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BUCHANAN v. ANGELONE 103 F.3d 344 (4th Cir. 1996) United States Court of Appeals, Fourth Circuit

quickly and diligently as possible and make a record of all external impediments (denial of discovery, the lack of timely discovery by the Commonwealth, government concealment of evidence, insufficient time for meaningful investigation) so that claims will not be defaulted and there will remain at least a chance that facts may be further developed in federal court. On a final note, *McCleskey* and *George* make clear that any claim with a mere scintilla of evidence to support it must be included at every stage of collateral review.

Summary and analysis by:
Deborah A. Hill

BUCHANAN v. ANGELONE

103 F.3d 344 (4th Cir. 1996)
United States Court of Appeals, Fourth Circuit

FACTS

On September 15, 1987, Douglas McArthur Buchanan, Jr. brought his rifle to his father's house. After an argument about his natural mother, the defendant shot his father through the back of the head. Then he waited for his two half-brothers to return home from school. Upon their arrival, Buchanan shot both brothers. One died. The other survived the shooting, but Buchanan subsequently stabbed him to death with a kitchen knife. When his step-mother later arrived at the home, Buchanan attempted to shoot her. Unsuccessful, he resorted to stabbing her with the kitchen knife, delivering lethal wounds to her neck.[1]

The Commonwealth charged Buchanan with capital murder of "more than one person as part of the same act or transaction."[2] A grand jury issued four separate indictments for first degree murder.[3] Buchanan also faced four counts of using a firearm in the commission of a murder.[4] At the end of his trial in Amherst County, a jury found Buchanan guilty on all charges and sentenced him to death for the capital murder of his father.[5]

Buchanan exhausted his direct appeal and state habeas proceedings. He then filed a petition for a writ of habeas corpus in federal district court. The court denied relief and Buchanan appealed.[6]

HOLDING

The court of appeals found no error in the district court's denial of Buchanan's petition for a writ of habeas corpus and affirmed its judgment.[7]

ANALYSIS/APPLICATION IN VIRGINIA

I. Inadequate Instruction Regarding Mitigating Evidence

A. A General Instruction Failed to Guide the Jury's Discretion

In the first of his five claims,[8] Buchanan alleged that the trial court inadequately instructed the jury about mitigating evidence by refusing to give specific and detailed instructions regarding mitigating evidence as defined in Va. Code Ann § 19.2-264.4, such as his youth, absence of prior criminal record, and the influence of an extreme mental or emotional disturbance.[9] Instead, the trial court instructed the jury, "[I]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment."[10] The court

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[1] *Buchanan v. Commonwealth*, 238 Va. 389, 394-95, 384 S.E.2d 757, 760-61 (1989).

[2] Va. Code Ann. § 18.2-31(7).

[3] Va. Code Ann. § 18.2-32.

[4] Va. Code Ann § 18.2-53.1.

[5] *Buchanan v. Angelone*, 103 F.3d 344, 346-47 (1996). Although not expressly stated in the opinion, or in the opinion of the Supreme Court of Virginia, the jury appears to have predicated Buchanan's death sentence on a finding of "vileness".

[6] *Id.* at 347.

[7] *Id.* at 351.

[8] Three of the court's rulings will not be discussed in this summary. Some of the rulings provide little if any guidance because they apply broad, settled principles of law to facts that are specific to the case being reviewed. These holdings are (1) trial counsel was not ineffective by not suggesting the defendant plead guilty to the first degree murder indictments so that double jeopardy would preclude a sentence of death. The court correctly applied the holding of *Ohio v. Johnson*, 467 U.S. 493 (1984), that pleading guilty to the lesser included offenses does not bar the state from prosecuting the greater offenses if it brought all charges in the same prosecution; (2) the Supreme Court of Virginia conducted a sufficient proportionality review; (3) having failed to raise the issue on direct appeal, Buchanan was barred from assigning error for the trial court's failure to instruct on second degree murder.

[9] *Buchanan*, 103 F.3d at 347. Va. Code Ann. § 19.2-264.4(B) states:

> "Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense or (vi) mental retardation of the defendant."

[10] *Id.*

of appeals also noted that the verdict form required the jury to indicate that it had considered the mitigation evidence. [11]

Buchanan made two arguments concerning the trial court's instruction about mitigation evidence. He first alleged that the court's general instruction failed to channel the jury's discretion, subjecting him to an arbitrary and capricious sentence in violation of the Eighth Amendment. The court of appeals held that the Eighth Amendment does not mandate specific standards for jury instructions on mitigating evidence.[12] So long as juries are able to consider "all relevant mitigating evidence,"[13] Virginia's sentencing procedure satisfies the Eighth Amendment requirement of individualized consideration in sentencing. Failure to require that judges instruct the jury as to statutory mitigating factors, the court held, does not render Virginia's death penalty scheme unconstitutional.[14] Accordingly, the court of appeals found no merit to Buchanan's Eighth Amendment claim.

