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# LITIGATING THE "VILENESS" FACTOR IN VIRGINIA

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serious threat to society," and (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 aggravated battery to the victim." Va. Code Ann. § 19.2-264.4C (1990). The law of relevancy limits the prosecution to introducing only evidence which would tend to make more likely that one of those two statutory factors exist. The court summarily concluded that the fact that Quesinberry's weapon was stolen is admissible to show his propensity to be armed. Likewise, the court concluded that the existence of a factor which mitigates the crime under statute is admissible in support of the death penalty.

Where evidence of questionable relevancy is known to exist, attorneys should seek to exclude the evidence pretrial by motions in limine and objections. The courts seem to be more willing to admit questionable evidence at the penalty phase, and the appellate courts are hesitant to find error when viewing the sufficiency of the evidence as a whole. A pretrial ruling on the relevancy of an item may receive more favorable treatment, at trial or on appeal.

### C. Refusal to Allow Parole Ineligibility Information

The court also refused to allow evidence that a life sentence would mean ineligibility for parole for at least 30 years. The duration of the defendant's stay in prison under a life sentence is almost certainly relevant to counter an argument of the defendant's "future dangerousness" under Virginia Code Section 19.2-264.4C. Additionally, the court's ruling deprives the defendant of the right under *Lockett* to present any evidence which could mitigate the penalty. Many jurors may hold the mistaken view that a life sentence would allow release in ten or fewer years. *See* Paduano & Stafford Smith, *Deathly Errors: Juror Misperceptions Concerning Parole in the Imposition of the Death Penalty*, 18 Colum. Hum. Rts. L. Rev. 211, 221-22 & nn. 30-34 (1987). As a result, the temptation exists to impose the stricter penalty (in this scenario, death) simply because the alternative is considered too lenient. The information about the actual meaning of a life sentence can clear up this misconception and make a juror more likely to impose a life sentence. In fact, a jury has been known to specifically request parole eligibility information, indicating that jurors do come to the trial with preconceived notions of what the practical effects of a life sentence might actually be. *Eaton v. Commonwealth*, 240 Va. 236, 397 S.E.2d 385 (1990). *See* case summary of *Eaton*, Capital Defense Digest, Vol. 3, No. 1, p. 22 (1990).

Clearly, the Virginia Supreme Court feels that a defendant is not entitled to clear up misconceptions of the true meaning of a life sentence. *Eaton*, 240 Va. at 248-49, 397 S.E.2d at 392-93; *Quesinberry*, 241 Va. at 371, 402 S.E.2d at 223. However, the Virginia Supreme Court is not the final arbiter of federal constitutional law. Federal courts have yet to determine this issue. As a result, attorneys should continue to request an instruction regarding the practical effects of a life sentence and assign the denial as error for federal review.

### D. Procedural Default

*Quesinberry* also illustrates the ease with which defense counsel can default or waive an issue and prevent it from ever receiving appellate review. In order to preserve an issue for review, counsel must timely object at trial, Virginia Supreme Court Rule 5:25, assign the ruling as error, Virginia Supreme Court Rule 5:27, and argue the issue on brief, Virginia Supreme Court Rule 5:17. *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990). The court's ruling in *Quesinberry* reveals just how strictly these rules are applied. Counsel objected to the court's definitions of several terms only seconds after the definitions were given. The objection came immediately after the jury retired to the jury room, perhaps so that the issue could be argued outside the jury's presence. On appeal, the court held that counsel's argument on the issue was procedurally barred because the objection at trial was untimely. *Quesinberry* at 228. In addition, the court declined to review four substantive issues because, although properly preserved at trial and assigned as error, the issues were not argued on brief. *Id.* at 222.

Attorneys should make sure that every possible issue for appellate review is properly preserved, assigned as error, and argued on brief. This is especially true considering that federal courts will refuse to hear issues which are procedurally barred under state law. *See* case summaries of *Coleman v. Thompson*, Capital Defense Digest, this issue, and *McClesky v. Zant*, Capital Defense Digest, this issue. If page limitations on appellate briefs prevent a thorough discussion on the issues, attorneys should request an extension. Where the page extension request is denied, that denial in itself should be assigned as error, briefed, and properly preserved for review. *See* case summary of *Stockton v. Commonwealth*, Capital Defense Digest, this issue.

Summary and analysis by:
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## LITIGATING THE "VILENESS" FACTOR IN VIRGINIA

BY: VICTOR A. LAGO

### INTRODUCTION

This article discusses the constitutionality of the "vileness" aggravating factor of the Virginia death penalty sentencing scheme, and suggests that the judicial application of the "vileness" factor is constitutionally infirm in two respects. First, the "vileness" factor on its face is too vague to provide meaningful guidance to the sentencer as provided by the eighth amendment.[1] Second, the Virginia courts' systematic failure in providing capital defendants with proper notice of the narrowing constructions which they intend to apply denies capital defendants due process as guaranteed by the fourteenth amendment. A defense attorney can litigate pretrial for the proper application of the "vileness" factor to generate valid claims for appeal and to insure that the Virginia courts and the Commonwealth apply the factor in a constitutional manner.

