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QUESINBERRY v. COMMONWEALTH 241 Va. 364,402 S.E.2d 218 (1991)

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before, during and after the commission of a murder until the actual trial, including anything which is debatably of a criminal nature. It is also worth noting that Strickler challenged the sufficiency of the evidence in the aggregate and not the relevance of the arguably non-violent acts.

Bill of Particulars

The Virginia Supreme Court upheld the circuit court's denial of Strickler's motion for a bill of particulars. The bill asked:

A. To identify the grounds, and all of them, on which [the Commonwealth] contends that defendant is guilty of capital murder under Virginia Code Sect. 18.2-31, as amended, 1950.

B. To identify the evidence, and all of it, upon which it intends to rely in seeking a conviction of defendant upon the charge of capital murder.

D. To identify the evidence, and all of it, on which it intends to rely in support of the aggravating factors identified, and all other evidence which it intends to introduce in support of its contention that death is the appropriate punishment for this defendant.

241 Va. at 490. The court stated that the motion was properly denied because:

> [t]o be sufficient, an indictment must give the accused "notice of the nature and character of the offense charged so he can make his defense." When an indictment meets that standard, as the indictments here do, a bill of particulars is not required.

Id. (quoting *Wilder v. Commonwealth*, 217 Va. 145, 147, 225 S.E.2d 411, 413 (1976))(citing *Ward v. Commonwealth*, 205 Va. 564, 569, 138 S.E.2d 293, 296-97 (1964); *Tasker v. Commonwealth*, 202 Va. 1019, 1024, 121 S.E.2d 459, 462, 463 (1961)). The court also held that anything sought by the petitioner's motion for a bill of particulars above and beyond the "'notice of the nature and character of the offense charged'" was a discovery request which must be made pursuant to the rules of the court. *Id. See generally* case summary of *Quesinberry v. Commonwealth*, Capital Defense Digest, this issue.

It is important to note that part (C) of Strickler's motion for a bill of particulars was granted by the circuit court. This is significant because the indictment did not give the "nature and character" of the aggravating factors that the commonwealth sought to prove and part (C) only asked the commonwealth to **identify** the aggravating factors. This motion should be granted so that the defendant can receive his due process right to be heard and to present evidence which will allow him to defend against evidence of aggravating factors. Defense counsel may contact the Virginia Capital Case Clearinghouse for a new model bill of particulars and supporting memorandum. Finally, is arguable that merely asking the commonwealth to identify the **type** of evidence it will seek to introduce is not the same as discovery. In addition, in light of the courts' willingness to allow a variety of conduct to prove future dangerousness, motions in limine on future dangerousness should be considered to exclude evidence which is not probative of defendant's propensity to commit acts of violence in the future.

Summary and analysis by:
Marcus E. Garcia

QUESINBERRY v. COMMONWEALTH

241 Va. 364, 402 S.E.2d 218 (1991)
Supreme Court of Virginia

FACTS

A Virginia jury convicted George Adrian Quesinberry of capital murder in the commission of a robbery. Virginia Code § 18.2-31(d) (now 4). Quesinberry and two friends were in the process of robbing an office building when they were interrupted by the owner, Thomas L. Haynes. Quesinberry shot Haynes twice in the back as the store owner attempted to flee. As the three thieves were leaving, Haynes tried to push himself up. Quesinberry hit him in the head at least twice with his pistol, and Haynes died later that morning.

Quesinberry filed a pre-trial motion for a bill of particulars requesting that the court direct the Commonwealth to identify: (1) the grounds, and all of them, on which the Commonwealth contended that the defendant was guilty of capital murder; (2) the evidence, and all of it, upon which the Commonwealth intended to rely in seeking a conviction of the defendant upon the charge of capital murder; (3) the aggravating factors, if any, upon which the Commonwealth intended to rely in seeking the death penalty, should the defendant be convicted of capital murder; and (4) the evidence, and all of it, on which the Commonwealth intended to rely in support of the aggravating factors identified, and all other evidence which the Commonwealth intended to introduce in support of its contention that death was the appropriate punishment for this defendant. The trial court granted the motion with respect to sections (1) and (3), but denied the motion with respect to sections (2) and (4). *Quesinberry v. Commonwealth*, 241 Va. 364, 372, 402 S.E.2d 218, 223 (1991).

