A Comparison of Extremes: Why Does Virginia So Successfully Convert Death Sentences Into Executions, While California Hardly Ever Succeed In Executing Anyone?

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INTRODUCTION

In 1972 the United State Supreme Court struck down the death penalty. [1] This decision came after prisoners challenged the imposition of death in their cases. [2] The Court found that the death penalty violated the Eighth Amendment as well as the Fourteenth Amendment. [3] It stated that the application of the penalty was haphazard, discretionary, and was imposed on a small number of the total cases available and predominantly against minorities. [4] Possibly most important, the death penalty in these many cases was being entered capriciously, with little guidance and gave judges latitudes of discretionary decision making. [5]

In 1976 *Gregg v. Georgia* reinstated the death penalty. [6] The Court ruled that death penalty did not violate the Constitution and met concerns by drafting a statute for guidance. [7] These guidelines include (but are not limited to) "requiring the presentation of mitigation evidence; requiring instructions about the ineligibility of parole for those defendants convicted of capital crimes; and changes in *voir dire* that insure that jurors can consider both like and death

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[1] *Furman v. Ga.*, 408 U.S. 238 (1972).
[2] *Id.* at 239.
[3] *Id.*
[4] *Id.*
[5] *Id.*
[6] *Gregg v. Ga.*, 428 U.S. 153 (1976).
[7] *Id.* at 169, 207.

before they are allowed to sit on a jury.[8] Executions resumed in 1977 with one person. [9] Over the next 34 years 1,277 executions have been carried out in the United States.[10]

Out of these numbers, Virginia has carried out 110 executions while California has executed only an astronomically low ten. [11] If we look comparatively at the other 30 states that have the death penalty, only three have executed over 100 people since 1976. [12] These states are Texas, with 508; Virginia with 110; and Oklahoma with 106.[13] Further, the death row population in California as of 2012 stands out right at 731 while Virginia has a death row population of just 10.[14] Again looking at the states with the death penalty, thirteen of these states have less than twenty people on death row.[15] The question that naturally follows this 721-inmate gap is why? The quick answer for this can be found in the cases of Teresa Lewis of Virginia[16] and Richard Ramierz of California.[17]

Teresa Lewis, a woman with a low IQ, conspired with two men to murder to her husband. [18] The two gunmen were spared the death penalty while Teresa was executed on September 23,

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[8] Cynthia M. Bruce, *Proportionality Review: Still Inadequate, But Still Necessary*, 14 Cap. Def. J. 265, 274 (2002).
[9] U.S. Department of Justice, *Capital Punishment, 2011 Statistical Tables* (July 2013) (available at http://www.bjs.gov/index.cfm?ty=pbdetail&iid=4697).
[10] *Id.*
[11] Death Penalty Information Center, *State by State Database* (Dec. 8, 2013) (available at http://www.deathpenaltyinfo.org/state_by_state).
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Id.* Colorado 4; Delaware 18; Idaho 13; Indiana 13; Kansas 10; Montana 2; Nebraska 11; New Hampshire 1; North Carolina 4; South Dakota 3; Utah 9; Washington 8.
[16] Melanie L. Crawford, *A Losing Battle With The 'Machinery of Death': The Flaws of Virginia's Death Penalty Laws and Clemency Process Highlighted By the Fate of Teresa Lewis*, 18 Widener L. Rev. 71 (2012).
[17] Judge Arthur L. Alarcon, *Remedies For California's Death Row Deadlock*, 80 S. Cal. L. Rev. 697, 700-05 (May 2007).
[18] Crawford, *supra* note 16, at 72-74.

2010. [19] This case shows prime ambiguity of how the sentencing in Virginia occurs. The judge who gave the two triggermen the sentence of life without parole was the same judge who sentenced Teresa to death. [20] Fruitless attempts to save Teresa's life were made by the European Union, ACLU of Virginia, and possibly the most shocking Iranian President Ahmadinejad asking the Governor to grant clemency. [21]

On the other hand there is Richard Ramirez who has been on California death row since November 7, 1989. [22] Ramirez was convicted of thirteen murders, five attempted murders, eleven sexual assaults, and fourteen burglaries[23] earning him the name of the "Night Stalker."[24] His direct appeal in front of the California Supreme Court was heard on August 7 2006.[25] After his conviction was affirmed on direct appeal to the California Supreme Court, both state and federal habeas corpus relief was filed. The "Night Stalker" died at the age of 57 on June 7, 2013 – of natural causes. [26] He became the 59th inmate to die of such while waiting for execution. [27]

This paper aims to explain the discrepancy between the two jurisdictions and why Virginia so effectively converts death sentence convictions to executions while California seems to be in a perpetual holding pattern. The first portion will look at how the two jurisdictions approach the trial phase in a capital case. The second portion will look at the appeals process,

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[19] *Id.* at 71.
[20] *Id.*
[21] *Id.* at 73.
[22] Alacron, *supra* note 17, at 700.
[23] *Id*.
[24] Greg Botelho, *Serial Killer, Rapist Richard Ramierz – Known As "Night Stalker" – Dead At* 53, (Jun. 9, 2013) (available at http://www.cnn.com/2013/06/07/justice/california-night-stalker-ramirez-dead/).
[25] Alacron, *supra* note 17, at 705.
[26] Bothelho, *supra* note 24.
[27] *Id.*

both at the state and federal levels. Finally, this paper will briefly cover the clemency process in both jurisdictions.

DISCUSSION

I. HOW CAPITAL CASES ARRIVE AT THE TRIAL STAGE

A. What cases are eligible for the death penalty?

Under California law the death penalty can be sought in a first-degree murder case with special circumstances.[28] There are twenty-two special circumstances in California that could constitute a prosecutor to seek the death penalty.[29] Comparatively, Virginia allows prosecutors to

[28] Death Penalty Information Center, *Crimes Punishable By The Death Penalty*, (Dec. 8, 2013) (available at http://www.deathpenaltyinfo.org/crimes-punishable-death-penalty).

