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Powell v. Commonwealth 590 S.E.2d 537 (Va. 2004)

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I. Facts

In 2000, a jury sentenced Paul Warner Powell ("Powell") to death for the capital murder of Stacey Lynn Reed ("Stacey") during or subsequent to the rape and sodomy of her sister, Kristie Erin Reed ("Kristie").[1] After the Supreme Court of Virginia reversed Powell's death sentence and remanded to the trial court for a new trial, the Commonwealth of Virginia issued a new indictment against Powell on December 3, 2001, alleging the capital murder of Stacey in the " 'commission of or subsequent to the attempted rape of Stacey . . . .' "[2] The new indictment was based on evidence contained in a profanity-filled letter written and sent by Powell to the Commonwealth's Attorney who prosecuted him in his first trial.[3] In the letter, believing he was immune from further prosecution, Powell related what had happened the day Stacey was murdered and confessed that he had attempted to rape Stacey before the actual killing.[4] Powell's second trial ended with a verdict of guilty and another sentence of death.[5]

Powell made several motions pre-trial, including two separate motions to dismiss the second indictment on serial prosecution, "law of the case," and

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1. Powell v. Commonwealth, 590 S.E.2d 537, 543 (Va. 2004); *see* VA. CODE ANN. § 18.2-31(5) (Michie Supp. 2003) (defining capital murder as "[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"); Powell v. Commonwealth, 552 S.E.2d 344, 363 (Va. 2001) (reversing Powell's sentence of death and ordering a new trial limited to a charge of first degree murder). For a complete discussion and analysis of *Powell*, *see generally* Kathryn Roe Eldridge, Case Note, 14 CAP. DEF. J. 175 (2001) (analyzing Powell v. Commonwealth, 552 S.E.2d 344 (Va. 2001)).

2. *Powell*, 590 S.E.2d at 543–44. The Supreme Court of Virginia reversed Powell's death sentence due to the fact that the Commonwealth could not prove that " 'Powell committed or attempted to commit any sexual assault against Stacey before or during her murder, or that the rape of Kristie did not occur after the murder of her sister.' " *Id.* at 543 (quoting *Powell*, 552 S.E.2d at 363).

3. *Id.*

4. *Id.* In the letter Powell stated, " 'I figured I would tell you the rest of what happened on Jan. 29, 1999, to show you how stupid all y'all . . . are.' " *Id.* Powell described how he threatened Stacey and pinned her down on the bed when she refused to have consensual intercourse with him. *Id.* He threatened to kill her if she did not stop fighting him. *Id.* When Stacey refused to disrobe for Powell, he stabbed her when she tried to leave the bedroom. *Id.* When this attack did not kill her, Powell " 'started stomping on her throat' until he 'didn't see her breathing anymore.' " *Id.*

5. *Id.* at 549.

double jeopardy grounds.[6] Powell also filed motions seeking to have Virginia's capital charging and sentencing scheme declared unconstitutional and challenging the constitutionality of Virginia Code section 19.2-264.4(B).[7] All of these motions were overruled by the trial court.[8] Powell appealed to the Supreme Court of Virginia claiming, inter alia, that the trial court erred in overruling the pre-trial motions and not striking the jury panel.[9] Along with its mandatory review of Powell's death sentence under Virginia Code section 17.1-313, the Fourth Circuit analyzed Powell's claim that the sentence was a result of the jury's passion, prejudice, or other arbitrary factors and that the sentence of death was disproportionate when compared to the penalty imposed in similar cases.[10]

II. Holding

First, the Supreme Court of Virginia ruled that the trial court did not err in failing to dismiss the December 3, 2001 indictment.[11] The court held that: (1) the opinion and mandate of the court from Powell's initial appeal was not a barrier to the Commonwealth issuing a new indictment; (2) Powell's first trial did not act as an actual or implied acquittal for the attempted rape of Stacey under the law of the case doctrine; and (3) that constitutional double jeopardy principles were not implicated due to the failure of the initial indictment to identify the victim of the attempted rape charge.[12] Second, the court held that the United States Supreme Court's decision in *Ring v. Arizona*[13] did not make Virginia Code section 19.2-264.4(B) unconstitutional.[14] Third, the court found that the trial court did not err in issuing an instruction to the jury to disregard a voir dire question rather than dismiss the panel.[15] Finally, the court held that Powell's death sentence was not the result of the jury's passion, prejudice, or any other

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6. *Id.* at 544–45; *see* U.S. CONST. amend. V ("No person shall be . . . subject for the same offence to be twice put in jeopardy of life or limb.").

7. *Powell*, 590 S.E.2d at 545–46; *see* VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003) (providing the procedure for capital sentencing in Virginia).

8. *Powell*, 590 S.E.2d at 544–47.

9. *Id.* at 549–53, 559–60.

