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Mapes v. Tate 388 F.3d 187 (6th Cir. 2004)

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I. Facts

On January 30, 1983, Donald A. Mapes and Randy Newton robbed Chap's Bar in Cleveland, Ohio.[1] During the robbery, Mapes shot John Allen, the owner of the bar, in the face with a sawed-off shotgun.[2] Eyewitness John Hovekamp identified Mapes as the shooter after viewing both a photographic array and a police lineup.[3] The police arrested Mapes's accomplice, Newton, on March 4, 1983.[4] Newton gave the police a statement implicating Mapes as the gunman and leading them to the discovery of shotgun shells similar to those used to kill Allen.[5]

Ohio prosecutors charged Mapes with aggravated murder during the course of an aggravated robbery and during the course of an aggravated burglary under Ohio Revised Code section 2903.01(B).[6] Each count carried with it three death penalty specifications: murder in the course of an aggravated robbery, murder in the course of an aggravated burglary, and a prior murder conviction.[7] The jury found Mapes guilty of both counts of aggravated murder but not guilty of the two death penalty specifications under section 2929.04(A)(7).[8] In a separate proceeding, the trial court found Mapes guilty of the prior murder specification because Mapes had made a no contest plea to a 1972 New Jersey murder indictment.[9] The jury then sentenced Mapes to death.[10]

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1. State v. Mapes, 484 N.E.2d 140, 141–42 (Ohio 1985). The facts important to this casenote are found in the "Syllabus by the Court" preceding the Supreme Court of Ohio's opinion.

2. *Id.* at 141.

3. Mapes v. Coyle, 171 F.3d 408, 411 (6th Cir. 1999).

4. *Mapes*, 484 N.E.2d at 142.

5. *Id.*

6. *Id.*; *see* OHIO REV. CODE ANN. § 2903.01(B) (West Supp. 2004) (defining aggravated murder as "purposely caus[ing] the death of another . . . while committing or attempting to commit . . . aggravated robbery . . . [or] aggravated burglary").

7. *Mapes*, 484 N.E.2d at 142; *see* OHIO REV. CODE ANN. § 2929.04(A)(7) (West Supp. 2004) (allowing a death sentence if there is proof beyond a reasonable doubt that the murder was committed during the course of an aggravated robbery or burglary); OHIO REV. CODE ANN. § 2929.04(A)(5) (providing for a death sentence if "[p]rior to the offense at the bar, the offender was convicted of an offense an essential element of which was the purposeful killing of or attempt to kill [another]").

8. *Mapes*, 484 N.E.2d at 142.

9. *Id.* at 143.

10. *Id.*

After the Supreme Court of Ohio affirmed Mapes's conviction and sentence on direct appeal and denied his habeas corpus petition for state postconviction relief, Mapes filed a habeas corpus petition in the United States District Court for the Northern District of Ohio.[11] Although his petition alleged fifteen constitutional errors, the district court found merit only in the claim "that Mapes had received ineffective assistance of appellate counsel by virtue of counsel's failure to argue on direct appeal that the trial court had impermissibly precluded the jury from considering mitigating factors related to Mapes's New Jersey murder conviction."[12] The district court consequently vacated Mapes's death sentence on the condition that the Ohio state courts review the sentence within ninety days.[13] Upon the State's appeal, the United States Court of Appeals for the Sixth Circuit reversed in part and remanded for an evidentiary hearing.[14] The court instructed the district court to determine the effectiveness of Mapes's appellate counsel in failing to raise the following issues:

> (1) that the jury was not allowed to consider mitigating evidence relating to Mapes's prior murder conviction . . . ; (2) that the jury was erroneously required to unanimously reject the death penalty before considering a life sentence . . . ; (3) that juror Chatman gave an equivocal response during polling . . . ; and (4) that trial counsel had been constitutionally ineffective.[15]

In its second consideration of the appeal, the district court accepted the magistrate judge's determination, in light of an evidentiary hearing, that Mapes's appellate counsel were ineffective and again granted Mapes relief conditionally, requiring that the state court review the death sentence.[16] Again the State appealed, and Mapes cross-appealed, requesting that the court vacate his death sentence instead of granting him a new appeal.[17]

II. Holding

Denying both the State's and Mapes's appeals, the Sixth Circuit affirmed the district court's conditional grant of habeas relief to Mapes.[18] The court found that a new appeal was the most appropriate remedy for ineffective assistance of

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11. Mapes v. Tate, 388 F.3d 187, 189–90 (6th Cir. 2004); *see Mapes*, 484 N.E.2d at 149 (affirming Mapes's conviction and death sentence); State v. Mapes, 558 N.E.2d 57, 57 (Ohio 1990) (denying postconviction relief).

