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Fisher v. Angelone 163 F.3d 835 (4th Cir. 1998)

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I. Facts

The evidence leading to the conviction and sentence of David Fisher ("Fisher") is somewhat complex. In summary, it tended to show the following: Fisher met David Wilkey ("Wilkey") at a motel in 1982.[1] After the two became friends, Wilkey moved into Fisher's apartment and occasionally worked for him.[2] Fisher devised a plan whereby Wilkey would become close to a young woman, Bonnie Jones ("Jones"), Fisher would obtain an insurance policy on her life, and Wilkey would kill Bonnie in return for a share of the insurance proceeds.[3] Fisher provided Wilkey a car and money to date Jones, but Wilkey eventually fell in love with the woman and refused to go through with the plan.[4]

In the summer of 1983, Fisher made a similar proposal to Bobby Mulligan ("Mulligan"), this time targeting Wilkey; Fisher would obtain an insurance policy on Wilkey before the three men went on a hunting trip during which Mulligan would kill Wilkey in exchange for a share of the insurance proceeds.[5] Fisher also approached Gerald Steadham ("Steadham") with a plan to kill Wilkey. Steadham was to push Wilkey off a ledge on a fishing trip in exchange for a cut of the insurance money.[6]

Steadham accompanied Fisher to a local office of the Kentucky Central Life Insurance Company "Kentucky Central).[7] Despite the fact that he had no legitimate insurable interest, Fisher was nevertheless able to obtain an insurance policy on Wilkey's life in the amount of $50,000 with double a indemnity clause in case of accidental death.[8] The original application listed Fisher as Wilkey's "guardian" and the owner and beneficiary of the policy.[9] After the agent issuing the policy was unable to demonstrate that Fisher was in fact Wilkey's court-appointed guardian, however, Kentucky Central

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1. Fisher v. Commonwealth, 374 S.E.2d 46, 48 (Va. 1988).
2. *Id.*
3. *Id.*
4. *Id.*
5. *Id.*
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.*

temporarily changed the beneficiary to Wilkey's estate.[10] But soon thereafter, and for reasons which are still unclear, the company eventually agreed to again change the beneficiary to "David Fisher, personal friend."[11] At about the same time, Fisher informed Mulligan that although he initially had problems getting the policy, a promise of one third of the proceeds had persuaded the insurance agent to "take care of it."[12] Fisher then promised Mulligan a little more than one third of the proceeds ($38,000) because he was to actually do the killing.[13]

In November of 1983, the plan to kill Wilkey came to fruition. Fisher, Mulligan, Wilkey and Jody Ayers ("Ayers"), a 16 year old son of Fisher's ex-wife, went deer hunting in Virginia.[14] Fisher's role included providing the guns, disposing of the murder weapon, and having the body cremated, while Mulligan was to be the trigger man.[15] When Wilkey chased a deer down a hill, Mulligan followed with Fisher close behind.[16] After Mulligan shot Wilkey, Fisher yelled for Ayers to get help and then attempted to insert his hand into the wound in order to stop Wilkey's heart.[17]

When the rescue squad arrived on the scene, Mulligan and Fisher both gave statements to the effect that Mulligan had slipped while running downhill and the gun had discharged accidentally.[18] Fisher and Mulligan were tried and convicted of misdemeanors.[19] Two days later, Fisher filed a claim for the $100,000 accidental death benefit on the insurance policy he held on Wilkey's life.[20] The company initiated an investigation of the death and referred the matter to a local attorney.[21] After the attorney questioned Fisher about discrepancies between Fisher's statements and the autopsy report, Fisher accepted a check from the attorney for $25,000 in exchange for a release of his claim.[22] Fisher later paid Mulligan $7,000 of this sum.[23]

Two years later, Mulligan had a nervous breakdown and confessed his role in the crime to the FBI.[24] Mulligan and Fisher were indicted for capital

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10. *Id.*
11. *Id.*
12. *Id.*
13. *Id.* at 48-49.
14. *Id.*
15. *Id.*
16. *Id.*
17. *Id.*
18. *Id.*
19. *Id.*
20. *Id.*
21. *Id.*
22. *Id.*
23. *Id.*
24. *Id.*

murder.[25] After he became worried about his own life, Steadham also went to the FBI.[26] Before Fisher knew he had been indicted, Steadham met with Fisher and secretly taped lengthy conversations during which they occasionally discussed Wilkey's murder.[27]

