Capital Defense Journal

Volume 14 | Issue 1 Article 13

Fall 9-1-2001

Bums v. Commonwealth 541 S.E.2d 872 (Va. 2001)

Burns v. Commonwealth
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I. Facts

On September 20, 1998, William Joseph Burns ("Burns") was drinking heavily during the day while performing some home repairs at his trailer in Baker, West Virginia. He resided there with his wife Penny Marlene Cooley Burns ("Penny"), and her two sons. The repairs were apparently not going well and Burns became increasingly angry with his wife. As Burns had previously assaulted and battered Penny on several occasions when he was drinking, she left the residence out of concern for her safety.[1]

Instead of going to the home of her mother in Edinburg, Virginia, as she had on a previous occasion, Penny went to the home of her friends, the Funkhousers.[2] Penny made several attempts to contact her mother, Tersey Elizabeth Cooley ("Cooley"), in order to let her know that she had left Burns and to warn her not to let Burns into Cooley's home if he came there;[3] Penny was not successful in reaching her mother.[4] Burns showed up at the Funkhouser residence around midnight and asked Penny to go home with him. She refused and Burns left, returning approximately one hour later. He remained in his car outside the Funkhouser residence until the next morning.[5]

On September 21, 1998, Penny's sister, Linda Yvonne Heres went to the home of her seventy-three year-old mother and found signs of forced entry. Upstairs she found her mother's unclothed dead body lying on the bedroom floor, the room in disarray. A medical examiner performed an autopsy on Cooley's body and reported that Cooley had multiple injuries on her head, neck, and upper chest including twenty-four fractures to her ribs.[6] Cooley died from "blunt force trauma to [the] chest, with rupture of the heart" and compression of the neck.[7]

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1. Burns v. Commonwealth, 541 S.E.2d 872, 878 (Va. 2001).

2. *Id.* "The Funkhousers lived in Fort Valley, Virginia, which is about a forty-five minute drive from Cooley's house in Edinburg." *Id.* at n.4.

3. *Id.* at 878. Penny stated that when she left him the first time, Burns threatened to kill her or her mother if she ever left him again. *Id.* at n.5.

4. *Id.* at 878.

5. *Id.*

6. *Id.*

7. *Id.* at 879. Dr. Frances Patricia Field, Assistant Chief Medical Examiner for the Northern Virginia District Medical Examiner's Office, who performed the autopsy, reported that there "was also a tearing of Cooley's pericardium, causing blood to spill out of the heart into the chest cavity. *Id.* Dr. Field opined that a broken rib probably had punctured [Cooley's] heart, though direct force

The forensic evidence collected from Burns, Cooley, and the crime scene pointed toward Burns as the assailant.[8] Burns was arrested, tried, and convicted by a jury of capital murder in the commission of rape and/or forcible sodomy, statutory burglary, rape, and forcible sodomy. At the conclusion of the penalty phase, the judge, following the jury's recommendations, sentenced Burns to death on the capital murder conviction, eighteen years on the statutory burglary conviction, and to life imprisonment on each of the convictions of rape and forcible sodomy.[9]

II. Holding

After considering Burns's assignments of error and the record, the Supreme Court of Virginia found no error and affirmed both the capital and non-capital convictions.[10] The court held that the indictment was not

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applied to the chest might have ruptured the heart." *Id.* She concluded that Cooley died within two or three minutes of the heart rupture. *Id.* at 879.

8. *Id.* at 880. "Karolyn Leclaire Tontarski, a forensic scientist employed by the Commonwealth of Virginia Department of Criminal Justice Services Division of Forensic Science, analyzed the physical evidence" and "reported the presence of spermatozoa on vaginal and anal smears taken from the victim." *Id.* Tontarski testified, "based upon DNA testing results, that the sperm fraction found in the vaginal swab was 1.6 to 100 million times more likely to have come from Burns than from any other randomly chosen individual" and "the sperm fraction on the anal swab was 8.7 to 540 million times more likely to have come from Burns than from any other randomly selected individual." *Id.* Tontarski also found sperm cells on several items in Cooley's bedroom and bathroom. *Id.*

9. *Id.* at 877.

