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## Joseph v. Angelone 184 F.3d 320 (4th Cir. 1999)

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# Joseph v. Angelone

## 184 F.3d 320 (4th Cir. 1999)

### *I. Facts*

On October 26, 1992, Jason Matthew Joseph (“Joseph”) and his co-defendant Kiasi Powell (“Powell”) entered a Subway store to commit a robbery. Joseph was armed with a .45-caliber pistol. Once inside the store, Joseph ordered a sandwich from Jeffrey Anderson (“Anderson”), a Subway employee. After Anderson finished making the sandwich, Joseph produced the pistol and told Anderson to open the cash register and drop to the floor. After Anderson complied with the demand, Joseph shot him. Evidence introduced by the Commonwealth during the guilt phase of the trial included Powell’s testimony and a video from the store’s security cameras.<sup>1</sup>

At sentencing, the jury recommended the death penalty after finding the future dangerousness aggravating factor. The trial court accepted the jury’s recommendation and sentenced Joseph to death. Joseph’s subsequent appeals to the Supreme Court of Virginia and the United States Supreme Court were denied. After his state habeas petition was denied, Joseph filed a federal habeas petition in the United States District Court for the Eastern District of Virginia. The district court dismissed the petition. From that order of dismissal, Joseph appealed.<sup>2</sup> On appeal, Joseph claimed he was entitled to habeas relief on the following grounds: (1) his constitutional rights were violated by the trial court’s refusal to inform the jury that he would not be eligible for parole for a number of years; (2) the district court erred in refusing to grant him an evidentiary hearing to examine whether a newspaper account of a comment allegedly made by Joseph influenced the jury’s sentencing decision; (3) he received ineffective assistance of counsel because (a) his attorneys failed to present certain mitigating evidence at sentencing, (b) the mental health expert evaluation provided to him was inadequate, and (c) his counsel and the Commonwealth failed to produce certain mental health records; and (4) application of section 19.2-264.3(1) of the Virginia Code violated his Fifth, Eighth, and Fourteenth Amendment rights.<sup>3</sup>

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1. Joseph v. Angelone, 184 F.3d 320, 323 (4th Cir. 1999).

2. *Id.* (citing Joseph v. Commonwealth, 452 S.E.2d 862 (Va. 1995); Joseph v. Virginia, 516 U.S. 876 (1995)).

3. *Id.* at 323-24. Joseph’s claims regarding his eligibility for parole and the effect of the newspaper report on the jury’s sentencing decision will not be discussed in detail in this

## II. Holding

The United States Court of Appeals for the Fourth Circuit denied Joseph a certificate of appealability and dismissed his petition.<sup>4</sup>

### III. Analysis / Application in Virginia

#### A. Ineffective Assistance of Counsel

##### 1. Failure to Investigate and Present Mitigating Evidence

Joseph claimed that the assistance provided by his attorneys at sentencing was constitutionally ineffective because they failed to investigate and present mitigating evidence which tended to prove that Joseph suffered from brain damage.<sup>5</sup> The court applied the two-pronged test established by *Strickland v. Washington*.<sup>6</sup> Because the court found that Joseph failed to prove that his trial counsel's performance was objectively unreasonable, it did not consider the prejudice prong.<sup>7</sup>

The crux of Joseph's claim was that his trial counsel should have uncovered evidence tending to show that Joseph suffered from brain damage. The court found counsel's performance on this issue to be objectively

article. The court's disposition of these claims does not offer any guidance for capital defense lawyers in Virginia. These claims are briefly described below.

During sentencing, Joseph sought to inform the jury that, although he would be eligible for parole, he would not be eligible for many years. Because then-applicable Virginia law prevented a defendant from introducing evidence of parole eligibility, the trial court overruled Joseph's motion to present such evidence. Subsequent to Joseph's sentencing, the United States Supreme Court decided *Simmons v. South Carolina*, 512 U.S. 154, 169 (1994) (holding that where future dangerousness is an issue and state law prohibits parole for capital life imprisonment sentences, due process demands that the defendant be allowed to inform the jury of parole ineligibility). The Supreme Court of Virginia, relying on language from Justice O'Connor's concurrence in *Simmons*, affirmed Joseph's sentence and concluded that *Simmons* was inapplicable when a defendant was eligible for parole. The Fourth Circuit affirmed. *Joseph*, 184 F.3d at 324.

