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THE CONSTITUTIONAL DEFICIENCIES OF VIRGINIA'S "VILENESS" AGGRAVATING FACTOR

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Court held that the jury unanimously found the existence of both predicates which justify the death penalty (future dangerousness and vileness) even though only one was necessary to sustain the death penalty. The court held that the jury's findings of future dangerousness and vileness were supported by the evidence.

The court failed to address the constitutionality of the language of the verdict form on its face. The wording of the verdict form leaves open the possibility of the jury unanimously finding either future dangerousness or vileness, but not unanimously agreeing as to which predicate exists. The wording of the verdict form also leaves open the possibility that a jury will unanimously find vileness but fail to agree on the elements of the vileness: torture, depravity of mind, or aggravated battery to the victim, each of which has been found independently sufficient to support a death sentence.

ANALYSIS

The importance of *Hoke* to attorneys in Virginia may be seen in several different issues. First, *Hoke* underscores the paramount importance of preserving issues on the record at trial. By failing to object, the defense waived the right to raise three possibly meritorious issues on appeal. The court preserved the verdict form issue by ruling on it voluntarily. Defense counsel should be careful not to summarily forfeit available objections just because the objection will most probably be overruled, as illustrated by the verdict form issue. Absent an objection, claims later determined by federal courts to be meritorious will be lost.

Virginia attorneys should also learn from this case to assess their cases as objectively as possible. The Virginia capital murder statute seems to be narrowly drawn. Nevertheless, the Supreme Court of Virginia has construed the statute very broadly. In spite of testimony of consensual sex followed by homicide, the court found evidence sufficient to support rape. Hoke's ransacking of Stell's apartment after murdering her was seen as sufficiently connected to the murder to support a finding of guilt of murder during commission of robbery while armed with a deadly weapon, again supporting a capital conviction. The court also found that there was sufficient force beyond that inherent in rape to support a conviction of abduction. These findings should put Virginia defense attorneys on notice that the capital murder statute will be construed very broadly.

Summary and analysis by: Kerry D. Lee

THE CONSTITUTIONAL DEFICIENCIES OF VIRGINIA'S "VILENESS" AGGRAVATING FACTOR

By: Juliette A. Falkner

I. As applied in Virginia the vileness predicate in Va. Code Ann. §19.2-264.2 is unconstitutional.

For an individual to receive a sentence of death in Virginia, the jury must find beyond a reasonable doubt the probability that: 1) the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society or; 2) 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 an aggravated battery to the victim." Va. Code Ann. § 19.2-264.2 (1983). All of these requirements constitute the "aggravating factors" of Virginia's death penalty scheme. The first factor is known as the "future dangerousness" predicate. Facially, future dangerousness is constitutional. *Jurek v. Texas*, 428 U.S. 262, 274, 96 S. Ct. 2950, 2957, 49 L. Ed. 2d 929, 940 (1988) (holding Texas capital sentencing scheme which allowed a jury to consider "future dangerousness" was not unconstitutional); *Barefoot v. Estelle*, 463 U.S. 880, 103 S. Ct. 3383, 77 L. Ed. 2d 1090 (1983). The second factor is known as the "vileness" predicate. On its face and as applied in Virginia the "vileness predicate" in § 19.2-264 is unconstitutional. *See Maynard v. Cartwright*, 486 U.S. 356, ____, 108 S. Ct. 1853, 1859, 100 L. Ed. 2d 372, 381 (1988) (unless the trial court communicates a limiting instruction to the jury regarding the meaning of statutory "vileness factors," the jury's discretion is unguided); *Godfrey v. Georgia*, 446 U.S. 420, 428, 100 S. Ct. 1759, 1765, 64 L. Ed. 2d 398, 406 (1980) (standing alone the words "outrageously or wantonly vile, horrible and inhuman" fail to limit the jury's discretion).

The purpose of aggravating factors is twofold under the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. First, aggravating factors narrow the class of death eligible defendants in a capital trial. Second, aggravating factors channel the discretion of the jury to prevent the arbitrary and capricious imposition of the death penalty:

> [A]n aggravating circumstance must genuinely narrow the class of persons elibible for the death penalty and must reasonably justify the imposition of a more severe sentence on the defendant compared to others found guilty of murder....[S]tatutory aggravating circumstances play a constitutionally necessary function at the stage of legislative definition: they circumscribe the class of persons eligible for the death penalty.

