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BREARD v. COMMONWEALTH 248 Va. 68, 445 S.E.2d 670 (1994) Supreme Court of Virginia

is to do everything possible to assure the defendant the constitutional rights that are guaranteed at the trial stage, it is equally important that if they are not granted there that they continually and consistently be pursued at every level. Though from the decision in *Turner* it appears that the Fourth Circuit Court of Appeals may be unsympathetic to such appeals, it is hoped that the full court will rehear this case and reverse this panel decision or that this issue will eventually be resolved by the United States Supreme Court. It is thus crucial to preserve this issue until that day comes.[62]

Summary and analysis by:
Timothy B. Heavner

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murderer to torture or commit an aggravated battery before killing a victim; "torture" and "aggravated battery" required a showing of "physical abuse"); *Walton v. Arizona*, 497 U.S. 639 (1990) (a crime is committed in an especially "cruel" manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death. A murder is committed in an especially "depraved" manner when the perpetrator either relishes the murder, evidencing debasement or perversion, or shows indifference to the suffering of the victim and evidences a sense of pleasure in the killing); *Huffstetler v. Dixon*, 28 F.3d 1209 (4th Cir. 1994):

> Was the murder especially heinous, atrocious, or cruel? As to the circumstance, the burden is upon the State to prove to you from the evidence, beyond a reasonable doubt, that the murder in this case was especially heinous, atrocious, or cruel. A person of ordinary sensibility could fairly characterize almost every murder as especially heinous, atrocious, or cruel. Not every murder is especially so. Before you may find the existence of this circumstance, the State must prove beyond a reasonable doubt that the brutality involved in the murder in this case exceeds that normally present in any killing. The words "especially heinous, atrocious, or cruel" mean extremely or particularly or especially heinous or atrocious or cruel. Heinous means hateful, odious, and reprehensible, and it also means extremely wicked or shockingly evil. Atrocious means marked by or given to extreme wickedness, brutal or cruel, marked by extreme violence or savagely fierce, outrageously wicked or violent. Cruel means designed to inflict a high degree of pain, utterly indifferent to or enjoyment of the suffering of others. For you to find this murder to have been especially heinous, atrocious, or cruel, it must have been done without conscience, pitiless, and so as to be unusually tortious to [the victim]. That is, in the nature of torture or serious physical abuse of [the victim] before death.

62 For a fuller discussion of the basis for these arguments in litigating the "vileness" factor in Virginia, see Lago, *supra* note 53. For more complete documentation for each of the steps in litigating the Virginia limiting constructions, see *Defending a Capital Murder Case in Virginia*, a manual published by the Virginia Capital Case Clearinghouse.

BREARD v. COMMONWEALTH

248 Va. 68, 445 S.E.2d 670 (1994)
Supreme Court of Virginia

FACTS

Ruth Dickie was murdered on February 17, 1992, in her Arlington apartment. Police also found evidence of attempted rape.[1] Six months later police arrested Angel Breard for sexually assaulting Jeanine Price, also of Arlington. Because of the assaults' similarities, Breard became a suspect in Dickie's unsolved murder.[2] Later Breard was indicted for attempted rape and capital murder in the commission of rape or attempted rape.[3]

The jury found Breard guilty of capital murder and attempted rape.[4] The jury subsequently sentenced Breard to death on the capital murder conviction, finding both "vileness" and "future dangerousness." Breard appealed the attempted rape conviction to the Virginia Court of Appeals and the capital murder conviction to the Supreme Court of Virginia. The Court of Appeals affirmed the attempted rape conviction, and Breard appealed it to the Supreme Court of Virginia as well. That court consolidated both of the appeals with its automatic review of Breard's death sentence.[5]

HOLDING

The Supreme Court of Virginia found no reversible error in the trial court's judgments and thus affirmed Breard's capital murder conviction

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1 *Breard v. Commonwealth*, 248 Va. 68, 72-73, 445 S.E.2d 670, 673-74 (1994).

2 *Id.* at 85, 445 S.E.2d at 680.

