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(Kent) Jackson v. Commonwealth 587 S.E.2d 532 (Va. 2003)

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I. Facts

On April 18, 2000, Beulah Mae Kaiser's ("Kaiser") body was found in her ransacked apartment with extensive injuries, any number of which could have been fatal. Law enforcement was unable to find a weapon or any fingerprints to aid in identifying the attacker. However, sixteen months later, DNA testing revealed a match between saliva on a cigarette butt found at the scene of the crime and Cary Gaskins ("Gaskins"). The police, acting on information provided by Gaskins, interviewed Joseph M. Dorsett ("Dorsett"). Dorsett was Kent Jermaine Jackson's ("Jackson") roommate in the apartment adjacent to Mrs. Kaiser at the time of the crime. After the interview, both Dorsett and Jackson were arrested for the murder of Mrs. Kaiser. Upon his arrest, Jackson confessed to the killing.[1]

In January of 2002, a grand jury indictment was issued against Jackson for, inter alia, the capital murder of Kaiser in the commission of a robbery or attempted robbery and object sexual penetration.[2] Jackson made several pre-trial motions, including a request for a change of venue, suppression of his confession, a bill of particulars, and additional peremptory strikes.[3] The trial court denied Jackson's motions and rejected his challenge to the constitutionality of Virginia's capital murder statutes.[4] Jackson was found guilty of all charges except

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1. Jackson v. Commonwealth, 587 S.E.2d 532, 537–38 (Va. 2003). The medical examiner reported that the seventy-nine-year-old "Mrs. Kaiser died from a combination of a stab wound to her jugular vein, a fractured skull, and asphyxia caused by blockage of her airway by her tongue. Any one of these injuries could have been fatal." *Id.* at 537. Mrs. Kaiser also had "two black eyes, a broken nose, and multiple abrasions, lacerations, and bruises. She had five stab wounds to her head and neck, including the wound to her jugular vein." *Id.* In addition, "Mrs. Kaiser had been anally sodomized with her walking cane and . . . the cane then had been driven into her mouth with such violence that it knocked out most of her teeth, tore her tongue and forced it into her airway, fractured her jaw, and penetrated . . . her face." *Id.* Blood splatters were found throughout Mrs. Kaiser's apartment. *Id.*

2. *Id.* at 538; *see* VA. CODE ANN. § 18.2-31 (Michie Supp. 2003) (providing the definition of capital murder); VA. CODE ANN. § 18.2-67.2 (Michie Supp. 2003) (providing the definition of object sexual penetration). Jackson was also charged with robbery, felony stabbing, and statutory burglary. *Jackson*, 587 S.E.2d at 538; *see* VA. CODE ANN. § 18.2-58 (Michie Supp. 2003) (providing the statutory definition for robbery); VA. CODE ANN. § 18.2-53 (Michie 1996) (providing the statutory definition for felony stabbing); VA. CODE ANN. § 18.2-90 (Michie Supp. 2003) (providing the statutory definition for burglary).

3. *Jackson*, 587 S.E.2d at 538.

4. *Id.*

object sexual penetration.[5] At sentencing, the jury found the statutory aggravating factor of vileness and recommended a sentence of death for the capital murder of Kaiser.[6] The trial court, after reviewing the pre-sentence report, additional mitigating evidence presented by Jackson, and arguments of counsel, adopted the jury's recommendation and sentenced Jackson to death.[7] The Supreme Court of Virginia consolidated the statutory automatic death sentence review, Jackson's appeal of the capital murder conviction, and Jackson's appeal of his noncapital convictions.[8]

II. Holding

The Supreme Court of Virginia first held that *Richardson v United States*[9] does not require a jury to specify the element or elements of the vileness aggravating factor upon which its decision was based.[10] Second, the court found that the trial court properly allowed the prosecution to cross-examine the defense DNA expert regarding his refusal to meet with his prosecution counterpart.[11] Third, the court held that the trial court properly excluded testimony offered by Jack-

