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WILLIAMS v. COMMONWEALTH 248 Va. 528,450 S.E.2d 365 (1994) Supreme Court of Virginia

However, due to Burket's failures to raise the issue in the trial court[52] and assign it as error on appeal,[53] the Supreme Court of Virginia refused to consider the merits of the issue. Burket's loss of the *Simmons* issue is yet another example of how procedural default is a trap for the unwary. Interestingly, in spite of Burket's guilty plea, the court nevertheless reviewed the penalty phase issues raised by the defense.[54] This may signal a movement away from the court's earlier pronouncements that "[w]hen an accused enters a voluntary and intelligent plea of guilty to an offense he waives all defenses except those jurisdictional."[55]

Much to the credit of the defense, an extensive case in mitigation was put on in the penalty phase of the proceedings. Yet this very presentation of evidence exemplifies why a capital defendant should not plead guilty without an agreement that he will receive a sentence less than death. By pleading guilty without such assurances, the defendant waives all appellate questions regarding guidance of jury discretion in sentencing[56] and drastically reduces any chance of appellate relief.

Finally, the *Burket* decision confirms that as of yet, the Supreme Court of Virginia has not found any Fifth or Sixth Amendment problems with any confession in the history of the modern capital murder statute.

V. Conclusion

The motion to suppress has not proven to be an effective tool for the Virginia capital defendant. The motion should not be abandoned, but by the same token the defense strategy certainly should not hinge on its success.[57]

Summary and analysis by:
Jody M. Bieber

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52 Va. Sup. Ct. R. 5:25.

53 Va. Sup. Ct. R. 5:17.

54 *Burket v. Commonwealth*, 248 Va. at 613-16, 450 S.E.2d at 133-35. Specifically, Burket argued that the trial court erred in finding the prosecution's expert witness more credible than the defense expert witnesses and in not considering all the evidence in mitigation. The Court found these challenges to be without merit. *Id.*

55 *Savino v. Commonwealth*, 239 Va. 534, 539, 391 S.E.2d 276, 278 (1990). *See also Stout v. Commonwealth*, 237 Va. 126, 131-32, 376 S.E.2d 288, 291 (1989).

56 For example, a meritorious and unresolved challenge to the "vileness" factor may be lost because the trial judge is presumed to apply a proper limiting construction. *See* Walton v. Arizona, 497 U.S. 639 (1990), *reh'g denied*, 497 U.S. 1050 (1990); *see also* Lago, *Litigating the "Vileness" Factor*, Capital Defense Digest, Vol. 4, No. 1, p. 25 (1991).

57 For a more thorough discussion of the state of confession law in Virginia, see Bieber, Burket v. Commonwealth: *Don't Put All Your Defense Eggs in the Suppression Basket*, Capital Defense Digest, this issue.

WILLIAMS v. COMMONWEALTH

248 Va. 528, 450 S.E.2d 365 (1994)
Supreme Court of Virginia

FACTS

Michael Wayne Williams was tried upon indictments charging him with twelve felonies, five of which were capital murder charges for the killing of Morris C. and Mary Elizabeth Keller.[1] At the guilt phase of a bifurcated trial conducted under Virginia Code sections 19.2-264.3 and 264.4, a jury convicted Williams of all twelve charges. At the penalty phase, the jury fixed the punishment for both capital murders at death based on both the "future dangerousness" and "vileness" aggravators. Williams appealed his capital murder convictions.[2] The Supreme Court of Virginia consolidated his appeal with their automatic review of his death sentences under Virginia Code section 17-110.1(A).[3]

HOLDING

The Supreme Court of Virginia conducted its mandatory review of the imposition of Davidson's death sentence, denied his appeal and affirmed the trial court's actions.[4]

Among the many issues raised and briefed on appeal,[5] the court stated that it would not consider certain contentions by Williams because they were not contained in his brief or were "incorporated by reference" to arguments made in the trial court.

