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United States Court of Appeals, Fourth Circuit

FACTS

Syvasky Lafayette Poyner was convicted of five counts of capital murder after three separate trials and was sentenced to death on all five counts of capital murder. The record reveals that during an eleven-day period in 1984, Poyner left five women in Virginia dead, all victims of gunshot wounds to the head. Poyner was arrested and confessed to all five killings. During his confession, Poyner told the police that he had chosen only women because women are afraid of guns and, thus, are easier to rob than men. He also stated that he had killed his victims so that they would not be able to identify him later; this was based on advice from fellow inmates during previous jail terms who had told him that they wished they had killed their robbery victims.

Although not introduced at trial, Poyner later relied upon, as an explanation for his killing spree, the affidavit of a psychiatrist that stated that Poyner may belong to a category of serial killers known as "Psychopathic Sexual Sadists". The psychiatrist also suggested several other possibilities as the motivation behind Poyner's killings.

Poyner appealed all five convictions and death sentences to the Supreme Court of Virginia; the court affirmed all convictions.[1] Poyner then sought collateral review of these convictions in the Virginia state courts. The three writs of habeas corpus filed on Poyner's behalf were denied by the respective courts. The Supreme Court of Virginia, finding no error in any of the denials, subsequently refused Poyner's petitions for appeal.

Following these successive denials, Poyner sought relief from the federal courts. Again, three habeas corpus petitions were filed, denied and dismissed. The district court denied the motion, and this appeal followed.

HOLDING

Poyner appealed on the following grounds: (1) that the performance of his counsel was so ineffective that he was denied the right to counsel under the Sixth and Fourteenth Amendments of the United States Constitution; (2) that Virginia's system of appointing counsel to indigent defendants violated his due process rights under the Fifth and Fourteenth Amendments; and (3) that the district court erred in refusing to grant him an evidentiary hearing on his *Miranda* and ineffective assistance claims. The Fourth Circuit Court of Appeals affirmed all of the convictions and sentences and found that the trial court had not erred on any of the above issues.[2]

ANALYSIS/APPLICATION IN VIRGINIA

I. The Ineffective Assistance of Counsel and Expert Witnesses Claim

Part of Poyner's claim of ineffective assistance of counsel revolved around counsel's failure to investigate, develop, and present psychiatric evidence of defendant's psychological condition as a mitigating factor during the penalty phase of the trial. Poyner argued that if his counsel had introduced evidence of his condition, the jury might have found that he was driven by motives other than simply a desire to prevent his victims from identifying him as the robber. He asserted that if this had been done the jury would have found this to be a mitigating factor.

The Fourth Circuit stated that their problem with this reasoning was two-fold. First, the court felt that the complaint of ineffective assistance seemed to be aimed more at the psychiatrist than at Poyner's counsel.[3] As a result of this characterization of Poyner's claim, the court saw the defendant as really making an "ineffective expert witness" claim, rather than alleging ineffective assistance of counsel. The court held, however, that there was no separately-cognizable constitutional claim for an ineffective expert witness.[4]

Attorneys should be aware of the court's refusal to characterize this type of claim as one that constitutes ineffective assistance of counsel. The court did not close the door entirely on habeas relief for a "substandard" performance by a psychiatrist, but made clear that to succeed on an ineffective assistance claim, the deficiency must be attributable to counsel.[5] Thus, in setting forth any ineffective assistance of counsel argument, defense must focus on **counsel's** ineffectiveness in presenting and developing the evidence, so that the court will not be able to dismiss the claim by pointing a finger at a participant who is not constitutionally encompassed within ineffective assistance claims.

Second, the court found that counsel's failure to "shop around" for a more effective psychiatrist[6] and to pursue some of the psychiatric avenues advocated by one of the evaluating psychiatrists did not constitute ineffective assistance of counsel.[7] The court viewed counsel's decision to avoid introducing this often risky testimony as a tactical decision "well within the range of reasonable professional standards."[8] The court also found that even to the extent defense counsel's performance was deficient, Poyner had not satisfied the "prejudice prong" of the *Strickland v. Washington* standard by showing how the new evidence would have likely changed the outcome.[9]

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1 *Poyner v. Commonwealth*, 229 Va. 401, 329 S.E.2d 815 (1985).

2 *Poyner v. Murray*, 964 F.2d 1404 (1992). Poyner's claim that his *Miranda* rights had been violated when the state court admitted certain confessions will not be discussed within the context of this case summary. However, Virginia attorneys should notice that *Poyner's* analysis of *Miranda* directly contradicts with the Virginia Supreme Court's narrow approach in *King v. Commonwealth*, 243 Va. 353, 416 S.E.2d. 669 (1992). *See* case summary of *King*, Capital Defense Digest, this issue.

3 *Id.* at 1420.

4 *Poyner*, 964 F.2d at 1419.

5 *Id.*

6 *Id.*

7 *Id.* at 1420.