Fisher was convicted of capital murder and, during the penalty phase of the bifurcated proceeding, the jury recommended he be sentenced to death.[28] The Circuit Court of the City of Bedford adopted the jury's recommendations. After exhausting direct appeals[29] and state habeas, Fisher sought a writ of habeas corpus in the United States District Court for the Western District of Virginia. The district court denied the writ, and Fisher appealed.[30] On appeal he claimed he was entitled to habeas relief on the following grounds: (1) extraneous juror interference; (2) his trial counsel were ineffective for (a) failing to challenge the admissibility of his taped conversations with a government witness, (b) failing to develop and present evidence to rebut the aggravating factor of future dangerousness, (c) failing to develop and present additional mitigating evidence, (d) opening the door to evidence of his parole eligibility status, and (e) failing to object when the burden was placed on him to prove that he should not be sentenced to death; (3) the cumulative effect of his trial counsel's individual errors rendered their assistance ineffective; (4) his court-appointed mental health experts were constitutionally ineffective; and (5) the Supreme Court of Virginia failed to review his sentence for proportionality.[31]

II. Holding

The court of appeals rejected all of Fisher's claims.

III. Analysis / Application in Virginia

A. Juror Misconduct

In his first claim, Fisher asserted that extraneous juror interference had tainted his jury, thereby denying him a fair trial in violation of the Sixth Amendment.[32] Although Fisher raised this claim as a single issue, the Fourth Circuit, for reasons which will later become apparent, addressed the claim as two issues, hereinafter referred to as "Claim XI" and "Claim XXXIV."[33]

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25. *Id.*
26. *Id.* at 50.
27. *Id.*
28. Fisher v. Angelone, 163 F.3d 835, 841 (4th Cir. 1998).
29. *Id. See* Fisher v. Virginia, 490 U.S. 1028 (1989) (denying writ of certiorari).
30. *Fisher*, 163 F.3d at 843.
31. *Id.*
32. *Id.*
33. *Id.*

1. Claim XI

In Claim XI, Fisher alleged that members of the jury had been exposed to documents and recordings which had not been admitted into evidence and to out-of-court statements from persons not on the jury, thereby violating his Fifth, Sixth, Eighth, and Fourteenth Amendment Rights.[34] The circuit court granted the Commonwealth's motion to dismiss the claim as procedurally barred on the basis of *Slayton v. Parrigan*[35] and the Supreme Court of Virginia affirmed.[36] In his federal habeas petition, Fisher argued that he could demonstrate cause and prejudice to excuse the procedural default due to the fact that the factual basis for his claim was unavailable at the time of his direct appeal.[37] The court of appeals rejected Fisher's claim, ruling that its basis was available to him at the time of his direct appeal.[38] However, it is clear that, as a practical matter, it was not. Fisher had requested that the circuit court allow him to interview jurors, but his request was denied on the ground that he had failed to make a "threshold showing of juror misconduct."[39] Evidence of misconduct was, of course, precisely the information Fisher did not have and hoped to uncover by interviewing the jurors. Under the circumstances of such a "Catch-22," it is obvious that in reality this claim was not available to Fisher.

2. Claim XXXIV

In Claim XXXIV, first raised in a motion to amend his state habeas petition, Fisher claimed that juror Bertha Thomas ("Thomas") had been improperly influenced by her husband.[40] According to Thomas's affidavit, which was the basis for the motion to amend but which was not submitted with the motion, her husband told her to vote for the death penalty if she "was the lone 'hold out' juror against a sentence of death."[41] Despite the fact that under the law at that time no time limits were imposed on habeas petitioners, the Commonwealth opposed the motion to amend "on the ground of timeliness."[42] The Commonwealth also objected to Claim XXXIV on the ground that it was "conclusory and insufficiently pleaded."[43]

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34. *Id.* at 844.

35. 205 S.E.2d 680, 682 (Va. 1974) (holding claim which could have been, but was not, raised on direct appeal may not be raised in collateral proceedings).

36. *Fisher*, 163 F.3d at 844.

37. *Id.*

38. *Id.*

39. *Id.* at 841.

40. *Id.* at 845.

41. *Id.* (citing J.A. at 2355).

42. *Id.* (citing J.A. at 2420).

