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BECK v. COMMONWEALTH 253 Va. 373,484 S.E.2d 898 (1997) Supreme Court of Virginia

the *Hawks* rule and a true procedural default rule such as in *Slayton*. It stated:

> *Slayton* is a valid procedural default rule . . . *Hawks*, however, is not a true procedural default rule; rather, it is more in the nature of a collateral estoppel rule. *Hawks* cannot prevent federal habeas review of federal constitutional claims properly raised on direct appeal. . . . Thus, we must ascertain whether Turner raised on direct appeal the aforementioned challenges to the application of the vileness factor. If he did, he is not procedurally barred from raising them here.[49]

According to the observation by the court of appeals in its footnote, that Smith's federal claims were raised and rejected on the merits by the Virginia Supreme Court on direct appeal, it follows that the district court was not prevented from reviewing Smith's federal constitutional claims. Thus, while the court of appeals' conclusion that Smith's state habeas counsel's errors could never constitute cause is correct, that conclusion is as irrelevant as *Slayton* is to this case. As *Turner* makes clear, Mr. Smith's federal constitutional claims cannot be defaulted by his counsel's failure to include them in his state habeas petition because those claims had already been raised and rejected by the Virginia Supreme Court on direct appeal.

It is difficult to decide what to recommend to habeas counsel in light of the court's holding. On the one hand, the law does not require habeas counsel, absent changed circumstances, to raise the same federal constitutional claims in state habeas that were raised and rejected on the merits on direct appeal in order to preserve them for federal habeas review. On the other hand, if a federal court does not understand that such claims do not need to be raised on state habeas to be preserved it might mistakenly find those claims to be procedurally defaulted for that very reason. In the Fourth Circuit it is always best to be overly cautious and prepared to explain to the court the crucial distinction between *Slayton* and *Hawks*.

Summary and analysis by:
Tommy Barrett

[49] *Turner*, 35 F.3d at 890 (citing *Yl st v. Nunnemaker*, 501 U.S. 797, 803-07 (1991)).

BECK v. COMMONWEALTH

253 Va. 373, 484 S.E.2d 898 (1997)
Supreme Court of Virginia

FACTS

Before the court, sitting without a jury, Christopher Beck pleaded guilty to: (1) capital murder of his cousin Florence Marie Marks during or subsequent to rape or in the commission of robbery while armed with a deadly weapon; (2) capital murder of William Miller in the commission of robbery while armed with a deadly weapon; (3) capital murder of David Stuart Kaplan in the commission of robbery while armed with a deadly weapon; (4) statutory burglary; (5) rape; (6) three offenses of robbery; and (7) seven offenses of the use of a firearm.[1]

The facts surrounding the murders are mainly drawn from statements Beck made to the police after his arrest.[2] According to Beck, he devised a plan to kill Miller, his former employer, several days before the murders actually occurred.[3] On June 5, 1995, Beck took a bus from his home in Philadelphia, Pennsylvania, to Washington, D.C. The next day, at approximately 11 a.m., Beck arrived in Arlington and went to the house shared by the three victims. He broke into the house through a basement window.[4]

After knocking a hole through to the first floor of the house, Beck went to Miller's apartment and took a loaded .22 caliber semi-automatic pistol belonging to Miller. Beck loaded a spare magazine for the weapon, and returned to the basement to wait for Miller.[5]

Sometime during the afternoon, Beck heard noises and realized someone was coming into the basement. He raised the pistol, and as the door opened, he closed his eyes and fired two shots. Upon opening his eyes, Beck found his first victim, Florence Marks, lying on the basement floor. According to Beck, he tried to make it look like Marks had been raped by cutting off her clothes, stabbing her in the right buttock, throwing a condom he had found in the washer onto the floor, kicking her, and penetrating her vagina with a hammer.[6] Beck reasoned that if the police believed Marks had been raped, then they would think a stranger, and not a family member, had murdered her.

