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Shafer v. South Carolina
121 S. Ct. 1263 (2001)

I. Facts

A South Carolina jury found Wesley Aaron Shafer, Jr. ("Shafer") guilty of murder, attempted armed robbery and criminal conspiracy. After unanimously finding that a statutory aggravator was present, the jury recommended the death penalty, which the judge imposed. During the sentencing phase, the State presented evidence of Shafer's criminal record, past aggressive conduct, probation violations, and misbehavior in prison. At an in camera hearing on the jury instructions, Shafer's counsel argued, relying on *Simmons v South Carolina*[1] and due process, that the jury must be instructed that life means life without the possibility of parole.[2] Shafer's counsel further asserted that the State's introduction of this evidence put future dangerousness at issue. The judge declined to include a life means life without parole instruction because, in his opinion, the State had not argued future dangerousness. The judge further denied Shafer's request to read the entirety of the applicable statute in his closing.[3] The State in its closing repeated several times the words of witnesses to the crime, suggesting that they were in fear the perpetrators would return, at which point Shafer's counsel renewed his request for a *Simmons* instruction. The judge again denied the request stating that the State had come close to crossing the line of putting future dangerousness at issue, but had not. The judge charged the jury that "life imprisonment means until the death of the defendant."[4] Shafer's counsel again objected to the failure to include the statutory language on parole ineligibility, and the motion was again denied. During deliberations, the jury submitted two questions to the court regarding parole eligibility.[5] The judge instructed the jury

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1. 512 U.S. 154 (1994).

2. *See also* Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (holding that the jury should be instructed life means life without the possibility of parole when the defendant is parole ineligible, future dangerousness is at issue and the jury may only impose life or death as sentencing options).

3. The section which counsel sought to read is: "For purposes of this section, 'life imprisonment' means until the death of the offender. No person sentenced to life imprisonment pursuant to this section is eligible for parole . . ." S.C. CODE ANN. § 16-3-20(A) (Law. Co-op Supp. 2000).

4. Shafer v. South Carolina, 121 S. Ct. 1263, 1269 (2001).

5. The specific questions asked by the jury were: "1) Is there any remote chance for someone convicted of murder to become elig[i]ble for parole? 2) Under what conditions would someone convicted for murder be elig[i]ble." *Shafer*, 121 S. Ct. at 1269 (alterations in original).

on parts of the law again but added "[p]arole eligibility or ineligibility is not for your consideration."[6]

The Supreme Court of South Carolina affirmed the trial court's decision. That court held that under South Carolina's new sentencing scheme, *Simmons* was inapplicable because three possible sentences are available at the outset of the sentencing proceedings.[7] The Supreme Court of South Carolina did not address the question of whether the State had put future dangerousness at issue.[8] Shafer sought a writ of certiorari from the United States Supreme Court asserting that *Simmons* applied to his case because future dangerousness was at issue and once the jury unanimously found an aggravator only life or death could be imposed.[9]

II. Holding

The United States Supreme Court reversed and remanded, holding that *Simmons* does apply to South Carolina's new sentencing scheme when future dangerousness is at issue.[10] The United States Supreme Court premised its holding on two bases: (1) the statutory effect of the sentencing scheme; and (2) jury understanding of parole eligibility or ineligibility.[11] However, the Court remanded the case to the Supreme Court of South Carolina to determine whether the State had put future dangerousness at issue.[12]

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6. *Id.* at 1267-70.

7. The pertinent excerpts of the new sentencing scheme are as follows:

> § 16-3-20. Punishment for murder: separate sentencing proceeding to determine whether sentence should be death or life imprisonment.
>
> (A) A person who is convicted of or pleads guilty to murder must be punished by death, by imprisonment for life, or by a mandatory minimum term of imprisonment for thirty years.
>
> (B) . . . the court shall conduct a separate sentencing proceeding . . . if a statutory aggravating circumstance is found, the defendant must be sentenced to either death or life imprisonment. If no statutory aggravating circumstance is found, the defendant must be sentenced to either life imprisonment or a mandatory minimum term of imprisonment for thirty years.
>
> (C) [If the jury finds a statutory aggravating factor it may impose death or life, and the judge must give the sentence which it recommends, as long as it is warranted.] If the jury does not unanimously find any statutory aggravating circumstances or circumstances beyond a reasonable doubt, it shall not make a sentencing recommendation. Where a statutory aggravating circumstance is not found, the trial judge shall sentence the defendant to either life imprisonment or a mandatory minimum term of imprisonment for thirty years.

