THE VIRGINIA SUPREME COURT AND THIRTEEN YEARS OF DEATH SENTENCE REVIEW

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In 1978, in *Smith v. Commonwealth*, the Virginia Supreme Court affirmed the sentence of the first defendant sentenced to death under Virginia’s capital murder statute enacted in response to *Furman v. Georgia*. In 1972, in *Furman*, the United States Supreme Court had declared that capital punishment, as then administered, was unconstitutional. In the thirteen years since *Smith*, the Virginia Supreme Court has had occasion to say a lot and has denied relief on automatic review and appeal of right in the vast majority of cases.

This piece discusses the history of death penalty law in Virginia since *Furman v. Georgia* and outlines the Virginia Supreme Courts initial interpretations of the State’s modern capital murder statute in *Smith*. The article then examines the development of the law of default and waiver, the construction and reach of the capital statute, the definition of and range of relevant evidence going to the aggravating factors, mitigating evidence, and the selection process of the capital jury since *Smith*.

The article then considers Virginia’s statutory requirement for automatic review of the death sentence and discusses the possible effects of the United States Supreme Court’s 1983 holding that proportionality review is not constitutionally required. Despite the statutory requirement for automatic review, and the constitutional right to meaningful appellate review, the Virginia Supreme Court has affirmed almost every death sentence since 1978. The article contains a brief summary of the few cases where the supreme court has granted relief.

Virginia’s capital murder statute is modeled after the Texas statute approved in 1976 by the United States Supreme Court in *Jurek v. Texas*. This article contains a brief comparative look at the Texas Court of Criminal Appeals and some of the cases decided by that court. The article concludes with some observations about the present status of capital penalty law in Virginia and offers several remedial tactics for use by Virginia defense counsel.

**Furman v. Georgia and Virginia’s Response**

In 1972, in *Furman v. Georgia*, the United States Supreme Court concluded that capital punishment, as then administered under statutory systems which permitted unbridled discretion, violated defendants’ eighth amendment protection against cruel and unusual punishment as well as the fourteenth amendment due process and equal protection clauses. In response, two-thirds of the states, including Virginia, which has had a death penalty statute since 1976, began crafting capital murder statutes which sufficiently limited jury discretion and avoided arbitrary and inconsistent results. In 1976, the Supreme Court struck down North Carolina and Louisiana statutes which had mandatory death penalty provisions for certain crimes but upheld statutes in Florida, Georgia, and Texas because each of those states had provided adequate standards to guide the exercise of the jury’s sentencing discretion.

In 1977, using the Texas statute found constitutional in *Jurek v. Texas* as a guide, the Virginia General Assembly enacted the capital murder statute substantially as it stands today. All of the approved statutes, including those of Texas and Virginia, provide for automatic review of death sentences. Most, including Virginia’s but not Texas’, require the reviewing court to consider whether the punishment is disproportionate to that imposed in similar cases. Also in Virginia, but not in Texas, every capital defendant has an appeal of right directly to the state supreme court rather than to the court of appeals, usually the first level of the appellate process. When a defendant in Virginia makes an appeal of right to the supreme court, this appeal is consolidated with the automatic review of the death penalty and advanced on the docket for an expeditious process.

**In the Beginning: Smith**

A trial jury convicted Michael Smith under the rape-murder subsection of the new capital murder statute in 1978. The Supreme Court of Virginia upheld his conviction and death sentence in *Smith v. Commonwealth*. The court consolidated the defendant’s appeal of right and automatic review of sentence. Smith raised multiple issues in his appeal, which fall into five broad categories: pre-trial proceedings, the guilt trial, constitutional challenges to the capital murder statute, the penalty trial, and the propriety of the penalty imposed.

Smith assigned error to the trial court’s exclusion of a juror for cause related to her predisposition against capital punishment. The court stated on review that, in line with *Witherspoon v. Illinois* and its progeny, the question of whether a venireman should be excluded turns upon the question whether, in fact, he is “irrevocably committed” to vote against the death penalty. Relying on footnote 9 of the Witherspoon opinion, the court held that “absent an unambiguous statement of absolute objection, the trial judge cannot assume absolute objection.” Under the Witherspoon holding and the corollary note, “general objections” to capital punishment are not constitutionally sufficient to justify the exclusion of a juror for cause; nothing less than an absolute objection . . . to vote against the death penalty, will suffice.” While the trial court noted that the excluded juror’s responses to questions during voir dire were sometimes inconsistent, it nevertheless concluded that “life [was] all she’d ever give” and discharged her from the jury panel. On review, the supreme court held that while it could not say that such a finding of fact was unmistakably clear, the ruling did not contravene Witherspoon.

Smith also challenged the Virginia capital murder statutory complex under which he was convicted and sentenced. The court responded with a full explanation of the four proceedings which it must conduct before it may deliver a sentence of death. The court conducts three evidentiary hearings. In the first, the jury determines guilt or innocence and may convict the defendant of the crime charged or a lesser-included offense. If the jury convicts the defendant of a class I felony, the jury determines in a penalty trial whether the penalty should be death or life imprisonment. The jury may hear aggravating evidence concerning circumstances of the offense and the history and background of the accused.