3 *Id.* at 71, 445 S.E.2d at 673.

4 *Id.*

5 *Id.* at 72, 445 S.E.2d at 673.

and death sentence.[6] The court also held, *inter alia*,[7] that Breard's sentence was not imposed under "passion, prejudice or any other arbitrary factor,"[8] and that the death sentence here was not "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[9]

ANALYSIS/APPLICATION IN VIRGINIA

I. Procedural Defaults

Unfortunately Angel Breard must be added to the long list of Virginia capital defendants who lose issues in appellate courts due to strictly applied procedural default rules.[10] Because Breard either erred procedurally while raising issues, or entirely failed to raise issues at trial, the Supreme Court of Virginia refused to address these issues.[11]

Some of these issues involved jury selection. Breard moved to strike juror Jane Healey for cause during voir dire. The trial judge temporarily denied the motion until voir dire ended, but Breard never renewed the motion.[12] The Supreme Court of Virginia ignored the issue accordingly.[13] Another juror, Bonnie Courtney, stated at one point during the proceedings that she had read a newspaper article about the trial. Breard did not move for a mistrial upon this revelation, but raised the issue on appeal.[14] Again, the Supreme Court of Virginia held that Breard's failure to move for a mistrial rendered this claim untimely.[15]

Also at trial, the victim's mother testified as to her daughter's age and marital status at the time of her death; that the victim had been her only child; and that she wore glasses. The mother cried as she left the witness stand. After a lunch recess, Breard moved for a mistrial on the grounds that the mother's testimony had no probative value and only served to inflame the jury's passions. The trial court denied the motion.[16] On appeal, the Supreme Court of Virginia noted that Breard's counsel had not moved for a mistrial on this issue until after four other witnesses had testified and the trial had recessed for lunch. The court classified the motion as untimely and refused to address it.[17] The court also refused to address another motion for mistrial because Breard made the motion (alleging that the Commonwealth's closing argument at the guilt phase was improper) after the jury had retired.[18]

The court also barred Breard's objections to the trial court's refusal of certain of Breard's proposed jury instructions. The court decided that Breard's failure to object to the refusal at trial barred his claims as to jury instructions defining "irresistible impulse" and "willful, deliberate and premeditated," respectively.[19] Finally, the court refused to hear Breard's contention that the Commonwealth made an improper closing argument during the penalty phase as well, since "Breard requested neither a cautionary instruction nor a mistrial."[20]

These examples reinforce the vital importance of timely objections and preserving issues for the record.[21] From the court's holdings here, it is evident that counsel for capital defendants can avoid procedural default in three ways. First, objections should be made at the proper times. If there is any doubt about whether an objection is continuing, it should be renewed.[22] Second, all errors should be assigned on appeal, both on direct appeal and in state and federal habeas corpus proceedings.

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[6] *Id.* at 89, 445 S.E.2d at 682.

[7] Breard's defense counsel diligently preserved several issues for appeal from trial, and raised other issues on direct appeal. The court summarily disposed of many of these issues in one or two sentences. This summary does not address most of these issues, many of which are too fact-specific to make review useful. They include: (1) trial court's refusal to hold a pretrial evidentiary hearing on the constitutionality of death by electrocution; (2) constitutionality of Virginia's death penalty, since the jury is not required to find that mitigating factors outweigh aggravating factors beyond a reasonable doubt; (3) constitutionality of Virginia's aggravating factors of "vileness" and "future dangerousness," since they are vague and unreliable; (4) rejection of the claim that the death penalty is arbitrary, discriminatory, excessive, contrary to society's "evolving standards of decency," and constitutes cruel and unusual punishment; (5) trial court's refusal to grant Breard additional peremptory challenges; (6) trial court's refusal to hold "individual and sequestered voir dire"; (7) rejection of the claim that Virginia death penalty defendants are denied "meaningful appellate review"; (8) constitutionality of the trial court's ability to consider hearsay information in a presentence report pursuant to Va. Code Ann. § 19.2-264.5 (Supp. 1993); (9) rejection of the claim that the trial court's imposition of the death penalty is conducted arbitrarily and discriminatorily, and is therefore unconstitutional; (10) trial court's exclusion of Elna Broffman from the jury when she stated that she "could not consider the death penalty"; (11) trial court's refusal to exclude certain other jurors for cause, based on certain of their statements; (12) trial court's admission of certain photographs and diagrams of the victim and the crime scene, since many of these items were repetitive and served only to incite the jury's passions; (13) trial court's refusal of Breard's instruction that he "could not be found guilty of capital murder if his voluntary intoxication rendered him incapable of deliberating or premeditating"; (14) trial court's refusal to omit language which added nothing to the definition of insanity from a jury instruction; and (15) sufficiency of the evidence to show that: (a) the murder was "willful, deliberate, and premeditated," and (b) that Breard raped the victim.

