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Kasi v. Commonwealth 508 S.E.2d 57 (Va. 1998)

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I. Facts

On January 25, 1993, a lone gunman armed with an AK-47 approached cars stopped outside the Main entrance of CIA headquarters in Fairfax County, Virginia.[1] A few seconds later, two men were dead and two others wounded.[2] Two days later, Zahed Mir ("Mir") reported to the police that Mir Aimal Kasi ("Kasi"), later identified as the gunman and with whom Mir shared an apartment, was a "missing person."[3] After a search of the apartment revealed the weapon used in the shooting and other personal property of Kasi's, he was indicted for capital murder, murder, malicious wounding, and five charges of using a firearm in commission of the foregoing felonies.[4] In June of 1997, the FBI apprehended Kasi in a hotel room in Pakistan.[5] After being turned over to Pakistani officials, he was thereafter flown to Fairfax County, during which time he confessed to an FBI agent that he was the gunman.[6] Kasi was convicted of capital murder, and during the penalty trial of the bifurcated proceeding the jury recommended a sentence of death based solely on Virginia's "vileness" aggravating factor.[7] The trial court adopted the jury's recommendation.[8]

Kasi appealed to the Supreme Court of Virginia. In addition, his death sentence was before the court on automatic review.[9] In his assignments of error,[10] Kasi made the following claims relating to: (1) his apprehension;

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1. Kasi v. Commonwealth, 508 S.E.2d 57, 59 (Va. 1998).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.* at 59-60.
8. *Id.* at 60.
9. VA. CODE ANN § 17.1-313 (Michie Supp. 1998).
10. Ninety-two errors had been assigned at trial; of those, ninety-one were listed in Kasi's brief. The court disposed of twenty-three of them because they were not argued, citing *Jenkins v. Commonwealth*, 423 S.E.2d 360, 364 (Va. 1992), fifteen because they "presented no meaningful argument," citing *Weeks v. Commonwealth*, 450 S.E.2d 379, 383 (Va. 1994), three because they had already been decided adversely to the defendant, and twenty-eight because, although argued in depth, they were "devoid of any merit whatsoever." *Kasi*, 508 S.E.2d at 60. The court then turned to what, by Supreme Court of Virginia arithmetic, were the

(2) his confession;[11] (3) the search of his apartment;[12] (4) the trial court's denial of his motion for a change of venue;[13] (5) the trial jury selection;[14]

"remaining twenty-three assignments of error." *Id.* It is not clear how the court derived this number. Note that because the fifteen claims which presented "no meaningful argument" and the twenty-eight claims which were "devoid of any merit whatsoever" were rejected on the merits, they are not defaulted. Under Supreme Court of Virginia Rule 5:26, briefs are not, absent permission of the court, permitted to exceed fifty typed pages. VA. SUP. CT. R. 5:26(a). In order to avoid waiving claims, defense counsel are advised to seek relief from this rule. Even denial of relief will put claims that cannot be briefed in fifty pages in a better procedural posture relative to avoiding default when they reach federal court.

11. The court's resolution of this claim is not discussed in detail in this summary. In brief, Kasi argued that the statements he made to an FBI agent were involuntary and obtained through coercion. *Kasi*, 508 S.E.2d at 62. The Supreme Court of Virginia concluded that the defendant had waived his constitutional rights. *Id.* Because Kasi, who "had a good command of the English language" and a master's degree in English, had been advised of his rights under *Miranda v. Arizona*, 384 U.S. 436 (1966), signed an FBI "Advice of Rights" form which had previously been read and explained to him, and was not threatened or promised anything for his cooperation, the court determined that Kasi's waiver was made knowingly, voluntarily, and intelligently. *Kasi*, 508 S.E.2d at 61-62 (citing Roach v. Commonwealth, 468 S.E.2d 98, 108 (Va. 1996)).

12. The court's resolution of this claim is not discussed in detail in this summary. The Supreme Court of Virginia concluded that the search of the apartment in which Kasi lived was valid given that the lessee, Kasi's roommate Zahed Mir, consented several times to the opening of the suitcase in which two handguns and AK-47 ammunition were found. *Kasi*, 508 S.E.2d at 64.