10. *Id.* at 897. Burns filed forty-six assignments of error, twenty-six of which were presented on appeal. *Id.* at 880. Burns failed to brief a number of assignments of error, which were consequently waived; the court did not consider them on appeal. *Id.* at 880 n.7; *see* Kasi v. Commonwealth, 508 S.E.2d 57, 60 (Va. 1998) (stating that issues not fully briefed on appeal are waived). These assignments of error will not be discussed in this note, nor will the following fourteen:

(1) First, Burns challenged the constitutionality of the Virginia capital murder statute. *Id.* at 881. Because on brief Burns relied solely upon his memorandum presented to the circuit court and did not brief the argument anew before the Supreme Court of Virginia, the court considered him to have procedurally defaulted this claim. *Id.*

(2) When Burns was arrested, he was charged with first-degree murder. *Id.* Following indictment by a grand jury on two counts of capital murder, an order of nolle prosequi was entered on the first-degree murder charge. *Id.* Thus, Burns never had a preliminary hearing. *Id.* On appeal, Burns claimed that the circuit court erred by failing to quash the capital murder indictment on the basis that he was denied a preliminary hearing. *Id.* The *Burns* court, citing *Webb v Commonwealth*, held that a preliminary examination was not necessary because Burns was indicted by a grand jury. *Id.*; *see* Webb v. Commonwealth, 129 S.E.2d 22, 27 (Va. 1963) (stating that preliminary examination of one accused of committing a felony not necessary where indictment has been found against him by a grand jury).

(3) Burns claimed that the circuit court erred by denying his motion to suppress evidence, including: all of Burns's statements to law enforcement officers; physical evidence, including DNA testing results, seized from his person and residence; and all documents obtained from him. *Burns*, 541 S.E.2d at 882. The court found no error. *Id.* at 882-86.

(4) Burns argued that the circuit court "erred by precluding him from asking questions during

voir dire to ascertain potential jurors' 'true feelings' about the death penalty" and by striking for cause and failing to strike for cause respectively two jurors. *Id.* at 887. After considering the entire voir dire of both jurors at issue, the court found no error in the circuit court's decisions regarding those jurors. *Id.*; *see* Mackall v. Commonwealth, 372 S.E.2d 759, 766 (Va. 1988) (stating that "either party may require prospective jurors to state clearly that whatever view they have of the death penalty will not prevent or substantially impair their performance as jurors in conformity with their oath and the court's instructions," but "that a party may[not] inquire what prospective jurors' views of the death penalty might be").

(5) Burns asserted that the trial court erred in admitting certain photographs of the victim's body into evidence. *Burns*, 541 S.E.2d at 887. The court held that the decision to admit photographic evidence rests within the sound discretion of the trial court and, after examination of the photographs in question, found no abuse of discretion. *Id.* at 887-88; *see* Hedrick v. Commonwealth, 513 S.E.2d 634, 639, (Va. 1999), *cert. denied*, 528 U.S. 952 (1999) (holding that admission of photographic evidence rests within the sound discretion of the trial court).

(6) During the trial, the Commonwealth played a videotape for the jury of a conversation between Burns and a friend. *Burns*, 541 S.E.2d at 888. In addition to viewing the tape, the jurors were provided with a transcript of the conversation over Burns's objection. *Id.* Without challenging the accuracy of the transcript, Burns contended that the trial court erred in allowing the jury to use the transcript because it contained gaps and inaudible references and because it highlighted prejudicial portions of the conversation. *Id.* The *Burns* court, citing *Fisher v Commonwealth*, held that the use of such a transcript is in the trial court's discretion, and found no abuse of discretion. *Id.*; *see* Fisher v. Commonwealth, 374 S.E.2d 46, 52 (Va. 1988) (stating that "[a] court may, in its discretion, permit the jury to refer to a transcript, the accuracy of which is established, as an aid to understanding a recording").

(7) At trial, Burns attempted to elicit testimony from several witnesses regarding Cooley's having revoked her power-of-attorney naming Penny as her attorney-in-fact, but the court sustained the Commonwealth's objection. *Burns*, 541 S.E.2d at 888. Burns was able to proffer testimony to that effect, but contended on appeal that the excluded evidence should have been admitted to show a motive for Penny to kill her mother. *Id.* Here, the *Burns* court held that if there was error in excluding the reasons why Cooley revoked the power of attorney, it was harmless because the jury heard such information through other sources during the trial. *Id.*

(8) Burns argued that the trial court erred in allowing into evidence his wife's testimony regarding prior episodes of violent and threatening conduct, and Burns's tendency toward sexual aggression when he consumed alcohol. *Id.* at 889. The court found no error in the trial court's admission of this testimony because it was admitted only for the purpose of showing why Penny left her residence on the night of Cooley's murder. *Id.*

(9) During his pretrial incarceration, Burns wrote several letters to his wife containing incriminating statements and differing versions of the events surrounding Cooley's murder. *Id.* At trial, these letters were introduced into evidence through the testimony of a law enforcement officer. *Id.* On appeal, Burns claimed that the letters were admitted into evidence in violation of Section 8.01-398 of the Virginia Code, which makes private communications between married persons privileged. *Id.*; *see* VA. CODE ANN. § 8.01-398 (Michie 2000). Section 8.01-398 provides that:

> Husband and wife shall be competent witnesses to testify for or against each other in all civil actions; provided that neither husband nor wife shall without the consent of the other, be examined in any action as to any communication privately made by one to the other while married, nor shall either be permitted, without such consent, to reveal in testimony after the marriage relation ceases any such communication made while the marriage subsisted.