In response to Williams' argument that the Commonwealth is required, by means of a bill or particulars, to "identify every narrowing construction of [the "vileness"] factor on which it intends to offer

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1 Two of the capital murder charges were based on Va. Code Ann. § 18.2-31(d) (1990) (murder in the course of a robbery while armed with a deadly weapon); two indictments were based on Va. Code Ann. § 18.2-31(e) (1990) (murder subsequent to rape); the fifth indictment was based on Va. Code Ann. § 18.2-31(g) (1990) (murder of more than one person as a part of the same act or transaction).

2 *Williams v. Commonwealth*, 248 Va. 528, 532, 450 S.E.2d 365, 369 (1994).

3 *Id.*

4 *Id.* at 528, 450 S.E.2d at 379.

5 Some of the errors briefed on appeal were rejected in brief, conclusive language. Arguments in this category that will not be addressed in this summary include: 1) the Virginia capital murder statute does not give meaningful guidance to a jury because it does not require the jury to find that the aggravating circumstances outweigh the mitigating circumstances; (2) the statute fails to inform the jury that it must find beyond a reasonable doubt that the aggravating factors outweigh the mitigating factors; (3) the statute fails to provide sufficient guidance to the jury to assure that the death penalty is not applied arbitrarily or capriciously; (4) the "future dangerousness" aggravator is inherently misleading; (5) the part of the statute that allows a finding of "future dangerousness" to be based on unadjudicated criminal conduct is unconstitutional; (6) if unadjudicated acts are allowed, the jury should be instructed that they must only be considered if established beyond a reasonable doubt; (7) the "future dangerousness" aggravator is inherently unreliable and insufficient to guide a jury's discretion; (8) the

evidence,"[6] the court held that the language of the statute itself provided the necessary narrowing construction and that due process does not require the Commonwealth to give any other pre-trial constructions of the statute. The court further held that Williams has no constitutional right to a bill of particulars "if the indictments are sufficient to give him notice of the nature and character of the offenses charged . . . so that he can make his defense."[7]

ANALYSIS/APPLICATION IN VIRGINIA

I. Procedural Default and the Fifty Page Brief Limit

The court refused to address certain assignments of error made by Williams either because they were not included in the appellate brief at all or were "incorporate[d] by reference."[8] The basis for this is the requirement of Rule 5:28(e) that "[t]he principles of law, the argument and the authorities relating to each question presented" be included in the appellate brief.[9] This exclusion of issues fails to consider the Rule 5:26(a) requirement that briefs to the Supreme Court shall not "exceed 50 typed or 36 printed pages,"[10] the default rules established under Rule 5:25, and the principle that state court remedies must be exhausted before a federal court will consider assignments of error in a federal habeas petition.

Taken together, these rules and principles require that all colorable issues that may be made concerning errors that occurred at the trial court level of a capital murder case must be raised at trial, included as assignments of error, and briefed on appeal. If every issue is not included at every stage, Virginia courts will strictly enforce default rules, including Rule 5:25, which states that "[e]rror will not be sustained to any ruling of the trial court . . . unless the objection was stated with reasonable certainty at the time of the ruling."[11] Once an issue is defaulted at the state level, federal courts have held that such a default, in the usual case, precludes review of federal questions because it constitutes an adequate and independent state ground of decision.[12] Thus once an issue is defaulted, it may never be raised again.[13]

The problem that arises in capital murder cases is that the breadth of issues that must be raised is enormous because of the complexity and instability of capital punishment law. No one can accurately predict what changes will occur in the law, thus all colorable federal and state law issues must be raised. The only certainty is that the client will more likely face execution if issues are "narrowed" by default.

