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Johnson v. Commonwealth 591 S.E.2d 47 (Va. 2004)

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591 S.E.2d 47 (Va. 2004)

I. Facts

In 1998, Shermaine A. Johnson ("Johnson") was convicted of the rape and capital murder of Hope Denise Hall ("Hall") and sentenced to death.[1] After unsuccessfully challenging his death sentence on direct appeal, Johnson filed a habeas petition in the Supreme Court of Virginia.[2] In his petition, Johnson alleged that his trial counsel rendered ineffective assistance by failing "to request an instruction informing the jury that Johnson would be ineligible for parole if sentenced to life imprisonment."[3] Pursuant to the United States Supreme Court's decision in *Simmons v. South Carolina*,[4] the Supreme Court of Virginia ruled that Johnson was entitled to an instruction concerning his parole ineligibility because his future dangerousness was at issue.[5] The Supreme Court of Virginia vacated Johnson's death sentence and remanded his case for a new sentencing hearing by a different jury.[6] The resentencing jury, finding that both predicates of future dangerousness and vileness existed, recommended a death sentence.[7] The circuit court once again sentenced Johnson to death.[8]

On appeal to the Supreme Court of Virginia, Johnson challenged the constitutionality of the resentencing proceeding.[9] Johnson claimed that the proceeding was a violation of double jeopardy and that he was improperly restricted from cross-examining "live" witnesses.[10] Johnson also argued that he presented sufficient evidence to necessitate a mental retardation determination.[11] Lastly, Johnson claimed that it would be a violation of the Eighth Amendment's

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1. Johnson v. Commonwealth, 591 S.E.2d 47, 49 (Va. 2004); *see* VA. CODE ANN. § 18.2-31(5) (Michie Supp. 2003) (stating that premeditated murder committed in the commission of rape or attempted rape qualifies as capital murder). The trial court also sentenced Johnson to life imprisonment for the rape of Hall. *Johnson*, 591 S.E.2d at 49.
2. *Johnson*, 591 S.E.2d at 49.
3. *Id.*
4. 512 U.S. 154 (1994).
5. *Johnson*, 591 S.E.2d at 49 (citing Simmons v. South Carolina, 512 U.S. 154, 156 (1994)).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 56–57.
10. *Id.* at 56, 58.
11. *Johnson*, 591 S.E.2d at 58.

ban on cruel and unusual punishment to sentence him to death for crimes committed when he was sixteen years old.[12]

II. Holding

The Supreme Court of Virginia found that Johnson's double jeopardy claim was procedurally barred because he failed to raise it during the resentencing proceeding.[13] The court determined that the circuit court properly restricted Johnson's ability to cross-examine witnesses on issues relating to his guilt.[14] In addition, the court held that Johnson's mental retardation claim was frivolous and did not warrant remand for jury consideration.[15] The Supreme Court of Virginia also reaffirmed its position that the Eighth Amendment does not prohibit the execution of juvenile defendants.[16] Finally, the court concluded that Johnson's sentence was not imposed arbitrarily and was not disproportionate to the sentences imposed in similar capital cases.[17]

III. Analysis

A. Resentencing Proceeding Claims

Johnson first argued that the resentencing proceeding violated double jeopardy principles.[18] In support of his argument, Johnson presented two affidavits from jurors explaining that they would not have voted for the death penalty in Johnson's first trial if they had known that he was ineligible for parole.[19] Additionally, Johnson claimed that the proceeding violated double jeopardy "because the prosecution acted in 'bad faith' at his first trial by failing to require that the jury be instructed correctly regarding the parole eligibility

12. *Id.* at 59. In addition to these claims, Johnson raised a number of arguments that the Supreme Court of Virginia summarily dismissed. *Id.* at 56. Johnson's additional claims were that: (1) "Virginia's capital murder sentencing statutes fail to provide meaningful guidance to the jury concerning the meaning of the terms 'future dangerousness' and 'vileness' "; (2) "Virginia's statutory scheme fails to properly inform and instruct the jury concerning its consideration of mitigation evidence"; (3) the Commonwealth is improperly allowed to use unadjudicated criminal conduct to prove future dangerousness; (4) Virginia's capital system is unconstitutional because the sentencing statutes "allow, but do not require, the court to set aside a death sentence on a showing of good cause and permit the court to consider hearsay evidence in the pre-sentence report"; and (5) that the Supreme Court of Virginia "fails to conduct its proportionality and 'passion-prejudice' review consistent with constitutional requirements." *Id.*

13. *Id.* at 57.

