Capital Defense Journal

Volume 11 | Issue 1 Article 19

Fall 9-1-1998

Stewart v. Angelone No. 97-26,1998 WL 391646 (4th Cir. May 29, 1998)

Stewart v. Angelone
No. 97-26, 1998 WL 391646 (4th Cir. May 29, 1998)[1]

I. Facts

Kenneth Stewart was convicted of capital murder of his son in Bedford, Virginia, on May 12, 1991.[2] The United States Court of Appeals for the Fourth Circuit recounted the facts found by the Supreme Court of Virginia. The events of that day were reconstructed from inferences[3] drawn from physical evidence at the crime scene.[4]

The Stewarts had separated in early April, and Mr. Stewart no longer resided with his wife and son. The circumstances of the separation and Stewart's visitation rights with Jonathan frustrated him. In the afternoon of May 12, 1991, Stewart went to visit his five month old son Jonathan at the house he formerly shared with his wife. After a failed attempt to persuade Mrs. Stewart to reconcile with him, which took place in an upstairs bedroom, Stewart removed a stolen handgun from his boot and shot his estranged wife twice in the head. He then went downstairs to Jonathan's play pen and shot his son twice in the head. Before leaving the house, Stewart placed Jonathan's body in the arms of his dead wife, smoked a cigarette, turned off the kitchen stove, placed the family dogs on the porch and locked the door to the house. Upon leaving the house, Stewart took Mrs. Stewart's newer car instead of his truck.[5]

Stewart called friends in the early morning two days later, confessing the murder and stating his plan to turn himself in to the police. On the following day, Stewart was arrested for public intoxication and disorderly conduct in a suburb of Cleveland, Ohio and later charged with the double homicide recounted above.[6]

Following conviction and a jury recommendation of the death sentence, citing both aggravating factors,[7] Stewart was formerly sentenced to death Feb-

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1. This is an unpublished disposistion which is referenced in the "Table of Decisions Without Reported Opinions" at 149 F.3d 1170 (4th Cir. 1998).

2. Stewart v. Angelone, No. 97-26, 1998 WL 391646, at *1 (4th Cir. May 29, 1998), *cert. denied*, 119 S. Ct. 27 (1998).

3. *Stewart*, 1998 WL 391646, at *2. Inferences were drawn due to Stewart's claim that he remembered nothing between shooting his wife and finding himself driving on a New York freeway.

4. *Id.* at *1-2.

5. *Id.* at *1-2.

6. *Id.*

7. VA. CODE ANN. § 19.2-264.4(C) (Michie Supp. 1998). Section 19.2-264.4(C) lists the two

ruary 7, 1992. A year later the Supreme Court of Virginia affirmed the conviction. The United States Supreme Court denied certiorari in 1993. After Virginia appointed habeas counsel, Stewart filed a written request in February of 1994, asking the trial court to terminate all work on his case and schedule an execution date. The court scheduled an execution date and ordered a mental competency examination. The court later vacated the execution date based on the mental health expert's assessment of Stewart.[8]

Stewart's counsel filed a state habeas petition which was dismissed by the Supreme Court of Virginia in March of 1996. Following Stewart's filing of a federal habeas petition, the United States District Court for the Eastern District of Virginia decided in August of 1997, after hearing arguments but not taking new evidence, to deny all relief and dismiss the petition. After the district court denied a motion by Stewart to alter or amend its decision, Stewart appealed the denial of habeas relief to the court of appeals.[9]

II. Holding

The United States Court of Appeals for the Fourth Circuit affirmed the district court's dismissal of Stewart's petition for a writ of habeas corpus, finding all of Stewart's claims to be without merit or procedurally barred.[10] Stewart's claims were: (1) the district court erred when it found that Stewart had not provided new evidence of his actual innocence in his habeas petition;[11] (2) the court-assigned mental health expert, Dr. Brown, was deficient in his performance and therefore prejudiced Stewart's defense;[12] (3) Dr. Brown's deficiencies could be imputed to defense counsel, leading to a valid claim of ineffective assistance of counsel;[13] (4) the depravity of mind jury instruction was unconstitutionally vague as applied to Stewart's case and the Supreme Court of Virginia made no independent determination of the death penalty's appropriateness so as to cure the jury instruction error;[14] (5) the government presented insufficient evidence to support a finding of depravity of mind;[15] (6) the jury instruction's failure to include instructions about the value of mitigating factors as weighed against the

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aggravating factors, vileness and future dangerousness, of which the Commonwealth must prove at least one for the defendant to be eligible for the death penalty.

