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Atkins v. Commonwealth 510 S.E.2d 445 (Va. 1999)

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I. Facts

On the afternoon of August 16, 1996, Daryl Atkins and William Jones were at the home of Atkins drinking alcohol and smoking marijuana.[1] Later that evening, Atkins, armed with a handgun, and Jones walked to a nearby convenience store to buy more beer. Once in the parking lot of the store, Atkins told Jones that he did not have enough money to purchase anything and would panhandle to get more money.[2] Thereafter, the pair proceeded to abduct Eric Nesbitt, a patron of the store. The pair drove Nesbitt into a field and Atkins allegedly shot and killed him.[3]

During the investigation which followed the incident, Atkins made a statement to Investigator Frederick Lyons, in which Atkins claimed Jones was the one who shot Nesbitt.[4] At trial, however, the jury found Atkins guilty of capital murder.[5] During the penalty trial, the Commonwealth sought to prove both the future dangerousness aggravating factor and the vileness aggravating factor. Atkins presented the testimony of Dr. Evan Stuart Nelson, a forensic psychologist, who testified that Atkins had an intelligence quotient ("IQ") of fifty-nine. Based on this score, Nelson stated that Atkins was "mildly mentally retarded."[6] The jury found the existence of both the future dangerousness and vileness aggravating factors, and sentenced Atkins to death.[7] After the judge imposed the sentence,[8] Atkins appealed to the Supreme Court of Virginia, presenting nineteen assignments of error.

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1. The opinion cited to in this article is the original opinion of the Supreme Court of Virginia, which was handed down on January 8, 1999. On February 26, 1999, the Supreme Court of Virginia handed down a revised opinion. At the time of publication of this article, this opinion was not yet available in any reporter or on any electronic database. The opinion can be found at < http://www.courts.state.va.us/txtops/1981477.txt > on the Supreme Court of Virginia website.
2. Atkins v. Commonwealth, 510 S.E.2d 445, 449 (Va. 1999).
3. *Id.*
4. *Id.* at 454.
5. *Id.* at 451.
6. *Id.*
7. *Id.* at 452.
8. *Id.* at 453.

II. Holding

The Supreme Court of Virginia ruled that several of the assignments of error had not been briefed, six of the claims had been previously decided by the court, and five other claims were without merit. The court held, however, that the use of an incorrect verdict form was reversible error with respect to the imposition of the death penalty. Accordingly, the court affirmed Atkins's conviction of capital murder, but overturned the sentence of death and remanded the case to the trial court for a new penalty proceeding.[9]

III. Analysis / Application in Virginia

This case is something of a landmark in recent Virginia capital case history. With the exception of penalty trial relief mandated by the decision of the Supreme Court of the United States in *Simmons v. South Carolina*,[10] this case marks only the third reversal by the Virginia Supreme Court since 1990.[11]

A. Batson *Claim*

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9. *Id.* at 453-57. The court's disposition of several of Atkins's claims will not be discussed further in this article, for they provide no new insight on capital defense law in Virginia. These claims are briefly identified below.

The Virginia Supreme Court dismissed some issues it had previously decided in other cases. These issues included challenges to the constitutionality of the Virginia death penalty statutes and a challenge to the trial court's failure to grant Atkins additional peremptory strikes. *Id.* at 453.

Atkins claimed error in the trial court's denial of his motion in limine to have a sample of blood taken from Jones or, in the alternative, to limit the prosecution's presentation of DNA testing of blood found at the scene of the crime. The court ruled that this testing was not necessary to his defense, and that Atkins did not demonstrate that the denial of the tests was materially prejudicial to his case. *Id.* at 453-54.

The court also noted that in Atkins's opening brief, counsel had modified the order and phrasing of his assignments of error from his original designation of the assignments under Virginia Supreme Court Rule 5.22(b). The court noted that it would only discuss the original assignments of error. *Id.* at 453. The court also ruled that it would not discuss any assignments of error which had not been briefed. It is important for defense counsel to be aware of this rule and be sure that those assignments of error listed in the Rule 5.22(b) designation are also briefed and that all assignments counsel wishes to pursue are listed in the Rule 5.22(b) designation.

10. 512 U.S. 154 (1994) (where future dangerousness is at issue and state law prohibits parole if the defendant is sentenced to life in prison, due process requires that the jury be informed–either by instruction or argument of counsel–that the only alternative to a death sentence is a life sentence without possibility of parole).