10. *Id.* at 549, 560–63; *see* VA. CODE ANN. § 17.1-313 (Michie 2003) (providing for the mandatory review of every death sentence).

11. *Id.* at 549–54.

12. *Id.* at 550, 553, 554–55.

13. 536 U.S. 584 (2002).

14. *Powell*, 590 S.E.2d at 555; *see* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that it is unconstitutional in a jury trial for a trial judge, and not the jury, to determine the presence of aggravating factors needed to impose the penalty of death).

15. *Powell*, 590 S.E.2d at 560.

arbitrary factor and the sentence was not disproportionate when compared with similar cases.[16]

III. Analysis

A. Failure to Dismiss the Capital Murder Indictment

Powell's claim that the trial court erred in failing to dismiss the second indictment was brought on the following three grounds: (1) the opinion and mandate issued by the court prevented the second indictment; (2) the law of the case doctrine prevented the prosecution from relying on a charge of the attempted rape of Stacey; and (3) that the second indictment violated the Fifth Amendment's double jeopardy prohibition.[17] The Supreme Court of Virginia rejected each of these contentions.[18]

1. The "Mandate" Rule and Serial Prosecution

At trial, Powell claimed that the second indictment should have been dismissed because the trial court was bound by the Supreme Court of Virginia's opinion and mandate issued after his first appeal.[19] The Commonwealth responded by asserting that the Supreme Court of Virginia's judgment had no bearing on the subsequent indictment "because Powell had 'never [previously] been charged with the capital murder of Stacey Reed in the commission or attempted commission [of] sexual assault against [Stacey Reed] because, at the time of [Powell's first] trial, no such evidence existed.' "[20] Thus, the Commonwealth argued that the new "indictment was 'a new charge, one that has never been litigated in trial nor considered by the Virginia Supreme Court.' "[21] The trial court overruled Powell's motion to dismiss.[22]

The Supreme Court of Virginia noted that the mandate rule was recognized by the court as stated in *Rowe v. Rowe*:[23]

> A trial judge is bound by a decision and mandate from [an appellate court], unless [the court] acted outside [its] jurisdiction. A trial court has no discretion to disregard [a] lawful mandate. When a case is remanded to a trial court from an appellate court, the refusal of the

16. *Id.* at 561–62.
17. *Id.* at 549.
18. *Id.* at 550, 553, 554–56.
19. *Id.* at 544.
20. *Id.*
21. *Powell*, 590 S.E.2d at 544–45.
22. *Id.* at 545.
23. 532 S.E.2d 908 (Va. Ct. App. 2000).

> trial court to follow the appellate court mandate constitutes reversible error.[24]

The Supreme Court of Virginia differentiated between the characteristics of an opinion, which applies to all future cases, and a mandate, "which is the directive of the appellate court certifying a judgment in a particular case to the court from which it was appealed."[25] The court noted that, by necessity, the mandate only applies to that particular case and only to matters " 'within its compass.' "[26] The court concluded that the trial court is not precluded from considering matters outside of the mandate.[27]

The court found that the discovery of new evidence, i.e., Powell's letter to the Commonwealth's Attorney, brought the new indictment outside the scope of the mandate rule.[28] The mandate was issued based on the record that the court had at the time, and any new evidence discovered fell outside of the mandate's requirements.[29] The court also found that nothing in the mandate forbade the Commonwealth from dismissing the first indictment and issuing a second indictment charging capital murder based on a different gradation offense.[30] Powell's confession to the attempted rape of Stacey gave the Commonwealth the evidence it needed to charge him with the attempted rape of Stacey as a predicate rather than the attempted rape of Kristie.[31]

The court further acknowledged that, as a general rule, "serial prosecutions are not permitted where the Commonwealth deliberately refrains from bringing criminal charges arising out of the same act or transaction while prosecuting others in order to gain the advantage of having multiple trials."[32] The court found that in Powell's case, unlike the case of *deliberately* prosecuting a defendant in separate trials for the same series of offenses, the unexpected discovery of new evidence pertaining to an uncharged offense made it impossible to have prosecuted him the first time for the attempted rape of Stacey.[33] Accordingly, the court ruled that the trial court did not err in overruling Powell's motion to dismiss the indictment based on the discovery of new evidence of the gradation offense.[34]

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24. *Powell*, 590 S.E.2d at 549 (quoting Rowe v. Rowe, 532 S.E.2d 908, 912 (Va. Ct. App. 2000)); *Rowe*, 532 S.E.2d at 912.

25. *Powell*, 590 S.E.2d at 550.

26. *Id.* (quoting Sprague v. Ticonic Nat'l Bank, 307 U.S. 161, 168 (1939)).

27. *Id.*

28. *Id.*

29. *Id.*

30. *Id.*

31. *Powell*, 590 S.E.2d at 550.

