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POPE v. NETHERLAND 113 F.3d 1364 (4th Cir. 1997)1 United States Court of Appeals, Fourth Circuit

Murphy's claim that his sentence was the product of ethnic discrimination and found instead that Murphy possessed a greater degree of culpability than the codefendants.[42] Even if discrimination was involved, the court reasoned that Murphy failed to offer any evidence that his consulate could have provided him with assistance not provided by his counsel.[43]

Likewise, the court rejected Murphy's claim that he was prejudiced by his inability to obtain mitigating evidence through his consulate. In rejecting this claim, the court cited the district court's finding that Murphy made no showing of what evidence his consulate would have provided.[44] According to the court of appeals, Murphy did not show how he needed the consulate's help in order to obtain character testimony, and even if he had, the court did not see how such testimony would have been any different from that offered at Murphy's sentencing hearing.

In these few sentences, the court of appeals managed to establish an extremely high standard for capital defendants attempting to show the existence of prejudice from a procedurally defaulted Vienna Convention claim. *Murphy* illustrates that, in the eyes of the court of appeals, it simply will not be enough to say the defendant might have obtained this evidence or assistance if the defendant had received his Convention rights. Habeas counsel will have to produce actual evidence that the defendant would have received from his or her consulate. For example, if counsel wanted to submit testimony of a character witness, counsel would actually have to produce the witness and the witness' testimony. This requirement of actuality also applies to the contents of any records that a consulate would have acquired on behalf of the defendant. Consequently, counsel must present as much actual evidence as possible in order to prevail on a showing of prejudice on a procedurally defaulted claim.

The fundamental lesson here is that capital defense counsel should avoid a procedural default bind at all costs, but if counsel does find a client in such a situation, counsel must make showings of both cause and actual prejudice.

Summary and analysis by:
Mary K. Martin

wife, who refused a bargain, was convicted and sentenced to life. Murphy was the only one of the six not offered a plea bargain.

[42] *Id.* The court agreed with the prosecutor's determination that Murphy was more culpable because of his primary role in the murder and his efforts to recruit others to help carry out the murder.

[43] *Id.*

[44] *Murphy*, 116 F.3d at 101.

POPE v. NETHERLAND

113 F.3d 1364 (4th Cir. 1997)[1]
United States Court of Appeals, Fourth Circuit

FACTS

On the evening of January 12, 1986, Carlton Jerome Pope shot and killed Cynthia Gray. While sitting in her car in the parking lot of "Nicks Pool Hall" in downtown Portsmouth with Marcie Ann Kirchheimer, Gray and Kirchheimer were approached by Pope. Pope asked Gray for a ride home and she agreed. Pope got into the back seat of the car and the three of them departed. After making one short stop, Pope directed Gray to Bagley Street where she stopped the car. Immediately after exiting the car, Pope turned toward the two women, pointed a pistol at them and demanded all their money. When the women made no immediate response, Pope fired a shot into Gray's head. Kirchheimer reached up from the passenger seat and briefly struggled with Pope for the gun. After he pulled free, Pope took a couple of steps away from the car, turned around and shot Kirchheimer in the back of the head. He then fled the scene. Gray died from the gun-shot wound to the head. Kirchheimer survived and testified against Pope at his trial.[2]

Kirchheimer told the police that Pope had taken nothing from her, but that Gray had been carrying a clutch-type purse which was missing after the shooting. Kirchheimer last remembered seeing the purse between the front seats. Although Kirchheimer did not actually see Pope take the purse, she testified that "it was in his view and that he had ample opportunity 'to grab it without [her] seeing him.'"[3]

The police examined the car shortly after the two women arrived at the hospital. In the car, the police found a wine bottle from which they obtained a fingerprint which positively matched Pope's fingerprint. In addition to the wine bottle, the police found a checkbook belonging to Gray in the car between the passenger seat and door. Kirchheimer testified that Gray had written and cashed a check from her checkbook earlier that evening and had then placed the checkbook back in her purse.[4]

The jury convicted Pope of capital murder in the commission of a robbery pursuant to Virginia Code Section 18.2-31(d)[5] and sentenced him to death. On direct appeal, the Supreme Court of Virginia affirmed Pope's conviction and sentence.[6] The supreme court held that "where a killing and a [larceny] are so closely related in time, place, and causal

[1] The United States Supreme Court, with Justices Stevens and Ginsburg dissenting, recently denied Pope's petition for a writ of certiorari. *Pope v. Pruett*, 1997 WL 429193 (U.S. Aug. 19, 1997). On that same day, Carlton Jerome Pope was executed by lethal injection.