[1] *Beck v. Commonwealth*, 253 Va. 373, 376, 484 S.E.2d 898, 900 (1997).

[2] When the Arlington Police first interviewed Beck, he claimed that at the time of the murders he was transporting bikes from Tennessee. After a friend failed to corroborate Beck's story, Beck confessed to the police that he had committed the three murders. Upon returning to Arlington after his arrest, Beck gave a full statement to the police. While making his statement, the police gave Beck an opportunity to say something on his behalf. He said:

> That ah I know what is like to kill somebody, its one of the worst feelings you can live with that I don't know that it is pretty painful that is one of the things that you can't go to sleep and I'm so sorry that I did, I'm so sorry that I had all that anger built up, I should had went to a counselor or something could have prevented it. I don't know, I'm sorry but I know this is going to be pretty hard for people to believe what happened. *Id.* at 378, 484 S.E.2d 901-02.

[3] *Beck*, 253 Va. at 376, 484 S.E.2d at 901.

[4] *Id.* at 376-77, 484 S.E.2d at 901.

[5] *Id.* at 377, 484 S.E.2d at 901.

[6] *Id.* According to the testimony of the assistant chief medical examiner, Marks' autopsy confirmed everything Beck said in his statement except Beck's remark regarding the "staged" rape. The Commonwealth presented evidence from the used condom found in the house, asserting that genetic material of both Marks and Beck was found in the condom. *Id.* at 378-79, 484 S.E.2d at 902.

Approximately an hour later, Miller returned home, and as he ascended the stairs, Beck shot him in the face. As Miller fell down the stairs, Beck shot five rounds at him.[7] He then placed Miller's body in Kaplan's apartment.[8] Later, Kaplan came home to find Miller's body in his apartment and Beck with a gun. Beck shot Kaplan in the back of the head and fired six rounds into him. Still conscious, Kaplan finally appeared to die after Beck stabbed him in the head.[9]

After the murders, Beck removed several guns and two bicycles from the house, and cash from the victims. Beck then changed his clothes and took Miller's car, driving to Washington, D.C. After making his way home to Pennsylvania, Beck hid the stolen goods, cleaned the car, and then abandoned the vehicle.[10]

The Commonwealth charged Beck with multiple offenses including capital murder, burglary, rape, robbery and use of a firearm in the commission of these offenses.[11] Beck's motion to suppress all of the statements made to the police was denied after a hearing.[12] Likewise, the trial court denied Beck's motion challenging the constitutionality of Virginia's capital murder statute and the statutes establishing trial and appellate procedure for capital cases.

The trial court accepted Beck's guilty pleas. During a delay between the pleas and sentencing, the trial judge was inundated with letters from family members and friends of the victims. The letters addressed the impact of the crimes on the family members and friends of the victims. Some recommended that Beck receive the death penalty.[13] Following a sentencing hearing, the trial court sentenced Beck to death for each of the three murders[14] based upon findings of both "vileness" and "future dangerousness."[15]

HOLDING

The Supreme Court of Virginia held that (1) since the admissibility of victim impact evidence during the sentencing phase of a capital murder trial is limited only by the relevance of such evidence to show the impact of the defendant's actions,[16] victim impact evidence from persons other than family members of the victims is admissible;[17] (2) with regard to the victim impact evidence, the record supported a finding that the trial judge separated the permissible evidence from any potentially prejudicial evidence and did not abuse his discretion;[18] (3) the evidence supported the trial court's findings of future dangerousness and vileness;[19] and (4) Beck's death sentences were neither excessive nor disproportionate to penalties generally imposed by other sentencing bodies in the Commonwealth for comparable crimes.[20]

ANALYSIS/ APPLICATION IN VIRGINIA

I. The Effect of Beck's Guilty Plea

The most striking effect of Beck's guilty plea, and consequently the greatest lesson to be learned, is that in so doing, he surrendered his sentencing hearing to the trial judge (as opposed to a jury). Since almost all of the decisions made during the sentencing hearing were later characterized by the Supreme Court of Virginia as within the discretion of the trial judge,[21] those decisions were subject to the stringent abuse of discretion standard on appeal.

