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HOKE v. COMMONWEALTH 237 Va. 303,377 S.E.2d 595 (1989) Supreme Court of Virginia

juror to answer the questions "yes," the juror might be disqualified. The life/death qualification of a juror to sit in a capital case is a federal constitutional question.

Counsel for capital defendants also should continue to ask questions similar to Buchanan's first question regarding pretrial publicity. Trial courts routinely ask jurors if they can set aside any impressions or opinions received of the case formed before trial. This question, however, leaves out a logical step: determining whether the juror has any specific impressions to set aside and what they are. The right to a fair and impartial jury is also a federal constitutional question.

Defense counsel also should continue to request individual sequestered voir dire, additional peremptory challenges, and meaningful, non-leading voir dire. Many trial judges will and have exercised their discretion to grant these requests. Counsel should continue to tie these requests to the Sixth Amendment to the United States Constitution's guarantee of the right to a fair and impartial jury and to *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976), as did *Buchanan*. *Woodson* held that due process requires a greater degree of reliability in a process that can determine death as an appropriate punishment. This has been termed "super due process." The United States Supreme Court has acknowledged this principle recently by suggesting that special capital procedures are available only at trial and on direct appeal. *Murray v. Giarratano*, 109 S. Ct. 2765, 106 L. Ed. 2d 1 (1989) (see discussion of *Giarratano*, this issue). Since the trial jury is the life/death decision maker, more Sixth Amendment procedures are arguably required to ensure reliability.

Individually, none of the objections based on jury selection procedures is particularly strong in the constitutional sense. The combined effect of all the things Buchanan complained about, however, could amount to a denial of due process. For instance, if the trial court denies defense counsel's motions for individual sequestered voir dire, meaningful, non-leading voir dire, additional peremptory challenges, change of venue, and others, the combined effect might well be that the defendant is not tried by a lawfully constituted, impartial jury in violation of the Sixth Amendment. Accordingly, defense counsel should object to the jury selection process as a whole, and tie this larger objection to federal law as described above. While individual jury selection problems may not result in an eventual reversal, a combined objection may.

It should also be remembered that objections to the qualifications of prospective jurors or limitations on examination of a particular prospective juror must be restated at the time the juror is about to be seated. Valid objections which counsel made during voir dire are lost if not renewed when the jury is seated. In addition, counsel should note which jurors counsel would challenge if additional peremptory challenges were granted. Only in this way will questionable jury selection procedures be preserved for appeal.

Summary and analysis by: Diane U. Montgomery

HOKE v. COMMONWEALTH
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FACTS

Ronald Lee Hoke, Sr., was convicted of capital murder in the commission of rape, robbery, and abduction. On October 7, 1985 the police found Virginia C. Stell's body in her apartment. Stell had been stabbed twice. A medical examiner expressed belief that Stell "had some period of time of survival, at least several minutes." Her arms bore severe bruises. Stell was tightly bound with electrical cords. Evidence indicated Stell had been penetrated vaginally and anally. Semen matching Hoke's blood type was found on sheets and a bedspread in Stell's bedroom.

On October 15, 1985, Hoke surrendered to police in Hagerstown, Maryland confessing to Stell's murder. He stated that they had engaged in consensual sex. They then argued. Stell's murder ensued. Hoke stated that Stell had taken unfair advantage of him in a drug deal, so he ransacked her apartment looking to recoup his loss. He also stated that he had previously pondered killing someone, not attributable to any provocation.

In addition to having been murdered, the jury found that Stell had been raped, robbed, and abducted. The jury found that each of these offenses occurred as an interdependent part of a common criminal design (murder and rape, murder and robbery, and murder and abduction). Each of these offenses gave rise to separate capital murder counts against the defendant. *See*, Va. Code Ann. § 18.2-31(1)(4)(5) (1988).

The defendant's appeal raised three issues concerning which no objection was raised at trial: that the court clerk struck the wrong venireman pursuant to the defense's fourth peremptory strike, that the trial court failed to rule on a defense motion for change of venue, and that Virginia's standard verdict form is constitutionally deficient.

HOLDING

On automatic appeal, the Virginia Supreme Court held that the findings of fact regarding the three capital murder counts were supported by the evidence. The rape charge was supported by the bruised and bound condition of the corpse in addition to the evidence of sexual activity. The robbery charge was supported by the ransacking of Stell's apartment at or about the time of the murder. The abduction was supported by Stell's period of survival after the stabbing and the excessive force involved in binding Stell's body. The court found that more force was involved in binding Stell than was necessary to affect a rape.

The court also held that Hoke waived his appeal to the mistakes in voir dire and change of venue because defense counsel failed to object to the former and failed to renew its motion for the latter. Also defense counsel presented no evidence in support of its motion for change of venue, making harmless any error in failing to rule on the motion.

Despite defense counsel's failure to object at trial, the court ruled that the use of Virginia's standard verdict form did not violate Hoke's constitutional right to a unanimous verdict. The jury's verdict incorporated the statutory language of the verdict form. The trial judge polled the jury. The opinion is silent concerning the scope of the questions used in polling the jury. Polling could entail at least three different levels of inquiry. The polling could have inquired whether each individual juryperson found that the defendant deserved the death penalty. Polling questions could have asked whether the juryperson agreed with the verdict as worded in the verdict form. More precise polling could have inquired into which aggravating predicate the juryperson found. Nevertheless, the Virginia Supreme

Court held that the jury unanimously found the existence of both predicates which justify the death penalty (future dangerousness and vileness) even though only one was necessary to sustain the death penalty. The court held that the jury's findings of future dangerousness and vileness were supported by the evidence.

