Capital Defense Journal

Volume 3 | Issue 1 Article 18

Fall 11-1-1990

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Supreme Court of Virginia

FACTS

On February 20th, 1989, Dennis Eaton shot and killed his roommate near their home in Shenandoah County, Virginia. He then shot and killed his neighbor, and stole both his wallet and automobile. Eaton and his girlfriend, Judy McDonald, drove the stolen automobile south on interstate highway 81. At 11:30 p.m. Jerry Hines, a Virginia state trooper, stopped the couple in Rockbridge County because he suspected McDonald of operating the vehicle while intoxicated. The trooper reported having trouble with a drunk driver and requested assistance. Another trooper arrived at 11:55 and found Hines dead from two gunshot wounds. Also at the scene was a traffic citation charging McDonald.

The couple was found at 1:30 a.m. in Salem, and a high speed car chase followed, ending with the crash of the stolen vehicle. Before police could get to the couple, Eaton shot McDonald in the head, killing her, and then shot himself. Forensics tests showed McDonald had handled the weapon used in all the killings. Empty shell casings were found in Eaton's pockets, but he tested negatively for handling the gun.

Eaton did not directly admit to any of the killings during questioning. When asked if McDonald shot Hines, Eaton said that McDonald was a good girl, and would not have hurt anybody. Later he claimed that McDonald killed the trooper. During the questioning by police, Eaton asked whether he could have a lawyer. Eaton also asked for a clarification of his rights and made statements indicating his concern that counsel be present. The police replied that he could have a lawyer, clarified his rights, and continued the questioning. They did not ask whether he wanted a lawyer or attempt to focus Eaton's ambiguous language. On another occasion, Eaton refused to talk to an investigator. Three days later, he was given *Miranda* warnings again and re-questioned. Some of the responses Eaton made to officers during custody were used to show he murdered Hines. Eaton made these statements without his lawyer being present. Eaton's cellmate also testified Eaton admitted to killing the trooper. Eaton was found guilty of capital murder under Va. Code Ann. 1950 § 18.2-31(6), 264.4 (1990), and was sentenced to death based upon his "future dangerousness".

HOLDING

Several claims were raised on appeal which were dependent on the particular facts of the case or were dealt with in a conclusory manner by the Virginia Supreme Court. These claims are not discussed in this summary.

The court held *inter alia*, that Eaton's fifth amendment *Miranda* rights were not violated during police questioning while Eaton was in custody. The court acknowledged the rule in *Edwards v. Arizona*, 451 U.S. 477, 482 (1981) and *Arizona v. Roberson*, 486 U.S. 675 (1988) which established that an accused's waiver of sixth amendment right to counsel must not only be voluntary but also a knowing and intelligent relinquishment of a known right. The court said that a waiver of the right to counsel need not be explicit, but can be demonstrated by the circumstances in the case, citing as authority *Cheng v. Commonwealth*, 240 Va. 26, 35, 395 S.E.2d 599, 604 (1990). *Eaton v. Commonwealth*, (Va., Sept. 21, 1990) (LEXIS, State library, 125) at 7-8.

The court held that "[a] mere refusal to speak...is not the same as a request for counsel." *Id.* at 8. Therefore, Eaton's refusal to speak with an investigator did not prohibit further interviews initiated by the police without counsel being present.

The court concluded that a request for counsel in Virginia must be "unambiguous and unequivocal". *Id.* at 9, citing *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985) and *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (Va. 1983). The court said that after the accused receives *Miranda* warnings and begins to answer questions put to him by police, he must first clearly assert his right to counsel *before* the police must cease questioning and the Edwards rule attaches. *Eaton v. Commonwealth*, No. 900238 (Va., Sept. 21, 1990) (LEXIS, State Library, 125) at 9-10.

The court also held that a voir dire question which would have informed the jury that Eaton would be ineligible for parole if sentenced to life in prison was rightfully excluded. The court said that any information pertaining to the post-sentencing status of the defendant is irrelevant evidence to the jury, and that the jury has no right to information concerning post sentencing events. *Id.* at 6, citing *Poyner v. Commonwealth*, 229 Va. 401, 432, 329 S.E.2d 815, 836 (1985).