[29] California Penal Code § 109.2: (a) The penalty for a defendant who is found guilty of murder in the first degree is death or imprisonment in the state prison for life without the possibility of parole if one or more of the following special circumstances has been found under Section 109.4 to be true: (1) The murder was intentional and carried out for financial gain; (2) The defendant was convicted previously of murder in the first or second degree. For the purpose of this paragraph, an offense committed in another jurisdiction, which if committed in California would be punishable as first or second degree murder, shall be deemed murder in the first or second degree; (3) The defendant, in this proceeding, has been convicted of more than one offense of murder in the first or second degree; (4) The murder was committed by means of a destructive device, bomb, or explosive planted, hidden, or concealed in any place, area, dwelling, building, or structure, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings; (5) The murder was committed for the purpose of avoiding or preventing a lawful arrest, or perfecting or attempting to perfect, an escape from lawful custody; (6) The murder was committed by means of a destructive device, bomb, or explosive that the defendant mailed or delivered, attempted to mail or deliver, or caused to be mailed or delivered, and the defendant knew, or reasonably should have known, that his or her act or acts would create a great risk of death to one or more human beings; (7) The victim was a peace officer, as defined in Section 830.1, 830.2, 830.3, 830.31, 830.32, 830.33, 830.34, 830.35, 830.36, 830.37, 830.4, 830.5, 830.6, 830.10, 830.11, or 830.12, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a peace officer engaged in the performance of his or her duties; or the victim was a peace officer, as defined in the above-enumerated sections, or a former peace officer under any of those sections, and was intentionally killed in retaliation for the performance of his or her official duties; (8) The victim was a federal law enforcement officer or agent who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a federal law enforcement officer or agent engaged in the performance of his

or her duties; or the victim was a federal law enforcement officer or agent, and was intentionally killed in retaliation for the performance of his or her official duties; (9) The victim was a firefighter, as defined in Section 245.1, who, while engaged in the course of the performance of his or her duties, was intentionally killed, and the defendant knew, or reasonably should have known, that the victim was a firefighter engaged in the performance of his or her duties; (10) The victim was a witness to a crime who was intentionally killed for the purpose of preventing his or her testimony in any criminal or juvenile proceeding, and the killing was not committed during the commission or attempted commission, of the crime to which he or she was a witness; or the victim was a witness to a crime and was intentionally killed in retaliation for his or her testimony in any criminal or juvenile proceeding. As used in this paragraph, "juvenile proceeding" means a proceeding brought pursuant to Section 602 or 707 of the Welfare and Institutions Code; (11) The victim was a prosecutor or assistant prosecutor or a former prosecutor or assistant prosecutor of any local or state prosecutor's office in this or any other state, or of a federal prosecutor's office, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties; (12) The victim was a judge or former judge of any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties; (13) The victim was an elected or appointed official or former official of the federal government, or of any local or state government of this or any other state, and the killing was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties; (14) The murder was especially heinous, atrocious, or cruel, manifesting exceptional depravity. As used in this section, the phrase "especially heinous, atrocious, or cruel, manifesting exceptional depravity" means a conscienceless or pitiless crime that is unnecessarily torturous to the victim; (15) The defendant intentionally killed the victim by means of lying in wait; (16) The victim was intentionally killed because of his or her race, color, religion, nationality, or country of origin; (17) The murder was committed while the defendant was engaged in, or was an accomplice in, the commission of, attempted commission of, or the immediate flight after committing, or attempting to commit, the following felonies: (A) Robbery in violation of Section 211 or 212.5, (B) Kidnapping in violation of Section 207, 209, or 209.5, (C) Rape in violation of Section 261, (D) Sodomy in violation of Section 286, (E) The performance of a lewd or lascivious act upon the person of a child under the age of 14 years in violation of Section 288, (F) Oral copulation in violation of Section 288a, (G) Burglary in the first or second degree in violation of Section 460, (H) Arson in violation of subdivision (b) of Section 451, (I) Train wrecking in violation of Section 219, (J) Mayhem in violation of Section 203, (K) Rape by instrument in violation of Section 289, (L) Carjacking, as defined in Section 215, (M) To prove the special circumstances of kidnapping in subparagraph (B), or arson in subparagraph (H), if there is specific intent to kill, it is only required that there be proof of the elements of those felonies. If so established, those two special circumstances are proven even if the felony of kidnapping or arson is committed primarily or solely for the purpose of facilitating the murder; (18) The murder was intentional and involved the infliction of torture; (19) The defendant intentionally killed the victim by the administration of poison; (20) The victim was a juror in any court of record in the local, state, or federal system in this or any other state, and the murder was intentionally carried out in retaliation for, or to prevent the performance of, the victim's official duties; (21) The murder was intentional and perpetrated by means of discharging a firearm from a motor vehicle, intentionally at another person or persons outside the vehicle with the intent to

seek the death penalty for first-degree murder that includes one of fifteen aggravating circumstances. [30]

Over the years the Virginia legislators have expanded VA Code § 18.2-31. In 1975 VA Code § 18.2-31 allotted for only three crimes to be punishable by death. [31] Of the twelve

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inflict death. For purposes of this paragraph, "motor vehicle" means any vehicle as defined in Section 415 of the Vehicle Code; (22) The defendant intentionally killed the victim while the defendant was an active participant in a criminal street gang, as defined in subdivision (f) of Section 186.22, and the murder was carried out to further the activities of the criminal street gang

[30] Death Penalty Information Center, *supra* note 28.; VA Code § 18.2-31 (2013) Capital Murder Defined: Willful, deliberate, and premeditated killing of any person: (1) in the commission of an abduction, when such abduction was committed with the intent to extort money or a pecuniary benefit or with the intent to defile the victim of such abduction; (2) of any person by another for hire; (3) of any person by a prisoner confined in a state or local correctional facility … or while in the custody of an employee thereof; (4) in the commission of robbery or attempted robbery; (5) in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration; (6) of a law enforcement officer … a fire marshal …, or a deputy or an assistant fire marshal … when such fire marshal or deputy assistant fire marshal has police powers …, and auxiliary police officer appointed or provided for …, an auxiliary deputy sheriff …, or any law – enforcement officer of another state or the United States having the power to arrest for a felony under the laws of such state or the United States, when such killing is for the purpose of interfering with the performance of his official duties; (7) of more than one person as a part of the same act or transaction; (8) of more than one person within a three-year period; (9) in the commission of or attempted commission of a violation of …, involving a Schedule I or II controlled substance, when such killing is for the purpose of furthering the commission or attempted commission of such violation; (10) by another person pursuant to the direction or order of one who is engaged in a continuing criminal enterprise as defined in subsection I …; (11) of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth; (12) of a person under the age of fourteen by a person age twenty-one or older; (13) of any person by another in the commission of or attempted commission of an act of terrorism …; (14) of a justice of the Supreme Court, a judge of the Court of Appeals, a judge of a circuit court or a district court, a retired judge sitting by designation or under temporary recall, or a substitute judge appointed under … when the killing is for the purpose of interfering with his official duties as a judge and; (15) of any witness in a criminal case after a subpoena has been issued for such witness by the court, the clerk, or an attorney, when the killing is for the purpose of interfering with the person's duties in such case.

