

The Juvenile Death Penalty in Virginia



Since 1998, Virginia has executed three individuals who were convicted for crimes committed while under the age of 18: Dwayne Wright, Christopher Thomas, and Steven Roach. This record places Virginia second in juvenile executions to the state of Texas.¹

Virginia is one of only twenty-two states that permits the imposition of a death sentence for crimes committed by persons under the age of 18.² Although none of the offenders currently on Virginia's death row were convicted as juveniles, Shermaine Johnson, who was 16 at the time of the crime, may soon return to death row given the jury's recommendation at his re-sentencing hearing. Virginia is also one of only seven states, including Georgia, Louisiana, Missouri, Oklahoma, South Carolina, and Texas, to have actually performed such executions.³

Virginia's Juvenile Death Penalty: History

Virginia Code Annotated § 16.1-241 requires the juvenile court to transfer any juvenile 14 and over to adult court, upon the finding of probable cause of the juvenile's commission of a violent juvenile felony. Because Va. Code Ann. § 18.2-31 does not specify a minimum age for imposition of the death penalty, a juvenile 14 or over could be sentenced to the death penalty in Virginia according to state statute. However, given the United States Supreme Court's decision in *Thompson v. Oklahoma*, 487 U.S. 815 (1988), prohibiting the execution of offenders age 15 and younger at the time of the crime as a violation of the Eighth Amendment to the U.S. Constitution, Virginia is constitutionally forbidden from imposing such a sentence.

Since the reinstatement of the death penalty in 1976, Virginia has sentenced five juvenile offenders to death and has carried out the execution of three. Recent developments in the cases of two juvenile offenders reveal procedural difficulties inherent in juvenile capital cases. In 2000, Chauncey Jackson's death sentence was reversed when his father was not notified of juvenile court hearings regarding his son. The State declined to pursue the death penalty at his retrial. Then, in 2001, the Virginia Supreme Court overturned Shermaine Johnson's death sentence and ordered a new sentencing hearing because the jury was not advised that Shermaine would not be eligible for parole if sentenced to life imprisonment. A re-sentencing hearing was held, and the jury recommended the death penalty for Shermaine; however, the judge has not yet officially ruled on this recommendation.

Virginia's Juvenile Death Penalty: Process

Once a juvenile is transferred to circuit court on capital charges, the trial and sentencing proceeds as an adult death penalty case. According to Va. Code Ann. § 19.2-163.8, the Virginia Supreme Court and the Public Defender Commission must maintain a list of attorneys qualified to represent defendants charged with capital murder. While these attorneys must meet certain criteria regarding their background and experience, the statute fails to provide special training or regulations for attorneys representing juvenile offenders. Given recent adolescent neurological research revealing the lack of development in juveniles' brains and the implications of this research in light of the U.S. Supreme Court's recent decision in *Atkins v. Virginia*, 122 S. Ct. 2242 (2002), such training is now of the utmost importance.

Furthermore, because the sentence of death in Virginia rests largely on the perceived future dangerousness of the offender, and the jury is explicitly permitted by statute to consider age as a mitigating factor in its sentencing deliberations

(Va. Code Ann. § 19.2-264.2 and § 19.2-264.4 respectively), the ability of attorneys to adequately employ juvenile-specific defense strategies in capital cases is particularly important.

The ability to appeal or challenge a sentence of death in Virginia is greatly limited by a procedural provision commonly referred to as the “21 Day Rule.” According to Superior Court Rule 1:1, trial courts lose jurisdiction over their cases twenty-one days after an individual has been sentenced. Because introduction of all evidence must be made to the trial court, this termination of jurisdiction necessarily bars the submission of any new evidence 21 days after sentencing. While the law was recently amended to allow for the introduction of certain types of biological evidence, such as DNA,⁴ Virginia remains one of the only states in the nation to employ such a limitation.⁵ Although the “21 Day Rule” remains law, nearly 83% of Virginia residents disagree with its use, according to a 2001 Annual Quality of Life in Virginia Survey conducted by the Center for Survey Research at Virginia Tech.

