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Jackson v. Commonwealth 499 S.E.2d 538 (Va. 1998)

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I. Facts

On August 31, 1994, Chauncey Jacob Jackson ("Jackson") rode in a Jeep Cherokee driven by one of his friends. His friend stopped the vehicle to talk with three other friends standing on a street. One of the three friends suggested that the group rob a man, Ronald Gene Bonney, Jr. ("Bonney"), who was seated in a car parked close by. Jackson took a gun from the Jeep and, accompanied by two others from the group, walked over to Bonney's car. One of the men accompanying Jackson blocked Bonney's door with his leg so that Bonney could not escape from his vehicle. Jackson, armed with the gun, entered Bonney's car on the passenger side and demanded that Bonney give him money. Bonney indicated that he had no money, and then purportedly said "Shoot me, you little f--ker," to Jackson. Jackson cocked the gun, it jammed, and then the gun fired three times, hitting Bonney in the arm and the chest and causing his death. Jackson fled in the Jeep and was arrested later that night.[1]

Jackson was found guilty by a jury on charges which included capital murder. At the penalty phase, the Commonwealth introduced evidence of Jackson's criminal record to establish that Jackson would be a danger in the future.[2] Jackson's juvenile criminal record included findings that Jackson was not innocent of other offenses, which included receiving stolen property, possession of cocaine, unauthorized use of a motor vehicle inspection sticker, driving without a license, altered license plates, and speeding.[3] Jackson was incarcerated for thirteen months awaiting trial on the capital murder charges, but was released on bond on October 24, 1995. Evidence was also introduced at the penalty phase

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1. Jackson v. Commonwealth, 499 S.E.2d 538, 543 (Va. 1998).

2. For a defendant to be sentenced to death in Virginia, it is statutorily required that:

> [T]he Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense . . . that he would commit criminal acts of violence that would constitute a continuing serious threat to society . . . .

VA. CODE ANN. § 19.2-264.4(C) (Michie 1998). This requirement is known commonly as proof of "future dangerousness."

3. Defense counsel should be aware that motions in limine can be filed to keep certain types of evidence from being introduced or even referred to at the penalty phase and at other phases of the trial process. Specifically, a motion in limine could have been made to keep out all of the offenses on Jackson's record that had no bearing on his future dangerousness. Acts such as driving without a license, possession of altered license plates, the unauthorized use of an inspection sticker, and the possession of cocaine could all be said to have little bearing on determining whether Jackson would commit criminal acts of ***violence*** that would constitute a continuing serious threat to society.

that in December of 1995, while free on bond, Jackson was involved in the unlawful entry of a house and that he was convicted of 14 felony charges arising therefrom. Additionally, an inmate testified that when Jackson was imprisoned for the December 1995 incident, Jackson assaulted the inmate. Jackson was never tried on this accusation.[4] Jackson was sentenced to death on the basis of "future dangerousness" under section 19.2-264.4 of the Virginia Code.[5] Jackson appealed his conviction of capital murder. The Supreme Court of Virginia consolidated his appeal of his conviction with the court's automatic review of Jackson's death sentence.[6]

II. Holding

The Supreme Court of Virginia denied all of Jackson's assignments of error stemming from his capital murder conviction, finding that the claims were without merit. Further, the court found that the sentence of death was not inappropriately imposed upon Jackson.[7]

III. Analysis/Application in Virginia

A. Previously Decided Issues

Jackson raised several issues that had been rejected by the Supreme Court of Virginia in past cases. Finding that Jackson presented nothing to persuade the

4. Use of alleged unadjudicated acts of misconduct is quite common in Virginia capital cases, especially where Commonwealth evidence may otherwise be weak. Use of fellow inmates to give statements against the defendant is also common. There are several ways to combat or discourage these practices.

