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# Powell v. Commonwealth 552 S.E.2d 344 (Va. 2001)

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## *I. Facts*

On January 29, 1999, Stacey Lynn Reed ("Stacey") was murdered and her sister, Kristie Erin Reed ("Kristie"), was raped, bound, stabbed and partially strangled. Stacey's autopsy revealed numerous abrasions and injuries and that a knife wound to the heart was the cause of her death. Kristie survived the brutal incident and identified her attacker as Paul Warner Powell ("Powell"). Powell and Stacey were acquainted for more than two years. Profiles of DNA found on Powell's knife matched profiles of Stacey's DNA and profiles of DNA found on Kristie matched Powell's DNA profile. Powell admitted to numerous individuals that he had committed the acts and he also shared details about the rape and murder with others.[1]

In May 1999, Powell was indicted on multiple counts, however his appeal only concerned the following four counts: (1) capital murder in the commission of a robbery and/or attempted robbery; (2) attempted capital murder in the commission of a rape; (3) abduction with intent to defile; and (4) rape. Powell made motions to have the capital statutes declared unconstitutional and to strike the capital indictments, which the trial court denied. Four months later, in September, the Commonwealth moved to amend the indictment to add the capital murder of Stacey during or subsequent to the rape and sodomy of Kristie.[2] The trial court granted the amendment over Powell's objection that the amendment changed the nature or character of the offense charged.[3] Also during the pre-trial phase, Powell made a motion for, and was granted, a mental health expert. However, Powell refused to cooperate with the Commonwealth's expert, violating the reciprocity requirement under Virginia Code Section 19.2-264.3:1.[4] The Commonwealth moved to exclude Powell's expert because of his non-

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1. Powell v. Commonwealth, 552 S.E.2d 344, 347-48 (Va. 2001).

2. *See generally* VA. CODE ANN. § 19.2-231 (Michie 2000) (allowing that "[i]f there be any defect in form in any indictment, . . . the court may permit amendment of such indictment, . . . provided the amendment does not change the nature or character of the offense charged).

3. *Powell*, 552 S.E.2d at 349.

4. *See generally* VA. CODE ANN. § 19.2-264.3:1(F)(1)-(2) (Michie 2000) (requiring the defendant to cooperate with the Commonwealth's expert and allowing that a failure to do so may result in exclusion of the defendant's expert by the court). *But see* Ake v. Oklahoma, 470 U.S. 68 (1985) (holding that an indigent defendant is entitled to a mental health expert to assist in his defense). Therefore, practitioners should attempt to obtain an expert under *Ake* first to avoid triggering the reciprocity requirement.

cooperation. The court indefinitely deferred the Commonwealth's motion to exclude Powell's expert.[5]

During voir dire, Powell questioned the jurors about their ability to consider specific mitigation evidence. The Commonwealth objected to this questioning; in response, the trial court limited the scope of Powell's questions. Three jurors were seated over Powell's objections. One juror was struck for cause on the Commonwealth's motion.[6]

During the guilt phase of the trial, a report was read into evidence which indicated that the witnesses saw Powell and the victims together. Powell moved for a mistrial alleging that this evidence had not been provided to the defense according to the discovery rules and that it prejudiced Powell's defense. The trial court denied Powell's motion after finding that the evidence was not exculpatory and that the objection was untimely because it was not made until the close of the Commonwealth's case. Powell also moved to strike the charges against him based on insufficient evidence and the wording of the indictment. The trial court denied this motion as well. Prior to the deliberation phase, Powell objected to several of the proposed jury instructions. Specifically he argued that the instructions needed to indicate clearly the rape-murder connection and to define more accurately a "willful, deliberate and premeditated" killing. The trial court overruled these objections and denied Powell's suggested instruction.[7]

The Commonwealth, in its closing argument, stated that Powell had attempted to rob Stacey, saying that "it's as likely as any scenario – but we'll never know because he hasn't told us."[8] Powell immediately objected asserting that the Commonwealth had impermissibly alluded to Powell's reliance on his Fifth Amendment right not to testify against himself. The court deferred Powell's objection until the end of the Commonwealth's closing. The trial court denied Powell's motion for mistrial, but gave a curative instruction. During deliberations, the jury asked the court whether Kristie's rape satisfied the gradation requirement for Stacey's capital murder. The judge answered the jury's question in the affirmative, to which Powell objected.[9] Powell was convicted of capital murder, attempted capital murder, rape, and abduction. The jurors were polled

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5. *Powell*, 552 S.E.2d at 349.

6. *Id.* at 349-50 (striking juror O'Dell for cause because she had not determined her position on the death penalty and was unsure of whether she would be able to follow the court's instructions).

