



Spring 3-1-1997

BEAVER v. THOMPSON 93 F.3d 1186 (4th Cir. 1996) United States Court of Appeals, Fourth Circuit

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlucdj>



Part of the [Fourteenth Amendment Commons](#), and the [Law Enforcement and Corrections Commons](#)

Recommended Citation

BEAVER v. THOMPSON 93 F.3d 1186 (4th Cir. 1996) United States Court of Appeals, Fourth Circuit, 9 Cap. DEF J. 14 (1997).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol9/iss2/6>

This Casenote, U.S. Fourth Circuit is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

to] assert the procedural bar and foreclose further consideration of Gray's misrepresentation claim."⁵⁷

The court found that Gray did not previously raise his misrepresentation claim in any federal proceeding with "the clarity required by *Picard and Harless*."⁵⁸ Following the reasoning discussed in *Picard*, the *Harless* Court, reversing the holdings of the district court and the court of appeals, found that Harless did not "provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim."⁵⁹ Hence, his federal writ of habeas corpus was, likewise, barred.⁶⁰

In concluding that Gray did not raise his misrepresentation claim in the district court or court of appeals, the court was correct. Gray presented adequate facts on which to base his misrepresentation claim in both proceedings, but it was not until he reached the United States Supreme Court that he cited cases which directly supported his misrepresentation claim.⁶¹ Even if the court were to apply the more deferential specificity standard found in *Taylor*, it does not appear that Gray had articulated an adequate constitutional claim of misrepresentation in either the district court or the court of appeals. Thus, the court's finding that Gray had not raised his misrepresentation claim at a lower federal proceeding and that the Commonwealth was, therefore, "free to maintain its defense of procedural default," is adequately supported by precedent.⁶²

⁵⁷ *Id.*

⁵⁸ *Id.* (see *Picard v. Connor*, 404 U.S. 270 (1971); *Anderson v. Harless*, 459 U.S. 4 (1982)).

⁵⁹ *Harless*, 459 U.S. at 6.

⁶⁰ *Id.* at 8.

⁶¹ *Gray v. Netherland*, 99 F.3d at 166. Specifically, Gray cited *Raley v. Ohio*, 360 U.S. 423 (1959) (holding that defendants who detrimentally relied on assurance of committee chairman could not be

III. Application in Virginia

Unfortunately, Gray was executed in spite of what anyone can see as basic unfairness because his attorney did not say "continuance" and did not say "misrepresentation." In other words, Gray was executed because of a technicality.

Gray's legal journey raises some important issues that must be addressed. First, because the Commonwealth, and at times the courts, will try to divide claims for the purpose of asserting that the issues were procedurally defaulted, it is imperative that defense counsel argue all possible claims in both broad and specific terms. Furthermore, more than just the facts must be presented. Each issue should be tied to a constitutional claim with adequate federal precedent supporting each issue.

Although this court did not specifically address the issue, language in the opinion indicates that it may be possible to preserve a claim for default purposes if it is raised at the post-sentence hearing conducted pursuant to Va. Code Ann. § 19.2-264.5.⁶³ Until this issue is decided, counsel should continue to make this argument if it is plausible in a specific case.

Summary and Analysis by
C. Cooper Youell, IV

punished from doing so), and *Mooney v. Holohan*, 294 U.S. 103 (1935) (forbidding prosecution from engaging in "a deliberate deception of court and jury"), as support for his misrepresentation claim. Unfortunately for Gray, however, he had not cited these cases in an earlier proceeding.

⁶² *Id.*

⁶³ Although unclear, a defendant may be able to have a sentence of death set aside with a showing of "good cause." Va. Code Ann. § 19.2-264.5.

BEAVER v. THOMPSON

93 F.3d 1186 (4th Cir. 1996)

United States Court of Appeals, Fourth Circuit

FACTS

On April 12, 1985 Gregory Warren Beaver shot and killed Trooper Leo Whitt of the Virginia State Police during a routine traffic stop. Beaver was charged with the willful, deliberate, and premeditated killing of a law enforcement officer for the purpose of interfering with his official duties under Va. Code § 18.2-31(f).¹ The court appointed John Maclin IV to represent Beaver and granted Maclin's request to appoint T.O. Rainey III as co-counsel. Rainey had a private law practice and was a part-time assistant prosecutor in neighboring Dinwiddie County.²

On July 9, 1985, Beaver pleaded guilty to capital murder. The Commonwealth, in exchange for Beaver's guilty plea, agreed not to argue the defendant's sentence. The trial court found that the Commonwealth had proven future dangerousness beyond a reasonable doubt and sentenced Beaver to death.³ The Supreme Court of Virginia affirmed his conviction and sentence.⁴ The United States Supreme Court denied certiorari.⁵

Beaver, with different court-appointed counsel, filed a petition for a writ of habeas corpus in the circuit court of Prince George County. Beaver raised twelve claims in all, ten of which were flatly denied or

¹ This section has been changed to Va. Code Ann. § 18.2-31(6).

² *Beaver v. Thompson*, 93 F.3d 1186, 1188 (4th Cir. 1996).

³ *Id.* at 1189.

⁴ *Beaver v. Commonwealth*, 232 Va. 521, 352 S.E.2d 342 (1987).