13. The court's resolution of this claim is not discussed in detail in this summary. In short, Kasi argued that the trial court's denial of his motion for a change of venue, which was based on "inflammatory and inaccurate media reports" in "all three local newspapers," violated his constitutional right to a fair trial. *Kasi*, 508 S.E.2d at 65. The court concluded Kasi failed to overcome the presumption that a defendant will receive a fair trial in the jurisdiction where the crimes were committed by establishing that the citizens of the jurisdiction harbor such prejudice against him "that it is reasonably certain he cannot receive a fair trial." *Id.* (quoting Lilly v. Commonwealth, 499 S.E.2d 522, 531 (Va.) *cert. granted sub nom*, Lilly v. Virginia, 119 S. Ct. 443 (1998). Note, however, that a certain level of "adverse pretrial publicity can create such a presumption of prejudice in a community that the jurors' claims that they can be impartial should not be believed." *See* Patton v. Yount, 467 U.S. 1025 (1984) (citing Irvin v. Dowd, 366 U.S. 717 (1961) (holding same)).

14. The court's resolution of this claim is not discussed in detail in this summary. Kasi claimed that the prosecutor's use of a peremptory strike to remove the only juror of color on the panel violated *Batson v. Kentucky*, 476 U.S. 79 (1986), and that the trial court erred in ruling to the contrary. *Kasi*, 508 S.E.2d at 64-65. To prevail on a *Batson* claim, as modified by *Powers v. Ohio*, 499 U.S. 400 (1991), and *Purkett v. Elem*, 514 U.S. 765 (1995), a defendant must first show that (1) the juror is a member of a cognizable group; and (2) the Commonwealth used peremptory strikes to remove that juror. The burden then shifts to the Commonwealth to provide a race-neutral explanation for the strike. The court must then decided whether the race neutral explanation overcomes the defendant's prima facie case. In this case, Kasi made out a prima facie case. The trial court and the Supreme Court of Virginia accepted the Commonwealth's race neutral articulation that the basis of the strike was that "she was the only member of the entire panel who never read anything about the case or heard anything about the case. My fear is somebody like that is kind of detached from the real world, and that's why I struck her." *Kasi*, 508 S.E.2d at 65. Although defense counsel should

(6) his conviction;[15] (7) the denial of his motion to preclude victim impact testimony;[16] (8) denial of his motion to strike the evidence as to vileness and future dangerousness;[17] (9) denial of his motion for a new trial based on the

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make every claim available to them, they should be aware that as a practical matter attacking the Commonwealths's race neutral-explanation will almost always be a loser. Other strategies are available, however. Specifically, counsel may be able to use a *Batson* challenge to obtain an evidentiary hearing which may yield facts which are useful in other contexts. *See* Marcus E. Garcia & James W. Miller, Jr., *Opposing Peremptory Challenges Under* Batson, CAP. DEF. J., Spring 1992, at 23; Paula Dyan Effle, *Litigating Jury Issues in Capital Trials: Constitutional Law and Virginia Procedures*, CAP. DEF. J., Spring 1996, at 18, 21.

15. The Court's resolution of this issue is not discussed in detail in this summary. Kasi claimed that there was insufficient evidence to support his capital murder conviction because the Commonwealth had not proved both men had been murdered in the first degree. *Kasi*, 508 S.E.2d at 65. Under Virginia Code Section 18.2-31(7), the Commonwealth must prove that defendant engaged in the "willful, deliberate, and premeditated killing of more than one person as a part of the same act or transaction" in order to convict for capital murder. VA. CODE ANN § 18.2-31(7) (Michie 1998). Although the Supreme Court of Virginia's resolution of the issue is almost certainly correct, its cursory analysis bears mention. Although Kasi may himself have incorrectly framed his claim in this manner, the Supreme Court of Virginia articulated his position as follows: "[d]efendant contends that his murder of Bennett can rise no higher than murder in the second degree because the Commonwealth failed to prove he intended to kill Bennett." *Kasi*, 508 S.E.2d at 65. Similarly, after summarizing the facts surrounding the murder and Kasi's confession, the court concluded that the "evidence establishes as a matter of law that Bennett's murder was intentional." *Id.* Notably absent from both quotations is any mention of the statutory requirement of premeditation, which, in addition to intent, must be proven for both victims. Under current Virginia law, "if the defendant thought about killing and then at the instant of action decided to kill, the killing is premeditated. The negative, of course, is that if the decision to kill and the killing coincide, but there was no prior thought about killing, there is no premeditation." ROGER D. GROOT, CRIMINAL OFFENSES AND DEFENSES IN VIRGINIA 129 (1984).

