

1983

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Recommended Citation

James T. Lloyd Jr., *Questions Surrounding Virginia's Death Penalty*, 17 U. Rich. L. Rev. 603 (1983).
Available at: <http://scholarship.richmond.edu/lawreview/vol17/iss3/8>

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QUESTIONS SURROUNDING VIRGINIA'S DEATH PENALTY

I. INTRODUCTION

On August 10, 1982, Frank J. Coppola died in Virginia's electric chair. His was the fifth execution¹ since the 1976 Supreme Court decision holding that a punishment of death was not unconstitutional *per se*.² In the Commonwealth of Virginia, Coppola's was the first execution in over a decade.³

Coppola sought to waive his right to counsel and further appeal, hoping to be allowed to die with "human dignity" on the set execution date.⁴ An initial stay of execution was overturned by the United States Supreme Court hours before expiration of the court order calling for his execution.⁵

The execution resurrected the debate on the purposes of capital punishment and heightened public awareness of the many questions surrounding the death penalty. This comment briefly traces the evolution of the death penalty as we know it today, and examines constitutional challenges to Virginia's capital punishment statutes in light of recent decisions in state and federal courts. The issue of waiver of right to counsel and further appeal is examined as well as the practice, on the opposite extreme, of plea bargaining in capital cases and whether this practice promotes voluntary decision or whether it is a product of duress.

II. CONSTITUTIONALITY OF THE DEATH PENALTY

A. Historical Background

The modern history of the death penalty began with the landmark decision of *Furman v. Georgia* in 1972.⁶ The Supreme Court held that the death penalty as applied was violative of the eighth amendment provision, incorporated to the states through the fourteenth amendment, against cruel and unusual punishment.⁷ Although no opinion commanded

1. The four others were: Steven T. Judy in Indiana, March, 1981; Jesse Walter Bishop in Nevada, October, 1979; John Spenkelink in Florida, May, 1979; Gary Mark Gilmore in Utah, January, 1977. See Richmond Times-Dispatch, Aug. 11, 1982, at A-2, col. 4.

2. *Gregg v. Georgia*, 428 U.S. 153, 169 (1976) (plurality opinion).

3. Prior to Coppola, the last person executed in Virginia was Carroll L. Garland, a Lynchburg man accused and convicted of first-degree murder, on March 2, 1962. See 66 VA. L. REV. 167, 167 n.1 (1980).

4. Interview by United States District Judge D. Dortch Warriner with Frank J. Coppola, reprinted in Richmond Times-Dispatch, Aug. 11, 1982, at A-2, col. 1-6.

5. Richmond Times-Dispatch, Aug. 11, 1982 at A-1, col. 5.

6. 408 U.S. 238 (1972) (5-4 decision).

7. *Id.* at 240.

a majority or even a plurality of the Court,⁸ the effect of *Furman* was virtually to overturn every death penalty statute then in existence.⁹

Shortly after *Furman*, the states began to rewrite their death penalty statutes to comply with the decision. The Supreme Court in *Gregg v. Georgia*,¹⁰ and its companion cases,¹¹ reestablished the death penalty as an acceptable form of punishment¹² and established certain constitutional guidelines for states to follow. The Court held the use of a dual trial, one for conviction and the other for sentencing, known as a bifurcated proceeding, relieves the threat of an arbitrary and capricious imposition of the death penalty.¹³ The sentencing authority is to be apprised of relevant information and provided standards to arrive at a decision in the

8. Each Justice wrote his own opinion in *Furman*. The four dissenters (Burger, C.J.; Blackmun, J.; Powell, J.; & Rehnquist, J.) agreed that the death penalty is constitutional, and the Court should leave to the state legislators the issue of sentencing procedures to be followed by judges and juries. *Id.* at 375-470.

Of the concurring opinions, that of Justice Douglas concluding that the death penalty is unconstitutional because of its overly discretionary application in an arbitrary, discriminatory manner, is most often cited as the holding of the case. *Id.* at 249, 256-57 (Douglas, J., concurring). Two justices held that any death penalty statute is unconstitutional: "States may no longer inflict [the death penalty] as a punishment for crimes." *Id.* at 305 (Brennan, J., concurring); "In recognizing the humanity of our fellow beings, we pay ourselves the highest tribute." *Id.* at 371 (Marshall, J., concurring). Justices White and Stewart fell short of this extreme, but concluded there were several arguments in its favor. *Id.* at 310-14 (White, J., concurring); *Id.* at 306-10 (Stewart, J., concurring).

For an extensive analysis of the *Furman* opinions in light of recent law concerning the death penalty, see Note, *Administering the Death Penalty*, 39 WASH. & LEE L. REV. 101, 106 (1982). Cf. Note, *The Death Penalty in Georgia: An Aggravating Circumstance*, 30 AM. U.L. REV. 835, 840 (1981) (discussing the lack of agreement on what constitutes cruel and unusual punishment) [hereinafter cited as *Aggravating Circumstance*].

