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FACTS

After a joint trial in the federal district court in Richmond, the jury found that the defendants, Richard Tipton, Cory Johnson and James Roane, had committed several murders in furtherance of a continuing criminal enterprise (CCE), capital offenses under 21 U.S.C.A. § 848,[1] as well as several related non-capital offenses, including conspiracy. The government charged the defendants with operating a drug-trafficking conspiracy based in the Richmond area. In the course of business, the defendants, in various combinations, murdered ten people in early 1992. The jury recommended the death penalty for each defendant under the federal death penalty statute. The district court judge subsequently ordered a stay of their deaths by lethal injection pending Congressional authorization for a means of execution.[2]

On direct appeal, the defendants raised almost sixty issues, most of which were common to all. The prosecution cross-appealed, challenging the trial court's order staying the executions.[3]

HOLDING

The Fourth Circuit Court of Appeals panel rejected the defendants' assignments of error with the exception of reversing the conspiracy convictions as lesser included offenses of the continuing criminal enterprise element of capital murder. In addition, the court granted the government's cross-appeal and vacated the trial court's order staying the executions.[4]

ANALYSIS/APPLICATION IN VIRGINIA

This case is the first direct appeal of a capital conviction in the Fourth Circuit. Accordingly, discussion of the procedure employed and issues decided on major components of the federal death penalty statute will be somewhat lengthy.[5]

I. Pre-trial Issues

A. Defendants Were Not Present During Entire *Voir Dire*

The selection of jury members occurred in three stages. The court first asked general questions to the jury pool about "non-sensitive" issues such as a juror's possible relation with a party in the case. This stage took place in open court and the defendants were present. During the second phase, the judge interviewed the remaining jurors individually about "sensitive" subjects, including their ability to be effective jurors in light of the capital charges. The judge performed this questioning in his chambers with only counsel present. While defense counsel raised issues concerning the defendants' absence at this phase, the record established that they expressly waived defendants' right to be present. During the final step, the court empaneled the jury after the parties exercised their peremptory challenges. This stage occurred in open court with the defendants present.[6]

Relying on their Fifth and Sixth Amendment rights to be present at all critical stages of the trial and Fed. R. Crim. P. 43(a), which grants a

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[1] 21 U.S.C. § 848(e) provides in part:

(1) In addition to the other penalties set forth in this section-

(A) any person engaging in or working in furtherance of a continuing criminal enterprise, or any person engaging in an offense punishable under section 841(b)(1)(A) of this title or section 960(b)(1) of this title who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual and such killing results, shall be sentenced to any term of imprisonment, which shall not be less than 20 years, and which may be up to life imprisonment, or may be sentenced to death . . .

[2] *United States v. Tipton, United States v. Johnson, United States v. Roane*, 90 F.3d 861, 869-70 (4th Cir. 1996).

[3] *Id.* at 868.

[4] *Id.* at 903.

[5] Many of the court's rulings, however, will not be discussed in this summary. The court rejected some of the defendants' assignments of error in brief, conclusive language. Other assignments 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 specific to the case being reviewed. Issues in these categories include:

(1) discriminatory use of peremptory strikes against women; (2) severance of conspiracies and related instructions; (3) inadequacy of an indictment concerning a CCE charge; (4) prohibition against murders being used as predicate offenses for a CCE charge; (5) instruction concerning emphasis that all elements of CCE must be found separately for each defendant; (6) amendment of jury instruction about supervision element of CCE after defendant's closing argument; (7) judge's errant use of "racketeering activity" when he should have said, "enterprise engaged in racketeering activity"; (8) sufficiency of the evidence for a finding of capital murder; (9) sufficiency of evidence to demonstrate "substantial planning and premeditation"; (10) facial challenges to the use of two non-statutory aggravating factors—substantial criminal histories and participation in a conspiracy having murder as a purpose; (11) failure to define reasonable doubt in the capital-sentencing instructions; (12) failure to hold the Government to penalty-phase discovery and proof requirements; (13) failure to instruct on proper use of mental and neurological impairments evidence; (14) failure to declare a mistrial because of a prosecutor's comment on Tipton's failure to testify; and, (15) failure to order a new penalty-phase trial because of the Government's withdrawal of death-penalty notice against a co-defendant.

