

JOINT LEGISLATIVE AUDIT AND REVIEW COMMISSION

The Virginia General Assembly

COMMISSION DRAFT

**Review of
Virginia's System of
Capital Punishment**

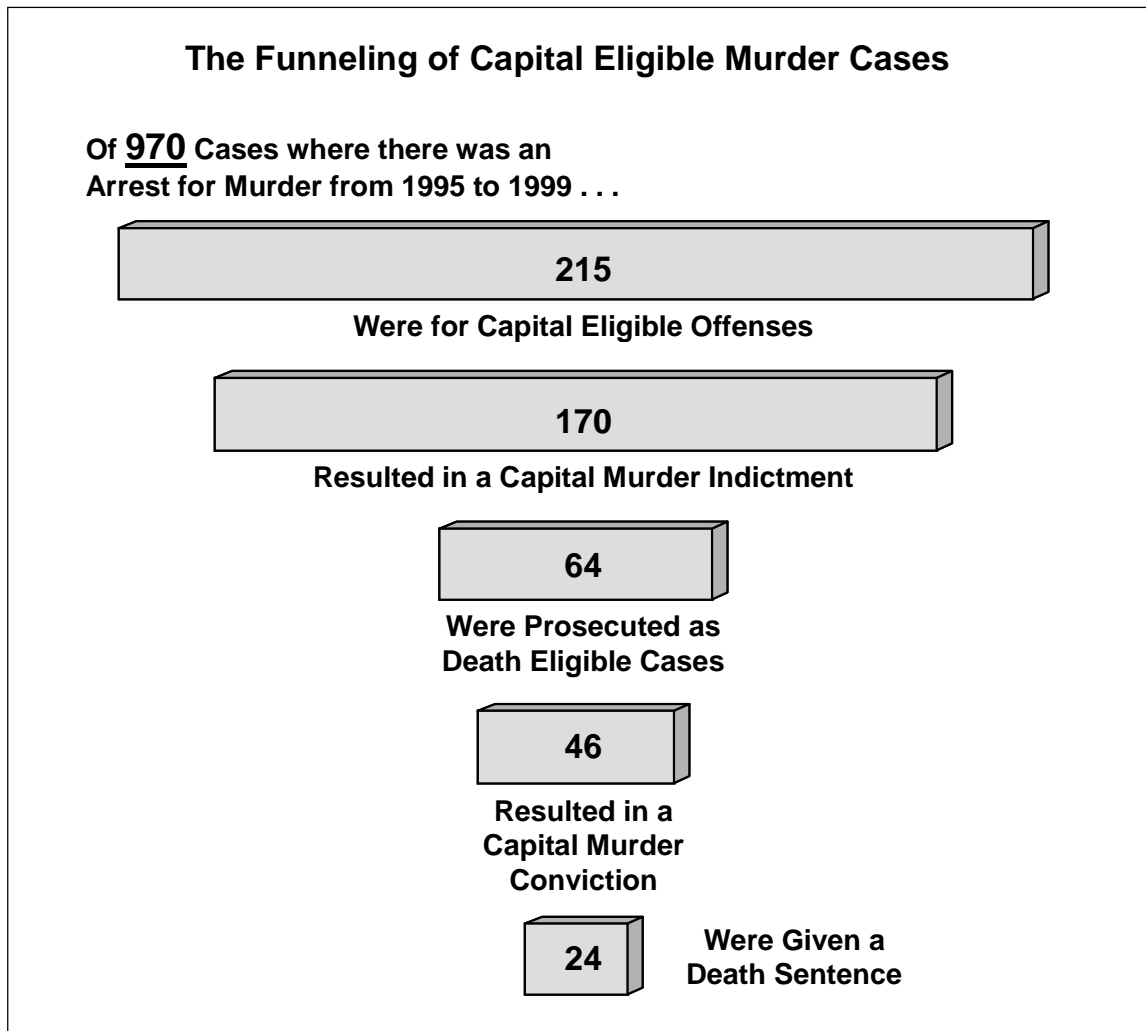
December 10, 2001

Report Summary

On November 13, 2000, the Joint Legislative Audit and Review Commission (JLARC) unanimously approved a subcommittee report recommending that JLARC staff conduct a study of capital punishment in Virginia. The report examines the State's implementation of the capital punishment statutes by focusing on two important elements of the system: the use of prosecutorial discretion by Commonwealth's Attorneys, and the judicial review of capital murder cases in which sentences of death have been imposed.

This review comes at a time when serious questions are being raised about the State's use of the death penalty. One of the most serious complaints is that the system is racially biased, systematically exposing black persons who are arrested for capital murder to the death penalty in larger percentages than their white counterparts. Beyond the question of race, there is a general concern that the small numbers of eligible cases where prosecutors decide to seek the death penalty (see figure) are not meaningfully distinguishable from the many in which they do not. This, it has been argued, speaks to the arbitrary manner in which prosecutors apply the death penalty statutes in Virginia.

There are also concerns about the fundamental fairness of Virginia's judicial review process for capital cases in Virginia. Many believe that Virginia's myriad of procedural restrictions bar the Courts from considering the merits of the claims raised on appeal by defendants who have been sentenced to die. Critics of the system contend that this has reduced the judicial review of death penalty cases to a hollow process, virtually assuring that some persons who are



convicted of capital murder will be executed despite having received constitutionally flawed trials.

Supporters of the Commonwealth's system of capital punishment suggest that many of the positions advanced by critics of the system are spurious. They point out that Virginia's statutory scheme for capital murder appropriately distinguishes those first-degree murder cases that qualify for the death penalty from those that do not. Moreover, supporters of the system argue that local prosecutors will pursue the death penalty for only the most heinous of cases in which evidence of guilt is overwhelming. Without the most convincing

evidence, it is stated, prosecutors will be more likely to seek a plea agreement even if the nature of the crime supports the pursuit of the death penalty. These decisions, it is argued, often appear arbitrary to those who lack insight into the nature of evidence surrounding the case.

Regarding the issue of judicial review, supporters of the death penalty agree that lawyers often raise claims that the higher courts are procedurally barred from considering. Still, those in favor of the death penalty argue that most of these claims either involved trial errors that are deemed by the higher courts to be harmless, or they otherwise lacked merit. Given these circumstances, it is believed by supporters of capital punishment that any significant statutory changes made to weaken some of the restrictions in the judicial review process would delay the system with frivolous litigation to the detriment of both the Commonwealth and the ends of justice.

Until now, the debate surrounding these issues has not received the benefit of systematically collected data on the application of Virginia's laws governing the use of capital punishment. Rather, the debate has been advanced largely on the basis of anecdotes which have been variously used to demonstrate either the strengths or weaknesses of the system. This report attempts to address that problem through a detailed analysis of cases that involved capital-eligible murders and a review of the outcomes of the State's judicial review process.

Study Findings

The evidence from this study offers a mixed picture of Virginia's system of capital punishment. The findings clearly indicate that race plays no role in the decisions made by local prosecutors to seek the death penalty in capital-eligible cases. However, the findings are equally clear that whether a defendant charged with a capital-eligible crime actually faces the death penalty is more related to the location in the State in which the crime was committed than the actual circumstances of the capital murder.

In terms of the judicial review process, the reversal rate for death sentences in Virginia is low. At the earliest stage of judicial review, procedural rules that limit the Virginia Supreme Court's review of claims of trial error, have little impact. However, during the later stages of post-conviction review, both the State and federal courts strictly adhere to procedural restrictions that substantially limit the number of claims of trial error that are reviewed on the merits. Because both the State and federal appellate courts strictly apply these standards, a substantial proportion of claims related to the fairness of capital murder trials are never considered during the post-conviction review process.

This study was not designed to address whether the inmates who are currently on death row are innocent of the crimes for which they were sentenced. Nor were JLARC staff in a position to evaluate the credibility of any claims of innocence raised by inmates who have been sentenced to death. Accordingly, it cannot be concluded from the findings presented in this study that the State is executing persons who are innocent of the crimes for which they were sentenced. Still, it should be noted that the magnitude of the evidence against

capital murder defendants that was examined by JLARC in its review of prosecutorial discretion was considerable.

Apart from questions regarding the nature of evidence in capital murder trials, the significant policy issue raised by this study is whether the uneven application of the death penalty statutes and the fact that Virginia's procedural restrictions have forced the State and federal courts to affirm the convictions for a small number of prisoners who may not have received a fair trial, warrant the attention of the General Assembly.

Some of the specific findings of this study are summarized as follows:

- Since the abolition of parole in 1995, nearly eight out of every 10 persons who were arrested for a capital-eligible crime were indicted for capital murder.
- Overall, these indictment rates were highest for white defendants, persons who were charged with murdering females, and defendants who allegedly committed the offenses in non-urban localities. However, when all these factors are considered together, only those defendants who were charged with murdering females, and those who were arrested for capital murder in non-urban areas, faced a higher probability of being indicted for capital murder.
- Since 1995, Commonwealth Attorney's have sought the death penalty for nearly three out of every 10 persons who were arrested for a capital-eligible crime. More than any other factor, the location of the crime (in non-urban areas), and whether the defendant was related to the victim were the factors most strongly associated with the decision of prosecutors to seek the death penalty. This means that capital murder cases that are similar on other key facts (such as the vileness of the crime or dangerousness of the defendant, and nature of the evidence pertaining to the case) are handled differently by some prosecutors across the State.
- Regarding appellate review, the Virginia Supreme Court has affirmed 93 percent of all cases in which a death

sentence has been imposed in the State's circuit courts since 1977. In affirming these death sentences, the Court considered and rejected on their merits, 83 percent of all claims of trial error.

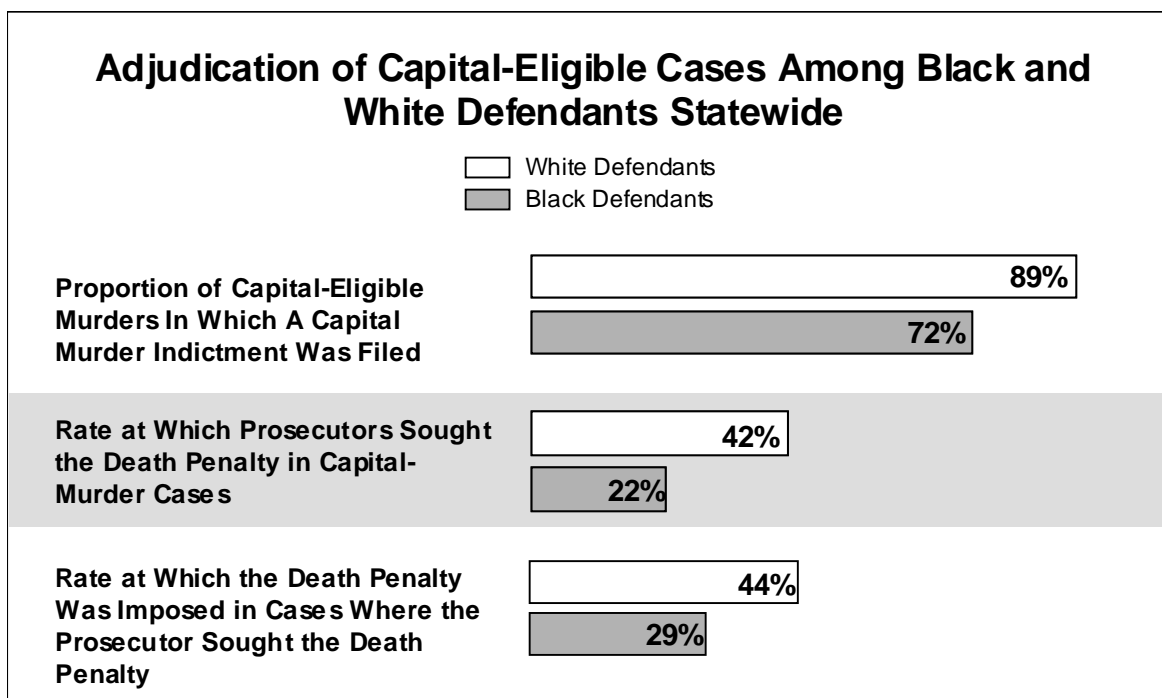
- None of the 119 death sentences reviewed by the Virginia Supreme Court were determined to be excessive or disproportionate. However, in making these determinations, the Virginia Supreme Court appears to have narrowly applied the statutes defining proportionality review in Virginia.
- At the State and federal habeas corpus stages of the judicial review process, the recognized rate of trial error in cases where defendants were sentenced to death was only two and four percent respectively. This may be partially related to the fact that more than three of every ten claims of trial error made by inmates during the post-conviction phase were rejected because they violated procedural restrictions.

Location More Than Any Other Factor Is Most Strongly Associated with the Decision by Commonwealth's Attorneys to Seek the Death Penalty.

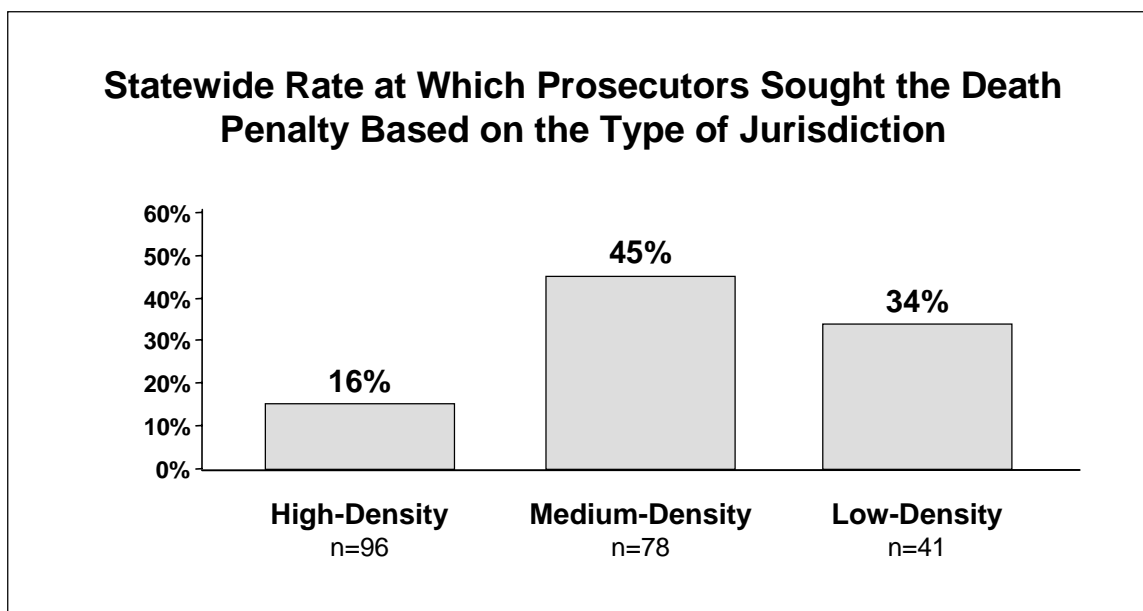
There are two key decisions faced by Commonwealth's Attorneys when presented with a case in which someone has been arrested for a capital-eligible crime. First, they must decide whether the defendant will be indicted for capital murder. If they seek and secure a capital murder indictment, they must next decide whether to pursue the death penalty throughout the entire proceedings. One goal of this study was to identify those factors that appear associated with the decisions prosecutors make at these stages of the adjudication process.

In Virginia, there have been well-documented racial disparities associated with the historical use of capital punishment. Notwithstanding the reforms mandated by the United States Supreme Court to address this problem,

the criticism persists that Virginia's system of capital punishment unfairly targets black defendants. This analysis indicates that those charges are unwarranted. Overall, and contrary to widely held views, white persons who are arrested for capital-eligible offenses are more likely to be indicted for capital murder, more likely to face the death penalty, and, once convicted, more likely to be sentenced to death (see figure).



However, it was equally apparent from this study that prosecutors in high-density population (typically urban) localities are much less likely to seek the death penalty when confronted with a capital-eligible case than their counterparts in other localities. For example, the overall rate at which local prosecutors in high-density jurisdictions sought the death penalty in capital-eligible cases was 200 percent lower than was observed in medium-density localities (see figure on next page). Thus a key question for this study was whether the factors which



appear to be associated with the decision of Commonwealth's Attorneys to seek the death penalty in capital murder cases are related to the specifics of the case (such as type of crime, nature of evidence), external to the case (such as type of locality), or extra-legal (such as the defendant's race).

Two factors emerged from this analysis as important indicators of whether prosecutors seek the death penalty: (1) the relationship between the defendant and the victim; and (2) the location of the crime. Commonwealth's Attorneys were less inclined to prosecute a capital murder case as a death case when the defendant was charged with the premeditated murder of a family member or relative. In cases involving premeditated murder among family members, prosecutors noted that they sometimes honored the request of grieving relatives to spare the life of the defendant.

However, after statistical controls were applied for other factors related to the specifics of each capital-eligible murder case in which at least one of the required aggravators was present, the location in which the capital murder was

committed appeared to be most strongly associated with the prosecutors' decisions to seek the death penalty. Specifically, other factors being equal, prosecutors in localities with high population density were significantly less likely than their counterparts to seek the death penalty for persons who were arrested for capital-eligible crimes.

Inconsistencies Are Evident in the Statewide Application of Capital Punishment in Virginia

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. This is best illustrated by case examples, such as the one presented on the next page. In this example, three cases are presented in which women were brutally raped and murdered in three different jurisdictions. In all three cases, defendants were implicated by DNA evidence and they confessed to the crimes. The prosecutors in the first case asked for the death penalty based on the vileness of the crime and future dangerousness. In the second case, the prosecutor sought the death penalty based on the vileness of the crime. In the third case, the defendant had a prior history of violence and was actually in prison for another rape when he was charged with capital murder in this case. However, the prosecutor agreed to allow the defendant to plead guilty to capital murder in exchange for the guarantee of a life sentence without the possibility of parole.

The problems with capital punishment that are illustrated in this study pose some significant policy challenges. On the one hand, no viable system of capital punishment can be sustained without vesting Commonwealth's Attorneys

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

with the discretionary authority they need to prosecute these difficult and troubling cases. Conversely, it must be recognized that this discretion, which is so needed to ensure that the system is operated with a sense of proportion, will generate outcomes that cannot be easily reconciled on the grounds of fairness. Thus, as the General Assembly deliberates the issues surrounding the use of the

death penalty, the key question that must be answered is whether some disparate outcomes can be accepted in a system where the ultimate sanction is execution.

Judicial Review in Virginia Is Characterized by Narrowly-Defined Sentence Reviews At Direct Appeal and Adherence to Procedural Restrictions During Post-Conviction

One of the cornerstones of America's criminal justice system is the process of judicial review. The purpose of appellate review is not to retry cases or consider new evidence, but to ensure that each defendant received a fair trial. In conducting this review the courts are not required to determine whether a correct decision was made, but whether it *could* reasonably have been made in light of the evidence presented.

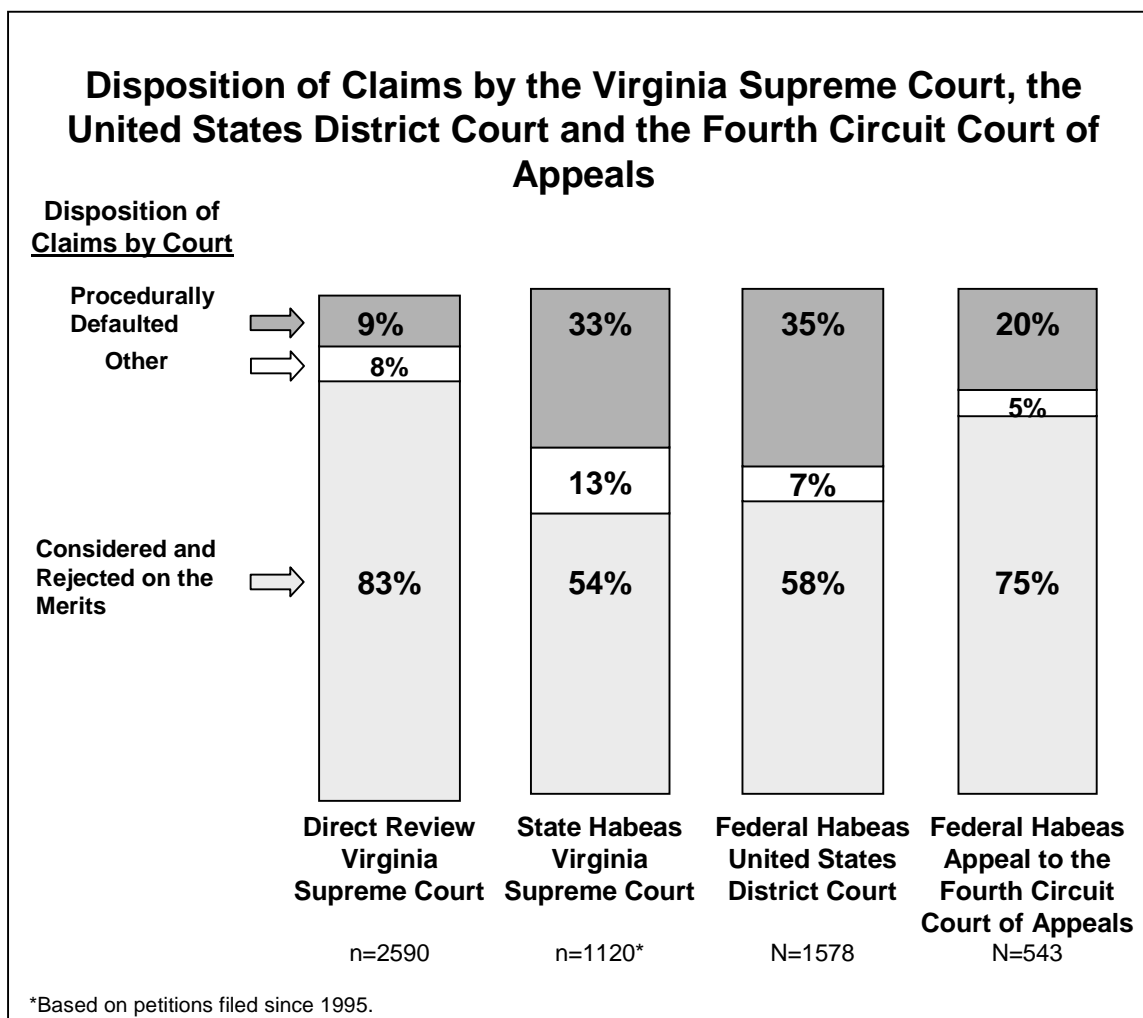
In making this determination for capital murder cases, the Virginia Supreme Court has repeatedly held that the trial court's judgment must be affirmed unless it appears that it is plainly wrong or without evidence to support it. Even if the appellate court finds that an error has occurred, it must distinguish between egregious errors that require a new trial or sentencing hearing versus those that are harmless. Thus the philosophy of appellate review is that defendants are entitled to a fair trial, not a perfect trial.

Operating within this framework of judicial review, the Virginia Supreme Court has overturned the decision of the trial courts in only seven percent of all cases in which a defendant was sentenced to death. In addition, the Virginia Supreme Court's statutorily required assessment of whether the sentence imposed by the court was excessive (even if the trial was error free)

has never produced a reversal of a death sentence. This can be partly attributed to the narrow but legally permissible manner in which the Virginia Supreme Court defines and implements sentence review for death penalty cases.

During post-conviction review, it appears that the Virginia Supreme Court's procedural rules and federal law do substantially limit the number of claims of trial error that are reviewed on the merits. While the Court has established standards that would allow the defaulted claims to receive a review on the merits, habeas petitions for post-conviction relief generally do not meet these standards. Because both the State and federal courts strictly adhere to these standards, a substantial proportion of claims related to the fairness of capital murder trials are never considered during the post-conviction phase of judicial review (see figure on next page).

It should not be concluded from these findings, however, that the restrictions in place in Virginia have resulted in the execution of an innocent prisoner. To prevent a miscarriage of justice, the State and federal courts may consider claims that would have otherwise been defaulted. Nonetheless, according to several written opinions of federal court judges, the procedural restrictions have forced the courts to affirm the convictions for some prisoners who were unquestionably guilty of capital murder, but who, nevertheless, did not receive a fair trial. Whether this is acceptable public policy is a question for the General Assembly.



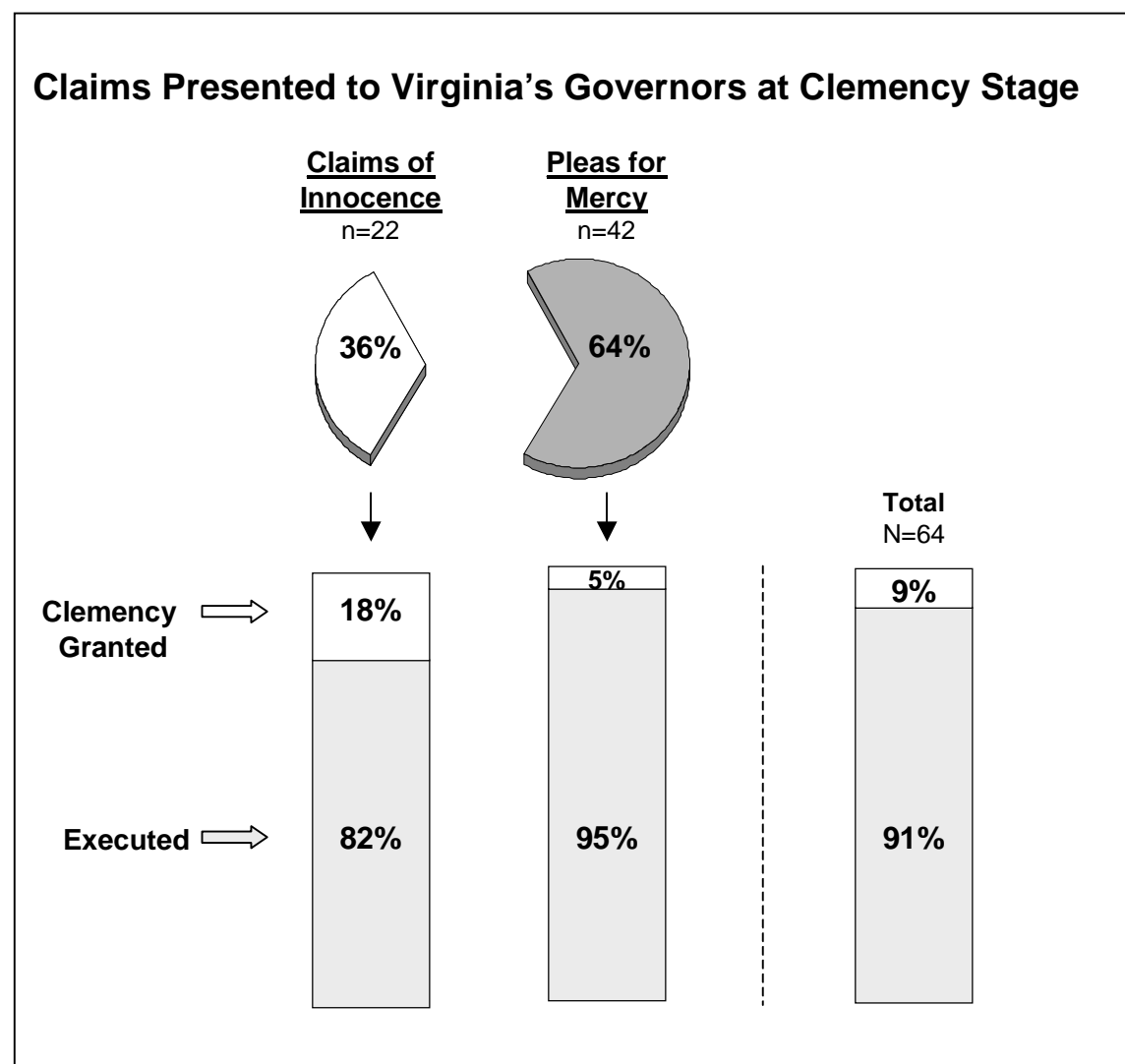
More Structure and Public Scrutiny of the Executive Clemency Process Is Needed

The final stage of the post-conviction review process for persons who have been sentenced to death in Virginia is executive clemency. Through the Constitution of Virginia and the *Code of Virginia*, Governors have been vested with the power to commute capital punishment sentences and to grant pardons or reprieves. This authority provides what many believe is a necessary safeguard against the possible execution of an innocent prisoner. Under current Virginia law, executive clemency is the only legally assured remedy available for

defendants who develop newly discovered non-DNA evidence which might prove their innocence more than three weeks after they have been sentenced to death.

This study found that 36 percent of all capital defendants on death row who submitted a clemency petition raised a claim of innocence (see figure). In 18 percent of those cases in which innocence was asserted the Governor granted a commutation or a complete pardon.

A more comprehensive assessment of the adequacy of executive clemency as a safeguard against the execution of an innocent prisoner was not



possible because of the manner in which this process is implemented and the lack of available records associated with the process. Currently, the inner-workings and deliberations of the clemency process occur largely beyond public view and are shielded from serious scrutiny. In the absence of a more formalized clemency process, the reliability of this part of the system will likely remain in question.

Table of Contents

	<u>Page</u>
I. INTRODUCTION.....	1
Evolution of Capital Punishment in Virginia	4
JLARC Review.....	27
Report Organization.....	41
 II. PROSECUTION OF CAPITAL ELIGIBLE CASES.....	 43
Use of Discretion by Commonwealth's Attorneys in Prosecuting Capital Eligible Cases.....	 45
 III. THE APPELLATE AND POST-CONVICTION REVIEW PROCESS FOR CAPITAL PUNISHMENT CASES IN VIRGINIA	 79
Administration of the Appellate and Post-Conviction Review Process for Death Penalty Cases in Virginia.....	 82
Executive Clemency in Virginia.....	118
 Appendixes.....	 127
Appendix A – Weights For Localities In The Study Sample	
Appendix B – Standards for the Qualifications of Counsel in Capital Cases	
Appendix C – Sampling Errors	
Appendix D – Data Collection Instrument Used in the Analysis of Prosecutorial Discretion	
Appendix E – Claims Submitted at Each Stage of Appellate Review	
Appendix F – Agency Responses	

I. Introduction

On November 13, 2000, the Joint Legislative Audit and Review Commission (JLARC) unanimously approved a subcommittee report recommending that JLARC staff conduct a study of capital punishment in Virginia. Presently, Virginia is one of 38 states in which a person can be sentenced to death for committing what is statutorily defined as capital murder. Since 1977 -- the year that the Virginia General Assembly completed the modification of the State's new death penalty statutes to comply with the rulings of the United States Supreme Court -- the Commonwealth of Virginia has executed 82 prisoners. In 2000, Virginia accounted for eight of the 85 executions (nine percent) that were carried out in the United States.

Two principal concerns provided the impetus for the Commission's focus on capital punishment in Virginia. The first relates to the use of prosecutorial discretion, or more specifically, the fairness with which local prosecutors apply the statutes that define a capital crime. Under current law, the General Assembly has established 20 types of premeditated murder which "shall constitute" capital murder. However, opponents of capital punishment contend that when faced with someone who has been arrested for a crime that can legally be charged as capital murder in Virginia, some prosecutors are clearly more likely than others to indict the accused for capital murder and pursue the death penalty. Critics of the system acknowledge that complete uniformity in the prosecution of all capital cases is neither possible nor desirable. Nonetheless, they believe that the death penalty is often pursued in an arbitrary manner

through a system that is subject to the influence of external factors that are either extra-legal or impermissible.

The second major concern that gave rise to the Commission's inquiry into capital punishment relates to the fundamental fairness of Virginia's appellate review process for persons who have been sentenced to die. According to some legal experts, the judicial review of capital cases in Virginia -- a bedrock element of America's criminal justice system -- has become a hollow process in which death row appeals are routinely dismissed for technical reasons, notwithstanding the merits of the appeal. Noting that the length of time that inmates spend on death row in Virginia has declined from an average of 10 to six years since 1995, concerns have been expressed that the State's expedited appellate review process could one day result in the execution of an innocent man or woman who was poorly represented at trial.

In November 2000, the Commission also expressed an interest in State policy relating to the use and storage of DNA evidence. Subsequent to the General Assembly actions during the 2001 session, however, the Commission approved a study workplan in May 2001 focusing on the use of prosecutorial discretion and the appellate review process.

Supporters of the Commonwealth's system of capital punishment suggest that many of the positions advanced by critics of the system are spurious. They point out that Virginia's statutory scheme for capital murder appropriately distinguishes those murder cases that qualify for the death penalty from those that do not. Moreover, supporters of the system argue that local

prosecutors will pursue the death penalty for only the most heinous of cases in which evidence of guilt is overwhelming. Without unequivocal convincing evidence, it is argued, prosecutors will be more likely to seek a plea agreement even if the nature of the crime supports the pursuit of the death penalty.

Supporters maintain that those without insight into the evidence surrounding the case respond by mistakenly branding the decision-making process as arbitrary and capricious.

Regarding the issue of judicial review, supporters of the death penalty agree that lawyers often raise claims that the higher courts are procedurally barred from considering. Still, those in favor of the death penalty argue that most of these claims either involved trial errors that are deemed by the higher courts to be harmless, or they otherwise lacked merit. Given these circumstances, it is believed by supporters of capital punishment that any significant statutory changes made to weaken some of the restrictions in the appellate process would delay the system with frivolous litigation to the detriment of both the Commonwealth and the ends of justice.

Until now, the debate surrounding these issues has not received the benefit of systematically collected data on the application of Virginia's laws governing the use of capital punishment. Rather, the debate has been advanced largely on the basis of anecdotes which have been variously used to demonstrate either the strengths or weaknesses of the system. This report attempts to address that problem more systematically through a detailed analysis of a representative cross-section of cases that involved capital-eligible murders,

and a review of the outcomes of the State's appellate review process. The remainder of this chapter offers a discussion of the history and evolution of capital punishment in Virginia, provides a brief overview of how capital-eligible cases are processed through the system, and presents a summary of the approach that was used to conduct this study.

EVOLUTION OF CAPITAL PUNISHMENT IN VIRGINIA

Over the first half of the 20th century, 42 states including Virginia authorized the execution of persons convicted of capital crimes. By 1972, due to numerous amendments and enhancements, the scope of Virginia's capital punishment statutes was unusually broad, covering any first-degree murder and numerous other offenses that did not involve murder. Further, as in most of the states where capital punishment was legal, Virginia juries were allowed unguided discretion in deciding whether a person convicted of capital murder should receive a death sentence or a term of life imprisonment.

While the broad reach of the law defining capital punishment did not lead to wholesale executions in Virginia, troubling racial disparities were evident in the application of this sanction. Moreover, legitimate questions were being raised nationwide concerning the absence of any meaningful distinction between those criminal cases where the death penalty was pursued from those in which it was not.

Due in large part to these problems, the United States Supreme Court effectively invalidated the capital punishment statutes in all states in a landmark decision – *Furman v. Georgia* -- handed down on June 29, 1972. Citing the

overly broad definitions of capital crime used by Georgia, and the apparently arbitrary and capricious nature in which these statutes were applied, the Court ruled that the death penalty “as previously administered amounted to cruel and unusual punishment in violation of the Eighth and Fourteenth Amendments.” As a result of this ruling, more than 600 death row inmates in 31 states had their sentences commuted to life imprisonment.

In response to this and subsequent United States Supreme Court rulings, the Virginia General Assembly made sweeping changes to the State’s statutes governing capital cases in 1975, and introduced additional modifications in 1977. Among the 1975 changes, the General Assembly elevated first-degree murder to capital murder only when one of six specified felonies accompanied the murder and also made the death penalty mandatory in these cases. Later, in 1977, after the United States Supreme Court invalidated statutes making the death penalty mandatory, legislators eliminated execution as the sole punishment for any capital crime, established a separate sentencing trial for capital cases, and provided for the automatic appeal of death sentences. Over the course of the next two decades the Virginia General Assembly expanded the scope of capital punishment to include 20 different types of premeditated murder.

In the years since these new laws were adopted, changes became evident in the pattern of State executions. On average, Virginia has executed slightly more than three persons per year in the post-Furman era, accounting for a significant share of the executions nationwide. While questions about the racial disparities associated with the use of the death penalty in the Commonwealth

have persisted since the Furman decision, blacks have accounted for 51 percent of all executions compared to 86 percent in the period from 1908 to the time before the United States Supreme Court's landmark 1972 ruling.

Virginia's Death Penalty System Prior to 1972

During the first 70 years of the 20th century, Virginia was one of 42 states that permitted the execution of convicted criminals. In many of these states, the use of the death penalty could be traced to the English traditions that took root in the American colonies. Under English law, any person convicted of a felony faced a mandatory death sentence. Because of the harshness of this system, colonial judges complained that it was virtually impossible to secure guilty verdicts for felony offenses because juries considered the punishment disproportionate to the crime. As the Virginia General Assembly moved to design its own system of capital punishment and mitigate the harshness of the colonial death penalty system, two central questions had to be addressed: (1) What should be the scope of the Virginia's capital punishment statutes? (2) How much discretion should juries be given when deliberating a sentence of death?

Scope of Virginia's Capital Punishment Statutes. In 1796, when the Virginia General Assembly first established the use of State executions as a permissible punishment for capital crimes, only the crime of first-degree murder could bring the punishment of death. By the time the United States Supreme Court began to hear challenges to state death penalty statutes almost 200 years later, the number of capital crimes identified in Virginia's statute had grown to 14 (Table 1).

Table 1 Evolution of Capital Punishment Statutes In Virginia, 1796-1968	
<u>Year Crime Defined As Capital Offense</u>	<u>Crimes Added To Capital Punishment Statutes</u>
1796	First Degree-Murder
1805	Arson, Treason
1866	Burglary, Armed Robbery, Rape
1868	Armed robbery expanded to include "partial strangulation or suffocation, or by striking or beating, or by other violence to the person, or by the threat of presenting firearms."
1894	Attempted Rape
1904	Kidnapping
1922	Entering a bank with the intent to commit larceny while armed with a deadly weapon
1934	Possession or use of a machine gun in any crime of violence
1960	Kidnapping expanded to include all types of abduction with the death penalty as possible punishment when the victim was a female under the age of 16 for purposes of prostitution or concubinage; or when kidnapping was conducted with the intent to extort money, pecuniary benefits, or to defile the victim.
1968	Possession or use of a sawed-off shotgun in any crime of violence or capital offense
Note: Prior to 1865, a separate and harsher set of capital punishment laws were applied to slaves. Sources: Virginia Acts of Assembly, 1866, 1968, 1994, 1904, 1922, 1934, and 1960. " <i>Capital Punishment in Virginia</i> ", 58 Va. L.Rev. 97, (1972).	

A few of these crimes were traditional capital offenses, common in many of the states that authorized executions. For example, three of Virginia's 14 capital offenses – first-degree murder, kidnapping, and treason -- were considered capital crimes in the majority of states. However, by 1972, only three other states had as many as 10 capital offenses (Virginia Law Review, 1972). As an example of the uniqueness of the State's capital punishment statutes, Virginia was the only state in the nation that authorized the death penalty as punishment for the crime of "entering a bank with the intent to commit larceny while armed with a deadly weapon."