[2] *Pope v. Netherland*, 113 F.3d 1364, 1367 (4th Cir. 1997).

[3] *Pope v. Netherland*, 113 F.3d 1364, 1367 (4th Cir. 1997) (quoting *Pope v. Commonwealth*, 234 Va. 114, 119, 360 S.E.2d 352, 355 (1987)).

[4] During Pope's second state habeas proceeding, the Commonwealth produced bank records that indicated that the check Gray wrote that night did not come from the checkbook found in the car. Thus, in his second state and federal habeas petitions, Pope contended that the Commonwealth violated *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to disclose exculpatory evidence. Additionally, Pope contended that the Commonwealth knowingly presented Kirchheimer's false testimony. *See, infra,* note 56 and accompanying text.

[5] This section has since been amended and changed to Virginia Code Section 18.2-31(4) (1995). *See, infra,* note 22.

[6] *Pope v. Commonwealth*, 234 Va. 114, 360 S.E.2d 352 (1987).

connection as to make them parts of the same criminal enterprise,"[7] a robbery is established for the purposes of the capital-murder statute.[8] The United States Supreme Court denied *certiorari*.[9]

Pope's first state habeas petition was dismissed by the City of Portsmouth Circuit Court on August 22, 1989.[10] This dismissal was affirmed by the Supreme Court of Virginia and the United States Supreme Court again denied certiorari.[11] Pope filed a second habeas petition with the Supreme Court of Virginia pursuant to its original jurisdiction. This petition was dismissed on September 6, 1991.[12]

With his state law remedies thus exhausted, Pope filed a habeas petition in the United States District Court for the Eastern District of Virginia. The district court granted a writ of habeas corpus on the grounds that the Supreme Court of Virginia in *Pope v. Commonwealth*[13] violated the due process clause of the Fourteenth Amendment by applying an unforeseeable, novel interpretation of robbery retroactively to the facts of Pope's case.[14] The Commonwealth appealed to the United States Court of Appeals for the Fourth Circuit arguing that in *Pope v. Commonwealth* the Supreme Court of Virginia's application of the "common criminal enterprise" rule was neither unforeseeable nor novel and rooted firmly in the laws of Virginia.[15]

HOLDING

The Fourth Circuit reversed and held: (1) Pope's federal due process claim was not procedurally barred due to his failure to couch the claim in explicit federal constitutional terms; (2) Pope was not denied due process of law because the Supreme Court of Virginia did not retroactively apply a novel and unforeseeable interpretation of the law to his case when it effectively elevated larceny to robbery for the purposes of the capital murder statute through application of the "common criminal enterprise" rule; (3) there was no "reasonable likelihood" that allegedly false testimony presented at trial affected the judgment of the jury and Pope's false testimony claims were procedurally barred; and (4) Pope's contention that the Commonwealth failed to divulge exculpatory evidence lacked merit because Pope's counsel could have obtained the information elsewhere, and thus the *Brady* rule did not apply. [16]

ANALYSIS/APPLICATION IN VIRGINIA

I. Preserving a Federal Due Process Claim

The Commonwealth contended that Pope's federal due process claim was procedurally defaulted because it was "not raised squarely, as required by law, until the second state habeas petition."[17] The Fourth Circuit found that although Pope had not raised the federal due process claim explicitly until the second state habeas petition, he had "squarely raised the issue whether the evidence was insufficient to convict him as a matter of law" in the state proceedings.[18] As the court of appeals stated, "[a]ny challenge to the sufficiency of the evidence to convict in a state prosecution is necessarily a due process challenge to the conviction."[19] Thus, the court held that "it is not necessary to cite 'book and verse on the federal constitution' so long as the constitutional substance of the claim is evident."[20]

Defense counsel should view this as a very narrow situation in which they need not federalize this specific objection. The Fourth Circuit's holding in *Pope* that a due process claim based on insufficiency of the evidence was not barred by a failure to "couch ... objections and challenges in state court in specific constitutional terms"[21] does not imply that all federal constitutional claims will receive the same treatment. As a result, attorneys should continue to couch all their objections in both state and federal terms.