S.C. CODE ANN. § 16-3-20 (Law. Co-op. Supp. 2000).

8. *Shafer*, 121 S. Ct. at 1270.

9. *Id.* at 1271.

10. *Id.* at 1273, 1275.

11. *Id.* at 1272.

12. *Id.* at 1275.

III. Analysis / Application in Virginia

In discussing the applicability of *Simmons*, the Court found that while the statute does permit three sentences to be imposed, its effect, once in the hands of the jury, only permits life or death.[13] Under South Carolina's sentencing scheme, the jury must first unanimously find an aggravator.[14] If the jury does not agree upon an aggravator, the judge may impose life or a minimum term of thirty years.[15] However, if the jury finds a statutory aggravating circumstance, "the defendant must be sentenced to either death or life imprisonment."[16] In the latter instance, the jury does not return to the court before recommending a sentence.[17] The Court examined this process as if it were done in two distinct phases: a "hypothesized bifurcated sentencing proceeding."[18] The Court based this decision on the idea that the jury made two separate decisions: first, whether an aggravator was present and second, what sentence to impose.[19] Thus, the Court concluded: "If the jurors should be told life means no parole in the hypothesized bifurcated sentencing proceeding, they should be equally well informed in the actual uninterrupted proceeding."[20] The Court's primary concern was whether the jury may only choose between life and death when it makes the sentencing decision.[21] Therefore, the United States Supreme Court extended *Simmons* to cases in which several sentences may be imposed, but the jury may choose only between life and death as possible sentences.[22]

The holding in *Shafer* does not have a direct impact in Virginia. *Yarbrough v. Commonwealth*[23] held that "the trial court shall instruct the jury that the words 'imprisonment for life' mean 'imprisonment for life without possibility of parole'" where vileness is the aggravating factor.[24] Thus, in Virginia, an instruction on parole ineligibility is required whether or not the Commonwealth puts future dangerousness at issue. In addition, in the Virginia scheme there is never a third sentencing option after a capital conviction; the only possibilities are life or death.[25] However, *Shafer* adds emphasis to the idea that the jury must fully understand the import of its sentencing options.

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13. *See id.* at 1272-73.
14. *Id.* at 1272.
15. *Id.* at 1273; S.C. CODE ANN. § 16-3-20(C) (Law. Co-op. Supp. 2000).
16. *Id.*
17. *Id.*
18. *Shafer*, 121 S. Ct. at 1273 n.5.
19. *Id.*
20. *Id.*
21. *Id.* at 1273.
22. *See id.* at 1271-72.
23. 519 S.E.2d 602 (Va. 1999).
24. Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999).
25. VA. CODE ANN. § 19.2-264.4(A) (Michie 2000).

The Court, by its decision in this case, has made the constitutionally required language from *Simmons* more stringent. The instruction "life imprisonment means until the death of the defendant" is inadequate to satisfy *Simmons* – a court must specifically address parole eligibility or ineligibility.[26] Not only did the United States Supreme Court address the language, but it also emphasized jury understanding.[27] The Court put a significant amount of weight on the jury's questions, because the questions "left no doubt about [the jury's] failure to gain from defense counsel's closing argument or the judge's instructions any clear understanding of what a life sentence means."[28] Furthermore the Court criticized the trial judge's response that the jury should not be concerned with parole eligibility, because this comment only led to further confusion and the assumption that parole was available.[29] Therefore, when a jury makes obvious that it is confused and concerned about parole eligibility, the court must explain clearly and plainly that the defendant has no possibilities of being released from prison. *Shafer* provides the means by which a practitioner may argue this point. One should note that this principle only applies to cases after January 1, 1995.[30]

The ability to introduce prison life evidence as rebuttal to future dangerousness and as mitigation to deter the jury from imposing death would be extremely helpful to most capital defendants. The Supreme Court of Virginia made the introduction of this evidence virtually impossible with its decisions in *Walker v Commonwealth*,[31] *Cherrix v Commonwealth*,[32] and *Burns v Commonwealth*.[33] The court held in *Walker* and *Cherrix* that prison life evidence was not proper as mitigation evidence.[34] In *Burns*, the Supreme Court of Virginia held that general evidence of prison life is not relevant rebuttal to the Commonwealth's evidence of future dangerousness, which is specific by nature.[35] The court also tailored the inquiry

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26. *See generally* Shafer v. South Carolina, 121 S. Ct. 1263 (2001).

