Capital Defense Journal

Volume 7 | Issue 1 Article 10

Fall 9-1-1994

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FACTS

On August 16, 1991, two black men wearing dark clothing and armed with semi-automatic pistols entered a restaurant in the Manaport Shopping Center in Manassas around closing time. The shorter of the two men jumped over the service counter, leaving a footprint. This assailant then ordered an employee to open one cash register from which he obtained $100. Attempts to open the second register, however, failed. As a result, the shorter man then entered the back room and returned with the manager. The manager, unable to open the register, was subsequently shot by the taller man. The bullet, piercing a major artery, caused the manager to bleed to death. Chichester was later identified as one of the two men running from the scene.[1]

Chichester was arrested on January 7, 1992. In the first stage of a bifurcated trial, a jury convicted Chichester of capital murder, robbery, the use of a firearm in the commission of murder and the use of a firearm during the robbery. In the second stage of the trial, the jury fixed his punishment at death based on "future dangerousness."[2]

HOLDING

Consolidating the automatic review of Chichester's death sentence with his appeal of the capital murder conviction, the Supreme Court of Virginia upheld the conviction and death sentence.[3]

ANALYSIS/APPLICATION IN VIRGINIA

I. Expert Testimony

A major issue faced by the defense in this case centered on expert testimony concerning a shoe print found on the counter of the restaurant.[4] On this issue, a forensics expert for the Commonwealth compared this print with shoes seized from the home of Shelton McDowell, another suspect in the robbery.[5] He testified that the impression made on the counter matched the design, size and particular "identifying" small cut in McDowell's shoe.[6] Such testimony tended to identify Chichester as the assailant standing in front of the counter and McDowell as the assailant who jumped over the counter. This situation placed Chichester as the triggerman, thus, eligible for the death penalty.[7] Although the opinion indicates that Chichester sought resources in the form of investigative assistance,[8] there is no reference to an attempt to secure appointment, under the authority of *Ake v. Oklahoma*,[9] of a defense expert to combat the critical shoeprint testimony.[10] An *Ake* expert might have been sought to conduct a separate shoeprint analysis, to assist the defense in cross-examination of the Commonwealth's expert, or to identify weaknesses in the forensic science methodology. Although the expert at issue in *Ake* was a psychiatrist, such a request can apply to more than just a mental health expert.[11] The defense, however, carries the burden of showing that an expert is essential to his defense and to deny such a

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1 *Chichester v. Commonwealth*, 448 S.E.2d 638 (1994)

2 *Id.*

3 *Id.* The defendant assigned twenty-six errors. The court, in turn, rejected some of these contentions in brief, conclusive language. Others did not involve death penalty law. On still others, the rulings provide little if any guidance because they apply broad, settled principles of law to facts that are specific to the case being reviewed. Issues in these categories that will not be addressed in this summary include: (1) the death penalty as cruel and unusual punishment, (2) electrocution as cruel and unusual punishment, (3) additional peremptory challenges, (4) limits on voir dire, (5) change of venue, (6) the admissibility of photographs, (7) possession of a handgun, (8) insufficient evidence of guilt, (9) exclusion of jurors, (10) sequestering the jury, (11) prejudice of the jury, and (12) prosecutorial default of an agreement.

4 *Id.* at 642.

5 *Id.*

6 *Id.*

7 Va. Code Ann. § 18.2-18 (1990).

8 Defense counsel also sought a continuance. It should also be noted that it is important that resources be sought on **federal** as well as appropriate state law grounds. It is clear that general investigative assistance was claimed on constitutional grounds. Regarding the motion for continuance and the request for investigative assistance to locate two particular witnesses, however, the Supreme Court of Virginia treated one claim as a state law issue to be decided under an abuse of discretion standard. *Chichester*, 448 S.E.2d at 645.

9 470 U.S. 68 (1985) (when assistance is a basic tool of defense, the defendant is entitled to the assistance of an expert and denial of this expert is a denial of due process). *See* case summary of *Stewart*, Capital Defense Digest, Vol. 6, No. 1, p. 21 (1993) (an analysis of why *Ake* should be relied upon when expert assistance is needed).

