

Spring 3-1-1999

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### Recommended Citation

*Payne v. Commonwealth* 509 S.E.2d 293 (Va. 1999), 11 Cap. DEF J. 449 (1999).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol11/iss2/26>

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# Payne v. Commonwealth

## 509 S.E.2d 293 (Va. 1999)

### *I. Facts*

On June 5, 1997, Eric Christopher Payne ("Payne") followed Ruth Parham ("Parham") into an office building in Hanover County, Virginia.<sup>1</sup> He found Parham, a sixty-one-year-old cleaning woman, in the office building's lunchroom and asked her if he could use the telephone.<sup>2</sup> When Parham turned to show Payne to the phone, Payne hit her in the back of the head with a hammer he had previously concealed in his pants.<sup>3</sup> Parham fell to the ground and Payne began to rip off her clothes.<sup>4</sup> Payne fondled Parham's breast and inserted his finger into her vagina, while repeatedly striking her over the head with the hammer.<sup>5</sup> Parham sustained four depressed skull fractures, a fractured nose and numerous facial and skull bruises and lacerations.<sup>6</sup> Evidence indicated that Parham was alive during the attack.<sup>7</sup> Payne decided not to rape Parham because "she did not appeal to him."<sup>8</sup>

Payne plead guilty to capital murder while in the commission of or subsequent to object sexual penetration and to capital murder while in the commission of or subsequent to attempted rape, both in violation of section 18.2-31(5) of the Virginia Code.<sup>9</sup> During the penalty trial, the court found that the evidence established beyond a reasonable doubt the presence of both aggravating factors "vileness" and "future dangerousness."<sup>10</sup>

Shortly after the Parham murder, Payne approached the house of Marie Fazio and asked Fazio if he could use the telephone.<sup>11</sup> Fazio permitted

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1. Payne v. Commonwealth, 509 S.E.2d 293, 299 (Va. 1999).

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.*

8. *Id.* (internal quotation marks omitted).

9. *Id.* at 298. The statute reads in relevant part: "The following offense[] shall constitute capital murder, punishable as a Class 1 felony: . . . The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration." VA. CODE ANN. § 18.2-31(5) (Michie 1998).

10. Payne, 509 S.E.2d at 298.

11. *Id.* at 296.

Payne to use a portable telephone, whereupon Payne feigned placing a telephone call.<sup>12</sup> As he returned the telephone to Fazio, Payne struck her in the head with a twenty-two ounce hammer he had previously concealed in his pants and forced his way into her house.<sup>13</sup> Fazio struggled briefly with Payne and then fled down the hallway to her bedroom.<sup>14</sup> Payne overpowered Fazio and forced his way into the bedroom.<sup>15</sup> Fazio pleaded for her life and offered to pay Fazio if he would spare her.<sup>16</sup> Payne told Fazio that he would not harm her if she removed her clothes.<sup>17</sup> After Fazio disrobed, Payne raped her, striking her repeatedly with the hammer.<sup>18</sup> Before leaving the house, Payne took money from Fazio's purse, ransacked the house looking for additional money and guns, and changed into sweat pants and a t-shirt belonging to Fazio.<sup>19</sup> Uncertain if Fazio was dead, Payne hit her with the hammer several times in the head and chest.<sup>20</sup> Payne wrapped the hammer in a towel and threw it out of his car window as he fled.<sup>21</sup> Payne later hid the clothing he had taken from Fazio's home in a dumpster at a public high school.<sup>22</sup>

Forensic evidence linked Payne to the murder.<sup>23</sup> Payne was charged with the capital murder of Fazio in the commission of robbery under section 18.2-31(4) of the Virginia Code, and with the capital murder of Fazio in the commission of rape under section 18.2-31(5) of the Virginia Code.<sup>24</sup> The jury found Payne guilty of both capital murders and unanimously fixed Payne's punishment at death for each of the two capital murder convictions based on both the "future dangerousness" and "vileness" predicates.<sup>25</sup>

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.*

21. *Id.*

22. *Id.*

23. *Id.* at 297.