> Traditional theories of appellate practice notwithstanding, appellate counsel in a capital case should not raise only the best of several potential issues. [footnote omitted]. Issues abandoned by counsel in one case, pursued by different counsel in another case and ultimately successful, cannot necessarily be reclaimed later. When a client will be killed if a case is lost, counsel (and the courts) should not let any possible ground for relief go unexplored or unexploited.[14]

Both the American Bar Association (ABA) and the National Legal Aid and Defenders Association (NLADA) have rejected the "narrowing" strategy as a reasonable choice in capital cases.[15]

This requirement to brief all colorable issues would normally require appellate counsel to compile a brief that exceeds the fifty page limit of Rule 5:26. Like most rules of procedure, the Supreme Court of Virginia strictly applies this rule.[16] The most glaring example of the misapplication of such rules occurred in *Stockton v. Commonwealth*.[17]

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statute as administered is unconstitutional because it is imposed arbitrarily and disproportionately upon black defendants; (9) the statute is unconstitutional because the death penalty is repugnant to evolving standards of decency; (10) the statute is unconstitutional because meaningful appellate review is denied because the administration of the state right to proportionality and passion/prejudice review is arbitrary; (11) the statute violates the Eighth Amendment bar against cruel and unusual punishment; and issues involving (12) the Sixth Amendment right to fair trial; (13) and the Fourteenth Amendment prohibition against deprivation of the defendant's life without due process; (14) the denial of a request by the defendant for sequestered *voir dire* and additional preemptory challenges; and (15) the failure to provide additional discovery required under Rule 3A:11.

Other rulings provide little guidance because they apply broad, settled principles of law to facts that are specific to the case being reviewed. Issues in this category that will not be addressed in this summary include: (1) objections to the exclusion of prospective jurors because no objection was made to their exclusion at trial; (2) denial of a motion for change of venue due to pretrial publicity; (3) denial of motion for assistance of a private investigator; (4) improper limitation on *voir dire*; (5) failure to grant a mistrial; (6) improperly admitting prejudicial photographs of victim and crime scene; (7) errors in the testimony of witnesses; (8) improper cross-examination of the defendant; (9) improper admission of defendant's out-of-court statement; (10) improper jury instructions; (11) insufficiency of the evidence; (12) double jeopardy violation; and (13) improper admission of photographs of other murders at the penalty phase.

Defense counsel is to be commended for assigning and preserving all of these issues for federal review.

[6] *Williams*, 248 Va. at 538, 450 S.E.2d at 372.

[7] *Id.*

[8] *Id.* at 537, 450 S.E.2d 372.

[9] Va. Sup. Ct. R. 5:28(e)(2).

[10] Va. Sup. Ct. R. 5:26(a).

[11] Va. Sup. Ct. R. 5:25.

[12] 28 U.S.C. § 2254(b) (1988). *See Dugger v. Adams*, 489 U.S. 401, 410 n.6 (1989); *Murray v. Carrier*, 477 U.S. 478 (1986).

[13] The only Virginia exception to this bar is "for good cause shown or to enable this Court to attain the ends of justice." Va. Sup. Ct. R. 5:23(e). This exception has been applied very rarely. For more information on procedural default, see Groot, *To Attain the Ends of Justice: Confronting Virginia's Default Rules in Capital Cases*, Capital Defense Digest, Vol. 6, No. 2, p. 44 (1994); Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990).

[14] *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guidelines 11.9.2 Commentary (1989); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, Standard 11.9.2(d), Duties of Appellate Counsel, Commentary (NLADA 1988).

[15] Appellate counsel should seek, when perfecting the appeal, "to present all arguably meritorious issues, including challenges to any overly restrictive appellate rules." *Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases*, Guidelines 11.9.2 Commentary (1989); *Standards for the Appointment and Performance of Counsel in Death Penalty Cases*, Standard 11.9.2(d), Duties of Appellate Counsel, Commentary (NLADA 1988).

[16] *See Weeks v. Commonwealth*, 248 Va. 460, 450 S.E.2d 379 (1994) and case summary of *Weeks*, Capital Defense Digest, this issue

[17] 241 Va. 192, 402 S.E.2d 196 (1991).

