.2d 135, 146 (1978) (noting that Virginia’s revised capital punishment scheme “follow[ed] the pattern approved in *Jurek*”). Virginia’s statutory scheme was different from that of Texas in important ways. It did not ask jurors to answer questions and then impose the death penalty if the answer was yes, and it recognized statutory

big, Virginia would go bigger. The Commonwealth added a second aggravating circumstance that would also allow the jury to return a death sentence: a finding that the offense was “outrageously or wantonly vile.”<sup>105</sup>

It is worth pausing to appreciate just how broad each of these aggravating circumstances were. Juries could look to the offense itself to satisfy either of the required findings,<sup>106</sup> and it was hard to imagine how the facts of a capital murder would *not* show that the defendant was dangerous to society, or that the murder was vile. Virginia did not have a mandatory death penalty (because it couldn’t), but it did have two aggravating circumstances that would almost always be met. The Commonwealth would guide sentencing discretion because it had to, but in most every case, it would guide the discretion towards death.

And that’s just the aggravators on their face. In practice, both were even more skewed toward death than they looked at first glance. Start with future dangerousness. Under the theory “the best predictor of the future is the past” (as one prosecutor told the jury in closing argument),<sup>107</sup> Virginia recognized three types of evidence relevant to the future dangerousness inquiry: the defendant’s prior history, the defendant’s criminal record, and the facts of the offense for which the defendant was convicted.<sup>108</sup>

Notably not on the list were clinical risk assessments informed by empirical research and diagnostic evaluations that went to the defendant’s *actual* future dangerousness. Those were not admissible in Virginia,<sup>109</sup> and, in this regard, Virginia stood alone—it was

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mitigators. See § 19.2-264.4(c) (Repl. Vol. 2008).

105. § 19.2-264.2(c) (Repl. Vol. 2008).

106. See § 19.2-264.4(c) (Repl. Vol. 2008) (allowing findings to be based on “the circumstances surrounding the commission of the offense of which [the defendant] is accused”); see also *Quintana v. Commonwealth*, 224 Va. 127, 151, 295 S.E.2d 643, 655 (1982) (holding that the “heinous circumstances surrounding this homicide” were themselves sufficient to support a finding of future dangerousness).

107. See *Garrett*, *supra* note 25, at 701 (quoting prosecutor as arguing to the jury, “The best predictor of future conduct, ladies and gentlemen, is past conduct”).

108. See *Porter v. Commonwealth*, 276 Va. 203, 252, 661 S.E.2d 415, 440 (2008) (affirming exclusion of expert testimony on future dangerousness because it did not go to “the defendant’s prior history, prior criminal record and/or the circumstances of the offense”).

109. See *Lawlor v. Commonwealth*, 285 Va. 187, 248–51, 738 S.E.2d 847, 882–84 (2013); accord *Porter*, 276 Va. at 252–54, 661 S.E.2d 415, 440–41; *Morva v. Commonwealth*, 278

the only jurisdiction in the country to employ the “future dangerousness” aggravator, but not allow clinical evidence on the very thing that the jury was being asked to decide.<sup>110</sup> Even Texas allowed risk assessment evidence on the issue of future dangerousness.<sup>111</sup>

Part of the problem was the fact that risk assessments assess risks *in specific contexts*. In a capital case, for example, the question of whether a defendant posed a “continuing serious threat to society” would depend heavily on whether they were being housed in a secure facility or were out on the street with ready access to alcohol and drugs. Risk is contextual, and risk assessments are too.

In Virginia, considering context cut in a capital defendant’s favor because as of 1995, when Virginia adopted life without the possibility of parole (“LWOP”), LWOP was the only alternative to a death sentence in a capital case.<sup>112</sup> As such, if capital defendants lived, they would live to die in prison with no chance whatsoever of re-entering society. That meant the only place they could actually be dangerous was a high-security prison, and it turns out that the risk of dangerousness, even for the most dangerous of offenders, is exceptionally low in that environment—0.2% in a study of Texas convicted murderers.<sup>113</sup>

All that is important because it sets up what this clinical risk assessment evidence looked like. It was not the prosecutor aching to admit this evidence. The prosecutor had the defendant’s

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Va. 329, 350–51, 683 S.E.2d 553, 565–66 (2009); *see also* Garrett, *supra* note 25, at 672 (noting that “future dangerousness in Virginia is not carefully informed by empirical research on the actual dangerousness of, say, a prisoner confined to prison for life without parole”).

110. *See* Gass, *supra* note 103, at 1927–28.

111. *See id.* at 1928; *see also* Garrett, *supra* note 25, at 701 (noting that in Virginia, “there has rarely been a battle of future dangerous experts, as is common in Texas”).

112. *See* VA. CODE ANN. § 18.2-31 (Repl. Vol. 2014); *Virginia Abolishes Life Without Parole for Children*, EQUAL JUST. INITIATIVE, <https://eji.org/news/virginia-abolishes-life-without-parole-for-children/> [<https://perma.cc/ZX9J-SVE3>].

113. *See* Jonathan R. Sorensen & Rocky L. Pilgrim, *An Actuarial Risk Assessment of Violence Posed by Capital Murder Defendants*, 90 J. CRIM. L. & CRIMINOLOGY 1251, 1256–57, 1262 (2000); *see also* Mark D. Cunningham, *Dangerousness and Death: A Nexus in Search of Science and Reason*, 2006 AM. PSYCHOL. 828, 832 (discussing research showing that the rate of violent crime in prisons is “quite low” despite a “concentration of individuals whose community conduct had been recurrently criminal and violent”).



criminal record and past misdeeds, plus the facts of the murder itself.<sup>114</sup> That was plenty for a jury to find future dangerousness in any case. It was the *defendants* who desperately wanted to get clinical risk assessment evidence to the jury, not only because the base rate of violence for capital offenders in a secured facility was exceedingly low, but also because individualized assessments almost invariably showed that when placed in a secure, structured environment without ready access to drugs or alcohol, the defendant posed little, if any, threat to others.<sup>115</sup>

Virginia would have none of it, literally. Defendants were not allowed to submit evidence that violent recidivism is pretty much non-existent in capital offenders imprisoned for life, and, more importantly, they were not allowed to present individualized risk assessments of their proclivity for future violence because those assessments were based on the fact that they would be living the rest of their lives in prison.<sup>116</sup> The question, the Supreme Court of Virginia explained, was not whether the defendant *could* be dangerous, but rather whether they *would* be if given the chance.<sup>117</sup> Indeed, capital defendants were not even allowed to instruct the jury that a life sentence meant life—at least until the Supreme Court required states to give an LWOP instruction<sup>118</sup>—and, even then,

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114. See *supra* note 108 and accompanying text.

115. For a discussion of what this evidence actually looked like, see *Lawlor v. Zook*, 909 F.3d 614, 619–23 (4th Cir. 2018) (discussing expert evidence as to the defendant's future dangerousness in a high-security prison setting).

116. See *supra* notes 109–13. Capital defendants were entitled to present evidence that they were well-behaved prisoners under *Skipper v. South Carolina*, but that evidence went to mitigation and not to rebut evidence of future dangerousness. 476 U.S. 1, 4–5, 7 (1986); see also *Lawlor*, 285 Va. 187, 249, 738 S.E.2d 847, 882 (2013).

117. *Burns v. Commonwealth*, 261 Va. 307, 339–40, 541 S.E.2d 872, 893 (2001) (“[T]he relevant inquiry is not whether [a defendant] could commit criminal acts of violence in the future but whether he would.”); *Morva*, 278 Va. at 349, 683 S.E.2d at 564; see also *Lawlor*, 285 Va. at 248, 738 S.E.2d at 882 (quoting *Morva* and *Burns* and noting that “the issue is not whether the defendant is physically capable of committing violence, but whether he has the mental inclination to do so.”).

118. See *Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding where a state makes a claim of future dangerousness, the capital defendant is constitutionally entitled to inform the jury that the defendant would be subject to life without parole). The following year, in *Mickens v. Commonwealth*, the Supreme Court of Virginia recognized *Simmons* and applied it. See *Mickens v. Commonwealth*, 249 Va. 423, 425, 457 S.E.2d 9, 9 (1995) (“*Simmons* requires a remand of the case for resentencing. ‘Future dangerousness’ was an issue in the sentencing phase of the capital murder trial; therefore, the jury was entitled to be informed of Mickens’ parole ineligibility.”). In *Yarbrough v. Commonwealth*, the Supreme Court of

capital defendants were not allowed to instruct the jury that in determining whether they would be a “continuing serious threat to society,” the relevant “society” was a high-security prison. Society meant society as a whole, the Supreme Court of Virginia held, repeatedly upholding jury instructions that told jurors to consider society *at large* in determining future dangerousness—a place that the Court knew full well a capital defendant would never be.<sup>119</sup>

It merits mention that Virginia’s refusal to allow individualized risk assessments of a defendant’s future dangerousness was so patently unreasonable that, in 2018, the Fourth Circuit ruled that it was “an unreasonable application of clearly established federal law.”<sup>120</sup> Virginia could define “society” as all of society if it wanted, the Fourth Circuit reasoned, but surely all of society *included* the prison society, and the Supreme Court of the United States had explicitly held that capital defendants were entitled to submit evidence of their dangerousness in the prison setting.<sup>121</sup> “Virginia is still part of the Union, right?” one of the Fourth Circuit judges

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Virginia went a step further and held that jurors must be instructed that a life sentence means life without the possibility of parole even in a case where future dangerousness is not in issue. 258 Va. 347, 368–69, 519 S.E.2d 602, 613 (1999) (“[T]his appeal presents our first opportunity to consider whether the granting of an instruction on parole ineligibility is required in a capital case in which the Commonwealth relied on the vileness aggravating factor alone.”); *id.* at 374, 519 S.E.2d at 616 (“Accordingly, we hold that in the penalty-determination phase of a trial where the defendant has been convicted of capital murder . . . where the defendant asks for such an instruction . . . the trial court shall instruct the jury that the words ‘imprisonment for life’ mean ‘imprisonment for life without possibility of parole.’”).

119. See *Lovitt v. Commonwealth*, 260 Va. 497, 517, 537 S.E.2d 866, 879 (“The statute does not limit . . . consideration to ‘prison society’ when a defendant is ineligible for parole, and we decline *Lovitt*’s effective request that we rewrite the statute to restrict its scope.”); *accord Lawlor*, 285 Va. at 249, 738 S.E.2d at 882 (reaffirming *Lovitt* on this point); *Porter*, 276 Va. at 256, 661 S.E.2d at 442 (upholding trial court’s instruction to the jury that society meant “[e]verybody, anywhere, anyplace, anytime”).

120. See *Lawlor v. Zook*, 909 F.3d 614, 618 (4th Cir. 2018); *id.* at 626 (noting that to reverse, “the ruling must be objectively unreasonable, not merely wrong; even clear error will not suffice . . . a litigant must show that the state court’s ruling was so lacking in justification that there was an error well understood and comprehended in existing law beyond any possibility for fairminded disagreement”).

121. See *id.* at 630–31 (agreeing with defendant’s argument that “evidence of future dangerousness in prison is *part of the society inquiry*” and ruling that the trial court erred when it “effectively held that evidence of *Lawlor*’s dangerousness in prison was *per se irrelevant*” and the Supreme Court of Virginia erred in agreeing); *id.* at 618 (“It is well established that ‘evidence that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating,’ and ‘such evidence may not be excluded from the sentencer’s consideration.’”) (quoting *Skipper v. South Carolina*, 476 U.S. 1, 5 (1986)).

asked the lawyer for Virginia at oral arguments, clearly incredulous at the stance that Virginia had taken.<sup>122</sup> In its written opinion, the Fourth Circuit stated that Virginia had “attempted to circumvent [binding precedent] by relying on baseless interpretations of state law that themselves contravened longstanding Supreme Court law.”<sup>123</sup> And that was true. But the Fourth Circuit’s ruling came too late in the game to have much of an impact. By then, Virginia had not seen a new death sentence in seven years, and it would not see another.<sup>124</sup>

Virginia’s “vileness” aggravator played out in a similarly skewed fashion. By statute, vileness was just shorthand for a murder that was “outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim.”<sup>125</sup> Thus, in order to find vileness, the jury had to find one of the three listed factors: torture, depravity of mind, or aggravated battery. But jurors did not have to agree on which one of those descriptors applied,<sup>126</sup> and they were still virtually all-encompassing. Indeed, the Supreme Court invalidated the exact same statutory language in *Godfrey v. Georgia* for being too broad to minimally guide the jury’s discretion.<sup>127</sup>

Virginia dodged *Godfrey* by interpreting depravity of mind to mean more than “ordinary legal malice,” and interpreting an aggravated battery to mean more than “the minimum necessary to

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122. See Oral Argument at 20:20–23, *Lawlor*, 909 F.3d 614, [https://storage.courtlistener.com/mp3/2018/09/25/mark\\_lawlor\\_v.\\_david\\_zook\\_cl.mp3](https://storage.courtlistener.com/mp3/2018/09/25/mark_lawlor_v._david_zook_cl.mp3) [<https://perma.cc/S8P5-TPTZ>].

123. See *Lawlor*, 909 F.3d at 633.

124. See *supra* note 23. Ironically, that case was *Lawlor*, 909 F.3d 614.

125. VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4(c) (Repl. Vol. 2015).

126. See *Clark v. Commonwealth*, 220 Va. 201, 213, 257 S.E.2d 784, 792 (1979); *accord Lawlor*, 285 Va. 187, 256, 738 S.E.2d 847, 886 (2013); *Prieto v. Commonwealth*, 283 Va. 149, 180–81, 721 S.E.2d 484, 503 (2012). For an argument that the sub-factors of the “vileness” aggravating factor should be subject to the unanimity requirement, see Douglas R. Banghart, *Vileness: Issues and Analysis*, 12 CAP. DEF. J. 77 at 98–99 (1999).

127. See *Godfrey v. Georgia*, 446 U.S. 420, 428–29 (1980) (“There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as ‘outrageously or wantonly vile, horrible and inhuman.’”); see also *Lawlor*, 285 Va. at 257, 738 S.E.2d at 887 (“Virginia’s vileness aggravating factor is identical to the State of Georgia’s aggravating factor reviewed by the Supreme Court in *Godfrey v. Georgia*.”).

accomplish an act of murder.”<sup>128</sup> But, here again, it is hard to imagine a capital murder that did not satisfy one of those findings. The egregious facts of any capital murder would suggest that the defendant acted with more than ordinary malice (whatever that is), and it is especially hard to imagine a capital defendant who stuck to the minimum force necessary to kill someone. What does that even look like—*I’m going to kill you now, so please be still so I can do this as quickly and with the least amount of force possible?*<sup>129</sup> To imagine it is to see how preposterously small the chance is that a capital murder would not also involve an aggravated battery.<sup>130</sup> Indeed, for capital murder offenses based on the commission of other felonies—rape, robbery, abduction—the force used in the commission of the felony was enough to satisfy this element without any further showing.<sup>131</sup>

Moreover, should a jury be on the fence about whether the vile-ness showing had been met, Virginia allowed victim impact evidence to be considered in determining whether the offense demonstrated depravity of mind.<sup>132</sup> For the uninitiated, victim impact evidence in the capital context is evidence about how a murder has

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128. The actual language that the Supreme Court of Virginia used to define depravity of mind was a glom of words sure to surpass any juror’s understanding. *See Smith*, 219 Va. at 478, 248 S.E.2d at 149 (“[W]e construe the words ‘depravity of mind’ as used here to mean a degree of moral turpitude and psychological debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.”). The language used to define aggravated battery was better, but not by much. *See id.* (“[W]e construe the words ‘aggravated battery’ to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.”).

129. Doug Ramseur submits that even this would be considered vile because telling the victim that they are about to be murdered would add an element of fear, and that would count as torture even if it would not count as an additional battery. Corinna Lain cannot believe that the most ridiculous law professor hypothetical doesn’t work. Readers should trust Doug.

130. The aggravated battery can even occur after the victim is dead. *See Jones v. Commonwealth*, 228 Va. 427, 448, 323 S.E.2d 554, 565 (1984). *See generally* Banghart, *supra* note 126 (arguing that Virginia’s vileness aggravator is all-encompassing).

131. *See Hedrick v. Commonwealth*, 257 Va. 328, 339, 513 S.E.2d 634, 640 (1999) (holding that the force used in the commission of the defendant’s ancillary offenses satisfied the aggravated battery finding).

132. *See* VA. CODE ANN. § 19.2-264.2 (Repl. Vol. 2015); *see also* *Weeks v. Commonwealth*, 248 Va. 460, 476, 450 S.E.2d 379, 389 (1994) (finding victim impact evidence relevant to depravity of mind inquiry); *accord* *Andrews v. Commonwealth*, 280 Va. 231, 291, 699 S.E.2d 237, 271–72 (2010); *Prieto*, 283 Va. 149, 167–68, 721 S.E.2d 484, 495–96 (2012).

impacted the friends and family of the murder victim.<sup>133</sup> Knowing that, it is difficult to see how the effect of a murder on the friends and family of the victim could shed light on the inquiry into a defendant's state of mind. One might imagine a defendant killing someone for the very purpose of torturing the friends and family left behind. Now *that* would demonstrate depravity of mind. But those were not the facts of any of the Supreme Court of Virginia cases asserting the relevance of victim impact evidence to the depravity of mind inquiry.<sup>134</sup> In the absence of any logical connection between the defendant's state of mind at the time of the murder and the impact of a murder on a victim's friends and family, the admission of this evidence did nothing but inflame the jury's emotions, infusing the deliberative process with a passion that the law did not countenance or allow.<sup>135</sup>

A final point about Virginia's aggravators merits mention, and it regards how juries understood them to work. The Capital Jury Project, a National Science Foundation consortium of studies that interview jurors in capital cases to understand their decision-making, found that 53% of Virginia's capital jurors mistakenly believed that a death sentence was required if they found the murder to be vile, and 41% mistakenly believed that a death sentence was required if they found that the defendant would be dangerous in the future.<sup>136</sup> A study of mock jurors in Virginia largely confirmed these findings, revealing that 44% of mock jurors who were given Virginia's standard capital jury instructions erroneously thought that the death penalty was required upon a finding of vileness, and 46% erroneously thought it was required upon a finding of future dangerousness.<sup>137</sup> In short, a shockingly large percentage of

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133. For an example from the case ruling that victim impact evidence was constitutionally admissible, see *Payne v. Tennessee*, 501 U.S. 808 (1991) (validating admission of victim impact evidence regarding slain victim's young son).

134. For the cases, see *Weeks*, 248 Va. at 460, 450 S.E.2d at 379; accord *Andrews*, 280 Va. at 231, 699 S.E.2d at 237; *Prieto*, 283 Va. at 149, 721 S.E.2d 484.

135. See *Payne*, 501 U.S. at 856–57 (Stevens, J., dissenting) (“Evidence that serves no purpose other than to appeal to the sympathies or emotions of the jurors has never been considered admissible.”); see also ARISTOTLE, *THE POLITICS OF ARISTOTLE* 102 (Benjamin Jowett trans.) (1885) (“The law is reason unaffected by desire.”).

136. See William J. Bowers & Wanda D. Foglia, *Still Singularly Agonizing: Law's Failure to Purge Arbitrariness from Capital Sentencing*, 39 CRIM. L. BULL. 51, 73 (2003).

137. See Stephen P. Garvey, Sheri Lynn Johnson & Paul Marcus, *Correcting Deadly Confusion: Responding to Jury Inquiries in Capital Cases*, 85 CORNELL L. REV. 627, 638–39

ordinary people confused a finding that *authorized* a death sentence with a finding that *required* one, raising the sickening possibility that a number of Virginia's death sentences were not even sentences that the jury actually chose (at least in any real sense of the word).

Part of the problem was Virginia's limited recognition of mitigating circumstances. Virginia statutorily recognized six mitigating circumstances in the sentencing determination, but three of them were circumstances that likely would have taken the offense out of the category of capital murder,<sup>138</sup> and the other three—the defendant's age, intellectual functioning, and lack of prior criminal activity—were often not applicable.<sup>139</sup> The more relevant mitigating circumstances, such as a capital defendant's own brutalization as a child, were not listed in Virginia's statute, which didn't prevent them from being considered,<sup>140</sup> but did prevent defendants from pointing to them as a circumstance that the Legislature explicitly recognized as worthy of serious consideration in a capital case. As a practical matter, that meant Virginia's statutory mitigators did not play much of a role in death sentencing one way or the other. The real mitigation battle was being fought off-list.

The other part of the problem was how Virginia instructed its capital juries. Virginia did not tell jurors to weigh the finding of an aggravating circumstance against any relevant mitigating circumstances.<sup>141</sup> It did not tell jurors that they did not need to find

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(2000).

138. See VA. CODE ANN. § 19.2-264.4(B) (Repl. Vol. 2015) (recognizing mitigating circumstances where “the defendant was under the influence of extreme mental or emotional disturbance”; where “the capacity of the defendant to appreciate the criminality of [their] conduct or to conform [their] conduct to the requirements of [the] law was significantly impaired”; and where “the victim was a participant in the defendant's conduct or consented to the act”).

139. See *id.* (recognizing mitigating circumstances where “the defendant has no significant history of prior criminal activity” and recognizing “age of the defendant at the time of the commission of the capital offense” and “the sub-average intellectual functioning of the defendant” as mitigating circumstances).

140. See *Lockett v. Ohio*, 438 U.S. 586 (1978) (defendants on trial for their lives are not limited to presenting evidence on statutorily recognized mitigating circumstances).

141. See ABA, EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE VIRGINIA DEATH PENALTY ASSESSMENT REPORT 299 (2013), [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_moratorium/va\\_complete\\_report.authcheckdam.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_moratorium/va_complete_report.authcheckdam.pdf) [<https://perma.cc/JS7S-CNAA>].

mitigating circumstances beyond a reasonable doubt, or unanimously, in order to consider them.<sup>142</sup> Most importantly, Virginia did not tell jurors that they could return a life sentence simply because they did not believe the defendant should receive the death penalty, even if they found an aggravator and did not find any mitigating circumstances.<sup>143</sup> Worse yet, when jurors communicated their confusion and asked for clarification as to what was required, Virginia trial courts typically responded by telling them to reread the instructions rather than just answering their question (at which point they usually returned a sentence of death).<sup>144</sup> An ABA report documented all these deficiencies in 2013.<sup>145</sup> Virginia stayed the course.

In short, Virginia's capital sentencing structure was like the mouth of a whale—capable of swallowing everything in sight—and this meant that the only constraint on Virginia's use of the death penalty was the fact that it was limited to six capital offenses, *for a time*. Virginia added another capital offense in 1981, then another in 1985, and then another in 1989<sup>146</sup>—and it was just getting started. By 2002, Virginia had modified or expanded its definition of capital crimes fourteen times.<sup>147</sup> Some of the added capital offenses were in response to particularly gruesome murders that had captured the public's attention.<sup>148</sup> Some were more attributable to political pressure that legislators were feeling to show that they were "tough on crime."<sup>149</sup> All told, Virginia listed fifteen separate capital offenses by the time of its repeal in 2021,<sup>150</sup> but that number did not account for the fact that many of those offenses included

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142. *See id.*

143. *See id.*

144. *See id.* at 295 (“[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.”); *id.* at 295–96 (discussing cases where this was instruction and jury shortly thereafter returned a sentence of death).

145. *See generally id.*

146. *See* 2002 JLARC STUDY, *supra* note 64, at 11 (listing amendments).

147. *See id.* at 10.

148. *See* Hammad S. Matin, *Expansion of Section 18.2-31 of the Virginia Code*, 12 CAP. DEF. J. 7, 33–34 (1999) (discussing well-publicized murders that resulted in amendments adding capital offenses).

149. *See id.* at 33.

150. *See* ABA, *supra* note 141, at 10–11 (listing offenses).

attempts as well as completed auxiliary offenses, along with other variations. In 1999, counting each of these variations brought the true number of capital offenses to twenty-seven.<sup>151</sup> And that was just the tally in 1999. Whatever that number was by 2021, the point is this: Virginia's death penalty in the modern era was *less* restrictive than it was in 1972, when the Supreme Court invalidated state statutes for not restricting the imposition of death.

This, then, was the statutory scheme for imposing Virginia's death penalty, but the real death-dealing magic was what happened next. Assuming that the trial court did not set aside the death sentence for "good cause shown" (which almost never happened),<sup>152</sup> condemned capital defendants turned to the post-conviction review process. That is where the mouth of the whale snapped shut.

### 3. Virginia's Post-Conviction Review Process: How to Keep Death

In theory, appellate and habeas review of death sentences operate as a series of veto gates, weeding out weak and constitutionally infirm death sentences that somehow make it out of the trial and sentencing process. Not so in Virginia. In Virginia, those veto gates were more akin to *through gates*, propelling death sentences along in a process that gathered momentum for death.

Start with the direct appeal. Defendants who received a death sentence in Virginia had a right of appeal, and it was directly to the Supreme Court of Virginia.<sup>153</sup> This eliminated the Court of Appeals' of Virginia middleman, fast-tracking the direct appeals process while removing the potential veto gate that would have come with intermediate review. The Supreme Court of Virginia further expedited the review process by giving death sentence appeals first

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151. See *A Quarter Century of Death: A Symposium on Capital Punishment in Virginia since Furman v. Georgia*, 12 CAP. DEF. J. 1, 2 (1999).

152. See VA. CODE ANN. § 19.2-264.5 (Repl. Vol. 2015); see also *Douglass*, *supra* note 26, at 878 n.36 ("I have found no record of a Virginia trial court reducing a jury verdict of death penalty to a lesser sentence based on 'good cause.' Accounts of practitioners suggest it almost never happens."). We know of just one such case. See *Winckler v. Com.*, 32 Va. App. 836, 842 (2000) ("The trial court set aside the death sentence and imposed a sentence of imprisonment for life on the capital murder conviction. This appeal followed.").

153. See § 17.1-406(B) (Repl. Vol. 2020).



priority on its docket—and it was quick on the backside too, deciding appeals in a median time of less than a year after trial and often issuing opinions in a little over three months.<sup>154</sup>

On direct appeal, the Supreme Court of Virginia considered claims of trial error and also performed a statutorily-required “automatic review.”<sup>155</sup> This portion of its review occurred whether the defendant appealed or not, and it was to determine whether a death sentence was influenced by “passion, prejudice or any other arbitrary factor” or was “excessive or disproportionate to the penalty imposed in similar cases.”<sup>156</sup> If the Supreme Court of Virginia found either of those things to be true, it had the authority to commute the defendant’s sentence to life or remand the case back to the trial court for resentencing.<sup>157</sup> But that never happened. As in, *never*. Not once, in the well over 100 death sentences reviewed since 1977, did the supreme court overturn a death sentence on proportionality review.<sup>158</sup> The title of one article said it all: *Great Myths: Santa Claus, the Easter Bunny & Virginia’s Proportionality Review*.<sup>159</sup>

Part of the reason was the cases that the Supreme Court of Virginia was using for its proportionality review. The Court considered only those capital cases that came to it, and those fell into just two categories: cases that resulted in a death sentence, which came to it on direct appeal, and cases that did *not* result in a death sentence, which came to it on discretionary review from the Court of Appeals of Virginia.<sup>160</sup> As a result, the vast majority of the cases that the Supreme Court of Virginia used for comparison were cases that resulted in a sentence of death. Indeed, a 2002 study showed that 45% of the Supreme Court of Virginia’s automatic review

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154. See BRANDON L. GARRETT, END OF ITS ROPE 118, 220 (2017).

155. See § 17.1-313(A) (Repl. Vol. 2020).

156. § 17.1-313(C) (Repl. Vol. 2020). Apparently, victim impact evidence did not count. See *supra* notes 132–35 and accompanying text.

157. § 17.1-313(D)(2)–(3) (Repl. Vol. 2020).

158. See ABA, *supra* note 141, at 218 (“[T]he Supreme Court of Virginia has never reversed a death sentence on proportionality grounds.”).

159. Deborah A. Hill, *Great Myths: Santa Claus, The Easter Bunny & Virginia’s Proportionality Review*, 10 CAP. DEF. J. 33 (1997).

160. See ABA, *supra* note 141, at 217–18. The ABA found that poor record-keeping practices made more meaningful review impossible. See *id.* at 223.

rulings considered *only* other cases where the death penalty was imposed.<sup>161</sup> As the 2002 study concluded, consideration of only (or even mostly) death sentence cases “skew[s] the Court’s analysis in a way that assures a finding supporting the proportionality of the lower court sentencing outcomes.”<sup>162</sup> Virginia’s comparative review was systematically excluding the cases needed for a comparative review.