First, defense counsel should require the state to give specific and timely notice of any unadjudicated act evidence it intends to use at trial. Under section 19.2-264.3:2 of the Virginia Code ("3:2"), upon motion by the defendant, if the attorney for the Commonwealth intends to introduce evidence of unadjudicated acts of criminal conduct during the sentencing phase, then the attorney for the Commonwealth must give notice in writing of such intent and describe the alleged conduct and the time and place where it is alleged to have occurred. *See* VA. CODE ANN. § 19.2-264.3:2 (Michie 1998). A 3:2 motion allows defense counsel to do background work to discredit the existence of the alleged act and to research any witnesses who may testify to the alleged acts.

Second, defense counsel should fully explore and demand information under *Kyles v. Whitley*, 514 U.S. 419 (1995), and *Brady v. Maryland*, 373 U.S. 83 (1963). These two cases require that the state disclose evidence casting doubt on the certainty and reliability of witness testimony, prior statements of the state's key witnesses, and evidence showing that the state's investigation was less than thorough. With regard to the use of statements by fellow inmates, defense counsel should make *Kyles/Brady* motions to discover the cellmate statements, other witnesses who may have heard the same purported statement made to the cellmate, jail records which may show that the cellmate was regularly placed near defendants to get statements for state use, any conversations with the Commonwealth that the inmate may have had, and any promises made to the cellmates by the state. All of these pieces of evidence may lead to the casting of doubt on the reliability of any cellmate witnesses.

In all cases it is important to treat unadjudicated misconduct as a separate criminal charge to be defended as such - a "trial within a trial" with its own discovery and motions as seen above.

5. VA. CODE ANN. § 19.2-264.4 (Michie 1998).

6. *Jackson*, 499 S.E.2d at 543-544.

7. *Id.* at 555.

court to decide the issues differently than it had in the past cases, the court rejected the claims.[8] It is important that defense counsel at least raised these issues, even though the Supreme Court of Virginia had already squarely ruled against them. By doing so, these issues were preserved for federal habeas or certiorari review. In particular, three of the issues rejected by the court in this manner seem to be particularly good candidates for federal review. These issues were: (1) that imposition of the death penalty based on future dangerousness was unconstitutional when partly based on prior unadjudicated acts committed by the defendant, without any requirement of a standard of proof for such acts; (2) that the future dangerousness factor and the instructions, in conformity with the statutory language, which were given by the court, are unconstitutional because they are vague; and (3) that the court's method of reviewing the proportionality of the imposition of the death sentence, by considering only those murder cases in which death was imposed and not cases where a lesser sentence was imposed, is invalid. Although all of these claims were rejected, they are all issues which may one day be heard by the Supreme Court of the United States.[9] Thus, it is important that defense counsel at least raised these claims, even in the face of certain rejection, because by raising the issues they were preserved for further review at other levels.[10]

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8. *Id.* at 544-45.

9. An example of a "hopeless" claim that eventually brought relief is the issue of whether due process requires that juries be informed that a life sentence without parole is the only alternative to a death sentence in states where parole is prohibited in cases of future dangerousness. *See* Simmons v. South Carolina, 512 U.S. 154 (1994). Another example of a "hopeless" claim that eventually brought relief is the issue of whether evidence that a defendant has adjusted well to incarceration between arrest and trial is mitigating evidence that cannot be excluded at trial. *See* Skipper v. South Carolina, 476 U.S. 1 (1986).

10. The court rejected some claims in cursory fashion. Some turned on facts particular to this case. Others provided little or no guidance for counsel in the future. These claims will not be discussed at length in this summary. They include Jackson's contention that his Fifth Amendment rights were violated by the admission of certain statements he made to the police into evidence at trial, in part because he was not allowed to see his mother, who was at the police station, during the four hour interrogation process. The court rejected this claim, however, it did imply that if a situation were factually sufficient, a juvenile defendant's interrogation without the presence of one of his parents may be constitutionally impermissible. Jackson also contended that the entire venire should have been struck because they had heard certain courtroom sentencing discussions. Jackson further claimed that the prosecution had improperly used peremptory strikes under *Batson v. Kentucky,* 476 U.S. 79 (1986) (holding that use of peremptory strikes may not be purposefully based on racial grounds; party whose use of peremptory strikes is questioned as being based on race must give a race-neutral explanation for the strike). Jackson also contended that he should have been granted a strike for cause on a juror who was illiterate. The court rejected this claim since all written evidentiary materials had been read to the illiterate juror by other jurors. This situation is potentially problematic if the reading juror incorrectly reads some of the materials to the illiterate juror, or if the reading juror seeks to influence the illiterate juror and purposefully misreads the evidence to the illiterate juror. Thus, this issue is one which may prompt further judicial inquiry and preservation of this issue for further appellate inquiry was important. Other holdings included: (1) the trial court has discretion to allow the Commonwealth to reopen its case after it has rested, and (2) only slight corroboration of an accused's statements is required to establish the corpus delicti when the accused

