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Lewis v. Commonwealth 593 S.E.2d 220 (Va. 2004)

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I. Facts

Before dawn on October 30, 2002, Matthew J. Shallenberger and Rodney L. Fuller, both bearing shotguns, entered the Danville mobile home of Julian Clifton Lewis ("Julian") and his wife Teresa Wilson Bean Lewis ("Lewis") through an unlocked back door. Shallenberger told Lewis, "Teresa, get up," and Lewis went into the kitchen. Shallenberger shot Julian several times while Fuller entered the room of Charles J. Lewis ("Charles"), Lewis's adult stepson, and shot him three times. Lewis returned to her bedroom to collect her husband's pants and wallet as he lay fatally wounded. Fuller entered the kitchen, where Shallenberger and Lewis stood counting the contents of the wallet, and declared that Charles "wouldn't die." Fuller retrieved Shallenberger's gun, returned to Charles's room, and shot him twice more. Fuller and Shallenberger collected the spent shells, split the money Lewis had taken from the wallet, and left the mobile home.[1]

At approximately 3:55 a.m., forty-five minutes after the shootings, Lewis phoned Pittsylvania County emergency services to report that a man had entered her home and shot her husband and his son. Twenty-three minutes later, sheriff's deputies arrived to discover Charles dead and Julian moaning in the bedroom. Julian died of blood loss after telling the officers, "[m]y wife knows who done this to me."[2]

Although Lewis initially denied any involvement in the murders, on November 7, 2002, she confessed to police that she had offered to pay Shallenberger to kill her husband and that she had let him into the mobile home, where he shot both Julian and Charles.[3] The next day, Lewis told police that Fuller and Lewis's own sixteen year-old daughter Christie Bean had also been involved in the murders. Lewis met Shallenberger and Fuller at a Danville retail store in the autumn of 2002. Soon thereafter, Lewis and Shallenberger developed a plan to kill Julian and divide the proceeds from his life insurance policy. To facilitate this plan, Lewis provided the two men with $1,200 to purchase weapons and ammu-

1. Lewis v. Commonwealth, 593 S.E.2d 220, 222–23 (Va. 2004).

2. *Id.* at 223–24.

3. *Id.* at 224. Lewis was the primary beneficiary on Julian's life insurance policy and the secondary beneficiary on Charles's will and life insurance policy. *Id.* at 222. On the day of the murder, Lewis called Julian's employer to ask him for her husband's paycheck and sought information from Charles's commanding officer about Charles's life insurance policy. *Id.* at 224. Charles was in the Army Reserves and on October 30 had been visiting his family before reporting to active duty with the National Guard in Maryland. *Id.* at 222–23.

nition. The initial plan provided that Shallenberger and Fuller would kill Julian on his way home from work and make it look like a robbery. After the first plan failed, they decided to kill Julian in his home and then kill his son Charles while he was home for his father's funeral. When Charles unexpectedly came home before October 30, they amended the plan a final time and succeeded in killing both Julian and Charles on the same morning.[4]

A grand jury indicted Lewis on November 20, 2002, for seven offenses, including the capital murders for hire of Charles and Julian Lewis, conspiracy to commit capital murder, robbery, use of a firearm to commit murder, and use of a firearm to commit robbery.[5] Lewis pleaded guilty to all of the charges, and the circuit court found, after a competency evaluation, that she did so "voluntarily, intelligently, and knowingly."[6] After considering a summary of the Commonwealth's evidence and the presentence report, the circuit court found that Lewis's "conduct was outrageously or wantonly vile, horrible, or inhuman" in that it involved both aggravated battery and depravity of mind.[7] The circuit court sentenced her to death for both capital murder charges.[8]

In her appeal to the Supreme Court of Virginia, Lewis argued that her death sentences were excessive and disproportionate in comparison with similar cases. She also argued that the circuit court erred in finding that her actions satisfied the vileness aggravator required for death eligibility by Virginia Code section 19.2-264.2, the court sentenced her to death "under the influence of passion, prejudice and other arbitrary factors," and the court erred in denying her motion to declare unconstitutional Virginia's death penalty statute.[9] Finally, she claimed that the

4. *Id.* at 222–24.