Here the court refused to grant leave to Stockton to file a brief in excess of the fifty page limit. When due to this denial assignments of error were not able to be briefed, the court adhered to the default rules and would not consider these assignments of error.[18]

In *Jones v. Barnes*[19] the United States Supreme Court restated the conventional wisdom that appellate counsel should narrow the range of issues to be considered by an appellate court.[20] However, *Jones* was a non-capital case, where it is proper to rely on the judgment of counsel to determine which issues should or should not be raised. In the capital case context, application of procedural rules and default rules by the Supreme Court of Virginia in order to force counsel to "narrow" issues is unacceptable because there is no room for the exercise of independent judgment by counsel. Even the most competent counsel cannot determine which claims will be validated in the future and which claims should be abandoned forever. It effectively forces counsel to disregard the national standards set by the ABA and NLADA and to act in an ineffective way. The right to effective assistance of counsel in a case where potentially life-saving claims may be lost to default substantially outweighs any interest a state may have in limiting the length of an appellate brief.

Faced with these procedural rules, defense counsel in Virginia should always move that the fifty page limit be waived when an appeal is made. If this motion is denied, reconsideration should be requested.[21] If this request is denied also, several options remain, including: (1) seeking a writ of mandamus from a federal court, (2) "incorporating by reference" the weakest, yet still relevant, arguments that counsel has previously raised, or (3) using one sentence arguments when briefing claims that have been repeatedly rejected by Virginia courts. If the Supreme Court of Virginia rejects these efforts to present claims for its consideration, a new issue is created.[22]

These mechanisms at least raise the possibility that a Virginia determination of default based on these "Catch-22" procedures may not be honored by the federal courts. There are federal precedents that could serve as a basis for overcoming these default rules. Some require that the state procedural rule must serve a state interest other than to frustrate federal rights.[23] Others hold a procedural rule may not act as a bar where the petitioner has substantially complied with the rule but defaulted in some technical sense,[24] the claim allegedly defaulted falls within an exception to the rule,[25] or the rule is discretionary.[26] Therefore, it may be argued that the rule itself is invalid and thus no default has occurred. Finally, the federal court may agree that although there is a default, there is cause for that default which will allow the federal court to hear the issue.[27]

II. Bill of Particulars

The court addressed Williams' contention that due process requires that he receive pretrial notification, by a bill of particulars, of the limiting constructions of the "vileness" aggravating factor of the capital murder statute upon which the prosecution intended to rely at trial. The court held that: (1) due process does not require such notification pretrial, (2) that there is no constitutional right to a bill of particulars if the indictments are sufficient to give notice of the nature and character of the offenses charged, and (3) that the necessary narrowing constructions are contained in the statute itself.[28]

The Virginia statutory scheme casts the aggravating factors as elements of the state's case for death. Persons found guilty of capital murder are not eligible for a sentence of death unless and until the Commonwealth has proven either "future dangerousness" or "vileness" beyond a reasonable doubt, which is the standard applicable to elements of an offense.[29] Separate from the issue of the utility of these factors in guiding the discretion of the sentencing jury, the defendant has a due process right to defend against the state's case for death.[30] Notice and the opportunity to be heard are the foundation of this due process right. The United State Supreme Court cases which held that the statutory language of the "vileness" and "heinousness" factors are inadequate to guide capital sentencing juries also illustrate the impossibility of defending against these factors.[31]

The United States Supreme Court has been equally clear that capital defendant's have a due process right to defend against the state's case for death.[32] In Virginia the aggravating factors of "future dangerousness" or "vileness" are the elements of the state's case for death, because persons found guilty of capital murder are not eligible for a sentence of

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18 *Id.* at 217, 402 S.E.2d at 210.

19 463 U.S. 745 (1983).

20 *Id.* at 751-54.

21 Another argument could be made that because the Supreme Court of Virginia is required by law to undertake a passion/prejudice review and proportionality review of any capital sentence, that any pages used in briefing assignments of errors concerning these areas should not be counted in the fifty page limit or, alternatively, that a separate brief should be allowed to be submitted by the defense which specifically addresses these areas.

22 For a comprehensive discussion of default, federal review, and the fifty page limit, see Ahrend, *Beating a Potential Deathtrap: How to Preserve the Appellate Record for Federal Review and Avoid Virginia's Procedural Default*, Capital Defense Digest, this issue.

