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GEORGE v. ANGELONE 100 F.3d 353 (4th Cir. 1996) United States Court of Appeals, Fourth Circuit

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FACTS

On June 16, 1990, Alexander Eugene Sztanko, at the age of 15, was murdered. On the day of the murder, Sztanko drove his motorcycle into the woods of Woodbridge, Virginia. There, he was tortured and then killed by a single gun shot to the head. The next day, the boy's body was found after the police confronted Michael Carl George in the area in which Sztanko's body lay. George was carrying a map marking the location of the body and the boy's bike. He was arrested and charged with capital murder under § 18.2-31(4) of the Virginia Code (murder in the commission of a robbery while armed with a deadly weapon).[1]

The jury convicted George and imposed a sentence of death, finding both vileness in the murder of Sztanko and a probability that George would be a future danger to society. George's conviction and death sentence were upheld on appeal.[2] The United States Supreme Court denied George's petition for certiorari.[3] Subsequently, George filed a petition for writ of habeas corpus in state court. His petition was denied. The state habeas court concluded that each of George's claims, with the exception of his claim of ineffective assistance of counsel, was barred either because it was raised on direct appeal or was procedurally defaulted by the failure to raise the claim during trial or on direct appeal.[4] The state habeas court also found that George's ineffective assistance of counsel claim was without merit. The Supreme Court of Virginia denied George's petition for review, and the United States Supreme Court denied his petition for certiorari.[5]

Thereafter, George filed a petition for habeas corpus in the federal district court. The district court dismissed his petition, holding that some of his claims were procedurally defaulted and that the remainder lacked merit. Pursuant to Federal Rule of Civil Procedure 59(e), George moved to alter or amend the judgment, asking the district court to modify its judgment by making the dismissal of his Sixth Amendment claim without prejudice.[6] The district court did so. George appealed the district court's dismissal of his petition to the Court of Appeals for the Fourth Circuit. The Commonwealth also appealed the district court's decision to dismiss his Sixth Amendment claim without prejudice.[7]

HOLDING

The Fourth Circuit affirmed the district court's dismissal of George's habeas corpus petition and modified the district court's ruling to deny his Sixth Amendment claim, with prejudice, as procedurally defaulted.[8]

ANALYSIS/APPLICATION IN VIRGINIA

I. Impermissible Use of Victim Impact Evidence

In order to convict George of capital murder, the Commonwealth was required to prove that the murder was committed during the commission of a robbery with a deadly weapon.[9] In addition, the Commonwealth had to prove that the robbery was one of the motivating factors for the killing.[10] The evidence of robbery was far from overwhelming in George's case. The Commonwealth based its theory of robbery on evidence that George hid Sztanko's motorcycle and helmet, later marking their location on a topographical map. The Commonwealth contended that the map was drawn by George with the intention of retrieving the items at a later date.[11]

In light of the relatively weak evidence of robbery, the Commonwealth apparently bolstered its case by including victim impact evidence during the guilt phase of George's trial. The victim impact evidence was likely presented because its emotional nature would increase the chance that the jury would not be overly concerned with the weakness of the evidence of the robbery predicate.

At the time of George's trial in 1991, victim impact evidence in capital sentencing proceedings was forbidden. The Virginia Code at that time excluded capital cases from the list of offenses for which victim impact statements were permitted.[12] Currently, Virginia allows victim impact evidence in a capital trial, under its 1996 version of § 19.2-299.1. This marked change is due to the Supreme Court's holding in *Payne v. Tennessee*.[13] The Virginia statute was modified to permit victim impact evidence after *Payne* overruled *Booth v. Maryland*[14] and *South Carolina v. Gathers*.[15]

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[1] *George v. Angelone*, 100 F.3d 353, 355-56 (4th Cir. 1996).

[2] *George v. Commonwealth*, 242 Va. 264, 285, 411 S.E.2d 12, 24 (1991).

[3] *George v. Virginia*, 503 U.S. 973 (1992).

[4] For an in-depth analysis of this procedural application, *see* case summary of *Stout v. Netherland,* Capital Defense Journal, this issue.

[5] *George*, 100 F.3d at 357.

[6] At issue was a *Massiah/Henry* claim where the Commonwealth allegedly planted a jailhouse snitch to elicit information from George. *See infra* discussion on procedural default under *Massiah/Henry*.

[7] *George*, 100 F.3d at 356-57.

[8] *Id.* at 365.

[9] Va. Code Ann. § 18.2-31(4) (1996).

[10] *George*, 100 F.3d at 358 (citing *Branch v. Commonwealth*, 225 Va. 91, 300 S.E.2d 758 (1983)).