9. 408 U.S. at 411 (Blackmun, J., dissenting). Justice Blackmun stated that the state statutes and those provisions of the federal statutory structure permitting the death penalty have been "discarded without a passing reference to the reasons, or the circumstances, that prompted their enactment. . . ." *Id.* at 412 (Blackmun, J., dissenting).

10. 428 U.S. 153 (1976) (plurality opinion).

11. In two companion cases, similar results were reached concerning statutes comparable to the Georgia statute questioned in *Gregg*. See *Proffitt v. Florida*, 428 U.S. 242, 259-60 (1976) (plurality opinion) (Florida death penalty statute held constitutional since system assures death will not be "wantonly" or "freakishly" imposed by allowing for evidentiary hearings into whether death should be imposed, and if such results in the sentence of death, a required writing to indicate the statutory reasons for the decision); *Jurek v. Texas*, 428 U.S. 262, 276 (1976) (plurality opinion) (Texas death penalty statute held constitutional since it narrows the definition of capital offenses, allows for a separate sentencing hearing, and states that there must be at least one statutory aggravating circumstance before death as punishment could even be considered).

12. "[T]he death penalty is not a form of punishment that may never be imposed regardless of the circumstances of the offense, regardless of the character of the offender, and regardless of the procedure followed in reaching the decision to impose it." *Gregg*, 428 U.S. at 187.

13. *Id.* at 195. See GA. CODE ANN. § 27-2503 (1978).

sentencing process.¹⁴ The Georgia statute examined in *Gregg* also required that an aggravating circumstance be present before imposition of the death penalty could be considered.¹⁵ The Court viewed this provision as another safeguard against discretionary imposition of the death penalty.¹⁶ The Georgia death penalty statutes thereby were upheld as constitutionally sound since the statutory scheme avoided arbitrary imposition and broad discretion in application.¹⁷

In two companion cases,¹⁸ the Supreme Court held, however, that state attempts to limit discretion in sentencing through a mandatory death sentence for certain homicides violated the eighth and fourteenth amendments of the Constitution.¹⁹ Such statutory schemes failed to take into account any mitigating factors, such as the defendant's character, his past record if any, or his state of mind.²⁰ States with similar statutes, Virginia among them, were left to reformulate their capital punishment legislation in light of these decisions. Many states adopted statutes similar to those upheld in *Gregg* and its companion cases.²¹

The Supreme Court next examined the scope of the "mitigating factors" to be considered in sentencing. The Court in *Lockett v. Ohio*²² held that an Ohio statute which enumerated the mitigating factors to be considered, failed to "permit the type of individualized consideration . . . required by the Eighth and Fourteenth Amendments in capital cases."²³

14. *Gregg*, 428 U.S. at 195.

15. *Id.* at 197. The Georgia statute listed ten aggravating circumstances for which a penalty of death could be imposed. See GA. CODE ANN. § 27-2534.1(b) (1978). In addition to the bifurcated trial and aggravating circumstances, the Georgia statute also provided automatic review by the Georgia Supreme Court of all death penalty sentences in the state. GA. CODE ANN. § 27-2537 (1978). For a detailed analysis of the *Gregg* decision, see *Aggravating Circumstance*, *supra* note 8, at 843-47.

16. 428 U.S. at 197-98.

17. The defendants in *Gregg*, *Proffitt*, and *Jurek* argued that arbitrariness still pervades in the statutes since the language of aggravating circumstances "is so broad that capital punishment could be imposed in any murder case." *Gregg*, 428 U.S. at 201. The plurality held there is no reason to believe a court will adopt such an "open ended construction." *Id.* at 201. For a summary of the constitutional challenges of this view, see *infra* note 24 and accompanying text.

18. *Roberts v. Louisiana*, 428 U.S. 325 (1976) (plurality opinion); *Woodson v. North Carolina*, 428 U.S. 280 (1976) (plurality opinion).

19. The plurality in *Woodson* concluded that imposing the death sentence on all of those convicted of certain offenses is unduly harsh and not a proper response to the *Furman* holding against unbridled jury discretion. 428 U.S. at 302.

20. *Id.* at 304 (Instead of treating the offender as an individual, the process of mandatory sentencing results in the offender being treated as a "faceless, undifferentiated mass to be subjected to the blind infliction of the penalty of death.").

21. Virginia modeled her 1977 death penalty legislation after the Georgia and Texas statutes held constitutional in *Gregg* and *Jurek*. See *infra* notes 33-36 and accompanying text.

22. 438 U.S. 586 (1978).

23. *Id.* at 606 (the "constitutional infirmities" of the Ohio statute are illuminated when compared with the statutes upheld in *Gregg*, *Proffitt*, and *Jurek*).

