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BASSETTE v. THOMPSON 915 F.2d 932 (1990)

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execution. *Ford v. Wainwright,* 477 U.S. 399 (1986), held that insanity will prohibit the carrying out a of death sentence. In a footnote, the *Evans* court limited post-conviction review to the circumstance of insanity. *Evans,* 916 F.2d 166, n. 1.

The second exception to the *Teague* new rule doctrine is procedural in nature, permitting a new rule to be applied retroactively if it is a "watershed" rule that is essential to the fundamental fairness of the proceeding. *Sawyer v. Smith,* 110 S.Ct. 2822, 2831 (1990). Evans asserted that no procedure exists whereby his first exception claim might be heard. The nature of his second claim is such that it falls with the first. The lack of procedure to hear a first exception claim is moot when the first exception claim is found not to have merit. Nonetheless, the second *Evans* claim brings up an interesting distinction between reliability and "fundamental fairness."

The court analogizes Evans' second exception claim to several cases involving new evidence relevant to the conviction or sentencing of the defendant. Their reasoning does not entirely address Evans' claim regarding a change in his death qualification after sentencing. A typical *Teague* second exception claim would involve the inability of the accused to present evidence at the guilt or sentencing phase of a trial, or fundamental procedural impediments affecting reliability. Evans asserts that the rule regarding accuracy of conviction should also apply to death qualification, which in the case of a conviction based solely upon future dangerousness could involve matters <u>after</u> sentencing.

The "watershed rule" definition of the second *Teague* exception is a narrow reading in that "fundamental fairness" seems to exclude anything but a glaring deprivation of rights during trial. In the name of finality in judicial decision-making, the *Sawyer* decision all but eliminates the second exception as a means of federal habeas relief. (*See* case summary of *Sawyer v. Smith,* Capital Defense Digest, Vol. 3, No. 1, p. 4 (1990)). Historically, the purpose of habeas corpus has been protection of the wrongly accused. Capital punishment based upon future dangerousness raises the question of whether one may be "innocent" of the death penalty. *Cf. Smith v. Murray,* 477 U.S. 527, 537 (1986).

In closing, the Court of Appeals labeled Evans' claim as a plea for executive clemency clothed as a petition for habeas relief. The *Evans* decision does not further narrow federal habeas review but it does demonstrate that few avenues of relief are available after sentencing and direct appeal. Although evidence that long term predictions of future dangerousness are unreliable continues to mount (*See* Marquart and Sorensen, *A National Study of the Furman-commuted Inmates: Assessing the Threat to Society from Capital Offenders,* 23 Loyola L.A.L. Rev. 5 (1989)), practically speaking there is simply no procedure for assessing claims that a sentencing jury erred in its finding.

Summary and analysis by:
Christopher J. Lonsbury

BASSETTE v. THOMPSON

915 F.2d 932 (1990)
United States Court of Appeals, Fourth Circuit

FACTS

Herbert Russell Bassette was convicted of the 1979 murder of a sixteen-year-old night attendant during the robbery of a gas station in Richmond. Three participants in the robbery testified that Bassette shot the victim while he begged for mercy. This case arises from Bassette's federal habeas corpus petition.

Bassette presented thirty-six grounds for relief to the United States District Court for the Eastern District of Virginia. That court found that all but seven of these claims were barred by a Virginia state rule that prevents the hearing of a claim by a federal court if it has not been brought previously to a state court. The U.S. Court of Appeals for the Fourth circuit decided that under a new line of cases, all but three of Bassette's claims for habeas corpus relief are barred.

HOLDING

Bassette asserted many grounds for relief but the holdings of the U.S. Court of Appeals which merit discussion in this summary are limited to those which are not bound by the specific facts of the case.