Zant v. Stephens, 462 U.S. 862, 877-78, 103 S. Ct. 2733, 2742-44, 77 L. Ed. 2d 235, 249-250 (1983); *see also*, Rosen, *The "Especially Heinous" Aggravating Circumstance in Capital Cases—The Standardless Standard*, 64 N.C.L. Rev. 978-79 (1986) (discussing the general purpose of aggravating factors). Thus, guiding and limiting the capital sentencer's discretion "so as to minimize the risk of wholly arbitrary and capricious action" is a fundamental constitutional requirement. *Gregg v. Georgia*, 428 U.S. 153, 189, 96 S. Ct. 2909, 2940-41, 49 L. Ed. 2d 859 (1976); *see also Maynard*, 486 U.S. at ____, 108 S. Ct. at 1858. As applied in Virginia, the vileness predicate in Va. Code Ann. § 19.2-264.2 fails to fulfill this constitutional requirement.

In *Godfrey v. Georgia*, 446 U.S. at 420, the judge instructed the jury that a death sentence could be imposed if the jury found the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to the Victim." *Id.* at 429. Based on this instruction, the jury sentenced Godfrey to death. *Id.* The United States Supreme Court held "there is nothing in these few words, standing alone that implied any inherent restraint on the arbitrary and capricious infliction of the death sentence." *Id.*; *see also, Maynard*, 486 U.S. at ____, 108 S. Ct. at 1853. The *Maynard* Court found that "especially heinous, atrocious and cruel" means the same as "outrageously or wantonly vile, horrible or inhuman" as used in *Godfrey*. *Id.* at ____, 108 S. Ct. 1859.

Virginia's list of aggravating factors parallels the language found unconstitutional in its application in *Godfrey* and *Maynard*. *See* Va. Code Ann. § 19.2-264.2. However, the Supreme Court's rulings in *Godfrey* and *Maynard* also held that such factors may be Constitutional if: 1) the state places a constitutionally acceptable limiting construction on the term; *Godfrey*, 446 U.S. at 429; and 2) the judge communicates this limiting construction to the jury. *Id.; Mills v. Maryland*, 486 U.S. 367, 108 S. Ct. 1860, 100 L. Ed. 2d. 384 (1988); or 3) the reviewing court strikes down death sentences arbitrarily imposed under this factor. The Supreme Court of Virginia insists that § 19.2-264.2 satisfies the above-mentioned criteria because the words forming the vileness predicate have common meanings.

The Supreme Court of Virginia has held that "depravity of mind" and "aggravated battery" have a common meaning and provide the objective standards necessary to guide a jury's discretion. *Stockton v. Commonwealth*, 227 Va. 124, 134-45, 314 S.E.2d 371, 378 (1984) (holding these terms do not give a jury "unbridled discretion."); *Clark v. Commonwealth*, 220 Va. 201, 211, 257 S.E.2d 784, 790 (1979); *see also, Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 148-49 (1978). In *Smith* the court stated:

> "...[W]e construe the words 'depravity of mind' as used here to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation. Contextually, we construe the words 'aggravated battery' to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder." *Id.*

A definition of these terms in a jury instruction was determined not to be necessary. *Clark*, 220 Va. at 211, 257 S.E.2d at 790. Such reasoning is inconsistent with the rationale of *Maynard* and *Godfrey* which held that these words standing alone failed to restrain the "arbitrary and capricious infliction of the death penalty." *Godfrey*, 420 U.S. at 428-29; *see also Maynard*, 486 U.S. at ___, 108 S. Ct. at 1859.

Despite the assertion that these words standing alone have a commonly accepted meaning, the Supreme Court of Virginia has recognized that the "generally accepted" meanings of the words may not be the best definitions. *Clark*, 420 Va. at 211, 257 S.E.2d at 790. For example, the trial judge in *Clark* allowed the defendant to submit alternative definitions to the "accepted" meanings of these terms. *Id.* The supreme court reasoned that the common definitions did not mean "these definitions were the best or only ones possible." *Id.* It should be noted that Clark's counsel failed to provide the court with any alternative definitions. *Id.*

The court's assertion that there are better or alternative definitions suggests that there is no generally accepted meaning of these words. If "alternative" or "better" definitions exist, it is difficult to say that understanding of their meaning is "common." Absent a clear limiting definition of these words in each capital case the jury's discretion is unguided. *See Godfrey*, 446 U.S. at 428-29. Generally Virginia trial courts give a jury no definition of these words. *See Clark*, 420 Va. at 211, 257 S.E.2d 790; *see* Va. Model Jury Instruction No. 34.120 (1988).

Consequently, Virginia's vileness predicate on its face and as applied fails to guide the jury's discretion to prevent the arbitrary and capricious infliction of the death penalty. Further, the Supreme Court of Virginia fails to overturn death sentences based on these aggravating factors, even in cases where no limiting instruction is given. The result is the arbitrary and capricious imposition of the Virginia death penalty in violation of the Sixth, Eighth, and Fourteenth Amendment rights.

II. *Lowenfield v. Phelps*, 484 U.S. 231, 108 S. Ct. 546, 57 L. Ed. 2d 335 (1988) fails to save Virginia's vileness factor.