[8] *Breard*, 248 Va. at 88, 445 S.E.2d at 681-82.

[9] *Id.* at 89, 445 S.E.2d at 682.

[10] *See, e.g., Pruett v. Thompson*, 996 F.2d 1560 (4th Cir. 1993), and case summary of *Pruett*, Capital Defense Digest, Vol. 6, No. 1, p. 15 (1993). *See also* Groot, *To Attain the Ends of Justice: Confronting Virginia's Default Rules in Capital Cases*, Capital Defense Digest, Vol. 6, No. 2, p. 44 (1994).

[11] *See infra* notes 12-20 and accompanying text.

[12] *Breard*, 248 Va. at 80, 445 S.E.2d at 677.

[13] *Id.* at 80, 445 S.E.2d 677-78.

[14] *Id.* at 80, 445 S.E.2d at 678.

[15] *Id.*

[16] *Id.*

[17] *Id.*

[18] *Id.* at 82, 445 S.E.2d at 679.

[19] *Id.*

[20] *Id.* at 87, 445 S.E.2d at 681 n.2.

[21] *See, e.g., Beavers v. Commonwealth*, 245 Va. 268, 427 S.E.2d 411 (1993) (illustrating the application of procedural default rules to several jury issues, including voir dire), and case summary of *Beavers*, Capital Defense Digest, Vol. 6, No. 1, p. 26 (1993); *Quesinberry v. Commonwealth*, 241 Va. 364, 402 S.E.2d 218 (1991) (illustrating the application of procedural default rules to jury instructions and other issues), and case summary of *Quesinberry*, Capital Defense Digest, Vol. 4, No. 1, p. 23 (1991).

[22] *See, e.g. Beavers v. Commonwealth*, 245 Va. 268, 427 S.E.2d 411 (1993), and case summary of *Beavers*, Capital Defense Digest, Vol. 6, No. 1, p. 26. (1993), specifically the directives concerning objections at voir dire at p. 27. *See also* Groot, *To Attain the Ends of Justice: Confronting Virginia's Default Rules in Capital Cases*, Capital Defense Digest, Vol. 6, No. 2, p. 44 (1994).

Finally, all errors should be briefed at all these stages as well. Admittedly preserving every issue is immensely difficult. But procedural default rules are applied so strictly in Virginia that in spite of counsel's diligent efforts, capital defendants can easily lose a series of issues from trial to appeal.[23]

II. Bill of Particulars

Prior to trial, Breard moved for a bill of particulars, apparently requesting the Commonwealth to provide the definitions of "vileness" and "future dangerousness" which it would use at trial.[24] The trial court denied Breard's request.[25] The Supreme Court of Virginia flatly rejected Breard's claim that the trial court erred, stating that "a bill of particulars is not required if the indictment gives an accused notice of the nature and character of the offense charged. In the present case, the indictment gave Breard such notice."[26]

United States Supreme Court precedent virtually requires that a bill of particulars must include aggravating factors, and their definitions, intended by the state to be proven in support of a death sentence. The indictment provides a defendant no notice on this matter.[27] Despite the unwillingness of the Supreme Court of Virginia to reexamine this issue, capital defense attorneys in Virginia should continue to raise it. This decision shows that counsel should continue to insist on this bill of particulars on federal grounds.[28] Counsel should also preserve the issue through every appeal to reach the federal court system, where at some point the error may be corrected.

