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# Atkins v. Commonwealth

## 534 S.E.2d 312 (Va. 2000)

### I. Facts

A jury convicted Daryl Renard Atkins ("Atkins") of capital murder under Virginia Code Section 18.2-31(4) and sentenced him to death for the 1996 abduction, robbery, and murder of Eric Nesbitt ("Nesbitt").<sup>1</sup> The Supreme Court of Virginia reversed Atkins's death sentence due to an error in the verdict form and remanded for a new sentencing hearing.<sup>2</sup> The second jury also sentenced Atkins to death.<sup>3</sup> The case then went to the Supreme Court of Virginia for review of the second death sentence.<sup>4</sup>

### II. Holding

The Supreme Court of Virginia affirmed Atkins's sentence of death and rejected his assignments of error.<sup>5</sup>

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1. *Atkins v. Commonwealth*, 510 S.E.2d 445, 447 (Va. 1999); see VA. CODE ANN. § 18.2-31(4) (Michie 2000) (defining as capital murder the "willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery").

2. *Atkins*, 510 S.E.2d at 456-57 (remanding for re-sentencing because the verdict form did not present option of life imprisonment upon finding that neither future dangerousness or vileness was proven beyond a reasonable doubt). For a more complete discussion of the facts of the case and the first decision of the Supreme Court of Virginia see Jason J. Solomon, Case Note, 11 CAP. DEF. J. 401 (1999) (analyzing *Atkins v. Commonwealth*, 510 S.E.2d 445 (Va. 1999)).

The practitioner should note that the Supreme Court of Virginia remanded for re-sentencing despite the fact that defense counsel did not object to the Commonwealth's verdict form. *Id.* The court construed defense counsel's preference for his own verdict form as an adequate objection to the Commonwealth's proffered verdict form. *Id.* at 456 n.8. The court articulated an affirmative duty on the part of the trial court to ensure that the verdict form properly states the law because it is "materially vital to the defendant in a criminal case that the jury have a proper verdict form." *Id.* at 456.

Defense counsel may argue on appeal that an expressed preference for the jury instructions proffered by defense counsel to the trial court sufficiently preserves the challenge on appeal. See *Pilot Life Ins. Co. v. Karcher*, 229 S.E.2d 884, 885 (Va. 1976) (proffering of an alternative jury instruction that properly states the law acts to preserve an objection to the jury instruction that misstates the law).

3. *Atkins v. Commonwealth*, 534 S.E.2d 312, 314 (Va. 2000).

4. *Id.*; see VA. CODE ANN. § 17.1-313(C) (Michie 2000) (mandating review by the Supreme Court of Virginia of all death sentences). Atkins pleaded guilty to abduction, robbery, and the corresponding firearm charges prior to his capital murder trial. *Atkins*, 510 S.E.2d at 447 n.1.

5. *Atkins*, 534 S.E.2d at 314.

### III. Analysis / Application in Virginia

Atkins assigned eight errors on appeal to the Supreme Court of Virginia.<sup>6</sup> The court's opinion broke the errors into the following four categories: (1) mitigation issues; (2) jury issues; (3) motion to strike the Commonwealth's evidence; and (4) proportionality review.<sup>7</sup>

#### A. Mitigation Issues

Atkins argued that Virginia's bifurcated jury system, which permitted his re-sentencing before a different jury, unconstitutionally prevented him from introducing relevant evidence from the guilt/innocence phase of the trial.<sup>8</sup> Atkins argued that the Constitution permitted him to present evidence of "residual doubt" to the re-sentencing jury.<sup>9</sup> The Supreme Court of Virginia and the United States Supreme Court previously rejected Atkins's argument.<sup>10</sup> Atkins was not entitled to use evidence to raise "residual doubt" as mitigating evidence at sentencing.<sup>11</sup> The court noted that in certain instances the defendant may introduce mitigating evidence which was used during the guilt/innocence phase of the trial as long as the evidence is not used for purposes of "residual doubt."<sup>12</sup>

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6. *Id.* at 314-318. Atkins presented the following arguments: (1) Virginia's bifurcated jury system is unconstitutional when a case is remanded to a new jury for sentencing; (2) the circuit court erred in limiting examination of a witness; (3) the circuit court erred in refusing to instruct the jury about mitigating factors; (4) the circuit court erred by denying his motion to strike the venire because it was not representative of the demographics of the county; (5) the Commonwealth's peremptory strike of a black juror violated the Equal Protection Clause; (6) the circuit court erred because it failed to grant his motion to strike the evidence for insufficiency to prove future dangerousness; (7) the circuit court erred because it failed to grant his motion to strike the evidence for insufficiency to prove vileness; (8) his death sentence was disproportionate to the penalties imposed for similar crimes. *Id.*

7. *Id.* This Case Note does not address the court's proportionality review.