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5. *Id.*

6. *Id.* The jury recommended life imprisonment plus twenty-five years and a $100,000 fine for the remaining noncapital offenses. *Id.*

7. *Id.*

8. *Id.*; *see* VA. CODE ANN. § 17.1-313 (Michie Supp. 2003) (providing the procedures for the mandatory review of death sentences in Virginia). Jackson raised fifteen claims on appeal to the Supreme Court of Virginia. *Jackson*, 587 S.E.2d at 538. The court rejected four of Jackson's claims on the ground that they were previously decided and rejected another three claims on the ground that they were procedurally defaulted at trial. *Id.* Jackson raised several other claims as follows: (1) his rights under *Miranda v Arizona*, 384 U.S. 436, 471 (1966), were violated when the trial court refused to suppress his confession; (2) the trial court erred in not disqualifying a juror tainted by newspaper accounts of the case; (3) jurors were improperly challenged based on their race in violation of *Batson v Kentucky*, 476 U.S. 79, 89 (1986); (4) the trial court erred in not allowing Jackson to present " 'negative evidence' of good character"; and (5) the jury's verdict was the result of passion, prejudice, or some other arbitrary factor and the sentence of death was disproportionate when compared with similar cases. *Id.* at 538–46. All of these claims were rejected by the Supreme Court of Virginia and will not be further discussed in this case note. For a discussion and analysis of the issues surrounding a *Batson* challenge, *see generally* Priya Nath, Case Note, 15 CAP. DEF. J. 407 (2003) (analyzing Miller-El v. Cockrell, 123 S. Ct. 1029 (2003)). For a discussion of the Supreme Court of Virginia's proportionality review procedures, *see generally* Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 533 (2004) (analyzing (Jerry) Jackson v. Commonwealth, 590 S.E.2d 520 (Va. 2004)); Terrence T. Egland, Case Note, 16 CAP. DEF. J. 591 (2004) (analyzing Powell v. Commonwealth, 590 S.E.2d 537 (Va. 2004)); and Jessie A. Seiden, Case Note, 16 CAP. DEF. J. 625 (2004) (analyzing Palmer v. Clarke, 293 F. Supp. 2d 1011 (D. Neb. 2003)).

9. 526 U.S. 813 (1999).

10. *Jackson*, 587 S.E.2d at 541; *see* Richardson v. United States, 526 U.S. 813, 819–20 (1999) (holding that the violations required for conviction of participating in a continuing criminal enterprise were elements of the crime upon which the jury must agree).

11. *Jackson*, 587 S.E.2d at 543.

son's expert witness concerning "false confessions."[12] Finally, the court rejected Jackson's claim that the evidence was insufficient to convict him.[13] The court affirmed Jackson's conviction of capital murder and his sentence of death.[14]

III. Analysis

A. Jury Polling

Jackson claimed that the trial court erred in denying his pre-trial motion to have the jury polled to identify "which statutory element(s) established vileness," whether it be torture, depravity of mind, or aggravated battery.[15] Jackson argued that the trial court should have allowed jury instructions and a verdict form that required the jury to reach a unanimous verdict on one or more of the statutory vileness elements.[16] Jackson relied on *Richardson*, arguing that when death is imposed, due process requires unanimity as to the statutory elements of the aggravating factor of vileness.[17]

The *Jackson* court found that in *Clark v. Commonwealth*[18] the Supreme Court of Virginia "rejected the proposition that the jury must identify the element or elements of the vileness factor upon which it based its decision."[19] The *Jackson* court noted that "*Richardson* involved a prosecution for engaging in a continuing criminal enterprise" and that the *Richardson* Court distinguished between its holding and a case in which "the jury must unanimously find force as an element of the crime of robbery, but whether the force is created by the use of a gun or a knife is not an element of the crime and therefore does not require jury unanimity."[20] The *Jackson* court found that torture, depravity of mind, and aggravated battery were not elements of the vileness aggravating factor, but rather " 'several

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12. *Id.* at 544.

13. *Id.* at 545.

14. *Id.* at 546.

15. *Id.* at 541 (internal quotation marks omitted).

