Capital Defense Journal

Volume 3 | Issue 1 Article 13

Fall 11-1-1990

JUSTUS v. MURRAY 897 F.2d 709 (1990)

pronounced him able to understand the nature of his choice. The fact that Simmons was determined sane after thorough evaluation and that he maintained his desire for execution made it impossible, in the Court's view, for Whitmore to show the necessary incapacity. The Court decided Whitmore was not truly dedicated to Simmons' cause because his attempt to join as next friend was based primarily on his own self-interest in delaying the execution of his sentence, and not out of a sincere concern for Simmons as an individual.

ANALYSIS/APPLICATION IN VIRGINIA

A possible reason for the Court's strict holding in this case is to avoid deciding whether the Constituition requires mandatory review of capital cases. If Whitmore could have entered Simmons's case this would have been the most obvious argument for him to make. The *Whitmore* court specifically refused to rule on the matter, and the issue is still open. *Id.* at 1723.

Virginia, unlike Arkansas, has a statutory provision requiring the state supreme court to review all capital cases and sentences. Va. Code Ann. § 17-110.1 (1990). Significantly, the statutory language is "review", as opposed to "appeal". This has been interpreted to require review in all cases. *Briley v. Bass*, 854 F. Supp. 807 (E.D. Va. 1984), *construing* Va. Code Ann. § 17-110.1 (1990).

It is possible that a question involving the intervention of a next friend could arise in a Virginia capital case context. Virginia common law on next friend (also called *prochein ami*) is more liberal than the standard announced by the U.S. Supreme Court. Virginia does not require the next friend to obtain the consent of the person he will represent. See *Kirby v. Gilliam*, 28 S.E.2d 40 (Va. 1943); Va. Code Ann. § 8.01-8 (1984) In Virginia, there are also no formal requirements needed to gain admission to the court as next friend. See *Jackson v. Counts*, 54 S.E. 870 (Va. 1906). Presumably, it would be easier to bring a next friend in for a Virginia capital defendant than it would be in Arkansas. The code requires only that the next friend diligently press the cause once he takes it, and makes no threshold demands on who can enter as next friend on the litigant's behalf. Va. Code Ann. § 8.01-8 (1990). For these reasons it is unlikely that a case like *Whitmore* would arise in Virginia.

The dissent in *Whitmore* makes an interesting point in remarking that under this holding there is no one who can enter under a general concern for justice unless the defendant himself chooses to do so. The interested party lacks standing by the Article III constraints. The only alternative has been the traditional common law device of next friend. Because the court intimates that only a near relative or acquaintance can meet the strict requirements the majority imposes, a capital defendant can force the state into executing an unlawful sentence, simply through a waiver of appeal. In the opinion of the dissent, this clearly violates the meaning of due process.

As a final point of analysis, the court mentioned in dicta that despite Simmons's explicit desire to waive appeal and face execution, his attorney still appeared before the court and outlined the avenues and issues that were open to appeal. It might be argued that an attorney must research and argue the merits of the case for the record, notwithstanding the defendant's desire to be executed. Attorneys would also do well to consider other resources to help persuade defendants to exercise their rights guaranteed by law. A defendant in a recent capital case, Joseph Savino, was initially willing to be executed. See, *Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276 (1990), and case summary of *Savino v. Commonwealth, Capital Defense Digest,* this issue. His attorney sought help from others, and ultimately Savino changed his mind and went forward with his appeals process. Clients who volunteer for execution may be an increasing problem for defense counsel. Of one hundred forty people executed in the United States since reinstatement of the death penalty in 1976, twenty-one have been volunteers. Nine of those twenty-one, however, have been executed in the last sixteen months. Death Row, U.S.A., N.A.A.C.P. Legal Defense and Education Fund, Inc. (Sept. 21, 1990). Arguing the case over defendant's wishes will at least preserve a record for a reasonable, albeit belated defense, if the defendant has a change of heart. Counsel representing death sentenced clients who wish to volunteer for execution may contact Virginia Capital Case Clearinghouse for reference to persons skilled in counseling such prisoners.