II. Application of "Common Criminal Enterprise" Rule to Capital Murder

Under the statutory scheme in existence in 1986, Pope committed four separate crimes. First, he committed petit larceny when he removed the purse from between the front seats of the car.[22] Second, Pope committed attempted robbery when he pulled the pistol and demanded money.[23] Finally, Pope committed murder in the first degree[24] when he shot Gray and attempted murder in the first degree[25] when he shot

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[7] *Id.* at 125, 360 S.E.2d at 359.

[8] Va. Code § 18.2-31(d) (1985).

[9] *Pope v. Virginia*, 485 U.S. 1015 (1988).

[10] *Pope v. Netherland,* 113 F.3d 1364, 1366 (4th Cir. 1997).

[11] *Pope v. Thompson*, 498 U.S. 908 (1990).

[12] *Pope v. Netherland*, 113 F.3d 1364, 1366 (4th Cir. 1997).

[13] 234 Va. 114, 360 S.E.2d 352 (1987).

[14] *Pope v. Netherland*, 113 F.3d 1364, 1366 (4th Cir. 1997).

[15] *Pope,* 113 F.3d at 1368.

[16] *Id.* at 1366. The court rejected all of Pope's assignments of error and held that the district court erred in granting the writ. It rejected several of Pope's assignments of error without discussion because it found them to be either procedurally barred or without merit. These rulings provide little if any guidance because they apply broad, settled principals of law to facts that are specific to this case. As such, the issues which are not addressed in this summary include: (1) ineffective assistance of counsel; (2) failure to appoint an independent fingerprint expert; and (3) arbitrary imposition of the death penalty.

[17] *Id.* at 1368.

[18] *Id.*

[19] *Pope*, 113 F.3d at 1368 (quoting *West v. Wright*, 931 F.2d 262, 266 (4th Cir. 1991)).

[20] *Id.* (quoting *Picard v. Connor*, 404 U.S. 270, 278 (1971)).

[21] *Id.*

[22] Virginia Code Section 18.2-96(2) (1982) defines petit larceny as "simple larceny not from the person of another of goods and chattel of the value of less than $200 ...." While this section has been renumbered, Virginia Code Section 18.2-96(b) (1995), the content remains the same. "Larceny" is defined as "the wrongful taking of the goods of another without the owner's consent and with the intention to permanently deprive the owner of possession of the goods." *Bright v. Commonwealth*, 4 Va.App. 248, 356 S.E.2d 443 (1987). The crime of larceny is complete when both the *mens rea* (the intention to permanently deprive the owner of possession) and the *actus reus* (wrongful taking of the goods of another) are complete. Thus, when Pope took the purse from between the front seats of the car and secreted it in his jacket, the crime was complete.

[23] Va. Code §§ 18.2-26 & 18.2-58 (1982). The numbering and content of these sections remains the same.

[24] Va. Code § 18.2-32 (1982). Under the statutory scheme which was in effect in 1986, attempted robbery was not one of the predicate felonies listed under Virginia Code Section 18.2-31. *See Ball v. Commonwealth*, 221 Va. 754, 273 S.E.2d 790 (1981) (murder in an attempted robbery violates section 18.2-32, the first-degree-murder statute, but not section 18.2-31, the capital-murder statute). Virginia Code Section 18.2-31(4) was subsequently amended to add attempted robbery as a predicate felony for purposes of the capital-murder statute. Thus, under the current statutory scheme, a defendant in Pope's position could be tried for capital murder without resort to the "common criminal enterprise" rule. Petit larceny, a misdemeanor, is not a predicate felony for capital murder. Va. Code § 18.2-31 (1982) & Va. Code § 18.2-31 (1995). Similarly, "common criminal enterprise" is not mentioned in either version of the capital-murder statute.