Proponents of the “21 Day Rule” argue that it brings necessary finality and efficiency to capital cases. Critics contend, however, that by limiting the introduction of newly discovered evidence, the rule makes it harder to challenge a conviction--increasing the possibility of wrongful imprisonment or the execution of the innocent, a mistake that cannot be repaired.⁶ Experts also argue that recent modifications allowing the submission of biological evidence after 21 days will have a negligible effect in alleviating the rule’s potentially fatal consequences, as the majority of death penalty cases do not hinge on such evidence. Out of 93 death row prisoners recently acquitted nationwide, DNA evidence was the exonerating factor in 10 cases.⁷

Per the Virginia State Code, the Governor has sole power to grant clemency in capital cases.⁸ Since 1976, six death row inmates have had their sentences commuted by the Governor. The most often cited reason for these decisions is uncertainty as to the actual guilt of the individual on death row.⁹ Clemency has never been granted to a juvenile offender in Virginia.¹⁰

Legal Death Penalty Trends

The recent U.S. Supreme Court decision banning the execution of those with mental retardation in *Atkins v. Virginia* has raised new questions as to the constitutionality of the juvenile death penalty. Recent brain development research contradicts previously held beliefs that the brain is fully developed by age 14. In fact, using Magnetic Resonance Imaging, the Director of Neuropsychology at the University of Pennsylvania Health Center found that the brain system necessary for inhibition and goal directed behavior is not fully operational until early adulthood (about 18-22 years).¹¹ Further, a Harvard University researcher found that juveniles lack the brain capacity to control impulses and make informed decisions to the extent of adults.¹² The implication of this research is that juveniles share many mental characteristics which caused the U.S. Supreme Court to deem those with mental retardation less culpable than the average adult. Hence, as the Supreme Court found the use of capital punishment against persons with mental retardation to be “cruel and unusual punishment” given their diminished moral culpability (122 S. Ct. 2242, 2244), it is quite possible that this new research will persuade the Court of the unconstitutionality of the death penalty for juvenile offenders. In fact, the Missouri Supreme Court issued a stay of the execution of Christopher Simmons, a juvenile offender on its death row, pending a decision on the effect of *Atkins* on the juvenile death penalty.¹³ The Missouri Supreme Court is expected to make a decision this fall.

Beyond Eighth Amendment concerns, these developmental issues also mean that juveniles, like those with mental retardation, may be less able to assist in their own defense at trial.¹⁴ Furthermore, juveniles typically make poor witnesses, may be less able to offer mitigating evidence, and are more prone to giving false confessions.¹⁵

National Juvenile Death Penalty Trends

Of the 22 states that currently permit the execution of juvenile offenders, only 7 have actually carried out such executions since the reinstatement of the death penalty; Texas and Virginia having performed the vast majority (16 out of 21).¹⁶ Not only has the trend in actually executing juvenile offenders ebbed, but there has been increasing state movement toward abolishing the juvenile

death penalty. For example, Montana and Indiana recently banned the juvenile death penalty in 1999 and 2002, respectively. In 2002, the Florida Senate passed a bill banning the execution of juvenile offenders, but no further action was taken on the bill in the House before the close of the legislative session. However, in the previous legislative session, the situation was reversed, and the Florida House passed such a bill. In the Texas State 2001 legislative session, the House passed a bill banning the execution of juvenile offenders, which ultimately stalled in the Senate due to procedural difficulties. It is expected that another bill will be introduced in the next legislative session. Many other states are also considering enacting similar legislation, including Alabama, Arkansas, Arizona, Kentucky, Mississippi, Missouri, Nevada, and South Carolina. While Virginia legislators have not yet introduced bills specifically regarding the juvenile death penalty, the introduction of several bills in the 2002 General Assembly calling for abolishing the death penalty for all offenders, for offenders with mental retardation, and a moratorium on the death penalty (see HB 224, 549, 957 and SB90 and 497) reveal Virginia constituents' growing concerns regarding capital punishment.

Finally, while the political landscape reveals popular concerns about the juvenile death penalty, the reluctance of jurors in capital cases to impose the punishment on youthful offenders provides further evidence of its diminishing popular acceptability. In one study, only 35% of death-qualified mock jurors were willing to sentence a 17-year-old defendant to death.¹⁷ This hesitancy is also reflected by the infrequency with which the punishment is imposed throughout the United States.¹⁸

Public Opinion in the United States

A May 2002 Gallup poll found that 69% of Americans oppose the death penalty for juveniles. This figure has remained relatively static over the last 40 years despite fluctuating support for the death penalty, generally, and the seemingly favored status of capital punishment for adult offenders in the United States today (72% in favor of the adult death penalty).¹⁹

Although polls have not been conducted to gauge the opinion of Virginia residents on the topic of the juvenile death penalty specifically, a 2001 state

poll reveals that support for capital punishment generally has fallen to under 70%. When Virginia residents were given the option of sentencing an individual to life in prison without parole versus the death penalty, support for capital punishment dropped to 45.2%.²⁰

Assessing Virginia

Although the general validity of capital punishment for juvenile offenders has been confirmed by the Virginia State Supreme Court in such cases as *Jackson v. Commonwealth*, 499 S.E.2d 552 (1998), the aforementioned developments reveal a changing landscape.