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67 *Id.* at 1733.
68 *Id.*
70 See Va. Code Ann. § 19.2-399 (1991). (This statute is applicable if the defense files a motion to prohibit the imposition of the death penalty challenging the Virginia death penalty, prior to filing its motion for a bill of particulars.)
71 See *Walton v. Arizona*, 110 S. Ct. 3047 (1990) (a crime is committed in an especially “cruel” manner when the perpetrator inflicts mental anguish or physical abuse before the victim’s death. A murder is committed in an especially “depraved” manner when the perpetrator either relishes the murder, evidencing debasement or perversion, or shows indifference to the suffering of the victim and evidences a sense of pleasure in the killing) see also the narrowing constructions given in *Godfrey v. Georgia* at n. 12 of this article.
Code § 19.2-264.4(C) provides that the death penalty shall not be imposed unless the Commonwealth proves one of two statutorily-provided factors in aggravation of the offense. The Commonwealth must prove beyond a reasonable doubt either that there is a probability that the defendant would commit acts of violence that would constitute a continuing serious threat to society, or that his conduct in committing the crime was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind or an aggravated battery to the victim. Under the language of the section, the jury can recommend a sentence of imprisonment for life even when the Commonwealth establishes either or both aggravating circumstances (although this fact may not be clear to most jurors). A jury recommendation of life in prison is binding on the court.

The jury may also hear facts in mitigation of the offense. Five mitigating circumstances are listed for illustrative purposes but are not meant to be exclusive.

Smith argued that the Commonwealth’s instructions on imposition of the death penalty failed to adequately advise the jury that, even though it may find aggravating circumstances, the death penalty is not mandatory. The court held that the instructions, although inartfully drawn, told the jury that it “may fix... punishment at death,” and that what a jury “may” do it is at liberty not to do. When the jury recommends the death penalty, the trial court investigates the history of the defendant and other relevant facts. A copy of the report must be made available to the defendant at least five days before it is presented in open court, and the defendant is guaranteed the right to cross-examine the investigating officer and the right “to present any additional facts bearing upon the matter which he may desire to present.” At the conclusion of this third hearing, if the trial court determines that the death penalty is not appropriate, it may set aside the sentence of death and impose a life sentence.

If the trial court affirms the death sentence, the defendant is entitled to an appellate review of the sentence as a matter of right, and the review is accorded priority on the docket. In the course of this fourth proceeding, this court makes two determinations—whether the sentence was imposed under the influence of passion, prejudice, or other arbitrary factor, and whether, considering similar cases, the penalty is excessive or disproportionate. Having made these determinations, the court may affirm the death penalty or commute it to life imprisonment. The court held that Smith’s trial was conducted in strict compliance with the procedures in effect.

The court addressed Smith’s contention that the statutory definitions of the two statutorily provided aggravating circumstances were “so vague as to vest the sentencing authority with standarless sentencing power.” As to the first aggravating circumstance, “future dangerousness,” the court found no constitutional vagueness because the statutory language is “designed to focus the fact-finder’s attention on prior criminal conduct as the principal predicate for a prediction of future dangerousness.” The court also noted that the circumstances surrounding the commission of the offense provide a further predicate. Significantly, the supreme court focused then on violence, saying that “if the defendant has been previously convicted of ‘criminal acts of violence’, i.e., serious crimes against the person committed by intentional acts of unprovoked violence, there is a reasonable ‘probability’, i.e., a likelihood substantially greater than a mere possibility, that he would commit similar crimes in the future.” In later decisions, the court’s focus has wandered considerably.

As to the “vileness” factor, involving “depravity of mind” and/or “aggravated battery to the victim,” the court interpreted the words “depravity of mind” to mean “a degree of moral turpitude and psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation.” The court found that “aggravated battery” meant “a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder.” The court maintained that these constructions would be the only constructions of “depravity of mind” and “aggravated battery” rationally related to the commonly accepted meanings of “outrageously or wantonly vile, horrible or inhuman.” The court held that although it is conceivable that proof of an intentional killing is all the proof necessary to establish vileness, such a construction is “strained, unnatural, and manifestly contrary to legislative intent.” According to the court, the General Assembly did not intend to sweep all grades of murder into the capital class.

The court noted in passing that Virginia’s capital murder statute contains a safeguard available to the defendant, a non-exclusive list of mitigating factors. (Mitigation factors are not articulated in the approved Texas statute, on which the Virginia statute is based, and so, may not be constitutionally required). The court noted only that the list is illustrative and not exclusive and that “the statute expressly provides that facts in mitigation ‘may include, but shall not be limited to’ the items codified, and that evidence may be adduced to show ‘any other facts in mitigation of the offense.’” Apparently, the court believed then that a defendant could bring anything that he wanted to the jury’s attention.

Pursuant to Code § 17-110.1(E), the court then directed its attention to the determination of whether the penalty imposed was “excessive or disproportionate to the penalty imposed in similar cases.” In aid of that determination today, the court is empowered by statute to “accumulate the records of all capital felony cases tried with such period of time as the court may determine.” However, for the supreme court’s review of Smith’s case, no record of cases involving the particular crime charged in the indictment was available because it was the first case reviewed under the 1977 law. The court, relying on its own research of “comparable” cases, the source of which the court did not disclose, noted that in no cases had a penalty less than death been imposed. Ultimately, the Virginia Supreme Court affirmed the guilty verdict and the sentence of death.

