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I. Facts

On December 3, 1997, at a bench trial, James Edward Reid ("Reid") entered an *Alford* plea[1] to capital murder, attempted rape and attempted robbery in the death of Annie V. Lester ("Lester").[2] During the penalty phase, the judge, sitting as jury, sentenced Reid to death, relying on the vileness aggravating factor.[3] The circumstances surrounding the murder included twenty-two stab wounds, multiple wounds caused by physical blows and/or strangulation, the dragging of the body through the victim's house, partial disrobement of the body, and the ransacking of Lester's house.[4]

The decision to enter a guilty plea was predicated on overwhelming circumstantial evidence of Reid's guilt, including fingerprint and DNA matches and handwriting samples, all found at the scene of the crime or on Reid's bloody clothes.[5] In addition, several witnesses placed Reid at or around the scene of the crime during the time that Lester was murdered.[6] However, no eyewitness testimony of the actual murder was ever presented, because the only person present at the crime and available to testify, Reid, was unable to remember any of the events that occurred between arriving at Lester's house and waking up the next morning with blood on his clothing.[7]

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1. Reid v. Commonwealth, 506 S.E.2d 787, 788 n.1 (Va. 1998). Reid entered an *Alford* plea in an effort to avoid a sentence of death. *See* North Carolina v. Alford, 400 U.S. 25 (1970) (stating that a defendant has the right to choose to plead guilty in a capital murder trial in order to attempt to avoid the death penalty, without making a personal admission of guilt).

2. *Reid*, 506 S.E.2d at 788. The indictment charged more than one offense on one count, making it duplicitous and invalid. *See* Payne v. Commonwealth, 509 S.E.2d 293 (Va. 1999) (stating that every means of committing capital murder constitutes a separate offense). While pointing out such an error may lead the government to charge a defendant with multiple counts of capital murder, this tactic may be utilized to provide additional pre-trial time for a defense attorney and the defendant.

3. *Reid*, 506 S.E.2d at 788-89.

4. Id. at 788-90.

5. *Id.* at 790.

6. *Id.* Two of Reid's friends dropped Reid off at Lester's house in the morning after bringing him to a store where he bought a bottle of wine. The empty wine bottle was later found in Lester's bedroom. *Id.*

7. *Id.*

Reid presented uncontradicted mitigating evidence during the penalty phase of his capital trial which suggested a low level of culpability due to impairments which led to a black out period encompassing the time in which the crime transpired.[8] Evidence was presented by three medical experts who discussed Reid's impairments and their effect on Reid's ability to form the requisite intent necessary to commit the crime.[9] The three experts also testified to the nature and quality of the blackout periods that Reid experiences, which result in a loss of control and a propensity to engage in disorganized, aggressive behavior toward unlikely persons.[10] In addition, Reid presented numerous lay witnesses who supported the expert testimony by chronicling Reid's impairments and relating episodes of blackouts.[11]

On direct appeal to the Supreme Court of Virginia, Reid claimed that the trial court failed to consider his uncontradicted evidence, including indicia of a lack of planning, premeditation and memory of the incident, in addition to evidence of Reid's behavior directly following the murder.[12] Reid claimed that this evidence refuted the vileness factor,[13] the aggravating factor relied upon by the trial court to sentence Reid to death.[14]

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8. *Id.* at 790-91.

9. *Id.* Reid presented evidence of three impairments which, alone or taken together, provided an explanation, if not an excuse, for his actions in committing the murder. First, Reid suffered brain damage as a result of head injuries sustained during a 1968 car accident which left him in a coma for at least five days. The damage occurred to a part of Reid's brain affecting personality and the ability to control impulses. Second, the head trauma led to the development of a seizure disorder. Reid's non-compliance in taking medication to control his condition has led to repeated seizures which have progressively caused more brain damage. Third, Reid is an alcoholic and binge drinker, with numerous admissions to both alcohol abuse rehabilitation centers and psychiatric hospitals. Due to his brain injury, Reid is more vulnerable to the effects of alcohol. As a binge drinker, Reid has not built up a tolerance to alcohol and thereby becomes intoxicated more quickly than the average drinker. *Id.* at 791.

10. *Id.* at 790-91. Dr. Pogos H. Voskanian, a forensic psychiatrist, Dr. Stephen Herrick, a forensic psychologist, and Dr. Randy Thomas, a clinical psychologist, all testified concerning Reid's medical and psychiatric conditions. The experts cited Reid's inability to resist acting on impulses, his tendency to blackout while intoxicated, and his inability to perform intentional acts during blackout phases, brought on by his impairments, in providing the court with the opportunity to find that Reid did not have the requisite intent required to make him eligible for the death penalty. *Id.*

11. *Id.* at 791. Reid's ex-wife, his sister and his mother testified. They all stated that Reid is a different and violent person when intoxicated. They confirmed that Reid cannot remember his actions during periods of intoxication. As an example, Reid's ex-wife testified that Reid stabbed her when he was intoxicated but could remember nothing of the incident the next day. *Id.* Counsel should be commended on the impressive case in mitigation, especially with respect to the extra step taken in providing support of the expert witness testimony through lay witness, firsthand experience of Reid's impairments.