[6] *Tipton*, 90 F.3d at 871-872.

right to be present at all stages of the *voir dire*, the defendants assigned error for their absence during juror questioning in the judge's chambers. Specifically, they argued that this right cannot be waived at a capital trial or, if it can, a formal written waiver is necessary.[7] The court of appeals reviewed this alleged error under the "plain error" standard of review set out in Fed. R. Crim. P. 52(b).[8] Finding no prejudicial error under this standard, the court did not reach the constitutional merits of the defendants' objections.[9]

In conducting its "plain error" review of an alleged violation of a trial right, the court relied heavily on *United States v. Olano*.[10] The *Olano* court applied the Rule 52(b) limitations to appellate review of procedurally forfeited assignments of error. In the instant case, defense counsels' failure to object during *voir dire* and post-verdict resulted in the forfeiture of an assignment of error based on the defendants' absence. The court of appeals explained that under *Olano*, a reviewing court has the authority to correct forfeited error "only if it is 'plain' and 'affects substantial rights,' and even then is not required to do so unless the error is one that 'causes the conviction or sentencing of an actually innocent defendant' or otherwise 'seriously affect[s] the fairness, integrity or public reputation of the judicial proceedings.'"[11] While conceding that any error resulting from the defendants' absence would be "'plain'" on the record, the court stated that any such error did not "affect a substantial right."[12]

The court discussed three ways appellants can demonstrate how an error may effect a substantial right. A defendant may either make a showing of actual prejudice, invoke a presumption of prejudice where no showing can be made, or claim a substantial right was affected independent of prejudice.[13] In this case, the court found that the defendants could not demonstrate actual prejudice — that is, that the absence affected the outcome of the trial. The court did acknowledge that it is almost impossible to make such a showing due to all the factors that result in a conviction. At a minimum, the defendant must show that a different jury would have heard the case had the defendant been present during the *voir dire* stage in question, but this showing would not itself suffice to make out prejudice.[14]

The defendants also argued that the court of appeals should presume prejudice from their absence. While a total absence from all stages of *voir dire* may give sufficient grounds for a presumption, stated the court, temporary absence was not prejudicial, especially so here because counsel was present at the in-chambers proceedings.[15]

To some degree, the court has perhaps under-estimated the connection between the defendants' presence at *voir dire* and the composition of the jury. The defendants' presence likely affected the disposition and answers of potential jurors when their responses concerned their ability to sentence individuals to death who were present in court, or chambers, with them. For this reason, it is probably better practice to ensure that a defendant is present during every phase of jury selection. The question as to whether a defendant may waive his right to be present at all remains an open one in the Fourth Circuit.

Finally, the court held that absence from a portion of *voir dire* does not curtail an absolute right that flows from "overarching systematic reasons" such that prejudice need not be shown.[16] The court also found that the "right to presence at all critical stages of trial . . . is not such an absolute, systemic right."[17] The court further reasoned that a due process argument suggesting a defendant was denied the opportunity to effectively assist in his defense, while systemic in nature, requires a showing of actual prejudice.[18] Because the defendants failed to show prejudice, the court rejected their assignment of error pertaining to absences during *voir dire*.[19]

B. The District Court Failed to Conduct Adequate *Voir Dire* Regarding Racial Bias and Consideration of Aggravating/Mitigating Factors in Sentencing

The trial court denied defense counsel's pre-trial motions to participate in *voir dire* questioning about racial prejudice. In response, counsel submitted sixty-two proposed jury questions concerning racial bias. The trial court did not accept these questions and instead asked, "Do you harbor any bias or prejudice, racial or otherwise, that would prevent you from being fair to the defendants in this case?"[20] Depending on a juror's response to this general question, the trial court permitted limited follow-up questioning by counsel. The defendants claimed this single question was insufficient for exposing racial bias, especially because the presiding judge was himself a black person to whom jurors would be less inclined to speak about their racial attitudes.[21]

The court of appeals held that, given that the crime was not interracial in nature (i.e.; motivated by racial hatred) and that the defendants and victims were of the same race, the trial judge clearly had full discretion over the formation and submission of race questions for *voir dire*.[22] The court did not, however, address whether the question was effective in exposing racial attitudes. Instead, the court focused on the trial judge's non-abuse of discretion in asking only one question.[23] The

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7 *Id.* at 870, 873.

8 *Id.* at 873. The jury selection process in federal court and the 'plain error" standard of review, represent differences between Virginia practice and federal practice. In federal court, the trial judge does the examination of the jurors after submission of questions by counsel. The role of counsel is simply to move for a juror's removal for cause, unless the trial court allows limited participation. This procedure sharply contrasts with Virginia practice where counsel plays an active role in interviewing potential jurors.

9 *Id.* at 876. The court briefly discussed the merits of the defendants' contentions. *Id.* at 873 nn.3-4. Citing *Campbell v. Wood*, 18 F.3d 662 (9th Cir. 1994), the court suggested that a defendant may waive his right to presence during *voir dire* in a capital case. The court did not decide whether a formal procedure is required to effect such a waiver. *Id.* at 873 n.3. Since this issue remains undecided, advocates should continue to raise it on appeal and in *habeas corpus* petitions.

10 *United States v. Olano*, 507 U.S. 725 (1993).

11 *Tipton*, 90 F.3d at 873-74 (citations omitted).