Virginia's death penalty sentencing statute does not require that a trial judge specifically instruct a jury about statutorily defined mitigating factors. Nevertheless, a trial court's failure to provide such instructions arguably violates a defendant's rights under the Eighth Amendment. The decisions of the United States Supreme Court in *Mills v. Maryland*[15] and *McKoy v. North Carolina*,[16] are instructional, though they address issues that are only analogous. In those cases, as in Virginia, no procedural bar prevented the defendants from presenting mitigating evidence and juries were not flatly barred from considering it. Nevertheless, the Court condemned procedural "barriers" to the consideration of mitigation.[17] In *Mills*, the Court stated,

> Under our decisions, it is not relevant whether the barrier to the sentencer's consideration of all mitigating evidence is interposed by statute . . . by the sentencing court . . . or by an evidentiary ruling. . . . "Because the [sentencer's] failure to consider all of the mitigating evidence risks erroneous imposition of the death sentence . . . it is our duty to remand for resentencing."[18]

Similarly, the Court has held that jurors must be permitted to give effect to mitigating evidence if they choose to do so.[19] While no court has conclusively determined the issue, a trial court's refusal to instruct the jury on specific mitigating factors may place an unconstitutional barrier to the jury's meaningful consideration of mitigating evidence and may impede the jury's opportunity to give effect to it. Under a general instruction, a jury is not instructed on how the mitigating evidence presented to it relates to their duties under the capital sentencing statute. There is a substantial risk that mitigating evidence will not be considered according to law without guidance from the trial court. Lower federal courts have held that the Constitution forbids the reasonable possibility that a juror may not understand the meaning and function of a mitigating factor.[20] As a potential barrier that prevents jurors from considering mitigating evidence, a trial court's failure to provide instructions on statutorily defined mitigating factors may violate the Eighth Amendment. In any event, many circuit court judges are willing to give proffered mitigating instructions and counsel should continue to make that effort.

B. A General Instruction Denies a Defendant His Rights Under Virginia's Sentencing Statute

Buchanan also alleged that the general mitigation instruction violated Virginia's death penalty sentencing statute, thereby denying him any benefit provided by the statute. The defendant argued that this denial of rights under state law amounted to a violation of the Due Process Clause of the United States Constitution.[21] The court of appeals, while treating Buchanan's claim as a federal issue, dismissed the claim on its merits. While the court agreed that the denial of a state procedural right may rise to the level of a federal due process violation, the court held that the Virginia statute only assures that a defendant has a right to present mitigating evidence.[22] The statute does not require the trial court to provide jury instructions regarding specific mitigating factors. Finding that the trial court's instruction was not inconsistent with the Virginia statute, the court of appeals rejected Buchanan's due process claim.[23]

The court's resolution of Buchanan's claim, based on the absence of any express language, leaves open the question of whether Buchanan had a due process right to have the jury informed of mitigating factors deemed significant by the legislature, and in support of which he had offered evidence. Section 19.2-264.4 sets forth several statutory mitigating factors. Because the legislature codified the factors, it must have recognized them to be significant in the sentencing process. Arguably, these specific mitigating factors represent items the legislature believed to be particularly relevant to consideration of a sentence other than death. If not, the legislature could have codified a general mandate that the defendant could introduce mitigating evidence. At a minimum, the enumerated mitigating factors are beneficial sentencing considerations that the legislature provided to capital defendants. The trial court's failure to instruct the jury about these statutory mitigating factors prevented the jury from learning the importance the legislature assigned to them. Furthermore, it may have negated the legislature's attempt to make the death sentencing procedure comport with the Eighth Amendment. While it is true that there is no language in the statute commanding an instruction, the statutory scheme is frustrated when the trial court refuses to assist the jury in giving effect to evidence that addresses the statutory mitigating factors.

The general instruction in Buchanan's case is a standard instruction given to juries after the presentation of a case in mitigation. Nevertheless, the instruction may be inconsistent with the statutory scheme. The Virginia statute does not create a presumption in favor or against a sentence of death. The statute states that "a proceeding shall be held which shall be limited to a determination as to whether the defendant shall be sentenced to death or life imprisonment."[24] Yet, the trial court instructed, "[I]f you believe from all the evidence that the death penalty is not **justified** . . . ."[25] The instruction suggests that a death sentence is presumed unless evidence is available to show that it is unreasonable.

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[11] *Id.*

[12] *Id.*

[13] *Id.* at 348.

[14] *Id.* at 347(citing *Clozza v. Murray*, 913 F.2d 1092, 1105 (4th Cir. 1990)).

[15] 486 U.S. 367 (1988).

[16] 494 U.S. 433 (1990).

[17] *Mills*, 486 U.S. at 375.

[18] *Id.*(citations omitted).

[19] *See Eddings v. Oklahoma*, 455 U.S. 104 (1982), and *Penry v. Lynaugh*, 492 U.S. 302 (1989).

[20] *Peek v. Kemp*, 784 F.2d 1479 (11th Cir. 1986). *See also Andrews v. Shulsen*, 802 F.2d 1256, 1264 (10th Cir. 1986) (holding that "jury should be instructed that law recognizes circumstances which may be considered as extenuating or otherwise reducing a defendant's culpability and hence his punishment.").

[21] *Buchanan*, 103 F.3d at 348.

[22] *Id.*

[23] *Id.*

[24] Va. Code Ann. § 19.2-264.4(A) (1995).

