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Cherrix v. Commonwealth Nos. 981798, 982063, 1999 WL 101077 (Va. Feb. 26, 1999)

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I. Facts

During the night of January 27, 1994, Tessa Van Hart ("Van Hart") was sodomized and murdered while making a pizza delivery outside of Chincoteague, Virginia.[1] The murder remained unsolved for over two years. In June 1996, Brian Lee Cherrix ("Cherrix"), who was incarcerated in the Accomack County Jail pending trial on unrelated charges, offered to give the county sheriff information on the Van Hart murder in exchange for a possible sentence reduction.[2] Cherrix told the sheriff that his cousin, who had passed away the preceding year, had murdered Van Hart and discussed the killing with Cherrix.[3] The state police, acting pursuant to Cherrix's directions, then recovered from a creek near the murder scene a .22 caliber rifle which Cherrix claimed his cousin had used to murder Van Hart.[4]

Cherrix recounted to police several different versions of the story of how his cousin had killed Van Hart.[5] After investigating the cousin's whereabouts on the night of the murder, the police determined that he was not a plausible suspect.[6] In April 1997, while incarcerated on another set of unrelated charges, Cherrix requested to speak with a police officer and subsequently confessed to the murder.[7] Cherrix was convicted of capital murder and sentenced to death based on the jury's finding of both vileness and future dangerousness.[8]

II. Holding

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1. Cherrix v. Commonwealth, Nos. 981798, 982063, 1999 WL 101077, at *1 (Va. Feb. 26, 1999).
2. *Id.*
3. *Id.*
4. *Id.* At trial, the Commonwealth presented evidence that the rifle belonged to Cherrix.
5. *Id.*
6. *Id.*, at *2.
7. *Id.*
8. *Id.*

On appeal, the Supreme Court of Virginia held that all of Cherrix's claims were either procedurally defaulted or lacked merit.[9]

III. Analysis / Application in Virginia

Cherrix raised numerous issues on appeal. The court rejected several claims in cursory fashion, adhering to its rulings in prior cases.[10] The court's resolution of other claims turned on facts unique to the case, or provide little guidance or explanation of use to defense counsel in the future.[11] As such, the court's disposition of only three of Cherrix's claims bears extended discussion.

A. Adequacy of 3:1 Mental Health Expert

Prior to trial, Cherrix filed a motion pursuant to section 19.2-264.3:1 ("3:1") of the Virginia Code for the appointment of a mental health expert and informed the trial court that he had "selected" an expert from Chesterfield County, Virginia.[12] The trial court declined to appoint the requested expert, instead appointing a local psychiatrist, Dr. John Bulette ("Dr.

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9. *Id.*, at *14.

10. The claims decided in this manner include the following: (1) Virginia's statutory aggravating circumstances of vileness and future dangerousness are unconstitutionally vague; (2) Virginia's penalty stage instructions do not adequately inform the jury of the concept of mitigation; (3) the use of unadjudicated acts to prove future dangerousness without proof of such acts beyond a reasonable doubt is unconstitutional; (4) the trial judge must be required to reduce a jury's sentence of death to life imprisonment on a showing of good cause; (5) the consideration of hearsay evidence or information in a presentence report at the sentencing phase is unconstitutional; (6) the review provided by the Virginia Supreme Court in capital murder cases is unconstitutional; (7) capital murder defendants have the right to individual and sequestered voir dire of jurors; and (8) capital murder defendants have a constitutional right to have a questionnaire mailed to potential jurors. Though rejected summarily, these claims are preserved for further review.

