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STRICKLER v. MURRAY 249 Va. 120, 452 S.E.2d 648 (1995) Supreme Court of Virginia

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sentence.¹⁸ Although the court found this claim to be defaulted,¹⁹ it may still be advisable for defense counsel to consider utilizing this type of evidence in mitigation, particularly of the "future dangerousness" predicate. In addition to its relevance as mitigation, the rationale is that a court cannot prohibit the introduction of evidence that rebuts an aggravating factor.²⁰ The United States Supreme Court has observed that "evidence

¹⁸ *Wilson*, 249 Va. at 104 n.1, 452 S.E.2d at 675 n.1.

¹⁹ *Id.* See *supra* section I.

²⁰ See *Skipper v. South Carolina*, 476 U.S. 1, 4 (1986); *Eddings v.*

that the defendant would not pose a danger if spared (but incarcerated) must be considered potentially mitigating."²¹ Thus, the denial of this type of evidence by the trial court would mean another potential federal claim for a defendant.

Summary and analysis by:
Michael H. Spencer

Oklahoma, 455 U.S. 104, 113-14 (1982); *Lockett v. Ohio*, 438 U.S. 586, 608 (1978) (plurality opinion).

²¹ *Skipper*, 476 U.S. at 5.

STRICKLER v. MURRAY

249 Va. 120, 452 S.E.2d 648 (1995)
Supreme Court of Virginia

FACTS

Nineteen year-old James Madison University student Leanne Whitlock was returning her boyfriend's car to him on January 5, 1990 in Harrisonburg.¹ While she was stopped in traffic, Thomas David Strickler forced his way into her car. His two companions, Ronald Henderson and an unidentified blond woman, entered the car immediately afterwards. Subsequently, the intruders brought Whitlock to a nearby cornfield, where a witness saw them turn off the main road.²

Police searched the cornfield eight days later. They found Henderson's wallet, Whitlock's clothing, and her body in quick succession. Her assailants had killed her by striking her head with a sixty-nine pound rock. Later investigators discovered that Strickler had taken Whitlock's driver's license, identification card, bank card, wristwatch, and earrings.³ Investigators also located hairs matching Strickler's on Whitlock's clothing. They also found that the shirt Strickler had worn on the day of the murder contained human blood stains and semen stains consistent with Strickler's semen. Unidentified semen was also taken from Whitlock's body.⁴

At trial, the jury was instructed, *inter alia*, as to the crime of capital murder, the meaning of "deadly weapon," and the crime of robbery.⁵ As to capital murder, the jury was instructed as follows:

The defendant is charged with the crime of capital murder. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant killed Leanne Whitlock; and
- (2) That the killing was willful, deliberate and premeditated; and
- (3) That the killing occurred during the commission of robbery while the defendant was armed with a deadly weapon, or occurred during the commission of abduction with the intent to extort money or a pecuniary benefit or with the intent to defile or was of a person during the commission of, or subsequent to, rape.⁶

¹ *Strickler v. Murray*, 249 Va. 120, 122, 452 S.E.2d 648, 649 (1995).

² *Id.* at 123, 452 S.E.2d at 649.

³ *Id.* at 123-24, 452 S.E.2d at 649-50.

⁴ *Id.* at 124, 452 S.E.2d at 650.

⁵ *Id.* at 124-25, 452 S.E.2d at 650.

⁶ *Id.* (emphasis added).

As to the definition of "deadly weapon," the jury was instructed that "a 'deadly weapon' is any object or instrument that is likely to cause death or great bodily injury because of the manner, and under the circumstances, in which it is used."⁷ As to the crime of robbery, the jury was instructed as follows:

The defendant is charged with the crime of robbery. The Commonwealth must prove beyond a reasonable doubt each of the following elements of that crime:

- (1) That the defendant intended to steal; and
- (2) That a motor vehicle and other personal property was taken; and
- (3) That the taking was from Leanne Whitlock or in her presence; and
- (4) That the taking was against the will of the owner or possessor; and
- (5) That the taking was accomplished by violence to the person or the threat of serious bodily harm.⁸

Strickler's attorney apparently did not object to any of the jury instructions.