16. *Id.*; *see* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (providing that a defendant shall not be sentenced to death unless the jury finds that "his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim").

17. *Jackson*, 587 S.E.2d at 541; *see* VA. CODE ANN. § 19.2-264.2 (providing for the jury to find that an offense "involved torture, depravity of mind or an aggravated battery" in order to find the vileness predicate satisfied); *Richardson*, 526 U.S. at 819–20 (holding that all violations constituting a charge of a continuing criminal enterprise were elements of the offense that must be agreed upon by the jury).

18. 257 S.E.2d 784 (Va. 1979).

19. *Jackson*, 587 S.E.2d at 541; *see* Clark v. Commonwealth, 257 S.E.2d 784, 792 (Va. 1979) (holding that jury unanimity as to sentence is required, but reiterating "that a jury need not specify which portion of the factor it finds in order to fulfill the requirement that a verdict be unanimous").

20. *Jackson*, 587 S.E.2d at 541 (citing *Richardson*, 526 U.S. at 817).

possible sets of underlying facts [that] make up [the] particular element.' "[21] The *Jackson* court further found that the actual element the jury was required to find unanimously was the aggravating factor of vileness, which required a showing that Jackson's actions were " 'outrageously or wantonly vile, horrible or inhuman.' "[22] The *Jackson* court concluded that the holding in *Clark* was unaffected by *Richardson* and that jury unanimity as to the torture, depravity of mind, or aggravated battery subelements in section 19.2-264.2 was not required.[23]

B. Issues Involving Experts

1. Failure to Cooperate

Jackson claimed that the trial court erred when it allowed the prosecution to cross-examine his DNA expert, Sean Weiss ("Weiss"), concerning his refusal to meet with the prosecution's DNA expert.[24] Jackson's expert questioned the DNA test results presented by the prosecution; however, Weiss conducted no independent tests of his own to refute the prosecution expert's findings.[25] During the disputed cross-examination, Weiss revealed that the Commonwealth asked him to meet with its DNA expert to discuss the DNA test results, but that he refused because "he was 'under the direction of the person that hired [him].' "[26] The Commonwealth asked Weiss if he knew that the Commonwealth had "just opened everything up, showed it, no requests having been made."[27] Jackson objected at that point and the trial court overruled his objection.[28]

Jackson argued that the Commonwealth's questioning was misleading to the jury because "it implied that Jackson did not adhere to the rules of discovery."[29] The Commonwealth responded that it was showing Weiss's lack of "credibility, potential bias and the basis of his opinions."[30] The court found that under *Goins v Commonwealth*,[31] the bias of a witness "based on a relationship to a party in the case" is a proper subject for cross-examination and the decision to limit such

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21. *Id.* (alteration in original) (quoting *Richardson*, 526 U.S. at 817).

22. *Id.* (quoting VA. CODE ANN. § 19.2-264.2).

23. *Id.*

24. *Id.* at 543.

25. *Id.*

26. *Jackson*, 587 S.E.2d at 543.

27. *Id.* (internal quotation marks omitted).

28. *Id.*

29. *Id.* Jackson also argued that the questions violated his due process rights; however, the Supreme Court of Virginia refused to consider that argument because Jackson did not make it at trial. *Id.* at 543 n.3 (citing VA. SUP. CT. R. 5:25).

30. *Id.*

31. 470 S.E.2d 114 (Va. 1996).

cross-examination is left to the trial court's discretion.[32] The court found that Weiss's refusal to meet with the prosecution's DNA experts, due to his relationship with the defense, "could have reflected bias."[33] The court concluded that the trial court did not err in overruling Jackson's objection.[34]