5. *Id.* at 221; *see* VA. CODE ANN. § 18.2-31(2) (Michie 2004) (stating that "[t]he willful, deliberate, and premeditated killing of any person by another for hire" constitutes capital murder); VA. CODE ANN. § 18.2-22 (Michie 2004) (stating that conspiracy to commit a felony is itself a felony); VA. CODE ANN. § 18.2-58 (Michie 2004) (stating that "robbery . . . by other violence to the person" is a felony punishable by imprisonment for life); VA. CODE ANN. § 18.2-53.1 (Michie 2004) (making it "unlawful for any person to use . . . [a] firearm . . . in a threatening manner while committing . . . murder").

6. *Lewis*, 593 S.E.2d at 221. Dr. Barbara G. Haskins, the psychiatrist who found Lewis competent to stand trial, noted that Lewis had a Full Scale I.Q. of 72, placing her within the "borderline range of mental retardation." *Id.*

7. *Id.* at 222; *see* VA. CODE ANN. § 19.2-299(A) (Michie 2004) (requiring a court, "when the defendant pleads guilty without a plea agreement," to "direct a probation officer . . . to thoroughly investigate and report upon the history of the accused . . . to fully advise the court so the court may determine the appropriate sentence to be imposed"); VA. CODE ANN. § 19.2-264.2 (Michie 2004) (defining the aggravating factors that must be proven in order for a person convicted of capital murder to be eligible for a death sentence). In the postsentencing hearing, the circuit court concluded that the triggermen, Shallenberger and Fuller, had committed aggravated battery upon the victims and imputed that battery to Lewis, although she took no part in the actual slayings. *Lewis*, 593 S.E.2d at 222.

8. *Lewis*, 593 S.E.2d at 222.

9. *Id.* at 228–29.

court erred in sentencing her to death because the indictments "omitted essential aggravating elements."[10]

II. Holding

In denying Lewis's appeal, the Supreme Court of Virginia held that because of the "special heinousness associated with the murder for hire in this particular case," the death sentences were neither excessive nor disproportionate.[11] The court did not decide whether the circuit court erred in imputing to Lewis the aggravated battery by the triggermen because it concluded that the circuit court had ample evidence to determine that Lewis's own conduct in the scheme demonstrated her depravity of mind and thus satisfied the vileness aggravator.[12] In addition, the court found no evidence in the record to support Lewis's argument that the sentencing court was influenced by passion or prejudice.[13] The court also held that by pleading guilty to the charges, Lewis waived her arguments concerning the constitutionality of Virginia's death penalty statute.[14] Finally, the court found that Lewis had procedurally defaulted her claim concerning the validity of the indictments because she failed to raise an objection to them in circuit court.[15]

III. Analysis

A. Proportionality Claims

1. Gender

Lewis first argued that her death sentence was "excessive and disproportionate" in comparison to similar cases involving female defendants with no violent criminal history and who accepted responsibility for their crimes.[16] Without addressing Lewis's points about her history and remorse, the Supreme Court of

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10. *Id.* at 225–28; *see* VA. CODE ANN. § 17.1-313(C)(2) (Michie 2003) (requiring that the Supreme Court of Virginia evaluate if a sentence of death "is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant"); VA. CODE ANN. § 19.2-264.2 (stating that "a sentence of death shall not be imposed unless the court or jury shall . . . find . . . that [the defendant's] conduct in committing the offense for which [she] stands charged was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim"); VA. CODE ANN. § 17.1-313(C)(1) (stating that the Supreme Court of Virginia must decide if a lower court imposed a death sentence "under the influence of passion, prejudice or any other arbitrary factor").

11. *Lewis*, 593 S.E.2d at 226–27.

12. *Id.* at 227–28.

13. *Id.* at 228.

14. *Id.*

15. *Id.* at 228–29; *see* VA. SUP. CT. R. 5:25 (disallowing claims of error that were not "stated with reasonable certainty at the time of the ruling").

