082464, 082465

ASSIGNMENTS OF ERROR

4. The Court erred in denying Mr. Prieto's request for an additional expert to testify on the issue of mental retardation.[1]

6. The Court erred in denying Mr. Prieto's motion to bar a re-trial and impose a life sentence.

13. The Court erred in failing to bifurcate the penalty phase from the mental retardation issue.

14. The Court erred in failing to determine the issue of mental retardation prior to trial.

15. The Court erred in denying Mr. Prieto's motion to declare the Virginia death penalty statutes unconstitutional, and to prohibit the imposition of the death penalty, on grounds the Virginia death penalty statutes violate the Virginia and United States Constitutions.

17. The Court erred in denying motion that Virginia's vileness predicate is so arbitrary and unclear that it is unconstitutional.

18. The Court erred in not excluding evidence of unajudicated acts.

22. The Court erred in sustaining the Commonwealth's attorney's objection to Mr. Prieto's attorney's question to Officer John Halley, as follows: "[C]ould [there] have been other trace evidence which could reveal who the assailants in this case were in a head hair, but that would be lost in this one?"

25. The Court erred in allowing Gerald Murphy to testify that the apartment complex he shared with Rachael Raver had a community

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[1] On December 29, 2008, Mr. Prieto filed a request for additional pages for this brief. However, this Court denied his request on January 8, 2009. As such, Mr. Prieto was forced not to fully brief the Assignments of Error (the "AOE") Nos. 1, 2, 3, 5, 7-12, 16, 19-21, 23-24, 44, 47-59, 62-66, 70-74, and 76-77, even though he does not wish to waive them, and believes them to have merit. (JA 17024-032). Since this denial occurred during the appeal, it is not subject to the AOE; however, it is addressed in this brief in Section VI.

laundry room, as the testimony was irrelevant and invited the jury to improperly speculate that the hair was the result of her washing laundry.

26. The Court erred in allowing Tulio Sanchez to testify that Mr. Prieto sometimes worked near Dulles Airport because it invited the jury to speculate that Mr. Prieto was familiar with Hunter Mill Road.

27. The Court erred in allowing Charles Linch to testify about the "transiency of hair" because he was not qualified as an expert on this subject.

28. The Court erred in allowing Alicia Hernandez to testify to witnessing Mr. Prieto cleaning a gun, as its prejudicial effect outweighed its probative value.

29. The Court erred in denying Mr. Prieto's motion to strike the capital murder counts, rape count, use of a firearm in the commission of a felony counts, and grand larceny count for insufficient evidence.

30. The Court erred in allowing the Commonwealth's attorney to ask Myron Scholberg about the length of the hairs recovered from the pubic combings of Rachael Raver because the Commonwealth lost the evidence and the witness could not answer the question.

31. The Court erred in allowing the Commonwealth's attorney to ask Myron Scholberg about how he cannot exclude the possibility that the hairs in V2 were of Hispanic origin, as the question was misleading to the jury because Mr. Prieto's hair was not classified as Hispanic, but as Mongoloid/Caucasian.

32. The Court erred in allowing the Commonwealth's attorney to ask Charles Linch about whether one could conclude that hair that had "dense, dark pigmentation" was Negroid if that is all the information about the hair one had, as the question's prejudice outweighed its probative value.

33. The Court erred in failing to strike the death penalty at the close of the Commonwealth's case-in-chief because the Commonwealth failed to prove Mr. Prieto was the triggerman.

34. The Court erred in not granting Mr. Prieto's request for a mistrial based on Charles Linch's answer ("... if I just had a short piece, or dark ones, I may have mistakenly thought it was from a black person.").

35. The Court erred in adopting the "principal-in-the-first-degree" language in the "triggerman" jury instruction.

36. The Court erred in not granting Mr. Prieto's instruction G, which related to the "missing evidence."

37. The Court erred in denying Mr. Prieto's motion to bar the death penalty because the Commonwealth had lost evidence crucial to Mr. Prieto's defense.