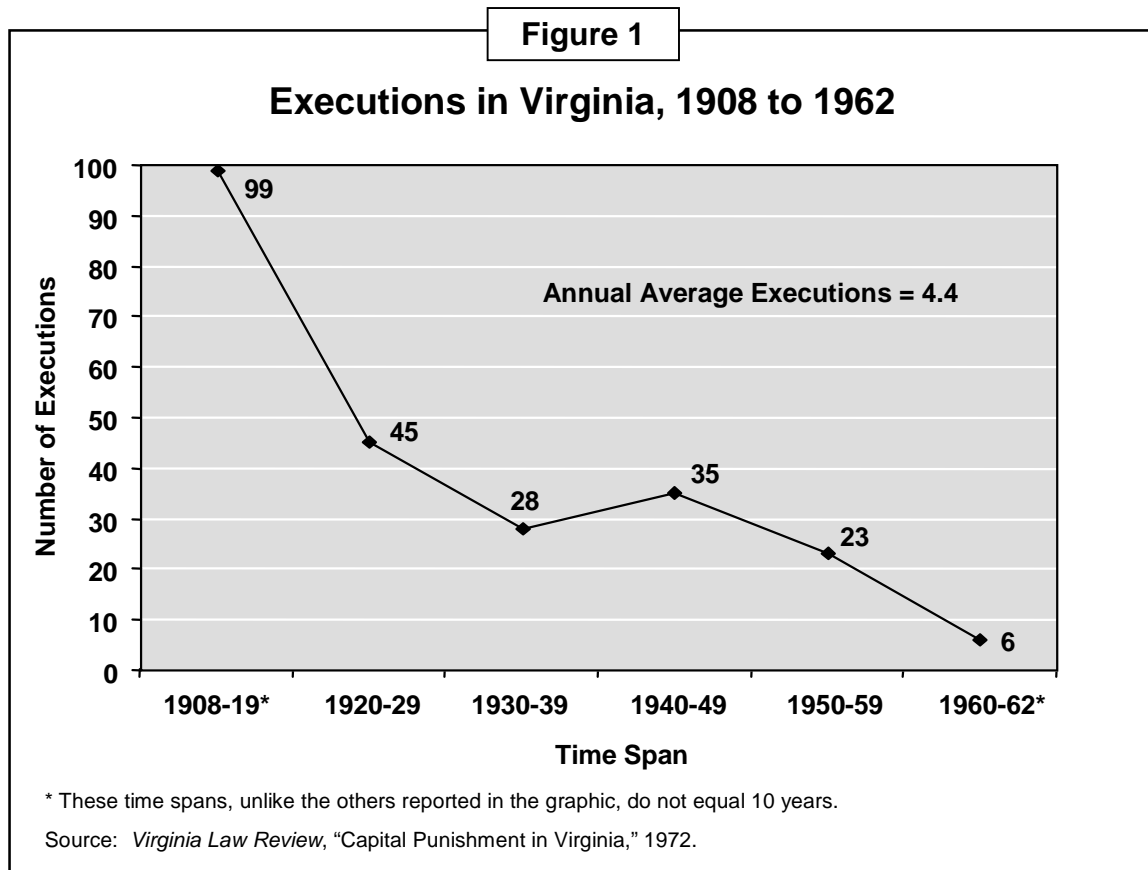
Jury Discretion. The second element of Virginia's system of capital punishment that warrants discussion was the discretion the General Assembly granted juries in meting out punishment in capital cases. Under Virginia law, juries that were convened for capital crimes were given unrestricted discretion in deciding whether a person convicted of the relevant crime would be executed. For example the statute that defined the punishment for first-degree murder in the State read as follows:

Murder of the first degree shall be punished with death, or at the discretion of the jury, by confinement in the penitentiary for life (Acts of Assembly, 1866).

The *Code of Virginia* was, however, silent on the factors a jury should consider in the exercise of this discretion. This meant that individual jurors were free to act according to their own judgment or conscience without the guidance of a set of criteria or standards that would either support or work against a sanction of death. As a result, in arriving at a decision for a given case, some jurors might consider certain evidence to be mitigating or aggravating and others might not. This unfettered discretion created inconsistencies both within and across juries that deliberated in capital cases.

State Executions from 1908 to 1962. Although this broad statutory scheme for capital crimes and unlimited jury discretion did not result in wholesale executions in the State during the early part of the 20th century, reasons for concern about the fairness of the system were clearly evident. A reliable count of the number of executions conducted prior to 1972 must begin in 1908 -- the year that the State centralized its executions in the State penitentiary through the use of electrocution. Executions in Virginia and other states were halted in 1962

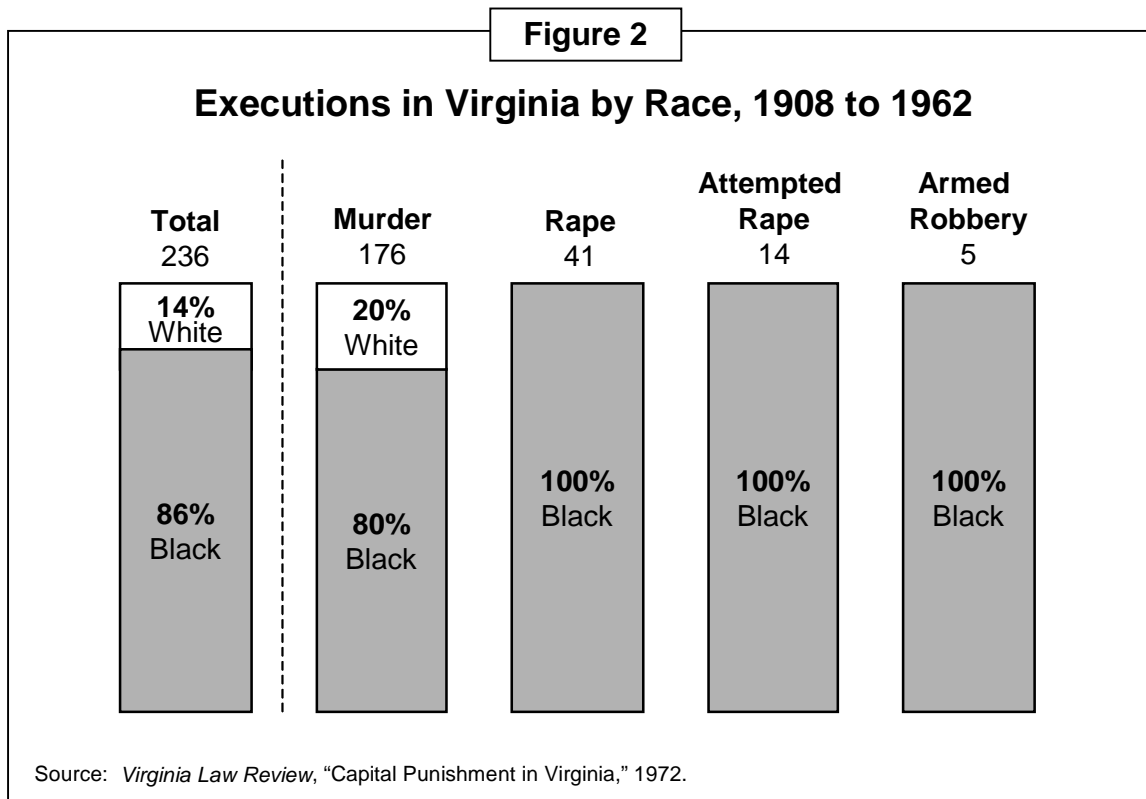
through "unofficial moratoriums" while the United States Supreme Court began to consider cases challenging the constitutionality of the death penalty. During the 54-year span from 1908 to 1962, Virginia executed a total of 236 inmates – an average of more than four prisoners per year (Figure 1).



While precise numbers are not available, it was evident, given the broad scope of Virginia's capital punishment statutes, that juries were returning a sentence of death for only a small fraction of the capital-eligible cases. Proponents of the State's system of capital punishment pointed to this limited use of the death penalty as an indicator that juries were reserving the punishment for the most atrocious or egregious crimes, consistent with the intent of the

legislature. Others argued that the few eligible cases that received the sanction of death were virtually indistinguishable from the thousands that did not.

More damaging to the integrity of the system were the stark racial disparities associated with State-administered executions. Of the 236 persons who were executed from 1908 to 1972, 86 percent were black (Figure 2). Moreover, executions for the capital crimes of rape, attempted rape, and armed robbery, appear to have been reserved exclusively for the punishment of blacks. In particular, of the 41 persons executed for rape, none were white. Yet, over this same time period, 45 percent of all persons who were incarcerated for rape were white (Virginia Law Review, 1972). Additionally, each of the 14 persons executed for attempted rape was black. Finally, all five armed robbery cases that resulted in executions involved black defendants. These outcomes along with



the data on executions in other states heightened public concern about the overall fairness of capital punishment, triggered constitutional challenges to the death penalty, and prompted the previously mentioned moratoriums.

The United States Supreme Court Invalidates All Capital Punishment Statutes

As the unofficial moratorium on executions continued through the early 1970s, the United States Supreme Court agreed to hear two pivotal cases regarding the constitutionality of the death penalty. In *McGautha v. California* and *Crampton v. Ohio*, the Supreme Court reviewed the claim that capital punishment was unconstitutional because it violated certain aspects of the 14th Amendment. In a second case, heard one year later, the Court considered whether the death penalty was unconstitutional because it amounted to cruel and unusual punishment. The two cases that raised this claim -- *Jackson v. Georgia* and *Branch v. Texas* -- were consolidated for review by the Court with the third case of *Furman v. Georgia*.

Death Ruled Cruel and Unusual Punishment by the United States Supreme Court in 1971. The first major attack on capital punishment in the 1970s called the entire system into question as a violation of the due process clause of the 14th amendment. This claim (*McGautha v California*) criticized the failure of the State to provide juries with standards or criteria on which to base life or death decisions. In *Crampton v. Ohio*, an additional claim was made against the use of a single trial in which the jury determined both the guilt and punishment of the accused. According to the petitioner, in a single trial, defendants would have to take the stand to offer any evidence of mitigating

circumstances. However, by doing so, these defendants faced the possibility of incriminating themselves under cross-examination. In a 6-3 opinion, the United States Supreme Court ruled against both claims.

Nonetheless, when presented with the claims in *Furman v. Georgia* -- that the outcomes of the system of capital punishment represented cruel and unusual punishment -- the United States Supreme Court narrowly (by a 5-4 vote) ruled in favor of Furman. Two justices rejected capital punishment as “per se unconstitutional.” Three justices, in support of the 8th amendment challenge held that “the statutory processes by which defendants were being sentenced to death were unconstitutional.” Each of the justices involved in the decision filed individual opinions. For example, Justice Douglas offered the following:

In a Nation committed to equal protection of the laws there is no permissible “caste” aspect of law enforcement. Yet we know that the discretion of judges and juries in imposing the death penalty enables the penalty to be selectively applied, feeding prejudices against the accused if he is poor and despised, and lacking political clout, or if he is a member of a suspect or unpopular minority, and saving those who by social position may be in a more protected position...A law that stated that anyone making more than \$50,000 would be exempt from the death penalty would plainly fail, as would a law that in terms said that blacks, those who never went beyond the 5th grade in school, or those who were unpopular or unstable should be the only people executed. A law which in the overall view reaches that result in practice has no more sanctity than a law which in term provides the same. Thus the discretionary practices statutes are unconstitutional in their operation. They are pregnant with discrimination and discrimination is an ingredient not compatible with the idea of equal protection of the laws that is implicit in the ban on “cruel and unusual punishment.

Since Virginia and the states that authorized the use of the death penalty had similar statutory schemes, the practical effect of the landmark

Furman ruling was substantial. Specifically, all existing death penalty statutes nationwide were invalidated and the sentences for the more than 600 inmates on death row at that time were commuted to life.

Virginia Reforms Its System of Capital Punishment

While the United States Supreme Court ruling in *Furman v. Georgia* was a clear signal to the states that the statutes governing the application of capital punishment were flawed, the Court strongly hinted that the death penalty under certain statutory schemes could be considered constitutional. Accordingly, Virginia and many other states began the work of rewriting their statutes to bring them in compliance with the rulings of the Court. These states took their lead from the dissenting opinion of Chief Justice Burger, who stated:

Since the two pivotal concurring opinions turn on the assumption that the punishment of death is now meted out in a random and unpredictable manner, legislative bodies may seek to bring their laws into compliance with Court's ruling by providing standards for juries and judges to follow in determining the sentence in capital cases or by more narrowly defining the crimes for which the penalty is to be imposed.

Virginia Code Commission Recommends Reform. As all of these issues were being debated in the Court, the 1971 Virginia General Assembly directed the Virginia Code Commission to study a number of issues including the State's criminal code. Two years later, the Commission presented its report which directly addressed the problems with Virginia's capital punishment statutes. In light of the decision in *Furman v. Georgia*, the Commission concluded that the death penalty should no longer be an available punishment for certain types of first-degree murder, abduction, robbery, less aggravated

rape, arson, armed burglary, and the previous capital crimes involving use of a machine gun or shotgun in a crime of violence.

On the question of rape, the Commission recognized that the provisions of Virginia's law at that time were unconstitutional under Furman. Therefore, a recommendation was made to divide rape into two categories -- capital rape for "aggravated situations" which would be punishable by death and other forcible rape that would carry a twenty-year to life prison term.

Based on the Commission's recommendations, the General Assembly established a new definition of capital crime in Virginia. Under the new law (which was enacted in 1975 and modified in 1977), first-degree murder would constitute capital murder when it was committed under the following circumstances:

- in the commission of abduction with the intent to extort money or a pecuniary benefit;
- as a part of contract killing, referred to in the statute as murder for hire;
- by an inmate in a penal institution;
- in the commission of a robbery while armed with a deadly weapon;
- during the commission of, or subsequent to, rape; and
- the killing of a law enforcement officer when the murder was committed for the purpose of interfering with the law enforcement officer's performance of his duties.

As further provided by law, persons convicted of any of these crimes faced a mandatory death sentence.

While Virginia was in the process of revising its criminal codes, the United States Supreme Court ruled on five death penalty cases that were based

on new death penalty statutes passed in response to the Court's ruling under *Furman*. In the cases of *Woodson v. North Carolina* and *Roberts v. Louisiana*, the Supreme Court rejected the use of the death penalty as a mandatory punishment for any broad category of crimes such as rape. However, in *Gregg v. Georgia*, the Court sanctioned the use of the death penalty in states whose system of capital punishment contained the following elements:

- guided discretion for juries in two-phase trials where the first trial would be used to determine the defendant's innocence or guilt and the second trial would be used to set punishment;
- a process where both mitigating and aggravating factors are explicitly considered in the second phase of the trial; and
- an independent judicial review of the appropriateness of the death sentence.

Virginia Revisits Its Capital Punishment Statutes. In light of the United States Supreme Court's rulings, the General Assembly made three important changes to its statutory scheme for capital punishment in 1977. First, mandatory death sentences for capital crimes were repealed. Although the General Assembly did not change its existing definition of capital punishment, it gave juries the authority to impose a life sentence as opposed to death.

Second, to address the United States Supreme Court's expectation that jurors in capital cases be given some guided discretion in their deliberations concerning the fate of the convicted, the legislature required the use of bifurcated trial proceedings. The first phase of this process was designed to assess the guilt or innocence of the accused. For those persons found guilty, the legislature required that a sentencing phase be implemented in which the punishment for the defendant would be decided. Under the revisions to State law, the penalty of

death could not be imposed unless the Commonwealth proved that the accused would either pose a continuing threat to society if he were not executed (future dangerousness), or that his conduct in committing the crime was “wantonly vile.” To prove the element of future dangerousness, the State could rely on evidence of past criminal conduct, or the circumstances of the crime itself. While the General Assembly offered no detailed definition of conduct that should be considered vile, the law stated the existence of either torture, evidence of depravity of mind, or aggravated battery were sufficient to support a finding of vileness and justification for imposition of the death penalty.

In addition, at the sentencing phase of the trial, the defendant’s attorneys would be allowed to submit evidence of mitigating circumstances that could justify a sentence of life imprisonment, even if the one or both of the aggravators were proven. According to Section 19.2-264.1(B) of the *Code of Virginia*, the type of mitigating factors that could be presented include: the defendant’s prior criminal history, the defendant’s state of mind at the time of the crime, evidence of the victim’s consent or participation in the defendant’s conduct, and both the defendant’s age and mental capacity at the time of the crime.

Finally, to provide for the automatic review of capital convictions, the General Assembly required the clerk of the circuit court to transmit the trial record to the State Supreme Court within 10 days following the receipt of that record. Accordingly, the Court was then required to conduct an appellate review focusing on the existence of any claims of trial error outlined in the condemned person’s

appeal. In considering the possibility of trial error, the Court was directed to determine whether the death sentence was imposed arbitrarily or under the influence of passion or prejudice. Also, using data on previous capital cases, the Court was required to determine whether the death penalty in the case before the Court was either excessive or disproportionate punishment. Based on these deliberations, the Virginia Supreme Court was required by the new law to either affirm the sentence of death, commute the punishment to life in prison or remand the case back to circuit court for a new trial or sentencing hearing.

Virginia Expands Its Death Penalty Statutes

Since 1977, Virginia has modified or added to the State's definition of capital crimes 14 times (Table 2). Premeditated murder remains the only capital crime, but there are now 20 different types of murder that qualify as such in the Commonwealth. At first inspection, these additions appear to have broadened the scope of capital murder in the Commonwealth beyond what was witnessed prior to the landmark United States Supreme Court cases in the 1970s. However, with a few notable exceptions -- such as murder for hire, murder of more than one person, and murder at the direction of a person engaged in running a criminal enterprise -- capital murder can only be charged when accompanied by a predicate felony such as rape, or robbery. Hence, even with these recent expansions to the statutes, capital murder in Virginia is more narrowly defined than it was prior to 1972 when any first-degree murder indictment brought with it the specter of execution.

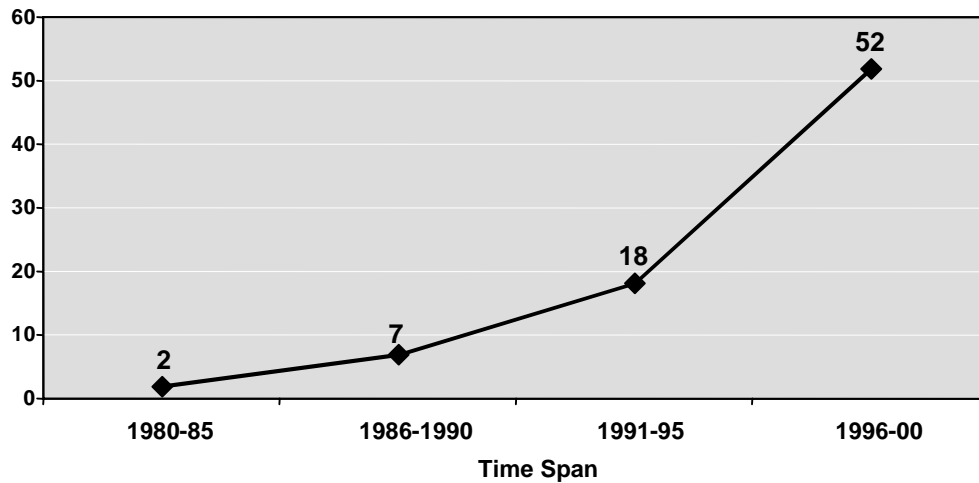
Table 2 Evolution of Capital Punishment Statutes In Virginia Since 1977 Revisions	
<u>Year Crime Defined As Capital Offense</u>	<u>Amendments To Capital Punishment Statutes</u>
1981	Murder of more than one person in the same act or transaction
1985	Murder of a child under the age of 12 in the commission of abduction with the intent to extort money or a pecuniary benefit, or with the intent to defile
1989	Murder in the commission of attempted robbery or Murder in the commission of attempted rape
1990	Murder in the commission or attempted commission of a drug transaction, when the murder is for the purpose of furthering the drug violation
1991	Murder in the commission of forcible sodomy or attempted forcible sodomy
1995	Murder in the commission of object sexual penetration
1996	Murder in the commission of abduction of any person with the intent to extort money or a pecuniary benefit or with the intent to defile. [This amendment consolidated the abduction statutes that were passed in 1975 and 1985 and expanded the crime to include any person]. Murder in the commission of robbery or attempted robbery (requirement that the defendant had to be armed with a deadly weapon was deleted). Murder of more than one person within a three-year period
1997	Murder of any police officer having the power of arrest under federal or any state law
1997	Murder at the direction or order of one engaged in a continuing criminal enterprise
1997	Murder of a pregnant woman with intent to cause the involuntary termination of her pregnancy
1998	Murder of a person under age 14 by a person over age 21
Sources: Virginia Acts of Assembly, 1981, 1985, 1989, 1990, 1991, 1995, 1996, 1997, 1998.	

State Executions Since the 1977 Reforms. Because of the post-conviction review process that is now afforded persons who are tried for capital murder and sentenced to death, a considerable delay can be expected before a person who is sentenced to die will actually face execution. While the average length-of-time that elapses from the time a defendant is sentenced to die to the actual date of the execution has decreased in Virginia over the last 10 years,

inmates who have been condemned to die still spend approximately six years on death row before they are executed.

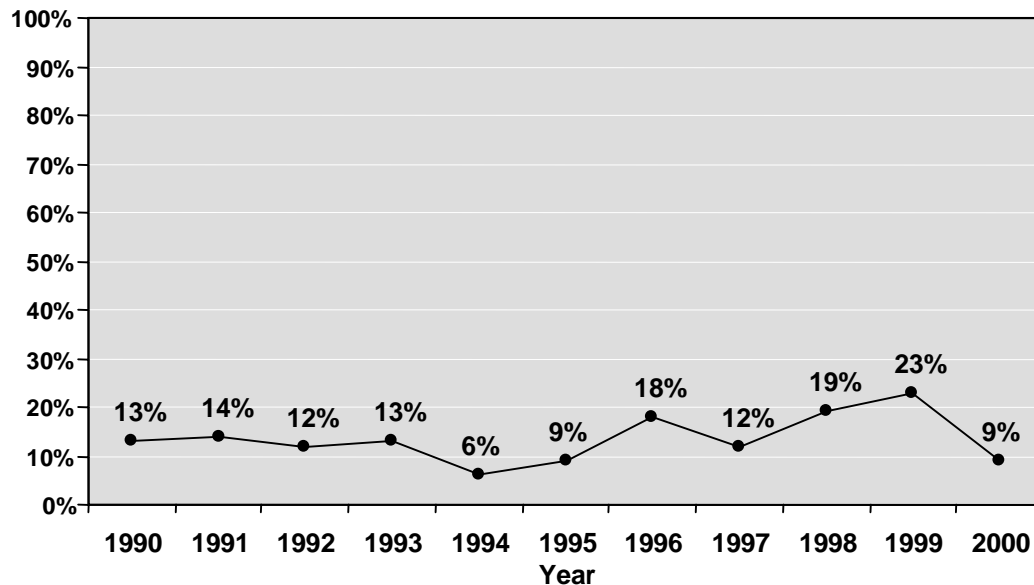
The top half of the graphic in Figure 3 reports the trend in these executions since 1980. As shown, in the 22 years since the State altered its system of capital punishment, a total of 82 prisoners have been put to death in Virginia. By the end of 1990, only nine inmates had been executed under the new system. However, in the years following 1990, the number of persons executed increased substantially. For example, in the next five-year period following 1990, nine additional prisoners were put to death – an increase of 150 percent. As larger numbers of inmates exhausted their appeals in the State and federal courts from 1996 to 2000, 52 additional prisoners were executed. This represented a 188 percent increase over the previous five years.

Due to this surge in the number of prisoners who were put to death since 1991, Virginia now accounts for a disproportionate number of the executions conducted nationwide (see bottom of Figure 3). As noted earlier, critics of the system believe that a cursory, and overly restrictive post-conviction judicial review process has unjustifiably fueled the rise in executions witnessed over the last 10 years. These critics contend that the appellate courts perform a perfunctory review of the death cases they receive on appeal, routinely overlooking legitimate claims of trial error raised by appellate lawyers. This, they argue, disproportionately increases the State's share of nationwide executions. In terms of the racial composition of those executed, blacks are still disproportionately represented, accounting for slightly more than half of all

Figure 3**Number of Persons Executed in Virginia
Since the Reform of the Capital Punishment Statutes**

Note: There were three persons executed in 2001.

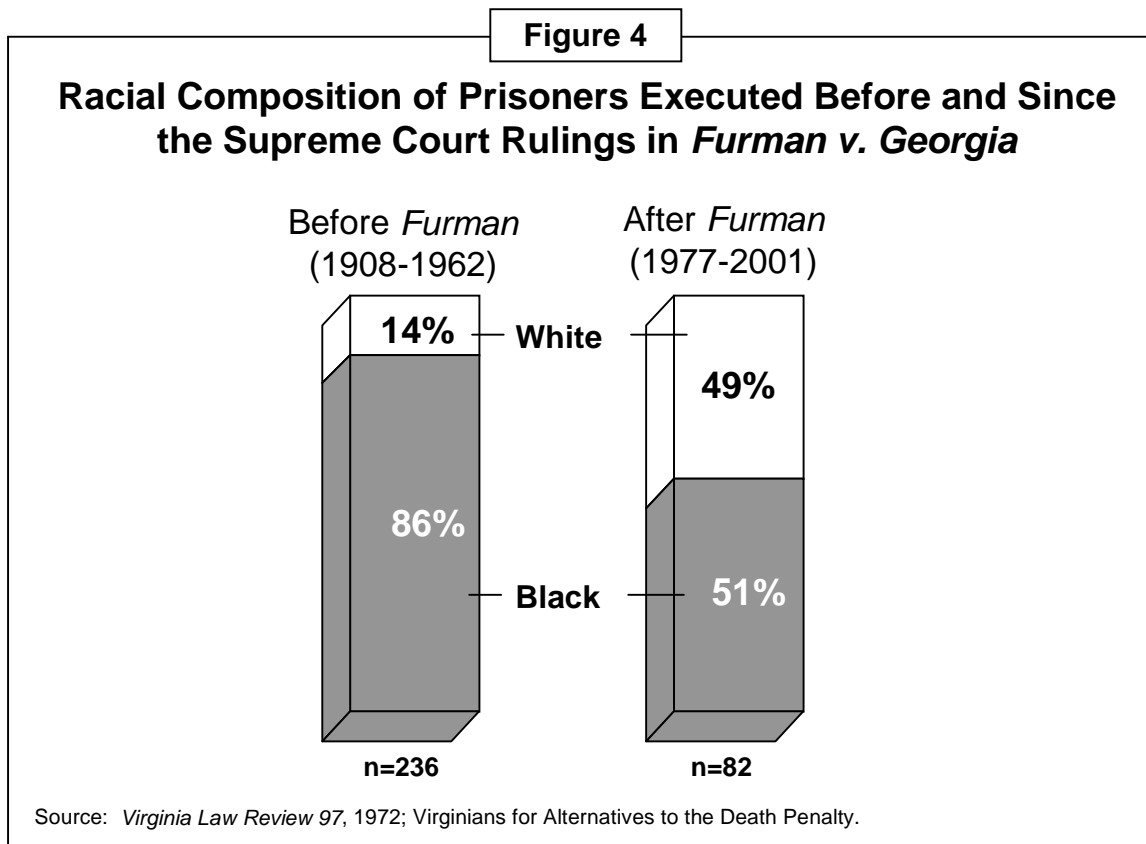
Source: Virginians for Alternatives to the Death Penalty.

**Trends in the Number of Executions Carried Out
in Virginia as a Percent of All Executions
Conducted Nationwide, 1990-2000**

Source: Bureau of Justice Statistics, *Capital Punishment*, 1990-2000.

persons who were put to death during the period from 1977 to 2001 (Figure 4). Nonetheless, the apparent racial disparities that were so evident among those executed prior to 1977 have moderated considerably.

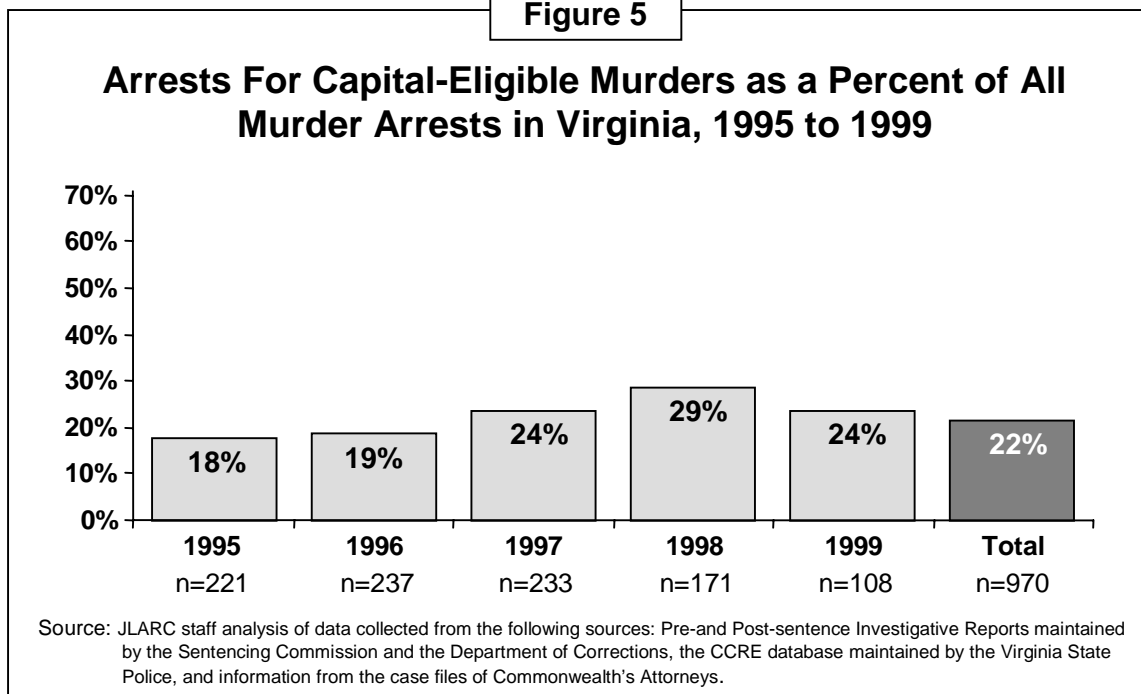
Present Concerns With the Death Penalty in Virginia. Due in part to the expanded definition of a capital crime, there are questions about the impact this will have on the number of people who are indicted for capital murder and ultimately executed. To shed some light on more recent trends in the rate of arrests for capital-eligible crimes in the Commonwealth, JLARC staff collected data on all persons who were arrested and indicted for murder from 1995 to 1999. JLARC staff selected 1995 as the starting point for the study because that was the year that parole was abolished in Virginia. According to some prosecutors,



this statutory change decreased the likelihood that they would pursue the death penalty, as a capital conviction was not necessary to ensure that defendants who were convicted of first-degree murder would remain in prison for life. After eliminating those cases that ultimately resulted in manslaughter indictments, the number of persons who were arrested for crimes that qualified as a capital-eligible offense was expressed as a percent of all persons who were arrested for murder.

For purposes of this study, JLARC staff classified capital-eligible arrests as those arrests which resulted in a capital murder indictment, or those arrests in which all of the elements necessary to support a capital murder indictment were alleged to have occurred. If the indictment filed for a particular case was a general murder indictment, questions concerning the identity of the alleged “triggerman” and the existence of premeditated murder were resolved through a discussion with the local prosecutors or a review of the files for the case.

As shown in Figure 5, in 1995, persons who were arrested for capital-eligible crimes accounted for at least 18 percent of all arrests for murder. By 1998, this figure had grown to 29 percent. While these types of murders as a proportion of all arrests declined slightly in 1999, the rate remained nearly one-quarter of all arrests for murder. This increase in arrests for capital-eligible murders in this time period can be partly attributed to legislative expansions to the death penalty made by the General Assembly in 1997 and 1998. In these years, the General Assembly added four additional types of murder to the capital

Figure 5

murder statutes in Virginia. Overall, during the five-year period from 1995 to 1999, a total of 970 arrests were made for murder. Of these arrests, 215 (22 percent) were for crimes that contained all of the necessary elements to qualify as a capital-eligible case.

Regarding the demographics and alleged crimes of those persons who are arrested for a capital-eligible offense, 97 percent were males (Table 3). In

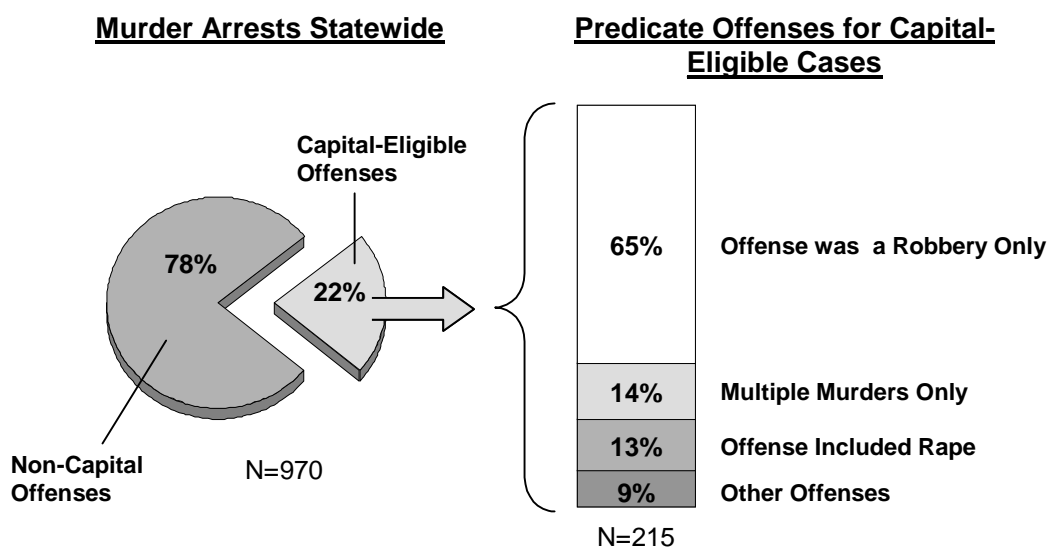
Table 3	
Characteristics of Persons Who Were Arrested For A Capital-Eligible Offense, 1995 to 1999	
Characteristic	Percent
Sex	
Male	97
Female	3
Race	
Black	60
White	39
Other	1
Source: JLARC staff analysis of data collected from criminal indictments, pre-sentence investigative reports, and case files of Commonwealth Attorneys.	

terms of race, blacks were substantially more likely to be arrested for a capital-eligible offense than their white counterparts. In particular, six out of every ten persons who were charged with a capital-eligible crime over this five-year period were black.

Figure 6 reveals the predicate offenses – the crime alleged to have occurred in addition to the premeditated murder – that formed the basis for a possible capital murder indictment. Overall, for the 215 arrests that were made for a capital-eligible murders from 1995 to 1999, the predicate offense in most of these cases was robbery (65 percent). In fourteen percent of the capital-eligible murder arrests, the killing of more than one person was the sole predicate that elevated the offense to a capital-eligible crime.

Figure 6

Type of Capital-Eligible Offenses Committed in Virginia from 1995 to 1999



Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the CCRE database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

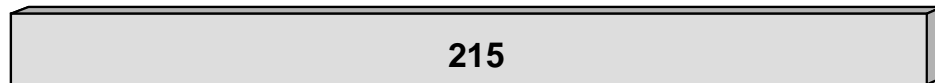
For 13 percent of those arrested for a capital-eligible offense, at least one of the predicate offenses for which they were charged included rape. For the remaining persons arrested for a capital-eligible murder (nine percent), the offense included other predicates (including multiple predicates), which could have elevated their alleged crimes to capital murder. This category included arrests made in cases where adults were charged with killing victims under the age of 14, murder for hire cases, and persons who were apprehended and charged with murder in the commission of abduction with to the intent to defile the victim.

Still, despite the substantial number of arrests for crimes that qualify as capital-eligible murder, a capital sentencing proceeding is held in only a fraction of these cases. As Figure 7 illustrates, the winnowing process begins at indictment. In particular, of the 215 murder arrests involving capital-eligible offenses, 170 were actually indicted for capital murder. However, prosecutors decided to seek the death penalty for only 64 of these cases. Of these 64 cases, 46 were convicted of capital murder, and only 24 resulted in capital murder convictions where either a jury or a judge imposed the death penalty. This means that approximately 11 percent of persons charged with a capital-eligible crime were eventually found guilty of capital murder and received a sentence of death.

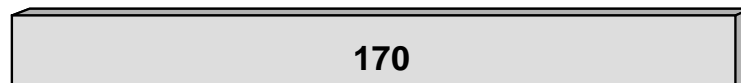
To supporters of Virginia's system of capital punishment, the data presented in this section reflect the outcomes of a system that is operating according to the intent of the General Assembly. The relatively low numbers of

Figure 7**The Funneling of Capital Eligible Murder Cases**

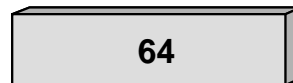
Of **970** Cases where there was an
Arrest for Murder from 1995 to 1999 . . .



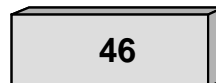
Were for Capital Eligible Offenses



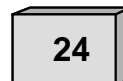
Resulted in a Capital Murder Indictment



**Were Prosecuted as
Death Eligible Cases**



**Resulted in a
Capital Murder
Conviction**



**Were Given a
Death Sentence***

* There were two persons who were each sentenced to die in two separate cases.

Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the CCRE database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

persons who have been sentenced to death and their changing racial composition are the hallmarks of a system that metes out its most severe punishment in a non-arbitrary fashion, for only those criminals who constitute a future danger to society or who commit the vilest of capital crimes.

Based on these same data, however, critics of the system would question whether any meaningful distinctions exist between those persons who were indicted, tried for capital murder, found guilty, and sentenced to death, and

those who received more favorable treatment from the system. Moreover, to the extent that some distinctions can be made, these critics would argue that they likely reflect factors that are not equally applied in all capital cases. These are the types of concerns that have brought the State's system of capital punishment under increased scrutiny. Hence, these questions and those concerns raised about the judicial review of capital cases, form the primary basis of JLARC's staff review of the death penalty in Virginia.

JLARC REVIEW

JLARC's review of capital punishment in Virginia was requested by a vote of the full Commission in November 2000. The approach adopted by the Commission focused the attention of this review on the issues of prosecutorial discretion and Virginia's post-conviction judicial review process for capital cases. JLARC staff began the work to address the issues raised in the Commission's report in January 2001. An extensive data collection effort was conducted in the spring and summer of 2001. A third issue – quality of legal representation – was explored but could not be adequately addressed by this review.