24. *Id.* at 296. The relevant sections of the statute read as follows:

The following offenses shall constitute capital murder, punishable as a Class 1 felony: . . . 4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery. . . . 5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration.

VA. CODE ANN. §§ 18.2-31(4)-(5) (Michie 1998).

25. *Payne*, 509 S.E.2d at 296. See VA. CODE ANN. § 19.2-264.2 (Michie 1998).

Evidence of Payne's prior criminal history was introduced during the penalty phase of the trial; this history included the attempted rape and murder of Ruth Parham as well as an assault on Ridley Fleck and her young son, W. Dean Fleck on June 11, 1997.<sup>26</sup>

The trial court found that Payne voluntarily, intelligently, and knowingly waived his right to appeal in both cases; as a result, the Supreme Court of Virginia conducted only a proportionality review as required under section 17.1-313 of the Virginia Code.<sup>27</sup>

## II. Holding

The Supreme Court of Virginia held that the death sentences imposed in connection with the Parham murder as well as those imposed as a result of the Fazio murder were neither the product of passion, prejudice, or any other arbitrary factor, nor were they excessive or disproportionate.<sup>28</sup> In addition, the court held that it is constitutionally permissible to have more than one death sentence imposed for one victim.<sup>29</sup>

## III. Analysis / Application in Virginia

### A. Proportionality Review of the Fazio & Parham Cases

At the Supreme Court of Virginia's direction, the trial court found that Payne had made a knowing, voluntary and intelligent decision to waive his appeal of right in both the Fazio and Parham cases.<sup>30</sup> The court accordingly limited its review to a proportionality analysis of the imposition of Payne's death sentences, as required by statute.<sup>31</sup>

#### 1. Excessiveness / Disproportionate Nature of Death Sentence

Payne argued that his death sentences for the Fazio murder were excessive and disproportionate.<sup>32</sup> The court summarily dismissed this contention, citing cases where the death sentence had been imposed for similar crimes.<sup>33</sup>

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26. *Id.* The Fleck incident occurred shortly before Payne murdered Fazio. The Flecks were also attacked with a hammer; Payne told the police that he attacked them because he wanted to incapacitate Ms. Fleck in order to rape her. Payne was forced to leave the scene since Dean Fleck was screaming and fighting. Both Flecks suffered skull fractures as a result of the attack. *Id.*

27. *Id.* at 296. See VA. CODE ANN. § 17.1-313 (Michie 1998).

28. *Payne*, 509 S.E.2d at 301.

29. *Id.*

30. *Id.* at 296.

31. *Id.* at 298.

32. *Id.* Payne did not make an argument that his death sentences in the Parham case were excessive or disproportionate. *Id.* at 299.

33. *Id.* at 300.

Although proportionality review in capital murder cases is a rubber-stamp exercise by the Supreme Court of Virginia, there may be ways defense counsel can further urge the court to make the review one of substance, as opposed to formality. A reviewing court needs a database to enable the court to analyze and compare those crimes for which the death penalty has been given to the crime for which the appellant has been convicted.<sup>34</sup> Currently, the Supreme Court of Virginia's database includes all capital murder cases, including those where life sentences have been imposed. However, the court does not compare appeals of life sentences. Counsel can, and should, supply the court with cases of this nature and others in an effort to expand the court's database. Additionally, it is suggested that defense counsel request information on cases submitted to the Supreme Court of Virginia for review and conduct an independent comparison of crimes and the respective punishment imposed for each.

The inadequacy of proportionality review<sup>35</sup> should also be preserved as a due process issue for review.<sup>36</sup> The following are two strong grounds for preservation: (1) that the reviewing court has failed to conduct a meaningful review of the appellant's sentence;<sup>37</sup> and (2) that proportionality review is a state-created right that is subject to procedural due process protections if applied in an arbitrary manner.<sup>38</sup>

## 2. *Influence of Passion, Prejudice, or Any Other Arbitrary Factor*

In the Fazio case, Payne first argued that the death sentences he received were imposed under the influence of passion or prejudice because a videotape of the crime scene and autopsy and crime scene photographs shown to the jury were excessively graphic and were shown for the purpose of inflaming the passions of the jury.<sup>39</sup> The court dismissed this argument, finding the

