

**A LOSING BATTLE WITH THE ‘MACHINERY OF DEATH’: THE
FLAWS OF VIRGINIA’S DEATH PENALTY LAWS AND
CLEMENCY PROCESS HIGHLIGHTED BY THE FATE OF
TERESA LEWIS**

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“An eye for an eye leaves the whole world blind.”
Attributed to Mahatma Gandhi¹

I. INTRODUCTION

Teresa Lewis enjoyed a final meal of fried chicken, sweet peas in butter, Dr. Pepper, and a slice of German chocolate cake; she directed her final words, “I love you, and I’m very sorry,” to her slain husband’s daughter.² On the evening of September 23, 2010, despite international protest, Teresa Lewis became just the twelfth woman executed since the Supreme Court’s reinstatement of capital punishment in 1976, and the first woman executed in Virginia since 1912.³ The 41-year-old grandmother met her death by lethal injection⁴ for her role in the gruesome murders of her husband and stepson, a plot hatched for insurance money proceeds and executed by Teresa and triggermen Matthew J. Shallenberger and Rodney L. Fuller.⁵ Particularly disturbing to opponents of Teresa’s execution is the fact that Shallenberger and Fuller, sentenced by the same judge who sentenced Teresa, were spared the death penalty and instead received life sentences for their roles as the triggermen, the *actual* murderers.⁶

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1. THE YALE BOOK OF QUOTATIONS 269-70 (Fred R. Shapiro ed., 2006).

2. Maria Glod, *Va. Woman Executed for Slayings in 2002*, WASH. POST, Sept. 24, 2010, at A1.

3. *See id.*; *Teresa Lewis Execution Plan Draws Protest Worldwide*, CHRISTIAN SCI. MONITOR (Sept. 23, 2010, 10:25 AM), <http://www.csmonitor.com/USA/Latest-News-Wires/2010/0923/Teresa-Lewis-execution-plan-draws-protest-worldwide>. Many news articles about Teresa Lewis begin by reporting these statistics, highlighting the role that her gender has played in the debate surrounding her fate. *See* Dahlia Lithwick, *Lady Killer: How the Planned Execution of Teresa Lewis Challenges Our Views on Gender and Capital Punishment*, SLATE (Sept. 21, 2010, 5:02 PM), <http://www.slate.com/id/2267989/>.

4. Glod, *supra* note 2.

5. *Lewis v. Commonwealth*, 593 S.E.2d 220, 222-23 (Va. 2004).

6. *Lewis*, 593 S.E.2d at 228; Transcript of Sentencing Hearing at 38-39, *Commonwealth v. Shallenberger*, No. CR 02000935-00 and CR 02000936-00 (Va. Cir. July 11, 2003). The illogicality of the “hierarchy of culpability” upon which these sentences were based is poignantly illustrated in a letter from Teresa’s former prison Chaplain, Rev. Lynn Litchfield, to Virginia Governor Robert F. McDonnell: “My five year old [daughter], Lexie, asked me what an execution is. I explained that an execution is when someone is killed as punishment for their having killed someone else. After thinking a minute, Lexie said, ‘But [Teresa] didn’t actually kill

Teresa met Julian Lewis at work in the spring of 2000.⁷ She moved in with him a few months later, and they eventually married.⁸ When Julian's older son died in a car accident in December 2001, Julian received life insurance proceeds of more than \$200,000.⁹ Teresa and Julian lived in a mobile home on five acres of land that Julian purchased a few months after his son's death.¹⁰ Before reporting for active duty in August 2002, Julian's younger son Charles J. Lewis, an Army reservist, identified his father as primary beneficiary, and Teresa as secondary beneficiary, in a will and life insurance policy worth \$250,000.¹¹ In the fall of 2002, Teresa met and exchanged telephone numbers with Shallenberger and Fuller while standing in line at a local Walmart.¹² A relationship among the three developed, and they discussed killing Julian and sharing the insurance proceeds that Teresa would receive.¹³ Teresa gave Shallenberger and Fuller \$1,200 on October 23, 2002.¹⁴ Shallenberger gave the cash to a friend, who purchased three guns and ammunition ultimately used in the murders.¹⁵ That same day, Shallenberger and Fuller, without Teresa, were to kill Julian on the highway as he traveled home from work, but the plan was unsuccessful.¹⁶ Instead, the three chose October 30, 2002 as the date of execution, expanding their murder plot to include both Julian and Charles, who they learned would be visiting Julian.¹⁷ Armed with shotguns, Shallenberger and Fuller entered the mobile home through a door unlocked by Teresa.¹⁸ After waking up Teresa, who moved from the bed she shared with her husband to the kitchen, Shallenberger shot Julian several times.¹⁹ Meanwhile, Fuller found Charles in the home and shot him several times.²⁰ As Julian lay bleeding, still alive, Teresa took his wallet from the bedroom and

anyone.” Petition for Executive Clemency for Teresa Wilson Lewis, Ex. 2, at 1, 5, *Lewis v. Commonwealth*, 593 S.E.2d 220 (Va. 2004) (No. 032153); see Transcript of Sentencing Hearing, *supra*, at 36-37; see also *infra* Part III.A.1. Shallenberger committed suicide behind bars in 2006. See Melissa Scott Sinclair, *Blood Sisters*, STYLE WKLY. (Sept. 15, 2010), <http://www.styleweekly.com/richmond/blood-sisters/Content?oid=1362230>.

7. *Lewis*, 593 S.E.2d at 222. For a complete discussion of the facts of Teresa's case considered throughout Teresa's ultimately unsuccessful journey through the court system, see *id.* at 222-25. For a discussion of the facts from Teresa's point of view, including new evidence procedurally barred from coming into the appeals process, see Petition for Executive Clemency, *supra* note 6.

8. *Lewis*, 593 S.E.2d at 222.

9. *Id.*

10. *Id.*

11. *Id.*

12. *Id.*; Petition for Executive Clemency, *supra* note 6, at Ex. 18, 125.

13. *Lewis*, 593 S.E.2d at 222.

14. *Id.* at 222-23.

15. *Id.* at 223.

16. *Id.*

17. *Id.*

18. *Id.*

19. *Lewis*, 593 S.E.2d at 223.

20. *Id.*

divided the \$300 she found inside with Shallenberger and Fuller.²¹ The men left, and Teresa waited a while before dialing 911.²² Julian and Charles died as a result of their gunshot wounds; among Julian's final words to sheriff deputies, who were the first to arrive upon the scene, were "[m]y wife knows who done this to me."²³ Following a few crude, unsuccessful attempts to recover Julian's paycheck, money from savings, and insurance proceeds, Teresa ultimately confessed to the murders and revealed the involvement of Shallenberger and Fuller.²⁴ Despite Teresa's confession, which led to the arrests of the triggermen, and the greater culpability of Shallenberger and Fuller as the triggermen, Teresa was sentenced to death while the men received only life sentences.²⁵

Teresa's fate sparks new life in the ongoing debate about the death penalty in America. Bestselling author John Grisham²⁶ penned an op-ed that explores troubling issues in Teresa's case, including her low IQ, the disparity in the sentences of Teresa and the triggermen, and the ultimate unfairness of Virginia's death penalty laws.²⁷ Human rights advocate Bianca Jagger appealed to Virginia Governor Robert F. McDonnell on the morning of Teresa's execution, citing these same issues as reasons why Teresa's case "highlight[s] the need for the abolition of capital punishment."²⁸ The European Union, ACLU of Virginia, and Arc of Virginia, among other organizations, sent letters to the Governor citing Teresa's mental capacity and the unconstitutionality of the execution of mentally retarded individuals as the primary reasons that ought to compel the Governor to grant clemency.²⁹ Even Iranian President Mahmoud Ahmadinejad joined in the criticism, blasting the Western media for its fierce condemnation of the fate of an Iranian woman who received a stoning sentence for adultery while remaining largely silent on the execution of

21. *Lewis*, 593 S.E.2d at 223.

22. *Id.*

23. *Id.*

24. *Id.* at 224-25.

25. *Id.* at 224, 228; Transcript of Sentencing Hearing, *supra* note 6, at 38-39.

26. *Bio*, JOHN GRISHAM: THE OFFICIAL SITE, <http://www.jgrisham.com/bio/> (last visited June 5, 2011).

27. John Grisham, Op-Ed, *Why is Teresa Lewis on Death Row?*, WASH. POST, Sept. 12, 2010, at B5.

28. Bianca Jagger, *I Urge Virginia Governor Bob McDonnell to Stop the Execution of Teresa Lewis*, HUFFINGTON POST (Sept. 23, 2010, 7:01 AM), http://www.huffingtonpost.com/bianca-jagger/teresa-lewis-execution_b_736089.html.

29. Letter from João Vale de Almeida, Ambassador, European Union, to The Honorable Robert F. McDonnell, Governor, Commonwealth of Virginia (Sept. 17, 2010), available at <http://www.eurunion.org/eu/images/stories/lewisvva.pdf>; Letter from Kent Willis, Executive Director, and Katherine Greenier, Director of Patricia M. Arnold Women's Right Project, ACLU of Virginia, to The Honorable Robert F. McDonnell, Governor of Virginia (Sept. 16, 2010), available at <http://acluva.org/wp-content/uploads/2010/09/Letter-to-Governor-re-Teresa-Lewis-9-16-10.pdf>; Letter from Howard Cullum, President, The Arc of Virginia, to The Honorable Robert F. McDonnell, Governor of Virginia (Sept. 14, 2010), available at http://www.thearcofva.org/docs/09142010_arc_va_letter_gov.pdf. An in-depth examination of Teresa's claims involving the constitutionality of her sentence in light of her mental capacity is beyond the scope of this note.

