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presumption of truth in a judge's § 2245 sentencing certification, but also outlines the grounds upon which the presumption may be rebutted. Neither statute dictates that subjective conclusions regarding the judge's opinion about the relative weight of evidence during sentencing hearing certifications are above review in the event of constitutional challenge. The statutes apply to findings of historical fact.

The court also said in dicta that a violation of *Ake v. Oklahoma*, 470 U.S. 68 (1985)(holding due process requires defendant have access to a psychiatric expert where sanity is at issue) was harmless error under *Williams v. New York*, 337 U.S. 241 (1947). *Bassette*, 915 F.2d at 939. Bassette contended he needed the expert to refute psychiatric evidence based on that expert's comments contained in a presentence report. *Williams* held that due process of the fourteenth amendment does not require a defendant have the opportunity to confront and cross examine witnesses who testify about his prior criminal activity during the sentencing phase of a capital case. Although not overruled, *Williams* does not accurately state the current law in capital cases, and the more recent case wherein the court mentions that *Williams* is cited with approval (*U.S. v. Grayson*, 438 U.S. 41 (1978)) was not a capital case. *Gardner v. Florida*, 430 U.S. 349 (1977), on the other hand, holds that the eighth and fourteenth amendments require the right to reliable procedures at sentencing phases of capital trials. This entails the right of the defendant to know and to have an opportunity to rebut evidence in aggravation of the crime. *Id.* at 361-62. Clearly, modern legal principles demand that a capital defendant has the right to be aware of and rebut evidence considered as basis for a death sentence.

The court qualified its analysis of Bassette's *Ake* issue by holding that *Ake* was in any event unavailable to him because of the "new rule" doctrine of *Teague v. Lane*, 489 U.S. 288 (1989). *Teague* holds that if a requirement not affecting elements of fundamental justice is placed on states by the United States Supreme Court after the final disposition of a defendant's state court case on direct appeal, it is a "new rule" for that defendant and its implications are not open for use in his case. Bassette's direct appeal became final before *Ake* was decided. This is perhaps useful as an example of how important it is to raise all issues possible at the state court trial and appellate levels. *See* Hobart, *State Habeas in Virginia, A Critical Transition*, Capital Defense Digest, Vol. 3, No. 1, p.23 (1990). Notwithstanding the protection offered by the *Harris* rule, if the record does not speak for itself when the case enters the federal system, many vital issues may be waived permanently. *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990).

Summary and analysis by:
Peter T. Hansen

CLOZZA v. MURRAY

913 F.2d 1092 (1990)
United States Court of Appeals, Fourth Circuit

FACTS

On January 14, 1983, the Virginia Beach Police arrested Albert J. Clozza for sexual offenses and the murder of thirteen year old Patty Bolton. While initially denying that he committed the crimes, Clozza eventually confessed to all of the crimes except rape, an essential element of the capital murder charge. Later, in an interview he initiated, Clozza admitted to raping the victim. Clozza also stated that he had consumed approximately sixteen beers during the day of the offense. In response to police interrogation, Clozza suggested that cruelty may have been his motivation for the physical and sexual assaults. *Clozza v. Murray*, 913 F.2d 1092, 1096 (1990).

The jury convicted Clozza of capital murder, aggravated sexual battery, sexual penetration with an inanimate object, abduction with intent to defile, and two counts of forcible sodomy. Based upon a finding of both statutory aggravating factors, the jury sentenced Clozza to death for capital murder committed during or after rape. *Id.*

After exhausting his direct appeals and state habeas claims, Clozza filed petition for federal habeas relief. *Id.* at 1096. The District Court denied relief. *Id.* at 1092. He appealed to the Fourth Circuit, assigning two grounds of error. First, Clozza claimed that he had been denied effective assistance of counsel during the trial and sentencing phases of the capital murder trial. *Id.* at 1097. Second, he claimed that the Virginia capital sentencing procedure was unconstitutional under the fifth, eighth and fourteenth amendments of the United States Constitution. *Id.*

I. Ineffective Assistance of Counsel

A. Trial Phase

Clozza's first claim of ineffective assistance of counsel revolved around two concerns: Clozza claimed that his attorney's statements prejudiced his case and conceded his guilt, and that his attorney failed to adequately prepare him for cross examination.

