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# ROGERS v. COMMONWEALTH 242 Va. 307,410 S.E.2d 621 (1991)

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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 psychical 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 enterprise. *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, 621 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.

## ANALYSIS / APPLICATION IN VIRGINIA

Under the Virginia "triggerman rule," when the offenses constituting the charge of capital murder are the willful, deliberate, and premeditated killing of a person in the commission of robbery armed with a deadly weapon, or while in the commission of, or subsequent to, rape, a defendant may not be convicted of capital murder unless the Commonwealth proves beyond a reasonable doubt that the defendant was the actual perpetrator of the murder. *See Johnson v. Commonwealth*, 220 Va. 146, 149, 255 S.E.2d 525, 527 (1979), *cert. denied* 454 U.S. 920 (1981). Contrary to normal rules of accomplice liability, neither an accessory before the fact nor a principal in the second degree may be so convicted. *Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990).

In *Cheng*, three individuals participated in the robbery and fatal shooting of the victim. The evidence did not suggest, however, that more than one person shot the victim. The supreme court reversed the trial court's conviction of Cheng for capital murder because it held that the jury could not have determined beyond a reasonable doubt that Cheng was the triggerman.

Like Cheng, Rogers was admittedly a participant in the incident, but as the court points out, "[t]he significant weakness in the Commonwealth's case is the lack of any evidence, direct or circumstantial, which places the murder weapon in defendant's hands." *Rogers*, 242 Va. at 319, 410 S.E.2d at 628. Accordingly, the jury could not have determined beyond a reasonable doubt that Rogers was the triggerman.

While a defendant may be found to be the triggerman based entirely upon circumstantial evidence, such circumstantial evidence only may be used "provided it is of such convincing character as to exclude every reasonable hypothesis other than that the accused is guilty." *Dukes v. Commonwealth*, 227 Va. 119, 313 S.E.2d 382 (1984). Thus, "[s]uspicion of guilt, however strong, or even a probability of guilt, is insufficient to support a conviction." *Cheng*, 240 Va. at 42, 393 S.E.2d at 608.

In the instant case, the court acknowledged that there is indeed, a "**probability** that the defendant was the criminal agent in the victim's death." *Rogers*, 242 Va. at 320, 410 S.E.2d at 629 (emphasis added). However, "all necessary circumstances must be consistent with guilt, must be inconsistent with innocence, and must exclude every reasonable hypothesis of innocence. [. . .] Because the circumstances of defendant's conduct do not exclude the reasonable hypothesis that Troy Malcolm killed the victim, the capital murder prosecution fails." *Id.*

Where the evidence suggests the possibility of joint perpetration of acts causing death, the Virginia Supreme Court has departed from a strict interpretation of the triggerman rule. In *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991), and in *Coppola v. Commonwealth*, 220 Va. 243, 257 S.E.2d 797 (1979), *cert. denied*, 444 U.S. 1103 (1980), the court upheld capital murder convictions based upon theories of joint participation. In *Coppola*, the co-defendants each repeatedly assaulted the victim, causing her death. In *Strickler*, the co-defendants killed the victim by crushing her skull with a sixty-nine pound rock. Partly because of the very specific circumstances which made it feasible to believe that two people would have been needed to hold the victim and drop the rock, the Virginia Supreme Court held that it was immaterial whether Strickler held the victim down or pummeled her with the rock because the evidence showed that the victim's death was caused by one indivisible act perpetrated by two individuals. *See* case summary of *Strickler v. Commonwealth*, Capital Defense Digest, Vol. 4, No. 1, p.22 (1991).

*Cheng*, *Strickler*, and *Rogers* indicate that except in murder for hire cases, where the evidence does not suggest joint participation in acts causing death, both co-defendants may not be convicted of capital murder. In cases where the evidence is arguably less than *prima facie* that a particular defendant caused death, the issue may be raised pretrial by a motion to dismiss the capital indictment. If the issue is determined to be a jury question, care should be taken to preserve it clearly on the record.

Summary and analysis by:
Anne E. McInerney

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## GEORGE v. COMMONWEALTH

### 242 Va. 264, 411 S.E.2d 12 (1991)
### Supreme Court of Virginia

## FACTS

Michael Carl George was convicted of capital murder in the commission of robbery while armed with a deadly weapon. Va. Code Ann. § 18.2-31(4). Upon a finding of "future dangerousness" and "vileness," the jury set George's penalty at death, which was accepted by the trial court.

On June 16, 1990 at approximately 2:00 p.m., fifteen-year-old Alexander Eugene Sztanko was last seen alive by his parents when he rode his motorcycle away from his family's house to nearby woods. Approximately one hour to half an hour later, Alex's father heard two gunshots which originated from the woods. The next day, Corporal Joseph Dillon of the Prince William County Police Department noticed a blue Ford Bronco in the woods near Alex's house. Aware that Alex had been reported missing and that he had seen the same vehicle at the same location the day before, Corporal Dillon ran a license check of the Bronco and found that it was registered to George. Shortly thereafter, Corporal Dillon observed a camouflaged person who "appear[ed] . . . that he did not want to be seen." *George v. Commonwealth*, 242 Va. 264, 269 (1991). This person identified himself as George and stated that he was in the area to find a hunting ground. In a conversation with Dillon, George admitted that he had been in the same area the day before. Once another police unit arrived, officer Dillon arrested George for trespassing.

Once George was in custody and transferred away, "Dillon walked to the spot where George had knelt down." *Id.* at 269. There, officer Dillon found Alex's tennis shoes. After a more thorough search of the area, the police discovered Alex's shoeless body. The police also recovered Alex's motorcycle and helmet and determined that they were found approximately five-tenths of mile from where the body had lain.

Alex died instantaneously of a single gunshot wound to the head. In addition, the autopsy revealed abrasions of Alex's penis which were consistent with an "electrical burning." *Id.* at 269-270. The autopsy also revealed "the presence of seminal fluid." *Id.* at 270. "Fibers found on Alex's T-shirt were consistent with the material from . . . George's camouflage jacket." *Id.* An examination of George's clothing revealed blood "inconsistent with his blood type but consistent with Alex's." *Id.*

Police searches of George, his vehicle, and his parents' home led to the discovery of a topographical map marking where the victim's body and motorcycle plus helmet were found, a stun gun, and a fully loaded nine millimeter pistol determined to be the murder weapon.

## HOLDING

The Virginia Supreme Court upheld George's conviction of capital murder in the commission of robbery while armed with a deadly weapon, and affirmed his sentence at death. George assigned numerous