16. The court's resolution of this issue is not discussed in detail in this summary. In brief, the Supreme Court of Virginia found the trial court correctly denied Kasi's motion to exclude the penalty trial testimony of a victim's wife, who was a front-seat passenger in the car driven by her husband at the time of the murder, about the effect the murder had had on her life. She had also testified at the guilt/innocence trial. *Kasi*, 508 S.E.2d at 65 (citing Payne v. Tennessee, 501 U.S. 808, 827 (1991) (holding victim impact evidence relating to the victim's personal characteristics and the emotional impact of the murder on the victim's family is admissible in capital proceeding); Weeks v. Commonwealth, 450 S.E.2d 379, 389-90 (Va. 1994) (concluding victim impact evidence is probative of the depravity of mind component of the vileness predicate)).

17. The Supreme Court of Virginia's resolution of this matter is not discussed in detail in this summary. Kasi's claim, however, may well have merit. Kasi argued the following: "[t]he trial court's failure to strike the evidence as to future dangerousness was a structural error that unfairly prejudiced Kasi in the sentencing phase" because the prosecutor's argument in support of the future dangerousness predicate "may well have made it easier to show [vileness]." *Kasi*, 508 S.E.2d at 66. The Supreme Court of Virginia found that "the circumstances surrounding the commission of the offense" provided sufficient evidence to submit to the jury the issue of future dangerousness. *Id.* Although the issue of combining future dangerousness and vileness in this manner is unresolved, defense counsel should be aware of the fact that no United States Supreme Court decision has provided support for doing so.

prosecutor's failure to disclose exculpatory evidence;[18] (10) juror conduct; and (11) the Supreme Court's failure to conduct a proportionality review.[19]

II. Holding

The Supreme Court of Virginia denied relief on all of Kasi's claims.[20]

III. Analysis / Application in Virginia

A. International Law Issues

Kasi claimed that the trial court lacked jurisdiction over him and that his seizure violated the Fourth Amendment to the United States Constitution, the equivalent clause in the Constitution of Virginia,[21] and the Vienna Convention on Consular Relations and Optional Protocol on Disputes.[22]

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18. The court's resolution of this matter is not discussed in detail in this summary. Kasi contended that the trial court erred in denying his motion for a new trial because the prosecutor, in violation of *Brady v. Maryland*, 373 U.S. 83 (1963), failed to disclose that the victim's wife (who provided victim impact testimony) had been diagnosed with post-traumatic stress disorder. *Kasi*, 508 S.E.2d at 66. The trial court denied the motion during a post-trial hearing on the Commonwealth attorney's representation that neither he nor any of the investigating police officers had knowledge at the time of trial "of the label that had been placed on this witness by a doctor in Pennsylvania." *Id.* The Supreme Court of Virginia accepted the trial court's conclusion that no one connected with the Commonwealth "knew of this event and [that there is] no evidence that they did." *Id.* (citing Robinson v. Commonwealth, 341 S.E.2d 159, 167 (Va. 1986)). Although in *Kyles v. Whitley*, 514 U.S. 419 (1995), the Supreme Court held that the prosecutor remains responsible for his duty under *Brady* to disclose favorable evidence to the defendant, regardless of whether police investigators failed to inform the prosecutor of its existence, because the prosecutor can establish procedures and regulations to insure communication of all relevant information, this evidence was apparently not in the possession of any agency that would charge the Commonwealth with notice of it. *Id.* at 437-38. *See* Matthew K. Mahoney, Case Note, 11 CAP. DEF. J. 353 (1999) (analyzing Johnson v. Moore, 164 F.3d 624 (4th Cir. 1998)).

19. The court's resolution of this matter is not discussed in detail in this summary. Kasi contended that his death sentence was imposed under the influence of passion, prejudice, or other arbitrary factor, and that the death sentence was excessive or disproportionate to the penalty imposed in similar cases. *Kasi*, 508 S.E.2d at 67. The court determined that "there [was] nothing 'arbitrary' about a death sentence imposed under the circumstances of this case and, thus, there [was] no basis for commutation." *Id.* at 68. In conducting its proportionality review, the Supreme Court of Virginia concluded that Kasi's death sentence was not excessive or disproportionate to penalties generally imposed by sentencing bodies in the Commonwealth for similar conduct. *Id.*

20. *Id.*

21. VA. CONST. art. 1 § 10. Because of the court of appeal's brief treatment of this issue, it will not be discussed in detail in this summary. In brief, Kasi claimed his seizure was "illegal and unreasonable" in violation of the Fourth Amendment to the United States Constitution and the equivalent section 10 of Article 1 of the Virginia Constitution. The court rejected this claim on the ground the Supreme Court, in *United States. v. Verdugo-Urquidez*, 494 U.S. 259 (1990), held that the Fourth Amendment does not protect aliens outside of the United States territory. *Id.* at 266.