[11] Although there was considerable evidence to suggest that the killing was motivated by George's sexual abnormalities, the court rejected the claim that the helmet and bicycle were secreted only to help George avoid detection for the murder, and found that robbery was at least one motive for the murder. *George*, 100 F.3d at 355, 358.

[12] Va. Code Ann. § 19.2-299.1 (1991).

[13] 501 U.S. 808, 825 (1991) (holding that victim impact evidence is admissible at the sentencing phase of a capital trial so long as it does not violate fundamental fairness protected by the due process clause).

[14] 482 U.S. 496 (1987) (holding that introduction of victim impact evidence describing personal characteristics of the victim and the emotional impact of the crime on the victim's family violates the Eighth Amendment).

[15] 490 U.S. 805 (1989) (death sentence was obtained in violation of the constitution where the prosecutor, during closing argument, read from a prayer found in the victim's possession and argued personal characteristics of victim based upon prayer and voter registration card also found among victim's possession); for further discussion, *see* case summary of *Payne*, Capital Defense Digest, Vol. 4, No. 1, p. 14 (1991).

In *George*, the Commonwealth's position was that the victim impact evidence was permissible because the jury, in one proceeding, found guilt or innocence on all charges, including capital murder **and** set punishment for the non-capital offenses. The Commonwealth argued, and the Fourth Circuit agreed, that the victim impact evidence was presented for the jury to determine the punishment for the non-capital offenses.[16]

Since *George*, Virginia statutory changes not only permit victim impact evidence at capital trials, but now non-capital sentencing is also bifurcated.[17] This procedure raises the possibility, of course, of a "trifurcated" capital trial, given the usual related non-capital charges. That, however, is apparently not the practice. Rather, the penalty trials are combined.

Since the tactic employed by the Commonwealth in *George* is unlikely to arise under current practice, of more importance, for defense counsel is the recognition that the content of prosecution arguments must be limited. In light of the holding in *Payne*, it is important for defense counsel to narrow the Commonwealth's use of victim impact evidence to family members and close friends. Moreover, the Court stated in *Payne* that victim impact evidence had a limited purpose: to show each victim's uniqueness as an individual human being.[18] Therefore, defense counsel should attempt to confine the Commonwealth to a limited showing of victim impact evidence fitting within the definition of *Payne*.[19]

II. *Godfrey* and the "Vileness" Factor

At the sentencing phase of George's trial, the jury instruction given by the court plainly violated *Godfrey v. Georgia*.[20] The instruction given in *George* was identical to that found inadequate in *Godfrey*. In both *George* and *Godfrey*, the jury instruction at issue merely parroted the language of the statute without any further clarification or narrowing construction.[21]

George did not default his *Godfrey* claim. It was squarely presented and erroneously decided in the Supreme Court of Virginia. Nevertheless, the court of appeals held that the unconstitutional vileness instruction used by the Commonwealth was harmless error because the jury convicted him of capital murder and also found that there was a probability that George would be a danger in the future. One of the several flaws in the court's harmless error analysis is that the wrong court is making it.

Virginia's capital scheme does not require a formal "weighing" of aggravating and mitigating factors by the sentencer. The United States Supreme Court addressed the situation presented by *George* in *Stringer v. Black*.[22]

The *Stringer* Court stated that there is a distinction of "critical importance" between weighing and non-weighing states. The Court assessed this distinction by stating:

> In a nonweighing State, so long as the sentencing body finds at least one valid aggravating factor, the fact that it also finds an invalid aggravating factor does not infect the formal process of deciding whether death is an appropriate penalty. **Assuming a determination by the state appellate court that the invalid factor would not have made a difference to the jury's determination,** there is no constitutional violation resulting from the introduction of the invalid factor in an earlier stage of the proceedings.[23]

According to *Stringer*, the Virginia sentencing scheme does not lead to a constitutional violation when an invalid aggravating factor is used **if the state appellate court** determines that the invalid factor played no part in the jury's determination. In *George*, the state appellate court did not make this determination. Instead, the Fourth Circuit went outside its authority in making a *de novo* finding of harmless error.[24]

Also, the court, apparently, bolstered its harmless error finding by reference to the fact that the Supreme Court of Virginia had conducted statutory review of George's death sentence. If the court relied on that statutory review, it erred. The United States Supreme Court has rejected the contention that this review automatically corrects *Godfrey* error.[25]

III. Procedural default under *Massiah/Henry*

Finally, George asserted that his Sixth Amendment right to counsel was violated by the Commonwealth's placing an inmate snitch in George's cellblock in violation of *Massiah v. United States*[26] and *United States v. Henry*.[27] The district court ruled that George's claim was

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[16] *George*, 100 F.3d at 360.