[31] Hammad S. Matin, *Symposium: A Quarter Century Of Death: A Symposium On Capital Punishment In Virginia Since Furman v. Gerogia: Expansion of Section 18.2-31 of the Virginia Code*, 12 Cap. Def. J. 7, 8 (Fall 1999).

mitigating circumstances that have been added; only one (VA Cod § 18.2-31(3)) has been narrowed. [32]

In both Virginia and California just because the state sets the ability for prosecutors to seek the death penalty if the mitigating circumstances exist does not mean that the prosecutor will in every case.

In Virginia, prosecutors are "granted nearly unbridled discretion over the prosecution of criminal charges." [33]A study conducted by the Joint Legislative Audit and Review Condition (JLARC) found that prosecutors would most likely seek to impose the death sentence based on location. [34] Between 1995-1997 Attorneys for the Commonwealth in small density as well as medium density areas sought the death penalty in 85% of all capital-eligible cases. [35]

In contrast, during this same study in areas that were heavily populated prosecutors chose to seek the death penalty in 72% of cases. [36] The JLARC's conclusions on the matter were this:, "The data show that there is significant disparity in how prosecutorial discretion is exercised among localities and that neither the race of the defendant nor the race of the victim are statistically significant factors in the Commonwealth's Attorneys pursuit of the death penalty."[37]

California gives prosecutorial discretion where the crime supports the death penalty and has the general power to handle cases that arise in their jurisdiction. [38] The California Supreme Court has held, "prosecutorial discretion to select those eligible cases in which the death penalty

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[32] *Id.* at 12.
[33] Herman J. Hoying, *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, 351 (Spring 2002).
[34] *Id.* at 353.
[35] *Id.* at 353.
[36] *Id.*
[37] *Id.* at 355
[38] John A. Horowitz, *Prosecutorial Discretion and the Death Penalty: Creating Committee to Decide Whether to Seek the Death Penalty*, 65 Fordham J. L. Rev. 1, 2588 (1997).

will actually be sought does not in and of itself evidence an arbitrary and capricious capital punishment system or offend principles of equal protection, due process, or cruel and/or unusual punishment."[39] The attorney general supervises the district attorney. [40] The legislature in California Penal Code § 923 and California Government Code § 12550 has enumerated this.[41]

Under the California Penal Code § 923:

(a) Whenever the Attorney General considers that the public interest requires, he or she may, with or without the concurrence of the district attorney, direct the grand jury to convene for the investigation and consideration of those matters of a criminal nature that he or she desires to submit to it. He or she may take full charge of the presentation of the matters of the grand jury, issue subpoenas, prepare indictments, and do all other things incidence thereto to the same extent as the district attorney may do.[42]

Under California Government Code § 12550:

The Attorney General has direct supervision over the district attorneys of the several counties of the State and may require of them written reports as to the condition of public business entrusted to their charge.

When he deems its advisable or necessary in the pubic interest, or when direct to do so y the Governor, he shall assist any district attorney in the discharge of his duties, and may, where he deems it necessary, take full charge of any investigation or prosecution of violations of law of

[39] *Id*. at 2588; *People v. Keenan*, 46 Cal. 3d 478 (Cal. 1988).
[40] Horowitz, *supra* note 38, at 2588.
[41] *Id* at n. 2589; Penal Code Section 914-924.6 (available at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=pen&group=00001-01000&file=914-924.6).
[42] Cal. Penal Code § 923(a) (2014).

which the superior court has jurisdiction. In this respect he has all the powers of a district attorney, including the power to issue or cause to be issued subpoenas or other process. [43]

It is important to recognize that although in the California Code the Attorney General supervises the district attorney it is unclear how much overview that entails. Under the California Constitution Article 5 § 13, "the Attorney General shall be the chief law officer of the State."[44] Arguably, the Attorney General is one person and it is nearly impossible for her to oversee all the legal cases in each county, so she more than likely steps in when an issue rises to her attention.

B. Finding adequate counsel in capital cases.

Under California law if the defendant is charged with a capital crime there are strict guidelines for what type of counsel may represent them. Each defendant is entitled to an attorney that has experience litigating violent felonies and has tried two murder cases. [45] Although this regulation seems to provide adequate counsel for defendants when their life is on the line, California is struggling to keep attorneys in the state willing to take these cases. [46] As of 2009 attorneys who meet these stringent requirements are close enough to retiring that they do not want to take on a case that will require work of possibly a decade. [47] Making the problem worse is that California is not attracting new attorneys that in fact meet these requirements because of the extremely low pay the state provides. [48] The numbers in 2009 reflect that 295 inmates on death row have been there more than 15 years. [49]

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[43] Horowitz, *supra* not 38, at 2389; California Government Code § 12550 (available at http://www.leginfo.ca.gov/cgi-bin/displaycode?section=gov&group=12001-13000&file=12550-12553).
[44] CA. Const. Article 5 § 13 (available at http://www.leginfo.ca.gov/.const/.article_5).
[45] Sara Colon, *Capital Crime: How California's Administration of the Death Penalty Violates the Eight Amendment*, 97 Calif. L. Rev. 1377, 1391 (Oct. 2009).
[46] *Id.*
[47] *Id.*
[48] *Id.*
[49] *Id.*

Virginia has a much different system than California does. In Virginia, the majority of inmates row are too poor to afford adequate counsel. [50] Statistics have found that 97% of inmates on death row are too poor to afford counsel and have one appointed for them. [51]There is a presumption that the correlation between the low-density areas that commonly are shown to have less jobs or be lower income. These defendants are then be appointed ineffective counsel that does not have the time or money in question witnesses or to find key evidence. [52]

