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## *I. Facts*

Robert Stacey Yarbrough ("Yarbrough") was convicted of the capital murder of Cyril Hugh Hamby ("Hamby") and sentenced to death upon a jury finding of the vileness aggravator. On May 8, 1997, Yarbrough and Dominic Jackson Rainey ("Rainey") went to Hamby's Store on Route 1 in Mecklenberg County, with the intention of robbing the store. Upon entering the store, Rainey locked the front door and Yarbrough confronted the proprietor, Hamby, with a shotgun. Yarbrough retrieved an electrical cord and string from the living quarters behind the store and bound Hamby's arms and legs, placing him on the floor in one of the aisles of the store. Yarbrough repeatedly asked Hamby where he kept guns hidden in the store, kicking Hamby in the head and left arm between inquiries. Yarbrough also removed cash from the register, cut Hamby several times on his neck with a knife and took Hamby's wallet. Both Yarbrough and Rainey took cigarettes, beer, and wine and then left the store through the back door. While none of the cuts to Hamby's neck severed major arteries, Hamby bled to death as a result of the wounds.[1]

At trial, Rainey testified against Yarbrough. In addition, the Commonwealth presented as evidence the murder weapon, Yarbrough 's bloody sneakers and clothing, footprints from the store which matched Yarbrough's sneakers, and DNA evidence linking Yarbrough to the scene of the crime and the murder weapon. The jury found Yarbrough guilty of capital murder. The Commonwealth sought the death penalty based on the vileness aggravating factor only. Before the commencement of the penalty phase, Yarbrough proffered a jury instruction that life imprisonment meant life without parole; he asserted that such an instruction would prevent jury confusion and was a matter of fundamental fairness. Citing *Simmons v. South Carolina*[2] and Supreme Court of Virginia precedent, the court denied Yarbrough's request; it reasoned that such an instruction was required only when the Commonwealth was trying to prove future dangerousness as an aggravating factor. Yarbrough again sought such an instruction after the Commonwealth's closing argument and the trial court again refused to give the instruction. After a period of deliberation, the jury sent a question to

1. Yarbrough v. Commonwealth, 519 S.E.2d 602, 603-07 (Va. 1999).
2. 512 U.S. 154 (1994).

the court regarding the meaning of life in prison. Yarbrough again requested that the court define life imprisonment as imprisonment without possibility of parole. The trial court recalled the jury and refused to answer their question, telling them "not [to] concern [themselves] with what might happen afterwards."[3]

After further deliberation, the jury sentenced Yarbrough to death. During Yarbrough's sentencing hearing, defense counsel urged the court to consider the jury's reluctance during its deliberations and the court's own knowledge regarding Yarbrough's ineligibility for parole. The trial court imposed the jury's verdict and sentence without comment.[4]

On direct appeal to the Supreme Court of Virginia, Yarbrough's major arguments consisted of the following: (1) the trial court erroneously appointed a special assistant prosecutor from another jurisdiction to assist the Commonwealth's Attorney from Mecklenberg County; (2) evidence presented by the Commonwealth and relied upon by the jury lacked both credibility and sufficiency to support a capital murder conviction; and (3) the trial court erred in failing to provide the jury with an instruction regarding the meaning of life imprisonment as life imprisonment without the possibility of parole, either upon the defendant's request or when the jury sought clarification on this point.[5]

## *II. Holding*

The Supreme Court of Virginia affirmed Yarbrough's capital murder conviction, vacated the death sentence, and remanded the case for a new sentencing phase.[6] The court held that "in the context of a capital murder trial a jury's knowledge of the lack of availability of parole is necessary" to prevent a harsher sentence recommendation by the jury than would have normally been given had the jury known the end result of its decision.[7] This holding ensures that upon conviction of capital murder, a defendant's request for an instruction defining life imprisonment, either prior to submitting the issue of penalty to the jury or following an inquiry from the jury during deliberation, will be granted.[8]

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3. *Yarbrough*, 519 S.E.2d at 604-07, 610.
4. *Id.* at 607.
5. *Id.* at 608-11.
6. *Id.* at 617.
7. *Id.* at 616.
8. *Id.* at 615.