### THE VIRGINIA "VILENESS" FACTOR IS UNCONSTITUTIONALLY VAGUE

In the landmark United States Supreme Court case, *Furman v. Georgia*, the Court held that states could not impose the death penalty under sentencing procedures that created a substantial risk that punishment could be inflicted in an arbitrary and capricious manner.[2] The Court required that capital sentencing schemes provide a meaningful basis for distinguishing the few cases in which a death penalty is imposed from the many cases in which it is not.[3]

Following *Furman*, state legislatures attempted to formulate death penalty statutes which guided sentencing discretion by permitting a death sentence only on a finding of certain aggravating factors which made the offender more culpable than others that committed similar crimes. In fashioning these aggravating factors many states found guidance in the Model Penal Code, which provided a template of aggravating factors.[4]

Section 210.6(3)(n) of the Model Penal Code included a "vileness" factor. Under the Model Penal Code rubric, if the murder was "especially heinous, atrocious or cruel, manifesting exceptional depravity," a state could impose the death sentence.[5] The drafters of the Model Penal Code first recognized that the degree of ruthlessness involved in a killing, and the perpetrator's intent to commit more violence than necessary to kill a victim, could be a "rational" classification for the application of the severest of all criminal penalties.

Following the Model Penal Code template, many states introduced the "vileness" aggravating factor into their death penalty sentencing schemes. Georgia's capital murder scheme first passed the constitutional standards set out in *Furman*. In *Gregg v. Georgia* the United States Supreme Court upheld Georgia's capital sentencing scheme, which included a "vileness" factor among its statutory aggravating factors.[6] The Supreme Court did not specifically address the vagueness of the Georgia "vileness" factor. Nevertheless, in blessing the statute, the Court noted that if a state wished to authorize capital punishment, it had a constitutional responsibility to tailor and apply its law in a manner that avoided the arbitrary and capricious infliction of the death penalty.[7] The Court required that death penalty statutes channel the sentencer's discretion by "clear and objective standards."[8] Thus, even at this early point in modern capital murder jurisprudence the Supreme Court expressed concern that an aggravating factor could be too vague to limit the discretion of the sentencer as to exactly what kind of activity fell within the aggravating factor's definition. In this regard, a "vileness" factor posed a major dilemma because the elements of the factor used equivocal terms that could apply to any killing.

In *Godfrey v. Georgia*, the Supreme Court revisited the Georgia death penalty statute in 1980, to test the constitutionality of the Georgia "vileness" factor.[9] The statute provided that the sentencer could impose the death penalty upon a finding that the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim".[10] The Supreme Court found the application of the "vileness" factor unconstitutionally vague in *Godfrey* because nothing in the words of the factor, standing alone, implied any inherent restraint on sentencer's imposition of the death sentence.[11] Any person of ordinary sensibility could fairly characterize every murder as "outrageously or wantonly vile, horrible or inhuman".[12]

In Georgia death penalty cases under the "vileness" factor prior to *Godfrey*, the trial courts correctly channeled the jury's discretion by providing narrowing constructions, i.e., definitions of each vague statutory term.[13] In prior cases the Georgia Supreme Court had held that "depravity of mind" comprehended "the kind of mental state that led a murderer to torture or commit an aggravated battery before killing a victim" while "torture" and "aggravated battery" required a showing of "physical abuse".[14] The Court determined that in *Godfrey* the Georgia Supreme Court failed to apply the narrowing constructions developed in prior cases and absent a method of guiding sentencing discretion, the application of the Georgia "vileness" factor was unconstitutional.

In 1988 the Supreme Court again addressed the constitutionality of the "vileness" factor in *Maynard v. Cartright*.[15] In *Maynard*, a defendant convicted of double murder challenged the constitutionality of the Oklahoma "vileness" factor which permitted a death sentence on a finding that the murder was "especially heinous, atrocious and cruel."[16] The Court found that absent any narrowing constructions, "especially heinous, atrocious and cruel" gave no more guidance than the language of the Georgia "vileness" factor found unconstitutional in *Godfrey*.[17] However, the Court noted that a state could use a factor, constitutionally infirm on its face, if state courts monitored its use and provided narrowing constructions of the vague terms to the sentencer.[18]