2. *Expert Testimony on False Confessions*

Jackson argued that the trial court erred in refusing to allow Jackson to ask his expert witness, Dr. Steven C. Ganderson ("Dr. Ganderson"), " 'a hypothetical question about false confessions.' "[35] The court relied on *Pritchett v. Commonwealth*[36] for the proposition that expert witnesses may state opinions concerning the hypothetical effects of a defendant's mental disorder on his confession, but that the witness may not state an opinion on a particular defendant's "veracity or reliability" because that is a matter left to the jury to determine.[37] Dr. Ganderson testified about "transference," in which a person succumbs to the power of suggestion and "may say things which are untrue in an attempt to gain approval from an authority figure."[38] The trial court allowed Jackson's trial counsel to question Dr. Ganderson on the theory of transference.[39] The Commonwealth objected, however, when Jackson attempted to ascertain Dr. Ganderson's opinion concerning the veracity of Jackson's confession in light of transference theory, and the trial court sustained the objection.[40] The Supreme Court of Virginia concluded that the trial court properly relied on *Pritchett* in sustaining the Commonwealth's objection to Dr. Ganderson's testimony.[41]

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32. *Jackson*, 587 S.E.2d at 543; *see* Goins v. Commonwealth, 470 S.E.2d 114, 129 (Va. 1996) ("The bias of a witness, based on a previous relationship with a party to the case, is always a relevant subject of cross-examination."); Norfolk & W. Ry. Co. v. Sonney, 374 S.E.2d 71, 74 (Va. 1988) ("The bias of a witness is always a relevant subject of inquiry when confined to ascertaining previous relationship, feeling and conduct of the witness.").

33. *Jackson*, 587 S.E.2d at 543.

34. *Id.*

35. *Id.* at 543–44.

36. 557 S.E.2d 205 (Va. 2002).

37. *Jackson*, 587 S.E.2d at 544; *see* Pritchett v. Commonwealth, 557 S.E.2d 205, 208 (Va. 2002) ("An expert witness may not express an opinion as to the veracity of a witness because such testimony improperly invades the province of the jury to determine the reliability of a witness.").

38. *Jackson*, 587 S.E.2d at 544.

39. *Id.*

40. *Id.*

41. *Id.*

3. Motion to Strike

Jackson claimed that the trial court improperly denied his motion to strike the prosecution's evidence.[42] In particular, Jackson argued that the evidence presented by the Commonwealth was insufficient to support his conviction for three reasons: (1) "his confession was not reliable"; (2) the forensic testing on the cigarette butt was inadequate; and (3) there was no other evidence that connected Jackson to the crime scene.[43] Jackson cited two reasons why his confession was not reliable.[44] Jackson argued that "his will was overborne by the deception of the officers" and that he gave a false confession.[45] The court noted that it had previously held that Jackson's will was not overborne and also found no evidence to support Jackson's contention that the tactics used by the officers were sufficiently inappropriate to categorize Jackson's confession as involuntary.[46]

Jackson also claimed that the forensic DNA testing used to link him with the crime was not as accurate as the standard procedure typically used at the state laboratory.[47] The test used to link Jackson to the crime utilized only eight loci, of which Jackson matched six, whereas the usual state laboratory standard requires the testing of thirteen or sixteen loci.[48] Weiss indicated in his testimony that had the state procedure been used, "there was a 'possibility' that other suspects may have had more loci matches than Jackson."[49] The court stated that "Jackson's criticism of the Commonwealth's forensic testing does not change the fact that some of the loci matched his DNA."[50] The court, citing the testimony of Jackson's own expert, concluded that " 'Kent Jackson [could not] be excluded as a minor contributor.' "[51]

The court also rejected Jackson's contention that the lack of forensic evidence supported the conclusion that there was insufficient evidence to convict him.[52] The court stated that Jackson's detailed confession was corroborated by evidence of Kaiser's injuries and was, therefore, sufficient to enable the jury to

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42. *Id.* at 545.

43. *Id.*

44. *Jackson*, 587 S.E.2d at 545.

45. *Id.*

46. *Id.* The court rejected Jackson's argument that the interrogating officers overwhelmed his will and induced him to confess. *Id.* at 540–41.

47. *Id.* at 545.

48. *Id.* Blood from the toe of a sock found at the crime scene was used to connect Jackson to the crime. *Id.*

49. *Id.*

50. *Jackson*, 587 S.E.2d at 545.