The supreme court’s proportionality review of a juvenile death sentence in 1998 illustrates the point. In *Jackson v. Commonwealth*, the supreme court upheld the death sentence of a sixteen-year-old defendant convicted of capital murder and robbery on automatic review.<sup>163</sup> Justice Leroy Hassell dissented, noting that “[s]ince 1987, ten sixteen-year-old offenders have been convicted of capital murder, and only one defendant, Chauncey J. Jackson, has been sentenced to death.”<sup>164</sup> Because juries imposed a life sentence in the other cases, those cases went to the court of appeals rather than the supreme court and thus were not considered in the high court’s review.<sup>165</sup>

The supreme court proportionality review was problematic for other reasons as well. The Court typically limited its comparison to cases that had the same aggravator, paying little attention to the actual facts of the case.<sup>166</sup> Since there were only two

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161. See 2002 JLARC STUDY, *supra* note 64, at 68.

162. *Id.* at 55. Unfortunately, Virginia was not alone in this regard; other states have problematic proportionality review processes too. For a survey of state practices and discussion of the problem, see William W. Berry, *Practicing Proportionality*, 64 FLA. L. REV. 687 (2012).

163. *Jackson v. Commonwealth*, 255 Va. 625, 499 S.E.2d 538 (1998). The Supreme Court ruled that executing juvenile offenders was unconstitutional in 2005. See *Roper v. Simmons*, 543 U.S. 551 (2005).

164. *Jackson*, 255 Va. at 652, 499 S.E.2d at 555 (Hassell, J., concurring in part and dissenting in part).

165. See *id.* at 652–55, 499 S.E.2d at 555–57 (discussing five cases where sixteen-year-olds were convicted of capital murder but spared the death penalty); see also ABA, *supra* note 141, at 218–19 (discussing *Jackson* and noting sixteen cases involving juveniles convicted of capital murder that were not included in the supreme court’s proportionality review because the juries imposed life sentences). The defendant’s sentence in *Jackson* was ultimately reversed on habeas and ended as a life sentence. See ABA, *supra* note 141, at 219 n.62.

166. See *id.* at 219 (“Frequently, the [Virginia Supreme] 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

aggravators and both were breathtakingly broad, the Court had plenty of cases to support any affirmance, and that became even more true as the pool of death sentences grew over time.<sup>167</sup> Moreover, even when its comparison included non-death sentences, the Court explicitly gave “particular emphasis” to those cases in which a death sentence was returned.<sup>168</sup> This is how it came to be that not once in the entire modern era did Virginia reverse a death sentence on proportionality review. For a sense of perspective, Florida reversed thirty-seven death sentences on proportionality review from 1989 to 2003 alone, and Florida is no friend to capital defendants.<sup>169</sup>

Virginia’s overall reversal rate on direct appeal—that is, its reversal rate including claims of trial error as well—was higher in that it was more than non-existent, but not by much. A 2002 Virginia study found that the state’s reversal rate on appeal was just 7%.<sup>170</sup> The supreme court upheld the conviction and death sentence 93% of the time. From 1977 to 2001, for example, it reversed in only 9 of 132 capital cases considered on direct appeal.<sup>171</sup> A national study led by Professor James Liebman at Columbia Law School two years earlier reported similar results, putting Virginia’s reversal rate on direct appeal at 10%—by far, the lowest in the country.<sup>172</sup> For a sense of perspective, the Liebman study found that the reversal rate in Texas on direct review was 31%, and put the national average at 40%.<sup>173</sup> Virginia was a whopping 30 percentage points below the national average.

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defendant’s life.”).

167. See Legislative Study Review, *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, 360 (2002).

168. *Peterson v. Commonwealth*, 225 Va. 289, 301, 302 S.E.2d 520, 528 (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.”).

169. See ABA, *supra* note 141, at 218 n.56.

170. See 2002 JLARC STUDY, *supra* note 64, at 55 (“This analysis revealed that the Supreme Court [of Virginia] affirmed the judgment of the trial court, including the death sentences, in 93 percent of the death cases that it has reviewed.”).

171. See *id.* at 58.

172. See Liebman et al., *supra* note 4, at 45.

173. See *id.* at 45; see also *id.* at 47 (“[T]he Supreme Court [of Virginia] finds error only 10% of the time—7 percentage points below Missouri, 16 percentage points below where the

And that was just the direct appeal process. If a capital defendant's direct appeal failed (as it almost always did), then, assuming that the Supreme Court of the United States did not grant certiorari, the defendant's next step was to challenge their conviction and/or sentence through the habeas process, starting in state court. Prior to 1995, that meant filing a petition for habeas corpus relief in the state court where the defendant was tried.<sup>174</sup> In 1995, however, Virginia "streamlined" its habeas process and gave the supreme court original jurisdiction over state habeas petitions, eliminating the trial court veto gate.<sup>175</sup> That's right, Virginia sent capital defendants seeking habeas relief back to the exact same court that had just denied their direct appeal. *Oh, you again.*

Virginia's process for considering state habeas petitions went a long way towards ensuring that a capital defendant's second trip to the supreme court would end the same way the first one did. Aside from Virginia's strict and notably limited time and space constraints for filing a habeas petition (especially when compared to other states),<sup>176</sup> Virginia allowed for habeas petitions to be decided on affidavits and other "recorded matters," and they almost always were.<sup>177</sup> Although the supreme court had the authority to order the trial court to hold an evidentiary hearing,<sup>178</sup> it rarely did so. The ABA's 2013 study of Virginia's death penalty found that only *five* habeas petitions had been granted an evidentiary hearing since 1995, when the supreme court's original jurisdiction over them began.<sup>179</sup> This was "particularly troublesome," the ABA report

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distribution becomes continuous, and 31 percentage points below the national average. . . . Missouri's rate is only 40%, and Virginia's is less than 25%, of the national average.").

174. See 2002 JLARC STUDY, *supra* note 64, at 57 (discussing Virginia's habeas process prior to 1995).

175. See VA. CODE ANN. § 8.01-654(C)(1) (Cum. Supp. 1995). It is tempting to say that the move eliminated two veto gates in one shot—the trial court and Court of Appeals of Virginia—but Virginia's habeas process prior to 1995 already had eliminated the Court of Appeals of Virginia by providing for a direct appeal to the supreme court. See 2002 JLARC STUDY, *supra* note 64, at 57.

176. See ABA, *supra* note 141, at 230–32 (discussing "[i]nsufficient [t]ime and [s]pace to [a]dequately [p]resent [s]tate [h]abeas [c]laims" and noting, "[o]ther jurisdictions—including those with a higher volume of capital cases than Virginia—do not impose such limitations").

177. § 8.01-654(B)(4) (Cum. Supp. 1995).

178. See § 8.01-654(C)(1) (Cum. Supp. 1995).

179. See ABA, *supra* note 141, at 233. ("Since the Supreme Court of Virginia gained exclusive jurisdiction over capital habeas cases in 1995, it has granted evidentiary hearings

concluded, because habeas proceedings are typically the place where non-record claims are first presented, and it is difficult to develop those claims in the absence of an evidentiary hearing where witnesses testify and are cross-examined.<sup>180</sup>

More troubling still was the fact that *no* court had jurisdiction over a capital defendant's case on habeas until the habeas petition was actually filed.<sup>181</sup> That meant there was no right to discovery in order to develop habeas claims because there was no court that had jurisdiction to grant it.<sup>182</sup> "Virginia law effectively bars discovery in most capital state habeas proceedings," the ABA wrote in its 2013 report.<sup>183</sup> Under Virginia law, discovery was only possible in the context of an evidentiary hearing, and that only happened *after* a petition was filed, which meant it was too late to assist in filing the petition itself.<sup>184</sup>

For the same reason, capital defendants had no access to funding for investigators, mitigation specialists, or mental health and other experts to assist them in developing their claims on state habeas review. No court had jurisdiction to grant the request before the petition was filed,<sup>185</sup> and by the time a court did have such

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in only five cases, a small fraction of the total number of capital habeas petitions it has reviewed. 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.").

180. *Id.* at viii; *see also id.* at xxv (noting that on habeas review, the supreme 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"); *id.* at 233 ("[M]any 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.").

181. *See id.* at xxv ("Virginia law provides that *no* court has jurisdiction over a death row inmate's case until after his/her habeas petition is filed."); *id.* at 239 (discussing Virginia law on this issue).

182. *See id.* at xxv ("[D]eath row inmates have no right to discovery in capital habeas proceedings, because there is no court with the jurisdiction to grant it."); *id.* at 239 (reiterating point and noting that "[i]n 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.").

183. *Id.* at 240.

184. *Id.*

185. *See id.* at xxv (Because no court has jurisdiction over a condemned capital defendant's case until after the habeas petition is filed, "[d]eath row inmates are also unable to seek the appointment of mitigation specialists, investigators, and experts, who are often

authority, it was the Supreme Court of Virginia, which always said no. *Always*. As in, not once did the supreme court approve funding for mitigation, investigative, or expert assistance in a capital case petitioning for habeas relief.<sup>186</sup> Shockingly, that sort of assistance, which was critical in developing off-record claims (as well as identifying them in the first place) was left to the VCRRC, which often requested pro bono assistance from these service providers.<sup>187</sup>

Little wonder, then, that the Liebman study reported Virginia's rate of reversal on state habeas claims in capital cases to be three percent, and a 2002 Virginia study reported that figure to be a mere two percent.<sup>188</sup> The 2002 Virginia study found that of the fifty-six state habeas petitions in capital cases that were filed between 1995 and 2002, the supreme court granted relief in just *one*.<sup>189</sup> The ABA looked again in 2013 and reported that the number was still one, although it missed a few cases and the actual number is three.<sup>190</sup> Yet this is a minor quibble, and the ABA's

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needed to fully develop state habeas claims.”).

186. *See id.* at viii (noting that, from 1995–2012, “no court has approved funding for mitigation, investigative, or expert assistance in a death row inmate’s case for state habeas relief”).

187. *See id.* at viii–ix (“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.”). Now is a good time to reiterate that we stand in awe of the excellent and important work of the VCRRC, and indeed, rely on its work in our discussion of the Ricky Gray case. *See infra* notes 481–501 and accompanying text.

188. *See Liebman, et al., supra* note 4, at 48; 2002 JLARC STUDY, *supra* note 64, at 54–55. The Liebman study reported that the total reversal rate for capital cases in Virginia courts (direct appeal and state habeas review combined) was thirteen percent. *See Liebman, et al., supra* note 4, at 51. Again, that figure was by far the lowest in the country. *See id.* at 53 (“As in other analyses, *Virginia is a distinct anomaly*. Its courts’ capital error-detection rate during the study period was less than a third the national average, and 35% below the next nearest state, Missouri—which itself has an error-detection rate 31% below the next lowest state, after which the differences among states are small.”).

189. *See id.* at 57–58. Although the 2002 Virginia study does not name the case, we presume from its description (specifically, its disposition on remand after habeas relief was granted) that the defendant was Chauncey Jackson, discussed at *supra* text accompanying note 163–65. *See Jackson v. Warden*, 259 Va. 566, 529 S.E.2d 587 (2000) (granting habeas relief); *see also* ACLU OF VA., *BROKEN JUSTICE: THE DEATH PENALTY IN VIRGINIA* 39 (2003) (discussing disposition of Chauncey Jackson case after habeas relief was granted).

190. *See ABA, supra* note 141, at 233. The ABA report listed the one exception as *Lenz v. Warden*, a case in which the Supreme Court of Virginia granted a new sentencing hearing for ineffective assistance of counsel in the sentencing phase of trial. 265 Va. 373, 579 S.E.2d 194 (2003). *See ABA, supra* note 141, at 233 n.58. But the supreme court reversed itself and denied the writ in that case after a rehearing several weeks later, so that is not a case we

conclusion still rang true: “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.”<sup>191</sup> This was a problem not only because Virginia did not allow successive state habeas petitions—one shot was all a condemned inmate had—but also because it resulted in an extremely limited record to consider claims on federal habeas corpus review.<sup>192</sup> Indeed, we suspect that was the point.

Federal habeas review of Virginia’s capital cases was the next—and, for all practical purposes, last<sup>193</sup>—chance for a court to reverse a death sentence, and here, too, relief was almost never granted (at least not until the last decade).<sup>194</sup> The 2002 Virginia study found that of the 111 federal habeas petitions that were filed in Virginia capital cases between 1977 and 2001, federal district courts granted a new trial or sentencing in fifteen, denying relief in the

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count. *See Lenz v. Warden*, 267 Va. 318, 593 S.E.2d 292 (2004). However, the supreme court of did grant habeas relief in three other cases in the 2000s. *See, e.g., Jackson v. Warden*, 259 Va. 566, 529 S.E.2d 587 (2000); *Morrisette v. Warden*, 270 Va. 188, 613 S.E. 551 (2005); *Johnson v. Commonwealth*, 267 Va. 53, 591 S.E.2d 47 (2004) (noting as procedural posture of the case that the supreme court awarded the writ of habeas corpus, remanding for a new capital sentencing proceeding, and on resentencing the defendant was again sentenced to death). We thank Matthew Engle for bringing these cases to our attention, and Rob Lee for verifying that the supreme court granted habeas relief in just three cases.

191. ABA, *supra* note 141, at xxiv.

192. *See id.* at xxiv–xxv (“[T]he 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. . . . Virginia law . . . does not permit successive habeas petitions under any circumstances.”).

193. A condemned capital inmate can petition for a writ of certiorari from the Supreme Court of the United States upon denial of the state habeas petition, and again upon denial of the federal habeas petition, but the chances of the Supreme Court granting certiorari to even review the case are exceedingly small. *See* 2002 JLARC STUDY, *supra* note 64, at 60 (noting that of the 111 petitions for federal habeas review in Virginia capital cases, the Supreme Court granted certiorari in just two). *See generally id.* at 56 (mapping out judicial review of death sentences in Virginia).

194. For a detailed discussion of the exceedingly low success rate of capital cases on federal habeas review in the Fourth Circuit, see John H. Blume, *The Dance of Death or (Almost) No One Here Gets out Alive: The Fourth Circuit’s Capital Punishment Jurisprudence*, 61 S.C. L. REV. 465 (2010). For a discussion of the Fourth Circuit’s shift over the last decade from a staunchly conservative court to a court that leans in a moderate/liberal direction, see Ann E. Marimow, *There’s a Word That No Longer Describes the Federal Appeals Court in Richmond*, WASH. POST (Apr. 13, 2017), [https://www.washingtonpost.com/local/public-safety/theres-a-word-that-no-longer-describes-the-federal-appeals-court-in-richmond/2017/04/12/3a82e0c4-193c-11e7-9887-1a5314b56a08\\_story.html](https://www.washingtonpost.com/local/public-safety/theres-a-word-that-no-longer-describes-the-federal-appeals-court-in-richmond/2017/04/12/3a82e0c4-193c-11e7-9887-1a5314b56a08_story.html) [<https://perma.cc/M448-GA9D>].

other ninety-six.<sup>195</sup> Of those fifteen, the Fourth Circuit Court of Appeals upheld the district court's ruling in just *two*.<sup>196</sup> That is an overall reversal rate of just under 2%. The Liebman study put the rate of reversal on federal habeas review of Virginia capital cases at 6%, three times the teeny number that the Virginia study reported.<sup>197</sup> But it also had this to say: "Virginia is again an anomaly in this analysis. The 6% error-detection rate among Virginia capital habeas cases is well under half that of the next lowest state (South Carolina at 14%), and is exactly 15% of the national average."<sup>198</sup> Once again, Virginia's reversal rate was, by far, the lowest in the nation—at least among states that were actually doing federal habeas review.<sup>199</sup>

Worse yet, these record-low reversal rates were in part the product of rules that prevented claims from being considered on the merits. Virginia has the strictest procedural default rules in the country, and it made no exceptions for capital cases.<sup>200</sup> Virginia's rules prevent the consideration of any claim on direct review that has not been properly preserved at trial,<sup>201</sup> and Virginia courts interpret the requirements for properly preserving a claim at trial in a hyper-technical way. In one capital case, for example, the defense attorney objected to a prosecutor's statement during closing argument, and also made a motion for a mistrial—but the attorney did not make the motion for mistrial *at the same time* as the objection, so the claim was dismissed as procedurally defaulted.<sup>202</sup> In another

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195. See 2002 JLARC STUDY, *supra* note 64, at 59–60.

196. See *id.*

197. See Liebman et al., *supra* note 4, at 55.

198. *Id.* at 57.

199. *Id.* at 55. Technically, Delaware was the lowest reversal rate in the nation, as its reversal rate was zero, but it also had just two federal habeas cases from 1973–1995. *Id.* at app. 17.

200. See James S. Liebman, Jeffery Fagan, Valerie West & Jonathan Lloyd, *Capital Attrition: Error Rates in Capital Cases, 1973–1995*, 78 TEX. L. REV. 1839, 1858 n.57 (2000) ("The explanation [for Virginia's outlier status on reversal rates] may lie in the unusual extent to which Virginia courts limit review of capital judgments by, for example: (1) enforcing the region's (and nation's) strictest procedural default doctrine (the rule permitting even egregious error to be ignored on appeal if it was not objected to at trial).").

201. See VA. SUP. CT. R. 5:25 (Repl. Vol. 2021) ("No 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 this Court to attain the ends of justice.").

202. ABA, *supra* note 141, at 244–45 (discussing *Rogers v. Commonwealth*, unpublished



capital case, the Supreme Court of Virginia dismissed thirteen assignments of error as procedurally defaulted because the record where they were preserved was the first sentencing hearing, not the second.<sup>203</sup> Virginia's procedural default rules do have narrow exceptions, but these essentially require defendants to show that, were it not for the error, they would not have been convicted, or that they could not have made the claim at trial because they did not know about it.<sup>204</sup> Outside one of those circumstances (and not once in the entire modern era did the Supreme Court of Virginia reverse a death sentence on a procedurally defaulted claim),<sup>205</sup> a capital defendant was out of luck. However meritorious, those claims were gone.

Moreover, Virginia's strict procedural default rules, combined with its draconian page limitations on briefs filed in capital cases, added a second way for condemned capital defendants to default on their claims. Before 2010, when the page limit on briefs filed in capital cases was raised to 100 pages (which was still quite limited given the host of issues in a capital case), a condemned capital defendant's brief in Virginia was capped at 50 pages.<sup>206</sup> That made it exceedingly difficult for defense counsel to comply with the rules for preserving assignments of error, which were deemed defaulted if not fully developed for review.<sup>207</sup> "It is not the role of the courts . . . to research or construct a litigant's case or arguments for [them]," the Court of Appeals of Virginia has stated, adding: "where a party fails to develop an argument in support of [their] contention and merely constructs a skeletal argument, the issue is

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decision by the Court of Appeals of Virginia).

203. See *Prieto v. Commonwealth*, 283 Va. 149, 160–61, 721 S.E.2d 484, 491–92 (2012) (dismissing assignments of error 14, 81, 82, 85, 90, 93, 101, 130, 131, 139, 172, 185, and 186 as procedurally defaulted).

204. See 2002 JLARC STUDY, *supra* note 64, at 64–65 (discussing exceptions to Virginia's procedural default doctrine).

205. See ABA, *supra* note 141, at 245.

206. See R. 5:22, 5.26, 5:7A(g) (Repl. Vol. 2021); see also ABA, *supra* note 141, at 232 n.45 (noting page limits prior to 2010 and adding that capital defense counsel reported that "requests for page extensions were frequently denied").

207. See R. 5A:20(d)–(e) (Repl. Vol. 2021) (requiring that opening brief include "[a] clear and concise statement of the facts that relate to the assignments of error" and "[t]he standard of review and the argument (including principles of law and authorities) relating to each assignment of error").

waived.”<sup>208</sup> That left counsel in capital cases squeezed between rules that required the full development of claims lest they be procedurally defaulted, and rules that strictly limited their ability to do so. The ABA’s 2013 report on Virginia’s capital punishment system documented the problem, noting that the exceedingly short page limits in capital cases led to claims being “pled more thinly.”<sup>209</sup> Indeed, in several capital cases, attorneys desperate to save pages simply cross-referenced a memorandum of law filed with the trial court, or transcript pages where the argument was fully presented, but the supreme court held that doing so rendered those claims procedurally defaulted, too.<sup>210</sup>

Whatever impact these procedural default rules had on the supreme court’s direct review of capital cases,<sup>211</sup> that impact was only magnified on habeas review. Any claims that a capital defendant did not make at trial and direct appeal were deemed procedurally defaulted on state habeas review, with important exceptions for non-record claims like ineffective assistance of counsel and prosecutorial misconduct.<sup>212</sup> And any claims that a capital defendant did not make on state habeas review were deemed procedurally defaulted on federal habeas review, absent a set of narrow and

208. *Bartley v. Commonwealth*, 67 Va. App. 740, 746, 800 S.E.2d 199, 202 (2017).

209. *See* ABA, *supra* note 141, at 232 n.47.

210. *See, e.g., Burns v. Commonwealth*, 261 Va. 307, 319, 541 S.E.2d 872, 881 (2001) (“[O]n brief, [defendant] relied solely on his memorandum presented to the circuit court with regard to this issue. Burns’ reference to argument that he made in the circuit court is ‘insufficient and amounts to procedural default.’”) (quoting *Jenkins v. Commonwealth*, 244 Va. 445, 461, 423 S.E.2d 360, 370 (1992)); *Schmitt v. Commonwealth*, 262 Va. 127, 138, 547 S.E.2d 186, 194 (2001) (“[O]n brief, [defendant] refers solely to his motion presented to the trial court with regard to this issue. Schmitt’s references to arguments that he made in the trial court are insufficient and amount to procedural default of this issue.”); *Hedrick v. Commonwealth*, 257 Va. 328, 336, 513 S.E.2d 634, 638 (1999) (where capital defendant on appeal referenced a memorandum of law filed with trial court regarding claim, “[w]e hold that the defendant’s assertions are insufficient and constitute a procedural default”).

211. The 2002 Virginia study concluded that just nine percent of claims rejected by the Supreme Court of Virginia on direct review were procedurally defaulted, but it did not categorize a claim as procedurally defaulted where the supreme court ruled that it was procedurally defaulted but stated that the claim would have nevertheless failed on the merits. As a result, the study did not report the percentage of claims that were actually deemed procedurally defaulted. *See* 2002 JLARC STUDY, *supra* note 64, at 65–66.

212. *See Slayton v. Parrigan*, 215 Va. 27, 29–30, 205 S.E.2d 680, 682 (1974); *see also* ABA, *supra* note 141, at 243 (“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.’”) (quoting *Teleguz v. Warden*, 279 Va. 1, 7–8, 688 S.E.2d 865, 872 (2010)).

exceedingly complicated exceptions.<sup>213</sup> Moreover, any claim that a state court on direct *or* habeas review ruled was procedurally defaulted was also deemed procedurally defaulted on federal habeas review (again, absent a set of narrow and exceedingly complicated exceptions).<sup>214</sup>

The numbers speak for themselves. The 2002 Virginia study found that a third of all claims made in capital cases on state habeas review—33%—were deemed procedurally defaulted and dismissed without consideration on the merits.<sup>215</sup> A slightly higher percentage—35%—of all claims made in capital cases on federal habeas review at the district court level were deemed procedurally defaulted and dismissed without consideration on the merits, while another 20% were deemed procedurally defaulted and dismissed without consideration on the merits at the federal appellate level.<sup>216</sup> In several of the federal habeas cases, the court lamented that procedural default rules forced the affirmance of a death sentence where the defendant clearly did not receive a fair trial.<sup>217</sup>

One final point about the procedural rules that governed post-trial review of a capital case merits mention, and it is Virginia's "21-day rule." The 21-day rule deprives trial courts of jurisdiction to set aside the verdict in a case after 21 days have passed from the entry of a final order.<sup>218</sup> The rule has no exceptions for capital cases and, until 2001, Virginia had no other mechanism by which courts

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213. See 28 U.S.C. § 2254(b)(1) (failure to exhaust all state remedies available on direct appeal and state habeas review is grounds for dismissal of claim, with exceptions).

214. *Wainwright v. Sykes*, 433 U.S. 72 (1977); see also 2002 JLARC STUDY, *supra* note 64, at 75 (discussing exceptions).

215. See 2002 JLARC STUDY, *supra* note 64, at 55.

216. See *id.* at 55, 76 fig.28.

217. See, e.g., *Edmonds v. Jabe*, 874 F. Supp. 730, 738 (W.D. Va. 1995) ("In closing, the court would like to make it clear that it believes Dana Ray Edmonds did not receive effective assistance of counsel. . . . Nevertheless, bound by case precedent and the enigmatic doctrine of procedural default, the court must deny the Petitioner's motion for stay of execution and writ of habeas corpus. Edmonds' claim that his 6th Amendment rights were violated is procedurally barred from a collateral review on the merits."); Order at 21–22 n.4, *Jenkins v. Angelone*, No. 96CV934 (E.D. Va. Jan 22, 1998) ("More troubling than the sheer number of defaulted claims is that on its face, at least one of these claims appears to have merit. . . . The claims concerning Clendenen cry out for further inquiry but this Court is prohibited under the law from heeding these claims. Despite the number and apparent weight of the petitioner's defaulted claims, Jenkins is nevertheless unable to present a viable ineffective assistance of counsel claim. This impresses the court as a significant gap in the law.")

218. See VA. SUP. CT. R. 3A:15(b) (Repl. Vol. 2021).

could consider newly discovered evidence.<sup>219</sup> Newly discovered evidence was not a trial court error that could be raised on direct appeal, and Virginia did not recognize claims of actual innocence on state habeas review.<sup>220</sup> Claims of actual innocence were also generally not cognizable on federal habeas review,<sup>221</sup> which meant that a convicted capital defendant's only way to get a court to set aside a conviction based on newly discovered evidence was a motion that had to be made within 21 days of the sentence of death.

As a point of comparison, 33 states give condemned capital inmates 6 months after their appeals have ended to challenge their conviction based on newly discovered evidence, while another 7 states place no time limit at all on such claims.<sup>222</sup> Virginia gave condemned capital defendants a mere 3 weeks from the date their death sentence was entered—by far the shortest deadline in the country.<sup>223</sup> Even if a condemned capital inmate found unassailable evidence of innocence, if it came on day 22, the inmate's only available option was to ask for executive clemency. To borrow from Sister Helen Prejean's articulation of the point: "Virginia has this incredible 21-day rule that says if you don't present evidence in 21 days, they'll let an innocent guy die. That's just atrocious when you think of it."<sup>224</sup> In 2001, Virginia addressed this problem by creating a writ of actual innocence, initially limiting the writ to claims of innocence based on biological evidence, then expanding it in 2004 to claims based on nonbiological evidence under limited circumstances.<sup>225</sup> But for decades of death penalty practice, 21 days was all condemned capital defendants had to get newly discovered evidence of their innocence before a court for consideration.

So there it is—the basic structure of Virginia's capital punishment system and how it played out in practice. All that remains

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219. In 2001, Virginia established Writs of Actual Innocence to fill this gap. *See infra* text accompanying note 225.

220. *See Lovitt v. Warden*, 266 Va. 216, 585 S.E.2d 801 (2003).

221. *See Herrera v. Collins*, 506 U.S. 390 (1993).

222. *See* ROBERT M. BOHM, *DEATH QUEST* 221 (4th ed. 2011).

223. *See id.*

224. Anne E. Duprey, *Virginia's "21 Day Rule" and Illinois' Death Row Debacle: A Comparative Study in Capital Justice and the Relevance of Innocence*, 10 CAP. DEF. J. 82, 94 (1998) (quoting Sister Helen Prejean).

225. VA. CODE ANN. § 19.2-327.1(A) (Cum. Supp. 2001) (writ of actual innocence based on biological evidence); *id.* § 19.2-327.10 (Repl. Vol. 2004) (writ of actual innocence based on nonbiological evidence, where the defendant did not plead guilty at trial).

are some data points to show just how lethal Virginia's death penalty was when considered as a whole, and just how committed Virginia was to the execution enterprise. We turn to those next.

### C. *The Big Picture View: Facts and Figures of Fealty to Death*

Understanding the structure of Virginia's machinery of death is the start of understanding just how committed Virginia was to its death penalty, but the big picture view is what drives the point home. Start with executions. Virginia was the second most executing state in the country in the modern era of the death penalty, with 113 executions since 1976.<sup>226</sup> Only Texas had more executions during this time, and Texas has way more people—twenty million more in 2020<sup>227</sup>—so everything is going to be bigger in Texas. Indeed, when adjusted for population, Virginia had *more* executions pound for pound (of flesh) than even Texas in the modern era, at least before 2000.<sup>228</sup> At its peak in 1998 and 1999, Virginia was executing thirteen to fourteen people *per year*, accounting for nearly a quarter of all executions nationwide.<sup>229</sup>

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226. See DEATH PENALTY INFO. CTR., STATE AND FEDERAL INFO: VIRGINIA, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/virginia> [<https://perma.cc/R59A-6V7J>].

227. Compare DEATH PENALTY INFO. CTR., STATE AND FEDERAL INFO: TEXAS, <https://deathpenaltyinfo.org/state-and-federal-info/state-by-state/texas> [<https://perma.cc/GNM3-2ZW7>] (570 executions since 1976), with DEATH PENALTY INFO. CTR., STATE AND FEDERAL INFO: VIRGINIA, *supra* note 226 (113 executions since 1976); compare U.S. CENSUS BUREAU, QUICK FACTS: TEXAS (reporting population in Texas as 29,145,505 as of 2020 census), <https://www.census.gov/quickfacts/TX> [<https://perma.cc/6BXR-PXQF>], with QUICK FACTS: VIRGINIA (reporting population in Virginia as 8,631,393 as of 2020 census), <https://www.census.gov/quickfacts/VA> [<https://perma.cc/AB6T-ARUA>].