Furthermore, the court gave great deference to the trial judge regarding the admissibility of victim impact evidence. Given the judge's training and experience, the court presumed the judge's ability to separate the permissible victim impact evidence from any potentially prejudicial statements.[22] This presumption, coupled with the application of the abuse of discretion standard, made it virtually impossible for Beck to succeed on his victim impact claim on appeal. Beck's ill-fated appeal is a lesson in capital defense, in that it reinforces the idea that pleading guilty to a capital offense is rarely if ever opportune.

II. Victim Impact Evidence: Where It Stands After *Beck*

A. Constitutional Admissibility

In claiming that it was improper for the trial court to receive victim impact evidence from persons not related to the victims,[23] Beck asserted

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[7] *Beck*, 253 Va. at 377, 484 S.E.2d at 901. Miller's autopsy report showed several bruises and abrasions and several gunshot wounds to the face. The examiner concluded that one of the bullets would have caused death almost instantaneously. *Id.* at 379, 484 S.E.2d 902.

[8] *Id.* In his statement, Beck said that he put Miller's body in the other apartment because "I got sick and tired of looking" at it. *Id.* at 377, 484 S.E.2d at 901.

[9] *Id.* at 377-78, 484 S.E.2d at 901. Although the medical examiner was unable to determine the order in which the gunshot wounds to Kaplan were inflicted, she did conclude that only two of the seven wounds would have been immediately fatal. *Id.* at 379, 484 S.E.2d at 902.

[10] *Id.* at 378, 484 S.E.2d at 901.

[11] *Beck*, 253 Va. at 375, 484 S.E.2d at 900.

[12] *Id.* Beck did not assign error to the trial court's denial of his motion. *Id.* at 375, 484 S.E.2d at 900.

[13] *Id.* at 376, 484 S.E.2d at 900.

[14] At sentencing, the trial court reviewed evidence of Beck's prior criminal history. At the age of fourteen, Beck was charged with aggravated assault after he shoved one of his high school teachers. The teacher, Joyce Leff, stated that Beck was "hostile towards authority," and had threatened her to the point of fear. Additionally, Leff testified that Beck was in special education, and that she found him to be, "emotionally disturbed . . . [v]ery hostile, full of rage and anger." In 1991, Beck was committed to the Pennsylvania Department of Welfare for threatening to harm his former girlfriend and her parents. While incarcerated and awaiting the current trial, Beck replaced an inmate's mouthwash with disinfectant and hit another inmate. The court examined a document written by Beck in which he included the phrase: "I'm sorry but I love killing." *Id.* at 379, 484 S.E.2d at 902.

The court also heard testimony from a clinical psychologist who had examined Beck. The psychologist found that Beck was learning disabled, suffering from attention deficit and hyperactivity disorder, and antisocial personality disorder. Another clinical psychologist who examined Beck believed that Beck's pathology was a result of neglect by his mother. Additionally, the second psychologist concluded that Beck was able to express regret but lacked the capacity to experience remorse. *Id.* at 380, 484 S.E.2d at 902-03.

[15] The opinion is another example of a court in Virginia ignoring the individuality of the defendant and determining vileness and future dangerousness in its boilerplate one paragraph analysis. The courts arbitrarily void these claims deeming the evidence as "sufficient" without ever discussing contentions that the aggravators are vague. *Id.* at 387, 484 S.E.2d 906-07.

[16] *Id.* at 381, 484 S.E.2d at 904.

[17] *Beck*, 253 Va. at 384, 484 S.E.2d at 905.

[18] *Id.* at 386, 484 S.E.2d at 906.

[19] *Id.* at 387, 484 S.E.2d at 906-07.

[20] *Id.* at 388, 484 S.E.2d at 907. In reaching this part of the holding, the court conducted its mandatory "proportionality review." Va. Code § 17-110.1(C) (1996). While the review is mandated by statute, there is wide speculation on how such a review is actually conducted.