51. *Id.*

52. *Id.*

find Jackson guilty beyond a reasonable doubt.[53] The court concluded that the trial court properly denied Jackson's motion to strike.[54]

IV. Application in Virginia

A. Vileness Predicate as an Element

The *Jackson* court rejected the proposition that *Richardson* requires jury unanimity on the sub-elements of the vileness aggravator; however, Jackson could have made the argument for unanimity differently and, perhaps, with greater success.[55] The Court in *Richardson* held that the jury must be instructed to reach a unanimous verdict concerning each individual violation comprising the series of violations needed to prove a continuing criminal enterprise under federal law.[56] *Richardson* is a federal statutory construction case rather than a constitutional case. The *Richardson* Court, however, noted that its construction of the federal statute avoided a constitutional issue that would have been presented by the opposite construction.[57]

Richardson stands together with *Jones v. United States*.[58] In *Jones*, the Court addressed whether a statutory factor in the federal carjacking statute, "serious bodily injury," which increased the penalty, was to be decided by the jury beyond a reasonable doubt or by the judge by a preponderance of the evidence.[59] The Court, again construing a federal statute, held that the factor was an element to be determined by the jury and again concluded that the opposite construction would raise constitutional questions.[60]

The Court constitutionalized *Jones* in *Apprendi v. New Jersey*,[61] which held that any factor that places the defendant at risk of a higher maximum sentence must, consistent with the Sixth Amendment jury trial guarantee and Fourteenth

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53. *Id.*; *see* Clozza v. Commonwealth, 321 S.E.2d 273, 279 (Va. 1984) ("When . . . the commission of the crime has been fully confessed by the accused, only slight corroborative evidence is necessary to establish the corpus delicti.").

54. *Jackson*, 587 S.E.2d at 545.

55. *Id.* at 541.

56. *Richardson*, 526 U.S. at 824; *see* 21 U.S.C. § 848(c) (2000) (defining a "continuing criminal enterprise").

57. *Richardson*, 526 U.S. at 820.

58. *See* Jones v. United States, 526 U.S. 227, 229 (1999) (holding that a federal carjacking statute defined three separate offenses rather than one "crime with a choice of three maximum penalties"); 18 U.S.C. § 2119 (2000) (defining and providing punishment for carjacking).

59. *Jones*, 526 U.S. at 231, 252; *see* 18 U.S.C. § 2119 (2000) (defining and providing punishment for carjacking).

60. *Jones*, 526 U.S. at 252 (holding that constitutional questions can be avoided "by construing § 2119 as establishing three separate offenses by the specification of distinct elements, each of which must be charged by indictment, proven beyond a reasonable doubt, and submitted to a jury for its verdict").

61. 530 U.S. 466 (2000).

Amendment due process, be found beyond a reasonable doubt by a unanimous jury.[62] The Court specifically extended *Apprendi* to capital cases in *Ring v Arizona*,[63] which held that "[c]apital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."[64]

Jones, *Apprendi*, and *Ring* stand for a simple proposition—a factor that increases the maximum penalty is an element of the more serious offense. *Apprendi* and *Ring* state the constitutional imperative that flows from that proposition, that the State must prove that element beyond a reasonable doubt to a unanimous jury.[65] In effect, there is no longer a constitutional difference between penalty-determination devices "whether the statute calls them elements of the offense, sentencing factors, or Mary Jane."[66] After these cases, a defendant prosecuted under a state statute like the federal one in *Richardson* would be constitutionally entitled to a jury determination of the violations making up the series. Conversely, a robbery defendant would not be constitutionally entitled to a jury determination of the "brute facts," such as whether the use of a knife or gun satisfied the force/intimidation element of robbery.[67]

The *Richardson* Court set out two considerations to distinguish "elements" from "brute facts"—the language and the breadth/unfairness of the statute.[68] The Court decided that the word "violation" in the continuing criminal enterprise statute implied more than a simple act or conduct; it implied an act or conduct that violates the law.[69] Further, the Court noted that a jury traditionally determines whether an act or conduct violates the law.[70] The broad range of possible violations that could be used to satisfy the statute concerned the Court in two ways: (1) it could cover up a wide range of disagreement among the jurors about

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62. Apprendi v. New Jersey, 530 U.S. 466, 476 (2000) (holding that the Fourteenth Amendment requires the extension of the *Jones* rationale to state statutes).

