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Bailey v. Commonwealth 529 S.E.2d 570 (Va. 2000)

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I. Facts

In 1998, Mark Wesley Bailey ("Bailey") began telling his co-workers that his wife was receiving threatening phone calls and notes. On September 10, 1998, Bailey awoke at about 4:30 a.m., took a borrowed .22 caliber pistol, and shot his wife three times in the head. Upon hearing his son awaken, he went into the bedroom of his two-year-old son and shot him twice in the head. Bailey then cut the bathroom window screen and the telephone line in order to give the appearance of a break-in. He went to work that day and fabricated a story that his wife had received a threatening note he believed meant "Time's up." Bailey reported to his supervisor that he just received a telephone call from someone who claimed he "had his [Bailey's] wife."[1]

A co-worker called the police and his supervisor accompanied Bailey to his house. The City of Hampton Police had already arrived at Bailey's home and informed him that his wife and child were dead. Bailey agreed to go to the police station with the detective. At the station, Bailey consented to a search of his home and to a polygraph test. During the polygraph test, the examiner detected deception after he asked the question, "Are you intentionally withholding the name of the killer . . . ?" The examiner asked Bailey if it was time to explain what actually happened. Bailey responded "Yeah," and wrote a confession to the murder of his son and wife.[2]

On December 7, 1998, a grand jury returned an indictment against Bailey that charged him with the capital murder of his son ("Nathan") as part of the same act or transaction of killing his wife ("Katherine") "and/or" the killing of a person under the age of fourteen by a person twenty-one years of age or older.[3] In February 1999, Bailey filed a pre-trial motion to have the Virginia capital murder and death penalty statutes declared unconstitutional.[4] Bailey objected to the jury instructions offered by the Com-

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1. Bailey v. Commonwealth, 529 S.E.2d 570, 573 (Va. 2000).

2. *Id.* at 574. The confession said, "I Mark Bailey do hereby without any coerscion [sic] admit to the murder of my wife and son." *Id.*

3. *Id.*; *see* VA. CODE ANN. § 18.2-31(7) (Michie 2000) (defining capital murder to include "[t]he willful, deliberate and premeditated killing of more than one person as a part of the same act or transaction"); VA. CODE ANN. § 18.2-31(12) (Michie 2000) (defining capital murder to include "[t]he willful, deliberate and premeditated killing of a person under the age of fourteen by a person age twenty-one or older").

4. *Bailey*, 529 S.E.2d at 575 (arguing that the manner in which capital murder trials are

monwealth because the instructions permitted conviction of two counts of capital murder and he contended that the indictment charged only one count of capital murder.[5] The Commonwealth argued that the statutes articulated in the indictment supported both counts of capital murder. The trial court found that the indictment properly charged two counts of capital murder for the murder of Nathan.[6] In July 1999, a jury convicted Bailey of two counts of capital murder in the killing of Nathan, one count of first-degree murder in the killing of Katherine, and both counts of firearms charges.[7]

At sentencing, the Commonwealth elected to rely solely upon vileness as the aggravating factor to support the imposition of the death penalty.[8] Bailey objected to the verdict forms at the sentencing phase because the jury could impose the death sentence founded upon the vileness aggravator without unanimity on the factor or factors supporting the finding of vileness.[9] Bailey did not proffer alternative forms and the trial court adopted

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conducted and death sentences reviewed "violated aspects of the Fifth, Sixth, Eighth, and Fourteenth Amendment of the United States Constitution").

Bailey filed a motion for a bill of particulars requesting that the Commonwealth specify which of the aggravating factors of future dangerousness or vileness it would rely upon in seeking to impose the death penalty. The trial court denied this motion because it found that the indictment adequately informed Bailey of the nature of the charges brought. *Id.*

Bailey filed the following additional motions, which were all denied: (1) motion to suppress his confession because it was given prior to his *Miranda* rights, was involuntary, and was the result of improper custodial interrogation; (2) motion for the appointment of an expert investigator; (3) motion for discovery and inspection of additional information; and (4) objection to the introduction of autopsy photographs as inflammatory and irrelevant. *Id.* at 574-76.