Study Approach and Major Study Issues

In order to meet the requirements of the study mandate, JLARC staff developed a narrowly defined study plan to address concerns raised about the use of prosecutorial discretion in capital-eligible cases and the nature of the judicial review process. Within this framework, the following research questions were identified to shape the focus of this study.

1. What is the nature of the variation that exists in the decisions of prosecutors to seek indictments for capital murder for persons who are charged with committing a capital-eligible offense?
2. What factors appear to influence the decisions of prosecutors to seek the death penalty in capital-eligible cases? Is there evidence to suggest that arbitrary or extra-legal factors, such as the defendant's race have an impact on prosecutors' decisions to pursue the death penalty?
3. How can those cases in which a person received a death sentence be distinguished from those in which the sentence of death was considered but not imposed?
4. How is the appellate and post-conviction processes for persons sentenced to death administered in Virginia?
5. What is the impact of appellate review restrictions and applicable post-trial rules on the judicial review of capital cases in Virginia?

Prosecutorial Discretion and Jury Sentencing

The question of whether the system of capital punishment is fairly administered generally turns on two issues: (1) whether local prosecutors treat comparable cases of capital murder the same, and (2) whether judges and juries apply sentencing sanctions equitably based on the internal factors of the case. To examine these issues, the first part of this study examined the decisions prosecutors make when presented with premeditated murder cases that rise to the level of capital murder. However, efforts to examine the sentencing practices of juries and judges in capital murder cases were constrained by the small number of capital cases that reach this stage of the process.

To carry out the assessment of prosecutorial discretion, JLARC staff conducted detailed file reviews in a representative subset of localities in which at least one capital-eligible murder has occurred in the five-year period from 1995 to 1999. In addition, mail surveys were conducted of all 121 local prosecutors across the State.

File Reviews. For each of the capital-eligible murder cases included in this study, JLARC staff reviewed the records from the case and constructed an electronic file to support the analysis of the use of prosecutorial discretion. To construct the analysis file, a variety of primary data sources were used. Included among these sources were criminal indictments, reports on the descriptions of the crimes, court transcripts, demographic data on the defendants and the victims, autopsy reports, forensic evidence reports, witness files provided by the Commonwealth's Attorneys, criminal history data on the defendants, and the pre- and post-sentence investigative reports compiled by the Department of Corrections. The goal of this analysis was to use these data to identify the similarities and differences between those capital-eligible cases in which prosecutors sought the death penalty with those in which they did not.

Selecting a Sample. To carry out this analysis, a sample of capital-eligible cases had to be identified for review. In selecting the sample, two principal objectives were pursued. First, JLARC staff wanted to identify the universe of capital-eligible murders that occurred from 1995 to 1999. As noted earlier, 1995 was selected as the starting point for the study because that was the year that parole was abolished.

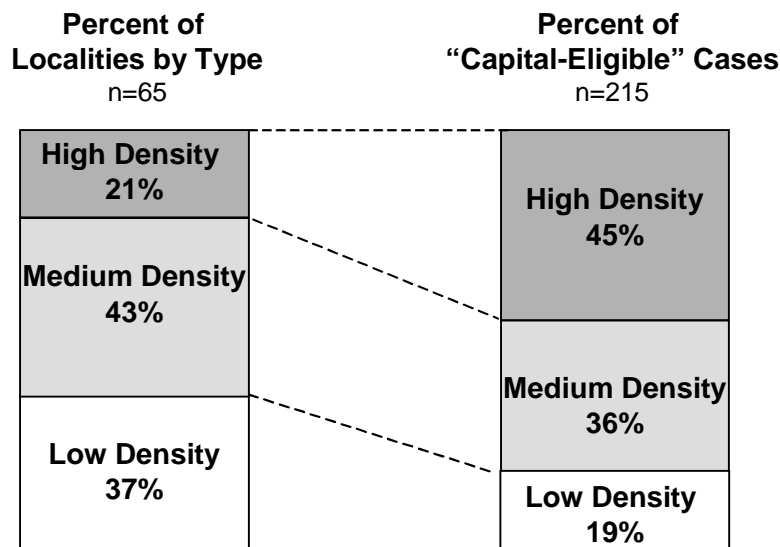
Selecting a universe or sampling frame for the study was complicated by the unique data problems associated with this subject. Currently, Virginia does not maintain a centralized database containing information on murder cases that can be prosecuted as capital cases. The State Police collect and automate data on all arrests in the Commonwealth and report the court disposition for some of these cases. However, the arrest data are not complete and the variable used to identify the crime for which the arrest was made is not sufficiently detailed to distinguish among the different types of murder. Nor does the file contain the necessary information to allow for a determination of whether specific murder cases contained the necessary elements to elevate the cases to capital crimes.

For certain criminal cases, the Sentencing Commission of the Virginia Supreme Court maintains a more complete automated record of the court proceedings and, to a certain degree, the specific circumstances surrounding the case. However, this file only contains this information for persons who have been convicted of a felony and does not offer the types of crime descriptions needed to conduct this analysis. Therefore, to approximate the universe of arrests for capital-eligible murder cases, JLARC staff had to use both of these databases, review indictments for persons arrested for murder, interview some local prosecutors regarding the murder cases in their jurisdiction, and examine crime descriptions from a variety of sources for each of these cases identified in this study.

The second objective of the sampling design was to capture the geographic diversity among localities with capital-eligible murder cases. This was necessary because of the widely held view that capital cases are handled differently based on the geographic nature of the locality. A review of the official indictments and descriptions of the circumstances of the murders revealed that 65 of the 121 jurisdictions in Virginia experienced a murder that qualified as a capital crime. While only 21 percent of these localities are considered “high-density” jurisdictions (based on relative differences in population density), these localities accounted for 45 percent of all capital-eligible murders (Figure 8) during the relevant study period. By comparison, “low-density” localities accounted for

Figure 8

**Type of Localities in which at Least One Arrest was Made
for a “Capital-Eligible” Murder, 1995 to 1999**



Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the CCRE database maintained by the Virginia State Police, and information from the case files of Commonwealth’s Attorneys.

37 percent of these jurisdictions, but only 19 percent of the capital-eligible murders.

Having identified the universe of murder cases, a straight random selection of persons who were arrested for capital-eligible murder was feasible. However, JLARC staff determined that if this approach were used to select the cases for this study, staff visits would have been required at more than 50 localities to review the desired number of cases. More important, this approach would greatly reduce JLARC staff's ability to assess the effect of geography on the use of prosecutorial discretion as well as the outcomes of capital murder trials.

Therefore, a cluster sampling technique was used to select the sample of cases for this study. With this approach, each locality in which a capital-eligible murder occurred was organized into one of three separate, non-overlapping geographic clusters. As noted earlier, these clusters were determined based on the population density of each locality. The top third of the localities with the largest population per square mile were established as the "high-density" cluster sites. The middle third were established as the "medium-density" cluster sites, and the bottom third was designated as "low-density." Next, a combination of critical case and random sampling strategies was employed to select a subset of localities from each cluster. Once a locality was selected, all of the capital-eligible cases in that jurisdiction were included in the study.

As shown in Table 4, in the “high-” and “medium-density” clusters, a total of seven and eight localities, respectively, were selected for the study. A number of these localities were selected with certainty because a large number of the capital murder cases occurred within their boundaries. For example,

Table 4 The Number of Capital-Eligible Murder Cases Reviewed for Each Locality Selected for the Study	
Locality	Number of Murder Cases
High-Density Cluster Sites	
*Arlington	4
Fairfax	3
Newport News	7
*Norfolk	30
Portsmouth	12
*Richmond	23
*Virginia Beach	9
Total Cases in High-Density Cluster	88
Medium-Density Cluster Sites	
Chesterfield	10
Henrico	9
Montgomery	4
Prince William	4
Chesapeake	6
Danville	3
Petersburg	3
Suffolk	4
Total Cases in Medium-Density Cluster	43
Low-Density Cluster Sites	
Accomack	3
*Augusta	2
Carroll	2
*Floyd	1
*Franklin	2
*Grayson	4
*Greensville	2
Halifax	1
Lunenburg	1
*Nottoway	2
*Pittsylvania	2
Richmond County	2
Smyth	3
Southampton	1
Westmoreland	1
Total Cases in Low-Density Cluster	29
Notes *These localities entered the sample with certainty.	

the “high-density” cluster localities chosen for the study account for 93 percent of all the capital-eligible cases in that statewide cluster and 41 percent of all such cases statewide. Any random selection process that failed to include many of these localities would substantially weaken the degree to which the findings could be generalized to the general population of cases.

A total of 15 localities were selected from the “low-density” cluster sites. Of these localities, eight were randomly chosen. JLARC staff over-sampled localities in this cluster to compensate for the limited number of capital-eligible cases among “low-density” jurisdictions. By over-sampling, the team increased the possibility that a sufficient number of rural cases would be included in the study to allow for detection of any geographic effects in the study outcomes.

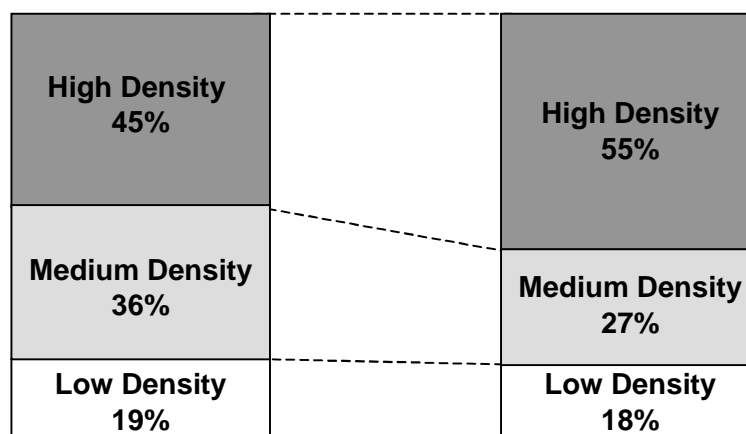
When the distribution of cases across the three clusters in the JLARC sample is compared to the universe of cases statewide, a higher percentage of cases from the “high-density” clusters are present in the JLARC sample, as shown in Figure 9. Therefore to prevent these cases from having a disproportionate effect on the statistics that were computed from the data, sample weights were calculated for each locality. Accordingly, any statistical value for a given variable (for example, the average age of persons charged with capital murder), was computed separately for each locality and then adjusted with the weight for that particular jurisdiction (Appendix A lists the weight for each locality in the study).

Figure 9

A Comparison of the Geographic Distribution of “Capital-Eligible” Cases Statewide to the JLARC Sample

**Percent of “Capital-Eligible”
Cases Statewide**
n=215

**Percent of “Capital-Eligible”
Cases in JLARC Sample**
n=160



Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the CCRE database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

Mail Surveys of Commonwealth Attorneys. JLARC staff also surveyed each of the local prosecutors in the State regarding the policies and practices associated with the application of death penalty statutes. This survey was used to query local prosecutors on a range of issues concerning their practices in capital cases. Among other issues, prosecutors were questioned on the factors they consider when deciding how to proceed with capital-eligible murder cases, and their use of, and rationale for, plea agreements in capital murder cases.

Virginia's Judicial Review Process

Because of the severity of the death penalty as a punishment for capital murder, the General Assembly requires an extensive post-conviction

review of each case in which the penalty of death is imposed. Critics of judicial review in Virginia contend the State Supreme Court has historically been skeptical of claims of trial error made by the attorneys for death row inmates. When this alleged skepticism is combined with what some view as the most procedurally restrictive appellate process in the country, some experts claim that post-conviction claims of death row inmates rarely get a substantive review. Hence, for this part of the study, JLARC staff reviewed the relevant court documentation for the 120 defendants who have been sentenced to death since the State reformed its statutes in 1977.

The purpose of this review was to develop a descriptive picture of how appellate cases moved through the judicial review process. This analysis allowed JLARC staff to determine what types of claims are made at each stage of the review process, and assess the impact of some of the existing procedural restrictions on these claims. The scope of this review covered the direct appeals made to the Virginia Supreme Court, State and federal habeas corpus petitions, all petitions for Writs of Certiorari, and the petitions for clemency to the Governor of Virginia.

Outstanding Issues Concerning Quality of Counsel In Capital Murder Trials

In Virginia, as in many other states, there have been longstanding questions concerning the quality of legal representation afforded indigent persons who are charged with capital murder. Following the reinstatement of capital punishment in Virginia by the General Assembly in 1977, there was no special mechanism in place to ensure that capital defendants received quality

representation. Specifically, there were no special standards in place to govern the selection of attorneys for persons who could not hire private counsel.

Moreover, the fees that were paid by the State to attorneys who accepted capital cases were capped at \$650 per case. Combined, these factors greatly reduced the possibility that an experienced, qualified attorney would represent an indigent person charged with capital murder at trial.

Since that time, the General Assembly passed legislation requiring the Public Defender's Commission, in conjunction with the Virginia State Bar and the Virginia Supreme Court, to establish standards for appointed counsel in capital murder cases. In addition, there is no longer a cap on fees paid to court-appointed attorneys in capital murder cases. Now, when an indigent defendant who has been charged with capital murder makes a request for counsel in circuit court, the judge may select an attorney from the list maintained by the Public Defender's Commission. Judges may, as an alternative, appoint attorneys who are not on the list as long as they meet the qualifications established by the Commission.

It is widely acknowledged that these changes have improved the quality of counsel available to indigent defendants in capital murder cases. However, critics maintain that problems remain with the identification and selection of qualified attorneys. 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. Complaints have also 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. Finally, there is a concern about the adequacy of fees made available for investigative services, and the State's failure to address the issue of adequate compensation for attorneys who handle capital murder cases in the post-conviction phase of the judicial process.

Given the time and resource constraints faced by JLARC staff, addressing these issues were beyond the scope of this study. What follows is a brief discussion of the scope of the research that is needed to address questions regarding the identification and selection of quality of counsel for indigent persons who face capital murder indictments.

Standards for Capital Defense Attorneys. In 1992, the Public Defender's Commission and the Virginia State Bar developed a set of standards governing the selection of attorneys for indigent persons who were charged with capital murder. These standards, which were modified in 2001, represent the minimum qualifications that attorneys must possess before serving as counsel in the trial and/or appellate phases of capital murder cases (Appendix B). New standards will be published in January 2002 which will be established as rules of the Virginia Supreme Court.

While acknowledging the value of these standards in ensuring that a defendant receives an experienced attorney, critics point out that the standards fail to address whether the attorney is actually competent. Because it is possible for attorneys who fail to "zealously" represent their clients in capital murder

cases, to continue to meet these standards and remain on the list of “qualified attorneys” questions about the effectiveness of counsel in capital murder cases persist.

In an attempt to develop some insight on this issue, JLARC staff conducted a mail survey of a sample of attorneys who have represented persons who were charged with capital murder from 1995 to 1999. This survey was designed to collect information on the qualifications, experience levels, and case outcomes for attorneys who have represented clients charged with capital murder in the last five years. In addition, the disciplinary records of attorneys who accepted at least one capital case for the defendants in the JLARC study sample were also examined.

Unfortunately, the response rate to the JLARC staff survey was too low – 28 percent – to generate reliable estimates for the measures developed from the data. Regarding the disciplinary action taken by the Virginia State Bar, 26 percent of the defense attorneys in the JLARC study sample who handled capital murder cases in the last five years have been disciplined by the Virginia State Bar. None of the disciplinary action was related to the performance of counsel in a capital murder trial.

According to members of the Criminal Law Subcommittee of the Virginia State Bar, conducting a comprehensive evaluation of the performance of trial attorneys in capital murder cases is a significant undertaking. Such an effort would require persons with legal expertise to review the transcripts from each relevant case and determine if the performance of counsel was adequate.

Should the research extend to the post-conviction stage of the appellate process, a similar effort would be required for each of the petitions filed at post-conviction.

There are a number of questions that must be addressed to determine whether, and to what degree, the use of non-qualified attorneys remains a problem for capital murder cases in Virginia. Some of these that could be considered for additional study are as follows:

- Has the performance of attorneys who have defended persons charged with capital murder in Virginia been adequate?
- Has the performance of attorneys who have represented capital murder defendants in the appellate and/or post-conviction phases of capital murder cases in Virginia been adequate?
- How do the Public Defender's Commission and the Virginia State Bar monitor the performance of attorneys who are selected to handle capital murder cases in Virginia? Are attorneys whose performance has not been adequate subsequently removed from the list of "qualified" attorneys maintained by the Commission for capital murder cases?
- What proportion of attorneys who are selected for capital murder cases by judges are not on the list of "qualified" attorneys? How does the performance of these attorneys compare to those who are selected from the list maintained by the Commission?
- Are the fees that are paid to attorneys at both the trial and post-conviction phases of capital murder cases sufficient to ensure that indigent defendants receive quality representation?
- What, if any, barriers do attorneys for indigent persons face in their efforts to mount a defense to the capital murder charges faced by their clients?

The Virginia State Crime Commission has initiated a study of the quality of legal representation received by defendants in criminal cases, including

those persons who have been charged with capital murder. This study will likely yield some information on the quality of representation provided in capital murder cases.

REPORT ORGANIZATION

The remaining chapters of this report present the results of JLARC's staff review of the administration of the death penalty in Virginia. Chapter II presents the study findings regarding the use and impact of prosecutorial discretion for persons who are arrested for capital-eligible offenses. Chapter III discusses the outcomes of Virginia's appellate review process for persons who have been sentenced to die.

II. Prosecution of Capital-Eligible Cases

The discretion allowed Commonwealth's Attorneys in prosecuting capital cases is a hallmark of Virginia's criminal justice system. As the following quote from Virginia Criminal Law and Procedure indicates, both custom and statute provide the basis for this exercise of prosecutorial discretion even in the most serious of criminal cases:

Statutes and custom have vested in the Commonwealth's attorney power over the charging process which is nearly unfettered. This power includes the decision to charge or not, and the decision about which crimes to charge after the first decision is made. Thus, statutes may vest in that officer the power to decide whether to charge a capital offense or not; and the power to decide to charge one coactor with a capital offense and the other with another type of homicide.

Thus, when presented with a murder case that contains the statutory elements of capital murder, the local prosecutor has the sole authority to decide whether to seek a capital murder indictment, and if successful, argue for the death penalty. Conducted within the framework of the statutory reforms that were put in place by the General Assembly in the mid 1970s, Commonwealth's Attorneys insist that the use of discretion is essential to a fair judicial process and that this is all the more so in capital cases because the stakes involve the defendant's life.

Opponents of capital punishment acknowledge the value of the reforms that overhauled the State's capital punishment system, as well as the continuing need for the proper exercise of prosecutorial discretion. Still, despite the reforms, some critics maintain that many death prosecutions in Virginia remain racially tinged. Equally damaging to the integrity of the system, they

argue, is the arbitrary application of prosecutorial discretion. Due to what they perceive as an uneven application of the death penalty statutes, critics of the system contend that many of the cases in which the death penalty is pursued are virtually indistinguishable from cases where it is not.

The Joint Legislative Audit and Review Commission requested its staff to examine the prosecution of capital-eligible cases as part of a larger review of capital punishment. As a part of this analysis, an assessment is made of the outcomes associated with the decisions Commonwealth's Attorneys make when contemplating how they should proceed in prosecuting persons who are charged with crimes that qualify as capital murder.

The results presented in this study offer a mixed picture of Virginia's capital punishment system. On the one hand, the findings clearly indicate that local prosecutors do not base the decision of whether to seek the death penalty in capital-eligible cases on the race of the defendant or the race of the victim. Overall, JLARC staff found that white defendants who committed capital-eligible offenses were more likely to be indicted for capital murder and face prosecution as a death case than their black counterparts. Defendants who murdered white victims were also more likely to be indicted for capital murder and face prosecution than are defendants who murdered black victims. However, once factors are considered which relate to the size of the locality in which the offense was perpetrated, the circumstances of the capital murder, and the relationship between the defendant and the victim, race appears to play no role in the decision-making process of Commonwealth's Attorneys.

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. The findings of this study are equally clear that local prosecutors do not consistently apply the death penalty statutes based on these factors. Cases that are virtually identical in terms of the premeditated murder and predicate offense, the associated brutality, the nature of the evidence and the presence of the legally required aggravators are treated differently by some Commonwealth's Attorneys across the State.

Still, it must be noted that the presence of widespread inconsistency in the system does not mean that the State is executing persons who are innocent of the crime for which they were sentenced. In fact, for the majority of capital-eligible cases reviewed by JLARC staff, the evidence of guilt appeared overwhelming, often including oral or written confessions, forensic evidence implicating the accused, and sometimes eyewitnesses to the actual crime. However, the rather uneven application of the statutes observed in this study calls into question the equity of the application of the death penalty in Virginia and raises significant policy questions that defy a simple solution.

USE OF DISCRETION BY COMMONWEALTH'S ATTORNEYS IN PROSECUTING CAPITAL-ELIGIBLE CASES

Under current Virginia law, Commonwealth's Attorneys have a considerable amount of authority in determining whether to seek the death penalty in homicide cases that meet the statutory requirements of capital murder.

The major question surrounding the prosecution of capital-eligible cases is whether Commonwealth's Attorneys wield their discretionary authority in a way that is appropriate, fair, and consistent given the facts of the relevant premeditated murder cases.

This study found that since parole was abolished in Virginia, Commonwealth's Attorneys have indicted for capital murder nearly eight out of every ten persons who were arrested for a capital-eligible crime. Overall, the rates of indictment were highest for those persons whose predicate offenses involved rape (96 percent), defendants who were accused of murdering a female (91 percent), and for persons who were charged with committing their crimes in either low-density, typically rural localities (85 percent), or medium-density, mostly suburban jurisdictions (85 percent).

Based on the findings of this study, concerns that Commonwealth's Attorneys are more likely to bring a capital murder indictment against black persons who are arrested for a qualifying offense are unwarranted. Overall, white defendants who were charged with a capital-eligible offense were more frequently indicted for capital murder than were black defendants. Further, a more detailed analysis conducted in this study indicates that when a number of factors specific to the circumstances of these cases are considered, the apparent racial disparity against whites disappears.

Alternatively, when the analysis examined the decision of whether prosecutors chose to actually seek the death penalty throughout the adjudication process, the results were similar. Location, more than any other factor, impacted

the probability that prosecutors would actually seek the death penalty for capital murder cases. Most notably, statewide, prosecutors in high-density, mostly urban areas sought the death penalty for only 16 percent of their capital-eligible cases. By comparison, Commonwealth's Attorneys in medium-density localities pursued the death penalty in approximately 45 percent of these cases. As there are often no major differences in the types of capital cases that occur across the State, those cases in which the prosecution sought a death sentence shared many similarities with those in which a death sentence was not sought.

Commonwealth's Attorneys are More Likely to Seek a Capital Murder Indictment When the Murder Victim Is a Female and the Crime Is Committed in a Non-Urban Jurisdiction

Commonwealth's Attorneys are the initial gatekeepers to Virginia's system of capital punishment. As such, they must first decide whether a person who is arrested for a crime that meets the statutory requirements for capital murder will be indicted for capital murder or face a lesser charge. This section of the chapter examines the charging decision made by Commonwealth's Attorneys for all persons who were arrested for a capital-eligible crime that was committed in the five-year period from 1995 to 1999. As noted in Chapter I, JLARC staff's definition of a capital-eligible crime was as follows:

- An arrest resulting in a capital murder indictment, or
- An arrest resulting in a first-degree murder indictment where all of the elements necessary to qualify the offense for a capital murder indictment were present.

Comparison of Cases Resulting in a Capital Murder Indictment to Cases Resulting in a Non-Capital Indictment. To examine prosecutorial

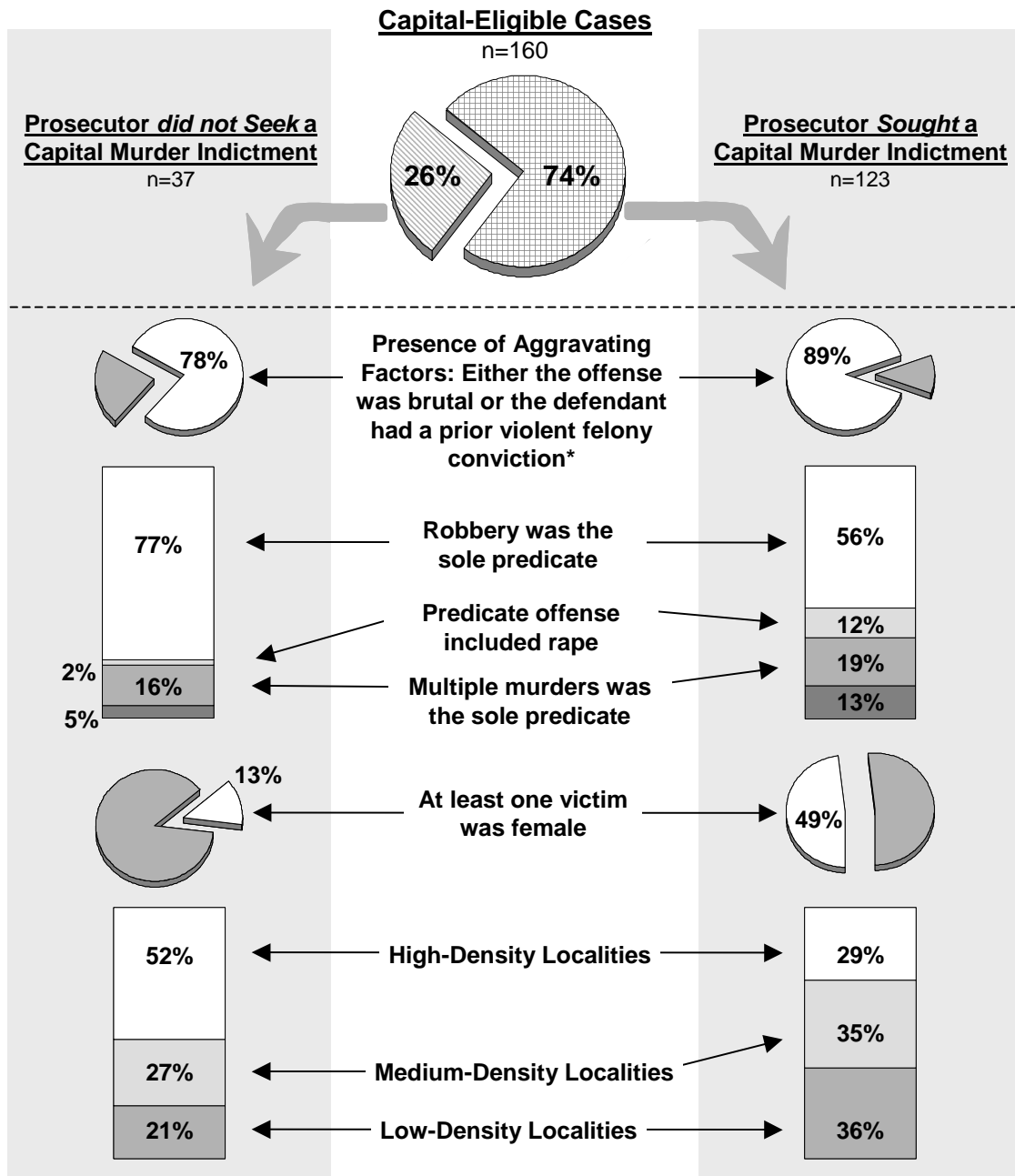
discretion in seeking a capital murder indictment, JLARC staff first compared cases where the prosecutor filed a capital murder indictment to cases where an indictment for first-degree murder was filed. The results of this comparison for capital-eligible cases in the study sample are presented in Figure 10. As shown, a higher percentage of the cases resulting in a capital murder indictment were multiple murders (19 percent) or involved rape (12 percent). In addition, a higher percentage of cases occurred in medium-density jurisdictions (35 percent of capital indictments; 27 percent of non-capital indictments), and involved female victims (49 percent of capital indictments; 13 percent of non-capital indictments).

Capital Murder Indictment Rates by Locality, Crime, and Race. To supplement the information collected from the file reviews, JLARC staff conducted a survey of Commonwealth's Attorneys regarding their handling of capital-eligible cases. One of the questions on the survey asked Commonwealth's Attorneys to indicate their approach for seeking an indictment for capital murder when the facts alleged in the arrest files supported such a charge. Reflecting the varying practices of these prosecutors statewide, 60 percent indicated that they *always* seek a capital murder indictment when the elements of the offense warrant the charge. In contrast, 38 percent indicated that they *sometimes* seek a capital murder indictment, while two percent declared that they *never* seek such an indictment.

Some evidence of this variation can be seen when statewide data on the indictment rates for capital-eligible crimes are presented by type of

Figure 10

A Comparison of Case Characteristics, Based on the Prosecutor's Decision to Seek a Capital Murder Indictment



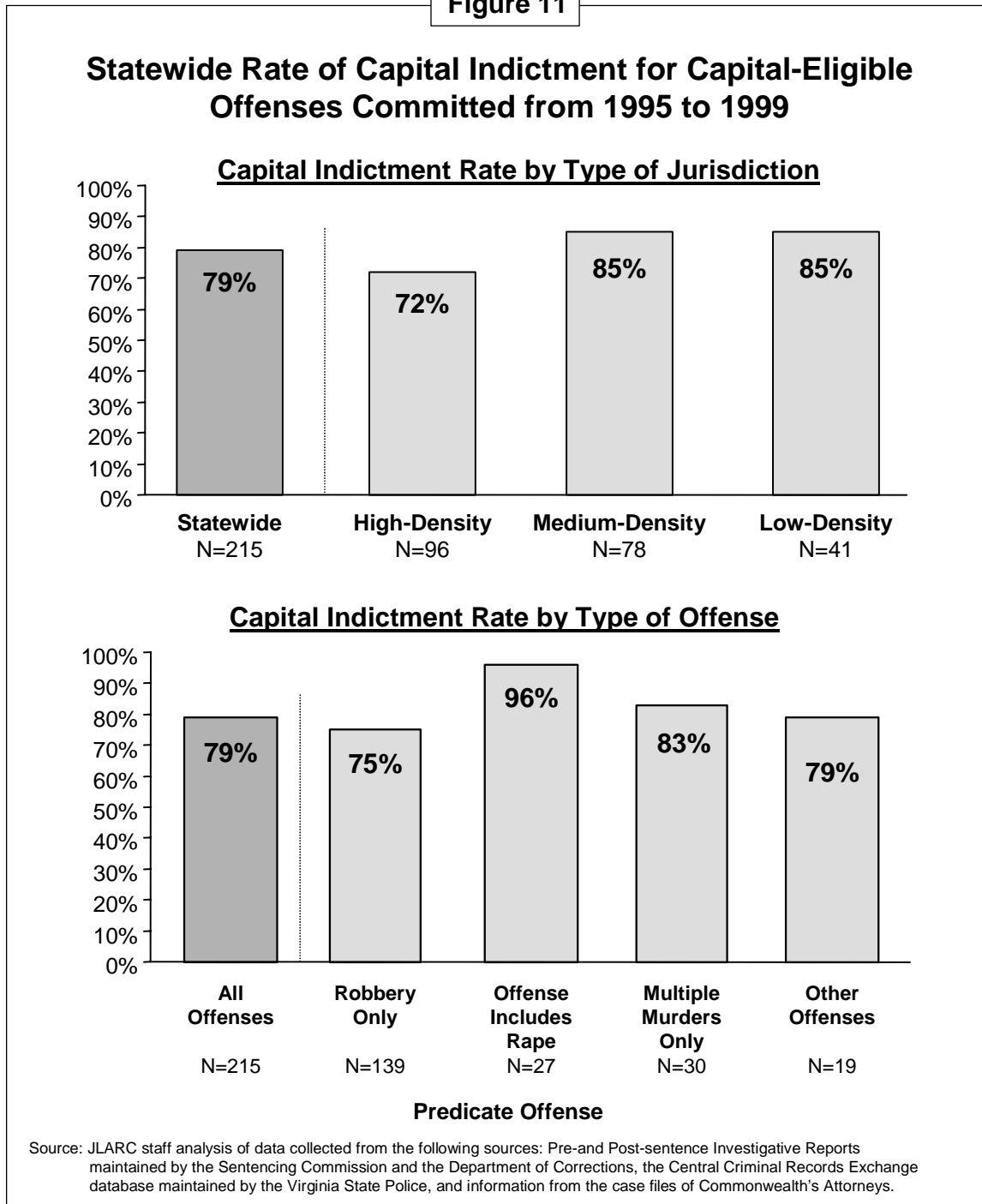
Note: Percentages are based on weighted observations as described in Chapter I. Total number of unweighted cases =160. Sampling errors and results of statistical tests for these estimates are reported in Appendix C. *JLARC staff developed a measure of the brutality of the crime and a measure whether the defendant had a history that included violence as proxy measures for vileness and future dangerousness

Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the Central Criminal Records Exchange database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

jurisdiction. The top half of Figure 11 reports the indictment rates by the size of the jurisdiction (based on population density) in which the offense occurred. As shown, 79 percent of all persons who were arrested for a capital-eligible offense committed from 1995 to 1999 were indicted for capital murder. Overall there were differences in the rates generated by prosecutors in high-density localities compared to their colleagues in smaller jurisdictions. Specifically, Commonwealth's Attorneys who represent high-density urban areas sought indictments for capital murder 15 percent less than those for low- and medium-density localities.

The bottom half of the graphic illustrates the capital indictment rates for the predicate offense which elevated the premeditated murder to capital murder. If the predicate offense that qualified the crime as capital murder included rape, the capital indictment rate was 96 percent. Persons who committed robbery as the predicate, were indicted at a rate of 75 percent. Defendants charged with killing more than one person were indicted 83 percent of the time.

In interviews with JLARC staff, some Commonwealth's Attorneys from high-density areas cited a number of reasons for their lower rates. However, the most common reason was the perceived reluctance of juries in high-density localities to impose death sentences in capital-eligible cases. These attorneys noted that in capital cases, urban jurors are generally reluctant to vote in favor of an execution and will sometimes impose a much higher burden of proof on the prosecution. As a result, these prosecutors indicated that they generally prefer to seek a conviction for first-degree murder.

Figure 11

This has been especially true since parole was abolished by the General Assembly in 1995. Now, without the possibility of an early release from prison (except under the limited geriatric parole provisions), the distinction

between punishments for someone who is convicted of first-degree murder and sentenced to life in prison, compared to the defendant who is found guilty of capital murder and sentenced to life without the possibility of parole is insignificant.

Even when faced with “more difficult” juries, several Commonwealth’s Attorneys from high-density areas stated that in deciding whether to seek a capital murder indictment, they are influenced by the nature of the victim. According to these prosecutors, defendants who are charged with a capital-eligible murder involving victims with whom juries are likely to sympathize will usually be indicted for capital murder. This might explain why 91 percent of all persons in the JLARC study sample who were charged with a capital-eligible crime in which at least one of the victims was a female were indicted for capital murder. When the victim was male, the capital murder indictment rate was 63 percent.

In the terms of the race of the defendant, the disparities that have been historically associated with the use of capital punishment in Virginia have been well documented. Notwithstanding the reforms mandated by the United States Supreme Court to address this problem, the criticism persists that Virginia’s system of capital punishment unfairly targets black defendants. Accordingly, one of the goals of this study was to assess the degree to which race appears to play a role in the decision of local prosecutors to indict for capital murder. It should be noted that the review does not account for arrest rates which result in a higher total number of black defendants arrested for capital-eligible offenses.

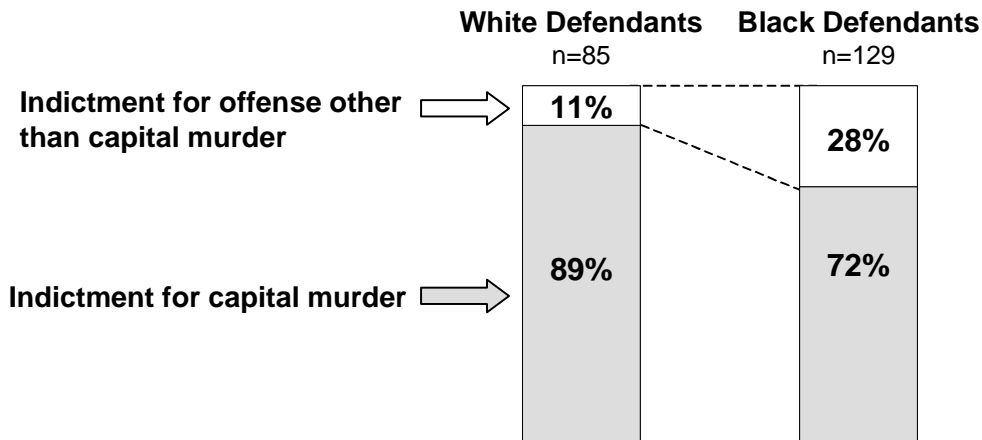
Based on the figures presented in Figure 12, there is no reason to believe that prosecutors are more willing to indict black persons who are arrested for capital murder than whites. In fact, contrary to widely held views, white persons who are arrested for capital-eligible offenses faced a higher capital murder indictment rate than blacks. Specifically, nearly nine out of every ten white persons arrested for a capital-eligible offense were subsequently indicted for capital murder. This is substantially higher than the rate witnessed for black defendants (72 percent).

The differences observed between cases resulting in a capital murder indictment and cases resulting in a non-capital indictment as well as the differences in the rate at which prosecutors seek a capital murder indictment raise several important questions: What factors are most strongly associated with the prosecutor's decision to indict someone for capital murder? Are these factors specific to the case (such as the vileness of the crime); are they largely external (such as type of jurisdiction); or, do they represent extra-legal factors (such as the defendant's race)?

To address these questions, JLARC staff specified a multivariate model. Because the dependant variable for this model is dichotomous (1 = yes, the defendant was indicted for capital murder, 0 = no, the defendant was not indicted capital murder), the statistical technique of logistic regression was used to examine how several factors collectively influence the decision to obtain a capital murder indictment. The factors included in the analysis were those presented in Figure 10, as well as case-specific factors (such as evidence of

Figure 12

Statewide Rate of Capital Murder Indictment for Capital-Eligible Crimes Committed in Virginia from 1995 to 1999



Note: N=214, there is one defendant of Asian descent who is not included in the analysis.

Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the Central Criminal Records Exchange database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

guilt), which prosecutors consistently argue play a role in their decision making, and extra-legal factors (race of the defendant and victim) that some critics suggest inappropriately influence prosecutorial discretion.

The results clearly indicate that race of the defendant and victim were not significant in determining the probability that local prosecutors would seek a capital murder indictment, after the influence of other factors are considered. However, none of the case-specific factors in the model were significant (Table 6). The only factors that were significant were the gender of the victim and the type of locality in which the offense was committed.