Following the decisions in *Maynard* and *Godfrey*, other states which use a "vileness" factor provided narrowing constructions in the form of instructions to their juries. In Alabama, which uses a "heinous, atrocious and cruel" "vileness" factor, the Alabama Supreme Court defined all the vague terms.[19] For example, the Alabama Supreme Court defined "cruel" as "designed to inflict a high degree of pain with utter indifference or even enjoyment of the suffering of others".[20] The state attempted to apply these terms consistently in all capital cases under the Alabama "vileness" factor.[21] North Carolina also applies narrowing constructions to its "heinous atrocious and cruel" "vileness" factor and defines these terms conclusively as "a conscienceless or pitiless crime which is unnecessarily tortuous to the victim."[22] Thus, many states follow the guidelines set forth in *Godfrey* and *Maynard* and consistently correct their vague "vileness" factors by providing narrowing constructions to their sentencers.

The Virginia "vileness" factor supports a sentence of death if the jury finds beyond a reasonable doubt 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".[23] The language of the Virginia "vileness" factor mirrors the Georgia "vileness" factor found unconstitutionally applied in *Godfrey*.[24] Therefore, Virginia only may apply its "vileness" factor if its courts monitor the use of the factor and provide narrowing constructions of the vague statutory language.

Unlike the courts of its sister states, the Virginia Supreme Court has held that its trial courts may dispense with furnishing narrowing constructions to the jury.[25] While some trial courts have given narrowing constructions for some of the terms, the Virginia Supreme Court has not required subsequent capital cases to use those definitions or even to provide any narrowing constructions at all.[26] In *Clark v. Commonwealth*, the defendant assigned as error failure of the trial court to define "outrageously or wantonly vile, horrible and inhuman", "depravity of mind" or "aggravated battery."[27] Prior to *Clark*, the Virginia Supreme Court defined "aggravated battery" and "depravity of mind" in *Smith v. Commonwealth*.[28] Nevertheless, the trial court refused to communicate these same definitions to the jury or to give any other narrowing constructions.[29] The Virginia Supreme Court found that the *Smith* definitions "were not the best or the only ones" and that all the terms of the "vileness" factor had a common meaning which did not require additional clarification.[30]

In *Tuggle v. Commonwealth*, decided in 1984, the defendant requested two jury instructions which defined "aggravated battery" and "depravity of mind."[31] The trial court refused to provide the jury with the narrowing constructions requested by the defense although they were the same constructions as those given in *Smith*.[32] The Virginia Supreme Court reaffirmed *Clark* and did not mandate that the trial court define the statutory terms of the "vileness" factor because no single definition was correct in all instances.[33] Thus, the Virginia Supreme Court continues to dispense with the requirement of narrowing constructions under the rationale articulated in *Clark*, although this policy directly conflicts with the holdings of *Godfrey* and *Maynard*.

While the Virginia Supreme Court fails to place an affirmative duty on its courts to provide narrowing constructions in every case involving the "vileness" factor, the court occasionally gives narrowing constructions for "depravity of mind" and "aggravated battery." In *Smith v. Commonwealth* the court defined "depravity of mind" as "a degree of moral turpitude and psychic debasement surpassing that inherent in the definition of legal malice and premeditation".[34] It defined "aggravated battery" as "a battery which is qualitatively and quantitatively more culpable than the minimum necessary to accomplish an act of murder".[35]

In *Shell v. Mississippi*, the United States Supreme Court held, per curiam, that a narrowing construction for a component of the Mississippi "vileness" factor provided by a Mississippi trial court was unconstitutionally vague.[36] In *Shell*, the Mississippi death penalty statute contained a vague "vileness" factor which according to the constitutional requirements of *Godfrey* and *Maynard*, required a narrowing construction to guide the sentencing discretion of the jury.[37] The trial court instructed the jury that the word "heinous" meant "extremely wicked or shockingly evil"; "atrocious" meant "outrageously wicked and vile"; and "cruel" meant "designed to inflict a high degree of pain with indifference to or an enjoyment of the suffering of others."[38] The Supreme Court unanimously found no meaningful distinction between these narrowing constructions

and the "vileness" factor itself.[39] Any person of ordinary sensibility could use the narrowing constructions to characterize almost every murder.[40] Therefore, the Court found no means to meaningfully distinguish the application of the death penalty to the cases in which it was to be imposed, from the many cases in which it was not, as required by *Furman*.

In *Jones v. Murray*, a recent federal habeas case decided by the Fourth Circuit, the defendant argued that Virginia Supreme Court's narrowing construction for "depravity of mind" was facially unconstitutional because of its vagueness.[41] The defendant contended that the *Smith* definition of "depravity of mind" *supra*, exacerbated the vagueness which the narrowing construction itself attempted to alleviate because the definition was utterly unintelligible to the average juror.[42] The Fourth Circuit rejected this argument. It found that the U.S. Supreme Court had upheld the "vileness" factors of other states which employed narrowing constructions which were more vague than the Virginia "depravity of mind" definition.[43] However, the Fourth Circuit did not consider *Shell* which clearly controlled in *Jones v. Murray*.