8. *Stewart*, 1998 WL 391646, at *1. Stewart was executed on September 23, 1998. He had requested death by electric chair. This "form of execution" request led prison officials to question Stewart's competency to be executed since, absent such a request, executions in Virginia are by lethal injection.

9. *Id.* at *1.

10. *Id.* at *13.

11. *Id.* at *3.

12. *Stewart*, 1998 WL 391646, at *6.

13. *Id.* at *6.

14. *Id.* at *8.

15. *Id.* at *8.

two aggravating factors violated Stewart's Eighth and Fourteenth Amendment rights;[16] (7) the testimony of the government's expert witness violated VA. CODE ANN. § 19.2-264.3:1(G) which prohibits the use of defendant's statements, made at capital sentencing evaluations, by the government while it tries to prove aggravating factors;[17] and (8) the Supreme Court of Virginia's proportionality review violated Stewart's due process and equal protection rights.[18]

III. Analysis/Application in Virginia

A. The Schlup Test for Sufficiency of New Evidence and the Need to Employ Specialized Experts

1. New Evidence of Innocence Standard Not Met

Stewart claimed that the district court erred in rejecting evidence in his habeas petition proving his actual innocence.[19] Stewart alleged that the new evidence demonstrated that he suffered from temporal lobe epilepsy and that this malady negated the mens rea needed to convict him of capital murder.[20] The heart of Stewart's claim involved the findings of Dr. Morgan, an expert employed by Stewart's habeas counsel, "that Stewart 'may suffer from temporal lobe epilepsy.'"[21] Additionally, Stewart protested the district court's refusal to permit brain scans necessary to confirm Dr. Morgan's prognosis.[22]

The court of appeals, citing *Satcher v. Pruett*,[23] held that the standard of review for such claims of actual innocence is de novo review.[24] Citing *Schlup v. Delo*,[25] the court stated that the "defendant must provide 'new reliable evidence' of his innocence 'that was not presented at trial' and establish that it is more likely than not that 'in light of the new evidence, no juror, acting reasonably, would have voted to find him guilty beyond a reasonable doubt.'"[26] In light of the evidence furnished at trial by Stewart's original court-appointed mental health expert (Dr. Brown), including the absence of a conclusion that tests of the type suggested by Dr. Morgan were necessary, the court of appeals found that no new

16. *Stewart*, 1998 WL 391646, at *10.

17. *Id.* at *11. VA. CODE ANN. § 19.2-264.3:1(G) (Michie Supp. 1998). Section 19.2-264.3:1(G) provides that the introduction of a defendant's statements or evidence derived from a defendant's statements by the prosecution is barred, except to rebut specific mitigation evidence.

18. *Id.* at *12.

19. *Id.* at *3. Stewart tied this evidence to a constitutional claim of ineffective assistance of counsel in order to excuse defaults and permit review of other claims of constitutional error.

20. *Stewart*, 1998 WL 391646, at *3.

21. *Id.* at *3.

22. *Id.* at *5.

23. 126 F.3d 561 (4th Cir. 1997).

24. *Stewart*, 1998 WL 391646, at *4 (citing Satcher, 126 F.3d at 570).

25. 513 U.S. 298 (1995).

26. *Stewart*, 1998 WL 391646, at *3 (quoting Schlup v. Delo, 513 U.S. 298, 324-29 (1995)).

evidence existed. Instead, the court held that Dr. Morgan's tentative diagnosis was an additional opinion based on the old evidence found at the time of the trial.[27] Such a new spin on old evidence does not fulfill the requirements of *Schlup*.[28] The court dismissed Stewart's allegation that any failure of proof regarding the new evidence was attributable to the district court's refusal to allow testing in the form of brain scans.[29]

2. *The Need for Specialized Expert Witnesses*

Stewart's case demonstrates that additional experts may be required in preparation of a case in mitigation beyond the expert initially provided by section 19.2-264.3:1 of the Virginia Code.[30] Psychologists, even those with medical degrees such as Dr. Brown, are neither qualified to diagnose certain conditions, nor to assist defense in presenting those conditions as part of the case in mitigation.[31] When work of one expert indicates the existence of other conditions, such as organic brain damage, mental retardation, etc., counsel may build from this evidence the right to secure additional experts under authority of either 3:1[32] or *Ake v. Oklahoma*.[33]

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27. *Id.* at *3-6.