12 *Id.* at 874. Virginia, in effect, does not have a plain error rule and the slightest failure to follow trial procedure results in findings of default or waiver. *See, e.g., Claget v. Commonwealth*, 252 Va. 79, 472 S.E.2d 263 (1996); summary of *Claget*, Capital Defense Journal, this issue; *Sheppard v. Commonwealth*, 250 Va. 379, 464 S.E.2d 131 (1995); case summary of *Sheppard*, Capital Defense Digest, Vol. 8, No. 2, pg. 9; *Beavers v. Commonwealth*, 245 Va. 268, 427 S.E.2d 411 (1993); and case summary of *Beavers*, Capital Defense Digest, Vol. 6, No. 1, p. 26.

13 *Id.* at 874-76.

14 *Id.* at 876. Without deciding what would constitute prejudice, the court of appeals indicated that, at minimum, a defendant would have to show some bias on part of the current jurors selected. *Id.*

15 *Id.* at 875.

16 *Id.* at 874.

17 *Id.*

18 *Id.* at 874-75.

19 *Id.* at 876.

20 *Id.* at 877.

21 *Id.*

22 *Id.* at 877-78.

23 *Id.* at 878-89. The court refused to consider the sufficiency of the *voir dire* question in light of the trial judge's race. The court observed that to hold that jurors might tailor their responses because the trial judge was a member of a minority class would adopt an "unthinkable" *per se* rule as a matter of policy. *Id.* at 879 n.8.

court did not consider the apparent intent of the framers of the federal CCE statute to eliminate racial prejudice in capital trials. For example, the statute requires that the jury be instructed not to impose a death sentence "unless it has concluded that it would recommend a sentence of death for the crime in question no matter what the race [or] color . . . of the defendant or the victim, may be."[24]

Notwithstanding the court's ruling, many times judges recognize the real effect of race in capital trials and will permit meaningful *voir dire* on the issue. Counsel should continue to urge them to do so. Counsel in this case recognized the importance of the context in which a question is posed to its ability to expose bias. It is not unreasonable to suspect a juror is perhaps less likely to reveal racial attitudes to a black trial judge. The extent of questioning about race should not be determined only by the context of the crime, but should also take into account the context of the courtroom.

When conducting *voir dire* concerning the prospective jurors' willingness to consider mitigating factors specifically relevant to the case, the trial judge again declined to incorporate suggested questions submitted by defense counsel and refused to allow counsel to participate in questioning.[25] The trial court posed a single question: "Do you have strong feelings in favor of the death penalty?"[26] If the juror gave any answer other than "no," the court then asked whether the juror "would always vote to impose the death penalty in every case where a defendant was found guilty of a capital offense."[27] The court of appeals held that this line of questioning was a proper exercise of discretion.[28]

In finding no error, the court improperly characterized the holding of the United States Supreme Court in *Morgan v. Illinois*.[29] The court interpreted *Morgan* as holding only that the Sixth Amendment grants the right to ensure "a jury none of whose members would 'unwaveringly impose death after a finding of guilt' and hence would uniformly reject any and all evidence of mitigating factors, no matter how instructed on the law."[30] In essence, the court read *Morgan* narrowly to mean that by granting defendants the right to eliminate unequivocally pro-death penalty jurors, defendants will necessarily eliminate those who will not consider mitigating factors. However, the entitlement under *Morgan* is much broader. Under *Morgan*, the defendant is not limited to asking whether the juror would always impose a death sentence. Instead, the defendant is allowed to ask questions about how the juror's attitudes concerning the death penalty affect his or her fitness to sit and whether a juror could consider mitigating evidence.[31]

The Supreme Court framed the important Sixth Amendment issue concerning *voir dire* questioning about a juror's opinions on the death penalty in *Wainwright v. Witt*.[32] In *Witt*, the Supreme Court stated that the proper standard for the excluding a juror for cause is whether a juror's attitude for or against the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[33] Inquiries about the influence of a juror's opinions in favor of the death penalty on his or her ability to sit are best characterized as "reverse-*Witt*" questions. That is, a pro-death penalty attitude that would substantially impair the ability of a prospective juror to follow the law is also disqualifying. In order to follow the law, capital jurors must consider as a mitigating factor any aspect of the defendant's character or history, as well as circumstances of the offense, proffered as a basis for a sentence less than death.[34] Therefore, any potential juror who would not at least consider some particular mitigating factors would not be qualified to serve.

The questions asked by the trial court were inadequate for examining a juror's opinions about the death penalty. The questions merely revealed if a juror had an opinion against the death penalty. They did not explore how that opinion might influence the juror's ability to perform his or her duties. This situation was exacerbated by the disparate treatment of those who expressed reservations toward the death penalty. The trial court allowed extensive questioning of jurors who expressed hesitation towards a death sentence, but did not allow such questioning for those who expressed no discomfort.[35] With these hesitant jurors, the court recognized that their opinion could prevent or substantially impair the performance of their duties as jurors.[36] This disparity in treatment of jurors raises issues of fundamental fairness at the trial level.