[17] Va. Code Ann. § 19.2-295.1.

[18] *Payne*, 501 U.S. at 822, *citing*, *Booth v. Maryland*, 482 U.S. 496 (1987).

[19] For further discussion of the limitation of victim impact evidence, *see* Jonathan H. Levy, *Limiting Victim Impact Evidence and Argument After Payne v. Tennessee*, 45 Stan. L. Rev. 1027, 1043 (1993).

[20] 446 U.S. 420, 433 (1980) (holding that the death sentence was invalid because the state court failed to provide a constitutional limiting construction to the aggravating circumstance of vileness). George's assertion that the evidence of the defilement of Sztanko was inadmissable as it was prejudicial under the Fourteenth Amendment Due Process clause failed because the evidence was found to be relevant to George's guilt. 100 F.3d at 361-62.

[21] While denying the need for a narrowing construction, the Supreme Court of Virginia has further defined the aggravators in *Smith v. Commonwealth*, 219 Va. 455, 248 S.E.2d 135 (1978). While defense counsel contend that the definitions remain inadequate and the United States Supreme has never approved of the definitions, they have been upheld by Fourth Circuit. *See O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996), and case summary of *O'Dell*, Capital Defense Journal, Vol. 9, No. 1, p.29 (1996); *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994), and case summary of *Turner*, Capital Defense Digest, Vol. 7, No. 1, p. 15 (1994).

[22] 503 U.S. 222 (1992).

[23] *Id.* at 232 (emphasis added).

[24] Both *Clemons* and *Stringer* were reaffirmed in *Sochor v. Florida*, 504 U.S. 527 (1992). Another possible error is the standard the court employed for harmless error review. Presumably, the Fourth Circuit, in habeas review, applied the standard of *Brecht v. Abrahamson*, 507 U.S. 619 (1993), which requires a showing, by the defendant, that the constitutional violation had a substantial and injurious effect on the determination of the jury's verdict. *Brecht* is more generous to the prosecution. If the correct court, the Supreme Court of Virginia, had conducted the review, it presumably would have been required to apply *Chapman v. California*, 386 U.S. 18 (1967), compelling the Commonwealth to show the *Godfrey* error harmless beyond a reasonable doubt.

[25] *Sochor v. Florida*, 504 U.S. 527 (1992); *see also* case summary of *Sochor*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).

[26] 377 U.S. 201 (1964) (holding that the Sixth Amendment prohibits extraction of incriminating statements from an indicted person without the presence of counsel).

[27] 447 U.S. 264 (1980) (holding conduct of the police in asking Henry's cellmate to report back defendant's incriminating comments created a situation likely to induce Henry to make these statements, meeting the "deliberately elicited" test in violation of the Sixth Amendment).

procedurally defaulted and dismissed it without prejudice. The Fourth Circuit modified this ruling by declaring that George's claim was defaulted and dismissed it with prejudice because George failed to demonstrate cause for the default.[28]

George claimed that he failed to include his *Massiah/Henry* claim in his state habeas petition because he did not discover the underlying facts supporting it until his case reached federal habeas. The Fourth Circuit held that the fact that George's habeas counsel had only one month in which to investigate all of George's claims did not mean that the facts regarding the inmate were unavailable to George when he filed his state habeas petition.[29] This result is based on an erroneous reading of the Virginia statutory procedures for issuing an extraordinary writ.

Section 8.01-654 of the Virginia Code sets out the procedure for issuing an extraordinary writ. A person seeking an extraordinary writ must apply by petition. The petition "shall contain all allegations the facts of which **are known** to petitioner at the time of the filing.... No writ shall be granted on the basis of any allegation the facts of which petitioner **had knowledge** at the time of filing any previous petition."[30] The court, in analyzing George's claim, erroneously injected the term "could have known" into the language of § 8.01-654(B)(2). Therefore, it was error to default George's claim on the basis that he could have known of the *Massiah/Henry* facts; rather, the court should have determined whether he actually knew of those facts. The Fourth Circuit made this same error in both *Barnes v. Thompson*[31] and *Hoke v. Netherland*.[32]

In *Barnes* the Fourth Circuit held that Barnes's *Brady* claim was defaulted because proof of the exculpatory evidence was either known or "reasonably available" to him.[33] The *Barnes* court cited *Wainwright v. Sykes*[34] for the proposition that if a state prisoner defaults a federal claim, the prisoner can no longer raise the defaulted claim unless cause or prejudice exists. However, the *Barnes* court misapplied § 8.01-654(B)(2) by including a requirement that facts "reasonably available" to a petitioner must be asserted and that absence of such facts operates as a grounds for default. According to the court in *Barnes*, the governing question was not simply whether Barnes knew of the *Brady* evidence, but "whether Barnes could have obtained the information through 'reasonable and diligent investigation.'"[35]