22. Vienna Convention on Consular Relations and Optional Protocol on Disputes,

Kasi claimed that the court lacked jurisdiction over him because his seizure violated both the Extradition Treaty between the United States and Great Britain[23] and the Vienna Convention on Consular Relations.[24] Given this, Kasi argued that the proper sanction for this violation should have been the reversal of his conviction and "repatriation to Pakistan without prejudice for a new trial."[25]

The Commonwealth stipulated as follows:

> that [d]efendant was arrested in Pakistan by an FBI agent; that the agent did not "have any jurisdiction in the nation of Pakistan;" that defendant "was not taken before a judicial officer . . . until he returned to the United States and was presented before this Court"; [sic] that "in the course of time from his arrest until he was brought to this country there was no compliance with the Vienna Convention until my letter of July 3rd"; [sic] and that "the seizure in Pakistan was not made pursuant to any Pakistani paper or document which would allow him to be seized under the laws of Pakistan." The record shows there "was an unlawful flight warrant issued by a U.S. Magistrate in Alexandria in February of 1993 authorizing Federal agents to arrest Mr. Kansi." [sic] Also, the record shows that the July 3 letter mentioned in the stipulation was a letter from the prosecutor formally notifying the defense of defendant's right to seek consular assistance.[26]

Apparently, there is no extradition treaty between the United States and Pakistan. Therefore Kasi argued, and the Commonwealth stipulated, that the treaty governing relations between the the United States and United Kingdom (Pakistan's former colonial sovereign) was applicable.[27] Kasi relied on the following language:

> The extradition of fugitive criminals under the provisions of this Treaty shall be carried out in the United States and in the territory of His Britannic Majesty respectively, in conformity with the laws regulating extradition for the time being in force in the territory from which the surrender of the fugitive criminal is claimed.[28]

Although the plain meaning appears to read otherwise, the Supreme Court of Virginia, citing *United States v. Alvarez-Machain*,[29] ruled that "nothing in this treaty can be construed to affirmatively prohibit the forc-

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Apr. 24, 1963, art. 36(1), 21 U.S.T. 77, 596 U.N.T.S. 261 [hereinafter Vienna Convention].

23. Extradition Treaty between the United States of America and Great Britain, December 22, 1931, U.S.-United Kingdom, 47 Stat. 2122 [hereinafter Extradition Treaty].

24. *Kasi*, 508 S.E.2d at 62.

25. *Id.*

26. *Id.*

27. *Kasi*, 508 S.E.2d at 62-63.

28. Extradition Treaty, *supra* note 23, art. 8 of 47 Stat. at 2125.

29. 504 U.S. 655 (1992) (holding that an alien defendant who is kidnapped in a foreign country may be tried under United States law).

ible abduction of defendant in this case so as to divest the trial court of jurisdiction or to require that 'sanctions' be imposed for an alleged violation of the treaty."[30] In *Alvarez-Machain*, DEA agents arranged for, in the Supreme Court of Virginia's language, the "kidnaping" of a Mexican pilot in Mexico.[31] Despite the fact that the United States has an extradition treaty with Mexico,[32] the Supreme Court determined it was not controlling, stating that: "Extradition treaties exist so as to impose mutual obligations to surrender individuals in certain defined sets of circumstances, following established procedures."[33] In essence, the United States Supreme Court determined that following the extradition requirements and procedures imposed by the treaty were but one legal way to go about bringing a foreign citizen indicted by a jury in the United States to face our legal system. Another perfectly legal way, according to the Supreme Court, was to simply kidnap him or her. Applying that rule to Kasi's situation, the Supreme Court of Virginia concluded that his abduction never even triggered the Extradition Treaty, obviously foreclosing any need to ascertain whether the United States had jurisdiction thereunder.[34]

