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JOSEPH v. COMMONWEALTH 452 S.E.2d 862 (Va. 1995) Supreme Court of Virginia

death unless one of these two aggravators are proven beyond a reasonable doubt at the penalty phase of the capital murder trial.[33]

In the face of these constitutional requirements, the Supreme Court of Virginia held in *Williams* that: (1) defendants are not even entitled to pretrial notice that the Commonwealth will rely on either or both of the statutory elements of its case for death, (2) directly contrary to *Godfrey*, the language of the "vileness" factor is not vague,[34] and (3) the statutory language is vague, but the definitions of the terms found in *Smith v. Commonwealth*[35] provide sufficient explanation.[36] The court previously held in *Clark v. Commonwealth* that the *Smith* definitions were "not the best or the only ones."[37] The court in *Williams*, however, refers to the *Smith* definitions as "necessary," implying that they are the only acceptable constructions.[38] To confuse the matter further, the Supreme Court has also held that vagueness in the statutory language of an aggravating factor is not cured by a narrowing construction that is itself unconstitutionally vague.[39] The *Smith* definitions are certainly suspect under *Shell*, notwithstanding the cursory approval given to them in *Turner v. Murray*.[40]

Williams illustrates that the Supreme Court of Virginia is all over the map in its efforts to uphold the application of Virginia's vague aggravating factors. Both defendants and jurors are left in the dark because of these efforts.

Defense counsel should continue to move for a bill of particulars that includes all the narrowing constructions of the capital statute aggravators on which the Commonwealth intends to rely. The brief in support of this motion must frame the issue as a federal question, so that if this motion is denied, the issue may be preserved for later argument to a federal court if necessary. It is clear that Virginia courts are not sympathetic to this claim; however, it seems inevitable that a federal court will eventually take up this issue. It is vital that this issue be raised and preserved at every stage to assure than when the federal courts take the opportunity to appropriately apply the United States Constitution to Virginia's aggravating factors, no clients will be "defaulted out" of the benefit of that favorable ruling.

Summary and analysis by:
Timothy B. Heavner

33 *Tuilaepa, supra* note 29.

34 *Williams*, 248 Va. at 538, 450 S.E.2d 372 ("The necessary narrowing constructions are contained in the emphasized language of the Code § 19.2-264.4(C)" and indictments which contained this statutory language were "sufficient to give him notice of the nature and character of the offenses charged . . . .").

35 219 Va. 455, 248 S.E.2d 135 (1978) (defined the terms "aggravated battery" and "depravity of mind").

36 *Williams*, 248 Va. at 538, 450 S.E.2d at 372.

37 220 Va. 201, 257 S.E.2d 784 (1979).

38 *Williams*, 248 Va. at 538, 450 S.E.2d at 372.

39 *Shell v. Mississippi*, 498 U.S. 1 (1990) (held that there was no meaningful distinction between the limiting construction and the "vileness" factor itself and thus a person of ordinary sensibilities would still be able to characterize almost every murder as falling within its limits).

40 476 U.S. 28 (1986).

JOSEPH v. COMMONWEALTH

452 S.E.2d 862 (Va. 1995)
Supreme Court of Virginia

FACTS

On the evening of October 26, 1992, Jason M. Joseph and an accomplice, Kiasi Powell, entered a Subway Shop in Portsmouth, Virginia. Joseph ordered a sandwich from Anderson who was behind the counter. As the sandwich was being prepared, Joseph displayed a pistol and ordered Anderson to open the register. Joseph then ordered Anderson to hand him the cash drawer and to get down on the floor behind the counter. After receiving the drawer, Joseph indicated his intention to shoot Anderson. Subsequently, Joseph reached over the counter, shot and killed Anderson.[1]

In the first stage of a bifurcated trial, pursuant to Virginia Code sections 19.2-264.3 and 19.2-264.4, a jury convicted Joseph of capital murder, robbery while armed with a deadly weapon, the use of a firearm while committing murder, robbery and the use of a firearm while committing murder. His punishment was fixed at imprisonment for life on the robbery conviction and four years imprisonment for each firearm conviction. In the second stage of the capital murder trial, the jury fixed Joseph's punishment at death based on "future dangerousness."[2]