16. *Lewis*, 593 S.E.2d at 225.

Virginia stated that it could not consider Lewis's gender in its proportionality review because "[a]ll criminal statutes in this Commonwealth must be applied without regard to gender."[17] Interpreting Lewis's claim as an invitation "to apply Virginia's capital murder statutes in a discriminatory fashion based upon gender," the court rejected it.[18]

2. *Capital Murder for Hire*

Lewis next argued that her sentence was "excessive and disproportionate" because she merely employed the men who killed Julian and Charles.[19] She further argued that the Supreme Court of Virginia had never upheld a death sentence in a murder for hire case in which vileness was the sole aggravator.[20] The court responded by outlining the general rule for proportionality review, as stated in Virginia Code section 17.1-313(C)(2), that "the court shall consider and determine . . . [w]hether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant."[21] Referring to its earlier decisions, the court explained the test as whether " 'juries in this jurisdiction generally approve the supreme penalty for comparable or similar crimes.' "[22] The court emphasized that it does not inquire "why the trier of fact imposed the sentence of life instead of the sentence of death," but instead looks to the cases that " 'justify the imposition of the death penalty.' "[23] In its search to "identify and invalidate the aberrant sentence of death," the Supreme Court of Virginia examined similar capital murder for hire cases in which the defendant received the death penalty and held "that given the special heinousness . . . in this particular case, emphasizing that the defendant was the mastermind of the plan to kill her husband and stepson solely for greed and monetary gain, the sentences of death are neither excessive nor disproportionate."[24]

3. *Life Sentences for the Triggermen*

Lewis's final proportionality argument rested on the fact that both of her co-defendants received life sentences, despite their more direct involvement in

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17. *Id.* at 226.

18. *Id.*

19. *Id.*

20. *Id.*

21. VA. CODE ANN. § 17.2-313(C)(2) (Michie 2003).

22. *Lewis*, 593 S.E.2d at 226 (quoting Wolfe v. Commonwealth, 576 S.E.2d 471, 490 (Va. 2003)).

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

24. *Id.* (citing *Wolfe*, 576 S.E.2d at 471; Williams v. Commonwealth, 472 S.E.2d 50, 54 (Va. 1996); Murphy v. Commonwealth, 431 S.E.2d 48, 55 (Va. 1993); Fisher v. Commonwealth, 374 S.E.2d 46, 55 (Va. 1988); Stockton v. Commonwealth, 314 S.E.2d 371, 389 (Va. 1984); Clark v. Commonwealth, 257 S.E.2d 784, 794 (Va. 1979)).

the killings.[25] The court refused to make a proportionality comparison among the sentences of co-defendants, stating that it " 'ha[s] rejected efforts by defendants to compare their sentences with those received by confederates.' "[26] Relying on its past decisions, the Supreme Court of Virginia rejected Lewis's argument.[27]

B. Vileness

1. Aggravated Battery

Lewis next claimed that the circuit court erred in finding the vileness element by imputing to her the aggravated batteries committed by Shallenberger and Fuller.[28] She argued that because she did not participate in the actual murders, she committed no aggravated battery.[29] The Supreme Court of Virginia noted that Virginia Code section 19.2-264.2 provides that vileness can be demonstrated by " 'torture, depravity of mind, or an aggravated battery to the victim.' "[30] The court then cited its decision in *Beck v. Commonwealth*[31] for the proposition that " '[p]roof of any one of these three components will support a finding of vileness.' "[32] The court clarified this position in *Hedrick v. Commonwealth*,[33] when it stated that " 'the term "vileness" includes three separate and distinct factors, with the proof of any one factor being sufficient to support a finding of vileness.' "[34] The court stated that it did not need to decide the aggravated battery issue raised by Lewis because Lewis's conduct demonstrated depravity of mind.[35] The court, therefore, relied on the circuit court's finding of depravity of mind to sustain the death sentence.[36]

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25. *Id.* at 226–27.