12. *Mapes*, 388 F.3d at 190.

13. *Id.*

14. *Id.*

15. *Id.*; *see Mapes*, 171 F.3d at 427, 429 (instructing the district court to hold an evidentiary hearing on appellate counsel's ineffectiveness).

16. *Mapes*, 388 F.3d at 190.

17. *Id.*

18. *Id.* at 189.

appellate counsel because its task on this appeal was to "neutraliz[e] the constitutional deprivation suffered."[19] The court recognized that Mapes may have suffered constitutional violations during his sentencing proceeding, but it could not address those violations because Mapes needed first to bring them before the state courts.[20] Accordingly, the court held that Mapes be granted "an opportunity to pursue his direct appeal with effective assistance of counsel."[21]

III. Analysis

A. Standard of Review

Because Mapes filed his first federal habeas corpus petition in 1991, prior to the 1996 effective date of the Antiterrorism and Effective Death Penalty Act ("AEDPA"), the Sixth Circuit originally applied the pre-AEDPA standard of review to the district court's findings.[22] Under this standard, the court must presume state findings of fact to be correct unless rebutted by clear and convincing evidence and must review de novo findings of law or mixed questions of law and fact.[23] "Because a claim of ineffective assistance of counsel raises mixed questions of law and fact," the court reviewed the district court's findings de novo.[24]

B. Ineffective Assistance of Appellate Counsel

The Sixth Circuit stated that under its own jurisprudence in *Joshua v. DeWitt*,[25] "[a] defendant is entitled to the effective assistance of counsel in his first appeal of right."[26] The court stated that it should judge appellate counsel by the same *Strickland v. Washington*[27] standards with which it judges trial counsel: counsel were ineffective if their performance fell below an objective standard of reasonableness under the circumstances and if the deficient performance preju-

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19. *Id.* at 195 (citing Magana v. Hofbauer, 263 F.3d 542, 553 (6th Cir. 2001)).

20. *Id.*

21. *Id.*

22. *Mapes*, 171 F.3d at 413; *see* Antiterrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended at 28 U.S.C. §§ 2244–2264 (2000)) (amending the procedures for review of habeas corpus petitions in federal court).

23. *Mapes*, 171 F.3d at 413; *see* Richmond v. Bell, 131 F.3d 1150, 1153–54 (6th Cir. 1997) (clarifying pre-AEDPA standards of review).

24. *Mapes*, 388 F.3d at 190; *see* United States v. Jackson, 181 F.3d 740, 744 (6th Cir. 1999) (setting forth the circuit court's standard for reviewing district court findings).

25. 341 F.3d 430 (6th Cir. 2003).

26. *Mapes*, 388 F.3d at 191; *see* Joshua v. DeWitt, 341 F.3d 430, 441 (6th Cir. 2003) (holding that a defendant has a Sixth Amendment right to effective assistance of counsel on his or her first appeal of right).

27. 466 U.S. 668 (1984).

diced the defense.[28] The court further refined its inquiry into the effectiveness of appellate counsel by considering the issues counsel omitted, the procedural requirements governing appeals, and the competence and effort of appellate counsel.[29] Within the category concerning the issues omitted on appeal, the court considered if the issues were " 'significant and obvious,' " subject to contrary authority, "clearly stronger than those presented," and "dealt with in other assignments of error."[30] Concerning procedure, the court determined whether trial counsel objected to the issues and whether "the trial court's rulings [were] subject to deference on appeal."[31] The court also questioned the competence and actions of appellate counsel by investigating counsel's testimony in collateral appeals about their appeal strategy and justifications, "level of experience and expertise," discussion of the issues with the client, review of the facts of the case, and strategy in omitting the issues.[32]