11. The claims involved (1) the suppression of Cherrix's statements under *Miranda v. Arizona*, 384 U.S. 436 (1966), and *Edwards v. Arizona*, 451 U.S. 477 (1981); (2) the Commonwealth's obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), to turn over to the defense a statement made by Cherrix's grandmother, an alibi witness for the defense at trial; (3) the reading and admission into evidence of a police officer's "question and answer session" with Cherrix during which the officer asked Cherrix questions and then wrote down Cherrix's responses; (4) the sufficiency of the evidence to support the conviction; (5) the trial court's refusal to give Cherrix's proposed jury instruction concerning the voluntariness of his statements to police; and (6) the trial court's failure to instruct the jury pursuant to *Simmons v. South Carolina*, 512 U.S. 154 (1994), that Cherrix would be ineligible for parole if sentenced to life in prison. The Court held this claim to be defaulted as Cherrix did not object to the trial court's instruction that the jury should "have no concern with parole." *Cherrix*, 1999 WL 101077, at *11. However, it should be noted that Cherrix's counsel did not err in failing to seek a *Simmons* instruction as the offense was committed prior to the *Simmons* decision.

12. *Cherrix*, 1999 WL 101077, at *9.

Bulette").[13] On appeal, Cherrix argued that Bulette did not possess the statutory qualifications to serve as a 3:1 expert as he had no prior experience in capital murder cases and thus was not "qualified by specialized training and experience to perform forensic evaluations."[14] The court rejected this argument, holding that the statute "simply requires specialized training and experience to perform forensic evaluations,"[15] and that a qualified 3:1 expert need not possess experience in prior capital cases.[16]

The court's resolution of Cherrix's 3:1 claim is reasonable. However, several points regarding court appointed experts deserve mention. The statute expressly provides that a defendant is not entitled to the mental health expert of his own choosing.[17] In *Cherrix*, defense counsel's choice of words in informing the trial court that he had "selected" an expert was perhaps unfortunate. Avoiding the use of that term by simply "recommending" a particular expert to the court may be the better practice.

In order to maximize the possibility that the trial court will appoint experts who will provide meaningful assistance to the defense, counsel should research potential experts and obtain the commitment of a qualified expert to join the defense team if appointed.[18] Counsel should also determine that the expert can do the required work within the available time frame. This information, along with the expert's fees and statutory qualifications, should be included with the 3:1 motion to make it easy for the trial court to appoint the recommended expert. In addition, when seeking more than one expert under 3:1, counsel should also gather preliminary evidence on the need for the particular experts.[19]

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13. *Id.*

14. VA. CODE ANN. § 19.2-364.3:1(A) (Michie 1998).

15. *Cherrix*, 1999 WL 101077, at *10.

16. *Id.*

17. VA. CODE ANN. § 19.2-364.3:1(A) (Michie 1998).

18. From the trial court's opinion, it seems clear that although Dr. Bulette may have been a "qualified" expert under the statutory training requirements, he was not "qualified" in terms of his ability to provide meaningful assistance to the defense. Counsel seeking appointment of experts under 3:1 and *Ake v. Oklahoma*, 470 U.S. 68 (1985), are encouraged to contact the Virginia Capital Case Clearinghouse to obtain information on potential experts.

19. Multiple experts may be appointed under 3:1 as the statute expressly authorizes the appointment of "one *or more* qualified mental health experts to evaluate the defendant and to assist the defense." VA. CODE ANN. § 19.2-264.3:1(A) (Michie 1998) (emphasis added). Although the statute grants indigent defendants the right to a minimum of one mental health expert, when seeking multiple 3:1 experts defense counsel should present evidence to the court as to why the single expert required by statute will be inadequate to properly assist the defense with all potential mental health issues.