⁵ *Beaver v. Commonwealth*, 483 U.S. 1033 (1987).

found to be procedurally barred. The state habeas court ordered an evidentiary hearing on Beaver's two remaining right to counsel claims: ineffective assistance of counsel and conflict of interest. After a two day evidentiary hearing, the state court adopted the factual findings presented by the Commonwealth and denied these two claims. Beaver appealed. Again, the Supreme Court of Virginia denied relief and the United States Supreme Court denied certiorari.⁶

Beaver next filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia. His request for an evidentiary hearing on his eleven federal habeas claims, including conflict of interest and ineffective assistance of counsel, and his motion for reconsideration were all denied. Beaver then appealed to the Court of Appeals for the Fourth Circuit, raising five issues including: (1) the district court erred in denying an evidentiary hearing; (2) a conflict of interest deprived him of his Sixth Amendment right to counsel; and (3) his trial counsel was constitutionally ineffective in failing to investigate and present mitigating evidence.⁷

HOLDING

A divided panel of the court of appeals affirmed the district court's denial of relief.⁸

ANALYSIS / APPLICATION IN VIRGINIA

The court of appeals found that Beaver was not entitled to an evidentiary hearing on his conflict of interest and ineffective assistance of counsel claims because he was unable to show cause for failing to adequately develop the material facts at the state habeas proceeding and prejudice resulting from this failure.⁹ The court also held that the state

habeas court's finding of no actual conflict was an historical fact entitled to a presumption of correctness and refused to overturn that finding.¹⁰ Finally, the court held that the performance of Beaver's trial counsel was not, under *Strickland v. Washington*,¹¹ constitutionally ineffective.¹²

I. Standard for Federal Evidentiary Hearing

The court upheld the district court's denial of Beaver's request for a new evidentiary hearing on his conflict of interest and ineffective assistance of counsel claims. It stated that such a hearing is properly held "only when the petitioner (1) alleges additional facts that, if true, would entitle him to relief, and (2) establishes any one of the six factors set out by the Court in *Townsend v. Sain*¹³ (overruled in part by *Keeney v. Tamayo-Reyes*¹⁴) or one of the factors provided in 28 U.S.C. § 2254(d)."¹⁵ The *Beaver* court's recognition that *Tamayo-Reyes* partially overruled *Townsend* has tremendous practical significance for habeas practice in Virginia.

In *Townsend* the United States Supreme Court set forth six circumstances in which a federal court must grant an evidentiary hearing.¹⁶ The fifth circumstance, possibly the broadest of the six, required the district court to grant a request for an evidentiary hearing if the petitioner established that material facts were not adequately developed at the state court hearing. The Court, in *Townsend*, stated, "If, for any reason not attributable to the inexcusable neglect of petitioner . . . evidence crucial to the adequate consideration of the constitutional claim was not developed at the state hearing, a federal hearing is compelled."¹⁷ This "inexcusable neglect," or, "deliberate bypass," standard expressed by the Court in *Townsend* reflected an overall Supreme Court presumption in favor of meaningful review for federal habeas claims.¹⁸

⁶ *Beaver v. Thompson*, 510 U.S. 879 (1993).

⁷ *Beaver v. Thompson*, 93 F.3d 1186, 1190 (4th Cir. 1996). Beaver's other two claims, that his guilty plea was not knowing and voluntary and that the Virginia capital murder statute is unconstitutional, will not be discussed in this summary. Beaver argued that Virginia's capital murder statute is unconstitutionally vague because the language of § 19.2-264.2, which allows the introduction only of evidence of the defendant's past criminal record of convictions, and § 19.2-264.4, which permits the introduction of alleged crimes for which the defendant has not been convicted, conflict and, in effect, do not give a capital defendant notice of the kind of evidence that can be used against him to prove future dangerousness. The court summarily rejected this argument as having been already decided in *LeVasseur v. Commonwealth*, 225 Va. 564, 304 S.E.2d 644 (1983).

⁸ *Id.* at 1198.

⁹ *Id.* at 1190 (emphasis added).

¹⁰ *Id.*

¹¹ 466 U.S. 668 (1984).

¹² *Beaver*, 93 F.3d at 1192-98.

¹³ 372 U.S. 293, 313 (1963) (holding that a federal court must grant an evidentiary hearing to a habeas applicant if: "(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair hearing.") (emphasis added).

¹⁴ 504 U.S. 1 (1992).

¹⁵ *Beaver*, 93 F.3d at 1190. 28 U.S.C. § 2254(d) states that state

court findings of fact are presumed correct unless the habeas applicant establishes one of the following circumstances:

- (1) that the merits of the factual dispute were not resolved in the State court hearing;
- (2) that the fact finding procedure employed by the State court was not adequate to afford a full and fair hearing;
- (3) that the material facts were not adequately developed at the State court hearing;
- (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
- (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
- (6) that the applicant did not receive a full, fair, and adequate hearing in the State court proceeding; or
- (7) that the applicant was otherwise denied due process of law in the State court proceeding;
- (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to the determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record.

(emphasis added).

¹⁶ 372 U.S. at 313. See *supra* note 13.

¹⁷ *Id.* at 317.

¹⁸ See *Id.* at 312-13 ("[A] federal evidentiary hearing is required unless the state-court trier of fact has after a full hearing reliably found the relevant facts").

In *Tamayo-Reyes*, however, the Supreme Court explicitly adopted a “cause and prejudice” standard in place of *Townsend’s* “deliberate bypass” standard for evaluating claims of inadequately developed evidentiary records. After *Tamayo-Reyes*, a habeas petitioner requesting an evidentiary hearing due to inadequate development of material facts in the state court proceeding, has to show cause for his failure to develop material facts in the state court proceedings and actual prejudice resulting from that failure.¹⁹ The “cause and prejudice” standard for evaluating such claims has changed the presumption, from one in favor of a federal evidentiary hearing, to one deferential to and in favor of state court findings of fact. *Tamayo-Reyes* was another step in a long line of Supreme Court cases signaling a retreat from meaningful review of federal habeas claims²⁰ and toward what in all practicality is a pro-death presumption that state court proceedings were full and fair.

The *Beaver* court’s analysis and approach to *Beaver’s* claim that material facts were not adequately developed at the state court proceedings demonstrates the degree of specificity required under the “cause and prejudice” standard to support a request for an evidentiary hearing. *Beaver* claimed that his state habeas proceedings were not full and fair because his “‘habeas counsel were not permitted to depose . . . *Beaver’s* trial counsel, especially *Rainey*,” and the state court ‘limited the testimony of two of *Beaver’s* expert witnesses and did not permit at all the testimony of the expert on conflict of interest.’”²¹ In rejecting these claims, the court applied the cause and prejudice standard to each basis with considerable rigor. As to the first basis of *Beaver’s* claim, the court noted, “While [*Beaver*] describes such interrogatories as ‘limited,’ any limitations which were placed upon them he does not disclose.”²² The court approached the other basis of *Beaver’s* claim in a similar manner: “We also note that *Beaver* in his brief does not identify by name of witness or content the expert witnesses’ testimony he now complains was limited or not permitted”²³ These and other portions of the opinion resonate with this theme: when a petitioner requests a federal evidentiary hearing because of a failure to develop the record in state proceedings, he must, with code-pleading-like particularity, show cause for this failure and actual prejudice resulting from it.

