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Emmett v. Commonwealth 569 S.E.2d 39 (Va. 2002)

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I. Facts

In late April 2001, Christopher Scott Emmett ("Emmett") and John Fenton Langley ("Langley") were assigned to the same roofing project in the city of Danville. Emmett and Langley shared a room at a local motel. On the evening of April 26, 2001, Emmett, Langley, and Michael Darryl Pittman ("Pittman") ate dinner at the motel, drank beer, and played cards. During the course of these events, Langley loaned some money to Emmett and Pittman, both of whom used the money to buy crack cocaine.[1]

Around 11:00 p.m. that evening, a member of the roofing crew heard "bang, bang" noises from Emmett and Langley's room. Around midnight that same evening, Emmett went to the motel office and asked the clerk to call the police. Emmett told the clerk that he returned to his room and saw "blood and stuff . . . and didn't know what had took [sic] place." The police arrived at 12:46 a.m. and accompanied Emmett back to his room. They found Langley's dead body lying face-down on his bed and spattered blood on the sheets, headboard, the wall behind the headboard, and on the wall between the bathroom and Emmett's bed. The police also found a damaged brass lamp, stained with blood, underneath Langley's bed.[2]

Emmett initially told police that he had returned to the room and gone to bed. He told the police that he discovered the blood and Langley's body when he went to the bathroom later that night. The police observed bloodstains on Emmett's personal effects, and they took possession of his boots and clothing with Emmett's permission. Emmett suggested to the police that the blood might be his own from an injury he sustained earlier in the week. Subsequent testing revealed that his boots and clothing actually were stained with Langley's blood.[3]

Later in the morning of April 27, 2001, Emmett voluntarily accompanied police officers to the Danville police station. He agreed to be fingerprinted, and he gave a sample of his blood. He also admitted that he had been drinking and that he used cocaine the previous evening. During the next several hours, Emmett told different versions of the events from the previous evening. He first implicated Pittman as Langley's murderer. Emmett eventually told the police, however, that he alone beat Langley to death with the lamp. The police gave Emmett *Miranda* warnings, and he gave a full, taped confession in which he

1. Emmett v. Commonwealth, 569 S.E.2d 39, 42 (Va. 2002).
2. *Id.*
3. *Id.*

stated that he and Pittman decided to rob Langley after Langley refused to lend them additional money to purchase more cocaine. Emmett confessed to striking Langley five or six times with the brass lamp. He also stated that he took Langley's wallet and left the motel to buy cocaine.[4]

Emmett was indicted for capital murder and robbery.[5] The guilt-determination phase of a bifurcated jury trial began on October 9, 2001. The Commonwealth presented, in addition to the facts above, evidence from the medical examiner indicating that Langley was not killed immediately by the first blow from the lamp. The medical examiner admitted, however, that Langley might have lost consciousness after the first blow and that Langley may have suffered "brain death" before his actual death.[6]

The jury convicted Emmett of capital murder and robbery.[7] During the penalty-determination phase, the Commonwealth presented evidence of Emmett's prior criminal history that included an incident in which Emmett had participated in an escape plan while he was incarcerated at a maximum-security juvenile detention facility. The Commonwealth also presented evidence of an involuntary manslaughter conviction that involved a motorcycle accident in which Emmett said "that there was no need to worry about the man on the motorcycle. He was already dead, and that [Emmett] could do nothing to help him."[8]

In addition, the Commonwealth presented extensive victim-impact testimony from members of Langley's family, during the course of which some of the family members appeared to urge the imposition of the death penalty. The trial court sustained Emmett's objections to these statements and directed the jury to disregard the statements. Emmett then presented mitigation evidence from his family and a family friend.[9]

The jury returned its verdict recommending the death sentence. The jury based its verdict on the statutory aggravating factors of future dangerousness and vileness. After consideration of a post-sentence report, the trial court imposed the jury's sentence of death.[10]

Emmett also was convicted of robbery and was sentenced to life imprisonment for that crime. He appealed his convictions, but on February 8, 2002, he filed a motion to withdraw the appeal. The Supreme Court of Virginia ordered the trial court to determine if the waiver of appeal was voluntarily and intelligently made. The trial court conducted the hearing on March 4, 2002, and found

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4. *Id.* at 42-43.

5. *Id.* at 43; *see* VA. CODE ANN. § 18.2-31(4) (Michie Supp. 2002) (defining willful, deliberate, and premeditated killing in commission of robbery as capital murder).