23 *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

24 *Id. See White v. Sowders*, 644 F.2d 1177, 1182 (6th Cir. 1981) *cert. denied*, 454 U.S. 853 (1981).

25 *Johnson v. Mississippi*, 486 U.S. 578, 587-89 (1988); *Hathorn v. Lovorn*, 457 U.S. 255, 262-65 (1982); *County Court of Ulster County v. Allen*, 442 U.S. 140, 150-51 n.8, 10 (1979).

26 *Johnson v. Mississippi*, 486 U.S. at 587-89; *Hathorn v. Lovorn*, 457 U.S. at 262-65; *Sullivan v. Little Hunting Park, Inc.*, 396 U.S. 229, 233-34 (1969).

27 *Wainwright v. Sykes*, 433 U.S. 72, 92-94 (1977).

28 *Williams*, 248 Va. 528, 538, 450 S.E.2d 365, 372.

29 Va. Code Ann. § 19.2-264.4(c) (1990). *See Tuilaepa v. California*, 114 S. Ct. 2630 (1994) (the factors for determining a defendant's eligibility for death may not be vague) and case summary of *Tuilaepa*, Capital Defense Digest, Vol. 7, No. 1, p. 8 (1994).

30 *Gardner v. Florida*, 430 U.S. 349 (1977) (holding that reliance by court on confidential presentence report that was not made available to the defendant violated the Fourteenth Amendment because it denied him the opportunity to "deny or explain" such information); *Simmons v. South Carolina*, 114 S. Ct. 2187, 2194 (1994) (holding that the Due Process Clause does not allow the execution of a person on the basis of information which he had no opportunity to "deny or explain").

31 *Godfrey v. Georgia*, 446 U.S. 420, 428-29 (1980) ("There is nothing in these few words, standing alone, that implies any inherent restraint on the arbitrary and capricious infliction of the death sentence. A person of ordinary sensibility could fairly characterize almost every murder as 'outrageously or wantonly vile, horrible and inhuman.'"); *Maynard v. Cartwright*, 486 U.S. 356, 363 (1988) (rejected argument that "a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty.").

32 *Gardner v. Flordia*, 430 U.S. 349 (1977); *Skipper v. South Carolina*, 476 U.S. 1 (1986); *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994).

death unless one of these two aggravators are proven beyond a reasonable doubt at the penalty phase of the capital murder trial.[33]

In the face of these constitutional requirements, the Supreme Court of Virginia held in *Williams* that: (1) defendants are not even entitled to pretrial notice that the Commonwealth will rely on either or both of the statutory elements of its case for death, (2) directly contrary to *Godfrey*, the language of the "vileness" factor is not vague,[34] and (3) the statutory language is vague, but the definitions of the terms found in *Smith v. Commonwealth*[35] provide sufficient explanation.[36] The court previously held in *Clark v. Commonwealth* that the *Smith* definitions were "not the best or the only ones."[37] The court in *Williams*, however, refers to the *Smith* definitions as "necessary," implying that they are the only acceptable constructions.[38] To confuse the matter further, the Supreme Court has also held that vagueness in the statutory language of an aggravating factor is not cured by a narrowing construction that is itself unconstitutionally vague.[39] The *Smith* definitions are certainly suspect under *Shell*, notwithstanding the cursory approval given to them in *Turner v. Murray*.[40]

Williams illustrates that the Supreme Court of Virginia is all over the map in its efforts to uphold the application of Virginia's vague aggravating factors. Both defendants and jurors are left in the dark because of these efforts.

Defense counsel should continue to move for a bill of particulars that includes all the narrowing constructions of the capital statute aggravators on which the Commonwealth intends to rely. The brief in support of this motion must frame the issue as a federal question, so that if this motion is denied, the issue may be preserved for later argument to a federal court if necessary. It is clear that Virginia courts are not sympathetic to this claim; however, it seems inevitable that a federal court will eventually take up this issue. It is vital that this issue be raised and preserved at every stage to assure than when the federal courts take the opportunity to appropriately apply the United States Constitution to Virginia's aggravating factors, no clients will be "defaulted out" of the benefit of that favorable ruling.