Despite an absence of prior cases on which it could rely, the Virginia court said quite a lot that day. The court discussed the limitations of the capital murder statute, jury qualification and exclusion, the aggravating factors, the ability to present evidence in mitigation, and the test for excessiveness and proportionality of the death sentence. In the thirteen years since the court decided Smith, it has departed substantially from the standards set forth in that decision that it has received for automatic review or on appeal of right.

The Appeal: Relief Denied

Default and Waiver

Since Smith, the Virginia appellate process has not provided much recourse for capital defendants. One of the reasons is that the default and waiver rules allow the court to dismiss claims without judgment on the merits for purely procedural error. Known as the contemporaneous objection rule, Rule 5:25, in pertinent part, provides that “[e]xception will not be sustained to any ruling of the trial court ... before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling, except for good cause shown or to enable [the Virginia Supreme] Court to attain the ends of justice.” The unfortunate result is that the defendant is deprived of a ruling on the merits of the defaulted claim, and the record will not contain any indication of how the court would rule on the same issue if it were timely raised.

An assignment of error which merely states that the judgment or award is contrary to the law and the evidence is not sufficient. The purpose of Rule 5:25 is “to protect the trial court from appeals based upon undisclosed grounds, to prevent the setting of traps on appeal, to enable the trial judge to rule intelligently, and to avoid unnecessary reversals and mistrails.” Thus, in the supreme court’s opinion, strict application of the rules tends to promote, not hinder, the administration of justice. Despite the fact that “death is different,” and the penalty absolute, the supreme court has repeatedly applied the rule in death penalty cases.

The court has applied the exception to the contemporaneous objection rule “for good cause shown or to attain the ends of justice” only once. The court reversed the capital murder conviction of the defendant in Ball.
because the defendant had been convicted of a crime of which under the evidence he could not properly be found guilty. In *Ball*, the defendant was convicted of murder in the commission of robbery while armed with a deadly weapon under Code § 18.2-31(4), which at that time allowed conviction of capital murder only for "robbery," not "attempted robbery." In the light most favorable to the Commonwealth, the evidence showed that the victim was killed during an attempted robbery, rather than in the actual commission of a robbery. At the time, the most that the defendant could be convicted of was felony murder under Code § 18.2-32. The defendant had not raised this point at trial.

Rule 5:17(c), amended in 1991, applies the provisions of Rule 5:25 to limit substantially the questions upon which the supreme court will rule. "Only errors assigned in the petition for appeal will be noticed. . . . Where appeal is taken from a judgment of the Court of Appeals, only assignments of error relating to questions presented in the Court of Appeals and assignments of error relating to action of the Court of Appeals may be included in the petition for appeal."\(^{39}\)

The Virginia Supreme Court also will not consider assignments of error which are waived by the defendant's failure to argue them on brief.\(^{40}\) Recently, in *Stockton v. Commonwealth*,\(^{41}\) the court rigorously applied the rule. The court refused to grant the defendant's request to file a brief in excess of a 50-page limitation set by Rule 5:26.\(^{42}\) Later, when the defendant attempted to rely upon issues which he raised in assignments of error but did not brief because of the page limitation, the court adhered to Rule 5:27 and refused to hear the issues.

**Construction and Reach of the Capital Murder Statute\(^{43}\)**

The Virginia capital murder statute enacted in 1977 is § 18.2-31 of the *Code of Virginia*. Nine subsections create specific forms of capital murder rather than a single generic form.\(^{44}\) This difference makes it difficult to compare the construction of the Virginia statute with those of other states. Nevertheless, Virginia defines what constitutes capital murder for gradation purposes. The Assembly grades murder in order to assign punishment consistent with prevailing societal and legal view of what is appropriate and procedurally fair.\(^{45}\)

The Virginia Supreme Court has held that when construing § 18.2-31 "[p]enal statutes are to be strictly construed against the Commonwealth and in favor of a citizen's liberty."\(^{46}\) The Commonwealth cannot extend statutes by implication and must confine them to those offenses proscribed by the language used. Therefore, every phrase of each subsection must be examined to determine the breadth of the subsection. Essentially, the nine subsections under § 18.2-31 all require a willful, deliberate and premeditated killing of any person and a "gradation element," e.g., rape or murder for hire. Unless the Commonwealth can prove one of these gradation elements beyond a reasonable doubt, an addition to proving a willful, deliberate and premeditated killing, a criminal defendant cannot be convicted under the capital murder statute.\(^{47}\)

In response to judicial efforts like *Ball* to construe the statute narrowly, the General Assembly periodically broadens the statute. For example, until 1988, the rape subsection, § 18.2-31(5), referred to the killing of "a person during the commission of, or subsequent to rape." In 1985 in *Harward v. Commonwealth*,\(^{48}\) the Virginia Supreme Court held that the language limited the subsection to situations in which the victim of the homicide and the victim of the rape were the same person. The *Harward* court also concluded in *dictum* that the phrase "during the commission of" in the rape subsection was narrower than the phrase found in other parts of the statute, "in the commission of."\(^{49}\) [During the commission of excluded a killing which preceded the rape while "in the commission of" included a killing which preceded the felony, for example, robbery. In response, the Virginia Assembly began amending the subsection in 1988. These amendments included changing the reference of "a person" to "any person,"\(^{50}\) The amendment conformed this section to §§ 18.2-31(1) and 31(4), in which "any person" means that the victim of the homicide and the victim of the underlying felony do not have to be the same person. The 1988 amendments also changed "during the commission of," to "in the commission of." The Virginia Assembly also added "attempted rape" to the rape subsection in 1989. In 1991, the General Assembly added § 18.2-31(9), dealing with the manufacture and distribution of controlled substances. The 1991 amendments added "forcible sodomy or attempted forcible sodomy" to the rape subsection. As the court's scrutiny narrowed the scope of the existing capital murder statute, the legislature added gradation elements.