The odds-ratios, which are reported in the table, provide another means for summarizing the data in that they represent the predicted odds that a prosecutor will seek an indictment for a given factor, after controlling for the other

Table 6 Variables for the Multivariate Analysis of Factors Associated with the Prosecutors Decision to File a Capital Murder Indictment			
<u>Dependant Variable</u>	<u>Standardized Parameter Estimates</u>	<u>Odds Ratio</u>	<u>Significance Level</u>
Indicator of whether the local prosecutor indicted the defendant for capital murder 1=Yes 0=No			
<u>Case-Specific Factors</u>			
DNA implicates the defendant	0.0965	1.436	0.4624
Eyewitness	0.0722	1.299	0.5788
Evidence of aggravating factors	0.0162	1.090	0.8771
Offense involves rape	0.0888	1.714	0.6624
<u>Extra-legal Factors</u>			
Black defendant	-0.0721	0.769	0.6130
White victim	-0.0607	0.803	0.6578
Female victim *	0.4994	6.314	0.0025
<u>External Factor</u>			
High-density locality *	-0.2286	0.420	0.0728
Low-density locality	0.1082	1.519	0.4660
Notes: The multivariate model, whose unit of analysis is each capital-eligible case in the study sample, is significant at the .0001 level. N=159, as one case where the defendant was of Asian descent was removed from the analysis. * Statistically significant.			
Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the CCRE database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.			

variables in the model. As shown, defendants arrested for committing a capital-eligible crime in a high-density locality had a 58 percent lower odds ($100 - 42 = 58$) of being indicted for capital murder than those who were charged with committing an otherwise similar capital-eligible offense in a medium-density jurisdiction. Most notably, if the defendant was charged with a capital murder in which at least one of the victims was female, their odds of being indicted for

capital murder were over six times greater than for those defendants whose alleged victims were all male (odds ratio = 6.3).

The Decision by Commonwealth's Attorneys to Seek the Death Penalty Is Most Strongly Associated with an External Factor: the Location of the Offense

The next goal of this analysis was to determine how those capital-eligible cases in which the prosecutor sought the death penalty throughout the adjudication process differed from those capital-eligible cases in which they did not. To accomplish this, JLARC staff identified the number of cases in which prosecutors sought the death penalty throughout the entire adjudication process as a percent of all capital-eligible cases. Here it is important to note that JLARC staff included in this analysis those capital-eligible cases in which a capital murder indictment was filed as well as those capital-eligible cases in which the prosecutor chose to file a first-degree murder indictment.

In conducting this aspect of the analysis, JLARC staff had to categorize each case in the study sample as a "death" or "non-death" case. This was accomplished using the following classification strategy based on a review of court files and interviews with Commonwealth's Attorneys:

- "Death cases" were identified as those cases in which the defendant was convicted of capital murder and received a sentencing hearing in which the prosecutor asked the judge or jury for a sentence of death; or cases where the prosecutor death-qualified the jury in preparation for the penalty phase of the trial, but the defendant was either acquitted or convicted of a lesser charge.
- "Non-death cases" were defined as those capital-eligible cases: where the defendant was indicted for capital murder but the local prosecutor informed the court that he would not be seeking the death penalty; where the

defendant was indicted for first-degree murder (when the elements of capital murder were present); or where a plea agreement was reached prior to conviction.

In cases where the local prosecutor did seek a capital murder indictment, but where the records in the files did not offer clear and convincing evidence as to whether the Commonwealth's Attorney was seeking the death penalty, JLARC staff collected this information through interviews with the attorneys who prosecuted the cases.

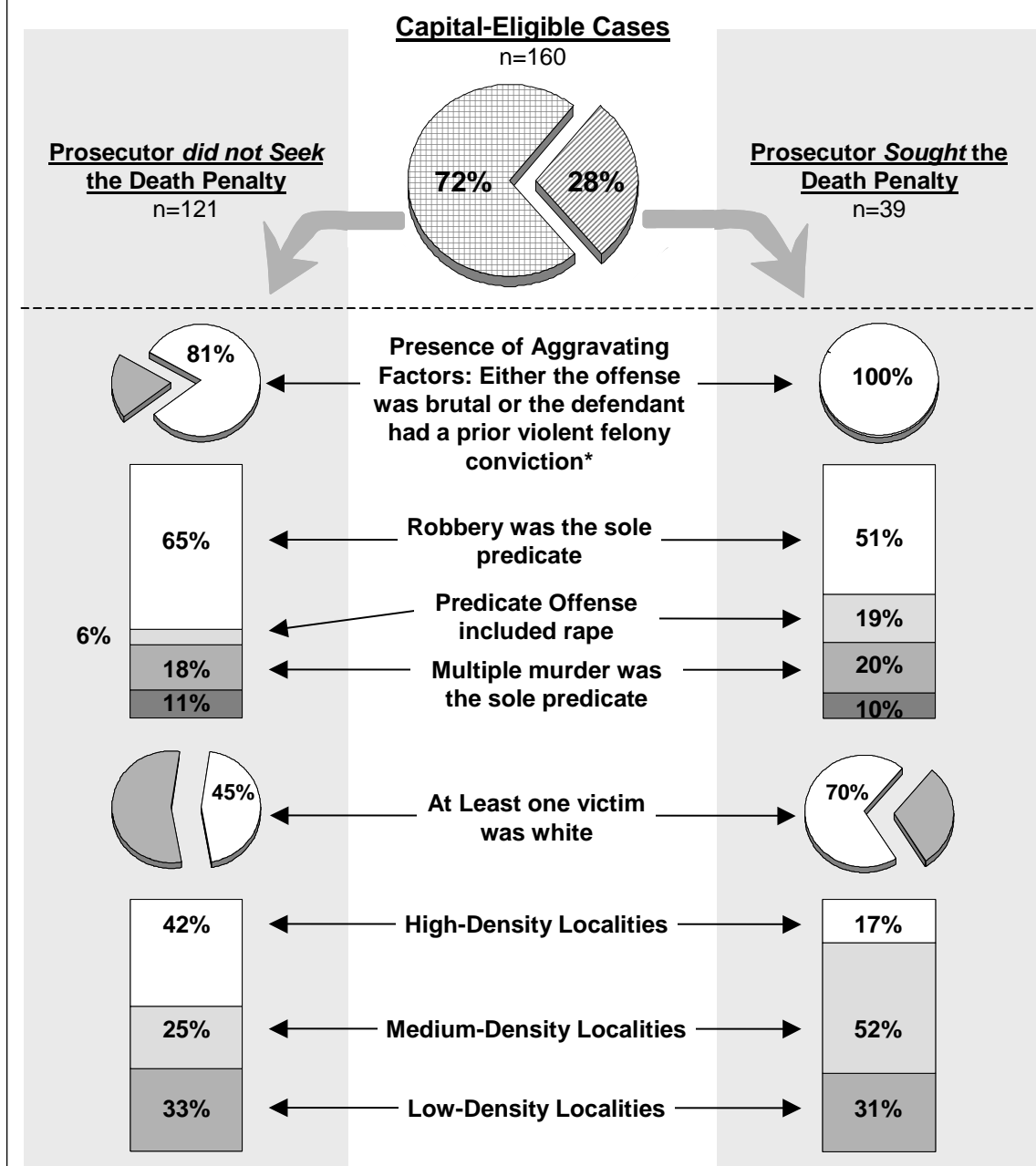
Comparison of Death Cases to Non-Death Cases. JLARC staff first compared cases where the prosecutor sought the death penalty to cases where the prosecutor did not seek the death penalty. To conduct this analysis, JLARC staff relied on cases in the study sample. An examination of these cases reveals that in 28 percent of the cases in the sample, the prosecutor argued for the death penalty. When a comparison of these cases is made with non-death cases, a number of differences were observed.

Specifically, a substantially larger portion of the death cases involved rape (19 to 6 percent), a higher portion of the victims in the death cases were white (70 to 45 percent), and the cases were significantly more likely to be located in medium-density jurisdictions (52 to 25 percent), as shown in Figure 13.

Not surprisingly, in 100 percent of the cases where the prosecutors decided to seek the death penalty, the aggravators of vileness or future dangerousness, (which are needed to secure a sentence of death), were present. It is important to note that these factors were also present in eight out of every 10 cases where prosecutors decided not to seek the death penalty. In

Figure 13

A Comparison of Case Characteristics, Based on the Prosecutor's Decision to Seek the Death Penalty throughout the Adjudication Process



Note: Percentages are based on weighted observations as described in Chapter I. Total number of unweighted cases =160. Sampling errors and results of statistical tests for these estimates are reported in Appendix C. *JLARC staff developed a measure of the brutality of the crime and a measure whether the defendant had a history that included violence as proxy measures for vileness and future dangerousness

Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the Central Criminal Records Exchange database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

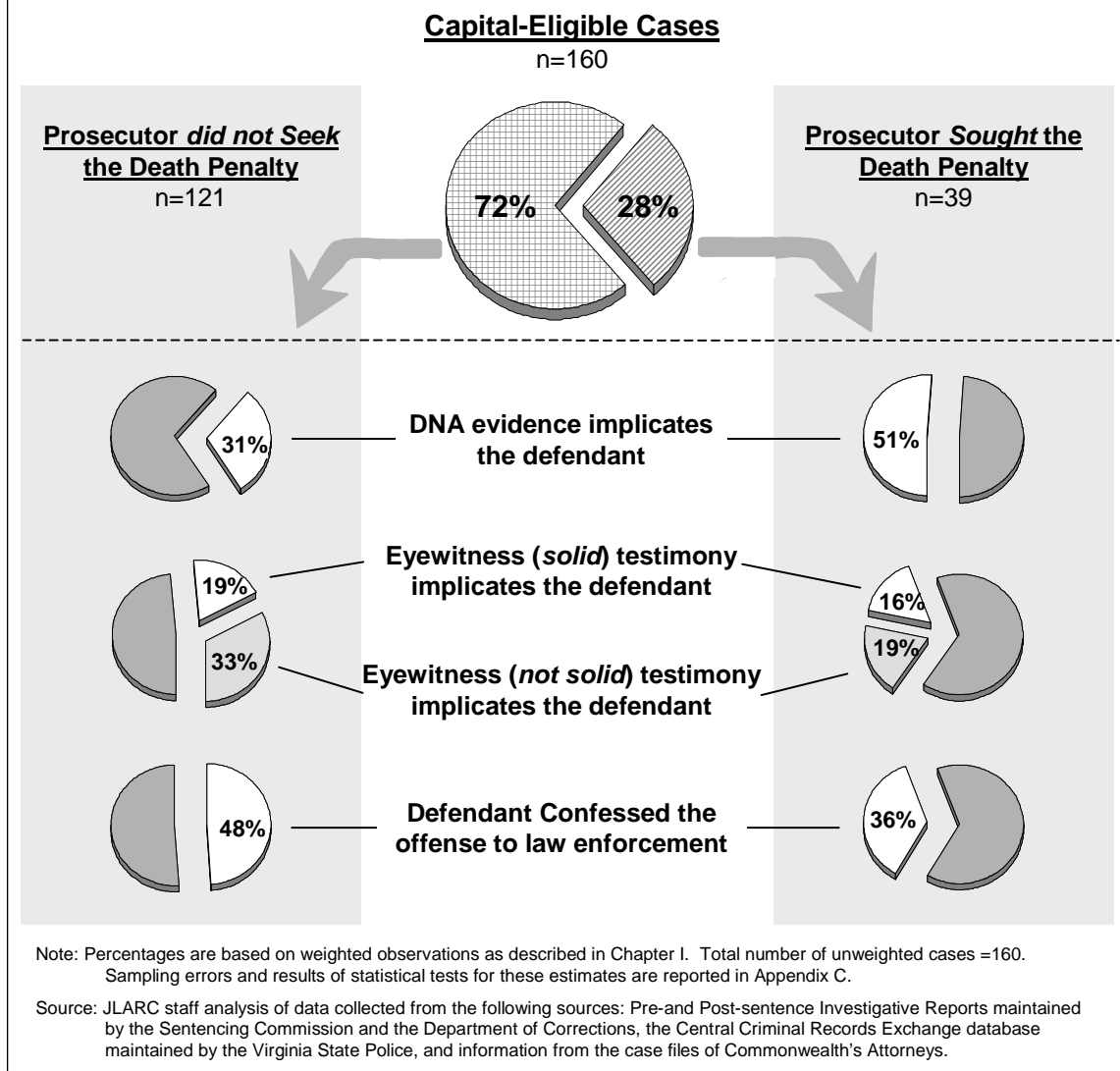
developing measures of the two aggravating factors -- vileness and future dangerousness -- JLARC staff conducted interviews with Commonwealth's Attorneys. Based on these interviews, only certain types of murders were considered brutal (see the data collection instrument in Appendix D). For future dangerousness, defendants who had a history that included violence against persons were classified as meeting the criteria for this aggravator.

According to some prosecutors who were interviewed by JLARC staff, the nature of the evidence is one of the most important factors they consider when deciding whether to seek the death penalty. While the nature of the evidence is always a factor in criminal cases, some prosecutors stated that juries impose an even higher standard in this area when prosecutors indicate they will be seeking the death penalty. This analysis revealed that DNA evidence was present in more than half (51 percent) of the cases where the prosecutors sought the death penalty (Figure 14). This compares to 30 percent for cases in which the death penalty was not pursued.

Still, the existence of other key measures of evidence -- eyewitness testimony, defendant confessions -- did not increase the likelihood that prosecutors would seek the death penalty. In fact, this type of evidence was available in a larger percentage of cases in which prosecutors did not seek the death penalty. This provides the first indication that evidence may not play as critical of a role in distinguishing death cases from non-death cases as is often proffered.

Figure 14

A Comparison of the Nature of the Evidence, Based on the Prosecutor's Decision to Seek the Death Penalty throughout the Adjudication Process

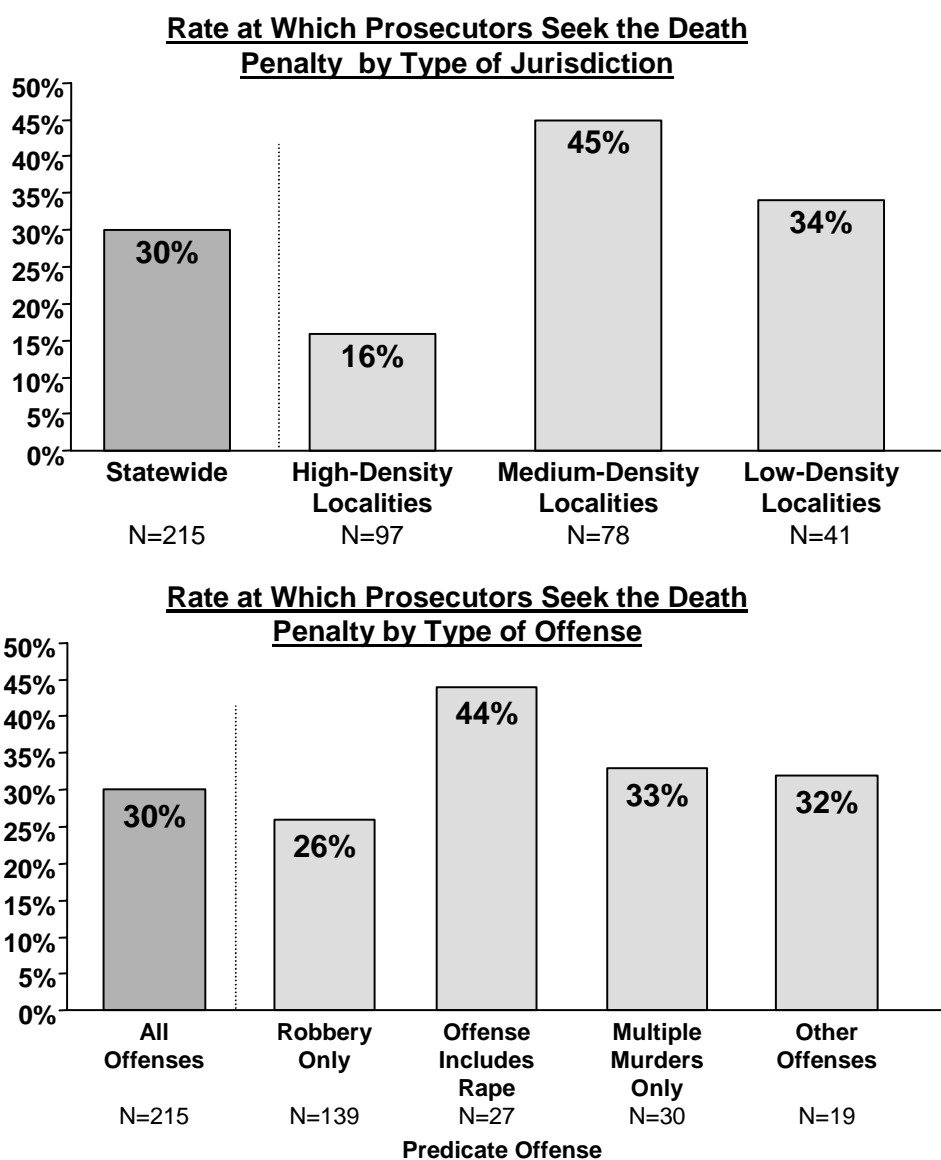


Death Prosecution Rates by Locality, Crime, and Race. The next step in the analysis was to look at the rate at which prosecutors decide to seek the death penalty based on several factors, including the locality of the offense, the type of crime, and the race of the defendant.

The data presented in Figure 15 illustrate the death prosecution rates for all capital-eligible cases controlling for the type of jurisdiction and the type of predicate offense. Statewide, prosecutors sought the death penalty in 30 percent

Figure 15

Statewide Rate at Which Prosecutors Seek the Death Penalty in Capital-Eligible Offenses Committed from 1995 to 1999



Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the Central Criminal Records Exchange database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

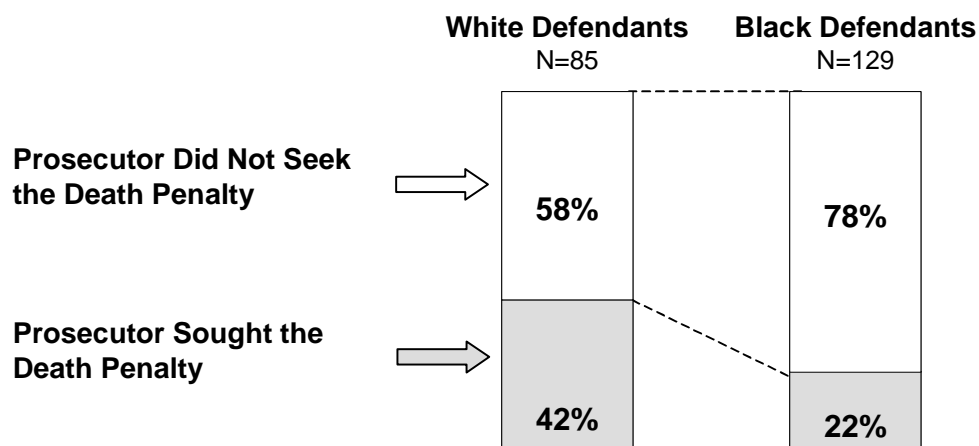
of the capital-eligible offenses committed between 1995 and 1999 for which there was an arrest. As shown, persons who committed capital-eligible offenses in high-density localities faced death penalty prosecutions at a lower rate (16 percent) than persons committing capital-eligible offenses in medium- and low-density localities (45 percent and 34 percent respectively). In addition, prosecutors sought the death penalty at a higher rate for offenses that involved rape (44 percent) and multiple murders (33 percent) than for offenses that qualified for capital murder based solely on the predicate offense of robbery (26 percent).

As with the decision to indict defendants for capital murder, whether the race of the defendant plays any role in the decision of prosecutors to seek the death penalty is a public policy concern. Although this study has shown that race does not impact the decision-making process pertaining to indictments, whether a prosecutor actually decides to pursue the death penalty is a separate point of discretion with implications that are far more serious for the Commonwealth and the defendant. Once a defendant is indicted for capital murder, prosecutors are not bound to seek the death penalty. Therefore, even in a system in which race was not a consideration in the decision to indict, it is possible that black defendants could, nonetheless, face prosecution as a “death case” at a higher rate than non-blacks.

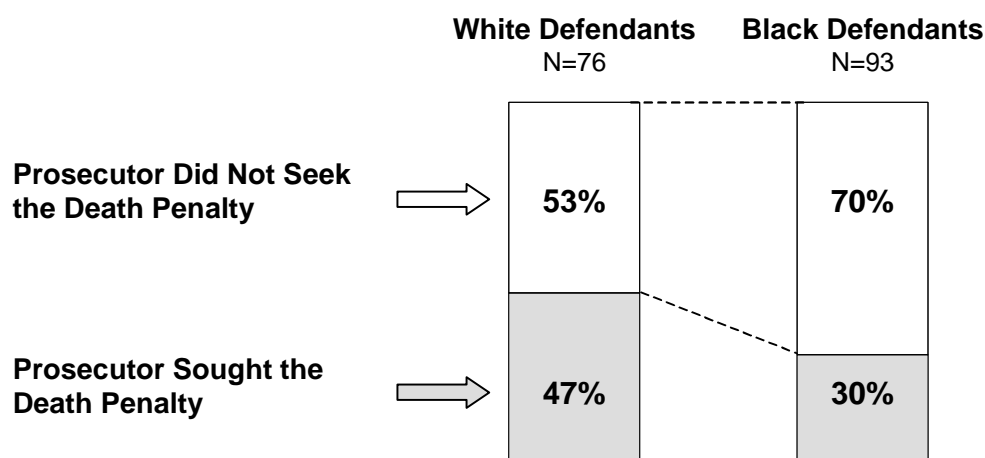
In the top half of Figure 16, the statewide rate at which prosecutors sought the death penalty, controlling for the race of defendants who were arrested for a capital-eligible offense is presented. While there were significant

Figure 16

**Statewide Racial Differences in the Rate at Which
Prosecutors Sought the Death Penalty for Persons who were
Arrested for a Capital-Eligible Offense, 1995 to 1999**



**Statewide Racial Differences in the Rate at Which
Prosecutors Sought the Death Penalty for Persons who Were
Indicted for Capital Murder, 1995 to 1999**



Note: N=214, as there is one defendant of Asian descent who is not included in this analysis.

Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the Central Criminal Records Exchange database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

differences in the outcomes according to race, the 42 percent rate for white defendants was substantially higher than the rate observed for blacks (22 percent). If the rates are calculated only for those defendants who were actually

indicted for capital murder (see bottom of Figure 16), the previously observed racial differences diminish, but white defendants still more frequently faced a death prosecution than similarly situated blacks (47 percent to 30 percent). On its face, this outcome appears to suggest a racial bias against white defendants in the decision to seek the death penalty in capital cases. However, these are unadjusted rates; as such they do not reflect the influence of other factors that are associated with the decision by prosecutors to seek the death penalty.

Therefore, as was the case with the findings concerning defendant's race and the decision to indict, it is possible that the association observed here between race and the decision to seek the death penalty is actually a spurious reflection of a third factor such as crime type. If so, when this third variable is accounted for, the association between race and the prosecutors' decision to seek the death penalty will disappear.

To examine this theory, JLARC staff selected only those death-eligible cases – cases where either the aggravator of vileness or future dangerousness was present. These cases where at least one aggravator was present were included in this analysis even if the Commonwealth's Attorney did not file a capital murder indictment. In conducting the analysis, a logistic regression model was estimated similar to the one developed in the previous analysis of capital murder indictment rates. In this model, however, the dependent variable had a value of "1" if the prosecutor sought the death penalty and a value of "0" if the prosecutor chose not to seek the death penalty.

The results of the model, which are presented in Table 7, again show that neither the race of the defendant nor the race of the victim determined whether a local prosecutor sought the death penalty. Rather, it suggests that two factors impacted the probability that a prosecutor would seek the death penalty: (1) the relationship of the victim to the defendant; and (2) the location where the crime occurred.

Table 7 Variables for the Multivariate Analysis of Factors Associated with the Prosecutors Decision to Seek the Death Penalty			
Dependant Variable	Standardized Estimate	Odds Ratio	Significance Level
Indicator of whether the local prosecutor argued for the death penalty in cases where either of the aggravators were present 1=Prosecutor argued for the death penalty 0=Prosecutor did not argue for the death penalty			
Case-Specific Factors			
Offense involved rape	0.0171	1.100	0.8938
DNA implicated the defendant	0.0644	1.264	0.6509
Eyewitness testimony implicated defendant	-0.0555	0.821	0.7087
Extra-legal Factors			
Black defendant	0.0219	1.081	0.9417
White victim	0.3261	3.188	0.2726
Black defendant AND White victim	0.0179	1.090	0.9426
Female victim	0.0939	1.400	0.5435
Victim Characteristics			
Victim was of solid character	0.2105	2.226	0.3011
Victim was related to or intimate with the defendant*	-0.3600	0.217	0.0192
Victim was a drug acquaintance of the defendant	-0.2378	0.345	0.2299
Victim was a stranger to the defendant	-0.1411	0.573	0.3316
External to Case			
High-density locality*	-0.5391	0.126	0.0004
Low-density locality*	-0.3700	0.249	0.0144
Notes: The multivariate model, whose unit of analysis is each capital-eligible case in the study sample, is significant at the .0001 level. N=133. * Statistically significant			
Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the CCRE database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.			

As the results from the model indicate, when defendants murdered members of their own family, there was a 78 percent lower probability that the local prosecutor would ask for the death penalty than if the victim and defendant knew each other but were not related ($100 - 21.7 = 78.3$). The deference that prosecutors give to the wishes of the victim's family is a likely reason for this outcome. Some prosecutors indicate that in the case of relationship murders, surviving family members will often urge the prosecutor to eschew the use of capital punishment to spare the life of a relative. In some of these cases, prosecutors will abide by the wishes of the family and resolve the homicide in a manner that removes the death penalty as a sentencing option.

The location of the offense has the strongest effect on the probability that a person who commits a capital-eligible offense will face the possibility of the death penalty. The analysis reveals that prosecutors in high-density areas were 87 percent less likely to seek the death penalty in any given case than a prosecutor in a medium-density locality ($100 - 12.6 = 87.4$). Along the same lines, prosecutors in low-density, mostly rural jurisdictions were over 75 percent less likely to argue for death than their counterparts in medium-density localities ($100 - 24.9 = 75.1$).

While the odds ratios appear to indicate that prosecutors are over three times more likely to seek the death penalty if the victim is white, this result is not statistically significant and therefore cannot be treated as a reliable predictor of whether a prosecutor will seek the death penalty.

Another way to interpret the results of this analysis is by examining the predicted probability that a prosecutor will seek the death penalty in a given case. As an example, JLARC staff calculated the probability that a defendant who committed a robbery-murder, where the defendant and victim were black, the victim was a stranger and there was no DNA evidence or eyewitness testimony implicating the defendant, would face a death penalty prosecution based on where the offense occurred. As Table 8 illustrates, when all case characteristics are held constant, the probability of the perpetrator in such a case facing a death penalty prosecution changes substantially based on location.

Table 8 Predicted Probability that the Defendant will Face a Death Penalty Prosecution in a Murder Robbery Case			
	<u>High-Density Locality</u>	<u>Medium-Density Locality</u>	<u>Low-Density Locality</u>
Predicted probability	10%	46%	17%
Source: Predicted probabilities are based on the results of estimating the logistic regression model presented in Table 7.			

Significant Inconsistencies Are Evident in the Statewide Application of Capital Punishment in Virginia

As revealed in the previous analysis, there are factors external to the circumstances of the crime that determine whether a local prosecutor will argue for the death penalty in any given case. The question, then, is whether this has implications for the fairness of how capital punishment is administered in Virginia. Critics would argue that any system that allows cases to be treated differently that are virtually identical on the facts and evidence is unjustifiably inconsistent, even if the reasons for the inconsistency are not rooted in racial bias.

Most prosecutors would contend that no two cases are alike and therefore should be treated differently. Moreover, they would further suggest that individual prosecutors face external circumstances -- willingness of juries to impose death, wishes of the victim's family -- that must be taken into account when decisions are made about whether to seek the death penalty in capital-eligible cases. Because these external circumstances are likely to vary, some prosecutors contend that consistent outcomes should not be expected. This section of the chapter examines how prosecutors treat capital-eligible cases that appear similar on the major facts surrounding the cases.

To accomplish this analysis, JLARC staff stratified the study sample of capital-eligible cases into three categories -- high-density, medium-density, and low-density jurisdictions. Next, within each of these categories, cases were grouped based on similarities in the type of the offense, the evidence of guilt and the presence of aggravating factors. For each group of cases, these factors are described and the discretionary decisions of the local prosecutors are reported.

The first case example illustrates three capital-eligible cases involving multiple victims who were family members of the persons charged with the premeditated murders (Exhibit 1). As discussed in Column B, the defendant in a high-density locality, brutally murdered his mother, father and grandfather, leaving their bodies in a bomb shelter. Despite overwhelming evidence against the defendant, the local prosecutor decided not to seek the death penalty and, instead, charged the defendant with three counts of first-degree murder. One of

Exhibit 1

Case Example

Column A – Low-Density Locality

A white male killed his ex-wife's sister and boyfriend by shooting them in the head while they sat in their car because they would not tell him where he could find his ex-wife and one of his sons. The defendant murdered both of the victims while his eldest son sat next to him in his car.

Evidence of Guilt

The defendant's son testified as an eyewitness to the offense. There also were other witnesses to the circumstances of the offense.

Evidence of Aggravation

One victim was shot once in the head. The second victim suffered multiple gunshot wounds.

The defendant had prior rape convictions.

The local prosecutor argued for the death penalty

Column B – High-Density Locality

A white male murdered his mother, father and grandfather by stabbing them and slashing their throats. He placed their bodies in a bomb shelter outside of their home and fled.

Evidence of Guilt

When in custody, the defendant confessed to a law enforcement officer, DNA implicated him, and there was a witness who heard him admit to the offense, though she gave conflicting stories.

Evidence of Aggravation

Both victims were stabbed and their throats were slashed.

The defendant had no prior violent felony convictions.

The local prosecutor charged the defendant with three first-degree murder charges

Column C – High-Density Locality

A white male went to his ex-wife's home and fired a sawed-off shotgun through the front door, striking his ex-wife's boyfriend in the face. He entered the home and shot the boyfriend in the abdomen. He then tied up his ex-wife and held her hostage for several hours before executing her by shooting her in the back of the head with the sawed-off shotgun

Evidence of Guilt

When in custody, the defendant confessed to a law enforcement officer, DNA and ballistics evidence implicated him, and officers involved in the hostage negotiations were on site when the second victim was murdered.

Evidence of Aggravation

The first victim was shot multiple times. The second victim was held hostage for several hours before being executed.

The defendant had no prior violent felony convictions.

The local prosecutor charged the defendant with capital murder but did not ask for the death penalty

Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the Central Criminal Records Exchange database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

the main factors guiding his use of discretion in this case was the desire of the victims' family that their relative, the defendant, not be put to death by the State.

Considering the wishes of the victim's family is not impermissible, but prosecutors disagree on whether these sentiments should be reflected in their decision-making. For example, one prosecutor stated that the Commonwealth's Attorney does not represent the victim's family, but the community in which he was elected. Therefore, the decision to seek the death penalty should not turn on what the family wants, but what will ultimately protect and bring justice for the community.

As an illustration, this prosecutor decided not to seek the death penalty in the multiple murder case described in Exhibit 1, Column C. This decision was made despite pressure by the families of the victims who wanted the defendant to be executed for the murders. In making this decision, the prosecutor explained to the family that he did not perceive the crime to be "heinous" because the gunshots killed both victims instantaneously, and there was no evidence of future dangerousness because the defendant had no criminal record. However, one of the assistant prosecutors handling the case believed the crimes qualified on vileness and promised the family members that the State would pursue the death penalty. The assistant prosecutor's promise was vetoed.

Exhibit 2 shows two cases where the defendants brutally raped and murdered elderly women in their homes. In both cases, investigators were able to gather DNA evidence, and fingerprints from the crime scene. Evidence of aggravation consisted of strangulation in one case and strangulation and multiple

Exhibit 2

Case Example

Column A – Medium-Density Locality

A black male attempted to rape an elderly black woman and stabbed her to death in her home.

Evidence of Guilt

The defendant did not confess to the offense, however DNA and fingerprints evidence implicated him and there were several witnesses to the circumstances of the offense

Evidence of Aggravation

The victim was sexually abused and suffered multiple stab wounds and strangulation

The defendant had several prior violent felony convictions.

The local prosecutor argued for the death penalty

Column B – High-Density Locality

A white male raped and strangled to death an elderly white woman who let him into her home to prepare a meal for him. They were previously acquainted.

Evidence of Guilt

The accused confessed his offense to a law enforcement officer, DNA, fingerprint, and shoeprint evidence implicated him, there was a solid witness to the circumstances of the offense; and, a solid witness that heard the defendant admit to the offense.

Evidence of Aggravation

The victim was sexually abused and suffered strangulation.

The defendant had no prior violent felony convictions.

The local prosecutor entered into a plea agreement – defendant pleaded guilty to capital murder and received a life sentence

Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the Central Criminal Records Exchange database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

stabblings in the other. In the first case (described in Column A), the prosecutor sought the death penalty. In the second case, which occurred in an urban locality, law enforcement secured a confession from the defendant but the prosecutor decided not to seek the death penalty. In this case, prosecutors took into consideration the expressed sentiments of the victim's family for an alternative punishment.

Exhibit 3 provides another example of two similar cases involving multiple homicides that were treated differently by local prosecutors. The evidence in each case is similar in that the defendants did not confess to the offense, had no prior violent felony convictions, and the victims were brutally

Exhibit 3

Case Example

Column A – Medium-Density Locality

After a dispute with his girlfriend, a black male stabbed her approximately 58 times in her upper torso and arms. He then stabbed his girlfriend's daughter multiple times, stole credit cards and jewelry and fled. Both of the victims were also black and died as a result of their wounds.

Evidence of Guilt

The defendant did not confess to the offense, but DNA and fingerprint evidence implicated him, and there was a solid witness to the circumstances of the offense

Evidence of Aggravation

Both victims suffered violent stabbing deaths.

The defendant had no prior violent felony convictions.

The local prosecutor argued for the death penalty

Column B – Low-Density Locality

A 21 year old black male murdered his aunt, uncle, and cousin after a family dispute about the defendant's failure to repay money he was loaned. The defendant laid in wait in their home and attacked them as they returned from shopping. He first beat, strangled, and shot his aunt. As the uncle entered the house, he shot him multiple times. When his cousin witnessed these crimes and attempted to escape, the defendant tackled him, bludgeoned him with a heavy object, and shot him. The defendant left the house, returned with gasoline and proceeded to burn down the house with the bodies inside.

Evidence of Guilt

The defendant did not confess to the offense, but DNA, fingerprint, and ballistics evidence implicated him in the offense and there was a solid witness of the circumstances of the offense and a solid witness that heard him admit to the crime

Evidence of Aggravation

One victim suffered multiple gunshot wounds and the other two victims suffered beatings and multiple gunshot wounds.

The defendant had no prior violent felony convictions.

The local prosecutor entered into a plea agreement – three first-degree murder convictions with a life sentence for each

Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the Central Criminal Records Exchange database maintained by the Virginia State Police and information from the case files of Commonwealth's Attorneys.

murdered, either by stabbings, beatings or multiple gunshot wounds. The offenses described in Column A occurred in a medium-density locality, and the prosecutor sought the death penalty. In the case described in Column B, which occurred in a low-density locality, the prosecutor entered into a plea agreement for three first-degree murder convictions. Documents reviewed in the files indicated that some members of the victim's family in the case described in Column B thought the death penalty was the appropriate punishment for the defendant. However, believing that a jury could not be seated that would vote in favor of the death penalty, the local prosecutor decided to reach a plea agreement with the defendant.

Other prosecutors have cited jury behavior as a factor they consider when deciding whether to seek the death penalty in an eligible case. As an example, for almost half of the capital-eligible cases in the study sample, the local prosecutors surveyed by JLARC staff perceived juries as being typically unwilling to impose a sentence of death even when the defendant's guilt was clear and compelling. This was especially true for Commonwealth's Attorneys in high-density areas. As noted earlier in Figure 13, the rates at which prosecutors seek the death penalty in the low- and medium-density localities are substantially higher than the rates observed for prosecutors in high-density localities. Based partly on these numbers, it can be concluded that Commonwealth's Attorneys in high-density localities often seek plea agreements or indict capital-eligible defendants on lesser charges for offenses that would almost certainly bring a death prosecution in other localities.

Some of these prosecutors expressed philosophical concerns about the death penalty and one questioned the broad scope of the statutes. In the view of another Commonwealth's Attorney from a high-density area, capital murder prosecutions should be reserved for "monsters" rather than the straightforward cases such as murder and robbery that he believes are too often prosecuted as death cases.

The final case example, presented in Exhibit 4, highlights three cases where women were brutally raped and murdered in three different jurisdictions. Despite the obvious similarities in these crimes, the prosecutors in the first two cases asked for the death penalty. In the third case, however, the prosecutor agreed to allow the defendant to plead guilty to capital murder in exchange for the guarantee of a life sentence without the possibility of parole.

Current Status of Cases in Which Prosecutors Sought Death.

Since 1995, Commonwealth's Attorneys have sought the death penalty for a total of 64 cases statewide. Figure 17 illustrates how those cases moved through the judicial process. As shown, 46 of the cases where the prosecutor sought the death penalty resulted in a capital murder conviction, while the remaining cases resulted in either an acquittal (1) or a conviction for an offense other than capital murder (17). Of the capital murder convictions, 24 cases resulted in a death sentence. Because two defendants were sentenced to the death penalty for murders in more than one jurisdiction, there were actually 22 *persons* sentenced to die in the 24 cases.

Exhibit 4

Case Example

Column A – Low-Density Locality

A white male abducted a white woman from her place of work, took her to a remote location, raped her, slit her throat and left her in a river. She died as a result of her wounds while crawling away from the river.

Evidence of Guilt

When in custody, the defendant confessed to a law enforcement officer, DNA implicated him, and there was a witness to the circumstances of the offense and a witness who heard him admit to the offense.

Evidence of Aggravation

The victim suffered sexual abuse and throat slashing.

The defendant had no prior violent felony convictions.

The local prosecutor argued for the death penalty

Column B – Medium-Density Locality

A white male raped his estranged wife and then stabbed and strangled her to death because he thought she was having a sexual relationship with a black man. After she was dead, he defiled her body, and then asked a neighbor to call the police.

Evidence of Guilt

When in custody, the defendant confessed to a law enforcement officer, DNA implicated him, and there was a witness who heard him admit to the offense.

Evidence of Aggravation

The victim suffered sexual abuse, stab wounds, and strangulation.

The defendant had no prior violent felony convictions.

The local prosecutor argued for the death penalty

Column C – High-Density Locality

A black male raped and stabbed to death a white female in her home after one of the men he was with forced his way into her apartment.

