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FITZGERALD v. THOMPSON 943 F.2d 463 (1991)

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B. Witherspoon/Witt Standard

The standard for questioning members of the venire with regard to their opinions of the imposition of the death penalty at the time of Stamper's trial was set forth in *Witherspoon v. Illinois*, 391 U.S. 510 (1968). *Witherspoon* stands for the proposition that a prospective juror cannot be excused from jury service on the basis of her scruples against imposition of the death penalty unless (1) she would automatically vote against death without regard to the evidence, or (2) her attitude would prevent the making of an impartial decision as to the defendant's guilt. That standard was subsequently modified in *Wainwright v. Witt*, 469 U.S. 412 (1985). *Witt* allowed exclusion of prospective jurors when their beliefs regarding capital punishment, either way, would substantially impair their ability to follow their instructions and render a fair and impartial verdict.

The lower standard should disqualify a greater number of jurors with reservations about the death penalty. It should also make it easier for defense attorneys to exclude potential jurors on the basis of their pro-death inclinations. Even under *Witherspoon*, however, jurors who are irrevocably pro-death are not qualified to sit. The Virginia Supreme Court has recognized that "the process of selection of an impartial jury permits elimination for cause of those veniremen who are biased in favor of the death penalty under all circumstances as well as those who are biased against its imposition under all circumstances." *Patterson v. Commonwealth*, 222 Va. 653, 659, 283 S.E.2d 212, 216 (1981). Stamper was unsuccessful in urging that his counsel was ineffective for failure to explore this possibility.

It is important to remember, though, that the "reverse *Witt*" inquiry to identify jurors who are substantially impaired by their views from considering evidence supporting a life sentence should be undertaken as a part of every capital jury selection process. Defense counsel should make such challenges at trial and not wait for an ineffective assistance of counsel claim under habeas. Denial of a "reverse *Witt*" challenge for cause at trial is a better appellate issue than a claim of ineffective assistance of counsel for failing to raise the challenge or undertake "reverse *Witt*" examination.

Summary and analysis by:
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FITZGERALD v. THOMPSON

943 F.2d 463 (1991)
United States Court of Appeals, Fourth Circuit

FACTS

A Virginia jury convicted Edward B. Fitzgerald of capital murder in the commission of, or subsequent to, a rape. Virginia Code § 18.2-31(5). On direct appeal, both the Virginia Supreme Court and the United States Supreme Court affirmed Fitzgerald's conviction. State collateral proceedings also failed to afford relief to Fitzgerald. On federal collateral proceedings, the district court dismissed Fitzgerald's petition for a writ of habeas corpus, and this appeal followed.

At the guilt phase of the trial, the principal witnesses against Fitzgerald were his codefendant, Daniel Johnson, and a prison cellmate, Wilbur Caviness. Fitzgerald's attorney made a specific request for evidence relating to the credibility of the Commonwealth's witnesses. The Commonwealth attorney refused to disclose any credibility information, claiming that impeachment information was not discoverable. Although the Commonwealth's position was incorrect as a matter of law, *Giglio v. United States*, 405 U.S. 150 (1972), Fitzgerald's attorney made no objection.

Fitzgerald was convicted after a jury instruction that "a person is presumed to intend the natural consequences of his acts." Although this instruction shifted the burden of persuasion to the defendant — plainly a violation of *Sandstrom v. Montana*, 442 U.S. 510 (1979) — defense counsel made no objection.

At the penalty phase, the jury sentenced Fitzgerald to death, basing its decision on the defendant's future dangerousness "**and/or**" the vileness of the murder. The trial judge asked the jury foreman which word, "and" or "or" was a correct statement of the jury's position. The foreman responded that the jury had found future dangerousness **or** vileness. The judge sent the jury back to the jury room to choose which factor was the basis for its decision. The jury again stated its decision with the word "or." After the judge reinstructed the jury, they again sentenced Fitzgerald to death, this time basing its decision on the "vileness" factor alone.