28. *Id.* at *4. The court of appeals supported its conclusion by citing *Bannister v. Delo*, 100 F.3d 610, 618 (8th Cir. 1996) (stating that the *Schlup* standard could not be satisfied by presenting a new spin on evidence previously presented to the jury).

29. *Id.* at *5. The magistrate judge held that Stewart was entitled to the brain scan tests. The district court later denied Stewart's motion to be transported for the test, ruling that the test would be new evidence and therefore barred because Stewart could have procured such a test before trial, but did not based on the judgement of trial counsel and Stewart's court-appointed mental health expert. Stewart sought the order to gather new evidence in an attempt to excuse default, tied to Stewart's ineffective assistance of counsel claim. The court denied Stewart the means necessary to excuse default based on the actions at the trial level of the attorney who allegedly caused the default. This circular logic defeats the concept of excusable default when a possible proof of innocence exists.

30. VA. CODE ANN. § 19.2-264.3:1(A) (Michie Supp. 1998).

31. VA. CODE ANN. § 19.2-264.3:1(A) (Michie Supp. 1998). Section 19.2-264.3:1(A) provides a wide range of qualifications to select from when the court appoints, at its discretion, a mental health expert. The expert shall be "a psychiatrist, a clinical psychologist, or an individual with a doctorate degree in clinical psychology who has successfully completed forensic evaluation training." *Id.* Often the initial court-appointed mental health expert will be incapable of authoritatively testifying as to the types of physical and mental diseases, which modern science has identified and the law has recognized, affecting a defendant and his culpability.

32. VA. CODE ANN. § 19.2-264.3:1(A) (Michie Supp. 1998). Section 19.2-264.3:1(A) states: "the court shall appoint one *or more* qualified mental health experts to evaluate the defendant and to assist the defense." *Id.* (emphasis added).

33. 470 U.S. 68 (1985). *Ake* states that upon a showing that a particular resource is a basic tool of defense, it is a due process violation not to be afforded that resource. Requesting expert witness's via *Ake* preserves the issue for appeal at the federal level because the United States Supreme Court stated that this right was based on the Due Process Clause of the Fourteenth Amendment of the Constitution. Federal grounds are essential in light of the continuous refusal of Virginia courts to grant relief in capital cases. Ake v. Oklahoma, 470 U.S. 68, 83-87 (1985).

B. *Ineffective Assistance of Expert Witnesses and of Counsel*

Stewart also claimed that his court-appointed mental health expert at the trial stage of litigation, Dr. Brown, was ineffective and in the alternative that this ineffectiveness could be imputed to trial counsel, thereby making a constitutionally-based ineffective assistance of counsel claim. Relying on the results of his habeas court-appointed expert, Stewart suggested that Dr. Brown provided "counsel [at] trial [with] misleading and prejudicial information" and "that Dr. Brown was aware of organic brain injury but unreasonably failed to order tests."[34] In the alternative, Stewart suggested that trial counsel failed to ascertain Stewart's condition by ineffectively utilizing Dr. Brown.[35]

The court of appeals cited *Poyner v. Murray*[36] in dismissing Stewart's claim of ineffective assistance of expert witness.[37] The court noted in *Poyner* that "there is no separately-cognizable claim of ineffective assistance of expert witnesses."[38] The court of appeals turned to the claim of ineffective assistance of counsel in connection with Dr. Brown's performance and held that trial counsel legitimately relied on the opinion of his expert witness.[39] This conclusion suggests that, while counsel should be able to rely on an expert's advice, counsel may also ask for an additional expert to check an expert's diagnosis if counsel has any question as to the validity or aid of the initial court-appointed expert.

C. *Depravity of Mind*

Stewart challenged the "vileness" aggravating factor as applied in his case, citing an erroneous jury instruction on its "depravity of mind" component.[40] The

34. *Stewart*, 1998 WL 391646, at *6.

35. *Id.* at *6-7. Stewart also alleged a failure on the part of Dr. Brown and of trial counsel for not investigating his family's history of mental illness. The court dismissed this claim by citing the record which included a report from Dr. Brown and Dr. Brown's testimony, both of which recognized Stewart's family mental health history. An investigation into the defendant's family mental health history should be given early priority during trial preparation.

36. 964 F.2d 1404 (4th Cir. 1992).