6. *Emmett*, 569 S.E.2d at 43.

7. *Id.*

8. *Id.*

9. *Id.*

10. *Id.*

that Emmett fully understood the consequences of voluntarily waiving his right to appeal.[11] The Supreme Court of Virginia, pursuant to Section 17.1-313(A) of the Virginia Code, reviewed the imposition of the death sentence.[12]

II. Holding

The Supreme Court of Virginia held that: (1) it would not consider the merits of any assertion that evidence was improperly admitted or that the Commonwealth made improper statements to the jury, but that Emmett was entitled to review of the sentence of death based on the impact of such evidence and statements on the jury's sentencing decision;[13] (2) the sentence of death imposed by the jury was not a result of passion, prejudice, nor other arbitrary factors;[14] and (3) the sentence of death was not disproportionate to the penalty imposed in similar cases.[15] The court affirmed the sentence of death.[16]

III. Analysis / Application in Virginia

A. Scope of Review

The Supreme Court of Virginia first examined the extent of its review of the case. The Commonwealth argued that Emmett's waiver barred him from asserting that the death sentence was improperly imposed as a result of passion, prejudice, or other arbitrary factors based on allegations that evidence was erroneously admitted or on improper remarks made by the Commonwealth during its penalty-phase closing argument.[17] The court agreed that Emmett was barred from asserting that the sentence of death was improper solely because reversible error may have been committed at trial.[18]

Emmett, however, could not waive mandatory review by the court under Section 17.1-313(C)(1) of the Virginia Code.[19] The court stated that mandatory

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11. *Id.* at 42 n.1.

12. *Emmett*, 569 S.E.2d at 42; *see* VA. CODE ANN. § 17.1-313(A) (Michie 1999) (stating that Supreme Court of Virginia shall review, on the record, sentence of death when such judgment has become final).

13. *Emmett*, 569 S.E.2d at 43-44; *see infra* Part III.A (describing court's holding on its scope of review).

14. *Emmett*, 569 S.E.2d at 44-45; *see infra*, Part III.B (describing court's examination of jury's findings).

15. *Emmett*, 569 S.E.2d at 47; *see infra*, Part III.C (examining court's proportionality review).

16. *Emmett*, 569 S.E.2d at 47.

17. *Id.* at 43.

18. *Id.* (quoting Akers v. Commonwealth, 535 S.E.2d 674, 677 (Va. 2000)); *see* VA. SUP. CT. R. 5:25 (stating that court shall not find error in trial court's ruling unless objection was stated with reasonable certainty at time of ruling); *see also* VA. SUP. CT. R. 5:17(c) (requiring appellant to list specific errors in rulings, upon which appellant intends to rely, under separate heading in petition for appeal).

19. *Emmett*, 569 S.E.2d at 44; *see* VA. CODE ANN. § 17.1-313(C)(1) (Michie Supp. 2002) (requiring Supreme Court of Virginia to consider and determine "whether sentence of death was

review under Section 17.1-313(C)(1) would be meaningless unless it gave some recognition that an error at trial may result in a prejudicial verdict.[20] The court therefore found that even when it is barred from finding reversible error in the trial proceedings, it may still consider a sentence of death to be erroneous if it finds that the sentence was imposed as a result of passion, prejudice, or other arbitrary factors.[21] As a result, the court refused to consider the merits of any assertion of improperly admitted evidence or improper statements by the Commonwealth, but considered the potential impact such evidence and statements may have had on the decision to impose the sentence of death.[22]

B. Passion, Prejudice, or Other Arbitrary Factors

Emmett pointed to several factors to support his contention that the sentence of death resulted from passion, prejudice, or other arbitrary factors: (1) statements by the victim's family members appearing to urge a sentence of death;[23] (2) misstatements by the Commonwealth during closing arguments of the penalty-determination phase;[24] (3) admission of autopsy photographs that were unduly gruesome;[25] (4) admission of his prior inconsistent statements in which he denied his responsibility for the murder and shifted the blame to someone else;[26] and (5) insufficiency of evidence to find an aggravating factor necessary under Section 19.2-264.2 of the Virginia Code.[27]

1. Testimonies Urging Sentence of Death

Emmett's primary argument was that the testimony of members of Langley's family was emotionally charged and appeared to urge the imposition of the death penalty.[28] Every time such a statement was made, Emmett objected, and the trial court instructed the jury to disregard the statement.[29] The court found that the disputed testimonies did not prejudice the jury in its death sentence determination because a jury is presumed to follow the instructions of the trial court.[30] The court, however, did not note how often these statements were

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imposed under influence of passion, prejudice or any other arbitrary factor").