The sentencing authority must be able to consider "any aspect of a defendant's character or record and any of the circumstances of the offense" which can justify "a sentence less than death."²⁴

The constitutional attacks culminated in the Supreme Court case of *Godfrey v. Georgia*,²⁵ which again challenged the Georgia death penalty statute, this time for "broad and vague construction" of the provision on aggravating circumstances required for a sentence of death.²⁶ The Court upheld the validity of the Georgia statute, but reversed the death sentence due to the failure of the Georgia Supreme Court to follow its own precedent defining the criteria for "aggravating circumstances."²⁷ While statutory language may be interpreted broadly, the state courts and other authorities are given only the discretion to interpret the language in a constitutionally permissible way,²⁸ which the Georgia courts had done in the past.²⁹ Since the statutory language can be and was previously defined in a constitutional way, the death penalty legislation passed constitutional muster.³⁰

24. *Id.* at 604. For a summary of the constitutional standards of the death penalty in light of mitigating factors and Virginia's response to the Supreme Court decisions, see Bonnie, *Psychiatry and the Death Penalty: Emerging Problems in Virginia*, 66 VA. L. REV. 167 (1980).

25. 446 U.S. 420 (1980).

26. *Id.* at 423. The defendant challenged the "open ended construction" of the statute by the Georgia Supreme Court which the plurality in *Gregg* had held there was "no reason to assume" would occur. *Gregg*, 428 U.S. at 201. See also *supra* note 17 and accompanying text (discussing the "arbitrariness" claim of the defendants in *Gregg* and its companion cases).

The challenged statute said a person may be sentenced to death when convicted of murder if the offense "was outrageously or wantonly vile, horrible or inhumane in that it involved torture, depravity of mind, or an aggravated battery to the victim." GA. CODE ANN. § 27-2534.1(b)(7) (1978) construed in *Godfrey v. Georgia*, 446 U.S. 420, 422 (1980).

27. 446 U.S. at 431-32 (noting that the Georgia Supreme Court previously had defined "depravity of mind" to be that "kind of mental state that led the murderer to torture or to commit an aggravated battery before killing his victim," and defining "torture" and "aggravated battery" to be "serious physical abuse of the victim before death").

28. *Id.* at 432.

[T]he validity of the petitioner's death sentence turns on whether, in light of the facts and circumstances of the murders . . . the Georgia Supreme Court can be said to have applied a constitutional construction of the phrase "outrageously or wantonly vile, horrible or inhumane in that [they] involved . . . depravity of mind. . . ."

Id.

29. See *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977); see also *Harris v. State*, 237 Ga. 718, _____, 230 S.E.2d 1, 11 (1976) (court recognized possibility of abuse of the aggravating circumstances statute and said it would use its discretion to restrict application to "those cases that lie at the core"). See generally 446 U.S. at 430, 431 nn.10-11 (listing those Georgia cases rejecting the constitutional challenges to the construction of the aggravating circumstances statute).

30. The Supreme Court did not say this as such in *Godfrey*. The plurality opinion reiterated past decisions against arbitrary and capricious sentencing, and then moved on to the question of constitutional application. *Id.* at 428-29.

B. *Application of the Death Penalty in Virginia*

In 1977, the Virginia legislature adopted a death penalty statute to comply with the decisions of *Gregg v. Georgia*³¹ and its companion cases.³² The statutes allow for imposition of the death penalty in capital cases,³³ when there is a finding of "aggravated circumstances."³⁴ The sentencing authority, however, must examine all mitigating factors, including those not enumerated in the statute.³⁵ If a death sentence is rendered, the case is automatically reviewed by the Virginia Supreme Court,³⁶ at which time any such factors are subject to review.

The Virginia Supreme Court made its first major pronouncement on the 1977 death penalty statutes in *Smith v. Commonwealth*,³⁷ upholding the constitutionality of the statutes, citing *Gregg* and its progeny.³⁸ In a discussion of aggravating circumstances, the court interpreted the statutory "vileness" standard³⁹ by defining "depravity of mind" as "a degree of moral turpitude and physical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."⁴⁰ Further, "aggravated battery" was defined as "a battery which . . . is more culpable than the minimum necessary to accomplish the act of murder."⁴¹ These definitions were seen as "the only constructions rationally related"⁴² to the statutory language and have been followed in subsequent decisions.⁴³

31. 428 U.S. 153 (1976) (plurality opinion).

32. See *supra* notes 16 & 18.

33. VA. CODE ANN. § 18.2-31 (Repl. Vol. 1982).

34. VA. CODE ANN. § 19.2-264.2 (Cum. Supp. 1982) provides:

In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society ['dangerousness' standard] or that his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim . . . ['vileness' standard].

35. VA. CODE ANN. § 19.2-264.4 (Cum. Supp. 1982) ("[f]acts in mitigation may include but shall not be limited to . . ."). See *infra* notes 43 & 47 and accompanying text.

36. VA. CODE ANN. § 17-110.1 (Repl. Vol. 1982).

37. 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1978).

38. *Id.* at 476-79, 248 S.E.2d at 148-49.

39. See *supra* note 34.

40. 219 Va. at 478, 248 S.E.2d at 149.

