Contempt for the Rights of Man: The Role of Prosecutorial Misconduct in Virginia Capital Cases

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ABSTRACT

From reinstatement of the death penalty in Virginia in 1977 until January 2001, 132 Virginia defendants have been sentenced to death. Approximately 70% of the federal post-conviction proceedings in these cases allege some form of prosecutorial misconduct. This article discusses the appellate and post-conviction treatment of the prosecutorial misconduct allegations in each of these cases. Three cases were actually reversed because of misconduct. Courts recognized prosecutorial misconduct in another 14 cases, but held it to be “harmless error.” In 32 of the cases, the courts refused to address the allegations of misconduct, finding the issue to be “procedurally defaulted.” In 29 cases, the courts held that the alleged prosecutorial behavior did not amount to “misconduct.” Judicial treatment of prosecutorial misconduct allegations in many of these cases is alarming, because prosecutorial misconduct potentially causes the conviction and even execution of innocent persons. Equally important, such behavior by the government also contributes to a poor public perception of the justice system. This article concludes with several recommendations for responding to and preventing prosecutorial misconduct, including improved training for prosecutors, increased disciplinary committee involvement, and judicial and legislative changes in capital case procedures.
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I. INTRODUCTION

Across the United States, State and Federal courts reviewed 4,578 death sentences imposed by trial courts between 1973 and 1995.¹ According to Professor Liebman’s seminal study, sixty-eight percent of those sentences were ultimately reversed because of “serious error,” that is, “error that substantially undermines the reliability of the guilt finding or death sentence imposed at trial.”² Prosecutorial suppression of evidence accounted for sixteen percent of those reversals (nearly five hundred cases).³ Potential consequences of such misconduct are even more serious in capital cases than in other criminal prosecutions, especially when an innocent person is sentenced to die or actually executed.⁴ Between 1970 and 1998, seventy-six persons previously sentenced to death in the United States were released from prison (after serving an average of nine to ten years in prison) based on their actual innocence of the crimes for which they were sentenced to die.⁵ In these seventy-six cases of actual innocence, prosecutorial misconduct was the leading cause of the wrongful convictions, cited as the reason for release in forty percent of the court opinions.⁶ In most of these cases, the factual innocence was discovered by accident or through the extraordinary efforts of pro bono attorneys, and not through the normal appellate and post-conviction procedures.⁷ This raises serious questions about how many erroneous capital convictions have remained undetected.⁸

In sharp contrast to the national statistics, only eighteen percent of death sentences in the Commonwealth of Virginia were ultimately reversed between 1973 and 1995, the lowest overall error rate in the country.⁹ While some might say that Virginia’s capital case procedures must be less prone to error than the procedures in other states,
many consider the appellate and post-conviction procedures available to Virginia convicts to be more lax in detecting errors.\textsuperscript{10} Virginia has the nation’s strictest procedural default rule; the courts will not considering issues on appeal if not objected to at trial.\textsuperscript{11} Further, at the time of these convictions, the state allowed a defendant only twenty-one days after sentencing to petition for a new trial, the shortest time-frame in the country.\textsuperscript{12} Indeed, the Virginia General Assembly’s Joint Legislative Audit and Review Commission reported that approximately one-third of the errors raised by death row inmates in post-conviction proceedings between 1995 and 1999 were never considered on the merits because of procedural default rules.\textsuperscript{13}

As a direct result of the low reversal rate, Virginia has carried out a higher number of executions than other states and has executed death row inmates at a higher rate.\textsuperscript{14} Between 1973 and 1995, Virginia executed twenty-nine convicts, representing twenty-eight percent of the persons sentenced to death in Virginia during that time, compared to a national execution rate of only 5.4% of death row inmates.\textsuperscript{15} Since the death penalty was reinstated in the 1970s, Virginia has executed more people than any state except Texas.\textsuperscript{16} In 2000, Virginia executions comprised nine percent of all executions nationwide, even though thirty-eight states allow the imposition of the death penalty.\textsuperscript{17} Virginia’s high execution rate, combined with very restrictive review of errors, raises serious questions about the fairness of the capital punishment system in Virginia and whether innocent people are more vulnerable to execution in this state.

Because prosecutorial misconduct is the leading cause of known miscarriages of justice across the nation, an analysis of the possible role of prosecutorial misconduct in Virginia capital cases is warranted. In addition to causing the potential execution of
innocent persons, prosecutorial misconduct undermines confidence in the integrity and reliability of the system and in the concept of justice. This article identifies the types of prosecutorial misconduct most frequently appearing in capital cases and then surveys all of the post-1973 capital cases in Virginia through January 2000, in which prosecutorial misconduct has been alleged. After examining these allegations and the judicial responses to them, the author makes several policy recommendations for reducing prosecutorial misconduct and improving the administration of justice in potentially capital cases in Virginia.

II. PROSECUTORIAL MISCONDUCT

A. THE PROSECUTOR’S DUTIES IN A CRIMINAL CASE

The prosecutor decides whether to bring criminal charges against a person, what charges to bring, whether to accept a plea agreement, and even whether to grant immunity from prosecution. Such power over citizens’ reputations and lives carries great responsibility. As the United States Supreme Court noted, a prosecutor’s duty “is not that he shall win a case, but that justice shall be done.” The same sentiment is expressed in the American Bar Association’s Standards for Criminal Justice: Prosecution and Defense Function: “The duty of the prosecutor is to seek justice, not merely to convict.”

Three major sources provide guidance to the prosecutor regarding his conduct in a criminal case: Court cases interpreting the U.S. Constitution, Disciplinary Rules, and Professional Standards. When a court decides that certain behavior of the prosecutor deprives a defendant of Constitutional rights, then the defendant’s conviction is supposed
to be reversed, which secures the defendant’s Constitutional rights and deters prosecutorial misconduct. The primary obligation imposed on prosecutors by judicial opinions is the duty to produce exculpatory evidence to the defense, that is, evidence which tends to support a defendant’s claim of innocence or which mitigates the seriousness of the offense. Exculpatory evidence includes information that attacks the credibility of prosecution witnesses. The prosecutor’s duty extends not only to information actually known to her, but also to information that she “should have known.” Generally, a prosecutor is supposed to know whatever is known by other prosecutors in her office, by the police officers who investigated the case, and by other government agencies involved in the case. Finally, in limited circumstances, the duty to disclose exculpatory evidence has been extended to require preservation of evidence from loss and destruction if the potentially exculpatory nature of the evidence is readily apparent.

Disciplinary Rules are promulgated by each state. Within the jurisdiction of a given state, violation of the Rules may result in professional discipline. As the majority of other states had already done, Virginia adopted the Rules of Professional Conduct in 1999, and they became effective January 1, 2000, replacing the prior Code of Professional Responsibility. Failure to comply with a Rule is “a basis for invoking the disciplinary process.” Whether discipline is actually imposed, and the severity of the sanction, depends on all the circumstances surrounding the attorney and the infraction. Significantly, the preamble to the Rules makes clear that violation of a disciplinary rule does not, of itself, give rise to any civil cause of action against the attorney who violated the Rules.
Under these Rules, all lawyers, including prosecutors, have certain fundamental duties: Competence, diligence, candor and truthfulness, fairness, and respectfulness. Rule 3.8 imposes additional responsibilities specifically for prosecutors: (a) not to initiate or continue prosecution of charges that the prosecutor knows are not supported by probable cause; (b) not to knowingly take advantage of an unrepresented defendant; (c) not to instruct or encourage someone to withhold information from the defense, once charges have actually been filed against the defendant; (d) to timely disclose to the defense the existence of evidence which the prosecutor knows might negate or mitigate the defendant’s guilt or reduce the punishment; (e) not to encourage other persons to make statements to the media or others that the prosecutor himself would be prohibited from making.

The Rules of Professional Conduct are similar to the prior Code of Professional Responsibility, the disciplinary rules in effect for Virginia at the time most of the cases discussed in this Paper were prosecuted. According to the commentary written by the Committee on Lawyer Discipline, the current Rules are actually more precise and narrow than the prior Code, except for the prohibition against taking advantage of an unrepresented defendant. Under the prior Code, DR 8-102(A)(2) prohibited prosecutors from inducing unrepresented defendants to “surrender important procedural rights.” The other differences between the two sets of disciplinary rules, as they pertain to prosecutors, are very minor. The new Rules prohibit a prosecutor from “instructing or encouraging” someone to withhold information from the defense; the prior rules prohibited the prosecutor from “discouraging” someone from sharing information with the defense. Likewise, the current Rules require a prosecutor to disclose evidence that
he knows tends to be exculpatory, whereas the prior rules required disclosure if the prosecutor had “reason to believe” the evidence could be exculpatory.\textsuperscript{41}

The final source of guidance for prosecutors is the \textit{Standards for Criminal Justice}, which itemizes a prosecutor’s functions.\textsuperscript{42} These Standards are merely guidelines, which do not independently give rise to disciplinary proceedings or appellate reversals, much less provide a basis for civil liability. They suggest that a prosecutor should disclose exculpatory evidence “at the earliest feasible opportunity” and that a prosecutor should not avoid pursuing potential evidence just because he or she believes that it will damage the prosecution’s case.\textsuperscript{43} In presenting evidence, a prosecutor should not knowingly offer false evidence and should not ask improper questions to bring inadmissible evidence to the attention of the judge or jury.\textsuperscript{44} In making arguments to the jury, a prosecutor should not intentionally misstate the evidence, inject his personal beliefs about the case, or make arguments intended to appeal to the prejudices of the jury.\textsuperscript{45}

\textbf{B. MISCONDUCT DEFINED}

In the broad sense, prosecutorial misconduct refers to any behavior that violates a prosecutor’s ethical duties (whether intentionally or unintentionally) or that results in a violation of the defendant’s right to due process and a fair trial. Professor Gershman defines it as “any activity by the prosecutor which tends to divert the jury from making its determination of guilt or innocence by weighing the legally admitted evidence in the manner prescribed by law.”\textsuperscript{46} Others adopt a more narrow definition, limited to suppression of exculpatory evidence, knowing use of perjured testimony, and intentional courtroom misconduct.\textsuperscript{47} Commentators and courts across the nation have included the
following laundry list of behaviors in the scope of prosecutorial misconduct: failing to disclose exculpatory evidence; soliciting false testimony; failing to correct unexpected false testimony; asking improper questions; eliciting inadmissible information in front of the jury; arguments that contain inflammatory, prejudicial, or irrelevant remarks; arguments that refer to information not introduced into evidence; commenting on defendant’s failure to testify or exercising his Fifth Amendment right to remain silent; injecting personal beliefs into the argument; disparaging the defendant or defense counsel; ex parte communication with the judge; racial discrimination in selection of the jury; breaching plea agreement; vindictive selective prosecution; and improperly coaching a witness about what to say at trial.

One writer has suggested that the term “prosecutorial misconduct” is used too loosely, suggesting that the prosecutor has acted intentionally or maliciously. Green notes that the line between permissible advocacy and improper argument is not clearly drawn by the courts. Further, prosecutors have little time to prepare argument for the jury after the evidence is presented: “He must decide what points to make and choose the precise words with which to make those points, almost instantaneously.” Under such circumstances, even the most experienced attorney can be carried away in the excitement of the moment. Another author uses the term “prosecutorial negligence” to refer to unintentional behavior by the prosecutor that has the effect of violating the defendant’s right to a fair trial.

