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BEAVERS v. PRUETT 1997 WIL 585739 (4th Cir. Sept. 23, 1997)' United States Court Of Appeals, Fourth Circuit

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Due Process Clause requires some "minimal requirements" in clemency proceedings.[15] Thus, five of the nine justices agreed that **Due Process does require some minimal procedural safeguards in clemency proceedings.**

ANALYSIS/APPLICATION IN VIRGINIA

Because the Court did not define what clemency procedures would satisfy Due Process, the application of the decision to Virginia is difficult to ascertain. Nevertheless, it is clear that the majority of the Court found the Ohio clemency procedures sufficient. It is equally clear that in some important respects, the procedure in Virginia provides far fewer protections. Thus, capital counsel may argue that the Virginia procedure is insufficient.

Specifically, Virginia's clemency procedures differ from Ohio's in two important respects.[16] First, the Virginia Parole Board ("VPB") is not required to conduct a clemency investigation in every case.[17] Rather, it is only required to do so "at the request of the Governor."[18] VPB may, however, conduct a clemency investigation on its own initiative in any other case in which it is "proper or in the best interest of the Commonwealth" to do so.[19] Counsel may be able to argue that a discretionary clemency investigation is insufficient to satisfy the minimum requirements of due process. Such unfettered discretion could lead to grants of clemency which are based on some constitutionally impermissible factor or procedure.[20]

Second, Virginia's clemency procedures do not guarantee an inmate any notice or hearing. Notice and an opportunity to be heard are two of the most fundamental requirements of due process.[21] Arguably, without these two fundamental requirements, there is no "process" being afforded the inmate. The guarantees of notice and hearing to Ohio inmates were very important to Justice O'Connor's determination of the case. She reasoned that the "process [Woodard] received, **including notice of the hearing and an opportunity to participate in an interview,** comports with . . . whatever limitations the Due Process Clause may impose on clemency proceedings."[22] It is not at all clear that she would have found Due Process satisfied in the absence of notice and an opportunity to be heard. Based on this, counsel could argue that because Virginia does not provide these fundamental requirements of Due Process, its clemency process violates the Fourteenth Amendment.

Summary and analysis by:
Brian S. Clarke

[15] *Id.* at *11 (Stevens, J., concurring in part & dissenting in part). Justice Stevens concluded that the case should be remanded to the District Court to consider whether Ohio's procedures meet the minimum standards of Due Process.

[16] *See* Va. Const. art. 5, §12 & Va. Code §§ 53.1-229 to 53.1-231 (1994).

[17] VA. CODE § 53.1-231 (1994).

[18] *Id.*

[19] *Id.*

[20] In *Woodard,* Justice O'Connor stated that "[j]udicial intervention might . . . be warranted in the face of a scheme whereby a state official flipped a coin to determine whether to grant clemency, or in a case where the State arbitrarily denied a prisoner any access to its clemency process." *Woodard,* 1998 WL 129931, at *10 (O'Connor, J., concurring in part & concurring in the judgment). Similarly, Justice Stevens expressed the belief that a denial of clemency which resulted from "procedures infected by bribery, personal or political animosity, or the deliberate fabrication of false evidence" would be constitutionally unacceptable. *Id.* at *11 (Stevens, J., concurring in part & dissenting in part).

Additionally, if there was evidence that Virginia's clemency process operated in a racially discriminatory manner, an inmate may have an Equal Protection claim. As Justice Stevens stated in *Woodard,* "no one would contend that a governor could ignore the commands of the Equal Protection Clause and use race, religion, or political affiliation as a standard for granting or denying clemency." *Woodard,* 1998 WL 129931, at *12 (Stevens, J., concurring in part & dissenting in part).

[21] *See Matthews v. Eldridge,* 424 U.S. 319 (1976).

[22] *Woodard,* 1998 WL 129931, at *11 (O'Connor, J., concurring in part & concurring in the judgment) (emphasis added).

BEAVERS v. PRUETT

1997 WL 585739 (4th Cir. Sept. 23, 1997)[1]
United States Court Of Appeals, Fourth Circuit

FACTS

On the night of May 1, 1990 Thomas H. Beavers, Jr. broke into the home of a sixty year-old widow named Marguerite Lowery. Beavers subsequently raped and murdered Ms. Lowery by smothering her with a pillow.[2] Beavers was convicted of capital murder and sentenced to death[3] based on the "future dangerousness" aggravator.[4] The Supreme Court of Virginia affirmed on direct appeal and the United States Supreme Court denied certiorari.[5] Beavers then filed a state habeas peti-

[1] This is an unpublished disposition which is referenced in the "Table of Decisions Without Reported Opinions" at 125 F.3d 847 (4th Cir. 1997).

