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VA. CODE ANN. § 19.2-264.5*

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I. Introduction

Virginia Code section 19.2-264.4 governs capital sentencing proceedings in Virginia.[1] During sentencing, the jury may impose the death penalty only if the Commonwealth proves, beyond a reasonable doubt, the existence of at least one statutory aggravating factor.[2] If the jury returns a death verdict, the court may set aside the sentence and impose life.[3] The judge may do so, pursuant to Virginia Code section 19.2-264.5, "[a]fter consideration of the [postsentence] report, and upon good cause shown."[4] The requirement of cause limits the trial judge's discretion to impose life.[5] At the same time, section 19.2-264.5 gives capital defendants the same right as those charged with misdemeanor and other felony offenses to request that the trial judge reduce the jury's sentence.[6]

In early February 2003 a Pittsylvania County jury convicted Roy Douglas Inge of capital murder in the slaying of a deputy police officer.[7] The jury deliberated for an hour and twenty minutes and recommended a sentence of death.[8] On April 24, 2003, after reviewing the presentencing report, Judge William Alexander concluded that the death penalty should not be imposed.[9] Despite the jury's recommendation, Judge Alexander took an unusual step and imposed a life

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* H.D. 755, 2004 Gen. Assem., Reg. Sess. (Va. 2004) (amending § 19.2-264.5).

1. VA. CODE ANN. § 19.2-264.4 (Michie 2004).

2. *See* VA. CODE ANN. § 19.2-264.4(C) (stating that "[t]he penalty of death shall not be imposed unless the Commonwealth shall prove beyond a reasonable doubt... that [the defendant] would commit criminal acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the offense was outrageously or wantonly vile"); *see also* Ring v. Arizona, 536 U.S. 584, 609 (2002) (holding that statutory aggravating factors that raise the maximum punishment effectively to death are elements of the offense and must be proven to a jury beyond a reasonable doubt).

3. *See* VA. CODE ANN. § 19.2-264.5 (Michie 2004) (stating that the court may set aside a death sentence upon review of the postsentence report and impose a life sentence).

4. *Id.*

5. *See* Basset v. Commonwealth, 284 S.E.2d 844, 854 (Va. 1981) (rejecting defendant's argument that § 19.2-264.5 "unconstitutionally discriminate[d] against him because its good cause provision impose[d] upon him a heavier burden in reducing a capital verdict than in reducing a non-capital verdict" (internal quotation marks omitted)).

6. *Id.*

7. Jamie C. Ruff, *Murderer Receives Life Sentence*, Richmond Times-Dispatch, April 25, 2003, at B1.

8. *Id.*

9. *Id.*

sentence with little to no explanation.[10] Apparently in response to the Inge case, the Virginia General Assembly amended Virginia Code section 19.2-264.5.[11]

II. Discussion

As noted above, the trial judge is the final word in the Virginia death-sentencing proceeding. Even if the jury finds a statutory aggravator beyond a reasonable doubt and determines after consideration of mitigating and aggravating circumstances that death is warranted, the trial judge can override that determination for good cause.[12] Prior law did not require the judge to explain his reason for setting aside the jury's determination that death should be imposed.[13] However, in 2004 the Assembly added to section 19.2-264.5 the following provision: "[I]f the court sets aside the sentence of death and imposes a sentence of imprisonment for life, it shall include in the sentencing order an explanation for the reduction in sentence."[14]

III. Analysis

The legislative history of section 19.2-264.5 does not reveal the motivation for the amendment. On its face, however, the new language prevents trial courts from arbitrarily ignoring jury determinations that death is the appropriate sentence. Although some research suggests that capital juries frequently misunderstand statutory sentencing standards and begin to consider what punishment to impose even prior to the penalty phase, the role of the jury in the criminal justice system remains sacrosanct.[15] Community participation in the criminal process ensures that the government does not exert an unchecked power over a defendant's fate.[16] The jury's limit on such arbitrary power is particularly important when a defendant's life is at stake.[17]

However, the concern represented by the amended language cannot be that a judge will arbitrarily impose death but rather that he will arbitrarily impose life. At the same time, because the Commonwealth cannot appeal the judge's final determination, the requirement that the judge explain the reduction in sentence

10. *Id.* Virginia Capital Case Clearinghouse records indicate that judges have overridden jury recommendations of death under Va. Code Ann. § 19.2-264.5 in only three other cases.

11. VA. CODE ANN. § 19.2-264.5 (Michie 2004).

12. *Id.*

13. VA. CODE ANN. § 19.2-264.5 (Michie Supp. 2003).

14. VA. CODE ANN. § 19.2-264.5 (Michie 2004).

15. William J. Bowers, *The Capital Jury Project: Rationale, Design, and Preview of Early Findings*, 70 IND. L. J. 1043, 1087, 1090–93 (1995).

16. Spaziano v. Florida, 468 U.S. 447, 482 (1984) (Stevens, J., dissenting). Justice Stevens added that "community participation is 'critical to public confidence in the fairness of the criminal justice system.' " *Id.* (quoting Taylor v. Louisiana, 419 U.S. 522, 530 (1975)).

17. *Id.* at 483.

serves little purpose. At most, the provision will dissuade the judge from acting out of emotion without first explaining his decision.

