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FRY v. COMMONWEALTH 250 Va. 413, 463 S.E.2d 433 (1995) Supreme Court of Virginia

"suspect" and such a classification need only "rationally advance[] a reasonable and identifiable governmental objective[,]"[49] which the court found in the objective of eliminating improper speculation by the jury. The court justified the anomalous result by claiming that lifetime parole ineligibility is relevant to the issue of the defendant's "future dangerousness" but parole ineligibility for a period of 25 or more years is not probative of this issue. This rationale is flawed, however, in that it fails to take into account the drop-off in recidivism after 25 years in prison and 25 years of aging and maturity. Although parole ineligibility for a period of years may not have the weight of evidence of parole ineligibility for life, it is relevant to that issue.[50]

It is likely that "rational basis" is the correct equal protection standard to be applied since capital defendants ineligible for parole for a period of years are not a "suspect" class. However, to conclude that the rational justification for not requiring such jury instructions is that parole ineligibility for a period of years is not probative, either as mitigation or to rebut "future dangerousness," directly contradicts the United States Supreme Court's rationale in *Simmons*. Furthermore, as Roach contended, this distinction appears to be unreasonable in that it leads to anomalous results. It is difficult to see any impropriety in the jury's consideration of the effect that a defendant's incarceration might have on his "future dangerousness." Such a consideration is an essential part of the jury's determination of the existence of the "future dangerousness" aggravator. Thus it seems that the court's stated objective is unreasonable and the classification fails even rational basis scrutiny. This ruling appears even more unreasonable in the face of the jury's direct questioning as to the parole ineligibility of the defendant. By refusing to provide the jury with the factually correct information, and only telling the jury not to concern itself with what may happen after sentencing, the Supreme Court of Virginia has, in its own words, done "nothing more than invite the jury to speculate"[51] on the probability that the defendant will be paroled from prison in a short period of time if the jury spares his life. In *Simmons*, the United States Supreme Court specifically admonished such a response by the trial court.[52]

In the few pre-1995 cases that remain, defense counsel are urged to preserve the post-*Simmons* issues, including the equal protection claim.

Summary and analysis by:
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248 Va. 485, 487, 450 S.E.2d 361, 362 (1994), *cert. denied*, 115 S. Ct. 1800 (1995)).

[49] *Id.* at *13 (quoting *Schweiker v. Wilson*, 450 U.S. 221, 235 (1981) and citing also *Evans v. Commonwealth*, 228 Va. 468, 481, 323 S.E.2d 114, 122 (1984), *cert. denied*, 471 U.S. 1025 (1985)).

[50] "In assessing future dangerousness, the actual duration of the defendant's prison sentence is indisputably relevant." *Simmons*, 114 S. Ct. at 2194.

[51] *Roach*, 1996 WL 88107 at *13.

[52] "The jury was left to speculate about [the defendant's] parole eligibility when evaluating [his] future dangerousness, and was denied a straight answer about [the defendant's] parole eligibility even when it was requested." *Simmons*, 114 S. Ct. at 2195. "Far from ensuring that the jury was not misled, however, [instructing the jury not to consider parole] actually suggested that parole was available but that the jury, for some unstated reason, should be blind to this fact." *Id.* at 2197.

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FACTS

On February 21, 1994, near the end of Exeter Mill Road in Chesterfield County, Virginia, Tony Leslie Fry shot a car dealer, Leland A. Jacobs, eleven times. He and his accomplice, Brad Hinson, had taken a Ford Explorer out on a test drive with the intent to steal it and to murder any salesperson who insisted on accompanying them. Fry stopped the truck on Exeter Road, feigning a need to check the spare tire. After Jacobs had exited the truck, Fry told him to "look at that owl." When Jacobs turned his head, Fry shot him in the back. Fry fired a total of eleven shots into Jacobs' head, chest, and abdomen.[1]

Coincidentally, Officer David L. Suda of the Chesterfield County Police was looking for Fry on an arson charge when he confronted Hinson and Fry in the Ford Explorer on Exeter Road shortly after the killing. Hinson was driving. Suda approached the car and, upon noticing blood on Fry's hand, asked Fry for an explanation. Fry said that he had hurt himself "playing in the woods." Suda attempted to handcuff Fry, but Fry resisted. He ceased resisting, but reached for the glove compartment stating he wanted to kill himself. Suda sprayed Fry with mace. Hinson immediately dove for the backseat of the truck and grabbed his coat, but he released it when Officer Suda drew his gun. He then exclaimed his innocence in the killing and led Suda to Jacobs' body. Fry confessed to the killing and attested to Hinson's innocence.[2] Once in police custody, Fry was polite, respectful and candid about his part in the killing. He was also very remorseful.[3]