*Shell* stands for the proposition that narrowing constructions, provided to channel the jury's discretion, may themselves be unconstitutionally vague. In *Shell*, the definition of heinous as "wicked or shockingly evil" did nothing to distinguish the higher standard of culpability which the eighth amendment demands in capital cases. In this regard, the Virginia narrowing construction of "depravity of mind" is particularly suspect. In applying the "depravity of mind" narrowing construction the juror must know what "moral turpitude" and "psychical debasement" mean in order to make a proper application. Moreover, the jury must know the definition of "legal malice" and "premeditation" to determine if the murder surpassed those minimum standards. Without further guidance, a juror cannot make a determination of whether a particular murder involved more "depravity of mind" than that involved in every killing. Like the use of "wicked" to limit "heinous" in *Shell*, the depravity of mind definition fails to provide a meaningful distinction between these limiting constructions and the "vileness" factor itself. Thus, despite the Fourth Circuit's holding in *Jones v. Murray*, there is a strong argument that Virginia's narrowing constructions are unconstitutionally vague.

In summary, broad aggravating factors are constitutionally suspect because they fail to limit adequately the sentencing discretion of the jury in making a meaningful distinction between the isolated cases where the death penalty is imposed from the many cases in which it is not. "Vileness" factors used in the capital sentencing schemes in many states are prone to this deficiency because the factors use vague terms that could apply to any killing. Every murder could be said to be heinous, atrocious and cruel. The Supreme Court recognized this infirmity in *Godfrey* and *Maynard*, and held that states may only implement unconstitutionally vague "vileness" factors if state courts clarify the vague statutory terms by providing the jury with narrowing constructions of the terms. The Virginia Supreme Court fails to impose this duty on its trial courts. Moreover, the narrowing constructions adopted by the Virginia Supreme Court which are used by Virginia trial courts on occasion are unconstitutionally vague under *Shell*. Thus, the application of the "vileness factor" in Virginia is unconstitutional under the eighth amendment.

## THE PROCEDURAL APPLICATION OF THE VIRGINIA "VILENESS" FACTOR IS UNCONSTITUTIONAL UNDER THE FOURTEENTH AMENDMENT BECAUSE IT FAILS TO GIVE CAPITAL DEFENDANTS PROPER NOTICE

Some of the Virginia courts refuse to require that the Commonwealth give the defense notice of the aggravating factors and the narrowing constructions which it intends to rely on. This denies a capital defendant due process of law as guaranteed by the fourteenth amendment. In Virginia, both the trial courts and the Supreme Court of Virginia often deny motions for a bill of particulars asking for, among other things, the aggravating factors that the Commonwealth seeks to rely on in seeking the death penalty, and the narrowing constructions if the Commonwealth intends to seek the death sentence under the "vileness" factor. The fourteenth amendment requires that the state inform the defendant of the nature and cause of the accusation against him.[44] The defendant is entitled to have the offense charged stated in plain and unequivocal terms.[45] The adversarial format of a capital sentencing proceeding makes it sufficiently like a trial that counsel's role is also to ensure that the adversarial testing process works to produce a just result.[46] Thus, notice requirements also apply to the penalty phase of a capital trial. In addition, the unique nature of the death penalty requires additional protection during pretrial, guilt and sentencing stages.[47] Due process demands a greater degree of reliability in a process that can find death as the appropriate punishment.[48]

In *Maynard v. Cartright, supra*, the United States Supreme Court held that a state could only use a vague aggravating factor if a state supreme court monitored its use, and insured that the its courts furnished the sentencer with narrowing constructions.[49] Thus, the Virginia "vileness factor" requires narrowing constructions to further distinguish its application because it uses broad, vague terms that could apply to any murder. The narrowing constructions are, in effect, a limitation and clarification of the offense charged. Thus, for a capital defendant to have constitutionally adequate notice and opportunity to defend himself, it is essential that the Virginia courts insure that the Commonwealth provides the defendant with both the aggravating factor and the narrowing construction, pretrial.

