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Green v. Commonwealth
580 S.E.2d 834 (Va. 2003)

I. Facts

On Friday, August 21, 1998, Kevin Green ("Green") entered a grocery store owned by Patricia L. Vaughan ("Mrs. Vaughan") and her husband Lawrence T. Vaughan ("Mr. Vaughan"). On Fridays, the Vaughans routinely withdrew large sums of cash from the bank and brought it to the grocery store in order to cash checks for employees of local businesses. Green worked for a nearby lumber company and often cashed his weekly paychecks at the Vaughans' grocery store. On the day in question, Green entered the grocery store with another man and began shooting. After firing four shots, Green stood as a lookout while his accomplice grabbed the bank bag and exited the store. Green walked over to Mrs. Vaughan and shot her three more times before leaving the store. An autopsy revealed that Mrs. Vaughan died after sustaining four gunshot wounds, three of which were lethal. The police searched Green's home and recovered six bullets from a tree trunk on his property. Forensic testing revealed that the bullets found at Green's home were fired from the same gun used to shoot Mrs. Vaughan. Green was arrested and confessed to the robbery and shooting.[1]

Green was convicted of the capital murder of Mrs. Vaughan and sentenced to death.[2] In June 2001 the Supreme Court of Virginia reversed Green's conviction and remanded the case to the circuit court for a new trial on the capital murder charge.[3] On remand, Green was again convicted of capital murder in the commission of a robbery under Virginia Code section 18.2-31(4).[4] At the penalty phase of Green's trial, several correctional officers testified that Green often exhibited disruptive and threatening behavior.[5] An acquaintance of Green, Clement Leon Cleaton ("Cleaton"), testified that Green had previously threatened to rob and kill him.[6] Cleaton also claimed to have heard Green threaten to

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1. Green v. Commonwealth, 580 S.E.2d 834, 837–39 (Va. 2003).

2. *See* Green v. Commonwealth, 546 S.E.2d 446, 447 (Va. 2001). *See generally* Damien P. DeLaney, Case Note, 14 CAP. DEF. J. 145 (2001) (analyzing Green v. Commonwealth, 546 S.E.2d 446 (Va. 2001)).

3. *Green*, 546 S.E.2d at 452. The Supreme Court of Virginia held that the trial court abused its discretion by failing to seat impartial jurors. *Id.* at 451.

4. *Green*, 580 S.E.2d at 837; *see* VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2003) (defining "[t]he willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery" as capital murder).

5. *Green*, 580 S.E.2d at 839.

6. *Id.*

rob an ice cream vendor.[7] As mitigating evidence, Dr. Jack Daniel ("Dr. Daniel") testified that there was no evidence that Mrs. Vaughan endured prolonged suffering before dying from the gunshot wounds.[8] Dr. Scott Sautter ("Dr. Sautter"), a neuropsychologist, testified that Green exhibited a low level of intellectual functioning but also that he would not be a danger to others in a maximum-security setting.[9] Two clinical psychologists testified for the Commonwealth that Green exhibited "low average" mental functioning and posed a low risk of violence in a prison setting.[10]

The jury found both the future dangerousness and vileness predicates satisfied, and the Circuit Court for Brunswick County sentenced Green to death.[11] Green appealed his capital murder conviction to the Supreme Court of Virginia, which consolidated Green's appeal with the automatic review of his death sentence under Virginia Code section 17.1-313(F).[12]

II. Holding

The Supreme Court of Virginia held that the circuit court did not abuse its discretion by denying Green an investigator.[13] The court also found that it was not an abuse of discretion for the circuit court to refuse to allow Green to ask seven of his fifty-two voir dire questions.[14] The court found no manifest error in the circuit court's decision to excuse a potential juror for cause.[15] Finally, the

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7. *Id.*

8. *Id.*

9. *Id.* at 839–40. Dr. Sautter used two tests to assess Green's I.Q., the "Wechsler abbreviated intelligence scale" and the "Wechsler Adult Intelligence Scale Revised." *Id.* at 839. The abbreviated test revealed that Green had an I.Q. of fifty-five, while the other test revealed that Green had a full-scale I.Q. of seventy-four. *Id.* Dr. Sautter also concluded that in a less secure environment Green "would be susceptible to harm from other people because of his limited capacity for communication." *Id.* at 840.

10. *Id.* at 840. The prosecution's psychologists found that Green had an I.Q. of eighty-four on the "Ammons & Ammons quick test" and that Green had a full-scale I.Q. of seventy-four on the "Wechsler Adult Intelligence Scale." *Id.*

11. *Green*, 580 S.E.2d at 837; *see* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (stating that "a sentence of death shall not be imposed unless the court or jury shall . . . find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society"); VA. CODE ANN. § 19.2-264.4(C) (Michie Supp. 2003) (stating that death may be imposed upon a finding that the defendant's "conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or aggravated battery to the victim").

12. *Green*, 580 S.E.2d at 837; *see* VA. CODE ANN. § 17.1-313(F) (Michie 2003) (stating that "[s]entence review shall be in addition to appeals, if taken, and review and appeal may be consolidated").

13. *Green*, 580 S.E.2d at 841.

14. *Id.* at 843.