Teresa.³⁰ Teresa's case has also impassioned ordinary citizens. Over 5,500 people signed an electronic petition imploring Governor McDonnell to reconsider his denial of Teresa's Petition for Executive Clemency.³¹ Articles about the case have generated numerous reader comments reflecting the passion on both sides of the death penalty debate.³² On the eve of Teresa's execution at the Greensville Correctional Center,³³ approximately a dozen protestors gathered outside; Teresa was pronounced dead at 9:13 p.m. on September 23, 2010.³⁴

This note will highlight the arbitrariness and unfairness of Virginia's imposition of the death penalty as exemplified by Teresa's case. Further, due to the nature of Virginia's death penalty laws, this note will argue that, absent the abolition of the death penalty, capital defendants deserve a more meaningful and structured clemency process. First, this note will provide background information regarding the death penalty and clemency process nationwide and in Virginia. Next, this note will examine the arbitrariness exhibited by decision-makers in sealing Teresa's fate. That section will consider the role that Teresa's gender played in the outcome of her case, and will address the outcomes of other cases sharing similar facts in the context of the ultimate unfairness of Virginia's death penalty laws. While exposing the unfairness of Teresa's fate as compared to the fate of the triggermen and defendants in similar cases, this note will argue that the appellate court's required proportionality review in death penalty appeals needs to be bolstered

30. *Ahmadinejad: U.S. Kills Women, Too*, CBSNEWS.COM (Oct. 11, 2010, 4:47 PM), <http://www.cbsnews.com/stories/2010/09/21/world/main6887502.shtml?tag=contentMain;contentBody>. Ahmadinejad's speech in New York accused the media of operating under a double standard. *Id.*

31. The Governor denied the electronic petition less than a week before Teresa was executed. Lithwick, *supra* note 3. The petition was housed on www.saveteresalewis.org, a website set up to educate citizens about Teresa's case. Alexwahooouva, *Save Teresa Lewis*, YOUTUBE (Sept. 19, 2010), http://www.youtube.com/watch?v=-w9Dpj_3JFE. As of November 20, 2010, the content of www.saveteresalewis.org is inaccessible because it has been made password protected.

32. See, e.g., Laura Lynn Litchfield Divers, *Teresa Lewis: God Have Mercy on Us*, GUARDIAN.CO.UK (Sept. 21, 2010), <http://www.guardian.co.uk/commentisfree/cifamerica/2010/sep/20/capital-punishment-usa> (listing 324 comments); Alan Gomez, *Clemency Urged for Woman With Low IQ on Death Row*, USA TODAY (Sept. 21, 2010, 12:47 AM), available at http://www.usatoday.com/news/nation/2010-09-21-execution21_ST_N.htm#uslPageReturn (listing 111 comments); Lithwick, *supra* note 3 (listing 128 comments). Compare Eaglestare, comment to Gomez, *supra* ("She may be the one that said to pull the trigger, but it was 2 others that actually pulled the trigger. 2 men get life in prison and she gets the death penalty. Where is the justification in that? How do you justify a word uttered to action taken?") with slvrt, comment to Gomez, *supra* ("I am a Christian and I DO believe in the death penalty, [y]ou kill someone—You must pay for it. An eye for an eye and a tooth for a tooth!").

33. Glod, *supra* note 2.

34. Frank Green & Zachary Reid, *Woman Dies by Injection for '02 Deaths*, RICH. TIMES-DISPATCH, Sept. 24, 2010, at A-01. The protestors were joined by approximately thirty-six members of the media from as far away as Great Britain and Italy. *Id.*

by greater analysis. Finally, this note will advocate for changes to Virginia's clemency procedure to ensure that it retains its usefulness as a "fail safe"³⁵ remedy for those deserving and facing Virginia's "machinery of death."³⁶

II. BACKGROUND

A. The Death Penalty in the United States

The only western democracy that executed people in 2009 was the United States.³⁷ Thirty-four states still retain the death penalty; sixteen states do not.³⁸ Since 1976, only Texas has executed more inmates than Virginia.³⁹ However, even in states such as Texas and Virginia, the death penalty is relatively rare in comparison to the number of capital crimes that take place each year.⁴⁰ Perhaps due to a reflection of the recent spike in exonerations, the economic troubles of the nation, and a realization of the death penalty's lack of real benefits, the number of people sentenced to death has experienced a sharp decline in the past decade.⁴¹ The Supreme Court has declared that the death penalty is to be reserved for the worst of the worst,⁴² but the statistics highlight an unfortunate randomness in death penalty sentencing.⁴³ As one scholar puts it, "[w]ho is chosen to die? Is it legitimate to say that the people who receive these death sentences, not to mention the ones who are executed,

35. *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

36. *Callins v. Collins*, 510 U.S. 1141, 1145 (1994) (Blackmun, J., dissenting).

37. *New Global Death Penalty Stats Out Today*, AMNESTY INT'L (Mar. 30, 2010, 8:56 AM), <http://blog.amnestyusa.org/deathpenalty/business-as-usual-for-death-penalty-outliers/>. In 2009, only China, Iran, Iraq, and Saudi Arabia executed more people than the United States. AMNESTY INT'L, DEATH SENTENCES AND EXECUTIONS 2009 12, 24 (2010), available at <http://www.amnesty.org/en/library/asset/ACT50/001/2010/en/17348b70-3fc7-40b2-a258-af92778c73e5/act500012010en.pdf>.

38. DEATH PENALTY INFO. CTR., FACTS ABOUT THE DEATH PENALTY (2011) available at <http://www.deathpenaltyinfo.org/documents/FactSheet.pdf>.

39. *Id.*

40. MATTHEW B. ROBINSON, DEATH NATION: THE EXPERTS EXPLAIN AMERICAN CAPITAL PUNISHMENT 7 (2008).

41. See DEATH PENALTY INFO. CTR., THE DEATH PENALTY IN 2009: YEAR END REPORT 1-4, 8 (2009), available at <http://deathpenaltyinfo.org/documents/2009YearEndReport.pdf>.

42. *Roper v. Simmons*, 543 U.S. 551, 568-70 (2005):

Because the death penalty is the most severe punishment, the Eighth Amendment applies to it with special force. Capital punishment must be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution." . . . These rules vindicate the underlying principle that the death penalty is reserved for a narrow category of crimes and offenders.

Id. (citations omitted).

43. DAVID M. OSHINSKY, CAPITAL PUNISHMENT ON TRIAL: *FURMAN V. GEORGIA* AND THE DEATH PENALTY IN MODERN AMERICA 40 (2010).

have actually committed more horrible crimes than the thousands upon thousands of defendants who receive prison terms?”⁴⁴

In *Gregg v. Georgia*,⁴⁵ the Supreme Court held that the death penalty, in and of itself, is not unconstitutional.⁴⁶ Reflecting our country’s system of federalism and the Court’s philosophy that certain policy questions are best left to the legislative branch, the Court emphasized that the decision of whether or not to have the death penalty on the books lies with each state.⁴⁷ The Supreme Court is the only institution with the power to declare the death penalty unlawful on a nationwide scale.⁴⁸ However, the Court has remained largely divided over the issue, and has instead whittled down the death penalty’s scope by examining and refining death penalty laws.⁴⁹ The Court’s death penalty jurisprudence reflects the passion and perplexity that the debate conjures up.⁵⁰ Illustrating this point, the separate opinions that each Justice wrote in *Furman v. Georgia*,⁵¹ issued *per curiam*, spanned 232 pages.

Furman put a temporary stop to the death penalty in America, holding 5-4 that the death penalty statutes at issue violated the Eighth and Fourteenth Amendments as “cruel and unusual punishment.”⁵² The concurring justices struck down the statutes because of the arbitrary and discriminatory ways in which states were imposing the death penalty.⁵³ Justice Stewart concluded that “[t]hese death sentences are cruel and unusual in the same way that being

44. OSHINSKY, *supra* note 43, at 40.

45. 428 U.S. 153 (1976).

46. *Id.* at 169.

47. *Id.* at 176.

The deference we owe to the decisions of the state legislatures under our federal system is enhanced where the specification of punishments is concerned, for “these are peculiarly questions of legislative policy.” Caution is necessary lest this Court become, “under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility . . . throughout the country.”

Id. (citations omitted). See also ROBINSON, *supra* note 40, at xvi-xvii.

48. David Garland, *Five Myths About the Death Penalty*, WASH. POST, July 18, 2010, at B03.

49. OSHINSKY, *supra* note 43, at 120.

50. See generally OSHINSKY, *supra* note 43.

51. 408 U.S. 238 (1976).

52. *Id.* at 240. For an insightful account of the history of the death penalty leading up to *Furman*, a behind-the-scenes look at the case, and an examination of the issues that have survived *Furman*, see OSHINSKY, *supra* note 43.

53. *Furman*, 408 U.S. at 249-250, 257, 305, 309-10, 313, 364.

struck by lightning is cruel and unusual”⁵⁴; likewise, Justice Brennan compared death sentences to a “lottery system.”⁵⁵

In response to *Furman*, states revised their death penalty statutes.⁵⁶ Some states made the death penalty a mandatory sentence for certain crimes in an effort to make its imposition less arbitrary.⁵⁷ These laws were short-lived, however, as the Court struck down mandatory death sentences as unconstitutional.⁵⁸ Many states passed laws giving juries and judges guidelines to assist them in determining whether or not to sentence a defendant to death, also meant to remove arbitrariness from the process.⁵⁹ These laws were examined and upheld in *Gregg v. Georgia*.⁶⁰ In *Gregg*, the Court approved reliance upon bifurcated trials in capital cases where sentencing is considered in a separate phase complete with guidelines to reign in unbridled discretion.⁶¹ In this separate sentencing phase, which culminates in a decision meaning life or death, the jury’s attention should focus upon the details of the crime and the characteristics of the defendant.⁶² The Court also approved of automatic review of death sentences in which an appellate court considers whether a death sentence was prejudicial, supported by the evidence, and proportionate to the sentences handed down in similar cases.⁶³ Nearly three decades later, the Court further narrowed the reach of the death penalty in *Atkins v. Virginia*,⁶⁴ where it held that imposing the death penalty on a mentally retarded criminal was unconstitutional.⁶⁵

B. The Death Penalty in Virginia

The Virginia Supreme Court has held that the death penalty does not violate the State’s Constitution.⁶⁶ State law defines murder for hire, the crime that Teresa committed, as a capital offense.⁶⁷ In capital offense cases, local

54. *Furman*, 408 U.S. at 309. The crux of the dissenting opinions was that whether wrong or right, the death penalty is an issue for the legislature, not the judiciary. See, e.g., *id.* at 411, 461-62, 465.

55. *Id.* at 293.

56. See OSHINSKY, *supra* note 43, at 60-61; ROBINSON, *supra* note 40, at 26-27, 71.

57. ROBINSON, *supra* note 40, at 26-27, 71.

58. *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). The Court stated that such statutes treated people “as members of a faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.” *Id.* at 304. The Constitution, however, commands “consideration of the character and record of the individual offender and the circumstances of the particular offense” when the death penalty is at issue. *Id.* This is because death is different than a sentence of life imprisonment. *Id.* at 305.