During the penalty stage, Quesinberry's attorney objected to the introduction of evidence that the defendant possessed a stolen gun and that the defendant was a user of marijuana and cocaine. The court admitted the evidence over defendant's objection. *Id.* at 380, 402 S.E.2d 227. In contrast, the court refused to instruct the jury that a life sentence meant that Quesinberry would be ineligible for parole for thirty years. *Id.* at 371, 402 S.E.2d 223. After hearing the instructions, the jury retired to deliberate and fix punishment. The jury returned and requested definitions of several words appearing in the instructions: "culpable," "moral turpitude," "quantitatively," and "qualitatively." The court gave definitions without objection from counsel. *Id.* at 380, 402 S.E.2d 228. Immediately after the jury left the courtroom to resume deliberation, Quesinberry's attorney objected to the definitions given by the court. The court overruled the objection as untimely. The jury fixed Quesinberry's punishment at death.

Quesinberry appealed to the Virginia Supreme Court, claiming, *inter alia*, that the trial court erred in not ordering a bill of particulars in accordance with paragraphs (2) and (4) of his motion; that the court erred in admitting evidence that he had possessed stolen property and used marijuana and cocaine; that the court erred in refusing to instruct the jury as to the practical consequences of a life sentence; and that the trial court erred in its definitions of the terms for which the jury sought clarification.

HOLDING

Quesinberry assigned numerous errors. Some of these the court treated in a conclusory fashion. Others did not involve death penalty law or are unlikely to arise often because they revolved around facts peculiar to the case. These issues, which will not be discussed in this summary, include: the constitutionality of the death penalty; the constitutionality of

Virginia's statutory capital murder framework; the denial of defendant's request for additional peremptory challenges; the sufficiency of proof that the robbery predicate for capital murder had been established; the sufficiency of a post-verdict instruction regarding the defendant's failure to testify; the permissiblity of allowing the jury to view the crime scene; the admissibility of photographs of the victim's wounds and a photograph of the victim taken during the autopsy; and the proportionality of the death sentence with other Virginia cases.

The issues meriting discussion are included in the remainder of this summary. The court ruled that a defendant is not entitled to a bill of particulars as a matter of right. In so holding, the court relied upon Virginia Code § 19.2-230, which states, "a court of record **may** direct the filing of a bill of particulars at any time before trial." *Id.* at 372, 402 S.E.2d 223 (emphasis in original). Thus, the decision to grant or deny a motion for a bill of particulars is within the discretion of the trial court.

The court also held that evidence indicating that the weapon used by the defendant had been stolen was properly admitted. The court explained, in a conclusory fashion, that such evidence was relevant to show Quesinberry's "propensity to arm himself with a weapon." *Id.* at 380, 402 S.E.2d 227. Similarly, the court ruled that evidence of Quesinberry's drug use was relevant as indicative of his "future dangerousness." *Id.* Conversely, the court held that a defendant is not entitled to inform a jury as to the practical effects of a life sentence in a capital case. *Id.* at 371, 402 S.E.2d 223.

Finally, the court concluded that some claims were defaulted because defense counsel failed to argue them on brief. *Id.* at 370, 402 S.E.2d 222. The court also held defaulted Quesinberry's claim regarding the court's definitions of terms in the jury instructions, given pursuant the request of the jury. *Id.* at 380, 402 S.E.2d 228. The court based its ruling on defense counsel's failure to make a timely objection. *Id.*

ANALYSIS / APPLICATION IN VIRGINIA

A. Bill of Particulars

The most important aspect of the court's decision on defense counsel's motion for a bill of particulars is that the trial court **did** grant two of counsel's requests. Regardless of whether a defendant is entitled to a bill of particulars **as a matter of right**, it should be requested, especially since an indictment gives no notice of the aggravating factors upon which the Commonwealth intends to rely. The Virginia Capital Case Clearinghouse has prepared a new model motion for a bill of particulars with a supporting memorandum. Where the prosecution intends to prove the "vileness" factor under Virginia Code section 19.2-264.4C, the new motion requests that the prosecution identify each narrowing construction upon which it intends to offer evidence. *See* Lago, *Litigating the "Vileness" Factor in Virginia*, Capital Defense Digest, this issue. Copies of the motion and supporting memorandum are available through the Virginia Capital Case Clearinghouse.

A motion requesting the court to direct the filing of a bill of particulars is especially important in light of the United States Supreme Court's recent decisions in *Lankford v. Idaho*, 111 S. Ct. 1723 (1991), and *Shell v. Mississippi*, 111 S. Ct. 313 (1990). In *Lankford*, the Court emphasized the importance of giving notice to the defendant, enabling the adversary process to function at a capital penalty trial. *Lankford*, 111 S. Ct. at 1732-33. *See* case summary of *Lankford*, Capital Defense Digest, this issue. In *Shell*, the Court struck Mississippi's limiting construction of its "vileness" factor because the construction did not provide adequate guidance to the sentencer. *Shell*, 111 S. Ct. at 313. *See* case summary of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991). A bill of particulars is designed to give the defendant notice of the issues which will be important in the trial, including the penalty phase issues which are unique to a capital case.