32. *Id.* (citing Ashe v. Swenson, 397 U.S. 436, 444 (1970)).

33. *Id.*

34. *Id.*

2. *The Law of the Case Doctrine*

Powell claimed that the failure of the indictment or jury instructions to charge him with either the attempted rape of Stacey or specify the victim of the attempted rape gradation offense resulted in an implied acquittal of the attempted rape of Stacey under the law of the case doctrine.[35] To support this contention Powell asserted that the Commonwealth presented evidence that Stacey's murder involved a sexual assault and that the jury had considered and rejected the possibility that Powell attempted to rape Stacey.[36] The court rejected these assertions by noting that the bill of particulars issued in response to Powell's motion clearly indicated that the gradation offense was the attempted rape of Kristie.[37] The court found that the bill of particulars was not irrelevant, as Powell claimed, and that the bill of particulars limited the prosecution to the capital murder of Stacey based on the attempted rape of Kristie.[38] The court agreed that a bill of particulars is not a charging document but noted that when a bill of particulars is issued, it must be read together with the indictment to determine the details of a charged offense.[39] The court concluded that when the indictment and the bill of particulars charging Powell were read together, the prosecution of Powell was limited to the capital murder of Stacey predicated on the attempted rape of Kristie.[40]

The court also rejected Powell's claim that statements in the Supreme Court of Virginia's opinion reversing his first conviction acted as an express acquittal of the attempted rape of Stacey.[41] In reversing Powell's capital murder charge, the court had stated that there was insufficient evidence in the record to prove that Powell had attempted to rape Stacey.[42] Powell relied on *Burks v United States*[43] for the proposition that "the determination of an appellate court that the trial court erred in permitting the jury to consider a charge not supported by the evidence acts as an acquittal on that charge and that a retrial for the same offense

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35. *Id.* at 550–51.

36. *Id.* Powell pointed to the fact that the prosecution proffered at trial that it had "evidence . . . [that Powell] was having sex or attempting to have sex with [Stacey]" to support his contention that the Commonwealth tried to prove the attempted rape of Stacey. *Id.* at 551. To support his contention that the jury had considered and rejected that Powell attempted to rape Stacey, Powell noted that the jury had inquired whether the attempted rape of Kristie would satisfy the gradation requirement for Stacey's murder. *Id.*

37. *Powell*, 590 S.E.2d at 552.

38. *Id.*

39. *Id.*

40. *Id.*

41. *Id.* at 553.

42. *Id.*

43. 437 U.S. 1 (1978).

is barred by the prohibition against double jeopardy."[44] The court found that its original reversal and mandate requiring a charge of no greater than first degree murder were based on the evidence available in the record of the first trial and did not take into account Powell's confession in the letter, which was discovered after the initial reversal.[45] The court held that "the trial court did not err in denying Powell's motions to dismiss the indictment."[46]

3. *Double Jeopardy*

Powell next contended that the December 3, 2001 indictment should have been dismissed on Fifth Amendment double jeopardy grounds.[47] Specifically, Powell claimed that the double jeopardy prohibition invalidated the second indictment for the capital murder of Stacey under the same subsection of Virginia Code section 18.2-31.[48] Powell's argument depended on the fact that no victim of attempted rape was specified in the first indictment and, as such, the proof of the identity of the victim was not an element of the crime.[49] Under this theory, it did not matter whether Stacey or Kristie was the victim of the gradation offense in the first indictment and, thus, the second indictment specifying Stacey as the victim violated the Fifth Amendment.[50]

The court, finding that the bill of particulars cured any lack of specificity in the first indictment, disagreed with this argument.[51] The court noted that the identification of Kristie as the victim of attempted rape in the bill of particulars occurred prior to the point when jeopardy attached upon the impaneling of the jury.[52] The court held that:

> [W]here, prior to the attachment of jeopardy, the Commonwealth limits the prosecution of a capital murder, undifferentiated in the indictment by the identity of the victim of the gradation offense, by naming a specific victim of the gradation offense in a bill of particu-

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44. *Powell*, 590 S.E.2d at 552 (citing Burks v. United States, 437 U.S. 1, 5–6 (1978)); *Burks*, 437 U.S. at 5–6.

45. *Powell*, 590 S.E.2d at 552.

46. *Id.* at 553.

47. *Id.*

48. *Id.*; *see* VA. CODE ANN. § 18.2-31(5) (Michie Supp. 2003) (providing that murder committed in conjunction with rape or attempted rape qualifies as capital murder).

49. *Powell*, 590 S.E.2d at 553.

50. *Id.* at 553–54.

51. *Id.* at 554.

52. *Id.*; *see* Commonwealth v. Washington, 559 S.E.2d 636, 641 (Va. 2002) ("The right not to be subjected to double jeopardy attaches in a criminal case when the jury is impaneled and sworn.").