15. *Id.* at 844–45.

court held that the evidence adduced at trial was sufficient to establish premeditation and that Green's death sentence was neither excessive nor disproportionate to similar death penalty cases.[16]

III. Analysis

A. Appointment of Investigator

Green argued that the circuit court erred by denying his motion for an investigator.[17] He claimed that an investigator was necessary to assist his defense because he lacked investigative resources and his counsel lacked training in criminal investigation.[18] On appeal, Green argued "that the 'imbalance' resulting from his lack of investigative resources as compared to the Commonwealth's vast resources violated his equal protection and due process rights as well as his Sixth Amendment right to counsel."[19]

The Supreme Court of Virginia stated that defendants, even those charged with capital murder, do not have an absolute right to an investigator.[20] To obtain the assistance of an investigator a defendant " 'must show a particularized need' " by establishing " 'that the services of an expert would materially assist him in the preparation of his defense and that the denial of such services would result in a fundamentally unfair trial.' "[21] In *Bailey v. Commonwealth*,[22] the defendant, like Green, claimed that an investigator was necessary to locate witnesses and data and to evaluate testimony and documents.[23] The court found that Bailey did not adequately demonstrate a particularized need.[24] To establish a particularized need, defendants must demonstrate more than a "mere hope" that an expert could obtain evidence favorable to the defense.[25] The Supreme Court of Virginia found that Green failed to establish a particularized need for the appointment of

16. *Id.* at 847, 850.

17. *Id.* at 840.

18. *Id.*

19. *Green*, 580 S.E.2d at 840.

20. *Id.*; *see* Bailey v. Commonwealth, 529 S.E.2d 570, 578 (Va. 2000) (stating that the court has "consistently rejected the contention that defendants, even in capital murder cases, have an indiscriminate entitlement to the assistance of an investigator").

21. *Green*, 580 S.E.2d at 840 (quoting Husske v. Commonwealth, 476 S.E.2d 920, 925–26 (Va. 1996)). The court stated that "[t]he determination whether a defendant has made an adequate showing of particularized need for expert assistance lies within the sound discretion of the trial court." *Id.*

22. 529 S.E.2d 570 (Va. 2000).

23. *Green*, 580 S.E.2d at 840; *Bailey*, 529 S.E.2d at 578.

24. *Green*, 580 S.E.2d. at 840–41 (citing *Bailey*, 529 S.E.2d at 578).

25. *Id.* at 841 (quoting *Husske*, 476 S.E.2d at 925).

an investigator.[26] Therefore, the court held that the circuit court's decision to deny Green's motion was not an abuse of discretion.[27]

B. Vileness

Green argued that the circuit court erred by denying his pre-trial motion challenging the sufficiency of the Commonwealth's evidence.[28] Green claimed that the prosecution's evidence establishing the vileness predicate was insufficient as a matter of law.[29] The Supreme Court of Virginia stated that Virginia has no process for making pre-trial determinations of sufficiency in criminal cases.[30] Rather, courts must base sufficiency determinations on evidence contained in the trial record.[31] The court found sufficient evidence in the record supporting the jury's determination that the vileness factor was satisfied.[32] Thus, the court held that the circuit court properly denied Green's pre-trial motion.[33]

C. Change of Venue

Green also argued that the circuit court erred by denying his motion for a change of venue.[34] Green moved for a change of venue prior to trial and the circuit court took the motion under advisement.[35] Defense counsel did not object to the court's decision.[36] At the end of the penalty phase, the court noted that it considered the motion denied at the time the jury was empaneled.[37] The Commonwealth argued that the circuit court's order denying the motion was proper because Green did not renew his motion at the completion of voir dire or prior to the jury being empaneled and sworn.[38] In addition, the Common

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26. *Id.*

27. *Id.* The court rejected Green's Sixth Amendment argument citing its decision in Lenz v. Commonwealth, 544 S.E.2d 299, 305 (Va. 2001). *Id.* at 841 n.4.

28. *Id.* at 841.

29. *Id.*

30. *Green*, 580 S.E.2d at 841.

31. *Id.*

32. *Id.*

33. *Id.*

34. *Id.*

35. *Id.* Green submitted newspaper articles, affidavits, and a survey in support of his motion for a change of venue. *Id.*

36. *Green*, 580 S.E.2d at 841.

37. *Id.*

38. *Id.* After the qualification of twenty-four jurors, Green's counsel indicated to the court that there were no preliminary matters to be addressed before the jury was brought in. *Id.* Again, after the parties completed their peremptory strikes, Green's counsel responded in the affirmative when the court asked, "[I]s that your jury?" *Id.* "At no time did Green's counsel ask the court to rule on the motion for a change of venue previously taken under advisement or renew that motion."

wealth argued that Virginia Supreme Court Rule 5:25 barred Green from presenting a change of venue claim.[39] Green argued that the change of venue issue was not waived and that the court was aware that the motion was pending.[40]

In *Hoke v Commonwealth*,[41] the Supreme Court of Virginia refused to consider a similar change of venue argument.[42] The defendant in *Hoke* agreed to continue his change of venue motion and then failed to renew the motion.[43] On appeal, the Supreme Court of Virginia refused to consider Hoke's challenge because he failed to renew his motion at trial.[44] In the present case, the court recognized that Green never agreed to continue his motion, but noted that he failed to object to the circuit court's decision to take the motion under advisement.[45] Because Green also failed to renew his motion before the jury was empaneled, the court found that he "implicitly consented to the seating of the jury."[46] Green failed to give the court any indication that he wished to pursue the change of venue motion.[47] Defense counsel essentially waived the motion by accepting the jury.[48] Thus, the Supreme Court of Virginia refused to find error in the circuit court's denial of Green's change of venue claim.[49]

D. Juror Questionnaire

Green argued that the circuit court erred by denying his request to submit a juror questionnaire.[50] Although Green indicated at the pre-trial hearing that he would file a motion and sample questionnaire, he failed to do so.[51] The Supreme

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Id. at 841–42.

39. *Id.* at 841; *see* VA. SUP. CT. R. 5:25 (stating that "[e]rror will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice").

40. *Green*, 580 S.E.2d at 842. In support of his argument that the court was aware that the motion was still pending, Green pointed to evidence in support of his motion which was submitted prior to voir dire. *Id.*

41. 377 S.E.2d 595 (Va. 1989).