5. *Id.* at 576. The indictment clearly charged that the killing of his wife occurred as a part of the same act or transaction as the killing of his son "and/or" the killing of a person under the age of fourteen by a person twenty-one or older. Bailey contended that the indictment was disjunctive and could only support a conviction of one count of capital murder. *Id.* at 584. *But see* VA. SUP. CT. R., Rule 3A:6(b) (permitting two or more offenses to be charged in an indictment in separate counts if based on the same act or transaction).

6. *Bailey*, 529 S.E.2d at 576.

7. *Id.* at 575-76 (convicting of two counts of capital murder under Virginia Code §§ 18.2-31(7) and 18.2-31(12), one count of first-degree murder under § 18.2-32, and one count of the use of a firearm in each of the two killings under § 18.2-53.1); *see* VA. CODE ANN. §§ 18.2-31(7), 18.2-31(12), 18.2-32, 18.2-53.1 (Michie 2000).

8. *Bailey*, 529 S.E.2d 576; *see* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (providing that the sentence of life imprisonment shall be imposed unless the Commonwealth establishes either the probability that defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society" or that the conduct for which defendant was convicted was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim").

9. *Bailey*, 529 S.E.2d at 576; *see* § 19.2-264.2. *See generally* M. Kate Calvert, *Obtaining Unanimity and a Standard of Proof on the Vileness Sub-Elements with* Apprendi v. New Jersey, 13 CAP. DEF. J. 1 (2000) (positing the argument that the Virginia statute permitting the finding of vileness by the jury without unanimity is unconstitutional); Apprendi v. New

the verdict forms to which Bailey objected. The jury sentenced Bailey to death for each of the two capital murder convictions, imposed a life sentence for the first-degree murder conviction, and eight years imprisonment for the firearms convictions.[10] Prior to sentencing, Bailey made a motion requesting the trial court to obtain records of capital murder cases maintained by the Supreme Court of Virginia.[11] The trial court denied this motion.[12] Bailey included a motion for the sentence to be set aside because it was disproportionate to sentences imposed in similar cases.[13] The Supreme Court of Virginia, pursuant to Virginia Code section 17.1-313, reviewed Bailey's convictions and sentences.[14]

II. Holding

The Supreme Court of Virginia held that the capital murder convictions and the sentences were proper, and did not find reversible error or reason to commute Bailey's death sentence.[15]

III. Analysis / Application in Virginia

Bailey brought numerous claims of assignment of error against the trial court's conduct, many of which were summarily dismissed.[16] The three

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Jersey, 120 S. Ct. 2348, 2362-63 (2000) (requiring the jury to find factors beyond a reasonable doubt that would increase the punishment imposed to greater than the statutory maximum).

10. *Bailey*, 529 S.E.2d at 577.

11. *Id.* Bailey made the motion pursuant to § 17.1-313(E) of the Virginia Code, which provides the following:

> The Supreme Court may accumulate the records of all capital felony cases tried within such period of time as the court may determine. The court shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive. Such records as are accumulated shall be made available to the circuit courts.

VA. CODE ANN. § 17.1-313(E) (Michie 2000).

12. *Bailey*, 529 S.E.2d at 577.

13. *Id.*; *see supra* note 11.

14. *Bailey*, 529 S.E.2d at 577; *see* VA. CODE ANN. § 17.1-313(A) (Michie 2000) (providing mandatory review by the Supreme Court of Virginia of all capital convictions).

15. *Bailey*, 529 S.E.2d at 586-87.

16. *Id.* at 577-86. Bailey raised the following claims, which will not be addressed in this note: (1) the Virginia death penalty statute was unconstitutional because evidence of unadjudicated criminal conduct may be used; (2) trial court erred in denying his discovery motion; (3) trial court abused its discretion in denying his motion for an expert investigator; (4) trial court abused its discretion in admitting into evidence 13 photographs of the crime scene; (5) the system of appointing counsel in capital cases results in the denial of the right to effective assistance of counsel; (6) trial court erred in not suppressing his confessions; (7) the evidence was insufficient to support the verdicts of capital murder; (8) trial court erred in failing to set aside the death sentences; and (9) trial court erred in failing to grant motion for bill of particulars. *Id.*

The defense attorney should note that the court held that the trial court did not err on

claims that have the greatest impact for the practitioner are addressed below.