10 The only other evidence lending to the identification of Chichester as the triggerman consisted of evidence of an earlier similar robbery where he had fired a weapon and testimony that he had remarked that "he had a body on the gun." *Chichester*, 448 S.E.2d at 643.

11 *See Little v. Armontrout*, 835 F.2d 1240, 1243 (8th Cir. 1987) (en banc) ("There is no principled way to distinguish between psychiatric and nonpsychiatric experts."), *cert. denied*, 487 U.S. 1210 (1988). *See also United States v. Patterson*, 724 F.2d 1128 (5th Cir. 1984) (defendant entitled to expert when expert testimony is pivotal); *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980) (defendant denied equal protection, due process and effective assistance of counsel by court's failure to provide a pathologist to assist with defense); *United States v. Durant*, 545 F.2d 823, 829 (2d Cir. 1976) (defendant entitled to fingerprinting expert); *Washington v. State*, 800 P.2d 252 (Okla. Crim. App. 1990) (*Ake* applied to defendant's motion for psychiatrist, forensic odontologist and chemist); *State v. Bridges*, 385 S.E.2d 337 (N.C. 1989) (failure to grant defendant's motion for fingerprint expert at public expense was reversible error); *State v. Carmouche*, 528 So. 2d 159 (La. 1988), *clarifying*, 527 So. 2d. 307 (La. 1988) (in capital cases, "any reasonable request of the defendant" for expert assistance "should be granted"; trial court should have granted defendant's requests for "a neurologist and a psychiatrist and any additional experts that these doctors deem necessary," as well as "experts in fingerprint analysis and serology"); *State v. Moore*, 364 S.E.2d 648, 656-58 (N.C. 1988) (*Ake* extends to any expert as to which defendant makes threshold showing of need, including, *inter alia*, fingerprint expert); *State v. Coker*, 412 N.W.2d 589 (Iowa 1987) (defendant entitled to intoxication expert to "assist him in the evaluation, preparation, and presentation of his intoxication defense"); *Thorton v. State*, 339 S.E.2d 240 (Ga. 1986) (defendant entitled to funds to employ assistance of forensic dental expert).

request would render a trial unfair.[12] Although no court has created a specific checklist of what establishes entitlement to an expert under *Ake*, courts have examined certain factors in the preliminary showing of need.[13] In addition to such a listing, it is often helpful to make a showing current problems associated with governmental forensic testing. Such forensic testing has often been shown to demonstrate a pattern of unreliability.[14] The advantages of such expert assistance are many and a defendant would essentially be given a "defense consultant" in preparation and presentation of the case as well as cross-examination of prosecution experts. Not every use of expert testimony by the Commonwealth will entitle defendants to a corresponding expert. Nevertheless, *Ake* is underutilized as a resource in Virginia.

II. Jury Issues

A. *Batson v. Kentucky*

The defense counsel made a challenge under the authority of *Batson v. Kentucky*,[15] maintaining that the Commonwealth engaged in discrimination by peremptorily striking two prospective jurors solely because of their race. Assuming that the defense had established a *prima facie* case of discrimination, the Supreme Court of Virginia evaluated the race-neutral explanations proffered by the Commonwealth for the strikes[16] and found them not to be pretextual. It is not clear that any other avenue was available to the defense in this case to question the Commonwealth's peremptory strikes. Counsel are reminded, however, that support for establishing *Batson* challenges can sometimes be found in disparity of strikes[17] or disparity in voir dire.[18]

The Supreme Court of Virginia accepted the prosecution's explanation because the defense did not assert that the Commonwealth's explanation was insufficient to rebut the presumption of invalid peremptory strikes.[19] At this point,the defense could have possibly focused on the disparate treatment of similarly situated jurors who had not been challenged by the Commonwealth. Another possible avenue by which to challenge a race-neutral explanation, deals with establishing a pattern of prosecutorial discrimination in all cases.[20]