26. *Id.* at 227 (quoting *Murphy*, 431 S.E.2d at 53). In support of its refusal to consider the sentences of Lewis's co-defendants, the court also cited Thomas v. Commonwealth, 419 S.E.2d 606, 620 (Va. 1992); King v. Commonwealth, 416 S.E.2d 669, 679 (Va. 1992); Evans v. Commonwealth, 284 S.E.2d 816, 823 (Va. 1981). *Id.*

27. *Id.*

28. *Lewis*, 593 S.E.2d at 227.

29. *Id.*

30. *Id.* (quoting VA. CODE ANN. § 19.2-264.2 (Michie 2004)).

31. 484 S.E.2d 898 (Va. 1997).

32. *Lewis*, 593 S.E.2d at 227 (quoting Beck v. Commonwealth, 484 S.E.2d 898, 907 (Va. 1997)).

33. 513 S.E.2d 634 (Va. 1999).

34. *Lewis*, 593 S.E.2d at 227 (quoting Hedrick v. Commonwealth, 513 S.E.2d 634, 640 (Va. 1999)).

35. *Id.*

36. *Id.*

2. *Depravity of Mind*

Lewis also argued that the circuit court erroneously found that her actions demonstrated depravity of mind.[37] The Supreme Court of Virginia conclusively rejected this argument, stating that "the evidence of record is overwhelming that the defendant's conduct showed a depravity of mind."[38] The court provided specific examples of Lewis's conduct relevant to the depravity of mind issue.[39] In particular, the court noted that Lewis was the mastermind of the crimes, that she married and had her husband killed solely for money, that she involved her adolescent daughter in the scheme, that she allowed her husband to lie suffering before calling for help, and that she "showed no emotion or remorse" after his death.[40] The court found the family relationship to be significant evidence of depravity and stated that "but for the conduct of this defendant . . . the killings would not have occurred."[41] The court therefore held that the evidence was sufficient to support the circuit court's finding of vileness based on depravity of mind.[42]

C. *Passion, Prejudice, or Other Arbitrary Factors*

Lewis's next claim was that the circuit court imposed the death penalty "under the influence of passion, prejudice, and other arbitrary factors."[43] Lewis argued that her death sentence could not stand because the judge who sentenced her to death sentenced her confederates to life, despite the fact that as the triggermen they were more "directly culpable in the slayings."[44] She claimed, therefore, that the vileness of the crime should have been applied to all three perpetrators or applied to none at all.[45] Notwithstanding this argument, the court held that there was insufficient evidence in the record to support Lewis's prejudice argument.[46]

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37. *Id.*

38. *Id.*

39. *Id.* at 228.

40. *Lewis*, 593 S.E.2d at 228.

41. *Id.*

42. *Id.*

43. *Id.*; *see* VA. CODE ANN. § 17.1-313(C)(1) (Michie 2003) (requiring the Supreme Court of Virginia to determine whether a death sentence was imposed "under the influence of passion, prejudice or any other arbitrary factor").

44. *Lewis*, 593 S.E.2d at 228.

45. *Id.*

46. *Id.*

D. Procedurally Defaulted Claims

1. Constitutional Argument

Lewis argued that the circuit court erred in denying her motion challenging the constitutionality of Virginia's death penalty statutes.[47] The Supreme Court of Virginia refused to consider Lewis's arguments because she pleaded guilty to the offenses.[48] Relying on several of its past decisions, the court held that by entering a plea of guilty, Lewis waived her constitutional arguments.[49]

2. Faulty Indictments

Lewis concluded her appeal with an argument that the death sentence should not stand because the indictments "omitted essential aggravating elements."[50] The court, in accordance with Virginia Supreme Court Rule 5:25, stated that the "[d]efendant failed to assert this argument in the circuit court and, therefore, she may not assert the argument on appeal."[51] Therefore, because Lewis did not raise an objection to the indictments in circuit court, she defaulted this claim on direct appeal.[52]