14. *Id.* at 58.

15. *Id.* at 59.

16. *Id.* at 60 (citing Stanford v. Kentucky, 492 U.S. 361, 380 (1989)).

17. *Johnson*, 591 S.E.2d at 60–61.

18. *Id.* at 56.

19. *Id.* at 56–57.

issue."[20] The Supreme Court of Virginia did not consider these claims on the merits because it concluded that they were procedurally barred based on Johnson's failure to raise them at the resentencing proceeding.[21]

In addition, Johnson argued that the circuit court acted improperly by allowing "live" witness testimony while restricting his ability to cross-examine witnesses.[22] Johnson claimed that it was error for the circuit court to prevent him "from challenging the veracity of that testimony before the jury."[23] Relying on its decision in *Atkins v. Commonwealth*,[24] the Supreme Court of Virginia stated that a defendant may not "challenge the Commonwealth's evidence of guilt during the penalty phase" or "argue during the penalty phase proceedings that there is a 'residual doubt' concerning his guilt."[25] Accordingly, the court rejected Johnson's arguments and affirmed the circuit court's decision to restrict the defense from questioning witnesses on issues regarding Johnson's guilt.[26]

B. Mental Retardation Claim

Johnson also claimed that his case should be remanded for a jury determination of whether he should be classified as mentally retarded under section 19.2-264.3:1.1 of the Virginia Code.[27] He argued that he had "presented sufficient

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20. *Id.* at 57.

21. *Id.*; *see* VA. SUP. CT. R. 5:25 (stating that "[e]rror will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling"); Sattazahn v. Pennsylvania, 537 U.S. 101, 112 (2003) (plurality opinion) (stating that double jeopardy will only apply to capital sentencing proceedings if the jury unanimously finds that the State failed to prove that one or more aggravating factor existed). Because Johnson was sentenced to death in his first trial, it is clear that the jury found that at least one aggravating factor existed. Thus, the Supreme Court's ruling in *Sattazahn* precludes Johnson's argument that double jeopardy had attached. *See generally* Priya Nath, Case Note, 15 CAP. DEF. J. 419 (2003) (analyzing Sattazahn v. Pennsylvania, 123 S. Ct. 732 (2003)); Whitnan J. Hou, *Capital Retrials and Resentencing: Whether to Appeal and Resentencing Fairness*, 16 CAP. DEF. J. 19, 22 (2003) (discussing the Supreme Court's decision in *Sattazahn*).

22. *Johnson*, 591 S.E.2d at 57–58.

23. *Id.*

24. 534 S.E.2d 312 (Va. 2000).

25. *Johnson*, 591 S.E.2d at 57 (quoting Atkins v. Commonwealth, 534 S.E.2d 312, 314 (Va. 2000)); *Atkins*, 534 S.E.2d at 314. The Supreme Court of Virginia's rationale is based on the premise that "the issue of a defendant's guilt has already been decided at the guilt phase of a capital murder trial" and is therefore not at issue in the sentencing proceeding. *Id.*

26. *Johnson*, 591 S.E.2d at 58.

27. *Id.* The Virginia Code defines "mentally retarded" as:

> [A] disability, originating before the age of 18 years, characterized concurrently by (i) significantly subaverage intellectual functioning as demonstrated by performance on a standardized measure of intellectual functioning administered in conformity with accepted professional practice, that is at least two standard deviations below the mean and (ii) significant limitations in adaptive behavior as expressed in conceptual, social and practical adaptive skills.

evidence, including evidence of his low I.Q. scores and his [Dissociative Identity Disorder], which demonstrates that his claim is not frivolous."[28] Under section 8.01-654.2 of the Virginia Code, the Supreme Court of Virginia may dismiss a petition for a mental retardation determination if the court finds the claim to be frivolous.[29] The statutory test for mental retardation requires the defendant to provide proof of subaverage intellectual functioning and significantly limited adaptive behavior, and that these traits originated before the defendant was eighteen years old.[30] If a defendant satisfies this two-part test, his claim will not be found frivolous.[31] However, the Supreme Court of Virginia held that Johnson's mental retardation claim was frivolous because his I.Q. "exceed[ed] the score of 70 that the General Assembly has chosen as the threshold score below which one may be classified as being mentally retarded."[32]