41. *Id.*

42. *Id.*

43. See, e.g., *Whitley v. Commonwealth*, 223 Va. 66, 78-79, 286 S.E.2d 162, 169-70 (1982). See also *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784, 790 (1979) (relying on the definitions of *Smith*, but stating that the terms need not be defined to the sentencing authority because the enumerated terms need not be "the best or the only [definitions]"), *cert. denied*, 444 U.S. 1049 (1979); *Coppola v. Commonwealth*, 220 Va. 243, 254, 257 S.E.2d 797, 805 (1979) (holding the words of the statute need not be defined in jury instructions), *cert.*

Concerning the "dangerousness" standard of aggravating circumstances,⁴⁴ the court held that "the Commonwealth must prove beyond a reasonable doubt that there is a 'probability' that the defendant would commit 'criminal acts of violence' such as would pose a 'continuing serious threat to society.'"⁴⁵ This definition also has been accepted in subsequent decisions.⁴⁶

Finally, the *Smith* court noted in dicta that an additional safeguard against unconstitutional arbitrariness exists in the Virginia statutes. The court recognized that the Virginia statute expressly provides that the list of mitigating circumstances which may be considered by the sentencing authority is not limited to those enumerated, but that evidence may be adduced to show any other facts in mitigation of the offense. This additional safeguard contrasts with statutes held to be constitutional by the Supreme Court which were silent in this regard.⁴⁷

C. *Recent Cases and the Question of Constitutionality*

The decision in *Godfrey* led to the belief that the death penalty in Virginia was under attack because of its vague construction.⁴⁸ The United States Supreme Court upheld the facial constitutionality of Georgia's death penalty statute and questioned only its application in light of the Georgia Supreme Court's own criteria.⁴⁹ The Virginia Supreme Court also has established and followed its own criteria, and has distinguished *Godfrey* in subsequent attacks on the statutes⁵⁰ as has at least one federal court.⁵¹

denied, 444 U.S. 1103 (1980).

44. See *supra* note 34.

45. *Smith*, 219 Va. at 477, 248 S.E.2d at 148.

46. See, e.g., *Martin v. Commonwealth*, 221 Va. 436, 271 S.E.2d 123 (1980); *Stamper v. Commonwealth*, 220 Va. 260, 257 S.E.2d 808 (1979), *cert. denied*, 445 U.S. 972 (1980).

47. 219 Va. at 479, 248 S.E.2d at 149. The *Smith* court directly compared the Virginia statute to the Texas statute found to be constitutional in *Jurek*. See *Jurek*, 428 U.S. at 272. *Accord Clark v. Commonwealth*, 220 Va. at 211, 257 S.E.2d at 791. See also *Waye v. Commonwealth*, 219 Va. 683, 700, 251 S.E.2d 202, 212 (1979) (stating that there is no constitutional infirmity in allowing the jury the discretionary authority to afford the defendant mercy when considering mitigating factors), *cert. denied*, 442 U.S. 924 (1979).

48. For a comment on the *Godfrey* decision and the problems of Virginia's death penalty law, see Comment, *Godfrey v. Georgia: Possible Effects on Virginia's Death Penalty Law*, 15 U. RICH. L. REV. 951 (1980) [hereinafter cited as *Death Penalty Law*].

49. See *supra* notes 27-30 and accompanying text.

50. See *Briley v. Commonwealth*, 221 Va. 563, 579, 273 S.E.2d 57, 66 (1980) (holding sufficient facts present to meet the criteria set down in *Smith* and subsequent cases which were distinguishable from the failure of the Georgia Supreme Court to follow the criteria established in *Godfrey*); *Turner v. Commonwealth*, 221 Va. 513, 526, 273 S.E.2d 36, 44 (1980) (holding *Godfrey* "rested upon its unique facts"), *cert. denied*, 451 U.S. 1011 (1981).

51. *Stamper v. Baskerville*, 531 F. Supp. 1122, 1129-30 (E.D. Va. 1982), *appeal filed*, No. 82-6152 (4th Cir. May 27, 1982). See *infra* note 68.

Recent United States Supreme Court decisions have not questioned the constitutionality of state legislation. The Supreme Court, however, reiterated the *Lockett* decision, emphasizing that all mitigating circumstances must be considered by the sentencing authority in the sentencing phase of a capital trial.⁵² The Court also remanded a case to the Supreme Court of Georgia for further explanation of state law.⁵³ However, state authorities have been given extreme deference in decisions where the death penalty has been imposed.⁵⁴ A statute rarely is challenged as being unconstitutional "on its face." Rather, the constitutionality of the statutory application is questioned,⁵⁵ primarily in reference to its failure to define statutory terms for the sentencing authority.⁵⁶

Thus, there is a chance, however slim, that an attack on the Virginia death penalty statutes would succeed on the grounds of arbitrary and capricious application.⁵⁷ A successful attack might rest on an unconstitutional application in light of *Godfrey*.⁵⁸ If a state's statutory definitions do not fall below the minimum standards set forth in *Gregg*,⁵⁹ such an attack is likely to fail. Virginia courts, in adhering to the definitions set down in *Smith*, probably would not run the risk of overstepping the constitutional boundaries.⁶⁰

III. WAIVER OF COUNSEL AND APPEAL IN DEATH PENALTY CASES

A. *Coppola and the Question of Competency*

Of the five convicted felons executed since *Gregg*, only one vigorously

52. *Eddings v. Oklahoma*, ___ U.S. ___, 102 S. Ct. 869 (1982) (holding family history can be considered in the mitigation of the death penalty).