Evidence of Guilt

When in custody, the defendant confessed to a law enforcement officer, DNA evidence implicated him, and there was an eyewitness to his offense (co-defendant).

Evidence of Aggravation

The victim suffered sexual abuse and multiple stab wounds.

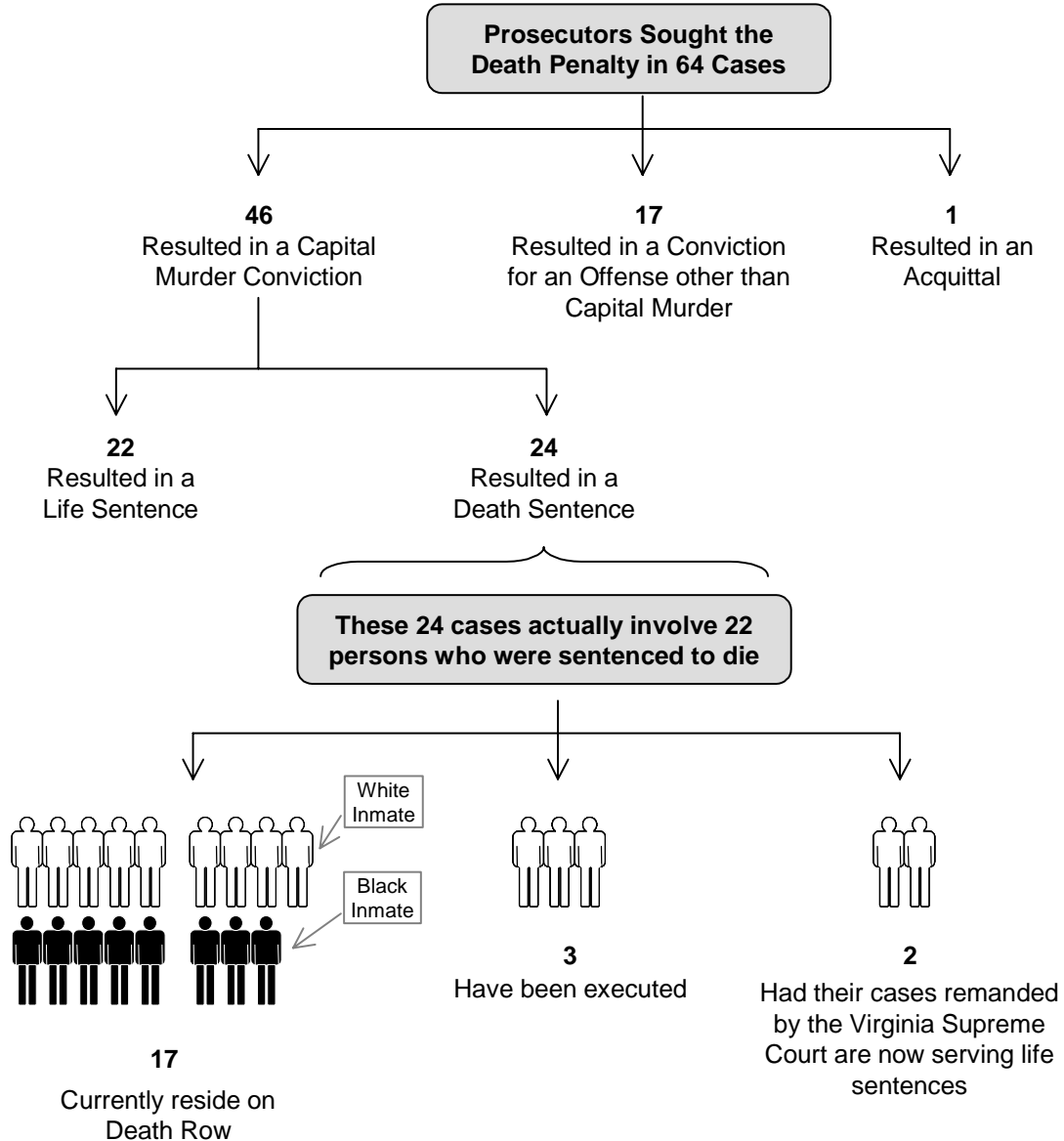
The defendant had a rape conviction at the time of his arrest for the instant offense.

The local prosecutor entered into a plea agreement – defendant pled guilty to capital murder with a life sentence

Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the Central Criminal Records Exchange database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

Figure 17

Disposition for the Capital-Eligible Cases Statewide Where the Prosecutor Sought the Death Penalty



Note: Data in this figure relate only to those persons sentenced to die for offenses committed between 1995 and 1999. Of the two persons who had their cases returned by the Virginia Supreme Court, one entered into a plea agreement for the life sentence and the other had a life sentence imposed by the Court.

Source: JLARC staff analysis of data collected from the following sources: Pre-and Post-sentence Investigative Reports maintained by the Sentencing Commission and the Department of Corrections, the Central Criminal Records Exchange database maintained by the Virginia State Police, and information from the case files of Commonwealth's Attorneys.

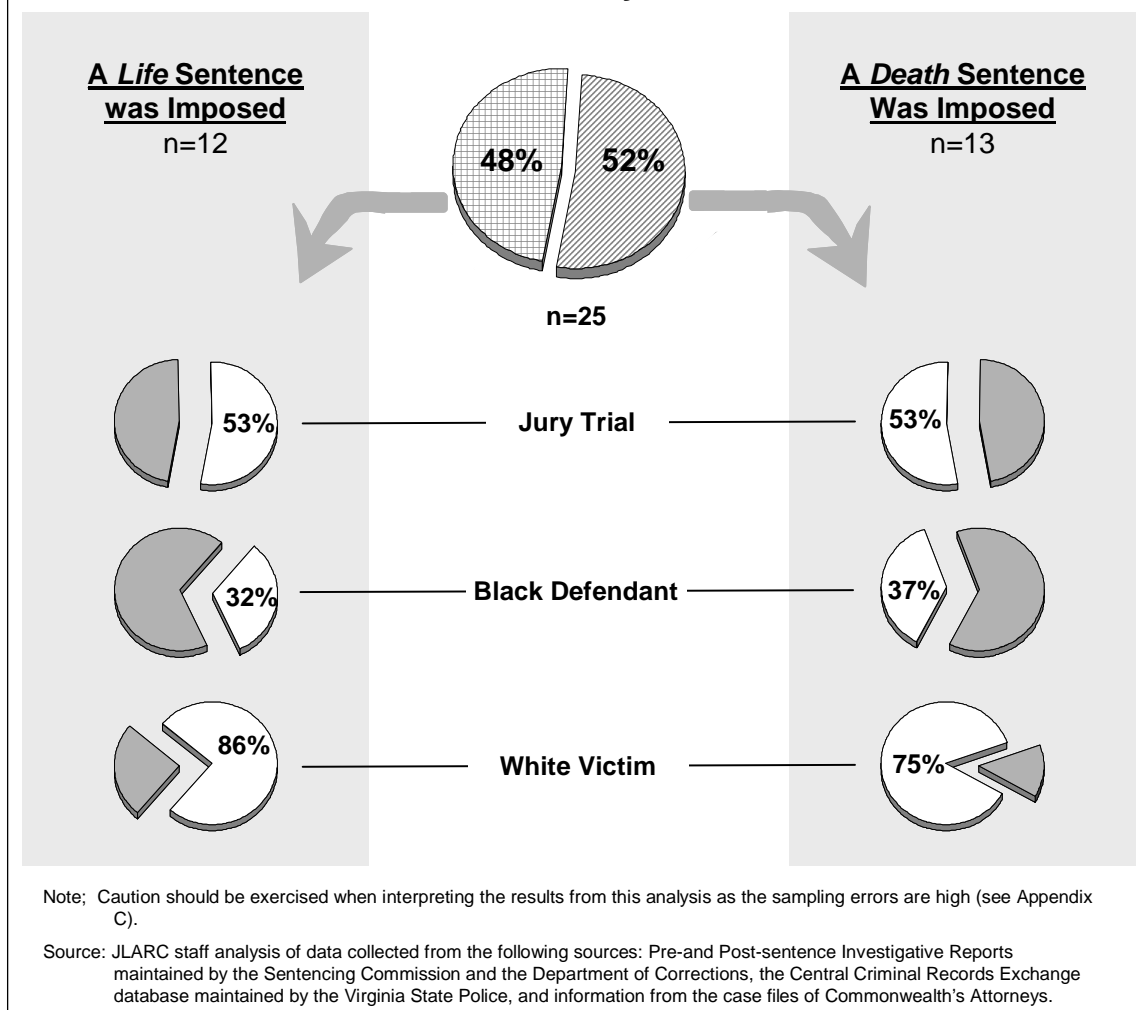
The death penalty has been carried out for three of the 22 persons who were sentenced to die for offenses committed in the study timeframe. Two inmates are serving life sentences after the Virginia Supreme Court reversed their death sentences and the remaining 17 currently reside on death row.

Because of the limited number of cases in which a capital murder indictment was obtained, a more detailed analysis of these outcomes was not possible. JLARC staff, however, did compile some descriptive information on the 25 cases *in the study sample* that resulted in a capital murder conviction where the prosecutor was arguing for the death penalty. For example, a jury decided the penalty in 53 percent of the cases in which the result was a life sentence and 53 percent of the cases where the result was a death sentence (Figure 18). In addition, white defendants and white victims make up a larger portion of both the cases that resulted in a life sentence and the cases that resulted in a death sentence.

In summary, the problems with capital punishment that are illustrated in this chapter pose a significant challenge for the General Assembly. On the one hand, no viable system of capital punishment can be sustained without vesting Commonwealth's Attorneys with the discretionary authority they need to prosecute these difficult and troubling cases. Conversely, it must be recognized that this discretion, which is so needed to ensure that the system is operated with a sense of proportion, will generate outcomes that cannot be easily reconciled on the grounds of fairness. Thus, as the General Assembly deliberates the issues surrounding the use of the death penalty, the key question that must be

Figure 18

Comparison of Cases Resulting in a Capital Murder Conviction Where the Prosecutor was Seeking the Death Penalty



answered is whether some disparate outcomes can be accepted in a system where the ultimate sanction is execution.

III. The Appellate and Post-Conviction Review Process for Capital Punishment Cases in Virginia

One of the cornerstones of America's criminal justice system is the process of judicial review. Guided by a myriad of procedural rules and governed by ever-changing case law, the appellate courts in Virginia review criminal cases at the conclusion of trial court proceedings to determine whether the law was properly applied. The purpose of appellate review is not to retry cases or consider new evidence, but to ensure that each defendant received a fair trial. Although this review is important to all criminal defendants, it is vital to those who are convicted of capital murder and receive sentences of death.

In reviewing capital cases, appellate courts must balance the defendant's interest in obtaining judicial review of claims of error with the State's interest in finalizing judgments and imposing the applicable sentences. If this process becomes too heavily weighted toward the defendant, the judicial system could become so backlogged with cases that the death penalty would be effectively eradicated. In California, for example, only 7 persons have been executed in the last 10 years, despite the fact that there are now more than 550 condemned prisoners on death row.

According to critics of Virginia's capital punishment system, the appellate process in the Commonwealth is the opposite of states such as California. Citing statistics which indicate that Virginia executes its death row inmates at more than twice the rate of any other state, those who are opposed to

the death penalty contend that this can be attributed to an appellate and post-conviction review process that has been unnecessarily and unfairly accelerated.

Many of the criticisms of judicial review in Virginia are related to the Virginia Supreme Court's review of capital cases. Death penalty opponents contend that the Virginia Supreme Court stringently applies procedural rules that effectively leave defendants who have legitimate claims of trial error with no avenue for review. This problem is thought to be compounded at the post-conviction stage of judicial review because the courts are required to defer to earlier rulings by the State courts on claims of trial error that have been procedurally defaulted. Concern has also been expressed about the method used by the Virginia Supreme Court to determine whether the death sentences imposed by the trial courts are excessive.

Given these issues, the focus of this portion of the study was to determine how the appellate and post-conviction review process for death penalty cases in Virginia is implemented. The first part of this analysis describes how death penalty cases have progressed through the system since capital punishment was reinstated in Virginia. This is followed by an examination of each phase of judicial review, including the automatic appeal to the Virginia Supreme Court, State post-conviction proceedings, and federal post-conviction proceedings. This chapter concludes with a review of Virginia's executive clemency process.

The findings from this review indicate that the error rate is low for capital trials based on the Virginia Supreme Court's automatic review of death

penalty cases. However, these low error rates cannot be attributed to procedural rules. In addition, the Virginia Supreme Court's proportionality review of capital punishment sentences has not produced a reversal of a death sentence since the Virginia General Assembly passed new death penalty laws in 1977 to conform to the rulings of the United States Supreme Court. This can be partly attributed to the limited, but legally permissible, manner in which the Virginia Supreme Court defines and implements sentence review for death penalty cases.

At post-conviction proceedings, it appears that the Virginia Supreme Court's procedural rules and federal law do substantially limit the number of claims of trial error that are reviewed on the merits. While the Courts have left the door open to allow defaulted claims to receive a review on the merits in some cases, the exceptions are very narrow. Because the Courts strictly adhere to procedural default rules, a substantial proportion of claims related to the fairness of capital murder trials are never considered during judicial review.

This study was not designed to address whether the inmates who are currently on death row are innocent of the crimes for which they were sentenced. Nor were JLARC staff in a position to evaluate the credibility of any claims of innocence raised by inmates who have been sentenced to death. Accordingly, it cannot be concluded from the findings presented in this study that the State is executing persons who are innocent of the crimes for which they were sentenced. Still, as was noted in Chapter II, the magnitude of the evidence

against capital murder defendants that was examined by JLARC in its review of prosecutorial discretion was considerable.

Apart from questions regarding the nature of evidence in capital murder trials, one significant policy issue raised in this chapter is whether the fact that Virginia's procedural restrictions have forced the State and federal courts to affirm the convictions for a small number of death row inmates who may not have received a fair trial, warrant the attention of the General Assembly.

ADMINISTRATION OF THE APPELLATE AND POST-CONVICTION REVIEW PROCESS FOR DEATH PENALTY CASES IN VIRGINIA

According to a recent study at the Columbia University School of Law, Virginia's reversal rate for capital punishment death sentences is considerably lower than the rate observed in other states. Specifically, during the 23-year period examined in the study, Virginia had an 18 percent rate of reversal for death sentences, compared to a national average of 68 percent.

The results of JLARC's review confirmed the Columbia University study's findings regarding Virginia's low rate of recognized error in death penalty cases. At direct review, only eight percent of all cases were reversed. This low rate of reversal continues through the post-conviction review process. Two percent and four percent of death sentences were set aside at state habeas corpus review and federal habeas corpus review, respectively, during the time period under study.

Supporters of Virginia's system attribute this to the reliability of the State's capital murder statutes and the quality of Virginia's trial judges and lawyers. However, opponents of Virginia's system of capital punishment argue

that the low rate of reversal is generated by the narrow or restricted approach employed by the Virginia Supreme Court in its review of death cases. To address this criticism, JLARC staff examined appellate and post-conviction review documents for Virginia defendants with a death penalty sentence from 1977, when the death penalty was reinstated, to January 2001.

This analysis revealed that the Virginia Supreme Court affirmed the judgment of the trial court, including the death sentences, in 93 percent of the death cases that it has reviewed under the State's revised death penalty statutes. In affirming these death sentences, the Court considered and rejected on the merits 83 percent of the claims raised by defendants on direct appeal.

Regarding the issue of the proportionality of the death sentences imposed by the trial courts, the Virginia Supreme Court ruled that each of the death sentences that have been meted out by the lower courts since 1977 were generally consistent with the verdicts imposed by juries in other capital murder cases for similar crimes. However, in making this determination it appears that the Court applied a narrow definition of proportionality. These methods, although legal, appear to skew the Court's analysis in a way that assures a finding supporting the proportionality of the lower court sentencing outcomes.

At State and federal post-conviction review, 33 and 35 percent of the respective claims were rejected without a review on the merits because the claims were not raised in accordance with the Virginia Supreme Court's rules. In at least two cases, federal judges explicitly stated that they were forced to deny meritorious claims alleging unfair trials because of procedural restrictions.

The Recognized Trial Error Rate for Death Penalty Cases in Virginia Is Low

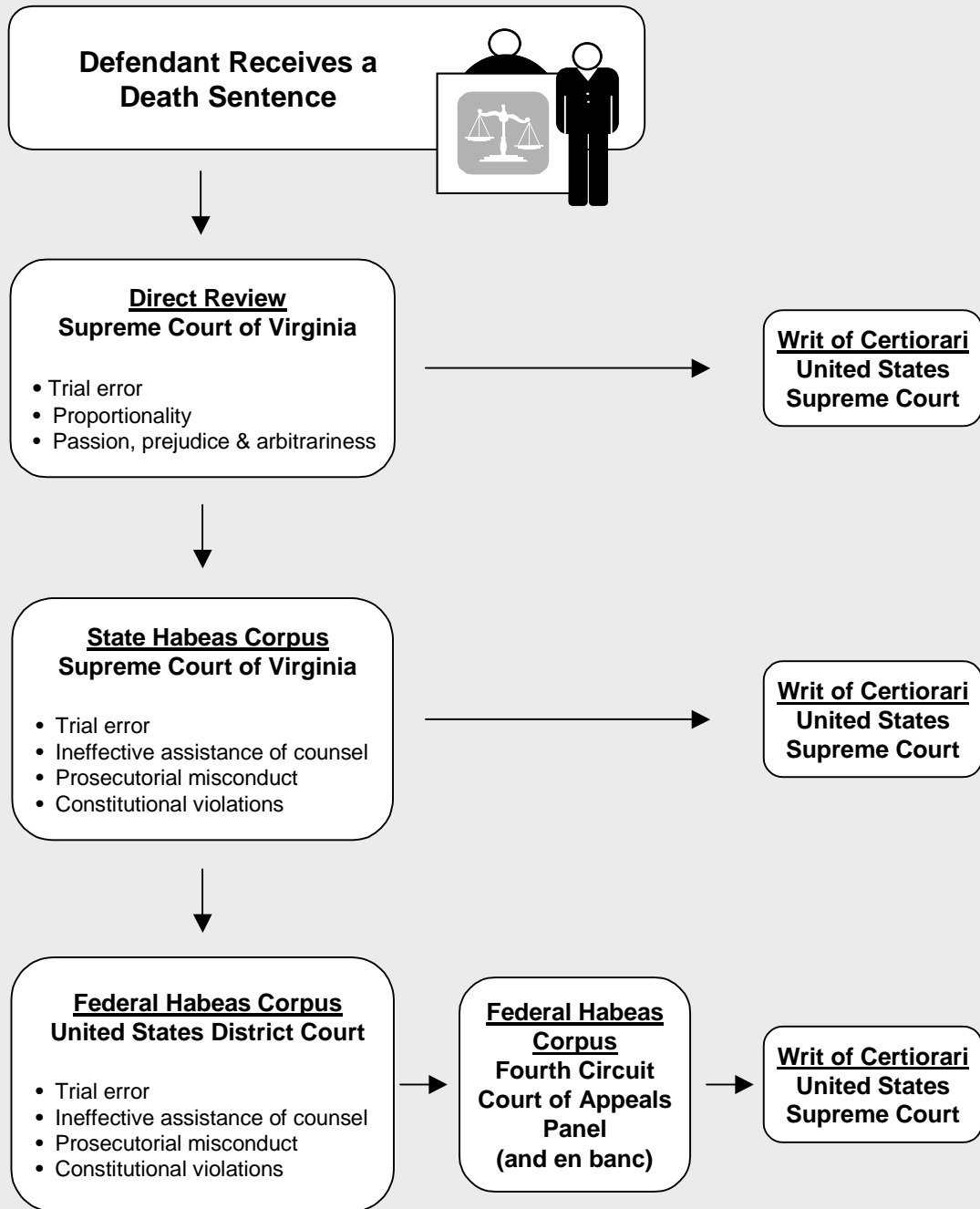
There are three major levels of judicial review for persons with death penalty sentences in Virginia. As shown in Figure 19, each individual who receives a capital punishment sentence has an automatic right of appeal to the Supreme Court of Virginia. Defendants may also seek relief through writs of habeas corpus in both State and federal court. Each of these stages of judicial review is described in the following section and the associated outcomes are summarized.

Direct Review. The appellate process begins with a direct appeal from the Circuit Court to the Supreme Court of Virginia for capital cases in which the death penalty was imposed. The primary purpose of this appeal is for the Virginia Supreme Court to review claims of trial error. Pursuant to the *Code of Virginia* (§17.1-313), the Supreme Court of Virginia also reviews each capital sentence according to two criteria. One issue the Court considers is "whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." The Court also determines "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."

Once the Virginia Supreme Court has completed its review, the Court may affirm the sentence of death, commute the sentence of death to life

Figure 19

Judicial Review of Death Sentences in Virginia

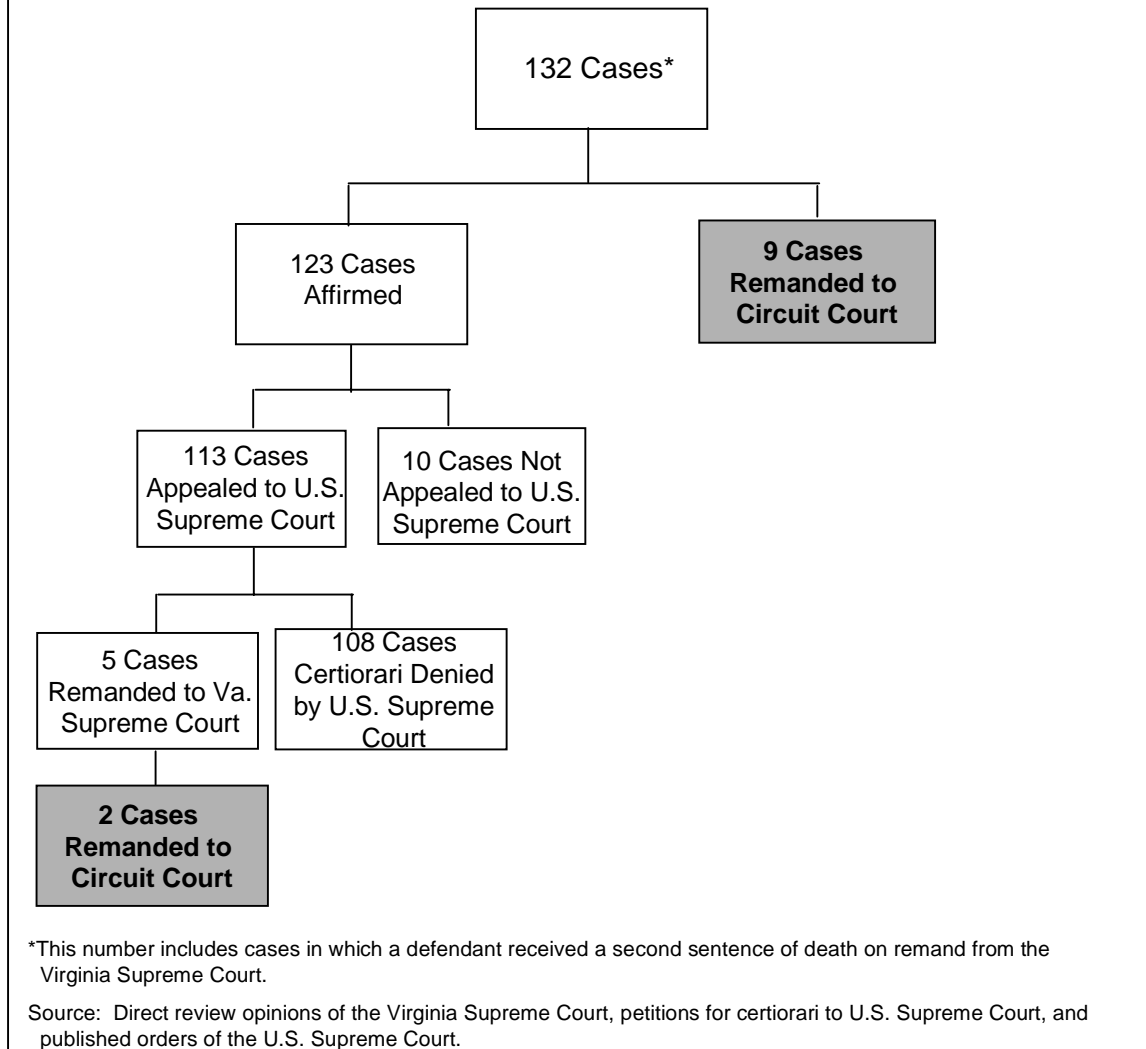


Source: *Code of Virginia* (§17.1-313 and §8.01-654) and *United States Code* (Title 28 §2241-2254).

imprisonment, or remand the case to the circuit court for a new trial or sentencing hearing (*Code of Virginia*- §17.1-313). Decisions from the direct appeal to the Supreme Court of Virginia may be appealed to the Supreme Court of the United States. In order to pursue this appeal, the defendant must file a petition for a writ of certiorari in the United States Supreme Court asking it to review the decision of the Virginia Supreme Court. If a writ of certiorari is granted, which it rarely is, the case will be heard in the next term of the United States Supreme Court.

As shown in Figure 20, the Virginia Supreme Court reviewed 132 cases during the time period under study. A majority of these cases (93 percent) were affirmed on direct review; that is, the decisions were upheld. Of the nine cases that were not affirmed, six of these defendants ultimately received a life sentence or less. Three of these defendants received a second death sentence after a new trial or sentencing proceeding. The United States Supreme Court has agreed to hear very few of the Virginia Supreme Court's direct review decisions. Of the five cases in which certiorari was granted, all were remanded to the Virginia Supreme Court. Of these five, only two cases were remanded to the Circuit Court for a new trial or sentencing hearing. One of those defendants received a life sentence, while the other received a second death sentence.

State Habeas Corpus. After the Supreme Court of Virginia affirms a capital punishment sentence on direct appeal, a defendant may file a petition for habeas corpus relief (*Code of Virginia* §8.01-654). The purpose of habeas corpus review is to protect inmates against unlawful confinement. A habeas corpus petition initiates a civil proceeding against a law enforcement official,

Figure 20**Direct Review by the Virginia Supreme Court (1977-2001)**

usually the prison administrator, to determine whether the prisoner's incarceration is in violation of due process.

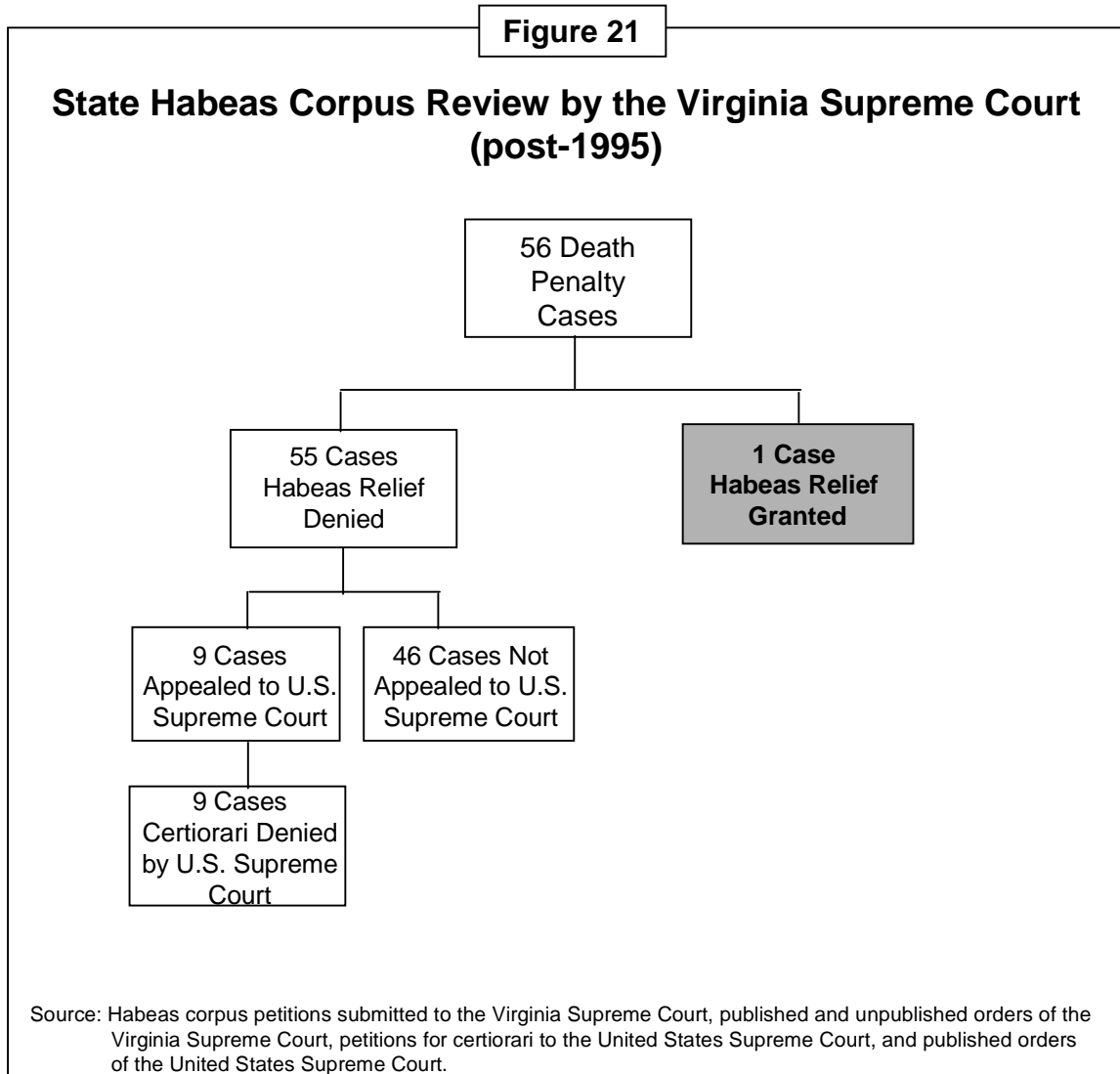
Indigent death-row prisoners are now appointed counsel within 30 days of the Virginia Supreme Court ruling on direct review in order to begin State habeas corpus proceedings. Habeas corpus claims are typically restricted to allegations of ineffective assistance of counsel and prosecutorial misconduct.

They may also include other violations of constitutional rights, such as the Sixth Amendment right to a speedy trial or the Fourth Amendment right to lawful search and seizure.

Although circuit courts had original jurisdiction over State habeas corpus petitions prior to 1995, they are now submitted directly to the Supreme Court of Virginia. Because of the difficulty and added expense of collecting habeas petitions filed with the circuit courts, JLARC's review includes only the 56 habeas petitions that were filed with the Virginia Supreme Court since 1995. Of the 56 state habeas corpus cases reviewed since the transfer of original jurisdiction, only one case has been reversed by the Virginia Supreme Court. This finding is shown in Figure 21. After this case was remanded back to the circuit court for a new trial, the prosecutor elected to retry the case as a non-death capital murder trial. Therefore the defendant did not receive the death penalty after his second trial.

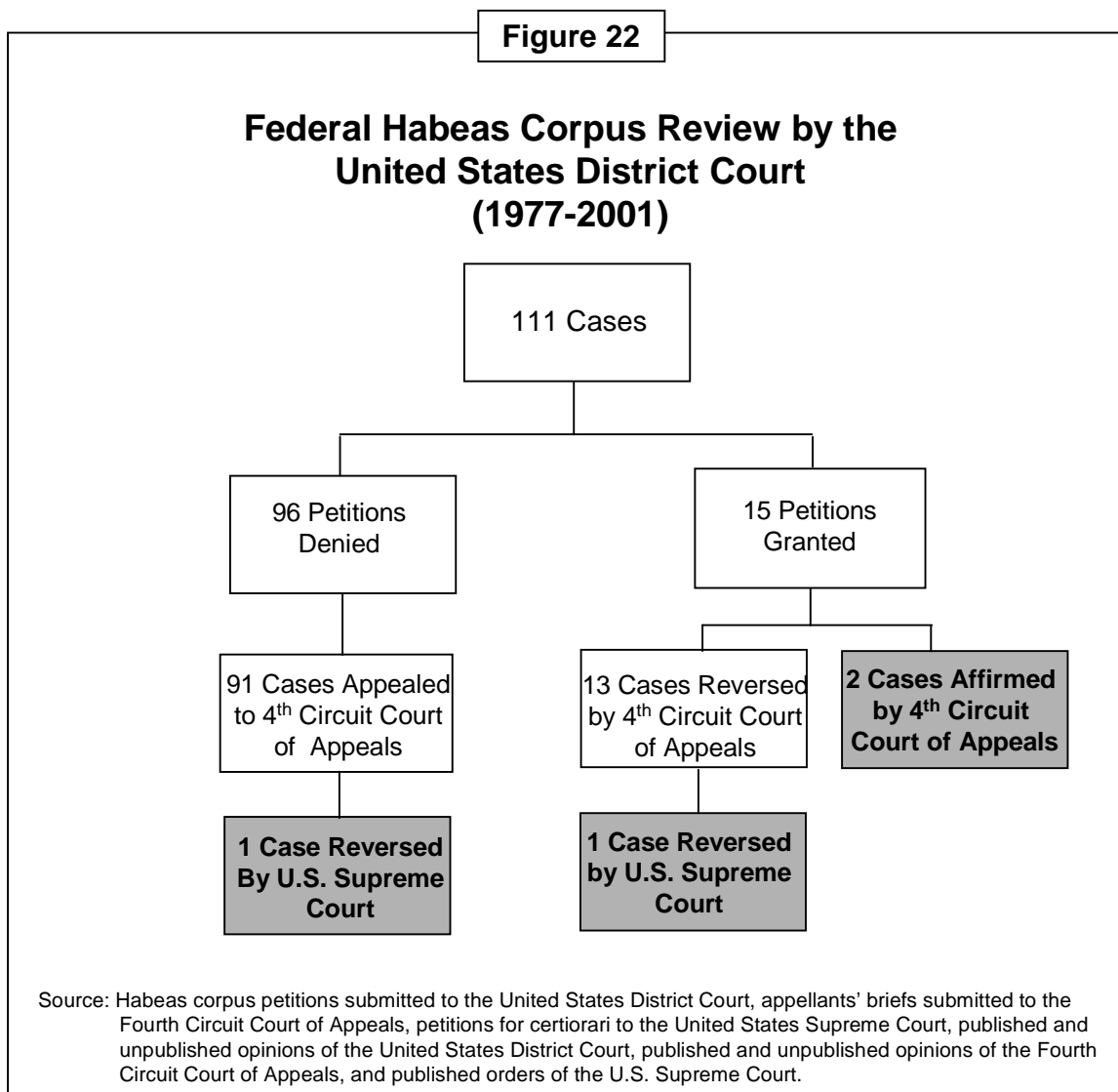
A defendant may seek review of a State habeas decision made by the Virginia Supreme Court by filing a petition for a writ of certiorari in the United States Supreme Court. However, no petition for certiorari has ever been granted by the United States Supreme Court to review a Virginia Supreme Court habeas corpus decision since 1995.

Federal Habeas Corpus. Once a state habeas corpus petition has been denied, a petition for habeas corpus may then be filed in United States District Court. This appeal may cover any claim decided by the Supreme Court of Virginia, including any issues related to the direct appeal or the State habeas



corpus petition. The losing party, either the inmate or the Commonwealth, may appeal that decision to the Fourth Circuit Court of Appeals. This appeal begins with a review by a panel of judges from the Fourth Circuit Court. The panel's decision may then be appealed to the entire Court (en banc). As with the Virginia Supreme Court's State habeas corpus decisions, defendants may seek review of the Fourth Circuit Court of Appeals' decisions by the United States Supreme Court.

Figure 22 illustrates the flow of cases through the federal habeas corpus process. As with State habeas corpus, the number of petitions that are denied as a percent of all petitions filed is high – 86 percent. Overall, of the 111 cases reviewed by the United States District Court, 15 defendants were granted a new trial or sentencing hearing and 96 were denied relief. However, the Fourth Circuit Court of Appeals upheld only two of those decisions, and affirmed the convictions and death sentences for the other 13.



Of the two sentences that were set aside, one defendant ultimately received a second sentence of death, and one received a life sentence. The Fourth Circuit Court of Appeals has overturned only one death sentence on appeal from the United States District Court, but this case was ultimately reversed again by the Fourth Circuit Court of Appeals en banc. The United States Supreme Court has overturned only two decisions by the Fourth Circuit Court of Appeals. One defendant eventually received a life sentence, while the other received a second sentence of death.

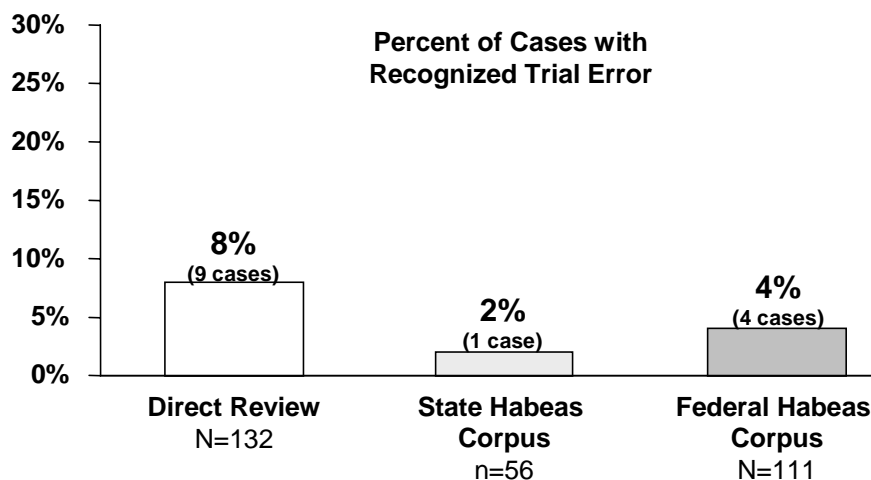
Recognized Error Rate For Death Penalty Cases. Based on the flow of cases observed in the previous flow charts, the recognized error rate for death penalty cases at each level of appellate review in Virginia is low (Figure 23). One explanation for this finding is that capital murder trials in Virginia are conducted with minimal errors, and the claims presented at appellate and post-conviction review simply have no merit. But opponents of capital punishment in Virginia blame the low rate of recognized error on various legal doctrines that they claim are zealously enforced by the appellate courts, at the expense of the defendant's right to a fair trial. These issues are considered in the next section of this study.

