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JONES v. MURRAY 947 F.2d 1106 (1991)

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order to withstand constitutional scrutiny. *Shell v. Mississippi*, 111 S.Ct. 313 (1990) (finding a narrowing construction for a component of the Mississippi "vileness" factor to be unconstitutionally vague). See case summary of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991).

Virginia allows a death sentence if the murder 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. § 19-2-264.2. The Virginia statute precisely mirrors the words found to be constitutionally deficient (as applied) in *Godfrey*. Thus, under current law, Virginia may apply its "vileness" factor only if the courts monitor its use and provide narrowing constructions of the vague language. *Maynard*, 486 U.S. at 356.

While Virginia does not require that narrowing constructions be provided for the sentencing jury, *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), the Virginia Supreme Court has defined two of the three factors in its vileness predicate. The court has defined "depravity of mind" as "a degree of moral turpitude and psychic debasement surpassing that inherent in the definition of legal malice and premeditation." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 148-49 (1978), cert. denied, 441 U.S. 967 (1979). The court defined "aggravated battery" as "a battery which is qualitatively and quantitatively more culpable than the minimum necessary to accomplish an act of murder." *Id.* In a recent case, *Jones v. Murray*, 947 F.2d 1106 (1991), the Fourth Circuit Court of Appeals approved the Virginia narrowing constructions announced in *Smith*. See case summary of *Jones*, Capital Defense Digest, this issue.

Bunch relied on *Godfrey* and *Maynard* in his attack on the Virginia vileness factor. Bunch asserted both that the Virginia vileness

factor was unconstitutionally vague and that the trial court erred in refusing to provide a limiting instruction. The Virginia Supreme Court did not explicitly monitor Bunch's conviction to discern whether its narrowing constructions of the "vileness" factor had been satisfied. In the absence of the application of a narrowing construction, Bunch's position is correct as a matter of law. See *Lago, Litigating the "Vileness" Factor in Virginia*, Capital Defense Digest, Vol. 4, No. 1, p. 24 (1991); Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest, Vol. 2, No. 2, p. 19 (1989).

The Fourth Circuit summarily rejected Bunch's attacks. *Bunch*, 949 F.2d at 1367. The court cited *Clozza v. Murray*, 913 F.2d 1092, 1105 (4th Cir. 1990), in support of its holding. The Fourth Circuit rejected a *Godfrey* challenge to the Virginia statute in *Clozza*, also in a conclusory fashion. *Id.* The *Bunch* court attempts to minimize this important issue by addressing it with only one unsupported sentence. *Bunch*, 949 F.2d at 1367.

Although the Fourth Circuit continues to ignore the constitutional attacks on the Virginia "vileness" factor, attorneys should not. The *Godfrey*, *Maynard* and *Shell* issues can be raised and preserved in the defendant's motion to prohibit the imposition of the death penalty, in a motion for a bill of particulars requiring the Commonwealth to disclose any aggravating factor and any narrowing construction upon which it intends to rely, and by appropriate objections at the penalty trial when the jury is instructed.

Summary and Analysis by:
G. Douglas Kilday

JONES v. MURRAY

947 F.2d 1106 (1991)

United States Court of Appeals, Fourth Circuit

FACTS

In 1984, Willie Leroy Jones was tried in York County, Virginia for the 1983 capital murders of Myra and Graham Adkins. Evidence at trial showed that both victims had been shot in the head at close range by Jones. The medical examiner testified that only Mr. Adkins died quickly. Mrs. Adkins' gunshot wound, according to the medical examiner, would have allowed her to live for several hours. Both Mr. and Mrs. Adkins had been covered with fire accelerant and Mrs. Adkins, who was still alive, had been bound, gagged and set on fire.

Jones was examined, prior to his trial, by three state doctors pursuant to a court order to determine Jones' competency to stand trial. Two of the doctors also examined Jones with specific attention to mitigating mental factors. The examining doctors found Jones competent to stand trial; the doctors also found no evidence of mental mitigating factors.

Immediately before Jones' trial began, the Commonwealth's Attorney offered two consecutive life terms with additional time for the arson charge in exchange for Jones' pleading guilty to capital murder and arson. Jones' attorney told him of the offer and reviewed the strengths and weaknesses of the Commonwealth's case as well as the evidence against Jones. Counsel told Jones that it was his opinion that there was a seventy percent chance of conviction and a forty to fifty percent chance of Jones receiving the death penalty. Jones' attorney made no recommendation to his client and completely left the decision of whether or not to accept the plea bargain to Jones. Jones, stating that he was innocent, rejected the Commonwealth's offer. Jones was found guilty of capital murder and sentenced to death.

