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I. Facts

Percy Lavar Walton ("Walton") pled guilty to three counts of capital murder during the commission of a felony and one count of capital murder for the killing of more than one person within a three-year period.[1] The charges arose from the murders of Elizabeth and Jessie Kendrick, ages eighty and eighty-one, between the 19th and 26th of November 1996, and the murder of Archie Moore ("Moore") shortly thereafter on November 29th or 30th in Danville, Virginia.[2] Judge James F. Ingram of the Circuit Court, City of Danville, sentenced Walton to death based on findings of both future dangerousness and vileness.[3] Walton appealed to the Supreme Court of Virginia.

II. Holding

The Supreme Court of Virginia set aside the trial court's finding of the vileness factor for failure to articulate it in a written sentencing order but otherwise upheld the convictions and death sentences, finding Walton's claims to be waived or without merit.[4]

III. Analysis/Application in Virginia

A. The Future Dangerousness Finding

Although Walton, age eighteen at the time of the crimes, had no significant history of criminal activity, the court found that the trial court's finding of future dangerousness could be supported by Walton's relatively minor record of assaults.[5] In upholding this finding, however, the court primarily relied on the

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1. Walton v. Commonwealth, 501 S.E.2d 134, 135 (Va. 1998).

2. *Walton*, 501 S.E.2d at 136-37.

3. *Id.* at 135.

4. *Id.* at 138-41. The court determined that Walton's claim that the trial court erred in finding the evidence stipulated to at trial sufficient to support a guilty plea was waived by the entry of his guilty pleas. *Id.* at 138. This claim evidently alleged the absence of a factual basis for the plea. The court disposed of other claims in summary fashion, either by application of well-settled law, or on a basis peculiar to the facts of the case. Because the court's discussion of these claims provided little guidance, the following claims will not be discussed in this case note: the admissibility of crime scene photographs, the sufficiency of evidence offered to support the finding of vileness, and the proportionality review required under section 17-110.1(C)(2) of the Virginia Code. *Walton*, 501 S.E.2d at 138-41. *See also* VA. CODE ANN. § 17-110.1(C)(2) (Michie 1997).

5. *Walton*, 501 S.E.2d at 139. Walton had previously been convicted of statutory burglary,

circumstances surrounding the commission of the offense[6] and statements allegedly made to a jailhouse informant, Lacy Johnson.[7]

Although the court did not assert directly that the circumstances of a single offense can alone constitute the necessary evidence to support a finding of future dangerousness, it has done so in the past.[8] Such a finding collapses a finding of future dangerousness into one of vileness and should be resisted on due process grounds. The United States Supreme Court permits death sentences to be based on future dangerousness but has recognized the difficulty in applying this factor.[9] The Court has never held that circumstances surrounding the offense, standing alone, could support such a finding.

The Walton opinion also does not reflect whether efforts were made to attack the credibility of the jailhouse informant's testimony by use of subpoenas duces tecum for jail records and demands for disclosures as required by *Kyles v. Whitley*[10] and *Brady v. Maryland*.[11] These discovery tools should be utilized in every instance where a jailhouse informer plays a role in the prosecution's case. The informant in this case, Lacy Johnson, was well known and had testified in other cases with hope of reward.

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grand theft, resisting arrest and assault and battery on a police officer. As a juvenile, Walton was convicted of possession of a firearm and assault and battery. *Id.*

6. *Id.* The Kendricks returned home while Walton was in the process of robbing their house. According to informant testimony, Mrs. Kendrick begged for her life prior to being shot. The cause of death was a contact gunshot wound to the top of the head. Although it did not contribute to her death, Mrs. Kendrick's shirt had been removed and fashioned into a noose and tied around her neck. Walton first attempted unsuccessfully to kill Mr. Kendrick with a knife and subsequently shot him in the top of the head at close range. *Id.* at 136, 139. Walton also relayed information concerning the murder of Moore to the government informant. Walton first gained access to Moore's apartment by asking to use the phone. Moore permitted him to do so. Later, Walton returned and again requested to use the phone and Moore again invited him in. When Moore went to hand him a portable telephone, Walton shot at him, missed, shot again and then "dropp[ed] to the floor... laughing." *Walton*, 501 S.E.2d at 139.

7. Johnson summarized the content of Walton's statements to him:

> [A]fter he did the first killing, he knew what he wanted to do. And then he said that he wanted to be famous, for killing a bunch of people, and that's why he wanted a high powered enough gun, where he can kill everybody over in Cabin Lake, and he wanted to catch everybody, like at the swimming pool one day, and just gun 'em all down... [H]e wanted to be famous... especially, in Danville, for killing a bunch of folks.

Id.

8. *See* Murphy v. Commonwealth, 431 S.E.2d 48 (Va. 1993). In *Murphy*, the defendant contested the trial court's finding of future dangerousness in absence of any prior criminal record. The court upheld this finding, concluding that "the facts and circumstances surrounding the... murder... [were] sufficient to support the trial court's finding of future dangerousness." *Murphy*, 431 S.E.2d at 53.

9. *See* Barefoot v. Estelle, 463 U.S. 880, 897-903 (1983) (approving future dangerousness as basis for death sentence but recognizing "difficulty" and power of American Psychological Association in opposition).

10. 514 U.S. 419 (1995).

11. 373 U.S. 83 (1963).

B. Pleading Guilty to Capital Murder

In a case like Walton's, with multiple elderly victims, there is even *more* reason not to allow a plea of guilty to be entered absent a formal or an extremely strong informal assurance from the trial judge that the defendant will not be sentenced to death. There is no reason not to go to trial in such a case, at the very least to preserve the systemic issues in Virginia's death penalty scheme that are as yet unresolved by the United States Supreme Court. A jury verdict could not have been worse than Walton's current position.

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