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(Jerry) Jackson v. Commonwealth 590 S.E.2d 520 (Va. 2004)

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(Jerry) Jackson v. Commonwealth 590 S.E.2d 520 (Va. 2004)

I. Facts

On Sunday, August 26, 2001, eighty-eight-year-old Ruth Phillips ("Phillips") did not attend church or answer her telephone. Her son, Richard Phillips, became concerned and went to her apartment, where she lived alone, to check on her. Upon arrival, he found his mother dead and disrobed. The autopsy indicated that Phillips died by asphyxiation and that she may have been raped. Subsequently, the police investigation of the apartment uncovered a white square paper in a wallet bearing a fingerprint identical to the fingerprint of the defendant, Jerry Terrell Jackson ("Jackson"). The police also found three pubic hairs on Phillips's body. The mtDNA sequence data on each hair matched the mtDNA sequence from Jackson's blood sample.[1]

After being taken into custody, Jackson confessed to the murder.[2] According to his confession, he entered the apartment alone and began to rifle through Phillips's purse in her bedroom, but he did not notice that she was lying on the bed.[3] Phillips exclaimed " 'What do you want? I'll give you whatever, just get out.' "[4] Startled, Jackson covered Phillips with a pillow in the hope she would pass out.[5] While smothering Phillips, Jackson also raped her.[6] After he finished, he stole her car and sixty dollars.[7]

At trial, however, Jackson offered a very different version of what occurred in the apartment.[8] He claimed that after an evening of playing basketball he met Alex and Jasper Meekins.[9] The two asked Jackson to participate in their plan to burgle Phillips's apartment.[10] Jackson acquiesed.[11] Alex Meekins climbed through a window into Phillips's apartment and let the other two in through the front door.[12] While Jackson rummaged through Phillips's purse, she awoke and

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1. Jackson v. Commonwealth, 590 S.E.2d 520, 524 (Va. 2004).
2. *Id.* at 524–25.
3. *Id.* at 524.
4. *Id.*
5. *Id.*
6. *Id.* at 525.
7. *Jackson*, 590 S.E.2d at 525.
8. *Id.*
9. *Id.*
10. *Id.*
11. *Id.*
12. *Id.*

asked the intruders what they were doing.[13] Jasper Meekins then suffocated Phillips with the pillow.[14] After hearing gurgling noises, Jackson knocked Jasper Meekins from atop Phillips and readjusted her clothing.[15] Jackson claimed that he did not relate this story to the investigators while in custody because he was intimidated by them and worried for the safety of his family.[16]

The jury found Jackson guilty of two counts of capital murder.[17] At the penalty phase of the trial, the Commonwealth introduced substantial evidence of Jackson's prior delinquency.[18] The Commonwealth also produced evidence of Jackson's unruly behavior while an inmate.[19] In mitigation, Jackson submitted evidence of his behavioral problems and difficulties in school.[20] The jury determined that Jackson posed a future danger to society and elected to impose a death sentence.[21] The trial judge sentenced Jackson accordingly.[22] Jackson then appealed to the Supreme Court of Virginia.[23] Jackson argued that his conviction must be overturned for the following reasons: (1) Virginia Code section 19.2-264.4(B) was unconstitutional because it allowed the Commonwealth to present normally inadmissible hearsay aggravating evidence during the penalty phase of the trial; (2) the trial court erroneously refused to strike three jurors for cause; (3) the jury improperly discussed evidence before the end of the trial; and (4) the victim's son was allowed to testify despite attending part of the trial in violation of the court's sequestering order.[24] Additionally, Jackson presented a number of

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13. *Jackson*, 590 S.E.2d at 525.

14. *Id.*

15. *Id.*

16. *Id.*

17. *Id.* at 523; *see* VA. CODE ANN. § 18.2-31(4), (5) (Michie Supp. 2003) (including "willful, deliberate, and premeditated" murders committed during the course of a rape or robbery in the list of capital murders).

18. *Jackson*, 590 S.E.2d at 525. Jackson had been convicted or adjudicated delinquent for "grand larceny, petit larceny, trespassing, drug possession, receiving stolen property, contempt of court, identity fraud, statutory burglary, credit card theft, and obtaining money under false pretenses." *Id.*

19. *Id.*

20. *Id.* Jackson was diagnosed with attention deficit hyperactivity disorder, for which he received medication. *Id.* Nonetheless, his difficulties continued. *Id.* at 525–26.

21. *Id.* at 523; *see* VA. CODE ANN. § 19.2-264.4(C) (Michie Supp. 2003) (allowing the jury to fix the sentence at death after convicting a defendant of capital murder, if the jury finds that the defendant posed a future danger to society). The jury also convicted Jackson of several other non-capital crimes. *Jackson*, 590 S.E.2d at 523.

22. *Jackson*, 590 S.E.2d at 523.