42. *Green*, 580 S.E.2d at 842; Hoke v. Commonwealth, 377 S.E.2d 595, 597 (Va. 1989).

43. *Green*, 580 S.E.2d at 842 (citing *Hoke*, 377 S.E.2d at 597).

44. *Id.* (citing *Hoke*, 377 S.E.2d at 597).

45. *Id.*

46. *Id.*; *see* Thomas v. Commonwealth, 559 S.E.2d 652, 659–61 (Va. 2002) (stating that the trial court's refusal to grant a change of venue motion should be reversed because the defendant appropriately renewed the motion after voir dire).

47. *Green*, 580 S.E.2d at 842.

48. *Id.*

49. *Id.*; *see* VA. SUP. CT. R. 5:25 (setting forth the circumstances under which the Supreme Court of Virginia will assign error to a trial court's ruling).

50. *Green*, 580 S.E.2d at 842–43.

51. *Id.* at 843.

Court of Virginia found no evidence in the record showing that the defense made any argument in support of a motion for a jury questionnaire.[52] Therefore, the court held that Green was barred from presenting this claim for the first time on appeal under Rule 5:25.[53] In addition, the court stated that it had previously "held that the use of a juror questionnaire outside the courtroom would undermine the value derived from a trial court's opportunity to observe and evaluate prospective jurors first hand."[54] The Supreme Court of Virginia found that the circuit court did not abuse its discretion regarding the juror questionnaire claim.[55]

E. Voir Dire Questions

On appeal, Green argued that the circuit court erred by preventing the defense from asking seven of its fifty-two voir dire questions.[56] The Supreme Court of Virginia found that the seven questions were too general and were " 'an invitation to a rambling discourse on a broad range of emotions.' "[57] The court stated that " 'trial courts are not required to allow counsel to ask questions which are so ambiguous as to render the answer meaningless.' "[58] Rather, "voir dire questions must relate to the four statutory factors of relationship, interest, opinion, or prejudice."[59] The Supreme Court of Virginia determined that Green had adequate opportunity to assess whether the jurors could "stand indifferent in the cause."[60] A trial court's decision to limit voir dire questions will not generally be reversed if the defense was able to assess the impartiality of the jury through other questions.[61] The circuit court reassured the defense that the court's voir dire would cover some of the issues contained in the disallowed questions.[62] Therefore, the Supreme Court of Virginia concluded that the circuit

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52. *Id.*

53. *Id.*; *see* VA. SUP. CT. R. 5:25 (discussing procedural default).

54. *Green*, 580 S.E.2d at 843 (citing Strickler v. Commonwealth, 404 S.E.2d 227, 234 (Va. 1991) (discussing the effect of juror questionnaires on voir dire)).

55. *Id.*

56. *Id.*

57. *Id.* (quoting Buchanan v. Commonwealth, 384 S.E.2d 757, 765 (Va. 1989)).

58. *Id.* (quoting *Buchanan*, 384 S.E.2d at 764).

59. *Id.*; *see* VA. CODE ANN. § 8.01-358 (Michie 2000) (stating that "counsel for either party shall have the right to examine under oath any person who is called as a juror . . . to ascertain whether he is related to either party, or has any interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein").

60. *Green*, 580 S.E.2d at 843 (quoting § 8.01-358).

61. *Id.*; *see Buchanan*, 384 S.E.2d at 764 (stating that when a "trial court affords ample opportunity to counsel to ask relevant questions and where the questions actually propounded by the trial court were sufficient to preserve a defendant's right to trial by a fair and impartial jury, we will generally not reverse a trial court's decision to limit or disallow certain questions from defense counsel").

62. *Green*, 380 S.E.2d at 843. The circuit court stated that counsel might be allowed to ask

court's refusal to allow specific voir dire questions was not an abuse of discretion.[63]

F. Juror Williams

Green contended that it was error for the circuit court to excuse a prospective juror for cause.[64] During voir dire, juror Williams stated that he did not know if he could find someone guilty knowing that the death penalty could be imposed.[65] In response to questions by defense counsel, juror Williams indicated that he would be able to do his duty as a juror.[66] However, juror Williams responded to the Commonwealth's line of questioning by stating that he could not vote for the death penalty.[67] The circuit court granted the Commonwealth's

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follow-up questions depending on the juror's responses to the court's questions. *Id.*

63. *Id.*

64. *Id.* at 844.

65. *Id.* Juror Williams revealed that his cousin had been sentenced to life imprisonment for murder and that this fact might affect his ability to make a decision in Green's case. *Id.*

66. *Id.* The following exchange took place between Green's counsel and juror Williams:

> Q. In this particular case, are you willing if called as a juror to listen to all of the evidence at the trial and then at the sentencing, and then come up with a decision as to whether to vote death or life imprisonment? Are you willing to do that as your duty, your civic duty as a juror?
>
> A. I don't want to, but I'll do it.
>
> Q. But you will?
>
> A. Yeah.
>
> Q. And you can come up with a decision?
>
> A. I think I can.

Id.

67. *Id.* The exchange between the Commonwealth and juror Williams went as follows:

> Q. Mr. Williams, I want you to look at Mr. Green there.
>
> (The prospective juror complied)
>
> All right. With what you have told us, could you under any circumstances vote to give him the death penalty? I know it puts you on the spot and I apologize for it, but under any circumstances, could you vote to give him the death penalty?
>
> A. Right now? I mean, right now, no.
>
> Q. I understand that. Can you imagine any is there any[sic] amount of evidence that I could put before you, would anything with the way you feel now, would anything change your mind?
>
> A. No.