In addition to 3:1, *Ake v. Oklahoma*[20] may also provide the basis for court appointment of a variety of experts. It should be noted that appointment of experts under *Ake* is completely distinct from appointment under 3:1 and nothing precludes counsel from attempting to secure one or more experts under both *Ake* and 3:1.[21] Upon a showing by the defendant that an expert will assist the defense with an issue that will be a significant factor at trial, *Ake* requires the appointment of a *competent* expert who will conduct an *appropriate* examination.[22] Although the United States Court of Appeals for the Fourth Circuit has held that *Ake* does not guarantee a defendant the right to the effective assistance of expert witnesses,[23] a viable argument exists that, at a minimum, *Ake* guarantees what it says—a competent expert and an appropriate examination.[24] If counsel suspects that a particular *Ake* expert is not meeting these minimal standards, the appropriate recourse is to file a motion for a second expert to evaluate the original expert's performance. Such a motion may provide a vehicle for ensuring that the principles underlying *Ake* are achieved and may in fact be required to avoid defaulting this issue.[25]

Both *Ake* and 3:1 provide for the appointment of experts to serve as members of the defense team. Dr. Bulette was not that. For example, Dr. Bulette testified that Cherrix, who had previously shot his half-brother, had "no remorse for the shooting."[26] Additionally, Bulette testified that Cherrix "had an anti-social personality, was 'angry with women,' and acted out this anger by assaulting them."[27] The Virginia Supreme Court relied on all of this testimony in upholding the jury's finding of future dangerousness.[28] Counsel must do all in their power, and make the record where necessary, to avoid being saddled with an "expert" who is not qualified to assist the defense in any meaningful sense of the word.

B. Expert Corrections Witnesses

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20. 470 U.S. 68, 83 (1985) (holding that when an indigent criminal defendant demonstrates that his sanity at the time of the offense will be a "significant factor" at trial, the defendant is entitled to "access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense").

21. *Ake* places no limit on the number of experts which a court may be required to appoint to aid an indigent defendant.

22. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

23. Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998).

24. *See* Anne Duprey, Case Note, 11 CAP. DEF. J. 175 (1998) (analyzing Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998)).

25. *See id.*

26. *Cherrix*, 1999 WL 101077, at *12.

27. *Id.*

28. *Id.*

During the trial's penalty phase, Cherrix attempted to present the testimony of an expert penologist, several officials from the Virginia Department of Corrections, a criminologist, a sociologist, and an inmate serving a life sentence in a Virginia prison.[29] Through these witnesses Cherrix sought to defend against the Commonwealth's case for future dangerousness by introducing evidence of what the Supreme Court of Virginia termed the "general nature of prison life."[30] The trial court refused to allow this testimony, finding that "'what a person may expect in the penal system' is not relevant mitigation evidence."[31] On appeal, Cherrix argued that this ruling violated his constitutional right to present mitigating evidence as established in *Skipper v. South Carolina*[32] and *Eddings v. Oklahoma*.[33]

1. Eighth Amendment Analysis

Employing a narrow view of precedent, the court rejected the contention that Cherrix's evidence was relevant in mitigation and that he had an Eighth Amendment right to present it as such.[34] The court analyzed this claim solely on Eighth Amendment grounds, and it is unclear from the court's opinion whether Cherrix also based the claim on the Fourteenth Amendment. As will be shown, this distinction may have proven critical.

The Eighth Amendment requires that the sentencer "not be precluded from considering *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[35] However, as the Virginia Supreme Court noted, this principle "does not limit 'the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant's character, prior record, or the circumstances of his offense.'"[36] Based

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29. *Id.*, at *10.

30. *Id.*, at *11. According to the court, the inmate would have testified as to "what prison life would be like for Cherrix if he received a life sentence." *Id.* The testimony of the Department of Corrections officials would have concerned "the ability of the penal system to contain Cherrix and the cost to the taxpayers of an inmate's life sentence." *Id.* The other witnesses sought by Cherrix would have offered similar testimony. *Id.*

31. *Id.*

32. 476 U.S. 1 (1986) (holding that Eighth Amendment requires admission of evidence of capital defendant's successful adjustment to incarceration as mitigating evidence).

33. 455 U.S. 104 (1982) (holding that Eighth Amendment requires admission of evidence of capital defendant's family history as mitigating evidence).

34. *Cherrix*, 1999 WL 101077, at *11.

35. Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

36. *Cherrix*, 1999 WL 101077, at *10 (quoting *Lockett*, 438 U.S. at 605 n. 12). The court's rigid Eighth Amendment relevance analysis seems hard to reconcile with *Payne v. Tennessee*, 501 U.S. 808 (1991) (holding that the Eighth Amendment does not bar the admission of victim impact evidence in the penalty phase of a bifurcated trial). It would seem that

on a narrow reading of these passages, the Virginia Supreme Court concluded that none of the evidence which Cherrix sought to present "concerns the history or experience of the defendant"[37] and therefore that its exclusion did not violate Cherrix's Eighth Amendment rights.[38]

In *Skipper v. South Carolina*,[39] the United States Supreme Court held that evidence regarding a capital defendant's ability to "make a well-behaved and peaceful adjustment to life in prison is itself an aspect of his character that is by its nature relevant to the sentencing determination"[40] and that the Eighth Amendment thus compels its admission.[41] The evidence at issue in *Skipper* concerned the defendant's prior good behavior in prison.[42] However, the Court's holding also extends to evidence of a defendant's ability to adjust to prison life in the *future*, regardless of his prior experiences in prison.[43]

The Virginia Supreme Court distinguished *Skipper* on the grounds that "none of the evidence proffered at trial addressed Cherrix's ability to conform or his experiences in conforming to prison life, as the defendant's evidence did in *Skipper*."[44] Based on this distinction, defense counsel must ensure that all evidence offered in mitigation under the Eighth Amendment is directly traceable to the defendant's "character, prior record, or the circumstances of the offense," as the Virginia Supreme Court will doubtless

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evidence of what a capital defendant may expect from a life sentence is as relevant to punishment as victim impact evidence.

37. *Cherrix*, 1999 WL 101077, at *11.

38. *Id.* As the Virginia Supreme Court adopted a narrow interpretation of the scope of relevant mitigating evidence under *Lockett*, the court did not consider whether the reality of a life sentence may be considered mitigating evidence. In *Simmons v. South Carolina*, 512 U.S. 154 (1994), the United States Supreme Court held that where a life sentence carries no possibility of parole, due process requires that "the sentencing jury must be informed that the defendant is parole ineligible." *Id.* at 156. The Court explicitly refused, however, to decide whether a defendant's right to inform the jury of his parole ineligibility is also compelled by the Eighth Amendment. *Id.* at 162 n. 4. Thus, it did not decide the issue whether the Eighth Amendment requires that a jury faced with only two sentencing choices is entitled to know the reality of those choices.

In a concurring opinion, Justice Souter argued that the Eighth Amendment's requirement that a capital jury have accurate sentencing information also compelled the Court's holding in *Simmons*. *Id.* at 172 (Souter, J., concurring). Failure to provide such information "diminished the reliability of the jury's decision that death, rather than that alternative, was the appropriate penalty in this case." *Id.* at 174. Based on this reasoning, an argument exists that accurate sentencing information includes evidence of the living conditions of a person serving a sentence of life without parole and that the Eighth Amendment thus compels its admission.

39. 476 U.S. 1 (1986).

40. Skipper v. South Carolina, 476 U.S. 1, 7 (1986).

41. *Id.*

42. *Id.* at 3.

43. *Id.* at 7.

44. *Cherrix*, 1999 WL 101077, at *11 n.4.

continue to apply its narrow construction of mitigating evidence under *Lockett*, *Eddings*, and *Skipper*. Defense counsel may accomplish this by presenting the testimony of a witness who has interviewed the defendant and can testify that life under the conditions existing in the "general nature of prison life" would constitute punishment for the individual defendant. Such evidence bears directly on the defendant and is admissible even under the Virginia Supreme Court's interpretation of the Eighth Amendment.