In a capital trial, failure to provide the defense with narrowing constructions denies the defendant due process because the trial or appellate court may apply another definition which the defendant was unprepared to litigate at the penalty trial. Justice Blackmun articulated this danger and the resulting injustice in his dissenting opinion in *Lewis v. Jeffers*.[50] In *Lewis*, the defendant challenged the constitutionality of the Arizona "vileness" factor because it did not articulate a limiting construction applicable to his case.[51] When the defendant prepared his defense, the relevant authority for the narrowing constructions of the "vileness" factor was *State v. Knapp*.[52] In *Knapp*, the Arizona Supreme Court recited dictionary definitions for each of the statutory terms of the Arizona "vileness" factor, and the defendant could prepare his defense only in reliance on this authority.[53] However, at the time of the defendant's trial and sentencing hearing, the court used the narrowing constructions given in *State v. Gretzler*.[54] *Gretzler*, decided eighteen days before Jeffers' case went to trial, held for the first time that the vague statutory term "especially heinous or depraved" encompassed crimes in which the defendant "relished the killing" and "inflicted gratuitous violence."[55] The defendant could not adequately litigate and defend against the constructions applied by the sentencer. He could not, for example, offer evidence that tended to show that he did not "relish the killing."[56] Had Jeffers sought, and been granted the opportunity to defend against every narrowing construction for which the state intended to offer evidence, his death sentence would not have rested upon a fact of which he was not aware of at trial.

Considering the striking similarity between the Arizona capital murder statute and Virginia Code §19.2-264(C), the danger articulated in *Lewis v. Jeffers* could manifest itself in Virginia.[57] This potential is best demonstrated by *Clark v. Commonwealth, supra*. In *Clark*, the trial court failed to define the terms "outrageously or wantonly vile, horrible or inhuman" or "depravity of mind." The Virginia Supreme Court held that the trial court's failure to give a definition did not constitute reversible error because more than one possible construction of these terms existed.[58] The court stated that previous definitions of the "vileness" factor "were not the best or the only ones."[59] Therefore, a capital defendant in Virginia cannot rely on an aggravating factor as having one specific meaning and seek to defend on those grounds. The court may apply a different definition from that which the defendant is prepared to litigate, and his ability to defend himself suffers dramatically.

In a Supreme Court Case decided recently, *Lankford v. Idaho*, the Court overturned the death sentence of a defendant because the trial court failed to give adequate notice of its intention to impose a death sentence, which violated the due process clause of the fourteenth amendment.[60] The defendant, charged with the first degree murder, received notice of the

possibility to the death sentence only through the statute that defined capital murder and the advice of the trial judge at arraignment.[61] However, the state prosecutor never mentioned the death sentence in subsequent plea discussions, during the guilt or innocence trial or prior to the penalty trial.[62] In fact, the state informed the defendant that it would not seek a death sentence.[63] During the penalty trial, the defendant presented little mitigating evidence and did not advance any arguments against the application of certain aggravating factors because the trial court led the defense to believe that the trial court would not consider a death sentence.[64] Nevertheless, the trial court judge ignored the state's request for life, and sentenced the defendant to death.[65]

The Supreme Court vacated the death sentence. It noted that notice of issues to be resolved by the adversary process is a fundamental characteristic of fair procedure consistent with due process of law.[66] The Court recognized that the debate between adversaries was essential to the truth-seeking function because it gave defense counsel an opportunity to comment on factors which influenced sentencing decisions in capital cases.[67] Thus, the defendant's lack of adequate notice that the judge contemplated the death sentence created an impermissible risk that the adversary process malfunctioned.[68]

In *Lankford*, the Supreme Court emphasized that the adversary process cannot perform its proper role unless the defendant receives adequate notice that a state plans to impose the death penalty. It also follows that the defense must receive adequate notice of the full offense charged in order to properly prepare its case. In this regard, adequate notice in a capital case involves disclosing both the capital crime, the aggravating factors to be litigated and any narrowing constructions which make up the full definition of the offense. Like the defendant in *Lankford*, who could not properly defend himself against the death penalty (which frustrated the truth-seeking function of the adversarial format), a failure by the state to provide notice of the aggravating factors it will seek to prove, and the narrowing constructions which clarify the definition, prevents the defense from properly applying its resources to insure that the defendant is given a fair trial.

In summary, it has repeatedly been held by the Virginia Supreme Court that it is the duty of the trial court to compel the attorney for the Commonwealth, when demanded by the accused, to file such a bill of particulars as will appraise the defendant of the cause and nature of the Commonwealth's accusation.[69] Moreover, Virginia Code § 19.2-399 provides that in seeking the dismissal of any charge on the grounds that the statute upon which it is based is unconstitutional, the trial court ***shall***, upon motion of the defendant direct that the Commonwealth file a bill of particulars.[70] The bill of particulars protects the defendant's fundamental right of receiving notice of his accusation as guaranteed by the fourteenth amendment. It also secures the ability of the defense to exercise a meaningful opportunity to contest the Commonwealth's evidence on a factor essential to a sentence of death which allows that the adversary process serve its truth-seeking function. Because Virginia's procedural application of the "vileness" factor refuses to require that the Commonwealth give the defense notice of the aggravating factors and the narrowing constructions on which it intends to rely, the capital defendant is denied due process of law as guaranteed by the fourteenth amendment.