27. *Id.* at 1273-74.

28. *Id.*

29. *Id.* at 1274.

30. *See generally* VA. CODE ANN. § 18.2-10(a) (Michie Supp. 2001) (setting punishment for class one felonies at death or life and a possible fine); VA. CODE ANN. § 53.1-165.1 (Michie 1998) (disallowing parole for felony offenses committed after January 1, 1995); VA. CODE ANN. § 53.1-40.01 (Michie 1998) (allowing geriatric conditional release except for class one felony offenses). Note that before 1995 a defendant with three separate felony convictions of murder, rape or robbery or any combination of the these three offenses, was already parole ineligible. *See* VA. CODE ANN. § 53.1-151 (Michie 1994).

31. 515 S.E.2d 565 (Va. 1999).

32. 513 S.E.2d 642 (Va. 1999).

33. *See generally* Walker v. Commonwealth, 515 S.E.2d 565 (Va. 1999); Cherrix v. Commonwealth, 513 S.E.2d 642 (Va. 1999) (holding that prison life evidence is not proper mitigation evidence); Burns v. Commonwealth, 541 S.E.2d 872 (Va. 2001) (holding that prison life evidence is not rebuttal to future dangerousness).

34. *See Walker*, 515 S.E.2d at 574; *Cherrix*, 513 S.E.2d at 654.

35. *Burns*, 541 S.E.2d at 893.

of future dangerousness as one of "would," not whether the defendant "could," commit future crimes.[36]

As discussed above, the United States Supreme Court emphasized the importance of jury understanding in *Shafer*. The opinion focused on the quantitative aspect of a life sentence: a defendant will never be released from prison until his death.[37] The emphasis the court placed on the jury quantitatively understanding the definition of a life sentence may be extrapolated to support the argument that the jury must also qualitatively understand a life sentence. As the Court said in *Simmons* and reiterated in this opinion: "It d[oes] not comport with due process . . . to 'secure a death sentence on the ground . . . of [defendant's] future dangerousness, while at the same time concealing from the sentencing jury *the true meaning* of its [only] noncapital sentencing alternative.'"[38] The "true meaning" of the non-capital alternative is life imprisonment. *Shafer* dealt specifically with the "life" aspect of life imprisonment. In fact, the standard *Simmons* instruction is typically called a "life means life" instruction. The jury also needs to know the "true meaning" of the "imprisonment" aspect of life imprisonment. If jurors are not informed of what imprisonment means as a qualitative matter, the jury will speculate about that meaning. A jury which speculates that imprisonment is qualitatively different from reality is as likely to react to its speculation by choosing death over life as is a jury which speculates about whether life means life. That jury will be sentencing based on fear rather than reason; sentencing on that basis is forbidden by *Shafer*.

Similarly, the Supreme Court of Virginia has also expressed concern for juror clarity in sentencing. The court in *Yarbrough* was concerned with "whether issues are presented in a manner that could influence the jury to assess a penalty based upon 'fear rather than reason.'"[39] In that case, the court was addressing the fact that when a jury thinks a defendant may be eligible for parole it is likely to give a harsher sentence based on this erroneous belief. The Supreme Court of Virginia states four different times in three pages that the jury must be informed in capital sentencing of its two options to avoid "speculative fears."[40] Similarly, in *Fishback v. Commonwealth*,[41] the Supreme Court of Virginia emphasized the harm of jury speculation in sentencing.[42] The court in that case emphatically stated:

36. *Id.*

37. *See Shafer*, 121 S. Ct. at 1273.

38. *Id.* at 1272 (quoting Simmons v. South Carolina, 512 U.S. 154, 162 (1994)) (alterations in original) (emphasis added).

39. *Yarbrough*, 519 S.E.2d 602, 613 (quoting Farris v. Commonwealth, 163 S.E.2d 575, 576 (Va. 1968)).

40. *Id.* at 613-16.

41. 532 S.E.2d 629 (Va. 2000).

42. Fishback v. Commonwealth, 532 S.E.2d 629, 634 (Va. 2000) (holding that juries shall be instructed on the possibilities of parole or geriatric release in all felony cases).

