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comments. Such an objection bears special significance, as it addresses a constitutional violation. Finally, counsel must take care to preserve this issue for appeal on both state and federal grounds.

III. Denial of Court Appointed Psychiatric Expert

Two years after the completion of Gardner's trial, the U.S. Supreme Court held in *Ake v. Oklahoma*[29] that a defendant had the right to a state appointed psychiatric expert in cases where sanity at the time of the offense was an issue. Gardner, whose conviction became final before *Ake* was decided, claimed that the rule should be applied retroactively in his case. However, the court noted that its previous decision in *Bassette v. Thompson*[31] had found the *Ake* requirement to be a "new rule" as interpreted in *Teague v. Lane*.[32]

In *Teague*, the United States Supreme Court held that a habeas petitioner defendant may not employ a new rule from a case decided after his sentence became final unless the case falls under one of two exceptions.[33] The new rule doctrine does not apply if the conduct in question was (1) "beyond the power of the law-making authority to proscribe,"[34] or (2) "if it requires the observance of 'those procedures that are implicit in the concept of ordered liberty,'."[35] Neither exception applied to Gardner, and, therefore, because *Ake* was decided after his sentence had become final, *Ake* could not be retroactively applied upon collateral review.[36]

The *Teague* decision should put defense counsel on notice that the Supreme Court intends to seriously curtail access to federal habeas corpus review. Taking this into consideration, counsel must be most conscientious in developing and advancing all possible constitutional arguments, both state and federal, at the earliest possible stages of the proceedings so as to avoid permanently waiving them. Preserving issues for appeal also allows the defendant to take advantage of any favorable changes in the law. In the meantime, counsel should continue to advance new rules, even on habeas, because they may fit within the exceptions, and to test the limits to which the Court is willing to carry the *Teague* "new rule" doctrine.

Summary and Analysis by:
Paul M. O'Grady

29 470 U.S. 68, 83 (1985).

30 915 F.2d at 938-39. *See* case summary of *Bassette,* Capital Defense Digest, Vol. 3, No. 2, p. 8 (1991).

31 *Gardner,* 1992 U.S. App. LEXIS at *33; *Teague*, 489 U.S. 288 (1989). In *Teague*, a defendant attempted to invoke, upon collateral review, the new rule from *Batson v. Kentucky*, 476 U.S. 79, that the prosecutor must give a racially neutral justification for his use of peremptory challenges. The Court held that *Batson* was a "new rule" which could not be retroactively applied. The *Teague* Court defined a "new rule" as one which "breaks new ground or imposes a new obligation on the States or Federal Government, . . . or if the result was not **dictated** by precedent." 489 U.S. at 301 (emphasis in original).

32 *Teague*, 489 U.S. at 310.

33 *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 692 (1971)).

34 *Id.* at 311 (quoting *Mackey*, 401 U.S.at 693 (quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937))).

35 For a more extensive discussion of the "new rule" doctrine, *see* case summary of *Williams v. Dixon,* Capital Defense Digest, this issue; case summary of *Adams v. Aiken*, Capital Defense Digest, this issue; and case summary of *Stringer v. Black*, Capital Defense Digest, this issue.

36 *See, e.g. Williams v. Dixon*, 691 F.2d 448 (4th Cir. 1992) (finding that even if the Court's ruling in *McKoy v. North Carolina*, 494 U.S. 433 (1990), was a new rule, it fell within an exception to *Teague* and thus could be retroactively applied). *See* case summary of *Williams*, Capital Defense Digest, this issue.

SPANN v. MARTIN

963 F.2d 663 (1992)
United States Court of Appeals, Fourth Circuit

FACTS

In October 1981, Sterling Barnett Spann was indicted for criminal sexual conduct in the first degree, robbery, burglary, and murder of an 82-year-old widow. He was convicted on all counts and received a life sentence for the burglary, thirty years (consecutively) for criminal sexual conduct in the first degree, ten years (consecutively) for robbery, and death by electrocution for murder.

Spann appealed to the South Carolina Supreme Court, which affirmed both the conviction and the sentence.[1] Spann then appealed to the United States Supreme Court, which dismissed his appeal.[2] He subsequently began state postconviction proceedings, claiming ineffective assistance of counsel and alleging various guilt and sentencing errors, but the state court denied his petition. Spann's petition for certiorari to the South Carolina Supreme Court was denied in 1985. Spann's subsequent petition for writ of certiorari to the United States Supreme Court was also denied. In 1986, Spann filed for a writ of habeas corpus in the United States District Court for the District of South Carolina. The court referred the matter to a magistrate for findings and recommendations. The magistrate subsequently filed a 173-page report and recommendation. After a ninety-day extension, petitioner filed objections to the report and sought to amend his habeas corpus petition. In 1988, the district court allowed the amendment and once again submitted the matter to the magistrate. A fifty-page recommendation followed, as did a response (and two supplemental memoranda) by petitioner.

In February 1991, Spann "filed a motion for leave 'to reexhaust his claim of ineffective assistance of counsel in the South Carolina Courts in light of *Frett v. State*,'"[3] a new state case. The U.S. District Court granted Spann's request and dismissed the writ without prejudice. The issue before the Fourth Circuit was whether the district court abused its discretion in granting that motion without prejudice.

HOLDING

The United States Court of Appeals for the Fourth Circuit held that the district court abused its discretion in granting Spann's motion to dismiss without prejudice.[4] The court found that the respondent (here the

1 *State v. Spann*, 308 S.E.2d 518 (S.C. 1983).