228. See Stephen C. Fehr, *Virginia's Efficient System of Death*, WASH. POST (Apr. 4, 1999), <https://www.washingtonpost.com/wp-srv/local/daily/april99/penalty4.htm> [<https://perma.cc/VD2S-URH5>] ("Virginia's politicians and courts have set up such an efficient system of carrying out the death penalty that Virginia now executes more murderers, given its population, than any other large state."). We note here that the structure of capital punishment in Texas has its own built-in biases designed to get death sentences and move them along. See generally Carol S. Steiker & Jordan M. Steiker, *A Tale of Two Nations: Implementation of the Death Penalty in "Executing" versus "Symbolic" States in the United States*, 84 TEX. L. REV. 1869 (2006).

229. See DEATH PENALTY INFO. CTR., STATE AND FEDERAL INFO: VIRGINIA, *supra* note 226; 2002 JLARC STUDY, *supra* note 64, at 13 fig.3 (showing number of executions carried out in Virginia as a percentage of executions carried out nationwide and noting that Virginia accounted for 19% and 23% of all executions in 1998 and 1999, respectively).

Here is how the gears of Virginia's machinery of death churned—at least before 2004, when Virginia's capital defender offices started taking cases. Prosecutors obtained capital murder indictments in eight out of every ten murders eligible to be charged as capital murder and took over a third of them to trial.<sup>230</sup> The vast majority of those cases ended in a death sentence. Between 1976 and 2004, Virginia tried 166 capital defendants, 140 of whom were sentenced to death—a death-sentencing rate of 84%.<sup>231</sup>

Then there were the gears that turned death sentences into executions. The overall reversal rate of death sentences in Virginia (all three levels of review combined) was just 18%—*half* the rate of the state with the second lowest reversal rate (Missouri), and just a *fourth* of the national average, which is a shockingly high 68%.<sup>232</sup> That made Virginia by far the most successful state in the Union at converting death sentences into executions. With an overall execution rate that was *five times* the national average,<sup>233</sup> Virginia did not mess around. It also did not like to be kept waiting. The average time between death sentence and execution in Virginia was just under eight years in 2012 (with a number of inmates being executed in under five).<sup>234</sup> The national average at that time was nearly double that—15.8 years—and since 2012, it has grown exponentially.<sup>235</sup> Putting it all together, Virginia's death penalty

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230. See 2002 JLARC STUDY, *supra* note 64, at 17 fig.17 (showing that from 1995–1999, 170 of the 215 murders eligible for a capital murder indictment resulted in a capital murder indictment, and of those 170 cases, prosecutors sought the death penalty in sixty-four).

231. See ABA, *supra* note 141, at 142 (“[P]rior to 2004, the year in which the [regional capital defenders] began accepting appointments, Virginia tried 166 defendants at a capital trial since 1976, of which 140 were sentenced to death. This is a death-sentencing rate for cases that went to trial of approximately eighty-four percent.”).

232. See Liebman et al., *supra* note 4, at 66–69; see also *id.* at 68–69 (“Virginia is a distinct outlier here, falling almost literally ‘off the charts’ on the low side of error detection. . . . In technical terms, Virginia’s overall-error detection rate is nearly 3 standard deviations below the mean . . .”).

233. See *id.* at app. E-2 (appendix showing that Virginia’s execution rate is 28%; the national average is 5%).

234. See Khalfani and Northup, *supra* note 3; ACLU OF VA., UNEQUAL, UNFAIR AND IRREVERSIBLE: THE DEATH PENALTY IN VIRGINIA 4 (2000), [https://acluva.org/sites/default/files/field\\_documents/unequalunfairandirreversible2000.pdf](https://acluva.org/sites/default/files/field_documents/unequalunfairandirreversible2000.pdf) [<https://perma.cc/QM5V-6AFK>] (noting that Virginia executed nine condemned inmates within five years of their sentencing between 1998–2000).

235. See U.S. BUREAU OF JUST. STAT., TABLE 12: AVERAGE ELAPSED TIME BETWEEN SENTENCING AND EXECUTION, 1977–2019, <https://bjs.ojp.gov/sites/g/files/xyckuh236/files/media/document/cp19st.pdf> [<https://perma.cc/VG68-DPHC>] (reporting average time between

produced the most executions (per capita, for a time), the least reversals, and the fastest time to execution. It was, to turn a Hobbesian phrase, “nasty, brutish, and short.”<sup>236</sup>

Naturally, this is not how Virginia officials saw the situation. When asked about Virginia’s “highly anomalous” low reversal rates in the wake of the well-publicized Liebman study,<sup>237</sup> a spokesman for Virginia’s then-Attorney General told the press: “Virginia has the most fair, balanced and carefully implemented death penalty system in the country.”<sup>238</sup> “Virginia prosecutors do a good job of trying their cases with few errors,” he explained, adding that “Virginia’s capital statutes are well written and narrowly defined.”<sup>239</sup>

Professor Liebman had a different take. “It’s a combination of things,” he said when asked the same question, explaining:

Virginia, in my view, has the broadest death penalty statute in the country. It has a court system in which . . . post-trial review is very limited. It’s got a conservative bench, both at the trial level and at the [s]upreme [c]ourt level. And then it has the Fourth Circuit. When it comes to getting and keeping death sentences, the planets are just really aligned over Virginia.<sup>240</sup>

Virginia was able to *get* death sentences with a capital murder statute that swallowed most everything in sight, and it was able to *keep* them with a post-sentencing review process that, as Brandon

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death sentence and execution in the United States in 2012 at 190 months (15.8 years), and average time between death sentence and execution in the United States in 2019 at 264 months (22 years)).

236. THOMAS HOBBS, *Of the Natural Condition of Mankind as Concerning Their Felicity, and Misery*, in LEVIATHAN 76, 78 (1651).

237. Liebman et al., *supra* note 4, at 14. The Liebman study is discussed *supra* text accompanying notes 172–73, 188, 197, 232–33.

238. ACLU OF VA., *supra* note 234, at 7 (quoting David Botkins, spokesman for Attorney General Mark Earley).

239. *Id.* at 31. See generally *Gaslighting*, URBAN DICTIONARY, <https://www.urbandictionary.com/define.php?term=Gaslighting> [<https://perma.cc/3B79-73XD>] (defining “gaslighting” as “systematically withholding factual information from, and/or providing false information”).

240. ACLU OF VA., *supra* note 234, at 7 (quoting Columbia Law Professor James Liebman). We note that the Fourth Circuit is not the conservative bench that it was in 2000, and that may have played a role in its receptiveness to capital defendants’ claims in later cases. For an example, see *supra* text accompanying notes 120–23.

Garrett writes, was “ruthlessly efficient.”<sup>241</sup> The combination was a killer.

Virginia’s resolve in carrying out death sentences and its ability to do so with such remarkable dispatch were markers of its fealty to capital punishment, but there were other markers as well, and one of them was *who* Virginia was willing to execute. Most states have little interest in executing women, although women comprise roughly ten percent of all homicide offenders.<sup>242</sup> But Virginia was willing to do so, executing a woman in 2010 whose intellectual functioning was assessed to be among the bottom three percent of society.<sup>243</sup>

The same was true of juvenile offenders. Very few states imposed the death penalty on juvenile offenders, even before the Supreme Court prohibited the practice in 2005.<sup>244</sup> But, here again, Virginia was one of them. Indeed, in 2003, Beltway sniper Lee Boyd Malvo was tried in Virginia (instead of Maryland or the District of Columbia) for the very reason that Virginia allowed the death penalty for juvenile offenders.<sup>245</sup>

The same could be said of Virginia’s willingness to execute intellectually disabled offenders and offenders who were severely mentally ill. Virginia had no prohibition against executing the severely mentally ill.<sup>246</sup> Indeed, its last execution before repealing the death

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241. GARRETT, *supra* note 154, at 3.

242. As of 2021, only seventeen women have been executed in the forty-plus years of the modern era. See DEATH PENALTY INFO. CTR., EXECUTIONS OF WOMEN (listing women executed and the nine states that executed them); see also BOHM, *supra* note 222, at 274–75. (discussing data and noting that states’ reticence to execute women reflects a widespread perception that women are the “gentler sex”).

243. See Segura, *supra* note 15 (discussing condemned capital murderer Teresa Lewis, who was convicted and sentenced to death in a murder for hire to kill her husband and his son for insurance money).

244. See *Roper v. Simmons*, 543 U.S. 551 (2005); Lain, *Deciding Death*, *supra* note 17, at 52 (“Even in the 1990s, when public support for the juvenile death penalty peaked, there were only around ten juvenile death sentences per year. By 2001, there were just seven, and in the two years before *Roper*—2003 and 2004—the annual tally was *two*.”).

245. See DEATH PENALTY INFO. CTR., STATE AND FEDERAL INFO: VIRGINIA, *supra* note 226; see Lain, *Deciding Death*, *supra* note 17, at 52 (“Not even Washington beltway sniper Lee Boyd Malvo received a death sentence, and he was tried in Virginia just to maximize the chance that he would.”).

246. See ABA, *supra* note 141, at 393 (“Virginia law does not prohibit the application of the death penalty to persons who suffer from severe mental disorders or mental disabilities



penalty was of a man who was actively psychotic and suffering from paranoid delusions, a long-standing condition that predated his offense.<sup>247</sup>

Moreover, Virginia was downright dug-in on the death penalty for intellectually disabled offenders, even after the Supreme Court in *Atkins v. Virginia* ruled that the practice was unconstitutional in 2002.<sup>248</sup> Virginia responded to *Atkins* by adopting a strict I.Q. cut-off score to determine who could benefit from the ruling, an approach expressly rejected by the relevant professional organizations and that was adopted by only one other state.<sup>249</sup> Indeed, Virginia's approach to identifying the intellectually disabled was so miserly that, in 2014, the Supreme Court ruled that it was unconstitutional, too.<sup>250</sup>

Virginia also had the jury make the determination of whether a capital defendant was intellectually disabled at the sentencing phase of trial, rather than having a judge make the determination in a pretrial ruling.<sup>251</sup> As a practical matter, this meant that the jury was deciding whether a defendant was exempt from the death penalty at the same time as it was hearing evidence on the reasons why the defendant should receive it. The ABA's 2013 assessment of Virginia's death penalty noted the clear advantages of

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other than [intellectual disability].”).

247. For a discussion of William Morva, see Lain, *Three Observations About the Worst of the Worst, Virginia-Style*, *supra* note 28, at 473–74.

248. See *Atkins v. Virginia*, 536 U.S. 304 (2002); see also DEATH PENALTY INFO. CTR., STATE AND FEDERAL INFO: VIRGINIA, *supra* note 226 (noting that on remand, *Atkins* was again sentenced to death when the jury rejected his claim that he was intellectually disabled, but prosecutorial misconduct was then discovered and the case was reversed and remanded again, at which time the prosecution agreed to plead the case for a life sentence).

249. See ABA, *supra* note 141, at x (noting that Virginia's adoption of a strict I.Q. cut-off score “has been expressly rejected by the American Association on Intellectual and Developmental Disabilities (“AAIDD”) and is contrary to the modern, scientific understanding of [intellectual disability]”); *id.* at 380–82 (discussing Virginia's approach to intellectual disability and noting its nonconformity with stance of professional organizations); see also *Hall v. Florida*, 572 U.S. 701, 718 (2014) (“In summary, every state legislature to have considered the issue after *Atkins*—save Virginia's—and whose law has been interpreted by its courts has taken a position contrary to that of Florida.”).

250. See *Hall*, 572 U.S. at 724 (2014).

251. See VA. CODE ANN. § 19.2-264.3:1.1(C) (Cum. Supp. 2021) (“[T]he issue of intellectual disability . . . shall be determined by the jury as part of the sentencing proceeding . . .”). The danger of Virginia's system is illustrated by the fact that the very defendant in *Atkins* was again sentenced to death, despite having an I.Q. of 59. See *supra* note 248.

determining death eligibility pretrial.<sup>252</sup> Knowing that a capital defendant was ineligible for the death penalty up front would spare the state “a long, expensive, and ultimately unnecessary capital proceeding,” the report noted, and jurors may be “strongly influenced” by aggravating circumstances when making the eligibility determination at sentencing.<sup>253</sup> Virginia’s implementation of *Atkins* by having the jury determine intellectual disability at sentencing simply made no sense, other than as a way to resist the ruling.

Just two more points merit mention here to complete the big picture view. The first goes to the relationship between Virginia’s death penalty and race: what, if anything, changed between the early and modern eras? A Virginia ACLU report answered that question in 2000, concluding that the impact of race on Virginia’s death penalty was more subtle in the modern era than it was before 1972, but it was just as present.<sup>254</sup> In the modern era, the report showed, what mattered most was the race of the *victim* in capital murder cases. In lieu of race playing a role in deciding whose lives Virginia would take, race played a role in deciding whose lives it would protect and whose deaths it would avenge.

The facts and figures tell the tale. Prosecutors were over three times as likely to seek the death penalty in a capital murder-eligible case if the victim was White.<sup>255</sup> And death *sentencing* rates were two to three times higher when the victim was White (depending upon the crime), and *four* times higher when the defendant was Black and the victim was White.<sup>256</sup> Of Virginia’s 113 executions in the modern era, 93 of them—82%—involved a White victim.<sup>257</sup>

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252. See ABA, *supra* note 141, at xxxvi; see *id.* at 353–55 (discussing Virginia’s statutory scheme for implementing *Atkins* and the ways in which it is problematic).

253. *Id.* at x.

254. See ACLU OF VA., *supra* note 234, at 41.

255. See 2002 JLARC STUDY, *supra* note 64, at 43. Astoundingly, this study concluded that such race effects were not statistically significant when the “character” of the victim was taken into account, noting that Black murder victims were themselves more likely to have been involved in criminal activity than their White counterparts. See *id.* We agree with the ABA that controlling for the “character” of the victim was an “unsuitable control variable.” ABA, *supra* note 141, at 337.

256. See ACLU OF VA., *supra* note 234, at 39–41 (discussing death sentencing rates by race of the victim and race of the offender for various capital offenses).

257. See DEATH PENALTY INFO. CTR., EXECUTION OVERVIEW: EXECUTIONS BY RACE AND

The cross-race comparison was particularly stark. Setting aside multiple-victim murders (every one of which involved at least one White victim), thirty-six Black offenders were executed for killing a White victim, while just *four* White offenders were executed for killing a Black victim.<sup>258</sup> That's it. In the entire modern era spanning over forty years of death penalty practice and encompassing 113 executions, Virginia had just 4 executions for White-on-Black crime.

In fairness, the race of the victim was not the dominant determinant of decisions to seek the death penalty in Virginia—that dubious distinction went to location, reflecting massive disparities among local prosecutors in their inclination to seek death.<sup>259</sup> “Location, More than Any Other Factor, Is Most Strongly Associated with the Decision by Commonwealth’s Attorneys to Seek the Death Penalty,” a subheading read in the 2002 Virginia study’s report, which went on to state: “Perhaps the key finding of this study is that Commonwealth’s Attorneys in different-sized localities handle capital murder cases differently, even when these cases appear strikingly similar on the facts.”<sup>260</sup> Some prosecutors sought a capital murder indictment every time they could; others did so some of the time, and a few never did.<sup>261</sup> One prosecutor had even stated that he would “charge capital murder even if it’s questionable as to whether or not it fits in that category.”<sup>262</sup> The ACLU’s study had shown that a third of the death sentences in Virginia were coming out of just 8 jurisdictions (of 133 in the state), and those jurisdictions accounted for just 10% of the pool of possible capital murder indictments.<sup>263</sup> If the goal in the modern era was to make death

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RACE OF VICTIM, <https://deathpenaltyinfo.org/executions/executions-overview/executions-by-race-and-race-of-victim> [<https://perma.cc/VH9G-GTKQ?type=image>] (select “State”; de-select “All”; and select “Virginia”).

258. *See id.* (Select “State”; de-select “All”; select “Sex”; de-select “All”; select “White”; select “Race of Victims”; de-select “All”; and select “Black”).

259. For an excellent discussion of the issue more generally, see Adam M. Gershowitz, *Statewide Capital Punishment: The Case for Eliminating Counties’ Role in the Death Penalty*, 63 VAND. L. REV. 307 (2010).

260. 2002 JLARC STUDY, *supra* note 64, at iv, vi.

261. *See id.* at 31 (finding that 60% of prosecutors surveyed said they always seek a capital murder indictment when eligible, 38% reported they sometimes seek a capital murder indictment, and 2% indicated that they never seek a capital murder indictment).

262. ABA, *supra* note 141, at 118.

263. *See* ACLU OF VA., *supra* note 234, at 9.

sentencing less arbitrary and capricious, the 2002 Virginia study concluded, “then it has not achieved this goal.”<sup>264</sup>

The second point goes to an issue that has been conspicuously absent from the discussion thus far: the role of capital defenders. It should come as no surprise that in a capital punishment system as skewed towards death as Virginia’s was, capital defense was not structured in such a way that would seriously challenge the state’s pursuit of death, at least not at first. When Virginia reinstated the death penalty, it had no standards governing the qualifications of capital defenders and capped their fees at \$650 per case.<sup>265</sup> That’s it: \$650 for representation in a capital case, no matter how much work the attorney did (and at that rate, it was hard to justify much). Of course, private attorneys who had been retained for their services made more than that, but ninety-seven percent of those who receive the death penalty are indigent, so indigent capital defense is pretty much the whole ball game.<sup>266</sup>

In 1982, Virginia removed the cap on attorney fees in capital cases,<sup>267</sup> but the pay was still abysmal. A study in the 1990s concluded that after taking into account overhead expenses, the hourly rate for capital defense counsel in Virginia was effectively thirteen dollars per hour.<sup>268</sup> By 2000, pay in capital cases had substantially improved, even as Virginia’s pay for indigent defense in *non-capital* cases ranked lowest in the nation.<sup>269</sup> The Virginia

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264. See 2002 JLARC STUDY, *supra* note 64, at 28 (“Nonetheless, if the goal of the General Assembly in revising the State’s capital punishment statutes was to create a statewide system in which death cases are distinguished from non-death cases by concrete and relevant factors such as the vileness of the crime, the future dangerousness of the criminal, and the nature of the evidence then it has not achieved this goal.”).

265. See *id.* at 24. Anecdotally, one lawyer who was trying capital cases back in the 1970s remembers the pay caps being even less than that. He remembers the caps being \$400 at the very beginning, and he remembers this because of a five-day capital trial in which he and his co-counsel were paid just \$450 each (and the \$50 was for expenses).

266. See ACLU OF VA., *supra* note 234, at 4.

267. See *id.* at 14.

268. See 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, 1853 (1994); see also BOHM, *supra* note 222, at 233 (“A paralegal working on a federal bankruptcy case is paid more per hour than a defense attorney in a capital case in Alabama, Georgia, Mississippi, and Virginia.”).

269. See THE SPANGENBERG GRP., A COMPREHENSIVE REVIEW OF INDIGENT DEFENSE IN VIRGINIA at 1–2 (2004), [https://www.americanbar.org/content/dam/aba/administrative/legal\\_aid\\_indigent\\_defendants/downloads/indigentdefense/va\\_report2004execsum.pdf](https://www.americanbar.org/content/dam/aba/administrative/legal_aid_indigent_defendants/downloads/indigentdefense/va_report2004execsum.pdf) [<https://perma.cc/KC4C-6KWW>] (prepared for the ABA Standing Committee on Legal Aid

ACLU's study that year found that the average fees in a capital case were just short of \$30,000, while the average hours on a capital case were just short of 250.<sup>270</sup> That worked out to be a little less than \$120 per hour, although this was an extremely rough estimate given that the hours and fees in any given case did not necessarily match either of those averages.<sup>271</sup> By the time Virginia repealed the death penalty, it was paying court-appointed capital defenders an amount "deemed reasonable" by the trial court, with hourly rates up to \$200 per hour for in-court work, and \$150 per hour for out-of-court work.<sup>272</sup> That was not law firm pay, but it was also not abysmal.

If pay was one-half of the problem, mandatory competency standards for court-appointed counsel in capital cases were the other. Prior to 2004, the vast majority of capital defenders were court-appointed; salaried public defenders took a slice of capital cases, but the lion's share of capital defense was performed by local attorneys appointed by the court with jurisdiction over the case.<sup>273</sup> In the 1990s, Virginia adopted a set of minimum qualifications for appointing counsel in capital cases and created a list of attorneys who met those qualifications.<sup>274</sup> Courts were expected to choose from this list when appointing counsel in a capital case.<sup>275</sup>

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and Indigent Defendants).

270. See ACLU OF VA., *supra* note 234, at 14 ("Overall, the average number of hours expended by this group of court-appointed lawyers was 249 total hours per case. The average total fees approved by the courts were \$29,800 per case.").

271. See *id.* ("The condition of these vouchers was, in a word, inadequate. . . . In very few cases did the vouchers include the attorneys' time records. Accordingly, any firm conclusion on the adequacy of the fees paid to appointed counsel is not possible.").

272. See VA. OFF. OF THE EXEC. SEC., SUPREME COURT OF VIRGINIA CHART OF ALLOWANCES 9 (Jan. 1, 2020), [https://www.vacourts.gov/courtadmin/aoc/fiscal/chart2020\\_0101.pdf](https://www.vacourts.gov/courtadmin/aoc/fiscal/chart2020_0101.pdf) [<https://perma.cc/G6XE-MCBB>].

273. See 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, 342 (2001) ("Salaried public defenders represented thirteen indigent capital defendants in 2000 and the remaining seventy or so indigent capital defendants obtained representation through appointed counsel paid at an hourly rate.").

274. See 2002 JLARC STUDY, *supra* note 64, at 24–25. See also *id.* at app. B-1–3 (listing qualifications for serving as capital counsel, which included being an active member in good standing of the Bar, having at least five years of experience in defense work, and attending a training session).

275. See *id.* at 24.

Virginia tightened those standards in 2002 and again in 2004,<sup>276</sup> but there were gaps in this regulatory framework. Lawyers who wanted to be on the list just filled out a form attesting to their qualifications and submitted it; for years, that was the extent of the screening and verification.<sup>277</sup> Moreover, Virginia did not *require* judges to appoint counsel in capital cases from the list. To the contrary, it explicitly allowed judges to go off-list (so long as the lawyer met the minimal qualifications), and a number of judges routinely did so; indeed, some did not use the list at all.<sup>278</sup> Perhaps most importantly, the minimal qualifications were focused mainly on an attorney's experience, and experience was no guarantee that an attorney was minimally competent.<sup>279</sup>

This is not to suggest that court-appointed representation in capital cases was not remarkably good—it was, *at times*. For example, the Virginia ACLU's 2000 report noted the work of Craig Cooley, a Richmond-area defense attorney who had served as court-appointed counsel for some sixty capital murder defendants by the time of the report.<sup>280</sup> Cooley went to trial in twenty-five of those capital cases, and just *one* ended in a sentence of death.<sup>281</sup> He also represented Beltway sniper Lee Boyd Malvo in 2003, and managed to convince a Virginia jury not to sentence Malvo to death, despite

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276. See *id.* at 25 (noting 2002 modifications to standards); GARRETT, *supra* note 154, at 122 (noting the same in 2004).

277. See ACLU OF VA., *supra* note 234, at 13 (“[T]he [Public Defender] Commission has no screening policy. Lawyers interested in representing capital defendants can join the list simply by completing and submitting a form identifying themselves as qualified according to the standards. The Commission does no independent verification of lawyers’ claims. It simply compiles the list and distributes it to interested judges.”).

278. See 2002 JLARC STUDY, *supra* note 64, at 24 (“Judges may, as an alternative, appoint attorneys who are not on the list as long as they meet the qualifications established by the Commission. . . . Complaints 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.”); ACLU OF VA., *supra* note 234, at 13 (“In a 1999 survey by the Virginia State Crime Commission, 18[%] of the participating judges said they had never appointed a lawyer from the list.”).

279. ACLU OF VA., *supra* note 234, at 12–13 (“These requirements are all concerned with past experience rather than past competence. . . . [N]o lawyer has ever been denied a place on the list or removed from the list . . . .”); 2002 JLARC STUDY, *supra* note 64, at 24 (“There 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.”).

280. ACLU OF VA., *supra* note 234, at 16.

281. *Id.*

the fact that he had killed ten people and injured three others in a shooting spree that terrorized entire populations in a three-state radius.<sup>282</sup> We can attest that many other court-appointed attorneys were phenomenally good as well, particularly those who regularly worked with the specialized capital defenders we are about to discuss—the ones whom specialized defenders would request as co-counsel any chance they could get.

The problem, in short, was not quality, but rather *consistency*. Some court-appointed attorneys in capital cases were not remarkably good, and some were downright terrible. Stories of abysmal representation in Virginia capital cases are legion.<sup>283</sup> Illustrating the point, a federal judge on habeas review of one Virginia capital case called an attorney's direct appeal brief "a shameful disgrace,"<sup>284</sup> while another federal judge in another capital case found that the attorney's performance amounted to "virtually a complete absence of representation."<sup>285</sup> The Virginia ACLU's study found that for every ten capital trials that ended in a death sentence, one involved a capital defense lawyer who would later lose their license.<sup>286</sup> It also found that lawyers who represented a capital defendant whose trial ended in a death sentence were six times more likely to be the subject of a bar disciplinary proceeding than other attorneys.<sup>287</sup> Virginia's 2002 study followed those alarming statistics with one of its own: a whopping twenty-four percent of attorneys who had handled a capital case in the previous five years in Virginia had been disciplined by the Virginia State Bar.<sup>288</sup>

As disturbing as the prospect of gross incompetence in a capital case was in its own right, two aspects of Virginia's capital

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282. See Andrea F. Siegel, *Va. Judge Sentences Malvo to Life Terms*, BALT. SUN (Mar. 11, 2004), <https://www.baltimoresun.com/maryland/bal-te.md.sniper11mar11-story.html> [<https://perma.cc/8EFJ-F5KA>].

283. For a sample, see *infra* notes 391–96 and accompanying text. See also ACLU OF VA., *supra* note 234, at 23 n.27 (listing six condemned capital defendants whose attorneys missed filing deadlines for state habeas review, rendering their claims procedurally barred). For an iconic discussion of the problem more generally, see Bright, *supra* note 268.

284. *Chichester v. Pruett*, No. 97cv155, at 90 (E.D. Va., Richmond Div., Apr. 7, 1998).

285. ACLU OF VA., *supra* note 234, at 18 (discussing the case *Stout v. Thompson*, No. 91-0719-R (W.D. Va., Roanoke Div., July 31, 1995)).

286. *Id.*

287. *Id.* at 17.

288. 2002 JLARC STUDY, *supra* note 64, at 25.

punishment system made it worse. First was the fact that, as discussed above, Virginia's post-trial veto gates were instead propelling death sentences along, so if a capital defendant was going to avoid execution, trial was the place where that needed to happen.<sup>289</sup> Second was the fact that the same court-appointed attorneys who represented capital defendants at trial were assigned to represent them on their direct appeal when the trial resulted in a sentence of death.<sup>290</sup> This was problematic not only because trial work and appellate work were two completely different types of litigation practice, but also because it meant that capital defendants who had substandard counsel at trial were stuck with substandard counsel on appeal as well. "[T]his 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," the ABA noted in its 2013 report.<sup>291</sup> Capital defendants with the bad luck of getting a bad lawyer suffered a double whammy in Virginia, and, here again, the combination was a killer.

This was the state of play in 2002. Virginia's machinery of death hummed along, and counsel in capital cases were generally powerless to stop it. But that was about to change in dramatic fashion.

## II. ENTER SPECIALIZED CAPITAL DEFENDERS

By 2002, the death penalty landscape had shifted significantly in the United States, and Virginia was not immune to these tectonic changes. In this Part, we first discuss the impetus for the creation of four specialized capital defender offices in 2002 and explain what those offices looked like. We then turn to their impact in the trial, pretrial, and (most importantly) plea-bargaining context. Our aim here is to share the story behind the story that others

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289. See *supra* section I.B.3. See also ACLU OF VA., *supra* note 234, at 20 (quoting capital defender Gerald Zerkin as explaining: "In a state like this, where there is little opportunity for relief [on appeal] . . . it is very hard to undo mistakes made at the trial level").

290. See VA. CODE ANN. § 19.2-163.7 (Repl. Vol. 2015).

291. ABA, *supra* note 141, at viii; see *id.* ("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.").



have told—to explain *why* the creation of specialized capital defender offices made a difference, in obvious and less obvious ways.