### *III. Analysis/Application in Virginia*[9]

The Supreme Court of Virginia ruled on two issues presented in this appeal as matters of first impression.[10]

#### *A. "Life Means Life" Instruction*

After his capital murder conviction, Yarbrough proffered a jury instruction which would inform the jury that "'imprisonment for life' means imprisonment for life without possibility of parole."[11] The trial court refused the instruction, citing current Virginia law as argued by the Commonwealth–namely, that the instruction is improper when "the Commonwealth relies only on the vileness factor."[12] Yarbrough repeated his request for a "life means life" instruction two more times during the penalty phase of the trial: once after the Commonwealth's closing argument and a second time during deliberations, when the jury asked the trial court for a definition of "life in prison."[13] The trial court refused to offer the instruction or answer the question posed by the jury.[14]

On appeal, Yarbrough argued that *Simmons v. South Carolina* created a due process right for a capital defendant that his "jury be fully informed as to what the realities of a sentence are."[15] Yarbrough asked that the holding of *Simmons* be extended in Virginia to all capital cases, not just those in which the Commonwealth relies on the aggravating factor of future dangerousness to prove death eligibility.[16] The Commonwealth contended that the Supreme Court of Virginia had already limited the application of *Simmons* to capital cases where future dangerousness is at issue because only

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9. Yarbrough raised "various challenges to the constitutionality of the Virginia capital murder statute and the statutory scheme under which capital murder trials are conducted and death sentences are reviewed on appeal." *Id.* at 607. The Supreme Court of Virginia summarily dismissed these claims, stating that it had previously addressed and rejected them. *Id.* These claims will not be discussed here.

10. *Id.* at 608, 612.

11. *Id.* at 606.

12. *Id.* Until *Yarbrough*, no Virginia capital murder defendant accused of only the vileness aggravating factor had been sentenced to death. In 1994, the United States Supreme Court held that when a capital defendant's future dangerousness is at issue, he is "entitled to inform the jury of his parole ineligibility." Simmons v. South Carolina, 512 U.S. 154, 171 (1994). After Virginia abolished parole in 1995 for convicted felons, *see* VA. CODE ANN. § 53.1-165.1 (Michie 1999), convicted capital murder defendants were entitled to a "life means life" instruction only if the Commonwealth relied on future dangerousness as an aggravating factor.

13. *Yarbrough*, 519 S.E.2d at 607.

14. *Id.*

15. *Yarbrough*, 519 S.E.2d at 612 (citation omitted in original).

16. *Id.* at 612.

in these cases would a defendant's parole eligibility prejudice the jury should the jury find the defendant a continuing threat to society.[17]

Ruling on the issue of availability of a "life means life" instruction (when the Commonwealth asserts only vileness as an aggravating factor) as a matter of first impression,[18] the Supreme Court of Virginia held that *Simmons* had no application, the arguments presented by Yarbrough and the Commonwealth were without merit, prior Virginia case law applied, and Yarbrough deserved the instruction.[19] The Supreme Court of Virginia held *Simmons* inapplicable because Yarbrough was challenging a death sentence imposed solely on the aggravating factor of vileness, whereas in *Simmons*, the defendant was sentenced to death based on the aggravating factor of future dangerousness.[20] The Supreme Court of Virginia then turned to a line of Virginia cases ruling on the provision of information to juries during sentencing.[21]

Citing *Hinton v. Commonwealth*,[22] *Jones v. Commonwealth*,[23] and *Coward v. Commonwealth*,[24] the Supreme Court of Virginia stated that instructions to the jury regarding parole eligibility, executive pardon, or executive clemency constituted error where such information "could lead a jury *to impose a harsher sentence than it otherwise might*."[25] In each of these cases, the trial court had given instructions explaining or alluding to the defendant's eligibility for parole or post-sentencing executive branch control over the number of years the defendant would remain in prison.[26] The Supreme Court of Virginia synthesized the policy underlying this line of cases:

> [T]he jury should not be permitted to speculate on the potential effect of parole, pardon, or an act of clemency on its sentence because doing so

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17. *Id.*

18. *Id.* at 612. Before *Yarbrough*, no capital defendant who was ineligible for parole had been sentenced to death exclusively on a finding of the aggravating factor of vileness. Since 1995, when the abolition of parole for felons convicted of capital murder was legislatively instituted, all Virginia capital defendants receiving the death penalty have been sentenced to death after either a finding of future dangerousness and vileness or of future dangerousness alone. *Id.* at 611-12. *See also* VA. CODE ANN. § 53.1-165.1 (Michie 1999).

19. *Yarbrough*, 519 S.E.2d at 612-16.

20. *Id.* at 612.

21. *Id.* at 613.

22. 247 S.E.2d 704 (Va. 1978) (describing to the jury the manner in which defendant might receive early release was reversible error on the part of the trial court).

23. 72 S.E.2d 693 (Va. 1952) (informing jury that the executive branch would control the defendant's ability to "get out" of prison if they imposed a life sentence instead of death was improper).

24. 178 S.E. 797 (Va. 1935) (informing jury of "good behavior" sentence reduction improper).

25. *Yarbrough*, 519 S.E.2d at 613 (emphasis added).

26. *Id.* at 614-15.

> would inevitably prejudice the jury in favor of a harsher sentence than the facts of the case might otherwise warrant.[27]

The Supreme Court of Virginia continued its analysis by stating that this rule has been applied to capital cases "where the defendant would have been eligible for parole" (cases prior to 1995) by the exclusion of any instruction regarding such eligibility.[28]

Section 53.1-165.1 of the Virginia Code eliminates parole eligibility for a convicted capital murderer.[29] Therefore, a jury sentencing a capital defendant has only two sentences to choose from: death or life imprisonment without possibility for parole.[30] When applying the policy developed in *Coward* and its progeny, the Supreme Court of Virginia determined that to eliminate erroneous speculation by the sentencing jury in a post-1995 capital murder sentencing, "the absence of such procedures or policies [for example, parole eligibility and executive action] favoring the defendant" should "be disclosed to the jury."[31] In support of this proposition the court cited the scenario played out during the sentencing phase of Yarbrough's trial where the jury returned to the court during deliberations to inquire about Yarbrough's parole eligibility. The *Yarbrough* jury in fact suggested a hypothetical where Yarbrough would serve only twelve years if sentenced to life imprisonment.[32] In direct contravention of the policy in *Coward*, the trial court permitted the sentencing jury to speculate on the effect of parole on any sentence it might impose.[33] The Supreme Court of Virginia stated that:

> [A] jury fully informed on [parole ineligibility] in this context [where the jury has a choice between death or life imprisonment without the eligibility of parole] is consistent with a fair trial both for the defendant and the Commonwealth.[34]

The Court then held that:

> [I]n the penalty-determination phase of a trial where the defendant has been convicted of capital murder, *in response to a proffer* of a proper instruction from the defendant prior to submitting the issue of penalty-determination to the jury or where the defendant *asks for such instruction* following an inquiry from the jury during deliberations, the trial court

27. *Id.* at 615.
28. *Id.*
29. VA. CODE ANN. § 53.1-165.1 (Michie 1999).
30. *Yarbrough*, 519 S.E.2d at 615.
31. *Id.*
32. *Id.* at 616.
33. *Id.*
34. *Id.*

> shall instruct the jury that the words "imprisonment for life" mean "imprisonment for life without the possibility of parole."[35]

Therefore, a defendant convicted of capital murder who makes a timely request for such instruction or clarification, is entitled to a jury instruction or clarification that life imprisonment means life without the possibility of parole.