Summary and analysis by:
Peter T. Hansen

JUSTUS v. MURRAY

897 F.2d 709 (1990)
United States Court of Appeals, Fourth Circuit

FACTS

A finding of error in jury selection by the Virginia Supreme Court overturned the first conviction and death sentence of Buddy Earl Justus. *Justus v. Commonwealth*, 220 Va. 971, 266 S.E.2d 87 (1980). On remand, Justus was again found guilty of capital murder during the commission of rape under Code § 18.2-31(e), now § 18.2-31(5), and sentenced to death. This second conviction and sentence was upheld on appeal. *Justus v. Commonwealth*, 222 Va. 667, 283 S.E.2d 905 (1981), *cert. denied*, 455 U.S. 983 (1982).

Failing in state habeas proceedings, Justus sought federal habeas relief. His first petition was dismissed without prejudice because it contained unexhausted claims. He then raised these claims back to the Virginia Supreme Court but was denied on the grounds that the claims were procedurally defaulted.

Justus returned to U.S. District Court and refiled for habeas relief. This petition was also dismissed. He then brought this appeal to the U.S. Circuit Court of Appeals for the Fourth Circuit. The dismissal was affirmed.

HOLDING

By reference to the findings of the federal magistrate at U.S. District Court, the Circuit Court of Appeals affirmed the denial on the merits of two claims that related to the death sentence: ineffective assistance of counsel at the penalty trial and denial of a court appointed psychiatrist.

The remainder of Justus' claims were found defaulted under state procedural requirements. Consequently the court refused to address them.

ANALYSIS/APPLICATION IN VIRGINIA

Justus raised seven assignments of error to the Court of Appeals for the Fourth Circuit. These claims may be put into three categories. The first category, as noted, were two of appellant's claims turned down on the merits throughout the state habeas process and likewise on federal review by the U.S. District Court. The Circuit Court of Appeals affirmed the disposition of these claims.

The second category consists of appellant's claim involving the sufficiency of the evidence supporting his death sentence. This matter was not raised on direct appeal after trial. In state habeas, the Virginia Circuit Court deemed the claim procedurally defaulted under *Slayton v. Parrigan*, 215 Va. 27, 205 S.E.2d 680 (1978), *cert. denied*, 419 U.S. 1108 (1979), which held that a petition for a writ of habeas corpus may not act as a substitute for a proper appeal based upon an objection not made at trial.

In federal habeas, Justus did not offer cause to excuse the default. This prompted a recommendation of dismissal of the claim under *Wainwright v. Sykes*, 433 U.S. 72 (1977), which requires both a showing of cause for not complying with state procedure and a showing of prejudice to the defendant before a claim will be addressed by the federal court. One of the excuses for failing to follow state procedure is ineffective assistance of counsel (IAC). Justus did not claim ineffective assistance of counsel as cause for the default until after the magistrate's recommendation of dismissal had been adopted by the U.S. District Court. In the instant case, the 4th Circuit, citing *Murray v. Carrier*, 477 U.S. 478, 488-89 (1986), upheld the procedural bar because the "IAC as cause" claim had neither been raised in the federal petition nor presented to and exhausted in the state courts.

The third category consists of the last four claims. These claims were also not raised on direct appeal and were lost by another variation of the *Murray* rule. However, unlike his previous claim at state habeas, Justus asserted ineffective assistance of counsel as cause for the default. The state habeas court rejected the IAC claims on the merits and as a result the underlying substantive claims fell with them.

When Justus appealed the state habeas decision to the Virginia Supreme Court, however, he did not separately assign error to the denial of his "IAC as cause" claims. He did raise the substantive claims themselves, probably believing that the IAC claims would be carried along. The Supreme Court of Virginia affirmed the holding that the substantive claims were defaulted under *Slayton*.

At federal habeas, Justus again raised his four procedurally-defaulted substantive claims and the procedurally-defaulted IAC claims as cause. The Court of Appeals for the Fourth Circuit held that the underlying substantive claims could not be considered because the IAC claims that might have kept them alive were also procedurally defaulted. It termed this failure "double default." *Justus* 897 F.2d at 712.