B. *Subjecting Sixteen Year Old Defendants to the Death Penalty*

Jackson, who was sixteen at the time of the murders,[11] claimed that Virginia statutes did not specifically provide for the imposition of the death penalty on juveniles convicted of murder, thus the death penalty could not be imposed upon him.[12] According to Jackson, under *Stanford v. Kentucky*,[13] each state has to use great specificity in death penalty statutes articulating a policy permitting imposition of the death penalty on juveniles, for the imposition of the death penalty to be constitutionally sound.

Stanford, and its companion case, *Wilkins v. Missouri*,[14] dealt with two juveniles, ages sixteen and seventeen, who had been sentenced to death for separate crimes under the laws of Kentucky and Missouri, respectively. The Supreme Court of the United States ruled that the execution of sixteen and seventeen year-olds was not, in and of itself, unconstitutional. However, the Court acknowledged that under *Lockett v. Ohio*,[15] each defendant is entitled to an individual consideration of his eligibility for the death penalty.[16] Accordingly, the court ruled that for a juvenile to be constitutionally eligible for the death penalty, the transfer proceedings which allowed him to be tried as an adult, rather than as a juvenile, must provide for an individualized determination that the juvenile possessed the requisite moral responsibility and maturity to be sentenced as an adult.[17] The court further ruled that the determination of requisite moral responsibility and maturity should be made initially by the juvenile courts, prior to transferring the juvenile to stand trial as an adult.[18]

In *Stanford* and *Wilkins*, the Court found that the respective juvenile transfer procedures employed by Kentucky[19] and Missouri[20] did provide for an individual-

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fully confesses that he committed the crime.

11. *Jackson*, 499 S.E.2d at 542.
12. *Id.* at 552.
13. 492 U.S. 361 (1989).
14. *Id.*
15. 438 U.S. 586 (1978).
16. Lockett v. Ohio, 438 U.S. at 605.
17. Stanford v. Kentucky, 492 U.S. 361, 374-75 (1989).
18. *Stanford*, 492 U.S. at 375.
19. The Kentucky statute provided, at the time, that:

> If the court determines that probable cause exists [to believe that a person 16 years old or older committed a felony or that a person under 16 years of age committed a Class A felony or a capital offense], it shall then determine if it is in the best interest of the child and the community to order such a transfer based upon the seriousness of the alleged offense; whether the offense was against person or property, with greater weight being given to offenses against persons; the maturity of the child as determined by his environment; the child's prior record; and the prospects for adequate protection of the public and the likelihood of reasonable rehabilitation of the child by the use of procedures, services, and facilities currently available to the juvenile justice system.

KY. REV. STAT. ANN. § 208.170(3) (Michie 1982) (repealed effective July 15, 1984).

20. The Missouri statute provided, at the time, that in determining whether a juvenile should

ized determination of whether juvenile defendants possessed the moral responsibility and maturity to be tried as adults.[21]

Accordingly, in *Jackson*, the Supreme Court of Virginia looked to Virginia's transfer proceedings and found that the Virginia transfer statute addressed the "prosecution and punishment of juveniles in as much detail as the similar Kentucky and Missouri statutes which are acknowledged in *Stanford* as sufficient to authorize those states to impose the death penalty upon juveniles 16 or 17 years of age."[22] At the time, the Virginia juvenile transfer statute bore some resemblance to the Kentucky and Missouri statutes, perhaps enough to be approved under *Stanford*. However, the juvenile transfer statute in effect today falls far short of providing for a determination of whether juvenile defendants possess the moral responsibility and maturity to be tried as adults.