Kasi also claimed that as the "record show[ed] that at no time did the Federal agents advise Kasi of his right to consult with a Pakistani diplomat pursuant to Article 36(1) of the Vienna Convention on Consular Relations . . . suppression of [his confession was required]."[35] That section reads, in pertinent part, as follows:

> 1. With a view to facilitating the exercise of consular functions relating to nationals of the sending State:
>
> . . .
>
> (b) if he so requests, the competent authorities of the receiving State shall, without delay, inform the consular post of the sending State if, within its consular district, a national of that State is arrested or committed to prison or to custody pending trial or is detained in any other manner. The said authorities shall inform the person concerned without delay of his rights under this sub-paragraph;[36]

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30. *Kasi*, 508 S.E.2d at 63 (citing United States v. Alvarez-Machain, 504 U.S. 655 (1992)).

31. *Id.* (citing *Alvarez-Machain*, 504 U.S. at 657). For a detailed discussion of international extradition law and capital punishment in the United States, see Mary K. Martin, *A One-Way Ticket Back to the United States: The Collision of International Extradition Law and the Death Penalty*, 11 CAP. DEF. J. 243 (1999).

32. *Id.*

33. *Alvarez-Machain*, 504 U.S. at 664.

34. *Kasi*, 508 S.E.2d at 63. Kasi has petitioned the United States Supreme Court for certiorari, citing more restrictive conditions in the Pakistani Extradition treaty compared with the Mexican Treaty. Petition for a Writ of Certiorari to the Supreme Court of Virginia, Kasi v. Commonwealth (decision forthcoming).

35. *Id.* at 62.

36. Vienna Convention, *supra* note 22, art. 36(1), 596 U.N.T.S. at 261.

The Supreme Court of Virginia rejected Kasi's claim on several grounds. First, citing the language of the Vienna Convention preamble which states that the "purpose . . . is not to benefit individuals but to ensure the efficient performance of functions by consular posts on behalf of their respective States,"[37] the court ruled the Vienna Convention did not create any legally enforceable individual rights.[38] Second, the court determined that the Vienna Convention would have applied only if Kasi had been arrested in the United States, not when he was arrested in Pakistan and had already been turned over to Pakistani officials.[39] Finally, the court rejected as speculative Kasi's claim that if he had been advised of his "rights" under the Vienna Convention he would not have confessed to the crimes.[40]

B. Jury Trial Issues

During the morning of the second day of the penalty trial, Kasi advised the court that there had been press reports that morning regarding the killing of four Americans in Karachi, Pakistan, the preceding evening. Consequently, he asked the court to question the jurors individually to determine whether any had heard or read the reports.[41] The court declined the motion, but continued its practice of asking the jurors at the beginning of each day of trial whether they had followed the court's admonition not to read, look at, or listen to any reports about the case.[42] Juror 31 accidentally had heard a portion of a radio report about the Karachi killings, but upon questioning her the trial court determined she remained impartial.[43]

The case proceeded for the remainder of the morning with testimony of defendant's mitigation witnesses.[44] After lunch, however, the trial court decided to sequester the jury for the rest of the case.[45] The Supreme Court of Virginia determined the trial court's refusal to grant Kasi's motions for a mistrial during this series of trial events was an exercise of the court's

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37. *Id.* (quoting Vienna Convention, *supra* note 22, preamble, 596 U.N.T.S. at 262). Note that the Supreme Court of Virginia's interpretation of the Vienna Convention is not the only one. *See* Breard v. Greene, 118 S. Ct. 1352, 1356 (1998) (noting "the Vienna Convention . . . arguably confers on an individual the right to consular assistance following arrest").

38. *Kasi*, 508 S.E.2d at 64.

39. *Id.*

40. *Id.* (citing *Breard*, 118 S. Ct. at 1356 (rejecting claim that if Vienna Convention had not been violated defendant would have accepted alleged plea agreement)). *See* Mary K. Martin, Case Note, 11 CAP. DEF. J. 39 (1998) (analyzing Breard v. Greene, 118 S. Ct. 1352 (1998)).

41. *Id.* at 66.