59. ROBINSON, *supra* note 40, at 26-27, 71.

60. 428 U.S. 153 (1976).

61. *Id.* at 195.

62. *Id.* at 197.

63. *Id.* at 198, 207.

64. 536 U.S. 304, 321 (2002).

65. *Id.*

66. *Jackson v. Commonwealth*, 590 S.E.2d 520, 535 (Va.), *cert. denied*, 543 U.S. 891 (2004).

67. VA. CODE ANN. § 18.2-31 (2010).

prosecutors make the decision of whether to seek the death penalty, a decision that can vary from one county to the next.⁶⁸ Once the decision has been made, a capital defendant's fate is determined by either a jury or judge. If a defendant pleads guilty to a capital offense, Virginia law dictates that the trial judge shall "hear and determine the case without the intervention of a jury."⁶⁹ At the recommendation of her trial counsel, Teresa pled guilty to capital murder.⁷⁰ Accordingly, her fate was sealed by the trial judge, as the task of conducting the sentencing hearing fell solely to him.⁷¹ Finally, Virginia law mandates that a death sentence shall not be imposed unless the court finds "a probability that the defendant would commit criminal acts of violence" in the future or that the defendant's conduct was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."⁷²

Once the judge or jury has imposed a sentence of death upon a capital defendant, Virginia's Supreme Court engages in an automatic review of trial errors raised by the appeal, whether the sentence was imposed arbitrarily, and whether the sentence is proportionate to the sentences handed down in similar cases.⁷³ Reversal of a death sentence following this review is rare.⁷⁴ Upon the

68. See Stephen B. Bright, *Foreword* to RAYMOND PATERNOSTER ET AL., *THE DEATH PENALTY: AMERICA'S EXPERIENCE WITH CAPITAL PUNISHMENT* xiii, xiv-xv (2008) (noting that prosecutors decide whether to seek the death penalty and that their discretion varies from city to city and state to state); Frank Green & Reed Williams, *Many Factors Figure in Death-Penalty Cases*, RICH. TIMES-DISPATCH, Oct. 3, 2010, at A-01 (reporting that prosecutorial discretion in Virginia varies according to availability of resources, personal philosophies, perceptions of constituents, and geography); Grisham, *supra* note 27 (lamenting that in Teresa's case, the sentence of death had "little [to] do with fairness . . . it depended more upon the assignment of judge and prosecutor . . .").

69. VA. CODE ANN. § 19.2-257 (West 2010); see also *Lewis v. Wheeler*, 609 F.3d 291, 297 (4th Cir. 2010).

70. *Wheeler*, 609 F.3d at 297.

71. *Id.* at 297, 308. Teresa's appellate counsel challenged the constitutionality of this statute in capital prosecutions. Petition for Writ of Certiorari at 3-4, 14-15, 20 *Lewis v. Wheeler*, 2010 WL 3740551 (No. 10-5692); Opening Brief of Appellant at 18-22 *Lewis v. Commonwealth*, 593 S.E.2d 220 (Va. 2004) (No. 032153). They based this challenge on the Supreme Court's holding in *Ring v. Arizona*, 536 U.S. 584 (2002), which ruled that the practice of a "sentencing judge, sitting without a jury, finding an aggravating circumstance necessary for imposition of the death penalty" is unconstitutional. *Id.* at 609. Indeed, scholars have also interpreted the Supreme Court's decision in *Ring* to "require[] that death sentences be recommended by a jury." ROBINSON, *supra* note 40, at 231; see also PATERNOSTER, *supra* note 68, at 101 (stating that *Ring* "held that a death sentence where the necessary finding of aggravating factors is determined by a judge rather than a jury is unconstitutional."). The Court of Appeals rejected Teresa's claim on procedural grounds. *Lewis*, 609 F.3d at 308-09. The Supreme Court denied certiorari. *Lewis v. Hobbs*, 131 S. Ct. 59 (2010). An in-depth analysis of this interesting and seemingly weighty argument is beyond the scope of this note.

72. VA. CODE ANN. § 19.2-264.2 (West 2010).

73. *Id.* § 17.1-313.

court's affirmation of the death sentence, the statute of limitations begins to run for the defendant to file a petition for habeas corpus relief, typically against a prison administrator, with the Supreme Court of Virginia.⁷⁵ Habeas corpus review is designed to reverse unlawful confinement of inmates; accordingly, the court engages in a review to determine whether the defendant's imprisonment violates her due process rights.⁷⁶ Capital defendants should proceed through the appeals process with low expectations, as even Virginia's lawmakers have acknowledged how infrequently its state courts reverse death sentences.⁷⁷

Once the appeals process has run its course through the Virginia state courts, a capital defendant may seek federal habeas corpus relief.⁷⁸ In the federal habeas proceeding, the court examines the state court's adjudication of the claim to determine whether it was contrary to federal law, or was based on an "unreasonable determination of the facts in light of the evidence presented."⁷⁹ Supreme Court precedent and Congressional laws, such as the Antiterrorism and Effective Death Penalty Act of 1996, have further narrowed the issues that federal courts may hear in habeas claims, making it unlikely that habeas review will encompass the merits of lower court rulings.⁸⁰ A capital defendant's final appeal avenue in the court system is filing a petition for writ of certiorari with the United States Supreme Court.⁸¹ A writ of certiorari is rarely granted.⁸² Clemency, then, is a capital defendant's final chance to be spared from the ultimate punishment.⁸³

C. *The Clemency Process in the United States*

Clemency, defined as "mercy or leniency; esp[ecially], the power of the President or a governor to pardon a criminal or commute a criminal sentence,"⁸⁴ is the capital defendant's last ray of hope before her death sentence is carried out. As one scholar eloquently summarizes, "[e]xecutive

74. See JOINT LEGISLATIVE AUDIT AND REVIEW COMM'N OF THE VA. GEN. ASSEMB., REVIEW OF VIRGINIA'S SYSTEM OF CAPITAL PUNISHMENT 54 (2000), available at <http://jlarc.state.va.us/reports/rpt274.pdf> [hereinafter SYSTEM OF CAPITAL PUNISHMENT].

75. VA. CODE ANN. § 8.01-654.1 (2010); SYSTEM OF CAPITAL PUNISHMENT, *supra* note 74, at 57.

76. SYSTEM OF CAPITAL PUNISHMENT, *supra* note 74, at 57.

77. *Id.* at 53, 54; see also Drew Lindsay, *An Innocent Man on Death Row?*, WASHINGTONIAN, Mar. 1, 2009, available at <http://www.washingtonian.com/articles/people/11712.html> ("Virginia's judicial review in capital cases offers little hope to defendants. Few appeals succeed, as the state and federal courts have the country's lowest reversal rate of capital convictions and death sentences.")

78. See ROBINSON, *supra* note 40, at 201; Austin Sarat, *Toward a New Perspective on Clemency in the Killing State*, in THE FUTURE OF AMERICA'S DEATH PENALTY 297-98 (Charles S. Lanier et al. eds., 2009).

79. 28 U.S.C.A. § 2254 (West 1996).

80. ROBINSON, *supra* note 40, at 201-02; Sarat, *supra* note 78, at 297-98.

81. SYSTEM OF CAPITAL PUNISHMENT, *supra* note 74, at 57, 59 Figure 21.

82. *Id.* at 57.

83. Sarat, *supra* note 78, at 298.

84. BLACK'S LAW DICTIONARY 269 (8th ed. 2004).

clemency in capital cases is distinctive in that it is the only power that can *undo death*—the only power that can prevent death once it has been prescribed and, through appellate review, approved as a legally appropriate punishment.”⁸⁵ Case law and scholarship have identified two main purposes of clemency. First, clemency is the final fail safe to remedy mistakes made by the courts, and, among other possibilities, can be used to commute the sentences of innocent inmates.⁸⁶ Second, clemency is granted as a showing of mercy due to unique facts or circumstances arising outside of the judicial system.⁸⁷ The Supreme Court has recognized the power of clemency, hailing it as a “historic remedy for preventing miscarriages of justice where judicial process has been exhausted” and an “act of grace.”⁸⁸

The United States adopted the concept of clemency from English common law.⁸⁹ In England, one purpose of clemency was to enhance the monarch’s power by evoking admiration and love towards the sovereign from his subjects.⁹⁰ This infusion of politics into executive clemency has not dissipated with time.⁹¹ In fact, politics is one explanation for the dramatic drop in the exercise of executive clemency in the U.S. in recent decades.⁹² Additionally, many governors hesitate to replace the court’s judgment with their own.⁹³

All fifty states provide for clemency in their state constitutions.⁹⁴ The procedures differ from state to state.⁹⁵ Three general schemes have emerged:

85. Sarat, *supra* note 78, at 298.

86. Mary-Beth Moylan & Linda E. Carter, *Clemency in California Capital Cases*, 14 BERKELEY J. CRIM. L. 37, 39 (2009).

87. *Id.*

88. *Herrera v. Collins*, 506 U.S. 390, 412, 413 (1993). In *Herrera*, a death row inmate based a federal habeas petition on new evidence showing his innocence. A plurality of the court denied habeas relief to *Herrera*, holding that unless an independent constitutional violation occurred in the state court adjudication, actual innocence based on newly discovered evidence alone does not entitle a defendant to habeas relief. *Id.* at 400. The court reasoned that the purpose of federal habeas relief is to ensure that a defendant’s imprisonment does not violate her due process rights; it is not to “correct errors of fact.” *Id.* Rather, executive clemency is the proper remedy for this situation. *Id.* at 411-12. However, given the data showing the rarity of executive clemency granted to capital defendants in recent times, the flaw in the Court’s reasoning is that it “presupposes that the governor will actually hear the evidence of innocence and take action in appropriate cases.” Kathleen Ridolfi & Seth Gordon, *Gubernatorial Clemency Powers: Justice or Mercy?*, 24 CRIM. JUST., Fall 2009, at 26, 29-30.

89. See PATERNOSTER, *supra* note 68, at 25 n.2.

90. Daniel T. Kobil, *The Quality of Mercy Strained: Wresting the Pardoning Power from the King*, 69 TEX. L. REV. 569, 586 (1991).

91. Ridolfi & Gordon, *supra* note 88, at 29; see also Sarat, *supra* note 78, at 301.

92. Sarat, *supra* note 78, at 298-99; Robert Salladay, *Clemency: Slim Chance These Days*, S.F. EXAMINER, Nov. 29, 1998, at A.1 (“[A]cross the nation, the long-held constitutional right of chief executives to bestow mercy through clemency has died its own death, the victim of a political lethal injection and a public that overwhelmingly supports the death penalty.”).