43. *Id.* at 842 (citing J.A. at 2421).

After first taking the decision under advisement, the circuit court refused to admit the affidavit, ruling "that it (1) represented an effort to impeach the jury verdict, (2) was not relevant to the issue of ineffective assistance of counsel, (3) was untimely, and (4) was unreliable."[44]

In accord with the circuit court's ruling on May 26, 1993, its Order noted that Fisher's motion to amend his petition further "was granted in part."[45] The Order failed, however, to explain the court's grounds for denying Fisher's motion to add Claim XXXIV. The question before the Fourth Circuit, therefore, was whether the circuit court denied the claim on procedural grounds (in which case the issue would be procedurally defaulted) or on substantive grounds (in which case it would not).[46]

The Fourth Circuit held that, for several reasons, two of which are discussed below, the circuit court denied Claim XXXIV on procedural grounds.[47] First, as noted above, even though no time limits were imposed on habeas counsel, the Fourth Circuit concluded that due to the fact that the Commonwealth had repeatedly grounded its objection to the motion on timeliness, the circuit court must also have made its decision on that ground.[48] Second, the court of appeals ruled that the circuit court never discussed the merits of Claim XXXIV when it denied the motion to amend. This is most curious given that the court of appeals itself claimed that the circuit court denied the motion because it: "(1) represented an effort to impeach the jury . . . [and] (4) was unreliable."[49] Without more, the Fourth Circuit ruled this was not a substantive ruling based on the following completely conclusory language of the district court: "[a] careful reading of the . . . passage . . . reveals that the judge was not ruling on the motion to amend, but merely refusing to accept [the Thomas] affidavit[ ] into evidence."[50]

In order to avoid the "damned if you do, damned if you don't" position into which Fisher's defense counsel was placed, defense counsel seeking to interview jurors have two options. First, at the end of the trial they may

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44. *Id.* at 846 (citing J.A. at 2714).

45. *Id.* at 842 (citing J.A. at 2824).

46. It is clear that as a matter of substance, under the authority of *Stockton v. Virginia*, 852 F.2d 740, 745-46 (4th Cir. 1988), Fisher would have been entitled to relief on his juror misconduct claim. In that case, the Fourth Circuit concluded that the defendant was prejudiced when the owner of the diner at which jurors were recessed for lunch explained that "they ought to fry the son of a bitch." *Id.*

47. *Fisher*, 163 F.3d at 845-476. The Fourth Circuit's other "reasons" as to why the claim was dismissed on procedural, and not substantive, grounds by the circuit court, are nothing more than conclusions: The circuit court did not consider the merits of Claim XXXIV at the hearing, nor did Fisher explicitly argue on habeas appeal to the Supreme Court of Virginia that the circuit court's dismissal was substantive. *Id.* at 847.

48. *Id.* at 846.

49. *Id.* (citing J.A. at 2714).

50. *Id.* at 847 (quoting J.A. at 3491 n.3 (emphasis omitted)).

file a motion seeking permission to interview jurors, citing this case for the proposition that counsel must do so in order to avoid defaulting any available claim. Counsel pursuing this option must, under all circumstances, be sure to federalize the claim by also framing the request under the Sixth Amendment rights to an impartial jury and effective assistance of counsel. A second option is to simply interview the jurors without filing a motion. Nothing, absent a court order, prevents counsel from doing so. Attorneys may not harass jurors, of course, but are not required to obtain prior permission to contact them. In either event, counsel must keep in mind that under Supreme Court of Virginia Rule 1:1 they have only 21 days after the end of trial during which they may file motions based on misconduct.[51] This may present a practical problem as jurors may be unwilling to talk to defense counsel immediately after trial because it is likely that they will be sitting on other juries and may feel too emotionally involved in their decision to be willing to speak about it. One of the two options should be employed, however, in virtually every case.

B. Ineffective Assistance of Counsel

Fisher raised a variety of ineffective assistance of counsel claims, the majority of which are explained below.[52] Under *Strickland v. Washington*,[53] a petitioner must demonstrate that his trial counsel's performance fell below an objective standard of reasonableness and "that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[54] Also, the court claimed to find in *Lockhart v. Fretwell*[55] further guidance in interpreting the prejudice prong.[56] That guidance is, as is explained in detail in the following section, misplaced.