Although under most circumstances the decision to grant or deny a motion for a bill of particulars is within the court's discretion, there are some situations where the court **must** grant at least part of the motion. Virginia Code section 19.2-399 **requires** the defense to raise certain issues pretrial, including an attempt to dismiss the charge or charging document on the ground that the statute upon which it is based is unconstitutional. Section 19.2-399 also requires the court and Commonwealth to aid the defense in making these motions in a timely fashion. When the defense has filed a motion for a bill of particulars relating to a section 19.2-399 motion, the trial court "**shall** . . . direct the Commonwealth to file a bill of particulars . . . ." (emphasis added). A *Shell* attack on the charging document, claiming inadequate guidance in Virginia's narrowing construction of the "vileness" factor, must be made pretrial. Such an attack is directed toward the unconstitutional application of the Virginia statute. Thus, section 19.2-399 arguably requires the court to direct the Commonwealth to file a bill of particulars for any narrowing construction of the "vileness" factor upon which it intends to rely in seeking the death penalty.

B. Evidence of Aggravating Factors

It is difficult to understand the court's reasoning in allowing evidence of Quesinberry's possession of a stolen weapon as relevant to an aggravating factor in support of imposing the death penalty. Quesinberry was convicted for capital murder under Virginia Code Section 18.2-31(d). In order to **convict** Quesinberry under 18.2-31(d), the Commonwealth was required to show that he killed the victim with premeditation in the commission of a robbery or attempted robbery **while armed with a dangerous weapon**. Possession of a weapon is an element of the crime itself, and defendant's possession alone, therefore, cannot be used as an aggravating factor in the penalty phase. The only additional information which might be used as an aggravator is the fact that the weapon was stolen. However, the court's explanation of the relevancy of the evidence is that it shows the defendant's "propensity to arm himself." *Quesinberry* at 380, 402 S.E.2d 227. The fact that a weapon happens to be stolen could hardly make the possessor more likely to be armed in the future. This illogical conclusion reveals just how far the court is willing to go in allowing evidence as probative of future dangerousness.

The court's ruling in allowing evidence of defendant's drug use is similarly confusing. Virginia Code Section 19.2-264.4 enumerates, but does not limit, the mitigating factors which the defendant may introduce. Among those mitigating factors is the defendant's impaired capacity "to appreciate the criminality of his [or her] conduct or to conform his [or her] conduct to the requirements of law," a not unlikely result of drug use. In *Quesinberry*, the court has allowed the Commonwealth to introduce as an aggravating factor, evidence which arguably mitigates the crime under the statute.

There is a paradox in weighing aggravating factors with mitigating factors. The jury is asked to balance all mitigating factors, including those enumerated in statute (i.e., the defendant's impaired capacity), with the statutory aggravators (i.e., the defendant's future dangerousness). Certain facts are likely to fit into both categories. As a practical matter, a person's impaired capacity at the time of a particular offense may or may not be likely to render that person more dangerous in the future. However, the Virginia legislature's specific inclusion of that factor as a mitigator should implicitly exclude it from the broad group of aggravating factors. Impaired capacity is a factor which mitigates the penalty under statute. The practical paradox that some facts both mitigate and aggravate should be recognized by counsel. The legal paradox should not continue. A reasonable interpretation of legislative intent is that reviewing courts should not consider mitigation as aggravation.

Although the Supreme Court has held that a jury in a capital case must be allowed to consider **any** evidence in mitigation, regardless of the factors enumerated in statute, *Lockett v. Ohio*, 438 U.S. 586 (1978), there has been no such ruling for aggravating factors. Thus, traditional laws of relevancy should apply to the prosecution's introduction of evidence in support of the death penalty. The two factors which are statutorily relevant to the imposition of capital punishment are: (1) "that [the defendant] would commit criminal acts of violence that would constitute a continuing

serious threat to society," and (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 aggravated battery to the victim." Va. Code Ann. § 19.2-264.4C (1990). The law of relevancy limits the prosecution to introducing only evidence which would tend to make more likely that one of those two statutory factors exist. The court summarily concluded that the fact that Quesinberry's weapon was stolen is admissible to show his propensity to be armed. Likewise, the court concluded that the existence of a factor which mitigates the crime under statute is admissible in support of the death penalty.

Where evidence of questionable relevancy is known to exist, attorneys should seek to exclude the evidence pretrial by motions in limine and objections. The courts seem to be more willing to admit questionable evidence at the penalty phase, and the appellate courts are hesitant to find error when viewing the sufficiency of the evidence as a whole. A pretrial ruling on the relevancy of an item may receive more favorable treatment, at trial or on appeal.