Fry was nineteen years old when he shot Jacobs. He had an IQ of 77 and a dependent personality disorder. His mother abandoned him and he never knew his father's identity. He was raised by his maternal great-grandmother, but grew up with few friends and was not involved in any extra-curricular activities, except for singing in the church choir. His schooling consisted of special education classes for the emotionally disturbed. Prior to the shooting, Fry had not engaged in violent conduct.[4]

Fry was indicted for capital murder for the willful, deliberate, and premeditated killing of Jacobs during the commission of robbery or attempted robbery while armed with a deadly weapon.[5] Fry pleaded guilty at an arraignment on October 3, 1994. The court conducted a

[1] *Fry v. Commonwealth*, 250 Va. 413, 415-16; 463 S.E.2d 433, 434-35.

[2] *Id.*

[3] *Id.* at 417-18; 463 S.E.2d at 435-36.

[4] *Id.* at 417-19; 463 S.E.2d at 435-36.

[5] *Id.* at 414, 463 S.E.2d at 434 (citing Va. Code Ann. §18.2-31(4) (Supp. 1994)).

sentencing hearing on January 5, 1995. After hearing the evidence and reviewing the pre-sentence report, the court sentenced Fry to death based on a finding of vileness.[6]

Fry appealed to the Supreme Court of Virginia, raising only the issue of whether his death sentence was excessive or disproportional to the penalty imposed in similar cases. The court reviewed Fry's case on this ground and to determine if his death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor.[7]

HOLDING

In affirming, the Supreme Court of Virginia summarily held that Fry's sentence was "neither excessive nor disproportionate to penalties generally imposed by other sentencing bodies in the Commonwealth." The court also concluded that the imposition of Fry's death sentence was free from passion, prejudice or any other arbitrary factor, finding that the trial court had acted with "extreme care" in applying the law to the facts of the offense and in considering all of the evidence in mitigation.[8]

ANALYSIS/APPLICATION IN VIRGINIA

I. The Perils of Pleading Guilty

A. Sacrificing Legal Issues

Once a defendant enters a guilty plea, the record becomes extremely constricted and counsel has forgone many potential appellate issues that arise during a jury trial. First, a guilty plea moots almost all antecedent defects in the prosecution. Unless specifically excepted as subject to appellate challenge, this list may include matters such as a flawed indictment, an inadequate bill of particulars, challenges to the jury array, and motions for suppression or discovery. In addition to the forgoing pre-trial issues, the defense loses both the opportunity to appeal trial errors and the right to challenge the overall sufficiency of the Commonwealth's proof of capital murder.

But it is not only potential legal issues for appeal that are lost. The defendant also loses the opportunity to sway a jury or a juror who may believe that while the facts point to guilt, they do not warrant the death penalty. Fry's case exemplifies such a situation. Although it is not completely clear from the Supreme Court of Virginia's opinion what was argued at the sentencing phase, some of Fry's described actions evidenced very child-like characteristics. These characteristics provided an opportunity to mitigate Fry's culpability and simultaneously to implicate his co-conspirator.

Fry's prior unadjudicated acts are those of a ten year-old boy. He set off fire alarms, vandalized cars, broke into three churches and a fire station (committing petty thefts in the process), set fire to two residences, and dug-up a grave.[9] Upon closer examination these acts are consistent with an immature, child-like mind. He broke into churches and a fire department —targets that suggest a young boy's curiosity. Firefighters are often the subject of adolescent wonder as are churches and clergy. Even setting a fire, though more serious and suspect at one level, can be attributed to a guileless, uncounseled mind. Fry set fire to **abandoned** buildings. Playing with fire when it is clear that no one will be hurt is the crime of a young boy. Digging up a grave site sounds ominous, but when the motive is to "see what a dead man looked like after he was dead,"[10] it is clear that the action lacked malice. Even in the commission of the killing, Fry's conduct was unsophisticated. He told the victim to "look at that owl," and then shot him when he turned his head. Finally, when Officer Suda asked how his hands became blood-stained, Fry answered that he was "playing in the woods."[11] This kind of answer does not come from an artful mind.

Had the case been before a jury, at the very least, counsel would have had the opportunity to turn this evidence of "criminal activity" around and convince a juror that Fry was not a leader but a follower.[12] He did not have a criminal record nor did he have a history of violent behavior, drug use, or alcohol abuse.[13] He was more than compliant with police. In fact, he confessed three times to the killing. Police officers testified that Fry was respectful and forthright about his involvement in this killing and in other criminal activities.[14] His remorseful, respectful, and submissive demeanor toward authority figures shows that he was easily controlled and susceptible to being told how and when to act. These same arguments can be made to a sentencing judge, but she is an audience of one, whereas a jury is an audience of twelve, one of which may be persuaded and argue against the imposition of death. Simply put, counsel's odds of receiving a life sentence for the defendant are usually much greater if she argues in front of a jury.