2 *Spann v. South Carolina*, 466 U.S. 947 (1984).

3 *Spann v. Martin*, 963 F.2d 663, 671; *Frett*, 378 S.E.2d 249 (S.C. 1988).

4 *Spann*, 963 F.2d at 672.

State of South Carolina) and the public have vital interests in the prompt and fair resolution of habeas claims.[5] Further, the court found that the court had a "'virtually unflagging obligation . . . to exercise the jurisdiction given them.'"[6] Such an obligation became even more compelling in light of the nature of the crimes and the length of delay in the case before the court.

ANALYSIS/APPLICATION IN VIRGINIA

In its recounting of Spann's process through the judicial system, the Fourth Circuit did little to hide its ire at the administrative burden and delay occasioned by Spann's various motions. In its findings, the court recounted the series of delays, extensions, and amendments won for Spann by his counsel. The court balanced these against the federal magistrate's "comprehensive . . . careful[] and meticulous[]"[7] recommendations—over two hundred pages of documents. Finding Spann's newly alleged state claim frivolous and refusing to add to the already "embarassing length of time that has elapsed since the case was filed in the federal courts," the court reversed and remanded to the district court for determinations on the two issues the district court had not yet formally ruled upon.[8]

Virginia practitioners will want to make note of the court's growing impatience with what it sees as administrative delays that work against state and public interests.[9] The net effect of such impatience for those representing capital defendants would seem to be that errors and possible remedies should be raised early and often. Saving them for later habeas relief will most likely result in their loss.

Summary and analysis by:
Roberta F. Green

5 *Id.* at 673.

6 *Id.* (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817 (1976)).

7 *Id.* at 672.

8 *Id.* at 673.

9 The United States Supreme Court has demonstrated similar impatience in the area of requests for stays of executions. *See In re Blodgett*, 112 S.Ct. 674 (1992). *See* case summary of *Blodgett*, Capital Defense Digest, this issue.

DAVIDSON v. COMMONWEALTH

244 Va. 129, 419 S.E.2d 656 (1992)
Supreme Court of Virginia

FACTS

On June 13, 1990, Mickey Wayne Davidson killed his wife, Doris Jane, and his two teenage stepdaughters, Mamie Darnell Clatterbuck and Tammy Lynn Clatterbuck. Autopsies revealed that each victim had been beaten with a crowbar. Davidson's wife, Doris, suffered numerous lacerations to her head and face, skull fractures, and bruises and contusions to the brain. Mamie suffered the most extensive injuries, with severe injuries to her head and face. Tammy suffered blows to her head, face and chest.

A psychologist examined Davidson and found him competent to stand trial and to make decisions regarding trial strategy. At the guilt phase of trial, Davidson pled guilty to each charge of capital murder. Before accepting the guilty pleas, the trial court heard witness testimony and considered numerous exhibits. The court also examined Davidson and determined that the guilty pleas were made knowingly, voluntarily, and intelligently. The court accepted the pleas and found Davidson guilty of the three capital murder charges. The court ordered a presentence investigation report.

At the penalty phase of the trial, Davidson's counsel advised the court that Davidson had ordered counsel not to present any mitigating evidence. Davidson then testified that he had been fully advised by his counsel of the charges against him, his right to a competency evaluation, and the possible sentences he could receive. He further testified that he had waived the competency evaluation and that he had directed that no evidence be presented on his behalf during the penalty stage. The court then considered the evidence presented by the Commonwealth and the pre-sentence report and found that Davidson's conduct in the commission of the offenses satisfied the "depravity of mind" and "aggravated battery" components of the Virginia "vileness" aggravating factor.[1] The court sentenced Davidson to death.

A timely notice of appeal to the Supreme Court of Virginia was filed by Davidson's lawyers, but Davidson requested permission to waive his appeal of right. The trial court conducted an evidentiary hearing and found Davidson's waiver to be knowingly, voluntarily, and intelligently made.

HOLDING

The Supreme Court of Virginia conducted its mandatory review of the imposition of Davidson's death sentence[2] and affirmed the trial court's actions.[3]

First, the Court confirmed the trial court's finding of two aggravating factors, depravity of mind and aggravated battery, either of which are sufficient for the imposition of the death penalty.[4] The Court also held that the trial court was not "under the influence of passion, prejudice or any other arbitrary factor" in imposing the death sentence on Davidson.[5] The Court further held that under the circumstances of Davidson's case, the sentence of death was not "excessive nor disproportionate to the penalty imposed in similar cases."[6]

Because the court treated these issues in a summary fashion under its mandatory review, they are not fully discussed here. The focus instead is on the duties imposed under Virginia law for presenting mitigating evidence during the sentencing phase of a capital murder trial.

1 Va. Code Ann. § 19.2-264.2 (1990); Va. Code Ann. §19.2-264.4(c) (1990).

2 Va. Code Ann. § 17-110.1 (1990).

3 *Davidson v. Commonwealth*, 244 Va. 129, 138, 419 S.E.2d 656, 661 (1992).

4 *Id.* at 135-136, 419 S.E.2d at 660. *See* Va. Code Ann. § 19.2-264.2 (1990); Va. Code Ann. §19.2-264.4(C) (1990).

5 *Davidson*, 244 Va. at 137-138, 419 S.E.2d at 661.

6 *Id.* at 136, 419 S.E.2d at 660.