[25] *Buchanan*, 103 F.3d at 347 (emphasis added).

The creation of this presumption is contrary to the statutory sentencing scheme.

The Supreme Court of Virginia's holding in *Smith v. Commonwealth*[26] mandates that a jury can recommend a life term even when the Commonwealth established either or both aggravating factors. Arguably, a defendant enjoys a benefit under the sentencing statute that the jury may elect to recommend life despite finding "future dangerousness" or "vileness." It can suggest a life sentence for any reason at all. Yet, the instruction given by the trial court instructs the jury that they can make such a recommendation only if it finds the death penalty is not justified. The suggestion of such a precondition to a recommendation of life arguably denies a defendant a state created right and violates the Due Process Clause. Counsel may wish to consider proposing a substitution of the word "appropriate" for "justified" and preserve the issue for appeal if the trial court denies the request.

II. Exclusion of Expert Testimony in Sentencing Phase as Hearsay

During the sentencing proceedings, Buchanan relied on his expert, Dr. Robert Brown, as the primary mitigation witness. Dr. Brown testified that Buchanan was under "extreme emotional stress at the time of the killings."[27] The trial court did not allow Dr. Brown to provide the basis for his opinion by repeating statements others made to him during his investigation, ruling statements made by persons not at trial were inadmissible hearsay.[28]

Buchanan claimed that the trial judge's application of the hearsay rule violated his constitutional right to present mitigating evidence.[29] Buchanan relied on the United States Supreme Court's opinion in *Green v. Georgia*.[30] In *Green*, the Supreme Court considered the statement of an inmate already convicted of capital murder to the effect that he acted alone, exonerating his co-defendant.[31] The Court held that because the testimony was "highly relevant to a critical issue in the punishment phase," the trial court could not employ the hearsay rule "'to defeat the ends of justice.'"[32] Although the application of the hearsay rule was proper, the unique circumstance made the use of the hearsay rule during the sentencing phase a violation of the Due Process Clause.

The court of appeals found that the facts in Buchanan's case were meaningfully different from those in *Green*. The court noted that in *Green*, the evidence spoke to the innocence of the defendant. In addition, the statement in *Green* was made against the utterer's penal interest, giving the statement inherent reliability. The statements made to Dr. Brown addressed the defendant's emotional suffering and not his innocence. Furthermore, they lacked any indicia of reliability. Given the different circumstances in Buchanan's case, the court held that "[t]he exclusion of the hearsay statements offered by Dr. Brown [did] not fit within the narrow exception recognized by *Green*."[33]

It is not clear from the opinion whether the trial court allowed Dr. Brown to at least state the number and identity of the persons he interviewed who provided the basis for his opinion. An expert's testimony and its effectiveness are severely undercut if she cannot substantiate her conclusion because a jury would have difficulty in giving weight to the expert's testimony.[34] For instance, an expert's conclusion that the defendant does well in a structured environment will appear unfounded unless she can identify her sources of information such as fellow prisoners and prison officials. At the other extreme, the court of appeals was probably correct that expert witnesses cannot use summations of out of court statements as a basis for their opinion. However, under Virginia law, trial courts should permit an expert witness to state the identity of a source of information while forbidding the expert from relating the source's testimony.[35] Allowing witnesses to name their sources allows them to legitimate their conclusions without running afoul of the prohibition against hearsay evidence.

The trial court offered defense counsel the opportunity to present the in-court testimony of the witnesses Dr. Brown would have spoken about. Counsel declined this chance to present non-expert testimony.[36] While the exact circumstances are unknown, an excellent opportunity to introduce testimony that may have been effective could have been missed. Lay witnesses, such as co-workers and correctional officers, can deliver information to the jury without having to overcome the suspicion of bias that accompanies expert testimony. For instance, a jury may be more likely to believe a correctional officer who testifies that when she knew the defendant as a prisoner, he posed no danger to himself or others and appeared to do well in a structured environment. Often a jury may view the expert as a hired gun, placing an additional burden on the defense. The Virginia Capital Clearinghouse recommends that practitioners strongly consider using lay witnesses when presenting their case in mitigation, alone or in conjunction with expert testimony.[37]

Summary and Analysis by:
David T. McIndoe

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[26] 219 Va. 455, 248 S.E.2d 135 (1978).

[27] *Buchanan*, 103 F.3d at 348.

[28] *Id.*

[29] *Id.*

[30] 442 U.S. 95 (1979).

[31] *Id.* at 96-97.

[32] *Id.* at 97 (citing *Chambers v. Mississippi*, 410 U.S. 284, 302 (1973)).

[33] *Buchanan*, 103 F.3d at 349.

[34] Charles Friend, The Law of Evidence in Virginia § 212, n.35 (Supp. 1992).

[35] *Id.* Friend notes that while the Supreme Court of Virginia has not made an affirmative declaration that experts may disclose the identity and number of their sources, the current common law suggests such a rule.

[36] *Buchanan*, 103 F.3d at 348.

[37] *See* case summary of *Stout v. Netherland*, Capital Defense Journal, this issue, for a discussion of the use of lay witnesses.