In his first ineffective assistance of counsel claim, Fisher challenged his counsel's failure to object adequately to the admissibility of six taped conver-

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51. VA. SUP. CT. R. 5:26.

52. Fisher raised several ineffective assistance of counsel claims which are not discussed in this summary. In one, Fisher claimed his right to effective counsel was denied him due to his counsel's failure to present evidence indicating he had not in fact been charged with several crimes for which he, while secretly being taped, bragged to a government witness he had been tried and acquitted. The court dismissed the claim on both objective unreasonableness and prejudice grounds. In another, Fisher contended that his trial counsel was ineffective in asking the trial court to place the burden on him at his proportionality review hearing to prove that he should not be sentenced to death. The Fourth Circuit dismissed the claim, citing the district court's conclusion that "[t]here was no burden shifting here, and even a cursory reading of the record . . . reveals that fact." *Fisher*, 163 F.3d at 848 (citing J.A. at 3597).

53. 466 U.S. 668 (1984).

54. Strickland v. Washington, 466 U.S. 668, 694 (1984).

55. 506 U.S. 364, 369-70 (1993).

56. *Fisher*, 163 F.3d at 848.

sations he engaged in with Gerald Steadham, a government witness, two of which were taped after Fisher was indicted.[57] Although the admission of these post-indictment tapings clearly violated the rule of *Massiah v. United States*[58] that "[a] petitioner [is] denied the basic protections of [the Sixth Amendment] guarantee when there was used against him at his trial evidence of his own incriminating words, which [government] agents had deliberately elicited from him after he had been indicted and in the absence of his counsel,"[59] Fisher's trial counsel failed to state the grounds for his objection and was overruled. Although the court of appeals, through extraordinarily strained reasoning,[60] concluded that this was not objectively unreasonable, it was also able to dispose of the claim on the prejudice ground, citing what it called the "prosecution's overwhelming case against Fisher."[61]

It is clear that Fisher's trial counsel should have stated the grounds for his objection. In addition, as the *Capital Defense Journal* repeatedly emphasizes, defense counsel must be mindful of the overwhelming obstacles posed by procedural default. In order to insure a claim is preserved, it must be framed as a violation of both the United States Constitution and any applicable state law.

In his next ineffective assistance claim, Fisher contended his counsel was ineffective for failing to develop and present certain mitigating evidence.[62] In particular, Fisher claimed his trial counsel unreasonably failed to (1) research Fisher's mental illness, (2) investigate Fisher's criminal history, and (3) contact Fisher's family and other witnesses regarding mitigating evidence.[63]

The court of appeals concluded that Fisher's counsel was not unconstitutionally ineffective for failing to investigate Fisher's mental state because the introduction of any such evidence might have led the Commonwealth to cross-examine mental health experts about Fisher's propensity for future violence and might have led to the introduction of evidence of his prior criminal record as a juvenile.[64] Thus, it concluded that "counsel's strategic decision not to introduce Fisher's medical records was [not] objectively unreasonable."[65]

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57. *Id.* at 849.

58. 377 U.S. 201 (1964).

59. Massiah v. United States, 377 U.S. 201, 206 (1964).

60. In essence, the Fourth Circuit "reasoned" that counsel's failure to state the basis for his objection to the introduction of the tapes was not unreasonable because, once the tapes were admitted over his objection, counsel insisted the tapes be played in full so as to prevent the jury from hearing the statements out of context. *Fisher*, 163 F.3d at 849.

61. *Id.*

62. *Id.* at 849-50.

63. *Id.* at 850.

64. *Id.*

65. *Id.*

The court disposed of Fisher's claim that he was denied effective assistance of counsel due to his counsel's failure to contact family members with the "Client Excuse Loop-hole." The court excused counsel's failure to investigate Fisher's family background on the ground that Fisher told him his family would not provide any helpful information.[66] Thus, it concluded that "counsel's strategic decision" not to call family witnesses was reasonable.[67]

Upon any indication of mental illness, counsel should actively pursue any avenue which might yield evidence of such mental disability, including contacting family members. The rule of economy which dictates that counsel cannot be expected to pursue all lines of evidentiary inquiry simply does not apply in a capital case because the consequences of failing to do so are so much greater than anywhere else. It should be remembered, of course, that if defense counsel pursues a line of investigation which yields a result that, as the Fourth Circuit guessed it might, is more likely to damage than help a defendant's case, counsel can simply make the "strategic decision" not to introduce it. If, however, as was the case here, counsel fails to pursue the inquiry in its entirety, not putting on the evidence is less a "decision" and more an uneducated conclusion that the defendant is in fact competent to direct the trial.