### A. *Seeds of Change*

It is hard to know where to start this story, but events in the late 1990s at least planted the seeds of change, so we start there. It all began when a slew of high-profile death row exonerations captured the public's attention and would not let it go.<sup>292</sup> The enormously influential book *Actual Innocence* hit the shelves shortly thereafter,<sup>293</sup> and the same year, 2000, the governor of Illinois—a life-long death penalty supporter who had helped rewrite the state's capital punishment statute in the wake of *Furman*—declared a moratorium on executions in the state.<sup>294</sup> The “innocence movement” had begun.<sup>295</sup>

Virginia had its own role in this historical moment with the DNA exoneration of Earl Washington in 2000, which sent shock waves through Virginia and, likewise, drew national attention.<sup>296</sup>

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292. See Lain, *supra* note 17, at 43–44 (discussing high-profile exonerations in late 1990s, including Anthony Porter's exoneration in 1999 after a group of Northwestern journalism students discovered, and then proved, his innocence).

293. See JIM DWYER, PETER NEUFELD & BARRY SCHECK, *ACTUAL INNOCENCE: FIVE DAYS TO EXECUTION AND OTHER DISPATCHES FROM THE WRONGFULLY CONVICTED* (2000).

294. See Lain, *supra* note 17, at 44–45 (discussing the Illinois moratorium). See also Dirk Johnson, *Illinois, Citing Faulty Verdicts, Bars Executions*, N.Y. TIMES (Feb. 1, 2000), <https://www.nytimes.com/2000/0201/us/illinois-citing-faulty-verdicts-bars-executions.html> [<https://perma.cc/K4LL-W29M>] (reporting on moratorium and noting that in the modern death penalty era, Illinois has executed twelve people and exonerated thirteen from death row).

295. See William Claiborne & Paul Duggan, *Spotlight on the Death Penalty*, WASH. POST (June 18, 2000), <https://www.washingtonpost.com/archive/politics/2000/06/18/spotlight-on-death-penalty/71cc957c-8854-4d20-8219-cb5216b52a04/> [<https://perma.cc/Q2VG-HWAG>] (“When Gov. George Ryan (R) announced on Jan. 31 that he was imposing a moratorium on executions in Illinois, little did he know he was igniting a national debate on capital punishment unsurpassed in intensity since the United States Supreme Court allowed reinstatement of the death penalty in 1976.”); *The Death Penalty on Trial*, NEWSWEEK (June 12, 2000), <https://newsweek.com/death-penalty-trial-160473> [<https://perma.cc/NSR6-2ZRV>] (discussing impact of exonerations on the cultural reception of the death penalty). For a discussion of the innocence movement more generally, see Jeffrey L. Kirchmeirer, *Another Place Beyond Here: The Death Penalty Moratorium Movement in the United States*, 73 U. COLO. L. REV. 1, 21–39 (2002).

296. See Francis X. Clines, *Furor Anew With Release of Man Who Was Innocent*, N.Y. TIMES (Feb. 11, 2001), <https://www.newsweek.com/death-penalty-trial-160473> [<https://perma.cc/PW6Y-ALD7>] (discussing Earl Washington exoneration in Virginia); Brooke A. Masters, *Misssteps On Road To Injustice*, WASH. POST (Dec. 1, 2000), (discussing the

Washington was an intellectually disabled Black man who falsely confessed to the rape and murder of a nineteen-year-old White woman, and was convicted on the basis of that confession in 1984.<sup>297</sup> The facts of the crime were egregious—the victim was stabbed thirty-eight times<sup>298</sup>—but so were the facts of the false confession. Washington could not tell police the race of his victim, or where the crime occurred, or even that he had raped her.<sup>299</sup> It took the police five tries to get a confession that they could take to trial, and that confession was the only evidence of Washington’s guilt in the case.<sup>300</sup>

As luck would have it (not the bad luck of being wrongfully convicted of a capital offense, but the good luck of being befriended by another death row inmate who was receiving pro bono representation from a high-powered New York law firm),<sup>301</sup> Washington’s case was briefly picked up pro bono by some lawyers in New York, who were able to get a stay of execution just nine days before he was

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investigation, trial, and exoneration of Earl Washington); Frank Green, *20th Anniversary of Earl Washington’s Freedom Nears as Abolition of Va. Death Penalty is Considered*, RICH. TIMES-DISPATCH (Jan. 27, 2021), [https://richmond.com/news/state-and-regional/20th-anniversary-of-earl-washingtons-freedom-nears-as-abolition-of-va-death-penalty-is-considered/article\\_6fc28f53-22f6-5f05-9cf4-667f783ebf46.html](https://richmond.com/news/state-and-regional/20th-anniversary-of-earl-washingtons-freedom-nears-as-abolition-of-va-death-penalty-is-considered/article_6fc28f53-22f6-5f05-9cf4-667f783ebf46.html) [https://perma.cc/68SJ-CPZC] (discussing impact of Earl Washington’s exoneration in Virginia and the role it played as a catalyst for changing Virginia law).

297. For a detailed account, see MARGARET EDDS, *AN EXPENDABLE MAN: THE NEAR-EXECUTION OF EARL WASHINGTON, JR.* (2003). For a shorter summary supporting the facts provided here, see *Earl Washington: Other Virginia False Confession Cases*, NAT. REGISTRY OF EXONERATIONS (2012), [hereinafter *Earl Washington*] <https://www.law.umich.edu/special/exoneration/Pages/casedetail.aspx?caseid=3721> [https://perma.cc/9SF8-74MJ]; see also David C.N. Swanson, *Exonerated and Imprisoned: DNA Exonerates Him, But Earl Washington Has been in Prison Since 1984*, JUSTICE DENIED, <https://justicedenied.org/earl.tn#:~:text=Exonerated%20and%20Imprisoned,been%20in%20prison%20since%201984.&text=Rebecca%20Lynn%20Williams%2C%2019%20and,was%20arrested%20for%20the%20crime> [https://perma.cc/L6MZ-LR36] (noting the race of the victim).

298. *Earl Washington*, *supra* note 297.

299. *Id.*

300. *Id.* The jury deliberated for just fifty minutes before finding Washington guilty, and another ninety minutes before sentencing him to death. See EDDS, *supra* note 297, at 67–68.

301. See *Earl Washington*, *supra* note 297. That inmate was Joseph Giarratano, whose death sentence was later commuted to life after doubts were raised about his guilt, and who has since been paroled and now works as a paralegal. See Green, *supra* note 296. “The hero of [the Earl Washington] story is absolutely Joe Giarratano,” one of the pro bono attorneys stated, recalling how Giarratano pressured the New York firm representing him to take Washington’s case too. *Id.*; see also Joseph Giarratano, *Annual Survey of Virginia Law: Foreword*, 56 U. RICH. L. REV. 5 (2021).

scheduled to be executed.<sup>302</sup> That set in motion a series of events (none of which would have happened without excellent pro bono representation by lawyers in Virginia) that resulted in DNA testing of biological evidence in the case twice—the first time taking Washington off death row, and the second resulting in a full pardon.<sup>303</sup> In both instances, DNA testing ruled out Washington as the perpetrator, but because well over twenty-one days had passed since the imposition of the death sentence, Washington was forced to petition the governor for clemency.<sup>304</sup> By the time he finally received it, Washington had spent eighteen years imprisoned for a crime he did not commit.<sup>305</sup>

Capital defense attorneys were part of the problem (both in Washington's case and more generally)<sup>306</sup> and they were part of the national conversation, too. The well-publicized Liebman study in 2000 showed that most death sentences were reversed on appeal—68% on average—and the number one reason for reversal was grossly ineffective assistance of counsel.<sup>307</sup> That same year,

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302. See Green, *supra* note 296. The understanding from the start was that someone else would take over the case if the stay was granted. See *id.*

303. See *id.* Again, it took a village, but we would be remiss without noting the representation of Bob Hall and Jerry Zerkin, as well as Marie Dean, whose advocacy work played a central role in obtaining that representation. See *id.*

304. It was a long road. Even after DNA testing excluded Washington as a suspect in 1993, he was only able to secure a commutation to a life sentence (which he received in 1994) because of his confession and an argument that the DNA was inconclusive. In 2000, more advanced DNA testing definitely ruled him out as a suspect, and he was finally pardoned. See *Earl Washington*, *supra* note 297.

305. See *id.* A federal jury ultimately awarded Washington \$2.25 million for the state's handling of the case, which at the time was thought to be the largest award to a single individual in Virginia history. See Green, *supra* note 296.

306. An excerpt from Margaret Edds's excellent book, *An Expendible Man*, provides a glimpse of the defense in Earl Washington's case: "[The prosecutor's] opening statement took up eleven pages of the transcript; [defense counsel] required three. [The prosecutor] called fourteen witnesses, and their testimony and cross-examination was 162 pages long. [Defense counsel] called two, Earl Washington and his sister, Alfreda, and their remarks filled twenty-seven pages. [The prosecutor's] closing statement covered nine pages of the transcript; [defense counsel], two. Then [the prosecutor] made an almost four-page rebuttal. In virtually every aspect of the trial, from understanding of the forensic evidence to a dissection of the arguments, Earl Washington's side of the story was inadequately told or never told at all." EDDS, *supra* note 297, at 50–51. For a detailed discussion of the defense strategy, including portions of the trial transcript, see *id.* at 50–67. For a famous discussion of the problem of incompetent counsel in capital cases more generally, along with its tragic consequences, see generally Bright, *supra* note 268.

307. See Liebman, Fagan, West & Lloyd, *supra* note 200, at 1850 (finding the most common error in the overall error-rate of 68% in capital cases was "egregiously incompetent

revelations of a capital case in Texas in which defense counsel literally slept through portions of the trial shocked the public's conscience and attracted national attention of its own.<sup>308</sup> With exonerations igniting a firestorm of criticism about the care with which the death penalty was being applied, it became increasingly clear that something needed to be done about representation in capital cases.

Apparently, the Supreme Court of the United States thought so, too. The Court had never reversed a conviction for ineffective assistance of counsel in a capital case, but that's exactly what it did in the 2000 decision of *Williams v. Taylor*.<sup>309</sup> It was a Virginia case.

In *Williams*, the attorney did not even *begin* to prepare for the all-important sentencing portion of the trial until a week before the trial began, and utterly failed to conduct any semblance of investigation into the defendant's social history.<sup>310</sup> The attorney's feeble attempt at mitigation boiled down to the defendant's mother

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defense lawyering," which accounted for 37% of all state post-conviction reversals alone). See also *supra* note 232 and accompanying text (discussing Virginia's reversal rate of 18%).

308. See Henry Weinstein, *Texas Fights Ruling of Legal Incompetence*, L.A. TIMES (Jan. 2, 2002), <https://www.latimes.com/archives/la-xpm-2002-jan-02-mn-19669-story.html> [<https://perma.cc/J98U-S9XR>] (noting that a Texas sleeping-lawyer case "became nationally prominent during the 2000 presidential election" as "a symbol of the troublesome way capital trials are handled in the Lone Star State," particularly because Bush defended the state's procedures); Paul Duggan, *Death Sentence Reinstated in 'Sleeping Lawyer' Case*, WASH. POST (Oct. 28, 2000), <https://www.washingtonpost.com/archive/politics/2000/10/28/death-sentence-reinstated-in-sleeping-lawyer-case/b363fbc3-11e3-4ef3-81c8-70f188a414da/> [<https://perma.cc/FES7-H6JE>] (discussing the sleeping-lawyer case in Texas and how Bush defended the case on the basis that the defendant had the benefit of judicial review); Paul Duggan, *George W. Bush: The Record in Texas*, WASH. POST (May 12, 2000), at A1, <https://www.washingtonpost.com/archive/politics/2000/05/12/george-w-bush-the-record-in-texas/d5285d54-4378-453a-8cd7-deab7798bb7a/> [<https://perma.cc/5RV3-U5XR>] (relaying several Texas cases in which a lawyer slept during the trial and others in which lawyers had extensive disciplinary records or drug and alcohol addictions, while noting that Bush vetoed a bill that would have improved the quality of legal representation to indigent capital defendants); Bob Herbert, *In America; The Death Factory*, N.Y. TIMES (Oct. 2, 2000), <https://www.nytimes.com/2000/10/02/opinion/in-america-the-death-factory.html> [<https://perma.cc/Z598-8GPW>] (lamenting the "consistently unjust and unquestionably inhumane manner in which Texas sends its prisoners to their doom" and "defense lawyers who slept through the trials, who were addicted to alcohol or drugs, who knew nothing about trying capital cases and who did virtually nothing on behalf of their clients").

309. 529 U.S. 362 (2000). See Garrett, *supra* note 25, at 676 ("Prior to *Williams v. Taylor*, the U.S. Supreme Court had never found defense counsel ineffective in a capital case . . .").

310. See *Williams*, 529 U.S. at 395.

testifying that Williams was “a nice boy at home,”<sup>311</sup> but there was a gold mine of information that the attorney did not know. Williams had endured a “nightmarish childhood,” to borrow from the Supreme Court’s opinion in the case—he had been removed from his parents for profound neglect, abused in foster care, and brutally beaten when he was returned to his parents’ care.<sup>312</sup> He was also borderline intellectually disabled.<sup>313</sup>

The jury heard none of this. The attorney in the case failed to request social services records, failed to get mental health experts, failed to return the call of a potential character witness, and failed to present the testimony of prison officials, who, by the time of trial, had awarded Williams two commendations (one for cracking a prison drug ring and the other for returning a guard’s wallet).<sup>314</sup> Even for a Court disinclined to protect capital defendants, the attorney’s (non)performance was over the line.

The Supreme Court reversed the conviction, and Williams eventually pleaded to a life sentence.<sup>315</sup> By then, the attorney in his case was long gone, having been indefinitely suspended from practice for his own mental health problems.<sup>316</sup> His Virginia State Bar record showed a prior private reprimand, a prior public reprimand, and a prior suspension of his license to practice.<sup>317</sup>

The Supreme Court’s decision in *Williams v. Taylor* spoke to Virginia because, well, the Supreme Court was speaking to Virginia. But there was reason to think the conversation was not over with

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311. GARRETT, *supra* note 154, at 119.

312. *Williams*, 529 U.S. at 395 (“[Counsel] failed to conduct an investigation that would have uncovered extensive records graphically describing Williams’ nightmarish childhood, not because of any strategic calculation but because they incorrectly thought that state law barred access to such records. . . . Williams’ parents had been imprisoned for the criminal neglect of Williams and his siblings, that Williams had been severely and repeatedly beaten by his father, that he had been committed to the custody of the social services bureau for two years during his parents’ incarceration (including one stint in an abusive foster home), and then, after his parents were released from prison, had been returned to his parents’ custody.”).

313. *See id.* at 396.

314. *See id.* at 395–96.

315. *See* ACLU OF VA., *supra* note 234, at 23 n.23.

316. *See id.* at 19.

317. *See id.* Williams was the attorney’s second court-appointed capital case. His first client was executed in 1994. *See id.*

that case. “People who are well represented at trial do not get the death penalty,” Justice Ruth Bader Ginsburg had stated in a 2001 speech, adding, “I have yet to see a death case among the dozens coming to the Supreme Court on eve-of-execution stay applications in which the defendant was well represented at trial.”<sup>318</sup> Justice Sandra Day O’Connor chimed in a few months later. “If statistics are any indication, the system may well be allowing some innocent defendants to be executed,” she told a group of women lawyers in mid-2001, stating, “[p]erhaps it’s time to look at minimum standards for appointed counsel in death cases and adequate compensation for appointed counsel when they are used.”<sup>319</sup> Anyone who could count to five knew the Supreme Court had more to say (and it did, expressing itself in a string of cases that continues to this day).<sup>320</sup>

This, then, was the backdrop against which the Virginia State Crime Commission issued a report recommending the creation of regional capital defender offices in 2002.<sup>321</sup> In part, the recommendation was a cost-cutting measure. Virginia was already spending between 1.5 and 2 million dollars per year on court-appointed capital defense, and the Commonwealth could “maximize cost savings” by going with specialized capital defender units instead.<sup>322</sup> But equally if not more important was the fact that creating the capital defender offices was a way to shore up the state’s capital defense. If Virginia was serious about its death penalty—and surely it was—then it needed to make sure that those death sentences

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318. *Justice Backs Death Penalty Freeze*, CBS NEWS (Apr. 10, 2001), <https://www.cbsnews.com/news/justice-blacks-death-penalty-freeze> [<https://perma.cc/8Z3B-QS4W>] (quoting Justice Ginsburg).

319. AP, *O’Connor Questions Death Penalty*, N.Y. TIMES (July 4, 2001), <https://www.nytimes.com/2001/07/04/us/o-connor-questions-death-penalty.html> [<https://perma.cc/4DP4-6WJR>] (quoting Justice O’Connor).

320. *See, e.g.*, *Wiggins v. Smith*, 539 U.S. 510 (2003) (reversing for ineffective assistance of counsel based on counsel’s failure to adequately investigate mitigating evidence); *Rompilla v. Beard*, 545 U.S. 374 (2005) (same); *Porter v. McCollum*, 558 U.S. 30 (2009) (same); *Sears v. Upton*, 561 U.S. 945 (2010) (same); *Andrus v. Texas*, 140 S. Ct. 1875 (2020) (same).

321. VA. STATE CRIME COMM’N, *INDIGENT DEFENSE: TO THE GOVERNOR AND THE GENERAL ASSEMBLY OF VIRGINIA* 4 (2002).

322. *See id.* at 36 (“The total expenditure for capital cases in the state was \$1,572,359. . . . Based on the findings of the analysis of average cost per charge between Court Appointed Counsel and Public Defenders, the Crime Commission analyzed where the state could maximize cost savings through the establishment of new Public Defender Offices.”).

continued to stick, even as judicial review of capital defense representation became more exacting. “There’s some cost savings, but really it’s an expertise issue,” a spokesperson for the State Crime Commission told the press, noting, “It’s such a complex area.”<sup>323</sup>

The State Crime Commission concluded that the complexity of the work and sheer volume of capital cases in Virginia created a capital case workload that could sustain *six* regional capital defender offices.<sup>324</sup> The General Assembly went with four. The patron of the bill to establish the offices would later recall that the goal was “to avoid any potential mishaps.”<sup>325</sup> Four offices would suffice for statewide capital defense.

And so it came to be that, in 2002, the Republican-controlled Virginia General Assembly authorized the creation of four regional capital defender offices at a time when the death penalty enjoyed widespread public support.<sup>326</sup> The four offices were a Richmond office to serve central Virginia, a Roanoke office to serve Southwestern Virginia, a Norfolk office to serve Southeastern Virginia, and a Manassas office (which later moved to Arlington) to serve Northern Virginia.<sup>327</sup> The offices were established in 2002 and 2003, and started taking cases in 2004.<sup>328</sup> Each office was originally staffed with three attorneys—a Capital Defender, Deputy Capital Defender, and Assistant Capital Defender—along with one investigator, one mitigation specialist, and an office manager for administrative support.<sup>329</sup>

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323. *Where the Newspaper Stands*, DAILY PRESS (Dec. 9, 2002), <https://www.dailypress.com/news/dp-xpm-20021209-2002-12-09-0212090011-story.html> [https://perma.cc/SKY2-8SUR] (quoting the acting executive director of the State Crime Commission).

324. *See* VA. STATE CRIME COMM’N, *supra* note 321, at 36 (“Using the current standards for workload, six localities in Virginia met the thresholds for existing offices.”).

325. *See* Ned Oliver, *Before Lawmakers Abolished the Death Penalty, Expert Public Defenders Had Quietly Defeated It Themselves*, VA. MERCURY (Mar. 26, 2021), <https://www.virginiamercury.com/2021/03/26/before-lawmakers-abolished-the-death-penalty-expert-public-defenders-had-quietly-defeated-it-themselves/> [https://perma.cc/CH4P-982P] (quoting former state Senator Ken Stolle, a Republican, who is now serving as sheriff of Virginia Beach).

326. *See id.*

327. *Where The Newspaper Stands*, *supra* note 323.

328. *See* ABA, *supra* note 141, at 143–44.

329. *See* 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 (2003).

The staffing was bare bones, but just moving the ancillary defense services in-house was a huge cost savings. As we discuss below, competent capital defense requires investigation and mitigation, and having non-lawyers do the sort of time-consuming investigative work that could save a defendant's life meant that court-appointed lawyers were not billing that time themselves.<sup>330</sup> The Virginia ACLU's report noted that Craig Cooley, for example, spent between 250 to 350 hours preparing for a capital case, and 100 to 200 of those hours were spent investigating.<sup>331</sup> Court-appointed capital defense attorneys could ask the court for funds to hire investigators and "mitigation specialists" (again, more on that below),<sup>332</sup> but they, too, billed by the hour and even that racked up costs. The creation of regional capital defender offices put those sorts of specialists on a salary and called it a day.

It merits mention that, over time, the offices grew. In the heyday of their work, they each hired another assistant capital defender and another specialist, which they allocated in different ways. Some offices had two investigators and one mitigation specialist, some had one investigator and two mitigation specialists, and one office had three mitigation specialists who also served as investigators.<sup>333</sup>

It is also worth noting an attempt to "defang" the offices in 2013. That year, the Virginia General Assembly considered a budget amendment that would have cut twelve positions from the capital defender offices—more than a third of its staffing.<sup>334</sup> In the end, the General Assembly settled upon a \$200,000 "reversion" instead, along with instructions to the Virginia Indigent Defense Commission ("VIDC"), which oversaw the capital defender offices, to review the workload of the various offices and reallocate positions "as may be appropriate."<sup>335</sup> An extensive report followed by the end of the

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330. See *infra* text accompanying note 414–17.

331. See ACLU OF VA., *supra* note 234, at 16.

332. See *infra* text accompanying notes 406–11.

333. See ABA, *supra* note 141, at 156 (discussing staffing as of 2012).

334. See THE VA. INDIGENT DEF. COMM'N, REVIEW OF THE CAPITAL DEFENDER OFFICES 3 (2013).

335. *Id.* at 2.



year, crunching the numbers and concluding that there was no “appropriate” cut or reallocation.<sup>336</sup> According to the VIDC report:

Reductions to the current staffing could negatively impact the ability of the offices to accept appointment of cases resulting in the loss of the expertise of attorneys and staff practicing solely in capital defense and the cost efficiencies built into the fixed costs of the capital defender offices, including capped salaries, investigators and mitigation staff.<sup>337</sup>

The message was clear: the General Assembly could cut funding of the capital defender offices if it wanted, but it would be shooting itself in the foot. And that was the end of *that*.

One last point merits mention here, and it goes to the percentage of capital cases in which regional capital defenders were appointed. In accordance with ABA guidelines, Virginia required the appointment of two defense attorneys in every capital case, and as of 2004, it required that one of those attorneys be a regional capital defender.<sup>338</sup> That would suggest that regional capital defenders were appointed in all capital cases as of 2004, but that’s not quite right. Staffing constraints sometimes limited an office’s ability to take cases, and from time to time, offices were conflicted out of representation (typically where codefendants were involved). Thus, the percentage of capital cases that involved regional capital defenders varied from around thirty percent (depending on the office and volume of cases in the region at the time) to well over seventy percent, particularly as the offices started stemming the tide of capital cases going to trial.<sup>339</sup> By the time Virginia repealed the death penalty in 2021, regional capital defenders were involved in most every capital case and, even then, some had begun to run out of work,

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336. *Id.* at 3 (“The information requested of and received from the Sentencing Commission is not indicative of the workload of the capital defender offices. The focus of the data was the final outcome. It was not intended to capture the number of charges of capital murder that were filed, which triggers the appointment of counsel. Nor was it intended to capture or measure the workload of the capital defender offices.”); *id.* at 4 (reporting hours worked by lead and second chair defense counsel in capital cases as “a median of 353 hours-in-court and 2373 hours out-of-court (a total of 2726 hours) spent on cases that went to trial, and 42 hours in-court and 992 hours out-of-court (a total of 1034) on cases that ended with pleas”).

337. *Id.* at 2–3.

338. See VA. CODE ANN. § 19.2-163.7 (Repl. Vol. 2015). For a discussion of ABA guidelines, see *infra* text accompanying note 373.

339. See THE VA. INDIGENT DEF. COMM’N, *supra* note 334, at 6.

with one office (Norfolk, serving the Southeastern region) already scheduled to close in June 2021.<sup>340</sup> The regional capital defender offices were literally working themselves out of a job, which brings us to the difference that those offices made.

*B. The Difference that Specialized Capital Defender Offices Made*

What happened when capital defense work in Virginia went from low paid court-appointed lawyers (and, from time to time, under-resourced and overwhelmed public defender offices) to specialized capital defenders with in-house defense team specialists? We start by taking a closer look at the raw data. Then we look behind the data, explaining why the capital defender offices had the impact they did.

First, the data. As mentioned early in the discussion, others have measured the impact that Virginia's regional capital defender offices made, both in the plea-bargaining context and at trial.<sup>341</sup> Writing in 2015, our colleague John Douglass showed that the capital trial rate—the rate of capital cases actually going to trial—was sliced in *half* after the capital defender offices started taking cases in 2004.<sup>342</sup> Importantly, the capital murder indictment rate had not changed much. It was 79% before 2004 and 73% after.<sup>343</sup> Those indictments were still coming down the pike. The difference was in the percentage of cases going to trial. Before 2004, twice as many capital cases were going to trial, which meant twice as many cases carried the possibility of actually resulting in a death sentence. Death sentences had fallen 80% by 2013,<sup>344</sup> and the chief reason was a steep decline in the sheer number of cases with death on the table. Those cases were pleading out for a sentence less than death instead. “Something . . . has happened in the past fifteen years to increase the chances that prosecutors will choose to resolve capital cases short of a contested trial with death still on the table,”

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340. *How Capital Defenders Helped End Virginia's Death Penalty*, DEATH PENALTY INFO. CTR. (Mar. 30, 2021); also on file with author (i.e., in Doug Ramseur's head).

341. *See supra* text accompanying notes 25–26.

342. *See* Douglass, *supra* note 26, at 885 (reporting a decline in the capital trial rate from 38% to 19%).

343. *See id.*

344. *See id.* at 882.

Douglass wrote after crunching the numbers.<sup>345</sup> “That ‘something,’” he concluded, was “a vigorous defense.”<sup>346</sup>

In 2017, Brandon Garrett followed Douglass’s study with a study of his own. The ABA’s 2013 report on Virginia’s death penalty had shown that the death sentencing rate at trial went from 84% before 2004 to just 47% from 2005 to 2011.<sup>347</sup> Garrett’s study showed that the same 47% death sentencing rate continued through 2015, and examined trial transcripts to see what was driving it.<sup>348</sup> Just twenty-one capital cases went to trial between 2005 and 2015, and Garrett read the transcripts of every one of them.<sup>349</sup> He then compared those transcripts to the transcripts of twenty contested capital cases between 1996 and 2004.<sup>350</sup>

The difference was dramatic. The average sentencing phase of a capital trial was less than two days long in the 1996–2004 set of cases, and most of the witnesses were called by the prosecution.<sup>351</sup> In the 2005–2011 set of cases, the average sentencing phase was double that—four days—and the defense was calling most of the witnesses.<sup>352</sup> The difference was especially striking in cases where the defendant was represented by one of the regional capital defender offices. The sentencing phase of trial was consistently longer in those cases than in the court-appointed counsel cases, largely because the regional capital defenders called more witnesses—nineteen, on average, compared to eleven when the capital defendant was represented by court-appointed counsel.<sup>353</sup>

Little did anyone know that by the time both of these studies came out, Virginia had already seen its last death sentence. That was in 2011, and it was reversed on appeal for improperly

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345. *Id.* at 887.

346. *Id.* For a nod to the role that progressive prosecutors played, see *infra* notes 517–18 and accompanying text.

347. See ABA, *supra* note 141, at 142; see also *supra* note 231 and accompanying text (discussing the 2013 ABA report findings on death sentencing rate before 2004).

348. See Garrett, *supra* note 25, at 664–65.

349. See *id.* at 664.

350. See *id.* at 665.

351. See *id.* at 667.

352. See *id.* at 692.

353. See *id.* at 683.

excluding mitigating evidence.<sup>354</sup> Regional capital defenders represented the defendant, and the prosecutor announced he would not seek death on remand.<sup>355</sup> What started as a death sentence would become a life sentence instead.

With that, we offer a final data point attesting to the impact of the regional capital defender offices. Altogether, the regional capital defenders handled over 250 capital cases.<sup>356</sup> Of those, only *ten* went to trial with death as a possible outcome.<sup>357</sup> All the other cases were negotiated for a sentence short of death.

As to those ten cases that went to trial, only *four* resulted in a death sentence, and one of them, as just mentioned above, was reversed on appeal and became a life sentence.<sup>358</sup> Four was actually three. And three was actually two, because another of the four death sentences was commuted by the governor when it was discovered that prosecutors used false evidence to convince the jury that the defendant deserved death.<sup>359</sup> That left just *two* death sentences intact. Of those, one capital defendant was on death row when Virginia repealed the death penalty, and one was executed.<sup>360</sup> *One*. Of the more than 250 capital defendants represented

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354. See *supra* note 23 (discussing *Lawlor v. Zook*, 909 F.3d 614 (4th Cir. 2018)).