## PRETRIAL LITIGATION OF THE "VILENESS" FACTOR

There are many compelling advantages to litigating the application of the "vileness" factor through pretrial motions. First, the defense is notified of what components of the "vileness" factor on which the Commonwealth will rely in seeking the death penalty. With this notice the defense can properly limit the Commonwealth's evidence in the penalty trial to that which is relevant to showing the existence of that component. Also pretrial litigation of the "vileness" factor provides the defense with an opportunity to test the constitutionality of the narrowing constructions supplied by the Commonwealth, or to preserve a constitutional claim for appeal if the trial court fails to give any narrowing constructions at all.

The cornerstone upon which the defense should mount an attack is the bill of particulars. To achieve its proper effect, the motion should ask the Commonwealth "to identify every narrowing construction of the components of the 'vileness' factor upon which the Commonwealth intends to rely on in seeking the death penalty." If the Commonwealth refuses to give the narrowing constructions pretrial, the defense can file a brief pursuant to *Godfrey* and *Maynard* which argues that the Virginia death penalty scheme is unconstitutionally applied unless the trial court provides narrowing constructions for the vague terms of the Virginia death penalty statute. This preserves a valid assignment of error for appeal and encourages the trial court to compel the Commonwealth to deliver the narrowing constructions.

If the Commonwealth identifies the narrowing constructions by providing the previous definitions given in *Smith*, the defense has grounds for a motion that the narrowing constructions given are too vague to guide sentencing discretion as required by *Shell*. In the alternative, the defense could suggest the definitions given for the "vileness" factor in Georgia and Arizona which provide more meaningful distinction for the sentencer.[71] However, generating constitutionally correct narrowing constructions is the job of Commonwealth and the Virginia courts. Nevertheless, if the court provides narrowing constructions it will correctly follow *Maynard* and *Godfrey* in ensuring that the Virginia "vileness" factor is applied in a constitutional manner. The defense has a definition upon which to begin preparing its case for the penalty trial, and it can begin pretrial strategies such as filing motions *in limine* to prohibit the introduction of evidence which is not relevant. Thus, the Commonwealth's proper answer of the motion for the bill of particulars will serve due process by providing proper notice of the offense charged and it will advance the truth-seeking function of the adversarial process.

In conclusion, both the defense and the Commonwealth of Virginia have much to gain by allowing the pretrial litigation of the "vileness" factor. As discussed, the Virginia "vileness" factor is unconstitutionally vague unless the Commonwealth provides narrowing constructions for the vague statutory terms. Moreover, Virginia's procedural application of the "vileness" factor, in refusing to require that the Commonwealth give the defense notice of the aggravating factors and the narrowing constructions on which it intends to rely, denies the defendant due process of law as guaranteed by the fourteenth amendment. If the Virginia courts grant motions for bill of particulars asking for aggravating factors and narrowing constructions they may cure both of the constitutional deficiencies of the "vileness" factor. However, defense counsel's failure to litigate the "vileness" factor pretrial not only raises the possibility of defaulting valid appellate claims, it is equivalent to entering into a lawsuit without knowing what the suit is about, which is poor litigation strategy under any circumstance.

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[1] *See* Falkner, The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor, Capital Defense Digest, Vol. 2, No. 1 (1989).

[2] *Furman v. Georgia*, 408 U.S. 238 (1972).

[3] *Id.* at 310.

[4] Model Penal Code § 210.6 (1962).

[5] *Id.* § 210.6(3)(n).

[6] *Gregg v. Georgia*, 428 U.S. 153 (1976).

[7] *Id.* at 196.

[8] *Id.* at 195.

[9] *Godfrey v. Georgia*, 446 U.S. 420 (1980).

[10] *Id.* at 426.

[11] *Id.* at 428.

[12] *Id.* at 429.
[13] *Id.* at 420.

[14] *Id.* at 429. The Georgia Supreme Court developed these narrowing constructions in *Harris v. State*, 237 Ga. 718, 230 S.E.2d 1 (1976); and *Blake v. State*, 239 Ga. 292, 236 S.E.2d 637 (1977).

[15] *Maynard v. Cartright*, 486 U.S. 356 (1988). *See* case summary of *Maynard v. Cartright*, Capital Defense Digest, Vol. 1, No. 1 (1988).

[16] *Maynard*, 486 U.S. at 359.

[17] *Maynard*, 486 U.S. at 364.

[18] *Id.* at 356.

[19] *Bui v. State*, 551 So.2d 1094 (Ala. Ct. App. 1988).

[20] *Id.* at 1100

[21] *Id.*

[22] *State v. Fulwood*, 323 N.C. 371, 373 S.E.2d 518, 535 (N.C. 1988).

[23] Va. Code Ann. § 19.2-264.2 (1990).