Occasionally, the court has also expanded the scope of the capital murder statute's sections, especially the robbery section.\(^{51}\) Section 18.2-31(4) requires that the Commonwealth prove a premeditated killing of "any person"\(^{52}\) and each element of common law robbery, and establish that the defendant was armed with a deadly weapon. The common law definition of robbery is "the taking, with the intent to deprive the owner permanently, of personal property, from his person or in his presence, against his will, by violence or intimidation."\(^{53}\) To prove robbery, the Commonwealth must prove that the violence or intimidation was contemporaneous with the taking. Then, the Commonwealth must prove that the killing occurred "in the commission of" the taking, which was contemporaneous with the violence or intimidation.

Despite the precise language of the statute, the court has opened up the time frame to include a killing and taking that are "so closely related in time, place and causal connection as to make them parts of the same criminal enterprise."\(^{54}\) In *Pope v. Commonwealth*, decided before attempted robbery was added to the statute, the defendant stole a purse from a car without violence or intimidation, apparently without the victim's knowledge, while he was a passenger. Upon exiting the car, the defendant pulled out a gun, demanded money, and killed the victim. Only later did a survivor notice that the purse was missing. By one view of the events, the taking was not contemporaneous with any intimidation. However, the court affirmed the conviction and sentence.

The court has also given the Commonwealth some freedom to prove that the defendant was "armed with a deadly weapon." *Coppola v. Commonwealth*,\(^{55}\) decided in 1987, suggests that the immediate perpetrator of the crime need not be armed with a deadly weapon himself. In *Coppola*, the court upheld the defendant's joint liability with a co-defendant for the victim's death and as principals in the first degree. However, the facts actually suggest that Coppola was not armed during the robbery and murder. Therefore, it seems that the immediate perpetrator of the killing need not carry, or use the deadly weapon to effectuate the killing.\(^{56}\)

The court has also held that the defendant does not have to be armed prior to the commission of the underlying crime of robbery, but may seize it at the scene to commit the killing.\(^{57}\) Similarly, the court has held that the defendant may arm himself during the commission of the entire crime, but after the robbery, and still satisfy the statute. In *Correll v. Commonwealth*,\(^{58}\) the defendant argued that he had already committed the robbery before he armed himself and killed the victim. The court, opening up the time line, held that the robbery continued throughout the killing and that the defendant was armed "during the commission of a portion of the robbery."\(^{59}\) The court, despite having a purely interpretive function, legislatively when it seems necessary, to reach the decisions it finds logical.

**Aggravating Circumstances\(^{60}\)**

In the sentencing phase of the bifurcated capital murder trial, "[t]he penalty of death shall not be imposed unless the Commonwealth shall prove by a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society (future dangerousness), or that his conduct in committing the offense was outrageously or wantonly vile, horrible or
inhuman (vileness), in that it involved torture, depravity of mind, or aggravated battery to the victim. The statute lists two aggravating factors in disjunctive terms, and the court has found them independently sufficient to support a death sentence.

Evidence of Future Dangerousness

In Smith, the supreme court held that the “future dangerousness” aggravating factor was not unconstitutionally vague in guiding sentencing discretion. The court found this factor identical to the one in the Texas statute approved by the U.S. Supreme Court in Jurek v. Texas. In upholding its adequacy, the court noted that the factor was designed to focus the jury’s attention on the prior criminal record primarily, but not exclusively. Thus, as the court later explained in Peterson v. Commonwealth, admissible evidence of future dangerousness is not limited to the defendant’s criminal record. In Poyner v. Commonwealth, the court allowed testimony by a victim of an unadjudicated assault and battery as evidence of future dangerousness. Moreover, the court also found the content of a confession and the demeanor of the defendant during the confession relevant to future dangerousness.

In recent years, the court has dispelled any notion that it should rely primarily on prior acts of unprovoked violence to show future dangerousness, as it did in Smith. In Quisenberry v. Commonwealth, decided last term, the court held that the defendant’s use of illegal drugs was relevant to the issue of future dangerousness. In Strickler v. Commonwealth, also decided last term, the court held that evidence of prior burglary, petit larceny, tampering with a vending machine, violation of probation and other felonies and misdemeanors was more than sufficient to support the jury’s finding of future dangerousness.

Evidence of Vilineness

The supreme court has held that the jury must specifically find the elements of torture, depravity of mind, or aggravated battery to support a death sentence under the “vileness” factor. However, the court has further defined only depravity of mind and aggravated battery. It has not defined torture. In Smith, the court held that its constructions of “depravity of mind” and “aggravated battery” would be the only acceptable constructions. By the time the supreme court reviewed Clark v. Commonwealth, less than one year later, the court clarified that it did “not mean, however, that those definitions [were] the best or the only ones.” In Clark, the trial court failed to define the terms “outrageously or wantonly vile,” “horrible or inhuman,” “depravity of mind or aggravated battery to the victim.” The supreme court held that, although it was guided by its definitions in Smith, it did “not necessarily follow that these particular definitions were necessary for the jury to determine whether the conduct of Clark was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind or aggravated battery.” Therefore, the supreme court has kept its vague definitions of the elements of the “vileness” factor and left the legal question of exactly what those terms mean to the unbridled discretion of the jury.