23. *Id.*

24. *Id.* at 526, 527, 531, 535.

arguments that the court had already decided in previous cases and waived several other arguments.[25]

II. Holding

The Supreme Court of Virginia found that Virginia Code section 19.2-264.4(B) forbids the use of hearsay aggravating evidence during the sentencing phase and is therefore constitutional.[26] The court also decided that the trial court properly denied each of Jackson's motions to strike jurors for cause.[27] The court decided that the evidence that the jurors improperly discussed the trial before its conclusion did not warrant further hearings or a new trial.[28] The court concluded that Jackson was not prejudiced by the testimony from Phillips's son at the penalty phase of the trial.[29] Finally, the court conducted the statutorily required review of Jackson's death sentence and determined the sentence was not the result of passion or prejudice and was proportional to sentences in similar cases.[30]

III. Analysis

A. The Constitutionality of Virginia Code Section 19.2-264.4(B)

Jackson argued that the trial court should have dismissed the indictment on the ground that Virginia Code section 19.2-264.4(B) was unconstitutional because it contained "a relaxed evidentiary standard" for admitting aggravating evidence during the sentencing phase of the hearing.[31] In his argument, Jackson cited the United States Supreme Court's decisions in *Ring v Arizona*[32] and *Apprendi v New*

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25. *Id.* at 535–36. Jackson also argued that the trial court erred by failing to suppress his confession, providing the jury with a transcript of his video taped confession, allowing the jury to view an in life picture of the victim and autopsy photographs, permitting the Commonwealth's attorney to demonstrate the manner of Phillips's death in court with a pillow, entering the autopsy report into evidence, and finding the evidence sufficient to support a finding of premeditation and intent. *Id.* at 526, 532–35. None of these claims were successful. *Id.* at 527, 532–535. This case note will not discuss further these claims.

26. *Id.* at 526; *see* VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003) (allowing the presentation of evidence "subject to the rules of evidence governing admissibility").

27. *Jackson*, 590 S.E.2d at 528–30.

28. *Id.* at 532.

29. *Id.* at 535.

30. *Id.* at 536–37; *see* VA. CODE ANN. § 17.1-313(A), (C) (Michie Supp. 2003) (requiring the Supreme Court of Virginia to review each death sentence entered by Virginia circuit courts and ensure that they are not disproportionate to sentences entered in similar cases or the result of passion or prejudice).

31. *Jackson*, 590 S.E.2d. at 526 (internal quotation marks omitted); *see* VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003) (stating that all relevant evidence is admissible during the sentencing phase subject to the rules of evidence).

32. 536 U.S. 584 (2002).

Jersey.[33] *Apprendi* requires sentence enhancers to be found by a jury beyond a reasonable doubt, and *Ring* extended that rule to include factors that enhance a sentence to death.[34] The court interpreted Jackson's citation to these cases as an argument that section 19.2-264.4(B) was unconstitutional because it allowed a court to impose the death penalty even if a jury did not find any aggravating factor beyond a reasonable doubt.[35]

First, the court rejected the argument that section 19.2-264.4(B) failed to comply with the Supreme Court's holdings in *Ring* and *Apprendi*.[36] The court noted that under the statutory scheme, before a defendant may be sentenced to death, the Commonwealth must prove one statutory aggravating factor beyond a reasonable doubt.[37] Additionally, the Code explicitly stated that, unless waived, a jury would determine whether the Commonwealth had made that showing.[38] Therefore, the court determined that section 19.2-264.4(B) did not violate the Supreme Court's mandates in *Ring* and *Apprendi* because, in Virginia, the jury must find at least one aggravating circumstance beyond a reasonable doubt to impose a death sentence.[39]

The court also found that section 19.2-264.4(B) did not contain a relaxed evidentiary standard for admitting aggravating evidence during the penalty phase of the trial.[40] Rather, the court noted that the statute specifically subjected relevant evidence during the sentencing phase " 'to the rules of evidence governing admissibility.' "[41] The court found this conclusion consistent with its prior

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33. *Jackson*, 590 S.E.2d at 526; *see* Ring v. Arizona, 536 U.S. 584, 589 (2002) ("Capital defendants . . . are entitled to a jury determination of any fact on which the legislature conditions an increase in their maximum punishment."); Apprendi v. New Jersey, 530 U.S. 466, 492 (2000) (finding that "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt").

34. *See Ring*, 536 U.S. at 589 (holding that aggravating factors that increase a sentence to death must be found beyond a reasonable doubt by the jury); *Apprendi*, 530 U.S. at 490 (stating that a jury must find all conditions precedent for an enhanced sentenced beyond a reasonable doubt).

35. *See Jackson*, 590 S.E.2d at 526 (stating that by citing *Apprendi* and *Ring*, Jackson apparently suggested that the Virginia statutes failed to comply with the mandates from those cases).