III. Standard of Proof for Unadjudicated Acts at Sentencing

The Commonwealth must prove a capital defendant's future dangerousness "beyond a reasonable doubt."[29] The Commonwealth attempted to demonstrate Breard's future dangerousness by way of testimony concerning Breard's alleged assault on Jeanine Price and alleged assault on another woman before Ruth Dickie's murder.[30] Breard wanted to instruct the jury that if the Commonwealth tried to show Breard's "future dangerousness" via any of these unadjudicated acts, it had to prove that he committed such acts (i.e., "building block evidence") beyond a reasonable doubt. The trial court refused this instruction.[31] The Supreme Court of Virginia upheld the trial court's refusal.[32]

No authority exists for the "beyond a reasonable doubt" standard for such "building block evidence." However, although the "beyond a reasonable doubt" standard may not be constitutionally required, some standard should indeed be required. It can be argued that the Commonwealth should have to show that a defendant committed certain unadjudicated acts at least by a "preponderance of the evidence." This argument stems from several United States Supreme Court opinions as well as Virginia law. Some of the federal decisions equate the sentencing phase of capital trials with the guilt phase for certain purposes. The other decisions, state and federal, establish the "preponderance of the evidence" standard for "building block evidence" in contexts analogous to capital penalty trials.

In *Bullington v. Missouri*[33] the Court held that in capital cases, the penalty phase of the trial should be treated the same way as the guilt phase of the trial for purposes of a defendant's Fifth Amendment guarantee against double jeopardy. In *Strickland v. Washington*[34] the Court extended that argument for the purposes of a defendant's Sixth Amendment right to counsel. Thus, proving elements of "future dangerousness" at sentencing beyond a reasonable doubt can be equated to proving elements of an offense at trial beyond a reasonable doubt, especially given the structure of the Virginia capital sentencing statute.

In some instances "preponderance of the evidence" is used to establish preliminary factual questions at the guilt phase, though the final act must be proven "beyond a reasonable doubt." An example at the state level is *modus operandi* evidence. In *Chichester v. Commonwealth*,[35] the defendant had been convicted of capital murder and robbery. Evidence linking the defendant to a previous robbery had been admitted on the basis of similar *modus operandi* evidence.[36] In *Chichester*, the Supreme Court of Virginia stated that "[i]f the evidence of other crimes bears sufficient marks of similarity to the crime charged to establish that the defendant is **probably** the common perpetrator, that evidence is relevant and admissible if its probative value outweighs it prejudicial effect."[37] This criteria indicates a preponderance of the evidence admissibility standard for *modus operandi* evidence, though the Commonwealth would still have to prove the actual crime "beyond a reasonable doubt."

At the federal level, another example is conspiracy. In *Bourjaily v. United States*,[38] the defendant was charged with conspiracy to distribute cocaine. The District Court had ruled that a co-conspirator's statements were admissible under Federal Rule of Evidence 801(d)(2)(E), since the government had shown proof of a conspiracy between the defendant and his co-conspirator by a preponderance of the evidence. The Sixth Circuit Court of Appeals affirmed.[39] The Supreme Court also affirmed, holding that "when the preliminary facts relevant to Rule 801(d)(2)(E) are disputed, the offering party must prove them by a preponderance of the evidence."[40] Thus, though the government would still have to prove the

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23 *See* Va. Sup. Ct. R. 5:19-5:35.

24 *Breard*, 248 Va. at 76, 445 S.E.2d at 675. The record does not state what Breard requested in the bill of particulars.

25 *Id.*

26 *Id.*

27 For cases holding that a defendant must have an opportunity to rebut the state's case for death—which obviously requires knowing what the aggravating factors to be relied upon are, and, where the law requires, their definitions—see *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994), and case summary of *Simmons*, Capital Defense Digest, this issue; *Lankford v. Idaho*, 500 U.S. 110 (1991); *Gardner v. Florida*, 430 U.S. 349 (1977).