11. The other two reversals were based on insufficiency of triggerman evidence. *See* Cheng v. Commonwealth, 393 S.E.2d 599 (Va. 1990); Rogers v. Commonwealth, 410 S.E.2d 621 (Va. 1991).

Based on *Batson v. Kentucky*,[12] Atkins challenged the Commonwealth's peremptory strike of a nineteen-year-old black female. The juror was questioned by the trial court, the Commonwealth, and Atkins's counsel, and denied ever having been the victim of a past crime.[13] The Commonwealth used one of its peremptory strikes to remove her, first claiming that the juror's age was the race neutral reason for the strike, and later claiming that the juror had been untruthful because she had been a victim of a crime. The Commonwealth produced an offense report showing that she was the complaining witness in a grand larceny complaint. The trial court and the Supreme Court of Virginia both accepted the latter reason.[14]

The court correctly focused on the subjective reason for the peremptory strike, as required by *Batson*. This case is further evidence that any race-neutral reason, however implausible, will be accepted by Virginia courts. Challenges on this basis will not succeed. However, when, as here, factual assertions are made or evidence is presented by the prosecution in support of a race-neutral reason, it may be possible to obtain an evidentiary hearing to test the validity or establish the context of the factual assertion. It may then in turn be possible to assert that, had the prosecutor known the truth in context, the strike would not have been made. The value of such a hearing or procedure is more tactical than substantive. At the very least, it slows down or disrupts what is too often a hurried process of jury selection.

B. Verdict Forms–Grounds for Reversal

After all of the penalty phase evidence had been received, the trial court and counsel considered jury instructions and the verdict form. The Commonwealth's draft of the verdict form did not give the jury the option to impose a life sentence upon a finding of neither aggravating circumstance and, accordingly, Atkins's counsel wanted to use his form which "[gave] the jury every option."[15] After redrafting, the prosecutor represented that its verdict form was the same as that of the defense counsel. Atkins's counsel agreed and said that the forms were "pretty close" to the same.[16] However, the Commonwealth's verdict form still did not provide the jury the option to impose only a life sentence and a fine if neither aggravating factor was

12. 476 U.S. 79 (1986) (holding that potential jurors may not be peremptorily stricken on the basis of their race and that if a defendant can make out a prima facie case that the juror was struck on the grounds of race, the state must assert a race-neutral reason for the strike).

13. *Atkins*, 510 S.E.2d at 448.

14. *Id.*

15. *Id.* at 452.

16. *Id.*

proven beyond a reasonable doubt. The trial court used the Commonwealth's verdict form.[17]

On appeal, Atkins asserted that the jury was not properly instructed during the penalty phase of his trial because the verdict form failed to provide the jury with the option to sentence Atkins to life imprisonment upon finding the existence of neither aggravating factor. The Supreme Court of Virginia agreed with Atkins and reversed the death sentence.[18] The court ruled that normally a trial court is under no duty to alter or correct an instruction which contains a misstatement of law, however, "when the principal of law is materially vital to [a] defendant . . . it is reversible error for the trial court to refuse a defective instruction instead of correcting it and giving it in the proper form."[19] The court held that a proper verdict form "is materially vital to the defendant in a criminal case,"[20] and overturned the death sentence on that ground.[21]

This ruling is helpful, but also somewhat puzzling. It is clear that counsel should ensure that all possible sentencing options are on the verdict form submitted to the jury,[22] be it the Commonwealth's verdict form or

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17. *Id.*

18. *Id.* at 455-56.

19. *Id.* at 456 (quoting Whaley v. Commonwealth, 200 S.E.2d 556, 558 (Va. 1973)).

20. *Id.*

21. *Id.*

22. For a verdict form which does list all possible jury sentencing options, see VIRGINIA MODEL JURY INSTRUCTIONS, CRIMINAL, No. 33.122 (1998), or contact the Virginia Capital Case Clearinghouse. The jury verdict form submitted in Atkins's case read as follows:

> We the jury, on the issue joined, having found the defendant guilty of the capital murder of [victim's name] occurring in the [offense provision from statute] and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society,
>
> **and**
>
> having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder or depravity of mind, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.
>
> Foreman _____
>
> **OR**
>
> We the jury, on the issue joined, having found the defendant guilty of the capital murder of [victim's name] occurring in the [offense provision from statute] and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society,
>
> **and**
>
> having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder or depravity of mind, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at life imprisonment and a fine of _____.

the defense's verdict form. Further, the court's broad language regarding the material vitality of proper verdict forms to criminal defendants may be the announcement of a broader principle. Creative advocacy may convince

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Foreman _____

OR

We the jury, on the issue joined, having found the defendant guilty of the capital murder of [victim's name] occurring in the [offense provision from statute] and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Foreman _____

OR

We the jury, on the issue joined, having found the defendant guilty of the capital murder of [victim's name] occurring in the [offense provision from statute] and having unanimously found after consideration of his history and background that there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at life imprisonment and a fine of _____ .