63. 536 U.S. 584 (2002).

64. Ring v. Arizona, 536 U.S. 584, 589 (2002).

65. *Apprendi*, 530 U.S. at 476 (holding that the Fourteenth Amendment requires that " 'any fact (other than prior conviction) that increases the maximum penalty for a crime must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt' " by the State (quoting *Jones*, 526 U.S. at 243 n.6)); *Ring*, 536 U.S. at 589 ("Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment.").

66. *Ring*, 536 U.S. at 610 (Scalia, J., concurring).

67. *Richardson*, 526 U.S. at 817.

68. *Id.* at 818–20.

69. *Id.* at 818; *see* 21 U.S.C. § 848(c) (2000) (stating that "a person is engaged in a continuing criminal enterprise if . . . he violates any provision of this subchapter . . . and . . . such violation is a part of a continuing series of violations of this subchapter").

70. *Richardson*, 526 U.S. at 818.

what the defendant did or did not do; and (2) by avoiding detail the jury might decide that smoke equals fire.[71]

In light of *Ring*, *Apprendi*, *Jones*, and *Richardson*, the Virginia vileness factors should be considered elements to be proven beyond a reasonable doubt. The first factor is "torture." Torture is "[t]he infliction of intense pain to the body or mind to punish . . . or to obtain sadistic pleasure."[72] There are two components to this definition— act and mental state. The act is infliction of pain; the mental state is the actor's purpose. Thus, "torture" is defined precisely as a crime— a "violation"— is. It is defined by *actus reus* and *mens rea*. In a torture case, the Commonwealth might present evidence that the victim was burned with cigarettes and had several bones broken. These are the brute facts from which the jury, some relying on the burns and others on the broken bones, could find the *actus reus*— infliction of pain— and from that infer the *mens rea*— for sadistic pleasure.[73] A jury deciding whether the defendant tortured his victim is performing the quintessential jury guilt/innocence function. It is assessing the brute facts to determine if the defendant did the forbidden acts with the requisite state of mind.

The second factor is "depravity of mind." Depravity of mind is "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."[74] Juries regularly determine malice and premeditation and do so by examining all of the "brute facts" and deciding whether those facts dictate a conclusion that the defendant must have acted with malice and/or premeditation. In a depravity-of-mind case involving a rape and murder, the Commonwealth might present evidence that the defendant had written out his plan to abduct, torment, rape, and kill the victim and that he gathered items (rope, duct tape, handcuffs) with which to accomplish his crimes. There are brute facts from which the jury, some relying on the plan and others on the "rape kit," could infer that the defendant's mental state surpassed ordinary premeditation. This jury is performing the quintessential guilt/innocence jury function. It is assessing the brute facts to determine if the defendant's mental state meets a legal standard.

The third factor is "aggravated battery." Aggravated battery is "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder."[75] Aggravated battery bears the same relation to battery as aggravated sexual battery bears to sexual battery.[76] A jury

71. *Id.* at 819.

72. BLACK'S LAW DICTIONARY 1498 (7th ed. 1999).

73. To the extent "for sadistic pleasure" might be described as motive rather than intent, the distinction is constitutionally irrelevant. *Apprendi*, 530 U.S. at 491–94.

74. Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978).