28 *Id.*

29 Va. Code Ann. § 19.2-264.4(C) (1990).

30 *Breard*, 248 Va. at 85, 445 S.E.2d at 680.

31 *Id.* at 86, 445 S.E.2d at 681.

32 *Id.*

33 451 U.S. 430 (1981).

34 466 U.S. 668 (1984).

35 448 S.E.2d 638 (1994). *See* case summary of *Chichester*, Capital Defense Digest, this issue.

36 The Supreme Court of Virginia had earlier held *modus operandi* evidence admissible where identity is a disputed issue. *See Spencer v Commonwealth*, 240 Va. 78, 89-90, 393 S.E.2d 609, 616, cert. denied 498 U.S. 908 (1990).

37 *Chichester*, 448 S.E.2d at 649 (emphasis added).

38 483 U.S. 171 (1987).

39 *Bourjaily v. United States*, 781 F.2d 539 (6th Cir. 1986).

40 *Bourjaily*, 483 U.S. at 176.

conspiracy itself beyond a reasonable doubt, evidence tending to prove conspiracy could be admitted under a preponderance standard.

Applying this logic to capital cases, the Commonwealth must prove future dangerousness itself beyond a reasonable doubt.[41] Though the Commonwealth would have a less burdensome standard for evidence tending to prove "future dangerousness" (i.e., unadjudicated acts), it would still need to show that the defendant committed the unadjudicated acts by a preponderance of the evidence. Some standard is better than no standard for capital defendants. The Supreme Court of Virginia has rejected the claim that a beyond a reasonable doubt standard is required and there is no legal authority to compel use of that standard. Thus, where alleged unadjudicated acts are contested, the better practice would be for capital defense attorneys to ask for a "preponderance of the evidence" standard in jury instructions. Absent **any** standard, capital juries are free to find that defendants committed violent acts relevant to the "future dangerousness" factor on the basis of completely unreliable evidence.

IV. Commonwealth Use of Defense Experts

The trial court in *Breard* had granted Breard's motion for appointment of mental health experts under Virginia Code section 19.2-264.3:1(A). Defense counsel elected not to use these experts at trial.[42] Apparently, however, the trial court also appointed these same experts to examine Breard concerning sanity at the time of the offense as per Virginia Code section 19.2-169.5(A). Section 19.2-264.3:1(B) expressly authorizes the court to use the same expert appointed to evaluate and assist in developing mitigation to evaluate sanity.[43] The court's appointment actions were thus authorized by statute.

The Commonwealth called the experts to testify at trial, even though Breard's defense counsel had elected not to call them as witnesses. The trial court overruled Breard's objection. The Supreme Court of Virginia affirmed, finding that their testimony that they had evaluated Breard at the request of defense counsel was relevant "because it provided background information about the experts and showed how they became involved in the case."[44] It is unclear exactly how this issue was presented to the Virginia Supreme Court, but if it was framed properly, it is almost inconceivable that this error could have been allowed to stand.

First, Sections 19.2-264.3:1 and 19.2-169.5 **both** classify experts appointed under those statutes as **defense experts.**[45] Thus Breard should still have been afforded the same protection guaranteed by both statutes, even though the experts appointed under each statute were the same persons. Breard declined to use these experts at trial. Consequently, the Commonwealth should not have been allowed to call them to testify at all.

Second, when the Commonwealth called the experts, it referred to Breard's having selected them. Breard argued that the trial court erred in failing to declare a mistrial. The Supreme Court of Virginia found that the motion had been made after the jury retired, and was thus too late.[46] The court itself stated that "[a]ll three [experts] had been selected by Breard's counsel."[47] But Sections 19.2-264.3:1 and 19.2-169.5 are discretionary statutes, meaning that the court may or may not appoint the experts suggested by the defense to conduct either examination.[48] Thus, at most, Breard could only have **recommended** that the court appoint those experts. The Commonwealth should not have been able to state that Breard had selected the experts.