To that end, the Virginia Supreme Court has not decided whether proof of an aggravated battery requires serious injury before death. In Bunch v. Commonwealth, the court held that if a jury could find that death did not occur until after some form of abuse, the jury can find aggravated battery. Therefore, by implication, the jury does not have to find absolutely that the victim was alive for the additional abuse. “For the purposes of the ‘vileness’ determination, it is immaterial whether the decedent remained conscious during the course of several assaults.”

The court held in Poyner v. Commonwealth that psychological torture adequately reflects depravity of mind. Therefore, execution-style murders, typically characterized by a single, fatal shot to the head, could fulfill the “vileness” factor. Further, mutilation or sexual assault committed upon a corpse or unconscious body has been held to demon-
that the sentencing responsibility lay with the court and not itself, were persuasive juror's placement on the jury. Ultimately, the defense exercised arguments at the sentencing trial, which tended to lead the jury to believe sentence and remanded the case for further proceedings only on the issue fair "should come from him and not be based on his mere assent to [1]
guilt."' 101 The trial court overruled defense counsel's objections to the reasonable doubt and that there is no burden on the defendant to prove in the jury selection process. The trial court refused to exclude for cause the conviction and sentence of a defendant on grounds of prejudicial error trial, imposed this and recommended the death sentence. The judge, who presided at the first trial, who presided at the first trial, imposed this sentence.92 Juror qualification is a confusing, important battleground for capital murder defense counsel. In Justus, the supreme court relied on Breeden v. Commonwealth,93 a non-capital case in which the court had observed that the right of an accused to an impartial jury is a constitutional right.94 reinforced in Virginia by legislative mandate95 and by the Rules of the supreme court.96 The court held that any reasonable doubt whether a venireman stands indifferent in the cause must be resolved in favor of the accused.97 The Justus supreme court did not rely on the Witherspoon98 test used in Smith to determine the juror's qualification. The question was not whether the prospective juror was "irrevocably committed" against the death penalty but rather the most basic test for juror qualification: impartiality. On remand, the jury again convicted Justus of capital murder and recommended the death sentence. The judge, who presided at the first trial, imposed this sentence.99 In Martin v. Commonwealth in 1981,100 the supreme court reversed the conviction and sentence of a defendant on grounds of prejudicial error in the jury selection process. The trial court refused to exclude for cause a venireman who expressed the belief during voir dire that the accused had to prove his innocence. During attempts to rehabilitate, the juror said she understood that the burden rests with the state to prove the case beyond a reasonable doubt and that there is no burden on the defendant to prove anything.101 The trial court overruled defense counsel's objections to the juror's placement on the jury. Ultimately, the defense exercised a peremptory challenge to exclude her from the jury, so the conviction and sentence were determined by a jury which did not include the challenged juror.

The supreme court held that with respect to the "crucial question" whether the accused had to prove his innocence, the juror's affirmative response "was not so much a symptom of her ignorance of the law as a candid reflection of the state of her mind concerning [the defendant's] guilt."102 The court held that proof that a prospective juror is impartial and fair "should come from him and not be based on his mere assent to persuasive suggestions."103 In Frye v. Commonwealth104 in 1986, the court vacated the death sentence and remanded the case for further proceedings only on the issue of penalty.105 The court determined that the Commonwealth's closing arguments at the sentencing trial, which tended to lead the jury to believe that the sentencing responsibility lay with the court and not itself, were improper. The Commonwealth, in an effort to diminish the impact of the defense's closing argument, in which counsel had repeatedly told the jury that it was being asked to "kill this boy," informed the jury that the responsibility was not theirs: "The [j]udge will be the person that fixes sentence if you find the defendant guilty as charged and fix his punishment at death. The [c]ourt will pronounce sentence."106

The court relied on a United States Supreme Court decision, Caldwell v. Mississippi,107 which also involved improper argument by a prosecutor in a capital sentencing proceeding. The United States Supreme Court held that the effort to minimize the jury's sense of responsibility for imposing a sentence of death violated the eighth amendment's heightened "need for reliability in the determination that death is the appropriate punishment."108 The United States Supreme Court also found that unreliability and bias inhere in death sentences following "state-induced suggestions that the sentencing jury may shift its sense of responsibility to an appellate court."109 The Virginia Supreme Court also relied on the Virginia statutory sentencing scheme and state case law to support the vacation of the sentence. Under the sentencing scheme, it is the jury's responsibility to "fix" the punishment of a defendant convicted of a capital offense, and it is the court's responsibility to "impose" sentence.110 Although the sentencing statute twice refers to the jury's verdict as a "recommendation,"111 in practice, the court must either impose sentence in accordance with the verdict fixing punishment at death or set aside the death sentence and impose the lesser penalty of life imprisonment.112 Therefore, in criminal actions in the Commonwealth, the jury has the power to determine punishment of one convicted of a crime unless the case is tried without a jury.113 The Frye court acknowledged that the jury's role has long been construed to be more than advisory, resulting in more than just a recommendation of punishment.114 Finally, the Frye court stated that it had already established that it was improper for a prosecutor to tell the jury that, if it makes a mistake, the court can correct it.115