In addition to alerting trial judges to the correct interpretations of *Morgan* and *Witt*, *Tipton* suggests defense counsel should make a record of her efforts to obtain meaningful *voir dire* to preserve the issue of a prospective juror's inability to consider mitigation evidence generally, as well as to specific factors that will be proffered by the defense. Preparing such a record is essential to preserve the issue for eventual determination by the United States Supreme Court.

II. Guilt Phase Issues

A. Conviction of Capital Murder in the Commission of a Continuing Criminal Enterprise

The jury found the defendants had committed several capital murders while furthering a continuing criminal enterprise (CCE) as defined in 21 U.S.C. § 848.[37] Each defendant received a death sentence for at least one conviction of capital murder.[38]

A person engages in a CCE if he (1) commits a drug related felony which (2) is part of a continuing series of violations that (a) are undertaken in concert with five or more other persons where the defendant is an organizer or holds another such management position, and (b) receives substantial income or resources.[39] Section 848(e) provides that

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[24] 21 U.S.C. § 848(o)(1).

[25] *Tipton*, 90 F.3d at 878.

[26] *Id.*

[27] *Id.*

[28] *Id.* at 879.

[29] *Morgan v. Illinois*, 504 U.S. 719 (1992).

[30] *Tipton*, 90 F.3d at 878.

[31] *Morgan*, 504 U.S. at 728 (citations omitted).

[32] *Wainwright v. Witt*, 469 U.S. 412 (1985).

[33] *Id.* at 424.

[34] *See, Lockett v. Ohio*, 438 U.S. 637 (1978)(holding that a statute is incompatible with the Eighth and Fourteenth Amendments that prevents the sentencer in all capital cases from giving independent mitigating weight to aspects of the defendant's character and record and to circumstances of the offense proffered in mitigation and that creates the risk that the death penalty will be imposed in spite of factors which may call for a less severe penalty); *Eddings v. Oklahoma*, 455 U.S. 104 (1982)(holding that a sentencer may not refuse to consider, as a matter of law, any relevant mitigating evidence); *Penry v. Lynaugh*, 492 U.S. 302 (1989)(finding that the jury is not provided with a vehicle for expressing reasoned moral response when there are no jury instructions informing the jury that it could consider and give effect to the mitigating evidence).

[35] *Tipton*, 90 F.3d at 880-81 (citations omitted).

[36] *Id.*

[37] For further analysis of 21 U.S.C. § 848, *see* O'Grady, *What Every Virginia Capital Defense Attorney Should Know About the Federal Drug Kingpin Statute*, Capital Defense Digest, Vol. 6, No. 1, p. 40 (1993).

[38] *Tipton*, 90 F.3d at 867-68.

[39] 21 U.S.C.A. § 848(c).

any person working in furtherance of a CCE who intentionally kills or commands the killing of an individual may be sentenced to death.

On the basis of § 848(e), the trial court fashioned a three part jury instruction concerning capital murder as part of a CCE. To return a conviction of capital murder, the trial court instructed the jury that it had to find: (1) "that the defendant was engaged in or working in furtherance of a CCE," (2) "that while so engaged, the defendant either intentionally killed or counseled the intentional killing of an individual" and (3) "that the killing actually resulted."[40] The defendants argued that this instruction allowed a juror to impermissibly find guilt on the basis of temporal coincidence of a murder with a CCE without finding a substantive connection between them. The court seemed to agree with the defense that a substantive connection must be found.[41] Although this interpretation is not plain on the face of the statute, it certainly makes sense, and the court's holding is encouraging in this respect. In fashioning this requirement, the court has provided some precedent to support a potential jury instruction or assignment of error based upon the requirement of a substantive connection between a murder in the furtherance of a CCE. In the instant case, the court rejected the defendants' claim, finding that the trial evidence and the government's closing arguments eliminated any possibility that the jury would fail to find a substantive connection.[42] In addition, defense counsel should note that prosecutors will supply ample evidence about drug activities in the belief that such evidence will make a death sentence more likely.

B. Government's Impeding of Timely and Effective Access to Witnesses Under Government Protection

When the prosecution submitted its list of witnesses, it omitted the addresses of witnesses who were in the federal protection program. The trial court then arranged for the defense to interview the witnesses, but the prosecution advised these witnesses that they were not obligated to meet with the defense. In response, counsel for the defendants filed a motion for further court supervision. The trial court denied this motion and found that the defendants only had a right of access to the witnesses, but not a right that compelled the witnesses to submit to an interview.[43]

The court of appeals agreed with the trial court that only access was constitutionally protected. The court of appeals held that the prosecutor's advice to the witnesses did not violate the defendants' constitutional right to confrontation. The court further held that the withholding of the witnesses' addresses, while a technical violation of 18 U.S.C. § 3432,[44] was justified because the threat of violence was "palpable."[45] To obtain judicial relief for this error, the defendants would have to make a showing of actual prejudice.[46]

The trial court also refused to allow defense counsel to cross-examine the witnesses about their unwillingness to submit to an interview. The court of appeals held that this restriction was well within the discretion of the trial court and that the motives and biases of the witnesses were exposed on cross-examination.[47]