The present Virginia juvenile transfer provision is found at section 16.1-269.1 of the Virginia Code.[23] Under section A of this statute, a list of factors ("section A factors"), very similar to those listed by the Kentucky and Missouri statutes, are to be considered by the juvenile court in determining whether to transfer jurisdiction from the juvenile to the circuit court.[24] However, under section B of this statute, if a juvenile fourteen years of age or older is charged with capital murder, the juvenile court holds a preliminary hearing.[25] If the court finds probable cause at the preliminary hearing, then the juvenile court certifies the charge to a grand jury, thereby divesting itself of jurisdiction over the juvenile without considering any of the section A factors.[26] Thus, if the juvenile is

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be transferred from the juvenile court to a circuit court, the juvenile court must consider:

(1) The seriousness of the offense alleged and whether the protection of the community requires transfer to the court of general jurisdiction;
(2) Whether the offense alleged involved viciousness, force, and violence;
(3) Whether the offense alleged was against person or property, with greater weight being given to the offense against persons, especially if personal injury resulted;
(4) Whether the offense alleged is a part of a repetitive pattern of offenses which indicates that the child may be beyond rehabilitation under the juvenile code;
(5) The record and history of the child, including experience with the juvenile justice system, other courts, supervision, commitments to juvenile institutions and other placements;
(6) The sophistication and maturity of the child as determined by consideration of his home and environmental situation, emotional condition and pattern of living;
(7) The program and facilities available to the juvenile court in considering disposition; and
(8) Whether or not the child can benefit from the treatment or rehabilitative programs available to the juvenile court.

MO REV. STAT. § 211.071(6) (1986).

21. *Stanford*, 492 U.S. at 375.
22. *Jackson*, 499 S.E.2d at 552.
23. VA. CODE ANN. § 16.1-269.1 (Michie 1998).
24. VA. CODE ANN. § 16.1-269.1(A)(4) (Michie 1998).
25. VA. CODE ANN. § 16.1-269.1(B) (Michie 1998).
26. VA. CODE ANN. § 16.1-269.1(D) (Michie 1998).

charged with capital murder there need not be any consideration of the factors found in section A, only a consideration of probable cause. One Virginia Court of Appeals case, *Dara v. Commonwealth*,[27] has construed the statute that way, holding that if a section B hearing is required (in other words, if capital murder or first degree murder is the charge), the court need not consider the section A factors. If this is so, then the Virginia juvenile transfer statute is in no significant way similar to the Kentucky and Missouri statutes upheld in *Stanford*. The Virginia statutes provide for no consideration of the juvenile's moral responsibility and maturity to be tried as an adult before the juvenile can be transferred to the circuit courts. Under *Stanford*, this statutory scheme is unacceptable.

This issue should definitely be litigated. The Virginia statutory scheme fails to meet the constitutional standard required by *Stanford*. This issue should be raised before the transfer proceeding is ever initiated, after it is initiated, and at every possible stage to assure its preservation for federal appeal. As seen by this decision and the *Dara* case, it is unlikely that any Virginia court will hold the juvenile transfer statutory scheme to be insufficient under *Stanford*. Thus, it becomes important to preserve this issue for federal appeal.

C. Speedy Trial Violations and Their Causes

Jackson contended that his constitutional[28] and statutory[29] rights to a speedy trial had been violated. The court conceded that the length of the delay in bringing Jackson to trial was both statutorily and constitutionally unacceptable.[30] However, the court found that the time delays were caused by continuances requested or acquiesced in by Jackson.[31] Thus, under *Barker v. Wingo*,[32] the court ruled that under these circumstances Jackson waived his rights to a speedy trial.[33]

The court may have misread *Barker*. Demand for trial is but one of four factors to be balanced in evaluating claims of speedy trial denial, as is illustrated

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27. No. 2795-95-1, 1997 WL 52421 (Va. App. Feb. 11, 1997).

