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CORRELL v. THOMPSON 63 F.3d 1279 (4th Cir. 1995) United States Court of Appeals, Fourth Circuit

sufficient time to have his counsel prepare his defense. The Court stated, "[t]o do that is not to proceed promptly in the claim... of regulated justice but to go forward with the haste of the mob...."[34] The Court quoted, "[i]t is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving [counsel] any opportunity to acquaint himself with the facts or law of the case."[35] The Court held, therefore, that due process required the assignment of counsel for an otherwise incapable defendant and that that duty was not discharged by an assignment "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[36] Even Justice Butler, dissenting in *Powell*, conceded that if defendants were "denied the right of counsel, with the accustomed incidents of consultation **and opportunity of preparation for trial**... they were denied due process of law...."[37]

The *Powell* Court's emphasis on the need for trial counsel to have an adequate chance to prepare applies with full force to the Commonwealth's use of unadjudicated crimes to show future dangerousness; the proof of unadjudicated crimes often, as in *Gray*, will resemble a trial in and of itself. Capital defense attorneys, therefore, should strenuously argue that any curtailment of an adequate opportunity for preparation will result in the same ineffective assistance that *Powell* sought to prevent. Defense counsel should point out the prejudice suffered in foregone areas of investigation, unpursued avenues of defense, and lost opportunities for the thorough use of the exculpatory evidence itself. Indeed, think of how different Gray's penalty phase would have been if the defense had known Timothy Sorrell was the prime suspect.

However, to make later claims of prejudice more meaningful and resounding, the defense must make *Brady* requests as specific and all-inclusive as possible. This will help the defense to show that exculpatory evidence that was withheld or that would have been uncovered if given adequate time to prepare would have been material and the case likely would have unfolded in much different fashion that it did.

In *United States v. Cronic*,[38] the United States Supreme Court has given defendants a guide on how to state an ineffectiveness claim because defense counsel has been denied adequate notice. Citing *Powell*, the Court held that in certain circumstances defense counsel may be so handicapped that they could not possibly provide effective assistance of counsel.[39] The Court stated that certain criteria were relevant to this determination:[40] "'(1) [T]he time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.'"[41]

Capital defense attorneys faced with inadequate notice should sculpt their claims in terms of *Powell* and *Cronic*, pointing out how the lack of notice will force them to provide ineffective assistance. The criteria announced in *Cronic* provide the template for crafting the ineffective assistance claim and provide a guide for arguing the materiality of the evidence withheld.

Summary and analysis by:
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[34] *Id.* at 59.
[35] *Id.* (quoting *Commonwealth v. O'Keefe*, 298 Pa. 169, 173, 148 A. 73, 74 (1929)).
[36] *Id.* at 71.
[37] *Id.* at 73-74 (dissenting opinion) (emphasis added).
[38] 466 U.S. 648 (1984).
[39] *Id.* at 659-660.
[40] *Id.* at 663.
[41] *Id.* at 652 (quoting *United States v. Golub*, 638 F.2d 185, 189 (10th Cir. 1980)).

CORRELL v. THOMPSON

63 F.3d 1279 (4th Cir. 1995)
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FACTS

Charles W. Bousman was robbed and murdered August 11, 1985 in Franklin County, Virginia.[1] Walter Milton Correll was arrested and taken to the Roanoke City Police Department on August 16th. Although Correll requested an attorney early into the first interrogation that evening, his request was not honored. He gave two incriminating statements that evening: one to a Roanoke officer and one to Detective Overton of the Frederick County Sheriff's Department, both without the benefit of counsel.[2]

On August 18th, Correll was escorted to Appomattox, Virginia to undergo a polygraph examination.[3] The record did not indicate whether Correll waived his rights before the test. During the examination, the examiner indicated to Correll that an answer indicated deception.[4] Subsequently, Correll was transported to the Franklin County Jail where he asked to speak with Detective Overton in order to explain his polygraph results.[5] Correll waived his rights and gave his third statement regarding the murder.