§ 8.01-398. Because the letters were not introduced by Penny, but rather by a law enforcement

officer, the court held that they were properly admitted by the circuit court. *Burns*, 541 S.E.2d at 889-90.

(10) Based on an evaluation by a clinical psychologist, the circuit court found Burns incompetent to stand trial, resulting in his commitment to an inpatient psychiatric facility prior to trial. *Id.* at 890 n.13. After approximately four months, the court determined that Burns's competency had been restored. *Id.* During the trial, Burns's counsel moved to have Burns evaluated for his competency to stand trial pursuant to Section 19.2-169.1 of the Virginia Code. *Id.* at 890; *see* VA. CODE ANN. § 19.2-169.1 (Michie 2000) (providing, in pertinent part, that "[i]f . . . the court finds, upon hearing evidence or representations of counsel for the defendant or the attorney for the Commonwealth, that there is probable cause to believe that the defendant lacks substantial capacity to understand the proceedings against him or to assist his attorney in his own defense, the court shall order that a competency evaluation be performed . . . "). The circuit court denied the motion. *Burns*, 451 S.E.2d at 890. The court in *Burns* found, based upon review of the record, which included testimony by the jail nurse that Burns was taking his prescribed anti-depressant medication, no probable cause to believe that Burns was not competent to stand trial. *Id.* at 890-91.

(11) Burns claimed that the evidence upon which he was convicted was insufficient to sustain the jury's verdict finding him guilty of capital murder, rape, forcible sodomy, and statutory burglary. *Id.* at 891. He argued that because he was allegedly intoxicated, and the Commonwealth produced conflicting evidence of his whereabouts on the night of Cooley's murder, the Commonwealth failed to prove beyond a reasonable doubt that he committed a willful, deliberate, and premeditated murder. *Id.* The court rejected this claim, finding that the alleged conflicts regarding Burns's whereabouts on the night in question were a matter for the jury to resolve, and that sufficient evidence existed to support the jury's finding. *Id.* at 892. Burns also claimed insufficient evidence of penetration to support his convictions for rape and forcible sodomy. *Id.* at 891. The court likewise rejected this claim, finding that the presence of Burns's sperm on the victim's vaginal and anal swabs was sufficient to support a finding of penetration. *Id.* at 892.

(12) During the penalty phase of the trial, Burns requested two jury instructions: (1) instructing the jury to "consider as a possible mitigating factor that a sentence of life in prison means that the defendant will never be eligible for parole"; and (2) instructing the jury that, with respect to future dangerousness, it "may consider the fact that if you set the defendant's punishment at life imprisonment, he will never be eligible for parole." *Id.* at 895. The circuit court rejected both proposed instruction as repetitious because the jury had already been instructed that imprisonment for life means life with no possibility for parole. *Id.*

(13) Section 17.1-313(C)(1) of the Virginia Code requires the Supreme Court of Virginia to consider "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor." *Id.* at 896; *see* VA. CODE ANN. § 17.1-313(C)(1) (Michie 1999). On appeal, Burns argued that his death sentence was imposed under the influence of passion and prejudice because the Virginia death penalty statute is unconstitutional; he was not allowed to rebut the Commonwealth's closing argument that, if Burns received life imprisonment, he would pose a continuing danger to the prison staff and could escape from prison (this issue will be addressed in the body of this note); and because the Commonwealth's Attorney referred to Burns as an "animal," arguing to the jury that their decision would "send a message." *Burns*, 541 S.E.2d at 896. The court rejected all of these arguments. *Id.*

(14) Section 17.1-313(C)(2) of the Virginia Code requires 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." *Id.*; *see* § 17.1-313(C)(2). Burns argued that his sentence of death was disproportionate because of his low IQ, the physical and sexual abuse that he suffered as a child, his incompetence to stand trial at one time, his continued need to be medicated throughout the trial, and his symptoms of depression and anxiety. *Burns*, 541

defective and that Burns was not entitled to examine police investigators under oath to determine whether they turned over all exculpatory evidence to the Commonwealth's Attorney.[11] The court also held that "a determination of future dangerousness revolves around [the] individual defendant and a specific crime" committed, stating that evidence concerning prison life in general is not relevant to that determination, and was, therefore, properly excluded by the trial court as rebuttal to the Commonwealth's evidence of future dangerousness.[12] Finally, the court held that the trial court did not err in denying Burns a mistrial as a result of improprieties in the Commonwealth's closing argument or in denying his motion for a mental examination under Section 19.2-300 of the Virginia Code.[13]