28. Under the case of *Barker v. Wingo*, 407 U.S. 514 (1972), there are four criteria which must be considered in determining whether the United States Constitution's Sixth Amendment right to a speedy trial has been violated. The criteria are "[l]ength of delay, the reason for the delay, the defendant's assertion of his right, and prejudice to the defendant." *Id.* at 530 (footnote omitted).

29. In Virginia, the statutory time frame in which a trial must begin is codified at section 19.2-243 of the Virginia Code. VA. CODE ANN. § 19.2-243 (Michie 1998). The time frame required is either five or nine months depending upon the procedural circumstances of the case. The time period may be extended if the failure to bring the defendant to trial within the requisite time period was caused by, among other causes, continuances granted on the motion of the accused or his counsel, or by concurrence in a motion for continuance made by the prosecution.

30. *Jackson*, 499 S.E.2d at 549-50.

31. *Id.* at 550.

32. 407 U.S. 514 (1972) (holding that in determining whether there has been a violation of the constitutional right to a speedy trial, the court should balance several factors, including length of and reason for delay, the defendant's assertion of his right, and the prejudice to the defendant caused by the delay).

33. *Jackson*, 499 S.E.2d at 550.

by a more recent case. According to *Doggett v. United States*,[34] when determining the reason for the delay under *Barker*, the inquiry to be made is "whether the government or the criminal defendant is *more* to blame for that delay."[35] Thus, if there are other reasons, the court should have determined who was more responsible for the delay.

In Jackson's case it is arguable that there were other government-caused reasons for the delay. Jackson was first indicted for the murder of Bonney in October of 1994.[36] However, these indictments were thrown out because the circuit court failed to conduct the review of Jackson's transfer from the juvenile courts required by section 16.1-269.6 of the Virginia Code[37] before the indictments were issued. After the review was conducted in June of 1995, new indictments were issued in December of 1995. The trial began on August 21, 1996. The period of time between Jackson's first indictment and his trial was almost two years. It is arguable then, that one of the reasons Jackson was not brought to trial sooner was the state's negligence in failing to conduct the proper review procedures. Under *Doggett*, negligence of the state is an "unacceptable reason for delaying a criminal prosecution once it has begun."[38] Thus, Jackson could have argued that under *Doggett*, there was more than one reason for the delay, therefore, it should have been determined whether the state or the defendant was more to blame for the delay.

Although it is rare for a defendant to prevail on a denial of speedy trial claim, it is worth noting, on a practical note, that responsibility for many continuances can properly be placed upon the Commonwealth. There is no reason, for example, to permit the record to cast any responsibility on defense counsel for delays occasioned by the Commonwealth's failure to provide timely disclosure of that which it is required by law to disclose, or by failure to respond in a prompt and relevant manner to pretrial motions.

D. Defense Counsel Use of Experts

Jackson made several claims based upon a mental examination conducted upon him by Dr. Nelson, the Commonwealth's expert appointed pursuant to section 19.2-264.3:1(F) of the Virginia Code ("3:1").[39] However, the court

34. 505 U.S. 647 (1992).

35. Doggett v. United States, 505 U.S. 647, 651 (1992).

36. *Jackson*, 499 S.E.2d at 542.

37. VA. CODE ANN. § 16.1-269.6 (Michie 1998).

38. *Doggett*, 505 U.S. at 657.

39. This statute provides:

> If the attorney for the defendant gives notice pursuant to subsection E and the Commonwealth thereafter seeks an evaluation concerning the existence or absence of mitigating circumstances relating to the defendant's mental condition at the time of the offense, the court shall appoint one or more qualified experts to perform such an evaluation.