For purposes of this article, “prosecutorial misconduct” refers to all behavior of the prosecutor, whether intentional or not, which does not comport with a prosecutor’s ethical obligations under the disciplinary rules or with the aspirations espoused by the
Standards of Criminal Justice. If the result of a prosecutor’s behavior raises questions about the fairness of a trial, the reliability of a conviction, or the integrity of the justice system, then the prosecutor’s behavior can fairly be called “misconduct.” The prosecutor’s motive or intent is relevant only to what penalty, if any, to impose on the prosecutor for her behavior.

C. OTHER GOVERNMENT MISCONDUCT DISTINGUISHED

Volumes have been written about police misconduct, including physical abuse of suspects, illegal searches and wiretaps, entrapment, and violations of a defendant’s right to remain silent or have counsel present. Prosecutorial misconduct, as used herein, refers only to conduct by an attorney assigned to handle the prosecution of a criminal matter. Prosecutorial misconduct sometimes overlaps with other government misconduct, because a prosecutor is responsible for discovering and disclosing exculpatory information known by the police officers investigating the case.

D. CAUSES OF PROSECUTORIAL MISCONDUCT

Many theories abound about the causes of prosecutorial misconduct. One of the most commonly cited reasons for misconduct is political pressure to obtain a conviction. High-profile violent crimes receive intense media exposure, resulting in public pressure to get the criminal off the street. In their zeal to obtain a quick and final conviction, prosecutors either negligently or intentionally cross the line, engaging in some form of misconduct. Other suggested reasons for misconduct include racial bias, covering up
for mistakes, and training courses that stress advocacy skills without emphasizing ethics.

One commentator suggests that most prosecutors are honorable and usually ethical attorneys who genuinely believe that the defendant is actually guilty. For such a prosecutor, a defendant’s acquittal is not only the prosecutor’s personal and professional failure, but a “miscarriage of justice” as well. Because the rules of evidence are intended to make sure that only reliable evidence is considered by the fact-finder, so that the truth can be reached, and he feels that the proper result of the truth-finding proceeding should be a conviction, a prosecutor can easily rationalize bending the rules to help the jury reach the “right” result.

Prosecutors usually get away with their misconduct for the same reason. Appellate courts and many members of society view the prosecutors as “the good guys,” and bending the rules is often tolerated when you have a “greater good” as your goal. Because misconduct obtains the desired conviction and is generally tolerated, it continues to occur. As Professor Gershman states succinctly, “It works.” Otherwise, prosecutors would not knowingly risk an ethical violation.

Several procedural rules often prevent defendants from successfully presenting prosecutorial misconduct claims. Contemporaneous objection rules, which require a defendant to object as soon as improper conduct occurs in the courtroom, leave defense attorneys in a catch-22 that prosecutors are well aware of and take advantage of: If the prosecutor asks an improper question or makes objectionable arguments, then the defense attorney must object immediately – highlighting the improper remarks in the jury’s mind – or lose the right to complain about the misconduct on appeal. Similarly, if the issue
was not preserved for appeal, the court system may treat the issue as procedurally defaulted for purposes of state and federal post-conviction proceedings, as well. If a federal court finds that an issue was procedurally defaulted, post-conviction relief will be granted only if the defendant can show that the prosecutor’s misconduct caused a constitutional violation that has “probably resulted in the conviction of one who is actually innocent.”

On appeal, a court may find that the prosecutor’s conduct was not proper, but still affirm the conviction under the “harmless error doctrine,” meaning that there is enough other evidence of the defendant’s guilt that the misconduct was not “reasonably likely” to affect the outcome of the trial. In Bagley, the Court upheld the defendant’s conviction even though the prosecutor willfully suppressed exculpatory evidence that had specifically been requested by the defense. As one scholar described the Court’s viewpoint, in deciding whether to grant a new trial, the U.S. Supreme Court has chosen to focus on the “character of the evidence” and not the “character of the prosecutor.”

Many commentators consider the harmless error rule to be the primary reason that appellate review is ineffective at controlling prosecutorial misconduct.

Even if the appellate court reverses a conviction, the case is usually retried, giving the prosecutor a second chance at a conviction. If a conviction cannot be obtained without the misconduct (perjured testimony, suppressed evidence, etc.), then even a reversal of the conviction and dismissal of the charges leaves the prosecutor no worse off than he would have been.

As disturbing as the appellate courts’ apparent lack of concern about prosecutorial misconduct, the lack of personal sanctions for prosecutors who commit misconduct is a
glaring failure of the criminal justice system. Even when a case is reversed for prosecutor misconduct, the prosecutor is rarely brought up on disciplinary charges, criminally prosecuted, or even fined by the court for contempt. Further, prosecutors have absolute immunity from civil suits arising out of their handling of a prosecution, even if the misconduct was intentional or malicious, leaving innocent defendants with no financial recourse against prosecutors whose misconduct may have led to a wrongful conviction.

In sum, whether a prosecutor is motivated by racial bias, professional ambition, political pressure, or a desire to obtain the “right” result, when convictions obtained by prosecutor misconduct are allowed to stand and prosecutors are not effectively sanctioned for the misconduct, then misconduct is condoned, causing disrespect for the law and further misconduct.

E. SCOPE OF THE PROBLEM

The extent of the problem of prosecutorial misconduct is not precisely known. The Justice Department’s Office of Professional Responsibility tracks the number of complaints against federal prosecutors, but does not break it down by nature of misconduct alleged, nor does it report the disposition of the complaints. The state of Virginia does not track such allegations at all. As previously noted, of the 4,578 death sentences imposed nationwide between 1973 and 1995, 68% were ultimately overturned; prosecutorial suppression of evidence accounted for 16% of the reversals, and other misconduct accounted for an addition 9%. Studies have noted that Virginia has the lowest overall reversal rate in capital cases in this country, but as yet, no one has
discussed whether prosecutorial misconduct is an issue in Virginia capital cases, and if so, the extent of the problem. Because more than one-third of the claims raised in Virginia in state and federal capital post-conviction proceedings are never even considered on their merits,\(^9\) in spite of the potentially severe consequences of an error in these cases, the possibility of an unacknowledged problem with prosecutorial misconduct warrants examination.

**III. VIRGINIA PROCEDURE IN CAPITAL CASES**

**A. TRIAL AND APPELLATE PROCEDURE**

When a defendant is charged with a capital offense in Virginia, a circuit court jury (or judge, if jury trial has been waived) must decide whether the defendant is guilty of the capital crime, guilty of a lesser non-capital offense, or not guilty. If the jury convicts the defendant of the capital crime, Virginia Code § 19.2-264.3 requires a second evidentiary hearing before the same jury (or same judge). Based on the evidence presented at this sentencing phase, the jury decides whether to impose the death penalty or to give a sentence of life imprisonment. This “bifurcated procedure” was patterned after similar legislation approved by the United States Supreme Court.\(^9\)

Before the jury may impose the death penalty, jurors must unanimously find, beyond a reasonable doubt, that the defendant “would commit criminal acts of violence that would constitute a continuing serious threat to society,” or that the crime was “outrageously or wantonly vile, horrible, or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim.”\(^9\) The prosecution has wide latitude at the sentencing hearing and can prove a defendant’s continuing danger to society by showing
the defendant’s prior convictions\textsuperscript{94} and evidence of prior bad acts with which the defendant has never been charged or convicted.\textsuperscript{95} If the prosecutor fails to prove at least one of these aggravating factors, then the jury cannot sentence the defendant to death.\textsuperscript{96} Even if the prosecutor proves one or both of the aggravating factors, the jury has the discretion to impose a life sentence instead of death.\textsuperscript{97} In making the sentencing decision, the jury must also consider mitigating evidence offered by the defense, including but not limited to factors such as the defendant’s age, emotional impairment, mental illness, retardation, or lack of a prior criminal record.\textsuperscript{98}

If the jury imposes a death sentence, the presiding judge is required to order the Department of Probation and Parole to prepare a pre-sentence report, containing information on the defendant’s family background, education, employment history, physical and mental health, and prior criminal record.\textsuperscript{99} After considering the information in the pre-sentence report, the judge can either impose the death sentence rendered by the jury or reduce the sentence to life in prison.\textsuperscript{100}

If the trial judge imposes the death sentence rendered by the jury, then Virginia Code § 17.1-313 requires an automatic appellate review of the conviction and sentence to be conducted by the Virginia Supreme Court.\textsuperscript{101} On this direct appeal, the defendant can raise objections to errors during the trial and sentencing hearing, including objections to any prosecutorial misconduct alleged.\textsuperscript{102} However, the Court often fails to render a decision on many of the objections raised by the defendant, finding that the defendant failed to make a timely objection at trial.\textsuperscript{103} Rule 5:25 of the Rules of the Supreme Court of Virginia specifically states that an alleged error will not be considered on appeal unless the defendant made the same objection during the trial or unless the “ends of justice”
require the Court to consider the unpreserved objection. This rule is considered the
strictest procedural default rule in the nation, and the “ends of justice” exception is rarely
applied.\textsuperscript{104}

If the Court rules in favor of the defendant, finding an error in the earlier proceedings,
the case is remanded to the circuit court for further proceedings.\textsuperscript{105} If the error occurred
only in the sentencing phase, a new jury will be impaneled for a new sentencing hearing
only.\textsuperscript{106} When the defendant is given a new trial and/or a new sentencing hearing, he
may still end up with a death sentence.\textsuperscript{107}

If the defendant loses his appeal to the Virginia Supreme Court, as occurs in 92\% of
the capital cases appealed in Virginia,\textsuperscript{108} then he may petition the United States Supreme
Court to hear his appeal, if his objections are based on federal Constitutional grounds.
Prosecutorial misconduct only becomes a Constitutional issue if the misconduct violates
the defendant’s right to due process and a fair trial. In the vast majority of petitions to the
United States Supreme Court, the Court declines to hear the case, but the U.S. Supreme
Court did remand 5 Virginia death sentences between 1977 and 2000 that previously had
been upheld by the Virginia Supreme Court.\textsuperscript{109}

\textbf{B. POST-CONVICTION PROCEDURE}

Sometimes, objections to the fairness of a trial cannot possibly be raised at trial or on
direct appeal, because the facts forming the basis of the objection are not known until
later. This is particularly true of certain types of prosecutorial misconduct, such as
suborning perjured testimony or suppressing exculpatory evidence. The United States
Supreme Court has suggested that states are constitutionally required to provide a means
for convicted prisoners to raise, in state court, any such federal Constitutional issues that could not be raised at trial or on direct appeal. Virginia provides post-conviction opportunities to raise these issues in its state *habeas corpus* proceedings.

Prior to 1995, state *habeas* petitions were filed in circuit court and then appealed through normal appellate channels. Even in capital cases, the circuit court and appellate post-conviction opinions were (and still are) often unpublished. Currently, the Virginia Supreme Court has exclusive original jurisdiction over state *habeas* petitions in capital cases, which eliminates the time-consuming process of starting in circuit court and appealing. Once counsel has been appointed for *habeas corpus* proceedings, the condemned inmate has 120 days to file the petition with the Virginia Supreme Court. If the claim was raised on direct appeal, and the Court ruled against the defendant, it will not be considered again during the state *habeas* proceeding. If the issue could have been raised on direct appeal, but was not, the issue will not be considered in the state *habeas* proceedings, but will be considered “procedurally defaulted.” Appealable issues that were not decided because of Rule 5:25 are also procedurally defaulted. Thus, on *habeas* review, the Court will consider only those claims that were not previously raised AND could not have been raised. Of death-sentenced inmates seeking state *habeas* relief between 1973 and 1995, only 3% (2 cases) received the relief requested, while 33% of the claims raised were considered procedurally defaulted.