53. *Zant v. Stephens*, ___ U.S. ___, 102 S. Ct. 1856 (1982) (per curiam) (remanding to the Georgia Supreme Court for explanation of the rationale behind a state law which allows imposition of the death penalty if any one of three aggravating factors found by the jury is set aside by the court on appeal).

54. See Donohue, *Godfrey v. Georgia: Creative Federalism, the Eighth Amendment, and the Evolving Law of Death*, 30 CATH. U.L. REV. 13 (1980).

55. The Supreme Court did warn in *Zant*, however, that Georgia's determinations on remand "might undermine the confidence . . . expressed in *Gregg v. Georgia*. . . ." *Zant*, ___ U.S. at ___, 102 S. Ct. at 1859.

56. See *supra* note 43.

57. See *supra* notes 43-47 and accompanying text.

58. See *supra* note 50.

59. See *supra* notes 10-17 and accompanying text. See also, Donohue, *supra* note 54, at 60-61 (describing the ability of a state's sentencing authority to weigh the aggravating and mitigating circumstances in light of the courts' definitions of statutory terms as "creative Federalism" which mandates dramatic changes in death penalty review). *Contra* Combs, *The Supreme Court and Capital Punishment: Uncertainty, Ambiguity, and Judicial Control*, 7 So. U.L. REV. 1, 38-39 (1980) (arguing *Gregg* and companion cases enhance the control of the United States Supreme Court in formulating death penalty policies).

60. *Contra*, *Death Penalty Law*, *supra* note 48 (concluding Virginia's death penalty laws face future problems in light of the *Godfrey* decision).

attacked his sentence and went to his execution against his will.⁶¹ The others chose, as did Coppola, to forego further appeal and allow the sentence to be carried out on the designated date.

Frank Coppola was sentenced to death for murder committed while in the act of robbing the victim's home.⁶² In *Coppola v. Commonwealth*,⁶³ the Virginia Supreme Court upheld Coppola's death sentence since the evidence indicated Coppola had "repeatedly beat[en] [the victim's] head against the floor," an action sufficient to constitute "aggravated battery" as defined in *Smith*.⁶⁴ The conviction was upheld twice by the Virginia Supreme Court and denied review by the United States Supreme Court. Thereafter, Coppola fired his attorneys and asked that his sentence be carried out as planned.⁶⁵

One of Coppola's former attorneys initiated an appeal to the United States District Court through a "next friend" petition.⁶⁶ The district court denied a stay of execution based on its finding that Coppola was competent to waive his right to counsel and further appeal.⁶⁷ The Court of Appeals for the Fourth Circuit, however, overturned the decision and granted a stay of execution on the basis that the constitutionality of Virginia's death penalty statute was being challenged in court at that time.⁶⁸ In a five to two vote,⁶⁹ the United States Supreme Court, at the request

61. John A. Spenkelink was executed in May, 1979, in Florida after 22 unsuccessful appeals. See *Coleman v. Balkcom*, 451 U.S. 949, 956-64 (Rehnquist, J., dissenting from denial of cert.) (arguing the ineffectiveness of the death penalty and the "constitutional stalemate" preventing states from administering it). See generally Note, *Administering the Death Penalty*, 39 WASH. & LEE L. REV. 101 (1982) (discussing death-row inmates' avenues of appeal and the defects inherent in the system).

62. VA. CODE ANN. § 18.2-31(d) (Repl. Vol. 1982) (establishing as a capital offense "[t]he willful, deliberate and premeditated killing of any person in the commission of robbery while armed with a deadly weapon").

63. 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1103 (1980).

64. *Clark v. Commonwealth*, 220 Va. at 211, 257 S.E.2d at 805 (quoting *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135, cert. denied, 441 U.S. 967 (1978)). See *supra* notes 35-40 and accompanying text.

65. Richmond Times-Dispatch, Aug. 11, 1982, at A-1 col. 2-3.

66. *Id.* See *infra* note 73 and accompanying text.

67. Richmond Times-Dispatch, Aug. 11, 1982, at A-1, col. 2. See *infra* notes 73-78 and accompanying text.

68. Richmond Times-Dispatch, Aug. 11, 1982, at A-1, col. 2. See *Stamper v. Baskerville*, No. 82-6151 (4th Cir. May 27, 1982). On the day of argument in the *Stamper* case, the Fourth Circuit remanded the case to the district court since it raised issues on appeal in the federal court not addressed at the state court proceedings. Virginia prosecutors then attempted to have the inmate's "exhaustion of state remedies" requirement waived by the United States Supreme Court. This attempt was denied, and the case is likely to return to Virginia state courts. See Richmond Times-Dispatch, Feb. 23, 1983, at B-1, col. 2 and B-8, col. 4.