Id. at 844–45.

motion to strike juror Williams due to his "equivocal answers about whether he could render a guilty verdict in a case involving the death penalty."[68]

The Supreme Court of Virginia stated that "[a] prospective juror is properly excused for cause when that person's views concerning the death penalty would substantially impair or preclude the performance of his or her duty in accordance with the court's instructions and the juror's oath."[69] The court accorded deference to the circuit court's decision because the circuit court's determination was based on firsthand observation of the juror's responses.[70] In reviewing the record, the Supreme Court of Virginia agreed with the circuit court's decision to excuse juror Williams for cause.[71] After a determination that there was no manifest error, the court affirmed the circuit court's decision.[72]

G. *Premeditation*

At trial, Green argued that the Commonwealth's evidence was insufficient to prove premeditation.[73] After the Commonwealth presented its case, defense counsel moved to strike the capital murder evidence on the ground that it failed to show that Mrs. Vaughan's murder was "willful, deliberate, and premeditated."[74] The circuit court denied Green's motion after finding that Green entered the store and "said nothing before shooting; that he killed, wounded and then robbed; and that he did not bother to wear a mask which he had prepared."[75] On appeal to the Supreme Court of Virginia, Green argued that the circuit court erred by denying his motion.[76]

The court found that the evidence regarding Mrs. Vaughan's shooting was sufficient to prove premeditation.[77] The court explained that "[p]remeditation is an intent to kill that needs to exist only for a moment."[78] Premeditation is

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68. *Green*, 580 S.E.2d at 844.

69. *Id.* at 845 (citing Schmitt v. Commonwealth, 547 S.E.2d 186, 195 (Va. 2001) and Barnabei v. Commonwealth, 477 S.E.2d 270, 277 (Va. 1996)).

70. *Id.* (citing Lovitt v. Commonwealth, 537 S.E.2d 866, 875 (Va. 2000)).

71. *Id.* Juror Williams never indicated that he would be able to listen to the evidence and decide whether to vote for life imprisonment or the death penalty. *Id.* The Supreme Court of Virginia found that this substantially impaired the juror's ability to perform his duty in accordance with the court's instructions. *Id.*

72. *Id.* at 844 (citing Yeatts v. Commonwealth, 410 S.E.2d 254, 262 (Va. 1991) (stating that the exclusion of prospective jurors will not be disturbed on appeal absent manifest error)).

73. *Id.* at 847.

74. *Green*, 580 S.E.2d at 847. Green based his motion on a statement he made to police explaining that he did not intend to kill Mrs. Vaughan, but rather that he intended to commit a robbery. *Id.*

75. *Id.*

76. *Id.*

77. *Id.*

78. *Id.* (citing Peterson v. Commonwealth, 302 S.E.2d 520, 524 (Va. 1983)); *see also* Giarratano

generally a factual issue which is reviewed "in the light most favorable to the prevailing party below."[79] The facts of the shooting demonstrate that Green shot Mrs. Vaughan without warning, and then he walked over to where she lay and shot her two more times.[80] The Supreme Court of Virginia found that the facts clearly established premeditation and affirmed the circuit court's refusal to strike the Commonwealth's evidence.[81]

H. Aggravating Factors

1. Vileness

Green made a motion at trial to strike the Commonwealth's evidence regarding the vileness predicate.[82] He claimed that the Commonwealth did not prove an aggravated battery to the victim or that he exhibited depravity of mind.[83] As support for his motion, Green pointed to forensic evidence that showed that three of Mrs. Vaughan's gunshot wounds were lethal.[84] Thus, he claimed that Mrs. Vaughan died almost instantaneously without suffering any other battery.[85] On appeal, Green argued that the circuit court erred by denying his motion.[86]

An aggravated battery is " 'a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.' "[87] The court disagreed with Green's interpretation of the forensic evidence presented at trial.[88] The forensic pathologist testified that he was unable to determine the order in which the four shots were fired at Mrs. Vaughan.[89] The evidence showed that it was possible that the gunshot wound to Mrs. Vaughan's

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v. Commonwealth, 266 S.E.2d 94, 100 (Va. 1980) ("A design to kill may be formed only a moment before the fatal act is committed provided the accused had time to think and did intend to kill."); Akers v. Commonwealth, 216 S.E.2d 28, 33 (Va. 1975) (stating that the intention to kill need not exist for any specified length of time prior to the actual killing).

79. *Green*, 580 S.E.2d at 847; *see* Clozza v. Commonwealth, 321 S.E.2d 273, 279 (Va. 1984) (stating that "[t]he question whether a defendant is guilty of a willful, deliberate, and premeditated killing of the victim is usually a question for the jury to determine from all the facts and circumstances").

80. *Green*, 580 S.E.2d at 847.

81. *Id.*; *see* Remington v. Commonwealth, 551 S.E.2d 620, 632 (Va. 2001) (stating that stabbing a victim eight to ten times constitutes premeditation).

82. *Green*, 580 S.E.2d at 848.

83. *Id.*

84. *Id.*

85. *Id.* In addition, Green noted the forensic pathologist's testimony that Mrs. Vaughan died within "seconds to minutes" of the first shot. *Id.*

86. *Id.*

87. *Id.* at 848 (quoting Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978)).

88. *Green*, 580 S.E.2d at 848.

89. *Id.*

chest was fired first, causing her to feel like she was suffocating.[90] The court reiterated its position that " '[a] killing inflicted by multiple gunshot wounds . . . when there is an appreciable lapse of time between the first shot and the last, and when death does not result instantaneously from the first' constitutes an 'aggravated battery.' "[91] Further, the court stated that multiple fatal gunshot wounds constitute an aggravated battery.[92]

In addition, the court defined depravity of mind as " 'a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.' "[93] The court found that Green's actions, specifically the repeated shooting of Mrs. Vaughan in front of her husband, displayed sufficient depravity of mind.[94] Therefore, the Supreme Court of Virginia determined that the circuit court properly dismissed Green's motion to strike the Commonwealth's evidence regarding vileness.[95]

2. *Future Dangerousness*

Green argued that the circuit court erred by denying his motion to strike the Commonwealth's evidence regarding the future dangerousness predicate.[96] He claimed that the Commonwealth failed to prove that he would commit violent criminal acts in the future and that he posed a serious threat to society.[97] First, Green argued that the testimony of Dr. Sautter and Dr. Pasquale indicated that he posed no serious threat if confined in a prison setting.[98] Second, Green noted his lack of prior convictions as evidence against the Commonwealth's assertion that he constituted a future danger to society.[99] Finally, Green argued that his unadjudicated prior bad acts were " 'benign' run-ins with friends, family and employers."[100]

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90. *Id.*

91. *Id.* (quoting Sheppard v. Commonwealth, 464 S.E.2d 131, 139 (Va. 1995)).

