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SAVINO v. COMMONWEALTH 239 Va. 534, 391 S.E.2d 276 (1990)

The second category consists of appellant's claim involving the sufficiency of the evidence supporting his death sentence. This matter was not raised on direct appeal after trial. In state habeas, the Virginia Circuit Court deemed the claim procedurally defaulted under *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1978), *cert. denied*, 419 U.S. 1108 (1979), which held that a petition for a writ of habeas corpus may not act as a substitute for a proper appeal based upon an objection not made at trial.

In federal habeas, Justus did not offer cause to excuse the default. This prompted a recommendation of dismissal of the claim under *Wainwright v. Sykes*, 433 U.S. 72 (1977), which requires both a showing of cause for not complying with state procedure and a showing of prejudice to the defendant before a claim will be addressed by the federal court. One of the excuses for failing to follow state procedure is ineffective assistance of counsel (IAC). Justus did not claim ineffective assistance of counsel as cause for the default until after the magistrate's recommendation of dismissal had been adopted by the U.S. District Court. In the instant case, the 4th Circuit, citing *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986), upheld the procedural bar because the "IAC as cause" claim had neither been raised in the federal petition nor presented to and exhausted in the state courts.

The third category consists of the last four claims. These claims were also not raised on direct appeal and were lost by another variation of the *Murray* rule. However, unlike his previous claim at state habeas, Justus asserted ineffective assistance of counsel as cause for the default. The state habeas court rejected the IAC claims on the merits and as a result the underlying substantive claims fell with them.

When Justus appealed the state habeas decision to the Virginia Supreme Court, however, he did not separately assign error to the denial of his "IAC as cause" claims. He did raise the substantive claims themselves, probably believing that the IAC claims would be carried along. The Supreme Court of Virginia affirmed the holding that the substantive claims were defaulted under *Slayton*.

At federal habeas, Justus again raised his four procedurally-defaulted substantive claims and the procedurally-defaulted IAC claims as cause. The Court of Appeals for the Fourth Circuit held that the underlying substantive claims could not be considered because the IAC claims that might have kept them alive were also procedurally defaulted. It termed this failure "double default." *Justus* 897 F.2d at 712.

The hair splitting analysis of this decision, based upon a process that is already very complicated, serves to reinforce the necessity for preserving appealable issues with the utmost care. Several valuable lessons may be extracted. First, "ineffective assistance of counsel claims offered as cause to excuse procedural defaults of other constitutional claims are *separate* and *distinct* from those other constitutional claims." *Kimmelman v. Morrison*, 477 U.S. 365 (1986)(emphasis added). An IAC claim and any underlying substantive claims are *not* inextricably linked. Again, it is likely that counsel assumed that appeal of the state habeas decision on the substantive issues would automatically carry the IAC claims offered as cause for default. This is not so. IAC claims used as "cause" under *Sykes* to cure a default must be separately appealed or are *themselves* defaulted.

Second, there is a range of inattention by counsel which can forfeit constitutional claims, yet not constitute ineffective assistance of counsel. *Sykes*, recall, permits reviving an otherwise defaulted claim with a showing of cause and prejudice. Under *Sykes*, the failure of counsel to comply with state procedure can supply the "cause" prong, but only if the failure can be characterized as so egregious as to fall below the minimal constitutional standard described in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Both *Sykes* and *Strickland* also require a further showing of prejudice.

Because the *Strickland* standard permits a great deal of bad lawyering without terming it constitutionally deficient, (*See* Marlowe, *Ineffective Assistance of Counsel,* Capital Defense Digest, this issue), there exists a *Sykes-Strickland* "gap." That is, an attorney may cause a possibly life-saving claim to be barred from federal review under *Sykes* and still not be ineffective under *Strickland*.

Sykes and *Strickland* are not new cases. One can argue that the bar should realize the pitfalls of default by now such that future failure by counsel to comply with state procedural requirements is IAC under *Strickland* and "cause" under *Sykes*. The procedural default requirements in Virginia should be well known to counsel from experience in non-capital cases. More importantly, any casual reading of Virginia Supreme Court opinions in *capital* cases will reveal them to be replete with findings that claims have been defaulted. (*See* Powley, *Perfecting the Record of a Capital Case in Virginia,* Capital Defense Digest, this issue.) Attorneys representing death-sentenced prisoners at state or federal habeas may wish to urge directly that the gap be closed.