[2] *Beavers v. Pruett,* 1997 WL 585739, at *1 (4th Cir. Sept. 23, 1997).

[3] *Beavers,* 1997 WL 585739, at *1. Beavers was also convicted of rape, grand larceny, and arson and was sentenced to life, ten years, and eight years respectively on those counts. *Id.* at *1 n.3.

[4] Va. Code § 19.2-264.2 (1995).

[5] *Beavers v. Commonwealth,* 245 Va. 268, 427 S.E.2d 411, *cert. denied,* 510 U.S. 859 (1993).

tion which was dismissed without an evidentiary hearing. In dismissing the petition, the circuit court reasoned that Beavers' ineffective assistance of counsel claims lacked merit and his other claims were procedurally defaulted because they were not raised on direct appeal.[6] The Supreme Court of Virginia denied review of the circuit court's dismissal.[7]

Beavers then filed this action seeking a "certificate of appealability" in the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. Section 2253(c)(1) (1997).[8] After the United States Supreme Court handed down its decision in *Lindh v. Murphy*,[9] Beavers sought a "certificate of probable cause to appeal"[10] from the United States District Court for the Eastern District of Virginia.[11]

The district court denied the certificate because Beavers had "not made a significant showing of the denial of a constitutional right."[12] Additionally, the district court determined that, of the issues Beavers pressed on appeal, four were procedurally defaulted[13] and another three were without merit.[14]

HOLDING

The court of appeals affirmed the district court's conclusion that Beavers was not entitled to habeas relief and denied Beavers' application for a certificate of appealability.[15]

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[6] *Beavers v. Pruett*, 1997 WL 585739, at *1 (4th Cir. Sept. 23, 1997) (citing *Hawks v. Cox*, 211 Va. 91, 95, 175 S.E.2d 271, 274 (1970) (precluding state habeas consideration of claims that were considered on their merits during direct review, absent changed circumstances) & *Slayton v. Parrigan*, 215 Va. 27, 30, 205 S.E.2d 680, 682 (1974) (holding that issues not properly raised on direct appeal will not be considered on state habeas)).

[7] This step of the state habeas process has since been removed by statute. Effective July 1, 1995, Virginia Code Section 8.01-654 was amended to add subsection (c) which states, in part, that the Supreme Court shall have "exclusive jurisdiction" to consider and grant writs of habeas corpus to convicts sentenced to death. Virginia Code Section 8.01-654(c), as amended, also states that the circuit court "which entered the judgment order setting the sentence of death shall have authority to conduct an evidentiary hearing on such petition [for a writ of habeas corpus] only if directed to do so by order of the Supreme Court." Thus all state habeas petitions filed after July 1, 1995, must be filed in the first instance with the Supreme Court of Virginia. Beaver's state habeas petition was filed on April 19, 1994. For a discussion of the standards of review applicable under Virginia Code Section 8.01-654, as amended, see Case Summary of *Williams v. Warden, Cap. Def. J.*, Vol. 10, No. 1, p. 30.

[8] Title 28 United States Code Section 2253 provides, in pertinent part, that "[u]nless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from . . . the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued by a State court." This section of chapter 153 of Title 28 was amended by the enactment of the Antiterrorism and Effective Death Penalty Act of 1996 (AEDPA), Pub.L.No. 104-132, 110 Stat. 1214. Beavers' petition for a writ of habeas corpus was filed on October 11, 1995. According to the United States Supreme Court in *Lindh v. Murphy*, 117 S.Ct. 2059 (1997), the amendments to chapter 153 of Title 28 effected by AEDPA do not govern federal habeas petitions such as Beavers' that were filed prior to April 24, 1996, the date AEDPA was enacted.

[9] 117 S.Ct. 2059, 2067 (1997) (concluding that AEDPA amendments to chapter 153 of Title 28 do not apply to petitions filed prior to the effective date of AEDPA).

[10] Prior to AEDPA, chapter 153 of Title 28 required habeas petitioners to seek a certificate of probable cause to appeal from a United States District Court. In order to warrant granting the certificate, a petitioner had to "make a substantial showing of the denial of [a] federal right" and the issue had to have been either one which was "debatable among jurists of reason" or that the "questions [were] adequate to deserve encouragement to proceed further." *Lozada v. Deeds*, 498 U.S. 430, 431-32 (1991).

[11] *Beavers v. Pruett*, 1997 WL 585739, at *1 (4th Cir. Sept. 23, 1997).