92. *Id.* (citing Walker v. Commonwealth, 515 S.E.2d 565, 575 (Va. 1999) (stating that multiple gunshot wounds establish an aggravated battery)).

93. *Id.* (quoting *Smith*, 248 S.E.2d at 149).

94. *Green*, 580 S.E.2d at 848. The court further stated that Green's conduct showed that he had no mercy for Mrs. Vaughan when he shot her without any provocation as she lay on the floor. *Id.* at 848–49.

95. *Id.* at 849.

96. *Id.*

97. *Id.*

98. *Id.* Dr. Sautter testified that Green would exhibit appropriate behavior if confined in a maximum-security setting. *Id.* Dr. Pasquale testified that Green posed only a low risk of misbehavior if confined to prison. *Id.*

99. *Id.*

100. *Green*, 580 S.E.2d at 848.

The Supreme Court of Virginia rejected Green's arguments and found that the circumstances of the murder were sufficient to establish that Green posed a future danger to society.[101] In making its decision, the court relied on various testimony that indicated Green's future dangerousness.[102] Green's acquaintance, Cleaton, testified that Green threatened to kill and rob him.[103] The court also considered the testimony given by correctional officers who interacted with Green.[104] The officers testified that Green exhibited disruptive behavior while incarcerated and made numerous threats to the officers.[105] Thus, the Supreme Court of Virginia affirmed the circuit court's refusal to strike the Commonwealth's evidence regarding Green's future dangerousness.[106]

I. Issues Already Decided

The Supreme Court of Virginia stated that "[s]everal of Green's assignments of error concern issues that this [c]ourt has already decided adversely to the position he . . . advances."[107] Green failed to put forth any reasons why the court should depart from its previous rulings.[108] Therefore, the court followed precedent and denied Green's assignments of error concerning specific issues.[109]

1. Bill of Particulars

Green claimed that the circuit court erred by overruling his motion for a bill of particulars.[110] The circuit court initially granted Green's motion in part.[111] On appeal, Green argued "that he was entitled to a bill of particulars providing a 'narrowing' construction of the 'vileness' predicate and listing all the evidence that the Commonwealth intended to rely upon at sentencing."[112] The Supreme Court of Virginia held, based on precedent, that Green was not entitled to such a broad bill of particulars.[113] The Virginia Capital Case Clearinghouse has a

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101. *Id.* at 849; *see* VA. CODE ANN. § 19.2-264.4(C) (Michie Supp. 2003) (stating that future dangerousness can be based on "the circumstances surrounding the commission of the offense").

102. *Green*, 580 S.E.2d at 849.

103. *Id.*

104. *Id.*

105. *Id.*

106. *Id.*

107. *Id.*

108. *Green*, 580 S.E.2d at 849.

109. *Id.*

110. *Id.*

111. *Id.*

112. *Id.*

113. *Id.* (citing Goins v. Commonwealth, 470 S.E.2d 114, 123 (Va. 1996) and *Strickler*, 404 S.E.2d at 233).

somewhat different motion for a bill of particulars which may avoid the application of precedent cited in *Green*.[114]

2. *Unadjudicated Acts*

Green also argued that the circuit court erred by denying his motion to prevent the Commonwealth from presenting evidence of Green's unadjudicated acts at sentencing.[115] The circuit court overruled Green's motion but stated that each unadjudicated act would be reviewed by the court to determine its relevance to future dangerousness.[116] The court also stated that it would consider the probative value and the possible prejudicial effect of such evidence.[117] The Supreme Court of Virginia cited previous cases in which it rejected the same argument.[118] Therefore, the court affirmed its prior holdings and denied Green's claim.[119]

3. *Conditions of Confinement*

Green made a motion at trial to introduce evidence regarding the confinement conditions of life imprisonment.[120] The circuit court overruled Green's motion to present such evidence in rebuttal to the Commonwealth's future dangerousness evidence.[121] The court noted that Green's motion was denied only "to the extent that it exceeds evidence of [Green's] previous adjustment to incarceration."[122] The Supreme Court of Virginia cited precedent in support of the circuit court's decision and affirmed the ruling.[123]

J. Mandatory Review

1. *Passion or Prejudice*

Pursuant to Virginia Code section 17.1-313(C)(1), the Supreme Court of Virginia must consider and determine "[w]hether the sentence of death was

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114. Please contact the Virginia Capital Case Clearinghouse at (540) 458-8557 for a motion for a bill of particulars relating to the vileness aggravator.

115. *Green*, 580 S.E.2d at 849.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* (citing *Walker*, 515 S.E.2d at 571–73, Williams v. Commonwealth, 450 S.E.2d 365, 371 (Va. 1994), and Stockton v. Commonwealth, 402 S.E.2d 196, 206 (Va. 1991)).

120. *Id.* at 849–50.

121. *Green*, 580 S.E.2d at 849–50.

122. *Id.* at 850.

