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Wright v. Angelone 151 F.3d 151 (4th Cir. 1998)

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I. Facts

On October 13, 1989, Dwayne Allen Wright ("Wright") followed Saba Tekle ("Tekle") to the parking lot of her apartment building. When Tekle exited the automobile, Wright approached her, displayed a gun, and demanded the keys to Tekle's automobile. Tekle dropped the keys to the ground and Wright retrieved them. He then ordered Tekle to take off her clothes so that they could have sex in a wooded area behind Tekle's apartment building. Tekle removed her shoes and underpants and then began screaming and running towards her apartment building. Wright chased her into the apartment building and fired two shots at Tekle. One of the bullets struck Tekle, and she died from the wound. After firing the shots, Wright left in the automobile that Tekle had been driving.[1]

Given Wright's age at the time of the crimes, seventeen, the Commonwealth initiated criminal proceedings in the juvenile court. The first two petitions to the juvenile court alleged that Wright had murdered Tekle and used a firearm to commit the murder. The juvenile court amended the first petition to charge Wright with capital murder because the murder occurred in commission of or in attempt to commit a robbery. The Commonwealth then obtained a third petition in juvenile court which charged Wright with robbery.[2]

On November 15, 1990, the Commonwealth gave formal notice of its intent to transfer the charges against Wright which originated in juvenile court to circuit court and its intent to seek the death penalty. The juvenile court granted Wright's motion for a sanity and competency hearing and also held a probable cause hearing. After finding probable cause on each of the three charges, the juvenile court then granted the Commonwealth's motion to transfer. The Commonwealth sought and received an indictment in the circuit court which charged Wright with (1) murder in the course of a robbery; (2) robbery; (3) use of a firearm during a robbery; (4) murder subsequent to attempted rape; and (5) attempted rape. A jury found Wright guilty on all counts and then recommended the death penalty for Wright based on the future dangerousness aggravating factor.[3]

On direct appeal, the Supreme Court of Virginia affirmed Wright's convictions and sentence. The United States Supreme Court vacated Wright's sentence

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1. Wright v. Angelone, 151 F.3d 151, 154-55 (4th Cir. 1998).
2. *Wright*, 151 F.3d at 155.
3. *Id.* at 155-56.

based on *Simmons v. South Carolina*.[4] On remand, the Supreme Court of Virginia reaffirmed the sentence, concluding that Wright was not ineligible for parole. The Supreme Court then denied certiorari. Wright filed state habeas petitions which were dismissed by the Supreme Court of Virginia. After Wright filed his federal habeas petition on March 14, 1997, a United States magistrate recommended denial of habeas corpus relief. On September 12, 1997, the district court adopted the magistrate's recommendation and dismissed the federal habeas petition.[5] Wright appealed to the Fourth Circuit.

II. Holding

The United States Court of Appeals, Fourth Circuit, affirmed the district court's denial of the writ of habeas corpus holding that: (1) the Virginia circuit court did not lack jurisdiction because Wright did not present any evidence to show that the Virginia circuit court's exercise of jurisdiction over the five charges resulted in a complete miscarriage of justice; (2) Wright's Fourteenth Amendment Equal Protection Clause challenge to the Supreme Court of Virginia's ruling that Wright could be tried as an adult, even though the Commonwealth failed to conduct proper transfer proceedings, a challenge raised in Virginia's state habeas proceedings, cannot provide a basis for federal habeas relief; (3) Wright's Sixth Amendment claim of a denial of a fair and impartial trial, based on alleged intimidation of a juror, was procedurally defaulted; and (4) Wright did not receive ineffective assistance from his counsel.[6] The court further ruled that the district court did not abuse its discretion by denying Wright's motion for funds to hire a neurologist.[7]

III. Analysis/Application in Virginia

Before examining the merits of Wright's habeas corpus petition, the court sought to determine the applicable standard of review under the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[8] The court cited *Green v. French*[9] which interpreted AEDPA to say that habeas relief will only be granted if the state courts have decided an issue on the merits by applying Supreme Court of the United States precedent in an unreasonable way. Wright objected to the use of this extremely deferential standard because the Supreme Court of Virginia

4. 512 U.S. 154 (1994) (holding that where future dangerousness is at issue and state law prohibits parole if defendant is sentenced to life in prison, due process requires that jury be informed – either by instruction or by argument of counsel – that the only alternative to a death sentence is a sentence of life without parole).

5. *Wright*, 151 F.3d at 156.

6. *Wright*, 151 F.3d at 157-63.

7. *Id.* at 163-64.

8. 28 U.S.C. § 2254(d) (West Supp. 1998).

