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PAYNE v. NETHERLAND 1996 WL 467642 (4th Cir. (Va.))l United States Court of Appeals, Fourth Circuit

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FACTS

Joseph Patrick Payne was convicted of capital murder in violation of Va. Code § 18.2-31(3),[2] and sentenced to death. At Payne's trial, the Commonwealth's evidence was to the effect that on March 3, 1985, an inmate at the Powhatan Correctional Center in Virginia locked inmate Dunford's cell door with a padlock, threw flammable liquid into the cell, and ignited the liquid with matches, resulting in a fire that killed Dunford. Prison officials soon came to believe that the inmates had conspired to murder Dunford. During the course of the investigation, inmate Robert Smith ultimately identified Payne, whose cell was located near Dunford's, as the individual responsible for the acts that resulted in Dunford's death. Payne was indicted for the murder of Dunford.[3] The Commonwealth's case against Payne hinged on the credibility of Smith, the only "eyewitness" who testified at Payne's trial. In his direct testimony, Smith acknowledged that he had taken part in the planning stages of the conspiracy, and that he had received a ten-year reduction in his sentence for testifying against Payne. Other witnesses asserted that Smith was a liar and a cheat.[4]

Believing that the prosecution's case against Payne was weak because the veracity of Smith's testimony was questionable, the defense chose not to call additional inmate witnesses after the prosection was able to show that the testimony of Payne's first inmate witness differed markedly from testimony the witness had provided in the trial of one of Payne's co-conspirators. Apparently, the defense was so confident that the prosecution would fail that Payne rejected an offer—extended while the jury was deliberating in the guilt phase of the trial—to permit him to plead guilty and receive a sentence that would have been concurrent to the one he was presently serving.[5] The jury nonetheless found Payne guilty of capital murder.

During the sentencing phase of the trial, Payne testified that he had not committed the murder. He also introduced two psychiatric "reports" relevant to his future dangerousness. In rebuttal, the prosecution presented the testimony of a psychologist, Dr. Centor, who was employed by the Commonwealth and who, pursuant to court order requested by defense counsel, had examined Payne regarding his competency to stand trial. In response to a prosecution question concerning his opinion as to Payne's future dangerousness based on the competency examination, Dr. Centor testified:

> In my opinion [Payne] shows a probability for committing criminal acts of violence, which would constitute a continuing serious threat to society. This is based on his past history going back to the age of [ten], going through previous convictions, other related difficulties with the law, and the circumstances of the present alleged crime.[6]

Payne was sentenced to death based on a jury finding of the "vileness" aggravating factor.[7]

The Supreme Court of Virginia affirmed Payne's conviction and sentence on direct appeal,[8] and the United States Supreme Court denied his petition for a writ of *certiorari*.[9] Payne next sought collateral review in the Virginia courts. All of Payne's claims were dismissed by the state *habeas* court except his claims of ineffective assistance of counsel and his allegations that he was denied due process by the prosecutor's knowing use of perjured testimony and also by its failure to disclose inducements that had been offered in return for Smith's testimony. The state *habeas* court denied relief to Payne;[10] the Supreme Court of Virginia denied review, and the Supreme Court again denied a writ of *certiorari*.[11]

Payne next filed a federal *habeas* petition. The district court refused to hold an evidentiary hearing, held a number of Payne's claims to be procedurally defaulted,[12] and dismissed the petition after finding the remaining claims to be without merit.[13] Payne appealed this decision to the Fourth Circuit Court of Appeals, claiming (1) factual innocence; (2) deprivation of his Sixth Amendment right to counsel because his attorneys failed to use all information available to impeach Smith, to call additional witnesses, and to seek or present evidence in mitigation of sentence; and (3) the testimony by Dr. Centor violated his Fifth Amendment privilege against self-incrimination and his Sixth Amendment right to effective assistance of counsel.

HOLDING

The court of appeals held: (1) Payne's claim of factual innocence lacked merit;[14] (2) Payne's counsel was not ineffective;[15] and (3) Payne's Fifth and Sixth Amendment rights were not violated by the introduction of Dr. Centor's testimony on future dangerousness based on Payne's competency examination.[16] Moreover, the court of appeals

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1 This is an unpublished opinion referenced in "Table of Decisions Without Reported Opinions," 94 F.3d 642.

2 Va. Code Ann. § 18.2-31 provides: "The following shall constitute capital murder, punishable as a Class I felony: . . . (3) [t]he willful, deliberate, and premeditated killing of any person by a prisoner confined in a state or local correctional facility as defined in § 53.1-1, or while in the custody of an employee thereof."