The two statements given by Correll on August 16th were suppressed at trial, but the third statement following the polygraph examination was admitted into evidence.[6] Correll waived his right to a jury trial and was convicted of capital murder in the commission of robbery. The judge sentenced Correll to death based on the vileness of the crime.

[1] *Correll v. Thompson*, 63 F.3d 1279, 1283 (1995).
[2] *Id.* at 1284.
[3] *Id.*
[4] *Id.* at 1287.
[5] *Id.* at 1284.
[6] *Id.* at 1284.

The Supreme Court of Virginia heard Correll's appeal and affirmed the conviction and sentence.[7] The federal district court for the Eastern District of Virginia, however, granted Correll's petition for a writ of habeas corpus, finding that the admission of the third statement was reversible constitutional error under the Fifth Amendment.[8] The Commonwealth appealed the issuing of the writ to the Fourth Circuit.

HOLDING

The Fourth Circuit held that the district court erred in granting Correll's petition for a writ of habeas corpus on the grounds that the third confession violated *Edwards v. Arizona*[9] and was a tainted confession. Instead, the appellate court ruled that the trial court had properly admitted Correll's third confession and that, even if the confession was improperly admitted, such error was harmless.[10]

ANALYSIS/APPLICATION IN VIRGINIA

I. The *Edwards* claim.

The United States Supreme Court held in *Edwards* that an accused who has invoked his right to counsel pursuant to *Miranda v. Arizona*[11] may not be questioned further until counsel is provided unless the accused himself initiates further "communication, exchange, or conversation" regarding the crime.[12] Every court that reviewed Correll's confessions readily found that Correll had unequivocally invoked his right to counsel before he made any of the incriminating statements in response to interrogation. Indeed, the trial court excluded the first two confessions from the evening of August 16th. However, on the crucial issue of whether Correll initiated the conversation leading to the third confession, the courts differed.

In granting habeas relief, the federal district court inferred that the government must have reinitiated the interrogation by revealing the polygraph results because Correll wanted to explain "what went wrong." The district court reasoned that Correll would not have known something "went wrong" unless he had been told by government officials. The trial court, on the other hand, found that Correll initiated the contact, a conclusion which the Fourth Circuit found should not have been disturbed.[13]

The Fourth Circuit's ruling was based largely on the lack of evidence as to what occurred at the polygraph session:

> although the record indicates that the polygraph examiner told Correll that his response to a question . . . indicated deception, there [was] a complete dearth of information in the record concerning the circumstances surrounding Correll's decision to submit to the polygraph examination or any further information pertaining to the timing or events surrounding the disclosure of the results. Correll simply failed to develop these facts during the state court proceedings.[14]

The court found the lack of a record crucial because "not all statements made by a defendant [after] [the disclosure of polygraph results] can be deemed to be the result of the interrogation."[15]

The court set out two hypothetical situations in which it would not "necessarily" find that the police had initiated the contact: 1) if Correll had requested the polygraph and validly waived his rights before taking the test, any disclosure of the results would not be interrogation conducted without a valid waiver of rights, or 2) if Correll was told of the results by the examiner early in the day and he requested to speak with Officer Overton that evening at the Frederick County Jail, Correll's third statement might not be a "response" to interrogation.[16]

One lesson to be learned from *Correll* is that the government must be held to its burden of proof at trial. The burden of proof is upon the government to prove that a suspect has waived his *Miranda* rights.[17] A waiver of rights will not be assumed by the mere existence of a confession.[18] However, a trial court's finding of waiver is very difficult to reverse, and the habeas petitioner challenging a confession is at a disadvantage for three reasons.