C. *Juvenile Death Penalty Claim*

Johnson contended that it was error for the circuit court to sentence him to death for crimes committed when he was sixteen years old.[33] Johnson urged the Supreme Court of Virginia to apply the rationale of *Atkins v. Virginia*,[34] which relied on "evolving standards of decency" in concluding that the execution of a mentally retarded defendant constitutes cruel and unusual punishment.[35] Johnson argued that these same "evolving standards of decency" should apply to executions of juvenile defendants.[36] Instead, the Supreme Court of Virginia relied on *Stanford v. Kentucky*,[37] in which the United States Supreme Court held that the execution of juvenile defendants is not a violation of the Eighth Amend-

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VA. CODE ANN. § 19.2-264.3:1.1(A) (Michie Supp. 2003).

28. *Johnson*, 591 S.E.2d at 58.

29. *Id.* at 58–59 (citing VA. CODE ANN. § 8.01-654.2 (Michie 2000)).

30. VA. CODE ANN. § 19.2-264.3:1.1(A).

31. *Johnson*, 591 S.E.2d at 59.

32. *Id.*; *see* AM. PSYCHIATRIC ASS'N, DIAGNOSTIC AND STATISTICAL MANUAL OF MENTAL DISORDERS, 39 (4th ed. 1994) [hereinafter APA] (stating that "[s]ignificantly subaverage intellectual functioning is defined as an IQ of about 70 or below (approximately 2 standard deviations below the mean)"). Intellectual functioning tests showed that Johnson "had an I.Q. score of 75 in 1991, and an I.Q. score of 78 in 1992." *Id.* at 51; *see* Burns v. Warden, No. 020971, at 1, 2 (Va. Oct. 28, 2003) (reh'g granted) (order on file with author) (providing an example of a nonfrivolous mental retardation claim).

33. *Johnson*, 591 S.E.2d at 59.

34. 536 U.S. 304 (2002).

35. *Johnson*, 591 S.E.2d at 59–60 (citing Atkins v. Virginia, 536 U.S. 304, 321 (2002)); *see* U.S. CONST. amend. VIII (prohibiting "cruel and unusual punishments").

36. *Johnson*, 591 S.E.2d at 59–60.

37. 492 U.S. 361 (1989).

ment.[38] In applying *Stanford*, the Supreme Court of Virginia stated that it was not at liberty to disregard directly applicable federal precedent.[39]

However, the Supreme Court of Virginia also addressed the possibility that the issue of juvenile executions might involve an independent state constitutional question.[40] The court initially noted that Johnson did not challenge the juvenile death penalty under the Constitution of Virginia.[41] The court's statement implies that the question of juvenile executions is a state constitutional question that the Virginia courts may decide. Yet the court went on to state that "[i]n the absence of such a [federal] constitutional prohibition . . . any further determination whether 16 and 17-year-old persons convicted of capital murder should be eligible to receive the death penalty in Virginia is a matter to be decided by the General Assembly, not by the courts."[42] Read together, the court's statements do not clarify whether the juvenile execution issue is a Virginia constitutional question for the courts or a question solely within the purview of the General Assembly. Relying solely on federal constitutional precedent, the Supreme Court of Virginia affirmed the circuit court's imposition of the death sentence even though Johnson was a juvenile at the time he committed the murder.[43]

D. Statutory Sentence Review

The Supreme Court of Virginia also performed the mandatory review of Johnson's death sentence pursuant to section 17.1-313(C) of the Virginia Code.[44] The first part of the statutory review required the court to consider whether Johnson's death sentence "was imposed under the influence of passion, prejudice

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38. *Johnson*, 591 S.E.2d at 59 (citing Stanford v. Kentucky, 492 U.S. 361, 380 (1989)). Like *Johnson*, the defendant in *Stanford* was sixteen years old at the time he committed the offense. *Id.*

39. *Id.* at 60. The Supreme Court of Virginia rejected Johnson's contention that the court should apply the rationale of the United States Supreme Court in *Atkins* because of the likelihood that the United States Supreme Court would reverse *Stanford*. *Id.* The court stated that "[w]hen a precedent of the Supreme Court has direct application in a case, we are not at liberty to ignore that precedent in favor of other Supreme Court decisions employing a similar analysis in a different factual and legal context." *Id.*

40. *See id.* at 60 n.* (discussing Johnson's failure to challenge the juvenile death penalty under the Constitution of Virginia).