3 *Payne v. Netherland*, 1996 WL 46472, *1 (4th. Cir. (Va.) August 19, 1996).

4 *Id.*

5 *Id.*

6 *Id.* at *2.

7 *Id.* at *1.

8 *Payne v. Commonwealth*, 357 S.E.2d 500, 509 (Va. 1987).

9 *Payne v. Virginia*, 484 U.S. 933 (1987).

10 *Payne v. Netherland*, 1996 WL 467642 at *2.

11 *Payne v. Thompson*, 506 U.S. 1062 (1993).

12 Payne claimed that the state trial court failed to provide an instruction defining torture and an instruction advising the jury that it could impose a life sentence. Because Payne failed to object at trial and failed to assert any issue related to the jury instructions on direct appeal, and instead raised them for the first time in his state habeas petition, these claims were procedurally defaulted. *Payne v. Netherland*, 1996 WL 467642 at *6.

13 *Payne v. Thompson*, 853 F. Supp. 932 (E.D.Va. 1994).

14 *Payne*, 1996 WL 467642 at *3.

15 *Id.* at *4.

16 *Id.* at *5.

stated that even if it were to conclude that Dr. Centor's testimony violated Payne's Fifth and Sixth Amendment rights, any error would be harmless because the jury found "vileness" as the aggravating factor to support the death sentence, not "future dangerousness."[17]

ANALYSIS/APPLICATION IN VIRGINIA

I. Factual Innocence and Prosecutorial Misconduct Claims

To support his claim of factual innocence, Payne asserted that: (1) Smith lied during his trial testimony, thereby rendering perjurious the testimony employed to obtain his conviction; (2) the prosecution knowingly used Smith's perjured testimony; and (3) the prosecution failed to disclose various inducements provided to Smith for his testimony.

In concluding that Payne's fact-bound claims of knowing use of perjured testimony and the *Brady*[18] withholding lacked merit, the court noted that, while the district court declined to conduct a hearing, it was required under then-existing 28 U.S.C. § 2254(d) to defer to state court fact-finding.[19] There was a hearing at the state *habeas* proceeding at which many additional witnesses impeached Smith, but the state court found them to be incredible. Curiously, the state court also found that while there was "additional" favorable treatment to Smith, there were no undisclosed inducements for his testimony. Thus, even before adoption of the Anti-Terrorism and Effective Death Penalty Act (ATEDA),[20] it was difficult for a defendant to obtain federal *habeas* relief, as the federal court was required to defer to state court findings of fact as long as such findings had support in the record. After ATEDA, it will most likely become even more difficult for the defendant to obtain federal *habeas* relief, as the new statute does not require any inquiry into the reliability of state-court fact-finding procedures.[21]

Furthermore, Payne's claim was a "stand-alone" claim of factual innocence and as such, did not entitle him to a hearing at federal *habeas*. The Supreme Court has indicated that federal *habeas corpus* has not been the traditional forum for a claim of "actual innocence" as a stand-alone claim (as opposed to a gate through which an otherwise procedurally-defaulted claim may be adjudicated.)[22] Thus, *habeas* counsel should note that in order for a claim of actual innocence to be heard on federal *habeas*, the claim of innocence must be connected to another constitutional claim of error.[23]

II. A Note on the Ineffective Assistance of Counsel Claims

In asserting that his counsel was ineffective, Payne assigned as error the fact that his counsel failed to: (1) use all evidence available to impeach Smith; (2) call additional witnesses; and (3) seek or present evidence in mitigation of sentence. The court of appeals disposed of Payne's claims that his counsel was ineffective, affirming the district court in cursory terms. Only in hindsight can the decisions of defense counsel not to use all impeachment witnesses and not to accept the plea agreement be criticized. In fact, the decision of the prosecutor, a minister of justice,[24] to pursue death after the evidence apparently planted enough doubt to induce the remarkable plea offer is the more questionable tactic. Nor can defense counsel be criticized for failing to anticipate the bizarre jurisprudence that would uphold admission of Dr. Centor's testimony.

If there is a lesson, it is the indication that less than a full case in mitigation may have been prepared because of the perceived strength of the defense to capital murder. Although it is difficult to prepare for the worst when it is anticipated that the worst will not happen, counsel must secure the appointment of two defense counsel in every case, and thoroughly prepare a complete case in mitigation.

