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BENNETT v. ANGELONE 92 F.3d 1336 (4th Cir. 1996) United States Court of Appeals, Fourth Circuit

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FACTS

A Virginia jury convicted Ronald B. Bennett of capital murder in the course of a robbery with a deadly weapon.[1] Upon finding vileness as an aggravating factor, the jury sentenced him to death.[2]

Bennett became a suspect in the murder of Anne Vaden after his estranged wife gave one of the victim's rings to a friend whose ex-husband was a former California parole officer. At trial, Mrs. Bennett testified that on the night of the murder, her husband returned home covered with blood and later confessed the murder to her. The coroner concluded that despite the infliction of blows to the head, strangulation and multiple stab wounds, Vaden survived the attack and later died of blood loss.[3]

In his opening statement, the prosecutor described Anne Vaden as a class valedictorian, a graduate of The College of William and Mary, a guest minister and "business woman of the year."[4] During the sentencing trial, the prosecutor made several religiously loaded statements while attempting to harmonize the death penalty with biblical passages. He also commented on Lee Harvey Oswald, Jack Ruby and a Muslim sect which carried out a series of murders in 1977.[5]

Bennett exhausted his direct appeals. The United States Supreme Court denied his petition for a writ of *certiorari*. On state collateral review, the Supreme Court of Virginia rejected many of Bennett's substantive claims of trial error as procedurally barred by his failure to raise them on direct appeal. The Supreme Court of Virginia also dismissed his ineffective assistance of counsel claims on their merits. After the United States Supreme Court denied *certiorari*, Bennett filed a petition for a writ of *habeas corpus* in federal district court. The district court held that most of Bennett's claims were procedurally defaulted and denied relief. On appeal to the Court of Appeals for the Fourth Circuit, Bennett raised both due process and ineffective assistance of counsel claims.[6]

HOLDING

Finding no error in the district court's dismissal of Bennett's claims, the court of appeals affirmed the district court's denial of relief.[7]

ANALYSIS / APPLICATION IN VIRGINIA

The court of appeals first considered whether the Antiterrorism and Effective Death Penalty Act (ATEDA) limited its scope of review.[8] Section 107(a) of ATEDA requires federal courts to give greater deference to the decisions of state courts in capital cases on federal *habeas* review if states meet certain requirements on state collateral review. The court of appeals held this provision was not applicable in this case because the Supreme Court of Virginia denied Bennett's state *habeas* petition before the Virginia Legislature enacted a law providing indigents with assistance of counsel in post-conviction proceedings.[9] Thus, the question remains whether Virginia's grant of post-petition assistance of counsel, Va. Code Ann. §§ 19.3-163.7 and 19.3-163.8, meets the ATEDA requirements in other cases. The court did not decide whether §§ 101 through 106, which referred to *habeas* petitions generally, retroactively applied to Bennett's petition because the court held it would also deny the petition under pre-ATEDA law.[10]

Bennett raised four substantive issues based on errors at the guilt and sentencing phases of his jury trial. These substantive issues included: 1) the Commonwealth's improper use of "victim impact" statements at the guilt phase; 2) the prosecutor's improper closing argument at the sentencing phase; 3) the defective nature of the jury instructions used at sentencing; and 4) the unconstitutional vagueness of the "vileness" aggravating factor under Virginia law. Bennett claimed that each of these issues constituted a violation of due process and that his counsel's failing to object to these errors amounted to ineffective assistance of counsel.[11]

I. Substantive Issues as Due Process Violations

A. Procedurally Defaulted Claims

The court held that Bennett procedurally defaulted his substantive challenges to the prosecutor's opening statement and to the jury instructions because he failed to raise these issues on direct appeal and only raised them for the first time on state *habeas*.[12] The court of appeals then held that Bennett's default of the claims in state court constituted a procedural bar to further federal review.[13]

Bennett did not raise his challenges to the prosecutor's inflammatory arguments at the sentencing stage and the constitutionality of Virginia's "vileness" factor until his federal *habeas* petition.[14] Under *Bassette v. Thompson*,[15] a federal *habeas* petitioner cannot raise a claim in a federal *habeas* petition that he has never brought in any state court.[16] Yet, the court of appeals suggested that, under the Court of Appeals for the Ninth Circuit's reasoning in *Beam v. Paskett*,[17] Bennett might not have lost these claims because they were the kind of claims required by statute to be heard as part of the mandatory review by the state supreme court. The court declined to decide whether Bennett's claims fit within the scope of the statutory review because it found the claims to be meritless.[18]

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1 Va. Code Ann. § 18.2-31(4).