The Court held that the district court read *Harris v. Reed,* 489 U.S. 255 (1989) and *Teague v. Lane,* 489 U.S. 288 (1989) too narrowly, and should not have heard seven of Bassette's claims. *Bassette v. Thompson,* 915 F.2d 932, 936 (1990). *Harris* holds that when it is contended that an appellant is barred from presenting a claim to the federal court because of state procedural rules, the federal court may still elect to consider the federal questions involved unless the state court has specifically stated it found against appellant based on a procedural bar. *Harris,* 489 U.S. at 261. *Teague* addressed, among other things, the issue that a claim, when it has never been raised in state court, is barred from federal consideration when there is no mention of the claim in the state opinion. *Teague,* 489 U.S. at 299. The Fourth Circuit decided that the *Harris* rule is limited by *Teague* because it would be illogical to expect a state court to invoke specifically a state bar to void a claim it has not heard either in court or in brief. The court decided that Bassette could have brought his claims to the state court, and therefore the procedural bar contained in Va. Code Ann. § 8.01-654(B)(2) prevents him from bringing his claims before the federal court in habeas corpus. This statute provides that a claim shall not be heard "on the basis of any allegation of facts of which petitioner had knowledge at the time of filing any previous petition."

ANALYSIS/APPLICATION IN VIRGINIA

Despite holding that Bassette's claims were barred, the court went on to issue advisory opinions on several of them. Bassette claimed that he should have been advised of his *Miranda* rights prior to a post conviction interview. During this interview, which was conducted by parole and probation officers, Bassette maintained his innocence. The prosecution used these statements to argue that Bassette was not entitled to mitigation of the death sentence because his failure to accept responsibility for the murder was evidence of future dangerousness. Despite the judge's certification that he did not rely on Bassette's statements from this interview when affirming the jury's death sentence, Bassette urged *Miranda* had been violated. *Estelle v. Smith,* 451 U.S. 454 (1981) supports his position by holding that use of statements by defendants undergoing court ordered examinations where defendants are not advised of their *Miranda* warnings violates the fifth, sixth and fourteenth amendments. The Court of Appeals stated that 28 U.S.C. §§ 2245 and 2254 (1988) support the proposition that a judge's affidavit is sufficient to create a presumption of truth that supports a finding of harmless error. *Id.* at 938. The court seems to misuse the statutes. 28 U.S.C. §2245 is procedural in nature and requires that judges certify the facts concerning their findings at sentencing hearings in order to complete the trial level record. 28 U.S.C. § 2254(d) is also a procedural statute. It acknowledges the

presumption of truth in a judge's § 2245 sentencing certification, but also outlines the grounds upon which the presumption may be rebutted. Neither statute dictates that subjective conclusions regarding the judge's opinion about the relative weight of evidence during sentencing hearing certifications are above review in the event of constitutional challenge. The statutes apply to findings of historical fact.

The court also said in dicta that a violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985)(holding due process requires defendant have access to a psychiatric expert where sanity is at issue) was harmless error under *Williams v. New York*, 337 U.S. 241 (1947). *Bassette*, 915 F.2d at 939. Bassette contended he needed the expert to refute psychiatric evidence based on that expert's comments contained in a presentence report. *Williams* held that due process of the fourteenth amendment does not require a defendant have the opportunity to confront and cross examine witnesses who testify about his prior criminal activity during the sentencing phase of a capital case. Although not overruled, *Williams* does not accurately state the current law in capital cases, and the more recent case wherein the court mentions that *Williams* is cited with approval (*U.S. v. Grayson*, 438 U.S. 41 (1978)) was not a capital case. *Gardner v. Florida*, 430 U.S. 349 (1977), on the other hand, holds that the eighth and fourteenth amendments require the right to reliable procedures at sentencing phases of capital trials. This entails the right of the defendant to know and to have an opportunity to rebut evidence in aggravation of the crime. *Id.* at 361-62. Clearly, modern legal principles demand that a capital defendant has the right to be aware of and rebut evidence considered as basis for a death sentence.