69. Justices Brennan and Marshall voted to uphold the stay. Justice O'Connor, unable to be reached, took no part in the vote. Justice Stevens abstained, desiring more information before making a decision. See Richmond Times-Dispatch, Aug. 11, 1982, at A-1, col. 3.

of the Commonwealth of Virginia, ruled to overturn the stay of execution and allow the sentence to be carried out as planned.⁷⁰

The rejection of the initial stay of execution in the district court rested on the issue of Coppola's competency to decide to forego further appeal. Imposition of the death penalty is subject to automatic review in many states,⁷¹ including Virginia.⁷² However, the question of a defendant's ability to waive his discretionary appeals is one in which the defendant's competency becomes an issue. Under the theory that the death-row inmate is incapable of petitioning for a stay of execution, courts have allowed eleventh-hour efforts by a "next friend" because of the inmate's presumed mental incompetency or related infirmities.⁷³ However, the Supreme Court in *Gilmore v. Utah*⁷⁴ terminated a stay of execution saying the defendant had "made a knowing and intelligent waiver of any and all federal rights he might have asserted after the . . . sentence was imposed. . . ."⁷⁵ The Court added that the "next friend" had "no standing to litigate an Eighth Amendment claim"⁷⁶ in light of Gilmore's competent waiver.⁷⁷ This view has been reiterated in subsequent cases.⁷⁸ The capital defendant who is mentally competent therefore is able to dismiss his counsel and waive discretionary review of his death sentence.

B. State Assisted Suicide?

In *Lenhard v. Wolff*,⁷⁹ two justices dissented from the Court's termination of a stay of execution, and concluded that "[b]y refusing to pursue his Eighth Amendment claim, . . . [the convicted] has, in effect, sought the State's assistance in committing suicide."⁸⁰ The dissent emphasized

70. Richmond Times-Dispatch, Aug. 11, 1982, at A-2, col. 2.

71. Those states with automatic appeals statutes are: Alabama, Arizona, California, Delaware, Florida, Georgia, Idaho, Louisiana, Maryland, Nevada, New Hampshire, Oklahoma, Pennsylvania, Virginia, and Wyoming. See Comment, *The Death Row Right to Die: Suicide or Intimate Decision?*, 54 S. CAL. L. REV. 575 (1981) [hereinafter referred to as *Right to Die*].

72. VA. CODE ANN. § 17-110.1 (Repl. Vol. 1982).

73. See *Lenhard v. Wolff*, 443 U.S. 1306 (1979), *vacating stay of execution*, 444 U.S. 807 (1979); see also, *Evans v. Bennett*, 440 U.S. 987 (1979) (desire of wanting to die submitted as evidence of incompetency), *vacating stay of execution*, 444 U.S. 1301 (1979). See generally *Right to Die*, *supra* note 71, at 585; H. BEDAU, *THE COURTS, THE CONSTITUTION AND CAPITAL PUNISHMENT* 121-25 (1977).

74. 429 U.S. 1012 (1976).

75. *Id.* at 1013.

76. *Id.* at 1017 (Stevens & Rehnquist, JJ., concurring).

77. *Id.* at 1016 (Burger C.J., & Powell, J., concurring).

78. See *Lenhard*, 443 U.S. at 1309 (Rehnquist, Circuit Justice). See also, 440 U.S. at 1303-06 (Rehnquist, Circuit Justice) (citing *Proffitt*, *Jurek*, & *Woodson*, as setting the standards in which the death sentence is constitutional, as well as the *Gilmore* decision on standing of the "next friend").

79. 443 U.S. 1306 (1979), *vacating stay of execution*, 444 U.S. 807 (1979).

80. 444 U.S. at 811-12 (Marshall, J., dissenting). See also, Richmond Times-Dispatch,

the inmate's complaints of "inhumane conditions" in the prison which caused him to declare that "he would rather die than remain incarcerated,"⁸¹ his desire to be executed swiftly "so that his family [would] suffer for the shortest possible period,"⁸² and his belief in the indignity of "ask[ing] for mercy."⁸³ There was nothing new in this death-row inmate's articulation of these reasons for accepting his sentence. Gary Gilmore had voiced similar complaints,⁸⁴ which led the dissent in that case to conclude that Gilmore could not "competently, knowingly, and intelligently . . . [decide] to let himself be killed."⁸⁵ The majority did not reply to the dissent's assertions in any of the cases. In each case, *Gilmore* and *Hammett v. Texas*, for example, the stay was terminated on the grounds that the defendant was competent to waive further appeal.⁸⁶

Frank Coppola made similar arguments to those in *Gilmore* and *Lenhard* in order to ensure that his execution was carried out. Coppola stated: "I have human dignity. I'm a person, and I like myself. I cannot see subjecting myself to all of these mitigating circumstances any longer. . . ."⁸⁷ He also added that his "family was suffering" and said the incident "adversely affect[ed] [his] kids among their peers."⁸⁸ Considering the district court's finding of competency, it was not surprising when Chief Justice Burger, acting as circuit justice, terminated the stay of execution granted by the Fourth Circuit.⁸⁹ The decision was in accordance with prior holdings addressing the same issue.⁹⁰ While an argument has been made that allowing the defendant to choose to die is "state-assisted suicide,"⁹¹ the courts seem disinclined to retreat from the position that discretionary appeals may be waived.