The Supreme Court of Virginia's brief comment in rejecting the claim did not discuss the issues of privilege, work product, or use of the client's statements.

The court's ruling should not deter defense counsel from using expert assistance made available by statutes. Subpoenas or attempts to call defense experts as witnesses can be resisted. Issues that were apparently unseen or unlitigated by the Supreme Court of Virginia in *Breard* can be addressed and the record made in motions to quash subpoenas or in hearings on the objection.

V. Jury Instructions at the Penalty Phase

A. "Same Factors Used to Convict" Instruction

The court also upheld the trial court's refusal of Breard's requested jury instructions concerning the factors considered in determining a death sentence. Breard wanted to instruct the jury at the penalty phase that the jury could not sentence him to death "solely on the same factors used to convict" him of capital murder.[49] The trial court refused the instruction and the Supreme Court of Virginia rejected Breard's assignment of error, stating that "[a] finding of 'future dangerousness' and a consequent death sentence may be based solely upon 'the circumstances surrounding the commission of the offense.'"[50]

It is suggested, however, that defense attorneys can frame a jury instruction stating that the jury cannot base its imposition of the death penalty solely on the finding of the legal elements of capital murder. This was probably the instruction Breard intended, and it is correct. A finding

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[41] Va. Code Ann. § 19.2-264.4(C) (1990).

[42] *Breard*, 248 Va. at 82, 445 S.E.2d at 678-79.

[43] Section 19.2-264.3:1 was drafted in response to the United States Supreme Court's decision in *Ake v. Oklahoma*, 470 U.S. 68 (1985), where the Court held that when an indigent defendant's sanity is a significant factor at both the guilt and penalty phases of the trial, due process requires that the court provide expert psychiatric assistance **to the defendant.** *See also Chichester v. Commonwealth*, 448 S.E.2d 638 (1994), and case summary of *Chichester*, Capital Defense Digest, this issue.

[44] *Breard*, 248 Va. at 82, 445 S.E.2d at 678-79.

[45] Section 19.2-264.3:1(A) (emphasis added) reads: "the court shall appoint one or more qualified mental health experts **to evaluate the defendant and to assist the defense** in the preparation and presentation of information concerning the defendant's history, character, or mental condition....". Section 19.2-169.5(A) (emphasis added) similarly reads: "the court shall appoint one or more qualified mental health experts **to evaluate the defendant's sanity at the time of the offense and, where appropriate, to assist in the development of an insanity defense.**"

[46] *Breard*, 248 Va. at 82, 445 S.E.2d at 679.

[47] *Id.* at 82, 445 S.E.2d at 678.

[48] Section 19.2-264.3:1(A) reads: "The defendant shall not be entitled to a mental health expert of the defendant's own choosing or to funds to employ such expert." Section 19.2-169.5(A) uses identical language.

[49] *Id.* at 86, 445 S.E.2d at 681.

[50] *Id.* (*citing* Va. Code Ann. § 19.2-264.4(C) (1990)).

of the elements of capital murder cannot be used as the sole basis for a death sentence. The jury must, in addition, find the aggravating factors of either "vileness" or "future dangerousness."[51] The trial court (and the Supreme Court of Virginia) evidently understood Breard's proposed instruction to mean that Breard wanted to keep the jury from considering anything which may have contributed to the jury's finding the defendant guilty during the guilt phase.

B. Defendant's Possibility of Parole Instruction

At trial, defense counsel expressly agreed, apparently for strategic reasons, to the judge's refusal to answer the jury's question concerning Breard's parole eligibility.[52] The record does not reflect whether Breard would have been statutorily eligible for parole if sentenced to life in prison. If life in prison for Breard meant life without parole, there is no justification for such a decision. If a life sentence would technically mean parole eligibility in twenty-five or thirty years,[53] however, an attorney might conclude in the rare case that parole law information would not be helpful.