HOLDING

The Fourth Circuit affirmed the dismissal of Fitzgerald's petition, in part finding his *Giglio* claim procedurally barred and in part ruling against the claim on the merits. The court also rejected Fitzgerald's claim of ineffective assistance of counsel, including the attorney's failure to object to a *Sandstrom* error. Finally, the court rejected Fitzgerald's claim that the trial judge's statements to the jury foreman regarding the verdict form in effect directed a penalty of death.

ANALYSIS / APPLICATION IN VIRGINIA

A. Giglio claim

The Fourth Circuit held that Fitzgerald's claim regarding the Commonwealth's failure to disclose credibility information was procedurally barred. *Fitzgerald v. Thompson*, 943 F.2d 463, 466 (4th Cir. 1991). The court applied the test of *Coleman v. Thompson*, 111 U.S. 2546 (1991), and ruled that Fitzgerald had not shown sufficient "cause" for the default.

Caviness testified at trial that Fitzgerald had admitted killing the victim. On cross-examination, defense counsel asked several questions to impeach Caviness' credibility. Caviness testified that he had only **one** prior felony conviction, that **no** charges were pending against him, and that he had been offered **nothing** in exchange for his testimony. In fact, Caviness had previously been convicted of **three** felonies, **two** more charges were pending against him, and he **had** received reimbursement for expenses of testifying. The Commonwealth's attorney made no attempt to correct the inaccurate statements as required by *Giglio*.

The Fourth Circuit viewed the record as a whole, addressing the merits of this portion of Fitzgerald's *Giglio* claim, and found no "reasonable likelihood that the false testimony could have affected the judgment of the jury." *Fitzgerald*, 943 F.2d at 467 (quoting *United*

States v. Agurs, 427 U.S. 97, 103 (1976)). The circuit court agreed with the state habeas court that Caviness had no **intent** to deceive. *Id.* The court also deferred to the finding of the Virginia Court of Appeals that the Commonwealth lacked actual knowledge of inaccuracies in Caviness' testimony. *Id.*

The court addressed each uncorrected inaccuracy separately. On Caviness' claim that he had previously been convicted of only one felony, the court found no prejudice to Fitzgerald. The court saw no critical difference between one and three prior felony convictions, so long as the jury knew that the witness was a convicted felon. *Id.* Similarly, the court found no prejudice in Caviness' statement that no charges were pending against him. The court noted that Caviness **did** admit that charges were pending against him at the time he was imprisoned with Fitzgerald. *Id.* Finally, the court found nothing inaccurate in Caviness' claim that his testimony was freely given without compensation. The court found no quid pro quo in the fact that the Commonwealth reimbursed Caviness for "minor" expenses which he incurred due to his role as a witness. *Id.*

The court viewed the alleged inaccuracies as a credibility issue only, and looked to other circumstances to determine whether Fitzgerald had been prejudiced by the Commonwealth's failure to correct them. The court stated that the defendant had every opportunity to challenge Caviness' credibility on cross-examination. *Id.* Since Caviness' testimony was corroborated by the testimony of co-defendant Johnson, and Caviness knew facts about the crime which were not public knowledge, the court found his credibility to be bolstered. *Id.* Due to these factors, the court ruled that any inaccuracies in Caviness' testimony did not affect the jury's verdict. *Id.*

The court seems to excuse the Commonwealth's error simply because it found Caviness' testimony to be credible. This holding narrows the rule in *Giglio* and prevents its application where the court happens to **believe** the relevant witness. This invasion of the province of the jury denies the defendant of a full and fair opportunity to cross-examine a witness and call that very believability into question. The court pays lip service to the Commonwealth's duty to find out criminal records of its witnesses, but provides no recourse for neglect of that duty. Whenever possible, attorneys should make certain that the Commonwealth's position regarding exculpatory evidence is on the record. Attorneys should also include as part of the record the exact nature of the defendant's request for exculpatory evidence. Attorneys should further insist, through motions and objections, that the Commonwealth fulfill its duty to disclose criminal records of its witnesses. In order to preserve these issues for appellate review, attorneys must raise them at trial, assign them as error, and argue them on brief. *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990).

