



[ePilot](#)   [Subscriptions](#)   [Advertising](#)   [Archives](#)   [Jobs](#)   [Contact Us](#)   [About The Pilot](#)



**Archives**

[Search Tips](#)  
[FAQ](#)

**ePilot**

[Free demo](#)  
[Sign up](#)  
[Feedback](#)

**Subscriptions**

[Delivery options](#)  
[Single copies](#)  
[Customer Service](#)

**Advertising**

[Advertise in print](#)  
[Advertise online](#)  
[Place a classified ad](#)

**VA. HIGH COURT PROPOSES DROPPING ``21-DAY RULE''**

**About The Pilot**

[Celebrations](#)  
[Joy Fund](#)  
[News ethics](#)  
[Schools / NIE](#)

**Archives**

**Contact us**

**Pilot Media Cos.**  
[HamptonRoads.com](#)  
[Pilot Online](#)



**Published:** October 14, 2000  
**Section:** LOCAL, page B1  
**Source:** TIM McGLONE, THE VIRGINIAN-PILOT  
© 2000- Landmark Communications Inc.

Death-row prisoners will be able to introduce new evidence in **court** any time after their conviction, under a rule change proposed Friday by the **Virginia Supreme Court**.

State officials had acknowledged Thursday that the **court** planned to study the issue. On Friday, the **court** announced details of its unprecedented proposal, which would eliminate the so-called "21-day rule" for death-row inmates that limits the introduction of new evidence to three weeks after a conviction. Civil rights activists and attorneys who represent condemned prisoners lauded the proposed change as a measure that could save an innocent person's life.

"This could be the most significant first step taken in **Virginia** to create some fairness in the administration of the death penalty," said Kent Willis, executive director of the **Virginia ACLU**.

The proposal comes at a time when the 21-day rule - the toughest in the nation - has come under intense scrutiny. Critics argue that the restriction unfairly prevents prisoners from bringing evidence of innocence to an appeals judge.

If approved, the change would allow death-row inmates to present newly discovered evidence of innocence to the **Virginia Supreme Court** at any time after conviction. Right now, only the governor can review new evidence more than three weeks after a conviction.

People on both sides of the death-penalty issue welcomed the move by the state's **highest court**.

Henry Heller, director of Virginians for Alternatives to the Death Penalty, called the **court's** decision "big news."

Even some legislators who have opposed extending the 21-day rule support the proposal, including Kenneth W. Stolle, a proponent of capital punishment.

"I don't think anybody objects to the Supreme **Court** considering an exception to the 21-day rule in capital cases," said Stolle, R-**Virginia Beach**.

**Court** officials could not say what prompted the proposal. Stolle said he has discussed the change with Chief Justice Harry L. Carrico during the past year.

Stolle speculated that a bitter fight in the last General Assembly session over a bill to extend the 21-day rule may have played a role in the **court's** decision.

He said Gov. Jim Gilmore's recent pardon of former death-row inmate Earl Washington Jr. probably had nothing to do with the proposal, but advances in DNA technology probably did.

DNA tests that led to Washington's pardon could not be admitted into **court** because of the 21-day rule.

"It does seem that this comes at a time when the entire nation, and particularly **Virginia**, has placed the death penalty under a microscope," said Willis of the American Civil Liberties Union, which issued a scathing report on **Virginia's** capital punishment system earlier this year.

According to the proposal, if the **court** agrees to review a case based on newly discovered evidence, it could then dismiss the case and set the prisoner free. The **court** also could decide to grant a new trial or dismiss the claim as baseless.

The **Virginia Supreme Court** has not overturned a death-penalty case since the state resumed executions in 1982. Critics argue that the 21-day rule is one reason for that.

Officials who have read the proposal say it still sets a **high** standard before the **court** will even consider new evidence.

The proposal states that there must be a "substantial likelihood" that the prisoner is actually innocent before the **court** will agree to review the new evidence. But "substantial likelihood" is not defined, and there likely will be arguments over its meaning.

Andrew A. Protogyrou, a Norfolk lawyer who has handled a number of death-penalty cases, said the **court's** proposal is long overdue and that he has been "begging" for it.

He said one of his clients, Russel Burket, who was executed this summer, was not allowed to show an appeals **court** evidence that could have resulted in new DNA testing.

An affidavit, never introduced at trial and purportedly written by Burket's father, implicated someone else in the murder of a **Virginia Beach** woman and her daughter.

Protogyrou said that under the proposed rule, he could have used that affidavit to gain access to the Supreme **Court**

and possibly get DNA evidence tested.

In the end, Burket had to rely on the governor, who denied the request for DNA testing and refused to stop the execution.

The Supreme **Court** has opened a 30-day period to receive comments about the proposed rule change.

Stolle, a member of the state Crime Commission, said he expects the **court** to receive a wide range of comments.

Crime Commission members already have differences of opinion, he said. Some support the proposal, some think it opens the door too wide, and others believe the Supreme **Court** is not going far enough.

Some say the post-conviction review should be opened up to all prisoners, not just death-row inmates, he said.

The proposal can be read in the current issue of **Virginia Lawyer**, available online at [www.vsb.org](http://www.vsb.org). It also will be published in *Lawyers Weekly*, due out Monday.

Comments can be sent to Robert N. Baldwin, executive secretary of the Supreme **Court** of **Virginia**, Third Floor, Supreme **Court** Building, 100 N. Main St., Richmond, VA 23219, on or before Nov. 13.

Reach Tim McGlone at 446-2343 or [tmcglone\(AT\)pilotonline.com](mailto:tmcglone(AT)pilotonline.com)

**Description of illustration(s):**

GRAPHIC

THE PROPOSAL The change: The state Supreme **Court** would eliminate the "21-day rule" for death-row inmates, allowing them to submit new evidence at any time after their conviction. Now, only the governor can review evidence introduced more than 21 days after a conviction in a capital punishment case.

The limits: The proposal states that there must be a "substantial likelihood" that a prisoner is innocent before the **court** will agree to review the new evidence.

To comment: The Supreme **Court** will accept comments on the proposal until Nov. 13. Send comments to Robert N. Baldwin, executive secretary of the Supreme **Court** of **Virginia**, Third Floor, Supreme **Court** Building, 100 N. Main St., Richmond, VA 23219.

---

© 2000- Virginian-Pilot

**Questions?** For NewsLibrary billing, call 1-800-896-5587 / [Archives FAQ](#) / [E-mail us](#)  
[HamptonRoads.com](#) and [Pilot Online](#)