123. *Id.* (citing Bell v. Commonwealth, 563 S.E.2d 695, 713 (Va. 2002), Burns v. Commonwealth, 541 S.E.2d 872, 892–93 (Va. 2001), *Louit*, 537 S.E.2d at 879, and Cherrix v. Commonwealth, 513 S.E.2d 642, 653–54 (Va. 1999)).

imposed under the influence of passion, prejudice or any other arbitrary factor."[124] In this case, Green did not argue that passion or prejudice affected his sentence.[125] After reviewing the trial record, the Supreme Court of Virginia found no evidence that either the jury's decision or the circuit court's decision was influenced by such factors.[126]

2. *Proportionality Review*

Under Virginia Code section 17.1-313(C)(2), the Supreme Court of Virginia is required to address whether a defendant's death sentence is "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[127] The statute also requires the court to compare the case before it with "similar cases."[128] The Supreme Court of Virginia compared Green's case to other death penalty cases involving a murder committed during the commission of a robbery in which the jury found both aggravating factors.[129] The court stated that the proportionality review included all capital cases reviewed by the court rather than just a selection of specific cases.[130] After conducting the proportionality review, the court concluded that Green's death sentence was "not excessive or disproportionate to sentences generally imposed" in Virginia for capital murders similar to the murder of Mrs. Vaughan.[131]

Green argued that his death sentence was excessive because Mrs. Vaughan did not endure prolonged suffering and because he did not have prior criminal convictions.[132] In other words, Green claimed that his case involved "less aggravation" than other death penalty cases in Virginia.[133] The Supreme Court of Virginia rejected Green's argument and reiterated that proportionality review is meant " 'to reach a reasoned judgment regarding what cases justify the imposition of the death penalty,' " and not to " 'insure complete symmetry.' "[134]

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124. *Id.*; *see* VA. CODE ANN. § 17.1-313(C)(1) (Michie 2003) (stating that reviewing a death sentence requires that "the court shall consider and determine . . . [w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor").

125. *Green*, 580 S.E.2d at 850.

126. *Id.*

127. *Id.* (quoting § 17.1-313(C)(2)).

128. *Id.* (quoting § 17.1-313(C)(2)).

129. *Id.*

130. *Id.*

131. *Green*, 580 S.E.2d at 850 (citing Akers v. Commonwealth, 535 S.E.2d 674 (Va. 2000), Stout v. Commonwealth, 376 S.E.2d 288 (Va. 1989), Poyner v. Commonwealth, 329 S.E.2d 815 (Va. 1985), and Edmonds v. Commonwealth, 329 S.E.2d 807 (Va. 1985)).

132. *Id.*

133. *Id.*

134. *Id.* (quoting Orbe v. Commonwealth, 519 S.E.2d 808, 817 (Va. 1999)).

IV. Application in Virginia

A. Pre-trial Determinations

In *Green*, the Supreme Court of Virginia stated that Virginia does not have procedures for pre-trial determinations of sufficiency of evidence.[135] The court stated that it "must determine the sufficiency of [the Commonwealth's] evidence based on the record made at trial."[136] However, Virginia Supreme Court Rule 3A:9(b)(2) states that "any defense or objection that is capable of determination without the trial of the general issue may be raised by motion before trial."[137] When the Commonwealth's evidence, taken in the light most favorable to the Commonwealth, is necessarily inadequate to support a verdict, trial of the general issue is not necessary. For example, Virginia law is absolutely clear that the use of force or intimidation to retain previously stolen property is not robbery.[138] If the Commonwealth has charged capital murder predicated on robbery and its best evidence will show larceny followed by force or intimidation, a motion under 3A:9(b)(2) is appropriate.[139] The motion should be granted to strike the capital aspect of the indictment.[140] Similarly, if capital murder is charged in a case involving only a single, distant-range gunshot, the Commonwealth will not be able to prove vileness.[141] A motion under Rule 3A:9(b)(2) to strike vileness would be appropriate here. The use of Rule 3A:9(b)(2) can be facilitated by ex parte hearings. For example, capital defense attorneys seeking to strike "vileness" pre-trial might suggest that the Commonwealth make an ex parte showing

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135. *Id.* at 841.

136. *Id.*

137. VA. SUP. CT. R. 3A:9(b)(2) (discussing the defenses and objections that may be raised before trial).

138. *See* Jones v. Commonwealth, 574 S.E.2d 767, 769 (Va. Ct. App. 2003) (finding the facts insufficient to support a robbery charge where the defendant took a pair of boots from a store and threatened a clerk with a gun in the parking lot when confronted by the clerk); Mason v. Commonwealth, 105 S.E.2d 149, 151 (Va. 1958) ("The violence or putting in fear, to constitute the essential element in robbery, must precede . . . the taking of the property . . . . No violence . . . resorted to merely for the purpose of retaining a possession already acquired, or to effect escape, will . . . supply the element of force or intimidation . . . .").

139. VA. SUP. CT. R. 3A:9(b)(2); *see* VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2003) (defining capital murder as "[t]he willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery").

140. *See* Commonwealth v. Bunn, CR94000306 (Circuit Court, Henrico County, 1994) (ruling that Bunn's larceny was completed prior to the homicide and striking pre-trial the capital aspect of the indictment).

141. *See* Watkins v. Commonwealth, 331 S.E.2d 422, 437 (Va. 1985) (stating that "[a]n aggravated battery is not proven where the evidence shows that the victim died almost instantaneously from a single gunshot wound"); Peterson v. Commonwealth, 302 S.E.2d 520, 525 (Va. 1983) (stating that "[a] death sentence based on vileness is not supported by the evidence where the victim died almost instantaneously from a single gunshot wound"); *see also* Godfrey v. Georgia, 446 U.S. 420, 433 (1980) (finding vileness absent where the "victims were killed instantaneously").

of its best evidence and waive their presence to allow the Commonwealth to present its "vileness" evidence to the judge. If the Commonwealth is unable to show sufficient evidence establishing the "vileness" aggravating factor, the judge can make a determination before trial of the general issue.