Foreman _____

OR

We the jury, on the issue joined, having found the defendant guilty of the capital murder of [victim's name] occurring in the [offense provision from statute] and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder or depravity of mind, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at death.

Foreman _____

OR

We the jury, on the issue joined, having found the defendant guilty of the capital murder of [victim's name] occurring in the [offense provision from statute] and having unanimously found that his conduct in committing the offense is outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim beyond the minimum necessary to accomplish the act of murder or depravity of mind, and having considered the evidence in mitigation of the offense, unanimously fix his punishment at life imprisonment and a fine of _____ .

Foreman _____

[The following provision was the seventh option which was absent from the verdict form submitted to the jury, but was on Atkins's counsel's form, and resulted in the court's reversal:]

OR

We, the jury, on the issue joined, having found the defendant guilty of the capital murder of [victim's name] occurring in the [offense provision from the statute] and having considered the evidence in aggravation and mitigation of the offense unanimously fix his punishment at life imprisonment and a fine of _____ .

Foreman _____

Jury verdict form provided by Atkins's defense counsel (on file in the Virginia Capital Case Clearinghouse).

the court of other "materially vital" principles. For example, proper jury *instructions* have been deemed "essentials of a fair trial."[23]

Also unusual in the disposition of this issue is that the court passed up chances to find the verdict form claim defaulted or to find the error resulting from the improper form to be harmless. Grounds for defaulting the claim included untimely objection to the use of the form,[24] failure to specifically make an assignment of error regarding the entire jury form, and stating in court that the verdict form was "pretty close" to being correct. Further, the court could have found any error resulting from the improper verdict form to be harmless error because the jury did find the existence of *both* aggravating factors. The court's failure to address these potential bars to Atkins's verdict form claim[25] also suggests that perhaps the court had other unannounced reasons for overturning the death sentence.

C. Execution of Mentally Retarded Defendants

Atkins's also asserted that under section 17-1.313 of the Virginia Code,[26] the sentence of death was disproportionate or excessive as compared to other cases similar to that of Atkins.[27] Atkins primarily relied on the fact that he was mentally retarded and had an I.Q. of only fifty-nine. Since the court had already determined that the death sentence would be overturned on the basis of the improper verdict form, the court ruled in its original decision that it was not necessary to rule on this claim.[28] On February 26, 1999, the Supreme Court of Virginia, after granting the Commonwealth's petition for rehearing, handed down an amended decision in the *Atkins* case. In the court's revised opinion, the only change made was to eliminate any discussion of mentally retarded defendants beyond stating Atkins's claim that the death sentence was disproportionate, and holding that it was unnecessary to decide the issue given the court's disposition on the jury verdict form claim.

In its original decision, the court did address the mental retardation issue raised by Atkins, stating that it is "likely to have relevance on re-

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23. *See* Darnell v. Commonwealth, 370 S.E.2d 717, 719 (Va. Ct. App. 1988) (quoting Dowdy v. Commonwealth, 255 S.E.2d 506 (Va. 1979)). *See also* Alix M. Karl, Case Note, 11 CAP. DEF. J. 463 (1999) (analyzing Swisher v. Commonwealth, 506 S.E.2d 763 (Va. 1998)).

24. Defense counsel did *not* object to the use of the Commonwealth's verdict form until the sentencing hearing, after the jury had recommended a sentence.

25. The trial court addressed both issues, holding that Atkins's objection to the use of the improper form was untimely, and even if the objection had been timely, the issue was moot because the jury found the existence of both aggravating factors.

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

27. *Atkins*, 510 S.E.2d at 457.