The court's opinions on these issues reflect the difficulty of practicing in federal court when a prosecution witness is within the witness protection program. Judges appear to be very tolerant of late access and shielding techniques so long as they draw "on the spirit" of the program. Defense counsel have limited options when faced with these difficulties. Counsel for the defense can remind the court that the prosecutor does not represent the witnesses and it is unethical to instruct them not to talk with defense counsel.[48] Defense counsel should also move for disclosure of addresses *in camera*. To facilitate getting access to the witnesses, counsel may want to inform the court that a continuance may be required if access is not timely provided. If the court grants access mid-trial and there is a need to follow-up on information gleaned from an interview with a witness, defense counsel should move for a continuance. The record should reflect that the motion was grounded upon the defendant's Sixth Amendment right to confront witnesses against him and his right to counsel.

C. Conspiracy as a Lesser Included Offense of CCE

Finally, the court held that a § 846 conspiracy is a lesser included offense of a § 848 CCE and vacated the conspiracy convictions in this case.[49] This holding suggests that where the evidence tends to show an overlap between the CCE and a conspiracy charge, counsel may move to dismiss the conspiracy. This tactic requires that defense counsel make a pre-trial effort to discover what evidence the prosecution intends to introduce for the purpose of establishing a CCE. This inquiry may be accomplished by a Bill of Particulars.

III. Penalty Phase Issues

A. Failure to Sever Trials for Sentencing

The trial judge denied multiple defense motions to sever the trials in the penalty phase. On appeal, defense counsel argued that a joint trial reduced individualized consideration of aggravating and mitigating

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[40] *Tipton*, 90 F.3d at 887.

[41] *Id.* While the court made no express statement that a jury must find a causal connection between the murder and the CCE, the court did state that the defendants' contention that the instructions allowed the jury to find only temporal relation, would be a "serious one" if there were no other instructions. The court made a great effort to demonstrate how a jury could not have overlooked the need for a substantive connection by looking at the context of the jury instructions as a whole. *Id.*

[42] *Id.*

[43] *Id.* at 889.

[44] 18 U.S.C. § 3432 provides:

> A person charged with treason or other capital offense shall at least three entire days before commencement of trial be furnished with a copy of the indictment and a list of the veniremen, and of the witnesses to be produced on the trial for proving the indictment, stating the place of abode of each venireman and witness, except that such list of the veniremen and witnesses need not be furnished if the court finds by a preponderance of the evidence that providing the list may jeopardize the life or safety of any person.

[45] *Tipton*, 90 F.3d at 889. The court of appeals also refused to provide defense counsel with addresses *in camera*. Proceeding *in camera* would appear to protect a defendant's right to prepare a defense and also address concerns about the safety of witnesses, unless the court simply distrusts one of its officers.

[46] *Id.*

[47] *Id.*

[48] *See*, Model Rules of Professional Conduct Rule 3.4(a) and (f).

[49] *Tipton*, 90 F.3d at 891. At this stage, of course, the government had already reaped at trial the evidentiary benefits that come with a conspiracy allegation. *See, e.g., United States v. Bourjaily*, 483 U.S. 171 (1987) (holding hearsay declarations of alleged co-conspirators admissible before conspiracy established).

factors. The court rejected this argument and noted that the trial judge had the discretion to bifurcate the trial. Under the relevant standard of review for abuse of discretion, the trial judge's discretion to bifurcate the trial needs to be constitutionally "constrained at its outer limits"[50] only in that the choice does not deny individualized consideration of each defendant's culpability as required by *Gregg v. Georgia*.[51] The court of appeals held there was no abuse of discretion by the trial judge because § 848(i)(1)(a) dictates that the guilt-stage jury will hear the penalty trial. Severance would have required three separate, and mostly repetitious, penalty trials. Such trials would be unwarranted in light of the policy considerations of efficiency and fairness to the prosecution. In addition, the court of appeals found that the trial court's frequent instructions, reprimands of the prosecutor, and distribution of separate sentencing packets for each defendant, eliminated any potential risk of unfairness to the defendants.[52]

Combined penalty-phase trials are a serious issue in capital defense cases because they impair the jury's ability to consider separate mitigating and aggravating factors pertaining to an individual defendant. In addition, combined penalty trials hinder the lawyers' ability to emphasize differences in culpability among the defendants themselves and differences with other persons sentenced to death. Therefore, defense counsel should vigorously resist joining defendants for the penalty stage.

