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Williams v. Taylor
163 F.3d 860 (4th Cir. 1998)

I. Facts

Harris Thomas Stone ("Stone"), an elderly resident of Danville, was found dead in his bed on Sunday, November 3, 1985.[1] Stone had a history of heart disease, and thus when the local medical examiner found no sign of bruising and only a slight abrasion on the chest, he concluded that Stone's death was the result of heart failure.[2] The regional medical examiner's office in Roanoke amended the finding of the cause of death to alcohol poisoning when Stone's blood alcohol content was later analyzed and reported to be 0.41%.[3] The funeral director, Jack Miller, called a bruise or abrasion over the left ribs to the attention of the police, but the police told Miller that the local medical examiner believed the bruise was an old one.[4] Though Miller disagreed with the local medical examiner, he embalmed the body on instructions from the police.[5]

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1. Williams v. Taylor, 163 F.3d 860, 863 (4th Cir. 1998), *stay granted*, No. 98-8384, 1999 WL 179763 (U.S. April 2, 1999), *cert. granted*, No. 98-8384, 1999 WL 148296 (U.S. April 5, 1999). The United States Supreme Court granted certiorari on the following issues: (1) whether the Fourth Circuit erred in concluding that, under 28 U.S.C. §2254(d)(1), a state habeas court's decision to deny a federal constitutional claim cannot be "contrary to" Federal law as determined by the United States Supreme Court unless it is in "square conflict" with a United States Supreme Court decision that is "controlling as to law and fact"; (2) whether the Fourth Circuit erred in concluding that, under 28 U.S.C. §2254(d)(1), a state habeas court's decision to deny a federal constitutional claim cannot involve "an unreasonable application of" clearly established Federal law as determined by the United States Supreme Court unless the state court's decision is predicated on an interpretation or application of relevant precedent that "reasonable jurists would all agree is unreasonable"; (3) whether the Fourth Circuit erred in reformulating the *Strickland* test so that ineffective assistance of counsel claims may be assessed under the *Lockhart* "windfall" analysis even where the trial counsel's error was no "windfall"; and (4)whether the Fourth Circuit erred in reformulating the *Strickland* test so that the petitioner must show that absent counsel's deficient performance in the penalty phase, all twelve jurors would have voted for life imprisonment, even where state law would have mandated a life sentence if only one juror had voted for life imprisonment. Petition for Certiorari, Williams v. Taylor, 163 F.3d 860 (4th Cir. 1998), *cert. granted*, No. 98-8384, 1999 WL 148296 (U.S. April 5, 1999). For a discussion of both *Strickland* issues, see *infra* Part III.A.
2. *Williams*, 163 F.3d at 862.
3. *Id.*
4. *Id.*
5. *Id.*

Almost six months after Stone's death, the chief of police in Danville received an anonymous letter from an inmate of the local jail in which the author wrote: "I can't write or spell too good. Please bare with me. [A]bout that man Who Die on Henry St . . . . Well, I kill him myself."[6] After the letter was received, two detectives interviewed Terry Williams ("Williams"), an inmate of the Danville jail at the time, and he implicated himself in the crime.[7] Williams later gave additional confessions to the murder and robbery of Stone. Williams said he had first struck Stone in the chest, and later on his back, with a mattock and had removed three dollars from Stone's wallet. Stone's body was subsequently exhumed. On July 2, 1986, Dr. David Oxley, a forensic pathologist and Deputy Chief Medical Examiner for Western Virginia, performed an autopsy. When Dr. Oxley opened the body, he found Stone's fourth and fifth ribs on the left side had been fractured and displaced inward, puncturing the left lung and depositing a quantity of blood in the left chest cavity.[8]

Williams was indicted on July 7, 1986, for the capital murder of Harris Thomas Stone on November 2, 1985, while in the commission of the armed robbery of Stone. A second count of the indictment charged Williams with the robbery of Stone during the course of the capital murder.[9] On September 30, 1986, a jury found Williams guilty of both charges and sentenced him to seven years imprisonment for the robbery. In a separate proceeding mandated by Virginia Code section 19.2-264.4, after hearing evidence of Williams's history, including aggravating factors and mitigating evidence, the jury fixed Williams's sentence at death, based on his "future dangerousness." After considering the probation officer's report and other evidence in a further hearing, the trial court, by its order dated November 19, 1986, sentenced Williams to death for capital murder.[10]

After his conviction for capital murder and death sentence were affirmed,[11] and his state petition for habeas corpus denied,[12] Williams petitioned the United States District Court for the Eastern District of Virginia for habeas corpus relief.[13] The district court ordered that the writ be granted on the ground that Williams's trial counsel were ineffective in failing to present certain evidence in mitigation of punishment during the sentencing phase of the trial. On appeal, the Commonwealth contended that the writ

6. Williams v. Commonwealth, 360 S.E.2d 361, 363 (Va. 1987).

7. *Id.* at 364.