20. *Emmett*, 569 S.E.2d at 44.

21. *Id.*

22. *Id.*

23. *Id.*; *see infra* Part III.B.1.

24. *Emmett*, 569 S.E.2d at 44; *see infra* Part III.B.2.

25. *Emmett*, 569 S.E.2d at 45; *see infra* Part III.B.3.

26. *Emmett*, 569 S.E.2d at 45; *see infra* Part III.B.4.

27. *Emmett*, 569 S.E.2d at 45; *see infra* Part III.B.5; VA. CODE ANN. § 19.2-264.2 (Michie 2000) (stating that sentence of death may not be imposed unless court or jury finds probability of future dangerousness of defendant or vileness in defendant's conduct in charged offense).

28. *Emmett*, 569 S.E.2d at 44.

29. *Id.*

30. *Id.*; *see* Weeks v. Angelone, 528 U.S. 225, 234 (2000) (holding that juries are presumed to

made and objected to, or whether such frequency factored into its determination.[31]

2. Commonwealth's Closing Argument During Penalty-Determination Phase

Emmett also argued that misstatements by the Commonwealth during closing arguments of the penalty-determination phase caused passion and prejudice to control the jury's recommendation of his sentence.[32] Emmett specifically cited three instances of prejudicial misstatement by the Commonwealth. First, Emmett contended that the Commonwealth erred when it said that any of the blows could have been fatal.[33] The Commonwealth also incorrectly made a reference to his prior conduct in a prison, when, in fact, the conduct occurred in a maximum-security juvenile detention facility.[34] Emmett further alleged that the Commonwealth attempted to "inflame the jurors' passions" by saying that "nobody is safe from this guy" and that he was dangerous because "[h]e has nothing to lose."[35] Although the court agreed with Emmett regarding the statements about the blows to Langley and the reference to "prison," the court considered these misstatements to be minor.[36] The court found that the statements were not unduly prejudicial because the trial court instructed the jury that the argument of counsel was not evidence.[37] The court reviewed the Commonwealth's argument as a whole and found that the misstatements, individually and cumulatively, did not create "an atmosphere of passion or prejudice that influenced the jury's sentencing decision."[38]

3. Autopsy Photographs

Emmett contended that crime scene and autopsy photographs admitted into evidence were unduly gruesome and inflamed the jury's passion in favor of

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follow instructions and to understand judge's answers to questions); *see also* LeVasseur v. Commonwealth, 304 S.E.2d 644, 657 (Va. 1983) (finding that improper question by Commonwealth during guilt phase of trial was not prejudicial because trial court took prompt and decisive action).

31. The opinion also did not note whether the prosecutor may have elicited these statements from the witnesses. If the prosecutor had done so, grounds may have existed for prosecutorial misconduct. *See* Robinson v. Commonwealth, 413 S.E.2d 885, 888 (Va. Ct. App. 1992) (reversing trial court's denial of motion for mistrial because Commonwealth repeatedly asked questions that were highly prejudicial despite defendant's constant objections, all of which were sustained).

32. *Emmett*, 569 S.E.2d at 44.

33. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.*

38. *Emmett*, 569 S.E.2d at 44; *see* Burns v. Commonwealth, 541 S.E.2d 872, 896 (Va. 2001) (finding that Commonwealth's statement that defendant was an "animal" during closing argument of penalty-determination phase of trial and argument to jury that decision would "send a message" did not create atmosphere of passion or prejudice that influenced sentencing decision).

imposing a sentence of death.[39] The court agreed that the photos were shocking and gruesome.[40] The court, however, considered the photographs to be an accurate depiction of the crime scene.[41] The court stated that the condition of the victim was "relevant to show motive, intent, method, malice, premeditation, and the atrociousness of the crimes."[42]

The court, citing *Payne v Commonwealth*,[43] also stated that the photographs were relevant to show the likelihood of Emmett's future dangerousness.[44] Neither the court in *Payne*, nor the court in *Emmett*, however, elaborated on why such evidence was relevant to show a likelihood of future dangerousness. Without any elaboration by the court, defense attorneys may have difficulty arguing against the admission of any overly gruesome evidence or identifying its prejudicial effect.