Aug. 11, 1982, at A-2, col. 1 (arguing the view of the dissent to achieve a stay of execution for Coppola).

81. 444 U.S. at 811 n.2. See also *Right to Die*, *supra* note 71, at 600.

82. 444 U.S. at 811 n.2.

83. *Id.*

84. *Gilmore*, 429 U.S. at 1015 n.4.

85. *Id.* at 1019 (Marshall, J., dissenting). See also, *Hammett v. Texas*, 448 U.S. 725, 726 (1980) (Marshall & Brennan, J.J., dissenting) (reiterating that the termination of a convicted felon's stay of execution when the condemned chose to waive further appeal is "state-administered suicide") (quoting *Lenhard v. Wolff*, 444 U.S. 807, 815 (1979) (Marshall, J., dissenting)).

86. See *Gilmore*, 429 U.S. at 1013; *Hammett*, 448 U.S. at 725.

87. Interview by United States District Judge D. Dortch Warriner with Frank J. Coppola, reprinted in *Richmond Times-Dispatch*, Aug. 11, 1982, at A-2, col. 5.

88. *Id.* at A-2, col.3.

89. See Lerner, *The Court Opts for Death*, *NEWSWEEK*, Aug. 23, 1982, at 28.

90. See *supra* notes 74-78 and accompanying text.

91. See, e.g., *Lenhard v. Wolff*, 444 U.S. 807, 815 (1979) (Marshall, J., dissenting).

IV. EFFECT OF THE DEATH PENALTY: DURESS AND THE PLEA BARGAIN

A. *The Self-Convicted Inmate*

The question of voluntary decision-making in plea bargaining has been a topic of discussion throughout criminal law.⁹² Plea bargaining is the predominant means of disposing of criminal offenses and serves both to ease the congestion of criminal dockets and to afford both prosecutor and defendant an opportunity to maximize their chances and minimize their losses.⁹³ However, legal writers and scholars have questioned the constitutionality of this process in capital cases in light of the duress caused by the possible imposition of the death penalty.⁹⁴

Harry Seigler was charged with brutally murdering an insurance agent during the course of a robbery.⁹⁵ During his trial for capital murder, carrying a possible sentence of death, the jury deliberated for more than four and one-half hours. Siegler earlier resisted any talk of plea bargaining, but agreed to plead guilty to first-degree murder in exchange for a forty-year prison sentence.⁹⁶ The trial occurred a few days after the Coppola execution, and Seigler insisted the reason for his decision to plea bargain was the duress caused by talk of the electric chair.⁹⁷

The controversy surrounding the issue of plea bargaining in capital cases dates to the United States Supreme Court decision in *Fay v. Noia*.⁹⁸ In that case, the Court held that waiver of a constitutional right is not valid if induced by fear of the death penalty.⁹⁹ The defendant in *Noia* did not file for appeal of a murder conviction based on a coerced confession because of fear that retrial would result in reconviction and the death penalty.¹⁰⁰ Because of this fear, the Court held that the defendant could not be allowed to waive his rights to federal habeas corpus relief.¹⁰¹

92. See generally Hughes, *Pleas Without Bargains*, 33 RUTGERS L. REV. 753, 753 (1981) ("Plea bargaining . . . threatens many values embodied in the Bill of Rights and, indeed, many values and interests of any rational and moral criminal justice system.").

93. *Id.* at 753-54.

94. The broad constitutional question of plea bargaining is beyond the scope of this comment. For a general discussion, see Hughes, *supra* note 92; Philips, *The Question of Voluntariness in the Plea Bargaining Controversy: A Philosophical Clarification*, 16 LAW & SOC'Y REV. 207 (1981-82).

95. McAllister & Green, *Media Descend on Self-Convicted Inmate*, Richmond Times-Dispatch, Aug. 22, 1982, at C-1, col. 3. Three minutes after Seigler agreed to plea bargain, the jury returned to say he should be acquitted. *Id.*

96. *Id.*

97. *Id.* at C-2, col. 5-6.

98. 372 U.S. 391 (1963). See also Halberstam, *Towards Neutral Principles in the Administration of Criminal Justice: A Critique of Supreme Court Decisions Sanctioning the Plea Bargaining Process*, 73 J. CRIM. L. & CRIMINOLOGY 1, 18-19 (1982).

99. 372 U.S. at 398.

100. *Id.*

101. *Id.*

Seven years later, however, the question of pleading guilty to avoid the risk of death came before the Supreme Court in *Brady v. United States*.¹⁰² The Court in *Brady* held that the defendant's plea was "intelligently made. He was advised by competent counsel, he was made aware of the nature of the charge against him. . . . [He] was aware of precisely what he was doing. . . ." ¹⁰³ In conclusion, the Court stated: "Although [the defendant's] plea of guilty may well have been motivated in part by a desire to avoid a possible death penalty, we are convinced that his plea was voluntarily and intelligently made and we have no reason to doubt that his solemn admission of guilt was truthful."¹⁰⁴ In *Parker v. North Carolina*,¹⁰⁵ decided the same day, the Court reemphasized "that an otherwise valid plea is not involuntary because induced by the defendant's desire to limit the possible maximum penalty. . . ." ¹⁰⁶