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34. VA. CODE ANN. § 17.1-313 (Michie 1998). The relevant portion of the statute reads as follows:

C. In addition to consideration of any errors in the trial enumerated by appeal, the court shall consider and determine:

2. Whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.

*Id.*

35. *Payne*, 509 S.E.2d at 300. This inadequacy includes the court's consistent failure to consider the defendant as well as the crime. *Id.*

36. In order to preserve the inadequacy of proportionality review for federal review, the defense must petition the Supreme Court of Virginia for rehearing when it rejects this claim.

37. See *Pulley v. Harris*, 465 U.S. 37 (1984) (comparative review not constitutionally required; meaningful review remains essential).

38. See *Evitts v. Lucey*, 469 U.S. 387 (1985) (holding that an individual is guaranteed effective assistance of counsel on a first appeal as a matter of right, even though a state is not required to provide for an appeal).

39. *Payne*, 509 S.E.2d at 297.

photographs to be "shocking and gruesome," but accurate and relevant to show motive, intent, method, malice, premeditation, as well as the atrociousness of the crimes.<sup>40</sup> In the Fazio case, Payne also argued that evidence of Dean Fleck's injuries and the Commonwealth's references to his bravery in assisting in Payne's arrest were intended to inflame the passions of the jury.<sup>41</sup> The court found no merit in this claim, noting that the evidence presented was accurate and relevant to show future dangerousness.<sup>42</sup>

Similarly, in the Parham case, the court found that the death sentences were imposed free of the influence of passion, prejudice or any other arbitrary factor.<sup>43</sup> Payne argued that the Commonwealth's attorney made improper remarks during the sentencing proceeding.<sup>44</sup> Specifically, Payne claimed that the prosecutor improperly referred to the defendant as a "predator" and a "monster."<sup>45</sup> In addition, Payne contended that the judge was affected by the Commonwealth's efforts to influence the court because the court described him as a "mad dog who should be put in a gunny sack with some bricks and dropped off a bridge."<sup>46</sup> The court failed to address the merits of this claim and concluded, "[w]hen all of the trial court's remarks are read, it is apparent that . . . the court considered not only Payne's criminal history, but also his evidence in mitigation."<sup>47</sup> This is not the test by which the impartiality of the trial court is to be judged. The United States Supreme Court has said, "[every procedure] which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might lead him not to hold the balance nice, clear and true between the state and the accused [denies . . . due process of law.]"<sup>48</sup> In spite of the nature of Payne's crimes, it is apparent that he was denied the fundamental right to an impartial judge; however, the Supreme Court of Virginia chose not to address the issue.

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40. *Id.* Photographs are generally admissible, given the minimal showing required under *Stewart v. Commonwealth*, 427 S.E.2d 394, 403 (Va. 1993). Counsel may wish to obtain a set of the photos in black and white, secure agreement from the forensic expert that the black and white photos are sufficient for testimony and, then, move to substitute these for the color photos.

41. *Payne*, 509 S.E.2d at 297-98.

42. *Id.* at 298. The court did not explain its holding that the bravery of one victim in assisting another made it more likely that the defendant would commit serious acts of violence in the future.

43. *Id.* at 299.

44. *Id.*

45. *Id.*

46. *Id.* (internal quotation marks omitted).

47. *Id.* (internal quotation marks omitted).

48. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972) (citing *Tumey v. Ohio*, 273 U.S. 510, 532 (1926)). See John M. DelPrete, *Not Holding the Balance Nice, Clear and True: The Right to An Impartial Judge*, CAP. DEF. DIG., Spring 1995, at 47.

Similarly, the court concluded that the prosecutor's comments regarding Payne's character were "fair comment upon properly admitted evidence."<sup>49</sup> The court's discussion of this claim is insufficient.