4. Prior Inconsistent Statements to Police

Emmett argued that admission of his prior statements, in which he denied responsibility for the murder and attempted to shift the blame to Pittman, was unduly prejudicial.[45] The court found that the statements "were clearly relevant to show Emmett's consciousness of guilt" because a defendant's false statements are probative of a defendant's attempts to conceal his guilt and, as a result, are evidence of his guilt.[46] The court did not find any improper purpose on the part of the Commonwealth in introducing the evidence, and it found no support in the record to find that the jury was unduly influenced by the evidence in its sentencing consideration.[47]

5. Insufficiency of Evidence to Find Aggravating Factors

Emmett contended that the evidence was insufficient to show that either future dangerousness or vileness existed in the case and that, as a result, the jury's sentence must have resulted from passion, prejudice, or other arbitary factors.[48]

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39. *Emmett*, 569 S.E.2d at 45.

40. *Id.*

41. *Id.*

42. *Id.*; *see* Stewart v. Commonwealth, 427 S.E.2d 394, 403 (Va. 1993) (holding that evidence is not inadmissible merely because it is gruesome or shocking, provided that it is "relevant 'to show motive, intent, method, malice, premeditation and the atrociousness of the crimes'" (quoting Spencer v. Commonwealth, 384 S.E.2d 785, 796 (Va. 1989))).

43. 509 S.E.2d 293 (Va. 1999).

44. *Emmett*, 569 S.E.2d at 45; *see* Payne v. Commonwealth, 509 S.E.2d 293, 297 (Va. 1999) (stating that shocking and gruesome photographs and videotapes were relevant to show likelihood of defendant's future dangerousness).

45. *Emmett*, 569 S.E.2d at 45.

46. *Id.* (citing false statement standard in Rollston v. Commonwealth, 399 S.E.2d 823, 831 (Va. Ct. App. 1991)).

47. *Id.*

48. *Id.*; *see* § 19.2-264.2 (stating that sentence of death may not be imposed unless court or jury finds probability of future dangerousness of defendant or vileness in defendant's conduct in

a. Future Dangerousness

The court found that the Commonwealth introduced sufficient evidence for the future dangerousness predicate.[49] The court relied on several pieces of evidence introduced by the Commonwealth to support its decision. The court first cited evidence of his prior participation in an escape from a maximum-security juvenile detention facility.[50] This incident also included an assault on a guard.[51] The court also relied on a subsequent conviction of Emmett for involuntary manslaughter, his lack of remorse for this crime, and his lack of remorse for the instant killing of a co-worker.[52] Finally, the court cited Emmett's statement that he killed Langley simply because it "just seemed right at the time."[53] The court found that Emmett lacked regard for human life and that the evidence left little doubt of the probability of future dangerousness.[54]

b. Vileness

The court found that the evidence supported two alternative circumstances supporting a finding of vileness.[55] It first found that Emmett's use of the brass lamp "to batter the skull of the victim repeatedly and with such force that blood spatter[ed] several feet from the victim" met the aggravated battery standard because it was "qualitatively and quantitatively more force than the minimum necessary to kill [Langley]."[56] The court also stated that the murder was a violent attack of a co-worker, with whom Emmett had apparently been amicable.[57] The court found that the evidence established Emmett's depravity of mind.[58] The

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charged offense).

49. *Emmett*, 569 S.E.2d at 45.

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.*

55. *Emmett*, 569 S.E.2d at 45; *see also* § 19.2-264.2(1) (stating that court or jury may not impose sentence of death unless it finds that defendant's conduct in committing charged offense was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind, or an aggravated battery to victim); Goins v. Commonwealth, 470 S.E.2d 114, 131 (Va. 1996) (holding that proof of any of three components listed in Section 19.2-264.2 will support finding of vileness).

56. *Emmett*, 569 S.E.2d at 45; *see* Smith v. Commonwealth, 248 S.E.2d 135, 149 (Va. 1978) (construing "'aggravated battery' to mean a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder").

57. *Emmett*, 569 S.E.2d at 45.

58. *Id.* at 45-46; *see also Smith*, 248 S.E.2d at 149 (construing "'depravity of mind' . . . to mean a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation").

court therefore rejected Emmett's claim that the evidence was insufficient to find an aggravating factor necessary to support a sentence of death.[59]

C. *Proportionality of Sentence to Penalties Imposed in Similar Cases*

Section 17.1-313(C)(2) of the Virginia Code requires the court to determine whether the sentence of death was excessive or disproportionate to the penalties imposed in similar cases, taking into account both the crime and the defendant.[60] Emmett presented two reasons why the death sentence was inappropriate under this section: (1) the review was inadequate because the comparison base unfairly favored a sentence of death;[61] and (2) the majority of capital murder convictions in which robbery was the gradation offense resulted in life sentences.[62] Defense counsel should be especially aware of the court's statements in these sections.