36. *Id.*

37. *Id.*; *see* VA. CODE ANN. § 19.2-264.4(C) (Michie Supp. 2003) (stating that the Commonwealth must prove one aggravating circumstance beyond a reasonable doubt before a court may sentence a defendant to death).

38. *Jackson*, 590 S.E.2d at 526; *see* VA. CODE ANN. § 19.2-264.3 (Michie Supp. 2003) (stating that a jury shall decide whether to impose the death sentence).

39. *Jackson*, 590 S.E.2d at 526.

40. *Id.*

41. *Id.* (quoting VA. CODE ANN. § 19.2-264.4(B)). Jackson's argument was not as easily dispatched as the opinion suggests. The actual text of the statute specifically directs the court to admit all relevant evidence at the penalty phase. VA. CODE ANN. § 19.2-264.4(B). Next, the statute states "[e]vidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the

holdings that irrelevant evidence, hearsay, and presentence reports from probation officers were all inadmissible during the penalty phase.[42] Lastly, the court concluded that because Jackson failed to point to any specific, normally inadmissible evidence admitted during the penalty phase of his trial, any concerns he raised regarding section 19.2-264.4(B)'s relaxed evidentiary standard were purely hypothetical.[43] Therefore, the court determined that the trial court correctly refused to dismiss the indictments.[44]

B. Jury Selection

Jackson claimed that the trial court erred in refusing to strike three prospective jurors for cause during voir dire.[45] The court acknowledged the defendant's right to an impartial jury.[46] Consequently, the court stated that a judge must dismiss any partial venire members.[47] However, because the trial judge had a greater opportunity to observe voir dire than the Supreme Court of Virginia, the court noted that it would overturn the judge's decision only if the record showed manifest error on the trial judge's part.[48] In deciding whether to disturb the trial judge's decision, the court considered the entire record of each juror's voir dire.[49]

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defendant, and any other facts in mitigation of the offense." *Id.* The word "other," in the final clause of the sentence, may have been interpreted to imply that the clause subjecting evidence presented during the sentencing phase to the rules of admissibility may only have applied to mitigating evidence. The court implicitly rejected this reading of the statute by determining that the clause also applied to aggravating factors. In effect, the court treated the first sentence of § 19.2-264.4(B) as surplusage. This feature of the court's opinion will be discussed further in Section IV.

42. *Jackson*, 590 S.E.2d at 526; *see* Lovitt v. Warden, 585 S.E.2d 801, 826 (Va. 2003) (stating that hearsay evidence is not admissible at the sentencing phase of a capital trial); Remington v. Commonwealth, 551 S.E.2d 620, 634–35 (Va. 2001) (finding the trial court properly excluded irrelevant evidence during the penalty phase proceeding and quoting the section of VA. CODE ANN. § 19.2-264.4(B) specifically prohibiting the admission of presentence reports from probation officers).

43. *Jackson*, 590 S.E.2d at 526.

44. *Id.*

45. *Id.* at 527.

46. *Id.*; *see* U.S. CONST. amend. VI (granting the accused the right to "an impartial jury"); U.S. CONST. amend. XIV (stating that no state shall "deprive any person of life, liberty, or property, without due process of law"); VA. CONST. art. I, § 8 (stating that in Virginia, the accused "shall enjoy the right to a speedy and public trial, by an impartial jury of his vicinage").

47. *Jackson*, 590 S.E.2d at 527; *see* VA. CODE ANN. § 8.01-358 (Michie 2000) (providing that "if it shall appear to the court that the juror does not stand indifferent in the cause, another shall be drawn or called and placed in his stead for the trial of that case").

48. *Jackson*, 590 S.E.2d at 527 (quoting Pope v. Commonwealth, 360 S.E.2d 352, 358 (Va. 1987)) (explaining that, due to the trial judge's greater opportunity to view prospective jurors during jury selection, " 'the trial court's exercise of judicial discretion in deciding challenges for cause will not be disturbed on appeal, unless manifest error appears in the record' ").

49. *Id.* at 527; *see* Vinson v. Commonwealth, 522 S.E.2d 170, 176 (Va. 1999) (observing that "a juror's entire voir dire, not isolated portions, must be considered to determine a juror's impartial-

1. Juror Reinsberg

Jackson argued that the judge erred by failing to dismiss juror Reinsberg for cause after she indicated that, due to a newspaper article she had read, she "probably" would require the defense to produce evidence indicating innocence.[50] However, the court noted that later during her voir dire, the juror told the Commonwealth's Attorney that she understood that the state must prove its case beyond a reasonable doubt and that she also understood that the defendant was under no obligation to produce evidence at either the guilt or sentencing phase of the trial.[51] Moreover, the court stated that, " '[t]he real test is whether jurors can disabuse their minds of their natural curiosity and decide the case on the evidence submitted and the law as propounded in the court's instructions.' "[52] Because juror Reinsberg satisfied this test, the court found that the trial judge did not err in declining to strike her for cause.[53]