### *B. Imposition of Multiple Death Sentences for One Victim*

Despite Payne's failure to present the claim on appeal, the Supreme Court of Virginia directed counsel to brief the question whether the imposition of more than one death sentence per victim is permissible.<sup>50</sup> Although the court confused the issue somewhat, it was correct in noting that the question is *not* governed by the Fifth Amendment Double Jeopardy Clause.<sup>51</sup> That is because the clause forbids being twice placed in jeopardy for the *same offense*. The question becomes, then, "what constitutes a separate offense?" The test employed to draw lines between offenses was laid out by the United States Supreme Court in *Blockburger v. United States*.<sup>52</sup> Under *Blockburger*, two or more offenses are *not* the same if each requires proof of an element the other does not.<sup>53</sup> That is the case in both the Parham and Fazio murders.<sup>54</sup>

It follows that the applicable analysis focuses on legislative intent. As a matter of statutory interpretation, the court's analysis is partially incor-

49. *Payne*, 509 S.E.2d at 299. The prosecution's editorial comments about Payne were made during the sentencing proceeding. When the prosecution makes comments during closing argument to the jury, strong jury instructions are constitutionally required in order to avoid a "fundamentally unfair" proceeding. See *Darden v. Wainwright*, 477 U.S. 168, 181-82 (1986) (stating that because the prosecution's argument did not manipulate or misstate the facts and the jury was instructed not to consider the prosecuting attorney's words as evidence that the prosecution's comments during closing argument were not "fundamentally unfair"); *Donnelly v. DeChristoforo*, 416 U.S. 637, 644-46 (1974) (noting the importance of jury instructions in remedying arguably prejudicial remarks by the prosecution in closing argument).

50. *Payne*, 509 S.E.2d at 300.

51. *Id.* See U.S. CONST. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb").

52. 284 U.S. 299 (1932).

53. *Blockburger*, 284 U.S. at 304 ("The applicable rule is that, where the same act or transaction constitutes a violation of two distinct statutory provisions, the test to be applied to determine whether there are two offenses or only one is whether each provision requires proof of an additional fact which the other does not.") (citations omitted).

In the Fazio case, Payne was charged with (1) the willful, deliberate, and premeditated killing in the commission of robbery and (2) the willful, deliberate, and premeditated killing in the commission of rape. In connection with the Parham murder, Payne was convicted of (1) the willful, deliberate, and premeditated killing in the commission of rape and (2) the willful, deliberate, and premeditated killing in the commission of object sexual penetration.

54. For example, in the Parham case, the intent to rape does not require the use of an object. Neither does object penetration require intent to rape as traditionally defined. In the Fazio case, clearly the predicate offenses charged, rape and robbery, each require proof of an element not found in the other.

rect. Section 18.2-31 of the Virginia Code identifies the following offenses as constituting capital murder: (1) killing in the commission of robbery; and (2) killing in the commission of rape. Each is enumerated under a *separate* section of the capital murder statute.<sup>55</sup> Accordingly, the court's analysis of the Fazio case is correct; the robbery and rape sections are expressly designated by the legislature as separate offenses.

As to the Parham case, however, killing in the commission of attempted rape and killing in the commission of object penetration are merely *alternative means of committing the same offense*.<sup>56</sup> The Supreme Court of Virginia's analysis of Parham, then, reaches the improbable conclusion that the legislature intended multiple offenses to be included *within* the enumerated offenses comprising the capital murder statute.

The practical effect of this decision is that trial counsel, instead of preparing themselves to defend against twelve, specifically enumerated and separately defined offenses must prepare themselves to defend against twenty-seven offenses carrying a potential death sentence.<sup>57</sup>

Alix M. Karl

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55. VA. CODE ANN. § 18.2-31 (Michie 1998). The relevant language of the statute reads:

The following *offenses* shall constitute capital murder, punishable as a Class I felony:

4. The willful, deliberate, and premeditated killing of any person in the commission of robbery or attempted robbery;

5. The willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, . . . or object sexual penetration.

*Id.* (emphasis added).

56. This offense is enumerated at section 18.2-31(5) of the Virginia Code. See *infra* note 55.

57. If the alternative means of committing capital murder contained in the twelve statute sections of section 18.2-31(5) of the Virginia Code are all viewed as separate offenses, then there are twenty-seven offenses.