2 *Bennett v. Angelone*, 92 F.3d 1336 (4th Cir. 1996).

3 *Id.* at 1340-41.

4 *Id.* at 1348.

5 *Id.* at 1341.

6 *Id.*

7 *Id.* at 1350.

8 *Id.* at 1341. For a detailed discussion of this act, *see*, Raymond, *The Incredible Shrinking Writ: Habeas Corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996*, Capital Defense Journal, this issue.

9 *Id.* at 1342.

10 *Id.* at 1342-43.

11 *Id.* at 1343.

12 *Id.*

13 *Id.*

14 *Id.* at 1344.

15 915 F.2d 932 (4th Cir. 1990).

16 *Id.* at 936.

17 *Beam v. Paskett*, 3 F.3d 1301, 1306 (9th Cir. 1993)(holding that, under Idaho Statute, Idaho Supreme Court must consider possible errors in sentencing that are not raised by defendant).

18 *Bennett*, 92 F.3d at 1344-45.

The court quickly rejected Bennett's challenge to the constitutionality of the Virginia "vileness" factor because, in *Tuggle v. Thompson*,[19] the court had recently upheld it as not unconstitutionally vague.[20]

B. Commonwealth's Religiously-Loaded Sentencing Arguments Were Inflammatory, Irrelevant and Prejudicial

Bennett alleged that the prosecutor's inflammatory use of references to religious teachings at the sentencing phase rendered the trial fundamentally unfair and denied him due process.[21] The Commonwealth's attorney drew on his reading of biblical law to justify the morality of the state's death penalty and to suggest the murder warranted a finding of "vileness."[22] For example, he referred to Jesus, on the cross, telling the Roman soldiers to give "those things that are Caesar's to Caesar and those things that are God's to God."[23] He suggested that the moral from this passage was that citizens should "follow the law and leave the rest to Heaven."[24]

The court held that these religious arguments were indeed improper, yet affirmed the denial of Bennett's claims. The court found that in the context of the entire trial, the religious comments did not have a sufficient prejudicial effect to deny Bennett due process.[25] The court stated that there was no prejudicial effect because "there is little doubt that the murder of which he was convicted was a particularly vile one."[26]

The court of appeals' analysis is questionable for two reasons. First, the court erred in conducting its assessment of the prejudicial effect of the prosecutor's comments. Under *Lawson v. Dixon*,[27] a court must consider the trial as a whole to assess the prejudicial effect of a prosecutor's alleged improper arguments.[28] Further, under *Donnelly v. DeChristoforo*,[29] the entirety of the argument must be considered when judging a due process claim. Yet, because the court did not consider all of the prosecutor's comments, it did not review the trial in its entirety. The court found that Bennett was procedurally barred from raising claims about other inflammatory remarks contained in the argument, such as the prosecutor's comparing Bennett's case to that of Lee Harvey Oswald.[30] It follows that the court could not have assessed the total prejudicial effect of the prosecutor's arguments because it did not consider all of his arguments, including these comparisons.

Secondly, in assessing the prejudicial impact of the prosecution's arguments, the court apparently relied on its own subjective reaction to the evidence in concluding that the murder was indeed vile. In *Maynard v. Cartwright*,[31] the United States Supreme Court held that an appellate court cannot simply make a subjective determination of vileness based only on its reaction to the facts of a particular case.[32]

II. Ineffective Assistance of Counsel Claims

Bennett made claims based on trial counsel's failure to object to portions of the trial and counsel's failure to adequately explain mitigating factors during the guilt phase. The district court dismissed these assignments of error on their merits; therefore, Bennett's claims were not procedurally defaulted.[33]

A. Failure to Object to Improper Use of Victim Impact Statements During Opening Arguments

In his opening argument at the guilt phase, the Commonwealth's attorney gave a brief description of the victim.[34] He told of her accomplishments, including her graduation as class valedictorian, guest ministry, and recognition as outstanding business woman of the year. Bennett claimed defense counsel was ineffective for failing to object to these comments at trial. The court of appeals dismissed this claim because it could not find that the prosecutor's statements were "genuinely improper."[35]

The court held that under *Payne v. Tennessee*,[36] the prosecutor's use of victim impact evidence was not necessarily improper.[37] In *Payne*, the United States Supreme Court held that use of evidence about the

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19 57 F.3d 1356 (4th Cir. 1995).

20 *Bennett*, 92 F.3d at 1345; *See also*, case summary of *Tuggle*, Capital Defense Digest, Vol. 8, No. 1, p. 10 (1995); case summary of *Tuggle*, Capital Defense Digest, Vol. 8, No. 1, p. 7 (1995).