A similar problem may be found in the court's resolution of the claim that Fisher's counsel was ineffective due to his failure to explain that Fisher's prior felonies were all non-violent.[68] The court rejected it on the prejudice prong, but the first question asked might have been why trial counsel permitted twenty-five non-violent felonies to be introduced into evidence at all. Motions in limine are available to weed out irrelevant evidence.[69]

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66. *Id.* at 851.

67. *Id.*

68. *Id.* at 850.

69. Fisher made two further ineffective assistance claims which will not be addressed in detail in this case note. First, he argued that his trial counsel was ineffective due to the fact that he claimed, during the penalty phase of Fisher's trial, that if the jury sentenced Fisher to a term of life "he [would] never see the sun shine again except through bars." *Id.* at 851 (quoting J.A. at 1736). Because the trial court erroneously took this as counsel erroneously suggesting that Fisher would be ineligible for parole, the court permitted the Commonwealth to point out that a life sentence would not necessarily mean that Fisher would be behind bars for the rest of his life. *Id.* Fisher challenged this ruling on direct and state habeas appeal. *Id.* At no point, however, did Fisher contend that his trial counsel was ineffective for opening the door to the prosecution's response. *Id.* The court of appeals therefore concluded that Fisher failed to exhaust his remedies, which constitutes a procedural default in Virginia. *Id.* (citations omitted). The Fourth Circuit did so because a Virginia Statute, then in effect, permitted him to raise his ineffective assistance claim on direct appeal. *See* Frye v. Commonwealth, 345 S.E.2d 267, 286-87 (Va. 1986) (citing former VA. CODE ANN. § 19.2-317.1, (repealed 1990)). What the court of appeals failed to mention, however, was that at the time Fisher made his direct appeal, the Supreme Court of Virginia had, with no guidance whatsoever from the legislature, effectively overuled the statute by devising a rule which, because

C. Deprivation of Fair Trial

Fisher claimed that even if each of his trial counsel's errors, taken on their own, did not amount to a Sixth Amendment violation, the cumulative effect of those errors, taken in their entirety, did so.[70] The Fourth Circuit rejected this argument, citing *Lockhart v. Fretwell*[71] for the proposition that a violation of the Sixth Amendment's fair trial guarantee could not occur absent an individual constitutional violation.[72] Under this very narrow interpretation of the Constitution, if counsel commits a multitude of errors, a violation of the Sixth Amendment nevertheless cannot occur absent a finding that counsel's performance, as to at least one of those errors, was constitutionally deficient, and that, again in regard only to that particular error, the petitioner was prejudiced thereby. As is explained below, it seems Fisher was likely correct in contending that both logic and United States Supreme Court precedent demand a more expansive reading of the right to a fair trial.

Fisher claimed that assessing the cumulative impact of counsel's errors is appropriate in at least three circumstances. Fisher agreed with the Fourth Circuit that a showing of constitutionally deficient performance resulting in prejudice amounts to a violation of the Sixth Amendment—this is nothing more than garden variety *Strickland v. Washington*[73] error. The problem, however, with limiting cumulative impact claims to instances in which *Strickland* error can be shown is an obvious one: if a *Strickland* violation as to a particular error has occurred, there is no need to assess the cumulative impact of all of counsel's errors because a constitutional error has already occurred. Therefore, Fisher contended cumulative impact should obviously not be limited to *Strickland* errors, and, unlike the Fourth Circuit, suggested it is appropriate in at least two other instances.

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of the availability of habeas proceedings, forbade petitioners from raising claims of ineffective assistance of counsel. *See* Walker v. Mitchell, 299 S.E.2d 698, 699 (Va. 1983) (ruling "in the interests of both the Commonwealth and the accused, the ends of justice dictate the adoption of a rule restricting to habeas corpus proceedings the litigation of claims of ineffective assistance of counsel"). The statute permitting the raising of ineffective assistance of counsel claims was eventually repealed, thereby making it clear that ineffective assistance claims may only be raised in habeas proceedings. Nevertheless, out of an abundance of caution and despite the fact that trial and direct appeal counsel are virtually always the same, trial counsel are advised that if it appears from the record alone that counsel was ineffective, that claim should be made on appeal and/or appointment of different appellate counsel sought.

