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In re Braxton
258 F.3d 250 (4th Cir. 2001)

I. Facts

Tessa Van Hart ("Van Hart") was sodomized, shot and killed on January 27, 1994. Van Hart worked as a pizza delivery person and was lured to the "Small Piney Island" area of Chincoteague Island to deliver a pizza. Van Hart's body was found one mile from the delivery location in the back seat of her car. The cause of Van Hart's death was two gunshot wounds to the head. For more than two years, the perpetrator of Van Hart's murder was a mystery.[1] Polymerase chain reaction testing ("PCR"), a form of DNA testing, was conducted on the seminal fluids found in Van Hart's anus and the results were inconclusive.[2]

On June 3, 1996, Brian Lee Cherrix ("Cherrix") offered to disclose information about the Van Hart murder to the police in the hopes of leniency in a pending criminal proceeding. Cherrix first told police that his cousin, who had died the year previous, had committed the murder and told Cherrix of the details. From Cherrix's information, the police recovered the .22 caliber Marlin rifle used in the murder. Cherrix told the police several variations of his story. On April 25, 1997, Cherrix confessed orally to the murder of Van Hart but refused to sign the written version, and has since disavowed the confession. Cherrix presented an alibi defense at trial to support his plea of not guilty.[3] Cherrix was convicted of capital murder, forcible sodomy and several other related charges. Cherrix was sentenced to death for the murder of Van Hart.[4]

Cherrix appealed his conviction to the Supreme Court of Virginia on the following issues: (1) his confession should have been suppressed; (2) the verdict was contrary to law and evidence; (3) the jury instructions were incorrect; (4) the denial of a mental health expert; and (5) the Commonwealth failed to prove future dangerousness or vileness.[5] The Supreme Court of Virginia rejected all of Cherrix's claims and affirmed the conviction and death sentence.[6] The United States Supreme Court denied Cherrix's petition for a writ of certiorari.[7] The

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1. Cherrix v. Commonwealth, 513 S.E.2d 642, 645-46 (Va. 1999) (affirming Cherrix's conviction and sentence).
2. *In re* Braxton, 258 F.3d 250, 253-54 (4th Cir. 2001).
3. *Id.* at 252-53.
4. *Cherrix*, 513 S.E.2d at 646-47.
5. *Id.* at 647-56.
6. *Id.* at 656.
7. Cherrix v. Virginia, 528 U.S. 873 (1999).

Supreme Court of Virginia dismissed Cherrix's petition for a writ of habeas corpus and denied a rehearing on that issue.[8]

Before his execution, Cherrix filed a motion to stay his execution in the United States District Court for the Eastern District of Virginia to allow him time to file his federal habeas corpus claim. The district court granted Cherrix's motion for appointment of counsel and stayed his execution on August 15, 2000. Cherrix then made a motion to retest the DNA evidence and also made a separate motion, at a later date, for preservation of the evidence. The district court conditionally granted the latter motion on December 12, 2000. On December 28, 2000, Cherrix filed a petition for a writ of habeas corpus. On January 9, 2001, the district court ordered the preservation of the evidence and funding for the retesting. The warden made an oral motion to stay the order, which was denied. The Commonwealth then filed an appeal of the order, an application for an emergency stay of the order, and a petition for a writ of mandamus and/or prohibition in the United States Court of Appeals for the Fourth Circuit.[9]

II. Holding

The Fourth Circuit granted the emergency stay. After inviting the district court to submit a response to the petition, the Fourth Circuit dismissed the appeal and denied the petition.[10] The Fourth Circuit premised its dismissal of the appeal on the interlocutory nature of the appeal, the absence of any irreparable consequences, and the non-immediacy of any threat of harm to the Commonwealth.[11] The Fourth Circuit denied the Commonwealth's mandamus petition because other adequate means of relief from the district court's order existed.[12]

III. Analysis / Application in Virginia

The Fourth Circuit reiterated the district court's rationale for the order as the following: (1) under 21 U.S.C. § 848(q), the district court may "provide funding for services which are reasonably necessary to support a petition for habeas corpus"; (2) the "DNA retesting is reasonably necessary to support Cherrix's claims of actual innocence, . . . other constitutional claims, . . . as well as a potential clemency petition"; and (3) "Cherrix showed good cause for DNA retesting, entitling him to discovery pursuant to Rule 6(a) of the Rules Governing § 2254 Cases and 28 U.S.C. § 2254(2)(A)(ii), (2)(B)."[13]

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8. *Braxton*, 258 F.3d at 254. *See generally* Cherrix v. Braxton, 131 F. Supp. 2d 756 (E.D. Va. 2000).