ANALYSIS/APPLICATION IN VIRGINIA

The effect of *Eaton* is primarily to reinforce an already difficult standard of establishing the constitutional right to an attorney in Virginia. The court holds that in order to trigger the right to counsel and to preclude further police interrogation without counsel present, an accused must use language that is clear, unambiguous and unequivocal. Essentially, any language like "maybe I should see a lawyer," or "can I get a lawyer", etc. will not be enough to trigger the right to have an attorney present. An accused will have to request the presence of an attorney specifically in order for his fifth and sixth amendment rights to attach.

Additionally, this holding makes it more difficult for an accused to avoid waiving the right to have an attorney present. An accused cannot prevent repeated questioning by remaining silent. Any comment that the accused may make to the police appears to be sufficient for the court to infer a willingness to respond to police without counsel present. The court noted that the rationale behind adopting the "unambiguous and unequivocal" request for counsel standard was to comply with the U.S. Supreme Court's preference for "bright-line rules" in this area. *Id.* at 9. Justice Lacy also offered a "bright line" in her dissenting opinion. The dissent suggested that once confronted with ambiguous language concerning request for counsel, police simply ask whether the accused wants a lawyer before being asked further questions. *Id.* at 16. Fifth and sixth amendment challenges should still be brought in Virginia since the holding of Eaton exists in the absence of a definitive Supreme Court ruling on what words or actions trigger the right to have an attorney present and when the police must cease initiating questioning.

The court's decision that the jury did not have the right to be informed of Eaton's parole ineligibility may be constitutional error. The jury sentenced Eaton to death based upon his future dangerousness. The jury is required to consider all of the evidence in mitigation or connected with the probability of Eaton's future dangerousness. Va. Code Ann. 1950 § 19.2-264.4 (1990). Parole ineligibility is a factor in the factual reality of this consideration. Without accurate information about where the defendant will be in the future, the jury cannot properly determine his future dangerousness to society. Additionally, life without parole is mitigation evidence because the severity of the sentence is so great that it properly affects determination of the propriety of a death sentence. To withhold information concerning the law regarding the accused from the jury is error that may not ultimately withstand challenge. In cases where

a life sentence would mean life without parole, defense counsel should continue to make the record on this issue through voir dire and proposed jury instructions.

The Virginia Supreme Court has consistently rejected constitutional objections to the application of the capital statute. Defense counsel must continue to raise meritorious constitutional challenges, because there will be further appellate review and well constructed arguments may eventually succeed in Federal court. *See, e.g., Hitchcock v. Dugger*, 481 U.S. 393 (1987), *Skipper v. South Carolina*, 476 U.S. 104 (1982).

Summary and analysis by:
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STATE HABEAS IN VIRGINIA: A CRITICAL TRANSITION

BY: CATHERINE M. HOBART

A defendant convicted of capital murder has a statutory right to post-conviction review of his judgment and sentence.[1] This statute allows the defendant to petition for a writ of habeas corpus to the circuit court which entered the original judgment order of conviction.[2] An evidentiary hearing may be granted in response to the petition and can be held at any circuit court within the circuit in which the petition was filed.[3] If the circuit court denies petitioner's writ of habeas corpus, the defendant may appeal to the Supreme Court of Virginia.[4] The right to habeas review at both the circuit court level and the Virginia Supreme Court is a statutory right and is "not a necessary element of due process. Thus, no due process violation occurs if an appeal is barred."[5]

In Virginia, as the law stands today, there is no constitutional right to counsel at the state habeas level.[6] However, there is a statutory entitlement in Virginia which permits the appointment of counsel at state habeas proceedings.[7] The Attorney General's Office does not oppose these appointments and they are routinely made if a *pro se* inmate can raise at least one non-frivolous claim in the habeas petition.