C. Refusal to Allow Parole Ineligibility Information

The court also refused to allow evidence that a life sentence would mean ineligibility for parole for at least 30 years. The duration of the defendant's stay in prison under a life sentence is almost certainly relevant to counter an argument of the defendant's "future dangerousness" under Virginia Code Section 19.2-264.4C. Additionally, the court's ruling deprives the defendant of the right under *Lockett* to present any evidence which could mitigate the penalty. Many jurors may hold the mistaken view that a life sentence would allow release in ten or fewer years. *See* Paduano & Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211, 221-22 & nn. 30-34 (1987). As a result, the temptation exists to impose the stricter penalty (in this scenario, death) simply because the alternative is considered too lenient. The information about the actual meaning of a life sentence can clear up this misconception and make a juror more likely to impose a life sentence. In fact, a jury has been known to specifically request parole eligibility information, indicating that jurors do come to the trial with preconceived notions of what the practical effects of a life sentence might actually be. *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990). *See* case summary of *Eaton*, Capital Defense Digest, Vol. 3, No. 1, p. 22 (1990).

Clearly, the Virginia Supreme Court feels that a defendant is not entitled to clear up misconceptions of the true meaning of a life sentence. *Eaton*, 240 Va. at 248-49, 397 S.E.2d at 392-93; *Quesinberry*, 241 Va. at 371, 402 S.E.2d at 223. However, the Virginia Supreme Court is not the final arbiter of federal constitutional law. Federal courts have yet to determine this issue. As a result, attorneys should continue to request an instruction regarding the practical effects of a life sentence and assign the denial as error for federal review.

D. Procedural Default

Quesinberry also illustrates the ease with which defense counsel can default or waive an issue and prevent it from ever receiving appellate review. In order to preserve an issue for review, counsel must timely object at trial, Virginia Supreme Court Rule 5:25, assign the ruling as error, Virginia Supreme Court Rule 5:27, and argue the issue on brief, Virginia Supreme Court Rule 5:17. *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990). The court's ruling in *Quesinberry* reveals just how strictly these rules are applied. Counsel objected to the court's definitions of several terms only seconds after the definitions were given. The objection came immediately after the jury retired to the jury room, perhaps so that the issue could be argued outside the jury's presence. On appeal, the court held that counsel's argument on the issue was procedurally barred because the objection at trial was untimely. *Quesinberry* at 228. In addition, the court declined to review four substantive issues because, although properly preserved at trial and assigned as error, the issues were not argued on brief. *Id.* at 222.

Attorneys should make sure that every possible issue for appellate review is properly preserved, assigned as error, and argued on brief. This is especially true considering that federal courts will refuse to hear issues which are procedurally barred under state law. *See* case summaries of *Coleman v. Thompson*, Capital Defense Digest, this issue, and *McClesky v. Zant*, Capital Defense Digest, this issue. If page limitations on appellate briefs prevent a thorough discussion on the issues, attorneys should request an extension. Where the page extension request is denied, that denial in itself should be assigned as error, briefed, and properly preserved for review. *See* case summary of *Stockton v. Commonwealth*, Capital Defense Digest, this issue.

Summary and analysis by:
G. Douglas Kilday

LITIGATING THE "VILENESS" FACTOR IN VIRGINIA

BY: VICTOR A. LAGO

INTRODUCTION

This article discusses the constitutionality of the "vileness" aggravating factor of the Virginia death penalty sentencing scheme, and suggests that the judicial application of the "vileness" factor is constitutionally infirm in two respects. First, the "vileness" factor on its face is too vague to provide meaningful guidance to the sentencer as provided by the eighth amendment.[1] Second, the Virginia courts' systematic failure in providing capital defendants with proper notice of the narrowing constructions which they intend to apply denies capital defendants due process as guaranteed by the fourteenth amendment. A defense attorney can litigate pretrial for the proper application of the "vileness" factor to generate valid claims for appeal and to insure that the Virginia courts and the Commonwealth apply the factor in a constitutional manner.

THE VIRGINIA "VILENESS" FACTOR IS UNCONSTITUTIONALLY VAGUE

In the landmark United States Supreme Court case, *Furman v. Georgia*, the Court held that states could not impose the death penalty under sentencing procedures that created a substantial risk that punishment could be inflicted in an arbitrary and capricious manner.[2] The Court required that capital sentencing schemes provide a meaningful basis for distinguishing the few cases in which a death penalty is imposed from the many cases in which it is not.[3]

Following *Furman*, state legislatures attempted to formulate death penalty statutes which guided sentencing discretion by permitting a death sentence only on a finding of certain aggravating factors which made the offender more culpable than others that committed similar crimes. In fashioning these aggravating factors many states found guidance in the Model Penal Code, which provided a template of aggravating factors.[4]