37. *Stewart*, 1998 WL 391646, at *6.

38. Poyner v. Murray, 964 F.2d 1404, 1419 (4th Cir. 1992). The court stated that even if it were to recognize a constitutional right to the effective assistance of expert, Stewart's claim would be barred by *Teague*. *Stewart*, 1998 WL 391646, at *6 (citing Teague v. Lane, 489 U.S. 288 (1989)) (holding that habeas process only designed to correct egregious errors of state law and since habeas is an intrusion on the separate sovereignties of states, defendant is only entitled to favorable law that existed while the case was tried or on direct appeal).

39. *Id.* at *7. The Fourth Circuit quoted *Hendricks v. Calderon*, 70 F.3d 1032 (9th Cir. 1995), as support: "[i]f an attorney has the burden of reviewing the trustworthiness of a qualified expert's conclusion before the attorney is entitled to make decisions based on that conclusion, the role of the expert becomes superfluous." *Hendricks*, 70 F.3d at 1038.

40. *Id.* at *8. The Commonwealth agreed with Stewart that the trial court erred when it included in the jury instructions "beyond the minimum necessary to accomplish that act of murder." The jury instructions read:

> Before the penalty can be fixed at death, the Commonwealth must prove beyond a

United States Supreme Court held in *Godfrey v. Georgia*,[41] that a state's statutory language which provided eligibility for the death penalty when certain acts were committed did not go far enough to satisfy constitutional considerations. The Court held that the state also had to provide either a constitutionally sufficient narrowing construction to the jury or a finding by a state appellate court applying the acceptable narrowing construction.[42]

The Fourth Circuit held that Stewart's claim had been defaulted because Stewart had failed to raise the claim at trial, on direct appeal or at state habeas.[43] Stewart argued that the claim had not been defaulted because its merits had been decided by the Supreme Court of Virginia, and that the Commonwealth had conceded this in a reply brief.[44]

The Fourth Circuit left undecided the question of whether the Supreme Court of Virginia addressed the *Godfrey* issue and held that the court made an independent finding of depravity of mind[45] under the authority of *Cabana v. Bullock*.[46] Under this authority, the Supreme Court of Virginia did not apply a constitutionally acceptable narrowing construction of the factor as required by *Godfrey*, but instead made its own independent finding.[47] The Fourth Circuit, relying on the district court's findings, held the Supreme Court of Virginia's independent finding valid and conclusive.[48] This holding is problematic because in order for the Supreme Court of Virginia to make a sufficient *Cabana* finding, the court would have had to apply an acceptable narrowing construction. Not

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reasonable doubt at least one of the following two alternatives:

> Number one, that after consideration of his history and background, there is a probability that he would commit criminal acts of violence that would constitute a continuing threat to society. Or number two, that his conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman in that it involved depravity of mind *beyond the minimum necessary to accomplish that act of murder.*

Id. (emphasis added). The italicized portion is actually part of the jury instruction for aggravated battery.

41. 446 U.S. 420 (1980) (holding death sentence invalid due to state court failure to provide a constitutionally limiting construction to the aggravating circumstances instruction).

42. Godfrey v. Georgia, 446 U.S. 420, 433 (1980).

43. *Stewart*, 1998 WL 391646, at *8.

44. *Id.* Stewart understood the Commonwealth's statement "[t]he Virginia Supreme Court, on direct appeal, reasonably rejected this contention" as an indication that the claim had been acknowledged and ruled on during direct appeal. The Fourth Circuit held that the commonwealth was not referring to a constitutional challenge to the jury instructions when it made the assertion quoted above. In the following section of its opinion, the Fourth Circuit stated "the Supreme Court of Virginia cured any defect in the jury instructions in Stewart's case by making an independent finding with respect to depravity of mind." *Id.*

45. *Id.*

46. Cabana v. Bullock, 474 U.S. 376 (1986) (holding that fact finding function required to impose death penalty need not be made at trial and sentencing, but rather can be made by trial court or state reviewing court).

47. *Stewart*, 1998 WL 391646, at *8.