The United States Supreme Court recently decided in *Simmons v. South Carolina*[54] that defense counsel can insist that the jury be informed when life means life without parole.[55] The Court also left open the possibility that parole information must be given to the jury on request in any case where future dangerousness is one of the aggravating factors upon which the Commonwealth relies in seeking a death sentence.[56] The implication of *Simmons* in Virginia should be followed closely.[57]

Summary and analysis by:
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51 Va. Code Ann. § 19.2-264.4(C) (1990).

52 *Breard*, 248 Va. at 87, 445 S.E.2d at 681.

53 *See* Va. Code Ann. § 53.1-151(4)(C) (Supp. 1994) ("Any person sentenced to life imprisonment for the first time shall be eligible for parole after serving fifteen years, except that if such sentence was for a Class 1 felony violation . . . he shall be eligible for parole after serving twenty-five years, unless he is ineligible for parole pursuant to subsection B1 or B2."); and Va. Code Ann. § 53.1-151(4)(D) (Supp. 1994) ("A person who has been sentenced to two or more life sentences, except a person to whom the provisions of subsection B1, B2 or E of this section are applicable, shall be eligible for parole after serving twenty years of imprisonment, except that if either such sentence, or both, was or were for a Class 1 felony violation, and he is not otherwise ineligible for parole pursuant to subsection B1, B2 or E of this section, he shall be eligible for parole only after serving thirty years.").

54 114 S. Ct. 2187 (1994).

55 *See* case summary of *Simmons*, Capital Defense Digest, this issue.

56 *See* Pohl & Turner, *If at First You Don't Succeed: The Real and Potential Impact of* Simmons v. South Carolina *in Virginia*, Capital Defense Digest, this issue.

57 *Id.* At this writing the United States Supreme Court had denied Breard's petition for certiorari. *Breard v. Virginia*, 1994 WL 512727 (U.S. 1994). In comparison, the petition of Walter Mickens, *Mickens v. Commonwealth*, 247 Va. 395, 442 S.E.2d 678 (1994), was granted and the case remanded to the Supreme Court of Virginia on the *Simmons* issue. *See Mickens v. Virginia*, 115 S. Ct. 307 (1994), and case summary of *Mickens*, Capital Defense Digest, this issue.

MICKENS v. COMMONWEALTH

247 Va. 395, 442 S.E.2d 678 (1994)
Supreme Court of Virginia

FACTS

On March 30, 1992, at approximately 12:30 p.m., a body identified as Timothy Jason Hall was found beneath an abandoned construction building in Newport News, Virginia. The body, lying face down on a mattress, was nude from the waist down except for white athletic socks. Bloody "transfer" stains and a white liquid substance were evident at the scene. At a nearby river the police found the victim's blue jeans and underwear which had washed up in the surf of the river. The medical examiner concluded that the victim had bled to death from twenty-five of 143 stab wounds.[1]

On April 4, 1992, Walter Mickens, Jr. was arrested by police on charges involving Timothy Hall. The following morning warrants were obtained charging Mickens with Hall's murder and attempted sodomy. An examination of a stain found on the mattress cover revealed human sperm. The Commonwealth's DNA analysis taken from the stain also revealed a pattern similar to Mickens' DNA. Furthermore, Tyrone Brister testified that when he and Mickens shared a holding cell at the courthouse on March 26, 1993, Mickens told him he had stabbed somebody 140 times, sodomized him and stole his sneakers.[2]

In the first stage of a bifurcated trial, the jury convicted Mickens of capital murder and attempted forcible sodomy. In the second stage of the trial, the jury fixed his punishment at death.[3]

HOLDING

Consolidating the automatic review of Mickens's death sentence with his appeal of the capital murder conviction, the Supreme Court of Virginia upheld the death sentence based on the "vileness" and "future dangerousness" predicates.[4]

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1 *Mickens v. Commonwealth*, 247 Va. 395, 398, 442 S.E.2d 678, 681 (1994).

2 *Id.*

3 *Id.*

4 The court rejected some of the defendant's assignments of error in brief, conclusive language. Others did not involve death penalty law. On still others, the rulings provide little if any guidance because they apply broad, settled principles of law to facts that are specific to the case