75. *Id.*

76. *See* VA. CODE ANN. § 18.2-67.3 (Michie Supp. 2003) (defining aggravated sexual battery);

deciding whether the battery that caused death is an aggravated battery is performing the same task as that performed by a jury deciding whether a sexual battery is an aggravated sexual battery. In the latter case, the jury must decide whether the defendant's conduct met the legal standards set out in section 18.2-67.3 of the Virginia Code.[77] For example, the Commonwealth might present evidence that the defendant threatened to shoot and stab the victim. The jury, some relying on one threat and some on the other, could find that the defendant "threatene[d] to use a dangerous weapon" and convict him of aggravated sexual battery.[78] In an aggravated battery case, the Commonwealth might present evidence that the victim suffered multiple blows to the head and was shot several times. These are the brute facts from which the jury, some relying on the blows and others on the gunshots, must determine the legal fact— whether the battery was qualitatively and quantitatively more culpable than ordinary death-dealing batteries. This jury will be performing the quintessential guilt/innocence function; it will be deciding whether the defendant committed the more serious or less serious form of battery.

In each instance, the jury determining a vileness factor will be doing exactly what a federal jury must do in determining the existence of a "violation." Each of the vileness factors, therefore, is an element and the jury must unanimously find the vileness elements. In addition, the breadth of the vileness factors is at least as great as the "violation" in *Richardson*. The *Richardson* Court identified ninety federal statutes that included qualifying violations. But, at the very least, there was a precise statutory definition for each of those violations.

The vileness factors, even as restated in *Smith*, are entirely open-ended. They invite the jury to decide that the case is an "awful" one and find vileness without textual regard to any of the three vileness factors. Such a decision, of course, is a direct violation of all constitutional death penalty jurisprudence since *Furman v Georgia*.[79] To ensure constitutional reliability in the sentencing process, the jury must be required to find unanimously the vileness elements.

VA. CODE ANN. § 18.2-67.4 (Michie Supp. 2003) (defining sexual battery).

77. *See* VA. CODE ANN. § 18.2-67.3 (defining aggravated sexual battery).

78. *See* VA. CODE ANN. § 18.2-67.3(A)(2)(c) ("An accused shall be guilty of aggravated sexual battery if he or she sexually abuses the complaining witness, and . . . [t]he act is accomplished against the will of the complaining witness, by force, threat or intimidation . . . and . . . [t]he accused uses or threatens to use a dangerous weapon.").

79. Furman v. Georgia, 408 U.S. 238, 239 (1972) (per curiam) (holding the Georgia death penalty statutory scheme unconstitutional); *see* Woodson v. North Carolina, 428 U.S. 280, 305 (1976) (holding that processes in capital cases must provide greater sentencing reliability than that acceptable in non-capital cases); *see also* Hill v. Commonwealth, 568 S.E.2d 673, 676 (Va. 2002) (holding that in non-capital cases "neither the defendant nor the Commonwealth has a constitutional or statutory right to question a jury panel about the range of punishment that may be imposed upon the defendant," although such questioning is allowed in capital cases).

B. *Bias Based on Prior Relationship*

The *Jackson* court found the cases of *Goins* and *Norfolk & Western Railway Co. v. Sorrey*[80] analogous to the situation presented by the cross-examination of the defense DNA expert, Weiss.[81] However, these cases are not clearly applicable to Jackson's circumstances and most likely could have been distinguished. In both *Goins* and *Norfolk & Western Railway Co.*, the trial court allowed cross-examination to prove that a witness was biased because of a *previous* relationship with either of the litigating parties.[82] In *Jackson*, the court appointed Weiss as the defense DNA expert *during* trial. Clearly, any bias towards the defense occurred after the trial began and could not be viewed as a previous relationship for purposes of *Goins* and *Norfolk & Western Railway Co.* The Supreme Court of Virginia declined to state the "previous" element of the relationship when restating the rule from *Goins* and, thus, found that Weiss's refusal to meet with the Commonwealth's expert based on the defense's instruction was sufficient to warrant an exploration of his credibility based on the relationship.[83] Defense counsel should be aware of how to distinguish the cases relied on for allowing cross-examination in this case in order to make an effective objection.