7. *Id.* at 352. Powell failed to offer alternative instructions to some of the Commonwealth's objectionable instructions. *Id.* at 351. Defense counsel should always proffer his own complete set of instructions, and at least proffer instructions in rebuttal to any harmful instructions proffered by the Commonwealth.

8. *Id.* at 352.

9. Specifically the judge responded, "Yes. Murder in [t]he [c]ommission of a rape is a killing which takes place before, during or after the rape and is so closely related thereto in time, place, and causal connection as to make the killing part of the same criminal enterprise as the rape." *Id.* (alterations in original). This is a correct statement of the general law but not as applied to this indictment.

and they stated that the gradation offense relied upon for the capital offense was rape.[10]

Prior to the commencement of the sentencing phase, the trial court ruled that Powell's expert would not be allowed to testify due to Powell's failure to cooperate with the Commonwealth's expert.[11] During the sentencing phase, the trial court allowed the Commonwealth to introduce testimony that Powell had committed burglaries in the past. Further, Powell refused to present any evidence in mitigation, which caused Powell's counsel to move for a competency evaluation, which the trial court denied.[12] The Commonwealth proffered an instruction that listed death, life, and life plus a fine as possible punishments if the jurors found either or both aggravators, and that the jury could impose life or life plus a fine if it found no aggravator. In contrast, Powell offered two instructions: the first instruction stated the possible sentences, and the second instruction stated that even if the jury found an aggravator, it could still impose a sentence of life or life plus a fine. The trial court used the Commonwealth's instruction. The Commonwealth also proffered five verdict forms that provided for the following possible findings: (1) a sentence of death upon the finding of both aggravators; (2) a sentence of death upon the finding of future dangerousness; (3) a sentence of death upon a finding of vileness; (4) a sentence of life; and (5) a sentence of life and a fine up to $100,000. Powell objected to the Commonwealth's forms, but the trial court found the forms to be an adequate representation of the law. The jury sentenced Powell to death based on a finding of vileness in the commission of the crime. Powell was also sentenced to three life terms and $200,000 in fines for the other convictions.[13]

On August 10, 2000, the trial court held Powell's sentencing hearing to determine whether the sentence recommended by the jury should be imposed.[14] Powell presented his jury's forewoman, Jennifer Day ("Day"), who testified that the judge's affirmative answer on the rape as a gradation offense question had been "the determining factor" in her guilty vote, and that she would have voted for life if the verdict form had indicated that life was a possible sentence when the jury found an aggravating factor.[15] However, on cross-examination, Day testified that she had sent Powell explicit sexual information and money. The trial court found Day's testimony tainted and confirmed the verdicts and sentences. Powell appealed his non-capital convictions, which were consolidated

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10. *Id.*

11. *See supra* note 4.

12. *See generally* Ross E. Eisenberg, *The Lawyer's Role When the Defendant Seeks Death*, 14 CAP. DEF. J. 55 (2001) (discussing an attorney's ethical obligations when a client wants death).

13. *Powell*, 552 S.E.2d at 353-54.

14. *See generally* VA. CODE ANN. § 19.2-264.5 (Michie 2000) (requiring the court to determine the appropriateness of the death sentence based on the pre-sentence report).

15. *Powell*, 552 S.E.2d at 354.

with the automatic review of his death sentence.[16] Powell raised twenty-five assignments of error in his appeal to the Supreme Court of Virginia.[17]

## *II. Holding*

The Supreme Court of Virginia reversed Powell's capital murder conviction, affirmed his non-capital convictions, and remanded the case for a possible retrial of first degree murder or less.[18] The court made the following eight separate decisions to reach this outcome: (1) the capital punishment statutes are constitutional; (2) the amendment of the indictment changed the nature of the offense; (3) the trial court did not abuse its discretion in selecting jurors; (4) Powell's motion for mistrial based on the Commonwealth's discovery violation was untimely; (5) the trial court gave an incorrect instruction regarding the gradation offense of rape; (6) the Commonwealth's comment on Powell's failure to testify was improper; (7) evidence of the abduction was sufficient; and (8) verdict forms must indicate to the jury that a sentence other than death may be imposed even when an aggravator is found.[19]

## *III. Analysis / Application in Virginia*

The Supreme Court of Virginia reversed Powell's conviction on the amendment issue, the second issue that it addressed.[20] The court went on to address six additional issues because it wanted to "take the opportunity provided by this case to address several other issues that are critical to the proper prosecution of capital murder cases and will be instructive of such future cases."[21] This preface to the decision provides extra weight to convince any court that it should follow the rationale and rules laid out in this opinion.