For habeas counsel at both the state and federal level the “cause and prejudice” standard has several practical implications. Federal habeas counsel is often confronted with the following situation: state habeas counsel, because of lack of time and resources, did not fully develop the evidentiary record necessary for adequate consideration of the petitioner’s federal habeas claims. Before *Beaver*, federal habeas counsel could expect to get an evidentiary hearing and have time to investigate and develop the material facts. Now that the court of appeals has ruled that petitioner must abide by *Tamayo-Reyes’s* “cause and prejudice” standard, however, the evidentiary record developed at the state level will almost always be the evidentiary record relied on for analyzing federal habeas claims. Thus, state habeas counsel must move for extra time whenever needed in order to investigate and develop the “facts” as fully

as possible. This effort is crucial because the presumption that the state court proceedings were full and fair coupled with the requirement that a defendant show “cause and prejudice” for his failure to develop material facts means that it will be the rare exception when a request for a federal evidentiary hearing is granted. In the vast majority of cases, state habeas proceedings will be the last opportunity to develop the evidentiary record.

An indispensable corollary to this lesson is that federal habeas counsel, when state habeas counsel has been unable to fully develop the evidentiary record, must make a record as to why the evidence was not fully developed, as well as how this resulted in prejudice to the petitioner. Moreover, if the *Beaver* court’s approach is indicative of the degree of particularity that courts within the Fourth Circuit will require, then the record must consist of code-pleading-like particularity. For example, counsel should not only allege that the depositions were limited, but also detail exactly how they were limited, what questions were asked, what questions were not asked, and how these limitations resulted in a violation of petitioner’s constitutional rights.

The already difficult task for state habeas counsel, to fully investigate and develop the factual record during the state proceedings, and for federal habeas counsel, to make a detailed record to satisfy the cause and prejudice for an evidentiary hearing, is further complicated under the recently enacted Anti-Terrorism and Effective Death Penalty Act of 1996 (ATEDA).²⁴ ATEDA, for the first time ever, places filing deadlines on habeas claims. States are classified as either opt-in or non-opt-in states.²⁵ The federal habeas filing deadlines for non-opt-in states is one year from when the judgment becomes final.²⁶ It is unclear whether “finality” occurs upon denial of relief on direct review by the Supreme Court of Virginia or by conclusion of certiorari proceedings by the United States Supreme Court. For opt-in states the petitioner has only 180 days from the Supreme Court of Virginia’s affirmation of the conviction and death sentence on direct review to file his federal habeas claims.²⁷

Regardless of whether Virginia qualifies as an opt-in or non-opt-in state, the die has been cast. The imposition of filing deadlines, whether 180 days or one year, when none existed before, significantly deprives habeas counsel of yet another resource: time. Less time to investigate and develop the factual record in state habeas will, absent extraordinary efforts by counsel, lead to inadequate development of the evidentiary record. At the same time, the likelihood of getting a federal evidentiary hearing is slim given the heightened requisite showing of “cause and prejudice” under *Tamayo-Reyes* coupled with less time under ATEDA to amass the evidence necessary to make such a showing. An inadequately developed evidentiary record will in turn produce meaningless, not meaningful, review of claims of constitutional violations. In short, the combined effect of ATEDA and *Tamayo-Reyes* is clear: federal and state habeas counsel have to do more in less time and federal courts will provide less meaningful review in more cases.

¹⁹ *Tamayo-Reyes*, 504 U.S. at 11.

²⁰ See e.g., *Coleman v. Thompson*, 501 U.S. 722 (1991); *McCleskey v. Zant*, 499 U.S. 467 (1991); *Wainwright v. Sykes*, 433 U.S. 72 (1977); *Francis v. Henderson*, 425 U.S. 536 (1976).

²¹ *Beaver*, 93 F.3d at 1190-91.

²² *Id.* at 1191.

²³ *Id.*

²⁴ See Raymond, *The Incredible Shrinking Writ: Habeas Corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996*, Capital Defense Journal, Vol. 9, No. 1, p. 52 (1996). This article discusses the major changes upon habeas corpus law wrought by ATEDA, including the newly imposed filing deadlines. See also, Eade, *The*

Incredible Shrinking Writ Part II: Habeas Corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996, Capital Defense Journal, this issue.

²⁵ The basic difference between the two classifications is that in order for a state to qualify as an opt-in state under ATEDA’s statutory requirements it has to provide considerably greater procedural protections and resources to the habeas petitioner than a non-opt-in state. In exchange for providing a petitioner with more protections and resources, an opt-in state gets to impose considerably shorter filing deadlines than non-opt-in states.

²⁶ 28 U.S.C. § 2244(d)(1)(A).

²⁷ 28 U.S.C. § 2263(a).

II. Conflict of Interest

Thomas O. Rainey, one of Beaver's defense attorneys, was, at the time of the trial and in the seven years prior, a part-time assistant prosecutor in a nearby county.²⁸ On both state and federal habeas, Beaver argued that this conflict of interest prevented Rainey from rendering effective assistance of counsel, violating Beaver's Sixth Amendment right.²⁹ In rejecting this claim, the court of appeals ignored the relevant Supreme Court case law and applied the wrong standard of review to the state habeas court's finding of no actual conflict. The court thereby avoided analyzing the facts of the case under the relevant Supreme Court test for conflict of interest.