In *Lowenfield*, 484 U.S. at ___, 108 S. Ct. at 555, the defendant objected to the Louisiana capital sentencing scheme. Louisiana's scheme employs an intent "to kill or inflict great bodily harm upon more than one person" as an element to be proven at the guilt phase of a capital trial and as an aggravating factor to be proven at the sentencing phase of a capital trial. La. Rev. Stat. Ann. § 14:30(A) (3) (West 1986). 108 S. Ct. at 553-54. Lowenfield argued that Louisiana's use of these factors to determine guilt and to aggravate capital murder failed to narrow further the class of death eligible defendants in the sentencing proceeding. *Id.*. The Supreme Court held:

"Petitioner's argument that the parallel nature of these provisions requires that his sentences be set aside rests on a mistaken premise as to the necessary role of aggravating circumstances. ...The use of 'aggravating circumstances,' is not an end in itself, but a means of genuinely narrowing the class of death-eligible persons and thereby channeling the jury's discretion." 108 S. Ct. at 554.

The Court concluded that this "narrowing function" could be performed during the guilt phase of a trial or the sentencing phase of a trial. *Id.*. Using this reasoning, Louisiana's statute performed the required "narrowing function" at the guilt phase. *Id.*.

Similar to Louisiana, Virginia's capital punishment scheme narrowly defines those crimes eligible for the death sentence. Va. Code Ann. § 18.2-31 (1988); *but compare, Hoke v. Commonwealth*, 237 Va. 303, 310-11, 377 S.E.2d 595, 603 (1989) (very broadly construing three sections of the capital murder statute). Unlike Louisiana, the Virginia legislature also requires a jury to make a finding of specific aggravating factors, different from the elements of the offense, before imposing a sentence of death. Va. Code Ann. § 19.2-264.2. After the Supreme Court's decision in *Lowenfield* it is unclear whether the United States Constitution requires Virginia to have a separate list of aggravating factors.

There are three other meaningful distinctions between Louisiana's capital punishment scheme and Virginia's capital punishment scheme. First, the aggravating factors involved in *Lowenfield* were plainly Constitutional, even if duplicative of elements of the crime charged. *Lowenfield*, 484 U.S. at _____, 108 S. Ct. 554. For the reasons discussed earlier, Virginia's aggravating factors are not constitutionally applied because they fail to guide the jury's discretion according to the principles established by *Maynard* and *Godfrey*. Second, prior Supreme Court decisions hold that aggravating factors provide two purposes. The Sixth, Eighth and Fourteenth Amendments require that aggravating factors narrow the class of death eligible individuals; and aggravating factors must "justify" the imposition of the death penalty and "channel" the discretion of the jury to prevent the arbitrary and capricious application of the death penalty. *See Supra*. Third, Virginia has chosen to have aggravating factors. Even though the law may no longer require such factors, Virginia gave capital defendants a statutory right to have their sentencers consider these factors in a meaningful manner under the constitution. Virginia cannot apply this state created right arbitrarily and capriciously.

In *Turner v. Murray*, the United States Supreme Court recognized that Virginia's statute gave capital defendants the right to have the jury impose a death sentence only after considering the aggravating factors listed in § 19.2-264.2. *Turner v., Murray*, 476 U.S. 28, 34, 106 S. Ct. 1683, 1687, 90 L. Ed. 2d 27, 35 (1986). A state created right entitles an individual to Due Process protection under the Fourteenth Amendment to the United States Constitution. *Ford v. Wainwright*, 477 U.S. 399, 414-16, 106 S. Ct. 2595, 91 L. Ed. 2d 335, 349-50 (1985) (holding that a state created right may not violate the due process requirements of the Constitution). "A person's liberty

is equally protected even when the liberty itself is a statutory creation of the State. The Touchstone of Due Process is protection of the individual against arbitrary action of government." *Wolff v. McDonnell*, 418 U.S. 539, 558, 94 S. Ct. 2963, 2976, 41 L. Ed. 2d 935, 952, *citing, Dent v. West Virginia*, 129 U.S. 114, 123, 9 S. Ct. 231, 233, 32 L. Ed. 2d 623, 626 (1889). Thus Virginia has a constitutional duty to protect against the arbitrary and capricious application of the aggravating factors in § 19.2-264.2 by the sentencing body.