2. *Fourteenth Amendment Analysis*

The Virginia Supreme Court analyzed the "general nature of prison life" evidence proffered by Cherrix solely on Eighth Amendment grounds. However, this evidence is almost certainly admissible under the due process clause of the Fourteenth Amendment. It is a well-settled principle that the due process clause prohibits the execution of a defendant sentenced to death "on the basis of information which he had no opportunity to deny or explain."[45] In *Simmons v. South Carolina*,[46] this principle was applied to require that where a life sentence carries no possibility of parole, "the sentencing jury must be informed that the defendant is parole ineligible."[47] Similarly, the Court's holding in *Skipper* that a defendant must be allowed to present evidence of his actual or foreseeable good behavior in prison, was based on the Due Process Clause as well as on the Eighth Amendment.[48] Taken together, these cases stand for the broad proposition that due process requires that a capital defendant be permitted to "rebut[] information that the sentencing authority considered, and upon which it may have relied, in imposing the sentence of death."[49]

If the Commonwealth elects to seek a death sentence based on the future dangerousness aggravating factor, the factor becomes an express element of the state's case for death.[50] Based on the principles set forth in *Gardner*, *Simmons*,

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45. Gardner v. Florida, 430 U.S. 349, 362 (1977).

46. 512 U.S. 154 (1994).

47. Simmons v. South Carolina, 512 U.S. 154, 156 (1994).

48. Skipper v. South Carolina, 476 U.S. 1, 5 n.1 (1980).

49. *Simmons*, 512 U.S. at 165. "When the prosecution urges a defendant's future dangerousness as cause for the death sentence, the defendant's right to be heard means that he must be afforded an opportunity to rebut the argument." *Id.* at 174 (Ginsburg, J., concurring).

50. Virginia's capital sentencing statute provides that "a sentence of death shall not be imposed unless the court or jury shall (1) after consideration of the past criminal record of the defendant, find that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society . . . ." VA. CODE ANN. § 19.2-264.2 (Michie 1998).

As this is an element of the offense, a finding beyond a reasonable doubt of future dangerousness is a necessary prerequisite to the sentencing body even considering a death sentence. *See* Brian S. Clarke, Case Note, CAP. DEF. J., Spring 1998, at 4 (analyzing *Buchanan v. Angelone*, 118 S. Ct. 757 (1998), and discussing the distinction between the eligibility and selection phases of the penalty proceeding in Virginia).

and *Skipper*, a capital defendant has a due process right to rebut the state's case for future dangerousness. This right, which encompasses evidence of the defendant's good behavior in prison and parole ineligibility, also includes evidence of the "general nature of prison life," including the security and supervision measures that are so much a part of that regime. Such evidence may inform the jury of the reduced likelihood that the defendant will commit criminal acts of violence within the prison setting as well as the lowered probability that the defendant will be able to escape and commit criminal acts in the outside world. Counsel should also consider obtaining an expert witness to interview the defendant and testify as to the defendant's capacity for future dangerousness.[51]

This due process argument for admission of "general nature of prison life" evidence is distinct from mitigating evidence under the Eighth Amendment. As such, the Fourteenth Amendment due process argument should not turn on whether the evidence relates directly to the defendant's "character, prior record, or the circumstances of the offense" as required by the Virginia Supreme Court's interpretation of *Lockett*. Counsel should continue to consider the type of evidence proferred in *Cherrix* and argue that both the Eighth and Fourteenth Amendments compel its admission.[52]

C. A Troubling Application of the Vileness Aggravating Factor

Cherrix was sentenced to death based on the jury's findings of both vileness and future dangerousness. On appeal, he contended that no reasonable juror could have concluded that his offense met the elements of either aggravating factor. The court held that a reasonable juror could have found future dangerousness based on Cherrix's record of "continuing assaultive behavior" and on the testimony of Dr. Bulette, Cherrix's mental health expert.[53]

Of potentially greater interest to defense counsel is the court's discussion of the vileness aggravating factor. A finding of vileness requires that the sentencing body determine that the defendant's "conduct in committing the offense" involved torture, depravity of mind or aggravated battery to the victim.[54] On appeal, Cherrix argued that the record did not support a finding of either depravity of mind or torture.