*Cuyler v. Sullivan*³⁰ established the test for determining whether a defense attorney's divided loyalties deprived the accused of his Sixth Amendment right to counsel. *Cuyler* requires that a defendant establish that "an actual conflict of interest adversely affected his lawyer's performance."³¹ This language seems to require that a defendant establish two things: (1) that his lawyer had an actual conflict of interest; and (2) that this actual conflict of interest adversely affected his lawyer's performance. Absent a conflict of interest or a state created impediment to representation, petitioners claiming denial of effective assistance of counsel must satisfy the standard established by the United States Supreme Court in *Strickland v. Washington*. The infamous "prejudice" prong of *Strickland* requires claimants to show a reasonable probability that but for counsel's deficient performance, the outcome would have been different.³² Conversely, in *Glasser v. United States*,³³ an early conflict of interest case, the Court, though discussing some questionable trial tactics by defense counsel, granted relief without any consideration of the possible impact of those tactics on the outcome. Thus, it would appear that, whatever "adversely affected" means under *Cuyler*, it was not intended to require a showing related to the probability of a more favorable outcome had counsel not been representing competing interests. Rather, given that *Glasser* is still law, it is plausible that the phrase "adversely affected" was meant to require no more than conduct providing corroboration of the basic requirement that conflicting interests were actively represented. Under that standard, properly interpreted, Beaver had a strong claim. In *Strickland*, the Court, interpreting the conflict of interest test from *Cuyler*, reached the same conclusion and explained the rationale behind it:

One type of actual ineffectiveness claim warrants a similar, though more limited, presumption of prejudice. In *Cuyler* . . . the Court held that prejudice is presumed when counsel is burdened by an actual conflict of interest. In those circumstances, counsel breaches the duty of loyalty, perhaps the most basic of counsel's duties. Moreover, it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests. . . . Even so, the rule is not quite the *per se* rule of prejudice that exists for the Sixth Amendment claims mentioned above. Prejudice is presumed only if the defendant

demonstrates that counsel "actively represented conflicting interests" and that "an actual conflict of interest adversely affected his lawyer's performance."³⁴

The Court has not explicitly said what type or how much of a showing is required to satisfy *Cuyler's* "adversely affected performance" prong. The Court's treatment of such claims in several other cases suggests, however, that the type of showing necessary to satisfy this prong of a conflict of interest claim requires the defendant to "identify an actual lapse in representation"³⁵ which, supported by the record, is attributable to an improper motivation resulting from his lawyer's conflict of interest.³⁶

Precisely how much of a showing is required to satisfy the "adversely affected" prong of *Cuyler*, though not explicitly stated either, is partially answered by the Court's analysis and discussion in *Strickland*. In *Strickland*, the Supreme Court observed that there are basically three types of ineffective assistance of counsel claims: (1) actual ineffectiveness; (2) conflict of interest; and (3) state interference with the right to effective assistance of counsel.³⁷ On one end of the spectrum, if the defendant claims actual ineffectiveness then the *Strickland* test applies and he "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."³⁸ On the other end of the spectrum is *United States v. Cronin*,³⁹ where the Court held that if the state has interfered with a defendant's right to counsel then prejudice is presumed.⁴⁰ Somewhere in between the presumption of prejudice and the requirement to show prejudice lies the "adversely affected his lawyer's performance" prong of *Cuyler*. Determining exactly where along this spectrum the second prong is satisfied, whether the required showing is closer to *Cronin* or *Strickland*, is crucial to a petitioner's ability to obtain relief.

The Court's discussion in *Strickland*, coupled with the particular facts of this case, support the argument that only a slight showing of adverse effect should have been necessary for Beaver to satisfy the second prong of *Cuyler*. In *Strickland*, the court recognized that, "it is difficult to measure the precise effect on the defense of representation corrupted by conflicting interests."⁴¹ Thus, it concluded, a presumption of prejudice, similar to *Cronin* but more limited, is called for by *Cuyler*. In addition, as the dissent in *Beaver* correctly observed, *Glasser* and *Cuyler* involved the potential conflict of interest that arises when an attorney represents **multiple defendants**, whereas, in this case, the conflict of interest arose from Rainey's simultaneous representation of Beaver (for killing a police officer) and his accuser, the Commonwealth. The dissent, recognizing the constitutional significance of this factual distinction, stated, "Rainey did not simultaneously represent codefendants whose interests were merely potentially conflicting, but instead simultaneously represented the opposing party, whose interests, by definition, were diametrical to those of Beaver."⁴² Moreover, not only was Rainey simultaneously representing the Commonwealth and Beaver, but he was also defending Beaver against a charge of capital murder for the killing of a Virginia State Trooper. In light of these facts, the dissent found that a conflict of interest existed as a matter of law.⁴³

²⁸ In 1986, Rainey was appointed as chief prosecutor of Dinwiddie County, "and has retained the post in several subsequent elections." *Beaver*, 93 F.3d at 1198 (Hall, J., dissenting).

²⁹ *Beaver*, 93 F.3d at 1192.

³⁰ 446 U.S. 335 (1980).

³¹ *Id.* at 348.

³² 466 U.S. at 694.

³³ 315 U.S. 60 (1942).

³⁴ 466 U.S. at 692.

³⁵ *Cuyler*, 446 U.S. at 349.

³⁶ *Burger v. Kemp*, 483 U.S. 776, 784-88 (1987).

³⁷ 466 U.S. at 691-94.

³⁸ *Id.* at 694.

³⁹ 466 U.S. 648 (1984).

⁴⁰ *Id.* at 659.

⁴¹ 466 U.S. at 692.

⁴² *Beaver*, 93 F.3d at 1199 (Hall, J., dissenting).