[21] *Beck*, 253 Va. at 385, 484 S.E.2d at 906.

[22] *Id.* at 386, 484 S.E.2d at 906.

[23] In addition to letters from family members of the victims, the trial court reviewed letters from co-workers and friends of the victims, letters

that such evidence was constitutionally barred because it exceeded the scope of victim impact evidence allowed in *Payne v. Tennessee*.[24] Beck argued that *Payne* was only intended to apply to family members based on the following language: "[a] State may legitimately conclude that the evidence about the victim and about the impact of the murder on the victim's family is relevant to the jury's decision as to whether or not the death penalty should be imposed."[25]

The Supreme Court of Virginia squarely rejected Beck's argument,[26] finding that such a limitation was neither implied nor expressed by the language in *Payne*. Rather, the Court reasoned, *Payne* was describing the **nature** and not the **source** of the evidence.[27] Moreover, citing Justice O'Connor's concurrence in *Payne*, the court stated that the impact of the loss of the victim of a murder may extend beyond the victim's family members to the victim's friends and community.[28]

For example, in *Payne*, the Court made no mention of whether such victim impact evidence was limited to family members of the victim or if it extended to non-family members.[29] Rather, victim impact evidence is admissible under *Payne* unless it is so prejudicial as to violate the Due Process Clause.[30] Therefore, while one cannot conclusively state that the Supreme Court of Virginia stretched the limits of *Payne* in allowing non-family victim impact testimony, such testimony should be objected to on the basis that *Payne* authorized the admission of family victim impact evidence, and did not sanction admitting evidence from those outside of the victim's family.

B. Relevance Standard

The Supreme Court of Virginia rejected Beck's constitutional argument concerning non-family victim impact evidence. In the alternative, the court held that the admissibility of victim impact evidence during the sentencing phase of a capital murder trial is limited **only by the relevance** of such evidence to show the impact of the defendant's actions.[31] Therefore, the sole standard for judging the admissibility of victim impact evidence is "relevance." Given the broadness of "relevance," it is difficult to imagine what testimony the Supreme Court of Virginia envisioned could be ruled inadmissible.

However, there is a possible argument to combat the broadness of the court's relevance standard. The court notes the use of a balancing test to determine the admissibility of victim impact evidence, stating, "[a] judge, unlike a juror, is uniquely suited by training, experience and judicial discipline to disregard potentially prejudicial comments and to separate, during the mental process of adjudication, the admissible from the inadmissible, even though he has heard both."[32] Based on this limitation, capital defense counsel can suggest that Federal Rule of Evidence 403[33] be used as a model for admitting victim impact evidence, in that it precludes the use of evidence when its prejudicial effect substantially outweighs its probative value.[34]

C. Statutory Admissibility

Beck contended that even if not constitutionally barred, "the criminal procedure provisions within Title 19.2 of the Virginia Code limit victim impact evidence in a capital murder case to that received from the victim's family members."[35] Relying upon Virginia Code Sections 19.2-11.01,[36] 19.2- 264.5,[37] and 19.2-299.1,[38] Beck argued that these

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sent to Kaplan's parents, news accounts and essays written by co-workers of Kaplan. Some of these letters included the authors' opinions whether Beck should receive the death sentence or life imprisonment. *Id.* at 380, 484 S.E.2d at 903.

[24] 501 U.S. 808 (1991) (holding that victim impact evidence is admissible at sentencing phase of capital trial so long as it does not violate fundamental fairness protected by due process clause).

[25] *Beck*, 253 Va. at 381, 484 S.E.2d at 903 (quoting *Payne*, 501 U.S. at 827).

[26] Prior to the sentencing hearing, Beck asked the trial court not to consider non-family victim impact evidence. The trial court stated that it would review all the documents, determining admissibility based upon the closeness of the relationship between the victim and the witness. *Id.* at 380, 484 S.E.2d at 903. This "closeness of the relationship" standard seems to be particularly broad, adding more weight to the discretion of the trial court.