8. *Id.* at 314.

9. *Id.* Residual doubt is the jury's consideration of aspects of the guilt/innocence phase during the sentencing which raise questions regarding the defendant's conviction and cause the jury to decide against the death penalty. See *Grigsby v. Mabry*, 758 F.2d 226, 247-48 (8th Cir. 1985) (Gibson, J. dissenting), *rev'd sub nom*; *Lockhart v. McCree*, 476 U.S. 162 (1986) (holding that the Constitution does not prohibit removal of jurors for cause whose opposition to the death penalty would impair performance of duties at sentencing proceeding).

10. *Atkins*, 534 S.E.2d at 314-15; see *Franklin v. Lynaugh*, 487 U.S. 164, 172-73 (1988) (holding that defendant has no constitutional right to present evidence at sentencing which would question his identity as the murderer); *Stockton v. Commonwealth*, 402 S.E.2d 196, 206-07 (Va. 1991) (holding that defendant may not present evidence at sentencing regarding his innocence).

11. *Atkins*, 534 S.E.2d at 315.

12. *Id.* at 315 n.4. *But cf.* *Oken v. Corcoran*, 220 F.3d 259, 267 (4th Cir. 2000) (holding that defendant's testimony used at the competency determination could be used against him at sentencing without abridging defendant's right against self-incrimination). The court in

Atkins attempted to introduce testimony from Investigator Lyons ("Lyons") that Atkins confessed to his involvement in the murder of Nesbitt.<sup>13</sup> Atkins argued that Lyons's testimony did not create "residual doubt" about his guilt, but illustrated his remorse and cooperation with law enforcement.<sup>14</sup> The Commonwealth objected because Lyons's testimony would necessarily include Atkins's assertion that he was not the triggerman, thus raising questions as to Atkins's guilt.<sup>15</sup> The court affirmed the circuit court's ruling that Lyons's statements were hearsay and not subject to any exceptions.<sup>16</sup> However, if the court had admitted the evidence, the evidence would have "improperly . . . interjected . . . a question about Atkins's guilt."<sup>17</sup>

### B. Jury Issues

Atkins raised two issues regarding jury selection and composition. Atkins first argued that the circuit court erred because it did not strike the entire venire.<sup>18</sup> Atkins asserted that the venire had three black members and did not represent a fair cross-section of the community.<sup>19</sup> The defendant carries a heavy burden of showing a constitutional violation of the right to a fair jury selection process, because the defendant must present evidence that the Commonwealth engaged in a systematic exclusion of a "distinctive

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*Oken* relied upon United States Supreme Court decisions that did not require an instruction to a jury in a bifurcated trial to disregard the evidence presented during the guilt/innocence phase when determining defendant's sentence. *Oken*, 220 F.3d at 267.

The practitioner may argue that a re-sentencing jury may consider evidence implicating defendant's innocence by applying the *Oken* reasoning. The United States Supreme Court's decision *not* to require an instruction that the jury should exclude from its sentencing consideration evidence presented at the guilt/innocence phase could arguably be read as an affirmative requirement that the sentencing jury ought to consider evidence presented at the guilt/innocence portion of the trial.

Additionally, the court footnoted the fact that defense counsel failed to assign error to the trial court's grant of the motion that restrained defense counsel from raising a factual issue relating to Atkins's guilt at sentencing. *Atkins*, 534 S.E.2d at 314 n.3. To raise the constitutional right to introduce "residual doubt" evidence, the practitioner should object to the grant of the motion that restrains defense counsel at sentencing and also assign the circuit court's grant of the motion as error. See Matthew K. Mahoney, *Bridging the Procedural Default Chasm*, 12 CAP. DEF. J. 305 (2000) (discussing methods by which an attorney may preserve claims from capital trial for appellate review).