> A jury should not be required to perform this critical and difficult responsibility without the benefit of *all significant and appropriate* information that would avoid the necessity that it speculate or act upon misconceptions concerning the effect of its decision. Surely a properly informed jury ensures a fair trial both to the defendant and the Commonwealth.[43]

This idea, that jurors may impose a harsher sentence when speculating on punishment, may easily be extended to prison life evidence. Not only do jurors speculate as to how long a defendant will remain incarcerated, but also what that incarceration will entail. Jurors also speculate about the defendant's enjoyment of prison life, and in some instances the Commonwealth encourages the jury to do so. In *Schmitt v. Commonwealth*[44] the Commonwealth, in its closing arguments, suggested to the jury the "wonderful life" Schmitt would have in prison if the jury sentenced him to life.[45] Thus, to remove all negative speculation, and to be consistent with *Shafer*, *Yarbrough* and *Fishback*, a defendant should be allowed to inform the jury of the nature of prison life.

Also, the defendant should be able to introduce prison life evidence in rebuttal to evidence of future dangerousness. The Supreme Court of Virginia's decision in *Burns* was erroneous because its focus on "would" versus "could" failed to take into account the reality of the society that a capital defendant faces. The General Assembly enacted Sections 19.2-264.2 and 19.2-264.4(C) of the Virginia Code in 1977.[46] At that time, Class 1 felons were eligible for parole and "society" therefore included both prison and non-prison societies. In 1995, parole was abolished.[47] Thus, after 1995, interpreting "society" to encompass both prison and non-prison societies results in a conflict between Sections 19.2-264.2 and 19.2-264.4(C), on the one hand, and Sections 53.1-165.1 and 53.1-40.01, on the other. It is a fundamental principle of statutory interpretation that "each statute should receive such a construction as will make it harmonize with the body of law."[48] Therefore, the only possible harmonized reading of "society" in Sections 19.2-264.2 and 19.2-264.4(C), is "prison society."

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43. *Id.* at 633 (emphasis added).

44. 547 S.E.2d 186 (Va. 200[1]).

45. Schmitt v. Commonwealth, 547 S.E.2d 186, 200 (Va. 200[1]) (refusing to address Schmitt's assignment of error on this point because the motion was untimely).

46. VA. CODE ANN. § 19.2-264.2, § 19.2-264.4(C) (Michie 1994).

47. VA. CODE ANN. § 53.1-165.1 (Michie 2000) (eliminating parole for all felony convictions after January 1, 1995); VA. CODE ANN. § 53.1-40.01 (Michie 2000) (excluding Class 1 felons from geriatric release).

48. HENRY CAMPBELL BLACK, CONSTRUCTION AND INTERPRETATION OF THE LAWS 60-61 (West Publishing Co. 1896). "The rule is that 'when one statute speaks to a subject in a general way and another deals with a part of the same subject in a more specific manner, the two should be harmonized if possible, and where they conflict, the latter prevails." Thomas v. Commonwealth, 419 S.E.2d 606, 618 (Va. 1992) (quoting Va. Nat'l Bank v. Harris, 257 S.E.2d 867, 870 (Va. 1979)).

The Commonwealth routinely proves future dangerousness by introducing evidence of a defendant's prior convictions or past acts and then asks the jury to predict a defendant's future conduct when in an environment different from the unstructured environment in which he committed those acts. *Skipper v South Carolina*[49] held that evidence of prior incarcerations is admissible as both mitigating and rebuttal evidence for future dangerousness.[50] When the defendant asks to demonstrate to the jury that her past conduct in a known environment corresponds to how she will react *in that same environment*, the evidence should be admitted. The past and future conditions of incarceration provide a direct indicator of the defendant's future dangerousness or lack thereof and are, therefore, more relevant than the Commonwealth's evidence. Future conditions of incarceration can indicate how the defendant *would* behave.

IV. Conclusion

In summary, *Shafer* may be used by the Virginia capital defense lawyer for two purposes: (1) to ensure that the jury fully understands what a life sentence means; and (2) when the Commonwealth puts future dangerousness at issue, it casts a broad umbrella under which evidence of prison life should be admissible. This argument is important to make because the *Cherrix-Burns* line of cases may well be found constitutionally deficient and the issue must be preserved.[51]

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49. 476 U.S. 1 (1986).

50. Skipper v. South Carolina, 476 U.S. 1, 8 (1986) (holding that evidence of a defendant's prior good behavior in prison is admissible as mitigation evidence).

51. Contact the Virginia Capital Case Clearinghouse for advice and sample motions for the admission of prison life evidence.

CASE NOTES:
United States Court of Appeals for the Fourth Circuit

Decisions on the Merits