IV. Application to Virginia Practice

A. Statutory Review

1. Gender

The *Lewis* opinion provides a cautionary tale for defense attorneys who might be tempted to rest their proportionality arguments on a category such as gender. In her appeal, Lewis phrased her plea for a consideration of her person solely in terms of her gender.[53] Although Virginia has not executed a woman since 1912, and despite the understandable question of why Lewis's case should be the one in which the Commonwealth has decided to break with tradition, her gender argument allowed the court to sidestep a real comparison of Lewis with similar defendants by asserting that it would not "apply Virginia's capital murder statutes in a discriminatory fashion based upon gender."[54] Lewis had other

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47. *Id.*

48. *Id.*

49. *Id.* (citing *Murphy*, 431 S.E.2d at 51; Savino v. Commonwealth, 391 S.E.2d 276, 278 (Va. 1990); Stout v. Commonwealth, 376 S.E.2d 288, 291 (Va. 1989)).

50. *Lewis*, 593 S.E.2d at 228–29.

51. *Id.* at 229 (citing VA. SUP. CT. R. 5:25).

52. *Id.*

53. *Id.* at 225. Lewis's gender claim relied primarily on the statutory language of VA. CODE ANN. § 17.1-313(C)(2) that the court must consider "both the crime and the defendant." *Id.*

54. *Id.* at 226; *see* Victor L. Strieb, *Death Penalty for Female Offenders, January 1, 1973, through June 30, 2003* (July 1, 2003), *available at* http://www.law.onu.edu/faculty/streib/femdeath.htm (providing

arguably valid proportionality claims, including her lack of violent criminal history, the fact that she confessed to the crimes and led police to the actual killers, and her borderline intellectual functioning.[55] The court, however, did not consider any of this evidence in its review because it was presented within the framework of an argument about gender.

2. Murder for Hire

It is interesting to note that in reporting its review of similar crimes, the Supreme Court of Virginia made no mention of the actual facts of any of the comparison murder for hire cases and instead relied on the facts of Lewis's case alone to uphold the death sentence.[56] Lewis argued that "there is no reported case in which this Court approved the death penalty for a 'mere hirer' due to the vileness predicate alone."[57] Indeed, the cases that the court cited include four murders for hire in which the defendants were the actual killers and two in which they were the hirers.[58] All six defendants received death sentences based either on future dangerousness alone or future dangerousness coupled with vileness.[59] The court acknowledged that there was little similarity among the cited murder for hire cases and Lewis's by stating that "the facts in all capital murder cases differ" and by upholding the sentence because of "the special heinousness associated with the murder for hire in this particular case."[60] *Lewis* seems to stand for the proposition that if the crime is especially bad, then the court can ignore its mandate to compare crimes and defendants and deny that a death sentence is disproportionate without comparing it to an appropriate set of similar cases.

3. The Triggermen

The Supreme Court of Virginia's treatment of Lewis's argument that the court should consider the sentences of her co-defendants in the proportionality

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data on death sentences for female offenders throughout the United States).

55. *Lewis*, 593 S.E.2d at 221, 224–25.

56. *Id.* at 226.

57. *Id.*

58. *Id.*; *see Wolfe*, 576 S.E.2d at 474–77, 490 (affirming the death sentence based on future dangerousness for the defendant's hiring of the actual killer and being directly involved with the slaying); *Williams*, 472 S.E.2d at 50–51 (affirming the death sentence based on future dangerousness for the actual killer); *Murphy*, 431 S.E.2d at 52–53 (affirming the death sentence based on future dangerousness and vileness for the actual killer); *Fisher*, 374 S.E.2d at 47–49, 55 (affirming the death sentence based on future dangerousness for the hirer who was directly involved in the slaying); *Stockton*, 314 S.E.2d at 385–86, 389 (affirming the death sentence based on future dangerousness and vileness for the actual killer); *Clark*, 257 S.E.2d at 786–87 (affirming the death sentence for the actual killer).

59. *Lewis*, 593 S.E.2d at 226.