1. *Adequacy of Review*

Section 17.1-313(E) of the Virginia Code states that the court "may accumulate . . . records of all capital felony cases tried within such [a] period of time as the court may determine."[63] This section also requires the court to consider such records as are available to guide its determination of whether the sentence imposed is excessive.[64] Emmett argued that the review was inadequate and unfairly skewed the comparison base in favor of a death sentence because the court did not collect, for its proportionality review, records of unappealed capital murder convictions that resulted in life sentences.[65] The court, however, relied on its holding in *Bailey v. Commonwealth*[66] to reject Emmett's argument and find that it had the discretion to determine what records to compile for its review.[67]

The court also focused on other language in *Bailey* in which the court stated that it had the discretion to determine what records to accumulate for review "'so long as the methods employed assure that the death sentence is not dispropor-

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59. *Emmett*, 569 S.E.2d at 45.

60. *Id.* at 46; *see* VA. CODE ANN. § 17.1-313(C)(2) (Michie 1999) (requiring Supreme Court of Virginia to consider and determine "whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").

61. *Emmett*, 569 S.E.2d at 46; *see infra*, Part III.C.1.

62. *Emmett*, 569 S.E.2d at 46; *see infra*, Part III.C.2.

63. VA. CODE ANN. § 17.1-313(E) (Michie 1999).

64. *Id.*

65. *Emmett*, 569 S.E.2d at 46.

66. 529 S.E.2d 570 (Va. 2000).

67. *Emmett*, 569 S.E.2d at 46; *see* Bailey v. Commonwealth, 529 S.E.2d 570, 580-81 (Va. 2000) (finding that statute and case law did not prescribe method for conducting proportionality review of death sentence and that Supreme Court of Virginia had discretion to determine what records to accumulate for review as long as due process was satisfied and defendant's constitutional rights were protected).

tionate to the penalty generally imposed for comparable crimes.'"[68] The court, however, did not explain how it could *assure* that the methods it employs are not disproportionate to generally imposed penalties for comparable crimes while, at the same time, it limits the body of cases it reviews. The court reached this conclusion despite the language of Section 17.2-313(E), which states, "The Supreme Court may accumulate the records of *all* capital felony cases *tried*.... The court *shall* consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive."[69] Although it was clearly within the court's power to collect cases that were tried and resulted in life sentences, and to develop a body of facts from those trial records, the court declined to do so.

The court, both in *Emmett* and *Bailey*, never specifically addressed Emmett's assertion that the comparison base was unfairly skewed. It only qualified its record-gathering system by stating that Section 17.1-313(E) did not require it to collect data from unappealed cases.[70] Defense attorneys should note the court's vagueness on this issue and argue that such limitation on the body of cases the court reviews cannot possibly assure that a death sentence is not disproportionate to the penalty generally imposed for comparable crimes.

2. *Proportionality of Life Sentences With Robbery as Predicate Crime*

The court stated that Emmett presented evidence showing that, of the fifty most recent capital murder appeals in the Supreme Court of Virginia, twenty-six of the convictions contained robbery as the predicate crime.[71] Of those twenty-six convictions, seventeen resulted in life sentences.[72] Emmett also argued that the facts of those seventeen "life cases" were comparable or similar to the facts of his own case, and, in some cases, were even more egregious.[73] The court rejected Emmett's argument, stating that its proportionality analysis encompasses *"all capital murder cases"* presented to the court for review and "[was] not limited to cases selectively chosen by a defendant."[74] It further stated that its test was

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68. *Emmett*, 569 S.E.2d at 46 (quoting *Bailey*, 529 S.E.2d at 581).

69. VA. CODE ANN. § 17.1-313(E) (emphasis added).

70. *Emmett*, 569 S.E.2d at 46.

71. *Id.* The court's statement is incorrect. Emmett's evidence actually consisted of the fifty most recently appealed capital murder convictions and was not limited to those appeals that reached the Supreme Court of Virginia. Appellant's Attachment A at 1-3, *Emmett*, 569 S.E.2d at 39. Most of the "life" cases in Emmett's attachment did not reach the Supreme Court. *Id.*

72. *Emmett*, 569 S.E.2d at 46.