During voir dire, but while outside the presence of any jurors, Clozza's attorney stated that he did not want to participate in the trial and did so only because it was his duty and his job. *Id.* at 1098. He also stated that "some of the ACLU lawyers" would have to decide if he had gone to far with his instincts in defending Clozza. *Id.* In his opening statements he stated it was difficult getting to like Clozza enough to defend him adequately. *Id.* Further, he stated, "[i]f it is my kid, a lawyer training in law school, it wouldn't make any difference, I would probably want to kill him." *Id.* During his direct examination of Clozza, the attorney asked if he knew that it would take a miracle such as would have saved the victim to save him. *Id.* In addition to these statements, the attorney also made the remark during the trial that it was "really weird" celebrating Halloween while representing Clozza. *Id.* During closing arguments, the attorney said that he did not want to put his client back on the street, and that if Clozza's suicide attempt had been successful, it would not have been the greatest tragedy. *Id.*

Clozza argued that these statements not only prejudiced his case but also conceded his guilt, thereby establishing a foundation to overturn his capital murder conviction due to ineffective assistance of counsel. His attorney, however, defended the remarks as an integral part of his trial strategy to build credibility with the jurors.

Additionally, Clozza argued that his attorney was ineffective because he failed to prepare Clozza for cross examination, allegedly causing the contradictory intoxication defense. Contrary to his confession statements, Clozza testified during cross examination that he was sober while abducting Patty Bolton. On the account of this testimony, Clozza's attorney had to persuade the jury to believe Clozza's out of court confession statement regarding his intoxication, while convincing them to disregard his in court statement that he was sober. Further, the attorney also had to convince the jury that Clozza's in court statement, that he didn't know if he raped the victim, was true and that Clozza's out of court statement that he had raped her should be disregarded.

B. Sentencing Phase

Clozza argued that his attorney failed to provide effective assistance of counsel by not adequately preparing for the sentencing stage of the bifurcated trial. *Id.* at 1101. He also made specific claims including, that his attorney failed to recall a physician who had testified about intoxication during the guilt phase, failed to call Clozza's parents to testify, and failed to submit jury instructions. *Id.* at 1102, 1103.

II. Virginia Capital Sentencing Procedures

Clozza advanced several theories to support his claim that the Virginia capital sentencing procedure is unconstitutional. First, he claimed that the procedure is unconstitutional on its face and as applied under the fifth, eighth, and fourteenth amendments. *Id.* at 1104. Second, Clozza made specific challenges to procedures employed in the Virginia death penalty statute, including: the vileness factor, the verdict form, the jury instructions, and the Virginia Supreme Court proportionality review. *Id.*

HOLDING

The Fourth Circuit affirmed the District Court's denial of relief. *Id.* at 1092. It reviewed Clozza's ineffective assistance of counsel claim using the two part test announced in *Strickland v. Washington*, 466 U.S. 668 (1984) (establishing the governing standard for review of ineffective assistance of counsel claims). *Clozza*, 913 F.2d at 1097. The *Strickland* test not only evaluates the attorney's performance but also determines whether his actions had a reasonable probability of affecting the outcome of the case. *Strickland*, 466 U.S. at 687; *see also*, Marlowe, *Ineffective Assistance of Counsel*, Capital Defense Digest, Vol 3, No. 1, p. 29 (1990).

The Fourth Circuit determined that the attorney's performance and trial conduct was a reasonable tactical strategy to build credibility with the jury considering the contradictory defense theories available. *Clozza*, 913 F.2d at 1100. The court further held that even if Clozza's attorney had failed to provide reasonable assistance, there was no reasonable probability that the outcome of the proceedings would have been different. *Id.* at 1101. Thus, the Court found that Clozza had not satisfied either prong of the *Strickland* test; and therefore, he had not been denied ineffective assistance of counsel. *Id.*

In response to the constitutional challenges to the Virginia sentencing procedure, the Fourth Circuit rejected Clozza's general and specific claims. Because Clozza failed to raise his constitutional challenges during the earlier appeals and because he failed to establish a sufficiently recognized legal excuse, the Fourth Circuit held that Clozza was barred from raising his constitutional challenges to the Virginia capital sentencing procedure. *Id.* at 1104. Noting the gravity of the case, the Fourth Circuit addressed Clozza's specific constitutional challenges but dismissed them in summary fashion.