[24] *See Godfrey v. Georgia*, 446 U.S. 420, 426 (1980).(the Georgia "vileness" factor permits the death penalty on a finding that the offense was "outrageously or wantonly vile, horrible and inhuman").

[25] *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979).

[26] *Id.* at 211, 257 S.E.2d at 790.

[27] *Id.*

[28] *Id.*; *see Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978).

[29] *Clark*, 220 Va. at 211, 257 S.E.2d at 790.

[30] *Id.*

[31] *Tuggle v. Commonwealth*, 228 Va. 493, 323 S.E.2d 539 (1984).

[32] *Tuggle*, 228 Va. at 515, 323 S.E.2d at 552.

[33] *Id. see also Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983); *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979) (in both cases the Virginia Supreme Court reaffirmed its holding in *Clark*).

[34] *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 148-149 (1978).

[35] *Id.*

[36] *Shell v. Mississippi*, 111 S. Ct. 313, 313 (1990).

[37] *Id.*

[38] *Id.* at 314.

[39] *Id.*

[40] *Id.*
[41] *Jones v. Murray*, No. 90-4004, slip. op. at 20 (4th Cir. Oct. 1, 1991).

[42] *Id.*

[43] *Id.* The Fourth Circuit found that the Supreme Court scrutinized identical language to the depravity of mind definition in *Gregg v. Georgia*, 428 U.S. 153 (1976). The Court in *Gregg* analyzed the Georgia death penalty statute in a general sense but did not discuss the constitutionality of the Georgia "vileness" factor.

[44] *Rosen v. United States*, 161 U.S. 29 (1896).

[45] *Riner v. Commonwealth*, 145 Va. 901, 134 S.E. 542 (1926).

[46] *Lankford v. Idaho*, 111 S. Ct. 1723, 1733 (1991) quoting *Strickland v. Commonwealth*, 466 U.S. 668 (1984).

[47] *Lockett v. Ohio*, 438 U.S. 586, 604 (1978).

[48] *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976).

[49] *Maynard v. Cartright*, 486 U.S. 356 (1988).

[50] *Lewis v. Jeffers*, 110 S.Ct. 3092 (1990). *See* case summary of *Lewis v. Jeffers*, Capital Defense Digest, Vol. 3, No. 1 (1990).

[51] *Id.*

[52] *State v. Knapp*, 114 Ariz. 531, 562 P.2d 704 (1977).

[53] *Lewis*, 110 S. Ct. at 3106.

[54] *State v. Gretzler*, 135 Ariz. 42, 659 P.2d 1 (1982).

[55] *Lewis*, 110 S. Ct. at 3110.

[56] *Id.*

[57] *See* Ariz. Rev. Stat. Ann. § 13-703(F)(3) (1989).

[58] *Clark v. Commonwealth*, 220 Va. 201, 211, 257 S.E.2d 784, 790 (1979).

[59] *Id.*

[60] *Lankford v. Idaho*, 111 S. Ct. 1723 (1991). *See* case summary of *Lankford v. Idaho*, Capital Defense Digest, this issue.

[61] *Lankford*, 111 S. Ct. at 1725.

[62] *Id.*

[63] *Id.* at 1726-1727.

[64] *Id.* at 1730.

[65] *Id.* at 1728.

[66] *Id.* at 1730.

[67] *Id.* at 1733.

[68] *Id.*

[69] *Riner v. Commonwealth*, 145 Va. 901, 134 S.E. 542 (1926).

[70] *See* Va. Code Ann. § 19.2-399 (1991). (this statute is applicable if the defense files a motion to prohibit the imposition of the death penalty challenging the Virginia death penalty, prior to filing its motion for a bill of particulars.)

[71] *See Walton v. Arizona*, 110 S. Ct. 3047 (1990) (a crime is committed in an especially "cruel" manner when the perpetrator inflicts mental anguish or physical abuse before the victim's death. A murder is committed in an especially "depraved" manner when the perpetrator either relishes the murder, evidencing debasement or perversion, or shows indifference to the suffering of the victim and evidences a sense of pleasure in the killing) *see also* the narrowing constructions given in *Godfrey v. Georgia* at n. 12 of this article.

## THE VIRGINIA SUPREME COURT AND THIRTEEN YEARS OF DEATH SENTENCE REVIEW

BY: ANNE E. MCINERNEY

In 1978, in *Smith v. Commonwealth*[1], the Virginia Supreme Court affirmed the sentence of the first defendant sentenced to death under Virginia's capital murder statute enacted in response to *Furman v. Georgia*.[2] In 1972, in *Furman*, the United States Supreme Court had declared that capital punishment, as then administered, was unconstitutional. In the thirteen years since *Smith*, the Virginia Supreme Court has had occasion to say a lot and has denied relief on automatic review and appeal of right in the vast majority of cases.