73. *Id.*

74. *Id.* (emphasis added); *cf.* § 17.1-313(C)(2) (stating that court shall consider and determine whether sentence of death is excessive or disproportionate to penalty imposed in *similar* cases, considering *both* crime and defendant).

whether "*generally*" juries in the jurisdiction impose the death sentence for "*conduct similar*" to that of the defendant.[75]

The court justified the above statements by stating that its method of review enabled it to identify a death sentence that is excessive or disproportionate to the penalty imposed in similar cases.[76] The court also stated that "[t]he purpose of performing a comparative review is not to search for proof that a defendant's death sentence is perfectly symmetrical with others, but to identify and invalidate a death sentence that is aberrant."[77] The court, however, never elaborated on how it could identify an excessive or disproportionate penalty despite its failure to use similar cases to achieve a clearer comparison. The court actually broadened the definition of "comparative review" in order to reject Emmett's evidence.[78] Its definition, however, appears to be in direct conflict with the standards set forth in Section 17.2-313(C)(2).[79] The court either ignored the "similar cases" standard required by statute and case law, or it considered all capital murder cases to be "similar."

The court continued by stating that Emmett's statistical analysis did not suffice for its proportionality analysis.[80] In the court's opinion, Emmett's conclusions from his statistical analysis were "an overly simplistic and unwarranted application of the proportionality review process."[81] The court then laid out the factors it used to narrow the focus in determining proportionality.[82]

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75. *Emmett*, 569 S.E.2d at 46 (citing Stamper v. Commonwealth, 257 S.E.2d 808, 824 (Va. 1979)) (emphasis added). The court also stated that "the question of proportionality does not turn on whether a given capital murder case 'equal[s] in horror the worst possible scenario yet encountered.'" *Id.* (citing Turner v. Commonwealth, 364 S.E.2d 483, 490 (Va. 1988)).

76. *Id.* (citing Orbe v. Commonwealth, 519 S.E.2d 808, 817 (Va. 1999)). In fact, the court has not found *any* death sentence, to date, to be excessive or disproportionate. *See* Kelly E.P. Bennett, *Proportionality Review: The Historical Application and Deficiencies*, 12 CAP. DEF. J. 103, 107 (1999) (stating that no death sentence has been reversed on the grounds of proportionality); *see also* Morrisette v. Commonwealth, 569 S.E.2d 47, 56 (Va. 2002) (concluding that sentence of death was not excessive or disproportionate); Patterson v. Commonwealth, 551 S.E.2d 332, 336 (Va. 2001) (holding same); Yarbrough v. Commonwealth, 551 S.E.2d 306, 312 (Va. 2001) (holding same); Remington v. Commonwealth, 551 S.E.2d 620, 638 (Va. 2001) (holding same); Schmitt v. Commonwealth, 547 S.E.2d 186, 204 (Va. 200[1]) (holding same); Lenz v. Commonwealth, 544 S.E.2d 299, 311 (Va. 2001) (holding same); Burns v. Commonwealth, 541 S.E.2d 872, 897 (Va. 2001) (holding same); Lovitt v. Commonwealth, 537 S.E.2d 866, 881 (Va. 2000) (holding same); Atkins v. Commonwealth, 534 S.E.2d 312, 321 (Va. 2000) (holding same); Johnson v. Commonwealth, 529 S.E.2d 769, 786 (Va. 2000) (holding same).

77. *Emmett*, 569 S.E.2d at 46 (citing *Orbe*, 519 S.E.2d at 817).

78. *Id.*

79. VA. CODE ANN. § 17.1-313(C)(2) (requiring court to examine similar cases "considering both the crime and the defendant").

80. *Emmett*, 569 S.E.2d at 46-47.

81. *Id.* at 46.

82. *Id.* at 46-47.

a. Predicate Gradation Offense or Status of Defendant or Victim

The court made two statements in one sentence that are worth noting. It first stated that it included consideration of the predicate gradation offense in narrowing its focus.[83] This statement, however, contradicts the court's rejection of Emmett's claims. The court considered *all* capital murder cases— without regard to gradation predicate— presented to it for review.[84] The court, therefore, either did not actually consider the predicate gradation offense or it made the predicate gradation offense a minor consideration.