APPLICATION/ANALYSIS IN VIRGINIA

I. Ineffective Assistance of Counsel Claim

The Fourth Circuit noted that all claims of ineffective assistance of counsel begin with the two part *Strickland* test. *Id.* at 1097. It stated that under *Strickland*, a court evaluates counsel's performance by the "objective standard of 'reasonably effective assistance' under prevailing professional norms." *Id.* In order to protect against the inherent difficulties of assessing counsel's conduct, this prong of the analysis includes a procedural presumption that the counsel's conduct falls within the range of reasonable professional assistance. *Id.* If the counsel's performance is found to fall below the professional norms of reasonable assistance, the court continues to the second prong of the test. The second prong of the *Strickland* test requires "[t]he defendant to show that there is a reasonable probability that, but for counsel's unprofessional errors, the results of the proceeding would have been different." *Id.* at 1097, 1098. This second prong essentially asks whether there is a reasonable probability sufficient to undermine confidence in the outcome of the case. *Id.* at 1098; *but see, Strickland v. Washington*, 466 U.S. 668, 697 (1984)(noting that a court is not required to address both prongs of the test if the defendant fails to prove either prong: "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice . . . that course should be followed.").

A. The Trial Phase

Clozza claimed that his attorney made remarks which prejudiced his case and conceded guilt, and that his attorney failed to adequately prepare him for cross examination. *Clozza*, 913 F.2d at 1098.

Foremost, the Fourth Circuit noted that such determinations must be viewed with an eye toward the particular facts of a case and the strategy employed by counsel. *Id.* According to the court, Clozza's attorney was faced with only two real defenses to the capital murder charge: the intoxication defense of diminished capacity and the insufficiency of evidence to establish rape beyond a reasonable doubt. These two defenses were complicated by the contradicting evidence.

The Fourth Circuit then addressed Clozza's claim that his attorney failed to provide effective assistance of counsel by conceding his guilt. While stating that unwarranted concessions of guilt have been sufficient to establish ineffective assistance claims, it found Clozza's claim distinguishable because he had confessed to the crimes. *Id.* at 1099 (noting that in previous successful ineffective assistance of counsel challenges, the attorney conceded guilt when the defendant had pleaded not guilty and denied committing the crimes). The court also highlighted the distinction between statements which are tactical retreats and statements which are a complete surrender. *Id.* It stated that since Clozza had already confessed to the offenses, nothing short of complete concession of the defendant's guilt would violate *Strickland. Id.* The court attributed the attorney's statements to trial strategy and could not, in keeping with *Strickland*, second guess counsel's tactical decisions. *Id.*

The Fourth Circuit also found that the attorney's failure to prepare Clozza for cross examination was not so egregious as to establish an ineffective assistance of counsel claim. *Id.* at 1101. Although Clozza's attorney stated that he did not normally prepare his clients for cross examination because a witness who is not lying will not be tripped up, the Fourth Circuit nonetheless observed that Clozza had maintained for nine months that he was intoxicated during his abduction of Bolton. Even though this failure to prepare Clozza for cross examination was not found to violate the *Strickland* standard, nothing in the court's opinion should be construed as endorsing the practice of not preparing clients for cross examination. Many factors other than untruthfulness can detrimentally affect a witness who has not been prepared for cross examination.

In this particular case, the Fourth Circuit stated that reviewing the state habeas court's finding of reasonable professional assistance involved mixed questions of law and fact; and for this reason, the first prong of the *Strickland* test was not subject to the ordinary procedural presumption in favor of state findings of fact as required under 28 U.S.C. § 2254(d). *Id.* However, even without the procedural presumption, the Fourth found that the attorney argued the contradictory defenses to best of his ability, and that looking at the picture as a whole, the attorney's performance was not ineffective. *Id.*

The Fourth Circuit further agreed with the state habeas court's findings that even if Clozza's attorney had failed to provide reasonable assistance that the attorney's actions did not have a reasonable probability of affecting the outcome of the case. *Id.* at 1101. Because Clozza's voluntarily confessed to all of the crimes except capital

murder and because of his testimony about intoxication and rape contradicted his confession statements, the Fourth Circuit could not conclude that the outcome of the proceedings would have been different. *Id.*

B. The Sentencing Phase

Using the *Strickland* test, the Fourth Circuit also rejected Clozza's claims that his attorney failed to provide effective assistance of counsel during the sentencing phase of the trial. *Id.* at 1102. These challenges alleged that Clozza's attorney generally failed to prepare for the sentencing phase, and specifically failed to recall the physician and Clozza's parents to testify and to submit jury instructions.