⁴³ *Id.*

Applying the rationale articulated by the Court in *Strickland* to the conflicting interests raised by the facts in this case leads to the conclusion that Beaver should have had to show only slight evidence of how Rainey's performance was adversely affected. The majority's only comment regarding Beaver's attempts to satisfy the second prong of *Cuyler* is a statement that the state habeas court "found that Beaver had presented no evidence that Rainey's conduct of the defense was altered in any way by his status as a part-time assistant Commonwealth attorney in Dinwiddie County."⁴⁴ The court's statement is somewhat confusing given that in a later portion of its opinion, which addressed Beaver's claim of actual ineffectiveness, it noted several instances of conduct by Beaver's attorneys that fell short of satisfying *Strickland's* requirement to show prejudice from deficient performance, but seemingly should have satisfied the "adversely affected" prong of *Cuyler*. Those instances of conduct include: failing to clearly explain to Beaver the terms of the plea agreement; failing to call Beaver's family members to testify at the sentencing hearing; calling the Commonwealth's mental health expert to testify at the sentencing hearing when they knew he had no favorable testimony to offer; and failing to inform the defendant's mental health expert of an unadjudicated robbery that they knew the Commonwealth was going to raise on cross-examination. The court, for no discernible reason, apparently considered this evidence inapplicable to the "adversely affected performance" prong in its conflict of interest analysis.

The court's analysis treated the conflict of interest claim and actual ineffectiveness claim as being wholly different. In fact, however, they are different approaches to the same inquiry, whether Beaver's Sixth Amendment right to effective assistance of counsel was violated. The court's focus on discrete doctrinal tests, apparently, caused it to overlook its ultimate inquiry as well as to fail to appreciate how the conflicting interests raised by the nature of the particular facts in this case were significantly different than the conflicting interests implicated by representing co-defendants as exemplified in *Glasser* and *Cuyler*.

In this case, neither the majority nor the dissent truly applied the *Cuyler* test. The majority, as will be explained briefly, essentially applied the improper standard of review to the state habeas court's finding of no actual conflict. The dissent, on the other hand, interpreted *Cuyler* to say, "Once the conflict is established, counsel is conclusively presumed to have rendered ineffective assistance of counsel as a matter of law."⁴⁵ The dissent's conclusion is not completely unwarranted. The following passage from *Cuyler*, relied upon by the dissent for its conclusion, rested heavily on *Glasser* and seems to adopt *Glasser's* holding:

Glasser . . . established that unconstitutional multiple representation is never harmless error. Once the court concluded that *Glasser's* lawyer had an actual conflict of interest, it refused "to indulge in nice calculations as to the amount of prejudice" attributable to the conflict. *The conflict itself* demonstrated a denial of the "right to effective assistance of counsel."⁴⁶

The Court, in *Cuyler*, does not claim to overrule *Glasser*. Indeed, the Court relies upon it. The test articulated by the Court in *Cuyler* for conflict of interest claims, "an actual conflict of interest adversely affecting his lawyer's performance," however, requires a showing of adverse effect that the *Glasser* test (which required the defendant to show

only "an actual conflict of interest") did not. Moreover, the rationale for not requiring a defendant to show prejudice in a conflict of interest claim, as articulated by the Court in *Strickland*, is more consistent with the test announced in *Glasser* than with *Cuyler*. Needless to say, the test to be derived from *Cuyler* is not entirely clear. Since, however, the specific language used in *Cuyler* is that a defendant must establish that an "actual conflict adversely affected his lawyer's performance," and because the Court in *Strickland* interpreted *Cuyler* as requiring a two-pronged showing, it is safe to say that it is likely that the Court of Appeals for the Fourth Circuit will require the two-pronged showing.

The court acknowledged that as evidence of the actual conflict, Beaver adduced testimony from Rainey at the state habeas hearing that from time to time Rainey represented the Commonwealth in grand jury proceedings and criminal prosecutions and wrote appellate briefs for criminal cases on behalf of the Commonwealth's Attorney.⁴⁷ Moreover, of great significance in light of the particular facts of this case, Rainey testified that he had interacted with law enforcement officers, including Virginia State Troopers, and that such officers would, on occasion, investigate cases and testify on behalf of the Commonwealth.⁴⁸

Rather than rule on the merits of this claim under the test set forth in *Cuyler*, the court characterized the state habeas court's finding of "no actual conflict" as a finding of "historical fact" according to 28 U.S.C. § 2254(d), and thus, it was entitled to a "presumption of correctness."⁴⁹ But, as the dissent correctly pointed out, the law in this area could not be more clear. The determination as to whether a conflict of interest exists in a particular case is a "mixed determination of law and fact."⁵⁰ *Cuyler* is unmistakable on this point. In analyzing a conflict of interest claim based on multiple representation, the Court in *Cuyler* stated:

Findings about the roles [Sullivan's lawyers] played in the defense of Sullivan and his codefendants are facts But the holding that the lawyers who played those roles did not engage in multiple representation is a mixed determination of law and fact that requires the application of legal principles to the historical facts of this case That holding is open to review on collateral attack in a federal court.⁵¹

The court of appeals in this case properly employed a presumption of correctness to historical facts such as whether Rainey interacted with state troopers or the extent of his duties as a part-time prosecutor. When the court applied a similar presumption of correctness to the state court's application of federal constitutional legal principles, however, it contravened *Cuyler*.

Beaver's conflict of interest claim was not based on multiple representation but on the fact that one of his defense attorneys was, before and after the trial, a prosecutor. Thus the appropriate inquiry is two-fold: (1) Did Rainey actively represent conflicting interests?; (2) If so, did Rainey's active representation of conflicting interests adversely affect his performance in representing Beaver in any way? Rainey had, for seven years, worked as a part-time prosecutor in a nearby county and resumed this work once Beaver had been convicted. His duties as a prosecutor could not be effectuated without the assistance and compliance of state law enforcement. There was no indication that Rainey no longer intended to work as a prosecutor. The notion that he would zealously defend Beaver with undivided loyalty is not plausible. He was

⁴⁴ *Id.* at 1192.

⁴⁵ *Id.* at 1198 (Hall, J., dissenting).

⁴⁶ *Id.* (Hall, J., dissenting) (quoting *Cuyler*, 446 U.S. at 349).

⁴⁷ It is unclear from the facts of the case whether Rainey's brief writing was limited to cases arising in Dinwiddie County or if it included appeals arising from other areas of Virginia.

⁴⁸ *Beaver*, 93 F.3d at 1192.

⁴⁹ *Id.*

⁵⁰ *Id.* at 1199 (Hall, J., dissenting) (quoting *Cuyler*, 446 U.S. at 342).