To combat this issue, Virginia has put in place guidelines for appointed counsel but rarely follows them.[53] The requirements to be followed in Virginia are: five years of experience in criminal trials, at least five jury trials where the underlying charge is a violent felony, (a mere) six hours of training in representing a capital defendant, and prior experience with a capital case. [54]

It is the job of the Virginia Public Defender's Commission to keep a list of qualified volunteers for capital cases. [55] Yet the Commission does not verify the truth of the qualifications volunteers purport to have. [56] Further, despite the attempts to provide adequate counsel, judges that preside over these cases are not bound to select an attorney from the list while appointing counsel. [57] It is no shock that in Virginia attorneys are six times more likely to be disciplined by the bar when compared to other attorneys in Virginia. [58]

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[50] Meagan E. Costello, *Smashing the Tragic Illusion of Justice: The Reprehensibility of the Death Penalty in Virginia*, 41 Cath. U. L. Rev. 255, 268 (Winter 2001).
[51] *Id.* at 270.
[52] *Id.*
[53] *Id*. at 271.
[54] *Id*. at 272
[55] *Id.*
[56] *Id.*
[57] *Id.*
[58] *Id.* at 273

Remember that in California qualified attorneys are regularly refusing to take cases because of the long time commitment associated with them. It is a not only a disadvantage to inmates who rely on appointed counsel but also harms the adversarial process to have attorneys with only six hours of training be able to representation clients where the defendant's life hangs in a balance against many other factors.

As noted before, appointment of substandard type of counsel harms the adversarial process. To take a closer look at this, counsel that is unprepared often fails to find or show mitigating evidence, shorter trials ensue and it then becomes too late to argue these issues on appeal. [59] As one scholar put it, "Literally, 'the quality of trial counsel can determine the difference between a life sentence and a death sentence in Virginia.'"[60] While California has taken a step that has hurt the courts in finding counsel to represent defendants of capital crimes (but arguably helps keep the integrity of the adversarial system), Virginia has taken extra steps to ensure that defendants do not have a fair or equal chance.

II. THE APPEALS PROCESS IN STATE COURT

In both jurisdictions, automatic appeals are sent directly to the state supreme court. [61] Once these cases are at the state appeal level they are (as expected) handled completely different.

A. Direct Appeals in California

The first step in the process for direct appeals in California mirrors the trial stage. As in Virginia, most inmates on death row are too poor to afford counsel. [62] This requires the system to

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[59] *Id.*
[60] *Id.* n. 20.
[61] Gerald F. Uelmen, *Criminal Appeals: Article: Institutional Roles: Death Penalty Appeals and Habeas Proceedings: The California Experience*, 93 Marq. L. Rev. 495, 498 (Winter 2009); Costello, *supra* note 45, at 276.
[62] Uelmen, *supra* note 56, at 498.

once again appoint counsel. [63] Herein lies the first problem in the appeals process: judgments for the death penalty are overwhelming the system. [64] Subsequently, this exceeds available and qualified attorneys that are able to handle direct appeals. [65]

The State Public Defenders office handles 125 automatic appeals for these inmates. [66] This office cannot accept any more appointments. [67] The rest of the appointed lawyers are private and earn a low rate of $145 per billable hour on these cases. [68] As of Winter 2009, the low pay associated with these appeals have caused *at least* 20 lawyers to relocate to other states because they can no longer afford to live in California. [69]

If an attorney has not practiced in California for four years or does not meet other qualifications they can still be appointed. [70] For example, if the attorney has substantially equivalent experience in "another jurisdiction or different type of practice for at least four years then you may be appointed. "[71] The Supreme Court (in determining if an attorney is qualified) may consider: two writing samples, evaluations from assisting counsel if the attorney was previously appointed in a death penalty appeal or post conviction proceedings, recommendations from two other attorneys familiar with the attorney's qualifications and an evaluation from the administrator responsible for appointing attorneys to represent "indigent" defendants (if the attorney is involved in such a program).[72]

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[63] *Id.*
[64] *Id.*
[65] *Id.*
[66] *Id*. at 499.
[67] *Id.*
[68] *Id.*
[69] *Id.*
[70] Alacron, *supra* note 17, at 716.
[71] *Id.*
[72] *Id.* at 717

To be a private attorney handling these appeals you must have: four years of practice, including serving as counsel of record in seven completed felony appeals,[73] This lawyer must also have service as supervised counsel in two death penalty appeals. [74]

After three to five years an inmate will have counsel appointed to them. [75] Then that attorney must review the entire record and file an opening brief. [76] The entire process takes an average of 2.74 years. [77] The responsive brief from the attorney general is normally filed within six months and a reply brief for the defendant is filed in an additional six months. [78]

Once all of the briefs have been submitted it a waiting game to have the arguments scheduled to be heard by the California Supreme Court. [79] The wait time is 2.5 years before the parties will step in front of the court. [80] This time is becoming increasingly longer as more defendants are convicted and the backlog becomes invariably deeper. [81]

B. Direct Appeals in Virginia

Appeals, just like in California, are sent directly to the Supreme Court of Virginia on an *expedited* basis.[82] VA Code § 17.1-313 -- Review of a Death Sentence explains what expedited means.[83]

> (b) The proceeding in the circuit court shall be transcribed as expeditiously as practicable, and the transcript filed forthwith upon transcription with the clerk of the circuit court, who shall, within ten days after receipt of the transcript, compile the record as proved in Rule 5:14 and transmit to the Supreme Court. [84]

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[73] Uelmen, *supra* note 56, at 499.
[74] *Id.*
[75] *Id.*
[76] *Id.*
[77] *Id.*
[78] *Id.*
[79] Colon, *supra* note 40, at 1392.
[80] *Id.*
[81] *Id.*
[82] Costello, *supra* note 45, at 276.
[83] VA Code § 17.1-313 (2013).
[84] *Id.*

It is unclear what the requirements for counsel at this level are however the wrongdoings of the previous counsel play a huge role in determining the outcome of the appeal. One example is because there is a strict adherence to procedural guidelines if an attorney fails to make an objection at the trial stage that objection is lost to the defendant throughout the entire appeals process.[85] Absent special permission from the court a defendant's brief is limited to 50 pages. [86] A significant portion of this will be taken up facts of what happened at the trial court level as well as remedial measures that the Virginia Supreme Court can take to rectify an unproportional judgment. This leaves little space for the defendant and his or her counsel to make the argument that could cause a reversal.