12. *Id.* at 789, 791.

13. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie 1998).

14. *Reid*, 506 S.E.2d at 788-89. It is curious that there is no mention of the fact that the

II. Holding

The Supreme Court of Virginia held that the trial court did consider Reid's mitigating evidence when sentencing him to death.[15] In addition, the court conducted its proportionality review and held Reid's sentence to be neither excessive nor disproportionate.[16]

III. Analysis / Application in Virginia

A. The Guilty Plea in a Capital Case

Reid, like many capital defendants, was faced with a difficult choice. The facts and circumstances surrounding the murder were extremely inflammatory and the police had videotaped the crime scene in anticipation of trial.[17] In consideration of the overwhelming evidence and its inflammatory nature, Reid chose to plead guilty and rely on the mercy of the court and his own evidence in mitigation to avoid the death penalty.[18]

The decision to plead guilty in a capital case is one of the most difficult choices presented to a criminal defendant and attorney. When considering a guilty plea, a defendant and counsel must consider which audience would provide the most favorable disposition upon being presented with the defendant's case in mitigation. In Reid's case, a wealth of mitigating evidence presentation was compiled, including expert witnesses who related the clinical impairments of Reid, and lay witnesses who brought a day-to-day reality of those impairments to the trier, breathing life into the medical experts' cold, scientific evidence. Some of this evidence even suggested a defense to capital murder.[19] At a full trial, Reid would have been able to begin presentation of mitigation during the guilt phase, an important step in winning over jurors during a bifurcated trial, the two parts of which often seem disjointed. Of the possible parties who will hear a case in mitigation after a plea negotiation has failed, the jury will often give the most promise for avoiding a sentence of death.

In *Reid*, the attorney may have been given an indication that the best route for his client was an *Alford* plea and reliance on the court.[20] If a plea

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testimony of Drs. Voskanian, Herrick and Thomas, if true, would cast doubt on Reid's guilt of capital murder. *See supra* note 10. This plausible defense strategy appears valid because the record does not show any finding of intent to kill, or any understanding by Reid that intent is an element of capital murder in the colloquy surrounding his *Alford* plea. Reid has raised this issue in his petition for certiorari to the United States Supreme Court.

15. *Id.* at 792.

16. *Id.* at 793.

17. *Id.* at 789. The videotape was presented into evidence during the guilt phase and again relied upon in the penalty phase. *Id.* at 789-90.

18. *Id.* at 788, 790-91.

19. *See supra* note 14.

20. *See* North Carolina v. Alford, 400 U.S. 25 (1970) (stating that a defendant has the right to choose to plead guilty in a capital murder trial in order to attempt to avoid the death

of guilty is being considered in a capital case it is imperative that the defendant be given a formal or strong informal indication from the court that the sentence will not be death. Absent such indication, a guilty pleas should not be entered.[21]

B. Failure to Consider Mitigating Evidence

Reid claimed that the trial court failed to consider mitigating evidence.[22] The Supreme Court of Virginia found that the trial court did consider mitigation when it imposed the death sentence[23] and then re-characterized the issue, turning the question into whether the judge had to give *controlling* effect to mitigation.[24] By twisting the initial claim into an easily refuted one, the court, citing two prior cases, disposed of Reid's claim.[25]

C. Reid's Claim that Uncontradicted Evidence Precluded a Vileness Finding

During the penalty phase of Reid's capital trial, Reid provided evidence suggesting that he did not have the requisite intent necessary to raise the nature of this crime to the degree necessary to impose the death sentence on the basis of the vileness aggravating factor.[26] This evidence was not challenged or contradicted by the Commonwealth.[27] In ruling that the trial court did not err in its finding of the vileness factor, enabling it to impose a sentence of death, the Supreme Court of Virginia demonstrated again that the Virginia application of the vileness factor is unconstitutional.

In *Godfrey v. Georgia*,[28] the United States Supreme Court held that the bare Georgia statutory language providing for the aggravating circumstance of vileness required for imposition of the death penalty, ("outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim"),[29] was unconstitutional absent

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penalty, without making a personal admission of guilt).

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

22. *Reid*, 506 S.E.2d at 789.

23. *Id.* at 792. The trial judge himself cast doubt on the Supreme Court of Virginia's finding with a 15-minute turn around from the end of the penalty phase to the imposition of the death penalty. In addition, the trial judge spoke of his duty in terms that suggested a view that death was to be the sentence if an aggravating factor was proven. *Id.* This, of course, is not the law in Virginia.