The statutory language and case law suggest the same conclusion. The Supreme Court of Virginia has consistently dismissed defendants' claims that trial courts improperly exercised their discretion when they refused to override jury recommendations of death.[18] The court has invariably found that evidence did not establish good cause for disturbing the jury's determination.[19] Although the court has not defined "good cause," the amended section 19.2-264.5 impliedly requires that trial judges state in writing the good cause upon which they base any decision to impose life over the jury's recommendation of death.[20]

Virginia has no equivalent requirement of explanation for the finding that death should be imposed. Under the Virginia procedure, the jury does not reveal anything about the factual basis for its decision except the statutory aggravating factor or factors that it found.[21] The judge, in turn, does not have to explain the refusal to override a jury's determination.[22]

Other capital jurisdictions require greater transparency in the decision to impose the death penalty. Under Florida law, for example, the trial court is the ultimate sentencing authority.[23] A jury weighs the aggravating and mitigating circumstances and makes an initial sentencing recommendation.[24] The judge then enters the final sentencing order.[25] By statute, the judge is required to set forth his findings explicitly as to the statutory aggravating and mitigating circum-

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18. *See Bassett*, 284 S.E.2d at 854 (finding that the trial court properly exercised its discretion in refusing to reduce the defendant's sentence because the trial judge had heard the evidence twice and "recognized the aggravating factors and looked for mitigating factors, but found none"); Yarbrough v. Commonwealth, 551 S.E.2d 306, 312 (Va. 2001) (concluding "that the trial court did not abuse its discretion in declining to change the sentence set by the jury"); Chandler v. Commonwealth, 455 S.E.2d 219, 226–27 (Va. 1995) (finding that, based upon the evidence presented to the trial court, including "Chandler's mitigation evidence, the post-sentence report, a victim impact statement, and the testimony of a deputy sheriff and the probation officer who prepared the post-sentence report," the trial court did not err in its determination that there was insufficient good cause to set aside the jury's verdict of death).

19. *See, e.g., Bassett*, 284 S.E.2d at 854 (finding that the trial court properly concluded that evidence did not establish good cause for disturbing the jury's determination that death should be imposed); *Yarbrough*, 551 S.E.2d at 312 (same); *Chandler*, 455 S.E.2d at 227 (same).

20. VA. CODE ANN. § 19.2-264.5 (Michie 2004).

21. VA. CODE ANN. § 19.2-264.4(D) (Michie 2004).

22. *See Bassett*, 284 S.E.2d at 854 (finding that the trial judge, who heard the evidence twice, and who made statements at sentencing that demonstrated that he recognized aggravating factors and looked for mitigating factors but found none, properly exercised his discretion in refusing to reduce a death sentence to life imprisonment).

23. Parker v. Dugger, 498 U.S. 308, 310 (1991).

24. *Id.* at 313.

25. *Id.*

stances.[26] In addition, in 1990 the Supreme Court of Florida required that trial court sentencing orders expressly evaluate each nonstatutory mitigating circumstance proposed by the defendant.[27] In the federal system, the Federal Death Penalty Act ("FDPA")[28] requires that a jury make relatively detailed special findings.[29] For example, in *Jones v. United States*,[30] a case decided under FDPA, the special findings form returned by the jury included the statutory and nonstatutory aggravating circumstances along with a list of eleven statutory and nonstatutory mitigating factors found by the jury.[31]

Because Virginia law does not require the same scrutiny of the decision to impose death, the amended section 19.2-264.5 creates an imbalance. The statutory requirement of explanation favors a judge's decision to uphold a jury's finding that death should be imposed. Given the paucity of decisions like Judge Alexander's, however, the amended language may get little use.

VI. Conclusion

The 2004 amendment of Virginia Code section 19.2-264.5 requires that a trial judge, at a minimum, state his reasons for disregarding a jury's recommended sentence of death. At most, the requirement might protect the trust that communities place in the jury system by requiring that a judge not override a jury's determination without reasoned consideration. Notably however, a sentence of death in Virginia is accompanied by little explanation.

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26. *Id.* at 317; *see* FLA. STAT. ANN. § 921.141(3) (West Supp. 2004) (requiring "specific written findings of fact based upon [aggravating and mitigating] circumstances").

27. *Dugger*, 498 U.S. at 317; *see* Campbell v. State, 571 So. 2d 415, 419–20 (Fla. 1990) (addressing the problem that state courts did not uniformly address mitigating circumstances under FLA. STAT. ANN. § 921.141(3) and providing guidelines that required the sentencing court to expressly evaluate in its written sentencing order, each mitigating circumstance proposed by the defense); *see* FLA. STAT. ANN. § 921.141(3) (West 1985) (requiring "specific written findings of fact based upon [aggravating and mitigating] circumstances").

28. Federal Death Penalty Act, 18 U.S.C. §§ 3591–3598 (2000).

29. 18 U.S.C. § 3593(d) (2000).

30. 527 U.S. 373 (1999).

31. Jones v. United States, 527 U.S. 373, 377 n.1, 378–79 n.3–4 (1999). In addition, the form included the number of jurors that found each of the mitigating factors. *Id.* at 378 n.4.