First, the petitioner has the burden of proof to show that the confession was improperly admitted. Second, in federal court, the state courts' findings of fact are presumed correct.[19] Finally, if the petitioner is deemed to have received a "full and fair hearing" in state court, he will not be entitled to a separate evidentiary hearing in federal court absent a showing of cause and prejudice. Therefore, generally, a habeas petitioner is relegated to accepting the fact

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[7] *Id.* Petitioner's writ of certiorari to the United States Supreme Court was denied. Correll filed a petition for writ of habeas corpus in the Franklin County Circuit Court. That court granted the Commonwealth's motion to dismiss except as to the ineffective assistance of counsel claim and ordered a hearing on that claim. The judge ultimately dismissed Correll's petition, the Virginia Supreme Court denied his appeal, and the United States Supreme Court denied his petition for a writ of certiorari. Correll filed a writ of habeas corpus in the federal district court. As part of his federal habeas petition in federal district court, Correll argued that he was denied the effective assistance of counsel for counsel's failure to adequately investigate the events surrounding the third confession. The federal district court of the eastern district of Virginia found this claim had no merit because the trial attorney had adequately investigated the statement. *Id.* at 1284-85. Correll did not raise this issue in the Fourth Circuit Court of Appeals, but did raise an ineffective assistance of counsel claim regarding waiver of his right to a jury trial. *Id.* at 1285.

[8] *Correll v. Thompson*, 872 F.Supp. 282, 291, 293 (W.D. Va. 1994).

[9] 451 U.S. 477 (1981).

[10] *Correll*, 63 F.3d at 1289, 1291. The court ruled against Correll's cross-claims that the district court had erred in: 1) failing to conclude that Correll was denied effective assistance because counsel misled the trial court concerning the reason for Correll's waiver of his right to trial by jury and failed to adequately apprise Correll of the consequences of waiver of the right; 2) applying the § 2254(d) presumption of correctness to the factual findings of the state habeas court concerning Correll's ineffective assistance of counsel claims; 3) holding that Correll's claim of denial of due process of law was procedurally barred. *Id.* at 1292-93. These claims were relatively unimportant compared to Correll's confession law claims. Therefore, they will not be discussed further in the summary.

[11] 384 U.S. 436 (1966).

[12] *Edwards*, 451 U.S. at 485-86.

[13] *Correll*, 63 F.3d at 1287.

[14] *Id.* at 1287-88.

[15] *Id.* at 1287. Although the Fourth Circuit did not rule out that the polygraph itself or the relaying of the results to Correll may have been interrogation, it found insufficient facts to make that determination in Correll's case.

[16] *Id.*

[17] *Colorado v. Connelly*, 479 U.S. 157 (1986).

[18] *Tague v. Louisiana*, 444 U.S. 469 (1980).

[19] *Miller v. Fenton*, 474 U.S. 104, 112 (1985)(interpreting 28 U.S.C. §2254(d)(1966)).

findings of the state courts and will not be allowed to further develop facts in federal court.[20]

In Correll's case, the failure to adequately develop facts in the state courts was fatal to his confession law claim.[21] The Fourth Circuit noted the "complete dearth of information in the record" regarding the events surrounding the polygraph examination and found that Correll had not upheld his burden as a habeas petitioner to prove the inadmissibility of the confession.[22] In addition, because the court found that Correll was given a full and fair hearing in the state courts, a federal habeas evidentiary hearing, in which he might develop further facts, was not available to him.[23] Therefore, based upon the incomplete facts in the record, the Fourth Circuit stated that it could not find that the trial court had erred in finding that Correll had initiated the questioning leading to the third confession.[24]

The message in *Correll* is clear: to preserve *Edwards* issues, trial and state habeas practitioners must put in the record all evidence of lack of waiver and of the circumstances surrounding an initiation of conversation after an invocation of rights. Unless evidence is presented at the state level, the federal courts will not later be able to consider it absent compelling reasons.