VA. CODE ANN. § 19.2-264.3:1(F) (Michie 1998).

rejected all of Jackson's claims because Jackson called Dr. Nelson to testify on Jackson's behalf at the penalty phase of his trial.[40] Were it not for this odd situation where the defense calls the state's expert to testify, several of Jackson's claims would appear to have merit and are worth mentioning.

If the Commonwealth seeks an examination of the defendant under 3:1, section F of the statute requires that the court order the defendant to submit to the examination, and "advise the defendant *on the record in court* that a refusal to cooperate with the Commonwealth's expert could result in exclusion of the defendant's expert evidence."[41] In Jackson's case, the court failed to give the warning required by section F. Defense counsel should pay careful attention to whether the court follows this procedure, and if it is not followed, assert it as a bar to testimony of the Commonwealth expert.

Second, Jackson contended that the evaluation sought by the state pursuant to section F should not have been ordered. Jackson contended that the statute forced him to choose between his Fifth Amendment right against self-incrimination and his Sixth Amendment right to a fair trial because the statute required him to cooperate with a court-appointed psychiatrist or suffer the possibility that his expert evidence would be barred.[42] The court cited past cases where it had rejected the same contention and accordingly ruled against Jackson.[43] However, Jackson's point is potentially a good one and should continue to be litigated.[44]

A related issue, not raised by Jackson, is the Fifth Amendment right to a warning before the evaluation. According to *Estelle v. Smith*,[45] a defendant's Fifth Amendment right not to incriminate himself applies to state mental examinations conducted at the penalty phase.[46] Accordingly, Jackson argued that the defendant in such situations should be warned that if he or she gives up his right to remain silent, and cooperates with the state's examination, his statements may be used against him at the penalty phase and his Fifth Amendment right may be waived. This warning is not given to defendants in Virginia, and under *Savino v. Murray*,[47] appears to not be required by the United States Court of Appeals, Fourth Circuit. However, the Supreme Court of the United States has yet to rule upon this issue,

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40. Defense counsel's decision to call the Commonwealth expert to testify is a curious one. There are high risk factors associated with calling an expert who performed an examination for the State. By calling the expert to testify, the defense counsel opened the door for the state to present expert testimony in rebuttal to the issues raised by the expert called by the defense. *See* VA. CODE ANN. § 19.2-264.3:1(G) (Michie 1998). On the other hand, the expert apparently gave some testimony favorable to Jackson.

41. VA. CODE ANN. § 19.2-261.3:1(F) (Michie 1998) (emphasis added).

42. *Jackson*, 499 S.E.2d at 553.

43. *Id.*

44. For a discussion of the issue raised by Jackson, and possibilities for court recognizance of the problem asserted, *see* Elizabeth A. Bennett, *Is Preclusion Under Va. Code. Ann. 19.2-264.3:1 Unconstitutional?*, CAP. DEF. DIG., vol. 2, no.1, p.24 (1989).

45. 451 U.S. 454 (1981).

46. Estelle v. Smith, 451 U.S. 454, 462-63 (1981).

47. 82 F.3d 593 (4th Cir. 1996).

and given the ruling in *Estelle*, the Court may rule that *Miranda* rights are not waived simply by availing oneself of a statutory right to an expert on capital sentence mitigation, as compared to an affirmative defense such as insanity.[48] Therefore the claim should be raised by defense counsel and preserved in the record at all levels so that the possibility of Supreme Court review is left open.

Finally, Jackson claimed that the court erroneously allowed Dr. Nelson to offer an opinion on Jackson's future dangerousness, which, according to Jackson, was an opinion on the ultimate issue for the jury.[49] The court held, and Jackson conceded, that Nelson did not actually say that Jackson would be a danger in the future.[50] However, the court ruled that even if Nelson had said that Jackson would be a danger in the future, such testimony would not have constituted an opinion as to the ultimate issue.[51] According to the court, the ultimate issue was whether Jackson should be sentenced to death or imprisoned for life, not whether he would be a future danger or not.[52]