III. Analysis / Application in Virginia

A. Multiplicious Indictment

The Commonwealth originally indicted Burns on two counts of capital murder.[14] The first count alleged that he had committed capital murder in the commission of robbery, and the second count alleged that he had committed capital murder in the commission of, or subsequent to, rape or object sexual penetration.[15] The Commonwealth then amended the first count, without objection from Burns, and moved the circuit court to nol-pros the second count.[16] On appeal, Burns claimed that the indictment against him was multiplicious because he was charged with three separate offenses of capital murder in one count.[17] The court found that the indictment, as finally amended, contained only one charge of capital murder with alternative "gradation" offenses.[18]

Though Burns's objection would have been better articulated as a contention that the indictment was duplicitous, rather than multiplicious, the objection is a sound one. The court's ruling on this matter appears to directly contradict

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S.E.2d at 897 n.18. Based on a review of Burns's case and similar cases, and noting Burns's prior criminal history and the fact that it has approved a death sentence for a defendant with a significantly lower IQ than that of Burns, the court concluded that Burns's sentence of death was neither excessive nor disproportionate to sentences imposed in Virginia for comparable capital murders. *Id.* at 897.

11. *Id.* at 882, 886.

12. *Id.* at 893.

13. *Id.* at 895; *see also* VA. CODE ANN. § 19.2-300 (Michie 2000) (providing for a mental examination prior to sentencing of any person convicted of an offense indicating "sexual abnormality").

14. *Burns*, 541 S.E.2d at 881.

15. *Id.*

16. *Id.* at 881-82, 882 n.9. The count, as finally amended, alleged that Burns "did unlawfully, feloniously, willfully, deliberately, and with premeditation kill and murder Tersey Elizabeth Cooley, in the commission of robbery or forcible sodomy or rape . . . " *Id.* at 882.

17. *Id.* at 881.

18. *Id.* at 882.

the holding of *Payne v. Commonwealth*.[19] In *Payne*, the defendant was convicted of killing two women.[20] Regarding the first victim, Payne was charged in one count with capital murder in the commission of robbery, in violation of Section 18.2-31(4) of the Virginia Code, and in a separate count with capital murder in the commission of rape, in violation of Section 18.2-31(5) of the Virginia Code.[21] Regarding the second victim, Payne was charged with capital murder while in the commission of or subsequent to object sexual penetration, and in a separate count with capital murder while in the commission of or subsequent to attempted rape, both in violation of Section 18.2-31(5) of the Virginia Code.[22] The *Payne* court held that subsections four and five of the Virginia capital murder statute are separate offenses.[23] The court also held that killing in the commission of attempted rape and killing in the commission of object sexual penetration are two distinct statutory provisions of subsection five of the Virginia capital murder statute and therefore constitute separate offenses.[24]

The indictment against Burns charged in a single count capital murder coupled with robbery, forcible sodomy, and rape, each separated by the phrase "and/or."[25] Under *Payne*, this indictment should be read as three separate offenses. The *Burns* court's holding that this method of charging constitutes one charge of capital murder with alternative "gradation" offenses is irreconcilable with *Payne*. However, in *Powell v. Commonwealth*,[26] the Virginia Supreme Court held that amending a capital murder–robbery indictment to include a charge under Section 18.2-31(5) "expand[s] the indictment to include a new and additional charge of capital murder."[27] Thus, the *Powell* court, in accord with *Payne*,

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19. Payne v. Commonwealth, 509 S.E.2d 293 (Va. 1999).

20. *Id.* at 296.

21. *Id.* at 296; *see also* VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2001) (providing that "[t]he willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery" constitutes capital murder); VA. CODE ANN. § 18.2-31(5) (Michie Supp. 2001) (providing that "[t]he willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration" constitutes capital murder).

22. *Payne*, 509 S.E.2d at 298; *see* § 18.2-31(4); § 18.2-31(5).

23. *Payne*, 509 S.E.2d at 301.

24. *Id.*

25. *Burns*, 541 S.E.2d at 881-82.

26. 552 S.E.2d 344 (Va. 2001).

27. Powell v. Commonwealth, 552 S.E.2d 344, 356 (Va. 2001). In *Powell*, the defendant was originally charged with capital murder in the commission of a robbery and/or attempted robbery in violation of Section 18.2-31(4) of the Virginia Code, attempted capital murder in the commission of rape under Section 18.2-31(5), and other non-capital offenses. *Id.* at 348. The Commonwealth subsequently amended the capital indictment to also charge capital murder "during the commission of or subsequent to rape and/or attempted rape and/or sodomy and/or attempted sodomy" under Section 18.2-31(5). *Id.* at 349.

found that each of the subsections of Section 18.2-31 constituted discrete forms of capital murder.[28]

These differing opinions create two distinct lines of authority. Depending upon how a defendant is charged, defense counsel can use either *Burns*, or *Payne* and *Powell* to attack the indictment. If the indictment charges a violation of more than one subsection of Section 18.2-31 or of more than one of the constituent parts of subsection five, in a single count, then defense counsel should attack the indictment as being duplicitous under both *Payne* and *Powell*. Conversely, if the indictment separates charges under the various subsections of Section 18.2-31 into individual counts, then defense counsel should attack the indictment as being multiplicious under *Burns*.