Procedural Restrictions Are Not a Key Factor Limiting the Number of Cases Reversed at Direct Review by the Virginia Supreme Court

Appellate courts examine legal errors and whether the trial court properly used its discretion. All questions of law are decided 'de novo', which means that the courts must re-examine any rulings brought to their attention by defendants to ensure that the law was properly applied. Even if the appellate

Figure 23

Rates of Recognized Trial Error in Virginia's Appellate and Post-Conviction Review Process



Source: JLARC staff analysis of Virginia Supreme Court published opinions, habeas corpus petitions to the Virginia Supreme Court, unpublished orders from the Virginia Supreme Court, habeas corpus petitions to the United States District Court, published and unpublished opinions of the United States District Court, appellant's briefs to the Fourth Circuit Court of Appeals, published and unpublished opinions of the Fourth Circuit Court of Appeals, petitions for certiorari to the United States Supreme Court, and published opinions of the United States Supreme Court.

court finds that an error has occurred, it must distinguish between egregious errors that require a new trial or sentencing hearing versus those that are harmless. The philosophy of appellate review is that defendants are entitled to a fair trial, not a perfect trial. Because of the high standard used by appellate courts to overturn trial court decisions, it is generally difficult for a criminal defendant who is convicted by a trial court to have the conviction or sentence reversed on appeal.

In examining legal errors in capital cases, the Virginia Supreme Court is often asked to determine whether there was enough evidence for a judge or jury to reach a verdict of guilt. The Virginia Supreme Court is not required to

determine whether the correct decision was made, but whether it could reasonably have been made in light of the evidence presented. In making this determination at direct review for capital murder cases, the Virginia Supreme Court has repeatedly held the following:

[W]hen the sufficiency of evidence is challenged on appeal, the evidence and all reasonable inferences fairly drawn therefrom must be viewed in the light most favorable to the Commonwealth. The trial court's judgment must be affirmed unless it appears that it is plainly wrong or without evidence to support it. *Spencer v. Commonwealth*.

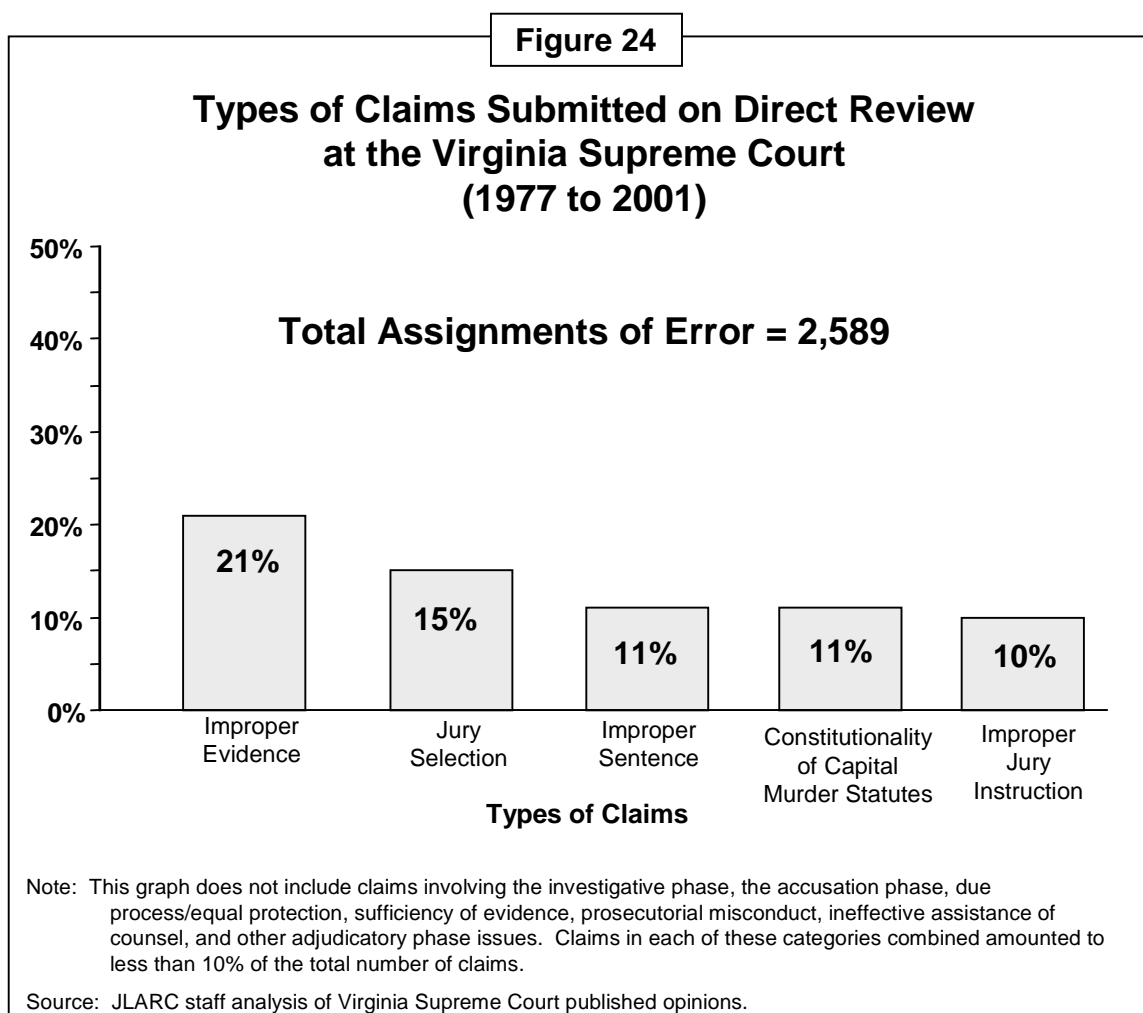
In addition to examining errors of law, in capital cases the Virginia Supreme Court is usually asked to review whether the trial court abused its discretion regarding procedural aspects of the trial as well. This may include decisions made by the court regarding the evidence permitted at the trial, the inclusion or exclusion of jurors, or the instructions provided to the jury. Although rules of law guide each of these decisions, trial courts are given considerable discretion in making these procedural rulings during trial. The purpose of appellate court review is to assess whether the trial court abused its discretion in making these decisions.

Appellate courts rarely reverse cases based on abuse of discretion by the trial court. The philosophy of appellate review was articulated in the following dissent issued by a member of the Virginia Supreme Court who disagreed with the decision of the majority regarding a juror selection issue in one case:

In the course of deciding that the trial court committed reversible error by failing to exclude Juror Cromwell, the majority has not given proper attention to the following elementary principles of appellate review. Whether a respective juror should be excluded for cause is a matter

within the sound discretion of the trial court. An appellate court must attach great weight to the opinion of the trial judge when the competency of a juror is in issue... The foundation for the foregoing principle is obvious. The trial judge observes and hears the veniremen in the midst of the trial atmosphere, while we are ... called upon to divine a prospective juror's state of mind...*Martin v. Commonwealth*.

Legal Errors and Abuse of Discretion. Figure 24 shows the types of claims raised at direct review. Defendants sentenced to death have raised a total of 2,589 assignments of error at the direct review stage of the appellate process between 1977 and 2001. The most frequent error assigned to a trial court by a defendant was that the court permitted the prosecution to present



improper evidence to the jury. There were also a large proportion of claims related to improper jury selection, such as failure of the trial court to excuse jurors for cause and improper jury instructions.

Out of the nine cases that were reversed by the Virginia Supreme Court, six of the cases were reversed based on errors of law. These primarily included cases in which there was insufficient evidence or improper jury instructions. As shown in Table 9, the remaining three cases were reversed based on abuse of discretion. In each of these cases, the Virginia Supreme Court ruled that the trial court had failed to procure and impartial jury.

Impact of Procedural Restrictions on Direct Review. Much of the criticism related to the Virginia Supreme Court's enforcement of procedural rules focuses on its application of the doctrine of procedural default. The doctrine of procedural default prevents a defendant from making a claim at a later stage in the appellate process that was not raised in an earlier proceeding. Procedural default rules originate from the premise that higher courts should only review decisions once a lower court has had the opportunity to make an informed ruling. These rules also enhance efficiency and expedite the administration of justice by encouraging the defense to object to errors as soon as they occur at trial. Ideally, this allows the trial court to deal with errors as soon as they occur and prevents unnecessary appeals.

Rule 5:25 of the Supreme Court of Virginia, which lays the foundation for the procedural default doctrine, specifically states:

Table 9 Cases Reversed by the Virginia Supreme Court on Direct Appeal (1977 to 2001)	
Cases	Basis for Reversal
1. <i>Atkins v. Commonwealth</i>	Error of law
2. <i>Cheng v. Commonwealth</i>	Error of law
3. <i>Frye v. Commonwealth</i>	Error of law
4. <i>Johnson v. Commonwealth</i>	Error of law
5. <i>Justus v. Commonwealth</i>	Abuse of discretion
6. <i>Martin v. Commonwealth</i>	Abuse of discretion
7. <i>Patterson v. Commonwealth</i>	Abuse of discretion
8. <i>Rogers v. Commonwealth</i>	Error of law
9. <i>Yarbrough v. Commonwealth</i>	Error of law

Error will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the 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.

For example, in *O'Dell v. Commonwealth*, the Court's opinion opens with a list of 10 alleged errors that were not considered because the defendant failed to make an objection at trial. Five additional errors were also barred from review because the grounds for the objection at trial differed from the grounds offered on appeal. Some of the claims included in these 15 assignments of error included improper jury selection, improper jury instructions, admission of improper evidence, and admission of improper testimony.

As another example, in *Thomas v. Commonwealth*, the defendant argued that the prosecutor made a remark that constituted an impermissible comment on Thomas's failure to testify. Again, the Court refused to consider the claim, stating that "...this point was not raised in the trial court, and, accordingly, we will not consider it now. Rule 5:25."

The Virginia Supreme Court may excuse a procedural default and review a claim on its merits "for good cause shown" or "to attain the ends of justice." In order to meet the standard for "good cause shown" a defendant must show that the claim could not have been known earlier, and therefore could not have been raised. An "ends of justice" review requires the defendant to demonstrate to the Virginia Supreme Court that if the error had not occurred, the defendant would not have been convicted.

The Supreme Court of Virginia has excused a procedurally defaulted claim only once to reverse a capital conviction, but this occurred in a capital murder case for which the defendant received a sentence of life imprisonment rather than the death penalty. In *Ball v. Commonwealth*, the Virginia Supreme Court ruled that the evidence against the defendant only supported an attempted robbery charge, a crime that was not included in the capital murder statute at the time of the offense. Even though the defendant did not object to this issue at trial, the Court invoked the "ends of justice" exception to procedural default, and reversed the capital murder conviction. That case was eventually remanded back to the circuit court for a new sentencing hearing on felony murder instead of capital murder.

Notwithstanding the exception noted above, critics have argued that the stringent application of Rule 5:25 allows the Virginia Supreme Court to overlook a large number of claims which contain merit -- legitimate examples that the defendants' trials were constitutionally infirm. Under such circumstances, these critics have stated that the Court's widespread application of the doctrine of procedural default means that many defendants are ultimately executed although they did not receive a fair trial.

Evaluating the merits of error assigned to trial court rulings by defendants at direct review is beyond the scope of this study. Instead, JLARC staff examined the direct review opinions of the Virginia Supreme Court to assess the degree to which the doctrine of procedural default was invoked in capital murder cases. The published opinions for all death penalty cases reviewed by the Virginia Supreme Court between 1977 and January 2001 were included in this analysis.

To ensure that those claims which were not reviewed on the merits were appropriately identified, JLARC staff grouped claims into three major categories:

1. Denied on the Merits. Claims were categorized as "denied on the merits" if the Court considered the entire claim and all related arguments. This category included claims that the Court stated were procedurally defaulted, but would have been denied on the merits but for the default. This category also includes claims that were not addressed in detail by the Court in a particular opinion because the issues had been thoroughly addressed in a previous decision.

2. Procedurally Defaulted. If the entire claim or parts of the claim were not considered pursuant to Rule 5:25, claims were categorized as procedurally defaulted.
3. Denied for Other Reasons. Claims were categorized as “other” if they were denied for reasons other than lack of merit or procedural default, such as waived by the defendant or a moot issue.

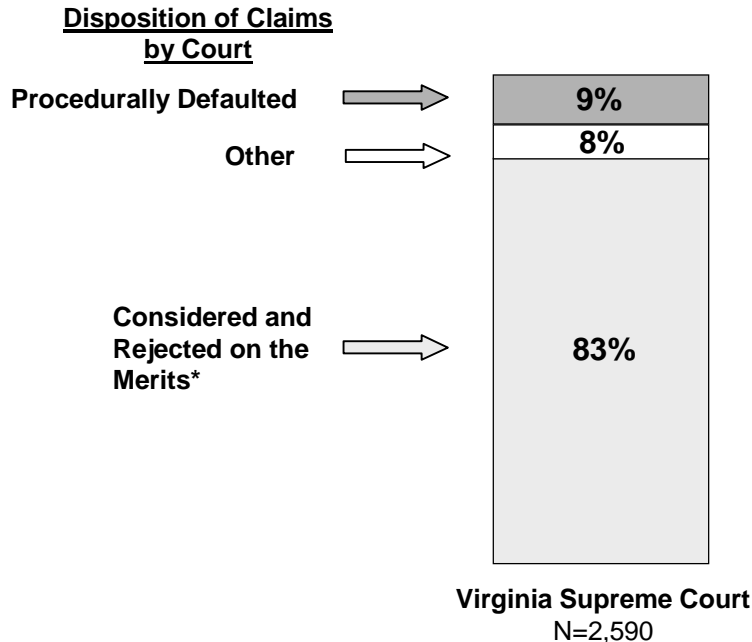
As illustrated in Figure 25, and contrary to the criticism that the Virginia Supreme Court typically applies procedural default rules to claims proffered at this stage of review, this analysis found only nine percent of all claims to be procedurally defaulted. Most of the claims raised on direct review were denied on their merits. This low error rate which has been observed at this stage of the appellate process, appears to be the product of the Court’s deference to the discretion of the trial courts in assessing whether the law was applied properly, and the fact that it views all challenges made regarding the evidence at trial in a light most favorable to the Commonwealth.

The Virginia Supreme Court Conducts a Narrowly-Defined Proportionality Review of Death Sentence Cases

A key component of the automatic review of death sentences conducted by the Virginia Supreme Court is what is commonly referred to as “proportionality review.” This aspect of the State’s appellate review process was established by the General Assembly and it represents an intended safeguard against the imposition of death sentences that are disproportionate or excessive given the circumstances of the crime and the nature of the defendant convicted of that crime.

Figure 25

Disposition of Claims Rejected by the Virginia Supreme Court on Direct Review



*This includes claims that were not addressed in detail by the Court in a particular opinion because the issues had been thoroughly addressed in a previous decision.

Source: JLARC staff analysis of Virginia Supreme Court published opinions.

Legislative Basis for Proportionality Review. Section 17.1-313 (C)

of the *Code of Virginia*, which mandates proportionality review in Virginia, reads as follows:

In addition to the consideration of any errors in the trial enumerated in the appeal, the court shall consider and determine: (1.) Whether the sentence of death was imposed under the influence of passion, prejudice or any arbitrary factor; and (2.) Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

To facilitate this review of death sentences, the General Assembly gave the Court the authority to accumulate the records of all capital felony cases tried within any time period that the Court deems appropriate. In theory, these

case records, which would include those capital murder cases in which a jury imposed a life sentence, can be compared with those cases in which a defendant was convicted of capital murder and received a sentence of death. Such a comparison would allow the Supreme Court to determine whether a given death sentence was excessive or otherwise similar to the verdicts observed for comparable cases. If the Supreme Court determines that the death sentence for a given defendant is disproportionate, the *Code of Virginia* grants the Court the authority to commute the sentence to life or remand the case back to the trial court for a new sentencing proceeding.

Although the General Assembly enacted legislation granting the Supreme Court the authority it needed to assemble a database of capital murder cases, the legislature stopped short of mandating that the Court compile these records. Specifically, Section 17.1-313 (E) of the *Code of Virginia* states that the “Supreme Court *may* accumulate the records of all capital felony cases”, thereby leaving this decision to the discretion of the Court. Nonetheless, if the Court collects these cases, Section 17.1-313(E) also states that the Court “shall consider such records as are available as a guide in determining whether the sentence of death imposed in the case under review is excessive.”

Guided by the discretionary language concerning the accumulation and use of comparison cases, the Supreme Court entered an order in 1978 directing the Clerk of the Court to “maintain a separate index of all class 1 felony cases.” Constructed over time, this database now includes the results of all appeals made to the Supreme Court in death or life sentence cases since 1978,

and all capital cases that resulted in a sentence of life imprisonment which were first appealed in the Virginia Court of Appeals beginning in 1986.

Apart from the issue of what records are to be collected for comparison purposes is the question of the methods to be used by the Court to implement proportionality review. Here the *Code of Virginia* is silent, leaving this decision to the discretion of the Supreme Court. The Court has decided that in determining whether a death sentence in a given case was excessive, it would inquire, “whether juries in this jurisdiction (meaning the Commonwealth of Virginia) generally approved the supreme penalty for comparable or similar crimes.”

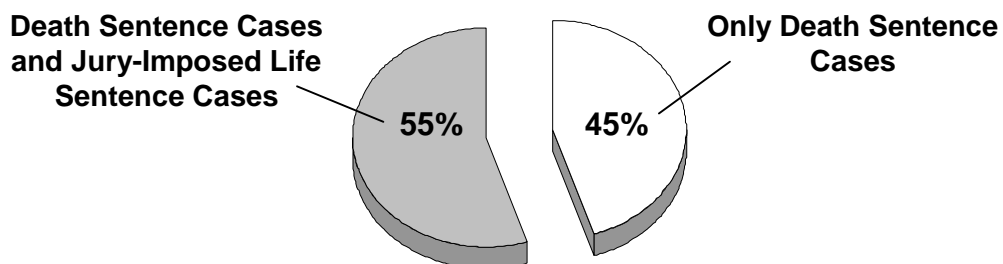
Methods Used by the Virginia Supreme Court to Conduct

Proportionality Review. One objective of this analysis was to determine how the Court implemented the sentence review required by State law. To conduct this analysis, JLARC staff reviewed the opinions of the State Supreme Court for each death case that it considered since the Virginia General Assembly revised the death penalty statutes in 1977.

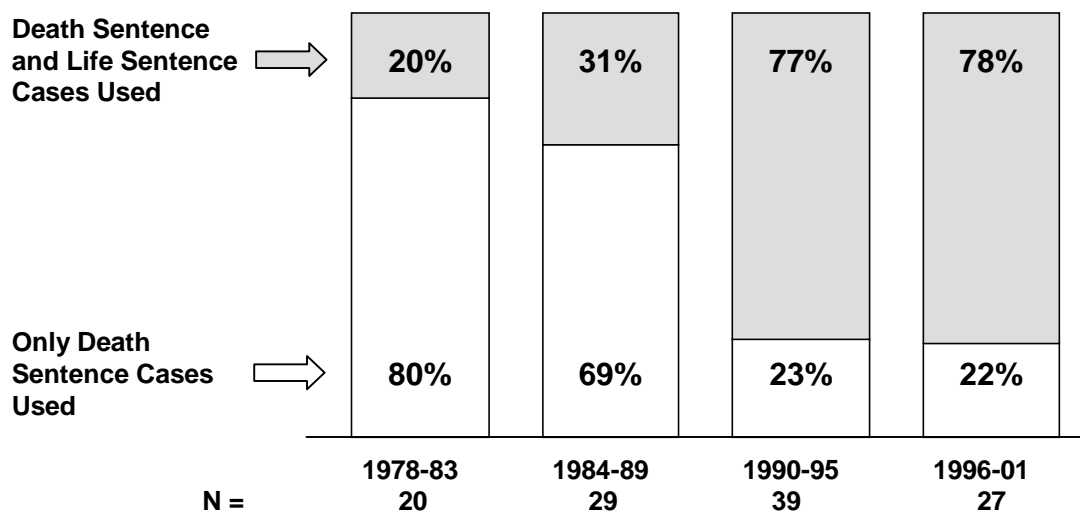
Figure 26 summarizes the findings of this analysis. As shown, in the top portion of the graphic, for 45 percent of all death sentence cases reviewed by the Court since 1977, the Supreme Court appears to have determined whether the sentences were excessive by comparing the cases only to others in which a death sentence was imposed. As an example, in *Barnes v. Commonwealth* (1987), the Court stated,

Figure 26

**The Type of Cases Used by the Virginia Supreme Court to
Conduct its Proportionality Review of Death Sentences
(1978 to 2001)**



**Type of Cases Used to Conduct
Proportionality Review by Year**



Note: The total number of cases reported in this figure do not include four cases for which sentence reviews were conducted shortly after the United States Supreme Court's ruling in *Furman v. Georgia*. The figures also exclude cases which were remanded based on other issues.

Source: Direct review opinions of the Virginia Supreme Court

[W]e have accumulated and reviewed the records in all capital murder cases reviewed by this court since the present statutes became effective, giving particular attention to cases in which the death penalty was imposed based on the vileness predicate.

Following this statement, the Court listed the number of cases that were used in the sentence review and they were all capital murder cases in which the defendant was sentenced to death. It appears that the Court most frequently used this practice of limiting the comparison cases to only other death cases in the first 12 years that it began to consider cases under the new statutes. Subsequent to this period, the Court with greater regularity began to incorporate those capital cases in which juries imposed life sentences in the proportionality review. For example during the period from 1990 to 1995, the court conducted sentence reviews for 40 capital murder cases in which the sentence of death had been imposed. In only 23 percent of these cases did the Court appear to limit the comparison to other capital murder cases in which juries imposed only a death sentence. In the next six-year period, the Court appeared to use this method of review for only 22 percent of the sentence reviews it conducted.

Nonetheless, even when the Court extends the comparison to include life cases, it often gives a particular emphasis to the death cases, thereby minimizing the impact of the capital murder cases that produced life sentences on their sentence review. This was evident by the fact that all cases that were cited by the Court in its comparison analysis were those in which a sentence of death was imposed. The following quote from one such sentence review illustrates the Court's position regarding this issue:

[W]e have examined the records in all capital murder cases reviewed by this Court, with particular emphasis given to those cases in which ***the death sentences*** were based upon the probability that the defendants would be continuing threats to society...[W]e conclude that juries generally in this jurisdiction impose the death sentence for conduct similar to that of Peterson. *Peterson v. Commonwealth*.

While these methods for conducting proportionality review are not an abuse of the discretion granted the Court by the General Assembly, it substantially limits the value of the review. By giving a “particular emphasis” to capital murder cases in which a sentence of death was imposed in its sentence review, or by excluding altogether cases in which life sentences were imposed, the Court is effectively stating that as long as the circumstances associated with the case under review can be found in any other cases in which juries returned a verdict of death, the sentence is not disproportionate. With such an analysis, it would be possible for the court to conclude that a death sentence was not excessive even if in a majority of similar cases, juries generally returned a verdict of life in prison.

This was most evident in the case of a 16-year old defendant who was sentenced to death for the capital murder and robbery of his victim. When the Virginia Supreme Court held that the sentence was not excessive, one member dissented. This judge’s dissent was formed after he conducted a proportionality review by comparing the defendant and his crime to other 16-year old defendants who were charged with capital murder. The dissenting justice noted that every other 16-year old defendant who was tried for capital murder, based on far more

egregious offenses than in the case at bar, was sentenced to life in prison.

Portions of his dissent are presented below:

We have stated that the test of proportionality is whether juries in this jurisdiction generally approve the Supreme penalty for comparable or similar crimes...Juries in Virginia generally have not approved the imposition of the death penalty for 16-year old capital murder offenders...Since 1987, ten 16-year old defendants have been convicted of capital murder, and only one defendant Chauncey Jackson [the case under review] has been sentenced to death. I agree with the majority that Jackson's offenses are atrocious and that he has exhibited little, if any regard, for the value of human life or the consequences of his criminal conduct...However, my review of all capital murder cases leads me to the conclusion that the sentence of death imposed upon Jackson is excessive and disproportionate to penalties imposed in similar cases...The facts in the Novak case [which included the near capitation of one of two young boys who were murdered] are far more egregious than the facts in the present case...Owens [another 16 year old defendant] killed four persons including a 14 year old boy. *Jackson v. Commonwealth*.

The Supreme Court is not unaware of the questions that have been raised regarding its practices associated with sentence review. Examples of the Court's defense of the methods it uses to conduct sentence review are presented below.

A determination of proportionality of punishment requires only that a defendant's death sentence not be incommensurate with his conduct, measured by other jury decisions, on a statewide basis, involving similar conduct. If juries generally in this jurisdiction impose the death sentence for crimes comparable with Coppola's then Coppola's death sentence is not excessive or disproportionate. *Coppola v. Commonwealth*.

The court's function in performing comparative review is not to search for proof that a defendant's death sentence is perfectly symmetrical, but to identify and invalidate the

aberrant death sentence. *Tennessee v. Bland* cited in *Overton v. Commonwealth*.

The purpose of comparative review is to reach a reasoned judgment regarding what cases justify the imposition of the death penalty. Although we cannot insure that complete symmetry exists among all death penalty cases, our review does enable us to identify and invalidate a death sentence that is excessive or disproportionate to the penalty imposed in similar cases. *Orbe v. Commonwealth*.

Impact of Missing Cases from Virginia Supreme Court's Database.

Another concern raised about sentence review in death cases is whether the Court has compiled a representative cross-section of capital murder cases in which life sentences have been imposed. As noted earlier, the Court includes in its database all capital murder cases resulting in life sentences that have been appealed to the Supreme Court or the Virginia Court of Appeals.

Critics of this approach have contended that a substantial number of capital murder cases in which a sentence of life in prison was received never reach the Virginia Court of Appeals or the Virginia Supreme Court. This, it has been argued, skews the database used in the comparisons towards capital murder death cases, virtually assuring that no jury-imposed death sentence will be reversed. In response to this argument, the Court has stated that the consideration of other life cases would not be appropriate because they typically involve plea bargains in which a sentence of life was granted by the judge in exchange for a guilty plea.

JLARC staff attempted to examine this issue by identifying those capital murder cases in which juries imposed life sentences, but the cases were

not appealed. These cases were identified through the use of the automated Pre-and Post-Sentence Investigative Reports maintained by the Virginia Sentencing Commission and matched against the cases in the Virginia Supreme Court's database. These records were only available for cases in which life sentences were imposed on or after January 1, 1985.

However, the automated file does not indicate whether the local prosecutor in these cases was seeking the death penalty. Those life cases in which the prosecutor was not seeking the death penalty would necessarily be excluded from the Court's file. Therefore, a reliable determination could not be made of whether any of these cases should be included in the Virginia Supreme Court's database of cases for sentence review.

Despite these data issues, questions remain about the way proportionality review is conducted in Virginia. Specifically, the Court's practice of not consistently considering those capital murder cases in which a life sentence was imposed, and at other times, its decision to give a particular emphasis to the death cases, limits the reliability of the Court's review. If the General Assembly intended that proportionality review be based on more consistent comparisons of capital murder death sentences with capital murder life sentences, language may be useful to guide the Supreme Court in that manner.

Both at State and Federal Post-Conviction Review, a Substantial Number of Claims of Trial Error Are Rejected Because the Courts Conclude That the Errors Do Not Pertain to the Defendant's Guilt or Innocence

Inmates who were unsuccessful in obtaining a reversal on direct review to the Virginia Supreme Court are permitted to file habeas corpus petitions in both State and federal courts. As described earlier, habeas corpus petitions allege that a prisoner is being held in violation of his federally guaranteed constitutional rights. If either a State or federal court finds that a constitutional violation has occurred, the prisoner's conviction and sentence may be overturned.

Defendants are typically provided new attorneys at this stage of the review process. The new attorneys must re-investigate the case and review the entire trial record to determine if the defendant received his constitutional right to a fair trial. As part of this review, the new attorneys must also determine whether the defendant received his right to effective assistance of counsel by examining any errors made by the trial counsel.

Although ineffective assistance of counsel claims could provide a defendant with the basis for a new trial, such claims are extremely difficult to prove. The standard used to determine whether a trial attorney's performance amounted to *constitutionally* ineffective assistance of counsel has been defined by the United States Supreme Court in *Strickland v. Washington*. In that decision, the United States Supreme Court articulated the following standard:

First, the defendant must show that counsel's performance was deficient. This requires showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth

Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

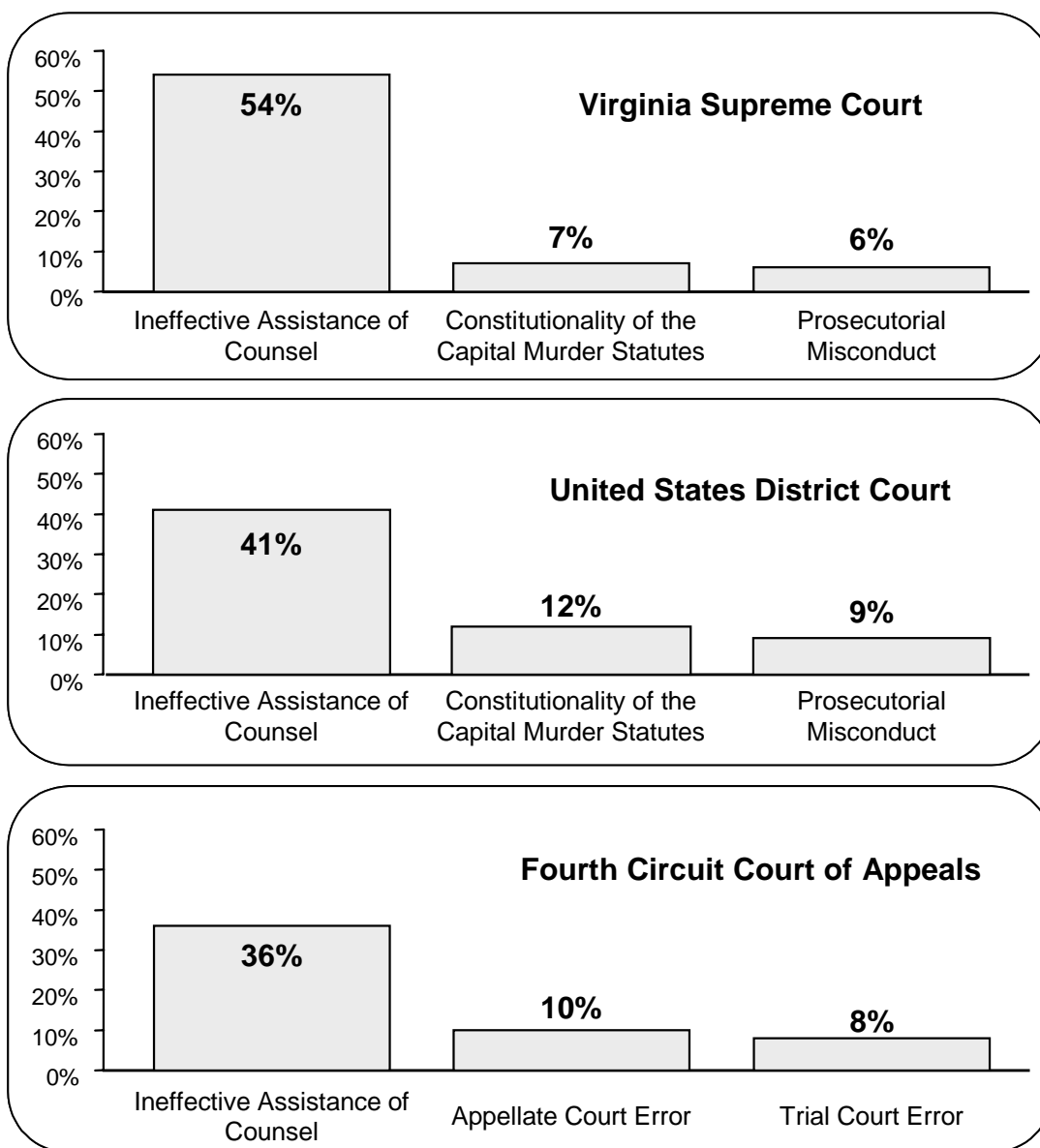
In reviewing claims of error other than those related to ineffective assistance of counsel, the same appellate review principles that require the Supreme Court of Virginia to defer to the discretion of the trial court at direct review apply at post-conviction review as well. Additionally, the passage of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) in 1996, which initiated a series of reforms related to habeas corpus proceedings, requires federal courts to defer to findings and judgments of state courts. Specifically, the amendment to 28 U.S.C. § 2254, which was enacted as a part of AEDPA, states the following:

An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim (1) resulted in a decision that was contrary to, or involved an unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Given the factors that govern State and federal habeas corpus review, it is very difficult for death-sentenced inmates to obtain a reversal during either the state or federal post-conviction review process.

Impact of Strickland Standard on Ineffective Assistance of

Counsel Claims. As shown in Figure 27, in petitions filed in both State and federal habeas corpus appeals, the most frequent claim of error raised by

Figure 27**Types of Claims Submitted at Post-Conviction Review**

Note: Claims not presented in this analysis for the Virginia Supreme Court and the United States District Court include those involving the investigative phase, accusation phase, due process/equal protection, sufficiency of evidence, improper sentence, appellate court error and other adjudicatory phase issues. For the Fourth Circuit Court of Appeals, claims not presented here involve the investigative phase, accusation phase, due process/equal protection, sufficiency of evidence, improper sentence, constitutionality of the capital murder statutes and prosecutorial misconduct. Individually, none of these categories account for more than five percent of the total claims.

Source: JLARC staff analysis of habeas corpus petitions submitted to the Virginia Supreme Court, habeas corpus petitions submitted to the United States District Court, and appellants' briefs submitted to the Fourth Circuit Court of Appeals.

inmates was ineffective assistance of counsel. The low reversal rate based on these claims reflects the courts' judgments that these claims did not meet the Strickland standard. The Fourth Circuit Court of Appeals in *Bunch v. Thompson* described the deference accorded to judgments made by trial counsel, where the judge wrote the following:

It is becoming all too commonplace to charge even diligent counsel in the midst of difficult circumstances with the adverse outcome in a capital case. When examining ineffective assistance of counsel claims, however, we must appreciate the practical limitations and tactical decisions that trial counsel faced.

Quoting the United States Supreme Court, he also wrote:

Particularly when evaluating decisions not to investigate further, we must regard counsel's choices with an eye for "reasonableness in all the circumstances, applying a heavy measure of deference to counsel's judgments" (*Strickland v. Washington*).

Impact of Procedural Restrictions on Post-Conviction Review.

Claims presented at post-conviction review are also subject to procedural default rules. In reviewing claims raised at State habeas corpus proceedings, the Virginia Supreme Court will not review claims that were not raised at trial and on direct appeal (*Slayton v. Parrigan*). Moreover, in accordance with United States Supreme Court rulings, when a State court has ruled that a claim is procedurally defaulted, that claim is ordinarily barred from federal habeas corpus review as well (*Wainwright v. Sykes*).

It should be noted that both the State and federal courts make exceptions to procedural default. A typical strategy used in State habeas corpus petitions is to argue that counsel was ineffective for failing to object to errors

made during the trial. If the ineffective assistance of counsel claim meets the standard in *Strickland v. Washington*, that would provide the Court with a basis for considering trial error that would otherwise be defaulted.

Another approach used by inmates to have an otherwise defaulted claim reviewed at the state habeas corpus stage is to argue that prosecutorial misconduct, such as the failure to disclose exculpatory evidence, prevented them from raising a claim at an earlier stage of the appellate process. However, they must prove that the information concealed by the prosecution could not have been known through any other means.

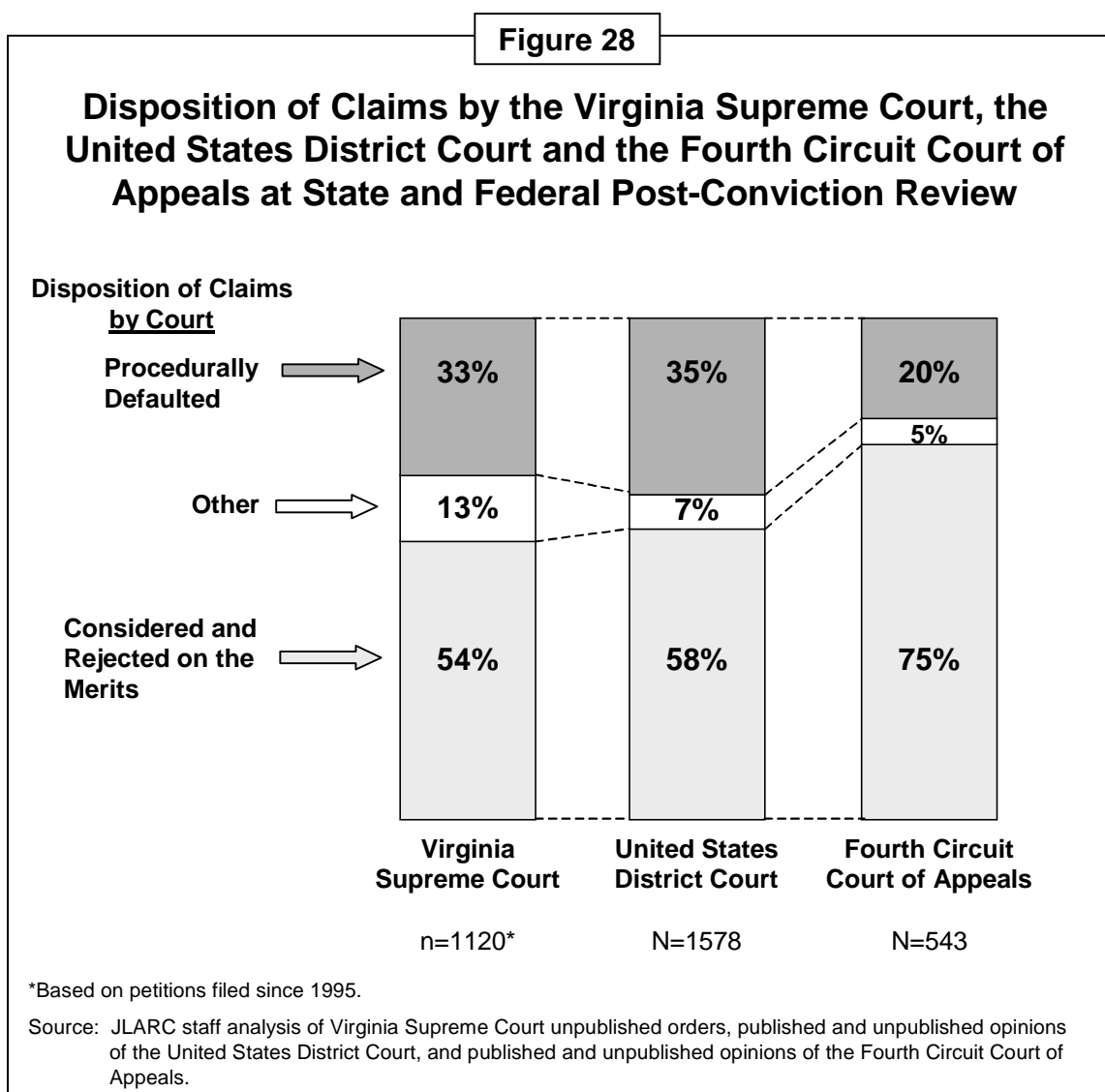
The United States District Court requires inmates to show “cause and prejudice” or a “miscarriage of justice” in order to excuse the procedural default of a claim at federal habeas corpus review. To meet the cause and prejudice requirements, inmates must show that the error could not have been raised earlier and that the violation “worked to his actual and substantial disadvantage” at trial (*Wainwright v. Sykes*).