[27] *Id.* at 381, 484 S.E.2d at 903.

[28] *Id.*

[29] It should be noted, however, that the evidence upon which the Supreme Court made its decision in *Payne* was testimony from Mary Zvolanek, the mother and grandmother of the two victims. *Payne*, 501 U.S. at 814.

[30] Levy, *Limiting Victim Impact Evidence and Argument After Payne v. Tennessee*, 45 Stan. L. Rev. 1027, 1060 (1993).

[31] *Beck*, 253 Va. at 381, 484 S.E.2d at 904.

[32] *Id.* at 385, 484 S.E.2d at 906 (quoting *Eckhart v. Commonwealth*, 222 Va. 213, 216, 279 S.E.2d 155, 157 (1981)).

[33] Fed. R. Evid. 403. FRE 403 states:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence.

[34] Levy, 45 Stan. L. Rev. at 1038.

[35] *Beck*, 253 Va. at 382, 484 S.E.2d at 904.

[36] Under Section 19.2-11.01, titled "Crime victim and witness rights," the Code provides:

> A. In recognition of the Commonwealth's concern for the victims and witnesses of crime, it is the purpose of this chapter to ensure that the full impact of crime is brought to the attention of the courts of the Commonwealth;. . .
>
> 4. Victim input.
>
> a. Victims shall be given the opportunity, pursuant to §§ 19.2-299.1, to prepare a written victim impact statement prior to sentencing of a defendant and may provide information to any individual or agency charged with investigating the social history of a person or preparing a victim impact statement under the provisions of §§ 16.1-273 and 53.1-155 or any other applicable law. . . .
>
> B. For purposes of this chapter, "victim" means . . . (iv) a spouse, parent or legal guardian of such a person who . . . was the victim of a homicide.

[37] Under Section 19.2-264.5, titled "Post-sentence reports," the Code provides:

> When the punishment of any person has been fixed at death, the court shall, before imposing sentence, direct a probation officer of the court to thoroughly investigate the history of the defendant and any and all other relevant facts, to the end that the court may be fully advised as to whether the sentence of death is appropriate and just. Reports shall be made, presented and filed as provided in § 19.2-299 except that, notwithstanding any other provision of law, such reports shall in all cases contain a Victim Impact Statement. Such statement shall contain the same information and be prepared in the same manner as Victim Impact Statements prepared pursuant to § 19.2-299.1. After consideration of the report, and upon good cause shown, the court may set aside the sentence of death and impose a sentence of imprisonment for life.

[38] Under Section 19.2-299.1, titled "When Victim Impact State-

three statutes, when read together, allow only for gathering and presentation of evidence from those persons determined to be "victims" under the Crime Victim and Witness Rights Act (hereinafter "the Act").[39] In reading these statutes in concert, Beck asserted that in limiting the definition of "victim" in the Act to members of the deceased's family, the legislature implicitly intended to limit admissible victim impact evidence to that submitted by persons under Code Sections 19.2-264.5 and 19.2-299.1.[40]

The court found no merit to this argument, determining that nothing within the Act limited the source of victim impact evidence.[41] Additionally, the court reasoned that sections 19.2-299.1 simply defined whose consent the Commonwealth had to acquire in order to submit the victim impact statement in the sentencing report. The court concluded that nothing in the cited code provisions limited the sources of the victim impact statements and found instead that the presentence report could include anything the trial court "may require related to the impact of the offense upon the victim."[42] Unfortunately, the court did not stop there, but went on to determine that "the circumstances of the individual case will dictate what evidence will be necessary and relevant, and from what sources it may be drawn."[43] Again, the court is establishing a standard, couched in broad, ambiguous language. At some point, such a standard becomes counterproductive, sweeping so much that the standard eliminates itself.