93. Sarat, *supra* note 78, at 300.

94. Ridolfi & Gordon, *supra* note 88, at 31.

95. *Id.*; DEATH PENALTY INFO. CTR., CLEMENCY (2011), <http://www.deathpenaltyinfo.org/clemency> (last visited Nov. 24, 2010).

(1) the governor has exclusive power to grant executive clemency (with some of these states creating an advisory body that offers nonbinding recommendations to the governor); (2) an executive board has exclusive power to grant executive clemency; or (3) the governor and an executive board share the power to grant executive clemency.⁹⁶

D. *The Clemency Process in Virginia*

Virginia's Constitution vests the clemency power in the governor, and dictates that the governor shall communicate the "particulars of every case" in which clemency is granted, as well as his reasons for granting clemency, to the General Assembly at its regular sessions.⁹⁷ Virginia has codified this broad power vested in the governor.⁹⁸ The website of Virginia's Secretary of the Commonwealth provides information regarding clemency to the public.⁹⁹ In its description of Virginia's clemency process, the website emphasizes the fact that the power to grant clemency rests solely with the governor, and he may grant it at his discretion.¹⁰⁰ To further highlight the broad clemency power that Virginia governors wield, the website states that each governor may "establish his own guidelines and policies regarding the eligibility of those seeking clemency."¹⁰¹ Virginia has established two mechanisms of clemency: restoration of civil rights, which restores for a felon the rights that were lost with the felony conviction, and pardons, the type of clemency applicable to this note.¹⁰² An individual may apply for three kinds of pardons: (1) a simple pardon, which is a statement of forgiveness; (2) a conditional pardon, which grants prisoners early release or modifies a court-imposed sentence; or (3) an absolute pardon, which enables a prisoner to petition the court for expungement of the conviction.¹⁰³ According to the website, the governor will grant a conditional pardon only "when there is substantial evidence of extraordinary circumstances to warrant it."¹⁰⁴ To be considered for a

96. Ridolfi & Gordon, *supra* note 88, at 31.

97. VA. CONST. art. V, § 12.

98. VA. CODE ANN. § 53.1-229 (2010); VA. CODE ANN. § 53.1-230 (2010); VA. CODE ANN. § 53.1-231 (2010).

99. SECRETARY OF THE COMMONWEALTH, *Clemency*, VIRGINIA.GOV (2011), <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/clemency.cfm>.

100. SECRETARY OF THE COMMONWEALTH, *Clemency*, VIRGINIA.GOV (2011), <http://www.commonwealth.virginia.gov/JudicialSystem/Clemency/clemency.cfm>. The website begins a description of Virginia's clemency procedures with a statement that "[s]olely the Governor has the authority to grant clemency and he may do so at his discretion." *Id.* Shortly thereafter, the website reiterates that "[u]nder Article V, Section 12, of the Virginia Constitution and Section 53.1-229 through 53.1-231 of the Code of Virginia, all clemency authority is vested solely in the Governor." *Id.*

101. *Id.*

102. *Id.*

103. SECRETARY OF THE COMMONWEALTH, *Pardons*, VIRGINIA.GOV. (2011), <http://www.commonwealth.virginia.gov/judicialsystem/clemency/pardons.cfm>; SECRETARY OF THE COMMONWEALTH, *Conditional Pardons*, VIRGINIA. GOV. (2011), <http://www.commonwealth.virginia.gov/judicialsystem/clemency/conditionalPardon.cfm>.

104. *Conditional Pardons*, *supra* note 103.

conditional pardon, the inmate or his attorney must provide the governor with a letter containing basic background information and an explanation as to why the inmate deserves the pardon.¹⁰⁵

The Virginia legislature, after studying the clemency process, reported that deliberations take place behind closed doors, leaving the reasons behind the granting or denial of clemency petitions largely a mystery.¹⁰⁶ This does not do much to quell criticism of the process.¹⁰⁷ The last commutation of a capital offense in Virginia was granted in 2008 to Percy Walton by then Democratic Governor Tim Kaine.¹⁰⁸ Governor Robert McDonnell, a Republican, was elected in 2010; his desire to broaden Virginia's death penalty laws was no secret during his campaign.¹⁰⁹ Because of the secrecy that shrouds the clemency process in Virginia and the broad discretion wielded by the governor in granting executive clemency, just how "fail safe" of a remedy clemency can be is questionable at best.

III. ANALYSIS

Reverberating throughout the Supreme Court's death penalty jurisprudence is fear of arbitrary infliction of the ultimate punishment. As the narrator of the television series *American Justice* aptly summarizes, in *Furman*, "the justices found that one jury might condemn someone to death for a certain crime, but another jury might decide the exact same crime only deserved a prison term. It was that arbitrariness which the Court now deemed cruel and unusual."¹¹⁰ In light of the uniqueness and finality of the punishment of death,¹¹¹ the Court has stated that it be reserved for the worst of the worst,¹¹² and thus imposed

105. *Conditional Pardons*, *supra* note 103.

106. SYSTEM OF CAPITAL PUNISHMENT, *supra* note 74, at 79.

107. *Id.*

108. CLEMENCY, *supra* note 95.

109. See William C. Flook, *Death Penalty Foes Ready for Fight as Expansion Looms in Va.*, WASH. EXAMINER (Dec. 11, 2009, 5:00AM), <http://washingtonexaminer.com/local/virginia/death-penalty-foes-ready-fight-expansion-looms-va>; Press Release, Attorney General Bob McDonnell, Statement from Attorney General Bob McDonnell on Governor's Veto of Death Penalty Legislation (Mar. 26, 2007), available at http://www.oag.state.va.us/PRESS_RELEASES/NewsArchive/032607_Death_Penalty.html.

110. *American Justice* (A&E television broadcast Feb. 9, 1994), available at <http://www.deathpenaltyinfo.org/arbitrariness>.

111. *Furman v. Georgia*, 408 U.S. 238, 306 (1972) (Stewart, J., concurring)

The penalty of death . . . is unique in its total irrevocability. It is unique in its rejection of rehabilitation of the convict as a basic purpose of criminal justice. And it is unique, finally, in its absolute renunciation of all that is embodied in our concept of humanity.

See also *id.* at 287 (Brennan, J., concurring) ("The only explanation for the uniqueness of death is its extreme severity. Death is today an unusually severe punishment, unusual in its pain, in its finality, and in its enormity.")

112. *Roper v. Simmons*, 543 U.S. 551, 568-69 (2005).

carefully, discreetly, and fairly. Yet Teresa's case highlights the difficulty of intertwining the death penalty with notions of fairness. To be sure, the deaths of Teresa's husband and stepson were horrific and deserving of stiff retribution. But the fact that the triggermen—the two men who *actually caused* their deaths—received life sentences while Teresa died by lethal injection for her part in the same crime illustrates that the death penalty is indeed doled out in arbitrary fashion. Virginia's death penalty laws essentially placed the fates of Teresa and her co-conspirators in the hands of three men: David Grimes, Pittsylvania County Prosecutor,¹¹³ The Honorable Charles J. Strauss, Presiding Judge of the Pittsylvania Circuit Court,¹¹⁴ and Virginia Governor Robert F. McDonnell.¹¹⁵ These men, representative of the court system and the clemency process through which a defendant sentenced to die must traverse for the slim, rare shot at reversal, operated amidst laws that teeter dangerously close to a punishment that is cruel and unusual for its arbitrariness, just as the Court has feared since its temporary suspension of the death penalty in 1972. If the United States must continue to isolate itself from other western democracies by retaining the death penalty,¹¹⁶ determinations of clemency must be a structured, meaningful process to compensate for the inherent arbitrariness that continues to plague the imposition of the death penalty.

A. Arbitrariness & Unfairness of Teresa's Death Sentence

1. The Sentences of Accomplices Should be Considered In Proportionality Reviews

Part of the Virginia Supreme Court's automatic review of a defendant's death sentence¹¹⁷ is composed of a proportionality review, whereby the court determines "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."¹¹⁸ While the objective of a proportionality review is to weed out

113. See *Lewis v. Wheeler*, 609 F.3d 291, 311 (4th Cir. 2010); *CNN Newsroom: Interview by Brian Todd with David Grimes*, (CNN television broadcast Sept. 22, 2010), transcript available at <http://transcripts.cnn.com/TRANSCRIPTS/1009/22/cnr.02.html> [hereinafter *Interview by Brian Todd with David Grimes*].

114. See *Petition for Executive Clemency*, *supra* note 6, at 1, 4; *Va. Woman Sentenced to Death*, CBSNEWS.COM (Feb. 11, 2009, 8:40 PM), <http://www.cbsnews.com/stories/2003/06/04/national/main556951.shtml>.

115. Press Release, Governor Bob McDonnell, Statement of Governor McDonnell on the Scheduled Execution of Teresa Lewis (Sept. 19, 2010), available at <http://www.governor.virginia.gov/News/viewRelease.cfm?id=388> [hereinafter *Press Release, Governor Bob McDonnell*].

116. See, e.g., *New Global Death Penalty Stats Out Today*, *supra* note 37; ALAN W. CLARKE & LAURELYN WHITT, *THE BITTER FRUIT OF AMERICAN JUSTICE: INTERNATIONAL AND DOMESTIC RESISTANCE TO THE DEATH PENALTY* 28-29 (2007).

117. VA. CODE ANN. § 17.1-313(A) (West 2010).

118. *Id.* § 17.1-313(C)(2).

death sentences imposed arbitrarily,¹¹⁹ the review has not been deemed a constitutionally required undertaking.¹²⁰ Nonetheless, the review has been codified as the law in Virginia, and thus has become a routine step in automatic death sentence appeals, supposedly allowing the court to “identify and invalidate the aberrant sentence of death.”¹²¹ Teresa’s appeal to the Supreme Court of Virginia raised proportionality issues, arguing that her death sentence was “excessive and disproportionate” in comparison to the life sentences received by her accomplices.¹²² The court summarily rejected this claim because it refuses to give weight to attempts by defendants to compare their sentences with those of their accomplices.¹²³

Once a defendant has been charged with a capital crime, the decision of whether to fight for the death penalty is left to the discretion of the local prosecutor.¹²⁴ This discretion is one factor that has allowed arbitrariness to linger in the death penalty system, for a prosecutor’s decision in one county might be different than a prosecutor’s decision regarding a similar crime in a neighboring county.¹²⁵ Notably, a Virginia study conducted by the General Assembly’s Joint Legislative Audit and Review Commission presented the fact that prosecutors approach very similar capital murder cases differently in different jurisdictions across the state as “perhaps the [study’s] key finding.”¹²⁶ The study pointed out that prosecutorial discretion produces results that are not always fair.¹²⁷ Unfortunately for Teresa, she committed her crime in a

119. *See* *Gregg v. Georgia*, 428 U.S. 153, 206 (1976); *Briley v. Bass*, 584 F. Supp. 807, 834-35 (E.D. Va.), *aff’d*, 742 F.2d 155 (4th Cir. 1984).