38. The Court erred in denying Mr. Prieto's motion to bar the Commonwealth's attorney from arguing the following "points" to the jury during his closing argument, as they have no basis but a speculative basis: (a) that any of the unknown hairs were from a female, from Mr. Prieto, from a Hispanic individual, or from an individual who was not a suspect; (b) that the "missing hair" was from transference, and was not related to the killings; (c) that the quality of the "missing hair" was insufficient for further forensic analysis; (d) that the gun to which Mr. Prieto allegedly had access was the gun that killed Rachael Raver and Warren Fulton; and (e) that Mr. Prieto was familiar with Hunter Mill Road since he allegedly worked near Dulles Toll Road in the past.

39. The Court erred in not sustaining counsel for Mr. Prieto's objection to the Commonwealth's attorney's characterization of Alicia Hernandez's testimony during his closing argument.

40. The Court erred in not striking the Commonwealth's attorney's "request for justice" plea during its (rebuttal) closing argument.

41. The Court erred in denying Mr. Prieto's motion to strike the vileness theory of the death penalty.

42. The Court erred in failing to give the penalty verdict form Mr. Prieto's attorneys provided and instead provided an erroneous verdict form.

43. The Court erred in overruling Mr. Prieto's objections to the Commonwealth's attorney presenting Mr. Prieto's records of conviction in California, with the death sentence displayed, to the jury.

45. The Court erred in overruling Mr. Prieto's objection to the Commonwealth's attorney cross-examining Dr. Stewart with regard to the Virginia standard for mental retardation.

46. The Court erred in denying Mr. Prieto's motion to exclude evidence related to Mr. Prieto's alleged unadjudicated criminal misconduct.

50. The Court erred in overruling Mr. Prieto's objection to the Commonwealth's attorney presenting rebuttal evidence with regard to the issue of mental retardation prior to the conclusion of Mr. Prieto's affirmative mental retardation case.

60. The Court erred in not instructing the jury that the sub-factors required for a finding of death, including vileness and future dangerousness, have to be unanimous.

61. The Court erred in denying counsel for Mr. Prieto's proposed instruction "J", which properly instructed the jury that a death sentence is never mandatory, and that a life sentence may still be imposed even where a jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.

66. The Court erred in refusing counsel for Mr. Prieto's proposed instruction "C", which provided a definition of the standard deviation to the jury.

67. The Court erred in refusing counsel for Mr. Prieto's proposed instruction "H", which provided a definition of future dangerousness to the jury.

68. The Court erred in refusing counsel for Mr. Prieto's proposed instruction "K", which provided a definition of vileness to the jury.

69. The Court erred in its response to jury note #1, which asked "Your Honor, regarding the first aggravating circumstance: 'constitute a continuing serious threat to society'; are we to consider that he is already

never likely to leave prison or should we consider the possibility of him walking the street as a free man?"

75. The Court erred in denying Mr. Prieto's motion for a new trial and motion to set aside the jury verdict.

78. The Court erred in not setting aside the jury verdict or granting a new trial because the Court erroneously refused to instruct the jury, pursuant to *Powell v. Commonwealth*, 261 Va. 512 (2001) and *Morrisette v. Warden of Sussex I State Prison*, 270 Va. 188 (2005), that a life sentence may still be imposed even where a jury finds that one or both of the aggravating factors have been proven beyond a reasonable doubt.

79. The Court erred in not dismissing the charges against Mr. Prieto because the Commonwealth lost exculpatory evidence, *i.e.*, hair recovered from the pubic combings of Rachael Raver.

80. The Court erred in not precluding the Commonwealth from arguing that the missing hair recovered from the pubic combings of Rachael Raver might have been Mr. Prieto's hair.

81. The Court erred in not instructing the jury that the missing hair recovered from the pubic combings of Rachael Raver was from a black person and was sufficient for DNA analysis, which might have identified its actual donor.

82. The Court erred in imposing the sentence of death, as it was imposed under the influence of passion, prejudice, and/or another arbitrary factor, and is excessive or disproportionate to the penalty imposed in similar cases.

QUESTIONS PRESENTED

1. Did the Circuit Court err in failing to dismiss the charges against Mr. Prieto because the Commonwealth had lost exculpatory evidence? (AOE Nos. 22, 25, 27, 30-32, 34, 37, 38, and 79-82).

2. Did the Circuit Court err in failing to preclude the Commonwealth from seeking a capital murder charge against Mr. Prieto because it had lost exculpatory evidence? (AOE Nos. 22, 25, 27, 30-32, 34, 37, 38, and 79-82).