Summary and analysis by:
Christopher J. Lonsbury

SAVINO v. COMMONWEALTH

239 Va. 534, 391 S.E.2d 276 (1990)
Supreme Court of Virginia

FACTS

On April 24, 1989, Joseph John Savino pled guilty to a capital murder indictment charging that he did "willfully, deliberately, feloniously and with premeditation, kill and murder Thos 'Thomas' McWaters, Jr. in the commission of robbery while armed with a deadly weapon," in violation of Va. Code § 18.2-31(4). Savino also pled guilty to the commission of the underlying robbery. By entering pleas of guilty, Savino waived his right to a jury trial and the Commonwealth presented its evidence in support of the indictment. Finding Savino guilty of both capital murder and robbery, the court proceeded to the sentencing phase of Virginia's bifurcated trial procedure. Va. Code Ann. § 19.2-264.4 (1990).

Pursuant to Savino's request, the trial court appointed a qualified mental health expert, Dr. Lisa Hovermale, to assist Savino in the preparation and presentation of his defense. Savino intended to present Hovermale's testimony in support of his theory of mitigation. Adhering to the rules prescribed by statute, he gave notice of his intention to the Commonwealth Attorney. Va. Code Ann. § 19.2-264.3:1(E) (1990). In response, the Commonwealth motioned the Court, pursuant to 3:1(F) to compel Savino to submit to an evaluation by its own expert "concerning the existence or absence of mitigating circumstances" relating to Savino's mental condition at the time of the murder. *Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276, 280-81 (1990). The court appointed Dr. Arthur Centor, a clinical psychologist, to examine and interview Savino.

At the sentencing hearing, the Commonwealth presented Dr. Centor's testimony as aggravating evidence. During his testimony, Centor opined that Savino showed signs of future dangerousness. Following the prosecution's use of Centor's testimony, Savino offered Hovermale's testimony to support his theory of mitigation. Savino objected to Centor's opinions regarding Savino's future dangerousness as "unreliable." Additionally, Savino objected to the Commonwealth's

questions to Centor regarding his testimony in other capital trials as "totally irrelevant." *Id.* at 545, 391 S.E.2d at 282.

The trial court sentenced Savino to death. On appeal, Savino challenged the constitutionality of Centor's testimony pertaining to Savino's future dangerousness.

HOLDING

The Supreme Court of Virginia consolidated the automatic review of Savino's death sentence with his appeal of right, and upon review, affirmed the judgment and sentence.

Savino asserted several grounds for relief but the holdings of the Virginia Supreme Court which merit discussion in this summary are the following: (1) the entry of Savino's voluntary guilty plea acts as a waiver to all challenges, including those raised at the sentencing phase, except jurisdictional challenges; and (2) testimony by the State's psychiatrist concerning Savino's future dangerousness following a compelled examination did not violate Savino's fifth or sixth amendment rights.

ANALYSIS/APPLICATION IN VIRGINIA

I. Effect of Guilty Plea

The Virginia Supreme Court refused to recognize Savino's constitutional challenges to the death penalty and sentencing procedures with the curious exception of the challenge to Centor's testimony. *Id.* at 539, 391 S.E.2d at 279. Because he knowingly and voluntarily pleaded guilty to the charges and waived his right to a trial on these charges, Savino was found to have waived all defenses except a jurisdictional challenge. *Id.* at 538, 391 S.E.2d at 278. "A voluntary and intelligent plea of guilty by an accused is, in reality, a self-supplied conviction authorizing imposition of the punishment fixed by law." *Id.* (quoting *Peyton v. King*, 210 Va. 194, 169 S.E.2d 569 (1969)).

There is a real probability that the court's holding is erroneously broad. For example, it would appear under the court's holding that the State's procedures *could* provide for a conclusive presumption of future dangerousness if Savino presented no evidence in mitigation. Savino would have waived any objection to this unlawful procedure by his plea of guilty at the guilt phase of the trial. However, there is no "punishment fixed by law" in capital cases. Within constitutional confines, the sentencing procedures must supply a guided choice between two punishments. A plea of guilty to an offense rendering one death-eligible does not appear to be a waiver of claims that the sentencing procedure was unconstitutional.

II. Admission of Expert Psychiatric Testimony on Future Dangerousness at the Penalty Phase

A. Fifth Amendment Claim

Relying on *Estelle v. Smith*, 451 U.S. 454, (1981), Savino claimed that the Commonwealth's expert testimony in the penalty phase of the trial violated his privilege against self-incrimination. In *Estelle*, the defendant was compelled by the court to submit to a mental examination even though he had not initiated an evaluation and did not introduce any psychiatric evidence in mitigation. Furthermore, the psychiatrist for the State did not advise Estelle of his right to remain silent. Finally, the psychiatrist testified at the penalty phase of the trial that Smith would be dangerous in the future, relying in part on his statements during evaluation. *Id.* at 456. Smith's death sentence was vacated because of the violation of his fifth amendment privilege against compelled self-incrimination. *Id.* at 454.