355. See *Jackman*, *supra* note 23.

356. See *Oliver*, *supra* note 325.

357. See *Garrett*, *supra* note 25, at 682–83 (noting that ten of the twenty-one capital cases that went to trial between 2005 and 2015 were represented by the regional capital defenders).

358. See *id.*; see also *supra* text accompanying notes 354–55 (referencing *Lawlor*, 909 F.3d 614).

359. See *Virginia Governor Commutes Death Sentence of Ivan Teleguz*, DEATH PENALTY INFO. CTR. (Apr. 21, 2017), <https://deathpenaltyinfo.org/news/virginia-governor-commutes-death-sentence-of-ivan-teleguz> [<https://perma.cc/PZN6-RB5Q>] (quoting then-Governor McAuliffe as saying, “[D]uring the trial, evidence was admitted implicating Mr. Teleguz in another murder in a small Pennsylvania town . . . . In arguing for the death penalty, the prosecutor made explicit reference to this evidence in arguing that Mr. Teleguz was so dangerous that he needed to be put to death. We now know that no such murder occurred, much less with any involvement by Mr. Teleguz. It was false information, plain and simple, and while I am sure that the evidence was admitted in a good-faith belief in its truthfulness at the time, we now know that to be incorrect.”).

360. The one person executed was Ricky Gray, whose case we discuss *infra* text accompanying notes 481–501. Thomas Porter was one of the two people on Virginia’s death row at the time of the repeal. Porter’s sentence was commuted to life without parole. See Dean Mirshahi, *Virginia Will End Capital Punishment, What Does That Mean for the Two Men Still on Virginia’s Death Row?*, WRIC (Feb. 22, 2021), <https://www.wric.com/news/virginia-news/virginia-will-end-capital-punishment-what-does-that-mean-for-the-two-men-still-on->

by the regional capital defender offices, just *one* was actually put to death.

In the wake of Virginia's repeal of the death penalty, the patron of the bill to create the regional capital defender offices told the press, "I think it went a little further than I thought it would."<sup>361</sup> *Just a tad*. With only two people on death row and no new death sentences in a decade, Virginia's death penalty was already half-dead when the Commonwealth finally abandoned it, and the regional capital defenders played a massive part in making that happen. "The four regional capital offices just transformed the landscape in Virginia," Executive Director of the VIDC David Johnson told the press.<sup>362</sup> And it was true. But *how* did that happen?

In the pages that follow, we answer that question, and here the discussion gets personal—as in, *first person-al*. Much of what we have to say here is actually what *Doug Ramseur* has to say. Doug Ramseur began with the regional capital defenders as a Deputy Capital Defender in the Central Virginia (Richmond) office in 2002. In 2009, he became the Capital Defender of the Southeastern office in Norfolk, and then in 2015, he returned to the Richmond office as its Capital Defender. From 2015 to 2017, he was the head of *both* the Central and Southeastern regional offices at the same time. All that is to say Doug Ramseur knows a thing or two about what was happening in the trenches, and sharing his knowledge is one of the core contributions of this piece. In the discussion below, we identify Doug Ramseur as the source of information when relaying his insights and refer to him in the third person (as we do here) for the sake of clarity.

We start with a disclaimer from Doug: *It's important to say up front that this is just the story as I know it. Other capital defenders could tell this story, too, and they would probably tell it a little*

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virginias-death-row/ [https://perma.cc/3TJK-ZSEV].

361. See Oliver, *supra* note 325.

362. Frank Green, *It Is the Moral Thing To Do: Virginia's Death Penalty Abolished in Historic Signing*, RICH. TIMES-DISPATCH (Mar. 24, 2021), [https://richmond.com/news/state-and-regional/it-is-the-moral-thing-to-do-virginias-death-penalty-abolished-in-historic-signing/article\\_93c5ea28-c676-5d23-b84f-1c3181f0d7b6.html](https://richmond.com/news/state-and-regional/it-is-the-moral-thing-to-do-virginias-death-penalty-abolished-in-historic-signing/article_93c5ea28-c676-5d23-b84f-1c3181f0d7b6.html) [https://perma.cc/GRL7-8ZLG].

*differently. There's nothing special about my knowledge as opposed to that of others. I'm just the one who knows Corinna Lain.*<sup>363</sup>

With that bit of housekeeping out of the way, our discussion can begin. In our minds, understanding *why* the regional capital defender offices had the impact that they did is easiest when considered in three separate contexts: trial, pretrial, and plea-bargaining. Of the three, plea-bargaining was the most impactful. As noted above, capital defenders defeated death not so much by winning at trial as by avoiding it. They were masters at taking death off the table. But understanding how they were able to do that first requires understanding the calculus they were changing at trial, and the mayhem they were causing pretrial. As such, we work our way backwards, starting with the most conspicuous setting—trial—and then moving to the slightly less conspicuous pretrial context before turning to the plea-bargaining that was happening in the shadow of both.

## 1. Trial

We start by reiterating that the real success of the regional capital defenders came from avoiding trial altogether. That said, their ability to change the calculus of the outcome at trial played an important part in that success and, as such, is an important part of our story. In the trial context, we see the impact of the regional capital defenders as falling into three categories: specialization, mitigation, and jury selection.

### a. Specialization

Practice makes perfect. There, that's the obvious part. Regional capital defenders were doing nothing but capital defense. Capital defense work is a highly complex, specialized area of the law, and regional capital defenders were the specialists. We would never

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363. Corinna Lain here to say: Fair enough. Doug and I have known each other for nearly twenty-five years. We tried a few cases together when I was a young prosecutor and he was a young defense attorney. And we both teach death penalty classes at the University of Richmond School of Law. Doug taught capital litigation, and I taught a survey course on the death penalty. They were scheduled pretty much back-to-back, so we had "death Tuesdays" together. Although it's true that others could share this knowledge, knowing Doug and respecting him is what led me to ask if he wanted to team up with me to write this piece.

ask a general practitioner to handle a highly complex IRS tax case. We would not even ask the Turbo Tax people to do that. We would go to a specialist because we know that specialized knowledge in the complexities of tax law would get us the best result in the case. So it is with capital defense work (except the stakes are life and death).

We pause here to make the point more concretely. As already discussed, indigent capital defendants before 2004 were represented by overworked public defenders and underpaid court-appointed lawyers, many of whom had limited experience with capital cases.<sup>364</sup> The regional capital defenders had more experience (because that is all they did, day in and day out) as well as more time to devote to each case (again, because that's all they did, day in and day out). They did not have other types of cases vying for their attention, and their research of the law never started at square one. The regional capital defenders knew the relevant cases like the back of their hand. They knew what motions to make and when. And they knew which strategies worked and which didn't.

But the advantage of specialization was more than just individual attorneys systematizing capital defense and figuring out what works. It also gave Virginia's capital defenders a *community*. Their world became the full-time version of consultations and conferences at Washington and Lee's VC3.<sup>365</sup>

Doug Ramseur explains: *Once we had a dedicated office doing capital defense work, we had other specialists in the building (and other regional offices) whom we could strategize with, so it wasn't just my expertise that was an advantage. It was plugging into the expertise of other capital defenders as well, and those were some smart, talented people. We had these day-long conferences—"bring your case" day—where we each brought our cases and just brainstormed and strategized with a room full of capital defenders. We*

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364. See Oliver, *supra* note 325 ("Before the offices were created, indigent defendants facing a capital murder charge were either represented by local public defender offices, which were often overworked and lacked expertise in death penalty cases, or private court-appointed lawyers, who also had limited experience with the cases and had to get the trial judge's approval for all but the most basic expenditures."); see also *supra* notes 265–79 (discussing indigent capital defense before 2004).

365. For a discussion of Washington and Lee's VC3, see *supra* notes 32–35 and accompanying text.

*were bouncing off each other's expertise and helping each other out in a way that just wasn't possible for court-appointed lawyers who were practicing on their own.*

And that community wasn't limited to the Virginia capital defender offices. Once created, those offices plugged Virginia's capital defenders into a professional community that extended far beyond the Commonwealth's borders. The VC3 had brought in nationally renowned experts to its conferences and training sessions, but now the capital defender offices had access to those experts on their own.

Doug Ramseur explains: *Once we had the capital defender offices, we started going to the capital defender trainings that were happening at the national level. We were getting trained on cutting-edge techniques and talking to capital defenders in other states about what was working elsewhere. There was this cross-pollination that was happening as we brought outside knowledge in and sent inside knowledge out, and there was a camaraderie among the people doing this work. Those sorts of exchanges also gave us perspective as to how draconian Virginia's rules were and where we could (and should) put energy into challenging them. In my case, this was magnified by the fact that I spent four years in Georgia trying capital cases. I came back to Virginia and thought on several occasions, not even Georgia does that. Another great regional capital defender came from New York, so we had a resident expert in how defenders beat cases there, and there were others who brought their own experiences and knowledge to the table, too. That sense of perspective was just invaluable. We benefitted in all sorts of ways from our ability to network with the larger capital defender community and access its deep wealth of knowledge.*

All this is more or less intuitive. One would expect there to be a difference between the representation provided by specialized capital defenders and the representation provided by court-appointed lawyers and public defenders who were not specialized in that area of practice. It would be weird if there weren't.

But other advantages of specialization were less intuitive. One was the fact that the regional capital defenders were not only more experienced than most of the lawyers who had been handling capital cases, but they were also more experienced than most of the



*prosecutors* they were up against. Before the advent of specialized capital defenders, prosecutors had the experiential advantage. They tried capital case after capital case, while court-appointed attorneys rotated through. The creation of the regional capital defender offices flipped that, giving the experiential advantage to the capital defenders instead. Some prosecutors' offices handled more capital cases than others, of course, but no prosecutor's office could match the experience that the regional capital defenders were getting. Even the busiest death-seeking offices had but a fraction of the regional capital defenders' cases, and the experience differential was especially stark in rural counties, which had few capital cases from the start.

Virginia's 2002 study of its death penalty found that prosecutors in low-density population (i.e., rural) jurisdictions were twice as likely to seek the death penalty in a capital case as those in high-density population (i.e., urban) jurisdictions.<sup>366</sup> Rural counties did not see a lot of capital murders, but when they did, those murders shook the communities to the core, and that was reflected in prosecutors' proclivity to seek death. Yet, as Brandon Garrett noted in his study of capital cases, by 2017, death sentencing in rural Virginia had all but disappeared.<sup>367</sup> As Garrett noted, some of that had to do with money—capital cases are expensive for prosecutors and defenders alike—but much had to do with prosecutors' assessment of the prospects of losing at trial.<sup>368</sup> Our point is that the experience differential played a part in the latter assessment. The regional capital defenders knew way more about how to try a capital case than rural prosecutors, whose experience in trying capital cases was naturally limited by the number of murders in their

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366. See 2002 JLARC STUDY, *supra* note 64, at V.

367. See GARRETT, *supra* note 154, at 142–43 (“[I]n the 1980s and 1990s, dozens of small counties [in Virginia] regularly imposed death sentences. . . . In the decade from 2005 to 2016, only *seven* counties imposed any death sentences, and most were large wealthy counties. . . . The smaller, poorer counties do not bother seeking the death penalty anymore, and . . . cost may be an important factor in this trend.”).

368. See Brandon L. Garrett, Guest Post, *How Virginia Ended the Death Penalty*, WASH. POST: TRUE CRIME (Mar. 24, 2021), <https://www.washingtonpost.com/crime-law/2021/03/24/va-ends-death/> [<https://perma.cc/34GX-9YTU>] (“Prosecutors stopped seeking death sentences in rural counties, due to the expense, but no doubt also because they knew they might lose.”).

jurisdiction. Rural prosecutors were getting completely outgunned when they asked for death, and so over time, they just stopped asking.

Doug Ramseur illustrates the point with an example from a jurisdiction where capital cases were not a rarity. As he tells it: *We were handling way more capital cases than most prosecutors ever had, and we knew the rules better than they did because we dealt with them all the time. In one case, the prosecution missed a filing deadline. The law on court-appointed experts changed in 2010,<sup>369</sup> and that mostly affected us because the Commonwealth already had its experts, but this little provision was added that said both sides had to give notice of experts testifying at trial. We did our part, and then we waited. And waited. And when they missed the deadline, we waited some more. We waited until we got right up on the eve of trial and then dropped the hammer, letting the prosecution know that it had not complied with the statutory requirements and so none of its expert testimony was admissible. The judge in the case had already been upset about continuances in the case, so everyone knew he was going to blow a gasket. We had them by the—well, we had them in an uncomfortable place, and it was glorious. Virginia is all about strict compliance with procedural rules, and we were able to capitalize on that and make it work for us. We were going to be able to keep all their experts off the stand, and that allowed us to leverage their misstep to take death off the table and deal the case for life.*

The same thing happened in a case out of Northern Virginia with one of the most death-seeking prosecutors in the Commonwealth. As Doug Ramseur tells it: *That prosecutor was notorious for getting death in capital cases and was well versed in the law, but he also missed the filing deadline. As a result, the regional capital defenders in the case were able to exclude that evidence. The case didn't really turn on expert evidence anyway so the Commonwealth was able to go forward without it, but these were the sorts of moves we sometimes could make because we knew the ins and outs of the law so well. Before opening the regional offices, it was the capital defense attorneys who were getting hung up on the technicalities. That*

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369. We discuss that change, and the regional capital defenders' role in it, at *infra* text accompanying notes 477–79.

*wasn't happening when the regional capital defenders had the case, and, from time to time, we were even able to work those strict procedural rules to our advantage and hang up the prosecution instead.*

Another way that the regional capital defenders changed the landscape of capital defense was the impact they had on the quality of capital representation by *court-appointed* counsel. As previously noted, Virginia required the appointment of two defense attorneys in every capital case, in accordance with ABA guidelines.<sup>370</sup> One of those attorneys was usually a regional capital defender, and the other was a local attorney appointed by the court. Again, some of those attorneys were already remarkably good. But for those who were not, partnering with the regional capital defenders provided a front-row seat to what high-end capital defense looked like. Court-appointed co-counsel saw the motions, and the strategies, and the mitigation and investigation work—they saw the regional capital defenders doing whatever they could to mount a vigorous defense. This exposure proved to be an inadvertent training ground for high-quality capital defense, while giving the regional capital defenders a glimpse of what low-end capital defense looked like. In both ways, the experience highlighted the need to develop new standards and mandatory training for attorneys doing court-appointed capital defense, laying the groundwork for systemic change.

Here is Doug Ramseur to explain how that change happened: *Understanding what it took to mount a vigorous defense in a capital case and seeing what many of the court-appointed attorneys weren't doing helped clarify what needed to be done to make sure a vigorous defense was being mounted in capital cases with court-appointed counsel, too. We had this list of attorneys who were nominally qualified to take capital cases, but the qualifications were all experience-based so nobody was getting weeded out for poor performance. And we had high-end capital defender training available through VC3, but it wasn't mandatory and the attorneys who needed it most weren't the ones attending. Both were problems that needed to be fixed, and that led to the creation of a review committee in 2012.*

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370. See *supra* text accompanying note 338.

*In 2014, the review committee recommended completely revamping Virginia’s system of qualifying counsel for representation in capital cases.<sup>371</sup> So that’s what we did. We took the list of qualified counsel in capital cases and purged the entire thing, starting over from scratch. Under the new system, which came into effect in 2015, attorneys had to be “certified” to take capital cases—they had to apply, and a committee had to approve the application.<sup>372</sup> The certification also had a sunset provision, so attorneys had to get re-certified, which allowed for qualitative assessments. And then, to get certified, attorneys had to attend training on the basics of quality representation in a capital case, which staff from our offices often led. All that goes back to having expertise in what quality capital representation looked like, and first-hand knowledge of what was needed to fill the gaps.*

Structural changes were one thing but changing the *culture* of representation in a capital case was quite another, and the regional capital defender offices made a difference here too. The advent of specialized capital defenders routinized high-quality capital defense, raising the bar of capital representation by setting a baseline of what competent representation looked like in a capital case. That changed expectations, and representation that might have passed as minimally acceptable before 2004 was no longer adequate after it. As Doug Ramseur puts the point: *People think of the regional capital defenders as raising the level of representation in capital cases, and they did. But what tends to get lost in that discussion is the socializing effect that had on the court-appointed attorneys who were taking capital cases too. They were also mounting a more vigorous defense. In that sense, our offices were like the rising tide that lifts all ships. It was a cumulative effect.*

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371. See CAPITAL COUNSEL QUALIFICATIONS STANDARDS REVIEW COMMITTEE REPORT (2014) [<https://perma.cc/67G8-S9BG>].

372. For a discussion of the new certification system, see generally VA. INDIGENT DEF. COMM’N, ANNUAL REPORT 10 (2016) (“[T]he list of attorneys qualified to serve as court appointed counsel in capital cases was purged on September 1, 2015 and a new list was created. The list only contains attorneys who have met the new qualification standards promulgated by a committee established by the Supreme Court, State Bar and VIDC to study capital qualification in Virginia.”).

## b. Mitigation Specialists and Fact Investigators

The ABA's guidelines for capital representation call for at least two attorneys, a mitigation specialist, and a fact investigator working on every capital case.<sup>373</sup> These are the four members of a minimally staffed capital defense team, and their involvement has become "the accepted 'standard of care' in the capital defense community."<sup>374</sup> Understanding why that is so requires understanding more about what these defense team specialists do and why their work is so important. As such, we are going to park the discussion right here for a bit to explain it.

First, mitigation specialists. Mitigation specialists are in some ways the most important part of a capital defense team. Sometimes, a capital case that goes to trial is a fight over guilt or innocence, but more often, it is a fight over life or death, and that's where the work of mitigation specialists comes into play. Mitigation specialists discover and synthesize information that can be presented at the sentencing phase of trial to save the defendant's life, and gathering as much of it as humanly possible is highly specialized work.<sup>375</sup>

What might lead a jury to spare the life of a defendant who has just been convicted of capital murder? That's the question that drives a mitigation specialist's work, and the hitch is that they do not know the answer until they find it. The possibilities for mitigation are endless. *A traumatic childhood of profound abuse and neglect. A history of mental illness. Intellectual disability. Brain damage. PTSD.* It would be an oversimplification to say that the prosecution in the sentencing phase of a capital trial presents everything bad that the defendant has ever done, while the defense presents everything bad that has ever been done to the defendant. But not by much. The whole point of the case in mitigation is to show the jury that the reason that the defendant committed a horrendous crime is *not* because the defendant is a horrendous person,

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373. See ABA, *supra* note 141, at 149–50 (discussing ABA guidelines).

374. See *id.* at 149 n.65 (citing 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.")).

375. For an excellent in-depth discussion of the work that mitigation specialists do and the skills involved in doing it, see generally Payne, *supra* note 329.

but rather because the defendant is a deeply broken person, usually for reasons well beyond the defendant's control.

As Doug Ramseur puts the point: *The prosecutor shows the jury our client's worst day of his life. We try to show the jury all the other days. We're not trying to excuse the conduct. We're trying to explain it—to help the jury understand why a defendant did what they did, and to use that understanding to make the case for life.*

Because mitigation specialists do not know what they are looking for until they find it, their work requires learning everything there is to know about a capital defendant. *Everything*. That means record checks—medical records, mental health records, school records, social services records, court records, work records, military records, prison records—every record they can find. And it means talking to people who know the defendant—friends, neighbors, teachers, pastors, coworkers, therapists, probation officers, and especially immediate family members. Immediate family members have the most intimate knowledge of the defendant's childhood and the major events in the defendant's life, but they also may be the least willing to share it, especially if it makes them look bad or pertains to sensitive information that is embarrassing for the family, like physical or sexual abuse. To overcome this reticence, mitigation specialists must earn family members' trust and get them to understand that the point is not to blame others for what the defendant has done, but rather to humanize the defendant in an attempt to save the defendant's life.<sup>376</sup> This trust-building process takes time. Mitigation specialists conduct multiple visits and follow-up interviews with multiple people as they follow leads and uncover clues in the other information they are scrutinizing.

At the end of the day, mitigation specialists compile everything they know into a comprehensive chronology of the defendant's life that documents everything from the defendant's genetic predispositions and prenatal care to the environmental influences that impacted the defendant's development, identifying multiple risk factors and illustrating their cumulative effect over time. This is often referred to as a defendant's "social history,"<sup>377</sup> but it is actually a

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376. *See id.* at 46 (discussing challenges of mitigation work, particularly in the context of family abuse and neglect).

377. ABA, *supra* note 141, at 152.

*life* history. It is the defendant's life story, and creating it is extremely time-consuming work.

Creating a life history is also highly skilled work that requires specialized training.<sup>378</sup> Mitigation specialists have to know where to find records and what to look for once they find them. They have to be able to get people to talk to them. They have to know what questions to ask. And they need to have the ability to interpret information and see clues to other leads. Mitigation specialists are the unsung heroes in the story we tell, and our hats go off to them for the critically important work they do.

The same is true of fact investigators—they also play a critically important role in defending a capital case. Fact investigators probe the facts of the case. Their work can result in discoveries that can be used to contest a defendant's guilt at trial or give defense counsel leverage in pleading the case.

In Virginia, the role of fact investigators in capital cases was especially important because of the state's "extraordinarily limited" discovery rules, as the ABA noted in its 2013 assessment report.<sup>379</sup> Until 2020, Virginia's discovery rules for felony criminal cases provided for just three things: the defendant's statements, forensic and other scientific reports, and the inspection (and copying) of tangible items.<sup>380</sup> The rules made no exception for capital cases, so capital defendants could go to trial without knowing who would testify against them or what those witnesses had said to the police.<sup>381</sup> Indeed, capital defendants could go to trial without ever having seen the police report that gave rise to the capital charges.<sup>382</sup> Even *civil* cases in Virginia allowed for more discovery

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378. See Payne, *supra* note 329, at 45 (discussing typical qualifications and training of mitigation specialists).

379. ABA, *supra* note 141, at 130.

380. See VA. SUP. CT. R. 3A:11(b) (2020).

381. See ABA, *supra* note 141, at 126–27 (noting that Virginia's discovery rule "expressly excludes from discovery 'statements made by Commonwealth witnesses or prospective . . . internal Commonwealth documents made by agents in connection with the investigation or prosecution of the case.' Thus, police reports and statements made by witnesses are not discoverable under Virginia law").

382. See *id.* at 130 ("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.").

than a defendant received in a capital case, and civil cases didn't have life on the line.<sup>383</sup>

As Doug Ramseur puts the point: *We were not entitled to know who was testifying after the bathroom break, that's how bad it was. Other states rejected the idea of "trial by ambush"<sup>384</sup> as patently unfair and inconsistent with the idea that trials are supposed to get at the truth. Not Virginia. Virginia embraced it.*

Some prosecutors went above and beyond the minimal disclosure requirements with "open file" policies that gave counsel a look at the prosecution's case. But many did not, most likely because they knew that defense counsel would exploit the weaknesses in their case (that is, after all, what defense counsel are supposed to do).<sup>385</sup> Indeed, one of the most death-seeking prosecutors in Virginia went so far as to tell a court that the reason he didn't share information more freely was a concern that defense counsel would be "able to fabricate a defense around what is provided."<sup>386</sup> This sense that sharing information might be a little *too* helpful to the defense not only resulted in minimal discovery in many capital cases, but also increased the risk that defense counsel would not be given exculpatory evidence and other information favorable to

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383. *See id.* at v ("By comparison, discovery rules governing civil cases are far more widely-encompassing than those required in a death penalty case in the Commonwealth.").

384. *See* ABA, HOW COURTS WORK, (Sept. 9, 2019), [https://www.americanbar.org/groups/public\\_education/resources/law\\_related\\_education\\_network/how\\_courts\\_work/discovery/](https://www.americanbar.org/groups/public_education/resources/law_related_education_network/how_courts_work/discovery/) [<https://perma.cc/MVB2-Y27U>] ("Discovery enables the parties to know before the trial begins what evidence may be presented. It's designed to prevent 'trial by ambush,' where one side doesn't learn of the other side's evidence or witnesses until the trial, when there's no time to obtain answering evidence"); *see also* ABA, *supra* note 141, at 130 ("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.").

385. *See* ABA, *supra* note 141, at 127 (discussing "open file" policies among some prosecutors but not others).

386. *Wolfe v. Clarke*, 819 F. Supp. 2d 538, 567 n.24 (E.D. Va. 2011) (quoting Prince William County Commonwealth's Attorney Paul Ebert as saying, "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"). The Eastern District was not impressed. *See id.* ("In effect, Ebert admits here that his contempt of defendants who 'fabricate a defense' guides his perspective on disclosing information. . . . [Ebert's] actions served to deprive Wolfe of any substantive defense in a case where his life would rest on the jury's verdict. The Court finds these actions not only unconstitutional in regards to due process, but abhorrent to the judicial process.").



the defense as constitutionally required by *Brady v. Maryland*.<sup>387</sup> The ABA's 2013 assessment report noted several capital case reversals on *Brady* grounds that could have been prevented with broader discovery in the first instance.<sup>388</sup> As one headline put the point in 2019, the gist of the problem was that Virginia was “*still an ambush state*.”<sup>389</sup>

Knowing that, one can readily see why fact investigators were so important to mounting an effective defense in Virginia capital cases. Fact investigators could interview police officers, track down witnesses, and just generally make up for what Virginia's discovery process lacked. Fact investigators were the key to figuring out what the prosecution's case was going to look like, and where its weaknesses were. And they were the ones who found the *Brady* evidence that should have been disclosed but was not. Here too, we tip our hats to these defense specialists and their important part in the story we tell.

That brings us to our story, and the difference that having regional capital defender offices made. We know from Brandon Garrett's work that the average sentencing phase of capital cases doubled after the capital defenders started taking cases in 2004.<sup>390</sup> But Garrett also presented rich narratives from the two sets cases he reviewed, and we pause here to note a few of those for a sense of what sentencing in the pre- and post-2004 cases looked like.

One of the cases from Garrett's first data set—cases tried between 1996 and 2004—is the case of Teresa Lewis, the woman executed by Virginia despite evidence that her intellectual

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387. 373 U.S. 83 (1963) (finding due process violation where prosecution withheld material evidence favorable to the defense); *see also* ABA, *supra* note 141, at 131 (“Despite prosecutors' efforts to act in good faith, the Virginia discovery system makes *Brady* violations more likely . . .”).

388. *See* ABA, *supra* note 141, at 127–29 (discussing *Wolfe*, 819 F. Supp. 2d 538 and *Hash v. Johnson*, 845 F. Supp. 2d 711 (W.D. Va. 2012)). Of course, a prosecutor's file may be “open” but not have the exculpatory information in it. *See, e.g.*, *Strickler v. Greene*, 527 U.S. 263 (1999).

389. Alex McCarthy, ‘*Still an Ambush State*’: *The Move Toward Discovery Reform is Going Slowly in Virginia*, VA. MERCURY (Dec. 23, 2019) (emphasis added), <https://www.virginiamercury.com/2019/12/23/still-an-ambush-state-the-move-toward-discovery-reform-is-going-slowly-in-virginia/> [<https://perma.cc/NDF6-NBQ3>].

390. *See supra* text accompanying note 352.

functioning was in the bottom three percent of society.<sup>391</sup> Incredibly, the defense did not present any mental health experts in the sentencing phase of Lewis's trial, calling just two witnesses—a probation officer and a family friend—instead.<sup>392</sup>

In two other cases in this first data set, the capital defendants pleaded guilty, leaving the sentencing decision to the judge, and defense counsel presented no expert testimony in the case, despite evidence that both defendants suffered from significant psychological dysfunction.<sup>393</sup> In one case, the defendant had told the state-appointed psychiatrist that he would come back to life after his execution and bring his grandfather with him (they had plans to get a burger).<sup>394</sup> In the other case, defense counsel simply submitted two psychological reports between five and ten years old, prompting the judge in the case to say, “I have a lot of papers dealing with psychological background and so forth but I really don't have any expert testimony to help me with that. It's just a comment.”<sup>395</sup>

By way of comments, consider what a judge said in the Edward Bell case, our last example of what the sentencing phase of a capital trial looked like prior to 2004. “[Y]ou presented literally no mitigating evidence,” the judge stated to the attorney in the case. The judge added: “There were seven pages of transcript of the defense's case in the sentencing phase. Two witnesses were called. There wasn't a single question asked about Mr. Bell, about his background, about anything about him.”<sup>396</sup>

Compare that to the John Joseph “Jose” Rogers case, which was tried by the regional capital defenders in 2006.<sup>397</sup> The defense team called twenty-one witnesses, compared to the state's five, and

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391. Lewis was Virginia's only woman to be executed in the modern era. *See supra* note 243.

392. *See* Garrett, *supra* note 25, at 711 (discussing the Teresa Lewis case, *Lewis v. Commonwealth*, 267 Va. 302, 593 S.E.2d 220 (2004)).