III. Admission of Dr. Centor's Testimony on "Future Dangerousness"

Payne argued that his Fifth and Sixth Amendment rights were violated because, as in *Estelle v. Smith*,[25] he was not given *Miranda* warnings or informed that his statements during the competency examination might be used to establish "future dangerousness" during sentencing. However, the court of appeals rejected this argument, citing its recent decision in *Savino v. Murray*,[26] which relied on *Buchanan v. Kentucky*,[27] to hold that Payne waived his Fifth Amendment right to

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[17] *Id.* at *6. The court of appeals cited *Tuggle v. Netherland*, 79 F.3d 1386 (4th Cir. 1996) as support for the proposition that under Virginia law, if the jury found one aggravating circumstance, it considered all of the evidence adduced during the guilt and sentencing stages of the trial to determine whether a death sentence was appropriate. *See* case summary of *Tuggle*, Capital Defense Journal, this issue.

[18] *Brady v. Maryland*, 373 U.S. 83 (1963) (holding "that the suppression by the prosecution of evidence favorable to an accused upon request violates due process where the evidence is material either to guilt or punishment"). *Id.* at 87.

[19] *See Sumner v. Mata*, 455 U.S. 591 (1982) (Section 2254(d) plainly requires a federal *habeas* court to presume factual findings made by a state court after a full and fair hearing on the merits to be correct unless "not fairly supported by the record"). *Id.* at 591-93.

[20] Pub. L. No. 104-132, 110 Stat. 1214 (April 24, 1996).

[21] For a comprehensive treatment of the 1996 amendments to 28 U.S.C.A. § 2254(d), *See* Raymond, *The Incredible Shrinking Writ: Habeas Corpus Under the Anti-Terrorism and Effective Death Penalty Act 1996*, Capital Defense Journal, this issue.

[22] *Herrera v. Collins*, 506 U.S. 390, 400-02 (1993). Although the Court left open a possibility that "a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional, and warrant federal *habeas* relief if there were no state avenue open to process such a claim;" *Id.* at 417, the court of appeals held that "[P]ayne's attempted showing of innocence fell far short of the 'extraordinarily high' threshold showing necessary to trigger such relief." *Payne v. Netherland*, 1996 WL 467642 at *3 n.2.

[23] For an example of such a claim, *see Schlup v. Delo*, 115 S.Ct. 851 (1995).

[24] ABA Model Rules of Professional Conduct, Rule 3.8 Comment 1 (1984) ("A prosecutor has the responsibility of a minister of justice and not simply that of an advocate.")

[25] 451 U.S. 454 (1981). In *Estelle*, the Court held that a defendant who neither initiates a psychiatric evaluation nor attempts to introduce any psychiatric evidence may not be compelled to respond to a psychiatrist if his statements can be used against him in a capital sentencing proceeding. In *Estelle*, the defendant did not voluntarily consent to the pretrial psychiatric examination after being informed of his right and the possible use of his statements. The Court held that, absent warning and waiver of Fifth Amendment rights, the State could not rely on what the defendant said to the psychiatrist to establish his "future dangerousness." *Id.* at 464.

[26] 82 F.3d 593 (4th Cir. 1996), *cert denied*, No. 95-5164, 1996 WL 400267 (U.S. July 17, 1996). *See* case summary of *Savino*, Capital Defense Journal, this issue.

[27] 483 U.S. 402 (1987). While the court of appeals assumes *Buchanan's* applicability to capital murder penalty trials, note that the United States Supreme Court has not decided that *Buchanan* applies to capital murder penalty trials. *Buchanan* involved a true mental status defense to the charge of murder. *See* case summary of *Savino v. Murray*, Capital Defense Journal, this issue.

remain silent when he introduced psychiatric evidence addressing future dangerousness at the penalty phase. In *Savino*, the court of appeals stated:

> When a defendant asserts a mental status defense . . . he may be required to submit to an evaluation conducted by the prosecution's own expert. That defendant has no Fifth Amendment protection against the introduction of mental health evidence in rebuttal to the defense's psychiatric evidence. In essence, the defendant waives his [Fifth Amendment] right to remain silent . . . by indicating that he intends to introduce psychiatric evidence.[28]

In applying this reasoning to *Payne*, the court of appeals confused a **mental status defense**—like insanity, which means no criminal liability if proven—with presentation of **mitigation evidence** at the capital penalty phase.