A similar misreading of § 8.01-654(B)(2) by the Fourth Circuit occurred in *Hoke*. Like Barnes, Hoke accused the Commonwealth of violating *Brady* by not divulging exculpatory evidence. In ruling that Hoke defaulted his *Brady* claim, the court held that the defendant could have obtained this information through reasonably diligent investigation; therefore, he could not establish "cause for that default such as to enable him to overcome this procedural bar in federal court."[36] The Fourth Circuit misapplied § 8.01-654(B)(2) in both *Hoke* and *Barnes*, and built upon this error in *George*.

In George's case, the Commonwealth denied that the inmate was planted to obtain information from George.[37] That denial in itself should have been weighed in George's favor, even if the proper question was whether counsel "could have known" facts in support of the claim earlier. Such a denial by the prosecution leads defense counsel to believe that the requested evidence does not exist. As the United States Supreme Court held in *United States v. Bagley*,[38] "an incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist."[39]

A similar *Massiah* denial was made by the state of Georgia in *McCleskey v. Zant*.[40] McCleskey had failed to include his *Massiah* claim in his first federal habeas petition. The Supreme Court ruled that for cause to exist, an "external impediment, whether it be government interference or the reasonable unavailability of the factual basis for the claim, must have prevented petitioner from raising the claim."[41] The Court ruled that the unavailability of a 21-page document at McCleskey's first federal habeas petition did not give sufficient cause for the failure to include the *Massiah* claim. The Court held that McCleskey had "constructive knowledge" of the facts that were contained in the document and, therefore, could have raised his *Massiah* claim in a timely manner.[42] Although McCleskey alleged that the state engaged in wrongful conduct by concealing the 21-page document, the Court held that there was no misconduct by the State.[43]

The Court also held that McCleskey's reliance on *Amadeo v. Zant*[44] was misplaced. In *Amadeo*, the Court stated that the concealment of evidence by the government may constitute cause for a procedural default if it "was the reason for the failure of a petitioner's lawyers to raise the jury challenge in the trial court."[45] The Court ruled that *McCleskey* did not satisfy *Amadeo* because there was no evidence of state concealment, and even if there had been evidence of concealment on the part of the state, McCleskey had constructive knowledge of the information contained in the 21-page document.[46]

The holding in *McCleskey* and *Amadeo* would have supported George's *Massiah/Henry* claim had he been able to show some type of concealment on the part of the Commonwealth. Even if he were unable to do so, it is clear that the Fourth Circuit has misread Va. Code Ann. § 8.01-654. George's *Massiah/Henry* claim was not procedurally defaulted if he did not have actual knowledge of the facts surrounding the claim prior to his state habeas petition.

The court also rejected George's contention that he had inadequate time to investigate his claim prior to filing his state habeas petition. The court faulted him for his delay in requesting counsel after the United States Supreme Court denied certiorari, yet George's case proceeded in a system that had no filing deadlines for state or federal review.

Finally, changes in state law and the passage of the Anti-Terrorism and Effective Death Penalty Act of 1996 will make matters even worse for defense counsel.[47] Defense counsel now have a severely limited amount of time to investigate claims for their inclusion in state and federal habeas petitions. It is advisable for counsel to investigate as

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[28] *George*, 100 F.3d at 365.

[29] *Id.* at 363.

[30] Va. Code Ann. § 8.01-654(B)(2) (emphasis added).

[31] 58 F.3d 971 (4th Cir. 1995).

[32] 92 F.3d 1350 (4th Cir. 1996).

[33] 58 F.3d at 977.

[34] 433 U.S. 72 (1977).

[35] *Barnes*, 58 F.3d at 975 (quoting *McCleskey v. Zant*, 499 U.S. 467, 498 (1991)).

[36] 92 F.3d at 1354-55 n.1.

[37] *George*, 100 F.3d at 363 n.12.

[38] 473 U.S. 667 (1985).

[39] Id. at 682.

[40] 499 U.S. 467 (1991).

[41] *Id.* at 497.

[42] *Id.* at 500.

[43] *Id.* at 501.

[44] 486 U.S. 214 (1988).

[45] *Id.* at 222.

[46] 499 U.S. at 502.