B. Challenges to Sentencing Under § 848

If the jury convicts a defendant of a violation of § 848(e), the jury may sentence him to death.[53] Sections 848(j) and 848(k) establish the sentencing procedure. In considering aggravating factors, the jury must first unanimously find that one circumstance under § 848(n)(1) exists.[54] The (n)(1) factors describe requisite mental states for capital murder. Failure to find a an (n)(1) factor ends the death-sentencing procedure and eliminates the possibility of death. After unanimously finding an (n)(1) circumstance, the jury must also unanimously find another aggravating factor among those listed in § 848(n)(2)-(12). If the jury cannot identify such a factor, the sentencing process ends and the death penalty is eliminated. The jury may also consider non-statutory aggravating factors if the prosecution has provided sufficient written notice under § 848(h)(1)(B). The jury weighs these aggravating factors against statutory mitigating factors listed in § 848(m) and other non-statutory mitigating factors. An individual juror may find a mitigating factor independently of the other jurors. After the weighing process, the jury must unanimously agree to a death sentence or may elect to recommend another, non-death sentence.[55]

Section 848(m) contains additional statutory mitigating factors that are not listed in § 19.2-264.4 of the Virginia Code. These include: being under substantial or unusual duress, playing a relatively minor role as a principal, not having reasonably foreseen that death would result from the actions, and that an existing equally culpable defendant will not receive a death sentence.[56]

1. Allowance of Non-Statutory Aggravating Factors

Defendants made facial and as-applied constitutional challenges to the sentencing procedure under § 848. They alleged on appeal that the § 848 sentencing provisions, § 848(h)(1)(B) and § 848(j) and (k), are facially unconstitutional in that they permit a jury to consider non-statutory aggravating factors. Specifically, defendants contended that Congress violated the separation of powers principles in delegating authority to prosecutors to introduce such factors for consideration in sentencing.[57] In other words, Congress cannot decline to delegate the authority to determine what aggravating factors a jury can consider for a death sentence. The court dismissed this challenge in a cursory manner. The court held that any delegation involved was "sufficiently circumscribed" by "intelligible principles" to avoid violating the separation of powers principles.[58]

2. Vagueness of "Substantial Planning" and "Premeditation"

The defendants also claimed that the (n)(8) aggravating factor listed in § 848(n)(8)—that the "the defendant committed the offense after substantial planning and premeditation"—is unconstitutionally vague.[59] Specifically, the defendants alleged that "substantial" as a modifier of "planning" is not sufficiently precise in meaning to serve the discretion-channeling function that is constitutionally required for applying eligibility factors in capital sentencing.[60] Because counsel did not raise this objection until appeal, the court reviewed the claim for plain error under the stringent definition of Fed. R. Crim. P. 52 as interpreted in *Olano*.[61] The Court of Appeals held:

> We are therefore satisfied that the (n)(8) aggravating factor's use of the word "substantial" to modify "planning and premeditation" . . . conveys with adequate precision a commonly understood meaning of "considerable," or "more than merely adequate," thereby ensuring that the (n)(8) factor served sufficiently to channel the jury's discretion in assessing eligibility for the death sentence.[62]

The court argued that the jury must have understood "substantial planning and premeditation" to mean "more than the minimum amount sufficient to commit the crime."[63] In an appropriate case, defense counsel may prepare a proposed jury instruction containing this approved definition of "substantial."

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[50] *Id.* at 892.

[51] 428 U.S. 153 (1976).

[52] *Tipton*, at 892-93.

[53] 21 U.S.C. § 848(e).

[54] 21 U.S.C. § 848(k). Subsection (n)(1) states:

(1) The defendant—
  (A) intentionally killed the victim;
  (B) intentionally inflicted serious bodily injury which resulted in the death of the victim;
  (C) intentionally engaged in conduct intending that the victim be killed or that lethal force be employed against the victim, which resulted in the death of the victim;
  (D) intentionally engaged in conduct which—
    (i) the defendant knew would create a grave risk of death to a person, other than one of the participants in the offense; and
    (ii)resulted in the death of the victim.

[55] 21 U.S.C. § 848(k).

[56] 21 U.S.C. Section 848(m)(2)-(4) and (8).

[57] *Tipton*, 90 F.3d at 895.

[58] *Id. See also, Loving v. United States*, 116 S.Ct. 1737 (1996), and case summary of *Loving*, Capital Defense Journal, this issue.

[59] *Id.*

[60] *Id.*

[61] *Id.* at 895. *See supra* Part I.A.

[62] *Id.* at 896.

[63] *Id.*

3. The (n)(1) Aggravating Factors Fail to Guide Sentencing Discretion.

Defendants alleged that the circumstances within the § 848(n)(1) aggravating factor fail to guide and channel the sentencing discretion of the jury in imposing the death penalty, as is constitutionally required. Specifically, they argued that every capital murder contains a circumstance or mental state that can be found among the several circumstances listed in (n)(1). As a result, a jury could assign an (n)(1) circumstance in every case of capital murder. Therefore, the (n)(1) aggravating factor fails to provide a standard by which juries can determine those capital offenses in which the death penalty is warranted and those in which it is not.[64]