41. *See id.* (stating that "[w]e note that in this appeal Johnson does not challenge under any provision of the Constitution of Virginia the imposition of the death penalty for 16 and 17-year-old persons convicted of capital murder").

42. *Id.* at 60.

43. *Id.*

44. *Johnson*, 591 S.E.2d at 60; *see* VA. CODE ANN. § 17.1-313(C)(1) (Michie 2003) (requiring the Supreme Court of Virginia to consider "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor"); VA. CODE ANN. § 17.1-313(C)(2) (requiring the Supreme Court of Virginia to consider "[w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").

or any other arbitrary factor."[45] The court concluded that there was no evidence that Johnson's death sentence was imposed arbitrarily.[46]

The second part of the court's mandatory review concerned whether Johnson's death sentence was proportionate to the sentences imposed in similar capital cases.[47] The court stated that it compared the record in Johnson's case "with the records of our other capital murder cases, including those cases in which a life sentence has been imposed."[48] In reviewing the records, the court paid particular attention to capital cases involving a death sentence based on both future dangerousness and vileness.[49] After "considering both the crime and the defendant," the Supreme Court of Virginia concluded that Johnson's death sentence was proportionate to the sentences imposed in similar capital cases.[50] The court held that no evidence of reversible error existed and affirmed the circuit court's ruling.[51]

IV. Application in Virginia

A. Resentencing Testimony

In *Johnson*, the Supreme Court of Virginia approved the Commonwealth's presentation of live testimony during the resentencing proceeding.[52] In addition, the court upheld the circuit court's decision to restrict Johnson's ability to cross-examine the witnesses on issues related to his guilt.[53] The rationale behind the restriction on cross-examination is based on the premise that the issue of a defendant's guilt is fully litigated and decided in the first phase of a capital trial.[54] According to the Supreme Court of Virginia in *Atkins*, a defendant may not raise issues of "residual doubt" as mitigation evidence during the sentencing proceeding.[55] The problem inherent in such restriction is that it effectively precludes

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45. *Johnson*, 591 S.E.2d at 60; VA. CODE ANN. § 17.1-313(C)(1).

46. *Johnson*, 591 S.E.2d at 60.

47. VA. CODE ANN. § 17.1-313(C)(2); *Johnson*, 591 S.E.2d at 60.

48. *Johnson*, 591 S.E.2d at 61.

49. *Id.* In conducting its proportionality review, the court also considered factors such as Johnson's age at the time of the offense, evidence of prior rapes, and the vileness of the murder of Hall. *Id.*; *see* VA. CODE ANN. § 17.1-313(C)(2) (requiring the court to "consider[] both the crime and the defendant").

50. *Johnson*, 591 S.E.2d at 61. It is clear that the court construed "similar offenses" narrowly to mean capital murders based on both statutory aggravators involving violent sexual crimes where "the defendant had committed violent crimes on other occasions." *Id.*

51. *Id.*

52. *Id.* at 58.

53. *Id.*

54. *Id.* at 57.

55. *Atkins*, 534 S.E.2d at 315; *see* Jeremy P. White, Case Note, 13 CAP. DEF. J. 429, 430 (2001) (analyzing Atkins v. Commonwealth, 534 S.E.2d 312 (Va. 2000)).

cross-examination. If the defendant is barred from relitigating his guilt or raising issues of "residual doubt" at sentencing, then the defense has little left to cross-examine the witness about. As Johnson argued, the new resentencing jury may not be "able to 'gain the same feel' for the case due to his inability to challenge the Commonwealth's evidence."[56] The prohibition on the defendant's ability to raise issues related to his guilt at his resentencing deprives the newly impaneled jury of the full picture of the case, which the first sentencing jury had when making its decision. Thus, the statutory scheme regarding live witness testimony at resentencing proceedings appears to put defendants at an immediate disadvantage.