[12] *Beavers*, 1997 WL 585739, at *6.

[13] *Id.* at *1. Beavers' defaulted claims included: (1) ineffective assistance of his court-appointed mental health expert; (2) the trial court's refusal to allow one of his trial attorneys to withdraw; (3) the trial court's refusal to remove for cause a prospective juror who stated that she would impose the death penalty if a capital conviction was returned; and (4) the trial court's failure to give a specific instruction on the jury's duty to consider the mitigating evidence. Of these four claims, the court of appeals only discussed the last one.

In holding that this claim was procedurally defaulted, the court said that although Beavers mentioned "[t]rial counsel['s failure] to request, and the trial court's failure to give" any mitigating instructions at the sentencing phase as part of his argument for ineffective assistance of counsel in his state habeas petition, this was insufficient to preserve the separate issue of the trial court's failure to "adequately [guide] the discretion of the jury in considering the mitigating evidence." *Id.* at *2. The court reasoned that Beavers' original petition to the Supreme Court of Virginia "omitted reference to any other constitutional right to additional instruction concerning the mitigating evidence and failed to provide any argument concerning why the referenced instructions were constitutionally required" and thus, Beavers failed to properly exhaust this claim. *Id.* at *2 n.4 (citing *Duncan v. Henry*, 513 U.S. 364, 366 (1995); *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997); *Mallory v. Smith*, 27 F.3d 991, 994 (4th Cir. 1994); & *George v. Angelone*, 100 F.3d 353, 363 (4th Cir. 1996), cert. denied, 117 S.Ct. 854 (1997)).

As the court's discussion of this issue makes clear, counsel must be very careful when drafting state habeas petitions in order to avoid procedural defaults on federal habeas. *See Beavers*, 1997 WL 585739, at *2 & *Matthews v. Evatt*, 105 F.3d 907, 911 (4th Cir. 1997) (explaining that for a federal claim to be properly exhausted, the substance of the federal claim must be presented to the highest state court). Unfortunately, the viability of the specific claim discussed here, failure of the trial court to adequately instruct the jury on consideration of the mitigating evidence, was dealt a serious blow by the Supreme Court in *Buchanan v. Angelone*, 1998 WL 17109, (U.S. Jan. 21, 1998). For further discussion on this issue, see Case Summary of *Buchanan v. Angelone*, Cap. Def. J., this issue.

[14] These claims are discussed *infra*.

[15] *Beavers*, 1997 WL 585739, at *1. The United States Supreme Court denied Beavers' petition for a writ of certiorari. *Beavers v. Pruett*, 118 S.Ct. 621, 66 U.S.L.W. 3416 (U.S. 1997). On that same day, December 11, 1997, Thomas Beavers was executed by lethal injection.

ANALYSIS/APPLICATION IN VIRGINIA

I. Motion for Mistrial Denied Despite Prejudicial Statements by a Prosecution Witness

A state law enforcement officer, Deputy Lam, testified for the Commonwealth at Beavers' trial. On direct examination, Lam testified that Beavers told him that "'he had no other choice but to do what he had done because [Mrs. Lowery] could identify him.'"[16] As his testimony progressed, however, Lam "equivocated regarding the accuracy of his memory of portions of the statement."[17] Beavers objected to Lam's testimony and moved for a mistrial due to the overly prejudicial nature of Lam's comments.[18] The trial court sustained the objection but denied the motion for a mistrial. Instead, the court instructed the jury to disregard Lam's testimony in its entirety.[19]

Beavers asserted that the cautionary instruction given by the trial court was, under the circumstances, insufficient to cure the prejudice caused by Lam's statement. Additionally, Beavers' claimed that the trial court's failure to grant a mistrial "created an impermissible risk that [his] conviction and sentence were the product of passion, prejudice, and arbitrary factors."[20] The court of appeals, without considering the merits of these claims, held that even if Beavers' assertions were correct, relief was barred by the new rule doctrine of *Teague v. Lane*.[21] The court reasoned that Beavers had "point[ed] to no clearly established rule of constitutional law in existence in October 1993 . . . that would have compelled a state court to reverse his conviction."[22]

The court's invocation of *Teague* in this situation is troubling. Beavers' claims on this issue were essentially that his trial was rendered unfair due to the statements of Deputy Lam. Thus, the constitutional right Beavers asserted was the right to a fair trial. It is well established that the "right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment."[23] An essential element of the right to a fair trial is the right to have "guilt [ ] established by probative evidence . . . ."[24] It is the duty of "courts [to] carefully guard against dilution of [this] principal"[25] by ensuring that passion, prejudice, and other arbitrary factors play no role in determining the guilt of an accused. This is especially true in capital murder proceedings where the United States Supreme Court has stressed the need for "heightened [ ] reliability" in the outcome.[26]

By characterizing the right Beavers asserted as the right to have a mistrial declared whenever a witness makes statements later deemed inappropriate, the court ignored the basic premise behind Beavers' argument. Additionally, by invoking *Teague* to avoid deciding Beavers' claim, the court tacitly adopted the position that, unless there was an explicit and absolute rule exactly on point in existence at the time the petitioner's conviction became final, relief will never be appropriate in the court of appeals because of the new rule doctrine.