Summary and analysis by:
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33 *Tuilaepa, supra* note 29.

34 *Williams*, 248 Va. at 538, 450 S.E.2d 372 ("The necessary narrowing constructions are contained in the emphasized language of the Code § 19.2-264.4(C)" and indictments which contained this statutory language were "sufficient to give him notice of the nature and character of the offenses charged . . . .").

35 219 Va. 455, 248 S.E.2d 135 (1978) (defined the terms "aggravated battery" and "depravity of mind").

36 *Williams*, 248 Va. at 538, 450 S.E.2d at 372.

37 220 Va. 201, 257 S.E.2d 784 (1979).

38 *Williams*, 248 Va. at 538, 450 S.E.2d at 372.

39 *Shell v. Mississippi*, 498 U.S. 1 (1990) (held that there was no meaningful distinction between the limiting construction and the "vileness" factor itself and thus a person of ordinary sensibilities would still be able to characterize almost every murder as falling within its limits).

40 476 U.S. 28 (1986).

JOSEPH v. COMMONWEALTH

452 S.E.2d 862 (Va. 1995)
Supreme Court of Virginia

FACTS

On the evening of October 26, 1992, Jason M. Joseph and an accomplice, Kiasi Powell, entered a Subway Shop in Portsmouth, Virginia. Joseph ordered a sandwich from Anderson who was behind the counter. As the sandwich was being prepared, Joseph displayed a pistol and ordered Anderson to open the register. Joseph then ordered Anderson to hand him the cash drawer and to get down on the floor behind the counter. After receiving the drawer, Joseph indicated his intention to shoot Anderson. Subsequently, Joseph reached over the counter, shot and killed Anderson.[1]

In the first stage of a bifurcated trial, pursuant to Virginia Code sections 19.2-264.3 and 19.2-264.4, a jury convicted Joseph of capital murder, robbery while armed with a deadly weapon, the use of a firearm while committing murder, robbery and the use of a firearm while committing murder. His punishment was fixed at imprisonment for life on the robbery conviction and four years imprisonment for each firearm conviction. In the second stage of the capital murder trial, the jury fixed Joseph's punishment at death based on "future dangerousness."[2]

HOLDING

In accordance with Virginia Code sections 17-110.1(A) and 17-110.1(F), the Supreme Court of Virginia consolidated the automatic review of Joseph's death sentence with his appeal of the capital murder conviction and other convictions on appeal. The court then upheld the convictions and death sentence.[3]

1 *Joseph v. Commonwealth*, 452 S.E.2d 862, 864-65 (Va. 1995).

2 *Id.* at 864.

3 The court rejected some of the defendant's assignments of error in brief, conclusive language. Others did not involve death penalty law. On still others, the rulings provide little if any guidance because they apply broad, settled principles of law to facts that are specific to the case being reviewed. Issues in these categories that will not be addressed in this summary include: (1) denial of an "Allen charge" and (2) sufficiency of the evidence of "future dangerousness." Further, some claims were found to have been defaulted or made solely on state law grounds, probably barring federal review. Claims falling in these categories included: (1) objection to Commonwealth voir dire questions (defaulted) and (2) objection to duplicative photographs (state law grounds). For discussion of placing federal law grounds in all claims, see case summary of *Cardwell*, Capital Defense Digest, this issue. For discussion of avoiding procedural default, see *Breard v. Commonwealth*, 248 Va. 68, 445 S.E.2d 670 (1994), and case summary of *Breard*, Capital Defense Digest, Vol. 7, No. 1, p. 19 (1994); *Pruett v. Thompson*, 996 F.2d 1560 (4th Cir. 1993), and case summary of *Pruett*, Capital Defense Digest Vol. 6, No. 1, p. 15 (1993). For a discussion on how to avoid procedural default, see Groot, *To Attain the Ends of Justice: Confronting Virginia's Default Rules in Capital Cases*, Capital Defense Digest, Vol. 6, No. 2, p. 44 (1994).