28. *Id.*

mand."[29] The court ruled that the trial court should have "instructed the jury to consider all the mitigating evidence including Atkins's mental retardation."[30] In its original decision, the court also took the further unusual step of directing that, at the new sentencing hearing, the jury is to be instructed that if it wishes it may consider and give effect to the mitigating evidence of the defendant's mental retardation.[31] The court cited the Supreme Court case of *Penry v. Lynaugh*[32] for this proposition. Finally, the court declined to address Atkins's claim that the Eighth Amendment bars execution of the mentally retarded because it was not "certain that the death penalty will be imposed on Atkins on remand."[33]

It is difficult to assess the court's action in granting the Commonwealth's petition for rehearing in this case. The revised opinion deleted all of the original directions on mental retardation it had mandated for the new sentencing hearing. In spite of the revised opinion, it is possible that some members of the court are increasingly concerned about the execution of the mentally retarded. Even though *Penry* explicitly did *not* bar execution of the mentally retarded as a class, it is important to recognize and develop for judge and jury the significance of this condition.

In the wake of *Penry*, Virginia added mental retardation to its statutory list of mitigating factors.[34] Consequently, it is important to know how to determine if a client is mentally retarded, how to distinguish mental retardation from mental illness, and how to make the most effective use of mitigation. Also, it is important to note the *Penry* Court's acknowledgment of lessened culpability for mentally retarded defendants. This is particularly true if *Atkins* is an indication, however tentative, of increased interest from the Supreme Court of Virginia in mentally retarded defendants.[35]

Because mental retardation is mitigating evidence, it is important that defense counsel understand how to determine if his client is mentally retarded. Mental retardation, especially mild mental retardation, is often not manifested by any physical signs or appearances. Many mentally retarded defendants appear perfectly normal, both physically and in some aspects of social interaction. Because of the normal appearance of such

29. *Id.*

30. *Id.* (citing Penry v. Lynaugh, 492 U.S. 302, 328 (1989)).

31. *Id.*

32. 492 U.S. 302, 328 (1989).

33. Penry v. Lynaugh, 492 U.S. 302, 328 (1989).

34. *See* VA. CODE ANN. § 19.2-264.4(B) (Michie 1998).

35. For further discussion of mental retardation, its characteristics, and its effect on the criminal system, see James W. Ellis & Ruth A. Luckasson, *Mentally Retarded Criminal Defendants*, 53 GEO. WASH. L. REV. 414 (1985). For a discussion of how to spot mental retardation in a defendant and the number and types of experts needed to verify mental retardation and aid in its presentation, see Silvia L. Simpson, *Confessions and the Mentally Retarded Criminal Defendant: Cheating to Lose*, CAP. DEF. J., Spring 1994, at 28.

defendants, counsel should pay particular attention, during interviews and consultations with the client, for signs of mental retardation.[36] After interviewing the client, counsel should look to defendant's medical, psychological, educational, and/or employment history for any further evidence of mental retardation. Finally, friends, family, teachers, and other people from the defendant's past may be able to provide anecdotal accounts of the defendant's mental retardation.

It is also worth noting that the viability of the determination in *Penry*, pursuant to *Trop v. Dulles*,[37] that there is no national societal consensus[38] against execution of the mentally retarded, may be weakening. At the time *Penry* was decided, only two states[39] specifically banned execution of the mentally retarded, in addition to fourteen states which outlawed capital punishment completely. Since the *Penry* decision, ten more states have categorically banned the execution of the mentally retarded,[40] while twelve states presently have no death penalty. While these numbers may not reach the level of a national societal consensus against execution of the mentally retarded,[41] these numbers do signify a significant state trend against execution of the mentally retarded. Perhaps as this trend continues, the *Penry* determination that execution of the mentally retarded does not violate the Eighth Amendment's prohibition of cruel and unusual punishment will come into question.

D. Exclusion of Defendant's Hearsay Testimony

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36. Such signs may include confusion, inconsistency, defensive reactions to difficult questions, and difficulty reading and writing.

37. 356 U.S. 86, 101 (1958) (plurality opinion) (holding that what the Eighth Amendment forbids at any given time is to be judged by "evolving standards of decency that mark the progress of a maturing society").

38. The national societal consensus standard requires that some number of states outlaw the execution of a certain class of defendants before the Supreme Court will find that the "evolving standards of decency" mentioned in *Trop* have evolved such that the Eighth Amendment would ban execution of that class. Ford v. Wainwright, 477 U.S. 399 (1986) (holding that a national societal consensus existed against execution of the insane, where twenty-six states had specifically outlawed such executions, and the other twenty-four states had adopted the common law prohibition against the death penalty for the insane).

39. The two states were Georgia and Maryland.

40. The ten states are Arkansas, Colorado, Indiana, Kansas, Kentucky, Nebraska, New Mexico, New York, Tennessee, and Washington. Also, the United States Congress has outlawed imposition of the death penalty on mentally retarded defendants in federal cases. 21 U.S.C. § 848(l) (1998).