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51. *See* Boyd v. French, 147 F.3d 319 (4th Cir. 1998) (holding that the exclusion of the testimony of a criminologist who had interviewed the defendant and would have testified as to the defendant's future dangerousness was constitutional error). *See also* Alix M. Karl, Case Note, 11 CAP. DEF. J. 61 (1998) (analyzing Boyd v. French, 147 F.3d 319 (4th Cir. 1998)).

52. It is also important to preserve the record on both grounds. *See* Matthew K. Mahoney, Case Note, 11 CAP. DEF. J. 393 (1999) (analyzing Yeatts v. Angelone, 166 F.3d 255 (4th Cir. 1999)). In *Yeatts*, the court of appeals held that a claim raised on Eighth Amendment grounds in the trial court and on direct appeal is procedurally defaulted when raised on Fourteenth Amendment grounds at federal habeas. *Yeatts*, 166 F.3d at 262.

53. *Cherrix*, 1999 WL 101077, at *12.

54. VA. CODE ANN. § 19.2-264.4(C) (Michie 1998).

In *Smith v. Commonwealth*,[55] the Virginia Supreme Court defined depravity of mind as "a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation."[56] To uphold the finding of depravity of mind in *Cherrix*, the court, without citing *Smith*, regurgitated the facts of the case, beginning with Cherrix's sodomy of the victim and ending with his statement to the police that the victim looked "beautiful" after viewing her body at the funeral home. The court then summarily concluded that "Cherrix's conduct in committing the sodomy and murder . . . reflected depravity of mind."[57]

The court found that Cherrix's sodomy of the victim at gunpoint while she begged for her life constituted adequate evidence of torture.[58] Although a narrowing construction for each of the vileness components is constitutionally required by *Godfrey v. Georgia*,[59] the Virginia Supreme Court has never adopted a narrowing construction for "torture" and did not do so in this case. Thus, it remains uncertain exactly what degree of conduct constitutes torture.

A vileness finding must be made based on the defendant's conduct "in committing the offense."[60] The court's depravity of mind analysis reveals its willingness to expand the time frame during which the defendant "committ[ed] the offense" in order to find vileness. From the court's opinion, with no chance to defend or be heard on the issue, Cherrix learned for the first time what conduct constitutes depravity of mind. The constitutional problems presented by the Virginia Supreme Court's refusal to consistently apply constitutionally required narrowing constructions for the vileness components[61] are discussed in this volume in *Hedrick v. Commonwealth*[62] and *Reid v. Commonwealth*.[63]

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55. 248 S.E.2d 135 (Va. 1978).

56. Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978).

57. *Cherrix*, 1999 WL 101077, at *13.

58. *Id.*

59. 466 U.S. 420 (1980) (holding that Georgia's vileness aggravating factor, which includes the components of torture, depravity of mind and aggravated battery, is unconstitutionally vague unless narrowing constructions are applied). Given that Georgia and Virginia have identical vileness aggravating factors, it seems clear that *Godfrey*'s holding applies to the Virginia statute.

60. VA. CODE ANN. § 19.2-264.4(C) (Michie 1998).

61. These concerns exist apart from the separate issue of whether the *Smith* narrowing construction for the depravity of mind component is constitutionally adequate on its face. It is the contention of the Virginia Capital Case Clearinghouse that this narrowing construction is constitutionally inadequate. *See* Virginia Capital Case Clearinghouse Trial Manual at 215-217.

62. *See* Kelly E.P. Bennett, Case Note, 11 CAP. DEF. J. 429 (1999) (analyzing Hedrick v. Commonwealth, Nos. 98-2205, 98-2056, 1999 WL 101079 (Va. Feb. 26, 1999)).

63. *See* Matthew K. Mahoney, Case Note, 11 CAP. DEF. J. 457 (1999) (analyzing Reid v. Commonwealth, 506 S.E.2d 787 (Va. 1998)).