While the court admitted that the four (n)(1) factors essentially replicate the mental states for constitutional death sentence eligibility, the court ruled that they reflect four distinctly different levels of moral culpability.[65] Quoting *Arave v. Creech*,[66] the court agreed that "'the degree of culpability, as measured by specific mental states, is a proper basis for making death penalty choices among murderers.'"[67] The court stated that in requiring juries to find one of these circumstances, (n)(1) "precisely provides" the principled basis for identifying those murderers "deserving of death," as the Constitution requires.[68] For example, the court suggested these factors help to morally differentiate intentional homicides from murders-for-hire.[69]

The court of appeals' position is somewhat disingenuous in that it ignores the fact that, under the guidance of (n)(1), the jury does not distinguish among mental states or degrees of culpability. The jury simply identifies one element among the list, which includes all mental states for capital murder and thereby all degrees of culpability. The jury does not engage in any comparison among the list. It makes little difference if the jury finds the lowest degree of culpability or the highest; either will result in the finding of the (n)(1) aggravating factor. Further, the court has not provided an explanation of exactly how mental states relate to degrees of moral culpability.

4. Jury Needs to Find Only One Aggravating Factor Under § 848(n)(1)

The defendants additionally alleged that the § 848(n)(1) factor was unconstitutionally applied to each of them when the trial court, over defense objections, allowed the jury to find more than one of the (n)(1) specific circumstances as a basis for determining the existence of the (n)(1) aggravating factor.[70] The trial court's allowance of such an accumulation of circumstances, the defense argued, "unconstitutionally skewed" the weighing process in favor of death.[71] Following the Court of Appeals for the Tenth Circuit's holding in *United States v. McCullah*,[72] the court accepted the defense's contention.[73] The court stated:

> To allow cumulative findings of these intended alternative circumstances, all of which do involve different forms of criminal intent, runs a clear risk of skewing the weighing process in favor of the death penalty and thereby causing it to be imposed arbitrarily, hence unconstitutionally.[74]

According to the court, the submission of instructions by the trial court permitting cumulative findings of more than one of the (n)(1) circumstances as an aggravating factor was a constitutional error.[75]

The court held, however, that the error was "harmless beyond a reasonable doubt."[76] The court concluded that the jury, even if properly instructed, would have reached the same outcome; therefore, the error was harmless. The combination of circumstances, the court observed, might have prejudiced the defendants if it gave a single factor, mental state, a four-fold effect in weight or "it allowed the jury to find a more morally culpable circumstance than was supported" by the evidence before it.[77] Yet, the court held that no prejudice existed because the jury, under proper instructions, would have found § 848(A), intentional killing, as the sole basis for its (n)(1) finding and no other less culpable circumstance.[78] The fact that the jury only recommended the death sentence with respect to those murders where a defendant was the actual killer or was a participant in the killing, suggested the jury only found the § 848(A) circumstance. A multiplier effect did not exist because each of the other three (n)(1) circumstances are "necessarily subsumed as merely a 'lesser-included' aspect of the (A)... circumstance."[79] In addition, the trial court's instructions emphasizing the impropriety of quantitative weighing and the overlapping "lesser-included" relationship between the § 848(A) and (D) circumstances, eliminated any possible prejudice resulting from the cumulative weighing of circumstances. From this instruction, the court reasoned that the jury properly did not weigh an aggregate of § 848(n)(1) circumstances.[80]

The court's holding on this issue suggests counsel should ensure that the jury is instructed that the sentence of death is eliminated if no (n)(1) component is found. In addition, the instruction should inform the jury that once they have identified one (n)(1) component they have satisfied (n)(1), and must cease consideration of other components.[81]

The court's language also serves as a reminder to parties that a jury's consideration of § 848(n)(1) components is confined to those components which the guilt-trial evidence supports. The court noted that there is potential prejudicial error "if a jury was permitted to consider and to find the § 848(A) circumstance when the guilt-phase evidence sufficed only to convict a defendant as a marginal aider and abettor who did not participate directly in the killing."[82] In light of this language, defense counsel should, by objection or motions in limine, limit the findings of the (n)(1) circumstances to those supported by the guilt-phase evidence.

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64 *Id.* at 898.
65 *Id* at 897-98. *See supra* at n.55.
66 507 U.S. 463 (1993).
67 *Tipton*, 90 F.3d at 898 (citations omitted).
68 *Id.*
69 *Id.*
70 *Id.* at 898-99.
71 *Id.* at 899.
72 *United States v. McCullah*, 76 F.3d. 1087 (10th Cir. 1996).
73 *Tipton*, 90 F.3d at 899.
74 *Id.* (citations omitted).
75 *Id.*
76 *Id.*
77 *Id.* at 900.
78 *Id.*
79 *Id.* The court also contended that *Lowenfield v. Phelps*, 484 U.S. 231 (1988), foreclosed claims of "impermissible duplication." 90 F.3d 898 n.19.
80 *Id.* at 900-01.
81 *See also*, *United States v. Chandler*, 996 F.2d 1073 (11th Cir. 1993); *United States v. Pitera*, 795 F.Supp. 546 (E.D.N.Y 1992); *United States v. Pretlow*, 779 F.Supp 758 (D.N.J 1991). The court interprets these cases to suggest that only one (n)(1) circumstance should be found. *Tipton*, 90 F.3d at 898 n.23.
82 *Id.* at 900 n.23.