21 *Id.*

22 *Id.* at 1346. Counsel made the following argument:

> Some will say that society shouldn't take a life because that's murder also. That's not true. Vengeance is mine saith the Lord, but later when he covered the Earth with water and left only Noah and his family and some animals to survive, when he saw the damage what [sic] had been done to the Earth, God said "I'll never do that again" and handed that sword of justice to Noah. Noah is now the Government. Noah will make the decision who dies. "Thou shall [sic] not kill" is a prescription [sic] against an individual; it is not against Government. Because Government has a duty to protect its citizens. *Id.*

23 *Id.*

24 *Id.* Not only is this argument prejudicial and inflammatory, it is inaccurate. Jesus did not make that comment to Roman soldiers, he made it to a group of lawyers well before his crucifixion. *See*, Matthew 22:15-21.

25 *Id.* at 1346-47.

26 *Id.* at 1346.

27 3 F.3d 743 (4th Cir. 1993).

28 *Id.* at 755.

29 416 U.S. 637 (1974).

30 *Bennett*, 92 F.3d at 1344. The court found that Bennett had also procedurally defaulted his claims concerning the prosecutor's referring to gruesome murders committed by the Hanafi Muslim sect and telling the jury that it was "like a commander in the field of battle." *Id.*

31 486 U.S. 356 (1988).

32 *Id.* at 463 (stating that Supreme Court in *Godfrey v. Georgia*, 446 U.S. 420 (1980), "plainly rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty").

33 *Bennett*, 92 F.3d at 1347. The court of appeals held that the defendant was not entitled to an evidentiary hearing regarding his ineffective assistance claims. Bennett failed to meet his burden under *Poyner v. Murray*, 964 F.2d 1404 (4th Cir. 1992), in alleging "additional facts that, if true, would entitle him to relief." Instead, Bennett only pointed to places in the record that weakened the credibility of his trial attorneys' explanation of their acts and omissions. *Id.*

Under ATEDA, defense counsel will find it even more difficult to introduce new facts on appeal and in *habeas* proceedings. For a detailed discussion of this act, *see*, Raymond, *The Incredible Shrinking Writ: Habeas Corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996*, Capital Defense Journal, this issue.

34 *Id.* at 1348.

35 *Id.*

36 501 U.S. 808 (1991).

37 *Bennett*, 90 F.3d at 1348.

victim and the murder's impact upon the victim's family at the sentencing trial was not unconstitutional.[38] The Court found that evidence about the victim assisted the jury in assessing the defendant's moral culpability. Furthermore, the state had a legitimate interest in counteracting mitigating evidence by reminding the sentencer that the victim represented a unique loss to society.[39]

If evidence about the victim's character enters during the guilt phase, such as in Bennett's case, the consequences are somewhat different. Justice Souter, in his concurring opinion in *Payne*, noted that some contextual evidence about the victim will unavoidably be introduced at the guilt stage.[40] Souter suggested in a hypothetical that the testimony of a victim's daughter would inform a jury that the victim was a father.[41] Taking this concurrence into consideration, the court of appeals held under its reading of *Payne*, that some background evidence is admissible at the guilt phase and, therefore, the prosecutor's description of the victim was not clearly unconstitutional. Accordingly, Bennett's claim of ineffective assistance of counsel lacked merit.[42]

Even if the opinion in *Payne* stood for all that court of appeals suggested it does, the prosecutor's comments did not fall within the category of contextual evidence described by Justice Souter. Evidence such as the victim's grade point average in college has no relevance to the crime or reasonable relation to the facts the prosecution must use to meet its burden of proof. The court of appeals' language that the prosecutor's comments were not "genuinely improper" suggests that the court was more concerned with degrees of impropriety than with the character of the evidence as prejudicial and irrelevant.

The court of appeals accepted trial counsel's claim that objection was not made in order to avoid emphasizing the Commonwealth's discussion of the virtuous characteristics of the victim. The court held that this was a reasonable trial tactic and, as such, did not render counsel constitutionally ineffective.[43]

The Supreme Court of Virginia requires that trial counsel object at the very moment the offending words are spoken.[44] Failure to immediately object will result in procedural default of an appellate claim based on a prosecutor's improper argument. Not only must counsel timely object, but counsel must object specifically to every part of the argument that is offensive because, as of yet, the court has not recognized a blanket objection to all inflammatory or prejudicial remarks. Furthermore, counsel should phrase the objection on federal constitutional grounds to preserve the issue for review in federal courts.

