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SPENCER v. COMMONWEALTH [SPENCER III] Va.., 385 S.E.2d 850 (1989) Supreme Court of Virginia

The Fourth Circuit also addressed the constitutionality of Coleman's sentence. The Court stated that a jury trial is **not** constitutionally required for imposition of the death penalty, and that the determination of its appropriateness may be made by an appellate court. *Id.* at 13 (citing *Cabana v. Bullock*, 474 U.S. 376, 106 S. Ct. 689, 88 L. Ed. 2d 704 (1986)).

In *Cabana*, however, the issue was whether, on substantive Eighth Amendment grounds, defendant was a mere accomplice who did not kill, or intend death and was therefore in a constitutionally protected class of defendants as defined by *Enmund v. Florida*, 458 U.S. 782, 102 S. Ct. 3368, 73 L. Ed. 2d 1140 (1982). The main issue in *Cabana* was at what point in the criminal process an *Enmund* finding must be made. *Cabana*, at 382. The United States Supreme Court determined that such a finding did not require a jury and that an appellate court could constitutionally determine whether the death penalty was permissible under *Enmund*. *Id.* at 385, 386.

The Fourth Circuit's reliance on *Cabana* is curious. The Fourth Circuit read *Cabana* as authority for an appellate court to determine in place of the jury the proper application of the vileness aggravating factor and then to impose the death penalty. *Coleman*, at 13. However, the United States Supreme Court has held that an appellate court *may not* simply review the circumstances of the crime and decide on its own that they are sufficient to make out this aggravating factor. *Maynard v. Cartwright*, 486 U.S. 356, 363, 108 S. Ct. 1853, 1857, 100 L. Ed. 2d 372, 377 (1988). Since *Maynard* dealt with the very issue raised by Coleman, it would appear to be the more appropriate authority.

As shown by this opinion, state and federal appellate courts require STRICT compliance with procedural rules. Virginia practitioners should note that, unlike *Coleman*, most appeals to the Supreme Court of Virginia involve several claims which the court may reject on the merits or find to be waived or defaulted. Habeas counsel should note that for a state to invoke the doctrine of procedural default, "'[T]he state court's opinion [MUST] contain a plain statement that its decision rests upon adequate and independent state grounds.'" *Coleman*, at 5 (quoting *Harris v. Reed*, 109 S. Ct. 1038, 1042 (1989) (quoting *Michigan v. Long*, 463 U.S. 1032, 1042 (1983)). Also, counsel should note that any discrepancies or ambiguities regarding this point should be resolved in favor of permitting federal jurisdiction and review. *Michigan v. Long*, 463 U.S. 1032, 1040-41, 103 S. Ct. 3469, 3476, 77 L. Ed. 2d 1201, 1214 (1983).

SUMMARY BY:
Thomas J. Marlowe

SPENCER v. COMMONWEALTH
[SPENCER III]

____ Va. ____, 385 S.E.2d 850 (1989)
Supreme Court of Virginia

FACTS

This is Timothy Wilson Spencer's third capital murder trial and appeal. *Spencer I* and *Spencer II* have been discussed in 2 *Capital Defense Digest* 13, (Nov. 1989).

Spencer was convicted of capital murder, i.e., willful, deliberate, and premeditated murder during the commission of or subsequent to rape, of Dr. Susan Hellams. Dr. Hellams' wrists had been tied behind her back with electrical tape. Death occurred by "ligature strangulation." Other injuries such as a fractured nose and marks indicating that she had been kicked with the edge of a shoe were found. *Spencer III*, 385 S.E.2d at 852. Spermatozoa were discovered on swabs taken from the victim's vagina, rectum, and perianal region, as well as from fluid found on the victim's skirt and slip. *Id.* Serological examination revealed that the seminal fluid was consistent with a type O secretor. Both Hellams and her husband were found to be non-secretors. *Id.* A sample of Spencer's blood revealed that he was a "type O secretor, PGM type 1, PGM subtype 1+, and peptidase A type 1." *Id.* However, 13% of the population have this particular combination of blood types. *Id.* As in *Spencer I* and *Spencer II*, DNA molecules from Spencer's blood sample were compared with DNA molecules from the seminal fluid, and were found to match. *Id.* at 853. No two individuals except for identical twins have the same DNA patterns. *Id.* at n.1.

HOLDING

At trial, Spencer challenged the constitutionality of the death penalty. The Virginia Supreme Court rejected this claim. *Id.* at 853. Spencer also contended that the death penalty statute was "vague" and does not specify which party carries the burden of proof of mitigation. The Virginia Supreme Court rejected this claim as not having been raised at trial. *Id.* at 854, n.3. Spencer also challenged the exclusion of venireperson Maureen Owens. The Virginia Supreme Court found no error in the exclusion of Owens. *Id.* at 854-5. The most significant holdings were those turning aside Spencer's challenges to the critical DNA evidence.

ANALYSIS

In this case, the "conventional" serological evidence showed only that the rapist-murderer was a "type-O secretor." Blood tests performed upon Spencer showed him to belong to this type. Since 13% of the population are type-O secretors, this evidence was insufficient to prove that Spencer had committed the rape. *Id.* at 852. In the absence of other forensic evidence, the DNA matching was necessary to show that Spencer had perpetrated the crime. The probability of error in the DNA matching process used to compare the DNA from Spencer's blood sample to the DNA in the seminal fluids recovered from the victim is alleged to have been one in 705,000,000. *Id.* at 853, n.2. Expert witnesses testified as to the accuracy and reliability of the test. "Dr. Roberts testified unequivocally that there was no disagreement in the scientific community about the reliability of DNA print testing." *Id.* at 854. DNA print testing was first at issue in Virginia as a forensic technique in *Spencer I* and *II*, where the Virginia Supreme Court held that "DNA testing is a reliable scientific technique." *Id.* at 855.