E. Attorney General May Authorize Lethal Injections

At the time the jury imposed the death sentences, no federal statute provided authorization for the "specific means of executing such sentences."[83] Yet, the Attorney General of the United States had promulgated regulations that death sentences imposed under § 848(e) should be executed "by intravenous injection of a lethal substance or substances in a quantity sufficient to cause death."[84] The trial court stayed the execution on the grounds that the Attorney General's regulation was *ultra vires* because Congress possessed the exclusive power to prescribe the means by which federal death sentences should be carried out. The court rejected this argument, stating that Congress's power was not exclusive and that Congress had not preempted the issue, expressly or impliedly.[85] In addition, the court held that application of the regulation to the defendants did not violate the Ex Post Facto Clause because it was promulgated after the commission of the capital offenses at issue.[86]

Summary and Analysis by:
David T. McIndoe

83 *Id.* at 901-902.
84 *Id.* at 902 (citations omitted).
85 *Id.* at 902-903.
86 *Id.* at 903.

BARNABEI v. COMMONWEALTH

1996 WL 517733 (Va. 1996)
Supreme Court of Virginia

FACTS

Derek Rocco Barnabei was indicted for rape[1] and for capital murder in the commission of a rape.[2] At trial, the Commonwealth introduced items of circumstantial evidence and various forensic tests tending to show that on the night of the murder, (1) the victim was with the defendant in the defendant's room, (2) the defendant and the victim had sexual intercourse, and (3) the victim was killed in defendant's room before her body was found in the river.[3] The sole witness to offer any evidence from which the jury could infer that a rape occurred was the Commonwealth's medical examiner. Although Barnabei had moved pre-trial for the appointment of a forensic pathologist to assist the defense, the trial court denied Barnabei's motion.[4] The jury found the defendant guilty of both rape and capital murder.[5]

At the sentencing phase, Barnabei's ex-wife was one of two witnesses to testify for the Commonwealth about various threats and acts of violence that Barnabei had allegedly inflicted upon her. Barnabei objected to her testimony as to specific incidents, arguing that such testimony went beyond the scope of the notice given by the Commonwealth pursuant to Va. Code § 19.2-264.3:2.[6] The trial court overruled Barnabei's objection and his motion for a mistrial and admitted further testimony from his ex-wife.[7] At the close of the evidence, the jury sentenced Barnabei to death based upon both the "vileness" and "future dangerousness" predicates.[8]

Barnabei appealed his capital murder conviction and death sentence, challenging, among other things, the trial court's refusal to appoint a defense forensic expert and the admission of a portion of his ex-wife's testimony.[9]

HOLDING

The Supreme Court of Virginia rejected both of Barnabei's challenges. In upholding the trial court's refusal to appoint a defense forensic pathologist expert, the Supreme Court of Virginia held that Barnabei failed to make the necessary particularized showing that would have entitled him to such an expert. The court upheld the admission of the testimony of Barnabei's ex-wife, ruling that the notice given by the Commonwealth pursuant to § 19.2-264.3:2 was sufficient and that the trial court did not abuse its discretion in admitting the testimony.[10]

1 Va. Code Ann. § 18.2-61(A).
2 Va. Code Ann. § 18.2-31(5).
3 *Barnabei v. Commonwealth*, 1996 WL 517733, *1-*4 (Va. 1996).
4 *Id.* at *5.
5 *Id.* at *1.
6 § 19.2-264.3:2 provides that if the Commonwealth intends to introduce evidence of any unadjudicated acts allegedly attributable to the defendant, the Commonwealth must provide pre-trial notice to the defendant of such intention, including a description of the unadjudicated acts.
7 *Barnabei*, 1996 WL 517733 at *11.
8 *Id.* at *1.
9 *Id.* at *5.
10 The court rejected all of defendant's assignments of error. Some of 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 that will not be addressed in this summary include:

(1) harmlessness of prosecution error in withholding exculpatory evidence; (2) removal of two jurors for cause by the Commonwealth; (3) denial of defendant's proposed jury instructions on mitigating factors and sentence alternatives; and (4) statutory review of imposition of death sentence.

The court also rejected Barnabei's claim that the trial court erred in refusing to instruct the jury that he would not be eligible for parole for at least 25 years. However, it is important to note that defense counsel preserved this type of claim pursuant to *Simmons v. South Carolina*, 114 S. Ct. 2187 (1994). For treatment of the implications of *Simmons*, *see* Pohl and Turner, *If at First You Don't Succeed: The Real and Potential Impact of* Simmons v. South Carolina *in Virginia*, Capital Defense Digest, Vol. 7, No. 1, p. 28 (1994).