Once the convict has exhausted state court remedies, including the state *habeas corpus* proceedings, then he may file a federal *habeas corpus* petition in the United States District Court sitting in the state where he was convicted and is incarcerated. Even at
this stage, procedural default haunts the petitioner. The federal courts will not disturb a state court finding that an issue is procedurally defaulted, as long as the state court’s decision is based on adequate and independent state law. Both Rule 5:25 and Virginia’s habeas corpus procedural rules are considered adequate and independent bases for finding that a petitioner has defaulted, thereby waiving his right to raise the objection in federal court, except in limited circumstances.

Prior to 1996, in order for the federal court to consider a Constitutional claim that had been procedurally defaulted in state court, the petitioner was required to show either (1) “good cause” for the default and actual prejudice as a result of the Constitutional error, or (2) that the Constitutional error has probably resulted in the conviction of one who is actually innocent. Since passage of the 1996 Anti-terrorism and Effective Death Penalty Act, the standard for considering defaulted claims has become even more stringent: If the petitioner failed to act reasonably to develop the factual basis for the Constitutional claim in state court (i.e., no evidentiary hearing was held in state court), then the federal court will not consider the issue unless petitioner could not have previously discovered the facts by the exercise of due diligence AND he can show by clear and convincing evidence that “no reasonable factfinder would have found [him] guilty of the underlying offense” but for the Constitutional violation. As Virginia’s Joint Legislative Audit and Review Commission noted, determining whether a factfinder would likely find a defendant innocent is speculative, at best, if the defendant didn’t get a fair trial in the first place.

Not only does the federal habeas petitioner have a heavy burden to meet on defaulted Constitutional claims, but he doesn’t fair much better on issues that have been decided
against him by the state courts. If the state court has ruled on the merits of a Constitutional claim, the federal court will not grant relief unless the state court’s decision was (1) contrary to clearly established federal law, (2) an unreasonable application of clearly established federal law, or (3) based on an “unreasonable determination of the facts in light of the evidence presented in the state court proceeding.”

Of Virginia death row inmates seeking federal habeas relief between 1973 and 1995, only 6% were granted relief, while 35% of the claims were not addressed because of procedural default.

IV. PROSECUTORIAL MISCONDUCT ALLEGED IN VIRGINIA CAPITAL CASES

Virginia imposed the death penalty in 132 cases between 1977 and January 2001, all of which were automatically reviewed by the Virginia Supreme Court as required by law. Virginia doesn’t maintain a centralized database regarding the prosecution of capital cases, and records of state habeas proceedings before 1994 were inconsistently maintained by the circuit courts and were too spread out across the state for a Virginia Legislative Commission to fully review these proceedings. At least one federal habeas petition was filed for 82 of the death-row inmates sentenced during the 1977-2001 time frame. Fifty-seven of those inmates (or seventy percent) alleged some form of prosecutorial misconduct in their petitions, but as noted later herein, the federal courts did not necessarily address or even acknowledge all of those allegations. Many of the misconduct allegations in the federal petitions had not been previously raised in state
court. By the same token, prosecutorial misconduct was alleged on direct appeal in some Virginia death cases, but not addressed in subsequent federal habeas decisions.

Of the 132 defendants sentenced to death, 67 (more than half) have raised prosecutorial misconduct issues in either state court, federal court, or both. In many of these cases, several allegations of misconduct were made, and some allegations were given more attention than others. In this section, the author will discuss how the state and federal courts treated each individual allegation of prosecutorial misconduct. Some cases will undoubtedly appear mentioned in several subsections because of different treatment given to different issues.

A. CASES REVERSED BECAUSE OF PROSECUTORIAL MISCONDUCT

Since 1977, three Virginia death sentences have been reversed because of prosecutorial misconduct, one by the Virginia Supreme Court on direct appeal, one in the United States Supreme Court, and one in which the Virginia Attorney General actually conceded that a Constitutional error had occurred.

Wilbert Lee Evans

Evans was convicted of the capital murder of a deputy sheriff while attempting to escape custody. At the sentencing hearing, the prosecutor offered erroneous and misleading information regarding Evans’ prior criminal record. In particular, he introduced copies of three different prior North Carolina conviction records, all with different dates, without informing the jury that these three documents actually represented only a single offense for which Evans had been re-tried after successful appeals. Several months later, while the appeal and state post-conviction proceedings
on Evans’ death sentence were pending, the Attorney General’s office conceded that Constitutional error had occurred, the only time in Virginia history that such an admission has been made by the Attorney General’s office in a death penalty case.\textsuperscript{136}

The victory was short-lived. Just before the Attorney General conceded error and allowed the case to be remanded, the Virginia legislature had amended Virginia Code § 19.2-264.3 to allow re-sentencing by a new jury, if a death penalty was reversed solely because of an error during the sentencing phase.\textsuperscript{137} Evans was again sentenced to death.\textsuperscript{138} He challenged the new sentence on the grounds that the original prosecutorial misconduct barred re-imposition of the death penalty, and he also alleged that the Commonwealth of Virginia had intentionally delayed admitting error in order to take advantage of the new procedural law, allowing re-sentencing by a new jury.\textsuperscript{139} In denying his appeal, the Virginia Supreme Court referred to the prosecutor’s initial misconduct as “indifferent and careless,” but not intentional.\textsuperscript{140} As unintentional misconduct, it was completely cured by the new sentencing hearing, and Evans was properly sentenced to death at the second hearing.\textsuperscript{141}

Following an evidentiary hearing in state \textit{habeas corpus} proceedings, a Virginia circuit court concluded that the Attorney General’s office had acted in good faith in conceding error when it did.\textsuperscript{142} Nothing indicated that the prosecutors involved in the case were aware of the pending legislative changes, and the timing of the new procedural law was merely fortuitous.\textsuperscript{143} The federal courts gave deference to the state court determination, and Evans’ second death sentence was allowed to stand.\textsuperscript{144}
**Gregory David Frye**

Frye was sentenced to death for the capital murder of a Virginia State Trooper.\(^{145}\) During closing arguments at the sentencing hearing, the prosecutor told the jury that responsibility for imposing the death penalty was not theirs, and the judge added that the jury’s verdict was only a recommendation.\(^{146}\) The Virginia Supreme Court found that this argument was both incorrect and prejudicial.\(^{147}\) Although the judge could commute the sentence to life in prison under some circumstances, he did not have unbridled authority to do so.\(^{148}\) Thus, the prosecutor’s comments inappropriately minimized the jury’s sense of responsibility for its decision.\(^{149}\) The death sentence was vacated.\(^{150}\)

**Michael Wayne Williams**

Williams was convicted of capital murder, rape, abduction, robbery, and arson, based upon the testimony of a co-defendant and other evidence.\(^{151}\) He raised several issues of prosecutorial misconduct, most of which will be discussed in other sections of this paper, at various times during the appeal, state and federal post-conviction proceedings.\(^{152}\) Although the Fourth Circuit Court of Appeals considered the issue procedurally defaulted,\(^{153}\) the United States Supreme Court held that Williams was entitled to an evidentiary hearing on an important set of issues: one of the jurors was divorced from a sheriff’s deputy who was a witness in the case, and she had been married to him for fourteen years, but she failed to disclose this when asked during *voir dire* if anyone was related to any of the witnesses, whose names were read.\(^{154}\) More significantly, the prosecuting attorney had represented this juror in her divorce case, and neither she nor the prosecutor advised the judge of this prior relationship, even though the
judge inquired whether any of the jurors had been represented by any of the attorneys.\footnote{155} The case was remanded to the Federal District Court for the Eastern District of Virginia, and after the evidentiary hearing, the judge awarded Williams a new trial, based on juror and prosecutorial misconduct.\footnote{156} When returned to the trial court, Williams received a life sentence on August 22, 2003, in exchange for pleading guilty to all charges.\footnote{157}

\section*{B. PROSECUTORIAL MISCONDUCT HELD TO BE “HARMLESS ERROR”}

In fourteen additional cases – more than 10\% of the cases in which a death sentence was imposed – various courts recognized that some form of prosecutorial misconduct \textit{had occurred} during the case. The errors ranged from suppression of exculpatory evidence and improper questions (the two most common errors held “harmless”) to improper argument, perjured testimony, and disregarding court orders, among others.\footnote{158} Yet, the courts considered the error “harmless.” In reviewing some of the cases, one can readily understand why some commentators have suggested that the “harmless error” doctrine be abrogated.

\textit{Thomas H. Beavers}

A deputy sheriff gave improper testimony during Beavers’ trial for rape and capital murder.\footnote{159} During his testimony, it became apparent that the witness had no recollection of the events and was reading verbatim from other documents provided to him by the prosecutor to “refresh his memory.”\footnote{160} The deputy’s testimony involved statements allegedly made by Beavers in the jail about his intent to kill the victim.\footnote{161} In response to the defense’s objection, the trial judge “struck” the testimony and instructed
the jury to disregard the testimony completely.\textsuperscript{162} Although acknowledging that the prosecutor had sought to get this information before the jury improperly, the Virginia Supreme Court noted other evidence in the record from which criminal intent to kill could be inferred, and decided that the error was harmless, allowing the death sentence to stand.\textsuperscript{163}

\textit{Ronald Bernard Bennett}

Bennett alleged that the prosecutor misstated the facts and argued matters not in evidence.\textsuperscript{164} Without discussing the nature of the alleged misstatements, the Virginia Supreme Court summarily stated that the improper argument was harmless error.\textsuperscript{165}

\textit{Walter Correll}

In Correll’s trial for robbery and capital murder, a co-defendant testified against him.\textsuperscript{166} The prosecutor failed to disclose that the co-defendant had a prior theft conviction, information that could be used to impeach the witness’ credibility.\textsuperscript{167} Although a prosecutor is clearly required to disclose such impeachment information, the federal court found this to be “harmless error,” noting that the defense attorney had impeached the witness in other ways, including pointing out his plea agreement in exchange for testifying.\textsuperscript{168}

\textit{Edward B. Fitzgerald}

In Fitzgerald’s trial for capital murder, rape, abduction, burglary, and robbery, a cell-mate testified that Fitzgerald had confessed to the crime.\textsuperscript{169} On cross-examination,
the witness lied about his criminal record and about whether he received anything in exchange for his testimony. In state habeas proceedings, the court held that the prosecutor should have known that the cell-mate’s testimony on these issues was false, but that the prosecutor did not have actual knowledge. The prosecutor’s failure to correct the testimony was “harmless error.” The federal court agreed, finding “no reasonable likelihood” that the verdict would have been any different if the jury knew of the cell-mate’s perjury.

Ronald Lee Hoke

Prior to Hoke’s trial for abduction, rape, capital murder, and robbery, the prosecutor obtained an unauthorized copy of a psychiatric report prepared by the defense psychiatric expert. In violation of state and federal confidentiality laws, he then met with the expert to discuss Hoke and the case, without the knowledge or permission of Hoke or his attorney. The Federal Court for the Eastern District of Virginia held that the prosecutor’s misconduct had no “substantial and injurious effect or influence” on the jury’s verdict.

John Joseph LeVasseur

During his trial for capital murder and robbery, LeVasseur testified on his own behalf. While cross-examining him, the prosecutor asked him if he had ever said he wanted to “do away with” his mother. Noting the total irrelevance and inflammatory nature of the question, the trial court instructed the jury to disregard the question. The defense argued that he should get a new trial because of the prosecutor’s misconduct in
The Virginia Supreme Court presumed that the jury followed the judge’s instruction to disregard the question, and therefore held the misconduct to be harmless error.