[25] Va. Code §§ 18.2-26 & 18.2-32 (1985). Under the current version of the statutes, Pope would have been guilty of attempted capital murder

Kirchheimer. The Supreme Court of Virginia[26] and the Fourth Circuit,[27] however, combined these statutorily distinct crimes into a "common criminal enterprise" which, in their view, justifies the imposition of the death penalty. This "common criminal enterprise" interpretation of the capital-murder statute allows petit larceny to become robbery and, thus, first degree murder to become capital murder. In essence, these courts have amended the capital-murder statute by judicial fiat to include misdemeanor larceny within the underlying felonies required for capital murder.

This interpretation flies in the face of more than a hundred years of common law precedent. Robbery is, after all, a common law crime in Virginia.[28] Robbery at common law was defined as the taking, with intent to steal, the personal property of another, from his or her person or presence, against his or her will, by violence or intimidation.[29] All elements of the common-law offense must be proved beyond a reasonable doubt in order to establish that a robbery has occurred.[30] The essential element of violence or intimidation must **precede or be concomitant with the** taking of property from the person or presence of the owner.[31] Even the Fourth Circuit itself has explicitly recognized that "[t]he violence or intimidation that is an essential ingredient of robbery **must precede or be concomitant with** the taking."[32] In light of this precedent, the Fourth Circuit's pronouncement that larceny "closely related in time, place, and causal connection" to a killing amounts to robbery for the purposes of section 18.2-31(d) is truly troubling. [33]

In order to support this seemingly insupportable application of the "common criminal enterprise" rule, the Supreme Court of Virginia looked to its first application of the "common criminal enterprise" rule in a capital-murder proceeding.[34] In that case, *Briley v. Commonwealth*,[35] the defendant and his accomplices robbed the victim at gun point, forced the victim into his own car and then shot and killed him some 20 minutes later.[36] In discussing the application of the "common criminal enterprise" rule to the facts of the case, the court pointed out that in a "robbery prosecution, where the violence against the victim and the trespass to his property combine in a continuing, unbroken sequence of events, the robbery itself continues as well for the same period of time."[37] The court went on to hold that "the killing ... was so closely related in time, place, and causal connection as to make the killing, as a matter of law, a part of the same criminal enterprise."[38]

Regardless of what the Supreme Court of Virginia suggests, *Briley* bears no similarity to *Pope*. First, there was undoubtedly a robbery in *Briley* without application of the "common criminal enterprise" rule. The defendant held a rifle on the victim and demanded his wallet and keys. This satisfies all the common-law elements of robbery. In *Pope*, however, without the "common criminal enterprise" rule, there was only a larceny. Another key difference is the point in time when violence or intimidation was used by the defendants. In *Briley*, intimidation was used **before** the taking. In *Pope*, intimidation and violence were used only after the taking had been accomplished.

In his federal habeas petition, Pope claimed that the supreme court "violate[d] the due process clause by applying a novel interpretation of the law that transform[ed] larceny to robbery as a matter of law in a context that made the novel change unforeseeable."[39] The Fourth Circuit rejected this contention because, in its view, the "common criminal enterprise" rule was first applied to felony murder nearly a decade earlier[40] and to capital murder seven years earlier.[41] Thus, the court concluded that use of the "common criminal enterprise" rule in a capital murder context was not novel; rather, it was "rooted firmly in the ... law of Virginia."[42]

What the court failed to recognize, however, was that all of the other cases in which the "common criminal enterprise" rule was applied, including *Briley*, dealt with actual common-law robberies. The "common criminal enterprise" rule was applied to bridge the temporal gap between the robbery and the murder when they did not occur contemporaneously. Thus, the application of this rule – in a completely new situation which effectively elevated petit larceny to felony robbery when there was force applied after the taking was complete – was a "novel" and "unforeseeable" interpretation of the capital-murder statute.