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16. *See generally* VA. CODE ANN. § 17.1-313 (Michie 2000) (requiring the Supreme Court of Virginia to review a sentence of death and allowing the court to consolidate other appeals with this mandatory review).

17. *Powell*, 552 S.E.2d at 355. Powell raised seven other issues which the court declined to address: failure to strike the Commonwealth's vileness evidence, admission of hearsay, exclusion of Powell's mental health expert, evidence of unadjudicated acts, denial of a competency evaluation, denial of Powell's proffered instructions, and the trial court's denial to set aside the death sentence. *Id.* at 355 n.6.

18. *Id.* at 363. The Supreme Court of Virginia would have been unable to find that Powell was acquitted of the capital murder based on robbery had Powell not requested that the jury be polled. Therefore, it is very important that the capital practitioner request that the jury be polled specifically on issues such as the gradation crime and the aggravator.

19. *Id.* at 355-63.

20. *Id.* at 356-57.

21. *Id.* at 355.

### *A. Problems Arising from Amending the Indictment*

#### *1. The Multiple Charge Issue*

In addressing the amendment of the indictment, the court needed to decide whether an indictment charging one theory of capital murder may be amended to include a separate and distinct second theory of capital murder. The original indictment only charged Powell under Virginia Code Section 18.2-31(4) for murder in connection with a robbery, while the amendment added charges under Virginia Code Section 18.2-31(5) for murder in connection with rape or sodomy.[22] The Commonwealth made a separate amended indictment with only one charge.[23] The court found that this language "expanded the indictment to include a new and additional charge of capital murder" because it allowed the possibility that Powell could receive two capital murder convictions; he could be convicted of murder in connection with robbery *and* murder in connection with rape.[24] This holding instructs that the Commonwealth may not amend an indictment to include an alternative and additional theory of the same crime already charged. While the court's decision relied on Virginia Code Section 19.2-231,[25] a purely statutory argument may be made that adding additional forms of capital murder violates the grand jury statute because the amended indictment includes a separate offense upon which the grand jury has not made a probable cause determination.[26]

Additionally, a possible duplicity problem exists when the Commonwealth amends an indictment to include two types of capital murder in one count. *Powell* and *Payne v Commonwealth*[27] both suggest that each individual subsection in Virginia Code Section 18.2-31 is a separate and freestanding offense.[28] If each subsection is a separate offense, it is duplicitous to charge two forms of capital murder in the same count. However, in *Burns v Commonwealth*,[29] the indictment

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22. *Powell*, 552 S.E.2d at 348; *see also* VA. CODE ANN. § 18.2-31(4), (5) (Michie Supp. 2001).

23. *Powell*, 552 S.E.2d at 349. Specifically the indictment read: "Paul Warner Powell, did feloniously, willfully, deliberately and premeditatedly kill and murder one Stacey Lynn Reed while in the commission of robbery and/or attempted robbery, and/or during the commission of or subsequent to rape and/or attempted rape and/or forcible sodomy and/or attempted forcible sodomy, in violation of Virginia Code Section 18.2-31." Commonwealth v. Powell, No. 45693 (Va. Cir. Ct. May 1, 2000) (Circuit Court for Prince William County).

24. *Powell*, 552 S.E.2d at 356-57. Note that this analysis should be the same if the amendment had been made to a single count in a multi-count indictment.

25. *See generally* VA. CODE ANN. § 19.2-231 (Michie 2000) (allowing amendment if nature or character of offense is unchanged).

26. *Powell*, 552 S.E.2d at 356-57; *see* VA. CODE ANN. § 19.2-200 (Michie 2000) (requiring the grand jury to inquire and present all felonies).

27. 509 S.E.2d 293 (Va. 1999).

28. Payne v. Commonwealth, 509 S.E.2d 293 (Va. 1999) (holding that Payne could receive four death sentences under the capital murder statute when only two victims were killed).

29. 541 S.E.2d 872 (Va. 2001).

was amended to include robbery and rape in a single count.[30] In that case, the Supreme Court of Virginia upheld the indictment because it "contained only one charge of capital murder and merely provided alternative 'gradation' offenses."[31] The inconsistency between these cases makes the state of the law unclear, thus each indictment and any proposed amendments should be scrutinized for the problems raised herein and objected to immediately.[32]

### 2. *The Rape Issue*

The Commonwealth also made an error in the language it used in the rape gradation offense. The Commonwealth, instead of using the language in the current statute allowing for a killing *before*, during or after a rape, used former statutory language that excluded a killing before a rape.[33] Prior to the amendment of Code Section 18.2-31(e) in 1988, the statute used the language "[t]he willful, deliberate and premeditated killing of a person during the commission of, or subsequent to, rape."[34] The Commonwealth used this language. Code Section 18.2-31(5) now reads "[t]he willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape."[35] The use of the former statutory language prevented the Commonwealth from obtaining an instruction that the rape, as a gradation offense, could come after the killing.[36] The problem arises from the fact that Stacey was murdered first, and then Kristie was raped. Even if only one victim were involved, Powell still could not have been charged in this manner.