The court failed to address the constitutionality of the language of the verdict form on its face. The wording of the verdict form leaves open the possibility of the jury unanimously finding either future dangerousness or vileness, but not unanimously agreeing as to which predicate exists. The wording of the verdict form also leaves open the possibility that a jury will unanimously find vileness but fail to agree on the elements of the vileness: torture, depravity of mind, or aggravated battery to the victim, each of which has been found independently sufficient to support a death sentence.

ANALYSIS

The importance of *Hoke* to attorneys in Virginia may be seen in several different issues. First, *Hoke* underscores the paramount importance of preserving issues on the record at trial. By failing to object, the defense waived the right to raise three possibly meritorious issues on appeal. The court preserved the verdict form issue by ruling on it voluntarily. Defense counsel should be careful not to summarily forfeit available objections just because the objection will most probably be overruled, as illustrated by the verdict form issue. Absent an objection, claims later determined by federal courts to be meritorious will be lost.

Virginia attorneys should also learn from this case to assess their cases as objectively as possible. The Virginia capital murder statute seems to be narrowly drawn. Nevertheless, the Supreme Court of Virginia has construed the statute very broadly. In spite of testimony of consensual sex followed by homicide, the court found evidence sufficient to support rape. Hoke's ransacking of Stell's apartment after murdering her was seen as sufficiently connected to the murder to support a finding of guilt of murder during commission of robbery while armed with a deadly weapon, again supporting a capital conviction. The court also found that there was sufficient force beyond that inherent in rape to support a conviction of abduction. These findings should put Virginia defense attorneys on notice that the capital murder statute will be construed very broadly.

Summary and analysis by: Kerry D. Lee

THE CONSTITUTIONAL DEFICIENCIES OF VIRGINIA'S "VILENESS" AGGRAVATING FACTOR

By: Juliette A. Falkner

I. As applied in Virginia the vileness predicate in Va. Code Ann. §19.2-264.2 is unconstitutional.

For an individual to receive a sentence of death in Virginia, the jury must find beyond a reasonable doubt the probability that: 1) the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or; 2) that the defendant's conduct in committing the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim." Va. Code Ann. § 19.2-264.2 (1983). All of these requirements constitute the "aggravating factors" of Virginia's death penalty scheme. The first factor is known as the "future dangerousness" predicate. Facially, future dangerousness is constitutional. *Jurek v. Texas*, 428 U.S. 262, 274, 96 S. Ct. 2950, 2957, 49 L. Ed. 2d 929, 940 (1988) (holding Texas capital sentencing scheme which allowed a jury to consider "future dangerousness" was not unconstitutional); *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). The second factor is known as the "vileness" predicate. On its face and as applied in Virginia the "vileness predicate" in § 19.2-264 is unconstitutional. *See Maynard v. Cartwright*, 486 U.S. 356, ____, 108 S. Ct. 1853, 1859, 100 L. Ed. 2d 372, 381 (1988) (unless the trial court communicates a limiting instruction to the jury regarding the meaning of statutory "vileness factors," the jury's discretion is unguided); *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 1765, 64 L. Ed. 2d 398, 406 (1980) (standing alone the words "outrageously or wantonly vile, horrible and inhuman" fail to limit the jury's discretion).

The purpose of aggravating factors is twofold under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. First, aggravating factors narrow the class of death eligible defendants in a capital trial. Second, aggravating factors channel the discretion of the jury to prevent the arbitrary and capricious imposition of the death penalty:

> [A]n aggravating circumstance must genuinely narrow the class of persons elibible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder....[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 877-78, 103 S. Ct. 2733, 2742-44, 77 L. Ed. 2d 235, 249-250 (1983); *see also*, Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. Rev. 978-79 (1986) (discussing the general purpose of aggravating factors). Thus, guiding and limiting the capital sentencer's discretion "so as to minimize the risk of wholly arbitrary and capricious action" is a fundamental constitutional requirement. *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2940-41, 49 L. Ed. 2d 859 (1976); *see also Maynard*, 486 U.S. at ____, 108 S. Ct. at 1858. As applied in Virginia, the vileness predicate in Va. Code Ann. § 19.2-264.2 fails to fulfill this constitutional requirement.

In *Godfrey v. Georgia*, 446 U.S. at 420, the judge instructed the jury that a death sentence could be imposed if the jury found the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the Victim." *Id.* at 429. Based on this instruction, the jury sentenced Godfrey to death. *Id.* The United States Supreme Court held "there is nothing in these few words, standing alone that implied any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.*; *see also, Maynard*, 486 U.S. at ____, 108 S. Ct. at 1853. The *Maynard* Court found that "especially heinous, atrocious and cruel" means the same as "outrageously or wantonly vile, horrible or inhuman" as used in *Godfrey*. *Id.* at ____, 108 S. Ct. 1859.