9. 143 F.3d 865 (4th Cir. 1998). *See also* Case Note on *Green v. French*, 11 CAP. DEF. J. 105 (1998).

had rejected his state habeas petition in a single paragraph and gave no detailed explanation of the grounds for its ruling. Wright argued that because of the limited nature of the state habeas dismissal, the court should exact a more probing review of Wright's habeas petition and be less deferential to the minimal decision issued by the Supreme Court of Virginia.

The court ruled against Wright, acknowledging that a more detailed state court order would make review easier, but held that the standard of review did not change simply because of the summary opinion accompanying the state court order. Thus, for habeas relief to be issued, the court held that it would have to find an "unreasonable application of clearly established Federal law, as determined by the Supreme Court of the United States." [10] Given that future federal habeas petitions will be governed by the deferential standards of AEDPA, as deferentially interpreted by the deferential Fourth Circuit, the importance of effective trial level defense is even more apparent.[11]

A. Lack of Trial Court Jurisdiction: Raising a Federal Claim

Wright argued that because he was seventeen at the time the criminal acts occurred, any charges brought against him had to have originated in juvenile court. Wright contended that under *Burfoot v. Commonwealth*,[12] for the circuit court to gain jurisdiction over any charges against a juvenile, those charges would have to first be brought in juvenile court and then transferred to the circuit court via a transfer hearing. Wright argued that because the attempted rape and capital murder subsequent to attempted rape charges originated in circuit court, and not in juvenile court, and thus were not subject to a transfer hearing, the circuit court lacked jurisdiction over those charges. Because the circuit court lacked jurisdiction, Wright argued that he was entitled to a new trial.[13]

In rejecting Wright's argument, the court ruled that under *Estelle v. McGuire*[14] and 28 U.S.C.A. § 2254(a),[15] federal courts can only grant habeas relief if the petitioner is in custody in violation of federal law.[16] Holding that Wright's

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10. *Wright*, 151 F.3d at 157 (citing Green v. French, 143 F.3d 865, 894 (4th Cir. 1998)).

11. One important aspect of trial level defense is negotiation. For a more thorough discussion of how to keep capital punishment out of a trial, *see* Lesley Meredith James, *Overlooked Victories: Techniques for Negotiating Non-capital Outcomes*, CAP. DEF. DIG., vol. 6, no. 2, p. 35 (1994).

12. 473 S.E.2d 724, 727 (Va. 1996).

13. *Wright*, 151 F.3d at 157.

14. 502 U.S. 62, 67-68 (1991).

15. 28 U.S.C. § 2254(a) (West 1998).

16. The statute provides:

> The Supreme Court, a Justice thereof, a circuit judge, or a district court shall entertain an application for a writ of habeas corpus in behalf of a person in custody pursuant to the judgment of a State court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States.

28 U.S.C. § 2254(a) (West 1998).

argument, "when pared down to its core, rests solely upon an interpretation of Virginia's case law and statutes,"[17] the court rejected Wright's argument because it was not cognizable at federal habeas review under *Estelle*.[18]

The court's ruling on this issue shows the need for defense counsel to urge all applicable federal grounds for all trial and appellate claims. Although absence of state court jurisdiction is not an issue which is easily couched in federal terms, there are three possible grounds on which absence of state court jurisdiction can be federalized, two of which were suggested in this case.

The first potential way to federalize this issue is by making a Fourteenth Amendment due process claim based on arbitrary enforcement of a state created right. The *Burfoot* decision was based on a section of the Virginia Code which stated that all prosecutions of juveniles for criminal offenses "shall" begin by the filing of a petition in juvenile court.[19] Thus, the Code created a statutory right or duty for criminal prosecutions against juveniles to begin in juvenile court. Arbitrary enforcement of this right or duty, as it seems to be the case here, would violate a defendant's right to due process under the Fourteenth Amendment of the United States Constitution. This existence of this federal basis for relief is at least implicitly recognized by the United States Court of Appeals, Fourth Circuit in *Dubois v. Greene*.[20]

A second way to federalize absence of state court jurisdiction is suggested by *Hailey v. Dorsey*.[21] Wright argued that *Hailey* created an exception to the rule of *Estelle*. In *Hailey*, the Fourth Circuit held that in cases where non-constitutional procedural errors, which did not result in violation of the defendant's fundamental rights, are urged, only those errors which resulted in the sentencing court having no jurisdiction to sentence the appellant are cognizable at federal habeas proceedings.[22] In *Wright*, however, interpreting its own holding in *Hailey*, the court stated that nothing in *Hailey* suggested that the court may resolve an issue based on a non-constitutional procedural error contrary to the highest court in the state absent a showing of a complete miscarriage of justice.[23] However, this is exactly what *Hailey* suggests. In Wright's case, the type of error was exactly the type mentioned in *Hailey*, an error which robbed the trial court of its authority to sentence Wright for the capital murder after attempted rape charge. The court should not have ruled that Wright's reliance on *Hailey* was incorrect. Thus,

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17. *Wright*, 151 F.3d at 157.

