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By Jennifer Bier
Monday, October 23, 2000

The Virginia Supreme Court shook the state's criminal justice system recently when it announced it would consider doing away with one of the strictest procedural rules on death penalty cases in the country.

But close observers say the court's Oct. 13 proposal to abolish the so-called 21-day rule in capital cases - which gives convicts only three weeks to introduce previously undiscovered evidence of innocence in order to gain a new trial - is more than a simple rule change. It is a mark of subtle shifts in the direction of the historically conservative court that has long been one of the country's toughest jurisdictions when it comes to criminal matters.

Some believe that relatively new justices - especially Justice Donald Lemons - are moving the seven-member court in a more moderate direction. Others believe the court is responding to a series of troubling cases where convicted killers have been exonerated or convictions have been overturned.

Either way, change is in the air.

"The composition of the court has changed - there's no question of that," says Richmond criminal defense attorney Gerald Zerkin, who has handled several death penalty matters. "I was surprised by [the proposed amendment], but not shocked by it. A year ago, I would have been shocked by it."

Lawyers who practice on the civil side agree that the court is shifting.

"There has been a movement to the center. It has been healthy," says Donald Patten, partner at Newport News' Patten, Wornom, Hatten & Diamonstein and president of the Virginia Trial Lawyers Association. "Ten years ago, the court might not even have considered [the rule change]. The court wants to be fair, and perhaps their ideas of fairness are becoming more modern."

In the last five years, the court has gotten three new justices, including its third woman justice. It was a lively burst of turnover for the court, which had not seen a new member since 1991.

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- Lawrence Koontz Jr. was named to a 12-year term by the General Assembly in 1995. He was a charter member of the Virginia Court of Appeals, established in 1985.
- Cynthia Kinser is a former federal magistrate judge in the Western District of Virginia. She was named to the court in 1997.
- Donald Lemons is a former trial judge who also sat on the Virginia Court of Appeals. He began his term in March.

The other justices, Chief Justice Harry Carrico and Justices Elizabeth Lacy, Leroy Hassell Sr., and Barbara Milano Keenan were appointed in 1961, 1989, 1989, and 1991, respectively.

Criminal Concerns

The present version of the 21-day rule dates back to 1971, when the Virginia Supreme Court rules were rewritten. Under a 1976 amendment, trial judges can suspend final judgment in a case to give a litigant time to seek a new trial.

It has been the subject of criticism for years.

Though the 21-day deadline applies in all civil and criminal cases, the court has now proposed eliminating it only in capital cases.

Rule changes require a majority vote of the justices. The court has not released any information about which of the justices voted to propose an amendment, and Chief Justice Harry Carrico declined comment on the rule change.

But criminal defense attorneys feel it is likely that Lemons played a significant role in the move.

"Perhaps his coming on the court and his discussion with us may be involved with the court's swing," says Andrew Protogyrou, a partner at Norfolk's Protogyrou and Rigney who was a member of a three-person Virginia College of Criminal Defense Attorneys panel that interviewed Lemons when he was being considered for the high court.

Protogyrou says that last winter, he and his colleagues asked Lemons "several questions [that] dealt with the handling of state habeas petitions. He was extremely informed on that subject, and he was going to make it a priority."

Justice Lemons agrees that he is concerned about the death penalty and state habeas issues, but contends that his concern is no greater than that of the other justices on the court. "I don't come to this court with an agenda," he said last week.

A Richmond Circuit Court judge for three years before he joined the Virginia Court of Appeals in 1998, Lemons has already shown that he is not afraid to dissent from his colleagues. On June 9, two months after he sat for his first case, Lemons wrote the dissent in *Walsh v. Bennett*, a civil case in which a trial court struck the testimony of an

Bennett, a civil case in which a trial court struck the testimony of an expert witness because of the plaintiff's failure to comply with a discovery order.

The Virginia Supreme Court voted 5-2 to overturn the decision. Lemons, joined by Lacy, wrote, "I respectfully dissent from the majority opinion because it elevates form over substance."

And although some criminal law practitioners believe that Lemons pushed for the court to amend the 21-day rule, he does not side with every criminal defendant he sees. As a member of the Virginia Court of Appeals, for example, Lemons broke from the majority in *Clay v. Commonwealth* in December 1998, calling for the appellate court to uphold a robbery conviction.