HOLDING

In accordance with Virginia Code sections 17-110.1(A) and 17-110.1(F), the Supreme Court of Virginia consolidated the automatic review of Joseph's death sentence with his appeal of the capital murder conviction and other convictions on appeal. The court then upheld the convictions and death sentence.[3]

1 *Joseph v. Commonwealth*, 452 S.E.2d 862, 864-65 (Va. 1995).

2 *Id.* at 864.

3 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 being reviewed. Issues in these categories that will not be addressed in this summary include: (1) denial of an "Allen charge" and (2) sufficiency of the evidence of "future dangerousness." Further, some claims were found to have been defaulted or made solely on state law grounds, probably barring federal review. Claims falling in these categories included: (1) objection to Commonwealth voir dire questions (defaulted) and (2) objection to duplicative photographs (state law grounds). For discussion of placing federal law grounds in all claims, see case summary of *Cardwell*, Capital Defense Digest, this issue. For discussion of avoiding procedural default, see *Breard v. Commonwealth*, 248 Va. 68, 445 S.E.2d 670 (1994), and case summary of *Breard*, Capital Defense Digest, Vol. 7, No. 1, p. 19 (1994); *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). For a discussion on how to avoid procedural default, see 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).

ANALYSIS/APPLICATION IN VIRGINIA

I. A Potential *Simmons* Issue

At trial, Joseph wished to ask prospective jurors if they were aware that a life sentence for Joseph would mean no parole eligibility for at least twenty-five years.[4] The defense again attempted to inform the jury of parole eligibility law through a proposed jury instruction.[5] Joseph claimed that this issue fell within the confines of *Simmons v. South Carolina*,[6] which required that capital defendants be permitted to communicate parole law to jurors.[7] The trial court, however, refused both of these attempts to inform the jury.

The Supreme Court of Virginia affirmed the trial court's ruling, distinguishing this case from *Simmons*. The court held that the *Simmons* ruling only applies to defendants who are **parole ineligible** unlike the parole eligible defendant in this case.[8] Nevertheless, Joseph preserved an issue that could later be decided in his favor. Peculiarities of Virginia law, and the basic rationale of *Simmons*, as well as some issues expressly left undecided by the United States Supreme Court in that case, could result in a decision that juries are entitled to this information.[9] In order to help preserve the claim for appellants who would have been statutorily eligible for parole consideration if sentenced to life in prison, the post-*Simmons* issue should be argued on three grounds: (1) that such an interpretation is necessary to the Eighth Amendment requirement of enhanced reliability in capital cases, (2) that this evidence is proper for mitigation and (3) that the basic *Simmons* rationale is that the due process right to rebut the state's case for death includes a right to use parole eligibility to rebut the "future dangerousness" aggravating factor.

If *Simmons* itself has revealed anything, it is the merit in maintaining issues for federal review even if the state court has rejected a claim. Many pre-*Simmons* capital defendants who would not have been parole eligible if sentenced to life in prison are likely to be granted new sentencing hearings, provided they raised the issue even though the Supreme Court of Virginia was consistently rejecting it.

II. Proposed Jury Instructions

The trial court denied Joseph's proposed instruction No. S-1 which would have told the jury that it could impose a sentence of life if there was a reasonable doubt whether to impose life or death.[10] The Supreme Court of Virginia found no error in the denial since the jury had been instructed that it was the Commonwealth's burden to prove "future dangerousness" beyond a reasonable doubt.[11]

The proposed instruction and the one given by the trial court instead do not address the same issue. The question of the standard of proof required for an aggravating factor that is an essential prerequisite to death eligibility[12] does not address the standard to be applied in making the ultimate life-death decision about a death-eligible prisoner. The Supreme Court of Virginia also apparently failed to see the issue, as evidenced by its citation of inappropriate authority in support of rejecting Joseph's claim.[13]