In 1990, the supreme court reversed the capital murder conviction and the death sentence of Dung Quang Cheng in Cheng v. Commonwealth.116 A Circuit Court jury convicted the defendant of capital murder pursuant to Virginia Code § 18.2-31(1) and § 18.2-31(4), abduction, robbery, conspiracy to commit abduction, robbery or murder, use of a firearm in the commission of robbery, abduction or murder; and possession of a sawed-off shotgun.117 The supreme court held that there was insufficient evidence to show that Cheng was, in fact, the triggerman. As mentioned above in relation to Johnson and Strickler, except in the case of murder-for-hire, the death eligible class of murderers is limited to the actual perpetrator or joint perpetrators who actually cause death. The court noted that while the evidence and the defendant's confession could lead to the reasonable inference that Cheng was the triggerman, a mere probability or suspicion of the defendant's guilt was insufficient to support a conviction. The court remanded the case for a new trial on a charge no greater than first degree murder.

Automatic Review

Section 17-110.1 of the Virginia Code provides that the supreme court "shall consider and determine . . . whether the sentence of death is excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant." The court also "shall consider and determine . . . [w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor."

Proportionality Review

Proportionality review by an appellate court is statutorily-required in Virginia. Virginia Code § 17-110.1(C) requires the supreme court to review the death sentence on the record to consider and determine: "1. [w]hether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor; and 2. [w]hether the sentence of death is excessive or disproportionate to the penalty imposed
in similar cases, considering both the crime and the defendant.” In
response, the court accumulates the records of all capital murder cases
reviewed by the court pursuant to Code § 17-110.1(E). In conducting the proportionality review, the court takes particular note of the facts in those cases in which juries imposed capital punishment on the basis of the same predicate factors as did the jury in the case being reviewed. In determining whether a sentence of death is excessive or disproportionate, the supreme court inquires whether juries in the jurisdiction generally approve the death penalty for comparable or similar crimes. The Virginia Supreme Court has never reversed a sentence on the basis of disproportionality.

Although the Virginia statute requires proportionality review, the United States Constitution does not. In 1984, the United States Supreme Court held in Pulley v. Harris that the eighth amendment does not require states to compare the sentence in the case before it with the penalties imposed in similar cases. In Pulley, the Court examined the case of a defendant sentenced to death under California’s capital murder statute. The defendant claimed that the California capital punishment statute was invalid under the United States Constitution because it failed to require the California Supreme Court to compare the defendant’s sentence with the sentences imposed in similar capital cases.

In denying the defendant relief, the Court discussed the difference between “traditional” proportionality and the proportionality review sought by Harris, and provided for in numerous state statutes, including Virginia’s. The Court decided that traditional proportionality refers to an “abstract evaluation of the appropriateness of a sentence for a particular crime.” The Court acknowledged that it has occasionally struck down punishment as “inherently disproportionate, and therefore cruel and unusual, when imposed for a particular crime or category of crime.”

The Court noted several criteria that were important to the proportionality review it imposed: “the gravity of the offense and the severity of the penalty”, “sentences imposed for other crimes”, and “sentencing practices in other jurisdictions”. Contrasting this traditional proportionality review to that provided for in numerous state statutes, including Georgia specifically and presumably Virginia, the Court decided that this proportionality review “presumes that the death sentence is not disproportionate to the crime in the traditional sense. It purports to inquire instead whether the penalty is nonetheless unacceptable in a particular because [it] is disproportionate to the punishment imposed on others convicted of the same crime.” The Court held that this proportionality review is not a constitutional requirement and “that some schemes providing proportionality review are constitutional does not mean that such review is indispensable.”

A Comparison to Texas

In Texas, a defendant is death eligible if he “intentionally or knowingly causes the death of an individual” and he satisfies any one of six additional predicates as follows:

1. the person murders a peace officer or fireman who is acting in the lawful discharge of an official duty and who the person knows is a peace officer or fireman;
2. the person intentionally commits the murder in the course of committing or attempting to commit kidnapping, burglary, robbery, aggravated sexual assault, or arson;
3. the person commits the murder for remuneration or the promise of remuneration or employs another to commit the murder for remuneration or the promise of remuneration;
4. the person commits the murder while escaping or attempting to escape from a penal institution;
5. the person, while incarcerated in a penal institution, murders another who is employed in the operation of the penal institution; or
6. the person murders more than one person:
   A) during the same criminal transaction; or
   B) during different criminal transactions but the murders are committed pursuant to the same scheme or course of conduct.

The statutory requirements are somewhat similar to those in Virginia. However, under Virginia law, the killing must be “willful, deliberate, and premeditated” and under the Texas statute a defendant arguably could be found guilty of capital murder for less than an “intentional” killing except under § 19.03(a)(2).

Then, in the sentencing phase of the bifurcated trial in Texas, the two states go their procedural separate ways. In Texas, the jury is asked to respond to three questions that guide its discretion to sentence a defendant to mandatory death or life imprisonment under Texas Penal Code § 12.31. The jury must find beyond a reasonable doubt: (1) the actor killed intentionally or knowingly; (2) he will probably commit other acts of violence if not executed; and (3) the killing was unreasonable in response to the provocation, if any, of the deceased. The jury may not answer “yes” to any of the questions unless it agrees unanimously and if the jury returns a negative finding on any issue submitted, the court shall sentence the defendant to life imprisonment. However, if the jury answers “yes” to each of the questions, it must sentence the defendant to death.