The hair splitting analysis of this decision, based upon a process that is already very complicated, serves to reinforce the necessity for preserving appealable issues with the utmost care. Several valuable lessons may be extracted. First, "ineffective assistance of counsel claims offered as cause to excuse procedural defaults of other constitutional claims are *separate* and *distinct* from those other constitutional claims." *Kimmelman v. Morrison*, 477 U.S. 365 (1986)(emphasis added). An IAC claim and any underlying substantive claims are *not* inextricably linked. Again, it is likely that counsel assumed that appeal of the state habeas decision on the substantive issues would automatically carry the IAC claims offered as cause for default. This is not so. IAC claims used as "cause" under *Sykes* to cure a default must be separately appealed or are *themselves* defaulted.

Second, there is a range of inattention by counsel which can forfeit constitutional claims, yet not constitute ineffective assistance of counsel. *Sykes*, recall, permits reviving an otherwise defaulted claim with a showing of cause and prejudice. Under *Sykes*, the failure of counsel to comply with state procedure can supply the "cause" prong, but only if the failure can be characterized as so egregious as to fall below the minimal constitutional standard described in *Strickland v. Washington*, 466 U.S. 668, 687-88 (1984). Both *Sykes* and *Strickland* also require a further showing of prejudice.

Because the *Strickland* standard permits a great deal of bad lawyering without terming it constitutionally deficient, (*See* Marlowe, *Ineffective Assistance of Counsel,* Capital Defense Digest, this issue), there exists a *Sykes-Strickland* "gap." That is, an attorney may cause a possibly life-saving claim to be barred from federal review under *Sykes* and still not be ineffective under *Strickland*.

Sykes and *Strickland* are not new cases. One can argue that the bar should realize the pitfalls of default by now such that future failure by counsel to comply with state procedural requirements is IAC under *Strickland* and "cause" under *Sykes*. The procedural default requirements in Virginia should be well known to counsel from experience in non-capital cases. More importantly, any casual reading of Virginia Supreme Court opinions in *capital* cases will reveal them to be replete with findings that claims have been defaulted. (*See* Powley, *Perfecting the Record of a Capital Case in Virginia,* Capital Defense Digest, this issue.) Attorneys representing death-sentenced prisoners at state or federal habeas may wish to urge directly that the gap be closed.

Summary and analysis by:
Christopher J. Lonsbury

SAVINO v. COMMONWEALTH

239 Va. 534, 391 S.E.2d 276 (1990)
Supreme Court of Virginia

FACTS

On April 24, 1989, Joseph John Savino pled guilty to a capital murder indictment charging that he did "willfully, deliberately, feloniously and with premeditation, kill and murder Thos 'Thomas' McWaters, Jr. in the commission of robbery while armed with a deadly weapon," in violation of Va. Code § 18.2-31(4). Savino also pled guilty to the commission of the underlying robbery. By entering pleas of guilty, Savino waived his right to a jury trial and the Commonwealth presented its evidence in support of the indictment. Finding Savino guilty of both capital murder and robbery, the court proceeded to the sentencing phase of Virginia's bifurcated trial procedure. Va. Code Ann. § 19.2-264.4 (1990).

Pursuant to Savino's request, the trial court appointed a qualified mental health expert, Dr. Lisa Hovermale, to assist Savino in the preparation and presentation of his defense. Savino intended to present Hovermale's testimony in support of his theory of mitigation. Adhering to the rules prescribed by statute, he gave notice of his intention to the Commonwealth Attorney. Va. Code Ann. § 19.2-264.3:1(E) (1990). In response, the Commonwealth motioned the Court, pursuant to 3:1(F) to compel Savino to submit to an evaluation by its own expert "concerning the existence or absence of mitigating circumstances" relating to Savino's mental condition at the time of the murder. *Savino v. Commonwealth*, 239 Va. 534, 391 S.E.2d 276, 280-81 (1990). The court appointed Dr. Arthur Centor, a clinical psychologist, to examine and interview Savino.

At the sentencing hearing, the Commonwealth presented Dr. Centor's testimony as aggravating evidence. During his testimony, Centor opined that Savino showed signs of future dangerousness. Following the prosecution's use of Centor's testimony, Savino offered Hovermale's testimony to support his theory of mitigation. Savino objected to Centor's opinions regarding Savino's future dangerousness as "unreliable." Additionally, Savino objected to the Commonwealth's