On automatic appeal the court looks at a mandatory proportionality review (required by VA Code § 17.1-313 [87]) to ensure the death penalty was not given based on passion, prejudice, or any other arbitrary factor. [88] This has been shown extremely hard to prove on appeal.[89] Proportionality review also compels the court to see if the sentence imposed is inline with the penalty or as the Virginia code explains, "Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases considering both the crime and the

[85] Costello, *supra* note 45, at 280. If an objection is raised at trial and on direct appeal but neglected during the state habeas appeal that objection is lost for the remainder of the process.
[86] *Id.* at 281.
[87] Hoying, *supra* note 33, at 359; VA Code § 17.1-313 (2013).
[88] Costello, *supra* note 45, at 281; VA Code § 17.1-313 (2013).
[89] Costello, *supra* note 45, at 278. "'For instance, in a case where the prosecutor called the defendant a "monster" and a "predator," and the judge stated that the defendant should be "put in a gunny sack with some bricks and dropped off a bridge,' it was held that passion and prejudice were not the reason for imposition of the death penalty."

defendant." [90] The proportionality review, discussed below, requires that both the crime and the defendant be considered on direct appeal.[91]

The first problem with proportionality review is that court does not seem to be bound to review cases where the defendant pled guilty to life without the possibility of parole.[92] Under 17.1-313(E) "the Supreme Court *may* accumulate the records of all capital felony cases tried within such period of time as the court may determine." [93] This renders the proportionality review wholly incomplete and allowing the court to "cherry pick" the cases that it considers for proportionality review. [94] When a defendant is handed down a life without parole judgment they follow a normal appeals process. This means that cases that do reach the Virginia Supreme Court come up as sentencing issues. [95] This allows the court to bypass relevant cases that could show that the judgment is not proportional. [96] As one author put it:

> . . . it is easy for the court to allow the review to become no more than an exercise in finding similar cases in which the death penalty has been imposed, thereby making the sentence in the instance case proportional, rather than actually determining whether juries and judges have generally imposed death sentences in similar circumstances.[97]

Second, proportionality review (required by VA Code § 17.1-313 [98]) seems to turn a cold shoulder on those that the death sentence is imposed upon. [99] A death sentence is proportional (and upheld) if with all facts considered the "court is satisfied that, 'while there are exceptions,'

[90] *Id.* at 278*;* VA Code § 17.1-313 (2013).
[91] Bruce, *supra* note 8, at 266.
[92] *Id*. at 267.
[93] *Id.* at 266; VA Code 17.1-313(E) (2013).
[94] Costello, *supra* note 8, at 266.
[95] *Id.* at 268.
[96] *Id.*
[97] *Id.*
[98] Hoying, *supra* note 33, at 359; VA Code § 17.1-313 (2013).
[99] Costello, *supra* note 8, at 276.

other sentencing bodies in the Commonwealth generally imposed the supreme penalty of death comparable or similar offences."[100] The lack of gathering cases harms this.

In *Jackson v. Commonwealth*, a 16 year old was charged with capital murder and five other felonies. [101] During a robbery incident he pointed a .25 caliber at the hostage and cocked the gun, which jammed and later gave off three shot killing the hostage.[102] He was waived into adult court and was sentenced to death. [103] During the trial the state introduced evidence that he has prior bad acts as a juvenile seemed to constantly be in trouble. [104] To rebut this, to doctors were called that had experience dealing with Jackson. They stated that he had antisocial personality disorder, that he had a high number of "risk factors" that could show further violent conduct and finally testified that he was at "moderate to severe [assault] risk. [105] Jackson's mother and grandmother testified to his good nature until problems occurred at school and neighbors of the family testified to how "respectful," "polite", and "courteous" Jackson was. [106]

The Supreme Court of Virginia conducted a proportionality review on direct appeal. [107] However, they focused only on the charges that Jackson was sentenced under as well as "future dangerousness."[108] In the dissent, Justice Hassell pointed out that the court did not look at other

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[100] *Id.*
[101] *Jackson v. Commonwealth*, 499 S.E.2d 538, 632 (Va. 1998).
[102] *Id.* at 633.
[103] *Id.* at 632.
[104] *Id.* at 633.
[105] *Id.* at 633 -34.
[106] *Id.* at 634.
[107] Bruce, *supra* note 8, at 273.
[108] *Id.*

similar defendants. [109] He pointed out that of the ten sixteen year olds that had been guilty of capital offenses, Jackson was the only sixteen year old to be sentenced (and upheld) to death. [110]

These rationales and practices of the court allow a "rubber stamp[111]" on the appeals process. [112] According to the JLARC the national reversal rate of for capital sentences is 68%. [113] In Virginia the reversal rate is an abysmal 8%.[114] The JLARC concluded that these large numbers were attributable to the large trust in the trial court as well as strictly viewing evidence in a light most favorable to the state from the previous trial. [115]

C. State habeas corpus review in California

After the state strikes down a direct appeal an inmate has the right to appeal in a writ of habeas corpus, normally because of incompetent lawyer or prosecutorial misconduct.[116] However, in a "Manual for California Prisoners" state habeas corpus proceedings can be brought for things such as a need for safe housing, due process violations in disciplinary proceedings and proper health care.[117] In a habeas corpus action "counsel independently investigates what the trial counsel did an did not do, and what was and was not turned over by the prosecution." [118] Keep in mind that before a state habeas corpus proceeding can be brought all the administrative remedies

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[109] *Id.* at 273; *Jackson v. Commonwealth*, *supra* note 96, Hassell, J., dissenting at 652.
[110] Bruce, *supra* note 8, at 273; *Jackson v. Commonwealth*, *supra* note 96, Hassell, J., dissenting at 652.
[111] Hoying, *supra* note 33, at 359.
[112] Costello, *supra* note 45, at 261-62.
[113] Hoying, *supra* note 33, at 358.
[114] *Id.*
[115] *Id.*
[116] Uelmen, *supra* note 56, at 501.
[117] Prison Law Office, *State Habeas Corpus Procedure: A Manual For California Prisoners*, (Nov. 2008) (available at http://www.prisonlaw.com/pdfs/STATEHABEAS2008.pdf).
[118] Uelmen, *supra* note 56, at 501.