C. *Proper Formulation of a* Pritchett *Hypothetical Question*

The *Jackson* court cited *Pritchett* in excluding Dr. Ganderson's testimony in response to a hypothetical question concerning the reliability of Jackson's confession.[84] *Pritchett* held that the exclusion of expert testimony concerning Pritchett's low I.Q. and the correlation between a low I.Q. and false confessions because of compliance and interrogative suggestibility was reversible error.[85] The *Pritchett* court found that voluntariness of a confession is to be determined by the trial court, whereas the reliability of a confession is to be determined by the jury.[86] *Pritchett* prohibits testimony by an expert about the veracity of a particular defendant's confession in light of a particular affliction but not testimony about

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80. 374 S.E.2d 71 (Va. 1988).

81. *Jackson*, 587 S.E.2d at 543; *see Goins*, 470 S.E.2d at 129 ("The bias of a witness, based on a *previous* relationship with a party to the case, is always a relevant subject of cross-examination." (emphasis added)); *Norfolk & W. Ry. Co.*, 374 S.E.2d at 74 ("The bias of a witness is always a relevant subject of inquiry when confined to ascertaining *previous* relationship, feeling and conduct of the witness." (emphasis added)).

82. *See Goins*, 470 S.E.2d at 129 (allowing cross-examination of witness to reveal a prior business relationship with the defendant); *Norfolk & W. Ry. Co.*, 374 S.E.2d at 74 (allowing cross-examination of an expert medical witness that had treated plaintiff's attorney's clients previously).

83. *Jackson*, 587 S.E.2d at 543.

84. *Id.* at 544.

85. *Pritchett*, 557 S.E.2d at 206–08.

86. *Id.* at 208 (citing Crane v. Kentucky, 476 U.S. 683, 688 (1986)).

the reliability of confessions given by defendants with similar afflictions.[87] In order for defense counsel to elicit the appropriate response to a hypothetical question concerning the reliability of a confession, several steps must be taken prior to asking the ultimate question: (1) the condition that rendered the confession unreliable, such as mental retardation, must be identified; (2) the effects of the condition must be established; (3) it must be concluded that the defendant has the condition in question; and (4) a hypothetical question must be posed that carefully draws out the correlation between the condition and a propensity to give false confessions.

In *Jackson*'s case, step one was accomplished when Dr. Ganderson testified about "transference" theory leading to Jackson's false confession.[88] Dr. Ganderson properly testified as to its effects generally, such as rendering a subject more prone to suggestion in order to gain approval from the interrogator, which satisfied step two.[89] However, he did not offer testimony concerning Jackson's reasons for being susceptible to transference.[90] In order to make the logical step of understanding how susceptibility to transference leads to false confessions, the jury would have needed more evidence in terms of an actual condition rendering Jackson susceptible. Evidence of a low I.Q., mental retardation, or other psychological problems would have bolstered the third step in the *Pritchett* analysis.

If it is assumed that the third step was satisfied and it was established that Jackson was susceptible to transference, then the fourth step must be approached with care. In *Jackson*, the hypothetical question would have been allowed had it been phrased in a manner that did not require an assessment by Dr. Ganderson of Jackson's veracity. Dr. Ganderson could have responded to a question that inquired about how a person with Jackson's affliction would react to interrogative questions but not to a question concerning Dr. Ganderson's opinion of Jackson's veracity in light of transference theory. A simple change in phrasing can salvage otherwise inadmissible testimony.

V. Conclusion

Jackson rejected the rationale in *Richardson*, continued the holding in *Clark*, and refused to require unanimity as to the vileness elements of section 19.2-264.2.[91] However, combining *Richardson* with the holdings in *Jones*, *Apprendi*, and

87. *Id.*

88. *Jackson*, 587 S.E.2d at 544.

89. *Id.*

90. *Id.*

91. *See* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (providing that a defendant shall not be sentenced to death unless the jury finds that "his conduct in committing the offense for which he stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim").

Ring should yield the opposite result. *Jackson* also illustrates the importance of mastering the common law evidence rules in Virginia to avoid the impeachment of favorable witnesses. Finally, *Jackson* highlights the importance of the appropriate phrasing of a question concerning the reliability of confessions in light of the holding in *Pritchett*.

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