60. *Id.*

review raises additional questions. In dismissing Lewis's claim, the court relied on its decisions in *Murphy v. Commonwealth*,[61] *Thomas v. Commonwealth*,[62] *King v. Commonwealth*,[63] and *Evans v. Commonwealth*[64] for the proposition that it need not consider the sentences of co-defendants.[65] A close look at those cases, however, reveals that the underlying rationale for the court's refusal to make a comparison of the sentences of co-defendants has its roots in just such a comparison. Without further explanation, *Murphy* simply cites *Thomas*, *King*, and *Evans*.[66] *Thomas* cites *King*, *Evans*, *Stamper v. Commonwealth*,[67] and *Coppola v. Commonwealth*.[68] *Evans* only cites *Stamper* and *Coppola*.[69] *King* and *Stamper* both stand for the proposition that the court does not need to compare the sentence of a defendant with that of a co-defendant convicted of a *lesser-included offense*.[70] In *Stamper*, the court stated that, "[w]e cannot fairly determine whether a death sentence is excessive or disproportionate by comparing it with sentences imposed upon convictions [of a confederate] for lesser included offenses, reached perhaps by compromise verdicts, even where there may be similarities in the evidence."[71] The court made clear in *King* that a comparison of the sentences of co-defendants convicted of different crimes "would amount to a comparison of apples and oranges."[72] A good portion, then, of the precedent on which the court in *Lewis* relied was simply inapplicable to her case, because her confederates were indeed convicted of the same, and not lesser-included, offenses.

In *Coppola*, the only applicable decision on which all of the Supreme Court of Virginia's precedents stand, the court actually did compare the co-defendants in its review of the death sentence.[73] Frank Coppola ("Coppola"), Joseph Miltier, Donna Mills, and Karen Coppola ("Karen") all participated in the murder and

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61. 431 S.E.2d 48 (Va. 1993).

62. 419 S.E.2d 606 (Va. 1992).

63. 416 S.E.2d 669 (Va. 1992).

64. 284 S.E.2d 816 (Va. 1981).

65. *Lewis*, 593 S.E.2d at 227; *see Murphy*, 431 S.E.2d at 53–54 (refusing to consider the sentences of co-defendants in proportionality review); *Thomas*, 419 S.E.2d at 620 (refusing to take note of the sentences that Thomas's co-defendants received); *King*, 416 S.E.2d at 679 (finding that a court need not compare the sentences of co-defendants who were convicted of lesser-included offenses with the sentence of the defendant); *Evans*, 284 S.E.2d at 823 (relying on previous cases for the court's refusal to compare the sentences of co-defendants).

66. *Murphy*, 431 S.E.2d at 53–54.

67. 257 S.E.2d 808 (Va. 1979).

68. *Thomas*, 419 S.E.2d at 620 (citing Stamper v. Commonwealth, 257 S.E.2d 808, 824 (Va. 1979); Coppola v. Commonwealth, 257 S.E.2d 797, 807 (Va. 1979)).

69. *Evans*, 284 S.E.2d at 823.

70. *King*, 416 S.E.2d at 679; *Stamper*, 257 S.E.2d at 824.

71. *Stamper*, 257 S.E.2d at 824.

72. *King*, 416 S.E.2d at 679.

73. *Coppola*, 257 S.E.2d at 807.

robbery of Muriel Hatchell.[74] Miltier and Mills received life sentences, but the jury sentenced Coppola to death.[75] In reviewing Coppola's sentence, the Supreme Court of Virginia distinguished Mills and Karen because they cooperated with the Commonwealth in its investigation, stating, "[t]heir cooperation puts them in a different category from . . . Coppola and diminishes the similarity of the cases."[76] The court then compared Miltier's conduct with that of Coppola and found that it was different enough to warrant a lesser sentence.[77] Coppola's "conduct towards Mrs. Hatchell . . . culminating in her death," the court stated, "appears . . . to have been more violent and vicious than that of Miltier, and thus distinguishable."[78] The court distinguished Miltier's conduct in reviewing Coppola's sentence, thus undermining its present insistence that it does not compare co-defendants. In short, the precedent upon which the Supreme Court of Virginia ostensibly relied in refusing to compare Lewis's conduct and sentence to those of her co-defendants actually has its basis in just such a comparison. The court in *Coppola* only held that it was not required to commute a defendant's death sentence simply because his co-defendant received life.[79] It was able to so hold precisely *because* it compared the conduct of all of the confederates. Given her level of cooperation with the police and her lack of violent conduct, Lewis might have fared better had the court more faithfully applied *Coppola*.