*Everett Mueller*

Mueller was charged with rape and capital murder of a 10-year-old girl. Eyewitness testimony placed him in the vicinity of the Hardee’s where she was last seen alive. The prosecutor failed to disclose to the defense that the eyewitness had been shown a photo line-up shortly after the crime and had picked someone else out of that lineup as the possible suspect. Without significant discussion, the federal appellate court held that the information was not likely to affect the outcome of the case, and therefore, the prosecutor’s suppression of the evidence was harmless error.

*Carlton Jerome Pope*

Pope was charged with robbery and capital murder. Two women picked up a man to help them find another man they were looking for. The helpful stranger subsequently shot one of the women and stole their car. The remaining woman reported the incident to the police and later identified Pope as the perpetrator of the crime. The investigating officer noted that the woman appeared drunk and confused when she came in to report the crime, that she admitted drinking five or six beers before the incident (contrary to her trial testimony), and that he suspected she had been looking for drugs because of the neighborhood and because the person she was looking for was a known drug dealer. The prosecutor suppressed these notes, rendering the information
unavailable to the defense at trial. The Fourth Circuit Court of Appeals held that the information was not “material” to the outcome of the case, so the misconduct was harmless error.

_Bobby Ramdass_

In Ramdass’ trial for robbery and capital murder, co-defendants and witnesses had given statements to the police that were internally inconsistent and inconsistent with each other. Although these inconsistencies clearly provided the basis for questioning the credibility of the witnesses and co-defendants who testified against Ramdass, the prosecutor withheld the statements from the defense. Again, a federal court held that the misconduct was not likely to have affected the outcome of the trial.

_Michael Satcher_

Two different prosecutorial indiscretions were held harmless in this capital murder, rape, and robbery case. First, in violation of a pre-trial discovery agreement, the prosecutor failed to provide the defense a timely copy of a prosecution expert’s resume, so that the defense attorney had insufficient time to prepare for cross-examination of the expert. Next, in closing argument, the prosecutor improperly appealed to the possible race and class prejudices of the all-white jury by suggesting that the black defendant had no business leaving his inner DC neighborhood and coming to the victim’s upper-middle-class white Alexandria neighborhood.
**Dennis Stockton**

Stockton had been very verbally abusive to the trial judge on a prior occasion. During his re-sentencing for capital murder for hire, while cross-examining a defense witness, the prosecutor asked the witness if he was aware of statements defendant had made to the judge on an earlier occasion. The judge sustained defense objections to the question. Because the jurors did not learn what comments had been made by Stockton, the Virginia Supreme Court considered the improper question to be harmless error.

**Lem Davis Tuggle**

During the sentencing phase of Tuggle’s trial for rape and capital murder, the prosecutor repeatedly made reference to defendant’s eligibility for parole, which was an improper argument under state law. The federal court refused to set aside the death sentence because this violation did not amount to a violation of federal Constitutional rights.

**Terry Williams**

Williams was convicted of robbery and capital murder. At the sentencing phase rebuttal argument the prosecutor improperly commented on the defense attorney’s change of position between the guilt phase (arguing that Williams was innocent) and the sentencing phase (acknowledging Williams’ guilt and asking for mercy). The Virginia Supreme Court held this to be harmless error.
Joe Louis Wise

During Wise’s trial for robbery, grand larceny and capital murder, the prosecutor asked an officer about statements from Wise that the court had already ruled inadmissible. The judge instructed the jury to disregard the questions and answers given by the officer. Again presuming that the jury followed the judge’s instructions, the Virginia Supreme Court held the improper questions to be harmless error.

C. PROSECUTOR’S ACTIONS NOT CONSIDERED MISCONDUCT

Certainly, not every allegation of prosecutorial misconduct is supported by the record. Just because a defendant claims that the prosecutor acted unethically does not automatically make the prosecutor guilty of misconduct, any more than a grand jury indictment automatically makes a defendant guilty of the charges against him. In 29 (less than 50%) of the 67 cases claiming prosecutorial misconduct, the courts decided that misconduct did not occur. In the brief summaries of the 29 cases which follow, some cases will stand out as having very strained logic, while other decisions will seem more appropriate.

Derek Barnabei

Barnabei claimed that the prosecutor intentionally misled defense counsel about the nature of “prior bad acts” testimony expected from Barnabei’s ex-wife at the sentencing phase of his trial for rape, sodomy, and capital murder. The prosecution timely advised Barnabei’s attorney that the ex-wife would testify about a course of continuous “threatening and assaultive behavior.” When she testified, one of the acts
she alleged was that Barnabei once tried to force her to have anal intercourse.\textsuperscript{213} The court did not consider the prosecutor’s conduct misleading, because the witness was timely identified and defense counsel could have spoken with her to get more specific information.\textsuperscript{214}

\textit{Herbert Bassett}

Defense witnesses testified that defendant had been looking for Mike at the time of the alleged offense. In closing argument, the prosecutor commented on defendant’s failure to call Mike as his alibi witness. The Virginia Supreme Court summarily rejected defendant’s claim that this argument was improper.\textsuperscript{215}

\textit{Ronald Bernard Bennett}

Bennett alleged that certain comments in the prosecutor’s closing argument amounted to improper comment on defendant’s failure to testify for himself.\textsuperscript{216} Without discussion of the specific comments, the Virginia Supreme Court held that the prosecutor’s argument was proper.\textsuperscript{217}

\textit{Earl Bramblett}

The trial court in this case entered a prior disclosure order, setting a deadline for the prosecution to identify its witnesses to defense counsel.\textsuperscript{218} The prosecution decided to use one of Bramblett’s cell-mates as a rebuttal witness, but did not identify him until five or six days before he testified.\textsuperscript{219} The defense alleged that this violated the trial court’s order.\textsuperscript{220} The trial court held, and the Virginia Supreme Court affirmed, that the
prior disclosure order applied only to witnesses in the prosecution’s case-in-chief, not to rebuttal witnesses.\textsuperscript{221} Therefore, the prosecutor had not violated the order.\textsuperscript{222}

\vspace{0.5cm}

\textit{Linwood Briley}

A co-defendant testified against Briley in exchange for a plea agreement.\textsuperscript{223} As part of the agreement, he could not be sentenced for his role in the crimes to any more time than the people he testified against.\textsuperscript{224} He acknowledged that part of the agreement during his testimony for the prosecution.\textsuperscript{225} The agreement also spared the co-defendant from the death penalty in another case and required him to testify against Briley in several cases besides the capital murder and robbery case.\textsuperscript{226} Briley contended that the prosecution was misleading the jury by not mentioning the agreement to remove the death penalty on an unrelated charge.\textsuperscript{227} The Fourth Circuit Court of Appeals disagreed, noting that Briley’s attorney was free to go into all terms of the plea agreement, but had chosen not to “open the door” to mention all the other charges against Briley.\textsuperscript{228} He was not allowed to use only the helpful parts of the plea agreement while seeking to exclude those parts with harmful information.\textsuperscript{229} There was no misrepresentation by the prosecutor.\textsuperscript{230}

\vspace{0.5cm}

\textit{Kevin DeWayne Cardwell}

Without ever describing the nature of Cardwell’s prosecutorial misconduct claims, the Federal District Court noted that the claims had been summarily rejected on the merits in state \textit{habeas} proceedings.\textsuperscript{231}
Lance Chandler

Chandler alleged the racially discriminatory use of peremptory strikes during jury selection, in violation of *Batson v. Kentucky*. In an unpublished opinion, the court held that the prosecutor gave appropriate race-neutral explanations for his strikes of three African-American jurors: two were reluctant to vote for the death penalty and one was non-communicative during voir dire.

Wilbert Lee Evans

As discussed in the earlier section on cases reversed for prosecutorial misconduct, Evans was re-sentenced to death after a new sentencing trial. He alleged that the prosecutor intentionally waited until the law changed to allow a new jury to re-sentence before admitting error in the first trial. The courts rejected this claim, finding that the prosecutor had acted in good faith.

David Lee Fisher

In closing argument of the sentencing phase, the prosecutor told the jury that Fisher “wouldn’t stay in jail forever” if he were sentenced to life in prison. While normally an improper argument, the Virginia Supreme Court held that Fisher invited the argument when he improperly argued that Fisher would never see sunshine again except through prison bars. Accordingly, there was no prosecutorial misconduct.
Michael Carl George

George was charged with abduction, sodomy, robbery and capital murder in connection with the death of a 15-year old boy. George objected to the prosecutor’s remarks during closing argument of the guilt or innocence trial, urging the jury to consider the impact of the crime on the boy, his parents, and the community. On capital murder charges, such an argument is appropriate at the sentencing phase, but not at the guilt phase. The court noted, however, that the jury set sentence on the non-capital offenses immediately upon conviction, and the prosecutor’s remarks were made in the context of arguing for the maximum sentence on those charges. Accordingly, the court held that the argument was not improper.

Christopher Goins

Goins was convicted of shooting his pregnant girlfriend (who lived to tell about it) and the capital murder of five of her family members. He alleged that the prosecutor did not disclose the fact that the gun introduced into evidence had been seized during an illegal warrantless search of someone else’s home. The court held that (1) the search of the other home was proper, not illegal, and (2) even if the search had been illegal, no rights of this defendant had been violated, so the prosecutor would have no duty to disclose the information.

Andre Graham

Graham alleged that the prosecutor exercised his peremptory strikes of potential jurors in a racially biased manner, removing black jurors on four out of five strikes, in
violation of *Batson.*\textsuperscript{248} The court held that the prosecutor gave adequate race-neutral reasons for the strikes, when he stated that the jurors were removed because they were the same age as the defendant, no because of their race.\textsuperscript{249}

*Ronald Lee Hoke*

Hoke was convicted of rape, abduction, robbery, and capital murder.\textsuperscript{250} He alleged that the prosecutor failed to disclose potentially exculpatory evidence, in particular, statements taken from three of the victim’s former boyfriends, describing consensual sexual practices with the victim, including anal sex, which could support Hoke’s claim of consensual sex with the victim.\textsuperscript{251} The court held that the prosecutor’s conduct was acceptable, because defense counsel could have learned the identity of the former boyfriends, and talked to them himself, by doing a more thorough investigation.\textsuperscript{252}

*Arthur Ray Jenkins*

Jenkins was convicted of the capital murder and robbery of his uncle and another person in the same transaction.\textsuperscript{253} He alleged that the prosecutor acted improperly, intimidating the defense psychiatric witness from testifying and thereby depriving Jenkins of his Constitutional right to present witnesses on his own behalf.\textsuperscript{254} The prosecutor’s action had been filing a motion to exclude the out-of-state psychiatrist’s testimony on the grounds that she was not licensed in Virginia; he argued that her testimony would be the unlawful practice of medicine without a license.\textsuperscript{255} Although the trial court ruled that the expert could testify, the psychiatrist withdrew her services and
refused to testify, based on legal and ethical concerns.\textsuperscript{256} The prosecutor never had any
direct contact with the defense expert witness; she learned about the motion to exclude
her testimony from the defense attorney.\textsuperscript{257} The Virginia Supreme Court held that the
prosecutor’s conduct was proper and did not violate Jenkins’ rights.\textsuperscript{258}

\textit{Mario Murphy}

At the sentencing phase of this murder-for-hire case, the prosecutor urged the
dge to impose the death penalty because Murphy killed someone he didn’t even know,
for money, and showed no remorse.\textsuperscript{259} Murphy argued on appeal that this argument was
improper, aimed at inciting the passions of the sentencing judge.\textsuperscript{260} The Virginia
Supreme Court disagreed, holding the argument proper.\textsuperscript{261}

\textit{Joseph Patrick Payne}

Payne was convicted of killing a fellow inmate in prison, based in part on the
testimony of another inmate who later recanted, saying his testimony had been false.\textsuperscript{262} Payne alleged that the prosecutor suborned perjury by offering the testimony of an inmate
with an “acknowledged history” of unreliability and lying.\textsuperscript{263} In state \textit{habeas} proceedings
accepted by the federal court, the court found insufficient evidence that the prosecutor
actually knew the testimony was false at the time he used it.\textsuperscript{264} The witness’ recantation
alone, in the absence of prosecutorial misconduct, is not grounds for setting aside a
conviction in federal \textit{habeas} proceedings.\textsuperscript{265}
David Mark Pruett

During jury selection in this trial for capital murder, rape and robbery, Pruett’s attorney told a few of the prospective jurors, while questioning them individually during voir dire, that Pruett had already conceded his guilt in the matter. During closing argument, the prosecutor argued to the empaneled jury that Pruett had conceded his guilt during voir dire and that he should be convicted. Pruett contended that the prosecutor’s argument was improper, but the Virginia Supreme Court and the federal courts disagreed with him.