The court also stated that it considered the "status of the defendant or victim that elevates a murder to a capital crime."[85] The court's language in this statement is either confusing or frightening. It neither defines "status" nor does it elaborate on how such status may justify a death sentence. It is possible that the court referred to the "status" of a victim in terms of whether the victim meets a statutory standard, such as being a law-enforcement officer, pregnant woman, or person under the age of fourteen.[86] If the court defines "status" in this way, then proportionality review is limited to a review of only the evidence that qualifies the murder as a capital crime anyway. This standard would render proportionality review meaningless. It is also possible that the court referred to the "status" of a victim in terms of non-statutory standards, such as social standing. This standard would be even worse, for it would indicate that factors such as the wealth, occupation, or even race of a victim drive the court's analysis.[87] Similarly, the "status" of a defendant may have been in reference to whether the defendant was an abductor, rapist, or terrorist, for example.[88] Again, proportionality review would be meaningless under this standard because the

83. *Id.*

84. *Id.*

85. *Id.*

86. *See* VA. CODE ANN. § 18.2-31(6) (Michie Supp. 2002) (defining "[t]he willful, deliberate, and premeditated killing" of law-enforcement officer as capital murder); VA. CODE ANN. § 18.2-31(11) (Michie Supp. 2002) (defining "[t]he willful, deliberate and premeditated killing of a pregnant woman by one who knows that the woman is pregnant and has the intent to cause the involuntary termination of the woman's pregnancy without a live birth" as capital murder); VA. CODE ANN. § 18.2-31(12) (Michie Supp. 2002) (defining "[t]he willful, deliberate and premeditated killing of a person under the age of fourteen by a person age twenty-one or older" as capital murder).

87. This standard would essentially state that a death sentence would be proportional if the victim was a "decent" person, but that a death sentence would be disproportionate if the victim was "indecent" (for example, if the victim was homeless, a prostitute, or a drug addict).

88. *See* VA. CODE ANN. § 18.2-31(1) (Michie Supp. 2002) (defining "[t]he willful, deliberate, and premeditated killing of any person in the commission of abduction . . . when such abduction was committed with the intent to extort money or a pecuniary benefit or with the intent to defile the victim of such abduction" as capital murder); VA. CODE ANN. § 18.2-31(5) (Michie Supp. 2002) (defining "[t]he 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" as capital murder); VA. CODE ANN. § 18.2-31(13) (Michie Supp. 2002) (defining "[t]he willful, deliberate and premeditated killing of any person by another in the commission of or attempted commission of an act of terrorism" as capital murder).

murder becomes a capital crime only when the defendant is identified as an abductor, rapist, or terrorist.

No matter how "status" is defined, and no matter to whom it applies, the court's use of "status" for purposes of proportionality review sets a very dangerous standard. If "status" is defined by statutory terms, then "status" can be used twice against a defendant (once to bump the murder to capital murder and once to declare the sentence of death proportional). If "status" is defined by non-statutory terms, then the court places itself in a position in which it identifies classes of victims whose deaths deserve more "redemption" than less valuable victims.

b. "Other Factors"

The court also stated that it took other factors into account in order to narrow its focus to determine proportionality.[89] The court listed, but did not restrict itself to, such factors as method of killing, motive for the crime, relationship between the defendant and the victim, aggravating factors found by the sentencing body, and whether there was premeditation.[90] The premeditation factor listed by the court is the most troublesome of all the factors. If premeditation is a factor in a proportionality analysis, then, because *all* capital murders require a finding of premeditation, the court cannot possibly narrow its focus.[91] The premeditation factor would make all capital murder convictions essentially similar in much the same way that statutorily-defined "status" would. Any death sentence is therefore proportionate to all other death sentences because premeditation was required to obtain the underlying capital conviction. This standard would make it almost impossible for defense attorneys to conduct a proportionality analysis for the benefit of the defendant.

The court concluded that it fulfilled the statutory mandate to consider both the crime (the "other factors") and the defendant (the "status" analysis).[92] The court stated that Emmett's reliance on the most recent capital murder cases appealed to the court with robbery as the gradation offense was not a probative selection of prior cases.[93] It considered Emmett's analysis to be an "incidental ratio that has little or no bearing on the crime or the defendant in this case," despite his contention that the facts of his cited cases were comparable or similar to the facts of his own case.[94] The court did not explain why Emmett's citations were an "incidental ratio," why they were not a "probative selection of prior cases," or why its broad analysis was a more probative selection.

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89. *Emmett*, 569 S.E.2d at 46-47.

90. *Id.*

91. *See generally* VA. CODE ANN. § 18.2-31 (defining all capital murders as willful, *premeditated* and deliberate killings).

92. *Emmett*, 569 S.E.2d at 47.