II. The Issue of Taint and the Third Confession.

The district court also had granted the writ for habeas corpus on the alternative ground that the third confession was tainted by the first and second inadmissible confessions and was, therefore, also inadmissible. The Fourth Circuit, however, reversed, finding that the first and second confessions did not taint the third confession.[25]

The Fourth Circuit faulted the district court for not reviewing the voluntariness of the first two confessions as part of its taint analysis. The Fourth Circuit relied upon a recent Supreme Court case, *Davis v. United States*,[26] which held that a violation of *Edwards* is a technical violation of *Miranda*, rather than a core Fifth Amendment violation.[27] The court noted that *Davis* had stated that, "The prohibition on further questioning of a suspect who has invoked his right to counsel set forth in Edwards, ''like other aspects of Miranda[,] is not itself required by the Fifth Amendment's prohibition on coerced confessions . . .''"[28]

By characterizing *Edwards* as a "technical" rather than a constitutional rule, the court was able to invoke the United States Supreme Court's ruling in *Oregon v. Elstad*.[29] *Elstad* had held that a mere *Miranda* violation (i.e. a statement that was "voluntary" in a Fifth Amendment sense, but given without proper *Miranda* warnings) could be cured by later *Miranda* warnings. Thus, the Fourth Circuit reasoned, an earlier *Edwards* violation could also be cured with subsequent *Miranda* warnings if the earlier statements were "voluntary."

The Fourth Circuit reviewed the facts found by the trial court, and determined *de novo* that Correll's confessions were voluntary as a matter of law in accordance with *Miller v. Fenton*.[30] The court stated that "[t]he only factor militating toward a finding that these confessions were involuntary [was] Correll's [extremely low] I.Q. of 68. . . ."[31] Upon determining that the first two confessions were voluntary, the Fourth Circuit found that the third confession had followed valid *Miranda* warnings and was untainted by the prior *Edwards* violations.[32]

Correll makes clear that the practitioner must vehemently argue that any prior statements were given involuntarily in order to suppress a subsequent statement taken in violation of *Edwards*.[33] The Fourth Circuit is likely to be the capital defendant's last chance. From the trial forward, defense attorneys must address the issue and repeat the factors "militating against a finding of voluntariness" as much as possible. If the lower courts had addressed the issue and found the first and second confessions involuntary, the Fourth Circuit would not have been able to find so easily the earlier confessions voluntary and uphold the third confession.

Summary and analysis by:
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[20] *Correll*, 63 F.3d at 1288. (citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-12 (1992)). Correll did not argue that cause and prejudice existed or that a fundamental miscarriage of justice would result from denying him a hearing. *Id.* The possibility of cause and prejudice will not be considered if the petitioner fails to argue any exist. *Teague v. Lane*, 489 U.S. 288, 298 (1989).

[21] Failure to develop facts pre-trial or at trial which support the suppression of evidence may constitute ineffective assistance of counsel. But, since admission of Correll's third confession was deemed harmless error by the Fourth Circuit, Correll could not show prejudice resulting from ineffectiveness nor from lack of evidence at the hearing.

[22] *Correll*, 63 F.3d at 1288.

[23] *Id.* at 1288 (citing *Keeney v. Tamayo-Reyes*, 504 U.S. 1, 8-12 (1992)).

[24] *Id.* at 1288, 1293.

[25] *Id.* at 1289.

[26] 114 S. Ct. 2350, 2354-55 (1994).

[27] *Correll*, 63 F.3d at 1290.

[28] *Id.* (quoting *Davis*, 114 S. Ct. at 2355 (quoting *Connecticut v. Barrett*, 479 U.S. 523, 528 (1987))).

[29] 470 U.S. 298 (1985).

[30] *Correll*, 63 F.3d at 1290 (citing *Miller*, 474 U.S. 104, 112 (1985)).

[31] *Id.* at 1291. The court ignored the extensive questioning by the police (*Turner v. Pennsylvania* (1949)); the incommunicado detention (*Davis v. North Carolina* (1966)); and the denial of counsel (*Fay v. Noia* (1963)). Instead, the Fourth Circuit noted that Correll had a "streetwise" nature; "more than a dozen" previous experiences with Miranda warnings; had been in custody "only" about seven hours before the first confession; was not deprived of food or water; and was not subjected to physical coercion, promises, or trickery. *Id.* at 1288.

[32] *Id.* at 1294. Of course, the finding of harmless error would make the taint issue irrelevant.

[33] To his or her credit, either the trial attorney or the habeas hearing attorney, or both, put many factors in the record which would have helped a court find that the confession was involuntary.