1. The Eddings *Claim*

In considering the first substantive issue that Mapes claimed his appellate counsel omitted, the Sixth Circuit noted that his counsel did not raise an *Eddings v. Oklahoma*[33] claim that the trial court refused to allow the jury to consider relevant mitigating evidence in its sentencing decision.[34] During sentencing, the only mitigating evidence Mapes offered was "an unsworn statement that he was only 18 years old at the time of the New Jersey murder, that the [New Jersey] conviction was really for manslaughter," and that he was not the triggerman in the New Jersey crime.[35] The trial judge instructed the jury that they could not "consider mitigating evidence related to Mapes's prior murder conviction."[36] Although Mapes's trial counsel objected to the instruction, his appellate counsel did not raise an *Eddings* claim on appeal.[37]

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28. *Mapes*, 388 F.3d at 191; *see* Strickland v. Washington, 466 U.S. 668, 687 (1984) (setting the standard for a court's review of counsel's performance under an ineffective assistance of counsel claim).

29. *Mapes*, 388 F.3d at 191.

30. *Id.* (quoting *Mapes*, 171 F.3d at 427–28).

31. *Id.*

32. *Id.*

33. 455 U.S. 104 (1982).

34. *Mapes*, 388 F.3d at 191–92; *see* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (stating that "[t]he Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death").

35. *Mapes*, 388 F.3d at 189.

36. *Id.*

37. *Id.* at 189–90; *see Mapes*, 171 F.3d at 417–19 (detailing the consequences of the trial court's instruction and its probable violation of *Eddings*).

Ohio argued on appeal that Mapes's appellate counsel were not ineffective as to this issue because the claim was not "significant and obvious."[38] Rejecting this argument, the Sixth Circuit ruled that the *Eddings* claim was indeed significant and obvious because the judge's instruction was reversible error and the Supreme Court had decided *Eddings* a year before Mapes's trial.[39] The court also found that the *Eddings* claim was stronger than the claims appellate counsel had made on direct appeal because those claims focused on the guilt phase, "despite the overwhelming evidence of Mapes's guilt," and "were asserted in the face of established law to the contrary."[40] Because trial counsel had objected to the instruction at trial, Mapes's appellate counsel were put on notice of the error and could have had no reasonable strategy for excluding the claim, especially given the fact that the error was subject to review.[41] The court further noted that Mapes's appellate counsel had no experience in capital appeals and could not explain their appeal strategy.[42] The court concluded that counsel did not act reasonably and prejudiced Mapes's appeal "so as to render [it] unfair and the result unreliable," thus satisfying both prongs of the *Strickland* ineffectiveness test.[43]

2. *Other Ineffective Assistance of Counsel Claims*

Although the district court found appellate counsel ineffective on two other claims, the Sixth Circuit held that the *Eddings* claim was sufficient to demonstrate that "Mapes was denied the effective assistance of appellate counsel."[44] Consequently, it did not consider the district court's finding that Mapes's appellate counsel failed to raise a claim that the trial court erred in instructing "the jurors that they could not consider giving Mapes a life sentence unless they first unanimously rejected the death penalty."[45] The district court had also found that appellate counsel failed by omitting a claim that the jury verdict might not have been unanimous because a juror "gave an equivocal response during polling."[46] The Sixth Circuit expressed no further opinion about these claims.[47]

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38. *Mapes*, 388 F.3d at 192.

39. *Id.*

40. *Id.*

41. *Id.*

42. *Id.*

43. *Id.* at 193.

44. *Mapes*, 388 F.3d at 193.

45. *Id.* at 189–90; *see Mapes*, 171 F.3d at 416–17 (detailing the problems with the acquittal-first instruction).

46. *Mapes*, 388 F.3d at 190; *see Mapes*, 171 F.3d at 422–24 (exploring the issue prompted by juror Chatman's statement when asked if the verdict was hers that "[i]t's to me, it's the State's verdict").

47. *Mapes*, 388 F.3d at 193.