120. *See* *Pulley v. Harris*, 465 U.S. 37, 43-44 (1984); *Briley*, 584 F. Supp. at 835.

121. *Lewis v. Commonwealth*, 593 S.E.2d 220, 226 (Va. 2004).

122. *Id.* at 226-27. Teresa also argued that her death sentence was “excessive and disproportionate” in comparison to the sentences handed down in similar cases, a claim that was also quickly rejected by the court. *See infra* Part III.A.3.

123. *Lewis*, 593 S.E.2d at 227.

124. *See* Deborah Fleischaker, *The ABA Death Penalty Moratorium Implementation Project: Setting the Stage for Further Research*, in *THE FUTURE OF AMERICA’S DEATH PENALTY*, *supra* note 78, at 81.

125. *See* Bright *foreword* to *PATERNOSTER*, *supra* note 68, at xiv-xv (noting that prosecutors decide whether to seek the death penalty and that their discretion varies from city to city and state to state); Green & Williams, *supra* note 68 (reporting that prosecutorial discretion in Virginia varies according to availability of resources, personal philosophies, perceptions of constituents, and geography); Grisham, *supra* note 27 (lamenting that in Teresa’s case, the sentence of death had “little [to] do with fairness . . . it depended more upon the assignment of judge and prosecutor . . .”).

126. *SYSTEM OF CAPITAL PUNISHMENT*, *supra* note 74, at vi.

127. *Id.* A recent example of the disparity in punishments resulting from broad prosecutorial discretion is the case of Sam McCroskey. *See* Green & Williams, *supra* note 68; Reed Williams, *McCroskey Gets Life Term in Four Farmville Slayings*, *RICH. TIMES-DISPATCH*, Sept. 21, 2010, at A-01. In Prince Edward County, Virginia, just a few counties northeast of Pittsylvania County, McCroskey was sentenced to life in prison pursuant to a plea deal offered by the prosecutor and approved by the Prince Edward Circuit County Court. Green & Williams, *supra* note 68. McCroskey had brutally bludgeoned his girlfriend, her parents, and her friend to death with a wood-splitting maul. Williams, *supra*. The prosecutor explained that

county with a prosecutor, David Grimes, who exercised his discretion aggressively in seeking the death penalty when he wanted to. Grimes was “adamant” in his fight to impose the death penalty upon Teresa, perceiving her as the “worst” of the three defendants.¹²⁸ Moreover, in the media storm leading up to Teresa’s execution, Grimes called Teresa “as evil a person as [he’d] ever met”¹²⁹ and stated that her involvement in the murder of loved ones “shows how cold she is.”¹³⁰

Grimes pursued the death penalty in Shallenberger’s case as well, arguing that “[t]o say [the murders] wouldn’t have happened without Teresa is an understatement, but what we know is that it didn’t happen with Teresa until she linked up with [Shallenberger].”¹³¹ Once Grimes made his charging decisions, however, the fates of Teresa, Shallenberger, and Fuller were turned over to one man: The Honorable Charles J. Strauss. Teresa’s trial counsel, appointed by Judge Strauss, recommended that she plead guilty to capital murder, believing that she would have a better shot of avoiding the death penalty in front of Judge Strauss rather than a jury.¹³² This belief stemmed from the facts that Judge Strauss had never before handed down a death penalty sentence and was sentencing Fuller to life in prison pursuant to a plea bargain.¹³³ Teresa’s attorneys were wrong. Judge Strauss based his fateful conclusions on his perception of the hierarchy of culpability among Teresa, Shallenberger, and Fuller, viewing Teresa as the “head” of the operation.¹³⁴ Clearly, Strauss placed special emphasis on who was more and most “evil” among the three.¹³⁵ Explaining his decision to sentence Shallenberger to life in prison, Strauss stated, “the Court is left with balancing the scales...[and] where the Commonwealth has chosen to offer one of the shooters life, I cannot in good conscience not do the same for the other shooter.”¹³⁶

What remains unclear is how Judge Strauss could in good conscience condemn Teresa to death while offering the *shooters* life. Without a hand pulling the trigger of a gun, there is no murder here. Especially where the sentencing of accomplices is left to the discretion of a single decision-maker,

while he recognized that the death penalty was appropriate for the case, the facts that McCroskey “had no criminal record and no known acts of violence[] weaken[ed] the argument for a death sentence.” *Id.* Teresa was not a violent person, and had not pulled the triggers of the weapons that mortally wounded her husband and stepson, but she was executed just three days after McCroskey’s plea deal was reached. Green & Williams, *supra* note 68.

128. *Lewis v. Wheeler*, 609 F.3d 291, 311 (4th Cir. 2010).

129. *Interview by Brian Todd with David Grimes*, *supra* note 113.

130. Maria Glod, *On Death Row, Killer Pleads for her Life*, WASH. POST, Sept. 14, 2010, at A08.

131. Transcript of Sentencing Hearing, *supra* note 6, at 32.

132. *Wheeler*, 609 F.3d at 297.

133. *Id.*

134. Transcript of Sentencing Hearing, *supra* note 6, at 34.

135. *Id.* at 36 (explaining that “the Court is convinced that in this case the Commonwealth sought Mr. Fuller’s assistance because they saw Mr. Shallenberger as a more evil person probably than Mr. Fuller, and they truly . . . want the death penalty for Mr. Shallenberger . . .”).

136. Transcript of Sentencing Hearing, *supra* note 6, at 37-38.

an appellate court's review of a death sentence should include an examination of the proportionality of sentences received by the accomplices. This review should be geared to objectively identify whether one equally guilty accomplice was sentenced to die, but not others, due to the "influence of passion, prejudice or any other arbitrary factor"¹³⁷ by the decision-maker. Ensuring that the death penalty is imposed fairly—if the death penalty can ever be fair¹³⁸—can only be bolstered by a comparison of a defendant's death sentence with the sentences of her accomplices. As the Court points out in *Furman*, the fact that in our vastly populated country, the death penalty is imposed so rarely invites the inference that it is not being inflicted regularly and fairly¹³⁹—rather, the apparently random nature of the death penalty is a reflection of its arbitrariness. Therefore, in reviewing a defendant's death sentence, courts should include an examination of the sentences of accomplices in statutorily-required proportionality reviews.¹⁴⁰

Other states have taken note of the effect upon fairness that such an examination can have. In Arizona capital cases, "[a] disparity in the sentences of codefendants or accomplices may be a relevant mitigating circumstance."¹⁴¹ Therefore, an Arizona jury contemplating whether or not to sentence a defendant to death can consider the fact that an accomplice was sentenced to life (or less) in reaching a decision. A report issued by the American Bar Association analyzing Alabama's death penalty laws advised that during a court's automatic review of a defendant's death sentence, the penalties received by any accomplices should be given consideration.¹⁴² Further, a recent newsletter published by a department within Texas' House of Representatives explored the issue of whether accomplices to capital murder should be eligible for the death penalty following the 2007 commutation by Governor Rick Perry of the death sentence of an accomplice to capital murder and the 2008 stay of execution by a federal court of another accomplice to

137. VA. CODE ANN. § 17.1-313(C)(1) (West 2010).

138. *See, e.g., Furman v. Georgia*, 408 U.S. 238, 251 (1972) (Douglas, J., concurring) (stating that "no punishment could be invented with so many inherent defects. . . . It is the poor, the sick, the ignorant, the powerless and the hated who are executed.") (citation omitted).

139. *Id.* at 293 (Brennan, J., concurring).

140. Though prosecutors assigned to crimes with multiple defendants should first consider whether pursuit of the death penalty against one defendant, but not others, is logical and fair.

141. ARIZONA DEATH PENALTY JUDICIAL ASSISTANCE PROGRAM, *Sentencing Disparity, CAPITAL SENTENCING GUIDE* (2010), <http://azcourts.gov/ccsguide/mitigatingcircumstances/sentencingdisparity.aspx>. The Guide clarifies that "[i]t is not mere disparity that is significant, however, but *unexplained* disparity." *Id.* (citation omitted).

142. AMERICAN BAR ASSOCIATION, *EVALUATING FAIRNESS AND ACCURACY IN STATE DEATH PENALTY SYSTEMS: THE ALABAMA DEATH PENALTY ASSESSMENT REPORT 135-36* (2006) [hereinafter *EVALUATING FAIRNESS*].

capital murder.¹⁴³ Texas has emphatically carried out the most executions of all states since 1976;¹⁴⁴ thus, recognition of this issue by its legislature helps demonstrate that it deserves more than the cursory rejection it receives from the Virginia Supreme Court.¹⁴⁵ The argument made by supporters of outlawing the death penalty for defendants who did not *actually commit* a murder is one revolving around proportionality; that is, “[t]he death penalty should be reserved for the worst of the worst, and allowing accomplices—who did not themselves kill—to be put to death violates this principle.”¹⁴⁶

A close examination of accomplices’ fates by courts reviewing a defendant’s death sentence would help to weaken the “death penalty is inflicted arbitrarily” argument legitimately raised by death penalty opponents. If accomplices receiving lesser sentences are equally guilty, or more guilty, than the defendant who received the death sentence, the reviewing court should reverse the death sentence to ensure fairness in the process.¹⁴⁷ Such a requirement would help the death penalty comport with the concerns of the Constitution.