B. Examination of Law Enforcement Personnel

Before his trial, Burns moved to examine law enforcement officials under oath to determine whether such officials had disclosed all exculpatory evidence to the Commonwealth's Attorney.[29] The circuit court denied the motion but directed the Commonwealth's Attorney to explain the meaning of exculpatory evidence to the police officers and ask whether all such evidence had been given to the Commonwealth's Attorney.[30]

On appeal, Burns claimed that "the problem of police-concealed exculpatory evidence is pervasive . . . throughout the country" and that the trial court's failure to grant Burns's motion "impinged on [his] constitutional right to effective assistance of counsel," as well as his Fourteenth Amendment right to due process and a fair trial.[31] The court rejected this argument on several grounds.[32] First, the court held that "to the extent that Burns raised an ineffective assistance of counsel claim, such a claim was not cognizable on direct appeal."[33] The court went on to cite *Kyles v Whitley*,[34] saying that it is "the individual prosecutor [who] has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police."[35] Finally, the court noted that Burns had admitted that the Commonwealth's Attorney had disclosed all exculpatory evidence in his possession prior to trial, and found the trial court's

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28. *Id.* at 356-57.

29. *Burns*, 541 S.E.2d at 886.

30. *Id.*

31. *Id.*

32. *Id.*

33. *Id.* (citing Johnson v. Commonwealth, 529 S.E.2d 769, 781 (Va. 2000)).

34. 514 U.S. 419 (1995).

35. *Burns*, 541 S.E.2d at 886 (alteration in original); *see* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (holding that defendant is entitled to new trial because the net effect of state-suppressed evidence raised a reasonable probability that its disclosure would have produced a different result at trial).

direction of the prosecutor to ensure that the police investigators had provided all such evidence to be adequate.[36]

Approval of the circuit court's denial of Burns's motion can be seen as a roadblock to combating the pervasive problem of police concealing potentially exculpatory evidence from defense counsel. The last three major *Brady v Maryland*[37] cases in the United States Supreme Court, *Strickler v Greene*,[38] *Kyles v Whitley*,[39] and *United States v Bagley*,[40] have dealt with this exact issue.[41] When *Strickler* was at the appellate level, the Fourth Circuit held that the defendant had procedurally defaulted his *Brady* claim by not raising it sooner.[42] Though the Fourth Circuit was reversed by the United States Supreme Court, this underscores the importance of defense counsel continuing to make these motions for examination of law enforcement officials under oath to preserve the issue for appeal or habeas. In *Burns*, the motion was not without its positive effect; it resulted in the circuit court's direction to the prosecutor to ensure that the mandate of *Kyles* be followed.

Such motions are strengthened if the defense has information suggesting that the prosecution is in fact withholding evidence. For example, if a witness for the Commonwealth has given several conflicting statements, the Commonwealth discloses only the final incriminating statement to defense counsel, and defense counsel learns of the earlier conflicting statements, the court is more likely to grant the motion. If, under these circumstances, the trial court denies the motion, the issue is preserved for appeal or habeas.

In any case, such a motion will produce one of three possible outcomes: first, the court may grant the motion; second, the court may simply deny the motion; and third, the court may deny the motion but examine or instruct the Commonwealth's Attorney. The first possible outcome is clearly desirable because it may provide defense counsel with exculpatory evidence to be used at trial. The second and third possible outcomes preserve the issue for appeal or

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36. *Burns*, 541 S.E.2d at 886-87.

37. 373 U.S. 83 (1963).

38. 527 U.S. 263 (1999).

39. 514 U.S. 419 (1995).

40. 473 U.S. 667 (1985).

41. Brady v. Maryland, 373 U.S. 83 (1963) (holding that the prosecution's withholding of evidence favorable to an accused and material to either guilt or punishment violates due process). *See* Strickler v. Greene, 527 U.S. 263 (1999) (holding that defendant petitioner did not procedurally default *Brady* claim by failing to raise the claim until federal habeas proceedings, where exculpatory evidence was not disclosed and where defense reasonably relied on prosecution's open file policy); *Kyles*, 514 U.S. 419; United States v. Bagley, 473 U.S. 667 (1985) (holding that exculpatory evidence withheld by the prosecution is material if there is a "reasonable probability" that, had the evidence been disclosed to the defense, the result of the proceeding would have been different).