The Fourth Circuit did recognize, however, that neither the capital-murder statute nor the felony-murder statute had ever been applied in a "Virginia case that dealt with a taking **before** the use of force."[43] Nonetheless, to support the conclusion that the "common criminal enterprise" rule was neither a "novel" nor an "unforeseeable" interpretation of the law, the court of appeals relied on a case from the Supreme Court of Connecticut which it claimed applied a "similar" statute to a "situation quite like Pope's offense."[44] In reality, both the applicable statute and the facts in *State v. Gunning*,[45] the Connecticut case, are quite different from those in *Pope*.

First, the distinctions between the Connecticut law at issue in *Gunning* and the Virginia law in *Pope*, render a comparison unreliable.[46]

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pursuant to Virginia Code Sections 18.2-25 and 18.2-31(4) (1995).

[26] *See Pope v. Commonwealth*, 234 Va. 114, 360 S.E.2d 352 (1987).

[27] *See Pope v. Netherland*, 113 F.3d 1364, 1370 (4th Cir. 1997).

[28] *See Houston v. Commonwealth*, 87 Va. 257, 12 S.E. 385 (1890).

[29] *See Pritchard v. Commonwealth*, 225 Va. 559, 303 S.E.2d 911 (1983).

[30] *See Mitchell v. Commonwealth*, 213 Va. 149, 191 S.E.2d 261 (1972).

[31] *Bunch v. Commonwealth*, 225 Va. 423, 439, 304 S.E.2d 271, 280, *cert. denied*, 464 U.S. 977 (1983), 505 U.S. 1230 (1992). *See Stamper v. Commonwealth*, 220 Va. 260, 274, 257 S.E.2d 808, 818 (1979), *cert. denied*, 445 U.S. 972 (1980).

[32] *Williams v. Kelly*, 816 F.2d 939, 947 (1987) (quoting *Stamper*, 220 Va. at 274, 257 S.E.2d at 818) (emphasis added).

[33] Additionally, the decision in *Pope v. Commonwealth* defies the statutorily mandated "strict construction" of criminal statutes. Va. Code § 19.2-5 (1982).

[34] *Pope v. Commonwealth*, 234 Va. 114, 125, 360 S.E.2d 352, 359 (1987).

[35] 221 Va. 532, 273 S.E.2d 48 (1980).

[36] *Briley*, 221 Va. at 535, 273 S.E.2d at 50.

[37] *Id.* at 543, 273 S.E.2d at 55. *See Haskell v. Commonwealth*, 218 Va. 1033, 243 S.E.2d 477 (1978) (adopting the "common criminal enterprise" rule for felony-murder cases).

[38] *Id.* at 544, 273 S.E.2d at 55-56.

[39] *Pope v. Netherland*, 113 F.3d 1364, 1368 (4th Cir. 1997) (citing *Bouie v. City of Columbia*, 378 U.S. 347 (1964)).

[40] *See Haskell v. Commonwealth*, 218 Va. 1033, 243 S.E.2d 477 (1978).

[41] *Briley*, 221 Va. at 543, 273 S.E.2d at 55.

[42] *Pope*, 113 F.3d at 1370.

[43] *Id.* at 1369 (emphasis added).

[44] *Id.*

[45] 183 Conn. 299, 439 A.2d 339 (1981).

[46] *Gunning* dealt with the Connecticut court's interpretation of its felony-murder statute, Connecticut General Statutes Section 53a-53c (1975), not its capital murder statute. Although the Fourth Circuit recognized this fact, it still asserted that the Connecticut felony-murder statute and the Virginia capital-murder statute, Virginia Code Section 18.2-31(d) (1985), contained "similar" provisions. *Pope*, 113 F.3d at 1369. This statement is true, but only to the extent that both statutes contained the words "murder" and "robbery." Beyond this similarity, however, the Connecticut felony-murder statute is, not surprisingly,