In order to excuse a procedural default through the miscarriage of justice exception, inmates must prove they are ineligible for the death penalty. Using the standard articulated by the United States Supreme Court in *Sawyer v. Whitley*, a petitioner must show “by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty” in order to have that claim heard.

To determine the impact of procedural default rules at post-conviction review, JLARC staff reviewed State and federal habeas corpus petitions, as well

as published and unpublished orders and opinions, for all death row inmates from 1977 to 2001. The same classification strategy described in the previous section was used for this analysis as well.

Figure 28 shows the proportion of claims procedurally defaulted at State and federal habeas corpus proceedings. The Virginia Supreme Court did not consider about one-third of all State habeas corpus claims due to procedural default. In addition, the United States District Court denied more than one-third of all federal habeas corpus claims based on procedural default. Procedural



default rules were applied to bar claims appealed to the Fourth Circuit Court of Appeals about 20 percent of the time.

Because the standard for excusing the procedural default of a claim is based on the likelihood that a jury would have found a defendant innocent, federal judges must sometimes rule that a claim is procedurally defaulted even when they believe that claim has merit and would provide the basis for a new trial or a new sentencing proceeding. For example, in reviewing the federal habeas corpus petition for Dana Ray Edmonds, United States District Court Judge James Turk wrote the following in an order dated January 23, 1995:

In closing, the court would like to make it clear that it believes Dana Ray Edmonds did not receive effective assistance of counsel. The court believed this to be the case when it granted habeas relief in August of 1992, and it is even more apparent to the court today. There cannot be a more blatant conflict of interest than the one that existed in the present case.

Even more troubling to the court, Dana Ray Edmonds will suffer the Commonwealth's most severe penalty in less than thirty-six hours, despite the fact that the trial in which his death sentence was imposed was, unquestionably, marred by a clear violation of his 6th Amendment right to counsel.

Nevertheless, bounded 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.

Edmonds was subsequently executed on January 24, 1995.

The federal habeas corpus review of Arthur Jenkins provides another example of a judge who felt compelled to procedurally default a claim that appeared to have merit, and may have justified a new trial. Arthur Jenkins had

been in the Washington County jail just prior to murdering his uncle and his uncle's friend. The jailer, Robert Clendenen, was subsequently charged with embezzlement and providing drugs to inmates in exchange for sex. This same jailer testified against Jenkins at the sentencing phase of his trial.

Although the prosecution knew about the charges against Clendenen, Jenkins' trial attorney was unaware of the situation. Furthermore, Jenkins, who was purported to have borderline intelligence, did not mention that Clendenen had sexually abused him and provided him with drugs until an investigator working for the federal habeas corpus attorney asked him about it. Therefore, the jury was never presented with this information.

Jenkins' federal habeas corpus attorney attempted to have his sentence overturned based on the fact that the prosecution permitted Clendenen to testify knowing that the jailer had been charged with abusive behavior. His attorneys claimed the prosecution had committed a Brady violation by deliberately withholding potentially exculpatory information, but the federal habeas corpus judge ruled that it was not a Brady violation because the defendant was aware of the information. Ruling that the defendant could not "show cause" for the default of the perjured testimony provided by Clendenen, that claim was procedurally defaulted from review by the United States District Court. Senior Judge Richard Williams wrote the following in an order dated January 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... No jury has heard and no court has considered the impact of the alleged abusive jailer, Clendenen, who preyed

on those in his custody, including Jenkins, and who testified against the petitioner at the penalty phase of his trial. 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.

Arthur Jenkins, like Dana Edmonds, was executed without benefit of a new trial, as the federal habeas corpus review was the last chance either of them had for a sentence reversal.

As noted earlier, while exceptions to procedural default are allowed when judges believe that the execution of an innocent person is at stake, this analysis to assess whether an exception is warranted is speculative at best in the absence of a fair trial. This dilemma is illustrated by Judge Turk's closing paragraphs in the Dana Edmonds opinion.

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

Although far from conclusive, the substance of these findings indicate that appellate review for death row inmates in Virginia has been expedited by the courts and that many claims raised by these inmates are not considered on their merits through application of the doctrine of procedural default. In addition, when Virginia's State courts procedurally bar certain claims from review, the federal courts are restricted from consideration of these assignments of error as well.

Whether Virginia's rules on procedural default should be loosened, at least in capital cases, is a decision for the General Assembly and the Virginia Supreme Court. They must strike the proper balance between the desire for finality and efficiency in capital cases and the ideal of fairness in the criminal process.

EXECUTIVE CLEMENCY IN VIRGINIA

The final stage of the post-conviction review process for persons who have been sentenced to death in Virginia is executive clemency. Through Article V, § 12 of the Virginia Constitution and §53.1-229 of the *Code of Virginia*, Governors have been vested with the power to commute capital punishment sentences and to grant pardons or reprieves. This authority provides what many believe is the final safeguard against the possible execution of an innocent prisoner. Governors may also use executive clemency to prevent executions in cases where a death sentence is deemed inappropriate due to other factors, such as the mental condition of the person who has been condemned to die.

However, opponents of the death penalty believe that executive clemency is, at best, an unreliable protection against the execution of the innocent. They feel public sentiment and the associated political pressures militate against the possibility that persons who have been wrongly convicted will receive clemency or a pardon from the Governor. In such cases, only those inmates whose claims of innocence are based on newly-discovered DNA evidence can petition the Virginia Supreme Court for a grant of a writ of innocence.

One goal of this study was to examine how Governors have used executive clemency under the reformed death penalty statutes to respond to claims of innocence from prisoners waiting execution. Also, an effort was made to distinguish the outcomes of appeals for clemency that were based on claims of innocence from those that were not.

These analyses revealed that approximately one-third of all capital defendants have raised a claim of innocence through a petition for clemency. Approximately 18 percent of those cases in which innocence was asserted received a commutation, and in one case a complete pardon. This compares to five percent for those prisoners who were making general pleas of mercy.

Nonetheless, the inner-workings and deliberations of the clemency process occur largely beyond public view and are shielded from serious scrutiny. As a consequence, despite a review of the claims made in the petitions, it was unclear why some cases were reversed while cases that appeared to include comparable claims of innocence were not. In the absence of a more formalized clemency process, the reliability of this system will likely remain subject to criticism and concerns that new claims of innocence are not properly handled in Virginia.

The Process of Executive Clemency Would Benefit from Greater Structure and Openness

In 1993, the United States Supreme Court explained the importance of executive clemency in *Herrera v. Collins*, stating that:

Executive clemency has provided the “fail safe” in our criminal justice system...It is an unalterable fact that our judicial system, like the human beings who administer it, is

fallible. But history is replete with examples of wrongfully convicted persons who have been pardoned in the wake of after-discovered evidence establishing their innocence.

Restrictions Placed on the Use of New Evidence in Virginia. In

Virginia, the importance of executive clemency is amplified in light of restrictions that the Virginia Supreme Court has placed on the introduction of newly discovered evidence. Known as the “21-Day Rule,” Rule 1.1 prevents defendants from introducing new evidence more than 21 days after the circuit court judge has ordered a death sentence. The purpose of this rule is to bring finality to trial court judgments, and to prevent long delays in imposing sentences. According to a study of the Virginia Crime Commission, this three-week period is the shortest such deadline in the country.

As noted earlier, exceptions to this rule are believed to be possible based on recently passed legislation that grants the Virginia Supreme Court the authority to issue writs of innocence based on newly discovered DNA evidence. This legislation, passed by the 2001 General Assembly, specifically excludes human biological evidence from the 21-Day Rule. Section § 19.2-327.1 of the *Code of Virginia* allows convicted felons to file a motion for scientific analysis of newly discovered or previously untested evidence under the following conditions:

if: (i) the evidence was not known or available at the time the conviction became final in the circuit court or the evidence was not previously subjected to testing because the testing procedure was not available at the time the conviction became final in the circuit court; (ii) the evidence is subject to a chain of custody sufficient to establish that the evidence has not been altered, tampered with, or substituted in any way; (iii) the testing is materially relevant, noncumulative, and necessary and may prove or disprove the convicted person's actual innocence; (iv) the testing requested involves a scientific

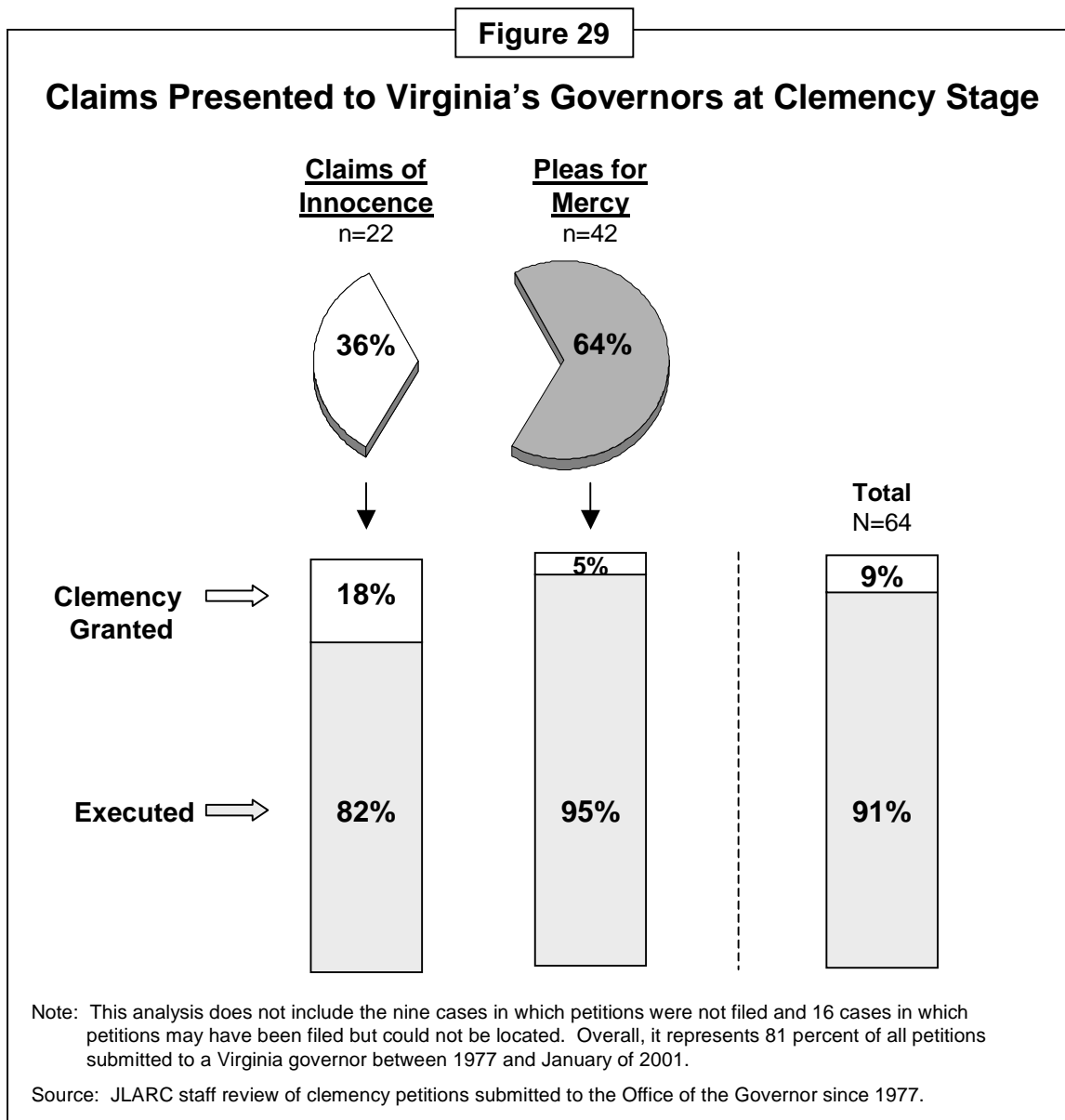
method employed by the Division of Forensic Science; and (v) the convicted person has not unreasonably delayed the filing of the petition after the evidence or the test for the evidence became available.

Once this evidence is tested, the defendant may submit a petition for a writ of actual innocence from the Virginia Supreme Court (*Code of Virginia* § 19.2-327.5). The Supreme Court then has several options. For cases in which the new evidence proves a person not guilty beyond a reasonable doubt, the Court may grant the writ and vacate the sentence altogether. The Court also has the option to remand a case back to the circuit court for re-sentencing, if there is sufficient evidence to find the defendant guilty of a lesser-included offense. However, if the defendant has failed to establish facts sufficient to justify the writ, the Court may dismiss the petition altogether.

Executive Clemency as a Last Option. Regardless of the outcome of judicial review, inmates on death row can use the clemency process in an attempt to stop their scheduled executions. Attorneys for these defendants are free to restate any old claims of innocence that were initially raised at trial, or bring to the Governor's attention any new evidence which they believe exonerates their clients. If the guilt of those convicted is conceded, attorneys can base the petitions on a general plea for mercy, or any other mitigating factor they believe to be relevant.

Upon the receipt of a request for clemency, the Governor can request the Parole Board to investigate and make a report on the matter. Also, if a formal request is not made, the Parole Board may at its discretion develop such a report and present recommendations to the Governor.

Outcomes of Clemency Petitions. As a part of this analysis, JLARC staff reviewed clemency petitions submitted to Virginia Governors since 1977. The purpose of this review was to examine the nature of the clemency requests and the decisions that have been made by various Governors based on these requests. These petitions were first examined to determine the types of claims made to Virginia's governors. Figure 29 shows the percentage of defendants



who made claims of innocence versus those who claimed that they did not deserve the death penalty for some other reason.

As shown, only about one-third of the clemency petitions reviewed included claims of innocence. Of the 22 cases for which claims of innocence were made, 12 defendants claimed complete innocence of the capital murder. Of the remaining ten cases, five claimed they were innocent of the murder but guilty of the predicate offense, and another five claimed they were innocent of the predicate offense but guilty of the murder.

To determine what factors might have resulted in a grant of clemency, JLARC examined the six cases for which Governors have awarded clemency. In two cases, the Governor of Virginia granted clemency to defendants who were not considered to be innocent of capital murder, but who were mentally ill (Table 10). The prosecutor in both of these cases supported a commutation of those sentences to life in prison. The remaining four cases in which clemency was granted involved claims of innocence. Only one defendant, Earl Washington Jr., presented new DNA evidence. Evidence presented by the other three defendants included recanted confessions, impeachments of prosecution witnesses, and recantations of testimony provided by prosecution witnesses.

Problems with the Clemency Process. Under current law, the Governor has complete discretion in deciding whether and how to investigate the underlying issues raised in a request for clemency. For some cases, the Governor may direct the Parole Board to conduct an investigation of the facts alleged in the petition, while in other cases such an investigation may never be

Table 10 Defendants Granted Clemency by the Governor of Virginia		
Names	Major Claims Presented at Clemency	Outcome of the Case
1. Herbert Bassette	Bassette contends that his conviction was based solely on inconsistent accomplice testimony. Bassette also presented evidence that he did not commit a previous murder robbery, which provided the basis for the jury's finding of future dangerousness.	Death sentence commuted to life sentence.
2. Joseph Giarratano	Giarratano argues that his conviction was based largely on his confession, which was a product of suggestion by law enforcement.	Death sentence commuted to life sentence.
3. Joseph Payne	Joseph Payne contends that his conviction was based solely on the uncorroborated testimony of a prison inmate who later recanted his testimony. He also presented statements of other inmates who came forward to impeach that testimony after Payne was convicted.	Death sentence commuted to life sentence.
4. William Saunders	Saunders claims to have a mental illness that was not investigated by his attorney at trial. The Commonwealth's Attorney supported clemency based on new evidence of his mental condition.	Death sentence commuted to life sentence.
5. Calvin Swann	Swann claims to have a mental illness that was not investigated by his attorney at trial. The Commonwealth's Attorney supported clemency based on new evidence of his mental condition.	Death sentence commuted to life sentence.
6. Earl Washington Jr.	Washington argues that his conviction was based largely on his confession, which was a product of suggestion by law enforcement. He also presented new DNA evidence proving he did not rape the murder victim, and therefore was ineligible for the capital murder charge.	He was released from prison in 2001 after serving more than 17 years in prison.

pursued. If the Parole Board submits a report with recommendations to the Governor, its substance is shielded from public scrutiny as a part of the Governor's confidential working papers.

While some confidentiality surrounding this process may be needed to protect the identification of those who would otherwise be unwilling to cooperate

in the investigation, the absence of greater public disclosure raises concerns about the reliability and fairness of executive clemency. Moreover, the possibility that an independent third party -- the Virginia Parole Board -- could be intimately involved in investigating some requests for clemency and not others, adds to the perception that the process is haphazardly implemented and subject to political pressures or public sentiment.

These problems could be addressed through legislative changes that established a more structured process involving the Parole Board or some other State entity that would be charged with reviewing and investigating each clemency petition submitted by an inmate on death row. Following this effort, the relevant authority could be required to make a public report to the Governor outlining the issues that were considered in the review and provide a recommendation regarding clemency to the Governor. The final decision on the petition would remain with the Governor. This board might also be required to maintain a complete file of clemency petitions for reference purposes, as this function is not currently provided by any other state office or agency.

APPENDIX A

Weights For Localities In The Study Sample

The sampling technique used in this study required the weighting of sample statistics in order to generalize to the entire population. Without such weights, the results from cases in clusters in which over sampling occurred would have had a disproportionate impact on any statewide values calculated for the study.

The construction of these weights required inverting a ratio (or index) composed of the proportion of the sample attributable to a locality divided by the proportion of cases in the population attributable to a locality. The representation of this ratio is shown by the formula for the relative index in Figure A.1.

Figure A.1

$$RI = \frac{\frac{n_i}{\sum_i n}}{\frac{x_i}{\sum_i x}}$$

Where:

- RI = relative index
- n_i = cases in the sample for a given locality
- x_i = cases in the population for a given cluster

The relative indices for each locality, which can be viewed as the likelihood of seeing a given case in a cluster relative to the statewide population of capital-eligible cases, is presented in Table A.1. For example, in the case of Richmond City, it was nearly three times more likely (2.948) to find a capital-

Table A.1 Weights and Sample Size for Each Locality In the Study Sample					
<u>Locality</u>	<u>Number of Cases in Sample</u>	<u>Cluster Size</u>	<u>Representation Index</u>	<u>Weight</u>	<u>Weighted Sample Size</u>
Accomack	3	41	0.872	1.1443	3
Arlington	4	96	0.491	2.0094	8
Augusta	2	41	0.581	1.7164	3
Carroll	2	41	0.581	1.7164	3
Chesapeake	6	78	0.916	1.0884	7
Chesterfield	10	78	1.527	0.6531	7
Danville	3	78	0.458	2.1769	7
Fairfax	3	96	0.368	2.6792	8
Floyd	1	41	0.291	3.4328	3
Franklin	2	41	0.581	1.7164	3
Grayson	4	41	1.162	0.8582	3
Greensville	2	41	0.581	1.7164	3
Halifax	1	41	0.291	3.4328	3
Henrico	9	78	1.375	0.7256	7
Lunenburg	1	41	0.291	3.4328	3
Montgomery	4	78	0.611	1.6327	7
Newport News	7	96	0.860	1.1482	8
Norfolk	30	96	3.684	0.2679	8
Nottoway	2	41	0.581	1.7164	3
Petersburg	3	78	0.458	2.1769	7
Pittsylvania	2	41	0.581	1.7164	3
Portsmouth	12	96	1.474	0.6698	8
Prince William	4	78	0.611	1.6327	7
Richmond City	23	96	2.948	0.3495	8
Ricmond County	2	41	0.581	1.7164	3
Smyth	3	41	0.872	1.1443	3
Southampton	1	41	0.291	3.4328	3
Suffolk	4	78	0.611	1.6327	7
Virginia Beach	9	96	1.105	0.8931	8
Westmoreland	1	41	0.291	3.4328	3
Totals	160	1911*	N/A	N/A	160
* The total column should not be viewed as the total of cases for the 31 localities. Each cluster size really represents the total number of cases for the urban, rural, or suburban cluster statewide and not the caseload for the locality.					

eligible case from Richmond in the study sample than in the universe of capital-eligible statewide. Therefore, a revised weight, which represented the inverse of the representation index ($.3393 = 1/2.948$), was calculated for Richmond to “decrease” the importance of cases from this locality relative to cases from the other clusters. This relationship allowed JLARC staff to ensure that cases that were represented in the sample in disproportionately high numbers, did not inappropriately influence the statistics that were calculated from the sample. Accordingly, statistical values for a given factor were computed separately for each locality and then adjusted with the weight for that locality.

APPENDIX B
STANDARDS FOR THE QUALIFICATIONS OF COUNSEL IN CAPITAL CASES

Pursuant to §19.2-163.8(E) of the Code of Virginia of 1950, as amended, the Supreme Court and the Public Defender Commission, in conjunction with the Virginia State Bar, hereby set forth the following standards required for counsel to be qualified and possess proficiency and commitment to quality representation in capital cases.¹ While §19.2-163.7 of the Virginia Code, effective July 1, 1992, does not require more than one attorney, the appointment of two attorneys is strongly urged for trial, appellate and habeas proceedings. Thus, the standards often refer to “lead counsel”² and “co-counsel”. If a Public Defender is appointed as either “lead” or “co-counsel”, the other attorney should be appointed from the private bar.

While the Supreme Court, Public Defender Commission, and the Virginia State Bar have endeavored to promulgate standards which will require the attorneys listed to be the most highly qualified of criminal defense practitioners, the Circuit Court judge is in a position to evaluate an attorney’s proficiency and commitment to quality representation.

A. TRIAL COUNSEL:

1. Lead counsel must:
 - a. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*;
 - b. Have at least five years of criminal litigation practice within the past seven years including acting as primary counsel (defense or prosecution) in at least five jury trials involving violent crimes with a maximum penalty of 20 years or more;
 - c. Have had, within the past two years, at least six hours of specialized training in capital litigation;
 - d. Have at least one of the following:
 - i. Experience as “lead counsel” in the defense of at least one capital case within the past five years; or

¹ Whenever the term “capital case” is used, it shall mean a case in which the death penalty was sought and which was concluded after the jury was impaneled

² Whenever the term “lead counsel” is used, this would also include an attorney acting as sole counsel in a case.

- ii. Experience as co-counsel in the defense of at least two capital cases within the past seven years;
 - e. Be familiar with the requisite court system, including specifically the procedural rules regarding timeliness of filings and procedural default; and
 - f. Have demonstrated proficiency and commitment to quality representation.
2. Co-counsel must meet all of the requirements of “lead counsel” except 1(d).

B. APPELLATE COUNSEL:

Appellate counsel must meet the following requirements:

- 1. Be an active member in good standing of the Virginia State Bar or admitted to practice *pro hac vice*.
- 2. Have, within the past five years, briefed and argued the merits in:
 - a. At least three felony cases in an appellate court; or
 - b. The appeal of a case in which the death penalty was imposed;
- 3. Have had, within the past two years, at least six hours of specialized training in capital litigation;
- 4. Be familiar with the rules and procedures of appellate practice.

C. HABEAS CORPUS COUNSEL:

- 1. Habeas Corpus counsel must satisfy one of the following requirements:
 - a. Possess experience as counsel of record in Virginia or federal post conviction proceedings involving attacks on the validity of one or more felony convictions as well as a working knowledge of state and federal habeas corpus practice through specialized training in the representation of persons with death sentences, including the training required by §19.2-163.8(vii) of the Code of Virginia of 1950, as amended.
 - b. Service as counsel in at least one capital habeas corpus proceeding in Virginia and/or federal courts during the past three years; or
 - c. Have at least seven years civil trial and appellate litigation experience in the Courts of Record of the Commonwealth and/or federal courts.

APPENDIX C

Sampling Errors

Table C.1				
Sampling Errors Associated with Figure 12				
Total Sample n=160				
Prosecutor Sought a Capital Murder Indictment	Percent 74%	Sampling Error 7%		
	Prosecutor Did Not Seek a Capital Murder Indictment n=37		Prosecutor Sought a Capital Murder Indictment n=123	
	Percent	Sampling Error	Percent	Sampling Error
Presence of Aggravators*	78%	13%	89%	6%
Type of Offense***				
Robbery sole predicate	77%	14%	56%	9%
Included rape	2%	4%	12%	6%
Multiple murders sole predicate	16%	12%	19%	7%
Other	5%	7%	13%	6%
At least one victim was female*	13%	11%	49%	9%
Type of Jurisdiction*				
Large	52%	16%	29%	8%
Medium	27%	14%	35%	8%
Small	21%	13%	36%	8%
Note: Between group differences in percentages and means are statistically significant at the following levels: * the .01 level ** the .05 level *** the .10 level				

Table C.2				
Sampling Errors Associated with Figure 14				
Prosecutor Sought the Death Penalty		Total Sample n=160		
		Percent 28%	Sampling Error 7%	
	Prosecutor Did Not Seek the Death Penalty n=121		Prosecutor Sought the Death Penalty n=39	
	Percent	Sampling Error	Percent	Sampling Error
Presence of Aggravators*	81%	7%	100%	0%
Type of Offense***				
Robbery sole predicate	65%	8%	51%	16%
Included rape	6%	4%	19%	12%
Multiple murder sole predicate	18%	7%	20%	13%
Other	11%	5%	9%	9%
At least one victim was white*	45%	9%	70%	14%
Type of Jurisdiction*				
Large	42%	9%	17%	12%
Medium	25%	8%	52%	16%
Small	33%	8%	31%	15%
Note: Between group differences in percentages and means are statistically significant at the following levels: * the .01 level ** the .05 level *** the .10 level				

Table C.3				
Sampling Errors Associated with Figure 15				
Total Sample n=160				
Prosecutor Sought the Death Penalty		<u>Percent</u> 28%	<u>Sampling Error</u> 7%	
	Prosecutor Did Not Seek the Death Penalty n=121		Prosecutor Sought the Death Penalty n=39	
	<u>Percent</u>	<u>Sampling Error</u>	<u>Percent</u>	<u>Sampling Error</u>
DNA Evidence**	31%	8%	51%	16%
Type of Eyewitness				
Eyewitness – Solid	19%	7%	16%	12%
Eyewitness - Not Solid	33%	8%	19%	12%
No eyewitness	48%	9%	65%	15%
Confession	48%	9%	36%	15%
Note: Between group differences in percentages and means are statistically significant at the following levels: * the .01 level ** the .05 level *** the .10 level				

Table C.4				
Sampling Errors Associated with Figure 18				
Life Sentence was Imposed		Total Sample n=25		
		<u>Percent</u> 48%	<u>Sampling Error</u> 20%	
	Life Sentence was Imposed n=11		Death Sentence was Imposed n=13	
	<u>Percent</u>	<u>Sampling Error</u>	<u>Percent</u>	<u>Sampling Error</u>
Jury Trial	53%	28%	53%	27%
Black Defendant	68%	26%	63%	26%
White Victim	86%	20%	75%	24%
Note: Between group differences in percentages and means are statistically significant at the following levels: * the .01 level ** the .05 level *** the .10 level				

APPENDIX D

Data Collection Instrument Used in the Analysis of Prosecutorial Discretion

FORM #1: ELIGIBILITY INFORMATION

Date _____ **JLARC ID** _____ **Analyst** _____

Defendant _____
(FIRST) (MIDDLE) (LAST) (SUFFIX)

Locality _____ **FIPS** _____

1. Premeditation Requirement (PREMED)

- 0 No, the crime does not appear to be premeditated
- 1 Yes, the crime was charged as premeditated first degree murder
- 2 Yes, the crime was charged as capital murder
- 3 Yes, other (PREMED2) _____

2. Triggerman Requirement (TRIGGER)

- 0 No, the evidence does not prove that the defendant was the triggerman
- 1 Yes, the defendant acted alone in the crime and was the triggerman
- 2 Yes, the defendant had accomplices but was the triggerman
- 3 Yes, other (TRIGGER2) _____

3. Aggravating Factors Requirement (AGGFACTOR1 - 3)

- | | |
|--|---|
| 0 No Aggravating Factor | 7 More than one person in the same transaction |
| 1 Abduction with intent to extort money or a pecuniary benefit (or intent to defile starting on July 1, 1995) | 8 More than one person in a three year period |
| 2 For hire (person who does the killing) | 9 Schedule I or II controlled substance violation |
| 3 By a prisoner while incarcerated | 10 Continuing criminal enterprise (starting July 1, 1997) (starting July 1, 1996) |
| 4 Robbery or attempted robbery (with a deadly weapon until July 1, 1996) | 11 Pregnant woman (starting July 1, 1997) |
| 5 Rape, attempted rape, forcible sodomy, attempted forcible sodomy (or object sexual penetration starting on July 1, 1995) | 12 Person under the age of 14 by a person age 21 or older (starting July 1, 1998) |
| 6 Law-enforcement officer while performing official duties | 13 Abduction of a child under the age of 12 with the intent to extort money or defile the victim (until July 1, 1996) |
| | 14 For Hire (person who does the hiring) |

4. Is the homicide eligible for capital murder? (ELIGIBLE)

(if any of the questions above are "0," then the homicide is not eligible)

- 0 No --- **STOP.**
- 1 Yes --- **Continue on to FORM #2**

FORM #2: DEFENDANT'S DEMOGRAPHICS

JLARC ID _____

5. Date of Birth (DDOB) _____
(mm/dd/yy)

6. SSN (DSSN) _____

7. IQ (DIQ) _____

8. Children (DCHILDREN) _____

9. Sex (DSEX) 0 Female
 1 Male

10. Education (DEDUC) 0 Less than High School
 1 High School / GED
 2 More than High School

11. Race (DRACE) 1 Black
 2 White
 3 Asian
 4 Hispanic
 5 Other

Continue on to Form #3

FORM #3: COURT PROCESS INFORMATION – Indictment

JLARC ID _____

12. Date of Offense (OFFDATE) _____

13. Date of Arrest (ARRDATE) _____

14. Date of Indictment (INDDATE) _____

15. Date of Conviction (CONVICTIONDATE) _____
(mm/dd/yy)

16. Number of Indictments (NUMINDICTS) _____

17. Complete the following table regarding the charges at indictment:

	VCC Code (IVCC1-12)	Plea to Charges (PLEA1-12)	Disposition (DISPOSITION1-12)
		0 – Not Guilty 1 – Guilty 2 – Nolo Contendere 3 – Alford Plea	0 – Found Not Guilty by judge or jury 1 – Found Guilty as charged by judge or jury 2 – Found Guilty of a lesser charge by judge or jury 3 – Plea Bargain – pleaded guilty to same charge 4 – Plea Bargain – pleaded guilty to reduced charge 5 – Plea Bargain – charge was nol prossed 6 – Dismissed 7 – Nol Pros (no plea bargain) 8 – Pleaded Guilty to same charge (no plea bargain) 9 – No verdict returned by jury * 10 – Hung Jury on first trial (mistrial) but case retried
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			

* an example: a defendant is indicted on first and second degree murder in one killing – if the jury finds the defendant guilty of first degree, there is no verdict for the second degree charge

Continue on to FORM #4

FORM #4: COURT PROCESS INFORMATION – Conviction

JLARC ID _____

18. Was the defendant found guilty of any charges due to a plea, judge or jury conviction?0 No --- **Go to FORM #4**

1 Yes

19. Number of charges at conviction: (NUMCONVICT) _____**20. Complete the following table regarding the charges at conviction:**

	VCC Code (CVCC1-12)	Sentence (SENTENCE1-12)	Number of Years (YEARS1-12)
		1 – Life in Prison 2 – Death Penalty 3 – Specified Number of Years	
1			
2			
3			
4			
5			
6			
7			
8			
9			
10			
11			
12			

Total Years:
(other than life)**Continue on to Form #5**

FORM #5: VICTIM INFORMATION

JLARC ID _____

21. How many victims did the defendant kill? (VICTIMS) _____

22. Complete the following table regarding the characteristics of the victims (see below):

	Victim #1	Victim #2	Victim #3	Victim #4	Victim #5
Age (VAGE1-5)					
Sex (VSEX1-5)					
Race (VRACE1-5)					
Relationship (VREL1-5)					
Dependants (DEP1-5)					
Surviving Children (SURVIVORS1-5)					
Well Known (WELLKNOWN1-5)					
Character (CHAR1-5)					
Location (LOCATION1-5)					
Culpable (CULPABLE1-5)					
Weapon (WEAPON1-5)					
Brutal (BRUTAL1-5)					

Sex

0-Female
1-Male

Race

1-Black
2-White
3-Asian
4-Hispanic
5-Other

Relationship

0-Stranger
1-Family
2-Intimate
3-Friend
4-Acquaintance
5-Drug Acquaintance

Character

0-Normal
1-Prostitute
2-Drug Dealer
3-Drug User/Buyer
4-Gang Member
5-Other negative
6-Inmate

Well Known

0-Not well known
1-Celebrity

Brutal*

0-Not Brutal
1-Multiple stab wounds/slashing
2-Multiple gunshots
3-Torture/starvation
4-Sexual abuse / Rape
5-Mutilation
6-Severe beating
7-Strangulation
8-Drowning
9-Execution
10-Burning
11-Burning+Multiple stab wounds
12-Rape + Multiple stab wounds
13-Burning + Multiple gunshots
14-Rape + Multiple gunshots
15-Drowning & strangulation
16-Gunshots and beating
17-Rape & strangulation
18-Stabbing & strangulation
19-Beating & Stabbing
20-Mult. gunshots & stabbing
21-Burning & Beating
22-Mult. gunshots, beat, stab
23-Rape, stabbing, strangle, defile body, beating
24-Slash, Strangle, Beat
25-Beating & Rape

Location

1-Victim's Residence
2-Defendant's Residence
3-Other residence
4-Business
5-Road/street/sidewalk/
parking lot
6-Park/school grounds
7-Wooded area/field
8-Other public place
9-Public transportation
10-Car
11-Prison

***Not Brutal:** Smoke inhalation, Single stab wound, Single gunshot wound (other than execution)

Culpable

"the victim was a participant in the defendant's conduct or consented to the act"

0-Not Culpable
1-Culpable-Prostitute
2-Culpable-Drug Dealer/Buyer
3-Culpable -Co-Conspirator

"99" = Not in File

Weapon

0-Beating with hands
1-Handgun (auto/etc)
2-Rifle (auto/etc)
3-Shotgun (all types)
4-Other firearm
5-Knife/sharp instrument
6-Strangled w/hands
7-Burned/Fire/Smoke
8-Drowned
9-Beating with object
10-Knife and burned
11-Starvation
12-Strangled w/object
13-Strangled w/obj. & drowned
14-Beating and handgun
15-Hands and Knife
16-Gun, knife, blunt object

**Continue on to
FORM #6**

FORM #6: DEFENDANT'S CRIMINAL HISTORY

JLARC ID _____

23. What was the status of the defendant at the time of the offense? (STATUS)

- 0 Not in the custody of the state
- 1 Inmate
- 2 On Parole
- 3 On Probation
- 4 Out on Bail/Bond
- 5 Other (explain) _____

24. Number of past convictions for felonies against property as an adult _____
(AFELPROP)

25. Number of past convictions for felonies against persons as an adult _____
(AFELPERS)

26. Number of past convictions for felonies involving drugs as an adult _____
(AFELDRUG)

27. VCC Code of the most serious felony against persons as an adult _____
(AFELONY)

28. Number of past convictions for felonies against property as a juvenile _____
(JFELPROP)

29. Number of past convictions for felonies against persons as a juvenile _____
(JFELPERS)

30. Number of past convictions for felonies involving drugs as a juvenile _____
(JFELDRUG)

31. VCC Code of the most serious felony against persons as a juvenile _____
(JFELONY)

Continue on to FORM #7

FORM #7: OTHER INFORMATION

JLARC ID _____

32. Did the defendant have a court-appointed attorney? (ATTORNEYAPPOINTED)

- 0 No, retained
- 1 Yes

33. Has the case been fully adjudicated (no pending appeals)? (ADJUDICATED)

- 0 No
- 1 Yes

34. How would the current Commonwealth's Attorney characterize juries in this jurisdiction who are asked to consider the death penalty after having found the defendant guilty of capital murder? (JURYCHARACTER)

- 1 In cases where the evidence is clear and compelling, death penalty juries in this jurisdiction are typically unwilling to impose the death penalty
- 2 In cases where the evidence is clear and compelling, death penalty juries in this jurisdiction are inconsistent in imposing the death penalty
- 3 In cases where the evidence is clear and compelling, death penalty juries in this jurisdiction are typically willing to impose the death penalty
- 4 Not applicable – never had a capital case get to the penalty phase

35. When did the current Commonwealth's Attorney take office? (CASTARTDATE)

(mm/dd/yy)

Continue on to FORM #8

FORM #8: PROSECUTION EVIDENCE

JLARC ID _____

36. Was there at least one of the following witnesses cited in the file who appeared willing to testify for the prosecution?