48. *Id.* at *9.

only is there no indication that the court varied from the impermissible, constitutionally vague instructions found at trial, but by finding that Stewart had defaulted this claim, the Fourth Circuit had earlier held, in effect, that the Supreme Court of Virginia had not addressed this matter on the merits.[49]

The Fourth Circuit compounded the errors associated with this claim by making an independent visceral assessment of vileness, comparing Stewart's double homicide with the double homicide committed by Godfrey, and finding Stewart's actions more vile than Godfrey's and therefore worthy of the death penalty.[50] The Supreme Court of the United States forbade such comparisons in determining death penalty eligibility via aggravating factors in *Maynard v. Cartwright*.[51]

Were it not for the procedural thicket in which it became mired, Stewart's claim should have resulted in a new trial. Virginia's application of its vileness aggravating factor is contrary to established United States Supreme Court precedent, a fact of which the high court may someday take notice. Counsel are urged to continue framing and presenting this issue at trial and on direct appeal. Virginia Capital Case Clearinghouse will be happy to provide assistance in this matter.

D. Violation of Virginia Code Section 19.2-264.3:1

Stewart argued that the State's expert witness, Dr. Centor, violated Stewart's constitutional rights when he testified on the aggravating factor of future dangerousness using statements made to him by Stewart.[52] Section 19.2-264.3:1(G) of the Virginia Code expressly forbids utilization by a prosecution witness of a defendant's statement or evidence derived from a defendant's statement, an occurrence which Dr. Centor admitted. The Fourth Circuit acknowledged that a violation had occurred, but refused to enforce the statute, stating that any effect of the violation was harmless.[53]

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49. *Id.* at *9. This finding contradicts the Fourth Circuit's reliance on the district court's conclusion that "the Virginia Supreme Court 'properly considered and rejected Stewart's challenges' with respect to the 'depravity of mind' issue." *Id.*

50. *Id.* at *9-10.

51. 486 U.S. 356 (1988). The Supreme Court explicitly "rejected the submission that a particular set of facts surrounding a murder, however shocking they might be, were enough in themselves, and without some narrowing principle to apply to those facts, to warrant the imposition of the death penalty." Maynard v. Cartwright, 486 U.S. 356, 364 (1988). The Fourth Circuit recited the facts surrounding Stewart's double homicide, compared them with Godfrey's circumstances, and without applying a narrowing construction of depravity of mind, found the death penalty appropriate. *Stewart*, 1998 WL 391646, at *9-10.

52. *Stewart*, 1998 WL 391646, at *11.

53. *Id.* at *11-12. The court cited *Savino v. Murray*, 82 F.3d 593 (4th Cir. 1996), involving similar circumstances in which it ruled that even though a clear violation had occurred, the error was harmless, thereby allowing the petitioner to go to his death even though the state violated the express provisions of 3:1.

It has become clear that the requirements of section 19.2-264.3:1(G) of the Virginia Code are routinely violated, the law is not upheld by the Virginia judiciary, and the statute cannot be relied on to protect a client's rights. Therefore, a theme reiterated throughout this case note applies once again to counsel's preparation and trial application.[54] The Commonwealth can be prevented from having a mental health expert examine the client at all if defense counsel does not intend to call the expert as a witness, but instead employs the expert as a full member of the defense team, assisting in the preparation and presentation of the case in mitigation,[55] and developing the need for other experts.[56] It is regrettable that the benefit of expert testimony, authorized by statute, has in effect been withdrawn by the courts. Nevertheless, until the Supreme Court of the United States recognizes this issue as an arbitrary application of a state-created right, the best course of action is not to have 3:1 experts testify.

E. Proportionality Review

In rejecting Stewart's claim, the court correctly stated that proportionality review is not constitutionally required. Therefore, the issue must be federalized in order to preserve it for federal habeas corpus review. The following two methods may be used to preserve the issue of proportionality review for the federal courts (these methods may be applied when counsel wishes to preserve other issues for federal review): (1) application of the Virginia-created right to proportionality review is arbitrary and therefore a violation of due process, and (2) the constitution requires meaningful appellate review, which the Virginia proportionality review does not provide. Both methods should be stated clearly and presented in motions and on direct appeal.

Matthew Mahoney

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54. *See supra* sections I.B and II and corresponding footnotes.

55. Non-testifying experts can work with defense counsel in preparing lay-witnesses to present, through permissible testimony, many of the findings of the expert. Also, as a member of the defense team, the expert's results and aid fall under the work product privilege and are not discoverable. Under sections 19.2-264.3:1 (E) and (F) any materials accumulated by a *testifying expert* must be provided to the prosecution. VA. CODE ANN. § 19.2-264.3:1(E)-(F) (Michie Supp. 1998).

56. *See supra* sections I.B and II and corresponding footnotes.