C. Remedy

The Sixth Circuit affirmed the district court's grant of a writ of habeas corpus conditioned upon Ohio's giving Mapes a new appeal within ninety days.[48] Mapes claimed that because the court found errors of constitutional significance in his sentencing proceeding, he deserved to have his sentence vacated and to be granted a new sentencing hearing.[49] Mapes also argued that Ohio law requires the imposition of a life sentence if the trial court erred in its instructions to the jury during the sentencing phase of a capital trial.[50] Mapes argued that the court should, in the interest of efficiency, cut out the superfluous judicial proceedings and require a new sentencing hearing.[51]

In response to Mapes's argument for relief, the Sixth Circuit clearly stated that it was making no actual ruling on the Eighth Amendment *Eddings* error at Mapes's sentencing.[52] The court explained that it could not rule on the Eighth Amendment issue in a federal habeas corpus proceeding because counsel had failed to raise the claim on direct appeal and thus had procedurally defaulted it.[53] The issue that it could decide was the Sixth Amendment ineffective assistance of counsel claim, and to do so, it did not need to determine if the underlying claim would have succeeded, only if there was a " 'reasonable probability' " that it would have succeeded.[54] The court stated that it was required under *United States v. Morrison*[55] to tailor the remedy for the Sixth Amendment violation to the injury it created.[56] Because Mapes's injury was a botched appeal, the court concluded, his remedy could only be a new appeal.[57] The Sixth Circuit did not foreclose the possibility that a future federal court might grant habeas corpus relief for the Eighth Amendment *Eddings* violation, but it chose to allow the Ohio courts to consider the issue first, citing the procedural bar doctrine.[58]

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48. *Id.* at 189, 193.

49. *Id.* at 193.

50. *Id.* at 194.

51. *Id.* at 193–95.

52. *Id.* at 194.

53. *Mapes*, 388 F.3d at 194.

54. *Id.* (quoting Smith v. Robbins, 538 U.S. 259, 285 (2000)).

55. 449 U.S. 361 (1981).

56. *Mapes*, 388 F.3d at 194; *see* United States v. Morrison, 449 U.S. 361, 364 (1981) (requiring that a court addressing a Sixth Amendment violation tailor the remedy to the injury suffered).

57. *Mapes*, 388 F.3d at 194.

58. *Id.* at 195.

IV. Application in Virginia

A. Procedural Bar

Mapes v. Tate presents in bold detail the difficulties appellate and habeas counsel can face in procedural bar states. In Virginia, appellate counsel may not raise a claim on appeal unless trial counsel immediately objected to it when it occurred in trial.[59] Such a rule creates a problem for appellate counsel, for they cannot raise potentially successful claims if trial counsel were not diligent and persistent in objecting to potential errors during trial. If counsel's failure to object does not rise to the level of *Strickland* ineffectiveness, then the defendant loses claims for relief and will also not be able to achieve relief on a *Strickland* claim.

Such troubles multiply for habeas counsel in both pre- and post-AEDPA cases because both federal habeas corpus regimes prevent the federal courts from granting relief if the issue was not raised before the state courts and if the state courts rejected the claim on an "independent and adequate state procedural rule."[60] Consequently, trial or appellate counsel who fail to raise timely objections also forfeit most chances for relief for their clients in habeas proceedings on any constitutional claim besides a Sixth Amendment claim of ineffective assistance. As often happens in Virginia habeas cases, the federal court will find that earlier counsel's deficient performance does not rise to the level of constitutional ineffectiveness, and the client will thus lose potentially successful claims. *Mapes* demonstrates the complications that arise even when the postconviction court finds ineffective assistance: Mapes must go back to state court to plead his seemingly valid *Eddings* claim, but he risks the Ohio courts' rejection of that claim.[61] If Ohio does not grant him relief, then he must return to the federal district court a third time, more than twenty years after his original trial. Mapes's situation would be even more precarious if his were a post-AEDPA case because Ohio's potential rejection of his Eighth Amendment *Eddings* claim could only garner him relief if the federal court deemed it "contrary to, or . . . an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States," a difficult standard to meet.[62]

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59. *See* VA. SUP. CT. R. 5:25 (stating that "[e]rror will not be sustained to any ruling of the trial court . . . before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling").

60. Coleman v. Thompson, 501 U.S. 722, 750 (1991); *see* 28 U.S.C. § 2254(b)(1)(A) (2000) (stating that a petitioner will not be granted habeas corpus relief if he or she has not "exhausted the remedies available in the courts of the State"; part of AEDPA).