18. *Id.*

19. VA. CODE ANN. § 16.1-260 (Michie 1996).

20. No. 97-21, 1998 WL 276282 (4th Cir. May 26, 1998). *See also* Case Note of *Dubois v. Greene*, 11 CAP. DEF. J. 87 (1998); Otto W. Konrad, *How to Look the Virginia Gift Horse in the Mouth: Federal Due Process and Virginia's Arbitrary Abrogation of Capital Defendant's State-Created Rights*, CAP. DEF. DIG., vol. 3, no. 2, p. 16 (1991).

21. 580 F.2d 112 (4th Cir. 1978).

22. Hailey v. Dorsey, 580 F.2d 112, 115 (4th Cir. 1978).

23. *Wright*, 151 F.3d at 158.

the language in *Hailey* suggests a second way to federalize an absence of state court jurisdiction claim.

Finally, a third way to federalize this claim would be to argue that the state is creating two classes of defendants in its application of the statute, thus violating the Fourteenth Amendment's equal protection guarantees. It is arguable that if the Virginia courts require compliance with the transfer statute at issue here for one class of defendant, non-capital defendants as in *Burfoot*, and does not require compliance for another class of defendant, capital defendants as in *Wright*, then the Fourteenth Amendment's Equal Protection Clause has also been violated.

Accordingly, Wright asserted that the Supreme Court of Virginia denied him equal protection of the law in violation of the Fourteenth Amendment when it ruled in Wright's state habeas proceeding, prior to all precedent, that Wright could be tried as an adult despite the Commonwealth's failure to comply with the transfer provisions denoted in *Burfoot*.[24] However, the court avoided addressing the issue presented by Wright by relying upon the language of 28 U.S.C.A. § 2254(a) for the proposition that the court could only grant habeas relief if Wright, pursuant to the judgment of a state court, was in custody in violation of federal law.

B. Violation of Sixth Amendment When Victim's Family Intimidated a Juror

Wright contended that members of the victim's family intimidated a juror, thereby tainting the entire jury and denying him a fair and impartial jury.[25] At state habeas review the Supreme Court of Virginia held that Wright did not raise the issue on direct appeal, and therefore, the claim was procedurally defaulted under *Slayton v. Parrigan*.[26] Nonetheless, Wright argued that procedural default should not have been applied to this issue because the issue had actually been raised and ruled upon on direct appeal by the Supreme Court of Virginia.[27]

In ruling against Wright, the court cited *Harris v. Reed*[28] to hold that procedural rules, such as default, cannot be questioned at federal habeas review if the rule is based on an "adequate and independent" state ground.[29] An "adequate" state ground is one which is consistently applied by the state court.[30] The court cited prior precedent to establish that the Virginia procedural default rule announced in *Slayton* was both adequate and independent, but failed to make any analysis of the rule in its decision.[31] The court concluded that it could not review

24. *Id.* at 159.

25. *Id.*

26. 205 S.E.2d 680 (Va. 1974) (holding that claims that could have been raised on direct appeal, but were not, cannot be raised on state collateral review).

27. *Wright*, 151 F.3d at 159.

28. 489 U.S. 255, 262 (1989).

29. *Wright*, 151 F.3d at 159.

30. Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (citations omitted).

31. Mu'Min v. Pruett, 125 F.3d 192, 196 (4th Cir.), *cert. denied*, 118 S.Ct. 138 (1997).

Wright's Sixth Amendment claim because the state court used an adequate and independent state procedural rule to default the claim.

The court obviously should have "questioned" the *Slayton* rule at federal habeas review because it was quite possible that the rule was not consistently applied as required by the adequacy prong in *Harris*. According to the court's own language, the *Slayton* procedural default rule is to be applied when an issue has *not been raised* on direct appeal. However, Wright claimed that the Sixth Amendment issue *was raised* on direct appeal and the court decided the issue adversely to Wright. Thus, if Wright was correct, the *Slayton* rule plainly should not have been applied and application of the rule to the case would clearly be inconsistent with the rule's own terms. However, the court did not determine whether or not the Sixth Amendment issue was ruled upon at direct appeal, thus it did not actually decide if the rule was correctly applicable to the case or not. It makes little sense to say that a procedural default rule is unquestionable if adequate and independent, and then not determine if the rule meets the definition of adequate (i.e., consistent) or not. Thus, the court's conclusion that it could not "question" procedural default in this case seems clearly to overlook that there is a test of the rule which must be satisfied before it can reach its unquestionable conclusion.