Further, the trial court erred in affirmatively telling the jury that Kristie's rape satisfied the gradation requirement for Stacey's capital murder.[37] This court emphasized how the exact language of the indictment is important because "the Commonwealth is limited to the prosecution of the crime charged in the indictment."[38] Therefore, defense counsel should always scrutinize the indictment for any possible problems or errors that may result in some form of relief for the defendant.

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30. *See* Burns v. Commonwealth, 541 S.E.2d 872, 882 (Va. 2001) (allowing the indictment to be amended).

31. *Id.*

32. *See generally* Jeffrey D. Fazio, Case Note, 14 CAP. DEF. J. 131 (2001) (analyzing Burns v. Commonwealth, 541 S.E.2d 872 (Va. 2001) and explaining how to make duplicity and multiplicity arguments).

33. *Powell*, 552 S.E.2d at 359 (citing Harward v. Commonwealth, 330 S.E.2d 89, 91 (Va. 1985)).

34. VA. CODE ANN. § 18.2-31(e) (Michie 1985).

35. VA. CODE ANN. § 18.2-31(5) (Michie Supp. 2001).

36. *Powell*, 552 S.E.2d at 359.

37. *Id.*

38. *Id.*

### B. The Commonwealth's Closing Argument

The Supreme Court of Virginia held that it was error for the Commonwealth to state in its closing "he hasn't told us" in reference to Powell's motives.[39] The court stated that this comment was likely to be taken as a comment on Powell's failure to testify, and therefore, was improper.[40] The court further held this error to be harmless, however, because Powell's capital conviction was already reversed on other grounds.[41] While this Fifth Amendment violation is obvious, it is important to note that Powell's counsel objected at the moment the phrase was uttered. Objecting at the moment a prejudicial statement is made during arguments is vital to avoid procedurally defaulting the issue.[42]

### C. Sentencing Verdict Forms

The last issue the court addressed in reviewing Powell's case was the appropriate type of jury verdict forms in capital sentencing. This issue was by far the most important because the court fundamentally changed the standard for capital sentencing verdict forms.[43] The court considered this part of the decision "critical to the proper prosecution of capital murder cases."[44]

The court first analyzed Virginia Code Section 19.2-264.4(D), which sets out forms for the jury verdict and the requirements of the verdict form.[45] Under the Supreme Court of Virginia's analysis, the statute is problematic in three major ways.[46] First, the statute fails to mention the sentencing possibility of a life sentence and a fine altogether.[47] Second, the aggravating factors are listed as "or" propositions when the jury may find both aggravators.[48] Third, the grammatical structure of the statute appears to require part of the vileness definition in every verdict form regardless of whether vileness is at issue.[49]

The court contrasted Virginia Code Section 19.2-264.4 with Virginia Code Section 18.2-10, which was amended in 1991 to include the sentencing option of

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39. *Id.* at 360.

40. *Id.*

41. *Id.* at 359-60.

42. *See* Mack v. Commonwealth, 454 S.E.2d 750, 752 (Va. Ct. App. 1995) (holding that objection at the close of the Commonwealth's argument was not timely); Russo v. Commonwealth, 148 S.E.2d 820, 824-25 (Va. 1966) (holding that objection made at conclusion of Commonwealth's opening argument waived the objection to the improper statement made in opening); *see also* Ashley Flynn, *Procedural Default: A De Facto Exception to Civility?*, 12 CAP. DEF. J. 289 (2000); Matthew K. Mahoney, *Bridging the Procedural Default Chasm*, 12 CAP. DEF. J. 305 (2000).

43. *Powell*, 552 S.E.2d at 361-63.

44. *Id.* at 361.

45. *Id.* at 361-62; *see also* VA. CODE ANN. § 19.2-264.4(D) (Michie 2000) (requiring verdict in writing and setting out two example forms).

46. *Powell*, 552 S.E.2d at 362-63.

47. *Id.* at 362.

48. *Id.* at n.15.