42. *See* Strickler v. Pruett, Nos. 97-29, 97-30, 1998 WL 340420, at *5 (4th Cir. June 17, 1998) (per curium) (unpublished) (holding that because the factual basis of defendant's *Brady* claim was available to him at the time he filed his state habeas petition, defendant's failure to raise the claim at that time constituted procedural default).

habeas and the third may produce evidence as well. All of these outcomes suggest that defense counsel should continue to move to examine law enforcement officers under oath in order to produce potentially undisclosed exculpatory evidence.

C. *Denial of Prison Life Evidence*

Prior to trial, Burns requested that a subpoena duces tecum be issued to a regional director of the Virginia Department of Corrections seeking "documents or records describing the daily inmate routine, general prison conditions, and security measures at the Red Onion Correctional Center and Wallens Ridge State Prison . . . and videotapes" of those facilities.[43] The Commonwealth moved to quash the subpoena and, after a hearing, the circuit court granted the Commonwealth's motion.[44]

During the penalty phase of the trial, Burns sought to introduce evidence concerning the security and day to day life of a prisoner incarcerated in a maximum security prison in order to rebut the Commonwealth's evidence regarding whether Burns would be a future danger.[45] Burns argued that the evidence should be admitted for the following reasons: (1) a defendant convicted of capital murder can only receive a sentence of death or life imprisonment without parole; and (2) the only society to which such a defendant can ever pose a "continuing serious threat" is the prison society.[46] Therefore, evidence regarding the structure and quality of an inmate's life in a maximum security prison, including such a prison's security and safety features, is relevant to rebut the

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43. *Burns*, 541 S.E.2d at 892.

44. *Id.* Burns also requested that subpoenas be issued to the wardens of Red Onion and Wallens Ridge. *Id.* at n.14. Because the Commonwealth's motion to quash did not cover those subpoenas, the circuit court did not address them in its opinion. *Id.* The circuit court did, however, indicate that it would grant a motion to quash those subpoenas were such a motion before it. *Id.*

45. *Burns*, 541 S.E.2d at 892.

46. *Id.* at 893. *See also* VA. CODE ANN. § 19.2-264.2 (Michie 2000). Section 19.2-264.2 provides that:

> In assessing the penalty of any person convicted of an offense for which the death penalty may be imposed, a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of convictions of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a *continuing serious threat* to society . . . and (2) recommend that the penalty of death be imposed.

Id. (emphasis added). *See also* VA. CODE ANN. § 19.2-264.4(C) (Michie 2000). Section 19.2-264.4(C) requires that:

> The penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a *continuing serious threat* to society.

Id. (emphasis added).

Commonwealth's evidence that a defendant would "commit criminal acts of violence" in the future.[47]

The Supreme Court of Virginia rejected Burns's argument.[48] It began by citing the recent case of *Lovitt v Commonwealth*,[49] in which the court held that a jury's determination, under Sections 19.2-264.2 and 19.2-264.4(C) of the Virginia Code, regarding whether a defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society" is not restricted to a consideration of only the prison society.[50] The court stated that the evidence was not admissible to dispel jurors' misconceptions about prison life.[51] Noting that the Commonwealth introduced future dangerousness evidence consisting only of Burns's prior criminal record and unadjudicated criminal acts, the court found that Burns' s evidence was not in rebuttal to any evidence regarding prison life.[52]

Citing *Cherrix v Commonwealth*,[53] the court stated: "The United States Constitution does not limit the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense."[54] The court found that the relevant inquiry, therefore, was whether Burns *would* (would be inclined to) commit criminal acts of violence in the future and not whether he *could* (would have the opportunity to do so).[55] The court held that a determination of future dangerousness should focus on an individual defendant and a specific crime.[56] The court stated that evidence offered on the general nature of prison life in a maximum security prison was not relevant to this type of inquiry even when offered to rebut evidence of future dangerousness such as a defendant's prior criminal record and unadjudicated criminal acts.[57]

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47. *See generally* §§ 19.2-264.2, 19.2-264.4(C).

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

49. 537 S.E.2d 866 (Va. 2000).

50. *Burns*, 541 S.E.2d at 893; *see* Lovitt v. Commonwealth, 537 S.E.2d 866, 879 (Va. 2000) (stating that a jury's determination, under Sections 19.2-264.2 and 19.2-264.4(C) of the Virginia Code, regarding whether a defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society" is not restricted to a consideration of only the prison society).

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

52. *Id.*

53. 513 S.E.2d 642 (Va. 1999).

54. *Burns*, 541 S.E.2d at 893 (quoting Lockett v. Ohio, 438 U.S. 586, 604 n.12 (1978)); *see* Cherrix v. Commonwealth, 513 S.E.2d 642, 653 (Va. 1999) (giving the court wide latitude to exclude mitigating evidence).