Bobby Ramdass

A co-defendant testified against Ramdass in his trial for capital murder and robbery. The co-defendant had failed a polygraph test regarding his version of the events, but the prosecutor failed to disclose the polygraph results to Ramdass’ attorney. Ramdass subsequently alleged prosecutorial misconduct in withholding exculpatory evidence. The Federal District Court for the Eastern District of Virginia held that the prosecutor was not guilty of misconduct. The polygraph results would not be admissible in court under Virginia law, so they couldn’t be exculpatory, and the prosecutor had no duty to disclose them.

Timothy W. Spencer

Spencer alleged that the prosecutor struck a prospective juror on racial grounds in violation of Batson. The state and federal courts agreed that the prosecutor gave an adequate race-neutral explanation for the strike, namely that the prospective juror had not
heard of the “Southside Strangler” and had not heard of DNA, so the prosecutor felt that she was too uninformed to be a juror.275

*Kenneth M. Stewart*

Stewart alleged prosecutorial misconduct in failing to comply with discovery rules by failing to disclose verbal opinion of state’s blood spatter expert.276 The Virginia Supreme Court held that the prosecutor had no duty to disclose verbal reports, only written ones, so no misconduct had occurred.277

*Dennis W. Stockton*

The state and federal courts rejected several prosecutorial allegations in this murder-for-hire case.278 First, Stockton planned to call the person who allegedly hired him as an alibi witness; a few weeks before trial, the prosecutor indicted that person on capital murder charges, and then arguing to the jury that the witness was also facing prosecution.279 After Stockton was convicted, the charges against the witness were dropped.280 Stockton alleged that the prosecutor had abused his authority by intentionally issuing an indictment that he never intended to pursue, solely to undermine Stockton’s defense.281 The prosecutor claimed that he dropped the charges because he believed that the witness would be charged for the same crime in North Carolina.282 The court held that the prosecutor’s conduct was reasonable and in good faith.283

In the same proceeding, Stockton alleged that the prosecutor knowingly allowed a witness to testify falsely that his testimony against Stockton was completely voluntary, when in fact, the prosecutor failed to press murder charges against the witness in
exchange for his testimony against Stockton. The prosecutor acknowledged that the witness had been questioned regarding another murder, but stated that the witness had been ruled out as a suspect in the other murder before he was ever asked to testify against Stockton. The state and federal courts accepted the Commonwealth’s position and found no misconduct. However, Stockton’s sentence was reversed on other grounds, not related to any misconduct by the prosecutor.

At the new sentencing hearing, Stockton was again sentenced to death, and he raised other prosecutorial misconduct claims. During defendant’s closing argument, the attorney argued that Stockton had never been convicted of the offenses that the state relied on to support imposing the death penalty. The prosecutor objected and interrupted the defendant’s argument, stating that the appeals court had already considered these offenses, even though unadjudicated, to be a sufficient aggravating factor to justify the death sentence. Stockton contended the argument improperly informed the jury that he had been previously sentenced to death. The Virginia Supreme Court rejected the argument, saying that a jury could not “possibly have put such a strained interpretation on the prosecutor’s remarks.”

*Thomas Strickler*

Strickler alleged that the prosecutor failed to disclose unspecified exculpatory evidence in his files. The Virginia Supreme Court rejected the argument, noting that Strickler was merely on a fishing expedition to examine the prosecutor’s complete file, which he did not have a right to do under Virginia law.
Bobby Wayne Swisher

Swisher also alleged failure to disclose unspecified exculpatory evidence in the file.\textsuperscript{295} The Virginia Supreme Court ruled consistently with its decision in \textit{Strickler}.\textsuperscript{296}

Douglas Thomas

Shortly after 17-year-old Thomas’ arrest for the capital murder of his girlfriend’s parents, Thomas’ mother found a bag of suspected marijuana in his bedroom, which she gave to his attorney.\textsuperscript{297} The attorney turned it over to the sheriff’s department, requesting analysis, in case something about the drug might be relevant to Thomas’ state of mind at the time the crime was committed.\textsuperscript{298} Without any objection from the prosecuting attorney, the sheriff flushed the bag’s contents down the toilet, without having it analyzed, under a policy requiring destruction of contraband.\textsuperscript{299} Defendant objected to the prosecution’s destruction of potentially exculpatory evidence.\textsuperscript{300} The court held that the prosecutor did not act in bad faith and that defendant could not prove that the contraband was obviously exculpatory because it had not been analyzed, and thus, no proof existed to suggest that the marijuana had been laced with PCP or some other substance that would have impaired Thomas’ ability to pre-meditate the crime.\textsuperscript{301}

Richard Townes

During the sentencing phase of Townes’ trial for capital murder and robbery, the prosecutor introduced testimony from the victim of an earlier crime that Townes had committed.\textsuperscript{302} The witness testified that he had been shot four times in the prior robbery, but he had actually been shot only twice according to the medical records.\textsuperscript{303} Townes
alleged that the prosecutor had knowingly used perjured testimony, since the prosecutor’s
office knew or should have known, from the prior case, how many times the witness was
shot. The court disagreed with Townes, finding no evidence that the prosecutor was
aware of the inaccuracies at the time the witness testified.

Earl Washington

Washington was convicted of rape and capital murder. Prior to the trial, the
prosecutor provided the defense attorney several sheets of raw data from laboratory DNA
analysis, but did not provide the accompanying report, which conclusively indicated that
Washington was not the source of semen found at the scene. In response to
Washington’s habeas petition alleging suppression of exculpatory evidence, the federal
court held that the prosecutor had provided all he was required to provide. Defense
counsel’s failure to have an expert explain the raw data to him was incompetent
representation. At the hearing on Washington’s claim for ineffective assistance of
counsel, the state offered a different opinion of the raw data, stating that the first report
might have reached the wrong conclusion if the semen samples on the blanket had
vaginal fluid mixed in. If that were the case, then the DNA test was inconclusive, not
necessarily ruling Washington out. Because of that testimony, the majority
inexplicably held that Washington was not prejudiced by the inadequate assistance of
counsel.
Lonnie Weeks

Weeks alleged prejudice caused by improper questions from the prosecutor during his trial for capital murder of a state trooper. The prosecutor asked the witness why he needed protection, and the witness responded that some of “Weeks’ admirers” had threatened him. The court found the prosecutor’s question permissible in response to the defense attorney’s cross-examination. Defense counsel asked the witness what he was getting in exchange for his testimony, and the witness said “protection.”

Michael Williams

As noted previously, Williams’ conviction and sentence have been set aside by the United States District Court for the Eastern District of Virginia based on one prosecutorial misconduct issue. Williams also alleged other prosecutorial misconduct, including failure to disclose the existence of an informal plea agreement with co-defendant. The co-defendant had confessed to the crimes, but implicated Williams as the rapist and triggerman. The co-defendant entered into a plea bargain to testify against Williams in exchange for receiving a life sentence instead of the death penalty. Subsequently, lab reports revealed the presence of co-defendant’s semen in the victim, contrary to his version of the crime. The state canceled the plea agreement and charged the co-defendant with capital murder. At Williams’ trial, the co-defendant testified against Williams, including that the plea agreement had been withdrawn and he was awaiting trial for capital murder as well. After Williams’ conviction, the prosecutor asked the court to waive the death penalty for co-defendant because of his cooperation in the prosecution of Williams. Williams alleged that the co-defendant
and prosecutor had reached an informal agreement all along, which he should have been advised of.\textsuperscript{325} The prosecutor filed an affidavit denying the existence of any informal agreement.\textsuperscript{326} The United States Supreme Court accepted the state \textit{habeas} court’s decision that no misconduct occurred because no informal plea agreement existed.\textsuperscript{327}

\textit{Joe Louis Wise}

In closing argument of the guilt phase of Wise’s trial for capital murder and robbery, the prosecutor noted that Wise had two different wallets at the time of his arrest.\textsuperscript{328} Wise alleged improper argument because there was no evidence that either wallet belonged to the victim.\textsuperscript{329} The Virginia Supreme Court disagreed, stating that the prosecution is allowed to ask the jury to draw reasonable inferences from the evidence.\textsuperscript{330}

D. PROSECUTORIAL MISCONDUCT CLAIMS PROCEDURALLY DEFAULTED

Thirty-two of the sixty-seven cases alleging prosecutorial misconduct had one or more issues not addressed by the courts because of procedural default, either failing to object at trial (or at least failing to object the right way) in violation of Rule 5:25, failing to raise the issue on direct appeal, or failing to raise the issue in state \textit{habeas corpus} proceedings. Over 30\% of the defaulted claims involved allegations of exculpatory evidence suppressed in violation of \textit{Brady}, either as the sole issue of in addition to other misconduct.\textsuperscript{331} The alleged errors and grounds for default are summarized below.
**Herman Barnes**

Barnes was convicted of double capital murder during the robbery of a store.\(^\text{332}\) The police report noted that one of the victims had a gun, owned by the victim, which was found underneath his body at the scene.\(^\text{333}\) This information, which may have provided support for a self-defense mitigator, was not provided to the defense.\(^\text{334}\) Because Barnes did not raise this alleged *Brady* violation in his state *habeas* petition, and the court believed that he “should have” learned about the information sooner, the federal court ruled that he had defaulted the issue.\(^\text{335}\)

**Thomas H. Beavers**

In closing argument, the prosecutor improperly told the jury that the jury recommends the penalty but does not make the final decision.\(^\text{336}\) Defense counsel did not object at the time the improper argument was made, and the Virginia Supreme Court held the issue defaulted under Rule 5:25.\(^\text{337}\)

**Earl Bramblett**

Bramblett alleged prosecutorial misconduct in withholding evidence in violation of a pre-trial discovery order and in knowingly asking objectionable questions during trial.\(^\text{338}\) Because he did not seek dismissal of the charges on those grounds at trial, the Virginia Supreme Court deemed both issues defaulted under Rule 5:25.\(^\text{339}\)
Angel Breard

During closing argument, the prosecutor improperly argued that defendant had selected the psychiatric experts who testified. His attorney moved for a mistrial, based on improper argument, after the jury retired. Because he did not object as soon as the argument occurred, he defaulted the issue under Rule 5:25.