The day after the jury found Joseph guilty, a local newspaper printed a story reporting that Joseph had turned to the victim's widow and said "shit happens" after the verdict was read. *Id.* at 325 n.3. Joseph claimed that the district court erred by refusing to grant an evidentiary hearing to examine the effect of the newspaper article on the jury's sentencing decision. Because Joseph did not raise this claim until the federal habeas proceeding, the court determined that it was procedurally defaulted. Joseph argued that he could overcome the default by showing cause and prejudice resulting from ineffective assistance of counsel in his state habeas proceeding. In rejecting Joseph's claim, the court refused to revisit its decision in *Mackall v. Angelone*, 131 F.3d 442, 449 (4th Cir. 1998), which held that a defendant cannot use ineffective assistance of counsel to show cause because there is no right to counsel during state habeas proceedings. *Joseph*, 184 F.3d at 324-25.

4. *Id.* at 330.

5. *Id.* at 325.

6. 466 U.S. 668, 687-88 (1983) (holding counsel's representation to be constitutionally ineffective if it was both objectively unreasonable and prejudicial to the defendant).

7. *Joseph*, 184 F.3d at 326.

reasonable under *Strickland*.<sup>8</sup> The court's decision was based on the efforts taken by Joseph's counsel to obtain a mental health expert to evaluate him. Prior to trial, Joseph's attorneys obtained the services of Dr. Andrew Billups.<sup>9</sup> After conducting eight sessions with Joseph, interviewing Joseph's mother, and reviewing Joseph's school and criminal records, Dr. Billups concluded that Joseph did not suffer from any mental illness.<sup>10</sup> The court determined that while Dr. Billups's testimony was not favorable to Joseph, his attorneys' reliance on a psychologist who specialized in capital sentencing was reasonable.<sup>11</sup>

In light of the fact that the Commonwealth put on a mental health expert of its own, it was important for Joseph's attorneys to obtain an independent expert to evaluate Joseph. It is impossible, however, for an attorney to guarantee that an expert will reach conclusions that ultimately favor his client. When expert testimony by a mental health expert does not produce favorable mitigating evidence, capital defense counsel should not foreclose the possibility that other avenues of investigation may produce evidence that would mitigate the Commonwealth's future dangerousness evidence. For example, research has indicated that jurors sometimes find certain lay witnesses more credible and persuasive than expert witnesses.<sup>12</sup> Specifically, jurors tend to find lay experts who have personal knowledge of the defendant's situation but do not have the bias that attaches to witnesses having personal relationships with the defendant particularly persuasive.<sup>13</sup> However, testimony by family and friends, although inherently biased in favor of the defendant, can also be powerful because it provides the jury with a personal picture of the defendant during the sentencing phase that usually does not surface during the guilt phase.<sup>14</sup> Joseph's attorneys should thus be commended for their efforts in presenting mitigating testimony by both Joseph's mother and girlfriend.<sup>15</sup>

## 2. Failure to Provide Constitutionally Effective Mental Health Experts

Joseph argued that his constitutional rights were violated because the evaluation provided by Dr. Billups was not a competent mental health

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8. *Id.* at 326-27.

9. *Id.* at 326.

10. *Id.* Joseph was also examined by Dr. Henry Gwaltney, the Commonwealth's expert. Dr. Gwaltney also concluded that Joseph did not suffer from any mental illness. *Id.*

11. *Id.*

12. 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, 1115 (1997).

13. *Id.* at 1118, 1145.

14. *Id.* at 1151-52, 1161.

15. *Joseph*, 184 F.3d at 323.

examination.<sup>16</sup> In support of his argument, Joseph relied on *Ake v. Oklahoma*.<sup>17</sup> In *Ake*, the United States Supreme Court held that when sanity will be an issue at trial, "the State must, at a minimum, assure the defendant access to a *competent* psychiatrist who will conduct an *appropriate* examination and assist in evaluation, preparation, and presentation of the defense."<sup>18</sup> Relying on its decision in *Wilson v. Greene*,<sup>19</sup> the Fourth Circuit reasoned that *Ake* was more concerned with providing access to mental health experts than with the ultimate performance of the expert.<sup>20</sup> It would appear, however, that an inadequate evaluation would render the expert assistance provided by the Commonwealth meaningless. The court determined that even if *Ake* entitled defendants to some minimum level of professional evaluation, Dr. Billups met that standard by evaluating Joseph on eight separate occasions.<sup>21</sup> In response, counsel should argue that the number of times an expert meets with a defendant is an inaccurate measure of the adequacy of the professional evaluation provided to the defendant.