must be exhausted.[119] This means that the defendant must "file a grievance with the agency responsible for the matter." [120]

With these examples of what can be filed for a habeas corpus proceeding the court looks if the petition alleges "unlawful restraint, name the person by whom the petitioner is so restrained, and specify the facts on which [the petitioner] bases his [or her] claim that the restraint is unlawful. [121] One similarity between Virginia and California is that at this point in California a defendant is not allowed to try and obtain habeas corpus relief on something that was not objected to at trial. [122]

The backlog continues for habeas corpus proceedings in California. [123] The average wait based on statistics from 2009 was eight to ten years. [124] Unless the prisoner directly asks to maintain the same counsel from the direct appeal California law requires separate counsel. [125] Lawyers that are appointed privately are paid at the same rate ($145) for the habeas proceeding, thus adding the problem of keeping adequate counsel in California. [126]

After counsel is appointed they have three years to file the petition. [127] At this point the petitions are generally decided in a summary order that declares even if the allegations are true the allegations in the petition would not merit relief. [128]

Defendants can represent themselves in habeas corpus issues pursuant to California Rules of Court 8.380(c). [129] In this situation the court "may request an informal written response form

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[119] Prison Law Office, *supra* note 112, at 5.
[120] *Id.*
[121] Alacron, *supra* note 17, at 739.
[122] *Id.* at 740.
[123] Uelmen, *supra* note 56, at 502.
[124] *Id.*
[125] *Id.*
[126] *Id.*
[127] *Id.*
[128] *Id.*

the respondent, the real party interest, or an interested person…."[130] If the petition is sufficient on its face the court must issue a writ of habeas corpus. [131]

Overall, the average delay between filing a state petition for writ of habeas corpus and filing of the court's decision is twenty-two months. [132] Because of a lack of factual record and an articulated analysis from the California Supreme Court adds to lengthier delays when filing additional state habeas corpus proceedings or federal proceedings. [133]

D. State habeas corpus review in Virginia

Once the Supreme Court of Virginia affirms the death sentence the defendant has the right to file a petition for a writ of habeas corpus relief.[134] These petitions are generally founded against a prison administrator. [135] Compared to the 8% of capital sentences are reversed on direct appeal only an additional 2% are reversed on state habeas corpus appeal. [136]

The JLARC found that 33% of claims raised on state habeas corpus petitions were rejected on the basis of procedural default without a review of the merits. [137] Part of this practice goes back to the rubber-stamping idea proposed earlier. [138] Virginia has rigidly stuck to procedural guidelines that require each objection to be renewed at every stage of the trial

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[129] Alacron, *supra* note 17, at 740.
[130] *Id.*
[131] *Id.*
[132] *Id.*
[133] *Id.* at 742
[134] Crawford, *supra* note 16, at 79.
[135] Hoying, *supra* note 33, at 358.
[136] *Id*.
[137] *Id.*
[138] Costello, *supra* note 45, at 280.

process. [139] If an objection is made at trial but not at a later point of the appeals process the objection is forfeited. [140] This continues all the way up the appeals process.

D. The role the Ninth Circuit plays in appeals process

First, to be eligible for federal habeas corpus review a defendant must exhaust all state remedies as well as collaterally attack his conviction and sentence in the state court. [141] This means that the petitioner must first petition the United States Supreme Court for a writ of certiorari (invariably denied). [142] The signal for the start of federal habeas proceedings is a warrant for execution. [143]

A federal stay will be entered while the petition is considered at the district court level. [144] However, it can take more than two years if the court wants to hold extensive evidentiary hearings. [145] These hearings are not unusual in the Ninth Circuit, further halting the execution process. [146] If the inmate's petition is denied at the district court level the defendant will appeal to the Ninth Circuit keeping the stay of execution in place. [147]

At this point, the defendant petitions for rehearing and suggests rehearing en banc. [148] In the Ninth Circuit this requires a vote on whether to "go en banc." [149] This adds a few more weeks

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[139] *Id.*
[140] *Id.*
[141] Alex Kozinski, Sean Gallagher, *Canary Lecture: Death: The Ultimate Run-On Sentence*, 46 Case W. Res. 1, 7 (Fall 1995).
[142] *Id.*
[143] *Id.*
[144] *Id.*
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.*

while the Ninth Circuit it deciding.[150] When this is denied the defendant will once again petition the United States Supreme Court for a writ of certiorari, which (again) is inevitable denied. [151]

For a second time, defendant and their counsel will file a federal habeas petition. [152] Unique to the Ninth Circuit, the district court can enter a stay when new issues raised by this petition are considered. [153] Even if the district court refuses a stay that does not mean that the defendant is ready for execution. There is an appellate panel assigned to each defendant facing execution. [154] The panel that is assigned to the case can enter a stay of execution for the defendant. [155]

Once the district court reaches its decision (usually denying relief) there are more safeguards put in place for the defendant. The Ninth Circuit has a three-judge panel that has been assigned to the case. [156] During the entire process this panel has been receiving briefs that have been filed at the same time as the district court (these papers are also sent to the Supreme Court). [157] If this three judge panel refuses (for some reason) to deny a stay *any* judge in the Ninth Circuit can force an expedited en banc vote upon request. [158]

In addition to the three-judge panel that has been monitoring the case, there is also an 11-judge en banc panel. [159] Once the single judge out of close to 30 in the Ninth Circuit issues a stay

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[150] *Id.*
[151] *Id.* at 8.
[152] *Id.*
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*
[157] *Id.*
[158] *Id.* at 10.
[159] *Id.* at 9.

this 11-judge panel will meet to discuss the case and dissolve the stay of execution. [160] The end of the process is signaled when this stay is lifted and the Supreme Court does not grant a stay. [161]

These facts aside, the numbers that reach execution are extremely low. Around 70% of defendants who have petitioned for federal habeas corpus relief have it grated in either a new trial or a new penalty proceeding. [162]