[47] For a discussion of ATEDA, *see* Raymond, *The Incredible Shrinking Writ: Habeas Corpus Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, Capital Defense Journal, Vol. 9, No. 1, p. 52 (1996); Eade, *The Incredible Shrinking Writ, Part II: Habeas Corpus Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, Capital Defense Journal, this issue.

quickly and diligently as possible and make a record of all external impediments (denial of discovery, the lack of timely discovery by the Commonwealth, government concealment of evidence, insufficient time for meaningful investigation) so that claims will not be defaulted and there will remain at least a chance that facts may be further developed in federal court. On a final note, *McCleskey* and *George* make clear that any claim with a mere scintilla of evidence to support it must be included at every stage of collateral review.

Summary and analysis by:
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BUCHANAN v. ANGELONE

103 F.3d 344 (4th Cir. 1996)
United States Court of Appeals, Fourth Circuit

FACTS

On September 15, 1987, Douglas McArthur Buchanan, Jr. brought his rifle to his father's house. After an argument about his natural mother, the defendant shot his father through the back of the head. Then he waited for his two half-brothers to return home from school. Upon their arrival, Buchanan shot both brothers. One died. The other survived the shooting, but Buchanan subsequently stabbed him to death with a kitchen knife. When his step-mother later arrived at the home, Buchanan attempted to shoot her. Unsuccessful, he resorted to stabbing her with the kitchen knife, delivering lethal wounds to her neck.[1]

The Commonwealth charged Buchanan with capital murder of "more than one person as part of the same act or transaction."[2] A grand jury issued four separate indictments for first degree murder.[3] Buchanan also faced four counts of using a firearm in the commission of a murder.[4] At the end of his trial in Amherst County, a jury found Buchanan guilty on all charges and sentenced him to death for the capital murder of his father.[5]

Buchanan exhausted his direct appeal and state habeas proceedings. He then filed a petition for a writ of habeas corpus in federal district court. The court denied relief and Buchanan appealed.[6]

HOLDING

The court of appeals found no error in the district court's denial of Buchanan's petition for a writ of habeas corpus and affirmed its judgment.[7]

ANALYSIS/APPLICATION IN VIRGINIA

I. Inadequate Instruction Regarding Mitigating Evidence

A. A General Instruction Failed to Guide the Jury's Discretion

In the first of his five claims,[8] Buchanan alleged that the trial court inadequately instructed the jury about mitigating evidence by refusing to give specific and detailed instructions regarding mitigating evidence as defined in Va. Code Ann § 19.2-264.4, such as his youth, absence of prior criminal record, and the influence of an extreme mental or emotional disturbance.[9] Instead, the trial court instructed the jury, "[I]f you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the defendant at life imprisonment."[10] The court

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[1] *Buchanan v. Commonwealth*, 238 Va. 389, 394-95, 384 S.E.2d 757, 760-61 (1989).

[2] Va. Code Ann. § 18.2-31(7).

[3] Va. Code Ann. § 18.2-32.

[4] Va. Code Ann § 18.2-53.1.

[5] *Buchanan v. Angelone*, 103 F.3d 344, 346-47 (1996). Although not expressly stated in the opinion, or in the opinion of the Supreme Court of Virginia, the jury appears to have predicated Buchanan's death sentence on a finding of "vileness".

[6] *Id.* at 347.

[7] *Id.* at 351.

[8] Three of the court's rulings will not be discussed in this summary. Some of the rulings provide little if any guidance because they apply broad, settled principles of law to facts that are specific to the case being reviewed. These holdings are (1) trial counsel was not ineffective by not suggesting the defendant plead guilty to the first degree murder indictments so that double jeopardy would preclude a sentence of death. The court correctly applied the holding of *Ohio v. Johnson*, 467 U.S. 493 (1984), that pleading guilty to the lesser included offenses does not bar the state from prosecuting the greater offenses if it brought all charges in the same prosecution; (2) the Supreme Court of Virginia conducted a sufficient proportionality review; (3) having failed to raise the issue on direct appeal, Buchanan was barred from assigning error for the trial court's failure to instruct on second degree murder.

[9] *Buchanan*, 103 F.3d at 347. Va. Code Ann. § 19.2-264.4(B) states:

> "Facts in mitigation may include, but shall not be limited to, the following: (i) The defendant has no significant history of prior criminal activity, (ii) the capital felony was committed while the defendant was under the influence of extreme mental or emotional disturbance, (iii) the victim was a participant in the defendant's conduct or consented to the act, (iv) at the time of the commission of the capital felony, the capacity of the defendant to appreciate the criminality of his conduct or to conform his conduct to the requirements of law was significantly impaired, (v) the age of the defendant at the time of the commission of the capital offense or (vi) mental retardation of the defendant."

[10] *Id.*