93. *Id.*

94. *Id.*

c. *The Court's Proportionality Review*

The court conducted what it considered "the appropriate proportionality review" and found that other sentencing bodies generally imposed the death penalty for comparable or similar crimes.[95] The court, without explaining why it considered these cases to be comparable or similar crimes, cited *Akers v. Commonwealth*,[96] *Graham v. Commonwealth*,[97] *Watkins v. Commonwealth*,[98] *Stout v. Commonwealth*,[99] *Watkins v. Commonwealth*,[100] and *Poyner v. Commonwealth*,[101] to support its finding.[102] The court, however, did not mention that each case, except *Akers*, was decided before the abolition of parole in Virginia and the subsequent rulings on the "life means life" instruction.[103] This factor would appear to be crucial to any analysis involving similarity of cases for proportional-

95. *Id.*

96. 535 S.E.2d 674 (Va. 2000).

97. 459 S.E.2d 97 (Va. 1995).

98. 385 S.E.2d 50 (Va. 1989).

99. 376 S.E.2d 288 (Va. 1989).

100. 331 S.E.2d 422 (Va. 1985).

101. 329 S.E.2d 815 (Va. 1985).

102. *Emmett*, 569 S.E.2d at 47; *see* Akers v. Commonwealth, 535 S.E.2d 674, 677 (Va. 2000) (finding that defendant's lack of remorse and statement that he would commit further acts of violence, if allowed, indicated trial court's sentencing decision was not result of passion, prejudice, or other arbitrary factor); Graham v. Commonwealth, 459 S.E.2d 97, 102 (Va. 1995) (finding that record did not show jury was influenced by arbitrary factors and that jury's findings of vileness and future dangerousness were supported by evidence); Watkins v. Commonwealth, 385 S.E.2d 50, 57 (Va. 1989) (finding that defendant's sentence was not racially prejudicial and that defendant conceded sentence was not disproportional); Stout v. Commonwealth, 376 S.E.2d 288, 293-94 (Va. 1989) (finding that defendant who posed as customer and could have taken money and fled without harming victim or inflicting five-inch gash in her neck sufficiently displayed evidence of vileness); Watkins v. Commonwealth, 331 S.E.2d 422, 436 (Va. 1985) (finding that evidence of defendant's involvement in earlier murder, together with prior felony convictions, was sufficient to support jury finding of future dangerousness); Poyner v. Commonwealth, 329 S.E.2d 815, 834 (Va. 1985) (finding that evidence supported jury finding of future dangerousness because "[a]fter a long career of crime, defendant graduated to repeated acts of violence and relentless killing").

103. *See* VA. CODE ANN. § 53.1-165.1 (Michie 2002) (stating that any person sentenced to term of incarceration for felony offense committed on or after January 1, 1995, shall not be eligible for parole upon that offense); VA. CODE ANN. § 19.2-264.4 (Michie 2000) (stating that, upon request by defendant, jury shall be instructed that for all Class 1 felonies committed after January 1, 1995, defendant shall not be eligible for parole if sentenced to imprisonment for life); Simmons v. South Carolina, 512 U.S. 154, 169 (1994) (holding that trial court's refusal in sentencing phase of capital murder conviction either to allow defendant to present evidence of ineligibility for parole or allow instruction to jury that defendant was ineligible for parole violated defendant's due process when prosecutor sought sentence of death based on future dangerousness); Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (holding that in penalty-determination phase after capital murder conviction, trial court must give instruction, upon defendant's proffer, that "imprisonment for life" means "imprisonment for life without possibility of parole"); *see also* Matthew K. Mahoney, Case Note, 12 CAP. DEF. J. 279, 281-85 (1999) (analyzing *Yarbrough* and "life means life" instruction).

ity review, and defense counsel should emphasize this point in any proportionality analysis argument.[104]

IV. Conclusion

The court's analysis should raise a number of concerns among defense attorneys. The court based many of its conclusions on very broad standards, particularly in its proportionality analysis, and it also failed to define specifically many of the standards it used or how they were applied. After allowing for the applicability of disputed evidence for its mandatory review, it showed a great reluctance in placing any weight on Emmett's arguments. The court's use of such factors as "status" and premeditation, for the purposes of proportionality review, and its analysis as a whole, further the belief that the court is unlikely ever to find a death sentence disproportionate.

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104. *See* Cynthia M. Bruce, *Proportionality Review Still Inadequate, But Still Necessary*, 14 CAP. DEF. J. 265, 278-79 (2002) (examining applicability of cases decided before "life means life" requirement to proportionality review).