⁵¹ *Cuyler*, 446 U.S. at 342.

employed by the Commonwealth to seek convictions and simultaneously was opposing the Commonwealth in order to prevent a conviction. Simply put, Rainey was actively representing conflicting interests.

Aside from the majority's statement that the state habeas court "found that Beaver had presented no evidence that Rainey's conduct of the defense was altered in any way by his status as a part-time assistant Commonwealth attorney in Dinwiddie County,"⁵² there is no discussion of whether the facts of this case establish any adverse effect resulting from Rainey's conflict of interest. To satisfy this prong, Beaver would have to be able to identify when and how Rainey's performance was adversely affected by his conflict of interest. If, for example, Beaver could show that Rainey's decision to seek a plea agreement rather than to try the case was motivated by his desire to maintain cordial relations with law enforcement in order to effectuate his job as assistant prosecutor he would likely satisfy the second prong. Thus, even if the decision to seek a plea agreement under similar circumstances would be considered effective representation, if Rainey's decision was motivated by his conflicting interest, then prejudice is presumed.

Another disconcerting aspect of this case is the fact that the majority's opinion, in effect, gave the court's imprimatur to Rainey's unethical conduct. As a part-time assistant prosecutor in a neighboring county, Rainey had many possible incentives, such as job maintenance, job promotion, and community standing, to act other than in Beaver's best interest. As Beaver's defense attorney, he had the opportunity to do it. It is both the appearance of impropriety and the opportunity for it which lies behind the ethical rule that "[a] lawyer shall not accept employment if the exercise of his professional judgment on behalf of his client may be affected by his own financial, business, property, or personal interest."⁵³ The Supreme Court has similarly expressed the belief that "[d]efense counsel have an ethical obligation to avoid conflicting representations."⁵⁴ Moreover, one Fourth Circuit Court of Appeals case has gone so far as to suggest that there is a per se conflict of interest when a prosecutor is appointed to represent a defendant.⁵⁵ Finally, a relatively recent survey of how states deal with part-time prosecutors acting as court-appointed defense counsel concluded, "In virtually every state there are ethics opinions stating that a part-time prosecutor may not defend in criminal cases—not just in the prosecutor's own county but anywhere else in his or her state. In some states the prohibition has been enacted into statutory law."⁵⁶ One would think, or at least hope, that the ethical rule against representing conflicting interests would have paramount importance in capital defense cases where more often than not the undivided loyalty of defense counsel is the only refuge and possible safeguard against community sentiment and Commonwealth efforts to see the accused executed.

⁵² *Beaver*, 93 F.3d at 1192.

⁵³ Va. Code Of Professional Responsibility DR 5-101(A). See also EC 5-14 which states, "Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client."

⁵⁴ *Cuyler*, 446 U.S. at 346.

⁵⁵ *Goodson v. Peyton*, 351 F.2d 905, 909-10 (4th Cir. 1965).

⁵⁶ Richard H. Underwood, *Part-Time Prosecutors and Conflicts of Interest: A Survey and Some Proposals*, 81 Ky.L.J. 1, 37 (1992) (discussing how various state bars have dealt with the ethical issues peculiar to part-time prosecutors).

⁵⁷ *Beaver*, 93 F.3d at 1194.

⁵⁸ *Id.* at 1195.

⁵⁹ See *Dubois v. Commonwealth*, 246 Va. 260, 435 S.E.2d 636

III. Ineffective Assistance of Counsel

Beaver claimed that he was rendered ineffective assistance of counsel because his guilty plea was not knowing and intelligent⁵⁷ and because his counsel failed to adequately investigate and present evidence in mitigation during the sentencing hearing.⁵⁸

The steadfast position of the Virginia Capital Case Clearinghouse over the years has been that an attorney representing a capital defendant should not allow him to plead guilty without some formal, or strong informal, indication from the judge that the sentence will not be death.⁵⁹ This case provides another instructive, albeit tragic, example of what happens when this rule is not heeded. Beaver agreed to plead guilty in exchange for the Commonwealth's promise "not to argue sentence" and "to submit the issue of the sentence to the court without comment."⁶⁰ A colloquy between Beaver and one of his attorneys during the sentencing hearing demonstrates that there was ambiguity in Beaver's mind regarding to what exactly the Commonwealth had agreed.⁶¹ Indeed, the ambiguity of the plea agreement is borne out by its terms. In other words, is there really any difference between not arguing sentence and submitting the issue of sentence to the court without comment?

In *Lankford v. Idaho*⁶² the Supreme Court had occasion to address at least one constitutional violation raised by an ambiguous plea agreement. In *Lankford*, the state had agreed in a pre-trial order not to seek the death penalty, even though the court had the power to impose it. The trial court listened to arguments about the appropriate length of the defendant's sentence even though the real issue the court was contemplating was whether or not it was going to impose the death sentence. Though neither side requested or expected it, the judge sentenced Lankford to death. The Supreme Court, in finding that the Fourteenth Amendment Due Process requirement had been violated, stated that "[p]etitioner's lack of adequate notice that the judge was contemplating the imposition of the death sentence created an impermissible risk that the adversary process may have malfunctioned in this case."⁶³ There was, likewise, a risk that the adversary process malfunctioned in Beaver's case.

Whatever this agreement meant, it did not prevent the Commonwealth from presenting evidence of the death eligibility factors at the sentencing phase. The Commonwealth called a clinical psychologist, Dr. Lee, and psychiatrist, Dr. Dimitris, without objection by either of Beaver's counsel, to testify as to whether Beaver was a Type B offender, more non-assertive and passive than most other felons, under the Megargee Typology criteria.⁶⁴ Dr. Lee testified that even though the Second Genesis report classified Beaver as a type B personality, he felt that the Megargee Typology had only a 40% rate of accurate predictions.⁶⁵ Dr. Dimitris testified that, according to the Minnesota Multiphasic Personality Inventory, he "predicted that Mr. Beaver would explode."⁶⁶ After

(1993), and case summary of *Dubois*, in *Capital Defense Digest*, Vol. 6, No. 1, p. 28.