Absent a jury trial, the only remaining issues for appeal are sentencing issues, such as contesting the adequacy of the Commonwealth's case as to future dangerousness and/or vileness, the constitutionality of the language that defines these aggravating factors, and the automatic review issues of proportionality and arbitrary imposition of death. Perhaps the most promising sentencing issue rests in the pre-sentence report that must be made and given to the sentencing judge. Counsel may challenge its accuracy or argue that it is prejudicial. At the same time, such challenges are subject to the same procedural default rules as all other issues; if counsel fails to object on both state and federal grounds, the issues are lost for later review by the state and federal courts.[15]

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[6] *Fry*, 250 Va. at 414-15; 463 S.E.2d at 434.

[7] *Id.* at 420, 463 S.E.2d at 437 (citing Va. Code Ann. § 17-110.1(C)(1) (Supp. 1994)).

[8] *Id.* at 419-20; 463 S.E.2d at 436-37.

[9] *Id.* at 417; 463 S.E.2d at 435.

[10] Petition for Certiorari at 2, *Fry v. Commonwealth*, 250 Va. 413, 463 S.E.2d 433 (Va. 1995) (No. 95-7795), *cert. denied*, 1996 WL 63336 (Mar. 25, 1996) (copy available from the Virginia Capital Case Clearinghouse).

[11] *Fry*, 250 Va. at 415-16, 463 S.E.2d at 434-35.

[12] The persuasiveness of this argument increases when Fry's behavior is contrasted to Hinson's. Fry's immature and unthinking conduct suggests that he did not have the capacity to create and carry out a plan to steal a car during a test drive by murdering a salesman. Instead, it appears more likely that his accomplice Brad Hinson thought of the plan and convinced Fry of the necessity to carry it out. When Officer Suda confronted them, Hinson was quick to pin the killing on Fry, asserting his own "innocence" in the meanwhile. Hinson was driving the Ford Explorer. He was also smart enough to make sure that Fry pulled the trigger and that his own hands did not get bloody. Hinson robbed the victim's wallet and when confronted by Officer Suda immediately dove for the backseat, retrieving his coat which probably contained what he had stolen. He knew when he faced trouble and took steps to evade police and the law. These are the actions of a mature and thinking adult. Fry's character and actions show a lesser degree of moral turpitude, despite the fact that he pulled the trigger.

[13] Petiton for Certiorari at 2, *Fry* (No. 95-7795).

[14] *Fry*, 250 Va. at 416, 418; 463 S.E.2d at 434-35, 36.

[15] Such a failure, however, may inadvertently give the defendant a viable ineffective assistance of counsel claim. But counsel are reminded that the standard for proving ineffective assistance is extremely difficult to meet. "The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome." *Strickland v. Washington*, 466 U.S. 668, 694 (1984). For a better understanding of

B. The *Anders* Brief

Given the shrinking record and basis for appeal where a defendant pleads guilty to capital murder, it may be that appellate counsel will believe the appeal is frivolous. It is not likely, for instance, that the Supreme Court of Virginia will find that the death sentence was disproportional or imposed arbitrarily, since it has never done so before.[16] However, even if counsel concludes that an appeal on the merits is frivolous, she is not relieved of a duty to support an appeal to the best of her ability. *Anders v. California*[17] requires that counsel, after a careful review of the record, submit a brief, arguing anything that might support an appeal. Counsel must also provide a copy of this brief to the defendant so that she may choose to raise additional points.[18] After submitting this brief, the state court decides if an appeal would be frivolous. If the court finds the appeal would be meritless, then counsel can withdraw.[19] If counsel fails to file an appeal and/or fails to submit an *Anders* brief, she has effectively abandoned the defendant and has violated the Sixth and Fourteenth Amendments.[20] Moreover, under *Penson v. Ohio*,[21] an appellate court is required to keep counsel from withdrawing where an *Anders* brief has not been submitted. The court is not allowed to engage in an independent review that amounts to harmless-error analysis.[22]

An appeal such as Fry's raises *Anders* concerns because appellate counsel did not raise a single "appeal of right issue"; the sole challenge was to proportionality which is a part of automatic review and not a part of Fry's appeal of right. And because the Supreme Court of Virginia failed to require Fry's counsel to submit an *Anders* brief, he arguably was abandoned by counsel within the meaning of *Anders*. At a minimum, the Virginia Supreme Court should have required appellate counsel to file an *Anders* brief subject to the United States Supreme Court's requirements governing the procedure.