393. *See id.* at 713–14 (discussing the cases of capital defendants Marlon Williams, *Williams v. Commonwealth*, 252 Va. 3, 472 S.E.2d 50 (1996), and Percy Levar Walton, *Walton v. Commonwealth*, 256 Va. 85, 501 S.E.2d 134 (1998)).

394. *See id.* at 714 (discussing *Walton*, 256 Va. 85, 501 S.E.2d, 134).

395. *Id.* at 713 (discussing *Williams*, 252 Va. 3, 472 S.E.2d 50).

396. *Id.* at 708.

397. *See id.* at 666 (discussing the Jose Rogers case, detailed in *Rogers v. Pearson*, No. 11cv1281 (E.D. Va., Alexandria Div., Aug. 27, 2012)).

showed in excruciating detail that the defendant had been subjected to horrific abuse.<sup>398</sup> “[M]ost moving was testimony from his younger brother, who he had tried to shelter from the abuse,” Garrett writes.<sup>399</sup> The jury was initially deadlocked on the sentencing decision, then returned a verdict of life.<sup>400</sup>

Garrett’s case comparisons focused on the sentencing phase of trial, and thus his findings are most relevant to our discussion of mitigation specialists. But we think his study may say something about fact investigators as well. Garrett did not compare the guilt phase of the two sets of cases (and since every case is different, the value of doing so is admittedly limited), but we note that, on average, the guilt phase was thirty percent longer in the 2005–2015 set of capital cases than it was in the 1996–2004 set of cases, and our cursory review of the transcripts suggests that a more robust defense was part of the reason why.<sup>401</sup> Moreover, of the twenty-one capital cases that went to trial between 2004 and 2015, a surprisingly large number—seven—involved a defense theory of innocence, relying on alibi testimony or evidence pointing to the guilt of a third party.<sup>402</sup> None of those cases resulted in an acquittal, but, in light of the fact that residual doubt has been empirically shown to be one of the most powerful considerations leading jurors to choose life,<sup>403</sup> it is possible that planting even the smallest seeds of doubt in the guilt phase of these capital trials may have impacted the jury’s sentencing phase considerations, too.

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398. *See id.*

399. *Id.*

400. *See id.*

401. For the raw data serving as the basis for comparison, *see id.* at 728–29 app. A–B. The average guilt phase in the 1996–2004 set of cases was 3.6 days, compared to 5.2 days in the 2005–2011 set of cases. *Id.* We concede that we cannot determine from that data point alone whether the additional length is accountable to the defense, but a cursory review of the trial transcripts suggests that in many cases it is.

402. *See id.* at 667 (“I was surprised to see how many capital trials continue to involve contested factual questions regarding guilt. Seven of twenty recent capital trials involved innocence defenses.”).

403. *See* Stephen P. Garvey, *Aggravation and Mitigation in Capital Cases: What Do Jurors Think?*, 98 COLUM. L. REV. 1538, 1563 (1998) (discussing Capital Jury Project findings showing that residual doubt over a defendant’s guilt was the most powerful consideration weighing against a death sentence). Virginia does not allow an instruction on residual doubt, nor may counsel argue it in sentencing. *See* *Stockton v. Commonwealth*, 241 Va. 192, 402 S.E.2d 196 (1991).

All this is highly speculative, of course, and we recognize that a strong defense case in the guilt phase of trial is just as likely to keep the case from going to trial at all. Illustrating the point is a case that Garrett discusses as an example of the tenacity of the regional capital defenders. As Garrett tells it, lawyers from the regional capital defenders office listened to countless hours of recorded jail phone calls in hopes of finding impeachment evidence on jailhouse informants and struck it rich.<sup>404</sup> The informants were calling relatives to get public information about the murder so that they could fabricate evidence against the defendant in hopes of benefitting from cooperation in their own pending cases.<sup>405</sup>

Turns out, it was Doug Ramseur's case. Here is what Doug had to say: *That was one of those cases where we used every last scrap of available manpower in the office. We had our investigators listening to the tapes. We were listening to the tapes. We even had some law students listening to the tapes. There is no way a court would have paid for all those hours, especially not to find a needle in a haystack. But we found it, and when we did, it was devastating to the Commonwealth's case. We had the Commonwealth's witnesses on tape saying that they needed to know the facts of the case so they could lie to the police about our defendant. It doesn't get any better than that. Ultimately, we were able to leverage what we had to take death off the table and plead the case. That work took the case from a possible death sentence to a sentence of ten years.*

All this is to say that the regional capital defenders appear to have made more extensive use of mitigation and investigation specialists than court-appointed attorneys. Garrett's data showed that the regional capital defender offices presented measurably stronger cases in mitigation, suggesting more extensive use of mitigation specialists. And the raw data supports a theory that the regional capital defender offices used fact investigators more extensively, too. But both data points just tell us that the offices had an impact on the use of these defense specialists. Neither tells us *why*.

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404. See Garrett, *supra* note 25, at 682.

405. See *id.* (“[T]hey talked about how ‘the cooperation thing’ is ‘the key to . . . freedom,’ and how prosecutors and police ‘just want convictions . . . .’”).

The untold story starts with what is perhaps an obvious point: court-appointed lawyers in capital cases do not have mitigation specialists and fact investigators on staff. On the few occasions when public defender offices represented capital defendants, they presumably had access to their in-house investigators, but even they did not have an investigator dedicated to capital cases, let alone a mitigation specialist. This is not to say that capital defense counsel had no access to the assistance of mitigation specialists and investigators. They did. But they had to *ask* for it.

By statute, indigent capital defendants in Virginia were entitled to the appointment of a psychiatrist or other mental health expert to evaluate the defendant and assist in preparation of the defense.<sup>406</sup> But they were not entitled to the appointment of any other experts or assistance other than the appointment of counsel. For the appointment of ancillary defense services, capital defendants had to petition the court and demonstrate that the assistance was “likely to be a significant factor in [the] defense” and that they would be prejudiced without it.<sup>407</sup> The decision to grant funding for such services was left to the trial court’s discretion. As the Supreme Court of Virginia stated in a case upholding the denial of a capital defendant’s request for the appointment of a fact investigator: “[A] defendant does not have an absolute right to the assistance of an investigator, even when charged with capital murder.”<sup>408</sup>

One would think that even though capital defendants did not have a right to the services of a mitigation specialist and fact investigator, they could make the showing to get one appointed in

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406. See VA. CODE ANN. § 19.2-264.3:1(A) (Repl. Vol. 2015), repealed by Act of Mar. 24, 2021, ch. 344 & 345, 2021 Va. Acts \_\_, \_\_. (“[T]he 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.”).

407. *Husske v. Commonwealth*, 252 Va. 203, 211–12, 476 S.E.2d 920, 925 (1996).

408. *Green v. Commonwealth*, 266 Va. 81, 91, 580 S.E.2d 834, 840 (2003).

any given case.<sup>409</sup> But it did not work out that way in practice. Although courts usually appointed mitigation specialists and fact investigators in capital cases, they did not always do so. Sometimes, they denied the request outright; sometimes, they appointed a single individual to perform both defense services; and, sometimes, they limited the hours and/or total compensation available for the work.<sup>410</sup> Indeed, even when courts allotted funding for these ancillary defense services, they controlled the purse-strings. Counsel would be allotted a certain number of hours or certain amount of assistance and would need to seek approval for assistance beyond that initial allotment.<sup>411</sup>

It is worth pausing to appreciate the bind this created for court-appointed counsel in a capital case. If a court refused to fund these defense services or refused to fund them at a level necessary to meet the needs of the case, the only option was for defense counsel to do the field work themselves. The defendant's court-appointed mental health expert was not going to fill that gap—those experts performed evaluations, not investigations.<sup>412</sup> In fact, they relied on the work of mitigation specialists to help inform their expert opinion in the case.<sup>413</sup>

That left defense counsel, and they were a mismatch, too. Defense counsel had no training or experience in the highly specialized work of a mitigation specialist.<sup>414</sup> Moreover, most attorneys came off as too intimidating to be good at getting family members

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409. See Payne, *supra* note 329, at 44–45 (arguing that mitigation will always be a “significant factor” in the defense of a capital case).

410. See ABA, *supra* note 141, at 158–59 (providing table listing number of requests for various ancillary defense specialists and number of requests actually granted, as well as discussing individual instances where courts either denied the request or limited the provision of services in some manner).

411. See *id.* at 156 (making point and noting, “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”).

412. See Payne, *supra* note 329, at 51–52 (discussing court-appointed mental health experts’ lack of both expertise and inclination to perform mitigation investigation work).

413. See *id.* at 53 (making point and noting that mitigation work can also inform the type of mental health expert appointed to evaluate a capital defendant).

414. See *id.* at 49–50 (discussing a host of reasons why capital defense attorneys are a poor choice for conducting mitigation work).

to reveal their deepest, darkest secrets.<sup>415</sup> In addition, defense counsel put themselves in a precarious position by doing fact investigation work on their own. If a witness turned on them, they would have to decide whether to pass on impeachment or withdraw from the case, as they could not take the stand in their own trial to say that the witness was lying.<sup>416</sup> On top of all that, doing the field work of a mitigation specialist or fact investigator was not a good use of defense counsel's time. Their time was precious—and expensive—and was better spent doing the work that only lawyers could do.<sup>417</sup>

The regional capital defenders had none of these problems. They didn't have to ask for these ancillary defense specialists because they already had them, and courts were not controlling their hours. That meant they also didn't have to wait for a court to approve these specialists before they could start working. ABA guidelines recommend that mitigation work begin "immediately upon counsel's entry into the case,"<sup>418</sup> and when the regional capital defenders were involved, it did. In addition, the regional capital defenders didn't have to spend time and energy coordinating with an outside

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415. See *id.* at 49.

416. See VA. STATE BAR, PROF. GUIDELINES R. 3.7, <https://www.vsb.org/pro-guidelines/index.php/rules/advocate/rule3-7/> [<https://perma.cc/539Q-UX48>] ("A lawyer shall not act as an advocate in an adversarial proceeding in which the lawyer is likely to be a necessary witness except [in limited circumstances.]"); see also ABA, *supra* note 141, at 159 ("[W]henver 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.").

417. See Payne, *supra* note 329, at 50 (making point and discussing differences in hourly rate for court-appointed counsel and ancillary defense specialists). For an excellent discussion of the point, see Helen G. Berrigan, *The Indispensable Role of the Mitigation Specialist in a Capital Case: A View from the Federal Bench*, 36 HOFSTRA L. REV. 819, 830 (2008) (making this point about mitigation specialists and summarizing by stating: "Appointing a mitigation specialist is arguably the best assurance a trial judge can have that all the available mitigation evidence will be available for trial counsel to present at the penalty phase. The failure to retain such a specialist places the responsibility in the hands of counsel, who is less qualified, more costly, and has less time to gather what is needed").

418. See ABA, GUIDELINES FOR THE APPOINTMENT AND PERFORMANCE OF DEFENSE COUNSEL IN DEATH PENALTY CASES 925 (2003), [https://www.americanbar.org/content/dam/aba/administrative/death\\_penalty\\_representation/2003guidelines.pdf](https://www.americanbar.org/content/dam/aba/administrative/death_penalty_representation/2003guidelines.pdf) [<https://perma.cc/KN33-VCWC>].

service provider. Those providers were in-house, on tap, ready to go.

But the benefit of having mitigation specialists and fact investigators in-house went well beyond these logistical advantages. Because the regional capital defender offices hired these investigators and mitigation specialists themselves, they were able to set their minimal qualifications and choose people particularly well-suited for the work they would be doing. Investigators in the office not only met minimum education and experience requirements, but also typically had a background in psychology or mental health.<sup>419</sup> The same was true of mitigation specialists, all of whom had a degree in social work, psychology, or some other mental health-related field.<sup>420</sup> Between the two, one of these specialists was almost always trained to screen capital defendants for mental health disorders or impairments, giving capital defenders a heads-up even before the appointment of a mental health expert in the case.<sup>421</sup>

Doug Ramseur explains: *Having these defense specialists embedded in the office was a game-changer, in part because we were hiring them and in part because they became socialized to the institutional mission. When a court appointed a mitigation specialist, they might be good, they might not be good. They might just do a minimal job. It was hard to know what you would be getting, and even harder to control for it. When we were hiring these people at the regional capital defender offices, we were making sure that they were highly qualified and good at what they did. And like the rest of us, they just got better over time as they worked on these cases day in and day out.*

*There was also a socializing effect that happened, and that was really impactful, too. The mitigation specialists and fact investigators were working closely with the capital defenders. They were not random service providers doing outsourced work. They were part of the team. That created synergies because we were working on multiple cases together and we knew how each other worked, but even*

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419. See ABA, *supra* note 141, at 152 (“Investigators must also meet specific education and experience requirements, and typically have a psychology background.”).

420. See *id.* (“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.”).

421. See *id.*



*more important, those close working relationships assimilated them into the institutional culture and ethos of the office. They got what we were trying to do and made it their mission to save lives, too.*

The impact was especially important in the context of mitigation specialists. Here again is Doug Ramseur: *We had a client-centered focus, and the people on the front lines of that were the mitigation specialists. They saw the client right away and started building relationships with the family right away. That was critically important because mitigation is the name of the game in a capital case. The guilt phase is basically the same in these cases; it is the sentencing phase and the case in mitigation that makes a capital case so different. We were successful in a number of these cases because we had a client-centered focus, and the people who made sure we did it right were the mitigation specialists.*

### c. Jury Selection

We start with the recognition that success for a capital defender means not having to pick a capital jury at all. Assuming guilt, success is pleading the case for a sentence less than death instead. But here again, the ability to prevail at trial is the key to avoiding it, and, as *Champion Magazine* noted in 2010, “[T]he capital defense community traditionally has done a remarkably poor job in voir dire and jury selection.”<sup>422</sup>

Most trials—eighty-five percent, experts say—are won or lost when the jury is sworn, a reflection of the fact that the worldview through which jurors filter information is every bit as important as the information itself.<sup>423</sup> That makes choosing a jury one of the most important things that trial lawyers do in any kind of case. Yet nowhere is that more important than in a capital case, where the

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422. Matthew Rubenstein, *Overview of the Colorado Method of Capital Voir Dire*, 34 CHAMPION 18, 18 (2010).

423. See Herald Price Fahringer, *‘Mirror, Mirror on the Wall . . .’: Body Language, Intuition, and the Art of Jury Selection*, 17 AM. J. TRIAL ADVOC. 197, 197 (1993); cf. Lee Ross & Donna Shestowsky, *Contemporary Psychology’s Challenges to Legal Theory and Practice*, 97 NW. U. L. REV. 1081, 1088 (2002) (“An important truism of social psychology is that people respond not to some objective reality but to their own subjective interpretations or definitions of that reality.”).

stakes are life and death and where jurors almost always come into the case with preconceived views about the death penalty itself.

Because the stakes are so high and jurors often have preconceived views, voir dire in the capital context is different than in other contexts. Jurors are “death qualified”—that is, they are excludable for cause if their personal views are such that they would *never* consider death as a sentencing option.<sup>424</sup> They are also what one might call “life qualified”—that is, they are equally excludable for cause if they would *only* consider death as the appropriate sanction for capital murder.<sup>425</sup> For a capital juror to be seated, they must fall somewhere in between these extremes. They must be able to consider both life and death sentencing options.

But all too often, capital jurors do not meet this constitutional requirement. The Capital Jury Project’s (“CJP”) work has shown that automatic-death jurors sometimes sit on capital juries<sup>426</sup> and, indeed, a CJP study involving a small sample of sixteen capital jurors from six capital cases in Virginia found that one of the jurors should have been excluded for cause on this basis.<sup>427</sup> That juror should never have been seated, so how did that even happen?

The CJP’s research has largely solved the mystery. Although jurors who would *never* give death are easily identified and removed for cause from the venire pool, jurors who would *always* give death are not, largely because they themselves are not aware that they are death-always jurors.<sup>428</sup> Doug Ramseur explains: *There are all these people out there who think, “I’m not an automatic-death juror. I could give a sentence short of death, if the defendant acted in self-defense or it was an accident or something like that.” The problem is that none of those scenarios are capital murder. When you take those considerations away and ask: if none of that was true so there were no excuses—the defendant meant to murder and the victim was innocent—do you think death is the only appropriate sentence? A lot of these people will answer “yes,” and they are*

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424. See *Witherspoon v. Illinois*, 391 U.S. 510 (1968).

425. See *Wainwright v. Witt*, 469 U.S. 412, 424 (1985); *Morgan v. Illinois*, 504 U.S. 719, 729 (1992).

426. See Rubenstein, *supra* note 422, at 18 (discussing CJP research findings).

427. See Stephen P. Garvey & Paul Marcus, *Virginia’s Capital Jurors*, 44 WM. & MARY L. REV. 2063, 2068, 2072 (2003).

428. See Rubenstein, *supra* note 422, at 18–19.

*absolutely excludable for cause. Defendants have a constitutional right to not have those people on the jury. But they were getting on the juries anyway.*

CJP research has revealed other problems as well. As already discussed, its work has shown that a distressingly large percentage of Virginia jurors did not understand that they were not required to impose a death sentence upon finding future dangerousness or that the murder was vile.<sup>429</sup> In addition, its work has shown that the death qualification process itself—the very process of asking questions to ensure that a juror *could* give death before the guilt phase even begins—makes jurors more likely to convict and return a sentence of death.<sup>430</sup> Perhaps most disturbingly, CJP studies have shown that jurors who initially vote for life during jury deliberations are often bullied into changing their vote to death.<sup>431</sup> Accounts of life-leaning jurors crying in bathrooms, being shunned and harassed by other jurors, and caving to pressure for a death sentence even though they still believed a life sentence was the appropriate punishment are all too common.<sup>432</sup>

That's where the "Colorado Method" of voir dire comes into play. The Colorado Method is "the gold standard in death penalty defense," and its aim is to neutralize the problems identified by the CJP work.<sup>433</sup> The Colorado Method is highly complex, dividing voir

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429. See *supra* text accompanying notes 136–37.

430. See Rubenstein, *supra* note 422, at 20. For an excellent discussion of the problem, see generally Claudia L. Cowan, William C. Thompson & Phoebe C. Ellsworth, *The Effects of Death Qualification on Jurors' Predisposition to Convict and on the Quality of Deliberation*, 8 LAW & HUM. BEHAV. 53 (1984).

431. See Rubenstein, *supra* note 422, at 19, 24 (discussing CJP research findings). The CJP's research has found that jurors' initial vote in deliberations almost always determines the sentence that is ultimately returned by the jury. When at least eight jurors vote for death, the sentence is almost always death. As Law Professor Scott Sundby's work on the CJP has shown, life-jurors need a critical mass or they will be isolated and targeted to change their vote to death. For important works on this issue, see Theodore Eisenberg, Stephen P. Garvey & Martin T. Wells, *Forecasting Life and Death: Juror Race, Religion, and Attitude Toward the Death Penalty*, 30 S.J. LEGAL STUD. 277, 304 (2001) ("The tipping point is juror eight. If juror eight goes with the prosecution . . . the result will be death; if juror eight goes with the defense, the result will be life."); see also SCOTT SUNDBY, *A LIFE AND DEATH DECISION: A JURY WEIGHS THE DEATH PENALTY* (2015).

432. For an excellent account of coercion against life-holdouts, and jury dynamics more generally, see SUNDBY, *supra* note 431.

433. Sophie E. Honeyman, *Escaping Death: The Colorado Method of Capital Jury Selection*, 54 J. MARSHALL L. REV. 247, 274 (2021).

dire into five stages and ranking jurors on a seven-point scale,<sup>434</sup> but the basic idea is to turn death-qualification on its head and make it work for the defense team instead. The Colorado Method is all about moving from the standard voir dire questions to more meaningful questions aimed at identifying potential jurors subject to challenge for cause and making the record to get them excluded, clarifying what the law does and does not require in a capital case, and extracting commitments from potential jurors to respect each other's views and remain true to their own.<sup>435</sup>

Doug Ramsey teaches the Colorado Method at the National College of Capital Voir Dire in Boulder, Colorado, each spring—the premier training ground for capital case voir dire in the country.<sup>436</sup> He explains: *There are all sorts of problems that keep capital juries from rendering fair and accurate verdicts, and the Colorado Method is a way to address those problems while doing a much better job of sussing out automatic-death jurors who don't belong on a capital jury in the first place. So, for example, we explain that we are asking questions about sentencing before the trial begins not because our defendant is guilty, but because this is the only opportunity we have to ask questions about every contingency that might arise, no matter how small. And we explain that the law never requires a death sentence; it just requires that a jury consider the full range of punishments. That is such an important message. A juror is never required to impose a death sentence. We tell them that explicitly and also explain to them the difference between the guilt phase of trial, which is about figuring out facts—what happened, who did it, that sort of thing—and the sentencing phase of trial, which is about figuring out what jurors think is an appropriate punishment. That is a judgment call. It is a moral decision, and the law cannot make it for them. The law can tell them when a death sentence is authorized, but it can never tell them whether it is appropriate. So we explain that, and we make sure they understand what the law does and does not require.*

In Virginia, the Colorado Method took on added importance in light of the Commonwealth's problematic jury instructions. Doug

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434. For a detailed explanation, see Honeyman, *supra* note 433, at 275. Or just ask Doug.

435. See Rubenstein, *supra* note 422, at 18–27.

436. See *National Capital Voir Dire Training Program*, NAT'L COLL. OF CAP. VOIR DIRE, <https://www.nccvd.org/> [<https://perma.cc/7XED-RGD6>].

Ramseur explains: *The Colorado Method of voir dire also allowed us to make up for a lot of what Virginia's capital jury instructions lacked. Virginia's jury instructions did not really talk about mitigating evidence—what that is, what it takes for a jury to consider it, all that. But we were able to tell jurors that mitigating evidence could be anything, and a jury could impose a life sentence without any mitigating evidence whatsoever. We made sure they knew that the law was always satisfied with a life sentence, and they could give life for any reason they wanted. I would tell them that they could give life just because they see some spark of humanity in our client, even if it is just a look or the twinkling of an eye. They could give life just because their heart tells them it is the right thing to do, even if they could not articulate why. A juror never has to justify a vote for life, and that goes to the respect part of the equation. We know that life-jurors get bullied into voting for death even though they do not agree with it, so another thing that the Colorado Method does is create some space for those life-jurors. We explain that each juror has a responsibility to bring their own best judgment to the case, and we ask jurors to commit not only to do that, but also to respect the personal judgment of other jurors and even stand up for other jurors if others are not respecting their views. All of this is critically important to neutralizing the dynamics and misconceptions that could result in a death sentence for our clients, so it is hard to overstate just how invaluable these questions are.*

But there is always a hitch, and the hitch in Virginia was twofold. The first was that court-appointed lawyers handling a capital case here and there were not trained on the Colorado Method. Their practice was in Virginia, not Colorado, so even if they had heard of the Colorado Method (and many had not), they did not know what it was, or how to do it, or why it was important. The advent of regional capital defender offices solved that problem in short order. The regional defenders went to the national trainings and learned everything there was to know. Then they shared it with everyone else.

The second problem remained a problem, and it was that Virginia law was not exactly tolerant of the Colorado Method of voir dire. Virginia had no special provision for voir dire in capital cases, so all defense counsel had to work with was a generic statute that

allowed questions that went to bias.<sup>437</sup> Worse yet, the Supreme Court of Virginia strictly limited defense counsel's ability to ask the probing sorts of questions that the Colorado Method required. "[A] party is not entitled to ask potential jurors their views on the death penalty," Virginia's high court had stated, explaining: "The relative inquiry is whether the juror would adhere to [those views] in disregard of the jury instructions and in violation of his or her oath."<sup>438</sup>

The upside of this downside was that Virginia's understanding of its constitutional obligations in the context of capital case voir dire was so limited that it was at odds with what the Supreme Court of the United States required. "[I]t may be that a juror could, in good conscience, swear to uphold the law and yet be unaware that maintaining such dogmatic beliefs about the death penalty would prevent him or her from doing so," the Supreme Court in *Morgan v. Illinois* stated, holding: "A defendant on trial for his life must be permitted on voir dire to ascertain whether his prospective jurors function under such misconception."<sup>439</sup> This was *exactly* what the Colorado Method was trying to do, and a Court of Appeals of Virginia opinion written by then-Judge Kelsey (now Supreme Court of Virginia Justice Kelsey) supported that view. Although the relevant question was not a prospective juror's views, the court of appeals conceded, the question *was* whether the prospective juror could set aside those views and follow the court's instructions, and it was difficult to know the answer to that question without probing the strength and nature of the views themselves.<sup>440</sup>

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437. See VA. CODE ANN. § 8.01-358 (Repl. Vol. 2015) (allowing counsel to ask, among other things, whether a juror "has expressed or formed any opinion, or is sensible of any bias or prejudice therein").

438. *Lawlor v. Commonwealth*, 285 Va. 187, 215, 738 S.E.2d 847, 863 (2013) (emphasis omitted).

439. 504 U.S. 719, 735-36 (1992) (emphasis omitted).

440. See *Hopson v. Commonwealth*, 52 Va. App. 144, 152, 662 S.E.2d 88, 92 (2008) ("Even though a prospective juror may hold preconceived views, opinions, or misconceptions, the test of impartiality is whether the venireperson can lay aside the preconceived views and render a verdict based solely on the law and evidence presented at trial. Faced with this problem, trial courts must examine 'nature and strength of the opinion formed.' The spectrum of opinion can range, by infinite shades and degrees, from a casual impression to a fixed and abiding conviction. The point at which an impression too weak to warp the judgment ends and one too strong to suppress begins is difficult to discern.") (quoting *Cressell v. Commonwealth*, 32 Va. App. 744, 761, 531 S.E.2d 1, 9 (2000); and then quoting *Briley*

In short, the Supreme Court of Virginia did not appear to allow the Colorado Method, but decisions by courts both above and below it did, and that was just the opening that the regional capital defenders needed. Voir dire was a matter left to a trial court's discretion,<sup>441</sup> so the regional capital defenders argued the law and tried to get courts to exercise discretion in their direction. Doug Ramseur explains: *We knew we were right on the law, and we argued it just enough to let courts know that we had an appealable issue from the start. Nobody wanted to go through an entire capital trial just to have it blow up over voir dire and jury selection, so we were able to have some success in using the Colorado Method despite what the Supreme Court of Virginia had said. It also didn't hurt that every question we were asking, every understanding we were making sure that jurors had—it was all just clearing up misconceptions so that we could get a fair trial. Prosecutors had benefitted from these misconceptions, and we were essentially saying: That's not right and it's not fair, and we are not going to let you do that anymore. We did not always win these battles, but even if a judge let us ask some of the questions we wanted, it could make a big difference in the case.*

Illustrating the point is Virginia's last capital jury trial, back in 2018. The defendant was indicted on two counts of capital murder—one for shooting his wife in their home and the other for shooting one of the police officers who responded to the scene.<sup>442</sup> It was her first day on the job. The prosecutor in the case was the elected Commonwealth's Attorney of Prince William County, Paul Ebert. Ebert was famous for seeking death in capital cases and equally famous for getting it. In fact, he held the record for securing

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v. Commonwealth, 222 Va. 180, 185, 279 S.E.2d 151, 154 (1981)).

441. *Le Vasseur v. Commonwealth*, 225 Va. 564, 581, 304 S.E.2d 644, 653 (1983) (“A party has no right, statutory or otherwise, to propound any question he wishes, or to extend voir dire questioning ad infinitum. The court must afford a party a full and fair opportunity to ascertain whether prospective jurors ‘stand indifferent in the cause,’ but the trial judge retains the discretion to determine when the parties have had sufficient opportunity to do so.” (emphasis omitted)).

442. For a discussion of the facts, see Ian Shapira, *Va. Jury Deadlocks on Death Sentence for Man Who Killed Wife and Police Officer*, WASH. POST (Oct. 25, 2018), [https://www.washingtonpost.com/local/va-jury-deadlocks-on-death-penalty-for-man-who-killed-wife-and-police-officer/2018/10/25/c2eeafb2-d6ad-11e8-aeb7-ddcad4a0a54e\\_story.html](https://www.washingtonpost.com/local/va-jury-deadlocks-on-death-penalty-for-man-who-killed-wife-and-police-officer/2018/10/25/c2eeafb2-d6ad-11e8-aeb7-ddcad4a0a54e_story.html) [https://perma.cc/N86J-FY6G].

more death sentences over the course of his career than any other prosecutor in Virginia.<sup>443</sup>

One of the regional capital defender offices represented the defendant and made numerous offers to plead the case for a life sentence.<sup>444</sup> Ebert was a hard no. Ed Ungvarsky, the regional capital defender on the case, later stated, “[The defendant] killed a police officer. That was the sticking point from when the case came in. And it was always the sticking point.”<sup>445</sup> The case was going to trial.