⁶⁰ *Beaver*, 93 F.3d at 1194.

⁶¹ While the Commonwealth was presenting evidence during the sentencing phase, Beaver turned to Maclin and asked if the Commonwealth could present evidence. Maclin says he responded, "Yes, its pursuant to our agreement." *Id.*

⁶² 500 U.S. 110 (1991).

⁶³ *Id.* at 127.

⁶⁴ The court does not list the criteria for a Type B personality under the Megargee Typology. The Megargee Typology is a diagnostic test related to the Minnesota Multiphasic Personality Inventory.

⁶⁵ *Beaver*, 93 F.3d at 1198.

⁶⁶ *Id.* at 1197.

considering the testimony of Dr. Lee and Dr. Dimitris, evidence adduced at trial, and the information contained in the presentence report detailing Beaver's criminal history, including both adjudicated and unadjudicated acts, the trial court sentenced the defendant to death, finding future dangerousness. The end result was that Beaver agreed to waive a host of Fifth and Sixth Amendment rights in exchange for the Commonwealth's agreement not to make an argument for the death penalty, although the Commonwealth could still introduce evidence at the sentencing phase and seek the death penalty.

The other basis for Beaver's claim of ineffective assistance of counsel was failure to investigate and present mitigating evidence at the sentencing hearing.⁶⁷ Beaver made three specific assertions in support of this claim. First, he asserted that his counsel failed to present significant and helpful testimony from family members in favor of reports by various social service agencies and probation officers. Beaver claimed that his father, Sandy Beaver, should have been called to testify about Beaver's relationship with his mother, namely that she encouraged and aided his involvement with drugs and petty crime, including planning a robbery and assault upon her ex-husband which Beaver carried out. Beaver claimed that his counsel failed to elicit similar testimony from his wife regarding his mother's influence on him and failed to call his mother.⁶⁸

Rainey testified that the strategy for sentencing was to portray Beaver as a troubled young man with many problems in his upbringing. Rainey also testified that the social service and probation reports supported their strategy, and that he was concerned that family members were susceptible to being discredited on cross-examination by the prosecutor. This justification is somewhat confusing. If Rainey's strategy was to show harmful experiences on Beaver from members of his family, their credibility on the stand would hardly seem to be a significant concern. At the very least, there is no discernible, rational reason offered in the opinion as to why it was reasonable not to call any of Beaver's family members to testify, other than the conclusion that reliance on written reports in the record was a reasonable tactical decision.

The court found defense counsels' decision to rely on the credibility of the state reports rather than call Beaver's family members for fear that they might "testify adversely to Beaver's interests on cross-examination was reasonable trial strategy that was within the objective standard of reasonable effective assistance."⁶⁹ This statement misses the point. Defense counsels' decision was not, "Should we present the state reports?" or "Should we present testimony by Beaver's family members?" Their decision was "What evidence should we present to persuade the court not to impose the death penalty?" Simply put, there was nothing to prevent defense counsel from presenting both state reports and testimony by family members at the sentencing phase. Given Rainey's stated strategy, testimony that would support it would cast Beaver's family members and his upbringing in a negative light. The only kind of testimony that would appear to undermine this strategy would still be testimony by good, upstanding people who loved and cared for Beaver. There was no evidence of that from any source.⁷⁰ Defense counsels' failure to present testimony by Beaver's family members, when it was a win-win situation, was unreasonable.

Second, Beaver claimed that the decision by his attorneys to call the Commonwealth's expert witness, Dr. Dimitris, to testify regarding

Beaver's future dangerousness constituted ineffective assistance. A week before trial, Dr. Dimitris told Rainey that he could not offer evidence in Beaver's favor. Rainey testified that he did not expect the testimony of Dr. Dimitris to be helpful but thought that the doctor might make some points beneficial to Beaver. The court stated:

On questioning from the court as to the broader question of the likelihood of future criminal conduct Dr. Dimitris replied that it was his impression that Mr. Beaver had not profited from his experiences in the Second Genesis program. We think this testimony is, as his attorneys had hoped, more helpful to Beaver than harmful.⁷¹

The court offered no further explanation for this conclusion, other than to state that the decision to call Dr. Dimitris was a reasonable tactical decision to control the presentation of evidence to diminish the force and effect of his testimony.⁷² For capital defense attorneys in Virginia who practice in the best interests of the defendant, it should be clear: do not call the Commonwealth's mental health expert as your witness when you know he has no helpful testimony to offer. The court's conclusion that this was a reasonable tactical decision by Beaver's counsel sends a bewildering message to capital defense attorneys about what constitutes reasonable tactical decisions: not calling the defendant's family members to testify and calling the Commonwealth's expert to offer unfavorable testimony constitutes reasonably effective assistance of counsel.

Beaver's third assertion was that his counsel were ineffective because they "failed to inform . . . Dr. Reddy of Beaver's alleged assault on his stepfather" and failed to independently corroborate the information Beaver gave to his attorneys and upon which Dr. Reddy relied.⁷³ Dr. Reddy, the defendant's psychiatric expert, was given reports and records detailing Beaver's juvenile offenses and his convictions in Maryland.⁷⁴ Based on this information, Dr. Reddy testified that Beaver did not pose a future danger to society. On cross-examination, however, Dr. Reddy testified that he was not aware of the unadjudicated robbery and assault upon the ex-husband of Beaver's mother and "that this information might influence his opinion as to Beaver's future violence to some degree."⁷⁵ Beaver contended that the surprise of Dr. Reddy, in learning of an alleged assault by Beaver for the first time on the witness stand, caused Dr. Reddy to lose credibility.⁷⁶

The first basis of this claim by Beaver, that his counsel were ineffective because they failed to inform Dr. Reddy of this alleged assault, was not addressed by the court. Indeed, it would be difficult to justify not informing Dr. Reddy of this alleged assault in light of the fact that defense counsel were fully aware of it and of the fact that the Commonwealth intended to introduce it against Beaver at the sentencing hearing. As the court recognized in a footnote in an earlier portion of its opinion:

There is no claim here that Beaver did not have notice of the introduction of evidence with respect to an incident of his robbery of his stepfather, of which he had not been convicted. . . . His attorneys knew about the robbery of his step-father and discussed the matter prior to trial.⁷⁷

⁶⁷ *Id.* at 1195.