	Cited in File	Reasons Not Solid
<p><i>An <u>Independent</u> person is a "person with <u>no</u> relationship to the victim or the defendant"</i></p> <p><i>A <u>Non-independent</u> person is a "person with <u>some</u> relationship to the victim or the defendant"</i></p>	<p>0=No 1=Yes, solid 2=Yes, but not solid</p>	<p>1=Drug dealer 2=Drug user/buyer 3=Prostitute 4=Co-defendant 5=Co-conspirator 6=Conflicting testimony/statements 7=Inmate (snitch) / Pending charges 8=Drunk or on drugs at time of offense 9=Criminal Record 10=Mental incapacity 11=Age 12=Combination of above 13-Co-Def and Combo of above 14-More than one witness who is not solid for combination of the above reasons 15-Accessory after the fact</p>
Independent Eyewitness		
Non-independent Eyewitness		
Independent Witness of circumstances of the crime		
Non-Independent Witness of circumstances of the crime		
Witness of admission (other than law enforcement)		

37. Did the defendant confess to each element of the crime to a law enforcement officer?

(CONFESSION)

- 0 No
- 1 Yes – video
- 2 Yes – other format (such as transcript or audio)
- 3 No – Confessed to murder/killing, but not to underlying felony
- 4 No – Confessed to underlying felony, but not to the murder/killing
- 5 No – Confessed to being at the scene of the crime

38. Do lab reports implicate the defendant? (LABTESTSIMPLICATE)

- 0 No --- **Go to FORM #9**
- 1 Yes

39. In which of the following ways do the lab reports implicate the defendant?

- 0 No 1 Yes (DNA) – ex: blood of the defendant on the victim or the blood of the victim on the defendant
- 0 No 1 Yes (FINGERPRINTS) – of the defendant found at the scene or on the murder weapon
- 0 No 1 Yes (DRUGS) – a schedule I or II drug found on the defendant
- 0 No 1 Yes (BALLISTICS) – the weapon linked to the defendant was the one used in the murder
- 0 No 1 Yes Other (Please explain) _____

Continue on to FORM #9

FORM #9: DEFENSE EVIDENCE

JLARC ID _____

40. Was there at least one of the following witnesses cited in the file who appeared willing to testify for the defense?

	Cited in File	Reasons Not Solid
<p>An <u>Independent</u> person is a "person with <u>no</u> relationship to the victim or the defendant"</p> <p>A <u>Non-independent</u> person is a "person with <u>some</u> relationship to the victim or the defendant"</p>	<p>0=No 1=Yes, solid 2=Yes, but not solid</p>	<p>1=Drug dealer 2=Drug user/buyer 3=Prostitute 4=Co-defendant 5=Co-conspirator 6=Conflicting testimony/statements 7=Inmate (snitch) / Pending charges 8=Drunk or on drugs at time of offense 9=Criminal Record 10=Mental incapacity 11=Age 12=Combination of above 13=Co-Def and Combo of above 14=More than one witness who is not solid for combination of the above reasons 15=Accessory after the fact</p>
Independent Alibi		
Non-independent Alibi		
Independent Eyewitness (raises questions as to defendant's guilt)		
Non-Independent Eyewitness (raises questions as to defendant's guilt)		
Independent Witness of circumstances of the crime (raises questions as to defendant's guilt)		
Non-Independent Witness of circumstances of the crime (raises questions as to defendant's guilt)		
Someone else confessed to the crime		

41. Do lab reports raise questions as to the defendant's guilt? (DLABTESTS)

0 No --- **Go to FORM #10**

1 Yes

42. In which of the following ways do the lab reports raise questions as to the defendant's guilt?

0 No 1 Yes (D_DNA) – ex.: blood of someone other than the defendant was found on the victim

0 No 1 Yes (D_FINGERPRINTS) – of someone other than the defendant at the scene or on the murder weapon

0 No 1 Yes (D_BALLISTICS) – the weapon used in the murder is linked to someone other than the defendant

0 No 1 Yes Other (D_LABOTHER)

Explain (D_LABOTHER2) _____

Continue on to FORM #10

FORM #10: CRIME NARRATIVE

JLARC ID _____

43. Should this case be considered as a case study? (CASESTUDY)

0 No

1 Yes

44. Provide a narrative of the crime: (NARRATIVE)

This image shows a single sheet of white paper with horizontal ruling lines. The lines are evenly spaced and run across the width of the page. There are no margins, text, or other markings on the paper.

Continue on to FORM #11

FORM #11: CAPITAL INDICTMENT AND TRIAL

JLARC ID _____

45. Was the defendant indicted for capital murder? (CAPITALINDICT)0 No --- **STOP.**

1 Yes

Prosecutor**Prosecutor**

Name

Title

Office

Defense Counsel**Defense Counsel**

Name

Title

Firm / Bar #

Phone

Type

0 Private

1 Public Defender

0 Private

1 Public Defender

Appointed

0 Retained

1 Court-Appointed

0 Retained

1 Court-Appointed

46. Was the defendant tried for capital murder? (TRIAL)1 No, plea agreement to a lesser charge ---- **STOP.**2 No, capital murder charge was nol pros, dropped, or reduced without a plea agreement ---**STOP.**

3 No, defendant pleaded guilty to capital murder (not part of a plea agreement)

4 Yes

5 No, court ordered the charges reduced

6 No, pleaded guilty as part of a plea agreement ---- **STOP.**7 No, capital charge nol pros as part of plea agreement after hung jury ---- **STOP****47. Was the defendant tried by a judge or a jury (guilt and/or penalty phase of trial)?** (JUDGEJURY)

0 Judge

1 Jury

48. Was the defendant convicted of capital murder? (CONVICTEDCAPITAL)

0 No, acquitted

1 No, convicted of a lesser murder charge

2 Yes

Continue on to FORM #12

FORM #12: PENALTY TRIAL

JLARC ID _____

49. Was the prosecutor pursuing the death penalty? (DEATHPURSUED)

- 0 No --- **STOP.**
- 1 Yes --- judge or jury found the defendant guilty of a lesser murder charge, but the prosecutor was pursuing the death penalty --- **STOP.**
- 2 Yes --- defendant was acquitted, but prosecutor was pursuing the death penalty --- **STOP.**
- 3 Yes --- judge or jury found the defendant guilty of capital murder and the prosecutor pursued the death penalty
- 4 Yes --- defendant pled guilty to capital murder and the prosecutor pursued the death penalty
- 5 Yes --- hung jury

50. Is jury information available? (JURYINFORMATION)

- 0 No, information was not available --- **Go to FORM #13**
- 1 No, the judge tried the case and/or sentenced the case --- **Go to FORM #13**
- 2 Yes

51. Complete the following table regarding juror characteristics:

Jurors	Age (JAGE1-12)	Sex (JSEX1-12)	Race (JRACE1-12)	Occupation (JOCCUPATION1-12)
		0 – Female 1 – Male	1 – Black 2 – White 3 – Asian 4 – Hispanic 5 – Other	
1				
2				
3				
4				
5				
6				
7				
8				
9				
10				
11				
12				

Continue on to FORM #13

FORM #13: PENALTY TRIAL

JLARC ID _____

52. Did the prosecutor pursue vileness? (VILENESS)

- 0 No
- 1 Yes

53. Did the prosecutor pursue future danger to society? (FUTUREDANGER)

- 0 No
- 1 Yes

54. Was the defendant sentenced to the death penalty? (DEATH)

- 0 No (Life) --- **Go to FORM #14**
- 1 Yes (Death)

55. Did the jury/judge give the death penalty based on vileness or the future danger? (DEATHREASON)

- 1 Vileness
- 2 Future Danger
- 3 Both
- 4 Information not in file

If the Judge sentenced the defendant, STOP HERE

Otherwise, Continue on to FORM #14

FORM #14: PENALTY TRIAL

JLARC ID _____

56. Was mitigating evidence admitted during the penalty phase of the trial?

- 0 No mitigating evidence admitted --- **Go to Question #59**
1 Mitigating evidence admitted

57. Identify the mitigating evidence admitted during the penalty phase of the trial.

- | | | | | |
|---|----|---|-----|---|
| 0 | No | 1 | Yes | No prior criminal record (MNORECORD) |
| 0 | No | 1 | Yes | Under influence of extreme mental or emotional disturbance at the time (MDISTURBED) |
| 0 | No | 1 | Yes | Victim was culpable (MCULPABLE) |
| 0 | No | 1 | Yes | Ability to appreciate the criminality of the conduct impaired (MIMPAIRED) |
| 0 | No | 1 | Yes | Age (MAGE) |
| 0 | No | 1 | Yes | Mental Retardation (MRETARDED) |
| 0 | No | 1 | Yes | Sexually abused as a child (MSEXABUSE) |
| 0 | No | 1 | Yes | Physically abused as a child (MPHYSICALABUSE) |
| 0 | No | 1 | Yes | Parent(s) on drugs/alcohol when defendant was a child (MPARENTSDRUGS) |
| 0 | No | 1 | Yes | Other (MOTHER) _____ |
-

58. Was victim impact evidence introduced during the penalty phase of the trial? (IMPACT)

- 0 No --- **Go to Question #60**
1 Yes

59. Did any victim impact evidence argue against capital punishment? (IMPACTARGUE)

- 0 No
1 Yes

60. Was the jury issued a jury instruction before penalty deliberations that life in prison means life in prison without the possibility of parole?

- 0 No
1 Yes

STOP.

APPENDIX E**Claims Submitted at Each Stage of the Judicial Review Process**

Table E.1 Types of Claims Submitted at Direct Review		
<u>Type of Claim</u>	<u>Virginia Supreme Court</u>	<u>United States Supreme Court</u>
Investigative Phase	1%	1%
Accusation Phase	1%	4%
Adjudicatory Phase / Jury Selection	15%	12%
Adjudicatory Phase / Improper Evidence	21%	12%
Adjudicatory Phase / Improper Jury Instructions	10%	10%
Adjudicatory Phase / Failure to Admit Proper Evidence	3%	6%
Adjudicatory Phase / Abuse of Discretion	9%	10%
Adjudicatory Phase / Jury Deliberations	1%	3%
Sentencing Phase	11%	2%
Due Process/Equal Protection	<1%	4%
Sufficiency of Evidence	7%	5%
Constitutionality of Capital Murder Statutes	11%	20%
Prosecutorial Misconduct	4%	1%
Appellate Court Error	1%	3%
Ineffective Assistance of Counsel	1%	3%
Other	<1%	1%
Unknown (petition not located)	4%	2%
Source: JLARC staff analysis of Virginia Supreme Court published opinions and petitions for writs of certiorari to the United States Supreme Court.		

Table E.2 Types of Claims Submitted at State Habeas Corpus Review		
<u>Type of Claim</u>	<u>Virginia Supreme Court</u>	<u>United States Supreme Court</u>
Investigative Phase	<1%	1%
Accusation Phase	1%	4%
Adjudicatory Phase / Jury Selection	3%	3%
Adjudicatory Phase / Improper Evidence	4%	7%
Adjudicatory Phase / Improper Jury Instructions	2%	7%
Adjudicatory Phase / Failure to Admit Proper Evidence	<1%	1%
Adjudicatory Phase / Abuse of Discretion	4%	6%
Adjudicatory Phase / Jury Deliberations	1%	<1%
Sentencing Phase	1%	<1%
Due Process/Equal Protection	3%	5%
Sufficiency of Evidence	2%	2%
Constitutionality of Capital Murder Statutes	7%	10%
Prosecutorial Misconduct	6%	4%
Appellate Court Error	4%	13%
Ineffective Assistance of Counsel	53%	29%
Other	1%	1%
Unknown (petition not located)	7%	2%
Source: JLARC staff analysis of habeas corpus petitions submitted to the Virginia Supreme Court since 1994 and petitions for writs of certiorari to the United States Supreme Court.		

Table E.3 Types of Claims Submitted at Federal Habeas Corpus Review			
<u>Type of Claim</u>	<u>United States District Court</u>	<u>Fourth Circuit Court of Appeals</u>	<u>United States Supreme Court</u>
Investigative Phase	<1%	0%	0%
Accusation Phase	1%	2%	2%
Adjudicatory Phase / Jury Selection	6%	4%	2%
Adjudicatory Phase / Improper Evidence	6%	7%	3%
Adjudicatory Phase / Improper Jury Instructions	7%	7%	7%
Adjudicatory Phase / Failure to Admit Proper Evidence	1%	2%	2%
Adjudicatory Phase / Abuse of Discretion	5%	8%	8%
Adjudicatory Phase / Jury Deliberations	1%	1%	0%
Sentencing Phase	2%	2%	0%
Due Process/Equal Protection	2%	2%	2%
Sufficiency of Evidence	3%	3%	2%
Constitutionality of Capital Murder Statutes	11%	7%	4%
Prosecutorial Misconduct	9%	6%	8%
Appellate Court Error	3%	10%	28%
Ineffective Assistance of Counsel	41%	37%	21%
Other	2%	2%	7%
Unknown (petition not located)	<1%	<1%	3%
<p>Source: JLARC staff analysis of habeas corpus petitions submitted to the United States District Court, appellants' briefs submitted to the Fourth Circuit Court of Appeals and petitions for writs of certiorari to the United States Supreme Court.</p>			

APPENDIX F
Agency Responses

CHIEF JUSTICE
HARRY L. CARRICO

JUSTICES
ELIZABETH B. LACY
LEROY ROUNTREE HASSELL, SR.
BARBARA MILANO KEENAN
LAWRENCE L. KOONTZ, JR.
CYNTHIA D. KINSEY
DONALD W. LEMONS

SENIOR JUSTICES
RICHARD H. POFF
A. CHRISTIAN COMPTON
ROSCOE B. STEPHENSON, JR.
HENRY H. WHITING

SUPREME COURT OF VIRGINIA
SUPREME COURT BUILDING
RICHMOND, VIRGINIA 23219
804-786-2251

CLERK
DAVID B. BEACH
EXECUTIVE SECRETARY
ROBERT N. BALDWIN
CHIEF STAFF ATTORNEY
JOHN THOMAS BRUCE
REPORTER OF DECISIONS
KENT SINCLAIR

November 30, 2001

NOV 30 2001

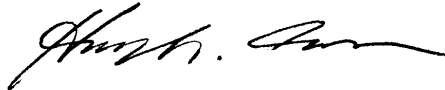
Phillip A. Leone, Director
Joint Legislative Audit
And Review Commission
Suite 1100, General Assembly Building
Capitol Square
Richmond, Virginia 23219

Dear Mr. Leone:

Thank you for sending me and the other members of the Court an exposure draft of your report, Review of Virginia's System of Capital Punishment. I have read the draft with great interest and am sure my associates have as well. I also thank you for extending us an opportunity to comment and an invitation to attend the Commission meeting on December 10. However, we do not plan to comment or to attend the meeting. But we would suggest that, if you have not already done so, you furnish the Attorney General a copy of the draft and invite him to comment and attend the meeting.

With best wishes, I am

Sincerely yours,



Harry L. Carrico
Chief Justice

HLC/cl



DEC 4 - 2001

COMMONWEALTH of VIRGINIA

Office of the Attorney General
Richmond 23219

December 4, 2001

900 East Main Street
Richmond, Virginia 23219
804 - 786 - 2071
804 - 371 - 8946 TDD

Philip A. Leone, Director
Joint Legislative Audit and Review Commission
Suite 1100, General Assembly Building, Capitol Square
Richmond, Virginia 23219

Re: Review of Virginia's System of Capital Punishment
Exposure Draft dated November 20, 2001

Dear Mr. Leone:

Thank you for giving us the opportunity to provide the Commission with a written response to the staff's Exposure Draft of its report on Virginia's system of capital punishment. The attached response is divided into 3 sections: (1) identification of errors of fact and law; (2) comments on Chapter II; and (3) comments on Chapter III. These comments by no means cover everything, but rather are an attempt to identify significant problems in the Draft.

In general, we are concerned about the tone of the report where it includes unsupported assumptions, or those supported only by the claims of particular inmates or dissenting judges or judges whose opinions have been overruled by higher courts. You should be aware that many of those assumptions have appeared frequently in briefs, pleadings or documents prepared by attorneys representing death-row inmates. Claims of "unfairness" in Virginia's system have been litigated thoroughly in the courts and, without exception, *rejected* in reasoned judicial opinions which also then have been upheld on appeal. We recognize that in a particular case, there will be opposing views voiced by the attorneys for the death-row inmate and by our Office representing the Commonwealth, but these opposing views now have been resolved by courts of law. We do not want the citizens of the Commonwealth to be misled about the status of capital punishment in Virginia, and thus are concerned that these opposing views seem to have been given equal weight in the draft report. In short, we are concerned that theories discredited in courts of law should not form the basis for policy determinations.

I hope that this response will be of assistance to you and your staff. Please do not hesitate to contact us about these matters.

Very truly yours,

E. Montgomery Tucker
Deputy Attorney General
Criminal Law Division

Enclosure

RESPONSE TO EXPOSURE DRAFT OF JLARC REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT

1. Errors of fact and law

1. It is stated at page 4 of the current Exposure Draft that “the United States Supreme Court invalidated the capital punishment statutes in all states” in Furman v. Georgia. This is incorrect. Furman vacated the death sentences of 2 Georgia inmates and 1 Texas inmate in a *per curiam*, one-paragraph opinion. Furman, 408 U.S. 238, 239 (1972) (*per curiam*). There were 9 separate opinions written, 5 concurring with the *per curiam* judgment and 4 dissenting from it. There was, in other words, no consensus as to why the death sentences in those cases violated the Eighth Amendment’s proscription against cruel and unusual punishment. The legislative changes made in Virginia and elsewhere over the next 4 years were an attempt to comply with the comments of the 5 different concurring Justices in Furman. Most importantly, however, is the fact that Virginia’s capital murder statutes *never were, nor have been since, found to be unconstitutional by any court*.
2. It is stated at page 77 of the current Exposure Draft that “several appellate court judges” have issued opinions that inmates were executed who did not receive a fair trial. The Draft does not identify these appellate judges and we are aware of none. If the Draft is referring to the opinions of the lower federal court judges quoted later in the Draft, then it is incorrect to refer to them as “appellate judges.” The judges of the Supreme Court of Virginia are referred to as “Justices.” The judges of the United States District Courts are “Judges” and the judges of the Fourth Circuit Court of Appeals are “appellate Judges.” The judges of the Supreme Court of the United States are “Justices.”
3. It is stated at page 83 of the current Exposure Draft that “claims denied on their merits on direct review by the Supreme Court of Virginia must be renewed at [the state habeas corpus] stage in order to preserve them for federal habeas corpus review.” This is incorrect. A claim that is decided on its merits by the Supreme Court of Virginia in *any proceeding* is thereafter forever preserved for review in a federal court habeas corpus proceeding. Such claims do not need to be renewed in successive state appeals or petitions. Correll v. Thompson, 63 F.3d 1279, 1290 n.8 (4th Cir. 1995), cert. denied, 516 U.S. 1035 (1996).
4. It is stated at page 88 and following pages of the current Exposure Draft that an appellate court is asked to review on appeal 2 major issues, sufficiency of the evidence to convict and “discretionary” rulings by the trial court, including claims of error relating to jury instructions. This is incorrect. On appeal, any ruling made below by a trial court may be assigned as error. It can be said that there are 2 major groups of assigned errors, but those errors would be grouped into “errors of law” and “abuses of discretion.” Under the “errors of law” would fall such claims as insufficiency of the evidence to convict, the inclusion or exclusion of particular jury instructions and the admission or exclusion of certain evidence. For such errors, there is no discretion which may be exercised by a trial court – the ruling either followed the law or it did not. Under the errors of “abuses of discretion” would fall such claims as the retention or removal of a prospective juror, granting or denying certain motions such as for a mistrial, or the admission or exclusion of certain evidence. However, even where a trial court is allowed

“discretion” in its ruling on a particular objection, *it is misleading* to imply that such discretion is unguided by rules of law. Trial courts must apply rules, statutes and constitutional law. If they apply the wrong law, then their “discretion” has been abused.

5. It is stated at page 97 and following pages of the Exposure Draft that the Supreme Court of Virginia in its proportionality review has compared death sentences only to other death sentence cases (as opposed to capital murder/life sentence cases) 45% of the time and that it only began to compare death sentences to life sentence cases in recent years. This is wrong. As the Exposure Draft acknowledges at page 96, in 1978 the Court ordered that, pursuant to its statutory duty to perform a proportionality review, all class 1 felony cases which have been appealed are maintained in a separate index for comparison with the death sentence cases. That order alone demonstrates that the Court has utilized the body of *all capital murder cases regardless of sentence* in its proportionality review. But a quick review of the Court’s opinions makes clear that it *always* has compared the death sentences to *any* similar case, including life sentence cases. For example, in the first case decided under the modern capital murder statutes, Smith v. Commonwealth, 219 Va. 455 (1978), cert. denied, 441 U.S. 967 (1979), the Court researched the previous 7 *decades* and found no similar case “in which a penalty less than death was imposed.” 219 Va. at 482. Thus, by its own express explanation, the Court, even in that first case, was comparing the death sentence to other cases in which a *lesser* sentence had been imposed. In the next 2 death cases (Waye and Mason), the Court found the facts to be far more aggravated than those in Smith and therefore appropriately found the sentence to be proportionate: in other words, the Court did not have to go back and perform the same comparison it had just completed in Smith to know that, if juries generally give a death sentence in cases like Smith, then the more aggravated facts of Waye and Mason would also be ones for which juries generally would impose a death sentence. See Waye v. Commonwealth, 219 Va. 683, 705, cert. denied, 442 U.S. 924 (1979); Mason v. Commonwealth, 219 Va. 1091, 1100, cert. denied, 444 U.S. 919 (1979). Indeed, in the very next 3 cases considered by the Court (Clark, Coppola and Stamper), the Court expressly and thoroughly discussed *why the most similar life-sentence cases* did not make the three capital murderers’ death sentences disproportionate. See Clark v. Commonwealth, 220 Va. 201, 221(1979), cert. denied, 444 U.S. 1049 (1980); Coppola v. Commonwealth, 220 Va. 243, 258 (1979), cert. denied, 444 U.S. 1103 (1980); Stamper v. Commonwealth, 220 Va. 260, 283 (1979), cert. denied, 445 U.S. 972 (1980). In the subsequent cases, the Court sometimes used its shorthand analysis that was used in Waye and Mason to find a death sentence proportionate because its facts were equal to or more aggravated in some particular way than a case that previously had been found to be proportionate. This does not mean that the Court does not compare to life sentence cases; it just means it would be a waste of time to redo the comparison each time if the current case is equal to or more aggravated than a previous case already found to be proportionate. What happened in the late 1980’s and early 1990’s was that, for the first time, defendants began to *complain* that the Court was not comparing to life-sentence cases. So the Court began expressly and regularly to say in its opinions what it always had done: that it compared the death sentence to all capital murder cases, including those in which a sentence of life had been imposed. See, e.g., Hoke v. Commonwealth, 237 Va. 303, 318, cert. denied, 491 U.S. 910 (1989). In 2000, the Court *expressly rejected the inmate’s claim of an improper proportionality review*, explaining that it had collected all capital murder cases and compared to life sentence cases since the advent of

the modern capital murder statutes. Bailey v. Commonwealth, 259 Va. 723, 740-741, cert. denied, 531 U.S. 995 (2000). As the Court properly has said, the proportionality review is not to “insure complete symmetry among all death penalty cases,” but rather to “identify and invalidate the aberrant death sentence.” Orbe, 258 Va. at 405.

6. At page 108 and following pages of the Exposure Draft, an attempt is made to explain the standard regarding procedural default. The standard as discussed is incorrect. In a federal habeas corpus proceeding, the court may review a claim that is procedurally defaulted if the petitioner shows either “cause and prejudice” or a “miscarriage of justice.” “Cause” for the default is shown if “an objective impediment made compliance with the procedural rule impossible,” Murray v. Carrier, 477 U.S. 478 (1986), or the default was the result of ineffective assistance of counsel. Id. “Prejudice” is shown if the error at trial “worked to [the petitioner’s] actual and substantial disadvantage, infecting his entire trial with error of constitutional dimension.” United States v. Frady, 456 U.S. 152, 170 (1982). A “miscarriage of justice,” often referred to as “actual innocence,” is shown if “it is more likely than not that no reasonable juror would have convicted [the petitioner] in the light of the new evidence,” Schlup v. Delo, 513 U.S. 298, 327 (1995), or if there is “clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty.” Sawyer v. Whitley, 505 U.S. 333, 336 (1992).
7. At page 110 and following pages of the Exposure Draft, a 1995 opinion of United States District Judge Turk is quoted for the proposition that Dana Edmonds was executed even though he received ineffective assistance of counsel. This at least is quite misleading if not outright incorrect. First, Judge Turk is a federal lower court judge who has been reversed many times on appeal in Virginia death penalty cases. Moreover, he had been reversed by the Fourth Circuit Court of Appeals in 1994 *in this very case* because he had *asserted a claim* and granted relief on it *even though the petitioner Edmonds never had raised the claim*. Edmonds v. Thompson, Nos. 92-4011 & 92-4012 (4th Cir. Feb. 16, 1994)(unpub.). Then, in the subsequent opinion quoted in the Exposure Draft, Judge Turk *denied* relief because, although he believed trial counsel had had a conflict of interest, he found that the conflict had absolutely no effect whatsoever on Edmonds’ conviction or sentence: “Even if Edmonds had been appointed new counsel ... the court is confident that he still would have been found guilty. ... the court believes the conflict did not affect the trial judge’s eventual decision to impose the death penalty.” Edmonds v. Jabe, 874 F.Supp. 730, 736 (W.D. Va. 1995). On appeal, the Fourth Circuit found that Edmonds’ claim was defaulted because he could have raised it in state court but did not, but also decided on the merits of the claim that trial counsel’s alleged conflict of interest *had no effect upon the conviction or sentence and no “miscarriage of justice” had occurred in the case*. Edmonds v. Jabe, No. 95-4002 (4th Cir. Jan. 23, 1995)(unpub.), cert. denied, 513 U.S. 1137 (1995).
8. At page 111 and following pages of the Exposure Draft, a 1998 opinion of United States District Judge Williams is quoted for the proposition that Arthur Jenkins’ jury never heard evidence that he allegedly was sexually abused by a jailer. The Draft also implies that Jenkins never told anyone about the alleged abuse because he had “borderline intelligence.” This is another example of why any *lower* federal court’s opinions should not be relied upon as a basis upon which to draw conclusions about the administration of the death penalty in Virginia. On appeal from Judge Williams’ decision, the Fourth Circuit pointed out that an investigator funded by the

lower federal court found *no evidence that the jailer ever had any improper relationship with Jenkins* even though the investigator had had access to information from the Virginia Department of Corrections, the county jail, 2 Commonwealth's Attorneys' offices, the Attorney General, the State Police, the FBI and a federal grand jury inquiry. *Jenkins v. Angelone*, No. 98-13, slip op. 6 (4th Cir. Jan. 12, 1999)(unpub.), cert. denied, 526 U.S. 1081 (1999). Indeed, the lower federal court funded Jenkins' investigative efforts with over \$400,000 of taxpayers' money. The Fourth Circuit, however, found that Jenkins could not show "cause" for his defaulted claim because, even if the abuse had happened, Jenkins decided not to tell anyone about it, not because he was in any way mentally impaired, but simply because he did not think the information was "important." *Id.* at slip op. 7. The Fourth Circuit additionally found that "no fundamental miscarriage of justice" occurred in the case and that, even if the evidence had been presented to the jury, "the reliability of the state trial remains." *Id.* at slip op. 8. And the Fourth Circuit concluded by finding that there simply was no constitutional violation because, even assuming the abuse occurred, no officer or agent of the Commonwealth other than the jailer knew about it and nothing prevented Jenkins from making the abuse known at the time he was tried. *Id.*

9. At page 113 of the Exposure Draft, it is stated that the Code of Virginia vests the Governor with clemency powers over death penalties. This is incorrect. Article V, § 12 of the Virginia Constitution vests such powers in the Governor.

2. Comments on Chapter II

1. The report's handling of the issue of prosecutorial discretion as a "*problem*" that results in "outcomes that cannot be easily reconciled on the grounds of *fairness*" is disturbing. If "fairness" is defined as identical "outcomes" in every case, to be "fair," every prosecutor must indict every potentially capital murder case as capital murder and pursue a death sentence in every case. Certainly not even an opponent of capital punishment would endorse a concept of "fairness" that is satisfied only by charging and prosecuting more people for capital murder. "Fairness" in the criminal justice system is *enhanced* by the prosecutor's exercise of discretion which includes his judgment as to the quality of evidence and the seriousness of the crime, his management of the resources his office can bring to a prosecution, his sensitivity to the needs and opinions of the community who elected him as their Commonwealth's Attorney, and even his ability to exercise mercy. It cannot be *unfair* that persons eligible for the death penalty are indicted and prosecuted for capital murder.
2. Also, and notwithstanding JLARC's own research that showed that prosecutors consider the "quality" or "nature" of evidence as the *significant* factor in deciding whether to pursue a death sentence, the Exposure Draft makes the familiar mistake of attempting to quantify the *quality* of evidence by reference to the existence of certain types of proof (e.g., DNA evidence, eyewitness testimony, confessions) for the purpose of discounting the prosecutors' position. Such quantification, however, is inherently suspect because it attempts to capture statistically what cannot be so captured: the individual differences in criminal cases. In McCleskey v. Kemp, 481 U.S. 279 (1987), the Supreme Court considered a statistical study that purported to show racial discrimination in Georgia based on consideration of 230 *variables*, divided into eight levels of "estimated aggravation," that could have explained disparate sentences on other than racial grounds. The Court rejected the argument because even that sophisticated statistical model could not take into account the "innumerable factors that vary according to the characteristics of the individual defendant and the facts of the particular capital offense." 481 U.S. at 294. Of course, JLARC's choice of cases it defines as "virtually identical" on the basis of a rudimentary checklist of a few similar types of proof, cannot hope to approximate the prosecutor's assessment of the quality of the witnesses and evidence.

3. Comments on Chapter III

1. We agree with the conclusion that the low reversal rates on direct appeal are not attributable to procedural rules. We disagree with the conclusion that the rates are attributable to “deference” given to the trial court. As explained above, on appeal there are claims of error of law and of abuse of discretion, however, the discretionary rulings of a trial court are guided by settled rules of law. For example, on appeal a trial court’s decision regarding the admissibility of a photograph is reviewed for an abuse of discretion, but the trial court is required to have determined whether the photograph’s probative value is outweighed by its prejudicial nature. Thus, when the appellate court determines the claim of error, it is determining the actual merits of the claim; it does not blindly “defer” to a lower court’s ruling. See, i.e., Green v. Commonwealth, 262 Va. 105, 116 (2001) (reversing capital murder conviction due to abuse of discretion by trial court). Consequently, the reason the Supreme Court of Virginia’s reversal rate is so low unquestionably is because the vast majority of claims of error presented to it *have no merit*. We object to the implication in the Draft that the Supreme Court of Virginia simply defers to lower courts, and believe this will mislead the public into thinking that JLARC has concluded that trials in the Commonwealth are largely “rubber-stamped” on appeal.
2. The Draft’s discussion of the direct appeal process is confusing and inaccurate. It inaccurately describes the habeas corpus proceedings as part of the “appellate” review, dividing the appeals into 3 parts, direct, state habeas and federal habeas. Habeas corpus review, however, is not part of the appellate process. A felon sentenced to death is constitutionally entitled to a trial, to the assistance of counsel at that trial and to the assistance of counsel in what is called a “first appeal of right.” Ross v. Moffitt, 417 U.S. 600 (1974). He is not constitutionally entitled to any review beyond that first appeal, nor to the assistance of counsel beyond it. Coleman v. Thompson, 501 U.S. 722 (1991). The modern writ of habeas corpus bears no resemblance to the “ancient writ” embodied in the Constitution which only requires that a prisoner not be held without jurisdictional authority. The modern writ under which Virginia death-row inmates proceed is a civil cause of action provided to inmates by statute. It is a lawsuit filed by the inmate in which the inmate is a plaintiff and the Department of Corrections is the defendant. In no way can, or should, the modern habeas actions be characterized as “appeals” or part of the “appellate system.” They are civil actions, collateral to the trial and appeal and are filed by inmates who wish to upset a conviction that is *presumed valid* under the law. See Barefoot v. Estelle, 463 U.S. 880, 887 (1983). After the direct appeal, the inmate is no longer a defendant, nor is the habeas action any part of the criminal proceedings which were conducted at the trial and on the direct appeal.
3. The Draft’s discussion of, and conclusions about, the Supreme Court of Virginia’s proportionality review are severely flawed. First, contrary to the Draft’s assertion at page 15, proportionality review is not now, and never has been, required by the Constitution. Pulley v. Harris, 465 U.S. 37, 50-51 (1984). Second, as shown above, it is absolutely incorrect to say that the Supreme Court of Virginia ever has restricted its review to cases involving only a death sentence. In fact, the last sentence on page 99 of the Draft is a sentence we have seen almost verbatim in inmates’ pleadings over the years and represents the flawed logic that has been rejected over the years: if you count up all the cases and there are more life sentences than death, then the inmate’s death sentence is disproportionate. What this superficial methodology

ignores is the whole picture of the case which is before the Court for review, including all the factors regarding the crime and the defendant. It is particularly inappropriate for JLARC to have quoted extensively at page 100 from a single dissenting Justice who happened to believe that one factor – age – in one case should have rendered that death sentence disproportionate. That “one factor” test never has been the standard and never should be: it would render every death sentence disproportionate because no 2 are identical. Such a quotation is misleading about the status of the system in Virginia.

4. Likewise, the “missing cases” analysis at page 101 is simply wrong. The Draft gives lip-service to “one member of the Court” who explained that the cases “missing” from the proportionality case database invariably must be guilty pleas or cases in which the Commonwealth withheld asking for a death penalty. However, it was not “one member” who made this explanation, but rather the *unanimous decision of the whole Court*. See Bailey v. Commonwealth, 259 Va. 723, 741 (2000). Of course the Court’s conclusion is entirely reasonable, given the fact that it is highly unlikely that any capital murder conviction would not have been appealed (and so included in the proportionality database) unless it was a guilty plea or one in which the prosecutor did not ask for a death sentence. Without any basis whatsoever, however, the Draft concludes that the Court’s analysis “raise[s] questions about the way proportionality review is conducted,” and recommends “substantial and more prescriptive legislative changes” to “direct the Supreme Court.” Such sweeping statements and recommendations are simply inexplicable. They certainly are not supported by any valid information in the Draft.
5. The Draft’s discussion of habeas review, including procedural default and ineffective assistance claims, is seriously misleading, if not incorrect. First, as shown above, the Draft does not recite the correct standards governing procedural default. Once the correct standard is expressed, it becomes clear that there are no “unfair” trials in Virginia, even when claims are barred due to procedural default. After all, if the inmate cannot show that he received ineffective assistance of counsel, *or* that he was prevented by the Commonwealth from presenting his claim to the state courts, *or* that the error he complains about substantially disadvantaged him, *or* that he is actually innocent, then how can it *ever* be concluded that that inmate’s trial was unfair? Second, as discussed and shown above, it is wholly inappropriate for JLARC to rely on the opinions of lower federal court judges which have been *reversed* or *rejected* by higher courts. They simply do not reflect the law. Third, the Draft’s assumptions at page 106 regarding the standard of review for ineffective assistance of counsel claims is very misleading. The conclusion is made that the “low reversal rate based on these claims is likely a reflection of the ... *Strickland* standard.” This statement improperly implies that (1) there must be another, better standard, and (2) there is something wrong with the standard because of the low reversal rate. However, Strickland v. Washington, 446 U.S. 664 (1984), has provided the *only* standard for such claims in all state and federal courts since 1984 and *never* has been called into question. The standard was set forth in a lengthy and thoroughly well-reasoned opinion almost 2 decades ago. The fact that the vast majority of ineffective counsel claims are denied under this standard, does not mean that there is something wrong with the standard or with the attorneys’ performances; to the contrary, it means that the vast majority of attorneys are *effective* and their performance as counsel has provided defendants with the assistance of counsel required by the Constitution. Again, it is inexplicable that the Draft would conclude without any valid basis at page 113 that “death row prisoners are executed whose guilt is not at question, but who may not have received

the constitutionally required fair trial.”

6. Finally, we believe that the Draft’s section on clemency is perhaps the most troubling. As shown above, the Draft incorrectly states that the Governor’s clemency powers are derived from the Legislature via the statutes instead of from the Virginia Constitution. In our opinion, the Draft’s recommendation that the “problems” with the clemency procedures be “addressed through legislative changes” that establish a “more structured process” through a State agency, violates the separation of powers doctrine. The Legislature has no power to change or reduce the Governor’s considerable powers to perform his clemency duties in any manner he sees fit because to do so would contravene the Constitution of Virginia. On a more fundamental level, we have objections to the Draft’s conclusions that there are “Problems with the Clemency Process.” (Draft at 121). For instance, the Draft concludes without any basis that “the absence of greater public disclosure serves to undermine public perception about the reliability and fairness of executive clemency.” (Draft at 122). This conclusion exhibits a profound misunderstanding about the nature of executive clemency for it is the very unreviewable nature of the Governor’s decision that makes confidentiality so crucial to the process. Unlike a court which must follow rules of law and precedent and then explain its actions *so that a reviewing court* may decide whether the decision is legal, a Virginia Governor enjoys complete and total discretion to grant clemency for any reason or *for no reason at all*. Surely Joe Giarratano, Herbert Bassette and other inmates whose guilt never was seriously challenged would not complain about the mercy which was extended to them through processes which were “shielded from public scrutiny.” Indeed, such extensions of mercy must, of necessity, be safeguarded - as they are now through the Constitution - against any bureaucratic imposition of guidelines or requirements.
7. Contrary to the Draft’s assertion, there is no difficulty in understanding why the Governor has denied clemency to most death-row inmates. The majority of such petitions simply reargue legal claims already rejected by multiple courts. The Draft states at page 119 that Strickler petitioned for clemency on the basis of evidence that supposedly impeached the testimony of 2 witnesses who placed him at the scene of his victim’s abduction. But the record in Strickler’s years of litigation showed that the courts had found one of the witnesses’ testimony to have been non-material to the prosecution, Strickler v. Greene, 527 U.S. 263, 296 (1999), and the evidence Strickler provided to challenge the second witness *was found by the Commonwealth’s own Forensic Laboratory to have been a forgery*. Additionally, Strickler admitted during and after his trial that *he had been present when his victim was abducted and murdered*. The Draft states at page 120 that King petitioned for clemency on the basis of allegations that his wife committed the murder, but that issue was well-litigated. The unrefuted evidence in the case was that King’s own footprint was found on his victim’s head and King expressly confessed before trial that he alone, and not his wife, had committed the murder. King v. Greene, No. 97-28 (4th Cir. Apr. 20, 1998), cert. denied, 524 U.S. 965 (1998).

RESPONSE OF THE VIRGINIA ASSOCIATION OF COMMONWEALTH'S ATTORNEYS
TO THE JLARC REPORT

Linda D. Curtis, President
Commonwealth's Attorney, City of Hampton

The Virginia Association of Commonwealth's Attorneys commends JLARC for its hard work on the important issue of the application of the death penalty. The report confirms what Virginia's prosecutors have long known:

That the death penalty is being administered in a race-neutral manner;

That prosecutorial discretion is an essential component in our criminal justice system, especially with regard to the death penalty.

That different prosecutors sometimes handle similar cases in different ways.

That Virginia is not executing innocent people.

In being tasked to evaluate the application of the death penalty, JLARC has been placed in the unenviable position of evaluating an issue difficult, if not impossible, to analyze in a quantitative way. Litigation of any type does not lend itself to quantitative analysis, and capital litigation is no exception. Appearances to the contrary, no two cases are identical. No two defendants can have identical backgrounds, criminal records, psychological profiles or other personal characteristics. And in cases which seem factually similar, the quality and strength of the evidence varies greatly. External factors, including community sentiment, the philosophy of the local judges, and other variables, are difficult to incorporate into any analysis.

Because every case is unique, we echo the sentiment of the report which says, "(N)o viable system of capital punishment can be sustained without vesting Commonwealth's Attorneys with the discretionary authority they need to prosecute these difficult and troubling cases."

JLARC
Suite 1100
General Assembly Building
Capitol Square
Richmond, Virginia 23219
(804) 786-1258 Fax: 371-0101
<http://jlarc.state.va.us>