Joseph also assigned as error the trial court's denial of his requested instruction No. S-2 which stated:

> Before you may fix the punishment of defendant at death, you must find, unanimously and beyond a reasonable doubt, the existence of the aggravating circumstances about which I have previously instructed you.
>
> I further instruct you that, under our law, you are permitted to fix the punishment of defendant at life if you find that to be the appropriate sentence, even if you find unanimously and beyond a reasonable doubt the existence of the aggravating circumstance about which I have previously instructed you.[14]

Upholding refusal of the trial court to give instruction No. S-2, the Supreme Court of Virginia held that sentencing instruction numbers one and four, which were given, fully and fairly covered the matters requested in the proposed instruction.[15] Instruction No. 1 provided that:

> If you find from the evidence that the Commonwealth has proved [future dangerousness] beyond a reasonable doubt, then you may fix the punishment of the defendant at death. But if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at [life imprisonment or life imprisonment and a fine not exceeding $100,000].[16]

Sentencing instruction No. 4 provided that:

> [M]itigating circumstances differ from aggravating ones because you are not required to be convinced beyond a reasonable doubt that a mitigating circumstance exists before you must take the circumstance into account as you deliberate this case.[17]

The Supreme Court of Virginia affirmed the trial court's decision by holding that "[i]f the principles set forth in a proposed instruction are fully and fairly covered in other instructions that have been granted, a trial court does not abuse its discretion in refusing to grant a repetitious instruction."[18]

The proposed instruction was not repetitious. The court apparently found the language "if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at [life imprisonment] . . . ."[19] sufficient to advise the jury that Virginia

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4 *Joseph*, 452 S.E.2d at 866.

5 *Id.*

6 114 S. Ct. 2187 (1994).

7 Joseph, 452 S.E.2d at 866.

8 *Id.*

9 After the passage of much of Governor George Allen's Proposal X in the fall of 1994, any crime committed after January 1, 1995 will render the perpetrator statutorily ineligible for parole. *See* Frank Green, *Parole act puts risk in play, critics say*, Richmond Times-Dispatch, Oct. 2, 1994, at A1. *Simmons* will be directly applicable in those cases. For discussion of how to preserve *Simmons* issues for those tried under 1994 parole law, 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, Vol. 7, No. 1, p. 28 (1994).

10 *Joseph*, 452 S.E.2d at 869.

11 *Id.*

12 *See* case summary of *Tuilaepa*, Capital Defense Digest, Vol. 7, No. 1, p. 8 (1994).

13 The court cited *Breard*, 248 Va. at 86-87, 445 S.E.2d at 681, and *Satcher v. Commonwealth*, 244 Va. 220, 228 n.3, 421 S.E.2d 821, 843 n.3 (1992), both of which dealt with defense proffered jury instructions on the standard of proof of aggravating factors.

14 *Joseph*, 452 S.E.2d at 869.

15 *Id.* at 869-70.

16 *Id.*

17 *Id.* at 870.

18 *Id.*

19 *Id.* at 869-70.

law permits a sentence of life in prison even if the Commonwealth has proven one or both aggravating factors beyond a reasonable doubt. A reasonable juror might conclude, however, that "if you believe from all the evidence that the death penalty is not justified"[20] means "if the Commonwealth has failed to prove one or more aggravating factors beyond a reasonable doubt." In any event, Virginia Code section 19.2-263.2 provides that courts are not to refuse instructions that are correct statements of the law simply because they do not conform to model instructions.

Communication from judge to jury about consideration of aggravating and mitigating factors implicates important Eighth and Fourteenth Amendment issues.[21] Consequently, instructions such as those rejected in *Joseph* should continue to be proffered. In many instances, they will be given by the trial judge. If denied, claims of error should be preserved on federal constitutional grounds.

