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

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

ANALYSIS/APPLICATION IN VIRGINIA

I. Default: Relief From Fifty Page Brief Limitation

On appeal, Mickens argued that the trial court erred in refusing to grant a pretrial motion to prohibit the imposition of the death penalty.[5] In doing so, he relied on his appellate brief and his trial memorandum.[6] The reliance on the trial memorandum was most likely an effort by Mickens to avoid the fifty page brief limitation imposed on those seeking review from the Supreme Court of Virginia.[7] The Supreme Court of Virginia, however, refused to consider these arguments.[8] The court stated that an assertion of a trial court error must be stated clearly to the appellate court and not through a cross-reference to arguments made at trial.[9] As a result, several grounds in support of the motion were found to be procedurally defaulted.[10] In Virginia, to avoid default, issues must be raised at trial, assigned as error on appeal and argued in the appellate brief.[11]

Given the state of the law, there should be a formal request for relief from the fifty page brief limitation due to the severity of a capital murder case and the necessity of preserving all issues for federal review. If the request is granted, every non-frivolous claim should be at least briefly argued in order to ensure appellate review.[12] However, if this motion is denied by the court an effort similar to that made by counsel for Mickens to get the court to consider all arguments could preserve them for habeas review.[13]

II. Vagueness in Aggravating Factors

A. Future Dangerousness

Mickens also objected to application of the "future dangerousness" factor on grounds that this predicate is unconstitutionally vague since a jury is asked to find a "probability" that an accused will commit acts of violence in the future.[14] Specifically, the defense alleged that the term "probability" is ambiguous.[15] The court, however, rejected the claim, observing that in a prior case it had defined "probability" as "'a reasonable "probability," i.e., a likelihood substantially greater than a mere possibility,' that an accused would commit violent acts in the future . . . ."[16] It is, however, unlikely that Mickens' jury heard this definition. Thus, it is strongly suggested that counsel in the future consider preparing and tendering a jury instruction incorporating the Supreme Court of Virginia's definition of "probability." There could hardly be grounds for refusing such an instruction.

B. Vileness

Mickens made a similar challenge to vagueness of the aggravated battery component of Virginia's "vileness" aggravating factor.[17] The court summarily rejected it, referring to its prior decisions. Although the Fourth Circuit Court of Appeals has now also rejected challenges to the factor,[18] vileness challenges should continue in an effort to increase the likelihood of United States Supreme Court review and clarification.[19]

III. Automatic Salvage Rule

In a somewhat confusing holding,[20] the court apparently reaffirmed its position that it is not required to conduct harmless error review, even if one of the two aggravating factors is later found to have been applied in an invalid or unconstitutional manner. The court based the holding on the assumption that the absence of a formal requirement in Virginia law that aggravating factors be weighed against mitigating factors means that death sentences are automatically salvaged by the presence of one valid

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being reviewed. Issues in these categories that will not be addressed in this summary include: (1) the constitutionality of the death penalty *per se*, (2) the constitutionality of electrocution, (3) double jeopardy, (4) additional peremptory strikes, (5) meaningful appellate review, (6) admission of confession, (7) sufficiency of evidence of attempt, (8) the use of photographs, and (9) sufficiency of evidence of guilt. By continuing to utilize arguments routinely and summarily rejected by the Supreme Court of Virginia, Mickens proved the value of preserving issues for federal review. This is evident in the United States Supreme Court remand of *Mickens* in order to allow the jury to hear parole evidence law in light of *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994). *See* case summary of *Simmons*, Capital Defense Digest, this issue.

[5] *Mickens*, 247 Va. at 401 n.4, 442 S.E.2d at 683 n.4.

[6] *Id.*

[7] Va. Sup. Ct. R. 5:26.

[8] *Mickens*, 247 Va. at 401 n.4, 442 S.E.2d at 683 n.4.

[9] 247 Va. at 401 n.4, 442 S.E.2d at 683 n.4. (*citing Jenkins v. Commonwealth*, 244 Va. 445, 461, 423 S.E.2d 360, 370 (1992), *cert. denied*, 113 S. Ct. 1862 (1993)).

[10] *Mickens*, 247 Va. at 401, 442 S.E.2d at 683.

[11] *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990); 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).

[12] *See* case summary of *Simmons*, Capital Defense Digest, this issue. *See also* 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. *Compare Breard v. Commonwealth*, 248 Va. 68, 445 S.E.2d 670 (1994) (defense did not preserve the issue of the jury's right to hear parole law, therefore, the United States Supreme Court has no issue to review).

[13] Failing to follow an impossible page limitation may be found by federal court not to be an "adequate and independent state ground[]" for rejecting the claim. *See Wainwright v. Sykes*, 433 U.S. 72 (1976). Though federal courts have jurisdiction, they will ordinarily refuse to hear claims rejected by state courts on adequate and independent state grounds, including failure to follow state procedure. *Coleman v. Thompson*, 501 U.S. 722 (1991).

[14] *Mickens*, 247 Va. at 402, 442 S.E.2d at 684.

[15] *Id.* The claim is arguably meritorious. Though most people might understand "probability" to be "more likely than not," in truth a one in one hundred chance that an event will occur is also a probability, and some jurors may recognize that and find "future dangerousness" on any likelihood of violence by the defendant in the future.

[16] *Id.* at 403, 442 S.E.2d at 684. *See also Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978), *cert. denied*, 441 U.S. 967 (1979).

[17] *Mickens*, 247 Va. at 403, 442 S.E.2d at 684.

[18] *See* case summary of *Turner*, Capital Defense Digest, this issue.