A. Whether the Statutory Scheme for Conduct of Capital Murder Trials, Sentencing, and Review Violates Due Process

The Supreme Court of Virginia rejected Bailey's claims that the statutes providing for the imposition of the death penalty violated due process.[17] Bailey argued, among other things, that the capital punishment statutes do not give adequate guidance to the jury because the jury is not required to find that the aggravating circumstances outweigh the mitigating circumstances before imposing the death penalty.[18] The court relied on *Breard v. Commonwealth*[19] for the proposition that the instruction to the jury on mitigation does not interfere with the jury's consideration of evidence offered in mitigation.[20] The court also rejected Bailey's claims that the vileness aggravator was unconstitutionally vague, the death penalty was cruel and unusual punishment, and the method of review was unconstitutional.[21]

Bailey argued that the court failed in its statutory duty to maintain "records of all capital felony cases" and thus violated his due process rights.[22] Virginia Code section 17.1-313(C)(2) directs the Supreme Court of Virginia to determine "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[23] Section 17.1-313(E) permits the court to compile records of all felony cases. Once compiled, the statute requires the court to consider the records in reviewing the sentence imposed, pursuant to section 17.1-

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motion (9) because the indictment properly gave the accused notice of the character of offenses charged and the sufficiency of the indictment was not challenged by defense counsel. *Id.* at 578. This indicates that the practitioner, when moving for a bill of particulars regarding grounds at sentencing for imposing the death penalty, should also make a motion that the indictment is insufficient to notice the defendant of the nature and character of the offense charged.

17. *Id.* at 579.

18. *Id. See generally* VA. CODE ANN. § 19.2-264.4(D) (Michie 2000) (providing the verdict forms that require the jury to only "consider" the mitigating and aggravating circumstances).

19. 445 S.E.2d 670 (Va. 1994).

20. *Bailey*, 529 S.E.2d at 579-80; *see* Breard v. Commonwealth, 445 S.E.2d 670, 674-75 (Va. 1994) (rejecting the contention that Virginia death penalty statutes are unconstitutional because the jury is not required to find beyond a reasonable doubt that aggravating factors outweigh mitigating factors).

21. *Bailey*, 529 S.E.2d at 580. *See generally* Calvert, *supra* note 9 (assessing the constitutionality of capital sentencing when based on the vileness aggravator).

22. *Bailey*, 529 S.E.2d at 580 (relying upon VA. CODE ANN. § 17.1-313(E) (Michie 2000)).

23. VA. CODE ANN. § 17.1-313(C)(2) (Michie 2000).

313(C)(2), to ensure that the sentence given was not excessive.[24] The court pronounced that it had indexed, compiled, and made available an archive of capital cases and dismissed Bailey's claim.[25]

Bailey also asserted that the trial court erred in not consulting the body of capital cases compiled by the Supreme Court of Virginia.[26] However, the Supreme Court of Virginia read section 17.1-313(E) to give the trial court discretion as to whether or not to use the body of cases compiled by the Supreme Court.[27] The trial court reviewed its own body of capital cases and deemed the sentence proportionate. The Supreme Court of Virginia found no abuse of discretion by the trial court in not considering the body of capital cases accumulated by the Supreme Court of Virginia.[28] The court reasoned that due process as to proportionality review is satisfied if the court utilizes any method which reveals that the defendant's sentence is not disproportionate from other sentences imposed for similar crimes.[29]

B. Whether the Indictment Supported Two Convictions of Capital Murder

The Supreme Court of Virginia rejected Bailey's claim that the trial court erred in permitting conviction of two counts of capital murder.[30] Bailey argued that the indictment charged one count of capital murder and another count in the alternative.[31] The court said that the indictment properly charged two counts of capital murder.[32] The court relied on *Payne v. Commonwealth*[33] in reaching this conclusion.[34] Under Rule 3A:6(b), one

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24. *Id.*; *see* § 17.1-313(E); *see also supra* note 11.