Dung Quang Cheng

Cheng alleged that the prosecutor, during closing argument, improperly made reference to the substantive content of a tape that had been excluded from evidence. During rebuttal, the prosecutor disassembled a shotgun in front of the jury, improperly appealing to fear and passion. The defense attorney moved for mistrial as soon as the jury retired. The court ruled that the objections were untimely, and the issues were defaulted under Rule 5:25.

Carl Hamilton Chichester

Prior to his trial for capital murder and robbery, Chichester pled guilty to an earlier robbery, pursuant to a plea agreement. In exchange for the guilty plea, the prosecutor agreed that the guilty plea to the other robbery would not be used in the sentencing phase of the capital murder trial. In violation of the agreement, the prosecutor introduced evidence of Chichester’s prior guilty plea. Defense counsel did not object on those grounds at the time the evidence was offered, so his post-trial motion for a new trial was barred by Rule 5:25.
**Earl Clanton**

During closing argument in the guilt phase of Clanton’s trial for capital murder and robbery, the prosecutor challenged Clanton’s credibility by referring to him as a three-time convicted felon. In fact, the prosecutor’s file indicated that Clanton had only two prior felony convictions. Clanton failed to raise this misconduct issue in his state habeas proceeding, so the federal court treated the issue as procedurally defaulted.

**Roger Coleman**

Coleman was charged with the rape and capital murder of his sister-in-law. Part of the prosecution’s theory was that the attacker was known to the victim and had gained consensual entry into the house. However, the police report documented pry marks on the door of the victim’s residence, along with an unidentified fingerprint. This information was withheld from the defense by the prosecutor. Attorneys discovered the existence of this exculpatory information before filing state habeas proceedings, and it was one of the issues raised in the habeas petition. Unfortunately, the attorney’s notice of appeal was filed two days late, rendering all of the issues raised in the state proceedings defaulted. Further, ineffective assistance of counsel in habeas proceedings did not excuse procedural default, because at that time, prisoners had no right to appointed counsel in habeas proceedings. Other than the alleged prosecutorial misconduct, many controversial issues surrounded this case, including questionable DNA interpretations, bloody sheets near the crime scene that were never recovered or investigated, and a neighbor of the victim who bragged about committing the crime.
Wayne Kenneth Delong

Defense counsel requested the notes of police interviews with the three eyewitnesses who testified against him at trial, alleging that the prosecutor was withholding potentially exculpatory evidence. In the state habeas proceedings, the court summarily rejected the claim without discussion. In his federal habeas petition, the court held that he did not sufficiently state the contents of the withheld notes and why they were exculpatory, so the claim was deemed defaulted.

Johnile DuBois

DuBois pled guilty to capital murder and robbery in exchange for the prosecutor’s agreement not to seek the death penalty. The judge rejected the plea agreement and imposed the death penalty. DuBois alleged prosecutorial misconduct in breaching the agreement and in failing to disclose unspecified exculpatory evidence. In an unpublished opinion, the Fourth Circuit Court of Appeals held that the prosecutorial misconduct issues were procedurally defaulted.

David Lee Fisher

Fisher alleged several improper comments by the prosecutor in closing argument. Without discussion of what the comments were, the Virginia Supreme Court noted that Fisher did not timely object during trial.
Edward B. Fitzgerald

The prosecutor refused to disclose criminal history information on the witnesses who were to testify against the defendant.\textsuperscript{370} The misconduct was procedurally defaulted because Fitzgerald did not raise it in his direct appeal to the Virginia Supreme Court.\textsuperscript{371}

Ronald Lee Fitzgerald

At Fitzgerald’s trial for capital murder during robbery, rape, and abduction, the prosecutor failed to disclose that the State’s primary witness was a convicted felon and was working as a police informant for the State in several unrelated cases.\textsuperscript{372} Because the issue was not raised on direct appeal, the federal court held that it was procedurally defaulted.\textsuperscript{373}

Andre Graham

Graham and a co-defendant were charged with capital murder and robbery.\textsuperscript{374} One of the robbery victims survived and testified at trial, as did the co-defendant, who stated that Graham was the triggerman.\textsuperscript{375} The prosecutor failed to disclose that the victim had been unable to identify the co-defendant from a photo line-up.\textsuperscript{376} The federal court did not consider this issue because of procedural default.\textsuperscript{377}

Coleman Wayne Gray

Gray alleged that the prosecution withheld exculpatory evidence showing that someone else committed the capital murder and robbery for which he was charged.\textsuperscript{378} The United States Supreme Court, noting that the issue had not been raised on direct
appeal or in state *habeas* proceedings, refused to consider the issue of procedural default.\textsuperscript{379} The Court remanded the case for determination of whether Gray had adequately raised a prosecutorial misrepresentation claim arising from the prosecutor’s surprise use at sentencing of graphic photographs, autopsy reports, and witnesses to describe an earlier murder of a woman and her daughter.\textsuperscript{380} The prosecutor had previously told defense counsel and the judge that the only information about the earlier murders would be Gray’s statements to cellmates that he had committed the earlier murders.\textsuperscript{381} On remand, the federal Circuit Court held that this claim was also procedurally defaulted.\textsuperscript{382}

*Ronald Lee Hoke*

Hoke alleged that the prosecutor knowingly offered perjured testimony from one of Hoke’s cellmates.\textsuperscript{383} He did not raise the issue in state *habeas* proceedings, and was therefore barred from raising it in federal court because of procedural default.\textsuperscript{384}

*Arthur Jenkins*

At Jenkins’ sentencing hearing on capital murder and robbery charges, one of the witnesses called by the state to prove “future dangerousness” was a deputy at the county jail where Jenkins was incarcerated.\textsuperscript{385} At the time of his testimony, this deputy had been charged with embezzlement and providing drugs to inmates in exchange for sexual favors.\textsuperscript{386} Although the prosecutor knew of this, he failed to disclose this impeachment evidence to the defense.\textsuperscript{387} In fact, Jenkins, who was borderline retarded, had been sexually abused by the deputy himself.\textsuperscript{388} Jenkins never raised the issue in state court,
and the federal court found no good excuse for his default, since Jenkins himself knew about the sexual abuse and should have told the defense attorney.\textsuperscript{389}

\textit{Jason Joseph}

In federal \textit{habeas} proceedings, Joseph alleged that the prosecutor failed to produce records from Central State Hospital that would have helped the defense present mitigating evidence.\textsuperscript{390} Because it was not raised in state court, the issue was procedurally defaulted.\textsuperscript{391}

\textit{Benjamin Lee Lilly}

During the prosecutor’s closing argument, the defense attorney objected to the prosecutor pointing a gun at Lilly and his attorney.\textsuperscript{392} In response to the objection, the trial judge said, “That’s ridiculous.”\textsuperscript{393} On appeal, Lilly alleged disparagement of defense counsel as prosecutorial misconduct, but because his objection in the trial court had not been worded in those terms, the issue was defaulted under Rule 5:25.\textsuperscript{394}

\textit{Joseph O’Dell}

In federal \textit{habeas} proceeding, O’Dell raised several issues of prosecutorial misconduct, including failing to correct perjured testimony of a cell-mate who denied any deal in exchange for his testimony, failure to comply with court-ordered expert discovery, failure to disclose exculpatory information regarding deals made by witnesses, and other undescribed allegations of prosecutorial misconduct “before, during, and after the trial.”\textsuperscript{395} Some were defaulted because they were not raised at trial, as required by Rule
The others were defaulted because his state habeas petition was dismissed on procedural grounds, rendering those issues procedurally defaulted in federal court.\textsuperscript{397}

\textit{Carlton Jerome Pope}

Pope alleged that the prosecutor suborned false testimony regarding whether a certain check came from the victim’s checkbook register.\textsuperscript{398} The issue was defaulted because it was not raised on direct appeal nor in state habeas proceedings.\textsuperscript{399}

\textit{David Mark Pruett}

Pruett alleged ten improper arguments and improper types of questions by the prosecutor during his trial for rape, robbery, and capital murder, including improper character evidence about the victim, comparing the worth of victim’s life to Pruett’s life, and other similar arguments.\textsuperscript{400} The federal court considered all of these arguments to be procedurally defaulted.\textsuperscript{401}

\textit{Thomas Lee Royal}

Royal pled guilty to capital murder of a police officer.\textsuperscript{402} At the sentencing hearing, the prosecutor allegedly introduced evidence in violation of the plea agreement.\textsuperscript{403} Three weeks after his guilty plea, the prosecutor disclosed that one of the investigating troopers had planted a gun into evidence.\textsuperscript{404} Six months later, while appeal was pending, the prosecutor disclosed that the same trooper had planted a .22 cartridge.\textsuperscript{405} On habeas review, the petitioner alleged prosecutorial misconduct on all of these issues, plus the prosecutor’s failure to disclose the co-defendant’s statements, which may have
been impeachable if they were tailored to match the planted evidence. The United States District Court held that all of the issues were procedurally defaulted because not raised at trial or on direct appeal.

Michael Satcher

Satcher was convicted of rape, robbery, and capital murder. In his federal habeas petition, he alleged that the prosecutor presented misleading DNA evidence, offered expert testimony that he knew or should have known was false, and made false statements to the jury regarding where evidence was found. All of these issues were deemed procedurally defaulted.

Mark Sheppard

Sheppard alleged improper closing arguments by the prosecutor. Although he raised the argument on direct appeal and in state habeas proceedings, he had not raised it during the trial, so the issue was defaulted under Rule 5:25.

Roy Bruce Smith

Following his conviction for capital murder of a police officer, Smith alleged that the prosecutor failed to disclose taped interviews of two other officers which were exculpatory. The federal court held that Smith had procedurally defaulted the issue by “unreasonable delay” in raising it.
Dennis W. Stockton

Stockton objected to improper cross-examination of the defendant, but made his objections the day after he testified, thereby waiving the issue under Rule 5:25 and procedurally defaulting the issue for all subsequent proceedings.415

Richard Townes

Townes represented himself at trial for capital murder and robbery.416 On appeal, he alleged several issues of prosecutorial misconduct, including withholding exculpatory evidence, failure to comply with discovery, improper closing argument, and releasing information to the media.417 The Virginia Supreme Court held each of these issues defaulted because they were not raised at trial.418 The fact that he represented himself did not provide any relief from the procedural default rules.419

Johnny Watkins

Watkins alleged that the prosecutor systematically used strikes to exclude blacks from the jury.420 He had not raised this objection at trial.421

Ronald Watkins

Watkins alleged “prosecutorial misconduct based on race.”422 The unspecific allegation had not been raised in state court, and thus, was defaulted.423
**Richard Whitley**

Whitley was charged with rape, robbery, and capital murder of his 63-year-old neighbor. In his federal *habeas* claim, he alleged that the prosecutor improperly questioned a detective, trying to elicit information about Whitley’s sexual improprieties with his step-daughter. He also alleged improper remarks in closing argument and at the sentencing phase. Without discussing the substance of those remarks, the court held that all of the prosecutorial misconduct issues had been procedurally defaulted.

**Michael Williams**

As previously discussed, Williams’ conviction was set aside for juror and prosecutorial misconduct. However, other prosecutorial misconduct issues were raised and either denied or not addressed by the Court. One such issue was the prosecutor’s failure to disclose a psychiatric report on the co-defendant, indicating that he had post-traumatic stress disorder, severe depression, and inability to remember the night of the crime due to alcohol and marijuana intoxication. The co-defendant was the primary witness against Williams, and the psychiatric report definitely impeached his ability to give accurate testimony. However, the issue was not raised in state court, and therefore, was procedurally defaulted.