2. Juror Baffer

Next, Jackson claimed that juror Baffer should have been excluded because he responded affirmatively when the defense counsel asked if he would automatically impose the death penalty should he find the defendant posed a future danger to society.[54] The court noted that juror Baffer's entire interview during voir dire indicated that he would not automatically impose a death sentence, but that he would also consider a sentence of life without parole.[55] Additionally, the court reiterated that "it is improper to ask prospective jurors speculative questions regarding whether they would automatically impose the death penalty in certain hypothetical situations without reference to a juror's ability to consider the evidence and follow the court's instructions."[56] Therefore, the court held that the judge properly seated juror Baffer.[57]

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ity").

50. *Jackson*, 590 S.E.2d at 528.

51. *Id.* at 528–29.

52. *Id.* at 529 (quoting Townes v. Commonwealth, 362 S.E.2d 650, 662 (Va. 1987)).

53. *Id.*

54. *Id.*

55. *Id.* at 529–30; *see Vinson*, 522 S.E.2d at 176 (stating that a court should examine the entire record of voir dire when reviewing a judge's decision of whether to strike for cause).

56. *Jackson*, 590 S.E.2d at 530 (citing Schmitt v. Commonwealth, 547 S.E.2d 186, 196 (Va. 2001)).

57. *Id.*

3. *Juror Berube*

Jackson also argued that the trial judge should have stricken juror Berube for cause after she stated that she would not consider all of the mitigating factors during the sentencing phase of the trial.[58] However, juror Berube also stated that she would be able to follow the trial court's instructions and consider all mitigating evidence when fixing the penalty.[59] Moreover, the trial judge noted that juror Berube "did not initially understand what mitigating factors were."[60] Thus, the court found no error in the trial judge's conclusion that juror Berube was fair and impartial.[61]

C. *Juror Misconduct*

During the course of the trial, the jurors asked the court if they could talk about the evidence they already observed and testimony they already heard.[62] The judge and parties agreed that the jurors should not discuss such matters until deliberation, and the judge gave the jury an instruction to that effect.[63] At that time, Jackson neither objected to those instructions nor asked for a mistrial.[64] Therefore, Jackson failed to preserve any claim for appeal that the judge should have granted a mistrial upon learning of the jury's confusion concerning what they could discuss before the close of evidence.[65]

After the trial, Jackson moved for an evidentiary hearing or a new trial based on an affidavit from alternate juror Picataggi, in which she alleged that the jury had improperly discussed the evidence presented at trial before deliberations.[66] Although Jackson asked the judge to summon all of the jurors to the evidentiary hearing, the judge only summoned alternate juror Picataggi.[67] She recalled one conversation, in particular, about the defense counsel's questioning of a detective in which the jurors decided that they did not like the attorney's manner but concluded that "he got to the truth or to the bottom of it."[68] More generally, she

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58. *Id.*

59. *Id.*

60. *Id.*

61. *Id.*

62. *Jackson*, 590 S.E.2d at 530.

63. *Id.*

64. *Id.*

65. *Id.* at 530–31; *see* VA. SUP. CT. R. 5:25 (stating that an appellate court may not find error in a trial court's decision unless the appealing party objected to that ruling).

66. *Jackson*, 590 S.E.2d at 531.

67. *Id.*; *see* Kearns v. Hall, 91 S.E.2d 648, 653 (Va. 1956) (finding that if "allegations of the misconduct of a jury are of such a nature as to indicate that the verdict was affected thereby, it becomes the duty of the court to investigate the charges and to ascertain whether or not, as a matter of fact, the jury was guilty of such misconduct").

68. *Jackson*, 590 S.E.2d at 531.

also stated that other conversations had not involved any third persons, did not lead to conclusions about Jackson's guilt or innocence, and were not limited to discussions about the lawyers' demeanors during questioning.[69] She admitted that she could not remember if the conversations had occurred before or after the trial judge ordered the jury not to discuss the events at the trial before deliberation.[70] After evaluating alternate juror Picataggi's testimony, the trial judge denied Jackson's motion for a new trial because the testimony failed to establish probable misconduct or prejudice to Jackson.[71]

Jackson argued on appeal that the statements indicated a probability of prejudice, that the assertion that the trial lawyer "got to the truth or to the bottom of it" amounted to a decision of actual guilt or innocence, and that the trial judge should have at least called all of the jurors to the evidentiary hearing.[72] The court found that in Virginia, juror testimony should not normally be used to impeach the jury verdict unless the prejudicial conduct occurred outside of the jury room and the evidence established a probability of prejudice.[73] The court decided that the trial court properly declined to order a mistrial or further investigate the allegations.[74] Alternate juror Picataggi's testimony did not establish a probability of prejudice because she only recalled one discussion, she could not remember any details about the other conversations, including whether they occurred before or after the judge issued his instruction, and she admitted that the conversations did not contain any expressions about Jackson's ultimate guilt or innocence.[75] The court concluded that " '[i]f gossip of [jurors] among themselves, or surmise, is to be the basis of new trials there would be no end to litigation.' "[76]