Regarding the general claim, the Fourth Circuit found that counsel had adequately prepared for the second phase of the bifurcated trial. *Id.* Even though this was the attorney's first capital case, the court pointed out that he was an experienced criminal defense attorney, that he had researched the Commonwealth's theories for prosecution, had studied the statutes and procedures, and had Clozza examined by a psychiatrist to discovery possible defenses theories. *Id.*

Regarding the specific claims, the court found that the attorney's explanations justified his decision not to call the physician or Clozza's parents to testify during the sentencing stage. *Id.* at 1102, 1103. In response to Clozza's claim that his attorney was ineffective for failing to submit jury instructions, the court noted that there is no constitutional duty that a state model instructions employ specific standards for instructing juries in the consideration of aggravating and mitigating factors. *Id.* at 1103. Because the Virginia model jury instructions informed the jury that they were entitled to consider all of the evidence presented, the court found "that the attorney was not ineffective for failing to offer further instructions with reference to mitigation of the sentence." *Id.*

The Virginia Supreme Court has also held that the Virginia jury instructions failure to instruct the jury about the statutory mitigating factors is not unconstitutional. *Clark v. Commonwealth*, 220 Va. 201, 212, 257 S.E.2d 784, 791 (1979). Because of this holding, it is important that jury instructions are submitted which highlight matters not contained in the Virginia model instructions. These instructions should include the definition of mitigation and the jury's right to vote for a sentence of life even if both aggravating factors have been found. It is also a useful strategy to reinforce these considerations during closing arguments of the penalty trial.

In rejecting Clozza's ineffective assistance of counsel claim at the sentencing phase, the court also pointed out that all mitigation evidence available had been presented during the guilt phase. However, because so much more evidence is relevant at the penalty phase of a capital murder trial, it is difficult to imagine that all possible mitigation evidence had been presented during the guilt phase of the trial. *See Lockett v. Ohio*, 438 U.S. 586 (1978)(any aspect of the 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 is relevant mitigation evidence that the jury is entitled to consider when determining the appropriate sentence). Even though some of the mitigating evidence may have been presented during the guilt phase, a theory of mitigation should always be supported during the sentencing stage with additional evidence and appropriate witness testimony.

II. Virginia Capital Sentencing Procedure

Clozza's last claim questioned the constitutionality of Virginia's capital sentencing procedure. The Fourth Circuit agreed with the state habeas court's finding that the claim was procedurally barred because it had not been brought up at trial or on direct appeal. *Id.* at 1104. Procedural defaults have been excused if there was (1) an objective factor external to the defense which impeded the defendant's attorney from complying with the state procedural rules; (2) a novel claim which has not been addressed by the courts; or (3) ineffective assistance of counsel caused the default. *Id.*

The court did not find any external factor or novel claim excusing the procedural default. When considering the third possible excuse, the court noted that allegations of general ineffective assistance of counsel will not always provide a basis to overturn specific claims of ineffective assistance. *Id.* Here, it pointed out that even if the attorney had been ineffective in a earlier phase of the trial, which the court did not find, it would not necessarily mean that the attorney was ineffective because of a failure to raise a claim on appeal. *Id.* Essentially, general allegations do not necessarily cover specific claims.

It should be noted that when an attorney fails to raise claims at trial or on appeal, the resulting procedural bar does not necessarily establish an ineffective assistance of counsel claim. *See Wainwright v. Sykes*, 433 U.S. 72 (1977)(denial of federal review of substantive and ineffective assistance of counsel claims procedurally barred on state grounds, unless the petitioner shows both "cause" excusing the default, and "prejudice" from lack of federal review); *see also, Strickland* (setting forth the standard for reviewing ineffective assistance of counsel claims).

Even though finding that Clozza's constitutional challenges were procedurally barred, the Fourth Circuit did address the merits of some of the claims. Particularly, Clozza's claims challenging the vileness factor as vague, the verdict form as depriving him of a unanimous verdict on either of the aggravating factors, the court's failure to instruct the jury on statutory mitigating factors, and the Virginia Supreme Court proportionality review. *Id.* After highlighting the merits of these claims, the Fourth Circuit dismissed each of these in a summary fashion.

The Fourth Circuit's analysis of the ineffective assistance of counsel claim displays the judicial deference and responsibility granted to capital defense attorneys. Even if the judicial standards do not require greater preparation, ethical responsibilities would certainly require diligence and professional representation on behalf of one who stands to lose his life. As evident through the rejection of the ineffective assistance of counsel claim and the constitutional challenges, this case, like many before, places a greater emphasis on the events at the trial level with limited opportunities to correct errors on appeal.

Summary and analysis by:
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