### 3. *Failure to Request Mental Health Records under Brady v. Maryland*<sup>22</sup>

In his final ineffective assistance of counsel claim, Joseph argued that both his trial counsel and the Commonwealth were at fault for failing to produce records from Central State Hospital.<sup>23</sup> In hindsight, both Joseph's trial counsel and Dr. Billups asserted that the Central State Hospital records would have assisted them in their preparation of mitigating evidence.<sup>24</sup> The court determined that because Joseph failed to raise this claim in his state habeas petition, it was procedurally defaulted. The court noted that mere allusion to a claim was inadequate to protect it from procedural default.<sup>25</sup> To avoid procedural default, a claim must "be presented faceup and squarely."<sup>26</sup> To protect a claim from falling prey to the rules of procedural default, capital defense counsel must insure that each claim they seek to preserve for appeal or habeas is stated clearly, raised as early as possible, and

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16. *Id.* at 327.

17. 470 U.S. 68, 83 (1985) (holding that when sanity will be an issue at trial, due process requires that the state provide indigent defendants with access to a competent psychiatric expert).

18. *Ake v. Oklahoma*, 470 U.S. 68, 83 (emphasis added).

19. 155 F.3d 396, 401-02 (4th Cir. 1998).

20. *Joseph*, 184 F.3d at 327.

21. *Id.*

22. 373 U.S. 83 (1963).

23. *Joseph*, 184 F.3d at 327.

24. *Id.*

25. *Id.* at 328.

26. *Townes v. Murray*, 68 F.3d 840, 846 (4th Cir. 1995) (quoting *Mallory v. Smith*, 27 F.3d 991, 995 (4th Cir. 1994) (internal quotation marks omitted)).

federalized. This case also illustrates why it is important for counsel to aggressively pursue all exculpatory material that they are entitled to receive under *Brady*. Capital defense counsel are invited to contact the Virginia Capital Case Clearinghouse for assistance with *Brady* motions.

*B. Application of Virginia Code Section 19.2-264.3(1)*

Under section 19.2-264.3(1)(F)(1) of the Virginia Code, if the attorney for the defendant gives notice that he plans to present testimony of a mental health expert to support a claim in mitigation, the Commonwealth then has the right to have an expert evaluate the defendant, and the defendant must cooperate with the Commonwealth's expert.<sup>27</sup> Joseph argued that the application of section 19.2-264.3(1) violated his constitutional rights because the statutory requirement that he cooperate with the Commonwealth's expert caused him to waive his Fifth Amendment right against self-incrimination in exchange for an evaluation by his own mental health expert, which was an integral component of his Sixth Amendment right to a fair trial and statutory right to present a defense.<sup>28</sup> The court held that the statute and its application to Joseph was constitutional.<sup>29</sup> Although the court rejected Joseph's challenge to section 19.2-264.3(1), it is a valid claim and defense counsel should continue to litigate this issue.<sup>30</sup>

Under section 19.2-264.3(1)(G) of the Virginia Code, evidence derived from statements made by a defendant to the Commonwealth's expert cannot be introduced against the defendant during the sentencing phase for the purpose of establishing an aggravating circumstance.<sup>31</sup> Dr. Gwaltney, the Commonwealth's expert, testified that Joseph lacked "insight and judgment" because he denied involvement in the crime.<sup>32</sup> The court held that the introduction of that statement was not error because it was elicited by Joseph's own attorney on cross-examination.<sup>33</sup>

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27. VA. CODE ANN. § 19.2-264.3(1)(F) (Michie 1999). For a discussion of why defense counsel should consider using court-appointed experts as a part of the defense team without calling the expert to testify during trial or sentencing, see Jason J. Solomon, Case Note, 11 CAP. DEF. J. 185 (1998) (analyzing *Wright v. Angelone*, 151 F.3d 151 (4th Cir. 1998)).

28. *Joseph*, 184 F.3d at 328.

29. *Id.* at 329.

30. For a discussion of other ways to attack the constitutionality of section 19.2-264.3(1), see Jason J. Solomon, Case Note, 11 CAP. DEF. J. 197 (1998) (analyzing *Jackson v. Commonwealth*, 499 S.E.2d 538 (Va. 1998)).

31. VA. CODE ANN. § 19.2-264.3(1)(G) (Michie 1999).

32. *Joseph*, 184 F.3d at 329 (internal quotation marks omitted).

33. *Id.* at 329-30.