D. Testimony from the Victim's Son

Jackson argued that the trial court erred by permitting the victim's son to testify during the penalty phase of the proceedings after allowing him to remain in the courtroom upon completing his testimony at the guilt phase of the trial.[77]

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69. *Id.*

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.* at 531–32; *see* Caterpillar Tractor Co. v. Hulvey, 353 S.E.2d 747, 750–51 (Va. 1987) (stating that testimony from jurors should not be used to impeach their own verdict unless the acts in the testimony occurred outside of the jury room); Haddad v. Commonwealth, 329 S.E.2d 17, 20 (Va. 1985) (requiring the appellate court to find a "probability of prejudice" before declaring a mistrial).

74. *Jackson*, 590 S.E.2d at 532.

75. *Id.*

76. *Id.* (quoting Margiotta v. Aycock, 174 S.E. 831, 835 (Va. 1934) (alterations in original)).

77. *Id.* at 535. Jackson also claimed that the son's presence in the courtroom during the trial

The court noted that Virginia Code section 19.2-265.01 permits a victim to stay in the courtroom during trial unless the judge decides that the victim's presence would prejudice the accused.[78] By attending the guilt phase, Phillips's son could not have learned anything that would have changed his victim impact testimony during the sentencing phase; consequently, the court determined that the trial judge properly allowed him to remain at the trial subsequent to his initial testimony.[79]

E. Issues Previously Decided

Jackson also argued that the circuit court erroneously denied his pretrial motion that alleged that Virginia's capital murder statutes were unconstitutional.[80] Jackson claimed that the statutes were unconstitutional because: (1) by failing to provide meaningful guidance to the jury, the aggravating factor future dangerousness was unconstitutionally vague and thereby caused arbitrary and capricious applications of the death penalty; (2) the statutes did not provide for adequate instruction to the jury concerning mitigating evidence; (3) the statutes permitted the introduction of unadjudicated prior conduct and therefore produced unreliable determinations; (4) the statutes allowed a trial court to consider hearsay evidence found in a post-sentence report; (5) the statutes did not permit a trial court to set aside a death penalty on a showing of good cause; (6) the statutes did "not provide for meaningful appellate review"; and (7) the statutes required expedited appellate review.[81] The court noted that it had previously rejected each of these arguments and found each prior rejection proper.[82]

F. Issues Waived

At oral argument Jackson withdrew his claims that the trial judge "erred in denying defendant's motion to dismiss capital murder indictment for failure to

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had an improper influence on the jury, but the court did not respond to this argument. *Id.*

78. *Id.*; *see* VA. CODE ANN. § 19.2-265.01 (Michie 2000) (stating that a victim "may remain in the courtroom and shall not be excluded unless the court determines, in its discretion, the presence of the victim would impair the conduct of a fair trial").

79. *Jackson*, 590 S.E.2d at 535.

80. *Id.*

81. *Id.* at 535–36.

82. *Id.*; *see* Bell v. Commonwealth, 563 S.E.2d 695, 716 (Va. 2002) (noting that the court had already decided that the future dangerousness requirement was not unconstitutionally vague, the introduction of unadjudicated criminal conduct during sentencing did not lead to unreliable results, the trial court's use of a post-sentence report that contained hearsay was not unconstitutional, and the appellate review specified by the statutes was not unconstitutional); Lovitt v. Commonwealth, 537 S.E.2d 866, 874 (Va. 2000) (stating that the court had already found Virginia's jury instructions on mitigating evidence constitutional); Chandler v. Commonwealth, 455 S.E.2d 219, 223 (Va. 1995) ("Allowing, but not requiring, a trial judge to reduce a sentence of death to life imprisonment on a showing of 'good cause' is not unconstitutional.").

allege aggravating elements" and that the trial judge erred in denying his motion for change of venue.[83] Therefore, the court did not consider those arguments.[84] Jackson also failed to brief his claim that the district court erred by permitting the Commonwealth to argue matters during the penalty phase not previously introduced during that phase.[85] Consequently, the court also declined to consider that argument.[86]