Not only have legal and public opinions changed regarding the death penalty for juvenile offenders, but the growing financial problems suffered by the Commonwealth of Virginia bring the cost effectiveness of pursuing capital sentences for juvenile offenders into question. In January 2002, Governor Warner lamented the "1.2 billion budget shortfall" and "an additional shortfall of \$2 billion for the next two fiscal years" in his State of the Commonwealth Address. Since the Governor's address, Virginia's pension funds have also suffered significant losses as a result of the corporate malfeasance by large publicly traded corporations, such as Enron.

Given the rarity of guilty pleas when the punishment is death, the length of capital trials, and the variety of appeals conducted in a death penalty case, including automatic review, state habeas corpus petitions, and federal habeas corpus petitions, expenses incurred by the state in pursuit of a capital sentence grow exponentially. According to a study conducted at Duke University comparing the costs of adjudicating capital and non-capital cases in North Carolina, capital cases cost "at least an extra \$2.6 million per execution compared to what the taxpayers would have spent if defendants were tried without the death penalty and sentenced to life in prison."²¹ Furthermore, because many capital trials ultimately result in a life sentence, the state actually bears the costs of life imprisonment *and* the expensive litigation.²²

Developments Worldwide

The execution of juvenile offenders has all but ended around the world-- today only the United States, Pakistan, Iran, and the Democratic Republic of Congo persist in such a practice. In the last decade, the U.S. has executed more juvenile offenders than all other nations combined.

The execution of those who commit crimes while under the age of 18 is denounced by a variety of world organizations, including the European Union and the United Nations.²³ Many countries, including Mexico, Sweden, and France, have also specifically condemned the U.S. for allowing capital punishment for juveniles.

Moreover, the juvenile death penalty is prohibited by many treaties and international agreements. Among these are the International Covenant on Civil and Political Rights, the United Nations Convention on the Rights of the Child, the Geneva Convention Relative to the Protection of Civilian Persons in Times of War, the American Convention on Human Rights, and the American Declaration of the Rights and Duties of Man.

¹⁵ See, e.g. Hugo Bedau and Michael Radalet, *Miscarriages of Justice in Potentially Capital Cases*, 40 STAN.L.R. 21, 157 (1987). See also Michael D. Sorkin, *Teens Cleared of Killing Homeless Man in Alton*, ST. LOUIS POST-DISPATCH, July 17, 1990 at A1.

¹⁶ ABA Fact Sheet

¹⁷ N.J. Finkel et al, *Killing Kids: The Juvenile Death Penalty and Community Sentiment*, BEHAVIORAL SCIENCES AND THE LAW, 12, 5-20 (1994).

¹⁸ Streib, 8

¹⁹ Gallup News Service, "Slim Majority of Americans Say Death Penalty Applied Fairly," (May 20, 2002).

²⁰ 2001 Poll conducted by the Virginians for Alternatives to the Death Penalty, available at <http://www.vadp.org/poll.htm>

²¹ Richard C. Dieter, *Millions Misspent: What Politicians Don't Say About the High Costs of the Death Penalty*. Fall 1994. (available online at www.deathpenaltyinfo.org/dpic.r08.html)

²² Id.

²³ ABA Fact Sheet

¹ <http://www.deathpenaltyinfo.org/juvexec.html>

² Victor L. Streib, *The Juvenile Death Penalty Today: Sentences and Executions for Juvenile Crimes* 6 (July 30, 2002) (available online at

<http://www.law.onu.edu/faculty/streib/juvdeath.pdf>)

³ The other states are Texas, Missouri, Louisiana, Georgia, South Carolina, and Oklahoma.

<http://www.deathpenaltyinfo.org/juvexec.html>

⁴ Robert H. Robinson, Jr., *Improving Process in Virginia Capital Cases*, 12 CAP.DEF.J. 363, 379 (2000).

⁵ *Herrera v. Collins*, 506 U.S. 390, 411 (1993).

⁶ Robinson, 379.

⁷ Kathryn Eldridge & Matthew Engle, *Case Note: Code of Virginia*, 14 CAP.DEF.J. 217, 222 (2001).

⁸ VA. CODE ANN. § 53.1-229

⁹ Robinson, 379

¹⁰ <http://www.deathpenaltyinfo.org/clemency.html>

¹¹ ABA Fact Sheet: *The Juvenile Death Penalty in the United States*

¹² Id.

¹³ Harvey Rice, *Teen-age murderer executed*, HOUSTON CHRONICLE, May 29, 2002.

¹⁴ See *Atkins*, 122 S.Ct. at 2251-52.

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