8. *Id.* at 364.

9. *Id.* at 363 (citing VA. CODE ANN. § 18.2-31(D) (Michie 1998)).

10. *Id.*

11. *Williams*, 163 F.3d at 862 (citing Williams v. Commonwealth, 360 S.E.2d 361 (Va. 1987)).

12. *Id.* at 864 (citing Williams v. Warden, 487 S.E.2d 194 (Va. 1997)).

13. *Williams*, 163 F.3d at 862 (citing 28 U.S.C.A. § 2254 (West Supp. 1998)).

was erroneously granted.[14] Williams cross-appealed, claiming that his lead trial counsel was ineffective at the guilt phase.[15]

II. Holding

The United States Court of Appeals for the Fourth Circuit affirmed in part and reversed in part, holding that: (1) the Supreme Court of Virginia's decision that Williams was not prejudiced by his counsel's allegedly deficient performance was not an unreasonable application of United States Supreme Court precedent;[16] (2) the Supreme Court of Virginia did not make an error in fact in characterizing alleged mitigating evidence;[17] (3) the diagnosed depression of Williams's lead trial counsel did not render counsel's representation ineffective;[18] and (4) counsel was not otherwise ineffective.[19]

III. Analysis / Application in Virginia

A. Ineffective Assistance of Counsel

In granting the writ of habeas corpus, the district court concluded that in reviewing Williams's claim of ineffective assistance of counsel, the Supreme Court of Virginia unreasonably applied *Strickland v. Washington*[20] and *Lockhart v. Fretwell*[21] in finding no prejudice.[22] According to the United States Supreme Court in *Strickland*, the "benchmark" for evaluating an

14. *Id.* at 862.
15. *Id.* at 864.
16. *Id.* at 871-74.
17. *Id.* at 860. The United States District Court for the Eastern District of Virginia concluded that the Virginia Supreme Court made an error in fact in its finding of no prejudice when the Virginia Supreme Court characterized the alleged mitigating evidence as "mostly relatives [who] thought the defendant was nonviolent and could cope well in a structured environment." *Williams*, 163 F. 3d at 870 (quoting Williams v. Warden, 487 S.E.2d 194, 200 (Va. 1997)). In fact, one of the mitigation witnesses was Williams's friend Bruce Elliot. On the importance of family and friends witnesses in a capital case, see Scott E. Sundby, *The Jury as Critic: An Empirical Look at How Capital Juries Perceive Expert and Lay Testimony*, 83 Va. L. Rev. 1109 (1997). Professor Sundby's research reveals that juries frequently identify witnesses who are family and friends as among those who are the most favorable to the defense. The United States Court of Appeals for the Fourth Circuit concluded that the Virginia Supreme Court's description of both the witnesses and the nature of their testimony was reasonable. The court of appeals held that the district court erred in granting the writ because the Virginia Supreme Court's decision was not based on an unreasonable determination of the facts in light of the evidence presented at the evidentiary hearing held by the Danville Circuit Court. *Id.* (citing 28 U.S.C.A. § 2254(d)(2) (West Supp. 1998)).
18. *Williams*, 163 F.3d at 871-74.
19. *Id.*
20. 466 U.S. 668 (1984).
21. 506 U.S. 364 (1993).
22. *Williams*, 163 F.3d at 864.

ineffective assistance of counsel claim is "whether counsel's conduct so undermined the proper functioning of the adversarial process that the trial cannot be relied on as having produced a just result."[23] *Strickland* set out the following now-familiar two-pronged test for determining ineffective assistance of counsel: (1) whether defendant received reasonably effective assistance; and if not, (2) whether a reasonable probability existed that the outcome would be different had counsel's error not occurred.[24] In *Lockhart* the United States Supreme Court held that in some limited and unusual cases, a proper prejudice analysis must consider "whether the result of the proceeding was fundamentally unfair or unreliable."[25]

According to the district court, the Supreme Court of Virginia's application of the *Strickland* prejudice standard was unreasonable because there was a reasonable probability that at least one juror would have concluded that the death penalty was not warranted had the evidence in question been presented.[26] In addition, the district court also determined that the prejudice standard in *Lockhart* only applied in "'the unusual circumstance where the defendant attempts to demonstrate prejudice based on considerations that, as a matter of law, ought not to inform the inquiry.'"[27] On appeal, the

23. Strickland v. Washington, 466 U.S. 668, 686 (1984).

24. *Id.* at 686.