G. *Statutory Review*

1. *Passion and Prejudice*

Virginia Code section 17.1-313(C)(1) requires the Supreme Court of Virginia to conduct an automatic review of each death sentence to determine if it was the result of "passion, prejudice or any other arbitrary factor."[87] Jackson argued that because the trial judge failed to grant his motion for a change of venue and to strike three jurors for cause, the verdict was a result of passion or prejudice.[88] The court noted that it had already found the three jurors properly seated and that Jackson had waived his claim that the trial judge's failure to grant a change of venue impacted the result of his trial.[89] Nonetheless, the court examined whether those issues, or anything else, may have caused the verdict to be a result of passion or prejudice and upheld the verdict.[90]

2. *Proportionality Review*

Similarly, Virginia Code section 17.1-313(C)(2) requires the Supreme Court of Virginia to review each death sentence to determine if it "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[91] Therefore, the court looked at all similar capital cases to determine whether Jackson's sentence was proportionate to the sentences imposed in those cases.[92] The court found that *Beavers v Commonwealth*[93] provided a useful comparison to Jackson's case.[94] In that case, the defendant was

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83. *Jackson*, 590 S.E.2d at 536.

84. *Id.*

85. *Id.*

86. *Id.*; *see* Wolfe v. Commonwealth, 576 S.E.2d 471, 479 (Va. 2003) (stating that, in accord with long-standing precedent, arguments not briefed will be deemed waived).

87. VA. CODE ANN. § 17.1-313(C)(1) (Michie 2003).

88. *Jackson*, 590 S.E.2d at 536.

89. *Id.* at 536–37.

90. *Id.* at 537.

91. VA. CODE ANN. § 17.1-313(C)(2).

92. *Jackson*, 590 S.E.2d at 537.

93. 427 S.E.2d 411 (Va. 1993).

94. *Jackson*, 590 S.E.2d at 537; *see* Beavers v. Commonwealth, 427 S.E.2d 411, 414–15, 423

sentenced to death for raping an elderly woman and suffocating her with a pillow.[95] Given the similar circumstances and sentences between the two cases, as well as the results from the other cases the court reviewed, the court determined that Jackson's sentence was neither excessive nor disproportionate to the penalties imposed in similar cases.[96]

IV. Application

A. The Constitutionality of Virginia Code Section 19.2-264.4(B)

By deciding that Virginia Code section 19.2-264.4(B) was not unconstitutional, the court implicitly adopted an unusual reading of the statute.[97] The actual text of the statute contains two parts. The first section states that, during the sentencing hearing, "evidence may be presented as to any matter which the court deems relevant to sentence."[98] This broad grant of admissibility implies that evidence need only be relevant to be admitted during sentencing. However, the second sentence restricts the first by stating that "[e]vidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense."[99] The wording of the second sentence restricts the first by subjecting some evidence to the rules of evidence. Its use of the word "other" modifying mitigation evidence strongly implies that the restriction only applies to mitigating evidence and consequently allows a court to admit relevant aggravating evidence whether or not it would satisfy the rules of evidence governing admissibility.

Such a reading, however, would be unconstitutional under United States Supreme Court precedent. Jackson cited *Ring* for the proposition that the statutory aggravating factors are elements of the crime that must be submitted to the jury and proven beyond a reasonable doubt.[100] The court interpreted this as an argument that the statute allowed a court to impose a death sentence on a defendant without first submitting the aggravating factor to a jury for proof beyond a reasonable doubt.[101] The court properly noted that such an argument

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(Va. 1993) (upholding the death sentence for a defendant who raped an elderly woman and suffocated her with a pillow).

95. *Beavers*, 427 S.E.2d at 414–15.

96. *Jackson*, 590 S.E.2d at 537.

97. *See id.* at 526 (stating that the statute requires both aggravating and mitigating circumstances to satisfy the rules of evidence prior to admission when the statute could be fairly read to subject only the mitigating circumstances to those requirements).

98. VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003).

99. *Id.*

100. *Jackson*, 590 S.E.2d at 526.

101. *Id.*

is clearly refuted by the actual texts of the statutes.[102] A more plausible argument based on the text of section 19.2-264.4(B) and the Supreme Court's holding in *Ring* would have been that the two combined allowed a court to decide an element of a crime without the procedural safeguard of the rules of evidence in violation of *Specht v Patterson*.[103] *Specht* held that a collateral proceeding that could increase the defendant's punishment and the result of which depended on a finding of additional facts not adduced at trial must also contain proper evidentiary safeguards such as the right to confront adverse witnesses.[104] Rather than arguing that the Virginia statute allowed an aggravating factor to not be found by a jury beyond a reasonable doubt, Jackson likely argued that it permitted the court to find an element of the crime without the necessary evidentiary procedural safeguards. The court avoided this argument by finding that the second sentence of the statute actually applied to aggravating factors as well as mitigating factors.[105] Therefore, section 19.2-264.4(B) should be read to subject aggravating factors, as well as mitigating factors, to the rules of evidence governing admissibility.[106]

B. Voir Dire

The court's holding also provides an important insight into the best manner to conduct voir dire. The court declined to find that the trial judge erroneously refused to strike a juror despite the juror's assertion that he would automatically impose the death penalty.[107] The court reasoned that the attorney improperly inquired about whether the juror would automatically vote for the death penalty in a hypothetical situation without also inquiring about whether the juror could follow the court's instructions.[108] Therefore, practitioners should be careful to reference a juror's capacity to follow instructions when asking whether she would automatically impose the death penalty. Otherwise, an impartial juror may be seated over defense counsel's objections, but an appellate court might not grant relief because the juror's signs of impartiality resulted from an improper question.