After Jones' direct appeals and state habeas claims were exhausted, he petitioned the District Court for a writ of habeas corpus. The District Court denied relief. Jones appealed to the Fourth Circuit, claiming *inter alia* that he had not received effective assistance of counsel and that the jury instructions at the penalty stage of his trial resulted in unconstitutional application of the aggravating factor used to support his death sentence.

Jones claimed ineffective assistance of counsel based on two allegations: Jones argued that his attorney neither recommended that he accept the Commonwealth's plea bargain, nor attempted to persuade him to accept the plea bargain, and that his counsel failed to investigate mitigating evidence that could have been used during the penalty phase of his trial.

Jones also contended that the jury instructions that dealt with the "vileness" aggravating factor given during the sentencing phase of his trial were unconstitutional. He argued that because the three "vileness" factor components ("torture, depravity of mind or aggravated battery to the victim" Va. Code Ann. §19-2-264.2(C)) were phrased disjunctively on the jury forms and in the instructions, there was "no assurance that his sentencing jury reached a unanimous decision as to which component of vileness was presented by his crimes." 947 F.2d 1106, 1116 (4th Cir., 1991).

Jones also argued that the Virginia vileness aggravating factor was unconstitutionally vague in that a constitutionally sufficient narrowing construction of it had not been applied pursuant to *Godfrey v. Georgia*, 446 U.S. 420 (1980), and its progeny.

Jones assigned numerous other errors. Some of these the court treated conclusively. Others did not involve death penalty law or are

unlikely to arise often because they revolved around facts peculiar to this case. These issues, which will not be discussed in this summary, include: various ineffective assistance of counsel claims, whether a defendant's not denying guilt upon taking the witness stand amounts to a confession, and whether failure to instruct the jury to consider mitigating circumstances is unconstitutional.

HOLDING

The Fourth Circuit affirmed the District Court's denial of relief. Using the standard set forth in *Strickland v. Washington*, 466 U.S. 668 (1984), the court held that Jones' trial attorney was not ineffective for failing to recommend the plea bargain or attempting to persuade Jones to accept it. Jones' counsel was also not ineffective, the court held, for not obtaining a psychiatric review independent of the State's investigation of Jones' possible mitigating mental state.

The court noted that a federal court's inquiry into whether or not an aggravating factor has been properly considered and found should not be restricted to jury instructions given at trial. Therefore, assuming *arguendo* that Jones was correct in his claim that the disjunctive instruction could have resulted in a less than unanimous finding, the court held that the Virginia Supreme Court, in its automatic review of Jones' sentence, made the appropriate finding of an aggravating factor thus authorizing the imposition of the death penalty.

Further, to Jones' contention that the Virginia Supreme Court failed to adopt any limiting construction of the vileness aggravating factor, the Fourth Circuit approved the Virginia Supreme Court's application of its narrowing construction as constitutionally sufficient.

ANALYSIS / APPLICATION IN VIRGINIA

A. Ineffective Assistance of Counsel

The court analyzed Jones' ineffective assistance of counsel claims by using the standard set forth in *Strickland v. Washington*: "the defendant must show that counsel's performance was deficient [and] . . . that the deficient performance prejudiced the defense." 466 U.S. at 687.

The court used the American Bar Association Standards for Criminal Justice to answer Jones' claim that he received ineffective assistance of counsel because his attorney did not persuade him to accept the Commonwealth's plea bargain. The ABA Standards were, the *Jones* court noted, "recognized by the Supreme Court as 'guides to determining what is reasonable.'" 947 F.2d at 1110 (citing *Strickland*, 466 U.S. at 688).

ABA Standard 14-3.2(a) provides that "defense counsel should conclude a plea agreement only with the consent of the defendant" and that the decision should be left entirely to the defendant. Standard 14-3.2(b) says that defense counsel should advise their client of alternatives and of important considerations respecting whether or not to accept a plea bargain. Jones' attorney advised Jones of the Commonwealth's offer. Counsel advised Jones of the available alternative of going to trial and gave Jones his opinion as to the probable outcomes of the guilt and penalty phases of his impending trial. Counsel also discussed the strengths and weaknesses of the Commonwealth's case against Jones. Thus, the court concluded, the attorney's performance did not violate professional standards.

When a defense attorney looks at the evidence against her client and assesses that the evidence is overwhelming, counsel may attempt, although it is not constitutionally required, to persuade her client to accept the Commonwealth's offer without violating ABA Standard 14-3.2(a).