Despite the court's rejection, the statutory argument devised by Beck's counsel is clever and worthy of future pursuit. To strengthen the argument, capital defense counsel should investigate its legislative history, to ascertain, if possible, the Act's legislative intent. Furthermore, counsel could argue the principles of *in pari materia* (statutes within the same Act should be construed consistently) and strict construction of criminal statutes.

III. The Twists within *Beck*

In spite of the fact that on the surface this seems to be another dismaying death penalty opinion handed down by the Supreme Court of Virginia, some careful "scratching" reveals quite a different conclusion. The first point of light within the darkness is that a capital defendant with a jury sentencing hearing may not be subject to the relevance standard of admissibility of victim impact evidence outlined in *Beck*. The court's heavy reliance upon the sound discretion of the trial judge in separating relevant from prejudicial victim impact evidence is not applicable to jury sentencing.[44] The unique training and experience of the trial judge which the court assures creates presumptions of fairness and impartiality is not present with jurors. Consequently, it can be argued that the broad relevance standard employed in *Beck* applies only to the trained judicial sentencer.

The second twist in *Beck* concerns the letters from family and non-family members of the victims which contained recommendations that Beck be sentenced to death, and which were reviewed by the trial judge as victim impact evidence.[45] Based on the record, the court found that the trial judge separated the permissible victim impact evidence from any potentially prejudicial statements concerning sentencing and only considered the former.[46] Arguably then, the inference can be drawn that the judge in his sound discretion must have decided that these recommendations for death should not be considered. Using this argument, capital defense counsel can attempt to keep out similar victim impact evidence which recommends the death penalty.

Summary and analysis by:
Mary K. Martin

ment required; contents; uses.," the Code provides:

The presentence report prepared pursuant to § 19.2-299 shall, with the consent of the victim, as defined in § 19.2-11.01, in all cases involving offenses other than capital murder, include a Victim Impact Statement. Victim Impact Statements in all cases involving capital murder shall be prepared and submitted in accordance with the provisions of § 19.2-264.5.

A Victim Impact Statement shall be kept confidential and shall be sealed upon entry of the sentencing order. If prepared by someone other than the victim, it shall... (vi) provide such other information as the court may require related to the impact of the offense upon the victim.

[39] Va. Code §§ 19.2-11.01 to -11.4 (1996).

[40] *Beck*, 253 Va. at 384, 484 S.E.2d at 905.

[41] *Id.* at 384, 484 S.E.2d at 905.

[42] *Id.*

[43] *Id.* Again, the court leaves such a determination within the sound discretion of the trial court subject only to an abuse of discretion standard on appeal. *Id.* at 384-85, 484 S.E.2d at 905.

[44] The court itself, in reviewing the admissibility and consideration of the victim impact evidence received by the trial court, "[stressed] that this was a trial without a jury." *Beck* 253 Va. at 385, 484 S.E.2d at 905.

[45] The court maintained that it does not necessarily agree with Beck's characterization of these letters as "recommendations" or that the trial judge took them as such. Instead, the court views the statements as expressions of the depth of the authors' feelings concerning the impact of these crimes. *Id.* at 386 n.2, 484 S.E.2d at 906 n.2.

[46] *Beck*, 253 Va. at 386, 484 S.E.2d at 906.

WILLIAMS v. WARDEN

487 S.E.2d 194 (Va. 1997)
Supreme Court of Virginia

FACTS

In November 1985, Terry Williams robbed and murdered Harris Thomas Stone. Williams struck Stone, an elderly man, on the chest and back with a mattock and removed three dollars from Stone's wallet. The blows from the mattock fractured several of Stone's ribs, punctured his left lung, and caused internal bleeding which ultimately led to Stone's death. Williams confessed to the murder and robbery on several occasions.[1] In September 1986, Williams was convicted of capital murder while in the commission of armed robbery pursuant to Virginia Code Section 18.2-31(d).[2]

[1] *Williams v. Warden*, 487 S.E.2d 194, 196 (1997).

[2] This section has since been changed to Virginia Code Section 18.2-31(4).