Robbery is a statutorily defined crime in Connecticut.[47] In Virginia, however, it is purely a common-law crime.[48] In stark contrast to the common-law definition of robbery applicable in Virginia, the Connecticut robbery statute explicitly accounts for the application of force **after** the taking.[49] In Virginia, the force or threat of force must "**proceed or be concomitant with** the taking of property from the person or presence of the owner."[50] Force applied after the taking is complete is insufficient under the Virginia common law definition of robbery.[51]

Although the cases might appear to be more similar factually than they are legally, they are not nearly as similar as the Fourth Circuit suggests. The factual chain of events in *Gunning* was virtually unknown. Although the evidence showed that defendant fled the area of the victim's house about the time the victim died and possessed the murder weapon and items from the victim's house shortly after the killing,[52] there was no evidence of the events which immediately preceded and followed the killing. Thus, the court found that the jury could have reasonably inferred that a robbery, within the meaning of the Connecticut statute, had occurred and that the murder occurred in furtherance of that robbery. The chain of events in *Pope*, however, was fairly certain. Pope took the purse from between the seats of the car, got out, pulled the gun, demanded money, received none, shot Gray and then shot Kirchheimer.[53] This chain of events does not necessarily lead to the conclusion that the murder was committed "in the commission of [a completed, not an attempted] robbery" as required by Virginia Code Section 18.2-31(d). In short, *Gunning* provides very weak support on both legal and factual grounds for the Fourth Circuit's conclusion in *Pope*.

After *Pope*, defense counsel in Virginia must remain aware of the latitude given the Commonwealth in its attempts to convict a defendant of capital murder. Attorneys must force the Commonwealth to prove every element of its case and refuse to acquiesce in the prosecutor's interpretation of the statute. Additionally, counsel should always request jury instructions which edify their theory of the case. Here, for example, counsel should have requested a larceny instruction[54] and should have objected upon refusal on both federal due process and state grounds.[55]

III. Use of Allegedly False Testimony

Pope also alleged that false testimony was admitted at his trial.[56] This allegedly false testimony consisted primarily of the testimony of Kirchheimer regarding both Gray's checkbook and her own involvement with drugs and alcohol.

Kirchheimer testified that Gray wrote a check shortly before the encounter with Pope and then returned her checkbook to her purse. Kirchheimer further testified that Gray had only one checkbook. After the shooting, a checkbook belonging to Gray was found on the floor of the car between the passenger seat and the passenger-side door. In its attempt to characterize the larceny of the purse as robbery, the Commonwealth theorized that "after killing Gray, Pope took the purse during the struggle with [Kirchheimer] and the checkbook fell out ...."[57] During the proceedings on Pope's second state habeas petition, the Commonwealth produced copies of Gray's checks which established that the check Gray wrote was not from the checkbook found on the floor of the car. Since the Commonwealth knew this, Pope alleged that the Commonwealth knowingly presented Kirchheimer's false testimony.[58]

Both the district court and the Fourth Circuit agreed that this claim was procedurally barred because it was not raised in either the state trial court or in the first state habeas petition and because Pope failed to establish either cause or prejudice—even though Pope did not have actual knowledge of the discrepancies until the proceedings on his second state habeas petition.[59] The Fourth Circuit held that "a reasonable and diligent" investigation by defense counsel would have turned up the discrepancies during trial.[60] Rather than explain exactly what constitutes a "reasonable and diligent" investigation, the court merely cited its decision in *Hoke v. Netherland*.[61] An important factor in the court's reasoning seems to have been that because Kirchheimer testified about the checks in open court, defense counsel knew about the checks and should have investigated. Further, because the checks were in the hands of a third party who had no reason to refuse to cooperate with defense counsel, counsel could have discovered them with minimal effort.[62]

Additionally, Pope alleged that Kirchheimer gave false testimony regarding her involvement with drugs and alcohol.[63] While Kirchheimer testified that she drank "as many as four beers that night,"[64] the prosecution had information that Kirchheimer drank "5 maybe 6" beers and that a police officer on the scene that night characterized her as "drunk and confused."[65] On this issue, the court held that a "conviction must only be reversed if there is 'any reasonable likelihood' that testimony the Commonwealth knew or should have known to be false

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much more similar to the Virginia felony-murder statute, Virginia Code Section 18.2-32 (1985). *Pope* did not concern application of the Virginia felony-murder statute.