> lars, jeopardy will attach only to the capital murder charge as made specific by the bill of particulars.[53]

The court concluded that the trial court properly denied Powell's motion to dismiss the indictment on double jeopardy grounds.[54]

B. Constitutionality of Virginia's Capital Murder Statutes

Powell argued that *Ring* "requires that many of the procedural safeguards that heretofore have only been required during the guilt/innocence phase of trial must now be extended to the sentencing phase."[55] The aggravating factors required to be found in order to impose the death penalty under Virginia Code section 19.2-264.4(B) should be treated as elements of the capital offense charged in the indictment.[56] Because *Ring* held that aggravating factors are elements of the charged offense, it was unconstitutional during a jury trial for a trial judge to determine the presence of aggravating factors, rather than the jury.[57] Powell claimed that the holding in *Ring* made the standards of proof and rules of evidence required in the guilt phase of trial mandatory at sentencing.[58] Moreover, under section 19.2-264.4(B), a "relaxed evidentiary standard" existed for the admission of unadjudicated criminal conduct (violating the rule against the admissibility of prior bad acts) or hearsay evidence (preventing proper cross-examination required by the confrontation clause).[59]

The court first found that Powell's reading of *Ring* was too expansive.[60] The court noted that the ruling in *Ring* pertained to the Arizona statutory scheme that allowed a trial judge "to assume the role of the jury in determining whether

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53. *Powell*, 590 S.E.2d at 554.

54. *Id.*

55. *Id.* at 555 (internal quotation marks omitted); *see Ring*, 536 U.S. at 609 (stating that aggravating factors are elements of the offense to be found by the jury and not the trial judge).

56. *Powell*, 590 S.E.2d at 555; VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003). Section 19.2-264.4(B) states in pertinent part:

> In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence . . . .
>
> Evidence 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.

VA. CODE ANN. § 19.2-264.4(B).

57. *Powell*, 590 S.E.2d at 555.

58. *Id.*

59. *Id.* (internal quotation marks omitted); *see* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); Scates v. Commonwealth, 553 S.E.2d 756, 761 (Va. 2001) (restating the general rule "that evidence of other offenses should be excluded if offered merely for the purpose of showing that the accused was likely to commit the crime charged in the indictment").

60. *Powell*, 590 S.E.2d at 555.

aggravating factors . . . were present" and not to the "broader issues of due process protections afforded in the penalty determination phase of all capital murder trials."[61] The court also found that there was not a "relaxed evidentiary standard" during the sentencing phase in Virginia.[62] The court stated that Virginia Code section 19.2-264.4(B) "expressly provides, and we have consistently held, that the Commonwealth must prove the existence of one or both aggravating factors beyond a reasonable doubt."[63] Further, the court ruled that *Ring* does not subject unadjudicated criminal act evidence to a "heightened reliability" standard in capital sentencing and Powell's claim that hearsay evidence is allowed under Virginia Code section 19.2-264.4(B) was "simply wrong."[64] The court found that the trial court's determination, that Virginia's capital charging and sentencing scheme was constitutional, was not erroneous.[65]

C. *Limiting Voir Dire and Failure to Strike Jury Panel*

Powell made two claims concerning the trial court's handling of the voir dire process.[66] First, Powell argued that the trial court erred in not allowing him to question potential jurors about their ability to remain impartial in the face of the knowledge that Powell had previously been convicted for the capital murder of Stacey.[67] Although Powell conceded that *Barker v. Commonwealth*[68] makes knowledge of a defendant's prior conviction grounds for dismissing a potential juror, Powell argued that the jury members would inevitably hear about the prior conviction at trial and he was entitled to question them about its effect on their judgment.[69] The court began by stating that the purpose of voir dire was " 'to ascertain whether [a prospective juror] is related to either party, or has any

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61. *Id.*

62. *Id.*

63. *Id.*; *see* Clark v. Commonwealth, 257 S.E.2d 784, 791 (Va. 1979) (finding that aggravating factors must be proven by the Commonwealth beyond a reasonable doubt).

64. *Powell*, 590 S.E.2d at 555–56; *see* Jackson v. Commonwealth, 590 S.E.2d 520, 526 (Va. 2004) (stating that "Code § 19.2-264.4(B) does not contain a relaxed evidentiary standard or produce unreliable determinations of aggravating factors"); Lovitt v. Warden, 585 S.E.2d 801, 826 (Va. 2003) (finding that mitigation evidence classified as hearsay was not improperly excluded under section 19.2-264.4(B)). For a complete discussion and analysis of *Jackson* and *Lovitt*, *see generally* Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 533 (2004) (analyzing (Jerry) Jackson v. Commonwealth, 590 S.E.2d 520 (2004)), and Meghan H. Morgan, Case Note, 16 CAP. DEF. J. 573 (2004) (analyzing Lovitt v. Warden, 585 S.E.2d 801 (Va. 2003)).