At trial, Ungvarsky and his team were allowed extensive use of the Colorado Method in voir dire, and it made a difference in the case. As Doug Ramseur tells it: *The defense team on that case had no doubt that the Colorado Method helped them get a favorable jury pool, and it ended up helping them get favorable jury instructions in the penalty phase as well.*

It is impossible to know how much the Colorado Method impacted what happened in that jury room, but we know that the jury’s deliberations were heated because people could hear the jurors’ voices through the walls,<sup>446</sup> and the result in the case speaks for itself. After deliberating for three days, the jury came back with a life sentence on the charge of killing a police officer, and split six-six on the charge of killing two people.<sup>447</sup> Ebert fought for the jury to keep deliberating, but the judge ruled that it was deadlocked and entered a life sentence (the default by law) on the second

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443. Justin Jouvenal, *Virginia’s Longest-Running Prosecutor Plans to Retire at End of the Year*, WASH. POST (Feb. 5, 2019), [https://www.washingtonpost.com/local/public-safety/virginias-longest-running-prosecutor-plans-to-resign-at-end-of-year/2019/02/05/824736ea-2988-11e9-b2fc-721718903bfc\\_story.html](https://www.washingtonpost.com/local/public-safety/virginias-longest-running-prosecutor-plans-to-resign-at-end-of-year/2019/02/05/824736ea-2988-11e9-b2fc-721718903bfc_story.html) [<https://perma.cc/Q6M5-CK3U>] (“Over 13 terms, Ebert has sent more defendants to death row than any other prosecutor in Virginia’s history.”).

444. The talented Ed Ungvarsky, Capital Defender of the northern office, led the team. See Ian Shapira, *He’s Sent More Killers to Death Row Than Any Va. Prosecutor. But Not This Time*, WASH. POST (Nov. 5, 2018), [https://www.washingtonpost.com/local/hes-sent-more-killers-to-death-row-than-any-va-prosecutor-but-not-this-time/2018/11/03/7873fbbe-dd32-11e8-b3f0-62607289efee\\_story.html](https://www.washingtonpost.com/local/hes-sent-more-killers-to-death-row-than-any-va-prosecutor-but-not-this-time/2018/11/03/7873fbbe-dd32-11e8-b3f0-62607289efee_story.html) [<https://perma.cc/356W-AX4H>]; see also *Commonwealth v. Hamilton*, No. CR16000898-00 (Va. Cir. Nov. 15, 2018) (Prince William County).

445. Shapira, *supra* note 444 (quoting Ed Ungvarsky).

446. See *id.*

447. See *id.*



charge.<sup>448</sup> A *Washington Post* headline said it all: *He's Sent More Killers to Death Row Than Any Va. Prosecutor. But Not This Time*.<sup>449</sup> After a long and laborious trial, the prosecution walked away with the same two life sentences that it had from day one. It would turn out to be Ebert's last capital case, and the only case he could remember where he did not get a death sentence when he asked for it.<sup>450</sup> He retired the following year.<sup>451</sup>

The case was momentous, and not just because it turned out to be Virginia's last capital jury trial. Three years later, it would also be the case that helped flip the Virginia legislator widely considered to be "the single biggest obstacle to the [death penalty repeal] bill's chances."<sup>452</sup> State Senator Dick Saslaw, Senate Majority Leader of the Virginia General Assembly, had been a hardline supporter of the death penalty for decades.<sup>453</sup> "It's no secret what my views are," he had said as he moved to table the repeal bill in 2020.<sup>454</sup> But much had changed between 2020 and 2021, and as Saslaw explained in an interview after the repeal vote—*which he supported*—"one case in particular" helped change his mind.<sup>455</sup> It

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448. *See id.*

449. *Id.*

450. *See id.* ("Ebert said he thinks the Hamilton case is the first time his office has failed to persuade a jury to recommend a death sentence.")

451. *See* Jouvenal, *supra* note 443 (also noting that Ebert had served as the elected Commonwealth's Attorney of Prince William County for more than fifty years).

452. Gregory S. Schneider, *Virginia is About to Abolish the Death Penalty. It Was a Long, Surprising Road to Get There.*, WASH. POST (Mar. 23, 2021), [https://www.washingtonpost.com/local/virginia-politics/virginia-death-penalty-abolish/2021/03/23/64a5a8fa-88dc-11eb-8a8b-5cf82c3dffe4\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-death-penalty-abolish/2021/03/23/64a5a8fa-88dc-11eb-8a8b-5cf82c3dffe4_story.html) [<https://perma.cc/W5U6-KAVR>].

453. To illustrate the point, see lowkell, *Audio: Add this to the Long List of Reasons Why Dick Saslaw Needs to Go*, BLUE VA. (Mar. 14, 2016), <https://bluevirginia.us/2016/03/audio-add-long-list-reasons-dick-saslaw-needs-go> [<https://perma.cc/8UMU-VHTU>] (quoting Saslaw as saying, "They've done these acts and they've given up their right to live. Essentially, you kill 7 people, you're not a human being, I'm sorry. You kill 7 people, you've given up the title of human being and you deserve whatever you get. Let me repeat that: you deserve whatever you get"); Corinna Barrett Lain, *Death Row, Calls for Indifference, and Redemption of the Soul*, 77 OHIO ST. L.J. FURTHERMORE 105, 110–11 (2016) (quoting Saslaw as saying that he "really could care less how damn long [inmates] suffer [during an execution]" and discussing media coverage of his statements in the General Assembly imagining "a world where criminals were executed in the manner of their crimes" and where Oklahoma City bomber Timothy McVeigh "might be taken to a field and blown up"). For the record, one of us, the one who writes about the death penalty rather than litigating it, is still traumatized from testifying before Saslaw on lethal injection secrecy legislation in 2015.

454. Schneider, *supra* note 452 (quoting Virginia Senate majority leader Dick Saslaw).

455. *Id.*

was the 2018 Prince William case. If the renowned Paul Ebert could not get a death sentence on two counts of capital murder, one of which was for the death of a female police officer on her first day of work, then Saslaw figured no one could. “[T]he capital punishment system does not make sense if it is no longer used,” he told the press, adding, “[t]hat was a chief motivator in this.”<sup>456</sup> (It didn’t hurt that in 2019, Saslaw had faced his first primary challenge in forty years, and having survived it by just a few hundred votes, needed to shore up his left flank).<sup>457</sup>

Saslaw’s vote was a wistful goodbye. “Juries are just not handing out the sentences anymore,” he stated, so it was time to let the death penalty go.<sup>458</sup> And so Virginia did.

## 2. Pretrial

We now turn to how the advent of regional capital defender offices made a difference pretrial. Here again, the story we tell is a precursor to where the real success of the regional capital defenders played out—the plea-bargaining context. But plea-bargaining takes place in the shadow of trial and pretrial positioning, and, thus, the impact of the regional capital defenders in the pretrial context is a critically important part of our story as well. As we will see, some of what the regional capital defenders did in the pretrial context feeds into a common critique that capital defense litigation is obstructionism for the sake of obstructionism, a strategy of litigating death to death (others, by the way, would simply call this a vigorous defense). But much of what the regional capital defenders did in the pretrial context served important purposes beyond that narrative, and here we see the advantages of the regional capital

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456. *Id.*

457. See Andrew Dupuy, *A Powerful Democrat Faces Off With a Progressive Challenger in Virginia’s Senate District 35*, GREATER GREATER WASHINGTON (Feb. 19, 2019), <https://ggwash.org/view/70977/a-powerful-democrat-faces-off-with-a-progressive-challenger-in-virginias-senate-district-35> [<https://perma.cc/8XNH-ERFG>]; Daniel Marans, *Top Virginia Democrat Survives Strong Progressive Challenge*, HUFFPOST (June 11, 2019), [https://www.huffpost.com/entry/dick-saslaw-survives-progressive-challenge-yasmine-taeb-virginia-primary\\_n\\_5d00523fe4b0e7e7816f1fdc](https://www.huffpost.com/entry/dick-saslaw-survives-progressive-challenge-yasmine-taeb-virginia-primary_n_5d00523fe4b0e7e7816f1fdc) [<https://perma.cc/U8K6-58BA>].

458. Laura Vozzella & Gregory S. Schneider, *Virginia Moves Toward Banning Capital Punishment, in a Shift for Prolific Death Penalty State*, WASH. POST (Jan. 23, 2021), [https://www.washingtonpost.com/local/virginia-politics/virginia-death-penalty/2021/01/23/5d51d21a-5c02-11eb-b8bd-ee36b1cd18bf\\_story.html](https://www.washingtonpost.com/local/virginia-politics/virginia-death-penalty/2021/01/23/5d51d21a-5c02-11eb-b8bd-ee36b1cd18bf_story.html) [<https://perma.cc/SY45-ZHVV>] (quoting Virginia Senate majority leader Dick Saslaw).

defenders as falling into three general categories: strategic-positioning, calendar-setting, and relationship-building.

a. Strategic-Positioning

We begin with what is perhaps an obvious point: the regional capital defenders litigated capital cases *to the hilt*. Different regional capital defenders took different approaches, with some viewing their pretrial motions practice as more of a surgical strike—relatively infrequent but highly targeted and successful—and others taking more of a machine-gun approach, crushing prosecutors with an onslaught of motions that often disrupted the smooth functioning of their entire office. In terms of sheer numbers, the surgical-strike approach averaged around 30 to 40 motions in a capital case, while the machine-gun approach averaged more like *130 to 140*. Either way, that is a *lot* of pretrial motions.

This aggressive pretrial-motions practice served several strategic purposes. One was making prosecutors have to work *hard* for a death sentence, so hard that they were open to just pleading the case instead. “Death sentences used to come all too easy,” Maria Jankowski, Deputy Executive Director of the VIDC, explains. “That changed when the regional capital defenders started taking cases,” she says, adding, “[a]fter that, no matter how much of a hardliner the prosecutor was, that prosecutor was up against a formidable opponent. Death sentences should never come easy, and the regional capital defenders made sure that they didn’t.”<sup>459</sup> We view the regional capital defenders’ pretrial practice as akin to throwing specks of sand into the gears of a well-oiled machine. Every motion they filed was a few specks of sand, and they were throwing handfuls of sand into the gears of Virginia’s machinery of death, grinding those gears to a halt.

One reason that the regional capital defenders were able to litigate these cases to the hilt was because they had the time and talent to devote to bogging down the machinery of death. But another, less obvious, reason was the independence that came with not doing court-appointed work. Doug Ramseur explains: *The pretrial*

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459. Interview with Maria Jankowski, Deputy Executive Director of the Virginia Indigent Defense Commission.

*context was the place where not having judges appointing us as counsel had a massive impact. We did not have to “go along to get along.” We could afford to be the bad guys because the judges didn’t pick us. We didn’t care if they did not like us, or did not like what we were doing, and that was very different from the perspective that the typical court-appointed counsel had. Court-appointed counsel were local counsel. They were repeat players, so their relationship with the judge was bigger than any single case. When courts appoint counsel, those judges are picking the lawyers they like, and there is a certain sensibility that comes with that, a sense that you shouldn’t make the judge mad because you won’t get appointed on the next case. Court-appointed lawyers had to worry about those sorts of relationships. We didn’t, and that gave us room to do things that were going to annoy the judge and mess up the court’s docket. That room was essential to being able to do our job right.*

From time to time, the regional capital defenders even managed to leverage the difference between their approach and that of court-appointed counsel into a strategic advantage of its own. As Doug Ramseur tells it: *Sometimes our court-appointed co-counsel was on board with our approach to a capital case, and they were fabulous in their own right. That much just needs to be said. Other times, not so much. But even then, local counsel could be useful partners in playing “good cop-bad cop” with the prosecutor in the case. Local counsel could say to the prosecutor: “Those people are nuts. They are bat\*\*\*\* crazy, and I am telling you, they are not going to let up in this case. They are going to make all of our lives miserable for as long as they possibly can.” And that could be the opening salvo to a plea deal in the case.*

Importantly, the regional capital defenders’ aggressive pretrial practice was not just about the fatigue factor. It was also a way to create and preserve issues for appeal and improve their position at trial. Here again is Doug Ramseur: *Our pretrial motions let prosecutors know that they were in for a fight. We were essentially saying to them, “You want to go to trial? Okay, here’s a taste of what that’s going to look like. By the way, we’re about to seriously drain your resources, so good luck with your other dockets.” But our aggressive motions practice did other things too. For example, it created opportunities for prosecutors to make mistakes, like when we triggered notice requirements that they sometimes failed to meet.*

*Motions also gave us appealable issues, which created risk. We wanted prosecutors thinking about the risk that something we were fighting about would get them overturned on appeal. So, for example, we were fighting about their experts, which in some cases were quite terrible, and judges were already starting to take note of that.<sup>460</sup> We were fighting about the admissibility of DNA mixture evidence, which can be incredibly problematic.<sup>461</sup> And we were fighting about whether, and how, certain Supreme Court rulings applied in our case. *Atkins v. Virginia*<sup>462</sup> is a good example of that. In theory, *Atkins* was good for us. But no juries were finding intellectual disability in the sentencing phase of a case. No one was actually winning on those claims. Mostly what *Atkins* did was give us claims to litigate, and those were strong claims that introduced a good amount of risk into the case.*

*It's worth adding that even when we lost on the various motions we were making, those motions would often improve our position at trial. For example, we weren't usually able to get experts disqualified, but we could bring some serious heat and embarrass them on the stand in a pretrial hearing, previewing an impeachment that was going to cause trouble at trial. And our motions would sometimes lead to favorable jury instructions in the case as well.*

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460. See, e.g., *Atkins v. Commonwealth*, 272 Va. 144, 153–54, 631 S.E.2d 93, 97–98 (“Dr. Samenow is not ‘skilled’ in the administration of measures of adaptive behavior. Accordingly, he would also lack the requisite expertise in scoring and interpreting such tests. Thus, on the record before us, we conclude that the Commonwealth failed to establish that Dr. Samenow possessed the necessary qualifications [as an expert] and therefore, the circuit court abused its discretion by allowing Dr. Samenow to testify and express an expert opinion with regard to whether *Atkins* is [intellectually disabled].”); *Atkins v. Commonwealth*, 260 Va. 375, 394–95, 534 S.E.2d 312, 323–24 (2000), *rev’d* 536 U.S. 304 (2002) (Hassell, J., concurring in part and dissenting in part) (“I simply place no credence whatsoever in Dr. Samenow’s opinion that the defendant possesses at least average intelligence. I would hold that Dr. Samenow’s opinion that the defendant possesses average intelligence is incredulous as a matter of law. Indeed, I am perplexed that Dr. Samenow, who did not administer a complete IQ test to the defendant and admittedly asked the defendant questions based upon bits and pieces of outdated tests to supposedly evaluate the defendant, would opine that this defendant possesses at least average intelligence. . . . Dr. Samenow admitted that some of the questions he administered to the defendant were based upon a test developed in 1939.”).

461. For a discussion of the problems with DNA mixture evidence, see Mark W. Perlin, *When DNA is Not a Gold Standard: Failing to Interpret Mixture Evidence*, CHAMPION (2018), [https://www.cybgen.com/information/publication/2018/Champion/Perlin-When-DNA-is-not-a-gold-standard-failing-to-interpret-mixture-evidence/The\\_Champion\\_May\\_2018\\_p50-56.pdf](https://www.cybgen.com/information/publication/2018/Champion/Perlin-When-DNA-is-not-a-gold-standard-failing-to-interpret-mixture-evidence/The_Champion_May_2018_p50-56.pdf) [<https://perma.cc/3HB8-SQY8>].

462. 536 U.S. 304 (2002).

Indeed, the regional capital defenders' pretrial-motions practice even played a part in changing the law. Before 2010, indigent capital defendants requesting the appointment of an expert had to make the request in open court. There was no statutory provision for them to do it in an *ex parte* hearing, and the Supreme Court of Virginia had held that there was no constitutional right to an *ex parte* hearing on those requests.<sup>463</sup> Thus, court-appointed counsel in capital cases were forced to show why they needed ancillary defense services like a mitigation specialist or investigator in open court, and the regional capital defenders (who already had their mitigation specialists and investigators) likewise had to show in open court why the appointment of an expert was necessary in their case (think fingerprint experts, pathologists and toxicologists, or any other expert, forensic or otherwise).

This put defense counsel at a serious disadvantage. To get a court to grant funding for an expert, defense counsel had to show why the assistance of an expert was needed in the case and how a defendant would be prejudiced without it.<sup>464</sup> This forced them to reveal their theory of the case or, at the very least, the avenues they were exploring to figure out what that theory would be.<sup>465</sup> The idea behind these open court hearings was to give prosecutors a chance to object to the request (and often they did),<sup>466</sup> but the damage was done without them ever saying a word. Just by being there, prosecutors had a front row seat to the defendant's case. They learned about potential leads on witnesses, potential defenses to the charge, and potential challenges to the evidence in the state's case.<sup>467</sup> These open court hearings amounted to non-reciprocal

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463. See VA. CODE. ANN. § 19.2-264.3:4 (Repl. Vol. 2015); *Ramdass v. Commonwealth*, 246 Va. 413, 421–22 (1993) 437 S.E.2d 566, 571; *O'Dell v. Commonwealth*, 234 Va. 672, 686, 364 S.E.2d 491, 499 (1988).

464. For a discussion of the showing necessary for the appointment of ancillary defense services, see *supra* text accompanying note 407.

465. See THE SPANGENBERG GRP., *supra* note 269, at 63 (“[D]efense counsel must show the need for their requests and reveal their need, which is often their theory of defense, to the prosecution.”). For an extended, and excellent, discussion of the point, see generally Justin B. Shane, *Money Talks: An Indigent Defendant's Right to an Ex Parte Hearing for Expert Funding*, 17 CAP. DEF. J. 347 (2005); Donna H. Lee, *In the Wake of Ake v. Oklahoma: An Indigent Criminal Defendant's Lack of Ex Parte Access to Expert Services*, 67 N.Y.U. L. REV. 154 (1992).

466. See THE SPANGENBERG GRP., *supra* note 269, at 62–63.

467. See *id.* at 63 (“Even if the prosecution does not oppose the motion, by attending the

discovery that not only went beyond what prosecutors were entitled to under Virginia's extremely limited discovery rules, but also forced the disclosure of information that came from confidential client communications and legal strategizing protected by the attorney work product doctrine.<sup>468</sup>

That type of exposure put defense counsel in a tight spot, forcing them to choose between revealing defense strategies and forgoing an expert's assistance before they could even assess its worth.<sup>469</sup> That choice was complicated by the fact that these disclosures did not just give prosecutors a heads-up as to what was coming, but also had the potential of impacting what *they* did in the case. If defense counsel asked for an expert to test a fingerprint, for example, and then sat on the results, prosecutors could infer (correctly in most cases) that the result was inculpatory, prompting *them* to test the sample as well.<sup>470</sup> Similarly, if defense counsel asked for a mitigation specialist to pursue a lead on a theory of sex abuse by a family member, that could conceivably trigger outreach to the defendant's family by the prosecution's investigator—technically, just to investigate the lead, but strategically, to inform family members that the defense strategy involved divulging family

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hearing they are able to learn the defense's reasons for the request, the trial strategy, the name of the expert and the requested amount of the fee."); Shane, *supra* note 447, at 353–54 (discussing information required to make showing for ancillary defense services and how such disclosures reveal key information about potential defense strategies).

468. See ABA, *supra* note 141, at 154 ("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 communications."); Shane, *supra* note 465, at 353 (discussing open hearing as a form of informal, non-reciprocal discovery and impact on work-product information and confidential attorney-client communications).

469. See THE SPANGENBERG GRP., *supra* note 269, at 63 ("Too often, indigent defense attorneys in Virginia are confronted with deciding which is the lesser of two evils: revealing their defense to the prosecution well in advance of trial in order to have the chance of obtaining the assistance of an expert; or not revealing their defense but not receiving expert assistances, and further not preserving the issue for appeal."); Shane, *supra* note 465, at 348 ("Defense attorneys must choose between applying for expert funding and safeguarding confidential defense strategy. The choice may cause attorneys not to pursue funds for an expert if they are unsure of the expert's value and would need to disclose a large amount of potentially damaging information in order to prove that the expert is necessary.")

470. See Shane, *supra* note 465, at 354 ("Because Virginia's discovery rules require the defense to disclose prior to trial the reports of any expert it intends to use at trial, the prosecution will infer that an expert's studies were not favorable to the defense if . . . the defense does not turn over any reports from the expert for which it had requested funds.")

secrets and blaming the family for what the defendant had done.<sup>471</sup> In short, the problem was not just tipping off the prosecutor as to what was in the defendant's hand. It was also that the tip could set off a chain of events that was potentially disastrous for the defense. For this reason, defense attorneys in capital cases sometimes found that the risks associated with showing the need for expert assistance outweighed the benefit of the assistance itself, leading them to forgo certain lines of investigation altogether (which was a problem of its own).<sup>472</sup>

For a sense of perspective, only three other death penalty states denied capital defendants the right to an *ex parte* hearing for the appointment of experts, and courts in those jurisdictions routinely allowed *ex parte* hearings anyway.<sup>473</sup> As consultants for the ABA stated in a scathing 2004 report: "One of the most striking discoveries of our site work in Virginia is the complete inadequacy of access by public defenders and court-appointed counsel to court-approved experts and a similar inadequacy of court-appointed counsel to court-approved investigators."<sup>474</sup> The problem was "pervasive and long-standing," the reporters wrote, and it was largely due to the lack of *ex parte* hearings.<sup>475</sup> "In our experience in studying indigent defense systems across the country," they stated, "we have never encountered such a persistent problem of indigent defendants' right to seek expert funds being extinguished by a widespread practice of the courts not allowing the requests to be filed *ex parte*."<sup>476</sup>

For those wondering what all this has to do with the regional capital defenders, here is Doug Ramseur: *Virginia's refusal to allow ex parte hearings to get court-appointed experts is a nice*

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471. See *id.* at 354–55 (discussing "counter-mitigation" strategies of prosecutors in capital cases and prejudice to the defense by forced disclosure of mitigation strategy and investigations).

472. See THE SPANGENBERG GRP., *supra* note 269, at 63 ("Some attorneys . . . told us that they balance the colliding interests and frequently decide not to reveal the theory of their case to the prosecution."); see also Shane, *supra* note 465, at 353 (noting that the attorneys for Beltway Sniper John Allen Muhammad obtained funds from another state's public defender office that was involved in the case for this very reason).

473. See Shane, *supra* note 465, at 359–62 (discussing the practices of other states and concluding that "Virginia stands almost alone in refusing to permit such *ex parte* hearings").

474. THE SPANGENBERG GRP., *supra* note 269, at 59.

475. *Id.* at 60.

476. *Id.* at 63.



*example of how having access to a professional community beyond Virginia made a difference. Court-appointed counsel in capital cases knew the rule was bad, but they didn't really question it. To them, that's just the way things were. But we knew different. In fact, this was one of those places where I thought, not even Georgia does that. So, we started arguing that we were entitled to an ex parte hearing on these motions as a matter of due process. We were winning some of those fights and losing some too. But, here again, we were making a record for constitutional claims, injecting a certain amount of risk into the case, and just the fact that we were fighting over procedure rather than substance was enough to bog the case down.*

*In time, this created just enough uncertainty that the Legislature was willing to do something about it. In 2010, a provision was added that allowed defense counsel in a capital case to seek expert assistance in an ex parte fashion.<sup>477</sup> That was clearly a response to the motions we were making because it was limited to capital cases. The new statute wasn't a great statute. It was complicated, and we had to explain in open court why we needed to be in closed court.<sup>478</sup> But we made it work, and just having a statutory provision that allowed ex parte hearings made the courts much more receptive to granting our requests.<sup>479</sup> This was another game changer. All of a sudden, prosecutors couldn't get a sneak peek at our case anymore. They didn't know what we had or what we were doing, and that not only put us in a better position at trial, but also set us up better for plea-bargaining the case.*

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477. See VA. CODE ANN. § 19.2-264.4(A) (Cum. Supp. 2010), repealed by Act of Mar. 24, 2021, ch. 344 & 345, 2021 Va. Acts \_\_, \_\_.

478. See *id.* (requiring the defendant to establish a need for confidentiality as part of request for an ex parte hearing for expert assistance); ABA, *supra* note 141, at 155 ("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.").

479. See ABA, *supra* note 141, at 155 ("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.").

## b. Calendar Setting

Good things take time, and mitigation work falls in the category of good things. It takes time to track down witnesses, follow leads, build relationships, and do all the other things that mitigation specialists do. That makes calendar-setting a critically important part of a capital defender's pretrial practice.

Before the advent of the regional capital defender offices, capital cases in Virginia were typically tried shockingly fast. The attorneys in *Williams v. Taylor*, for example, had less than two months to prepare for trial.<sup>480</sup> That is nowhere near enough time to put together a defendant's life story.

Another example is the Ricky Gray case. The regional capital defenders were *partly* involved in the case, and Gray was the one capital defendant—out of over 250—whose life they did not save.<sup>481</sup> Gray was sentenced to death in 2006 and executed in 2017.<sup>482</sup>

The fact that the regional capital defenders were involved in the Gray case at all makes it the exception in the story we tell, but the amount of their involvement, and speed with which Gray was tried, makes it the exception that proves the rule. The defense had just six months to prepare for Gray's trial.<sup>483</sup> That is scary fast, and again, nowhere near the time needed to fully develop a case in mitigation.

Doug Ramseur recalls: *In that amount of time, there was only so much that trial counsel was going to be able to do. Most of the cases we handled took eighteen to twenty months to go to trial. Gray's case*

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480. See GARRETT, *supra* note 154, at 127. *Williams v. Taylor*, 529 U.S. 362 (2000), is discussed *supra* text accompanying notes 309–317.

481. See *supra* note 360.

482. See Alanna Durkin Richer, *Virginia Man Convicted of 2006 Slaying of Family is Executed*, AP (Jan. 18, 2017), <https://apnews.com/article/6562ca36b54b4bcb9d79647d3986613c> [<https://perma.cc/6CL3-JHME>].

483. The murders were January 1, 2006, and Gray was indicted on February 9. His trial was early August. See *Capital Murder Charges Filed in Seven Slayings*, WASH. TIMES (Feb. 9, 2006), <https://www.washingtontimes.com/news/2006/feb/9/20060209-120218-3339r/> [<https://perma.cc/M8H6-5WY7>] (providing the date of indictment); Gary A. Harki, *Lawyers Describe Childhood Abuse as "Sexual Slavery" as They Argue Ricky Gray Should be Spared Death*, VA.-PILOT (Dec. 13, 2016), [https://www.pilotonline.com/news/crime/article\\_4e73312e-3c30-5206-bb96-996e4dc22c04.html](https://www.pilotonline.com/news/crime/article_4e73312e-3c30-5206-bb96-996e4dc22c04.html) [<https://perma.cc/KAK6-UB64>] (providing the date of conviction).

took six. It was bad timing for Gray that the Richmond capital defenders office was short-staffed during that time. As a result, although the office's mitigation specialist and fact investigator worked on the case, there was not a regional capital defender assigned to it. Instead, two court-appointed attorneys were chosen by the trial court to try the case. One thing that didn't happen in Gray's case was getting the trial pushed way back on the court's docket. Maybe it wouldn't have made a difference. Ricky Gray was a Black man who brutally killed a prominent White family of four, including two little girls. There was a high likelihood he was going to get the death penalty no matter what anybody did. But the subsequent habeas corpus investigation revealed a ton of evidence that conceivably could have made a difference if the defense had more time to fully develop the case in mitigation.

To be fair, the defense did present some mitigating evidence at trial. In the sentencing phase, Gray's mother testified that Gray was repeatedly beaten with a horse strap by his father and raped at least once by his older half-brother.<sup>484</sup> "Sorry, Cooley," she said to him on the witness stand, addressing him by his nickname as he looked back at her, crying.<sup>485</sup> Gray's older sister also testified, corroborating the abuse.<sup>486</sup> The jury knew that Gray had been abused. And it knew that he had tried to escape the trauma of that abuse through drugs, committing the murders while he was high on PCP.<sup>487</sup>

But the testimony was brief,<sup>488</sup> and there was much that the jurors did not know. They did not know that the sexual abuse began

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484. See *Jury Weighing Execution for Killer of Richmond Family Hears Testimony of Violence*, FOX NEWS (Aug. 18, 2006), <https://www.foxnews.com/story/jury-weighing-execution-for-killer-of-richmond-family-hears-testimony-of-violence> [<https://perma.cc/6E8D-S54P>] (also noting that Gray's mother wept as she testified on the abuse).

485. *Id.*

486. *See id.*

487. See *Ricky Gray Juror Claims Jury Knew of Gray's Drug Use*, NBC 12 (Sept. 17, 2015), <https://www.nbc12.com/story/30050274/ricky-gray-juror-claims-jury-knew-of-grays-drug-use/> [<https://perma.cc/VH54-VEHU>].