47 Connecticut General Statutes Section 53a-133 (1975) (emphasis added) defined robbery as follows:

> "A person commits robbery when, in the course of committing a larceny, he uses or threatens immediate use of physical force upon another person for the purpose of:
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> (1) Preventing or overcoming resistance to the taking of the property or to the retention thereof immediately after the taking; or
>
> (2) compelling the owner of such property or another person to deliver up the property or to engage in other conduct which aids in the commission of the larceny.

48 *See, supra* notes 28-32 and accompanying text.

49 Conn. Gen. Stat. § 53a-133(1) (1975).

50 *Bunch v. Commonwealth*, 225 Va. 423, 439, 304 S.E.2d 271, 280, *cert. denied*, 464 U.S. 977 (1983), 505 U.S. 1230 (1992) (citing *Stamper v. Commonwealth*, 220 Va. 260, 274, 257 S.E.2d 808, 818 (1979), *cert. denied*, 445 U.S. 972 (1980)).

51 Unless of course one is being accused of capital murder.

52 *State v. Gunning*, 183 Conn. 299, 310, 439 A.2d 338, 346 (1981).

53 *Pope v. Netherland*, 113 F.3d 1364, 1367 (4th Cir. 1997).

54 *Pope*, 113 F.3d at 1372. Pope's assertion that this failure constituted ineffective assistance was found to be procedurally barred because it was not raised until the second state habeas petition. *Id.*

55 *See* Cooper, *"The Never Ending Story: Combating Procedural Bars in Capital Cases,"* Cap. Def. J., Vol. 9, No. 2, p. 38.

56 *Pope*, 113 F.3d at 1370.

57 *Id.*

58 *Id.*

59 *Id.*

60 *Pope*, 113 F.3d. at 1371.

61 92 F.3d 1350 (4th Cir. 1996). *See* Case Summary of *Hoke*, Cap. Def. J., Vol. 9, No. 2, p. 5.

62 *Pope*, 113 F.3d at 1371. The same reasoning applies to Pope's contention that the Commonwealth withheld exculpatory evidence concerning the existence of the checkbook in violation of *Brady v. Maryland*, 373 U.S. 83 (1963). On this issue, the court held that "the failure of the Commonwealth to divulge [Gray's] bank records did not preclude Pope from obtaining the evidence elsewhere, [thus] the *Brady* rule does not apply." *Pope*, 113 F.3d at 1371.

63 *Id.*

64 *Id.*

65 *Id.*

affected the judgment of the jury."[66] In applying this test to the facts, the court found that there was no "reasonable probability" that the "potentially false testimony" regarding Kirchheimer's involvement with drugs and alcohol affected the jury's judgment. The court reasoned that the jury heard quite a bit of evidence regarding Kirchheimer's past, including her arrest record for drugs and prostitution.

It is unclear exactly what effect the decision in *Pope* will have on future cases in which prisoners allege that the government knowingly used perjured testimony to obtain a conviction. It bears mention, however, that the Supreme Court has, on several occasions held that "a State may not knowingly use ... false testimony to obtain a tainted conviction."[67] Further, this principle applies even if "the false testimony goes only to the credibility of the witness."[68] In *Pope*, Kirchheimer's allegedly false testimony regarding her use of alcohol that night bore directly on her credibility; however, the court of appeals determined that there was no "reasonable probability" that it affected the jury.

The court's decision on this issue should be an important lesson to defense counsel: counsel should attempt to follow every lead and investigate every issue which is practicable, especially when a witness gives questionable testimony. It is also important, as always, for attorneys to make their objections as early in the proceedings as possible in order to avoid the dreaded procedural bar in subsequent proceedings.

Summary and Analysis by:
Brian S. Clarke

[66] *Pope*, 113 F.3d at 1371 (quoting *United States v. Kelly*, 35 F.3d 929, 933 (4th Cir. 1994)). This test seems to favor the Commonwealth, as it did in this situation, to a significant degree.