The court did conclude that even if it reached the issue of whether or not the Sixth Amendment claim had been ruled upon, it would have ruled that the Supreme Court of Virginia did not rule upon the issue.[32] While it is in question whether or not the Supreme Court of Virginia ruled upon or even heard the Sixth Amendment issue, *Wright* demonstrates the need for appellate counsel to ensure that the record reflects presentation of claims to the state court. In *Duncan v. Henry*,[33] the Supreme Court of the United States ruled that in order to preserve the right to collateral review of an issue in federal court, the defendant must have fairly presented the issue to the state court. It is important to note, however, that the requirement is only that the claim be presented. If it is, default cannot be awarded whether the state court rules upon the claim or not.

C. Ineffective Assistance of Counsel

Wright contended that his trial counsel was constitutionally ineffective.[34] Wright based one of his claims on the fact that his trial counsel failed to

32. *Wright*, 151 F.3d at 159 n.4.

33. 513 U.S. 364, 366 (1995) (per curiam).

34. Wright claimed four reasons why his counsel was constitutionally ineffective. Wright claimed (1) that his trial counsel, in preparation for his juvenile court transfer proceeding, failed to investigate mental health records that suggested that Wright suffered from mental disabilities; (2) that his trial counsel failed to object to the trial court's jurisdiction over the attempted rape and murder subsequent to an attempted rape charges which were not presented to the juvenile court; (3) that his trial counsel failed to investigate the court-appointed mental health expert before counsel recommended him; and (4) that his trial counsel failed to investigate and present significant mitigation evidence during the penalty phase of the trial. *Wright*, 151 F.3d at 160. All four claims were rejected by the Supreme Court of Virginia under the test of *Strickland v. Washington*, 466 U.S.

conduct an investigation of Dr. Stanton Samenow ("Samenow") before recommending him to the court as a mental health expert. The court rejected the claim,[35] but there is much to learn from the disposition of this claim.

During the prosecution's cross-examination of Samenow, Wright's counsel learned for the first time that Samenow was a co-author of a study which concluded that mental illness and environment are not responsible for people committing crimes, but instead that criminals commit crimes because they believe they have an ability to get away with the crimes. Furthermore, Samenow testified that he did not believe Wright was delusional, suffered hallucinations, or was mentally ill. As the court stated, "[o]bviously this testimony dealt quite a blow to Wright's mitigation defense."[36] Wright's counsel even admitted that had he known about Samenow's studies, he would not have used him as his court-appointed mental health expert. The court even conceded under *Strickland v. Washington*[37] that the trial counsel's failure to investigate Samenow was unreasonable.[38] Noting that Samenow had offered some mitigating testimony, the court denied relief under the prejudice prong of *Strickland*.[39]

The failure of defense counsel to provide objectively reasonable assistance, under *Strickland*, in use of a mental mitigation expert, as the court assumed without deciding, is instructive on the subject of proper use of such experts. First, obviously, defense counsel must investigate potential expert witnesses and must not retain or permit appointment of Samenow or experts like him.

Second, under VA. CODE ANN. § 19.2-264.3:1 ("3:1"), defense counsel can request the court to appoint an expert to assist the defense in its preparations of mental evidence relevant to sentencing, just as the defense counsel requested an expert and got Samenow in this case.[40] Under 3:1, this expert creates a report for the defense counsel which specifically addresses certain questions relevant to the defendant's mental status.[41] However, if defense counsel decides to have this appointed expert testify at trial, 3:1 provides that the Commonwealth is entitled to receive the report prepared by the expert for defense counsel and that the Commonwealth may have an examination of the defendant performed by its own court-appointed expert.[42] For this reason, while it is essential that defense

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668 (1984). The Fourth Circuit held that, in each case, the Supreme Court of Virginia's rejection of Wright's claim was not an unreasonable application of *Strickland*. Thus, the court upheld the rejection of all four claims. *Wright*, 151 F.3d at 161-63.

35. *Wright*, 151 F.3d at 161-62.

36. *Id.* at 161.

37. 466 U.S. 668 (1984) (holding that to satisfy a claim of ineffective assistance of counsel a defendant must show that his attorney's conduct was unreasonable and that such conduct prejudiced the defendant).