In the present case, Savino requested a mental examination. Thereafter, he gave notice of his intention to use the expert's evaluation as mitigating evidence. Relying on *Buchanan v. Kentucky*, 483 U.S. 402 (1987), the Virginia Supreme Court held that when Savino gave notice of his intention to present evidence based on the evaluation, he waived his fifth amendment protection against the introduction of psychiatric testimony by the State.

However, in *Buchanan*, the United States Supreme Court held that when a defendant requests a psychiatric evaluation in order to prepare and present a mental-status defense at the *guilt/innocence* phase, he has waived his fifth amendment challenge to the prosecution's use of that evaluation in rebuttal. *Id.* at 422-23. The United States Supreme Court has not addressed the waiver issue relative to presentation of evidence at the *penalty* phase.

B. Statutory Claim

The State's evaluation of Savino quite possibly went beyond the scope of the statutorily-authorized examination. The Code specifies in 3:1(F), and the court's order explicitly directed, that the Commonwealth's evaluation of Savino was restricted to the "existence or absence of mitigating circumstances relating to the defendant's mental condition *at the time of the offense*." Va. Code Ann. 19.2-264.3:1(F) (Repl. Vol. 1990) (emphasis added). The Code further provides that no evidence derived from any statements or disclosures made during the Commonwealth's capital sentencing evaluation may be introduced against the defendant at the sentencing phase for the purpose of *proving* aggravating circumstances. Aggravating evidence obtained from these evaluations is admissible in *rebuttal* only when relevant to issues first raised by the defense. Va. Code Ann. 19.2-264.3:1 (G) (Repl. Vol. 1990)(emphasis added).

In the instant case, the State's expert's examination and subsequent testimony concerned the aggravating circumstance of Savino's future dangerousness. The testimony was not limited to his mental status at the time of the offense. Additionally, the Commonwealth presented this aggravating evidence *before* Savino had presented his evidence in support of a theory in mitigation. Unfortunately, defense counsel failed to object to this error at the sentencing hearing. A proper objection would have preserved this very important issue for appeal.

C. Sixth Amendment Claim

In *Powell v. Texas,* 109 S. Ct. 3146 (1989), the Supreme Court held that the sixth amendment requires that a defendant be given notice of the State's intended use of a psychiatric evaluation of the defendant. The Virginia Code also requires notification. Va. Code Ann. § 19.2-264.3:1 (Repl. Vol. 1990).

Savino claimed that his sixth amendment right to counsel was violated because he was never advised of the purpose of the psychiatric evaluation by the Commonwealth. *Savino*, 239 Va. at 544, 391 S.E.2d at 281. Savino relied on *Estelle* and *Powell*, in which the U.S. Supreme Court affirmed the defendant's sixth amendment right to have his attorney notified of the purpose of any psychiatric evaluation. *Estelle*, 451 U.S. at 470-71; *Powell*, 109 S. Ct. at 3146. Savino further argued that he was not advised that his evaluation by the Commonwealth could result in the presentation of "future dangerousness" testimony at the sentencing trial.

In the instant case, the Commonwealth requested and was granted a court order for the evaluation of Savino in the language of the statute, which itself restricts the scope of the evaluation to circumstances relating to his mental condition at the time of the offense. Thereafter, the testimony went beyond the authorized scope. Despite the explicit order regarding the scope of the evaluation, which echoes the codification, the Virginia Supreme Court held that, upon the court's issuance of the order, Savino was sufficiently notified that an examination would be conducted by the Commonwealth's expert in an effort to produce evidence against

Savino. *Savino*, 239 Va. at 544, 391 S.E.2d at 281.

As to Savino's contention that the Commonwealth failed to tell him that its evaluation of him could result in testimony regarding his future dangerousness, the Virginia Supreme Court held that he was adequately notified of the purpose. The court relied on *Woomer v. Aiken*, 856 F.2d 677, 681 (4th Cir. 1988), *cert denied*, 109 S.Ct. 1560, (1989), which it declared identical. However, in that case, the Fourth Circuit held only that *specific* notification of the defendant is not required. *Woomer*, 856 F.2d at 682. *Powell*, which was decided after *Woomer*, made it very clear that notification is necessary. Not only did Savino not get notice of the Commonwealth's intention to make an evaluation of his mental status for the purpose of producing evidence against him (see discussion above), but also the statute clearly restricts the scope of his evaluation and any testimony regarding that evaluation to his mental status at the time of the offense. Apparently, because the Code conceivably allows the State to use its evaluation of Savino against him for some purposes, Savino is adequately notified by the existence of the Code authorizing such use.