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102. *Id.*

103. *See* Specht v. Patterson, 386 U.S. 605, 608–10 (1967) (requiring procedural safeguards for a determination of future dangerousness in a separate proceeding that increases the sentence for those convicted under the Colorado Sex Offenders Act).

104. *Id.*

105. *Jackson*, 590 S.E.2d at 526.

106. For a motion to bar evidence supporting aggravating factors during the sentencing phase for failure to meet the rules of evidence governing admissibility, please contact the Virginia Capital Case Clearinghouse. For a complete discussion of VA. CODE ANN. § 19.2-264.4(B) with regard to mitigating factors, *see* Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 615 (2004) (analyzing Brown v. Luebbers, 344 F.3d 770 (8th Cir. 2003)).

107. *Jackson*, 590 S.E.2d at 530.

108. *Id.*

C. *Juror Misconduct*

The court also failed to clarify when, if ever, improper discussions among the jury will form the basis for a new trial. The court quoted seventy-year-old precedent for the proposition that " '[i]f gossip of [jurors] among themselves, or surmise, is to be the basis of new trials there would be no end to litigation.' "[109] This would indicate that the court is willing to countenance a fair amount of discussion among the jurors. However, the court also rested its decision on the fact that none of the discussions among the jurors addressed Jackson's guilt or innocence.[110] The court relied on *Haddad v Commonwealth*[111] for this proposition.[112] In that case, the court found that a new trial was required when a juror expressed a belief in the defendant's guilt to a third party.[113] Therefore, the court failed to state whether a new trial would be required if a juror expressed a belief in, or doubt of, the accused's guilt to another juror rather than a third party before deliberation. The court's reluctance to order a new trial based on mere "gossip" or "surmise" suggests that the court would not order a new trial. However, the court's concern over whether the jurors discussed Jackson's innocence implies that the court might order a new trial if the jurors broached the subject of the accused's innocence even once.

D. *Automatic Review*

1. *Passion or Prejudice*

The court also decided that the verdict was not the result of passion or prejudice, despite the defendant's motion to change venue.[114] The court based this holding on the "relative ease" with which the jury was seated.[115] In supporting this conclusion, the court cited *Thomas v Commonwealth*[116] for the proposition that " '[t]he ease with which an impartial jury can be selected is a critical element in determining whether the prejudice in the community stemming from pre-trial publicity is so wide-spread that the defendant cannot get a fair trial in that venue.' "[117] As the quote suggests, *Thomas* concerned a trial court's denial of a pre-trial change of venue motion, not whether a death sentence was the product of

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109. *Id.* at 532 (quoting *Margiotta*, 174 S.E. at 835 (alteration in original)).

110. *Id.*

111. 329 S.E.2d 17 (Va. 1985).

112. *Jackson*, 590 S.E.2d at 531–32; *see Haddad*, 329 S.E.2d at 20 (ordering a new trial when conversations between a juror and a third party touched on the accused's guilt or innocence).

113. *Haddad*, 329 S.E.2d at 20.

114. *Jackson*, 590 S.E.2d at 537.

115. *Id.* at 537 n.8.

116. 559 S.E.2d 652 (Va. 2002).

117. *Jackson*, 590 S.E.2d at 537 n.8 (quoting Thomas v. Commonwealth, 559 S.E.2d 652, 660 (Va. 2002)).

passion or prejudice.[118] Therefore, the relative ease with which the jury was selected may be at least one factor the court will consider in determining whether a death sentence resulted from passion or prejudice as well as whether a trial court improperly denied a request for a change of venue.

2. *Proportionality Review*

The specific mechanics of Virginia's proportionality review still remain unclear after the holding in *Jackson v Commonwealth*.[119] In *Hudson v Commonwealth*,[120] decided on the same day as *Jackson*, the court offered a slightly different formulation of how it conducts the proportionality review.[121] In *Hudson*, the court claimed to have "accumulated the records of all capital murder cases where a defendant received a death sentence as well as those where a defendant received a life sentence."[122] However, the court offered no indication of which capital murder cases were actually in its collection.[123] Does the collection include capital cases in which the defendant was charged with capital murder, but the Commonwealth did not seek the death sentence? Does it include cases in which the defendant was charged with capital murder, but was convicted of first degree murder? Does it include cases in which the defendant pleaded guilty to capital murder in exchange for a life sentence?