41. In *Stanford v. Kentucky*, 492 U.S. 361 (1989), Justice Scalia refused to find a national societal consensus against execution of defendants aged sixteen where only fifteen states outlawed such practices. *Id.* at 370-73. Scalia pointed out that in other cases, no less than 42 states were sufficient to find a national societal consensus. *Id.*

Atkins asserted that the trial court had erred when it failed to admit a statement Atkins had made to Investigator Lyons. In the statement, Atkins inculpated himself in the events of the night of August 16, but had stated that Jones was the one who actually fired the gun and killed Nesbitt.[42] Under section 18.2-18 of the Virginia Code, only the person who actually kills the victim, i.e., "pulls the trigger," may be tried for capital murder.[43] Accomplices to a capital murder may not be tried for capital murder except in murder-for-hire cases.[44] Atkins's counsel tried to enter the statement during the cross-examination of Lyons and the Commonwealth objected. The trial court upheld the objection, holding that the statement was hearsay. Atkins argued that the statement came under the declaration against penal interest exception to hearsay. The trial court rejected this claim, though, stating that Atkins's statement was "self-serving" and not against penal interest.[45] The court reasoned that the statement freed Atkins from "triggerman" status, thereby reducing his criminal liability to first degree murder.[46] The statement was later admitted when Atkins took the stand and referred to his prior statement.[47]

The Supreme Court of Virginia ruled that since the statement was ultimately admitted, there were no grounds for Atkins's appeal of the upheld objection. Further, the court stated that "there is no merit to Atkins's assertion that his prior statement should have been admitted during Lyons's testimony."[48] The court based this ruling on the fact that to establish the against penal interest hearsay exception, the declarant must be unavailable to testify.[49] Since Atkins was available to testify, but had not yet taken the stand, the court ruled that the exception would not have applied.[50]

The court's ruling on this claim is difficult to reconcile with its recent decision in a nearly identical situation in *Lilly v. Commonwealth*.[51] In *Lilly*, Mark Lilly, brother and accomplice of the capital defendant Benjamin Lilly, made a statement to police officers that inculpated himself in the events surrounding the murder which the two had committed. Specifically, Mark named Benjamin Lilly as the triggerman. At trial, the Commonwealth sought to introduce the statement during the testimony of the police officer

42. Atkins v. Commonwealth, 510 S.E.2d 445, 454 (Va. 1999).

43. *See* VA. CODE ANN. § 18.2-18 (Michie 1998).

44. *Id.*

45. *Atkins*, 510 S.E.2d at 454.

46. *Id.*

47. *Id.* at 455.

48. *Id.*

49. *Id.* (citing Ellison v. Commonwealth, 247 S.E.2d 685, 688 (Va. 1978)).

50. *Atkins*, 510 S.E.2d at 455.

51. 499 S.E.2d 522 (Va.), *cert. granted sub nom.* Lilly v. Virginia, 119 S. Ct. 443 (1998). *See also* Matthew Mahoney, Case Note, 11 CAP. DEF. J. 207 (1998) (analyzing Lilly v. Commonwealth, 499 S.E.2d 522 (Va. 1998)).

to whom Mark Lilly made the statement. The trial court admitted it, and the Supreme Court of Virginia upheld the admission on the grounds that Mark Lilly's statement was a declaration against penal interest. The Supreme Court of Virginia ruled that Mark Lilly met the unavailability requirement because he was a defendant in his own first degree murder trial and could therefore maintain the Fifth Amendment privilege not to incriminate oneself, thus making him unavailable.[52] The court further accepted Mark Lilly's statement as against penal interest, though it was as identically "self-serving" as the statement made by Atkins.

If Mark Lilly was unavailable to testify because he had a Fifth Amendment right to not incriminate himself, then Atkins was just as unavailable because at the point his statement was to be entered, during the testimony of Lyons, he had not yet waived his Fifth Amendment right and taken the stand. The situation presented in *Lilly* is identical to Atkins's situation, with the only, and obviously dispositive, difference between the two cases being that in *Lilly* the Commonwealth was seeking to prove capital murder and in *Atkins* the defendant was trying to disprove capital murder. The Supreme Court of the United States has granted certiorari in *Lilly*, so some resolution of this problem is forthcoming. One hopes for even-handed application of whatever rule is announced.

Jason J. Solomon

52. *Id.* at 533–34.