2. Role that Teresa’s Gender Played in her Fate of Execution

A searching look at the proportionality of the sentences handed down to Teresa, Shallenberger, and Fuller by Judge Strauss might have exposed the role that Teresa’s gender played in the outcome of her case. The simple truth is that Shallenberger and Fuller, the *triggermen*, received life, while Teresa, a woman who did not actually inflict any of her husband’s or stepson’s mortal wounds, received death.¹⁴⁸ In Teresa’s automatic appeal to the Virginia Supreme Court, she argued that her “gender is like the elephant in the room” when comparing her death sentence to the sentences imposed upon defendants in similar cases,¹⁴⁹ as the court is required to do as part of its proportionality review.¹⁵⁰ Although the court included cases involving female accomplices in its list of cases purportedly examined as part of its

143. Kellie Dworaczyk, *Should Accomplices to Capital Murder be Eligible for the Death Penalty?*, INTERIM NEWS (House Research Division, Texas House of Representatives), Oct. 9, 2008, at 1, available at <http://www.hro.house.state.tx.us/interim/int80-7.pdf>.

144. DEATH PENALTY INFO. CTR., *supra* note 38.

145. *Cf.*, *Lewis v. Commonwealth*, 593 S.E.2d 220, 227 (Va. 2004).

146. Dworaczyk, *supra* note 143, at 5. Dworaczyk also summarizes the counter-argument, pointing out that Texas’ current death penalty laws are constitutional and hold accomplices accountable for their actions. *Id.* at 6.

147. *See* Bidish Sarma, *Furman’s Resurrection: Proportionality Review and the Supreme Court’s Second Chance to Fulfill Furman’s Promise*, CARDOZO L. REV. DE NOVO 238, 241, http://cardozolawreview.com/content/denovo/SARMA_2009_238.pdf (arguing that the Court should deem proportionality reviews constitutionally required in an effort to remove arbitrariness in the imposition of the death penalty, and noting that meaningful proportionality reviews would “[c]ompare the relative culpability of codefendants (appellate courts can strike disproportionate outcomes when a less culpable codefendant receives a harsher sentence than a more culpable codefendant)”).

148. *Lewis*, 593 S.E.2d at 228; Transcript of Sentencing Hearing, *supra* note 6, at 38-39.

149. Opening Brief of Appellant, *supra* note 71, at 9.

150. VA. CODE ANN. § 17.1-313(C)(2) (West 2010).

proportionality review, none of these women were sentenced to death for their roles in the capital crimes.¹⁵¹ In fact, Teresa was only the second woman executed in Virginia since 1908, when the state took charge of carrying out executions, and the first woman put to death since 1912.¹⁵² The court refused to acknowledge the elephant, stating that “we do not and cannot consider the defendant’s gender in determining whether the sentences of death are excessive and disproportionate when considering both the crime and the defendant. All criminal statutes in this Commonwealth must be applied without regard to gender.”¹⁵³ Despite the court’s strongly-worded assertion, it appears that gender certainly had crept into the consciousness of the courts—the trial court that handed down Teresa’s death sentence and the appellate courts that reviewed the sentence. Indeed, as one scholar points out, “[i]n this life, we notice everybody’s sex and gender How then, when it comes to judging a life, in a capital case, could sex and gender not matter?”¹⁵⁴

The prosecution’s assertion that Teresa was the “mastermind” of the murder plot clearly persuaded Judge Strauss, who bought this version of events.¹⁵⁵ Although Judge Strauss acknowledged Teresa’s cooperation with police in providing them with the information leading to the arrests of the triggermen, in fixing her sentence at death he focused upon her role as “wife and stepmother to the victims” and his conclusion that her only motive for the murders was “greed.”¹⁵⁶ But that focus implies that Shallenberger and Fuller’s non-relationships with the victims makes them somehow less culpable, an implication that defies logic. It is not as if the triggermen had more honorable motives—in fact, Judge Strauss himself pointed out that Shallenberger’s motives were money and lust, while Fuller did not even stand to gain money and perhaps his only motives were “companionship” with Shallenberger and maybe Teresa’s daughter.¹⁵⁷ Judge Strauss also identified Teresa’s “cold” demeanor and his belief that she “lured [the] men and her juvenile daughter into [her] web of deceit and sex and greed and murder” as reasons for his

151. Opening Brief of Appellant, *supra* note 71, at 10 & n.8; *see also infra* Part III.A.3.

152. *See* Sinclair, *supra* note 6.

153. *Lewis*, 593 S.E.2d at 226.

154. Joan W. Howarth, *Executing White Masculinities: Learning from Karla Faye Tucker*, 81 OR. L. REV. 183, 217 (2002); *see also* MARY WELEK ATWELL, WRETCHED SISTERS: EXAMINING GENDER AND CAPITAL PUNISHMENT 12-13 (2007) (noting that “[t]he Supreme Court has said repeatedly in its ‘death is different’ jurisprudence that individualized sentencing is constitutionally required, that each defendant must be judged as an entire person. How could sex and gender not matter? What defendant was not classified as either a man or a woman?”).

155. Evidence gathered following the sentencing hearing clearly disputed this version of events, exposing Shallenberger—not Teresa—as the true mastermind of the plot. *See* Petition for Executive Clemency, *supra* note 6, at 1, 11-16. This evidence is detailed in Teresa’s Petition for Executive Clemency and corresponding exhibits. *See infra* note 209.

156. *Lewis v. Wheeler*, 609 F.3d 291, 298 (4th Cir. 2010).

157. Transcript of Sentencing Hearing, *supra* note 6, at 37.

decision that Teresa should die for her part in the murder plots.¹⁵⁸ Perhaps because Teresa was a woman, she should have been more emotional.

Revealing and powerful, the imagery that Judge Strauss relied upon in justifying Teresa's death sentence depicts Teresa as a black widow using her deviant powers to ensnare the helpless eventual-triggermen into her plot. During Shallenberger's sentencing, Judge Strauss reiterated his belief that Teresa was the guiltiest of the three, for she was "clearly the head of [the] serpent which has ravaged the Lewis and Clifton families."¹⁵⁹ This metaphor is also rich with symbolism, linking Teresa to masculinity as the serpent has been identified as a phallic symbol throughout history.¹⁶⁰ A scholar that has explored gender biases in the cases of females who are executed, Mary Welek Atwell, notes that these women—there have been twelve, including Teresa, executed since 1976—have been presented by the legal system and by the media as "not real women—they were promiscuous, they were bad mothers, they violated the norms that were expected of women . . . It's not just that [Teresa] killed her husband, but she violated all these other rules of behavior as well."¹⁶¹ In being denounced by the prosecutor and court as a black widow, serpent, and evil woman, Teresa was certainly stripped of femininity, and perhaps this helped to justify her sentence of death.

Following the Supreme Court of Virginia's affirmation of Teresa's death sentence vis-à-vis its automatic review,¹⁶² Teresa filed a petition for writ of habeas corpus that included an ineffective assistance of counsel claim.¹⁶³ In rejecting this claim, the court reexamined the aggravating circumstances justifying Teresa's death sentence and found that these circumstances outweighed mitigating evidence.¹⁶⁴ In detailing the aggravating circumstances pointing in favor of her death sentence, the court first summarized that "[t]he evidence in aggravation of Lewis' crimes included her extensive planning of crimes in which [she] recruited the killers . . . arranged sexual activities for them involving both Lewis and her 16 year old daughter, and assisted the killers' entry into the *marital home* at night."¹⁶⁵ The court essentially portrayed

158. *Wheeler*, 609 F.3d at 298.

159. Transcript of Sentencing Hearing, *supra* note 6, at 34.

160. See Christopher L.C.E. Witcombe, *Eve and the Identity of Women: Serpents*, (2000), <http://witcombe.sbc.edu/eve-women/serpents.html> (stating that the serpent has long been identified as a phallic symbol). See also Ralph W. Hood, Jr. & David L. Kimbrough, *Serpent-Handling Holiness Sects: Theoretical Considerations*, 34 J. SCI. STUDY RELIGION 311, 314 (1995) (asking, "[w]hen is the snake *not* phallic symbol?") (citation omitted).

161. Frank Green, *Two Women's Death Row Cases Share Similarities*, RICH. TIMES-DISPATCH, Sept. 7, 2010, at A1 (quoting Mary Atwell, professor of criminal justice at Radford University). See also ATWELL, *supra* note 154, at 8-9 (positing that "gender stereotypes are quite powerful, and a death sentence may be the result when the state argues successfully that a particular defendant is not a 'real' woman . . . but a Monster, an Evil Woman, or an Unnatural Mother. These individuals are portrayed by the prosecution . . . as having deviated so far from feminine norms that they forfeit any claim to humanity . . .").

162. *Lewis v. Commonwealth*, 593 S.E.2d 220, 229 (Va. 2004).

163. *Lewis v. Warden of Fluvanna Corr. Ctr.*, 645 S.E.2d 492, 495 (Va. 2007).

164. *Id.* at 504-06.

165. *Warden of Fluvanna Corr. Ctr.*, 645 S.E.2d at 504 (emphasis added).

the “killers” as mere puppets, leaving undisturbed the imagery of Teresa as a powerful black widow/serpent who was a promiscuous, unnatural mother. Surely the court’s use of the phrase “marital home” was no accident—Teresa failed in her role as feminine, dutiful wife. Moreover, the Court of Appeals for the Fourth Circuit adopted the state court’s gender consciousness as it repeated the above language and agreed with the state court’s conclusion.¹⁶⁶

While the gender biases lurking in the courts’ consciousness do not make the murders of Julian and Charles any less tragic and gruesome, they do impose another layer of unfairness upon the disparities between the death sentence that Teresa received and the life sentences that Shallenberger and Fuller received. Accordingly, rather than attempting to pretend that gender plays no part in a death sentence, courts should own up to the reality that gender does figure into the equation; after all, the Constitution commands “consideration of the character . . . of the individual offender” when the death penalty is at issue.¹⁶⁷

3. Richer Analysis Should be Required in Proportionality Reviews

a. Examining the Outcomes of Similar Cases

In his op-ed piece, John Grisham, a Virginia resident, writes that Virginia has seen other similar cases in which “a wife and her lover scheme to kill her husband for his money or for life insurance proceeds,” but in none of these cases has the wife received the death penalty—a fact that highlights the inherent unfairness of Virginia’s death penalty jurisprudence.¹⁶⁸ As part of its required proportionality review, the Supreme Court of Virginia had to examine whether Teresa’s death sentence was “excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.”¹⁶⁹ Specifically, the court looks to whether juries in Virginia normally hand out the death penalty for “similar crimes.”¹⁷⁰ In Teresa’s case, the court claimed that it reviewed the records of all murder for hire death penalty cases that had previously come under its jurisdiction, and then merely listed the six cases.¹⁷¹ This portion of the proportionality review is cursory and does not engage in analogizing or distinguishing the similar cases to the case at hand.¹⁷² The only substantive reasoning that the court provided for its

166. *Lewis v. Wheeler*, 609 F.3d 291, 304, 306 (4th Cir. 2010).