65. *Powell*, 590 S.E.2d at 556.

66. *Id.* at 559.

67. *Id.*

68. 337 S.E.2d 729 (Va. 1985).

69. *Powell*, 590 S.E.2d at 559; *see* Barker v. Commonwealth, 337 S.E.2d 729, 733 (Va. 1985) (finding knowledge of a defendant's prior conviction for the charged offense to be grounds for the dismissal of a potential juror).

interest in the cause, or has expressed or formed any opinion, or is sensible of any bias or prejudice therein.'"[70] With such a stated purpose, venirepersons may only be asked questions relevant to a determination of whether they should be removed for cause.[71] The court then recited the test for relevancy from *LeVasseur v. Commonwealth*.[72] "[t]he test of relevancy is whether the questions relate to any of the four criteria set forth in the statute. If an answer to the question would necessarily disclose, or clearly lead to the disclosure of the statutory factors of relationship, interest, opinion, or prejudice, it must be permitted."[73] The court found that the question Powell posed to the jury would not have illuminated any of "the four statutory factors of relationship, interest, opinion, or prejudice."[74] The court ruled that whether to allow the question was within the trial court's discretion and that the trial court did not err in disallowing Powell's question.[75]

Second, Powell claimed that the five jurors that were subjected to his question concerning the prior conviction should have been disqualified rather than simply instructed to disregard the question.[76] Powell contended that this conclusion was compelled by *Barker*.[77] The court ruled that the cause of the potential jurors grounds for dismissal in this case was Powell's question and that, therefore, the jurors were not required to be dismissed under the "invited error" doctrine.[78] The invited error doctrine prevents a defendant from benefitting from trial counsel's "voluntary, strategic choice."[79] For this reason, the court ruled that the trial judge did not err in allowing the jurors to be impaneled.[80]

D. Mitigating Mental Health Evidence

The court combined two issues raised by Powell together with its mandatory review of Powell's death sentence as required by the Virginia statute because

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70. *Powell*, 590 S.E.2d at 559 (quoting VA. CODE ANN. § 8.01-358 (Michie 2000)).

71. *Id.*

72. 304 S.E.2d 644 (Va. 1983).

73. *Powell*, 590 S.E.2d at 559 (quoting LeVasseur v. Commonwealth, 304 S.E.2d 644, 653 (Va. 1983)); *LeVasseur*, 304 S.E.2d at 653.

74. *Powell*, 590 S.E.2d at 559.

75. *Id.*

76. *Id.*

77. *Id.*; *see Barker*, 337 S.E.2d at 733 (requiring dismissal of potential jurors with knowledge of defendant's prior conviction).

78. *Powell*, 590 S.E.2d at 559–60.

79. *Id.* at 560 (citing Moore v. Hinkle, 527 S.E.2d 419, 426 (Va. 2000), Saunders v. Commonwealth, 177 S.E.2d 637, 638 (Va. 1970), and Clark v. Commonwealth, 120 S.E.2d 270, 273 (Va. 1961)).

80. *Id.*

Powell's claims "parallel[ed] the mandatory review of every death sentence th[e] Court conducts pursuant to Virginia Code section 17.1-313(C)."[81] The court first addressed Powell's claim that the jury's verdict was the result of passion, prejudice, or some other arbitrary factor.[82] The court next reviewed the decision to determine if the sentence of death was disproportionate when compared to similar cases.[83]

1. Passion, Prejudice, or Some Other Arbitrary Factor

Powell made three separate contentions concerning the jury's passion, prejudice, or some other arbitrary factor in reaching a verdict.[84] First, Powell claimed that the "graphic and irrelevant" testimony of Kristie Reed concerning the attack by Powell "virtually assured . . . a sentence of death."[85] The court found the testimony and evidence of the attack on Kristie relevant to a determination of guilt as well as relevant to a determination of future dangerousness during penalty deliberations.[86] The court ruled that although graphic testimony of "[t]he brutal rape and attempted murder of a thirteen-year-old child are undoubtedly among the most abhorrent crimes that can be placed in evidence before a jury contemplating whether to impose a sentence of death," there is no presumption that the jury cannot remain unbiased in the face of such testimony.[87]

Powell's second contention, not raised at trial, was that his death sentence should have been set aside because the verdict form the jury used allowed it to sentence Powell to life and a fine but did not instruct the jury, as did the judge, to use the form if neither aggravating factor had been proven beyond a reasonable doubt.[88] The court reviewed the trial record and found no indication that the jury did not fairly consider all the evidence in mitigation and aggravation and that the jury found both aggravating factors beyond a reasonable doubt.[89] The court found "nothing to suggest that the jury, or the trial court in reviewing the

81. *Id.*; *see* VA. CODE ANN. § 17.1-313(C) (Michie 2003) (providing for the mandatory review of every death sentence handed down in Virginia to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant").