61. *Mapes*, 388 F.3d at 195.

62. 28 U.S.C. § 2254(d)(1); *see, e.g.*, McHone v. Polk, 392 F.3d 691, 696 (4th Cir. 2004) (denying habeas corpus relief because the Supreme Court of North Carolina's application of *Brady v. Maryland* was neither "contrary to" nor "an unreasonable application of" federal law); Wilson v. Ozmint, 352 F.3d 847, 860 (4th Cir. 2003) (vacating district court's grant of relief because the lower

B. *Mitigation of Priors*

More importantly, Virginia practitioners should take note of the importance of the substantive issue in this case: the *Eddings* claim that the defendant is allowed to offer mitigation evidence on " 'any aspect of [his] character or record.' "[63] Evidence of mitigating factors in prior criminal and unadjudicated acts of the defendant surely will be relevant to the defendant's "character or record," and counsel must be sure to include them in a presentation of mitigation evidence. The Sixth Circuit emphasized that the right to mitigate prior offenses was established law even in 1983 and that the failure of Mapes's trial judge to allow him to offer such evidence in mitigation was both "significant and obvious."[64] That the court found appellate counsel's failure to raise the claim on appeal egregious enough to constitute a viable *Strickland* claim emphasizes the importance of counsel's duty to ensure that the jury receives all possible mitigating evidence.[65]

Capital defense counsel should make sure to conduct a thorough investigation to uncover all possible mitigating factors relevant to the client's prior convictions. In Virginia, counsel should also pay particular attention to mitigation in the context of unadjudicated offenses. Such an investigation is crucial, especially when the Commonwealth is relying on those prior offenses to make its case for death under the future dangerousness aggravator.[66]

V. *Conclusion*

Mapes v. Tate illustrates the importance of investigating and presenting a complete case in mitigation at the sentencing phase of any capital trial. The United States Supreme Court's 1982 ruling in *Eddings* clearly requires trial courts

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court did not properly apply the AEDPA standard to the Supreme Court of South Carolina's evaluation of Wilson's claim that his guilty plea was not knowing, intelligent, and voluntary); Reid v. True, 349 F.3d 788, 802 (4th Cir. 2003) (holding that the Supreme Court of Virginia's application of *Strickland* to Reid's IAC claim was not unreasonable); Kasi v. Angelone, 300 F.3d 487, 497 (4th Cir. 2002) (denying Kasi's appeal because the Supreme Court of Virginia's treatment of his claims was neither "contrary to" nor "an unreasonable application of" federal law); Beck v. Angelone, 261 F.3d 377, 391–92 (4th Cir. 2001) (denying Beck a certificate of appealability because reasonable jurists could not disagree that the Supreme Court of Virginia unreasonably applied federal law); Mickens v. Taylor, 240 F.3d 348, 363 (4th Cir. 2001) (holding that the Supreme Court of Virginia's application of *Strickland* was neither "contrary to" nor "an unreasonable application of" federal law).

63. *Eddings*, 455 U.S. at 110 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978)).

64. *Mapes*, 388 F.3d at 192.

65. *Id.* at 193.

66. *See* VA. CODE ANN. § 19.2-264.2 (Michie 2004) (stating that "a sentence of death shall not be imposed unless . . . after consideration of the past criminal record of convictions of the defendant, [the jury or court finds] that there is a probability that the defendant would commit criminal acts of violence that would constitute a continuing serious threat to society").

to allow juries to consider all relevant mitigating evidence, which includes any evidence that may mitigate prior offenses. This case also presents the conundrum of the ineffective assistance of counsel claim. The Sixth Circuit granted Mapes relief, but only conditioned upon Ohio's giving him a new appeal. Although Mapes had a clear and strong constitutional issue that would generally require resentencing—and in Ohio that resentencing would mean life—Mapes must wait and give his new counsel a chance to be effective on appeal. In order to give the State a chance to correct its own mistakes, the Sixth Circuit must extend the appeals process through at least one more proceeding. Virginia practitioners should do their best to head off these problems with complete mitigation investigations and timely objections at trial to any violation of the right to have all mitigating factors considered at sentencing.

Tamara L. Graham