The Supreme Court of Virginia rejected Spencer's assignment of error complaining of the trial court's limitations on the cross-examination of Dr. Roberts. The Court noted that Spencer made no proffer of his questions or the answers the witness would have given. *Id.*

Significantly, the Court also noted that Spencer did not dispute that the DNA testing was properly conducted. As noted above, conventional analysis of the seminal fluid and Spencer's blood samples did no more than allow him to be considered as a suspect; it was the DNA matching that provided virtually conclusive evidence of his guilt. The defense presented no evidence in the guilt phase of the trial. *Id.* at 853. In other words, defense counsel made no significant challenge to the DNA matching test procedure in general

or to the tests which the Commonwealth used to link Spencer to the murder. There is, however, at least one recent example of successful employment of the latter line of defense against DNA evidence.

In *People v. Castro*, 545 N.Y.S.2d 985 (1989), a successful challenge to the DNA matching test linking Castro to a murder was made. The evidence linking Castro to the murder victim consisted of bloodstains on his wristwatch. *Castro* at 985. Lifecodes Corp. performed a DNA matching test on DNA from the bloodstains on the wristwatch and determined that they matched those of the victim. *Id.* at 985-6. Castro's attorney, Peter Neufeld, fielded a team of five expert witnesses to challenge the Lifecodes data. *Id.* at 986. Eventually, although the New York Court of Appeals ruled that the DNA matching test was a valid procedure, it questioned the reliability of the actual procedure used in this case.

> The rule for declaring a measured match must be the same rule which is used for declaring a match between the measurements and the data pool. **This was not done in this case.** Because of this error, **the population frequencies reported by Lifecodes in this case are not generally accepted by the scientific community.** This mistake might have been corrected by remeasuring the bands, rematching them to the data pool, and then recalculating the allele frequencies. **However, this procedure was not undertaken in this case.** Accordingly, the statistical probabilities noted would have been precluded or substantially reduced . . .

Castro at 998 (emphasis added). The New York Court of Appeals found that this rendered the results so unreliable that they were "inadmissible as a matter of law." *Id.* at 999.

Castro illustrates the dangers inherent in "infallible" methods of identification. No analytical technique is any more reliable than the technician performing the procedure or the sample being analyzed. Further, the more complicated the procedure, the greater the need for safeguards to ensure reliability. An article in the December 1989 issue of *Student Lawyer* (Williams, "Conviction by Chromosome," p. 26) quotes Edward Lander, an expert witness for the defense in *Castro*, on the need for greater reliability in forensic testing: "At present, forensic science is virtually unregulated — with the paradoxical result that clinical laboratories must meet higher standards to be allowed to diagnose strep throat than forensic labs must meet to put a defendant on death row."

Ultimately, concentration on the reliability of particular, complicated forensic testing showed in *Castro* that Lifecodes' own test results excluded defendant as the perpetrator of the crime. *Castro* at 998.

It is suggested that Virginia attorneys faced with DNA matching test evidence study the *Castro* opinion. Although highly technical, it provides a readable and detailed explanation of the entire matching procedure and illustrates how the procedures were successfully challenged in that particular case. The opinion also lists numerous articles and learned treatises upon the subject. For these reasons it is an excellent starting place for research.

CRITICAL POINTS IN THE PROGRESS OF A CAPITAL CASE

By: Elizabeth A. Bennett

I. Introduction

In the progress of capital as compared with non-capital trials, there are points at which the capital trial presents unique challenges and responsibilities for defense counsel. In addition, there are points where the importance of matter also present in non-capital trials is enhanced. This article does not undertake exhaustive treatment of those points, it merely identifies them—some are also discussed elsewhere in this issue.

II. Pretrial Motions: Unique Resource Requirements in Capital Cases.

A. Securing Time and Resources

1. Mental Mitigation

a. Va. Code Ann. § 19.2-264.3:1 (Supp. 1989).

This section provides for the mandatory appointment of a mental health expert upon a showing that defendant is indigent and either has been charged with or convicted of capital murder. The function of the mental health expert is to evaluate the capital defendant and to assist in the preparation and presentation of evidence in mitigation to be presented during the sentencing phase of the trial. An alternative means of securing the assistance is to obtain appointment under the Constitutional authority originating in *Ake v. Oklahoma*[1]. Under *Ake*, however, a substantial showing is required by the defendant. The burden of making this showing must be weighed against the significant disadvantages which arise when defendant moves under § 19.2-264.3:1. Va. Code Ann. § 19.2-264.3:1 compels a capital defendant to waive his Fifth Amendment privilege against self-incrimination by submitting to examination by an expert appointed for the Commonwealth, furnish that expert with reports containing statements made by the defendant to his expert, or face possible preclusion of the testimony of his expert[2] at the capital penalty trial.

b. *Ake v. Oklahoma*

1. Introduction

As will be seen in the following sections, *Ake* is not only authority for securing expert mental mitigation assistance, but may also authorize other expert assistance deemed to constitute "basic tools" of an effective defense.

While the showing required under *Ake* is substantial, counsel should be permitted to make it *ex parte*. This is premised upon the fact that this showing cannot be made without revealing defense theories or other privileged undiscoverable material to the Commonwealth. Clearly this information would not be discoverable from a defendant who could afford to retain his own expert. One benefit of pursuing the *Ake* process is that it forces counsel to develop a theory of mitigation in order to show what defensive matters, particular to the case, require expert assistance for their preparation and presentation.

Counsel should consider moving on both constitutional and statutory grounds. First, counsel could make the *Ake* motion, supported by the *ex parte* showing. If appointment is denied, a motion under § 19.2-264.3:1 could follow, with appropriate objection