Federal death penalty law suggests that a comparison of the sentences that co-defendants receive is desirable, if not essential, when a court considers imposing the death penalty. The Federal Death Penalty Act requires that the trier of fact "shall" consider in mitigation whether "[a]nother defendant or defendants, equally culpable in the crime, will not be punished by death."[80] Virginia's own triggerman law, to which murder for hire is an exception, illustrates that the state takes seriously the importance of the actual killer's actions when considering a death sentence.[81] Fairness demands intra-crime proportionality review, especially in a case such as Lewis's, in which the circuit court chose to impute the aggravated battery committed by the triggermen to the hirer.[82] If it is true that

74. *Id.* at 800.

75. *Id.*

76. *Id.* at 807.

77. *Id.*

78. *Id.*

79. *Coppola*, 257 S.E.2d at 808.

80. 18 U.S.C. § 3592(a)(4) (2000); *see also* 21 U.S.C. § 848(m)(8) (2000) (requiring that identical mitigating factors must be considered in death penalty proceedings under the Anti-Drug Abuse Act).

81. *See* VA. CODE ANN. § 18.2-18 (Michie 2004) (stating that, except in cases of murder for hire, terrorism, and continuing criminal enterprise, "an accessory before the fact or principal in the second degree to a capital murder shall be indicted, tried, convicted and punished as though the offense were murder in the first degree").

82. *Lewis*, 593 S.E.2d at 222, 227.

"five Members of the Court have now expressly recognized that death is a different kind of punishment from any other which may be imposed in this country," as Justice Stevens observed in *Gardner v. Florida*,[83] then state courts should take more care to be sure that they reserve their death sentences for the worst of the worst.[84] Intra-crime proportionality review would be a strong step in the correct direction.

4. Passion and Prejudice

Lewis illustrates the superficiality of the Supreme Court of Virginia's statutory review for the influence of passion or prejudice. Instead of addressing Lewis's arguments about prejudice directly, the court dismissed them with a reference to the record.[85] Lewis's case involved a guilty plea, her confession led directly to the arrests of the actual killers, and the same judge sentenced all three participants.[86] The fact that the judge sentenced to death only the woman who fired no shots should merit a more careful review for prejudicial influences.

B. Vileness

Despite the Supreme Court of Virginia's holding that Lewis's depravity of mind was sufficient to satisfy the vileness aggravator and support her death sentence, its decision not to address the circuit court's possible error in imputing Shallengberger and Fuller's aggravated battery to Lewis raises a question about the distinction between the finding that a defendant is death-eligible and the decision to impose the death penalty. While either predicate—aggravated battery or depravity of mind—would have permitted a finding of vileness, both may have influenced the circuit court judge's ultimate decision to sentence Lewis to death. The direct appeal opinion, however, does not assess how much each predicate might have weighed in the actual sentencing decision. If the lower court's imputation of aggravated battery was in error and if it weighed heavily in the death decision, then depravity of mind alone might not have led the judge to impose the sentence.

In *Zant v. Stephens*,[87] the United States Supreme Court upheld a death sentence despite the fact that the Supreme Court of Georgia had invalidated as unconstitutional one of the aggravating factors found by the jury.[88] The Court found that the jury had sufficient evidence to make the decision to impose a

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83. 430 U.S. 349 (1977).
84. Gardner v. Florida, 430 U.S. 349, 357 (1977).
85. *Lewis*, 593 S.E.2d at 228.
86. *Id.*
87. 462 U.S. 862 (1983).
88. Zant v. Stephens, 462 U.S. 862, 891 (1983).