167. *Woodson v. North Carolina*, 428 U.S. 280, 304 (1976).

168. Grisham, *supra* note 27.

169. *Lewis v. Commonwealth*, 593 S.E.2d 220, 226 (Va. 2004) (quoting VA. CODE ANN. § 17.1-313(c)(2) (West 2011)).

170. *Lewis*, 593 S.E.2d at 226 (citation omitted).

171. *Id.* at 226.

172. *Id.* This brief exercise, coupled with the court’s summary dismissal of Teresa’s argument that her punishment was disproportionate to the life sentences that her accomplices

satisfaction of the proportionality review is that “given the special heinousness associated with the murder for hire in this particular case, emphasizing that the defendant was the mastermind of the plan to kill her husband and stepson solely for greed and monetary gain,” Teresa’s sentence was proportionate to those received for similar crimes.¹⁷³

Two of those listed cases involved female “mastermind” accomplices; neither received the death penalty. In *Clark v. Commonwealth*,¹⁷⁴ the defendant was sentenced to death for his part as the gunman in a murder for hire.¹⁷⁵ The hirers in *Clark* were Mrs. Betty M. Holler and the victim’s wife, Jamie Scarborough.¹⁷⁶ Acting for the wife, Holler did all of the legwork in arranging the murder—calling the defendant’s cousin, Stewart, to offer him \$7,000 to kill the victim, meeting with Stewart and the defendant to give them the victim’s contact information and chloroform “[t]o put the victim out” and pointing out the victim to Stewart and the defendant.¹⁷⁷ Holler also tipped off Stewart and the defendant that the victim was returning home on the night of the murder.¹⁷⁸ The murder itself was gruesome; after a struggle involving the chloroform, the defendant shot the victim “at pointblank.”¹⁷⁹ Stewart and the defendant then took money from the victim’s pants and steaks from his refrigerator before joining their girlfriends for a celebration.¹⁸⁰ Intriguingly, in a second detailed recap of the facts of the case, the court did not even mention Holler or Jamie Scarborough, the masterminds behind the crime.¹⁸¹ Such a focus upon the killers rather than the masterminds is in stark contrast to the approach of the courts in Teresa’s case. Furthermore, as part of its proportionality review, the *Clark* court engaged in a detailed examination of whether the defendant’s death sentence is “disproportionate to the penalty imposed on Stewart.”¹⁸² This review comprised over three pages of the opinion,¹⁸³ also a glaring difference from the court’s cursory rejection of Teresa’s argument that her death sentence was disproportionate to the life sentences received by her accomplices. A jury handed down a punishment of death to Stewart as well, but the court commuted Stewart’s sentence to life.¹⁸⁴ One of the reasons for the court’s decision to commute Stewart’s sentence was the fact that he “was not the ‘trigger-man.’ He did not kill

received, leads a cynic to question just how meaningful the proportionality review is as currently conducted. *See also supra* Part III.A.1.

173. *Lewis*, 593 S.E.2d at 226.

174. 257 S.E.2d 784 (Va. 1979).

175. *Id.* at 786.

176. *Id.* at 787.

177. *Id.*

178. *Id.*

179. *Id.*

180. *Clark*, 257 S.E.2d at 787.

181. *Id.* at 792-93.

182. *Id.* at 794.

183. *Id.* at 794-97. Detailed reviews such as this would help make proportionality reviews more meaningful; the severity of the death penalty should compel courts to compare the sentences of accomplices to a death sentence received by a defendant. *See supra* Part III.A.1.

184. *Clark*, 257 S.E.2d at 795.

Scarborough.”¹⁸⁵ Neither, of course, did Teresa pull the trigger. Finally, the *Clark* court revealed the fates of the women in the case, the masterminds behind the victim’s murder: the wife “was tried for capital murder and was acquitted. Betty Holler was charged with first degree murder and, on the Commonwealth’s Attorney’s recommendation, was sentenced to twenty-five years in the penitentiary.”¹⁸⁶ These sentences raise the question, what makes Teresa Lewis so different from Betty Holler and Jamie Scarborough? Because the court merely listed the *Clark* case among cases of a similar nature, without any analysis, to satisfy its proportionality review, we have no answer to this legitimate question. Moreover, the *Clark* case was listed because Clark, part of a murder for hire plot, received the death penalty. The fates of the *Clark* accomplices juxtaposed with Teresa’s death by lethal injection highlight the arbitrary nature of the death penalty—the very quality that caused the Supreme Court to deem the way in which it was being imposed unconstitutional in *Furman v. Georgia*.¹⁸⁷

The other case listed in the court’s proportionality review involving a female accomplice is *Murphy v. Commonwealth*.¹⁸⁸ In *Murphy*, the defendant and his friend were offered approximately \$5,000 by Gary Hinojosa to kill James Radcliff.¹⁸⁹ Hinojosa was having an affair with James’ wife, Robin, who was pregnant with Hinojosa’s child.¹⁹⁰ Following one failed attempt to kill James, Hinojosa, Robin, and the defendant decided that the murder would take place during a staged burglary.¹⁹¹ Robin pointed out her and James’ apartment and James’ car to the defendant in anticipation of the murder.¹⁹² On the evening of the murder, Murphy, with friends he had recruited to help, entered the apartment through a window that Robin had opened and made their way to the bedroom where James slept.¹⁹³ As the defendant and his friends brutally beat James with a metal pipe and stabbed him several times with a knife, Robin waited in the living room.¹⁹⁴ Keeping up the burglary hoax, Robin reported the intruders to a neighbor following their departure and requested that the neighbor call for help.¹⁹⁵ Murphy, the *actual* murderer, pled guilty to capital murder for hire and was sentenced to death by the trial court.¹⁹⁶ The Supreme Court of Virginia affirmed this sentence.¹⁹⁷

185. *Clark*, 257 S.E.2d at 795.

186. *Id.*

187. 408 U.S. 238, 239-40 (1972).

188. 431 S.E.2d 48 (Va. 1993).

189. *Id.* at 49.

190. *Id.* at 49-50.

191. *Id.* at 50.

192. *Id.*

193. *Id.*

194. *Murphy*, 431 S.E.2d at 50.

195. *Id.* at 51.

196. *Id.* at 49.

197. *Id.* at 55.

As it turns out, Robin Radcliff did not receive a sentence of death.¹⁹⁸ Notably, then-Governor of Virginia George Allen remarked that, “[i]n the case of Robin Radcliff . . . whatever her moral culpability may have been as an instigator of the conspiracy to murder her husband, the fact is that she was not in the room in which James Radcliff was murdered.”¹⁹⁹ The Governor noted that the prosecutor offered Robin a plea deal because he “knew the historical tendencies of Virginia juries not to impose death penalties on defendants who did not participate directly in the actual murder”²⁰⁰ Robin refused the plea deal, so the prosecutor argued for the death penalty.²⁰¹ The jury found her “guilty of capital murder, [but] could not agree to impose the death penalty.”²⁰² Accordingly, Robin received a sentence of life in prison pursuant to Virginia law.²⁰³ Robin was identified as a mastermind in the plot to murder her husband but adjudged less culpable than Murphy because she did not participate in *actually* murdering her husband—she was not present in the room when her husband was murdered. Neither was Teresa. For inexplicable reasons, then, Teresa was put atop the hierarchy of culpability while Robin was placed at the bottom in cases with very similar facts. Tellingly, juries did not sentence either Jamie Scarborough or Robin Radcliff to death for their very active roles in their husbands’ murders. The test of proportionality that the court relies upon is “whether ‘juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes.’”²⁰⁴ Questionable, then, is how Teresa’s death sentence passed this test.

The *Clark* and *Murphy* cases illustrate why the court’s current proportionality review does not do much to satisfy its objective—avoiding arbitrary imposition of the death penalty. For this required portion of an automatic review to have any meaning, the court should engage in a more thorough, searching examination of similar cases. In a report informing Alabama’s legislature how to improve its death penalty laws, the American Bar Association included an examination of the state’s required proportionality review.²⁰⁵ As part of this review “comparing the ‘penalty imposed in similar cases considering both the crime and the defendant,’” the report advised courts to examine cases “in which (1) the death penalty was imposed, (2) death penalty was sought but not imposed, and (3) the death penalty could have been sought”²⁰⁶ Likewise, Virginia’s reviewing court should broaden its proportionality review to include that recommended range of cases to cast away arbitrariness from the manner in which the death penalty continues to be

198. See Press Release, Governor George Allen, Statement of Governor George Allen Re: Mario Benjamin Murphy (Sept. 17, 1997), available at <http://www.state.gov/documents/organization/65743.pdf>.

199. *Id.*

200. *Id.*

201. *Id.*

202. *Id.* (emphasis omitted).

203. *Id.*

204. *Lewis v. Commonwealth*, 593 S.E.2d 220, 226 (Va. 2004) (citation omitted).

205. EVALUATING FAIRNESS, *supra* note 142, at 133-41.

206. *Id.* at 140 (citation omitted).

imposed. Furthermore, the court should be required to engage in a detailed analysis that analogizes or distinguishes the so-called similar cases to the case at hand.²⁰⁷ Defendants facing Virginia's machinery of death deserve a thorough, complete review; in fact, it seems that due process should compel such a review.

b. Improving Virginia's Clemency Procedure to Counter-Balance the Arbitrariness and Unfairness that Exists in the Imposition of Death Sentences

Teresa's case is a haunting reminder of the significance of the clemency process to capital defendants. Repeated over and over again throughout the court's opinions is the notion that Teresa was the "mastermind" behind the murders, and it is this role that the courts used to justify Teresa's death sentence.²⁰⁸ Following Teresa's sentencing hearing, however, powerful new evidence was uncovered by Teresa's appellate counsel clearly showing that Shallenberger, not Lewis, was the mastermind pulling the puppet strings.²⁰⁹ Underscoring the importance of clemency is the fact that Virginia's rules of procedure narrow the reach of judicial review to the record created during trial and the sentencing hearing.²¹⁰ Therefore, new, legitimate evidence is typically "dismissed without review."²¹¹ That is where clemency can step in to serve as an "act of grace,"²¹² a safe harbor for those defendants deserving of grace. The Supreme Court recognizes this important role of clemency, hailing clemency as a "historic remedy for preventing miscarriages of justice where

207. See EVALUATING FAIRNESS, *supra* note 142, at 133 (advising that "[s]imply stating that a particular death sentence is proportional is not enough Proportionality review should not only cite previous decisions, but should analyze their similarities and differences and the appropriateness of the death sentence.").