[67] *Napue v. Illinois*, 360 U.S. 264, 269 (1959). *See United States v. Agurs*, 427 U.S. 97 (1976).

[68] *Id.*

SMITH v. ANGELONE

111 F.3d 1126 (4th Cir. 1997)
United States Court of Appeals, Fourth Circuit

FACTS

On July 24, 1988, Roy Bruce Smith drank approximately fourteen beers between 2:30 p.m. and 8:30 p.m. Mr. Smith was upset by his wife's failure to invite him to her company picnic as well as other indications that she might have left him. Shortly after 8:30 p.m. Mr. Smith went to sit on his front porch armed with a .357 magnum, a .44 magnum, and an assault rifle with a bayonet attached.[1] At 8:45 p.m., Mr. Smith's next-door neighbor, Mr. Cottrell, saw Mr. Smith sitting on the front porch. Mr. Smith told Cottrell that his wife had left him and "that he was 'not going to make it through the night.'"[2] While Mr. Smith and Mr. Cottrell talked, Mr. Smith fired a shot in the air, and, a few minutes later, fired a couple shots in the general direction of two kids across the street who had set off some fireworks.[3] Saying he "had enough", Mr. Cottrell went back inside his home to which Mr. Smith replied, "I hope somebody calls the police because I'll shoot the first one that arrives and I hope they shoot me in return."[4] Another neighbor, Mr. Wood, remonstrated Mr. Smith for firing his gun. As Mr. Wood walked away, Mr. Smith said that he was waiting for somebody to call the police and that "I'll probably shoot the first one that I see."[5] Mr. Wood called the police and warned them that Mr. Smith was armed.

Around 9:00 p.m. several police officers arrived but parked where their vehicles would not arouse Mr. Smith's suspicions. Officer Anderson saw Mr. Smith sitting on the front porch and told the dispatcher to "[h]ave a unit cruise around . . . to the rear of the townhouses."[6] This order was relayed to Sgt. John Conner, a uniformed officer, who was en route. At this point, Mr. Smith, who was still out front, suddenly got up and went inside when "some person . . . started across the street."[7] A few moments later Sgt. Conner radioed that, "I've got him in sight he's coming out the back door."[8] Other officers headed to the back of Mr. Smith's house. One of the officers, James K. Ryan, heard Sgt. Conner say, "[d]rop the rifle, drop the rifle now," followed by gunfire consisting of eight to twelve sharp cracks, a short pop, and then more sharp cracks.[9] Officer Ryan found Sgt. Conner lying on the ground in the alleyway. Officer Steven Bamford found Mr. Smith crouching down next to the back deck with the rifle across his lap. Officer Bamford got Mr. Smith to drop his rifle, but he refused to comply with Officer Bamford's order to put his hands on the ground, walk out, and lay flat. A struggle ensued as several officers tried to take the rifle and the two revolvers away from him. During the struggle he requested that the officers "[g]o ahead and kill [him]."[10] After Mr. Smith was handcuffed and placed in leg restraints he said "that Conner was the 'first priority, take care of him, take care of him. He's one of us, one of ours.'"[11] Sgt. Conner died several hours later. Although sustaining several wounds, it was a head wound that proved to be fatal.[12]

Mr. Smith was convicted of the willful, deliberate, and premeditated killing of a law enforcement officer for the purpose of interfering

[1] *Smith v. Commonwealth*, 239 Va. 243, 248-49, 389 S.E.2d 871, 873 (1990).

[2] *Id.* at 249, 389 S.E.2d at 873.

[3] *Id.*, 389 S.E.2d at 874.

[4] *Id.*

[5] *Id.*

[6] *Smith v. Commonwealth*, 239 Va. at 250, 389 S.E.2d at 874.

[7] *Id.*

[8] *Id.*

[9] *Id.*

[10] *Smith v. Commonwealth*, 239 Va. at 251, 389 S.E.2d at 875 (alteration in original).

[11] *Id.*

[12] *Id.*

[13] This section has been changed to Virginia Code section 18.2-31(6).