death sentence even if the prior conviction's aggravator was no longer valid.[89] In reversing the death sentence in *Tuggle v. Netherland*,[90] by contrast, the Court distinguished *Zant*.[91] In *Tuggle*, the Court noted that Tuggle's original jury had sentenced him to death on both the vileness and the future dangerousness aggravators.[92] The Commonwealth had presented psychological evidence of Tuggle's future dangerousness, but Tuggle was not able to rebut that evidence because he was denied the assistance of a defense psychiatric expert.[93]

After the Supreme Court of Virginia had affirmed Tuggle's conviction and sentence on direct appeal, the Supreme Court decided in *Ake v. Oklahoma*[94] that a court must provide an indigent defendant with a psychiatric expert if the prosecution relies on psychiatric evidence to assert future dangerousness.[95] In light of *Ake*, the Supreme Court of Virginia invalidated Tuggle's future dangerousness aggravator but upheld his death sentence because the jury had also found vileness.[96] In *Tuggle*, the United States Supreme Court emphasized that the absence of psychiatric evidence called into question the validity of the choice to impose death despite the jury's additional finding of vileness.[97] The Court stated: "[w]e may assume . . . that petitioner's psychiatric evidence would not have influenced the jury's determination concerning vileness. Nevertheless, the absence of such evidence may well have affected the jury's ultimate decision, based on all of the evidence before it, to sentence petitioner to death rather than life imprisonment."[98] The Court in *Tuggle* made a clear demarcation between the stages of death eligibility and death selection and emphasized that the evidence used at the selection stage must be valid.[99] By not considering whether the circuit court erred in its aggravated battery determination, the Supreme Court of Virginia may have violated *Tuggle*'s distinction between the finding of a death-eligible predicate and the actual imposition of the death sentence.

C. Procedural Default

Lewis's guilty plea forced her to waive essential arguments about the constitutionality of Virginia's death penalty statutes, but her failure to object to

89. *Id.* at 888–89.
90. 516 U.S. 10 (1995).
91. Tuggle v. Netherland, 516 U.S. 10, 14 (1995).
92. *Id.* at 11–12.
93. *Id.*
94. 470 U.S. 68 (1985).
95. Ake v. Oklahoma, 470 U.S. 68, 83–84 (1985).
96. *Tuggle*, 516 U.S. at 12.
97. *Id.* at 14.
98. *Id.*
99. *Id.*

the faulty indictment in the circuit court prevented her from challenging what was arguably the clearest error in the imposition of her death sentence. *Ring v. Arizona*[100] requires that aggravating factors, because they increase the maximum sentence to death, must be proven beyond a reasonable doubt as elements of the crime of capital murder.[101] If Lewis pleaded guilty to an indictment that did not include the elements of future dangerousness or vileness, then she pleaded guilty to a crime that is not death eligible. A close examination of the indictments and a timely objection could have provided her with a winning argument for a life sentence.

V. Conclusion

Lewis highlights some of the dangers of a guilty plea in a capital case without a sentence bargain. Because of Lewis's plea, she was unable to challenge the Commonwealth's evidence in a way that might have made a difference in her sentencing. The narrative of the crime came directly from the Commonwealth's evidence, giving the judge little reason to consider a version more favorable to a life sentence. The opinion did not mention mitigating evidence, although there were strong indications that such evidence was available.[102] Perhaps the greatest danger lay in Lewis's default of her strongest argument: she pleaded guilty to a crime for which she, by law, could arguably not have received a death sentence. By not objecting to the indictment in court, Lewis fell victim to Virginia Supreme Court Rule 5:25 and lost her opportunity to challenge her death sentence in the manner most likely to succeed.[103]

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100. 536 U.S. 584 (2002).

101. Ring v. Arizona, 536 U.S. 584, 609 (2002).

102. Lewis's borderline I.Q. score undermines the conclusion that she could have been the "mastermind" of the murder scheme, and her confession led police to the actual killers. *See Lewis*, 493 S.E.2d at 221 (noting Dr. Hasher's finding that Lewis was borderline mentally retarded).

103. Lewis, 593 S.E.2d at 229; *see* VA. SUP. CT. R. 5:25 (disallowing claims of error that were not "stated with reasonable certainty at the time of the ruling").

CASE NOTES:

Court of Appeals of Virginia