8 *Id.*

9 *Id.* at 1421 (citing *Strickland v. Washington*, 466 U.S. 668 (1984)). For a general discussion of ineffective assistance of counsel claims, *see* Marlowe, *Ineffective Assistance of Counsel or "How I Can Satisfy the Sixth Amendment and Still Not Help My Client*, Capital Defense Digest, Vol.3, No.1, p.29 (1990).

II. Procedural Default and the "Novelty Exception"

As to Poyner's claim that Virginia's method for appointing counsel is unconstitutional, the court found it barred under Virginia's procedural default rule. Poyner asserted the following as "cause" justifying his procedural default: (1) his claim that Virginia's system of appointment of counsel for indigent defendants violated the Constitution was so novel that it fell within the scope of *Reed v. Ross*[10]; (2) his trial counsel's failure to raise the objection amounted to constitutionally ineffective assistance of counsel; and (3) the gravity of the sentence he faced militated in favor of allowing the issue to be heard.

Reed v. Ross held that procedural default may be excused when the defaulted claim is "so novel that its legal basis [was] not reasonably available to [trial] counsel..."[11] The court in *Poyner* stated that Poyner's claim clearly did not fall within the ambit of the *Ross* novelty exception, both because the Sixth Amendment claim was not "novel" and because Poyner had not shown prejudice.[12] The court distinguished *Ross* by pointing out that the legal argument held to be sufficiently novel in *Ross* to excuse a procedural default was one which the United States Supreme Court had later adopted and held to be retroactive. In Poyner's case, the court observed that "the Court has made no such pronouncement regarding Poyner's challenge to Virginia's system of appointment of counsel."[13]

However, the court did note that there is much ambiguity within the judiciary as to what definitively constitutes a "novel exception". There has been much discussion over whether the legal claim in question always must have been subsequently adopted and held retroactive by the Supreme Court in order to qualify. Some subsequent Supreme Court and circuit court decisions discussing *Ross* do not note any such requirement.[14] Thus, although the standards for finding a claim to be "novel" are high, attorneys should continue to argue *Ross* and present arguments that their claim falls within its scope, as the requirements for this exception have yet to be precisely defined.

III. The Requirements for Obtaining an Evidentiary Hearing

Poyner claimed that he was improperly denied his request for an evidentiary hearing on his *Miranda* and ineffective assistance of counsel claims. Poyner asserted that an evidentiary hearing would have enabled him to develop facts sufficient to demonstrate that his confessions were obtained in violation of his Fifth Amendment rights and that his attorney's actions violated the Sixth Amendment.

The court began by noting that a defendant is entitled to an evidentiary hearing only if, "(1) he alleges additional facts that, if true, would entitle him to relief; and (2) he is able to establish the existence of any of the six factors set out by the Supreme Court in *Townsend v. Sain*."[15] The *Townsend* Court held that a habeas petitioner is entitled to such a hearing if:

> (1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not fairly supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state-court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing.[16]

Applying the standard to Poyner's *Miranda* claim, the court stated that it was satisfied that Poyner had been afforded ample opportunity to develop the facts required and thus had not met the *Townsend* standard.[17]

As to Poyner's a claim that he was erroneously denied an evidentiary hearing on ineffective assistance of counsel, the court again disagreed, noting that the Fourth Circuit had held in *Becton v. Barnett*[18] that a habeas corpus petitioner is entitled to an evidentiary hearing only to resolve disputed issues of **material** fact.[19] In addition, *Becton* requires that the petitioner "present a **colorable** claim" to relief by showing that the additional facts, if found to be true, would at least in argument necessitate the granting of the writ.[20] Because the court found these factors were not met by Poyner, it concluded he was not entitled to an evidentiary hearing.[21]

Practicing attorneys who represent clients in collateral criminal proceedings must keep in mind the strict standards that must be met to be granted an evidentiary hearing. Defense counsel must be prepared to demonstrate how their claims meet the requirements set forth in *Townsend* and *Becton*, both as to the insufficiency of any state hearings that were held and as to how the facts to be shown could have a material effect.

Summary and analysis by:
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10 468 U.S. 1 (1984).

11 *Id.* at 16.

12 *Poyner*, 964 F.2d at 1424-25.

13 *Id.* at 1424.

14 *See, e.g., Murray v. Carrier*, 477 U.S. 478, 488 (1986); and *Clanton v. Muncy*, 845 F.2d 1238, 1242 (4th Cir. 1988).

15 372 U.S. 293, 313 (1963). In addition, attorneys should keep in mind that *Townsend* claims can be procedurally defaulted, stressing again the need to request an evidentiary hearing whenever possible. *See Kenney v. Tamayo-Reyes*, 112 S.Ct. 1715 (1992).

16 *Townsend*, 372 U.S. at 313.

17 *Poyner*, 964 F.2d at 1415.

18 920 F.2d 1190, 1192 (4th Cir.1990).

19 *Poyner*, 964 F.2d at 1422.

20 *Becton*, 920 F.2d at 1192 (emphasis added).

21 *Poyner*, 964 F.2d at 1416.