Fisher also claimed that his trial counsel was ineffective for allowing the trial court to place the burden on him at his post-trial hearing. The court of appeals summarily dismissed this claim on the grounds that the burden had not been placed on him and, even if it had been, Fisher was not prejudiced thereby. *Fisher*, 163 F.3d at 852 (citing J.A. at 3597).

70. *Fisher*, 163 F.3d at 852.

71. 506 U.S. 364 (1994).

72. *Fisher*, 163 F.3d at 852 (citing Lockhart v. Fretwell, 506 U.S. 364, 370 n.2 (1993)).

73. 466 U.S. 668 (1984).

First, Fisher contended that if there have been several constitutional errors which, taken individually, do not prejudice the defendant, the cumulative impact of those errors may do so. This seems plainly required. For example, assume that a defendant was convicted solely on the basis of three pieces of evidence, each of which was clearly inadmissable. If counsel failed to object to the introduction of each piece of evidence, counsel would have committed three performance prong errors. But if the defendant raised a claim of ineffective assistance as to any one of those pieces of evidence, it would fail on the prejudice prong because a court would find that the defendant would have been convicted on the basis of the two other pieces of evidence, despite the fact that they too were inadmissable. Because this result makes no sense, it seems plainly obvious that logic requires that a petitioner be permitted to raise a claim of ineffective assistance as to the cumulative impact of errors which violate the performance prong, despite the fact that they would not, taken on their own, be successful.

Counsel should note that in dismissing Fisher's fair trial claim the court of appeals lent support for evaluating the cumulative effect of "harmless" constitutional errors, when, in discussing a circuit split on the issue, it explained that:

> [t]he courts in question merely aggregated all of the actual constitutional errors that individually had been found to be harmless, and therefore not reversible, and analyzed whether their cumulative effect on the outcome of the trial was such that collectively they could no longer be determined to be harmless. . . . Thus legitimate cumulative-error analysis evaluates only the effect of matters actually determined to be constitutional error, not the cumulative effect of all of counsel's actions deemed deficient.[74]

Fisher also contended that a cumulative impact claim may be made even as to errors which do not rise to the level *Strickland* performance prong errors. Although the case for this interpretation is not as strong as is that for constitutional errors (described above), counsel is nevertheless advised to make it. The Supreme Court has never held that the cumulative effect of trial counsel errors which are not themselves unconstitutional may not be considered in assessing an unfair trial claim. In fact, language in *Strickland* itself indicates that a violation of the Sixth Amendment may occur even absent a showing of constitutional violation. There, the Supreme Court explained that "the ultimate focus of [ineffective assistance of counsel] inquiry must be on the fundamental fairness of the proceeding whose result is being challenged."[75] It also noted that "[a]n accused is entitled to be assisted by an attorney, whether retained or appointed, who plays the role necessary to ensure that the trial is fair."[76] In addition, the Supreme

74. *Fisher*, 163 F.3d at 853 n.9 (citation omitted).

75. Strickland v. Washington, 466 U.S. 668, 696 (1984).

76. *Id.* at 685.

Court ruled more recently in *Lockhart v. Fretwell* [77] that "an analysis . . . without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective."[78] Finally, many circuits have held that cumulative effect may be investigated.[79]

D. Failure to Provide Constitutionally Effective Mental Health Experts

Fisher argued that his court appointed mental health experts were constitutionally ineffective and failed to discharge their constitutional duty under *Ake v. Oklahoma*.[80] The court of appeals noted that a claim of ineffective assistance of expert witnesses, as distinct from the right to effective assistance of counsel, was not a cognizable claim.[81] As to the claim that Fisher's court-appointed mental health experts failed to discharge their duty under *Ake*, the Fourth Circuit adopted the Supreme Court of Virginia's finding that because the claim was raised for the first time on state habeas it was procedurally defaulted under the authority of *Slayton v. Parrigan*.[82]

The Fourth Circuit's resolution of this issue turned on the fact that the claim was not raised on direct appeal. As the Fourth Circuit has by this holding placed the burden of evaluating the professional performance of a court appointed expert squarely on trial counsel,[83] this is a difficult claim to preserve. Because the rules of procedural default apply as equally to claims of unconstitutional assistance of experts as they do to other claims, defense counsel essentially have a single course of action if they doubt their capacity

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77. 506 U.S. 364 (1994).

78. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

79. *See* Williams v. Washington, 59 F.3d 673, 682 (7th Cir. 1995) (stating that "a petitioner may demonstrate that the cumulative effect of counsel's individual acts or omissions was [prejudicial]"); Rodriguez v. Hoke, 928 F.2d 534, 538 (2d Cir. 1991) (noting that a "claim of ineffective assistance of counsel can turn on the cumulative effect of all of counsel's actions").

80. 470 U.S. 68, 82-83 (1985) (holding "that when a defendant demonstrates to the trial judge that his sanity at the time of the offense is to be a significant factor at trial, the State must, at a minimum, assure the defendant access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense.)

81. *Fisher*, 163 F.3d at 853 (citing Pruett v. Thompson, 996 F.2d 1560, 1573 n. 12 (4th Cir. 1993) (concluding that *Ake v. Oklahoma*, 470 U.S. 68 (1985), "held only that due process requires that an indigent defendant be provided with the services of a competent psychiatrist at state expense when the defendant's mental condition is in issue"); Poyner v. Murray, 964 F.2d 1404, 1418-19 (4th Cir. 1992) (declaring "there is no separately-cognizable claim of ineffective assistance of expert witnesses"); Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir. 1989) (per curiam) (same); Ake v. Oklahoma, 470 U.S. 68, 82-83 (1985)). *See also* Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998) (discussing requirements of court-appointed psychiatrist's performance).

82. 205 S.E.2d 680, 682 (Va. 1974) (holding claim which could have been, but was not, raised on direct appeal may not be raised in collateral proceedings).

83. *See* Wilson v. Greene, 155 F.3d 396, 413 (4th Cir. 1998) (Michael, J. concurring).

to evaluate the performance of their expert. In order to avoid the pitfall of failing to preserve the claim, upon the slightest hint that the current expert is failing to discharge his duty, defense counsel are advised to move for the appointment of a second expert to evaluate the first, citing *Fisher*. If counsel fails to raise the issue, he waives his right to do so on direct appeal or in any collateral proceeding.[84] Denial of the motion, however, should suffice to preserve the claim.

E. Failure to Review For Proportionality

Fisher claimed that the Supreme Court of Virginia erred in failing to review his sentence for proportionality. Fisher contended that because he was the first defendant accused of murder for hire who had been sentenced to death, or for that matter even tried for capital murder, his sentence was grossly disproportionate to that received by other defendant's tried for murder for hire.[85] The court of appeals rejected Fisher's contention on the ground that because proportionality review is not a right to which he was entitled under the United States Constitution, the Supreme Court of Virginia's decision not to review his sentence was an independent state ground over which the federal court did not have jurisdiction.[86] Although the court of appeals was correct in its finding that a state need not employ proportionality review, it is incorrect to the extent it implies that a state which chooses to employ proportionality review may pick and choose which defendants do and do not receive it—doing so is a violation of the appellate rights granted by the United States Supreme Court in *Evitts v. Lucey*.[87]

Douglas R. Banghart

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84. *See* Anne Duprey, Case Note, 11 CAP. DEF. J. 175 (1998) (analyzing Wilson v. Greene, 155 F.3d 396 (4th Cir. 1998)).

85. *Fisher*, 163 F.3d at 854.

86. *Id.* (citing Pulley v. Harris, 465 U.S. 37, 51-53, (1984); Estelle v. McGuire, 502 U.S. 62, 67-68 (1991); Kornahrens v. Evatt; 66 F.3d 1350, 1357 (4th Cir. 1995)).

87. Evitts v. Lucey, 469 U.S. 387, 393 (1985) (holding that where a state creates a right not required under the United States Constitution, that state is nevertheless prohibited under the Due Process Clause of the United States Constitution from arbitrarily depriving a petitioner of such a right) (citing Griffin v. Illinois, 351 U.S. 12, 20 (1956)). *See also* Alix M. Karl, Case Note, 11 CAP. DEF. J. 449 (1999) (analyzing Payne v. Commonwealth, 509 S.E.2d 293 (Va. 1999)).