208. See, e.g., *Lewis v. Wheeler*, 609 F.3d 291, 306 (4th Cir. 2010) ("[T]he factual evidence surrounding these murders demonstrates that it was Lewis who was uniquely positioned to . . . 'mastermind' . . . these gruesome crimes"); *Lewis*, 593 S.E.2d at 226 ("[W]e are confident that given the special heinousness associated with the murder for hire in this particular case, emphasizing that the defendant was the mastermind of the plan to kill her husband and stepson . . . the sentence[] of death [is not] excessive nor disproportionate . . .").

209. See Petition for Executive Clemency, *supra* note 6, at 1, 11-16. This evidence included a letter that Shallenberger wrote to an ex-girlfriend while in prison, explaining that Teresa "was exactly what I was looking for I knew I could get [her] to fall head over heels for me." *Id.* at Ex. 13, 2. Another key piece was an affidavit executed by Fuller, stating that, "[a]s between Mrs. Lewis and Shallenberger, Shallenberger was definitely the one in charge of things, not Mrs. Lewis." *Id.* at Ex. 14, 2. Moreover, Shallenberger told Evan Nelson, an expert forensic psychologist, that he was the "mastermind" of the plot. *Id.* at Ex. 16, 5, 16.

210. See SYSTEM OF CAPITAL PUNISHMENT, *supra* note 74, at 79-80; Lindsay, *supra* note 77.

211. Lindsay, *supra* note 77.

212. *Herrera v. Collins*, 506 U.S. 390, 413 (1993).

judicial process has been exhausted.”²¹³ Governors have utilized clemency in this role.²¹⁴

In Virginia, the pattern of unbridled discretion granted to individuals in death penalty decisions carries through the court system and continues on in clemency.²¹⁵ The Executive Director of the Virginia Capital Representation Resource Center, Robert E. Lee, confirms that the decision to grant clemency resides with the governor “alone.”²¹⁶ Teresa’s Petition for Executive Clemency is nearly 270 pages, including twenty-nine exhibits.²¹⁷ In stark contrast, Governor McDonnell’s statement explaining his decision to deny clemency does not even take up a single page.²¹⁸ The statement included a brief recap of the facts of the case; tellingly, these facts were all pulled from the trial record.²¹⁹ None of the new evidence presented in Teresa’s expansive Petition was included.²²⁰ The Governor concluded that several courts have reviewed and affirmed Teresa’s death sentence, and therefore he found “no compelling reason to set aside the sentence that was imposed by the Circuit Court and affirmed by all reviewing courts.”²²¹

Even if the Governor’s decision to deny clemency was correct, his statement reveals a misunderstanding of the important role of clemency as a remedy for considering powerful new evidence that the courts were barred from considering. As Teresa’s appellate counsel’s September 20, 2010 letter to Governor McDonnell urging him to reconsider his decision emphasized, “Teresa’s new evidence, which procedural rules prevented her from presenting to any court, is exactly the kind of information a governor should consider in deciding whether to grant clemency *in spite of* the decisions of the procedurally-bound courts.”²²²

In light of the arbitrariness and unfairness that continues to permeate Virginia’s death penalty laws, the clemency process should be improved and made more meaningful so that it has an opportunity to “prevent[] miscarriages

213. *Herrera*, 506 U.S. at 412.

214. E.g., *Governor Strickland Approves Sidney Cornwell Clemency Petition*, GOV MONITOR.COM (Nov. 15, 2010), http://www.thegovmonitor.com/world_news/united_states/governor-strickland-denies-sidney-cornwell-clemency-petition-42649.html. In November 2010, then Governor of Ohio, Ted Strickland, commuted convicted murderer Sidney Cornwell’s death sentence to life in prison without parole, stating that “[b]ecause the trial jury and sentencing judge did not have information at the time of sentencing about Mr. Cornwell’s Klinefelter’s syndrome, I have concluded that it would be inappropriate to proceed with the death penalty in this case.” *Id.*

215. VA. CODE ANN. § 53.1-229 (2010); VA. CODE ANN. § 53.1-230 (2010); VA. CODE ANN. § 53.1-231 (2010).

216. Sinclair, *supra* note 6.

217. Petition for Executive Clemency, *supra* note 6.

218. See Press Release, Governor Bob McDonnell, *supra* note 115.

219. See *id.*

220. See *id.*

221. *Id.*

222. E-mail from James E. Rocard, III, to the Honorable Robert F. McDonnell, Office of the Governor (Sept. 20, 2010), available at <http://voices.washingtonpost.com/virginiapolitics/lewis.pdf>.

of justice where judicial process has been exhausted.”²²³ For one, the secrecy that envelopes the clemency process should be removed and instead the deliberations that comprise clemency should be made public to encourage transparency. Requiring the clemency decision-maker to hold public clemency hearings is one way to dissipate the secrecy.²²⁴ Although the Governor does provide an explanation of his clemency decisions to the public through press releases, his statement in Teresa’s case was cursory and failed to provide solid justifications for his reasoning.²²⁵ More thorough, detailed explanations from the clemency decision-maker to the public would help to expose the thought process behind clemency. Moreover, due to the procedural restrictions that block new evidence from coming into the appeals process, clemency “decisions should be based upon an independent consideration of facts and circumstances.”²²⁶ That is, a conclusion to grant or deny clemency should not be based solely upon court decisions, as clemency is meant to extend beyond the judicial system.

In its review of Virginia’s death penalty laws, the legislature recognized the importance of clemency and the problems with the current structure of the process.²²⁷ The legislature’s recommendations for improvements included:

establish[ing] a more structured process involving the Parole Board or some other State entity that would be charged with reviewing and investigating each clemency petition submitted by an inmate on death row. Following this effort, the relevant authority could be required to make a public report to the Governor outlining the issues that were considered in the review and provide a recommendation regarding clemency to the Governor. The final decision on the petition would remain with the Governor. This board might also be required to maintain a complete file of clemency petitions for reference purposes, as this function is not currently provided by any other state office or agency.²²⁸

While implementation of these recommendations would add more structure to the current process and remove secrecy, ultimate discretion still lies with the governor. The fairest and least political solution would be to turn clemency decisions over to a panel of judges.²²⁹ Still better than leaving the final decision in the hands of the governor alone would be converting to one of the

223. *Herrera v. Collins*, 506 U.S. 390, 412 (1993).

224. See Robert M. Bohm, *Errors in Capital Cases and What Can be Done About Them*, in *THE DEATH PENALTY TODAY* 3, 20 (Robert M. Bohm ed., 2008) (advising that “clemency boards should hold public hearings to determine their recommendations to the governor. Governors should . . . be required to provide the public with an explanation of their clemency decisions.”).

225. See Press Release, Governor Bob McDonnell, *supra* note 115.

226. Fleischaker, *supra* note 124, at 83.

227. SYSTEM OF CAPITAL PUNISHMENT, *supra* note 74, at 78-83.

228. *Id.* at 83.

229. BOHM, *supra* note 224, at 20.

systems that other states have adopted in which an executive board has exclusive power to grant executive clemency, or the governor and an executive board share the power to grant executive clemency.²³⁰ Perhaps Teresa's new evidence would have influenced someone sitting on a clemency board to grant an act of grace in the face of the ultimate punishment.

IV. CONCLUSION

At approximately 9:09 p.m. on September 23, 2010, the chemicals that Virginia uses to kill capital defendants began to flow through Teresa's veins: "[t]he first, thiopental sodium, is intended to render the inmate unconscious. The second, pancuronium bromide, stops breathing. The third, potassium chloride, stops the heart."²³¹ Teresa was pronounced dead just a few minutes later,²³² only the second woman in the state to fall prey to Virginia's machinery of death. Whether one agrees with her execution or decries it—and there is a great deal of passion from both sides—it is hard to deny that there are flaws in Virginia's death penalty system. Sharp and merciless, these flaws reflect the very dangers that the Supreme Court feared the death penalty would breed: arbitrariness and unfairness. While the imposition of the death penalty is becoming rarer—perhaps a hopeful glimpse into a future unacquainted with the death penalty—it remains legal in this country and thus requires improvement. The broad discretion wielded by Virginia prosecutors, judges in cases of capital murder pleas, and the governor throughout the capital defendant's journey to the execution chamber needs to be checked to make the ultimate punishment as fair as it can be. Furthermore, Virginia's statutorily-required proportionality review needs to be improved. A more thorough analysis of the sentences received by accomplices and defendants in similar cases would help to remove the arbitrariness that has tainted the system. Had this occurred in Teresa's case, inexplicable disparities would likely have been revealed, and perhaps her life would have been spared.

Finally, if the death penalty is the ultimate punishment, the clemency process is the ultimate act of grace. In Virginia, the great power of clemency resides solely with one individual, the governor. But to ensure that clemency retains its usefulness as a "fail safe"²³³ remedy for those deserving of mercy, this power needs to be shared by many—perhaps a panel of judges or clemency board. Further, secrecy should be removed from the process to help hold the decision-makers accountable. The process must entail an independent review of the facts and evidence to compensate for Virginia's stiff

230. See Ridolfi & Gordon, *supra* note 88, at 31.

231. Catie Beck, *I Watched a Woman Die: Eye-Witness Reveals Haunting First-Hand Account of the Execution of Teresa Lewis*, DAILY MAIL (Sept. 25, 2010, 1:58 PM), <http://www.dailymail.co.uk/news/article-1314993/Teresa-Lewis-execution-I-watched-woman-die-One-witness-hand-account.html>; see also Maria Glod, *Watching Teresa Lewis Die*, WASHINGTON POST.COM (Sept. 24, 2010, 12:09 PM), <http://voices.washingtonpost.com/crime-scene/maria-glod/three-weeks-ago-i-met.html>.

232. Beck, *supra* note 231.

233. *Herrera v. Collins*, 506 U.S. 390, 415 (1993).

procedural rules that bar new evidence from being heard in the judicial system. Until and unless the state stops tinkering with the machinery of death, Virginia must improve its laws to ensure justice and equality to all facing the ultimate punishment.