B. Mental Retardation Claim

The Supreme Court of Virginia concluded that Johnson's mental retardation claim was frivolous because his level of intellectual functioning was not sufficiently subaverage.[57] The statute requires that the defendant score "at least two standard deviations below the mean" on a standardized intelligence test.[58] The court read this language in conjunction with the American Psychiatric Association's ("APA") definition of mental retardation in determining that a "score of 70 . . . [is] the threshold score *below which* one may be classified as being mentally retarded."[59] Thus, the court's analysis requires a defendant to score a sixty-nine or lower in order to qualify as mentally retarded.

However, the Supreme Court of Virginia's interpretation differs from the APA's definition in two ways. First, the APA specifies that a score of seventy, which is two standard deviations below the mean, permits a finding of mental retardation.[60] Second, the APA explicitly states that a margin of error of 5 points exists for all standardized tests.[61] Taking the statistical margin of error into account, Johnson's I.Q. score of 75 would qualify for a possible mental retardation diagnosis under the APA's definition. Thus, had the Supreme Court of Virginia applied the APA definition, taking into account the margin of error, it should have deemed Johnson's claim nonfrivolous.

C. Juvenile Death Penalty

In its discussion of the juvenile death penalty, the Supreme Court of Virginia "note[d] that in this appeal Johnson does not challenge under any provision

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56. *Johnson*, 591 S.E.2d at 57.

57. *Id.* at 59.

58. VA. CODE ANN. § 19.2-264.3:1.1(A) (Michie Supp. 2003).

59. *Johnson*, 591 S.E.2d at 59 (emphasis added); *see* APA, *supra* note 32, at 39 (stating that general intellectual functioning "is defined as an IQ of about 70 or below").

60. APA, *supra* note 32, at 39.

61. *Id.*

of the Constitution of Virginia the imposition of the death penalty for 16 and 17-year-old persons convicted of capital murder."[62] This statement appears to acknowledge that a state constitutional question exists. However, the court goes on to hold that the General Assembly, and not the courts, is responsible for determining whether juveniles are eligible to receive the death penalty.[63] The court's statements appear contradictory in that they acknowledge a constitutional question but assign the responsibility for deciding that question to the General Assembly. Thus, it is unclear whether the Virginia courts are willing to entertain state constitutional claims regarding the juvenile death penalty. In the event that a court is open to such a claim, capital defense attorneys should be prepared to make the argument based on the Constitution of Virginia that juveniles are death ineligible.

Capital defense attorneys must also be aware of *State ex rel. Simmons v Roper*,[64] in which the Supreme Court of Missouri held "that the Supreme Court of the United States would hold that the execution of persons for crimes committed when they were under 18 years of age violates the 'evolving standards of decency that mark the progress of a maturing society,' and is prohibited by the Eighth Amendment."[65] The United States Supreme Court recently granted certiorari in *Simmons* and will therefore decide whether the execution of juveniles violates the Eighth Amendment.[66] The Court's decision will have a significant effect on how the Virginia courts treat the juvenile death penalty issue. If *Simmons* is affirmed, then the Eighth Amendment question is resolved for Virginia. If *Simmons* is reversed, then the question remains whether the juvenile death penalty issue should be handled by the Virginia courts or the General Assembly. Thus, the United States Supreme Court's decision will significantly impact how defense attorneys in Virginia will argue juvenile capital cases.

D. Proportionality Review

In *Jenkins v Commonwealth*,[67] the Supreme Court of Virginia explained that the primary inquiry of its proportionality review was " 'whether other sentencing

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62. *Johnson*, 591 S.E.2d at 60 n.*. The court's statement appears to indicate that Johnson should have made a challenge under the Constitution of Virginia. Yet, the comment is curious considering that the Constitution of Virginia provides no direct authority on the question whether it is cruel and unusual to execute a juvenile. For a motion to declare the juvenile death penalty unconstitutional under the Virginia Cruel and Unusual Punishment clause, please contact the Virginia Capital Case Clearinghouse at (540) 458-8557.

63. *Id.* at 60.

64. 112 S.W.3d 397 (Mo. 2003).