49. *Id.*

life plus a fine.[50] The court held that the conflict between the two statutes could only be resolved by invalidating the less specific statute, Section 19.2-264.4(D).[51] Therefore, the Supreme Court of Virginia now requires that "the trial court must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life and a fine of not more than $100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt."[52] Further, the court referred to this holding as a "minimum" requirement.[53] Therefore, every capital defendant should urge the trial court to permit a far more explanatory verdict form to ensure the jury's complete understanding of its sentencing options.

This idea is cemented by the court's consideration of the Commonwealth's argument that a problem like that in *Atkins v Commonwealth*[54] was not present.[55] In *Atkins*, the trial court correctly instructed the jury, but the verdict forms given to the jury did not include forms allowing for a life sentence or a life plus a fine sentence if the jury found neither vileness or future dangerousness.[56] The Supreme Court of Virginia reversed Atkins's sentence because the verdict forms confused the jury into believing "that it was required first to find that at least one of the aggravating factors was present."[57] In this case, the Commonwealth attempted to distinguish *Atkins* by asserting that the jury forms provided the jury with all of the possible sentencing options, and that no *Atkins* problem was present because the instructions given by the court and the verdict forms were not in conflict.[58]

In response, the Supreme Court of Virginia stated that the issue presented by this case was not addressed in *Atkins*. The issue in *Atkins* was whether the "jury was provided with the means to discharge its obligation,"[59] while in this case the issue was jury confusion when the verdict forms did not "expressly state that the jury is allowed to fix a sentence of life imprisonment even though one or both aggravating factors are present."[60] Therefore, the court's holding is an extension of the *Atkins* rule.[61] Thus, taking the general principals espoused in the

50. *Id.* at 361-62. *See generally* VA. CODE ANN. § 19.2-264.4 (Michie 2000) (setting out sentencing scheme for capital cases); VA. CODE ANN. § 18.2-10(a) (Michie Supp. 2001) (listing the three possible punishments for a class 1 felony).

51. *Powell*, 552 S.E.2d at 362-63; *see also* VA. CODE ANN. § 19.2-264.4(D).

52. *Powell*, 552 S.E.2d at 363.

53. *Id.* at 362.

54. 510 S.E.2d 445 (Va. 1999).

55. Atkins v. Commonwealth, 510 S.E.2d 445 (Va. 1999) (reversing the defendant's sentence because of incorrect verdict forms).

56. *Id.* at 456.

57. *Id.* at 457.

58. *Powell*, 552 S.E.2d at 361-63.

59. *Id.* at 361-62.

60. *Id.* at 363.

61. *Id.*

two cases together, the Supreme Court of Virginia advocates clarity in jury instructions and verdict forms.

The court invalidated the statutory model verdict forms in this case. Verdict forms provided by the Model Jury Instruction Committee have been revised in light of *Powell*.[62] However, the new model verdict forms remain inadequate because the life sentence forms contain language requiring the jury to consider mitigation evidence. The defendant in a capital case is never required to present mitigation evidence. The forms imply that once the jury has found an aggravator it must sentence the defendant to death unless he has presented mitigation evidence. Thus, the verdict forms put at least a burden of production on the defendant. The court in *Powell* was specific:

> We hold that in a capital murder [ ] trial, the trial court must give the jury verdict forms providing expressly for the imposition of a sentence of imprisonment for life and a fine of not more than $100,000 when the jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.[63]

This language requires forms which permit the jury to impose a life sentence without consideration of mitigation evidence. Therefore, a set of forms should be developed and used that provide for the following: (1) the jury to find both future dangerousness and vileness, without mitigation, and recommend life; (2) a finding of future dangerousness, without mitigation, and a recommendation of life; and (3) a finding of vileness, without mitigation, and a recommendation of life.[64]

## *IV. Conclusion*

Three tools may be gained from the Supreme Court of Virginia's holding in this case. First, defense counsel should always proffer favorable jury instructions and verdict forms and urge the trial court to accept them under this case and the *Atkins* case. Second, this case illustrates how errors in the indictment may prove fatal to the Commonwealth's case; thus, indictments should be thoroughly examined. Third, the Commonwealth may not at any time comment on the defendant's failure to take the stand, and if the Commonwealth makes statements that may be impermissible, an objection should be made immediately.

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62. *See generally* VA. MODEL JURY INSTRUCTION CRIMINAL Nos. P33.130A-P33.130G (Lexis Law Publishing 2001).

63. *Powell*, 552 S.E.2d at 363.

64. *See generally* Virginia Capital Case Clearinghouse, Verdict Forms, Second Edition, Alternative 1-Alternative 10, 14 CAP. DEF. J. 233 (2001).