⁶⁸ *Id.*

⁶⁹ *Id.* at 1196 (relying on *Burger*, 483 U.S. at 788-95).

⁷⁰ *Id.* at 1196.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.* at 1196-97.

⁷⁴ *Id.*

⁷⁵ *Id.* at 1197.

⁷⁶ *Id.* at 1196.

⁷⁷ *Id.* at 1191 n. 5.

Perhaps there was no discussion of whether this particular omission was a "reasonable trial strategy" because it simply could not be justified. It should go without saying that expert witnesses must be informed of all relevant evidence that will be presented to the tribunal.⁷⁸

Beaver also argued that his counsel had a duty to investigate and independently corroborate the information provided by Beaver upon which Dr. Reddy relied. But the court stated, "we know of no authority that required Beaver's counsel to insure Beaver's truthfulness to Dr. Reddy or themselves while engaged on his behalf. We hold there is no such obligation and are of the opinion that this claim is frivolous."⁷⁹ While the court at an earlier juncture in its opinion noted that under *Strickland* a defense attorney has a duty to make reasonable investigation into mitigating factors,⁸⁰ this passage seems to indicate that the duty of reasonable investigation into mitigating factors does not include a duty to investigate and independently corroborate what the defendant says. The court's specific holding that a defense attorney has no duty to investigate and independently corroborate the defendant's statements demonstrates the court's practice of characterizing what constitutes reasonable investigation depending upon what is at stake for the defendant.

A comparison of two recent decisions by the Court of Appeals for the Fourth Circuit demonstrates this practice in action. In *Stout v. Netherland*,⁸¹ the court reversed the district court's finding that the failure of Stout's defense counsel to investigate and present virtually any case in mitigation was constitutionally ineffective assistance of counsel in light of the overwhelming evidence of mitigation evidence available and the five month hiatus in the sentencing phase.⁸² In reversing the district court, a panel of the court of appeals stated, "[A] federal habeas court must not second-guess counsel's strategic choices, particularly those choices related to the investigation of mitigation evidence, which must be evaluated . . . 'applying a heavy measure of deference to counsel's judgments.'"⁸³ A heavy measure of deference is applied in *Stout* as evidenced by the court's holding: "[I]n light of the detailed descriptions of Stout's background contained in the psychological report, there can be little doubt that [Stout's defense attorney] was adequately apprised of the relevant information; thus, there was no lack of investigation."⁸⁴ Apparently, under this "heavy deference" standard, as long as the defense attorney reads the psychological report and it apprises him of the defendant's background, he has satisfied his duty to conduct a reasonable investigation into mitigating factors.

What constitutes "reasonable investigation" depends, however, upon whether the law in question is beneficial or detrimental to the

defendant. The defendant in *Hoke v. Netherland*⁸⁵ certainly did not get the benefit of any judicial deference toward the investigation conducted by his attorney. In *Hoke*, the defendant claimed that the prosecutor violated his *Brady*⁸⁶ right to exculpatory evidence, by concealing the testimony of three men who claimed to have had sex with the victim.⁸⁷ This evidence of the victim's promiscuity directly contradicted the prosecutor's portrayal of the victim as a kindly old lady. The court of appeals, however, reversed the district court's finding of a *Brady* violation on the basis that had Hoke's defense attorney undertaken a "reasonable and diligent" investigation he would have learned of these three witnesses.⁸⁸ The court described the defense attorney's investigation as limited by the fact that he only visited the restaurant the victim frequented two to four times and interviewed only five to seven people.⁸⁹ The court further noted:

Hoke never even attempted to contact any of Stell's friends or acquaintances who were not patrons of the . . . [r]estaurant, or to visit other restaurants, bars, or business establishments frequented by Stell. . . . [T]here is no evidence that Hoke's attorney even attempted to learn about Stell's relationships from her neighbors and friends in the apartment complex.⁹⁰

In short, the *Hoke* majority found that the defendant could have easily discovered two of these three men, and with reasonable certainty the third man, despite evidence in the record that people at the restaurant were hostile to the defense attorney and that police only discovered such evidence after having to press at least one of the men for information.⁹¹

The court, undoubtedly, applied an entirely different concept of what constitutes a reasonable investigation in *Hoke* than it did in *Stout* and *Beaver*. One might think that the difference could be explained as involving different legal standards, the former case involving *Brady* and the latter two cases involving *Strickland*. But, in *United States v. Bagley*,⁹² the Supreme Court held that the standard for evaluating "materiality" under *Brady* claims is the same as the standard used for evaluating "prejudice" under *Strickland*. The most distressing aspect that emerges from comparing these three cases is that it appears that how the law affects the outcome of a defendant's claim is the most important factor for gauging how much investigation is required for reasonableness.

Summary and Analysis by:
Tommy Barrett

⁷⁸ The court's response that Beaver denied the incident and lied to his attorneys is irrelevant to the expert's lack of preparation to meet something the Commonwealth was sure to raise.

⁷⁹ *Beaver*, 93 F.3d at 1197.

⁸⁰ *Id.* at 1195.

⁸¹ 1996 WL 496601 (4th Cir. (Va.) September 3, 1996).

⁸² *Id.* at *9.

⁸³ *Id.* at *10 (quoting *Strickland*, 466 U.S. at 691).

⁸⁴ *Id.* at *11.

⁸⁵ 92 F.3d 1350 (4th Cir. 1996).

⁸⁶ *Brady v. Maryland*, 373 U.S. 83 (1963) (holding that due process requires the government to turn over to the defendant evidence that is favorable and material to the guilt or punishment of the defendant).

⁸⁷ *Hoke*, 92 F.3d at 1354.

⁸⁸ *Id.* at 1355.

⁸⁹ *Id.*

⁹⁰ *Id.*

⁹¹ *Id.* at 1356, 1366.

⁹² 473 U.S. 667, 682 (1985).