Under Virginia law, even if the jury finds the defendant guilty of capital murder and finds both aggravating factors, it may still sentence the defendant to life imprisonment.

The Texas Court of Criminal Appeals has direct appeal jurisdiction in death penalty cases in Texas. Under the Texas capital murder statute, upon which the Virginia statute is modeled, the Texas courts have sentenced more defendants to death than any other system in the United States.

A principal difference in conviction rates may be that under Texas law, “[a]ll traditional distinctions between accomplices and principals are abolished by [§ 7.01] and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice.” In Texas, a defendant may be convicted of capital murder for the actions of another. The law of accomplice liability of §§ 7.01 and 7.02 is applicable to capital murder cases in Texas. However, while the law of parties can apply to convict an accused of capital murder, the death penalty may be imposed only by examination of the mitigating and aggravating circumstances concerning the individual defendant. Therefore, while a defendant may be found guilty of capital murder on the basis of another’s actions, he must be sentenced on the basis of his own actions. However, the Texas court has been able to sustain the death penalty given to someone other than the triggerman, so any distinction is probably lost.

Occasionally, the Texas court has construed the statute strictly. For example, the court held in White v. State, decided a year earlier, the fact that the victim was murdered prior to being robbed did not invalidate the intent to steal, for purposes of murder in the course of committing robbery. In Virginia, the supreme court has also decided that there is really no distinction. In Virginia, the killing may occur before, during, or after the taking in Virginia where robbery is used as the predicate offense. In Barefoot v. State in 1980, the Court of Criminal Appeals of Texas held that the trial court did not err by permitting psychiatrists who had never personally examined the defendant to testify as to the defendant’s
Conclusions

Since Smith, almost thirteen years ago, the Virginia Supreme Court has departed from the course plotted during that first review of a capital murder case. Despite the fact that the Commonwealth must at least one aggravating factor to support a sentence of death, the court has failed to narrow the definition or application of the "vileness" factor as evidenced in Clark and Poynor. And it has never provided a definition of torture. It has broadly interpreted the scope of evidence relevant to future dangerousness, admitting a wide range of non-violent criminal activity and unadjudicated acts, rather than relying principally on a violent criminal record.

The court has broadly construed the construction and reach of the statute, especially the crime of murder in the commission of robbery. Only rarely has the court strictly construed the statute as it did in Ball v. Commonwealth, where the court could not find the defendant guilty of murder "in the commission of robbery" because the victim was killed during an attempted robbery.

The supreme court has waived the default rules only once, also in Ball, and then only in conjunction with its strict construction of the statute. Only when the defendant had been convicted under a subsection that he could not have possibly violated, even when the evidence was taken in the light most favorable to the Commonwealth, did the court allow some flexibility. It has not been flexible with the default rule despite the fact that the court has the discretion to hear cases in the interest of justice.

The court, not surprisingly, has never found error in a penalty trial. Nor has the court ever reversed on automatic review of the sentence.

Capital voir dire has some unique problems. The current standard in Virginia for removal of a prospective juror member is whether or not the views of the juror would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath." This standard is arguably adverse to defense counsel and it is certainly tougher to exclude a juror for cause under this standard than under the Witherspoon standard of "irrevocable commitment" used in Smith, thirteen years ago.

The courts have also restricted voir dire. In Mackall, the court concluded that counsel could ask whether the juror had views on the propriety of the death penalty but could not inquire into what those views were. Similarly, the court held in Mu'Min v. Commonwealth that while defense counsel may ask a prospective juror whether he has acquired information before trial, it does not follow that the defendants have a right to know what that information is.

The court held in Eaton v. Commonwealth in 1990 that the jury has no right to information concerning postsentencing events. The court excluded a voir dire question which would have informed the jury that the defendant would not have been eligible for parole if sentenced to life imprisonment. In Eaton, because the jury sentenced the defendant to death based on his future dangerousness, parole ineligibility was relevant to the reality of this situation.

In the last thirteen years, the Virginia Supreme Court has, with a very few exceptions, affirmed capital murder convictions and death sentences. Accordingly, defense counsel faced with tactical choices between matters that might succeed at trial and reliance on appellate issues would be well advised to place emphasis and effort on avoiding capital murder convictions and death sentences at trial or before.

4 Furman, 408 U.S. at 238.
7 Smith, 219 Va. at 482, 248 S.E.2d at 151.
8 Under the capital murder statute, every death sentence is subject to an automatic review by the Supreme Court of Virginia under Va. Code § 17-110.1.
9 Smith, 219 Va. at 460, 248 S.E.2d at 139.
11 Smith, 219 Va. at 464, 248 S.E.2d at 141.
12 Id. at 465, 248 S.E.2d at 142.
13 Id.
15 Smith, 219 Va. at 481, 248 S.E.2d at 150.
17 Smith, 219 Va. at 472, 248 S.E. 2d at 146.
18 Id. at 476, 248 S.E. 2d at 148.
19 Id. at 476, 248 S.E. 2d at 148.
20 Id. at 477, 248 S. E. 2d at 149.
21 Id. at 478, 248 S.E. 2d at 149.
22 Id. (Emphasis added).
23 See infra notes 58-63 and accompanying text.
24 See Lago, Litigating the "Vileness" Factor, Capital Defense Digest, this issue.
The court did not then address torture and has not since defined it in any decision.