24. *Id.*

25. *Id.* (citing Correll v. Commonwealth, 352 S.E.2d 352 (Va.), *cert. denied*, 482 U.S. 931 (1987); Murphy v. Commonwealth, 431 S.E.2d 48 (Va.), *cert. denied*, 510 U.S. 928 (1993)).

26. *Id.* at 790-91.

27. *Id.* at 791-92.

28. 446 U.S. 420 (1980).

29. Georgia and Virginia have statutorily identical vileness aggravating factors.

a narrowing construction given to the jury or applied by the court and sufficient to show an increased level of individual culpability in the defendant beyond that shown by the commission of the crime.[30] *Godfrey* also held that the gory nature of the crime scene was constitutionally irrelevant.[31]

While never formally acknowledging this obligation to narrow, Virginia courts have employed several definitions of the vileness factor. In *Reid*, the trial court relied on aggravated battery, and presumably applied the Supreme Court of Virginia's definition: "quantitatively and qualitatively . . . *more culpable* than the minimum necessary to accomplish an act of murder."[32] If Virginia applied the vileness factor by focusing on a quantitatively increased level of individual culpability, which would necessarily include a more blameworthy mental state, such a narrowing construction would probably be deemed constitutional. But, in *Reid* the court revealed the deficient interpretation it has been applying for years: "[w]e have never held that the 'vileness' factor under Code [sections] 19.2-264.2 and -264.4(C) includes a requirement that a defendant's mental state embrace the intent to commit an 'outrageously or wantonly vile' murder, and we decline to do so now."[33]

In refusing to consider the mental state of a capital murder defendant when applying the vileness aggravating factor, the court demonstrated its flawed application (or worse, ignorance) of the *Godfrey* requirement.[34] Instead, the Supreme Court of Virginia identified its true test for determining that one defendant's actions are more vile than another's and therefore worthy of the death penalty. The court stated that number and nature was the essence of the test.[35] The court's line of cases illustrate that number is all that is determinative (counting stab wounds or bullet holes) and nature merely refers to the weapon of choice (*e.g.*, gun, knife, pipe, etc.).[36] A mere comparison of wounds does not provide sufficient guidance in determining

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30. *Godfrey*, 446 U.S. at 432-33.

31. *Id.* at 433 n.16.

32. *Reid*, 506 S.E.2d at 793 (emphasis mine) (quoting Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978).

33. *Id.* at 793.

34. *See supra* note 27 and accompanying text.

35. *Reid*, 506 S.E.2d at 793. In *Boggs v. Commonwealth*, 331 S.E.2d 407 (Va. 1985) the Supreme Court of Virginia held that "[t]he number or nature of the batteries inflicted upon the victim is the essence of the test whether the defendant's conduct was outrageously or wantonly vile, horrible or inhuman in that it involved . . . an aggravated battery." *Id.* at 421 (internal quotation marks omitted).

36. *Reid*, 506 S.E.2d at 793. In conducting its proportionality review, the Supreme Court of Virginia listed other capital cases involving multiple wounds in determining whether Reid's sentence was appropriate. The court compared the damage inflicted on the victim by Reid with that inflicted on other victims by their murderers: eleven gunshot wounds, victim dragged down dirt road; multiple gunshot wounds; thirty-eight stab wounds; two stab wounds, with blows to head and neck. *Id.*

individual culpability in varying capital murder cases and is therefore unconstitutional.[37]

Reid's claim that the Virginia court's have misapplied a United States Supreme Court holding[38] by failing to provide a narrowing construction to the vileness aggravating factor in Virginia's death penalty statutory scheme is an old claim, brought before, and rejected numerous times by the Supreme Court of Virginia and the United States Court of Appeals for the Fourth Circuit.[39] Nevertheless, this is a meritorious claim that must continue to be raised and preserved. Reid is raising this claim on certiorari.[40] Some day this claim will succeed.

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37. In the rare case where there is only *one* gunshot, the court has recently proven resourceful enough to uphold the vileness factor anyway. *See* Kelly E.P. Bennett, Case Note, 11 CAP. DEF. J. 429 (1999) (analyzing Hedrick v. Commonwealth, Nos. 982055, 982056, 1999 WL 101079 (Va. Feb. 26, 1999)).

38. *See Godfrey*, 446 U.S. 420. *See also supra* note 27 and accompanying text.

39. Turner v. Williams, 35 F.3d 872 (4th Cir. 1994) (holding that the Virginia court utilized appropriate limiting instructions when supplying jury with instructions defining depravity of mind and aggravated battery).

40. In addition to the related claim regarding mental state necessary for capital murder, Reid's claim regarding the lack of a narrowing construction in respect to the vileness aggravating factor would provide the United States Supreme Court with a clean and clear opportunity to affirm their previous ruling in *Godfrey*, here disregarded by the Supreme Court of Virginia and the Fourth Circuit.