The dissent in *Yarbrough* argued that the majority only concerned itself with the fairness considerations of the defendant, and not those of "the Commonwealth and her citizens."[36] The latter "fairness considerations," the dissent argued, should lead to a jury instruction regarding executive clemency.[37] In *Dingus v. Commonwealth*,[38] the Commonwealth's Attorney had pleaded with the jury to impose death because clemency might shorten a life sentence.[39] The Supreme Court of Appeals of Virginia[40] held that "such a reflection upon the executive department as a reason for imposing the death penalty could not be justified and should not under any circumstances be tolerated."[41] Moreover, if the Commonwealth should be permitted to argue clemency, the defense should then be permitted to respond by informing the jury about the rarity and types of clemency in capital cases.

The holding in *Yarbrough* provides capital defendants with a safeguard against jury imposition of a harsher sentence, based on factors external to the defendant's particular case, than the jury would normally impose. Even though the cases cited by the majority prevented a jury from receiving an instruction regarding parole, while in *Yarbrough* the court ruled that the jury should receive such instruction, the underlying reasoning, prevention of a harsher sentence than would normally have been imposed, is identical in the two scenarios.[42] The dissent failed to recognize this underlying theme and instead seized on the disparate circumstantial facts between the cited cases and *Yarbrough*.

Finally, it should be noted that the decision to permit a "life means life" instruction in Virginia capital cases is strictly based on state law. In *California v. Ramos*,[43] the United States Supreme Court held that "the wisdom . . . to permit juror consideration of [post-sentencing events] is best

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35. *Id.* (emphasis added).
36. *Id.* at 617-18.
37. *Id.* at 618.
38. 149 S.E. 414 (Va. 1929).
39. Dingus v. Commonwealth, 149 S.E. 414, 415 (Va. 1929).
40. Now known as the Supreme Court of Virginia.
41. *Dingus*, 149 S.E. at 415.
42. *Yarbrough*, 519 S.E.2d at 615.
43. 463 U.S. 992 (1983).

left to the States."[44] The decision in *Yarbrough* is not based on the United States Constitution.

### *B. Appointment of Special Assistant Prosecutor*

Yarbrough argued on appeal that the trial court erred in appointing an assistant Commonwealth's Attorney from another jurisdiction as a special assistant prosecutor.[45] The special assistant prosecutor was originally appointed via an *ex parte* order based on section 19.2-155 of the Virginia Code.[46] Yarbrough correctly argued that the appointment was inappropriate because that statute allows appointment only when the original prosecutor is unable to perform his duties.[47]

The trial court vacated the original order and appointed the special assistant prosecutor pursuant to a renewed motion by the Commonwealth after a hearing at which both parties had opportunity to be heard.[48] The trial court relied on its "inherent authority to administer cases on its docket" in granting the motion.[49] Yarbrough contended that this second appointment, based on the courts inherent authority, constituted error because the special assistant prosecutor was not from the jurisdiction where the crime had occurred.[50]

The Supreme Court of Virginia ruled on this issue as a matter of first impression.[51] The court ruled that a trial court has broad discretion "in permitting the Commonwealth to obtain . . . assistance" when seeking help from a more experienced Commonwealth's Attorney whose services will not cost additional tax dollars.[52] As a result, the Commonwealth now has the ability to assemble a "dream team" to prosecute capital cases as long as the trial court approves the proffered appointments. Defense counsel should respond to such appointment motions with their own request for additional resources and time to prepare for trial. Defense counsel should argue that they are entitled to these additional resources in order to contest effectively the expertise and increased resources made available to the Commonwealth by this mechanism.

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44. *Yarbrough*, 519 S.E.2d at 612 (quoting California v. Ramos, 463 U.S. 992 (1983)) (internal quotation marks omitted).

45. *Id.* at 608.

46. *Id. See also* VA. CODE ANN. § 19.2-155 (Michie 1999).

47. *Yarbrough*, 519 S.E.2d at 608.