E. The role the Fourth Circuit plays in appeals process

On a national average 40% of reversals occur in federal courts because of habeas corpus petitions. [163] To no surprise, the Fourth Circuit has a reversal rate of 4%. [164]

In 1993 the Fourth Circuit decided that because federal habeas review does not have the ability to challenge the admissibility of evidence whether factual errors were made in state court a challenge to the admissibility of DNA evidence does not raise issues reviewable in the Fourth Circuit. [165]

Humanizing this ruling is *Spencer v. Murray* where the defendant found that DNA evidence used at his trial was flawed and he was wrongly convicted. [166] Under *Grundler v. North Carolina*:

> Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal

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[160] *Id.* at 10.
[161] *Id.*
[162] Judge Arthur L. Alarcon, Paula M. Mitchell, *Special Issue: Rethinking the Death Penalty in California: Executing the Will of The Voters?: A Roadmap To Mend or End the California Legislature's Multi-Billion-Dollar Death Penalty Debacle*, 44 Loy. L.A. L. Rev. 41, 55 (2010/2011).
[163] Costello, *supra* note 45, at 282.
[164] Hoying, *supra* note 33, at 358.
[165] Bernard A. Williams, *Guilty Until Proven Innocent: The Tragedy of Habeas Capital Appeals*, 18 J. L. & Politics 733, 800 (Summer 2002).
[166] *Id.; Id. n. 159.*

constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. The role of a federal habeas corpus petition is not to serve as an additional appeal. [167]

The Supreme Court in *Estelle v. McGuire* also stated that a federal habeas corpus appeal is not intended to be treated as a continuation of the appeals process from the state level.[168] The *Spencer* court concluded that the defendant did not meet the "extraordinarily high burden" for defendants who claimed actual innocence and that the record was well established by experts who testified to the admissibility of the D.NA. [169]

In all fairness, the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA) limits the actions of the Fourth Circuit. [170] Under the AEDPA the federal courts are stopped from granting relief from a lower court ruling unless that ruling is "clearly unreasonable." [171]This act granted the government more power to stop terrorism and to limit federal habeas courts ability to grant relief. [172]

Most states after the AEDPA was entered have held that federal and state governments are separate and can rule separate on issues that have previously been

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[167] *Grundler v. North Carolina*, 283 F.2d 798, 802 (4th Cir. 1960).
[168] *Estelle v. McGuire*, 502 U.S. 62, 67(U.S. 1991) ("We have stated many times that federal habeas corpus relief does not lie for errors or state law. Today we re-emphasize that it is not the province of a federal habeas court to re-examine state court determinations on state law questions. In conducting habeas review, a federal court is limited to deciding whether a conviction violated the Constitution, laws or treaties of the United States.
[169] Williams, *supra* note 160, at 800.
[170] *Id.* at 804.
[171] Paul J. Larking, Jr., *John Kingdon's "Three Streams" Theory and the Antiterrorism and Effective Death Penalty Act of 1996*, 28 J. L. & Politics 25, 41(Fall 2012).
[172] Williams, *supra* note 160, at 804.

decided by a state court. [173] When the AEDPA was made into law it hardly could have been concluded that it would have such lasting effects in Virginia.

The reason for AEDPA was twofold. First, legislatures found that habeas corpus needed to be reformed to restore public confidence. [174] Secondly, after the Oklahoma City bombing reformers were able to link habeas abuse to delays in executions. [175]

There was a public outcry in the lasting nightmare of the Oklahoma City bombing that Timothy McVeigh would use federal habeas corpus appeals to lengthen his time on death row. [176] The start of the AEDPA signaled when the Supreme Court heard a case challenging the act. Under this suit an inmate stated the act was unconstitutional under the Suspension Clause of the Constitution. [177] The Court found in favor of the government allowing the AEDPA to take root. [178]

Unlike in California where there is a significant backlog and every judge of the Ninth Circuit has the ability to weigh in, it appears that Virginia has taken the AEDPA more seriously. Under this Act federal courts must dismiss federal habeas petitions unless the defendant can prove that the trial court's decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court."[179]

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[173] Carrie M. Bowden, *The Washington and Lee Law Alumni Association Student Notes Colloquium: The Need for comity: A Proposal for Federal Court Review of Suppression Issues in the Dual Sovereignty Context After the Antiterrorism and Effective Death Penalty Act of 1996*, 60 Wash & Lee L. Rev. 185, 188 (Winter 2003).
[174] Benjamin R. Orye III, *The Failure of Words: Habeas Corpus Reform, The Antiterrorism and Effective Death Penalty Act, and When a Judgment of Conviction Becomes Final for the Purposes of 28 U.S.C. § 2255*, 444 Wm. & Mary L. Rev. 441, 453 (Oct. 2002).
[175] *Id.*
[176] Larkin, *supra* note 166, at 46.
[177] *Id.* at 46.
[178] *Id*.
[179] Williams, *supra* note 160, at 804.

Next the state court findings are considered presumptively correct. [180] This can only be overruled by the standard of clear and convincing evidence. [181] Further, successive claims with previous issues raised are dismissed unless it is found by a new rule of constitutional law or fact *not* discoverable at trial. [182] Finally, a six-month statute of limitation was imposed on federal habeas claims for death row petitioners. [183] This halts petitioner's ability to introduce evidence of "actual innocence discovered more than six months after trial."[184]

Virginia has held that a writ will not be granted on any previous claim the defendant could have brought. [185] The habeas corpus proceeding follow this where the previous court made a judgment resting on the procedural bar and that same procedural bar would not allow consideration of new allegations. [186]For a writ to be granted in the Fourth Circuit not only does a petitioner need to exhaust all of his state remedies (procedurally like California) but also must be able to allege that the state court had inadequate fact-finding. [187]

This defendant must show "cause and prejudice" for the miscarriage of justice or actual innocence. [188] Cause has been defined in the Virginia court system as "(1) Where a constitutional claim is so novel that its legal basis is not reasonably available to counsel at the time of the default; a claim is not so novel, however, if various forms of the claim had been percolating in the lower courts for years and (2) where counsel is responsible for the