III. Sentence Review

Joseph utilized a very salutary strategy by claiming that the cumulative effect of the trial court's errors produced a jury recommendation based upon impermissible factors.[22] The trial court and the Supreme Court of Virginia summarily rejected this contention.[23]

There may be great benefit, however, to Joseph's argument of error based on the entirety of the record. By making a cumulative claim and being rejected, Joseph may have preserved on appeal some issues not specifically addressed at trial. He has, in any event, added to the list of claims potentially eligible for federal review. All assignments of error should be raised broadly and narrowly.

IV. Proportionality

The Supreme Court of Virginia compared the record in this case and the records in other capital murder cases pursuant to Virginia Code section 17-110.1(E).[24] The court explained that it paid particular attention to cases in which the underlying felony was robbery and the death penalty was imposed based on "future dangerousness."[25] The court also claimed to have reviewed cases where life sentences were imposed, citing, *Whitley v. Commonwealth*.[26] *Whitley*, however, was a case where death was imposed. In all its proportionality review the Supreme Court of Virginia claims to review life sentence cases reaching it. Citations to such cases are never included. Appellate counsel might consider seeking them under Virginia Freedom of Information Act.[27] Even if life cases reaching the court are considered, the pool of cases is inadequate. Many capital cases resulting in life sentences are not appealed and others do not reach the Supreme Court of Virginia.

Summary and analysis by:
Michael H. Spencer

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[20] *Id.* at 869.

[21] Issues raised by the court's denial of proffered defense instructions suggest a procedural barrier to the jury's consideration of mitigation evidence. Such barriers are forbidden by *McKoy v. North Carolina*, 494 U.S. 433, 443 (1990) (holding that a state cannot have a unanimity requirement for the jurors consideration of mitigation evidence) and *Mills v. Maryland*, 486 U.S. 367, 384 (1988) (holding that a sentencer must be able to consider all mitigating evidence).

[22] *Joseph*, 452 S.E.2d at 870.

[23] *Id.*

[24] *Id.* at 871. This section requires that the Supreme Court of Virginia to conduct an analysis to determine whether the death penalty is excessive or disproportionate to the penalty imposed in similar cases.

[25] *Id.*

[26] 223 Va. 66, 81, 286 S.E.2d 162, 171 (1982), *cert. denied.* 459 U.S. 882 (1982).

[27] *See* Heavner, *Leaving No Stone Unturned: Alternative Methods of Discovery in Capital Cases*, Capital Defense Digest, this issue.

CARDWELL v. COMMONWEALTH

248 Va. 501, 450 S.E.2d 146 (1994)
Supreme Court of Virginia

FACTS

On January 26, 1992, a badly decomposed body was found in the woods behind a shopping center at the intersection of Patterson Avenue and Pump Road in Henrico County. The body was identified as fifteen-year-old Anthony Brown. He was determined to have died in November 1991. An autopsy revealed that Brown had sustained injuries to the throat and wrist, as well as two gunshot wounds to the back of the head. It was later determined that on November 20, 1991, Brown had travelled from New York City to Richmond, where he was abducted, robbed and killed by Kevin Cardwell.[1]

A Circuit Court jury in Henrico County convicted Cardwell of the capital murder of Anthony Brown in the commission of armed robbery, in violation of Virginia Code section 18.2-31(4) and capital murder in the commission of an abduction with intent to extort money or pecuniary benefit, in violation of Code section 18.2-31(1). The jury also found Cardwell guilty of related non-capital felonies and fixed punishment for those offenses.[2] In the second phase of the capital trial, the jury fixed Cardwell's punishment at death for capital murder based upon the "vileness" predicate under Virginia Code section 19.2-264.2. The court, pursuant to Code section 19.2-264.5, sentenced Cardwell in accord with the jury verdicts.[3]

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[1] *Cardwell v. Commonwealth*, 248 Va. 501, 506, 450 S.E.2d 146, 150 (1994).

[2] *Id.* at 504, 450 S.E.2d at 148-49. The jury fixed Cardwell's punishment at life imprisonment for abduction, twenty years for robbery and ten years for firearms charges as well as a $100,000 fine for the abduction.

[3] *Id.*