65. State *ex rel.* Simmons v. Roper, 112 S.W.3d 397, 413 (Mo. 2003).

66. Roper v. Simmons, No. 03-633, 2004 WL 110849, at *1 (U.S. Jan. 26, 2004) (mem.) (granting certiorari).

67. 423 S.E.2d 360 (Va. 1992).

bodies in this jurisdiction generally impose the supreme penalty for comparable or similar crimes, considering both the crime and the defendant.' "[68] In order to make this determination, the court compiles the records of similar capital murder cases for comparison.[69] In *Johnson*, the court stated that it "reviewed the records of all capital cases considered by this Court" and paid particular attention to cases "in which the death sentence was *based* on both predicates."[70] On the same day that it decided *Johnson*, the Supreme Court of Virginia also decided *Jackson v Commonwealth*[71] and *Hudson v Commonwealth*.[72] In *Jackson*, the court also stated that it compared Jackson's case to other similar cases where "the death penalty was imposed *based* upon the future dangerousness aggravating factor."[73] However, in *Hudson*, the court explained that it reviewed capital cases "where the Commonwealth *sought* the death penalty based upon the aggravating factors of vileness and future dangerousness."[74] The inconsistency in the court's language leaves open the question of what constitutes a "similar" case. It is unclear whether a "similar" case is one in which the Commonwealth *sought* the same aggravator/s, or one in which the sentence was *based* on the same aggravator/s.[75]

V. Conclusion

After *Johnson*, it is unclear whether the Virginia courts are willing to entertain state constitutional challenges to the juvenile death penalty. Lawyers should be prepared to challenge a juvenile death sentence under the Constitution of Virginia in the event that a court is willing to hear such a claim. In addition, lawyers

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68. *Johnson*, 591 S.E.2d at 60 (quoting Jenkins v. Commonwealth, 423 S.E.2d 360, 371 (Va. 1992)).

69. *See* VA. CODE ANN. § 17.1-313(E) (Michie 2003) (stating that "[t]he Supreme Court may accumulate the records of all capital felony cases . . . [and] shall consider such records as are available as a guide in determining whether the sentence imposed in the case under review is excessive"). For a more complete discussion of the problems associated with the Supreme Court of Virginia's compilation of records for proportionality review, *see* Cynthia M. Bruce, *Proportionality Review Still Inadequate, But Still Necessary*, 14 CAP. DEF. J. 265, 268–69 (2002) and Jessie A. Seiden, Case Note, 16 CAP. DEF. J. 625 (2004) (analyzing Palmer v. Clarke, No. 4:00CV3020, 2003 WL 2232710, at *1 (D. Neb. Oct. 9, 2003)).

70. *Johnson*, 591 S.E.2d at 61 (emphasis added).

71. 590 S.E.2d 520 (Va. 2004).

72. *See* Hudson v. Commonwealth, 590 S.E.2d 362 (Va. 2004) (finding the defendant's death sentence proportionate to the sentences imposed in similar capital murder cases); Jackson v. Commonwealth, 590 S.E.2d 520 (Va. 2004) (finding that the defendant's death sentence was not the result of passion or prejudice and was proportional to sentences in similar cases).

73. *Jackson*, 590 S.E.2d at 537 (emphasis added).

74. *Hudson*, 590 S.E.2d at 364 (emphasis added); *see* Jessie A. Seiden, Case Note, 16 CAP. DEF. J. 529 (2004) (analyzing Hudson v. Commonwealth, 590 S.E.2d 362 (Va. 2004)).

75. For a more complete discussion concerning the significance of this difference in language, *see* Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 533 (2004) (analyzing (Jerry) Jackson v. Commonwealth, 590 S.E.2d 520 (Va. 2004)).

must be aware of *Simmons* and anticipate the forthcoming United States Supreme Court decision regarding juvenile executions and the Eighth Amendment. If *Simmons* is affirmed, Virginia will no longer be able to execute juveniles. However, if *Simmons* is reversed and Virginia maintains the death penalty for juveniles, the question remains whether it is an issue for the courts or the General Assembly to decide. Attorneys must carefully observe how the United States Supreme Court resolves this issue because of the major implications such a decision will have on the manner in which juvenile capital cases are argued in Virginia.

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