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[180] *Id.*
[181] *Id.*
[182] *Id.* at 804-05.
[183] *Id.* at 805.
[184] *Id.*
[185] Michie's Jurisprudence of Virginia & West Virginia, *9A M.J. Habeas Corpus § 18*, n. 2878.
[186] *Id.* at n. 2884.
[187] *Id.* at n. 2952.
[188] Alan W. Clarke, *Procedural Labyrinths and the Injustice of Death: A Critique of Death Penalty Habeas Corpus (Part one)*, 29 U. Rich. L. Rev. 1327, 1387 (Dec. 1995).

default through a mistake of such magnitude that amounts to ineffective assistance of counsel under the strict standards established by the United States Supreme Court." [189] Prejudice is defined as "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."[190] It is nearly impossible to show both of these elements.[191]

Starkly contrasting to the Ninth Circuit where procedural safeguards are put into place to help assure innocent people are not executed the Fourth Circuit does not give as much deference to defendants. For example, there is an "actual innocence" exception that is reserved for defendants that can prove they are innocent of the crime. [192] This does not translate to "legal innocence." [193] A case will not be reversed in the Fourth Circuit if a claimed constitutional error "neither precluded the development of true facts nor resulted in the admission of false ones." [194]

III. CLEMENCY PROCESS IN VIRGINIA

The Governor has the power to grant clemency in cases that are appealed to him. [195]This power is at the discretion of the governor. [196]As of last year, since 1977 Governors of Virginia have granted 8 clemencies. [197]In contrast, California has not granted any

[189] Michie's, *supra* note 180, at n. 2955.
[190] Clarke, *supra* note 183, at 1354.
[191] *Id*. at 1358.
[192] Michie's, *supra* note 180, at n. 2956.
[193] *Id.* at n. 2959.
[194] *Id.*
[195] Crawford, *supra* note 16, at 81.
[196] *Id.*
[197] Death Penalty Information Center, *supra* note 11.

clemencies. [198]There are two methods of clemency that have been established in Virginia. [199]Frist, there is a restoration of civil rights. [200]This is intended to restore a defendant's rights that were lost during felony convictions. [201]Second, a defendant may apply for a pardon. [202] There are three types of pardons available: "(1) A simple pardon, which is a statement of forgiveness; (2) a conditional pardon, which grants prisoners early release or modifies a court-imposed sentence; or (3) an absolute pardon, which enables a prisoner to petition the court for expunngement of the conviction." [203]

Specifically for a conditional pardon the defendant and/or attorney must "provide the governor what a letter containing basic background information and an explanation as to why the inmate deserves the pardon." [204] This last safeguard in Virginia makes attempts to fix shortcomings of the judicial process. The rules of procedure that are strictly followed in courts "narrow the reach of judicial review to the record created during tail and the sentencing hearing."[205] The Virginia Supreme Court has recognized this important function of the Governor's rights and because of this Governors have used their ability to spare lives. [206] The decision to grant a clemency lies solely on the Governor. [207]

To see how this process follows through lets revisit Teresa Lewis' case. Teresa applied to Governor McDonnell with a 270-page petition that included 29 exhibits. [208]

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[198] *Id.*
[199] Crawford, *supra* note 16, at 80.
[200] *Id.* at 81.
[201] *Id.*
[202] *Id.*
[203] *Id.*
[204] *Id.*
[205] *Id. at 94.*
[206] *Id at 95.*
[207] *Id.*
[208] *Id.*

Before this her counsel had found evidence that one of the triggerman was the mastermind of the murder-for-hire plot, not Theresa as indicated previously. [209] In the Governor's decision (which denied her petition) what he wrote did not fill a single page. [210] Governor McDonnell stated that he found "no compelling reason to set aside the sentence that was imposed by the Circuit Court and affirmed by all reviewing courts." [211]

CONCLUSION

California and Virginia have taken two separate roads since 1976 in imposing the death sentence. In California, the death sentence is equivocally a life without parole. This realization comes after realizing how long individuals have been on death row as well as how the state and federal courts interact with one another. California has put in safe guards that could be said to halt the judicial process against people like the "Night Stalker."

Meanwhile, Virginia's strict adherence to deference of lower courts as well as the AEDPA could be argued to have sent less than the "worst of the worst" to execution. By implementing the view that the state courts are presumptively right has placed a burden on defendants who often are left with counsel that is less than desirable or adequate. The old saying of the "rich get richer while the poor get poorer" seems to fit in this circumstance. Plainly, poor inmates are more likely to be sentenced to death because of lack of adequate counsel. Further, procedural safeguards that have been put in place (must raise all objections, length of briefs) have required attorneys to make judgment based decisions with no certainty that what is being argued will result in relief for their client. While the

[209] *Id. at 94.*
[210] *Id. at 95.*
[211] *Id.*

Fourth Circuit is protecting its judicial economy it is failing to afford defendants a fair and adequate trial or appeal.

California has taken the left fork in the road from Virginia. The procedural safeguards can be said to spare defendants lives, but not necessarily for the right reasons. It is just as accurate to say that trying to protect defendants who are on death row California has put them in a perpetual holding pattern where their cases will be reviewed without the impositions of the AEDPA.

Further, California has taken the noble road of insuring that capital defendants of all types are given adequate counsel. This adds to a severe backlog of cases. The low amount these attorneys are paid also contributes to the backlog. As cited earlier, California is losing attorneys that meet the requirements because they cannot afford to live in the state or do not wish to take on a case that will take years to complete. Virginia sharply contrasts by allowing counsel that is appointed to not meet the requirements laid out.

While the Ninth Circuit takes extreme steps by creating multiple panels of judges to overview a case as it moves through the court, Virginia places almost all the trust at the state trial level and compounds the decisions as they move through the system. This high deference and rejection to hear new evidence gives defendants that are on death row little hope of a stay of execution.

This problem in Virginia seems to end with the clemency process. Although the Governor has the ability to pardon or convert sentences. Information that is lost through the process not objected to or not discovered the Governor will historically not take into consideration.

Both of these jurisdictions show a vastly different approach to capital punishment. It is unclear if either are using their resources adequately. While strictly adhering to the AEDPA Virginia takes away the ability for courts to consider new information while without following at least a portion of AEDPA California contradicts itself through the process. Both of these jurisdictions have recommendations on how to improve their process. Only time will tell if recommendations will be implemented and help the problem each faces.