13. *Atkins*, 534 S.E.2d at 315.

14. *Id.*

15. *Id.*

16. *Id.*; see VA. CODE ANN. § 19.2-264.4(B) (2000) (mandating that the evidence presented at sentencing be subject to the rules of evidence).

17. *Atkins*, 534 S.E.2d at 315.

18. *Id.* at 316.

19. *Id.* at 316 (arguing that the county contained 30% black population and the venire should reflect that same proportion).

group of the community."<sup>20</sup> Atkins failed to allege such a systematic exclusion and failed to identify evidence in the record to support such an allegation.<sup>21</sup>

Atkins also argued that the Commonwealth's peremptory strike of a black juror violated *Batson v. Kentucky*.<sup>22</sup> The court may only reverse the circuit court's finding of the absence of purposeful discrimination if the finding was clearly erroneous.<sup>23</sup> The Commonwealth proffered the juror's medical condition as the race-neutral reason for striking the juror.<sup>24</sup> The circuit court's finding of the Commonwealth's proper race-neutral justification was not clearly erroneous.<sup>25</sup>

### C. Motion to Strike the Commonwealth's Evidence

Atkins argued that the Commonwealth presented insufficient evidence to support a finding of future dangerousness or vileness.<sup>26</sup> The court disagreed and found that Atkins's eighteen prior felony convictions including robberies and a shooting sufficiently supported a finding of future dangerousness.<sup>27</sup> The court also concluded that the chief medical examiner's testimony that none of the shots were immediately lethal supported the jury's finding of vileness.<sup>28</sup>

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20. *Id.* (quoting *Chichester v. Commonwealth* 448 S.E.2d 638, 647 (Va. 1994) (holding that prosecutor's explanation that black jurors were struck because of possible bias against the prosecution adequately rebutted presumption of purposeful discrimination)).

21. *Id.*

22. *Id.*; see *Batson v. Kentucky*, 476 U.S. 79, 86 (1986) (holding that a peremptory strike based on race violated the Equal Protection Clause of the Fourteenth Amendment).

23. *Atkins*, 534 S.E.2d at 316; see *Chandler v. Commonwealth*, 455 S.E.2d 219, 223 (Va. 1995) (stating that the defendant who challenges a peremptory strike has the burden of proving purposeful discrimination in the selection of the jury panel (citing *Buck v. Commonwealth*, 443 S.E.2d 414, 415 (Va. 1994))).

24. *Atkins*, 534 S.E.2d at 316-17.

25. *Id.*

26. *Id.* at 317.

27. *Id.*

28. *Id.*; see VA. CODE ANN. § 19.2-264.4(C) (Michie 2000) (defining vileness to be torture, depravity of mind, or an aggravated battery). The court relied upon the suffering of the victim as the evidence sufficient to support a finding of vileness. *Atkins*, 534 S.E.2d at 317. Ironically, the court has also found that an execution-type murder supports a finding of vileness, although the victim did not suffer. See *Goins v. Commonwealth*, 470 S.E.2d 114, 131 (Va. 1996) (finding evidence sufficient to support vileness because the slaying was execution-style); *Stewart v. Commonwealth*, 427 S.E.2d 394, 409 (Va. 1993) (finding that the evidence was sufficient to support vileness because of a "deliberate execution-type murder" of defendant's wife and child).

It is difficult to imagine a capital murder in which the victim will not either suffer or die quickly. The court's construction of vileness reaches nearly every murderer, thus making the finding of vileness almost a certainty. The practitioner may use the disparity of these situations to raise a claim that Virginia's sentencing scheme is unconstitutionally vague under

*IV. Conclusion*

Rules regarding mitigating evidence remain unsettled and creative arguments ought to be used to introduce a diversity and volume of mitigating evidence. However, the circuit court may read the case law broadly to exclude relevant evidence that casts the slightest shadow on the guilt of the defendant.

Jeremy P. White

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*Godfrey v. Georgia.* See *Godfrey v. Georgia*, 446 U.S. 420, 427-28 (1980) (requiring a state's capital sentencing scheme to give adequate guidance to a sentencing jury to provide a meaningful basis for distinguishing between a murder deserving of the death penalty and other murders).