II. A Variety of Lessons for Capital Defense Attorneys

A. Attempting to Avoid Procedural Defaults

The basic requirement for avoiding the procedural default of a claim is that the petitioner must show either "that cause and prejudice exist to excuse the default or that failure to consider the claim would amount to a miscarriage of justice."[27] The petitioner, however, must argue that these elements exist, otherwise they will not be considered by a reviewing court.[28]

Beavers did not argue that cause and prejudice existed to excuse the default.[29] Instead, Beavers only argued that failure to consider the claims which the district court held were defaulted would result in a miscarriage of justice.[30] Beavers premised this claim on the fact that "his organic brain disorder and brain tumor demonstrate his actual innocence."[31] The court, however, reasoned that it was "undisputed . . . that Beavers actually murdered Lowery" and that his additional evidence did not demonstrate that he was not criminally responsible for his actions.[32] Further, the court reasoned that Beavers had failed to carry his burden of showing that "no reasonable juror would have found [him] eligible for the death penalty" based on the evidence of his brain disorder.[33]

Defense counsel should, if at all possible, avoid limiting their arguments to only one of the two paths available to avoid procedural defaults. If there is a good faith basis for doing so, counsel should make every effort to show both cause and prejudice and a miscarriage of justice in either the guilt determination or the sentence. While each of these theories is increasingly difficult to establish in Virginia, counsel should not abandon their efforts to do so.

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[16] *Beavers*, 1997 WL 585739, at *4 (quoting *Beavers v. Commonwealth*, 245 Va. 268, 280, 427 S.E.2d 411, 419 (1993)).

[17] *Id.*

[18] *Id.*

[19] *Id.*

[20] *Beavers*, 1997 WL 585739, at *4.

[21] 489 U.S. 288 (1989).

[22] *Beavers*, 1997 WL 585739, at *5.

[23] *Estelle v. Williams*, 425 U.S. 501, 503 (1976). *See Drope v. Missouri*, 420 U.S. 162, 172 (1975) (stating that the right to a fair trial is a fundamental liberty secured by the Fourteenth Amendment) & *Adamson v. California*, 332 U.S. 46, 53 (1947) (same).

[24] *Estelle*, 425 U.S. at 503 (citing *In re Winship*, 397 U.S. 358, 364 (1970)).

[25] *Id.*

[26] *Chambers v. Mississippi*, 472 U.S. 320 (1985).

[27] *Beavers*, 1997 WL 585739, at *2 (citing *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

[28] *Teague v. Lane*, 489 U.S. 288, 298 (1989).

[29] *Beavers*, 1997 WL 585739, at *2.

[30] *Id.* When making a claim such as this, the burden of persuasion is on the petitioner. Further, the standard of proof is "clear and convincing" evidence. *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 323 (1995)).

[31] *Id.*

[32] *Id.*

[33] *Beavers*, 1997 WL 585739, at *2.

B. Requesting Expert Examinations

During his life, Beavers suffered from both an organic brain disorder and a brain tumor.[34] In order to explore whether or not these conditions affected Beavers' mental health, Beavers' trial counsel requested that Beavers be examined by a mental health expert.[35] The court granted this request and appointed Dr. Henry O. Gwaltney, Jr. to examine Beavers.[36] Apparently, Dr. Gwaltney was not infrequently involved in the examination of capital murder defendants either as court-appointed psychologist or as an expert witness for the Commonwealth.[37] Dr. Gwaltney's examination and subsequent report, however, provided Beavers with "little support for an insanity defense or evidence in mitigation."[38] In order to avoid such a result, Beavers' trial counsel could have found an independent mental health expert and requested either the funds necessary to retain that person or appointment of that person by the court.

Experts appointed by the court pursuant to an *Ake*[39] request are required to "assist in evaluation, preparation, and presentation of the defense."[40] In order for this to be done effectively, trial counsel should request independent experts and not acquiesce in the court's appointment of a doctor who frequently testifies on behalf of the Commonwealth and may or may not be interested in developing useful mitigation evidence.