Smith, 219 Va. at 478, 248 S.E. 2d at 149.

Id.

Id.

Id.

Id.; see also Lockett v. Ohio, 438 U.S. 586 (1978)(death penalty schemes must allow consideration as a mitigating factor, any aspect of the defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death); see also Hitchcock v. Dugger, 481 U.S. 393 (1987)(death sentence unconstitutional where advisory jury was instructed to consider only mitigating factors set out in state statute and sentencing judge refused to consider nonstatutory mitigating factors).


Smith, 219 Va. at 482, 248 S.E.2d at 151.


Va. R. Sup. Ct. 5:25.


See, e.g., Macalla v. Commonwealth, 236 Va. 240, 372 S.E.2d 759 (1988), cert. denied, 492 U.S. 925 (1989); Quintana v. Commonwealth, 224 Va. 127,295 S.E.2d 643 (1982), cert. denied, 460 U.S. 1029 (1983); Whitley v. Commonwealth, 223 Va. 65, 486 S.E.2d 162 (1992); see Va. Code Ann. § 17-110.1 (1991)(requires that the supreme court review every case in which a sentence of death has been entered. However, that mandatory review is limited to whether the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor and whether the sentence was excessive or disproportionate).


Va. R. Sup. Ct. 5:17(c).

Va. R. Sup. Ct. 5:27(e).


Stockton, 241 Va. at ___, 402 S.E.2d at 210.

This section of the article relies extensively on Geimer and Groot, Trial of Capital Cases in Virginia (1991).

There have been additions to and alterations of the subsections over the years. The 1989 amendments redesignated subdivisions (a) through (h) as subdivisions 1 through 8. With the addition of a ninth subdivision in 1991, nine capital crimes exist in Virginia. For consistency within this paper, all references to the capital murder statute will reflect the current system.


See Nave.

Harward, 229 Va. at 366, 330 S.E.2d at 91.


By the terms of the statute, the victim of the robbery and the victim of the killing do not have to be the same.


Id.


See Payner, 229 Va. at 418, 329 S.E.2d at 828 (videotaped confession to five murders held relevant and reliable); see Frye v.


69 See supra notes 18-28 and accompanying text discussing the court’s statutory definitions of the aggravating factors in Smith.


71 Id. at 211, 257 S.E.2d at 791.


75 Id. at 424-25, 329 S.E.2d at 831-32.


82 Johnson, 220 Va. at 150, 255 S.E.2d at 527.

83 Id. at 153, 255 S.E.2d at 529.

84 Id.


87 The first time was in Coppola v. Commonwealth, 220 Va. 243, 257 S.E.2d 797 (1979), cert. denied, 444 U.S. 1103 (1980).


90 Justus, 220 Va. 971, 977, 266 S.E.2d 87, 91.

91 Id. at 975, 266 S.E.2d at 91.

92 Id. at 975, 266 S.E.2d at 90.


94 U.S. Const. amends. VI and XIV; Va. Const. art. 1, § 8.


96 Va. R. Sup. Ct. 3A:14(b).


98 Compare Witherspoon v. Illinois, 391 U.S. 510 (1968) (providing the early test for juror exclusion: an “irrevocable commitment” against the death penalty) with Wainwright v. Witt, 469 U.S. 810 (1985) (providing that potential jurors could be excused for cause if the juror’s views would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath).


101 Id. at 441-42, 271 S.E.2d 123, 127.

102 Id. at 445, 271 S.E.2d at 129 (quoting Breeden, 217 Va. at 300, 227 S.E.2d at 736).

103 Id. at 444, 271 S.E.2d at 129 (quoting Breeden, 217 Va. at 300, 227 S.E.2d at 736).


105 Frye, 231 Va. at 400, 345 S.E.2d at 287; see Va. Code Ann. § 19.2-264.3 (1990) (providing that “[i]f the sentence of death is subsequently set aside or found invalid, and the defendant or the Commonwealth requests a jury for purposes of resentencing, the court shall impanel a different jury on the issue of penalty”).

106 Frye, 231 Va. at 395, 345 S.E.2d at 284.


109 Id. at 320-21.


118 List provided by the Virginia Supreme Court Clerk’s Office, September, 1991.

119 See Washington v. Commonwealth, 228 Va. 535, 553, 323 S.E.2d 577, 589 (1984)(discussing cases in which juries imposed capital punishment solely on the basis of the vileness predicate. The court was satisfied that the sentence of death was not excessive where the defendant, without provocation, picked out his victim, a stranger, stalked her to her home, broke in, forcibly raped her, stabbed her 38 times, and left her to bleed to death, all in the presence of her two children); see Peterson v. Commonwealth, 225 Va. 301-02, 302 S.E.2d 520, 528-29, cert. denied 464 U.S. 865 (1980) (listing cases in which the court had affirmed the death penalty and the court’s rationale).


123 Id. at 44.

124 Id. at 39-40.

125 Id. at 42.

126 Id.

127 Id.

128 Id.

129 Id.


139 Green, 682 S.W.2d 271, 287-88.


142 See Whitley v. Commonwealth, 223 Va. 66, 286 S.E.2d 162 (1982) (holding that in a conviction for capital murder during robbery while armed with a deadly weapon it is immaterial that the victim is dead when the theft occurs).


145 Id. at 887.


A WORD OF THANKS
AND
A CONTINUED APPEAL

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