The irreversible nature of the death penalty makes it even more imperative that the accused be protected from arbitrary action of the government. *See, Booth v. Maryland*, 482 U.S. 496, 107 S. Ct. 2529, 96 L. Ed. 2d 944 (1987) (holding the "unique nature of the death penalty required additional protection during pretrial, guilt and sentencing phases); *Lockett v. Ohio*, 438 U.S. 586, 604 (1978); *Woodson v. North Carolina*, 428 U.S. 280 (1976). Hence, the "... Constitution places special constraints on the procedures used to convict an accused of a capital offense and sentence him to death." *Murray v. Giarrantano*, 109 S. Ct. 2765, 106 L. Ed. 2d. 713 (1989); *See also, Beck v. Alabama*, 447 U.S. 625, 100 S. Ct. 2382, 65 L. Ed. 2d 392 (1980) (trial judge must give jury the option to convict of a lesser offense; *Lockett*, 438 U.S. at 604 (jury must be allowed to consider all of a capital defendant's mitigating evidence). Therefore the severe and irreversible nature of the death penalty requires Virginia judges and attorneys to guide and limit the sentencers' discretion in applying the "vileness factors."

Whether Virginia's "vileness factors" are a federal requirement or a matter of state legislative choice, these factors are unconstitutional as applied in Virginia.

Restrictions on the State's Use of Mental Health Experts in Capital Trials

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There has been some question in recent years whether/under what circumstances the prosecution in a capital murder trial might use psychiatric[1] testimony to support its case at the penalty phase that the defendant should receive the death penalty. To the casual observer, it might appear that the matter was resolved by the United States Supreme Court in its 1983 opinion in *Barefoot v. Estelle.* [2] It was not, however.

Barefoot concerned psychiatric testimony given in response to hypothetical questions posed by the prosecution at the penalty phase of defendant Thomas Barefoot's capital murder trial in Texas. Neither of the psychiatrists who appeared for the state had personally examined Barefoot, yet both testified that, assuming the truth of the statements contained in the prosecution's hypotheticals, Barefoot was a "sociopath" who was not amenable to treatment and who would commit acts of violence in the future if given a chance. Under Texas law at that time, the trier of fact was required to impose the death penalty on a finding of two aggravating factors: (1) that the defendant killed deliberately, and (2) that the defendant would probably commit further acts of violence in the future.

Barefoot was sentenced to death. On appeal, he argued that, given (1) the law's heightened concern for reliability in capital case decision-making and (2) the patent unreliability of psychiatric dangerousness prediction—an unreliability well-documented in the psychiatric literature[3] and forcefully attested to by the American Psychiatric Association in its amicus brief in his case—the state's introduction of psychiatric testimony on the question of his dangerousness violated the Eighth and Fourteenth Amendments to the Constitution. The Supreme Court, however, was not impressed. Writing for the majority, Justice White observed, "[i]f it is not impossible for even a lay person sensibly to arrive at that conclusion [that a defendant is dangerous], it makes little sense, if any, to suggest that psychiatrists, out of the entire universe of persons who might have an opinion on the issue, would know so little about the subject that they should not be permitted to testify." Justice White suggested that concerns about the unreliability of prediction testimony properly go to the weight to be accorded such testimony, not to its admissibility: "We are unconvinced . . . that the adversary process cannot be trusted to sort out the reliable from the unreliable evidence and opinion about future dangerousness . . . ."[4]

The opinion of the Court in *Barefoot*, of course, was concerned solely with questions of constitutional law. The Court did not resolve whether the psychiatrists' testimony satisfied the requirements of Texas law governing the admissibility of expert opinion testimony. Thus, while perhaps not constitutionally objectionable, psychiatric testimony on the question of future dangerousness might be objectionable on state evidence law grounds. Certainly in any state that recognizes the *Frye* [5] test for the admissibility of scientific evidence—a test requiring not only that the witness have specialized knowledge or skills "beyond the ken of the lay person" but also that the subject matter of the testimony have gained general acceptance in the scientific community—psychiatric predictions of future violence would be highly suspect. Even in Virginia, where the *Frye* test recently was rejected in favor of a test speaking more generally in terms of "reliability,"[6] a good argument can be made that dangerousness predictions should be excluded.[7] There can be no guarantee of that such an argument will prevail in a given case, however. Indeed, as a matter of practice, psychiatric predictions of future dangerousness are heard in courtrooms every day.[8]

Fortunately, it should rarely be necessary to resort to the evidentiary objection when the prosecution offers psychiatric evidence in aggravation. Indeed, in the usual case—one in which the psychiatrist's opinion is based on a personal examination of the defendant—a winning objection ordinarily can be made on Fifth, Sixth, or Fourteenth Amendment grounds, or, in Virginia, on statutory grounds.

The United States Supreme Court recognized in *Estelle v. Smith*[9] that Fifth Amendment protection must be accorded a defendant at the penalty phase of a capital trial. The defendant in *Estelle* was sentenced to death on the strength of a psychiatrist's prediction that he would be violent in the future if permitted to live. The psychiatrist's opinion was based on an evaluation he performed prior to trial to assess the defendant's competency to stand trial. The psychiatrist did not warn the defendant that the evaluation might be used to address the issue of future dangerousness. Declaring the psychia-