25. *Bailey*, 529 S.E.2d at 580.

26. *Id.* at 581.

27. *Id.* at 580 n.3. The court asserted that a small number of defendants convicted of capital murder and sentenced to life imprisonment are not included in the records compiled by the Supreme Court because the right to appeal is often waived. *Id.*

The Supreme Court of Virginia, in this footnote, limited cases to be reviewed for proportionality review to only those reviewed by the court itself, despite the language of § 17.1-313(E) providing that if the court undertakes to accumulate cases, it should accumulate the records of "all capital cases tried." § 17.1-313(E).

28. *Bailey*, 529 S.E.2d at 581.

29. *Id.* (reasoning that because the statute does not prescribe a particular method for proportionality review, it will permit any method as long as it assures that the "death sentence is not disproportionate to the penalty generally imposed for comparable crime"). The court presupposes that despite varying bodies of cases compared, any method will reveal disproportionate sentences sufficient to satisfy due process.

30. *Id.* at 584.

31. *Id.*

32. *Id.*

33. 509 S.E.2d 293 (Va. 1999).

34. *Bailey*, 529 S.E.2d at 584; *see* Payne v. Commonwealth, 509 S.E.2d 293, 301 (Va. 1999) (explaining that "it is clear, as well as logical, that the General Assembly intended for each statutory offense [in Code § 18.2-31] to be punished separately as a 'class 1 felony'").

indictment may charge two or more offenses if the offenses are a part of the same act or transaction.[35] The court held that the Commonwealth was entitled to seek a separate conviction and death sentence on each offense of capital murder charged in the indictment.[36]

C. *Whether the Sentences of Death Were Appropriate*

The court held that the sentences of death were not "excessive and disproportionate" or "imposed under the influence of passion, prejudice, and other arbitrary factors."[37] Bailey argued that the sentences were excessive and disproportionate because the murder of his son was done impulsively, but the court decided that the "execution-style" shooting of his son refuted that argument.[38] The court rejected his claim that the sentence was imposed due to passion or prejudice because Bailey made no particularized argument.[39] However, within his disproportionality argument Bailey claimed that the "jury's passions had been inflamed" because a father had killed his two-year-old son.[40] The court rejected the claim because there was no evidence on the record to support the claim.[41]

IV. Conclusion

Bailey's counsel diligently raised all constitutional claims on direct review except the claim of a constitutional right to proportionality review. Although the Supreme Court of Virginia rejected the claims, the federal courts may assess the defendant's constitutional claims on a petition for writ of certiorari and, eventually, a federal petition for writ of habeas corpus.

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35. VA. SUP. CT. R., Rule 3A:6(b) (providing that "[t]wo or more offenses . . . may be charged in separate counts of an indictment . . . if the offenses are based on the same act or transaction").

36. *Bailey*, 529 S.E.2d at 584. At this point in the opinion the court addressed the claim that the verdict form was inherently confusing because of the three alternative forms of vileness which could be found. This claim was preserved because there was an express objection on the record, however the court suggested that a better practice would be to also proffer alternative verdict forms. *Id.* at 584-85.

37. *Id.* at 586; *see* VA. CODE ANN. § 17.1-313(C)(1) (Michie 2000) (providing Supreme Court of Virginia must determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice, and other arbitrary factors"); VA. CODE ANN. § 17.1-313(C)(2) (Michie 2000) (providing second portion of court's determination, "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").

38. *Bailey*, 529 S.E.2d at 586 (concluding that Bailey's sentence was proportionate and not excessive compared to penalties generally imposed in the Commonwealth).

39. *Id.*

40. *Id.*

41. *Id.* "[T]he mere fact that a crime is abhorrent does not raise a presumption that the jury will be unable to set aside its natural emotions and fairly consider all the evidence." *Id.*