While it is unclear whether Lemons or others among the newer justices played a key role in the decision to reconsider the 21-day rule, there's no doubt that controversy over Virginia criminal proceedings and death penalty jurisprudence is increasing.

The most prominent example is the case of Earl Washington, a convicted murderer who was pardoned by Gov. James Gilmore last month after DNA tests could not link him to the 1982 rape and murder of Rebecca Williams. Six years earlier, then-Gov. Douglas Wilder commuted Washington's sentence to life in prison because of concerns about the evidence against him.

"Washington came as close to going to the electric chair as you possibly can," says Scott Sundby, a professor at Washington & Lee University School of Law. "That perhaps made the court recognize that, as much as we work to make the system go, there will be new evidence that comes forward" more than 21 days after a conviction in trial court.

Other death row cases have caused a stir this year.

Russel Burket was executed in August after the U.S. Court of Appeals for the 4th Circuit refused to consider an unsigned affidavit that raised a conflict of interest claim against his trial counsel, and Gov. James Gilmore declined to stop the September execution of Derek Barnabei after agreeing to test DNA evidence that ultimately failed to exonerate him.

The justices of the Virginia Supreme Court are not the only officials to question the 21-day rule.

In recent years, the Virginia General Assembly has considered legislation that would alter the rule. Those efforts failed.

Alexandria's Marvin Miller, president-elect of the Virginia College of Criminal Defense Attorneys, says, "I think that while no one was looking, [the rule] was OK. Now that more people are looking," it is receiving greater scrutiny. "There is abroad in the land an understanding that there's something wrong," he adds.

Miller is quite familiar with another case that may have influenced the Virginia Supreme Court to make a change. Along with Barry Scheck, Miller aided in the representation of Edward Honaker, who was

Miller aided in the representation of Edward Honaker, who was convicted of sexual assault, sodomy, and rape, and sentenced to life in prison. But when Honaker was cleared in 1994 by DNA evidence obtained well after 21 days had passed, the decision to free him fell into then-Gov. George Allen's hands.

"[Honaker] was in there for 10 years, and it took forever to get the DNA evidence. We had to go to the governor, and the governor had to hem and haw about what he wanted to do," says Miller. "Barry persuaded Governor Allen to set him loose."

The Virginia Supreme Court's proposed rule, which sets no time limit for the introduction of new evidence, would not have helped Honaker because it applies only to those sentenced to death.

"I guess that, because of the difference between a life sentence and a death sentence, they felt it was critical to make a change in death sentences," opines Richmond defense attorney Robert Wagner, who is not at all certain that the relatively new justices are more liberal than their older counterparts.

"I think that the court has gotten more conservative with recent appointments," says the Wagner & Wagner partner.

Legislative Authority

One person who is not likely to agree with Wagner on that is Robert Horan Jr., who has been the Fairfax County Commonwealth's attorney since 1967 and was chosen by other Northern Virginia commonwealth's attorneys to speak on their behalf about the proposed rule change.

Horan adamantly opposes the elimination of the 21-day limit in capital cases, and questions the authority of the Virginia Supreme Court to amend the rule. "What the court is trying to do [is] what the legislature has been trying to do for the past two years," says Horan. "I question if the Virginia Supreme Court, by doing this, is invading the province of the General Assembly."

His disagreement with the proposed rule stems especially from what he sees as the failure to put an outside time limit on the discovery of new evidence, or on the hearings that convicted felons can receive on that evidence.

"You will never, ever go broke betting on the inventiveness of the American lawyer, and if you give them a card to play, they will play it. This is just one more card," says Horan.

Horan will have a chance to let the justices know of the potential downfalls of the rule change on Nov. 13. Though the court normally amends its rules without seeking comment, this time it offered a proposed rule and invited responses for 30 days. Supreme Court Clerk David Beach said he cannot remember the last time this happened.

But regardless of what happens with the rule, many attorneys working in the civil and criminal sectors agree that the court is undergoing a change.

"I think that there has been a shift towards the middle. But they've always been a court a little to the right of center," says Patten, president of the Virginia Trial Lawyers Association.

John Shea of Richmond's Marks & Harrison agrees that the court is shifting with the arrival of its new members.

"I wouldn't say that anyone would define the Virginia Supreme Court as liberal," says Shea. "They are less conservative than before. It's a gradual thing."

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