B. Ineffective Assistance of Counsel / Sandstrom claim

The *Sandstrom* issue was raised for the first time on state habeas. Since there was no objection at trial, the circuit court found that the issue was procedurally defaulted.

Fitzgerald claimed ineffective assistance of counsel ("IAC") due to his attorney's failure to object to the *Sandstrom* error. The court found that Fitzgerald failed to satisfy the "prejudice prong" of *Strickland v. Washington*, 466 U.S. 688 (1984) (holding that the sixth amendment is violated where (1) an attorney's **performance** is deficient, and (2) the deficient performance **prejudices** the defendant). *Fitzgerald*, 943 F.2d at 468. *See* Marlowe, *Ineffective Assistance of Counsel*, Capital Defense Digest, Vol. 3, No. 1, p. 29 (1990). Fitzgerald claimed that his attorney's failure to object to the improper instruction deprived him of his defense that his consumption of drugs and alcohol prevented him from forming the requisite intent. However, the Fourth Circuit agreed with the Commonwealth that Fitzgerald could not have been prejudiced due to the overwhelming evidence that the defendant was capable of forming the requisite intent. *Id.*

Fitzgerald pointed to a line of cases applying harmless error analysis to *Sandstrom* errors and concluding that the deficient instructions were **not** harmless. The court, however, ruled that the harmless error test was inapplicable, since the *Sandstrom* issue was **not raised in a timely manner**. The court applied *Strickland*'s ineffective assistance of counsel test and found the prejudice requirement to be "more stringent." *Id.* at 469. Because other intent instructions at trial incorporated the alcohol/drug issue, the court ruled that Fitzgerald was not prejudiced by his attorney's error. *Id.*

Attorneys should note the difference between a properly preserved *Sandstrom* claim and an IAC claim for failure to object to a *Sandstrom* error. When the issue has been properly preserved, **the Commonwealth** has the burden to show that the error was harmless. However, *Fitzgerald* illustrates that the burden belongs to the **defendant** when a *Sandstrom* error is the basis of an IAC claim in a collateral proceeding. The procedural default of Fitzgerald's *Sandstrom* claim illustrates yet again the importance of alert advocacy at trial. Attorneys should be extraordinarily careful in making objections at trial and preserving the record.

C. Jury Charge Claim

Fitzgerald claimed that the judge's instructions prohibited the jury from choosing a life sentence. The trial judge required the jury to choose between aggravating factors to justify the death sentence. Fitzgerald claimed that this requirement precluded a lesser sentence, contrary to Virginia law. Virginia law requires the jury to consider evidence in mitigation. Virginia Code § 19.2-264.4B. Virginia law also requires the court to order a life sentence when the jury cannot agree on a penalty. Va. Code § 19.2-264.4E. Virginia law further authorizes a life sentence even if both aggravating factors are found. *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978).

The Fourth Circuit ruled that Fitzgerald's claim on the trial judge's instructions was procedurally defaulted. *Fitzgerald*, 943 F.2d at 471. The state habeas trial court had dismissed the claim, and Fitzgerald did not argue the dismissal before the Virginia Supreme Court. The Fourth Circuit added that this issue had little merit because a poll of the jurors indicated their unanimity. *Id.*

The colloquy between the trial judge and the jury indicates the confusion of the Virginia verdict form. The suggestion of the form is that if aggravating factors are present, the jury should impose the death penalty. The verdict form does not indicate the jury's **duty** to impose a life sentence where mitigating factors outweigh aggravating factors, or when the jury simply does not recommend a death sentence. Attorneys should consider requesting instructions which require unanimity on an aggravating factor as a prerequisite to the imposition of the death penalty. In order to avoid the situation presented in *Fitzgerald*, attorneys may also request an instruction that in the absence of unanimity on an aggravating factor, the jury should impose a life sentence. Finally, attorneys might request an instruction informing the jury that, regardless of aggravating and mitigating factors which may be present, the jury may nevertheless impose a life sentence.

Summary and analysis by:
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