[19] *See* Lago, *Litigating the "Vileness" Factor*, Capital Defense Digest, Vol. 4, No. 1, p. 25 (1991); Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest, Vol. 2, No. 1, p. 19 (1989); Fischer, *Imposing Death Under Virginia's Statutory Scheme*, Capital Defense Digest, Vol. 1, No. 2, p. 10 (1989).

[20] *Mickens*, 247 Va. at 405, 442 S.E.2d at 685 ("Mickens contends that we have failed to adopt a 'harmless error' review procedure when a jury finds both aggravating factors.").

factor and no appellate court process is required.[21] The Supreme Court of Virginia apparently fails to see the requirement in *Stringer v. Black*[22] that "harmless error" analysis is required even in non-weighing states.[23] Furthermore, even though *Clemons v. Mississippi*[24] held that it is constitutionally permissible for state courts to remedy an invalid application of an aggravating factor through the reweighing of valid aggravating and mitigating factors or "harmless error" analysis, it specifically rejected automatic salvaging of death sentences.[25] As a result, Virginia appellate defense counsel have a dual task. The first is to convince a court of the invalidity of an aggravating factor. Second, in cases where the jury finds both factors, counsel should insist upon the right to a new sentencing hearing because of the Supreme Court of Virginia's position on the issue.[26]

IV. Mandatory Appellate Review

There is a mandatory appellate review by the Supreme Court of Virginia in capital cases.[27] As a result, even though an issue is not enumerated in an appellate brief, the appellate court is required to look for the influence of passion, prejudice or any other arbitrary factor.[28] The Supreme Court of Virginia, however, relied on the adversarial process and determined that since Mickens did not object to a statement made by the prosecution at closing, the court would not consider such a statement as part of its mandatory review. This is an example of a failure to give meaningful appellate review[29] and arbitrary application of a state-created right.[30] Default has no place in mandatory review. Even though this obligation of review originates from the state legislature rather than the United States Constitution, its mandatory language affords capital defendants federally protected liberty interests. Thus, inadequacies of Virginia's statutorily required review should be raised in federal courts.[31]

Mickens did bring to the court's attention a claim that admission of gory photographs at the federal sentencing phase, already seen by the jury at the guilt phase, was a factor in bringing about a death sentence imposed under influence of passion and prejudice.[32] The court rejected the claim by reference to its earlier ruling that photographs were properly admitted at the guilt phase to show motive, intent, method, premeditation, malice and atrociousness of the crime.[33] It must be noted, however, that motive, intent, method, premeditation and malice had been proven in the guilt phase of the trial. At that stage, the trial court also admitted the medical examiner's testimony along with the photographs, stating that the photographs were relevant and not repetitive.[34] Thus, the jury not only heard testimony on the condition of the victim, but also viewed graphic illustrations. To bring the pictures forward a second time was not only repetitive, but largely irrelevant to the sentencing phase of the trial. Only the fifth element, atrociousness, had anything to do with sentencing and the term has been found to be meaningless in determining a death sentence.[35] Combatting this "anything goes at penalty trial" approach is difficult. Nevertheless every effort should be made to remind trial courts that rules of relevance are applicable at penalty trials as well.

Summary and analysis by:
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[21] *Clemons v. Mississippi*, 494 U.S. 738, 753-54 (1990).

[22] 112 S. Ct. 1130, 1137 (1992). *See* case summary of *Stringer*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).

[23] "In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process . . . **[a]ssuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination, there is no constitutional violation . . . .**" *Stringer*, 112 S. Ct. at 1137 (1992) (emphasis added).

[24] *Clemons*, 494 U.S. at 753-54. *See* case summary of *Clemons*, Capital Defense Digest, Vol. 3, No. 1, p. 8 (1990).

[25] *Clemons*, 494 U.S. at 753-54.

[26] The defense did challenge both factors, specifically "vileness" which may have constitutional merit. *See Godfrey v. Georgia*, 446 U.S. 420 (1980) (plurality declared unconstitutional Georgia's codified aggravating factor of vileness); *Maynard v. Cartwright*, 486 U.S. 356 (1988) (Supreme Court invalidated Oklahoma's death penalty statute based on *Godfrey*); *Shell v. Mississippi*, 498 U.S. 1 (1990) (Supreme Court invalidated a limiting construction used by a trial court because it was vague in itself).

[27] Va. Code Ann. § 17-110.1 (1990).

[28] *Id.*

[29] *Pulley v. Harris*, 465 U.S. 37, 45 (1984) (reiterating holding of *Furman v. Georgia*, 408 U.S. 238 (1972), that some meaningful appellate review is required in a capital defense conviction).

[30] *See Hicks v. Oklahoma*, 447 U.S. 343, 345-46 (1980) (holding that because Oklahoma law afforded defendants the right to a jury sentence, the defendant had a liberty interest).

[31] *See Coleman v. Thompson*, 501 U.S. 722 (1991) (recognizing unique powers of the Supreme Court of Virginia to independently assess whether death penalty is improperly imposed and noting that appellate court with such powers must exercise them constitutionally). *See also* Konrad, *How to Look the Virginia Gift Horse in The Mouth: Federal Due Process and Virginia's Arbitrary Abrogation of Capital Defendant's State-Created Rights*, Capital Defense Digest, Vol. 3, No. 2, p. 16 (1991).

[32] *Mickens*, 247 Va. at 412, 442 S.E.2d at 689.

[33] *Id.* at 408, 442 S.E.2d at 687.

[34] *Id.*

[35] *Maynard v. Cartwright*, 486 U.S. 356, 364 (1988).