The *Brady* and *Parker* cases were decided before the *Furman* decision against arbitrary and capricious imposition of the death penalty¹⁰⁷ and the *Gregg* decision setting the standard for death penalty statutes.¹⁰⁸ However, *Parker* and *Brady* remain good law. The only question in these decisions concerned the "voluntariness" of the guilty plea. The courts have held that advising an accused of possible consequences of conviction does not amount to coercion.¹⁰⁹

B. Ambiguity and "Voluntariness"

The ambiguity in the Supreme Court decisions concerning plea bargaining in capital cases has fueled the controversy, especially since the Court has no current pronouncement on point. In *Noia* the Court held that a constitutional right to habeas corpus relief was *not* waived by failure to appeal in time because of the defendant's fear of the death penalty. However, that same fear, by itself, was judged insufficient to render a guilty plea involuntary in capital cases. The Supreme Court seems "determined not to weaken the plea bargaining process"¹¹⁰ and to construe narrowly any limits on the process.

102. 397 U.S. 742 (1970).

103. *Id.* at 756.

104. *Id.* at 758.

105. 397 U.S. 790 (1970).

106. *Id.* at 795.

107. See *supra* notes 6-9 and accompanying text.

108. See *supra* notes 10-17 and accompanying text.

109. See *Hopkins v. Anderson*, 507 F.2d 530, (10th Cir. 1974), *cert. denied*, 421 U.S. 920 (1975). Cf. *Giles v. Beto*, 437 F.2d 192, 195 (5th Cir. 1971) (holding a guilty plea is valid unless "induced by threats, misrepresentations, or improper promises"); *Jackson v. Cox*, 435 F.2d 1089, 1094 (4th Cir. 1970) (applying Virginia law and holding that "[t]he inevitable discussion of potential punishment in plea bargaining is not so coercive that it renders a subsequent plea involuntary").

110. See Halberstam, *supra* note 98, at 22.

The arguments focus on the definition of "voluntary." When a defendant is faced with impending death, can his decision to avoid it be characterized as truly voluntary? Opponents of the plea bargaining process argue that choosing between a possible death sentence and a lesser but more certain penalty is really not voluntary negotiation at all.¹¹¹ Advocates of plea bargaining urge that a defendant has a better bargaining situation with the process than in any "no-bargain" system.¹¹²

The controversy is waged in philosophical as well as legal terms, but the ambiguity of what constitutes "voluntary" has yet to be resolved. The problem can only be addressed through judicial guidance, but the possibility of new guidance is remote. The victims of the system will find no relief without direct evidence that threats and coercion have prompted the guilty plea.

V. CONCLUSION

The controversy surrounding the death penalty has changed little in light of the Coppola execution. Central issues have arisen from certain ambiguities and lack of concrete guidance in the recent decisions. The future seems to offer neither enlightenment nor significant change.

Any death penalty statute will be reviewed against the criteria established by *Gregg* and its companion cases.¹¹³ Laws which do not comply with those limits will be stricken as unconstitutional *per se*; laws which conform to the *Gregg* guidelines will be questioned as to constitutional interpretations in light of *Godfrey*.¹¹⁴ However, the state authorities have been given great deference in defining their statutory terms and in following those definitions.¹¹⁵ Virginia is no exception.¹¹⁶ As long as the statutory guidelines are followed, there is little chance of an arbitrary and capricious imposition of the death penalty.

As for waiver of discretionary appeal, there is little question as to its constitutionality as long as the death-row inmate is adjudged competent.¹¹⁷ Whether termed "state assisted suicide" or a voluntary decision, the system will allow those who want their death sentence carried out ample opportunity to do so. Thus, an execution may, to some extent, depend on the will of the convicted felon, since provisions for administering the death penalty allow ample opportunity to delay execution.¹¹⁸

111. See Philips, *supra* note 94, at 208.

112. *Id.* at 212.

113. See *supra* notes 10-17 and accompanying text.

114. See *supra* notes 25-27 and accompanying text.

115. See *supra* notes 28-30 and accompanying text.

116. See *supra* notes 31-47 and accompanying text.

117. See *supra* notes 71-78 and accompanying text.

118. See generally, Note, *Administering the Death Penalty*, 39 WASH. & LEE L. REV. 101 (1982) (discussing the various avenues of appeal and the problems inherent in the adminis-

However, for defendants who face capital charges, fear of a possible death sentence is not considered a mitigating factor in the ultimate decision to plead guilty to a lesser charge.¹¹⁹ Whether viewed as a voluntary or involuntary decision, precedent regards discussion of possible execution in the context of plea bargaining as lacking in coercive power.¹²⁰

The effects of the recent imposition of the death penalty remain pure conjecture. But, the *Coppola* case was not decidedly different from any in the past six years in that the positions have not changed and in that the established law was followed.

James T. Lloyd, Jr.

tration of the death penalty).

119. See *supra* notes 102-06 and accompanying text.

120. See *supra* notes 107-09 and accompanying text.