It is not necessary, however, to choose between preserving an appellate issue and highlighting prejudicial materials before the jury. Counsel could state she has an objection to the prosecutor's improper argument and then ask to be heard on a matter of law outside the jury's presence. Once the jury has left, defense counsel could present her objection to the specific prejudicial remark. It should also be noted that this is an appropriate time to move for mistrial, or other remedy that goes beyond a simple admonition to the prosecutor.

B. Failure to Object to Improper Sentencing Arguments

As discussed earlier, Bennett made several substantive claims concerning the prosecutor's use of religious and "other-crime" arguments during the sentencing phase. He also made an ineffective assistance claim based on trial counsel's failure to object to these arguments.[45] Defense counsel answered that they, as a matter of strategy, decided not to object in order not to appear over-antagonistic to the jury. The court rejected Bennett's suggestion that counsel's explanation was a post-hoc fabrication and unworthy of deference. Instead, the court held that refraining from objecting was a standard trial practice and not constitutional ineffectiveness.[46]

C. Failure to Object to Jury Instructions and Explain Mitigation Evidence

The court of appeals, relying on its reasoning in *Pruett v. Thompson*,[47] held that counsel is not ineffective for failing to offer alternatives to proper jury instructions. Consequently, Bennett could not base a claim of ineffective assistance of counsel on trial counsel's not objecting to, or offering, alternative jury instructions and forms.[48]

The court also found that trial counsel had in fact explained mitigating evidence. In his closing arguments, trial counsel reminded the jury of all the mitigating evidence and explained that the jury could consider the evidence even though they had identified an aggravating factor. Therefore, the court held that Bennett's claim of ineffective assistance of counsel for failure to explain mitigating factors was meritless.[49]

Under Virginia law, jury forms barely mention mitigation evidence. Furthermore, the Supreme Court of Virginia has held that it is not necessary to explain mitigation evidence.[50] Nevertheless, the inadequacies of Virginia procedure regarding mitigation have yet to be reviewed by the United States Supreme Court. These issues should be preserved. Meanwhile, every effort should be made at trial to draw the distinction between mitigation and excuse and to persuade juries through evidence and argument that mitigation is a reason to impose a severe punishment short of death. Counsel should also consider submitting jury instructions and forms that further clarify both the nature and purpose of mitigating evidence.

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38 *Payne* at 827.

39 *Id.* at 825.

40 *Id.* at 840-841. Although Justice Souter wrote on the inevitable introduction of some evidence about the victim in the guilt phase, the court of appeals suggested that Justice Rhenquist included this idea in the majority opinion. *Bennett*, 90 F.3d at 1348.

41 *Id.*

42 *Bennett*, 90 F.3d at 1348.

43 *Id.*

44 *See, Cheng v. Commonwealth*, 240 Va 26, 40, 393 S.E.2d 599, 606 (1990) (stating that defendant's failure to immediately object to improper argument resulted in procedural default).

45 *Bennett*, 92 F.3d at 1349.

46 *Id.* at 1349-1350.

47 996 F.2d 1560 (4th Cir. 1993).

48 *Bennett*, 92 F.3d at 1350.

49 *Id.*

50 *Mickens v. Commonwealth*, 247 Va. 395, 404, 442 S.E.2d 678, 684 (1994) (rejecting defendant's contention that Constitution requires granting of jury instructions defining mitigating evidence, specifying burden of proof for such evidence, and specifying how jurors must consider such evidence.)

III. Conclusion

The practical result of *Bennett* is depressing. The Commonwealth's attorney acted unethically in his use of inflammatory argument at least in that he did not "avoid any . . . conduct calculated to gain special consideration."[51] While he will never be punished for attempting to create unwarranted prejudice in the defendant's trial, the Commonwealth will probably execute Bennett as the law requires, unless the United State Supreme Court grants a writ of *certiorari*.