**E. PROSECUTORIAL MISCONDUCT ISSUES NOT MENTIONED BY THE COURT**

Information provided by the Joint Legislative Audit and Review Commission included a list of death row inmates who made prosecutorial misconduct claims in their federal *habeas* petitions. Wright stated that the list was a “conservative estimate,”
because the Commission only identified prosecutorial misconduct claims if the inmate specifically called the behavior a distinct “misconduct” claim in his petition. Of the 57 inmates who reportedly claimed prosecutorial misconduct in a federal petition, 18 of the inmates apparently never had their misconduct claims discussed by the federal court in a reported opinion, either published or unpublished, so information is not presently available about the nature of those misconduct allegations, except where misconduct claims were made in direct appeals to the Virginia Supreme Court.

1. Inmates for Whom No Reported Federal Cases Were Found

No reported federal opinions were found, either published or unpublished, for Herbert Bassett, Gregory Beaver, Thomas Strickler, Bobby Wayne Swisher, or Percy Walton. Except for Gregory Beaver and Percy Walton, each of these inmates had raised prosecutorial misconduct claims in their direct appeals to the Virginia Supreme Court, which have been discussed earlier in this Paper. The nature of the prosecutorial misconduct claims made by Beaver and Walton are not known, because no such issues are discussed in the existing state opinions.

2. Cases in Which Reported Federal Opinions Fail to Mention Prosecutorial Misconduct

In the following cases, prosecutorial misconduct was discussed in related Virginia Supreme Court opinions, previously analyzed herein, but the reported federal opinions did not discuss prosecutorial misconduct issues that purportedly were raised in habeas petitions.
Beaver v. Pruett, No. 97-4 (4th Cir. 1997)(unpublished). Thomas Beavers was convicted of rape and capital murder.


3. Cases in Which Neither Federal or State Opinions Mention Prosecutorial Misconduct

Reported State and Federal opinions are available on the following cases, but none of the opinions discuss any allegations of prosecutorial misconduct which were purportedly alleged in habeas petitions.

Boggs v. Bair, 892 F.2d 1193 (4th Cir. 1989).


Eaton v. Angelone, 139 F.3d 990 (4th Cir. 1998).


Based upon review of the cases discussed herein, improvements can be made in several arenas to reduce the incidents of misconduct, improve detection and correction of misconduct, and improve the perception of Virginia’s justice system as one that is fair as well as efficient.

A. TRAINING FOR PROSECUTORS

Harmon suggests mandatory ethics training for prosecutors who handle capital cases. Her point is well-taken. Many improper arguments and improper questions may well be the result of inexperience, lack of knowledge, or getting “caught up in the
moment.” Training, at least annually, that focuses on ethical obligations, rather than simply on advocacy skills, could prevent a number of these improprieties.

Diversity sensitivity training may also be helpful, to help prosecutors recognize and deal with unconscious bias that may be filtering into the jury selection process. Such training also sends a clear message that the government does not condone discrimination by the criminal justice system, and is making efforts to combat such discrimination.

B. DISCIPLINARY SYSTEM RESPONSE

Currently, the Virginia State Bar does not track disciplinary complaints against prosecutors as a class, according to Barbara Williams, State Bar Counsel. Keeping such records would enable the state to better understand the extent of prosecutorial misconduct, the types of misconduct occurring, and maybe even why it is occurring. Such understanding is essential to effective prevention measures.

Effective sanctions must also be imposed for prosecutorial misconduct. Of course, before sanctions can be imposed, there must be a mechanism for insuring that complaints are made to the disciplinary system. Judges are ethically obligated to report attorney misconduct, just as are other attorneys. Yet, somehow, misconduct continues to be acknowledged in court opinions, without any referral of prosecutors to the disciplinary system. Disciplinary action against prosecutors is exceptionally rare.

Once misconduct is reported, the Committee investigates to determine if the complaint is founded. One author suggests that a special panel of the Disciplinary Committee, containing prosecutors and criminal defense lawyers, should be responsible for investigating complaints against prosecutors. If the complaint is founded, the
Disciplinary Committee can choose from a wide range of sanctions, depending on the nature and severity of the misconduct. Sanctions can include private reprimand, requirement to attend ethics courses, public apology, or more severe forms, like suspension or disbarment. For intentional prosecutorial misconduct, such as knowing use of perjured testimony or intentional withholding of exculpatory evidence, automatic suspension or disbarment is appropriate.

C. JUDICIARY RESPONSE TO PROSECUTORIAL MISCONDUCT

In addition to reporting prosecutorial misconduct to the state Disciplinary Committee, which should be mandatory, judges have authority to hold attorneys in contempt of court. In exercising that authority, the judge can impose a fine or even a jail sentence, if warranted. Fines and jail sentences tend to get more attention than verbal reprimands, and misconduct is less likely to occur if a judge has a reputation for punishing misconduct.

Additionally, the Virginia Supreme Court can change the decisional rules applied in capital cases. First, the Virginia Supreme Court, responsible for propounding the Rules of Court, can decide to modify Rule 5:25, so that it is inapplicable in capital cases, where imposition of death penalty is serious enough to require that courts do not put “form over substance.” Many have also urged abolition of the “harmless error” doctrine. If complete abrogation of the doctrine seems too drastic, the courts can at least decide that prosecutorial misconduct can never be harmless error, because it is certainly not harmless to public perception of the system, especially in capital cases.
Further, if the misconduct was intentional, automatic reversal of the conviction is important to preserve the integrity of the justice system.\textsuperscript{444}

\textbf{D. LEGISLATIVE RESPONSE TO PROSECUTORIAL MISCONDUCT}

The Virginia Legislature can accomplish many of the same improvements, by statutorily providing that procedural default does not apply to prosecutorial misconduct claims in capital cases. The legislature can also pass laws to require full discovery of prosecutor and police files, except where the court determines that disclosure of certain particular information poses a serious risk of harm to a witness. Such full discovery is advocated by Jonakait as the only way a criminal defendant in the adversary system has any real chance of combating prosecutorial misconduct.\textsuperscript{445}

One area that is ripe for manipulation and abuse is testimony of jailhouse snitches. Many misconduct allegations arise from claims that such testimony was false, manufactured in exchange for a deal, and that the prosecutor knew or should have known of its falsity. By legislatively prohibiting deals in exchange for testimony and/or requiring significant corroborating testimony to support claims made by a fellow-inmate, claims of this nature can be reduced, as well as the attendant risk of wrongful convictions.

The Legislature can also abolish immunity for prosecutors, allowing civil suits for money damages against prosecutors who intentionally suppress exculpatory evidence or knowingly suborn perjured testimony.\textsuperscript{446}

If all of the judicial, disciplinary, and legislative changes seem too costly or impractical to implement, then the Legislature should consider abolishing the death
penalty. Capital cases require a great deal of resources for bifurcated trials, mandatory automatic appeals, and habeas proceedings, and the changes necessary to ensure that the system is perceived as fundamentally fair before exacting the ultimate penalty are equally costly. By eliminating the death penalty, this cost could not be saved, and if a person is wrongfully convicted, discovery of the error has a better chance of being corrected if the state hasn’t already executed him.

VI. CONCLUSION

Scholars who criticize the operation of the criminal justice system in capital cases are particularly critical of Virginia’s justice system.\textsuperscript{447} The review of prosecutorial misconduct claims in Virginia capital cases confirms that this criticism is valid. The number and nature of prosecutorial misconduct claims made in Virginia capital cases is troubling, not only from the perspective of individual defendants who may actually be innocent, such as Earl Washington, but also to the perception of our justice system as legitimate and fair.\textsuperscript{448} Prosecutorial misconduct claims are made in more than half of the cases resulting in death sentences in Virginia. The judicial treatment given to these claims in Virginia is alarming, with nearly half the cases shrugged off on procedural default grounds, and another 10% called “harmless error.”

Whether caused by political pressure to solve a crime or by personal certainty that conviction of a particular defendant is the only just result, prosecutorial misconduct places the government above the law. When we allow the ends to justify the means, we are allowing our society to crumble beneath us. Improved training for prosecutors, more involvement from the disciplinary system, and strong response from the judiciary and the
Legislature is required to ensure that prosecutorial misconduct is appropriately dealt with and that citizens can have confidence in the integrity of Virginia’s criminal justice system.
ENDNOTES


2 Id.

3 Id.

4 Id. at § 4.


6 Id. at 119.

7 See id. at 132.


9 See LIEBMAN ET AL, supra note 1, at § 8F (asserting that every state with the death penalty except Virginia and Missouri had an ultimate reversal rate between 52% and 91%).

10 Id. at § 8A. See also JOINT LEGISLATIVE AUDIT AND REVIEW COMM., REVIEW OF VIRGINIA’S SYSTEM OF CAPITAL PUNISHMENT, VA GEN. ASSEMBLY OF 2003 (2002) [hereinafter cited as AUDIT].

11 VA. SUP. CT. R. 5:25. See also LIEBMAN ET AL., supra note 1, at § 9.

12 VA. SUP. CT. R. 1:1. See also LIEBMAN ET AL., supra note 1, at § 9. In response to sharp criticism of the 21-day rule, the Virginia Legislature adopted a law in 2001 allowing certain convicts to file a Petition for Writ of Actual Innocence based on new
DNA evidence. VA. CODE ANN. § 19.2-327.2. The Petition can be filed in the Virginia Supreme Court by persons sentenced to death or convicted of a felony carrying a maximum of life in prison; those convicted of other felonies can file the Petition only if their convictions followed trial on a plea of “not guilty.” Also, the Petition must be filed without “unreasonable delay” once the new evidence is discovered or once the new test is available for old evidence. Id.

In 2004, the legislature passed VA. CODE ANN. § 19.2-327.10, allowing a Petition for Writ of Actual Innocence based on non-scientific evidence. Only those convicted of a felony on a “not guilty” plea are eligible to file this Petition, and only one such Petition may ever be filed per conviction. Id. The Petitioner bears the burden of proving, by clear and convincing evidence, that the evidence was previously unavailable and couldn’t have been discovered earlier by due diligence and that “no rational trier of fact could have found proof of guilt beyond a reasonable doubt” if such evidence had been considered. VA. CODE ANN. §§ 19.2-327.11, 19.2-327.13.

13 AUDIT, supra note 10, at preface.

14 LIEBMAN ET AL., supra note 2, at § 8H.

15 Id. at § 10.


17 Id.

18 Harmon, supra note 5, at 128. See also Carol A Corrigan, On Prosecutorial Ethics, 13 HASTINGS CONSTIT. L. Q. 537, 540 (1986).


ABA STANDARDS FOR CRIMINAL JUSTICE: PROSECUTION FUNCTION AND DEFENSE FUNCTION, 3-1.2(c) (3d ed. 1993) [hereinafter ABA].


Bruce A. Green, The Ethical Prosecutor and the Adversary System, 24 CRIM. L. BULL. 126, 128-29 (1988).


VA SUP. CT. R. PART 6 § 2.

VIRGINIA STATE BAR, PROFESSIONAL GUIDELINES 6 (2001).

Id.

Id.