82. *Powell*, 590 S.E.2d at 561.

83. *Id.* at 562.

84. *Id.* at 561.

85. *Id.* at 560 (internal quotation marks omitted).

86. *Id.* at 561.

87. *Id.* (citing Bailey v. Commonwealth, 529 S.E.2d 570, 586 (Va. 2000)).

88. *Powell*, 590 S.E.2d at 561.

89. *Id.*

verdict, imposed the death sentence under the influence of passion, prejudice, or other arbitrary factors."[90]

Finally, Powell contended that the error in the jury verdict form entitled him to a new sentencing proceeding.[91] The court ruled that because Powell did not raise the issue at trial, he had procedurally defaulted the claim.[92] The court ruled that the "arbitrary factor" language of Virginia Code section 17.1-313(C)(1) was not to be used to raise an issue barred by failure to object at trial.[93] The court concluded that the alleged erroneous life sentence verdict form could be the basis for commuting a sentence of death but could not be a basis for a new sentencing proceeding.[94]

2. *Proportionality Review*

Citing his mental health problems and inadequate treatment by the state when he was in custody as a juvenile, Powell claimed that the sentence of death in his case was disproportionate "when compared to similar cases considering both the crime and the defendant."[95] The court identified the applicable mitigating factor in Virginia Code section 19.2-264.4(B), which provides as a mitigating factor the inability of the defendant " 'to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.' "[96] The court found that Powell's psychologist could not particularize Powell's mental health problems nor did he testify that Powell satisfied the strictures of section 19.2-264.4(B).[97] This testimony was heard by the jury, and the court concluded that the jury did not consider it a sufficient mitigating factor.[98]

Next, the court conducted its statutorily mandated review of Powell's sentence of death.[99] The court was required "to conduct a comparative review of the death sentence imposed in this case with other capital murder cases, including those where a life sentence was imposed."[100] The court observed that

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90. *Id.*

91. *Id.*

92. *Id.*

93. *Id.* (citing Quintana v. Commonwealth, 295 S.E.2d 643, 653 n.6, 656 n.7 (Va. 1982)); *see* VA. CODE ANN. § 17.1-313(C)(1) (Michie 2003) (providing for the mandatory review of every death sentence handed down in Virginia to determine "[w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor").

94. *Powell*, 590 S.E.2d at 561-62.

95. *Id.* at 562.

96. *Id.* (quoting VA. CODE ANN. § 19.2-264.4(B) (Michie 2000)).

97. *Id.*

98. *Id.*

99. *Id.*; *see* VA. CODE ANN. § 17.1-313(C)(1) (Michie 2003) (providing for the mandatory review of every death sentence).

100. *Powell*, 590 S.E.2d at 562.

" '[t]he purpose of [this] comparative review [was] to reach a reasoned judgment regarding what cases justify the imposition of the death penalty.' "[101] The court focused its analysis on cases involving murder during the commission of rape or attempted rape and a sentence of death that was predicated on either a finding of future dangerousness or vileness.[102] The court also reviewed cases in which the defendant received a life sentence when facing similar charges.[103] After reviewing the aggravating and mitigating circumstances contained in the record, the court ruled that Powell's sentence was not disproportionate when compared with similar cases.[104]

IV. Application in Virginia

A. Conflation of Indictment and Bill of Particulars

In denying Powell's double jeopardy claim, the court relied on the fact that Kristie Reed was identified in the bill of particulars as the victim of the attempted rape that made Stacey's murder a capital offense.[105] The identity of the attempted rape victim was unknown without the bill of particulars.[106] Thus, double jeopardy would have likely barred Powell's second trial because his initial capital conviction might have been predicated on the attempted rape of Stacey, a crime for which the evidence was insufficient. The decision of the Supreme Court of Virginia reversing Powell's original death sentence would have barred retrial because that decision amounted to an appellate acquittal under *Burks*.[107]

Although recognizing that a bill of particulars is not a charging document, the court permitted the bill of particulars in this case to define the factual specifics of the generic crime found by the grand jury.[108] The bill of particulars could have properly served to narrow the indictment by specifically alleging the at-

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101. *Id.* (quoting Orbe v. Commonwealth, 519 S.E.2d 808, 817 (Va. 1999)).

102. *Id.* at 562. The Supreme Court of Virginia cited the following cases in conducting its review: Patterson v. Commonwealth, 551 S.E.2d 332 (Va. 2001); Swisher v. Commonwealth, 506 S.E.2d 763 (Va. 1998); Pruett v. Commonwealth, 351 S.E.2d 1 (Va. 1986); Coleman v. Commonwealth, 307 S.E.2d 864 (Va. 1983); Mason v. Commonwealth, 254 S.E.2d 116 (Va. 1979); and Smith v. Commonwealth, 248 S.E.2d 135 (Va. 1978).

