

Virginia Authority Against Reality-Based Dangerousness Determinations

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***Cherrix v. Commonwealth*, 513 S.E.2d 642, 653 (Va. 1999)**

In *Cherrix*, the Virginia Supreme Court upheld the exclusion of “prison life” evidence offered in mitigation to show “what prison life would be like for Cherrix if he received a life sentence.” The court deemed the evidence—testimony of a penologist, criminologist, sociologist, Virginia corrections officials, and a life-sentenced inmate—not relevant. The court relied on footnote twelve of the United States Supreme Court’s opinion in *Lockett v. Ohio*. In *Lockett*, after establishing a general Eighth Amendment requirement that capital sentencing juries consider any relevant evidence proffered by the defense as a basis for a sentence less than death, the Court added that “[n]othing in this opinion limits the traditional authority of a court to exclude, as irrelevant, evidence not bearing on the defendant’s character, prior record, or the circumstances of his offense.” *Lockett*, 438 U.S. at 604, 604 n.12. The Virginia Supreme Court interpreted this footnote to mean that any evidence not relating directly to the “defendant’s character, prior record, or circumstances of his offense” may properly be excluded. Accordingly, the court held that the proffered evidence regarding the “general nature of prison life” and “what a person may expect in the penal system” did not pertain to the defendant’s “history and experience” and therefore was not relevant as mitigation evidence.

- *See also Walker v. Commonwealth*, 515 S.E.2d 565, 574 (Va. 1999) (relying on *Cherrix* and prohibiting testimony of the Chief of Operations for the Virginia Department of Corrections to attest to the nature of life imprisonment without parole in a maximum security facility).

***Lovitt v. Commonwealth*, 537 S.E.2d 866, 879 (Va. 2000)**

The *Lovitt* court rejected the Defendant’s assertion “that the only relevant ‘society’ for the jury’s consideration of his ‘future dangerousness’ was prison society.” The Court stated:

Code § 19.2-264.2 requires that the jury make a factual determination whether the defendant “would commit criminal acts of violence that would constitute a continuing serious threat to society.” The statute does not limit this consideration to “prison society” when a defendant is ineligible for parole, and we decline *Lovitt*’s effective request that we rewrite the statute to restrict its scope. Thus, we conclude that the evidence of the present offenses and of *Lovitt*’s prior criminal behavior, including the evidence of his behavior while incarcerated for earlier offenses, is sufficient to support the jury’s finding of “future dangerousness.”

***Burns v. Commonwealth*, 541 S.E.2d 872, 893 (Va. 2001)**

The Virginia Supreme Court rejected, as not relevant, evidence regarding prison life in a maximum security prison offered to rebut the Commonwealth’s claim of future dangerousness. Because the Commonwealth’s evidence regarding future dangerousness “consisted of his prior criminal record and unadjudicated criminal acts,” and not of “evidence about the number of violent crimes committed in

prison or the likelihood that a prisoner could escape,” Burns’s evidence “was not in rebuttal to any evidence regarding prison life.” Relying on *Cherrix* and footnote twelve of *Lockett*, the court also noted that the statutorily “relevant inquiry is not whether Burns *could* commit criminal acts of violence in the future but whether he *would*.” Under this rationale, the court held that “a determination of future dangerousness revolves around an individual defendant and a specific crime,” and accordingly, concluded that “[e]vidence regarding the general nature of prison life in a maximum security facility is not relevant to that inquiry, even when offered in rebuttal to evidence of future dangerousness such as that presented in this case.”

- *See also Schmitt v. Commonwealth*, 547 S.E.2d 186, 199 (Va. 2001) (following *Burns* and rejecting evidence of prison life and security features of a maximum security prison).

***Bell v. Commonwealth*, 563 S.E.2d 695, 713–14 (Va. 2002)**

Virginia Supreme Court relied on *Cherrix* and rejected defendant’s assertion “that evidence concerning the prison conditions in which he would serve a life sentence is relevant not only in mitigation and in rebuttal to the Commonwealth’s evidence of future dangerousness, but also to his ‘future adaptability’ to prison life.” The court responded that “such general evidence, not specific to Bell, [is not] relevant to his ‘future adaptability’ or as a foundation for an expert opinion on that issue.” The court rejected Bell’s argument that *Cherrix* and *Burns* were inconsistent with the United States Supreme Court decisions in *Skipper v. South Carolina* (476 U.S. 1 (1986)), *Simmons v. South Carolina* (512 U.S. 154 (1994)), and *Williams v. Taylor* (529 U.S. 362 (2000)). Bell had asserted that “the ‘common thread’ running through [those decisions], is ‘the Court’s recognition that many inmates who would be dangerous if released are not dangerous when confined to the “structured environment” of prison.’ ” The Virginia Supreme Court reasoned instead that the “common thread” in those cases “is that evidence peculiar to a defendant’s character, history and background is relevant to the future dangerousness inquiry and should not be excluded from a jury’s consideration.”

***Juniper v. Commonwealth*, Rec. Nos. 051423 & 051424 (Va. Mar. 3, 2006)**

The Virginia Supreme Court upheld four death sentences imposed on Anthony Bernard Juniper. The court refused to allow Juniper’s mental health expert to testify regarding risk assessment evidence that life imprisonment without the possibility of parole tends to negate the “probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society.” In this case, the 3:1 expert was prepared to testify that the defendant’s risk of violence in prison would be “low to moderate” even though it would have been “high” if he was released to the community. This opinion does *not* decide the federal constitutionality of the trial courts interference with the right to rebut the Commonwealth’s claims of future dangerousness; the defendant litigated the claim on appeal solely as an abuse of discretion, rather than as a violation of due process under *Gardner*, *Skipper*, and *Simmons*.