488. The entirety of Gray's mother's testimony on direct was twenty-six pages in the transcript, much of which was a cursory recitation of the timeline of Gray's upbringing and more general conditions in which he lived. Gray sister's testimony was half of that, encompassing just thirteen pages of the trial transcript. See Transcript of Record at 1485–1511, *Commonwealth v. Gray*, No. CR06F0698, 2006 WL 6625217 (Va. Cir. Oct. 23, 2006) (direct

when Gray was just five, when the half-brother forced him to perform oral sodomy.<sup>489</sup> They did not know that Gray was getting anally raped on a weekly, sometimes nightly, basis by the time he was nine, often with Gray's sister forced to watch.<sup>490</sup> They did not know that the abuse was so bad that Gray bled through his clothes, and that his sister used balm to try to treat the tears in his anus.<sup>491</sup> And they did not know that the brutalization was so severe that even as an adult, Gray physically recoiled in revulsion at the memory of certain clothes (the striped socks used to muffle his screams) and certain sounds (the static of the television that was often on in the background) and certain smells (Vaseline and other products used to rape him).<sup>492</sup> Gray's clinical psychologist, who had been involved in some 150 capital cases, had never seen a case with such sustained and corroborated abuse.<sup>493</sup> "The rapes," the psychologist would conclude, "were so pervasive—so frequent and over such a long period of time—that they can only be described as sexual slavery."<sup>494</sup>

And that was just the sexual abuse. We could share a similar account of Gray's brutal and sustained physical abuse that the jury did not hear—beatings not just with a horse strap, but also using a PVC pipe and metal weather stripping, among other things.<sup>495</sup> The stories are endless because the physical abuse was relentless.

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of Gray's mother); *id.* at 1520–33 (direct of Gray's sister); *id.* at 1538 (redirect of Gray's sister)). For a point of comparison, the chief of operations at the Virginia Department of Corrections also testified for the defense in the sentencing phase, and his testimony was forty-three pages. *See id.* at 1561–1603.

489. *See* Lain, *Three Observations about the Worst of the Worst, Virginia-Style*, *supra* note 28, at 477–79 (discussing Ricky Gray case based on evidence presented in Petition for a Writ of Habeas Corpus, Gray v. Kelly, No. 11-cv630 (E.D. Va. Aug. 29, 2011) (on file with author)).

490. *See id.*

491. *See id.*; Harki, *supra* note 483.

492. *See* Lain, *Three Observations about the Worst of the Worst, Virginia-Style*, *supra* note 28, at 479; Harki, *supra* note 483.

493. *See* Lain, *Three Observations about the Worst of the Worst, Virginia-Style*, *supra* note 28, at 479.

494. Harki, *supra* note 483.

495. *See* Lain, *Three Observations about the Worst of the Worst, Virginia-Style*, *supra* note 28, at 479.

Indeed, it was so severe that sometimes Gray was not *allowed* to go to school out of fear that the authorities would intervene.<sup>496</sup>

As a result of his abuse, Gray developed a major psychiatric disorder that manifested in bed wetting, which lasted well into late childhood. The abuse also led to Gray using drugs at an early age. He was drinking by age eight, smoking marijuana by age nine, and getting high on PCP by age eleven.<sup>497</sup> The jury heard none of that. The neuropharmacist who later consulted on Gray's case had never even heard of a person so young using PCP, which alters the neurotransmitters in the brain and can cause cognitive dysfunction with long-term use.<sup>498</sup> Gray was a case of long-term use.

Would any of this have made a difference? Who knows. What we do know is that the race to get the case to trial meant that much of the information that could have been used to ask the jury to spare Gray's life was not uncovered until his post-conviction lawyers had the time to develop it.<sup>499</sup> In the end, Gray's only move was to ask the governor for a commutation to a life sentence, supported by a letter signed by over fifty mental health professionals attesting to the brain damage he suffered from severe childhood trauma and related drug abuse.<sup>500</sup> Executing Gray "would convey the message that he alone is responsible for his crimes," Gray's forensic psychologist wrote in his letter, calling it a "false message."<sup>501</sup> The governor's answer to the commutation request was no.

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496. *See id.*

497. *See id.*; Harki, *supra* note 483.

498. *See* Harki, *supra* note 483; *see also* Kathleen Davis, *What is Phencyclidine (PCP), or Angel Dust?*, MED. NEWS TODAY (Oct. 12, 2017), <https://www.medicalnewstoday.com/articles/305328> [<https://perma.cc/93A6-76GF>] (discussing effect of PCP on neurotransmitters in brain); *Long-Term Effects of PCP Abuse*, AM. ADDICTION CTRS. (Feb. 3, 2020), <https://americanaddictioncenters.org/pcp-abuse/long-term-effects> [<https://perma.cc/S4MU-UW8U>] <https://americanaddictioncenters.org/pcp-abuse/long-term-effects> [<https://perma.cc/S4MU-UW8U>] (discussing cognitive dysfunction).

499. Their habeas brief, which we relied on heavily in our discussion here, is cited at *supra* note 489. We are grateful to the VCRCC for its work in Ricky Gray's case, which although not successful in saving Gray's life, at least allows his story to be told.

500. *See* DEATH PENALTY INFO. CTR., MENTAL HEALTH PROFESSIONALS, RELIGIOUS LEADERS JOIN RICKY GRAY'S PLEA FOR CLEMENCY (Jan. 12, 2017), <https://deathpenaltyinfo.org/news/mental-health-professionals-religious-leaders-join-ricky-grays-plea-for-clemency> [<https://perma.cc/84N6-LGRC>]. The clemency petition was also supported by two former commissioners of the Virginia Department of Behavioral Health and Developmental Services. *See id.*

501. Harki, *supra* note 483.

We took the time to more closely examine the Gray case for two reasons. First, it is the one case, out of more than 250 that the regional capital defender offices were involved in, that ended in a death sentence and execution. But what we now know is that Gray is also the one case where a regional capital defenders office was involved but there was no regional capital defender working the case. In short, to the extent that the Gray case is an exception to the regional capital defenders' remarkable success in saving lives, it is the exception that proves the rule.

Second, and more to the point of the discussion here, the Gray case shows how important calendar-setting—managing the *timing* of trial—is to mounting a vigorous defense. Turns out, time is a necessary, although not sufficient, condition for gathering the type of mitigation evidence that could save a defendant's life. As is true generally in the pretrial context, independence is a critically important part of getting it.

Doug Ramseur explains: *A big part of our success more largely had to do with our ability to just slow the whole case down, and again, this is a place where not having judges appointing counsel had a major impact. We had no interest in keeping judges happy by adhering to their trial schedules. We didn't care if we messed up the court's docket. In fact, that was part of what we meant to do. Being specialists also allowed us to push back on judges to get the time we needed to prepare for trial. Their view was "Let's move this along." Our answer was "You have to allow us to do our mitigation investigation, or we'll have an appealable issue from the start. The Supreme Court has reversed where that was not done, and in most cases, that takes eighteen to twenty months." We crunched the numbers. We knew what we were talking about, and the judges had to respect that.*

### c. Relationship Building

A third area in which having regional capital defenders made a difference in the pretrial context was relationship-building with their clients. In part, this went back to having mitigation specialists in-house who could start building connections with clients and their families right away. And in part, the comparative advantage of the regional capital defenders in this area went back to their

independence, which gave them the ability to pick unpopular fights.

Doug Ramseur explains: *Some of the pretrial motions we filed, we knew we were going to lose. But our clients needed to see us fighting with all we had. A good example of that was a motion for the defendant to be able to wear civilian clothes at pretrial hearings. Sure, we wanted to win that. But even when we didn't win, it communicated to our clients that we were going to fight for them to be treated with respect.*

*Another example, and this is from 2020, just after I had left the office, was a motion I filed in a capital case in rural Louisa County. My client was African American, and there was a huge, life-sized portrait of Robert E. Lee hanging in the courtroom. That was not okay—not with me, not with my client. So, we filed a motion requesting that my client be tried in a courtroom that didn't have the guy who thought Black people should be enslaved hanging on the wall. The court could give us a change of venue or take it down.<sup>502</sup> The court took it down, permanently.<sup>503</sup> I just cannot see how a local lawyer, serving at the pleasure of the judge, was going to pick that fight. But in our view, that's what we were there to do—to fight the good fight, no matter how unpopular. We needed to fight for our client not only because it was the right thing to do, but also because it built trust, and that was critically important to our representation.*

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502. See Emily Davies, *Virginia Judge Orders Robert E. Lee Portrait Removed From Courtroom Ahead of Murder Trial*, WASH. POST (Sept. 11, 2020), [https://www.washingtonpost.com/local/virginia-judge-orders-robert-e-lee-portrait-removed-from-courtroom-ahead-of-murder-trial/2020/09/11/3c368fa6-f43a-11ea-999c-67ff7bf6a9d2\\_story.html](https://www.washingtonpost.com/local/virginia-judge-orders-robert-e-lee-portrait-removed-from-courtroom-ahead-of-murder-trial/2020/09/11/3c368fa6-f43a-11ea-999c-67ff7bf6a9d2_story.html) [https://perma.cc/9UL2-KKTL] (reporting that Doug Ramseur, appointed as the capital defense attorney for Darcel Murphy, filed a motion in 2018 “that Murphy should be tried in a courtroom without images ‘that could be interpreted as glorifying, memorializing, or otherwise endorsing the efforts of those [who] fought on behalf of the Confederate cause or its principles’”).

503. Doug and his co-counsel, Matthew Engle, were able to negotiate trying the case without a jury and without death on the table. The case proceeded as a bench trial non-death case, and the defendant was acquitted on a motion to dismiss. The case would turn out to be the last capital murder trial in Virginia, a fitting end.

### 3. Plea-Bargaining

Every point we have made thus far—every advantage that the regional capital defenders had in the trial and pretrial setting—brings us here, to the plea-bargaining context. The regional capital defenders did not grind Virginia’s machinery of death to a halt by winning cases at trial (although they did some of that, too). They did it by learning how to avoid trial in the first place.

Doug Ramseur has this to say: *If you want to know where the capital defender offices had the most impact, where our involvement made the biggest difference in terms of ending the death penalty in Virginia, it was here. The biggest thing we did was stop death sentences, and we did that mostly by stopping those cases from going to trial. Trial is bad for capital defendants. Around half the time, the jury comes back with death. So, job one was keeping those cases from going to trial, at least if the case was going to come down to sentencing. There is this impression out there that capital indictments were slowing down, and the death penalty was fading away. That was not what was happening, at least not until the very end. It was not that capital indictments were slowing down; it was that we were pleading them more. That’s why Virginia did not have any death sentences. We were pleading almost all of those cases for something less.*

We know from John Douglass’s work that since the regional capital defenders started taking cases in 2004, the capital trial rate plummeted to just *half* of what it had been beforehand.<sup>504</sup> Capital indictments were still coming down the pike, but prosecutors were not taking those cases to trial to get death. They were pleading them out instead.

The numbers are so impressive that we are re-upping them here to drive the point home. All told, the regional capital defenders represented defendants in over 250 capital cases.<sup>505</sup> Only ten went to trial with death on the table.<sup>506</sup> Just *ten*. The rest were resolved for

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504. See Douglass, *supra* note 26, at 885.

505. See *supra* text accompanying note 356.

506. See *supra* text accompanying note 357. Sometimes the regional capital defenders were able to negotiate an agreement to try the case, but without death on the table.



a sentence less than death instead. How did they manage to do that?

Part of the answer was what was happening at trial. Plea-bargaining happens in the shadow of trial, and the regional capital defenders were making a difference in the outcome of capital cases that went to trial. As already noted, the death sentencing rate in capital cases fell from eight-four percent before 2004, when the regional capital defenders started taking cases, to just *forty-seven percent* after.<sup>507</sup> Prosecutors went from being relatively confident that they could get a death sentence if they asked for it to being much less sure, and that factored into their assessment of whether to take the case to trial. As prosecutors themselves reported, the risk of “losing” the case (at least by way of asking for death and not getting it) had an impact on their appetite for aggressively pursuing death in the first place.<sup>508</sup>

Doug Ramseur explains: *It is hard to overstate how important it was that prosecutors were losing some of the cases that they took to trial. It made them look bad when they asked for death and didn't get it, despite all their time and effort. They started getting worried that they could lose, and that created an opening for us to deal the case. It's hard to say, but it's also possible that they were affected by the same mitigating evidence that we were preparing to submit to the jury. We were sharing that with them in plea negotiations to show that we had a strong case, but it also may have changed their personal views about the right outcome. It's easy to ask for death if you think the defendant is pure evil. It's a little harder if you come to conclude that the person never had a chance from the start.*

Another piece of the puzzle was what was happening pretrial. As discussed above, the regional capital defenders were raising the risk of reversal with an aggressive pretrial motions practice. The regional capital defenders were also just wearing prosecutors down

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507. See *supra* text accompanying note 347.

508. We know that Virginia prosecutors were factoring in juries' willingness to return a death sentence in deciding whether to seek one because in the 2002 Virginia study, they explicitly said so. See 2002 JLARC STUDY, *supra* note 64, at 31 (reporting that prosecutors in high-density, urban jurisdictions “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”).

by burying them with motions, mucking up their dockets, and just generally dragging those cases out. Cost considerations were a part of the mix too. The regional capital defenders made trying capital cases more expensive—more expensive to defend, and more expensive to prosecute. We don't know exactly what those costs were on the prosecution side, but on the defense side alone, the cost of one capital case that went to trial was estimated at \$750,000, and the cost of another was estimated at \$1.4 million.<sup>509</sup> If the prosecution's costs were anything even remotely close to those figures, that was a *lot* of money to try a case that had a fifty/fifty shot of ending in a life sentence. *Uncertainty. Risk. Time. Effort. Money.* In a multitude of ways, the regional capital defenders made pleading the case the most sensible thing to do.

But a prosecutor's willingness to take death off the table and plead the case for life is only half of the equation. The other half is getting a capital defendant to agree—and that's the hitch. Here is a striking statistic to give a sense of the challenge: an estimated *fifty percent to seventy-five percent* of condemned capital defendants who have been executed in the modern era had the opportunity to take a plea offer that would have saved their life.<sup>510</sup>

Doug Ramseur explains: *People tend to think that our ability to negotiate all those cases was because prosecutors were more willing to plead the case, and that was true. But the biggest challenge in negotiating a lot of these cases was not the prosecutor. It was our clients. These are people who are seriously depressed and lack any sense of self-worth. Their whole lives, they've been victimized, and then they have the added guilt of having massively victimized someone else. They are locked up so they can't use drugs as a coping mechanism to escape reality anymore, and the amount of self-loathing is just phenomenal. They don't not want to be executed. They hate themselves for what they have done and what they have become, so it's just really hard for them to not be indifferent in these cases.*

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509. See Garrett, *supra* note 25, at 716–17 (discussing trials of Joshua Andrews and Alfredo Prieto, respectively, noting that Prieto's \$1.4 million defense price tag was *before* his lengthy resentencing proceeding in 2010).

510. See Albert Alschuler, *Plea Bargaining and the Death Penalty*, 58 DEPAUL L. REV. 671, 671–72 (2008).

*And then if we can get past that, do you know how hard it is for someone to agree to spend the rest of their life in prison? No hope of getting out, ever—just lock them up and throw away the key. You have to be able to appreciate how hard it is for someone to agree to something like that. It takes a tremendous amount of relationship-building and trust.*

Here again, the Ricky Gray case is a prime example. “I just want to die,” Gray told investigators when he was arrested and confessed to the murders.<sup>511</sup> He later apologized for his crimes, saying: “Remorse is not a deep enough word for how I feel. I know my words can’t bring anything back but I continuously feel horrible for the circumstances that I put [the victims] through. . . . There’s nothing I can do to make up for that.”<sup>512</sup> Gray would have to live with what he had done until Virginia executed him for it.

It merits mention that the standard explanation for capital defendants not taking a plea offer is that they received bad advice from their lawyers, or their intellectual functioning was such that they could not appreciate the risks of going to trial, or they had plausible claims of innocence that they wanted to take to trial.<sup>513</sup> And surely those sorts of things are happening, too. But what “boots on the ground” experience reveals is that a client’s profound despair is an obstacle of its own. All too often, capital defendants don’t believe they are worth saving, and that misconception is an overlooked culprit in explaining these rejected plea-offer cases.

This was another place—and the last stop of our journey—where the regional capital defenders made a massive difference. Doug Ramseur explains: *Our entire approach was a client-centered focus. We would meet our clients right away. And we were making motions that demonstrated that we cared about them and would fight as hard as we could. Our clients needed to see us fight, and they also needed to see us lose on some of those motions. They needed to appreciate the risk, to see it for themselves. Everything we did helped us develop the sort of relationship with the client that built trust so that they knew we were trying to save their lives, and also that their*

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511. Transcript of Sentencing Proceedings at 1546, *Gray v. Commonwealth*, 274 Va. 290 (2007).

512. Harki, *supra* note 483 (quoting Ricky Gray).

513. See Douglass, *supra* note 25, at 891 (discussing various explanations).

*lives were worth saving. Again, it took a tremendous amount of trust to usher our clients through a capital prosecution in such a way as to save their lives, and our client-centered focus was the key to creating it.*

That brings us to the end of our story of how specialized capital defenders made a difference in the trial, pretrial, and plea-bargaining contexts. As for their cumulative impact, we agree with what Virginia State Senator Scott Surovell, who sponsored the death penalty repeal legislation, told the press: “I don’t think there’s any question that the lack of people on death row and the lack of sentences in the last ten years helped legislators feel that this punishment was out of step with where Virginians are today.”<sup>514</sup> Regional capital defenders weren’t the entire story of Virginia’s repeal of the death penalty, but they played a critically important part of it.

### III. QUALIFICATIONS AND IMPLICATIONS

We have now said most of what we have to say. In this Part, we bring the discussion to a close with two important points that have yet to be made. We start by qualifying our claims, acknowledging others who impacted the ground game in a significant way. We then turn to the implications of the story we have told, drawing lessons for those working to end capital punishment in their states and perhaps even offering lessons for those interested in criminal justice reform more broadly.

#### A. *Qualifications*

*It takes a village.* We said it once, and we are saying it again. Our account has set aside a number of factors that also played a role in Virginia’s repeal of the death penalty in order to highlight the role that the regional capital defender offices played in thwarting death sentences and grinding the machinery of death to a halt. But even this part of the story had other players, and we pause to recognize three that were especially impactful.

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514. Oliver, *supra* note 325.

First, advocacy groups. Before there were regional capital defenders, there were advocacy groups that labored tirelessly to change hearts and minds, and before there were advocacy groups, there were pioneers who led the way. Some were lawyers, some were nonlawyer activists, and some were even former death row inmates.<sup>515</sup> These advocacy groups ran information campaigns that educated the public about the death penalty, and they amplified the voices of surviving family members of slain victims, bringing their compassion and credibility to the fore. As Sister Helen Prejean observed, their activism over the past thirty years was “the sustaining fire that led to Virginia’s repeal of the death penalty.”<sup>516</sup>

The regional capital defenders reaped the benefits of this work. Doug Ramseur explains: *The cultural landscape shifted in Virginia, partly due to changing demographics but also partly due to information campaigns that helped people understand how the death penalty actually worked. Both had an impact on the juries we were getting. Death-seeking prosecutors had not caught on to that yet. They didn’t see it. But we did. We could see the changing attitudes and how that was feeding into our jury pools. We knew that jurors had less of an appetite for death, and that made them more receptive to the cases in mitigation that we were bringing. People tend to think that abolition groups mattered because of their work in the General Assembly, and that was true, but long before that, their work made a difference in the ground game we were playing. It changed the cultural landscape and that changed what we were able to do.*

Second, the VC3 and VCRRC. One of the many reasons that the regional capital defenders were able to have the success that they did owes to the VC3, which supported their work with trainings (especially at first), consultations, and comprehensive research and litigation guides. The VC3 was preaching the virtues of aggressive representation and negotiating the case to take death off the table long before the regional capital defenders mastered those

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515. We hesitate to list names, knowing that our list would never be complete, but we are confident that activist Marie Deans has a singular place on the list, and the same is true of former death row inmate Joe Giarratano. For work about the abolitionist efforts of Marie Deans, see PEPERS, *supra* note 11. For the advocacy work of Joe Giarratano, see Green, *supra* note 296.

516. See Brumfield, *supra* note 8 (quoting Sister Helen Prejean).

techniques. And the VCRRC was an important partner as well. The VCRRC's work is what created the risk of reversal on appeal that allowed the regional capital defenders to take death off the table at trial. In short, although the record of averted death sentences rightly belongs to the regional capital defenders, their work was in tandem with and benefitted from other capital defense organizations also in play.

Third and finally, prosecutors. That's right, *prosecutors*. We would be remiss without also acknowledging the progressive prosecutors who made a difference in the trenches of capital litigation in Virginia. Over time, a number of Commonwealth's Attorneys in Virginia were elected on progressive platforms that included not seeking the death penalty in capital cases. By 2020, when twelve of them formally organized, these no-death prosecutors represented over forty percent of the population in Virginia.<sup>517</sup> Capital murder indictments were the spigot feeding the entire capital punishment system, and these twelve progressive prosecutors had turned off the spigot in huge swaths of the state.<sup>518</sup>

Here again is Doug Ramseur: *Shifting demographics made the stance that these prosecutors took possible, but it was still bold and it was still brave. We need to make sure that we acknowledge that piece of the puzzle, because those prosecutors made a difference in what we were able to accomplish too. Check.*

Although we limit our discussion here to just three other players, the larger point is worth reiterating. The story of how the regional capital defender offices made a difference is not the *only*

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517. See letter from Virginia Progressive Prosecutors for Justice to members of the General Assembly (Jan. 4, 2020) ("We are a group of reform-minded Commonwealth's Attorneys who represent and are responsible for the safety of over 40% of Virginia's population. . . .") (on file with author). Thanks to Jim Hingeley for providing us the letter.

518. We note that these same twelve prosecutors also took a stand in the General Assembly, going on record in favor of repeal, which not only added an important voice to the chorus for repeal, but also resulted in the larger Virginia Association of Commonwealth's Attorneys ("VACA") declining to take a stand on the issue one way or the other. See *id.*; Segura, *supra* note 15 ("With their members divided on the matter, VACA stayed silent on the abolition bill."). It may have been difficult for VACA to take a stand in favor of retention in any event. To the extent prosecutors "needed" the death penalty, they needed it to plea-bargain capital cases to life, which is not only controversial but also exceedingly expensive. See Douglass, *supra* note 25, at 892–93 (discussing coercion in pleading capital cases and noting that capital cases ending in a plea are still three times as costly as noncapital cases that go to trial).

story important to Virginia's repeal of the death penalty. It is just the only story we tell.

### B. *Implications*

We turn now to the implications of the story we have told, offering lessons learned for those working to end capital punishment in their states and perhaps even for those interested in criminal justice reform more broadly. What made the regional capital defenders successful? And what were the conditions necessary for that success?

#### 1. Disruption

The first question we can answer in one word: disruption. Before 2004, Virginia had the most lethal death penalty in the country. It was structurally designed to get death sentences and keep them, and it hummed along like the well-oiled machine that it was, churning out death sentences and earning Virginia its place as a leading executioner nationwide. Prosecutors asked for death often, and more than eighty percent of the time, they got it.

The regional capital defenders managed to grind Virginia's machinery of death to a halt by disrupting death at every turn. They disrupted the provision of incompetent (or at least inconsistent) representation in capital cases by court-appointed attorneys who were no match for death-seeking prosecutors. They disrupted settled expectations of what passed for adequate mitigation in the sentencing phase of a capital case. They disrupted systemic information disadvantages. And court calendars. And the capital jury selection process. And their clients' belief that they were not worth saving. And, just for good measure, they disrupted the workload and work *life* of death-seeking prosecutors in every way they could.

Every single thing that the regional capital defenders did forced prosecutors to spend more time, more effort, and more money to pursue a death sentence that had also grown more elusive. In virtually every case—all but 10 of over 250—the death penalty was more trouble than it was worth. That's how the regional capital defenders ground the death penalty to a halt, by disrupting the

machinery of death one capital case at a time. What were the conditions that allowed them to do that?

## 2. Resources

The first necessity is resources. The regional capital defender offices are a case study in what happens when states actually fund indigent defense. As Doug Ramseur likes to say: *We gave poor people a rich person's defense*. Rich people don't get the death penalty in this country. That was true in 1972, when Justice Douglas wrote about it in *Furman*,<sup>519</sup> and it is just as true today. One searches in vain for a single rich person on death row.

But if a capital defendant *were* rich, what would that defense look like? It would look like a case litigated to the hilt, a case that had mitigation specialists devoted to building relationships with the client and the client's family from day one, and private investigators who could spend countless hours listening to taped conversations that *might* make a difference in the case. It would involve pretrial strategies that had no regard whatsoever for the judge's approval or trial calendar. And it would be led by highly trained specialists whose full attention would be focused on the case. *That* is the defense that indigent capital defendants were given by Virginia's regional capital defenders.

To those discouraged by the thought that their state would never appropriate the funding necessary for high quality capital defense, be of good cheer. To say that states must provide the resources for indigent capital defense is not to say that they actually have to care about it. Consider Virginia. It created the regional capital defender offices as a cost-savings measure and means of protecting its death sentences, which had become vulnerable under increased scrutiny. Moreover, when the report recommending creation of the offices had crunched the numbers and concluded that there was enough work to sustain six regional offices, the General Assembly authorized *four*. State Legislatures do not actually have to care about high-quality indigent capital defense in order to fund it. They just

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519. See *Furman v. Georgia*, 408 U.S. 238, 251–52 (Douglas, J., concurring) (“One searches our chronicles in vain for the execution of any member of the affluent strata of this society.”).



have to determine that funding indigent capital defense is in their best interest. The law of unintended consequences will take care of the rest.

But adequately funding indigent capital defense is a necessary, *not sufficient*, condition for capital defense success. We could throw a lot of money at substandard court-appointed counsel and we would still have substandard counsel doing indigent capital defense. Some of the conditions that led to the regional capital defenders' success were things that money cannot buy. We turn to those next.

### 3. Specialization

Capital litigation is a specialty law practice, and the regional capital defenders were the specialists. They had a deep reservoir of knowledge and experience, and that allowed them to be exceptionally good at what they did. *Practice makes perfect*.

But that rather obvious advantage was just the tip of the iceberg. Specialization also gave the regional capital defenders a community inside Virginia and out, and that gave them perspective, and camaraderie, and specialized training, which, in turn, allowed them to challenge outlier practices, maneuver their cases into strong strategic positions, and choose juries more strategically. Equally important, specialization came with a team of highly qualified defense team specialists who were in-house, on tap, and ready to go. Specialization even played a role in creating systemic change in Virginia, setting in motion a series of events that led to a new system for certifying court-appointed capital defense counsel, mandatory training in high-end capital defense, and a cultural shift in the standard of capital defense practice. It's fair to say that specialization had a profound effect on the capital litigation landscape.

### 4. Independence

Independence was another necessary ingredient in the regional capital defenders' success. Independence to file a *ton* of motions. Independence to mess up the trial court's docket. Independence to pick unpopular fights. The regional capital defenders had a client-centered defense, and a defense can't be client-centered when it

depends on a court's approval. The key to the capital defenders' success was their ability to put the client first, and that required independence.

### 5. Neutralizing Systemic Unfairness

Our last answer to the question of what conditions were necessary for the capital defenders' success has to do with neutralizing systemic unfairness—leveling the playing field. When the regional capital defenders began taking cases in 2004, the rules were stacked against them in numerous ways. Requests for expert assistance that gave prosecutors a sneak peek at a capital defendant's case. Capital voir dire that failed to identify automatic-death jurors who could (and should) be struck for cause. Jury instructions that allowed the mistaken impression that death was mandatory in a given case. Discovery so limited that capital defendants were not even entitled to the police report regarding the charge for which they could lose their life. And the list went on.

The regional capital defender offices had an institutional structure that worked to neutralize some of these inequities. For example, top-notch investigators made up for much of what Virginia's "trial by ambush" discovery rules lacked, and specialization worked to neutralize Virginia's procedural traps for the unwary. But many of these systemic failings were remedied *because the regional capital defenders remedied them*. They learned the Colorado Method of voir dire and used it every chance they could get. They asked for jury instructions that made clear that death was never mandatory. And they asserted a due process right to an ex parte hearing for the appointment of experts.

All this was just leveling the playing field so that capital defendants were not being systematically disadvantaged in what was supposed to be a fair trial. And what a difference providing an actually fair trial made. When the regional capital defenders came along, "The playing field was leveled," VIDC Executive Director David Johnson explained, adding, "and with a level playing field, the death penalty was going away."<sup>520</sup> And so it did.

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520. Oliver, *supra* note 325.

## CONCLUSION

Virginia's repeal of the death penalty in 2021 was the product of a perfect storm wrought by a number of forces. Some were political. Some were legal. Some were incremental. And some were incidental. But a critical part of the landscape that made repeal possible was the fact that, as a practical matter, Virginia's death penalty was already dead. For that, we can (largely) thank Virginia's regional capital defenders, who literally worked themselves out of a job by making the death penalty more trouble than it was worth. Specialized capital defenders ground Virginia's machinery of death to a halt by beating death sentences one capital case at a time. And if that can happen in Virginia, where the deck was stacked against capital defendants in most every conceivable way, it can happen anywhere. And by that, we mean *everywhere*.