25. Lockhart v. Fretwell, 506 U.S. 364, 369 (1993).

26. *Williams*, 163 F.3d at 868 (noting that the Virginia Code section 19.2-264.4(E) provides that a death sentence must be unanimous). According to the report of the Danville Circuit Court, Williams's trial counsel failed to investigate and present in mitigation Williams's juvenile records, evidence of Williams's early home life, testimony of Williams's estranged wife and daughter, and the testimony of a friend. The Danville Circuit Court concluded that the mitigation evidence "probably would have been given weight by at least one juror," and because a death sentence must be unanimous, Williams was prejudiced by trial counsel's failure to present the mitigating evidence. *Id.* at 867 (noting that the Virgina Code section 19.2-264.4(E) provides that a death sentence must be a unanimous one).

27. *Id.* at 868 (quoting *Lockhart*, 506 U.S. at 373 (O'Connor, J., concurring)). The facts of *Lockhart* are as follows: at trial, defendant Fretwell was sentenced to death by an Arkansas jury based on an aggravating factor that duplicated an element of the underlying felony-murder in the course of a robbery. Had Fretwell's counsel known of and cited *Collins v. Lockhart*, 754 F.2d 258 (8th Cir. 1985), at sentencing, Fretwell would not have been sentenced to death because *Collins* held that the use of an aggravating circumstance that duplicated an element of the crime itself violated the Eighth Amendment. The Arkansas Supreme Court declined to address Fretwell's claim on its merits on direct appeal because the issue was not raised at trial. Four years later, at habeas, the claim was couched as an ineffective assistance of counsel claim based on the failure of Fretwell's counsel to raise *Collins*. By this time, *Collins* had been overruled. The United States Supreme Court held that counsel's failure to make the *Collins* objection during the sentencing proceeding did not constitute prejudice within the meaning of *Strickland*. To show prejudice under *Strickland*, a defendant must demonstrate that counsel's errors are so serious as to deprive him of a trial whose result is fair or reliable. According to the Court in *Lockhart*, unfairness or unreliability does not result unless counsel's ineffectiveness deprives the defendant of a substantive or procedural right to which the law entitles him. The sentencing proceeding's result in *Fretwell* was

United States Court of Appeals for the Fourth Circuit held that the *Strickland* prejudice standard "assumes twelve reasonable, conscientious, and impartial jurors, [and] that one hypothetical juror might be swayed by a particular piece of evidence is insufficient to establish prejudice."[28] Moreover, the court stated that the prejudice standard in *Lockhart*, that a defendant must show that the proceeding itself was fundamentally unfair or unreliable, is not limited to the "unusual" case. According to the court, "the standard for prejudice set forth in *Lockhart* is not an exception to the *Strickland* standard, but rather a clarification."[29] The court concluded that the Supreme Court of Virginia's finding of prejudice was not based on an unreasonable application of the tests set forth in *Strickland* and *Lockhart*, and thus the district court erred in granting the writ.

Despite the fact that a death sentence must be unanimous under Virginia Code section 19.2-264.4 (E), the Fourth Circuit concluded that the district court was mistaken in suggesting that the *Strickland* prejudice standard could be met with a showing that there was a reasonable probability that at least one juror would have concluded that the death penalty was not warranted had the evidence in question been presented.[30] The court held that "the *Strickland* prejudice standard assumes twelve reasonable, conscientious, and impartial jurors. Thus, that one hypothetical juror might be swayed by a particular piece of evidence is insufficient to establish prejudice."[31] This holding is not only conclusory, but it is not responsive to the reality of Virginia law.

In addition to ignoring the reality of one juror in determining prejudice, the Fourth Circuit interpreted the more stringent *Lockhart* test as a "clarification" of the already difficult two-pronged *Strickland* test; consequently, the Fourth Circuit added another amorphous layer to the test and rendered the success of any ineffective assistance of counsel claim before the court very unlikely, if not entirely impossible, in the future.[32] The failure of the Fourth Circuit to find prejudice even where it recognized that "trial counsel's performance fell below an objective standard of reasonableness,"[33] suggests that the court requires only a minimal level of assistance on the part of counsel. It should thus be recognized that the standards of the Fourth

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neither unfair nor unreliable because the Eighth Circuit, which had decided *Collin* in 1985, overruled it in *Perry v. Lockhart*, 871 F.2d 1384 (8th Cir. 1989), four years later. Thus, Fretwell suffered no prejudice from his counsel's deficient performance. *Lockhart*, 506 U.S. at 364-65.

28. *Id.*

29. *Id.* at 868.

30. VA. CODE ANN. § 19.2-264.4(E) (Michie 1998).

31. *Williams*, 163 F.3d at 867.

32. The Fourth Circuit last gave relief on an ineffective assistance of counsel twelve years ago in *Hyman v. Aiken*, 824 F.2d 1405 (4th Cir. 1987).

33. *Williams*, 163 F.3d at 866-67.

Circuit are insufficient to provide meaningful guidance, and that defense counsel must rely on his or her own professional standards and personal integrity in providing the defendant with effective assistance.