The jury found Strickler guilty of capital murder (and fixed his punishment at death), guilty of robbery (and fixed his punishment as life imprisonment), and guilty of abduction (and fixed his punishment as life imprisonment).⁹ The Supreme Court of Virginia affirmed Strickler's conviction, and the United States Supreme Court denied certiorari.¹⁰ Strickler later filed a petition for habeas corpus. He made several claims, among them that his trial attorney's ineffective assistance of counsel should have served to invalidate his conviction. The Commonwealth moved to dismiss, and the circuit court granted this motion.¹¹ The Supreme Court of Virginia granted Strickler an appeal limited to two issues. First, Strickler contended that the trial court had erred in refusing to vacate his sentence because the capital murder jury instruction included the predicate offense of abduction with intent to defile. This

⁷ *Id.* at 125, 452 S.E.2d at 650.

⁸ *Id.*

⁹ *Id.* at 125-26, 452 S.E.2d at 650-51.

¹⁰ *Strickler v. Commonwealth*, 241 Va. 482, 404 S.E.2d 227 (1991), cert. denied, 502 U.S. 944 (1991).

¹¹ *Strickler*, 249 Va. at 121-22, 452 S.E.2d at 648.

offense cannot statutorily support a capital murder conviction if the victim is age twelve or older, as was Whitlock. Second, Strickler asserted that his trial attorney's failure to object to this instruction constituted ineffective assistance of counsel.¹²

HOLDING

The Supreme Court of Virginia held that Strickler had procedurally defaulted his claim that the capital murder instruction was erroneous since he had failed to object to it at trial.¹³ The court also held that Strickler's ineffective assistance of counsel claim failed since Strickler was not prejudiced by his counsel's failure to object to the erroneous inclusion of abduction with intent to defile as a predicate offense for capital murder.¹⁴ Accordingly, the court denied Strickler's petition for habeas corpus relief.¹⁵

ANALYSIS/APPLICATION IN VIRGINIA

The abduction with intent to defile instruction was indeed erroneous. This offense may only serve as a predicate for capital murder in Virginia if the victim is younger than twelve years.¹⁶ Leanne Whitlock was nineteen years old.¹⁷ But the court decided that since there was overwhelming evidence of both armed robbery and armed robbery with a deadly weapon, Strickler would still have been convicted of capital murder under that section¹⁸ without the erroneous abduction with intent to defile instruction.¹⁹

The court anchored its holding in the United States Supreme Court's decision in *Strickland v. Washington*.²⁰ This decision held that defendants seeking habeas corpus relief must prove two elements to establish an ineffective assistance of counsel claim. First, the defendant must show that counsel's performance was deficient—in other words, the reviewing court must assess "whether, in light of all the circumstances, the identified acts or omissions were outside the wide range of professionally competent assistance."²¹ From the facts, it seems clear that Strickler proved this element easily. However, the Supreme Court of Virginia did not address this point. It is not clear whether they failed to do so because they felt it was obvious that Strickler had shown his trial counsel's performance to be defective, or because they felt they did not need to discuss the issue in light of what the court found to be Strickler's failure to show the second element of an ineffective assistance of counsel claim, prejudice.²²

¹² *Id.* at 122, 452 S.E.2d at 648-49.

¹³ *Id.* at 126, 452 S.E.2d at 651.

¹⁴ *Id.* at 129-30, 452 S.E.2d at 652-53.

¹⁵ *Id.* at 130, 452 S.E.2d at 653.

¹⁶ Va. Code Ann. § 18.2-31 (Supp. 1994) states in relevant part: "The following offenses shall constitute capital murder, punishable as a Class 1 felony: . . . 8. The willful, deliberate, and premeditated killing of a child under the age of twelve years in the commission of abduction as defined in § 18.2-48 when such abduction was committed . . . with the intent to defile the victim of such abduction[.]"

¹⁷ *Strickler*, 249 Va. at 122, 452 S.E.2d at 649.

¹⁸ Va. Code Ann. § 18.2-31(4) (Supp. 1994).

¹⁹ *Strickler*, 249 Va. at 129-30, 452 S.E.2d at 652-53.

²⁰ 466 U.S. 668 (1984).

²¹ *Strickland*, 466 U.S. at 690.