48. *Id.*

49. *Id.*

50. *Id.* at 609.

51. *Id.* at 608.

52. *Id.* at 609.

### C. *Credibility and Sufficiency of Evidence of Capital Murder*

On appeal, Yarbrough argued that the testimony of his accomplice, Rainey, lacked sufficient reliability to support the Commonwealth's assertion that Hamby died at the hands of Yarbrough.[53] Rainey was the only eye witness to the murder and was therefore the Commonwealth's chief witness.[54] Yarbrough argued that because Rainey's testimony was self-serving, in that by testifying that Yarbrough was the "triggerman" Rainey evaded a death sentence, it lacked sufficient reliability to support a finding that Yarbrough was the killer.[55] Yarbrough also contended that the forensic evidence proved only that Yarbrough was present when Hamby died.[56]

The Supreme Court of Virginia held that the reliability and sufficiency of Rainey's testimony was a matter of fact to be determined by the trier of fact during the defendant's trial.[57] A jury's reliance on a specific witness's testimony or evidence provided by one of the parties to the case "will not be overturned on appeal unless it is plainly wrong or without evidence to support it."[58] Citing *Cardwell v. Commonwealth*,[59] the court stated that an accomplice's testimony is not inherently incredible when it is supported by forensic evidence.[60] Therefore, the court concluded that the evidence presented by the Commonwealth was a sufficient basis for the jury's decision that Hamby died at the hand of Yarbrough.[61]

In addition, Yarbrough argued that the Commonwealth failed to prove that Hamby's death supported a finding of vileness, the aggravating factor on which Yarbrough's death sentence was based.[62] Specifically, Yarbrough argued that the Commonwealth failed to establish that Hamby was conscious at the time of the murder (leading to an argument that the murder involved torture), or that any of the individual wounds would have lead to Hamby's death (leading to a conclusion that none of the acts of wounding Hamby were excessive, thereby disproving the aggravated battery which indicated vileness).[63] The Supreme Court of Virginia dismissed Yarbrough's first argument, that Hamby may have been unconscious, by relying on Rainey's testimony that Hamby pleaded for his life. The court dealt with the second argument by relying on precedent which allows for an expansion

53. *Id.*
54. *Id.* at 605.
55. *Id.* at 609.
56. *Id.*
57. *Id.* at 610.
58. *Id.* (citing VA. CODE ANN. § 8.01-680 (Michie 1999)).
59. 450 S.E.2d 146 (Va. 1994).
60. *Yarbrough*, 519 S.E.2d at 610.
61. *Id.* at 610.
62. *Id.*
63. *Id.*

of the time frame and acts which may constitute aggravated battery.[64] The court held that any acts that facilitate the murder or occur during the commission of a predicate felony are to be considered in the determination of aggravated battery.[65] Therefore, the restraining and kicking of Hamby during the commission of the robbery and the murder were acts that the jury could properly take into consideration when determining that an aggravated battery occurred.[66] Therefore, evidence existed on which the jury could rely in its finding of vileness.[67]

### *D. Conclusion*

*Yarbrough* provides capital defendants with the right to have the jury instructed that "life means life." It is important to note two things about this significant ruling. First, the Supreme Court of Virginia's decision is based entirely on state law, and is therefore susceptible to legislative action.[68] Second, the defendant has a right to a "life means life" instruction, but the defendant must timely request the instruction. Having said this, the ruling is an important step in Virginia capital case law, one that provides Virginia defendants with increased fairness when facing the ultimate societal penalty.

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64. *Id.* at 611 (citing Hedrick v. Commonwealth, 513 S.E.2d 634, 640 (Va. 1999)).

65. *Id.*

66. *Id.*

67. *Id.*

68. It is unclear whether the decision in *Yarbrough* has any basis in the Virginia Constitution. If the Virginia Constitution provides a capital defendant with such fairness considerations found in the *Yarbrough* decision, the holding cannot be legislatively overturned.

# ARTICLES