While cautioning that it does not wish to make a binding rule in such cases, the Fourth Circuit cited with approval one such instance in which the court wrote that an attorney may have had a **duty** to persuade his client to plead guilty: *United States v. Jones*, 392 F. 2d 567 (4th Cir.,

1968). Although ineffective assistance of counsel claims were not involved in *United States v. Jones*, a footnote at the end of the opinion stated that "this is the kind of case which should never have been tried." *Id.* at 569, n.3. The defendants in *United States v. Jones* were convicted of escaping from prison and appealed their conviction. The court in that case stated that "since people are either in or out of prison . . . it is difficult for a United States Attorney to fail to secure a valid conviction in a prosecution for escape. . . . [In such a case] nothing is gained for the defendant by pleading not guilty and other opportunities . . . may be lost by the entry of such a plea." *Id.*, cited in *Jones v. Murray*, 947 F.2d at 1111, n.3. The Fourth Circuit in *United States v. Jones* went on to note that an attorney's duties to his client and to the courts and public do not conflict in such a case; in fact, the court noted that "both [duties] dictate that the client be advised strongly to plead guilty." 392 F. 2d at 569, n.3 (emphasis added).

As to Jones' sixth amendment claim based on the fact that his counsel did not solicit additional psychiatric exams independent of those conducted by the State, the court again used the *Strickland* standard and held that counsel's reliance on the state psychiatrists' exams was not unreasonable.

However, Jones' counsel could have seen that the exams were incomplete. The opinion suggests strongly that the state-appointed psychologists considered only **statutory** mitigating factors: the Fourth Circuit wrote that "the psychologists testified that they were familiar with Virginia's statutory provisions regarding mitigating mental conditions. They ultimately concluded that there was no evidence of any such mitigating mental factors." 947 F.2d at 1112 (emphasis added). From the court's language, one may infer that no examination was done as to **non-statutory** mitigating factors.

The Fourth Circuit even failed to describe accurately the statutory mitigating factors. While the Code of Virginia describes mental mitigating factors as "at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was **significantly impaired**," §19.2-264.4 (emphasis added), the Fourth Circuit described them as "at the relevant time, **did not have the capacity** to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law." 947 F.2d at 1112 (emphasis added).

If the record shows that only statutory mitigating factors were considered in the psychiatric examinations, Jones' claim that state fact finding was not entitled to deference at federal habeas proceedings was correct. Again, from the language, it appears that the state psychologists investigated only statutory mitigating circumstances. Because the state court found that "there is no evidence that, at the time Jones committed the murders, **any** mitigating mental circumstances existed," *Id.* at 1112 (emphasis added), then the state court's factual determinations respecting the existence of mental mitigating factors and ineffective assistance of counsel were not supported by the record as a whole. For, again, Jones' attorney could have determined that the examinations were not, by themselves, adequate as to mitigating circumstances for the purposes of sentencing. Thus, Jones arguably should have been entitled to an evidentiary hearing at the federal level on this component of his ineffective assistance of counsel claim.

B. Vileness Aggravating Factor

To Jones' claim that the disjunctive phrasing of Virginia's vileness factor components in the jury instructions and forms did not guarantee jury unanimity, the court responded that a jury is not necessary for the constitutional imposition of the death penalty. The court relied on *Cabana v. Bullock*, 474 U.S. 376 (1986), for the proposition that "a federal court's inquiry should not be confined to the jury instructions, but should 'examine the entire course of the state court proceedings against the defendant in order to determine whether, at some point in the process, the requisite finding as to defendant's

culpability has been made.” *Jones*, 947 F.2d at 1117 (quoting *Cabana*, 474 U.S. at 387).

The requisite (or specific) finding in the instant case, the court wrote, is found in Va. Code Ann. §17-110.1(C)(2): “whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.” Because the Virginia Supreme Court found no disproportionality in its automatic review of Jones’ sentence, the Fourth Circuit held, based on *Cabana*, that this review met the specific finding and proper application of an aggravating factor authorizing the imposition of capital punishment.

However, the *Cabana* ruling that a requisite finding could be made by an appellate court (if not made by a jury) was limited to the specific finding of the defendant’s degree of culpability. In *Cabana*, the Supreme Court held that “the factual determination of whether the defendant killed, attempted to kill, or intended to kill” could be specifically made by an appellate court. 474 U.S. at 390. A specific finding as to the defendant’s degree of culpability was required by *Enmund v. Florida*, 458 U.S. 782 (1982), in which the Court held that, without the requisite finding of culpability, imposition of the death penalty would be disproportionate. *Cabana* did not authorize the curing of constitutional infirmities in aggravating circumstances via an appellate court’s general finding of proportionality.