²² In setting the tone for its review of Strickler's claim under *Strickland*, the Supreme Court of Virginia quoted that decision's admonition that "[i]f it is easier to dispose of an ineffectiveness claim on the

To show the requisite prejudice,²³ a "defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."²⁴ Applying this requirement, the Supreme Court of Virginia stated that "[w]hen a defendant challenges a conviction, the question is whether there is a reasonable probability that, absent the errors, the factfinder would have had a reasonable doubt respecting guilt."²⁵ The court cited another United States Supreme Court decision, *Kimmelman v. Morrison*,²⁶ to explain that "*Strickland's* standard, although by no means insurmountable, is highly demanding."²⁷

Consequently, the court held that Strickler had not shown the requisite prejudice.²⁸ The court decided that there was overwhelming evidence that Strickler had committed the murder while committing armed robbery, and that he had committed the armed robbery with a deadly weapon. The court thus held that since Strickler would have been found guilty of capital murder based on the armed robbery predicate offense anyway, there was no reasonable probability that he would not have been convicted of capital murder but for the erroneous abduction with intent to defile instruction.²⁹ In other words, since abduction with intent to defile would not have been the only basis for Strickler's capital murder conviction, there was no prejudice. Since there was no prejudice, there was no cognizable ineffective assistance of counsel claim.

But this outcome is not as "open-and-shut" as might be assumed from the opinion. In *Stromberg v. California*³⁰ the United States Supreme Court addressed situations such as Strickler's, where there are two bases for a conviction and where one of those bases is unconstitutional. In *Stromberg* itself there were three possible grounds for the jury's verdict of guilty, one unconstitutional and two constitutional. The Court held that a reviewing court could not conclude that the constitutional bases were dispositive.³¹ Thus, once one of the possible grounds for a general verdict convicting a defendant has been declared unconstitutional, the conviction must be remanded for a new trial.³²

First, *Stromberg's* analysis should apply whether the contested basis is unconstitutional, unlawful, or impermissible as in Strickler's case. Second, *Stromberg* suggests that allowing the general verdict to stand would be constitutionally improper not so much because of the particular unconstitutionality (or impermissibility) of one of the grounds, but because of the more general unconstitutionality of assuming that the jury convicted the defendant upon one of the legitimate grounds when the truth is not actually known. Finally, the standard of proof in

ground of lack of sufficient prejudice, which we expect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. Therefore, it seems likely that the Supreme Court of Virginia did not address the "performance" arm of the *Strickland* test because it was unnecessary to do so given that Strickler's claim could be disposed of based on the "prejudice" arm.

²³ *Strickland*, 466 U.S. at 693.

²⁴ *Id.* at 694.

²⁵ *Strickler*, 249 Va. at 128, 452 S.E.2d at 652.

²⁶ 477 U.S. 365 (1986).

²⁷ *Kimmelman*, 477 U.S. at 382.

²⁸ *Strickler*, 249 Va. at 129-30, 452 S.E.2d at 652-53.

²⁹ *Id.*

³⁰ 283 U.S. 359 (1931).

³¹ *Stromberg*, 283 U.S. at 367-68.

³² *Id.* at 368.

Stromberg appears to place the burden on the prosecution to show that the illegitimate basis was not used to convict the defendant. Again, the jury's verdict in *Stromberg* was a general one. The general verdict appears to have been the dispositive factor in this case, as it was impossible to tell which grounds the jury used to convict the defendant.³³ Thus, with a general verdict the defendant need only show that one of the grounds was unconstitutional. Presumably the burden is on the prosecution to show that the illegitimate grounds were not used to convict the defendant.

Applying that reasoning here, Strickler's conviction could have been based either on the abduction with intent to defile predicate offense (illegitimate) or the armed robbery predicate offense (legitimate). Since the jury's verdict does not clearly identify which offense it used to convict Strickler, under *Stromberg* the Supreme Court of Virginia cannot assume that the jury convicted Strickler based on the legitimate (i.e., correctly-instructed) offense. The prosecution would have to show that abduction with intent to defile was not used to convict Strickler.