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

56. *Id.*

57. *Id.*

The court went on to distinguish the cases relied upon by Burns, specifically *Gardner v Florida*,[58] *Skipper v South Carolina*,[59] and *Simmons v South Carolina*.[60] The court noted that in *Gardner*, the trial court imposed a death sentence after reviewing the contents of a pre-sentence report that had not been fully disclosed to the defendant.[61] Though *Burns* did not involve evidence not fully disclosed to the defendant, *Gardner* could still be read to give defendants a constitutional right to rebuttal. In *Gardner*, the United States Supreme Court held that the due process clause of the Fourteenth Amendment requires that a defendant have the opportunity to "deny or explain" any evidence upon which the Commonwealth relies in making its case for death.[62] In *Burns*, the Commonwealth offered evidence of the defendant's prior criminal record and unadjudicated criminal acts.[63] The implication of such evidence, clearly, is that Burns would commit such crimes in the future and would, therefore, be a danger to society. Burns's evidence of the security and nature of prison life, however, would "explain" that the Commonwealth's evidence of the defendant's prior criminal record (even assuming it is a predictor of future dangerousness) would likely never be operative because the defendant would never have the opportunity to pose a threat. Thus, despite *Burns*, *Gardner* may be interpreted to guarantee defendants a constitutional right to rebut evidence presented by the Commonwealth that goes toward proving that a defendant would pose a future danger.

The court distinguished *Skipper* because the evidence proffered in that case was peculiar to that particular defendant's history and background.[64] In *Skipper*, the Court required the admission of evidence of the defendant's past good behavior in jail while awaiting trial.[65] The *Burns* court argued that the ruling in *Skipper* would not require evidence of prospective adjustment because Burns sought to introduce general evidence regarding prison life rather than evidence

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58. 430 U.S. 349 (1977).

59. 476 U.S. 1 (1986).

60. *Burns*, 541 S.E.2d at 893-94; *see* Simmons v. South Carolina, 512 U.S. 154 (1994) (requiring the giving of an instruction regarding life without parole when future dangerousness is at issue and defendant is parole ineligible); Skipper v. South Carolina, 476 U.S. 1 (1986) (holding that exclusion from sentencing hearing of testimony regarding defendant's good behavior during time spent in jail awaiting trial deprived defendant of right to present relevant evidence in mitigation of punishment); Gardner v. Florida, 430 U.S. 349 (1977) (vacating death sentence and remanding case where contents of presentence report were not fully disclosed to defendant).

61. *Burns*, 541 S.E.2d at 893 (citing *Gardner*, 430 U.S. at 353).

62. *Gardner*, 430 U.S. at 362.

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

64. *Id.* at 893-94. The trial court in *Skipper* refused to admit the defendant's evidence of his good behavior in jail while awaiting trial. *Skipper*, 476 U.S. at 4. The *Skipper* court stated that the relevance of that evidence was highlighted "by the prosecutor's closing argument, which urged the jury to return a sentence of death in part because petitioner could not be trusted to behave if he were simply returned to prison." *Id.* at 5.

65. *Burns*, 541 S.E.2d at 893 (citing *Skipper*, 476 U.S. at 4).

specific to Burns's own behavior in prison.[66] However, the same rationale applies in *Burns* as it did in *Skipper*. A juror should be aware of a defendant's past good behavior in prison in order to determine if he will be a threat in the future. Likewise, prison life evidence is relevant to help jurors determine how a prisoner would adjust to a lifetime of incarceration and whether he is likely to pose a threat in the future.

Simmons, in the court's view, was irrelevant in Burns's case because it merely required the giving of an instruction regarding life without parole when future dangerousness is at issue and a defendant is parole ineligible.[67]

D. Commonwealth's Closing Argument

1. Reference to Burns as an Animal

During closing argument in the penalty phase of this case, the Commonwealth's Attorney referred to Burns as an "animal."[68] After an objection by Burns's counsel, sustained by the circuit court judge, the Commonwealth's Attorney retracted the reference.[69] Burns's counsel, after the Commonwealth's Attorney had completed his closing argument, moved for a mistrial on the grounds that the reference was improper and prejudicial.[70] The judge denied the motion and Burns assigned error to this ruling on appeal.[71] The *Burns* court, noting that by the time Burns moved for a mistrial the Commonwealth's Attorney had already corrected himself and the judge had stopped the Commonwealth's Attorney in front of the jury in order for him to do so, found no error in the circuit court's denial of the motion.[72]

In a situation such as this, defense counsel must move for a mistrial immediately, that is, as soon as the Commonwealth's Attorney makes such an inappropriate remark before the jury, in order to avoid possible default.[73] Counsel should also alternatively and secondarily move that the remark be stricken and for a cautionary instruction.[74] If the court does not grant the motion for mistrial, then the issue will be preserved for appeal and if the instruction is approved, then the damage done by the offending remark may be at least partially mitigated.