In *Jackson*, the court noted that it "consider[s] all capital murder cases presented to this Court for review."[124] This would imply that the only cases that are in the court's collection are those that the court has previously considered. *Jackson* fails to clarify if these cases include capital life cases that were appealed to the court, but which the court declined to hear.[125] Regardless, no matter how many capital life cases the court has collected, the collection will still be inadequate for the proportionality review. The statute directs the court to consider "both the crime and the defendant" in its proportionality review.[126] However, a defendant sentenced to a life sentence after a conviction for capital murder cannot appeal that sentence because that sentence is the most favorable outcome

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118. *Thomas*, 559 S.E.2d at 659.

119. *Jackson*, 590 S.E.2d at 537.

120. 590 S.E.2d 362 (Va. 2004).

121. *See* Hudson v. Commonwealth, 590 S.E.2d 362, 364 (Va. 2004) (containing slightly different wordings for a number of important aspects of proportionality review). For a complete discussion of the court's proportionality review in *Hudson*, *see* Jessie A. Seiden, Case Note, 16 CAP. DEF. J. 529 (2004) (analyzing Hudson v. Commonwealth, 590 S.E.2d 362 (Va. 2004)).

122. *Hudson*, 590 S.E.2d at 364.

123. *See id.* (declining to delineate what will constitute a capital murder case for the purposes of the proportionality review).

124. *Jackson*, 590 S.E.2d at 537.

125. *Id.*

126. VA. CODE ANN. § 17.1-313(E) (Michie 2003).

possible from that part of the trial.[127] The court will not have any record of the sentencing phase of the hearing available upon appeal, and consequently the court's collection of capital cases will have no record of the sentencing phases of the accumulated capital life cases. At the sentencing phase, the defendant's character is the main issue.[128] Thus, the court will be unable to fulfill the mandate of the statute and compare a given defendant's character to the character of defendants who committed similar crimes but received life sentences because the court will not have any record of the characters of the defendants who received life sentences.

In *Hudson*, the court stated that it first "reviewed" similar capital cases and then found that the defendant's sentence was not disproportionate to those imposed in "comparable" cases.[129] The court's analysis suggests that the court may broadly review all of the cases in the collection of capital cases and then compare the case before it to a selected subset of cases from that broader review. In *Jackson*, however, the court initially observed that it would "compare" Jackson's case with similar cases, but then stated that the purpose of the "review" was to ensure uniformity in the application of Virginia's capital sentencing statutes.[130] Therefore, it is also unclear whether the court will conduct its proportionality review in two stages, a broader review of all capital cases followed by a few comparisons between the case at hand and particularly similar cases, or if the court's analysis is conducted in one stage for which the court uses the words "review" and "compare" interchangeably.

Finally, in *Jackson* and *Hudson* the court noted that it would also only compare cases concerning the same aggravating factor. However, in *Jackson* the court stated it would only compare cases in which "the death penalty was imposed based upon the future dangerousness aggravating factor," whereas in *Hudson* the court said it would compare cases in which "the Commonwealth sought the death penalty based upon the aggravating factors of vileness and future dangerousness."[131] Therefore, the two cases propose somewhat different tests. Under the *Hudson* rationale, the court would compare two cases in which the Commonwealth sought the death penalty based on both aggravating factors but the jury found different aggravating factors in each case; under the *Jackson* formulation,

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127. *See* VA. CODE ANN. § 19.2-264.4(A) (Michie Supp. 2003) (stating that after a defendant is convicted of capital murder "a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment").

128. *See generally* VA. CODE ANN. § 19.2-264.4 (allowing the defendant to produce evidence supporting mitigating factors for the crime, including character and history, and the Commonwealth to produce evidence supporting aggravating factors like the future danger defendant poses to society and the vileness on the part of the defendant in committing the crime).

129. *Hudson*, 590 S.E.2d at 364.

130. *Jackson*, 590 S.E.2d at 537.

131. *Id.*; *Hudson*, 590 S.E.2d at 364.

the court would not. The *Jackson* formulation is superior because it directs the court to compare cases in which the jury actually found similar aggravating circumstances and thereby creates a more precise comparison because a salient feature of each case compared will be identical.

V. Conclusion

The court's opinion in *Jackson* has a number of important features. First, the court determined that Virginia Code section 19.2-264.4(B) applies to aggravating factors as well as mitigating factors. Second, the court found it improper to ask a prospective juror a speculative question about whether the juror would automatically impose the death sentence without including the juror's ability to follow the judge's instructions in the question. Third, the court decided that the ease with which a jury was seated is an important factor to consider in determining whether a death sentence was the result of passion or prejudice. Finally, the court did little to clarify the specifics of how it conducts the statutorily required proportionality review.

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