This piece discusses the history of death penalty law in Virginia since *Furman v. Georgia* and outlines the Virginia Supreme Courts initial interpretations of the State's modern capital murder statute in *Smith*. The article then examines the development of the law of default and waiver, the construction and reach of the capital statute, the definition of and range of relevant evidence going to the aggravating factors, mitigating evidence, and the selection process of the capital jury since *Smith*.

The article then considers Virginia's statutory requirement for automatic review of the death sentence and discusses the possible effects of the United States Supreme Court's 1983 holding that proportionality review is not constitutionally required. Despite the statutory requirement for automatic review, and the constitutional right to meaningful appellate review, the Supreme Court of Virginia has affirmed almost every death sentence since 1978. The article contains a brief summary of the few cases where the supreme court has granted relief.

Virginia's capital murder statute is modeled after the Texas statute approved in 1976 by the United States Supreme Court in *Jurek v. Texas*.[3] This article contains a brief comparative look at the Texas Court of Criminal Appeals and some of the cases decided by that court. The article concludes with some observations about the present status of capital penalty law in Virginia and offers several remedial tactics for use by Virginia defense counsel.

### *Furman v. Georgia* and Virginia's Response

In 1972, in *Furman v. Georgia*, the United States Supreme Court concluded that capital punishment, as then administered under statutory systems which permitted unbridled discretion, violated defendants' eighth amendment protection against cruel and unusual punishment as well as the fourteenth amendment due process and equal protection clauses.[4] In response, two-thirds of the states, including Virginia, which has had a death penalty statute since 1796, began crafting capital murder statutes which sufficiently limited jury discretion and avoided arbitrary and inconsistent results. In 1976, the Supreme Court struck down North Carolina and Louisiana statutes which had mandatory death penalty provisions for certain crimes but upheld statutes in Florida, Georgia, and Texas because each of those states had provided adequate standards to guide the exercise of the jury's sentencing discretion.[5]

In 1977, using the Texas statute found constitutional in *Jurek v. Texas* as a guide, the Virginia General Assembly enacted the capital murder statute substantially as it stands today. All of the approved statutes, including those of Texas and Virginia, provide for automatic review of death sentences. Most, including Virginia's but not Texas', require the reviewing court to consider whether the punishment is disproportionate to that imposed in similar cases. Also in Virginia, but not in Texas, every capital defendant has an appeal of right directly to the state supreme court rather than to the court of appeals, usually the first level of the appellate process. When a defendant in Virginia makes an appeal of right to the supreme court, this appeal is consolidated with the automatic review of the death penalty and advanced on the docket for an expeditious process.

### In the Beginning: *Smith*

A trial jury convicted Michael Smith under the rape-murder subsection of the new capital murder statute in 1978.[6] The Supreme Court of Virginia upheld his conviction and death sentence in *Smith v. Commonwealth*.[7] The court consolidated the defendant's appeal of right and automatic review of sentence.[8] Smith raised multiple issues in his appeal, which fall into five broad categories: pre-trial proceedings, the guilt trial, constitutional challenges to the capital murder statute, the penalty trial, and the propriety of the penalty imposed.[9]

Smith assigned error to the trial court's exclusion of a juror for cause related to her predisposition against capital punishment. The court stated on review that, in line with *Witherspoon v. Illinois*[10] and its progeny, the question of whether a venireman should be excluded turns upon the question whether, in fact, he is "irrevocably committed" to vote against the death penalty. Relying on footnote 9 of the *Witherspoon* opinion, the court held that "absent an unambiguous statement of **absolute** objection, the trial judge cannot **assume** absolute objection." Under the *Witherspoon* holding and the corollary note, "'general objections' to capital punishment are not constitutionally sufficient to justify the exclusion of a juror for cause; nothing less than an absolute objection . . . to vote against the death penalty, will suffice."[11] While the trial court noted that the excluded juror's responses to questions during *voir dire* were sometimes inconsistent, it nevertheless concluded that "life [was] all she'd ever give" and discharged her from the jury panel.[12] On review, the supreme court held that while it could not say that such a finding of fact was unmistakably clear, the ruling did not contravene *Witherspoon*.[13]

Smith also challenged the Virginia capital murder statutory complex under which he was convicted and sentenced. The court responded with a full explanation of the four proceedings which it must conduct before it may deliver a sentence of death. The court conducts three evidentiary hearings. In the first, the jury determines guilt or innocence and may convict the defendant of the crime charged or a lesser-included offense. If the jury convicts the defendant of a class 1 felony, the jury determines in the second phase whether the penalty should be death or life imprisonment. The jury may hear aggravating evidence concerning circumstances of the offense and the history and background of the accused.