B. Change of Venue

The Supreme Court of Virginia refused to consider Green's challenge to the denial of his change of venue motion.[142] The court's decision was based on Green's failure to renew his motion after the jury was selected and before it was sworn.[143] *Thomas v. Commonwealth*[144] is instructive.[145] The defense in *Thomas* renewed its motion for a change of venue at the appropriate time and avoided procedural default.[146] But, it is not enough simply to renew the motion. The grounds for the renewed motion must be stated with particularity lest the defendant be procedurally defaulted on a viable, but unstated, ground.[147] If the renewed motion for change of venue is denied, counsel should object to the swearing of the jury and state with particularity that the objection is based on the same reason(s) supporting the renewed motion.[148]

C. Jury Questionnaire

The Supreme Court of Virginia barred Green from presenting his jury questionnaire claim for the first time on appeal.[149] Virginia Supreme Court Rule 5:25 states that "[e]rror will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable this Court to attain the ends of justice."[150] Although Green stated his intention to move for a questionnaire at a

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142. *Green*, 580 S.E.2d at 842.

143. *Id.*

144. 559 S.E.2d 652 (Va. 2002).

145. *See Thomas*, 559 S.E.2d at 661 (holding that the trial court improperly denied the defendant's change of venue motion).

146. *See id.* at 659 (stating that the defense renewed its change of venue motion following voir dire).

147. *See* Riner v. Commonwealth, 579 S.E.2d 671, 682 (Va. Ct. App. 2003) (holding that the defendant's "ease of selection" claims were procedurally barred because he failed to object specifically to the standard applied to his change of venue motion at trial).

148. *See* Spencer v. Commonwealth, 384 S.E.2d 785, 793 (Va. 1989) (stating that when "a party objects to rulings made during the voir dire of a prospective juror, but subsequently fails to object to the seating of that juror, the party has waived the voir dire objections," and that the grounds for such objections must be "stated with sufficient specificity").

149. *Green*, 580 S.E.2d at 843.

150. VA. SUP. CT. R. 5:25.

pre-trial hearing, he never filed a motion or submitted a sample questionnaire.[151] The Supreme Court of Virginia required that Green at least proffer a questionnaire in order to prevent the procedural default of the claim.[152] Attorneys should preserve such issues by submitting sample questionnaires or by presenting an oral or written argument in support of the motion.[153] In addition, the court in *Green* suggested that juror questionnaires detract from "a trial court's opportunity to observe and evaluate prospective jurors" during voir dire.[154] In actuality, juror questionnaires serve as screening devices and are a useful starting point for more directed voir dire.

D. Juror Williams

During the Commonwealth's questioning of juror Williams, the Commonwealth asked whether he would be able to "vote" for the death penalty.[155] Attorneys should object to voir dire questions which force jurors to state conclusively whether they can vote for death. According to *Wainwright v. Witt*[156] and *Witherspoon v. Illinois*,[157] the relevant inquiry is whether a juror can *consider* both life and death.[158] Capital defense attorneys should recognize that questions that require jurors to state whether they could "vote" for death are inherently objectionable.[159] Rather than asking whether a juror could "vote" for death, attorneys should attempt to limit the Commonwealth's inquiry to whether the juror is willing to consider imposing life imprisonment or death.

E. Future Dangerousness

1. Prior Convictions

In the analysis of Green's future dangerousness challenge, the Supreme Court of Virginia reiterated that the circumstances surrounding the murder alone

151. *Green*, 580 S.E.2d at 843.

152. *Id.*

153. *Id.*

154. *Id.*

155. *Id.* at 844.

156. 469 U.S. 412 (1985).

157. 391 U.S. 510 (1968).

158. *See* Wainwright v. Witt, 469 U.S. 412, 424 (1985) (quoting Adams v. Texas, 448 U.S. 38, 45 (1980) (holding that "the proper standard for determining when a prospective juror may be excluded for cause because of his or her views on capital punishment . . . is whether the juror's views would 'prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath'")); Witherspoon v. Illinois, 391 U.S. 510, 522 n.21 (1968) (stating that veniremen must "be willing to *consider* all of the penalties provided by state law, and that he not be irrevocably committed, before the trial has begun, to vote against the penalty of death regardless of the facts and circumstances that might emerge in the course of the proceedings").

159. *See Witherspoon*, 391 U.S. at 522 n.21 (stating that a juror must consider imposing all of the penalties provided by state law).

were sufficient to establish future dangerousness.[160] Despite the fact that Green had no record of prior criminal convictions, the court found that the offense itself indicated that Green posed a future danger.[161] Virginia Code section 19.2-264.2 states that "a sentence of death shall not be imposed unless the court or jury shall . . . 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."[162] In *Green*, the court failed to make any reference to section 19.2-264.2.[163] The court's failure to recognize, or refusal to consider, the inherent conflict between sections 19.2-264.2 and 19.2-264.4(C) is troublesome.[164] Section 19.2-264.4(C) can be read to support the conclusion that a finding of future dangerousness can be based solely on the circumstances of the offense.[165] Section 19.2-264.2, however, appears to make a prior conviction a predicate to the future dangerousness inquiry.[166] Counsel representing capital defendants who have no prior convictions should rely upon section 19.2-264.2 when moving to strike future dangerousness from the case.[167]

2. *Unadjudicated Acts*

In addition, it is arguable whether the circuit court was correct in allowing the Commonwealth to present evidence of Green's unadjudicated acts.[168] Section 19.2-264.3:2, which controls notice to the defendant of the Commonwealth's intent to introduce evidence of unadjudicated conduct, is specific.[169] It refers

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160. *Green*, 580 S.E.2d at 849; *see* Wolfe v. Commonwealth, 576 S.E.2d 471, 485 (Va. 2003) (stating that the defendant's acts were sufficient to support the jury's future dangerousness finding and that "it is not necessary that [the defendant] have a prior criminal record as a predicate on which the jury must rely before it can sentence him to death based on future dangerousness").