42. *Id.*

43. *Id.*

44. *Id.*

45. *Id.*

discretion, and found no abuse thereof.[46]

It is clear that jurors may not expose themselves to media reports regarding the proceedings for which they have been empaneled; doing so may deprive the defendant of a fair trial.[47] In other words, "a juror's information about the case should come only from the evidence presented at trial and not from any extraneous source."[48] When, as in this case, highly prejudicial information has been communicated to the jury, the court is obligated to identify the extent, if any, to which the jury has been infected by that information and to take appropriate measures so as to insure a fair trial.[49] Exactly what will be required of the judge, however, will depend on the nature and context of the offending information, and the trial judge is given considerable discretion in determining what, if anything, should be done. Appellate courts are hesitant to second guess such matters. As discussed below, a rule much more favorable to the defendant applies in the context of a motion to set aside a verdict based on outside influence.

Kasi's next two claims rose out of the following facts, as recounted by the Supreme Court of Virginia:

> On November 20, six days after the jury's sentencing verdict was rendered, a newspaper published an article reporting information gleaned from an interview with one juror about the penalty stage deliberations. The article quoted the juror as stating, for example, that some jurors "thought the crime was vile because Kasi, an immigrant, 'had attacked the American way of life.'" Also, the juror reportedly labeled defendant a "terrorist," a term the court had prohibited the participants from attaching to defendant during the trial proceedings.[50]

Kasi asked permission to subpoena the juror for interrogation and moved to set aside the sentencing verdict, alleging juror misconduct on the basis of the article.[51] The trial court denied both motions.[52]

Several comments may be made in regard to the court's denial of Kasi's request to interview the jury. Defense counsel seeking to interview jurors have two options. As in this case, at the end of the trial they may file a motion seeking permission to interview jurors. The alternative is to simply interview the jurors without filing a motion. Nothing, absent a court order,

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46. *Id.* at 67.

47. Thompson v. Commonwealth, 247 S.E.2d 707, 708 (Va. 1978) (summarizing basic maxims regarding impermissible influences on jury in criminal trial).

48. In re Times-World Corp., 373 S.E.2d 474, 479 (Va. Ct. App. 1988) (noting that jurors serving in a criminal case may not, during trial, properly read newspaper stories or listen to media reports discussing the proceedings) (citing *Thompson*, 247 S.E.2d at 708).

49. 11B MICHIE'S JURISPRUDENCE Jury § 41 at 158 & n.16 (repl. 1986) (providing exhaustive survey of prejudicial and non-prejudicial influences).

50. *Kasi*, 508 S.E.2d at 67.

51. *Id.*

52. *Id.*

prevents counsel from doing so. Although attorneys may not, of course, harass jurors, nothing prevents counsel from contacting them.[53] It should be noted that, in this case, it is likely that a trial-court order prevented counsel from pursuing this second option.

As to Kasi's claim that the court erred in refusing to set aside the verdict, several points must be made. As explained above, when a motion to declare a mistrial based on prejudicial media attention is made during a trial, the trial judge is given wide discretion in dealing with the matter. In the context of a motion to set aside a verdict based on misconduct, however, the standard appears to be somewhat more favorable to defendants. *Evans-Smith v. Commonwealth*[54] is instructive. There, four days after finding the defendant guilty, a juror disclosed to defense counsel that another juror had consulted an almanac to determine the validity of the defendant's statement that he had turned on his car's headlights because it was dark outside.[55] Defense counsel made a post-trial motion to set aside the verdict based on juror misconduct which, ultimately, was denied. In reversing the trial court's ruling, the appellate court reprimanded the trial court for its failure to interview each individual juror, noting it had "the affirmative duty 'to investigate the charges and to ascertain whether or not, as a matter of fact, the jury was guilty of such misconduct.'"[56] Regarding the context of a motion to declare a mistrial, the court further noted that this duty is grounded in the requirement that "[a] juror may not properly receive any information about a case he is hearing except in open court and in the manner provided by law."[57] If he does, the court is then required to undertake a harmless error inquiry into "not whether the jurors were actually prejudiced by the extraneous matter, but whether they *might* have been so prejudiced."[58] If the court determines "they might have been prejudiced, then the purity of the verdict is open to serious doubt and the verdict should be set aside and a new trial awarded."[59]

In the present case, it not clear on exactly what basis Kasi claimed juror misconduct. He may have contended that the misconduct derived from the

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53. *See* Douglas R. Banghart, Case Note, 11 CAP. DEF. J. 329 (1999) (analyzing *Fisher v. Angelone*, 163 F.3d 835 (4th Cir. 1998)).

54. 361 S.E.2d 436, 445-47 (Va. Ct. App. 1987).