9. *Braxton*, 258 F.3d at 254-55.

10. *Id.* at 261.

11. *Id.* at 257-60.

12. *Id.* at 261.

13. *Id.* at 255; *see also* 21 U.S.C. § 848(q)(4)(A) (1994) (allowing the court to appoint counsel, investigators or experts in any case punishable by death, where the defendant is financially unable

In holding that the order was not a final order, nor directed at the merits, and thus, not appealable, the Fourth Circuit stated "[c]learly, the January 9, 2001 Order is just a step in the litigation process that is not directed to the merits of the underlying habeas action."[14] While this language may be construed to dismiss the importance of DNA evidence, it allows district courts great discretion in granting such orders. Similarly, the language may allow the practitioner great leeway in requesting such orders, especially in older cases. The district court, in finding good cause, acknowledged that DNA technology has vastly improved since the 1994 testing of the spermatozoa, and that two new tests are now used that analyze epithelial and white blood cells instead of spermatozoa.[15] Therefore the practitioner must assess whether any new DNA testing methods have been developed since his client's evidence was tested. If new tests exist, the practitioner has a strong and valid argument for DNA retesting.[16]

The Fourth Circuit also distinguished this case from *McClesky v Zant*,[17] which cautioned against federal habeas review.[18] The court asserted that a federal court has a "duty to examine actions taken by the Commonwealth to make sure that the final result obtained is one in keeping with Cherrix's constitutional rights."[19] The court's language implies that DNA testing may be necessary to prevent violation of a defendant's constitutional rights. The court balanced this concern with any "irreparable harm" flowing to the Commonwealth: "[I]t is doubtful that harm would flow to anyone other than Cherrix."[20] The astute practitioner should utilize the arguments made by the Fourth Circuit in declining the Commonwealth's petition and the Warden's appeal to fend off any attacks by the Commonwealth when attempting to obtain DNA retesting.

The Fourth Circuit dismissed the Commonwealth's petition for a writ of mandamus with little commentary other than the statement that "other adequate means exist to attain the relief [the Commonwealth] desires."[21] The court premised this statement on the rationale discussed above, and added that the

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to obtain these services); 28 U.S.C. § 2254(e)(2)(A)(ii)-(B) (Supp. V 1999) (allowing the court to hold an evidentiary hearing only if petitioner has shown facts previously unknowable and the facts would have precluded a finding of guilt); 28 U.S.C. foll. § 2254 RULES GOVERNING § 2254 CASES R. 6 (1994) (setting out procedure required for discovery under § 2254).

14. *Braxton*, 258 F.3d at 257.

15. *Id.* at 254.

16. The practitioner should also note that "[t]his [was] the first time in any proceeding that Cherrix ha[d] requested DNA retesting." *Braxton*, 258 F.3d at 254. Therefore, the practitioner may raise this argument for the first time in the federal habeas proceeding.

17. 499 U.S. 467 (1991).

18. *Braxton*, 258 F.3d at 259; *see also* McClesky v. Zant, 499 U.S. 467 (1991).

19. *Braxton*, 258 F.3d at 259 (citing Cherrix v. Braxton, 131 F. Supp. 2d 756, 784 (E.D. Va. 2000)).

20. *Id.* at 258.

21. *Id.* at 261.

Commonwealth may appeal after a final order is entered by the district court.[22] This section of the opinion has little effect for the Virginia practitioner.

IV. Conclusion

In this case, the Fourth Circuit did not disturb the district court's order. Several important tools may be drawn from the Fourth Circuit's holding. First, good cause for further discovery under Rule 6(a) may be shown by improved technology over a period as short as six years. Second, the court associates DNA testing with fairness and constitutional rights. Third, the Commonwealth does not have a strong argument against these two propositions; the Commonwealth will not be irreparably harmed by DNA retesting.

Kathryn Roe Eldridge

22. *Id.*