103. *Powell*, 590 S.E.2d at 563 (citing Horne v. Commonwealth, 339 S.E.2d 186 (Va. 1986) and Keil v. Commonwealth, 278 S.E.2d 826 (Va. 1981)); *see also* Burns v. Commonwealth, 541 S.E.2d 872, 896 (Va. 2001) (citing *Keil* and *Horne* as representative cases in which a life sentence was imposed for capital murder with attempted rape as the predicate offense).

104. *Powell*, 590 S.E.2d at 563.

105. *Id.* at 554.

106. *Id.*

107. *See Burks*, 437 U.S. at 18 ("Since we hold today that the Double Jeopardy Clause precludes a second trial once the reviewing court has found the evidence legally insufficient, the only 'just' remedy available for that court is the direction of a judgment of acquittal.").

108. *Powell*, 590 S.E.2d at 554.

tempted rape of Kristie because the initial indictment did not allege a victim.[109] Depending on the evidence presented to the grand jury, however, it could have been an impermissible expansion of the indictment by the bill of particulars. If the grand jury had heard evidence of the attempted rape of Stacey and had issued the indictment based on that evidence, the bill of particulars would have impermissibly expanded the charged offense to include the attempted rape of Kristie. The expansion of an indictment in this manner transfers the power of charging the defendant from the grand jury to the prosecution and violates section 19.2-217.[110]

B. Confusing the Evidentiary Standard Applicable to Mitigating and Aggravating Evidence

In *Lockett v. Ohio*,[111] the United States Supreme Court held that, under the Eighth and Fourteenth Amendments, the sentencer cannot be precluded from considering, as a mitigating factor, any relevant evidence proffered by the defense as a basis to consider a lesser sentence than death.[112] Moreover, *Green v. Georgia*[113] held that exclusion of highly relevant mitigating evidence through mechanical application of the hearsay rule is a violation of the Due Process Clause of the Fourteenth Amendment.[114]

In Virginia, a defendant is statutorily precluded from presenting certain mitigating evidence.[115] The first sentence of the second paragraph of Virginia Code section 19.2-264.4(B) explicitly commands that all evidence in mitigation is subject to the rules of evidence.[116] Furthermore, the Supreme Court of Virginia has held, citing to 19.2-264.4(B), that hearsay evidence is inadmissible during the penalty phase of a capital murder trial.[117] Because the limitations placed on the capital defendant by section 19.2-264.4(B) lead to arbitrary determinations of death sentences and violate a defendant's due process rights by

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109. *Id.*

110. *See* VA. CODE ANN. § 19.2-217 (Michie 2000) ("[N]o person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury in a court of competent jurisdiction . . . .").

111. 438 U.S. 586 (1978).

112. Lockett v. Ohio, 438 U.S. 586, 604 (1978).

113. 442 U.S. 95 (1979) (per curiam).

114. Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam).

115. *See* VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003) (providing for the application of the rules of evidence to the admission of mitigating evidence).

116. *Id.*

117. *See Lovitt*, 585 S.E.2d at 826 (finding that mitigation evidence classified as hearsay was not improperly excluded under section 19.2-264.4(B)).

ignoring the mandates of *Lockett* and *Green*, the statute must be declared unconstitutional.[118]

In *Powell*, the Supreme Court of Virginia, relying on *Louitt*, ruled that section 19.2-264.4(B) does not allow introduction of hearsay evidence, not otherwise admissible, during the penalty phase.[119] Issued on the same day, *Jackson v Commonwealth*[120] states even more starkly that "[e]vidence relevant to sentencing in the penalty phase of a capital murder trial is admissible, 'subject to the rules of evidence governing admissibility.' "[121] Insofar as *Jackson* and *Powell* relate to the introduction of *aggravating* evidence, the Supreme Court of Virginia is clearly correct. In *Ring*, the United States Supreme Court held that any fact upon which the legislature authorizes an increase in punishment is the functional equivalent of an element.[122] Evidence offered to prove an element must be subjected to evidentiary rules that ensure reliability and diminish the unduly prejudicial effect of some evidence that, in the capital case context, leads to unreliable and arbitrary impositions of the death penalty. Otherwise, a defendant's Due Process and Confrontation Clause rights would be severely restricted.[123]

This rationale does not apply to the introduction of mitigating evidence. In *Eddings v Oklahoma*,[124] the Supreme Court reaffirmed *Lockett* by declaring that a "State may not by statute preclude the sentencer from considering any mitigating factor."[125] In doing so, the Court held that mitigating evidence need not provide a legal excuse for conduct but that a jury should be allowed to consider any relevant evidence that may explain a defendant's behavior.[126] Furthermore, *Mills v Maryland*[127] held that a jury cannot be required nor be misled to believe that it must unanimously find the existence of mitigating circumstances.[128] This precedent, when read in combination with *Ring*, compels the determination that mitigating factors are not elements and strict evidentiary standards necessary for

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118. For a motion challenging the constitutionality of Virginia Code section 19.2-264.4(B), please contact the Virginia Capital Case Clearinghouse at (540) 458-8557.