Obviously defense attorneys should take care to insure that clients are not convicted of capital murder based on a non-existent capital murder offense. The first step is always to compare the evidence of the offense in the light most favorable to the Commonwealth to provisions of section 18.2-31. The statute is complex. For example, it contains two separate abduction sections—sections 18.2-31(1) and 18.2-31(8) (the

³³ *Id.*

³⁴ The Supreme Court of Virginia has addressed this issue many times and has continually held that "[i]n a robbery prosecution, where the violence against the victim and the trespass to his property combine in a continuing, unbroken sequence of events, the robbery itself continues as well for the same period of time." *Linwood Earl Briley v. Commonwealth*, 221 Va. 532, 543, 273 S.E.2d 48, 55 (1980), *cert. denied*, 451

subject of this case). Both of these subsections in turn refer to another statute, section 18.2-48. This statute covers drug-related homicides and incorporates by reference several other Virginia statutory provisions, but falls far short of encompassing all drug-related murders. If a statutory section is inapplicable under any evidence that could be presented by the Commonwealth, appropriate pre-trial actions may be taken to eliminate the charge from the case. The Virginia Capital Case Clearinghouse can help defense counsel with this problem.

Additionally, if a claim is defaulted as in *Strickler, Stromberg* may be of little help. Even though the Supreme Court of Virginia has broadly construed robbery's requirement of forcible taking from the victim to include takings after death,³⁴ that interpretation might well not have been as clear to the jury. The jury might well have found that the murder was committed during an abduction with intent to defile. Once no objection was made, however, the issue was evaluated and *Strickland*, not *Stromberg*, applied. The burden shifted to the defendant to prove prejudice—an impossible task if the robbery evidence was sufficient and the real basis for the guilty verdict was unknown.

Summary and analysis by:
Gregory J. Weinig

U.S. 1031 (1981); *accord Quesinberry v. Commonwealth*, 241 Va. 364, 373-74, 402 S.E.2d 218, 224, *cert. denied*, 502 U.S. 834 (1991). *See also* case summary of *Quesinberry*, Capital Defense Digest, Vol. 4, No. 1, p. 23 (1991); and Green, *Narrowing the Scope of Capital Murder During the Commission of a Robbery: When Must the Intent to Rob Arise?*, Capital Defense Digest, Vol. 5, No. 2, p. 45 (1993).

RAMDASS v. COMMONWEALTH

248 Va. 518, 450 S.E.2d 360 (1994)

WRIGHT v. COMMONWEALTH

248 Va. 485, 450 S.E.2d 361 (1994)
Supreme Court of Virginia

FACTS

Bobby Lee Ramdass was convicted for the capital murder of Mohammad Kayani. The capital murder charge was predicated on the commission of murder during the commission of a robbery while armed with a deadly weapon.¹ The jury fixed Ramdass' punishment at death, based on the "future dangerousness" aggravator of Virginia's capital murder statute.² The trial court imposed this sentence and sentences for the underlying crimes.³ The Supreme Court of Virginia affirmed this judgement and the sentences imposed.⁴

¹ Va. Code Ann. § 18.2-31(4) (Supp. 1994).

² *Ramdass v. Commonwealth*, 248 Va. 518, 519, 450 S.E.2d 360, 360 (1994).

³ *Id.* The court imposed a life sentence for the robbery and a four year sentence for the firearms violation.

⁴ *Ramdass v. Commonwealth*, 246 Va. 413, 437 S.E.2d 566 (1993).

⁵ Va. Code Ann. § 18.2-31(4) (Supp. 1994).

⁶ Va. Code Ann. § 18.2-31(5) (Supp. 1994).

Dwayne Allen Wright was convicted of two offenses of capital murder for the killing of Saba Tekle in the commission of a robbery while armed with a deadly weapon⁵ and the killing of Tekle subsequent to attempted rape.⁶ The jury fixed Wright's punishment at death based on the "future dangerousness" aggravator.⁷ The trial court imposed this sentence and other sentences for the underlying crimes.⁸ The Supreme Court of Virginia affirmed the judgments and sentence of death.⁹

The United States Supreme Court granted writs of certiorari for both of these cases on June 20, 1994, vacating the judgments and remanding both cases "for further consideration in light of *Simmons v. South Carolina*."¹⁰

⁷ *Wright v. Commonwealth*, 248 Va. 486, 450 S.E.2d 362 (1994).

⁸ *Id.* The trial court imposed a life sentence for the robbery, ten years' imprisonment for the attempted rape, and two years imprisonment for the firearm violation.

⁹ *Wright v. Commonwealth*, 245 Va. 177, 427 S.E.2d 379 (1993)

¹⁰ *Ramdass v. Virginia*, 114 S. Ct. 2701 (1994); *Wright v. Virginia* 114 S. Ct. 2701 (1994).

¹¹ 114 S. Ct. 2187 (1994).