Summary and Analysis by:
David T. McIndoe

[51] Va. Code of Professional Responsibility EC 7-13. Other professional responsibility norms may also be implicated. Va. Code of Professional Responsibility DR 7-105(C)(3) and (4) (In appearing in his professional capacity before a tribunal, a lawyer shall not assert his personal knowledge of the facts in issue or assert his personal opinion as to the justness of a cause); Va. Code of Professional Responsibility EC 7-21 (The expression by a lawyer of his personal opinion as to the justness of a cause . . . is not proper subject for argument to the trier of fact); Va. Code of Professional Responsibility EC 7-33 (Although a lawyer has the duty to represent his client zealously, he should not engage in any conduct that offends the dignity and decorum of proceedings); Va. Code of Professional Responsibility EC 8-10 (The responsibility of a public prosecutor . . . is to seek justice . . . during trial the prosecutor is not only an advocate but he also may make decisions . . . and those affecting the public interest should be fair to all). *See also*, ABA Standards for Criminal Justice 3-5.8(c)&(d) (The prosecutor should not use arguments calculated to appeal to the prejudices of the jury. The prosecutor should refrain from argument which would divert the jury from its duty to decide the case on the evidence); ABA Model Rules of Professional Conduct Rule 3.4(e) (a lawyer shall not in trial, allude to any matter the lawyer does not reasonably believe is relevant or that will not be supported by admissible evidence . . . or state a personal opinion as to the justness of a cause).

O'DELL v. NETHERLAND

95 F.3d 1214 (4th Cir. 1996)
United States Court of Appeals, Fourth Circuit

FACTS

On February 6, 1985, Helen Schartner's body was found in a field across the street from a nightclub which she and Joseph O'Dell had left at approximately the same time the previous night. Schartner had died from manual strangulation and had suffered eight head wounds which had bled extensively. About two hours after leaving the nightclub, O'Dell appeared in a convienience store. He was covered in blood. He phoned his girlfriend who allowed him to sleep at her home after he told her that the blood came from his own regurgitation. After reading about Helen Schartner's murder in the local newspaper, O'Dell's girlfriend went to her garage and discovered a brown bag full of bloody clothes which she turned over to the police.[1]

On October 10, 1986, Joseph O'Dell, who proceeded *pro se*, was convicted of capital murder for the killing of Helen Schartner.[2] The jury found both vileness and future dangerousness and sentenced O'Dell to death. O'Dell appealed, but the Supreme Court of Virginia affirmed the trial court.[3] Subsequently, the Supreme Court of Virginia granted O'Dell's petition for rehearing, considered and rejected a claim it had previously found barred, and again affirmed his conviction and death sentence.[4] On October 3, 1988, the United States Supreme Court denied *certiorari*.[5]

O'Dell next filed for a writ of *habeas corpus* in state court. His petition, as amended, was denied. O'Dell again sought relief from the Supreme Court of Virginia; however, he misnamed his appeal "Assignments of Error" as opposed to "Petition for Appeal." Although O'Dell attempted to correct his mistake, by then the time to file had expired. Consequently, the Supreme Court of Virginia dismissed his appeal. The United States Supreme Court denied *certiorari* on December 2, 1991 with three Justices noting that the case "should . . . receive careful consideration."[6]

O'Dell filed a federal *habeas* petition on July 23, 1992.[7] The United States District Court for the Eastern District of Virginia vacated O'Dell's sentence. O'Dell argued that he was entitled to the benefit of the rule handed down in *Simmons v. South Carolina*.[8] *Simmons* held that a defendant has a constitutional right to rebut the Commonwealth's evidence of future dangerousness with the fact of the defendant's parole ineligibility if sentenced to life in prison instead of death.[9] To find for O'Dell, the district court initially had to determine whether the doctrine first announced in *Teague v. Lane*[10] denied O'Dell the benefit of *Simmons*. *Teague* held that, with narrow exceptions, *habeas* petitioners will not be entitled to the benefit of favorable United States Supreme Court decisions that impose constitutional obligations that state courts could not have reasonably anticipated.[11] In other words, if *Simmons*

[1] *O'Dell v. Netherland*, 95 F.3d 1214, 1218-19 (4th Cir. 1996).

[2] Va. Code Ann. § 18.2-31(5) (killing in the commission of rape or attempted rape).

[3] *O'Dell v. Commonwealth*, 234 Va. 672, 364 S.E.2d 491 (1988).

[4] *O'Dell v. Commonwealth*, Record No. 861219, slip op. (Va. April 1, 1988).

[5] *O'Dell v. Virginia*, 488 U.S. 871 (1988).

[6] *O'Dell*, 95 F.3d at 1218, 1219 (citing *O'Dell v. Thompson*, 502 U.S. 995 (1991)).

[7] *Id. at 1219*.

[8] 114 S. Ct. 2187 (1994).

[9] *Id.* at 2193. Because of his prior record, O'Dell would have been sentenced to life in prison, and he would have been ineligible for parole under former Va. Code Ann. § 53.1-151. *O'Dell*, 95 F.3d at 1220.

[10] 489 U.S. 288 (1989).

[11] *Id.* at 310.