119. *Powell*, 590 S.E.2d at 555; *see* VA. CODE ANN. § 19.2-264.4(B) (providing that evidence at sentencing is admissible "subject to the rules of evidence governing admissibility").

120. 590 S.E.2d 520 (Va. 2004).

121. *Jackson*, 590 S.E.2d at 526 (quoting VA. CODE ANN. § 19.2-264.4(B)).

122. *Ring*, 536 U.S. at 605.

123. *See* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him."); Specht v. Patterson, 386 U.S. 605, 608 (1967) (requiring procedural safeguards for a determination of future dangerousness in a separate proceeding that increased the sentence for those convicted under the Colorado Sex Offenders Act).

124. 455 U.S. 104 (1982).

125. Eddings v. Oklahoma, 455 U.S. 104, 113–14 (1982).

126. *Id.*

127. 486 U.S. 367 (1988).

128. Mills v. Maryland, 486 U.S. 367, 384 (1988).

just determinations of the existence of elements are neither necessary nor permitted in the determination of mitigating factors.

C. *Perpetuation of Inadequate Proportionality Review*

With *Powell*, the Supreme Court of Virginia perpetuates its inadequate proportionality review by relying solely on cases that come before the court, rather than all capital cases.[129] In *Burns*, Justice Kinser stated that "our proportionality analysis encompasses all capital murder cases *presented to this Court* for review and is not limited to these selected cases."[130] If the court limits its review to only cases that come before it, its review "encompasses" very little.

Because cases that result in a sentence of death are by necessity reviewed by the Supreme Court of Virginia under section 17.1-313, the court sees all death cases.[131] Life cases must be appealed first to the Virginia Court of Appeals. Those cases only reach the Supreme Court of Virginia as discretionary appeals, and then only for alleged trial error.[132] These cases, therefore, cannot be based on the sentencing proceedings. As a result, the record in life cases reflects trial error issues that pertain very little to a comparative review of sentencing decisions. For example, in *Horne v. Commonwealth*,[133] a case cited for comparison by the *Powell* and *Burns* courts, the issue appealed was an alleged Fourth Amendment search and seizure violation.[134] The court cannot adequately compare like cases when the record of cases it chooses to compare are manifestly different.

The Supreme Court of Virginia must expand the cases it uses in its statutory review to include all cases of similarly charged defendants. This necessitates the inclusion of cases that were not appealed after the imposition of a life sentence. Only the trial court record will provide an adequate basis for the supreme court to compare cases resulting in death and those resulting in life. This expansion would allow the court to review the actual sentencing proceedings in cases that resulted in life sentences rather than reviewing decisions based on irrelevant trial

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129. *Powell*, 590 S.E.2d at 562–63.

130. *Burns*, 541 S.E.2d at 896–97 (emphasis added) (internal quotation marks omitted).

131. *See* VA. CODE ANN. § 17.1-313(C)(1) (Michie 2003) (providing for the mandatory review of every death sentence).

132. Life sentences are not appealed because with a capital conviction a life sentence is the minimum sentence that can be imposed. *See* VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) ("Upon a finding that the defendant is guilty of an offense which may be punishable by death, 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.").

133. 339 S.E.2d 186 (Va. 1986).

134. *See Horne*, 339 S.E.2d at 187 (stating that the sole issue to be decided was "[t]he issue [of] whether Sylvester Junior Horne was constitutionally in custody at the time he made certain statements to the police which led ultimately to his conviction for rape and capital murder during the commission of, or subsequent to, rape").

error grounds. Until the court expands its range of cases for proportionality review, the adequacy of its results will remain questionable.

V. Conclusion

Powell illustrates the flexible charging requirements from which the Commonwealth benefits. Absent a specific indictment, the Commonwealth can issue a bill of particulars that adds factual specificity to an element of the charged offense. This case also underscores the court's tendency to confuse the evidentiary standard that is constitutionally required in the presentation of mitigating evidence with the standard applicable to aggravating evidence. The court, relying on section 19.2-264.4(B), continues its effort to limit *Lockett* and *Eddings*, and ignore *Green*. Finally, this case serves to continue the Supreme Court of Virginia's inadequate proportionality review. Until the pool of cases used as a basis of comparison is expanded to include more life sentence cases with an adequate record of the sentencing proceedings, the Supreme Court of Virginia's review procedures will remain ineffective.

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CASE NOTES:

Cases of Interest