B. Fair Cross-Section

Chichester also claimed that since only one black served on the jury, he did not receive a fair trial due to an inadequate representation of blacks that resided in the community.[21] Rejection of this claim, in the form presented, was proper. The proper granting of challenges for cause and use of peremptory challenges can lawfully result in a **petit jury** that does not reflect the racial composition of a community. Defendants, however, are guaranteed a **venire** representing a fair cross section of the community, where no cognizable group is systematically excluded.[22] Underrepresentation of a group in the **venire** summoned for duty establishes a **prima facie** case of systematic exclusion.[23] Although the court correctly rejected Chichester's claim, it cited its opinion in *Watkins v. Commonwealth*[24] in doing so. The fair cross-section claim was properly presented in *Watkins* and the Supreme Court of Virginia misconstrued it. Assistance in investigating, preparing and presenting fair cross-section claims is available from the Virginia Capital Case Clearinghouse and the Virginia Capital Representation Resource Center.

III. Automatic Review

Again the Supreme Court of Virginia improperly employed its default rules in exercise of its statutory obligation to review death sentences.[25] The court also rejected several contentions regarding circumstances provoking passion or prejudice in the jury. One such claim involved seating the family of the victim near the jury box. Apparently an insufficient record was part of the basis for rejection of this claim. External factors, not ordinarily recorded by the court reporter are often important to this type of claim. If they occur it is essential that counsel assures that a record be made, even if the trial must be temporarily interrupted.

Summary and analysis by:
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[12] *See Little v. Armontrout*, 835 F.2d 1240, 1245 (8th Cir. 1987) (en banc) (where identification from victim was only evidence linking defendant to the crime, and identification came after hypnosis, court reversed and remanded defendant's post-conviction habeas petition which found failure to appoint a hypnotist was not error), *cert. denied*, 487 U.S. 1210 (1988).

[13] Factors important to courts evaluating *Ake* motions have included: type of expert, type of assistance, name and qualifications of the expert, reasonableness of the cost, objective bases for the request, subjective basis for the request, legal necessity, legal entitlement to defense experts, inadequacy of available state experts and supporting information for all of these factors.

[14] *See* Jonakait, *Forensic Science: The Need for Regulation*, 4 Harv. J. Law & Tech. 109 (1991) (reports a consistent pattern of unacceptable errors and inaccuracies among forensic crime labs); Decke, *Expert Services in the Defense of Criminal Cases: The Constitutional and Statutory Rights of Indigents*, 51 Cinn. L. Rev. 574, 577 (1982) (reports on the unreliability of the overworked and often insufficiently trained governmental crime lab employees). *See also* Imwinkelried, *The Constitutionality of Introducing Evaluative Laboratory Reports Against Criminal Defendants*, 30 Hastings L.J. 621, 623 (1979) (reports on the high incidence of errors in police laboratory analysis); Bradford, *Barriers to Quality Achievement in Crime Laboratory Operations*, 25 J. Forensic Sci. 902, 905 (1980) ("fundamental errors in identification and faulty methods have been found in numerous cases at the trial or trial preparation phase").

[15] 476 U.S. 79, 89 (1986).

[16] The explanation was a stated belief that the prior experiences of the prospective jurors and their family members with the criminal justice system might cause them to harbor bias or resentment against the Commonwealth. *Chichester*, 448 S.E.2d at 646-47.

[17] Here, for example, if the Commonwealth had not exercised peremptory strikes against white jurors who had bad experiences with the criminal justice system.

[18] Here, for example, if there were white jurors who had not been questioned or were not questioned as extensively about involvement with the court system.

[19] *Chichester*, 448 S.E.2d at 647.

[20] *Swain v. Alabama*, 380 U.S. 202, 227 (1965) (in attacking prosecutorial peremptory strikes, the defense "must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time").

[21] *Chichester*, 448 S.E.2d at 647.

[22] *Watkins v. Commonwealth*, 238 Va. 341, 347, 385 S.E.2d 50, 53 (1989), *cert. denied*, 494 U.S. 1074 (1990).

[23] *Id.*

[24] *Id.*

[25] Default has no place in statutorily mandated review of the record. Va. Code Ann. § 17-110.1 (1990). *See* case summary of *Mickens*, Capital Defense Digest, this issue.