The issues above raise additional questions not addressed by the court. If the defendant must submit to an evaluation by the Commonwealth, which might result in an affirmative case in aggravation against him, as a condition to even exploring the plausibility of presenting evidence in mitigation, the defendant is put in the precarious position of choosing between his fifth amendment privilege against self-incrimination and sixth amendment rights to put on evidence and of assistance of counsel. What should defense counsel do once notified of the Commonwealth's intentions?

There are a number of options available to capital defense counsel when considering the issues raised by use of mental health experts in mitigation. Ultimately, each is a tactical decision which rests on the unique aspects of a particular case. A threshold determination is whether a mental health expert will be helpful at all. For an expert to be useful, or for the defense to be able to deal with the consequences, counsel must be willing to engage in an extensive investigation into the defendant's background before the evaluation and a followup investigation afterward.

If an expert's evaluation is used, and the Commonwealth responds with a request for its own examination, counsel may either instruct the client to say nothing or to cooperate short of making any incriminating statements or commenting on the crime. If this option is used, a finding under the statute could be made that the defendant refused to participate and that any evidence from his own expert's evaluation will be precluded. Va. Code Ann. § 19.2-264.3:1 (F) (Repl. Vol. 1990). However, there is a substantial constitutional question raised by preclusion of evidence which is basic to an effective defense, particularly in the context of mitigation evidence at a capital trial. (*See* Bennett, *Is Preclusion Under Va. Code Ann. 19.2-264.3:1 Unconstitutional?*, Capital Defense Digest, Vol. 2, No. 1, p. 24, (1989)). Another option is that counsel could insist on being present at any evaluation conducted by the State, on the basis of the sixth amendment right to counsel as established in *Powell*. Another option is to cooperate fully with the Commonwealth as provided in 3:1 while objecting vigorously and preserving the constitutional arguments identified above.

Whenever the Commonwealth files a motion for an evaluation pursuant to 3:1(F), defense counsel should file and argue a motion in limine to ensure that scope of the Commonwealth's evaluation does not exceed that authorized by 3:1. The motion in limine should also seek an order that the expert's subsequent testimony may not be used to establish aggravating evidence at the penalty trial.

The instant case also spotlights the nightmarish possible effects of a voluntary guilty plea in Virginia. In non-capital cases, entry of a guilty plea may be a sound tactical choice. However, many, if not most, such non-capital cases are not appealed in the federal or state system. Quite the opposite is true in capital cases. Especially considering the scope of the waiver doctrine announced by the Virginia Supreme Court, guilty pleas should not be entered to a charge of capital murder absent formal or very strong informal agreements that a life sentence will be imposed.

Summary and analysis by:
Anne E. McInerney

MU'MIN v. COMMONWEALTH

239 Va. 433, 389 S.E.2d 886 (1990)
Supreme Court of Virginia

FACTS

Dawud Majid Mu'Min was an inmate serving a sentence for first degree murder. While assigned to a work detail for the Virginia Department of Transportation, he eluded supervision. After walking a mile along Interstate 95, he entered a retail carpet store and, according to his testimony, asked the operator about oriental rugs. A violent episode occurred. He removed several dollars from the scene and returned to the work crew.

The store operator, near death, was found with her blouse and brassiere pulled up above her breasts. She was also naked below the waist. The autopsy report indicated numerous bruises and lacerations as well as a deep puncture wound to the the left lung and the neck. The victim's genital area was undisturbed.

Mu'Min was found guilty of capital murder in the commission of a robbery while armed with a deadly weapon, and of capital murder while the accused was a prisoner confined in a State or local correctional facility. Va. Code Ann. §§ 18.2-31(4), 18.2-31(3) (1990). He was acquitted on a third charge of capital murder in the commission of or subsequent to rape. Va. Code Ann. § 18.2-31(5) (1990).

HOLDING

Some claims and holdings of this case are not discussed in this summary because they are either too fact specific or are treated in too conclusory a fashion to lend guidance to the bar. The holdings of the Virginia Supreme Court which merit discussion in this summary because of their potential value to practitioners include the following: (1) refusing to allow defendant to ask "content questions" to determine what pretrial publicity prospective jurors had been exposed to is not a denial of due process of law or a violation of the right to trial by an impartial jury; (2) it is immaterial to the validity of the death sentence that the Commonwealth's bill of particulars did not contain the word "torture" when the aggravating factor of vileness can otherwise be established; (3) multiple grievous wounds are sufficient to prove torture; and (4) a prospective juror expressing work related concerns over jury duty need not be excused unless such concerns involve a personal hardship.

ANALYSIS/APPLICATION IN VIRGINIA

1. Voir Dire and Publicity