38. *Wright*, 151 F.3d at 162.

39. *Id.*

40. *See* VA. CODE ANN. § 19.2-264.3:1 (Michie 1998).

41. *See* VA. CODE ANN. § 19.2-264.3:1(C) (Michie 1998).

42. *See* VA. CODE ANN. § 19.2-264.3:1(D) (Michie 1998).

counsel use any court-appointed experts to understand, prepare, and present mental evidence, it may not always be wise to actually call the court-appointed expert to testify at trial.[43] As seen in this case, because defense counsel called Samenow to testify at trial, he enabled the Commonwealth to have an examination of the defendant done by the likes of Dr. Centor, who in this case, as usual, delivered damaging testimony which predicted that Wright would be a danger in the future.[44] Thus, defense counsel should seriously consider using 3:1 expert witnesses as full members of the defense team, but short of actually calling the expert to testify at trial.

Third, this case shows that a need can arise for more than one expert. For example, in this case, reports existed which suggested that Wright may have suffered from organic brain dysfunction. Organic brain dysfunction is, by definition, a problem with the physical organ of the brain. This means the problem is one which would probably be more properly diagnosed by a medical doctor, who has the benefit of cat-scans and other devices to determine if the brain is organically proper, than by a psychologist or psychiatrist. While a psychologist or psychiatrist may be able to identify the symptoms or behaviors associated with organic brain disorder, a medical doctor would be able to diagnose the actual existence of the disorder. However, Wright's counsel only solicited the opinions of Samenow, Dr. Centor, the Commonwealth's mental expert, and Dr. Mauer, the court-appointed juvenile evaluator, to determine if Wright suffered from organic brain dysfunction. [45] Each of these three *psychologists*, including Samenow, informed Wright's counsel that they did not think Wright suffered from organic brain dysfunction, however, none of them were likely the best qualified to lend expert opinions on the topic. So, while a psychological expert such as Samenow was helpful for other aspects of the defense, an additional expert probably would have been useful to help the defense determine whether Wright suffered from organic brain dysfunction or not.

To obtain additional experts, counsel can rely on the language of 3:1 itself. In section A of 3:1, the statute states that the court may appoint "one *or more* qualified mental health experts."[46] However, the language may limit the type of expert to mental health experts. To obtain other kinds of experts, defense counsel can seek expert assistance under *Ake v. Oklahoma*.[47] Under *Ake*, if sanity is to be an issue at trial, the State is constitutionally required to assure that the

43. This is in part because of recent bizarre interpretations of 3:1 by the Supreme Court of Virginia and the Fourth Circuit. For an insightful discussion of tactical decisions surrounding the use of expert testimony in mental mitigation, *see* Douglas S. Collica, *Alice in Wonderland Interpretations: Rethinking the Use of Mental Mitigation Experts*, CAP. DEF. J., vol. 9, no. 1, p. 57 (1996); *see also* Case Note of *Savino v. Murray*, CAP. DEF. J., vol. 9, no. 1, p. 21 (1996); Case Note of *Stewart v. Angelone*, 11 CAP. DEF. J. 137 (1998).

44. *Wright*, 151 F.3d at 162.

45. *Id.*

46. VA. CODE ANN. § 19.2-264.3:1(A) (Michie 1998) (emphasis added).

47. 470 U.S. 68 (1985).

defendant has access to a competent psychiatrist.[48] Although *Ake* was limited to psychiatric experts, in *Caldwell v. Mississippi*,[49] the Supreme Court of the United States later implied that due process may require more than just psychiatric experts. In *Husske v. Commonwealth*,[50] the Supreme Court of Virginia read *Ake* and *Caldwell* together to mean that a defendant is entitled to non-psychiatric expert witnesses if he can show that assistance of such an expert is likely to be a significant factor in his defense and that he will be prejudiced by a lack of expert assistance.[51] Thus, under *Ake*, *Caldwell* and *Husske*, defense counsel can seek psychiatric or non-psychiatric expert assistance, in addition to other experts appointed under 3:1.[52]

Jason Solomon

48. Ake v. Oklahoma, 470 U.S. 68, 83 (1985).

49. 472 U.S. 320 (1985).

50. 476 S.E.2d 920 (Va. 1996).

51. Husske v. Commonwealth, 476 S.E.2d 920, 925-927 (Va. 1996).

52. The showings required to obtain experts under *Ake* and *Husske*, however, are extensive. Counsel are invited to consult the Virginia Capital Case Clearinghouse for assistance on this issue.

CASE NOTES:

Virginia Supreme Court