II. Taking Issue with Victim Impact Evidence and The Commonwealth's Future Dangerousness Case

The Supreme Court of Virginia's description of trial proceedings raises two issues that should have been appealed or, at a minimum, included in an *Anders* brief. One assignment of error originates in the Commonwealth's introduction of victim impact evidence that exceeded the permissible scope of this type of evidence under *Payne v. Tennessee*.[23] Because the evidence went beyond the scope of *Payne's* holding, it may be constitutionally invalid and, if the sentencing judge relied upon it in making his determination of vileness, then the validity of his decision to impose death would be called into question.

In *Payne*, the mother of the victim testified that her grandson missed his mother and sister who were killed and inquired after them on a daily basis. The state argued the "impact" on the family to the sentencing jury.[24] The United States Supreme Court, overruling *Booth v. Maryland*[25] and *South Carolina v. Gathers*,[26] held that the Eighth Amendment did not erect a *per se* bar to victim impact evidence.[27] The Court stated that "[a] State may legitimately conclude that evidence about the victim and **about the impact of the murder on the victim's family** is relevant to the jury's decision as to whether or not the death penalty should be imposed."[28] Most significantly, the Court specifically left open whether victim impact evidence could be admitted as to people who are not family members.[29]

In Fry's case, the Commonwealth introduced testimony from the owner of the car dealership where the victim worked. The owner testified that the victim was "very kind" and an "excellent employee." His testimony also implied that his business had suffered. His statements included that his "sales force" was now reluctant to go on test drives with male customers, and that his top salesperson, a woman, was afraid to accompany male customers to the back lot after dark.[30] As sentencer, the trial judge, therefore, may have relied upon evidence that was constitutionally impermissible to consider.[31]

A second assignment of error arose out of the Commonwealth's case of future dangerousness because it encompassed several prior unadjudicated acts that were of highly dubious quality. Stealing and vandalizing cars are not acts of violence against human beings. Nor is burning abandoned buildings. More disturbing was that Fry's digging up a grave was introduced as an unadjudicated act. The conduct was irrelevant because it did not involve violence, and, even if of marginal relevancy, the prejudicial and inflammatory value of this information is so great that it should never have been admitted. Future dangerousness evidence must show that the defendant poses a probability of committing "criminal acts of violence" that pose a "continuous and **serious** threat" to society.[32] Yet, all of this evidence was introduced by the Commonwealth in support of future dangerousness and is precisely the type of information to which counsel should object.

Summary and analysis by:
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procedural default in Virginia, *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).

16 The Virginia Supreme Court says that a death sentence is proportionate if "'other sentencing bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant.'" *Fry*, 250 Va. at 419; 463 S.E.2d at 436 (quoting *Jenkins v. Commonwealth*, 244 Va. 445, 461, 423 S.E.2d 360, 371 (1992), *cert. denied*, 113 S.Ct. 1862 (1993)). However, the court does not engage, at all, in comparing defendants and it compares crimes by looking at the capital predicate and the aggravating circumstances. Thus, if a defendant has committed murder during a robbery and vileness is found, then so long as death has been imposed on another defendant for the same general findings, the court finds the death sentence proportional. The limitation of review to these factors ensures that every death sentence will be proportional regardless of disparity between characteristics of individual defendants and the crimes they commit. Petition for Certiorari at 15-20, *Fry* (No. 95-7795).

17 386 U.S. 738 (1967).

18 *Id.* at 744.

19 *Id.*

20 *Id.* at 741-45.

21 488 U.S. 75 (1988).

22 *Id.* at 86.

23 501 U.S. 808 (1991).

24 *Id.* at 814-16.

25 482 U.S. 496 (1987).

26 490 U.S. 805 (1989).

27 *Payne*, 501 U.S. at 827.

28 *Id.* (emphasis added).

29 *Id.* at 830 n.2.

30 *Fry*, 250 Va. at 417; 463 S.E.2d at 435.

31 To have a colorable claim, counsel would need to investigate whether the sentencing judge relied upon this evidence in her finding of vileness. In Virginia, unfortunately, unlike the majority of the states, there is no requirement that a sentencing judge make a written report that evinces her rationale for finding an aggravating factor. However, some judges will engage in this task. Therefore, counsel faced with a similar situation should inquire into the record for any evidence showing that the judge relied upon what could be constitutionally impermissible victim impact evidence.

32 Va. Code. Ann. § 19.2-264.4(c); *see also*, Michael H. Spencer, *Challenging the Future Dangerousness Aggravating Factor*, Capital Defense Journal, this issue.