55. Evans-Smith v. Commonwealth, 361 S.E.2d 436, 475-46 (Va. Ct. App. 1987).

56. *Id.* at 446 (quoting Kearns v. Hall, 91 S.E.2d 648, 653 (Va. 1956). *See* 19 MICHIE'S JURISPRUDENCE Verdict §§ 34, 35 at 661-663 (repl. 1991) (noting exception to general rule limiting post-verdict examination of jurors when it appears matters not in evidence may have come before the jury).

57. *Id.* at 447 (quoting Brittle v. Commonwealth, 281 S.E.2d 889, 890 (Va. 1981) (citing Crockett v. Commonwealth, 47 S.E.2d 377, 386 (1948))).

58. *Id.* (emphasis added).

59. *Id.* (citing Thompson v. Commonwealth, 70 S.E.2d 284, 290 (Va. 1952) (citations omitted)).

jury concluding "the crime was vile because Kasi, an immigrant, 'had attacked the American way of life.'" [60] Specifically, in order to impose the sentence of death under the vileness predicate, a jury must find that the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim."[61] Given the facts of the case, the jury presumably found that the crime was committed with a "depravity of mind." A jury's finding of "depravity of mind" based solely on the fact that "an immigrant . . . 'had attacked the American way of life'" was precisely the kind of arbitrary and standardless sentencing that *Furman v. Georgia*[62] and subsequent cases declared unconstitutional, and Kasi may have claimed this as the basis of his misconduct claim. If he did so, it was likely to fail under existing precedent. Courts in Virginia have drawn a sharp line in what is often, as a practical matter, a blurred area, between "inside" and "outside" influences on juror conduct.[63] In essence, so long as the juror is not influence by what are clearly "outside influences," the rule, to which there are few exceptions, is that a juror may do no wrong in the jury room.[64] What is and is not and "outside influence" is, of course, a matter about which reasonable people can disagree.

Given this inside /outside distinction, Kasi's strongest argument may have been that the misconduct derived from the possibility that the jurors had been exposed to the media reports regarding the Karachi killings and

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60. *See supra* n.50 and accompanying text.

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

62. 408 U.S. 238 (1972) (holding death penalty, as applied, unconstitutional cruel and unusual punishment). In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Supreme Court explained that "if a State wishes to authorize capital punishment it has a constitutional responsibility to tailor and apply its law in a manner that avoids the arbitrary and capricious infliction of the death penalty. Part of a State's responsibility in this regard is to define the crimes for which death may be the sentence in a way that obviates 'standardless [sentencing] discretion.'" *Godfrey*, 446 U.S. at 428 (citations omitted).

63. *See generally* 19 MICHIE'S JURISPRUDENCE Verdict §§ 34, 35 at 661-663 (repl. 1991) (noting exception to general rule limiting post-verdict examination of jurors when it appears matters not in evidence may have come before the jury). *Compare* Stockton v. Commonwealth, 852 F.2d 740, 743-46 (4th Cir. 1988) (finding capital murder defendant prejudiced by restaurant proprietor's statement to jurors that "they ought to fry the son-of-a-bitch"), *and* Haddad v. Commonwealth, 329 S.E.2d 17, 19 (Va. 1985) (concluding that juror who, in course of verbal exchange with an unrelated defense attorney vowed "I don't think [the defendant in the case juror was seated] is going to be as fortunate," prejudiced defendant), *with* Jenkins v. Commonwealth, 423 S.E.2d 360 (Va. 1992) (finding no prejudice in jury discussing possibility that defendant might be eligible for parole in ten years if given life sentences), *and* Caterpillar Tractor Co. v. Hulvey, 353 S.E.2d 747, 751 (Va. 1987) (finding no prejudice because misconduct "occurred within the confines of the jury room and did not involve procurement outside the jury room of specific facts about the case which later were injected into the deliberations").

64. 19 MICHIE'S JURISPRUDENCE Verdict § 34 at 657 (repl. 1991).

that this had led them to conclude that Kasi was a terrorist and his crime therefore vile. In other words, a claim of juror misconduct may be strengthened, and individualized judicial inquiry into the conduct of each juror won, by showing that a juror's alleged misconduct was caused by external influences not properly before the jury, and was not subject to adversarial testing by the defense.

As a final note, defense counsel in this case should be commended for the thoroughness with which he presented his client's case. Although doing so clearly made the Supreme Court of Virginia uncomfortable, this is precisely what is required of a defense attorney in the capital context.

Douglas R. Banghart