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66. *Id.* at 894.

67. *Id.* (citing *Simmons*, 512 U.S. at 156). *See generally* Kathryn Roe Eldridge, Case Note, 14 CAP. DEF. J. 89 (2001) (analyzing Shafer v. South Carolina, 121 S. Ct. 1263 (2001)).

68. *Burns*, 541 S.E.2d at 894.

69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.* at 895.

73. *See* Reid v. Baumgardner, 232 S.E.2d 778, 781 (Va. 1977). "[T]he approved procedure for counsel to follow is to object to improper argument at the time, giving reasons for the objection, and to move for a mistrial or for a cautionary instruction to the jury to disregard the improper remarks." *Id.*

74. *Id.*

2. *Danger to Staff / Likelihood of Escape*

The Commonwealth, in its closing argument, argued that were Burns to receive life in prison, he would pose a continuing danger to the prison staff and could even escape from prison.[75] Burns did not object to this argument until after the jury had retired to deliberate, at which time he moved for a mistrial on the basis that the Commonwealth's argument was exactly the kind of argument that his evidence regarding the security features of a maximum-security prison and the nature of an inmate's life sought to rebut.[76] The circuit court denied this motion for not being timely and the *Burns* court affirmed.[77]

Defense counsel should anticipate this kind of danger-to-staff/possibility-of-escape argument in the Commonwealth's final closing argument.[78] Therefore, if the trial court has rejected the defense's conditions-of-incarceration evidence, the defense should move in limine to bar such argument on the part of the Commonwealth. In support of this motion, the defense should point out that such arguments depend upon an understanding of institutional security measures. When the defense's conditions-of-incarceration evidence was prohibited, the jury was deprived of evidence upon which to base a determination of danger to staff or likelihood of escape. Thus, the Commonwealth's arguments are unsupported by any evidence in the case and require the jury to speculate.

E. Sex Offender's Exam

Burns moved for a mental evaluation pursuant to Section 19.2-300 of the Virginia Code prior to commencement of the penalty phase of the trial, but the circuit court denied the motion.[79] Burns argued that the circuit court should have granted the motion because such an evaluation would be of equal value to the jury as to the judge.[80] The *Burns* court rejected this claim, citing the language of the statute and noting that when Burns raised the motion again, after the return of the jury's sentencing verdicts, the circuit court granted it.[81]

The *Burns* court was correct that the clear language of Section 19.2-300 requires that the motion be made subsequent to conviction. Defense counsel

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75. *Burns*, 541 S.E.2d at 896.

76. *Id.* at n.17.

77. *Id.*

78. *See generally* Cynthia M. Bruce, Case Note, 14 CAP. DEF. J. 185 (2001) (analyzing Schmitt v. Commonwealth, 547 S.E.2d 186 (Va. 200[1])).

79. *Burns*, 541 S.E.2d at 895; *see also* VA. CODE ANN. § 19.2-300 (Michie 2000) (providing, in pertinent part, that when any person is convicted of "any criminal offense which indicates sexual abnormality, the trial judge . . . shall upon application of the attorney for the Commonwealth . . . or counsel for defendant . . . defer sentence until the report of a mental examination conducted as provided in § 19.2-301 of the defendant can be secured *to guide the judge* in determining" how to sentence the defendant) (emphasis added).

80. *Burns*, 541 S.E.2d at 895.

81. *Id.*

should make such a motion whenever the predicate or gradation offense involves sexual abnormality. Section 19.2-264.5 of the Virginia Code requires that before the imposition of a death sentence the court must direct a probation officer to prepare and file a report containing information on the defendant's history, the circumstances of the offense, and a victim impact statement.[82] The statute goes on to state that "[a]fter consideration of the report, *and upon good cause shown*, the court may set aside the sentence of death and impose a sentence of imprisonment for life."[83] Given that the report contains a victim impact statement and biographical information about the defendant, the addition of the phrase, "and upon good cause shown," must indicate that more information than that contained in the report may be brought to bear on the judge's final sentencing decision. One type of information for the judge to consider would be the Section 19.2-300 mental evaluation.[84] For example, if the exam revealed that the defendant's sexually deviant behavior was "triggered" by a stimulus not available to him in prison, the judge could conclude that he would pose no future danger if sentenced to life in prison.

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82. VA. CODE ANN. § 19.2-264.5 (Michie 2000). The text of the statute mandates that:

> When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299 except that, notwithstanding any other provision of law, such reports shall in all cases contain a Victim Impact Statment. Such statement shall contain the same information and be prepared in the same manner as Victim Impact Statements pursuant to § 19.2-299.1. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

Id.

83. *Id.* (emphasis added).

84. *See* § 19.2-300.