For those defendants in the position of Payne and Smith, who have been formally charged at the time of the examinations, the United States Supreme Court has held that the Sixth Amendment right to counsel entitles defense attorneys to clear notice of the scope, purpose, and intended use of the examination.[29] In *Payne*, the court of appeals concluded that Payne's counsel should have known that information gained during the competency examination could be used in rebuttal if Payne were to introduce psychiatric evidence during sentencing relevant to future dangerousness. The court of appeals compared *Payne* with *Buchanan*, stating:

> As in *Buchanan*, the decision of the Supreme Court in *Estelle v. Smith* put Payne's attorneys on notice that the introduction during capital sentencing of psychiatric evidence addressing future dangerousness by the defense would permit the prosecution to offer rebuttal evidence based upon Paynes statements during the competency exam. Hence, Dr. Centor's testimony was not obtained in violation of Payne's Sixth Amendment right.[30]

To hold that *Estelle* gives the required Sixth Amendment notice of scope and purpose/intended use is absurd with respect to a competency exam. The competency of the defendant to stand trial is an issue in which all parties—the Commonwealth, the defense, and the court—have an interest. Thus, the defendant's competency to stand trial is **not** an adversarial issue. The Commonwealth has every right to put on trial and attempt to secure a death sentence for a defendant who has a substantial amount of mitigating evidence, including psychiatric evidence. However, the Commonwealth has no right even to try an incompetent defendant; furthermore, the court has a *sua sponte* obligation to pursue the issue if the defendant appears incompetent.[31] Defense counsel in *Payne* was acting in everyone's interest in requesting the competency examination. In so doing, counsel neither sought or gained any adversarial advantage. The court's conclusion that defense counsel was reasonably put on notice that Payne's statements during the competency exam could later be used by the Commonwealth to demonstrate future dangerousness is not only wrong, it strains credulity.[32]

As an appellate issue, defense counsel in Virginia should **not** accept the court's interpretation of *Estelle* as final, for the Supreme Court has not addressed whether the state may use expert psychiatric testimony concerning "future dangerousness" in rebuttal to a defendant's presentation of mitigation evidence at the sentencing phase of a capital murder trial. Neither has it held that requesting a competency examination puts the defendant on notice and waives the protection of the Fifth Amendment.[33] Further, counsel should be careful to make a record of a desire to be informed about any proposed interview so as to be able to advise the defendant about his participation in the examination, as the Sixth Amendment requires.

Nevertheless, until the United States Supreme Court rules on these issues, counsel should reconsider the utilization of experts in the case in mitigation. *Payne* was tried before the enactment of Va. Code § 19.2-264.3:1, the statute making a mental mitigation defense expert available in capital cases.[34] As a matter of trial tactics, counsel should consider the option of making full use of the expert assistance provided by 3:1 **short** of having the expert testify at trial. This will keep the client out of the hands of the Commonwealth's expert.[35] It is often as effective to tell the client's story in mitigation through the use of lay witnesses, with behind the scenes assistance from the defense expert. After *Payne* and *Savino*, such an option deserves serious consideration. As long as *Payne* remains the law, counsel should not even arrive lightly at the decision to have the client evaluated for competency to stand trial.

Summary and analysis by:
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[28] *Savino*, 82 F.3d at 604 (citations omitted).

[29] *See Powell v. Texas*,492 U.S. 680 (1989) (holding State's use of psychiatric testimony on issue of future dangerousness violated the Sixth Amendment where there was no notice to defense counsel that examination by psychiatrist would be for that purpose); *Satterwhite v. Texas*, 486 U.S. 249 (1988) (use, in capital sentencing, of psychiatric evidence obtained in violation of accused's Sixth Amendment right to have counsel receive advance notice of examination, held not to be harmless error under the circumstances).

[30] *Payne*, 1996 WL 46472 at *5.

[31] *See Pate v. Robinson*, 383 U.S. 375 (1966) (holding that (1) conviction of a legally incompetent defendant violates due process, and (2) where evidence raises a "*bona fide* doubt" as to a defendant's competence to stand trial, the judge on his own motion must impanel a jury and conduct a hearing). *Id.* at 378, 385. *See also*, case summary of *Cooper v. Oklahoma*, Capital Defense Journal, this issue.

[32] *See* case summary of *Savino v. Murray*, Capital Defense Journal, this issue.

[33] In *Estelle*, for example, the district court found the defendant did **not** have notice, though a report of the state psychologist terming the defendant "a severe sociopath" was contained in the court file. *Estelle*, 451 U.S at 458-59.

[34] Section 19.2-264.3:1 was passed on April 7, 1986 and became effective July 1, 1986. Payne's trial took place in April 1986; thus, the current provisions of § 19.2-264.3:1 were unavailable to Payne at the time of his trial.

[35] *See* Va. Code Ann. §19.2-264.3:1(E) and (F)(1). Section (E) provides that if the defendant intends to present testimony of a mental expert witness in mitigation, the defendant must give notice in writing to the attorney for the Commonwealth at least 21 days before trial. Section (F)(1) provides that once the defendant provides notice pursuant to (E), the court will order the defendant submit to an examination by the Commonwealth's mental expert if the Commonwealth so wishes.