38 VIRGINIA STATE BAR, supra note 29, at 6-7.

39 VIRGINIA STATE BAR, supra note 29, at 68.

40 Id.

41 Id.

42 ABA, supra note 21.

43 ABA, supra note 21, at Standard 3-3.11.

44 ABA, supra note 21, at Standard 3-5.6.

45 ABA, supra note 21, at Standard 3-5.8.


48 See GERSHMAN, supra note 25, at § 5:1; Gershman, supra note 19, at 219; Harmon, supra note 5, at 119; KROLL, supra note 47, at 16.


50 See GERSHMAN, supra note 25, at §§ 11:2, 11:7; Gershman, supra note 46, at 134.


52 See GERSHMAN, supra note 25, at § 10:13; Gershman, supra note 19, at 222.
53 See Gershman, supra note 25, at § 10:45; Gershman, supra note 46, at 139; Steele, supra note 51, at 971.

54 See Gershman, supra note 25, at § 11:16; Steele, supra note 51, at 971.

55 See Gershman, supra note 25, at § 13:12; Steele, supra note 51, at 972.

56 Gershman, supra note 25, at § 9.5.

57 Gershman, supra note 19, at 219.

58 Id.


60 Green, supra note 23, at 138.

61 Id. at 140-41.

62 Id. at 141.

63 Id. at 142.


65 See KROLL, supra note 47, at 16; Gershman, supra note 25, at §§ 1:2, 1:37, 1:44. See also Burns v. Commonwealth, 261 Va. 307, 541 S.E.2d 872, 876 (2001) (quoting the defense attorney’s argument that “the problem of police-concealed exculpatory evidence is pervasive…throughout the country”).


67 See Harmon, supra note 5, at 134; KROLL, supra note 47, at 1-2.

68 Harmon, supra note 5, at 115.

69 KROLL, supra note 47, at 3.
70 Id. at 6.

71 Gershman, supra note 46, at 133-35.

72 Jonakait, supra note 59, at 554.

73 Id. at 555.

74 Id. at 556.


76 Gershman, supra note 46, at 133.

77 Id. at 140-41.


80 Id. at 683-84.

81 Wolf, supra note 64, at 1944.

82 See SCHECK, supra note 75, at 226; Jonakait, supra note 59, at 557; Albert W. Alschuler, Courtroom Misconduct by Prosecutors and Trial Judges, 50 TEX. L. REV. 629, 659 (1972).

83 Gershman, supra note 46, at 136.

84 Id. at 137.

85 See Gershman, supra note 46, at 141; SCHECK, supra note 75, at 226.

86 Gershman, supra note 46, at 142.

87 GERSHMAN, supra note 25, at § 14:4.

88 Id. at § 1:49 n. 6.

89 LIEBMAN ET AL., supra note 1, at § 2.

90 Id. at § 8F; AUDIT, supra note 10, at 23.
91 AUDIT, supra note 10, at preface.


96 Id.

97 Id.


100 Id.

101 In all other criminal cases, including capital convictions with a life sentence, defendant must petition the Virginia Court of Appeals to accept an appeal, but the Court can decline to look at the case. VA. CODE § 17.1-313 (2004). After the Court of Appeals has disposed of the matter, either by denying the Petition for Appeal or by ruling against the defendant on the merits, the defendant can petition the Virginia Supreme Court to hear the appeal, but the Court can decline to do so. Id.

102 Id. In addition to considering any issues raised by the defendant on this automatic appeal, the Court is to determine if the death penalty was imposed under the influence of passion or prejudice and if the death penalty is excessive, given the crime and the defendant. Id. Significantly, the Virginia Supreme Court has never overturned a death penalty sentence on these grounds. AUDIT, supra note 10, preface. Further, of 132 death
sentences reviewed by the Virginia Supreme Court between 1977 and 2001, only 9 were reversed and remanded. *Id.*

103 LIEBMAN ET AL., supra note 1, at § 9.

104 *Id.*


106 *Id.*

107 See *e.g.* Evans v. Thompson, 881 F.2d 117 (4th Cir. 1989) (describing a defendant who received a new sentencing hearing because of prosecutorial misconduct in the first sentencing hearing, but defendant was again sentenced to death).


110 LIEBMAN ET AL., supra note 1, at § 5B.

111 Hoying, supra note 16, at 357.

112 LIEBMAN ET AL., supra note 1, at § 6.


117 LIEBMAN ET AL., supra note 1, at § 8B
118 *Id.*


120 LIEBMAN ET AL., *supra* note 1, at § 5C.


124 AUDIT, *supra* note 10, at 78.


126 LIEBMAN ET AL., *supra* note 1, at § 8D.


130 *Id.*

131 Letter from Sandra Wright, Senior Legislative Analyst, Joint Legislative Audit and Review Commission, to author (June 13, 2002)(on file with author).

132 *Id.*


134 228 Va. at 474, 323 S.E.2d 120.

135 *Id.*

136 LIEBMAN ET AL., *supra* note 1, at Appendix C-47.

137 *Id.*

138 Evans, 228 Va. at 481-83, 323 S.E.2d at 127-28.

139 *Id.*


231 Va. at 395, 345 S.E.2d at 292.

231 Va. at 397, 345 S.E.2d at 294.


Williams v. Taylor, 189 F.3d 421 (4th Cir. 1999).


http://wasdmz2.courts.state.va.us/CJISweb/circuit.html (follow “Cumberland County Circuit” link; then enter “Williams, Michael W” in name box).

See infra Appendix, page 1.

245 Va. at 179-80, 427 S.E.2d at 422.

Id.

Id.

Id.

Id.


236 Va. at 470, 374 S.E.2d at 325.


Id.

Id.

Id.


Id. at 48-49.

Id.

Id.

Fitzgerald v. Thompson, 943 F.2d 463 (4th Cir. 1991).


Id.

Id. at 1320.


Id.

Id.

Id.

183 *Id.* at 577.

184 *Id.*

185 *Id.*

186 *Pope v. Netherland*, 113 F.3d 1364 (4th Cir. 1997).

187 *Id.* at 1367.

188 *Id.*

189 *Id.* at 1371.

190 *Id.*

191 *Id.*

192 *Pope*, 113 F.3d at 1371.


194 *Id.*

195 *Id.*


197 *Id.*

198 *Id.*


200 241 Va. at 214, 402 S.E.2d at 218.

201 *Id.*

202 *Id.*


Id.

Id.


230 Va. at 332-33, 337 S.E.2d at 725.

Id.

See infra Part III.

Barnabei v. Angelone, 214 F.3d 463, 472 (4th Cir. 2000).

Id.

Id.

Id. at 472-73.


Id.


257 Va. at 276, 513 S.E.2d at 718.

257 Va. at 277, 513 S.E.2d at 719.

Id.

Id.

Id.


Id.

Id.

Id. at 160.


Id. at 1080.

Id. at 1081.

Graham v. Angelone, 191 F.3d 320 (4th Cir. 1999).
249 *Id.*


251 *Id.* at 1355

252 *Id.* As the Courts frequently do, the Federal appellate court also added that the error was harmless even if the prosecutor’s conduct was improper, because the defendant had confessed to murdering the victim. *Id.*


254 *Id.* at 458-460.

255 *Id.*

256 *Id.*

257 *Id.*

258 *Id.*


260 *Id.*

261 *Id.*


263 *Id.* at 936.

264 *Id.*

265 *Id.* at 936-37.


267 *Id.*

268 *Id.*

Id.

Id.

Id.

Id.

Id. at 372.

Spencer v. Murray, 5 F.3d 758, 763 (4th Cir. 1993).

Id.


Id.

Stockton v. Commonwealth of Virginia, 852 F.2d 740 (4th Cir. 1988).

Id. at 748

Id.

Id.

Id.

Id. at 750.

Stockton, 852 F.2d at 752.

Id.

Id.

Id.


Id.

Id.

76
292 Id.


294 Id.


296 Id.


298 Id.

299 Id.

300 Id.

301 Id.


303 Id.

304 Id.

305 Id.


307 Id. at 1484.

308 Id.

309 Id. at 1477.

310 Id.

311 Id.
Washington, 952 F.2d at 1479. Although the courts were not bothered by the prosecutor’s conduct, in 1994, the Governor of Virginia commuted his sentence to life in prison because of the doubts raised by the DNA evidence. After newer DNA tests conclusively exonerated Washington and another person was convicted for the crime, Washington was released from prison in 2001, after 17 years in custody. Virginia Governor Kaine issued a full pardon in July 2007, and the state paid 1.9 million dollars to settle Washington’s civil suit for the state’s violation of his rights. Maria Gold, *Former Death-Row Inmate Officially Declared Innocent*, WASH. POST, July 7, 2007, at B02.


314 *Id.*

315 *Id.*

316 *Id.*

317 Williams v. Taylor, 189 F.3d 1421 (4th Cir. 1999).

318 *Id.* at 428.

319 *Id.*

320 *Id.*

321 *Id.*

322 *Id.*

323 Williams, 189 F.3d at 428.

324 *Id.*

325 *Id.*

326 *Id.*


Id.

Id.

Id.

Id.

See infra Appendix 1, top chart.

Barnes v. Thompson, 58 F.3d 971 (4th Cir. 1995).

Id. at 973.

Id. at 975.

Id.


Id.


Id.


Id.

Id.


Id.

Id.

Id.

Id.


Id.

Id.

Id.

Id.


Id. at 1211.

Id.

Coleman, 798 F. Supp. at 1211.

See generally JOHN C. TUCKER, MAY GOD HAVE MERCY (Norton Press, 1997) (discussing Coleman’s case in detail). Coleman was executed in 1992. In the first case that a Governor allowed post-execution DNA testing, 2006 DNA testing confirmed that Coleman’s semen was present on the victim. Maria Gold & Michael D. Shear, DNA Tests Confirm Guilt of Executed Man, WASH. POST, Jan. 13, 2006, at A01.


Id.

Id.


Id.

Id. at 15.

Id.

Fitzgerald v. Thompson, 943 F.2d 463, 466 (4th Cir. 1991).


Id. at 1358.


Joseph v. Angelone, 184 F.3d 320, 327 (4th Cir. 1999).

Id.

Id.


Id.

Id. (stating that “Assignments of Error” were filed instead of “Petition for Appeal” when appealing the state habeas proceedings).

Pope v. Netherland, 113 F.3d 1364, 1370 (4th Cir. 1997).

Id.


Id. at 1436.


Id. at 563.

Id. at 566.

Id.

Id. at 566-67.

Id.


Id. at 1256-57.

Id.

Id.

Smith v. Angelone, 111 F.3d 1126, 1133 (4th Cir. 1997).

Id.


Id.

Id.

Id.

Watkins v. Murray, 998 F.2d 1101 (4th Cir. 1993).

Id.


Id.


Id.

Id.

Id.

See supra notes 320-330 and accompanying text.


Id.

Id.

Id.

Wright, supra note 129.

Id.

Harmon, supra note 5, at 134.

Green, supra note 23, at 142.

Telephone Interview with Barbara Williams, Virginia State Bar Counsel (March 5, 2002).

GERSHMAN, supra note 25, at §1-49.

SHECK, supra note 75, at 234.

Harmon, supra note 5, at 133-34.

Id.

See SHECK, supra note 75, at 223; Jonakait, supra note 59, at 557; Gershman, supra note 46, at 142-43.


Jonakait, supra note 59, at 567.

See SHECK, supra note 75, at 233; Gershman, supra note 46, at 143.

LIEBMAN ET AL., supra note 1, at § 8; Hoying, supra note 16, at 349, 356.

See Harmon, supra note 5, 128; Jonakait, supra note 59, 563.