The court erred by deciding that future dangerousness is not an ultimate issue in a capital case. For a death sentence to be imposed, future dangerousness must be proven beyond a reasonable doubt.[53] This requirement is similar to the state being required to prove intent in a larceny case, which also must be proven beyond a reasonable doubt. Both are ultimate issues on which witnesses should not be allowed to offer an opinion.[54] In any event, the court's treatment of this issue is but one more reason to consider making full use of 3:1 experts short of calling them to the stand.[55]

E. Dysfunctional Proportionality Review

Under section 17.1-313 of the Virginia Code,[56] the court had to determine whether the death sentence imposed upon Jackson was excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant. The court ruled that juries in the Commonwealth generally

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48. Invocation of an insanity defense to the crime itself does operate as a waiver. *See* Buchanan v. Kentucky, 483 U.S. 402 (1987).

49. *Jackson*, 499 S.E.2d at 553.

50. *Id.* at 553.

51. *Id.*

52. *Id.* at 553-54.

53. For a defendant to be sentenced to death in Virginia, it is statutorily required that: "the Commonwealth must prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant . . . that he would commit criminal acts of violence that would constitute a continuing serious threat to society . . ." VA. CODE ANN. § 19.2-264.4 (Michie 1998).

54. Bond v. Commonwealth, 311 S.E.2d 769 (Va. 1984).

55. For a more thorough discussion of using, but not calling an expert witness to testify, *see* Douglas S. Collica, *Alice in Wonderland Interpretations: Rethinking the Use of Mental Mitigation Experts*, CAP. DEF. J., vol. 9, no. 1, p. 57 (1996).

56. VA. CODE ANN. § 17.1-313 (Michie 1998).

impose the death sentence for crimes comparable to Jackson's murder of Bonney.[57] The court stated that it gave "particular consideration to other capital murder cases in which robbery or attempted robbery was the underlying felony and the death penalty was based only on future dangerousness."[58] This statement evidences that the court considered only the crime in its penalty comparison. The court should have more carefully considered those capital murder cases based on robbery and future dangerousness which were committed by sixteen-year-olds. By looking at such cases with sixteen-year-old defendants, the court would have considered *both* the crime *and* the defendant as required by section 17.1-313 of the Virginia Code.[59]

Justice Hassell dissented from the majority of the court on the grounds that the court failed to consider the defendant in its proportionality review. According to Hassell, juries in Virginia generally have not approved of the imposition of the death penalty for 16-year-old capital murder offenders.[60] Hassell looked at ten capital murder cases in which a 16-year-old was the defendant. In those ten cases, only Jackson was sentenced to death.[61]

Proportionality review in Virginia is perfunctory and meaningless. For that very reason, it must be challenged on federal constitutional grounds, even though proportionality review is a state statutory obligation. There are at least two ways to "federalize" a challenge of proportionality review conducted by the Supreme Court of Virginia. First, under *Pulley v. Harris*,[62] proportionality review of a death sentence, if required by statute, must at least be meaningfully done to be constitutional under the Eighth Amendment. Defense counsel should allege that by failing to examine the proportionality with regards to the crime and the defendant, as required by statute, the court is not meaningfully reviewing the proportionality of the death sentence. Second, it is arguable that it is a violation of the Due Process Clause to conduct the review, which is a right granted by statute, in an arbitrary manner. Arguably, the court's failure to examine similar crimes committed by 16-year-olds is arbitrary. In the case of *Dubois v. Greene*,[63] the United States Court of Appeals, Fourth Circuit implicitly recognized this state created right argument as a legitimate way to federalize an issue.

Jason J. Solomon

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57. *Jackson*, 499 S.E.2d at 554-55.

58. *Id.* at 554.

59. VA. CODE ANN. § 17.1-313 (Michie 1998).

60. *Jackson*, 499 S.E.2d at 555.

61. *Id.* at 555.

62. 465 U.S. 37 (1984).

63. No. 97-21, 1998 WL 276282 (4th. Cir. May 26, 1998). *See* Case Note of *Dubois v. Greene*, 11 CAP. DEF. J. 87 (1998).