Preparing for state habeas review of a capital conviction is not simply a paper exercise. Because this is probably the last opportunity to raise claims regarding the trial process, it is essential for the habeas attorney to reinvestigate all of the facts regarding the defendant's case. Upon completion of the reinvestigation, each and every claim of error that can be found to have existed at trial or on direct review must be included in the state habeas petition. It is also critically important that these claims be grounded in federal law as well as applicable state law.[8]

The Virginia Supreme Court has a restrictive policy regarding the scope of state habeas review, especially where procedural requirements have not been met. Habeas courts will almost always refuse to hear claims that are procedurally defaulted or which have already been decided on their merits. For this and other reasons, state habeas relief is almost never granted. Yet, it is a critical transition stage to federal review. Therefore, regardless of their potential for success, all claims must be raised in the state habeas petition.

Reinvestigation is also important because it may uncover facts which could ultimately merit relief and overturn a conviction or sentence. Further, there are circumstances and exceptions under federal law that may allow claims to be heard on their merits despite the fact that they are defaulted under state law. There are many reasons supporting the same conclusion: *All* claims must be included in the state habeas petition.

In addition to raising all state claims, any claims which the defendant wishes to raise at federal habeas must also be raised in the state habeas petition. This is necessary for two reasons. First, 28 U.S.C. § 2254(b) requires that all state remedies be exhausted before a federal habeas corpus petition can be granted. "The doctrine of exhaustion of state remedies is satisfied if the same claim raised in a federal habeas proceeding has been presented previously before the highest state court, either on direct appeal or in a post-conviction proceeding."[9] Second, a federal claim which is not properly raised in the state system will be procedurally defaulted. A finding of procedural default at the state habeas level will usually bar review at the federal habeas level. In *Wainwright v. Sykes*,[10] the Supreme Court held that a state finding of procedural default would bar federal habeas review unless both 'cause' excusing the default and 'prejudice' resulting from non-review could be shown. *Smith v. Baker*,[11] stated that the procedural bar would be upheld on federal habeas if, "the State procedural rule serves an adequate State interest . . . and the rule has been reasonably applied."[12]

State habeas claims can be said to fall into three categories. Those which have been procedurally defaulted, those which have already been decided on direct review and those new claims which could only have been brought before the court at the state habeas level. A brief explanation of case law in each of these categories will facilitate an understanding of why so few claims actually receive state habeas consideration on their merits.

A. Claims Which Were Not Raised at the State Trial Level

In *Slayton v. Parrigan*,[13] a prisoner convicted of robbery claimed in his state habeas petition that his in-court identification by the victim "was tainted by an impermissibly suggestive pretrial identification."[14] The petitioner had failed to raise this claim during trial and on direct appeal. The Virginia Supreme Court held that "[a] prisoner is not entitled to use habeas corpus to circumvent the trial and appellate processes for an inquiry into an alleged non-jurisdictional defect of a judgment of conviction."[15] Therefore, it is extremely important to object to all potential constitutional violations during trial[16] and further, to raise those issues on direct appeal.[17] Failure to do so may bar the claims from ever receiving habeas review.

B. Claims Decided On Their Merits On Direct Review

In *Hawks v. Cox*,[18] a prisoner attempted to raise claims in a state habeas petition which were the subject of previous adverse judicial rulings. The Virginia Supreme Court held that a "previous determination of the issues by either state or federal courts will be conclusive."[19] Thus, whenever claims have been decided on their merits by the Virginia Supreme Court on direct appeal, the Attorney General will argue that *Hawks* controls and that the claims should be dismissed. It may frequently be argued in response, however, that the Virginia Supreme Court's denial of the claims was based only on a determination that the trial court did not abuse its discretion in making the ruling, rather than a determination that the trial court made the proper ruling. If that is the case, the state habeas court will not violate *Hawks* by reviewing the claims. In any event, claims dismissed on *Hawks* grounds are properly exhausted and preserved for federal habeas review.

C. Claims Which Could Only Be Raised At State Habeas

Because of the holdings in *Hawks* and *Parrigan*, the only claims likely to be decided at state habeas are those which could not be raised until after the trial and direct appeal stages were completed. The most common of these claims are those arising from the ineffective assistance of counsel, *Brady* [20] violations, and prosecutorial, judicial or law en-