161. *Green*, 580 S.E.2d at 848.

162. VA. CODE ANN. § 19.2-264.2 (Michie 2000).

163. *Green*, 580 S.E.2d at 848–49; § 19.2-264.2.

164. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie Supp. 2003) (stating that "death shall not be imposed unless the Commonwealth shall prove . . . 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 . . . that he would . . . constitute a continuing serious threat to society" (emphasis added)).

165. *Id.*

166. *See* § 19.2-264.2 (stating that a death sentence shall not be imposed unless the court or jury finds that the defendant poses a continuing serious threat to society after considering the past criminal record of the defendant).

167. *Id.*

168. *Green*, 580 S.E.2d at 839, 848.

169. *See* VA. CODE ANN. § 19.2-264.3:2 (Michie 2000) (stating that if the Commonwealth intends to introduce evidence of the defendant's unadjudicated criminal conduct during the sentencing proceeding, the Commonwealth's attorney shall give the defense notice in writing of the

only to "unadjudicated criminal conduct."[170] It is, of course, absurd to assume that the General Assembly intended that the defendant receive notice of unadjudicated criminal conduct, but also intended that the Commonwealth can introduce evidence of unadjudicated non-criminal conduct and need not even give notice that it intends to do so. Some of the unadjudicated conduct in *Green* appears not to be criminal conduct (e.g., disruptive behavior in jail, the threat to rob an ice cream vendor).[171] There is no statutory basis for the admission of this unadjudicated non-criminal conduct in the Commonwealth's penalty phase case-in-chief.

F. Conditions of Confinement

In *Cherrix v Commonwealth*,[172] the Supreme Court of Virginia held that evidence describing the nature of prison life was inadmissible.[173] The defense attempted to introduce evidence describing the conditions of prison life in rebuttal to the Commonwealth's future dangerousness evidence.[174] The court held that prison life evidence is not mitigation evidence and is therefore inadmissible.[175] In *Burns v Commonwealth*,[176] the Supreme Court of Virginia reiterated its holding in *Cherrix* and stated that "[e]vidence regarding the general nature of prison life is not relevant . . . even when offered in rebuttal to evidence of future dangerousness."[177]

These holdings prevent defendants from proffering "prison-life" evidence to rebut the Commonwealth's future dangerousness evidence. When presenting evidence concerning the conditions of confinement, defense counsel must be extremely careful not to call it "prison-life" evidence. However, there are several ways in which defense counsel can try to put essentially the same evidence before the jury.

First, the defense can have an ex-warden or prison official testify as to how he would classify the defendant as an inmate. Inmate classifications are based on an assessment of the risk the inmate poses. Testimony of this kind directly

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Commonwealth's intention to do so).

170. *Id.*

171. *Green*, 580 S.E.2d at 839.

172. 513 S.E.2d 642 (Va. 1999).

173. *Cherrix*, 513 S.E.2d at 653.

174. *Id.*

175. *Id.*

176. 541 S.E.2d 872 (Va. 2001).

177. *Burns*, 541 S.E.2d at 893. Burns argued that "evidence regarding the quality and structure of an inmate's life in a maximum security prison, as well as the prison's safety and security features, is relevant evidence to rebut the Commonwealth's evidence that a defendant would 'commit criminal acts of violence' in the future." *Id.* at 893 (quoting VA. CODE ANN. § 19.2-264.2 (Michie 2000)).

rebuts the Commonwealth's future dangerousness evidence. Second, the defense can use its mitigation expert to present evidence regarding confinement conditions.[178] The Commonwealth will often argue that, based on the defendant's history and the circumstances of the offense, the jury could draw conclusions regarding the defendant's behavior in the future. However, the mitigation expert can testify that the best measure of future prison behavior is past prison behavior. To opine about future prison behavior, however, the expert must take into account and describe to the jury future conditions of confinement that are at least as restrictive as past conditions of confinement.

G. Proportionality Review

The defect in Virginia's proportionality review was repeated in *Green*. The Supreme Court of Virginia reviews capital cases in two instances: (1) mandatory review of death sentences under Virginia Code section 17.1-313; and (2) discretionary review of cases in which life sentences were imposed.[179] In the latter cases, of course, the sentences cannot be and are not reviewed. Consequently, the court will never see more than a small sample of life sentence cases in which the offense and the offender are more egregious than they are in the death sentence case being reviewed. If the Supreme Court of Virginia does not consider all cases in which the death penalty was not imposed, nothing can be done to address the random application of death sentences. Proportionality review that only looks at cases in which the death penalty has been imposed is tantamount to a rubber-stamping of death sentences.

V. Conclusion

Green demonstrates that absent manifest error or clear abuse of discretion, the Supreme Court of Virginia will affirm a trial court ruling. Defense counsel should be aware that the circumstances surrounding a murder can be sufficient to establish future dangerousness.[180] *Green* also illustrates the court's strict application of procedural default rules.[181]

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178. *See* VA. CODE ANN. § 19.2-264.3:1 (Michie Supp. 2003) (stating that in a capital case the court "shall appoint one or more qualified mental health experts to evaluate the defendant and to assist the defense in the preparation and presentation of information concerning the defendant's history, character, or mental condition" and that the mental health expert shall be a "psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology").

179. *See* VA. CODE ANN. § 17.1-313 (Michie 2003) (stating that "[a] sentence of death . . . shall be reviewed on the record by the Supreme Court").

180. *Green*, 580 S.E.2d at 849.

181. *Id.* at 841–43.

CASE NOTES:

Cases of Interest