C. Presenting the Case in Mitigation

It is not clear exactly what sort of mitigating evidence was presented at Beavers' trial. According to the court of appeals, "Beavers' trial counsel conducted a reasonable investigation for reasonable mitigating evidence with Beavers' closest family members and found nothing that, in the professional judgment of the attorneys, could be employed in Beaver's defense." [41] Yet, the court insinuates that no mitigating evidence was actually presented at trial. The court did not question the determination of Beavers' trial counsel that the testimony of either Dr. Gwaltney, regarding Beavers' mental health, or of Beavers' family would have been "more damaging than beneficial."[42] Thus, according to the court, trial counsel's strategic decision to present little, if any, mitigating evidence was not ineffective assistance.[43]

[34] *Id.*

[35] *Id.* at *3.

[36] *Id.*

[37] There are two other reported cases in which Dr. Gwaltney was involved. In one of these cases, Gwaltney was the Commonwealth's expert witness during the sentencing phase. *Mueller v. Commonwealth*, 244 Va. 386, 414, 422 S.E.2d 380, 397 (1992). In the other, as was done in *Beavers*, Gwaltney was appointed by the court to examine the defendant prior to trial. *Jones v. Murray*, 947 F.2d 1106, 1112-1113 n.4 (4th Cir. 1991). In both *Mueller* and *Jones*, the defendants were sentenced to death.

[38] *Beavers*, 1997 WL 585739, at *3.

[39] *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that when a defendant's mental condition is a significant factor in a criminal proceeding, the defendant is entitled to the appointment of a psychological expert to assist in the defense).

[40] *Ake*, 470 U.S. at 83.

[41] *Beavers*, 1997 WL 585739, at *4.

While it is true that some mitigating evidence may be misinterpreted as aggravating by the jury, it is impossible to say that this will happen in a given situation.[44] As a general rule, it is usually better to present all available evidence in mitigation and allow the jury to draw their own conclusions.[45] As one circuit judge put it, "at a capital murder sentencing, **any** evidence which might be favorable or mitigating can mean the difference between 'life or death.'"[46]

D. Questioning the Jury During Voir Dire

During jury voir dire, Beavers' trial counsel requested that the trial court ask prospective jurors the following question: "Do you believe that if one is convicted of taking another's life, the proper penalty is loss of your own life?"[47] The trial court declined to ask this question and instead asked the following question: "If the jury should convict the defendant of capital murder, would you be able to consider voting for a sentence less than death?"[48] The court of appeals held that the latter question was sufficient to "identify [potential jurors] who would automatically vote for the death penalty."[49]

It is very important for jurors to be asked searching questions on voir dire. As such, defense counsel should have a variety of proposed questions to present to the court. These questions should include various wordings which give the trial court several options which, while not as searching as defense counsel may like, are much more searching than the question ultimately asked by the trial court in *Beavers*.[50]

Summary and analysis by
Brian S. Clarke

[42] *Id.* at *3. [43] *Id.* at *4.

[44] In fact, the court of appeals pointed out that "evidence of a defendant's mental impairment" may both "diminish his blameworthiness" and "indicate[ ] that there is a probability that he will be dangerous in the future." *Id.* at *4 (quoting *Barnes v. Thompson*, 58 F.3d 971, 980-81 (4th Cir. 1995). Thus, the court concluded, "this evidence is a two-edged sword" and the "sentencing authority could well have found in the mitigating evidence of mental illness or history of abuse, sufficient evidence to support a finding of future dangerousness." *Id.* at *4 (quoting *Barnes*, 58 F.3d at 981). There is, of course, no guarantee that the jury will interpret the evidence in this way.

[45] Clearly, however, there are certain situations in which presenting a particular piece of evidence which is, technically speaking, "mitigating," would not actually mitigate the offense and thus should not be presented. As such, counsel should exercise their discretion in this area with the utmost thought and care.

[46] *Williams v. Warden*, 254 Va. 16, 22, 487 S.E.2d 194, 197 (1997) (emphasis original). Further, the burden of proof on the issue of future dangerousness is on the Commonwealth. Va. Code § 19.2-264.2 (1995). Thus, the Commonwealth is required to present evidence to support this finding beyond a reasonable doubt without assistance from any evidence presented by the defendant in mitigation.

[47] *Beavers*, 1997 WL 585739, at *5.

[48] *Id.*

[49] *Id.*

[50] For ideas on this issue, *see*, The Virginia Capital Case Clearinghouse Trial Manual.