The court qualified its analysis of Bassette's *Ake* issue by holding that *Ake* was in any event unavailable to him because of the "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* holds that if a requirement not affecting elements of fundamental justice is placed on states by the United States Supreme Court after the final disposition of a defendant's state court case on direct appeal, it is a "new rule" for that defendant and its implications are not open for use in his case. Bassette's direct appeal became final before *Ake* was decided. This is perhaps useful as an example of how important it is to raise all issues possible at the state court trial and appellate levels. *See* Hobart, *State Habeas in Virginia, A Critical Transition*, Capital Defense Digest, Vol. 3, No. 1, p.23 (1990). Notwithstanding the protection offered by the *Harris* rule, if the record does not speak for itself when the case enters the federal system, many vital issues may be waived permanently. *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990).

Summary and analysis by:
Peter T. Hansen

CLOZZA v. MURRAY

913 F.2d 1092 (1990)
United States Court of Appeals, Fourth Circuit

FACTS

On January 14, 1983, the Virginia Beach Police arrested Albert J. Clozza for sexual offenses and the murder of thirteen year old Patty Bolton. While initially denying that he committed the crimes, Clozza eventually confessed to all of the crimes except rape, an essential element of the capital murder charge. Later, in an interview he initiated, Clozza admitted to raping the victim. Clozza also stated that he had consumed approximately sixteen beers during the day of the offense. In response to police interrogation, Clozza suggested that cruelty may have been his motivation for the physical and sexual assaults. *Clozza v. Murray*, 913 F.2d 1092, 1096 (1990).

The jury convicted Clozza of capital murder, aggravated sexual battery, sexual penetration with an inanimate object, abduction with intent to defile, and two counts of forcible sodomy. Based upon a finding of both statutory aggravating factors, the jury sentenced Clozza to death for capital murder committed during or after rape. *Id.*

After exhausting his direct appeals and state habeas claims, Clozza filed petition for federal habeas relief. *Id.* at 1096. The District Court denied relief. *Id.* at 1092. He appealed to the Fourth Circuit, assigning two grounds of error. First, Clozza claimed that he had been denied effective assistance of counsel during the trial and sentencing phases of the capital murder trial. *Id.* at 1097. Second, he claimed that the Virginia capital sentencing procedure was unconstitutional under the fifth, eighth and fourteenth amendments of the United States Constitution. *Id.*

I. Ineffective Assistance of Counsel

A. Trial Phase

Clozza's first claim of ineffective assistance of counsel revolved around two concerns: Clozza claimed that his attorney's statements prejudiced his case and conceded his guilt, and that his attorney failed to adequately prepare him for cross examination.

During voir dire, but while outside the presence of any jurors, Clozza's attorney stated that he did not want to participate in the trial and did so only because it was his duty and his job. *Id.* at 1098. He also stated that "some of the ACLU lawyers" would have to decide if he had gone to far with his instincts in defending Clozza. *Id.* In his opening statements he stated it was difficult getting to like Clozza enough to defend him adequately. *Id.* Further, he stated, "[i]f it is my kid, a lawyer training in law school, it wouldn't make any difference, I would probably want to kill him." *Id.* During his direct examination of Clozza, the attorney asked if he knew that it would take a miracle such as would have saved the victim to save him. *Id.* In addition to these statements, the attorney also made the remark during the trial that it was "really weird" celebrating Halloween while representing Clozza. *Id.* During closing arguments, the attorney said that he did not want to put his client back on the street, and that if Clozza's suicide attempt had been successful, it would not have been the greatest tragedy. *Id.*

Clozza argued that these statements not only prejudiced his case but also conceded his guilt, thereby establishing a foundation to overturn his capital murder conviction due to ineffective assistance of counsel. His attorney, however, defended the remarks as an integral part of his trial strategy to build credibility with the jurors.

Additionally, Clozza argued that his attorney was ineffective because he failed to prepare Clozza for cross examination, allegedly causing the contradictory intoxication defense. Contrary to his confession statements, Clozza testified during cross examination that he was sober while abducting Patty Bolton. On the account of this testimony, Clozza's attorney had to persuade the jury to believe Clozza's out of court confession statement regarding his intoxication, while convincing them to disregard his in court statement that he was sober. Further, the attorney also had to convince the jury that Clozza's in court statement, that he didn't know if he raped the victim, was true and that Clozza's out of court statement that he had raped her should be disregarded.