In *Jones*, the Fourth Circuit finally acknowledged that the states must provide a narrowing construction for their aggravating factors pursuant to *Godfrey v. Georgia*, 446 U.S. 420 (1980). In *Godfrey*, the United States Supreme Court held that Georgia’s application of its vileness aggravating factor was unconstitutionally vague because “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.* at 429. The constitutionality of the application of the vileness aggravating factor was again tested in *Maynard v. Cartwright*, 486 U.S. 356 (1988). The Court in *Maynard* held that state supreme courts must monitor the use of any vague aggravating factors that the states use in sentencing a defendant to death.

The court approved Virginia’s application to the facts of Jones’ case the limiting constructions of “aggravated battery” — “a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder,” *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978) — and “depravity of mind” — “a degree of moral turpitude and psychological debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.” *Smith v. Commonwealth*, 219 Va. at 478, 248 S.E.2d at 149.

It should be noted that the United States Supreme Court has not yet approved Virginia’s narrowing construction of its statutory vileness factor. In *Shell v. Mississippi*, 111 S. Ct. 313 (1990), however, the Court held that the limiting construction of Mississippi’s vileness factor was not constitutionally sufficient. See also case summary of *Shell v. Mississippi*, Capital Defense Digest, Vol. 3, No. 2 (1991). Mississippi’s limiting construction is similar to Virginia’s.

Since the Supreme Court has not yet ruled on the constitutionality of Virginia’s narrowing construction, defense counsel should file a motion for a bill of particulars asking the Commonwealth to state upon which of the three vileness factor components the prosecution will rely in seeking the death penalty. In addition, defense counsel should request, pre-trial, disclosure of all “narrowing constructions” that the Commonwealth intends to use at the sentencing phase. Virginia’s construction of “depravity of mind,” defense counsel should note, is particularly suspect after *Shell v. Mississippi*. Defense counsel will, through pre-trial litigation, preserve constitutional challenges to the Commonwealth’s narrowing construction of its vileness factor at trial. In order to insure absolutely the preservation of this issue, objection should also be made at the penalty trial to the jury verdict form (see Va. Code Ann. §19.2-264.4 (D)) and the model penalty trial jury instruction (see Va. Model Jury Instruction No. 34.120).

Summary and analysis by:
Wendy Freeman Miles

ROGERS v. COMMONWEALTH

242 Va. 307, 410 S.E.2d 621 (1991)
Supreme Court of Virginia

FACTS

The Circuit Court of Allegheny County, Virginia convicted Rocky Dale Rogers of three felonies (robbery, burglary and rape) and capital murder in November 1990. The capital murder conviction was based on “the willful, deliberate, and premeditated killing of the victim while in the commission of robbery when armed with a deadly weapon, or while in the commission of, or subsequent to, rape” pursuant to Virginia Code Section 18.2-31(4)(5).

The victim, a 74-year-old-widow, was in her home in Covington when Rogers forced his way inside. According to the defendant’s own statement and the Commonwealth’s theory, at least one other individual, Troy Malcolm, accompanied the defendant. They entered the house planning to rob the woman. Ultimately, she was severely beaten about the head, face and neck with fists and a glass candlestick holder, stripped nude and raped. At some point she was stabbed a number of times in the chest and back, causing wounds which killed her.

The defendant changed his story during the course of several interrogations, admitted rape, but throughout maintained that he did not stab the victim. *Rogers v. Commonwealth*, 242 Va. 307, 316, 410 S.E.2d 621, 626 (1991). At trial, the Commonwealth’s position was that the defendant was “‘the last man in the house,’ tacitly conceding that at least one other person was present at some time” during the criminal enter-

prise. *Rogers*, 242 Va. at 318, 410 S.E.2d at 628. The detective who interrogated Rogers also represented to him that Malcolm had acknowledged being in the house. *Rogers*, 242 Va. at 316, 410 S.E.2d at 626. The Commonwealth presented no forensic evidence linking Rogers to the killing.

HOLDING

The Virginia Supreme Court affirmed the noncapital convictions, which the defendant did not appeal. On appeal of the capital murder conviction, however, the court chose to address the single issue of “whether the evidence [was] legally sufficient to establish that the defendant was the actual perpetrator of the crime,” and reversed. *Rogers*, 242 Va. at 310, 410 S.E.2d at 623.

The court held that, as to capital murder, the prosecution failed to exclude every reasonable hypothesis of the defendant’s innocence in that the Commonwealth failed to exclude Malcolm as the perpetrator of the killing. In other words, “the Commonwealth’s evidence failed to establish beyond a reasonable doubt that Rogers was the so-called ‘triggerman’ [in] that he wielded the knife.” *Rogers*, 242 Va. at 319, 410 S.E.2d at 628. The Virginia Supreme Court reversed and remanded the case for trial on an offense no greater than murder in the first degree.