B. Expert Witness Issues

After Williams's defense counsel suggested to the court that Williams might lack the capacity to understand the proceedings against him or assist counsel in his defense, the court appointed Dr. Centor to examine Williams. Although he was not appointed by the court, Dr. Ryans assisted Dr. Centor in this competency evaluation. During the sentencing phase of the trial, both Dr. Centor and Dr. Ryans were called by the Commonwealth as witnesses, and both doctors testified that based solely on Williams's criminal history, Williams represented a future danger to society.[34] These events were the basis of Williams's claim that his defense counsel was ineffective for the following reasons: (1) failing to object to the dual appointment of mental health experts; (2) failing to use the court-appointed experts in violation of *Ake v. Oklahoma*;[35] (3) failing to bar the Commonwealth's use of the court-appointed experts; and (4) failing to rebut the court-appointed experts' damaging testimony.[36] The court found the first two claims to be procedurally defaulted. The court rejected the third claim on the ground that the experts' testimony was not based on any statements made to them by the defendant in the competency evaluation but rested instead exclusively on a review of the defendant's criminal record.[37] Williams's fourth claim was rejected by the court because "a criminal defendant does not have a right to favorable expert testimony."[38]

The appointment of Dr. Centor, the assistance of Dr. Ryan at Williams's competency evaluation, and the later testimony of the two for the Commonwealth at the sentencing phase should illustrate serious issues for defense counsel in capital cases. To begin with, defense counsel should seek to ensure that any competency evaluation is strictly limited to the questions of whether a defendant understands the proceedings against him and whether he can assist his attorney in his own defense. The report generated by the competency expert is distributed to both the defense and the prosecu-

34. *Id.* at 872.

35. 470 U.S. 68 (1985).

36. *Williams*, 163 F.3d at 872.

37. *Id.* at 873 (citing VA. CODE ANN. § 19.2-264.3 (Michie 1998)). The court also notes that even if trial counsel's performance was deficient in failing to object to the Dr. Centor's and Dr. Ryan's participation in both the competency hearing and the sentencing phase, "Williams's prior criminal activity alone was more than enough to support a finding of future dangerousness. As a result, the testimony of Dr. Ryans and Dr. Centor to the same effect was not prejudicial." *Id.* at 873 n.8. The essence of this difficult-to-understand conclusion then is that expert testimony has no impact on juries.

38. *Id.* (citing Waye v. Murray, 884 F.2d 765, 766-67 (4th Cir. 1989)).

tion, and thus nothing should be revealed about the defendant beyond what is absolutely necessary for a determination of competency. In addition, defense counsel should never permit without objection the appointment of either Dr. Centor or Dr. Ryan by the court, for any purpose, because they have a demonstrated history of bias in favor of the Commonwealth in the sentencing phase of capital trials.[39] Thus, if these doctors examine a defendant for competency and then later testify, based solely on the defendant's criminal record, that the defendant represents a "future danger to society," the jury will still know that they examined the defendant to determine his competency to stand trial. The fact that the doctors met previously with the defendant in person will certainly lend credibility to their testimony at the sentencing phase. Finally, should a court appoint either Dr. Centor or Dr. Ryan as a mental mitigation expert under Virginia Code section 19.2-264.3:1 ("3:1"), defense counsel should object on the ground that the language of 3:1 makes it clear that the expert appointed is a partisan expert meant to assist in the preparation of mitigation evidence. Given the records of both Dr. Centor and Dr. Ryan as prosecution witnesses, neither is competent to be designated as a defense mitigation expert.[40]

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39. Centor and Ryan are not the only biased experts. Contact the Virginia Capital Case Clearinghouse for further information.

40. Defense counsel can request that the court appoint an expert to assist the defense in its preparation of evidence relevant to sentencing. Under 3:1, this expert creates a report for defense counsel which specifically addresses certain questions relevant to the defendant's mental status. 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 the defense counsel and that the Commonwealth may have an examination of the defendant performed by its own court-appointed expert. For this reason, while it is essential that defense counsel use any court-appointed experts to understand, prepare, and present mental evidence, it is seldom wise to actually call the court-appointed expert to testify at trial. Defense counsel should seriously consider using court-appointed experts as full members of the defense team but should stop short of calling them as experts to testify at trial. For an insightful discussion of the 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., Fall 1996, at 57. *See also* C. Cooper Youell, IV, Case Note, CAP. DEF. J., Fall 1996, at 21 (analyzing Savino v. Murray, 82 F.3d 593 (4th Cir. 1996)); Matthew Keil Mahoney, Case Note, 11 CAP. DEF. J. 137 (1998) (analyzing Stewart v. Angelone, No. 97-26, 1998 WL 391646 (4th Cir. May 29, 1998)).