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United States Court of Appeals for the Fourth Circuit

FACTS

Kermit Smith was sentenced to death following his conviction of the December 3, 1980 first-degree murder, second-degree rape, and common-law robbery of Whelette Collins. After the jury convicted Smith, the trial court held a sentencing hearing in which it submitted four aggravating circumstances and five mitigating circumstances for the jury's consideration. The jury found the existence of all four of the aggravating circumstances, including that Smith committed the murder while (1) raping, (2) robbing, and (3) kidnapping Collins, and (4) that the murder was "especially heinous, atrocious or cruel."[1]

Smith appealed his conviction and sentence, but did not challenge the constitutionality of the heinousness factor. The Supreme Court of North Carolina affirmed,[2] and the United States Supreme Court denied Smith's petition for certiorari.[3]

Smith's first application for post-conviction relief, in North Carolina superior court, raised for the first time the argument that the statutory aggravating factor of heinousness was unconstitutionally vague in violation of the Eighth and Fourteenth Amendments, and that the jury was not charged with a constitutionally acceptable limiting definition of the factor.[4] He also argued that North Carolina's system of appellate review of death sentences was constitutionally inadequate, and that he had been denied the right to effective assistance of appellate counsel because his attorney had failed to advance on direct appeal many of the issues raised in Smith's Motion for Appropriate Relief (the equivalent of a state habeas petition in Virginia).[5] Before the State responded to Smith's motion, the superior court entered an order denying all of Smith's claims.[6] The Supreme Court of North Carolina summarily denied Smith's petition for a writ of certiorari,[7] as did the United States Supreme Court.[8]

Smith filed a second Motion for Appropriate Relief in North Carolina superior court, and again, the superior court denied the motion;[9] the Supreme Court of North Carolina denied certiorari,[10] as did the Supreme Court of the United States.[11]

In May of 1988, Smith filed his habeas corpus petition in the United States District Court for the Eastern District of North Carolina. The district court, in an opinion rendered before the Supreme Court's decision in *Coleman v. Thompson*[12] concluded that consideration by a federal court of Smith's claims was not barred by procedural default because the last state court opinion addressing these claims had not included a plain statement that it based its decision on state law grounds.[13] On the merits, the district court found that the heinousness instruction was unconstitutionally vague under *Maynard v. Cartwright*,[14] and that Smith was not foreclosed under *Teague v. Lane*[15] from raising this as error.[16] Further, the court found that the North Carolina Supreme Court had not cured the vagueness error by reweighing the evidence or conducting a constitutional harmless-error analysis.[17] Declining to conduct harmless-error analysis itself,[18] the district court granted habeas relief, ordering that Smith's death sentence be set aside unless the State retried him within 180 days.[19] The court then stayed entry of judgment in order to allow the State to petition the Supreme Court of North Carolina for "further review . . . in accordance with *Clemons v. Mississippi*."[20] The Supreme Court of North Carolina subsequently denied the State's request,[21] believing that it lacked jurisdiction, and the district court ordered its prior

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[1] Regarding the aggravating circumstances, whether the murder was "especially heinous, atrocious or cruel," the court instructed:

> Every murder is not especially heinous, it is not atrocious nor cruel. While every murder, if it results from an unlawful killing, of course, is a violation of the law, but it does not necessarily mean that there is anything aggravated about it or that it was especially heinous or atrocious or cruel. And our Supreme Court has said that the words "especially heinous, atrocious or cruel" means extremely or especially or particularly heinous or attrocious or cruel. Heinous means extremely wicked or shockingly evil. Atrocious means marked by or given to extreme wickedness, brutality or cruelty, marked by extreme violence or savagely fierce. It means outrageously wicked and violent. Cruel means designed to inflict a high degree of pain, utterly indifferent to or the enjoyment of suffering of others.

Smith v. Dixon, 996 F.2d 667, 670 (4th Cir. 1993).

[2] *State v. Smith*, 292 S.E.2d 264 (N.C. 1982), *cert. denied*, 459 U.S. 1056 (1982).

[3] *Smith v. North Carolina*, 459 U.S. 1056 (1982).

[4] Smith's Motion for Appropriate Relief raised 57 issues, grouped into five "Claims."

[5] Not addressed in this summary are the court's treatments of Smith's claims under *McKoy v. North Carolina*, 494 U.S. 433 (1990) (holding that North Carolina's death penalty statute, which requires sentencing jury to find a mitigating factor unanimously before it can consider that factor, violates *Mills v. Maryland*, 486 U.S. 367 (1988)), *Caldwell v. Mississippi*, 472 U.S. 320 (1985) (holding that a prosecutor's argument to a jury at penalty phase, which suggested that the responsibility for determining the appropriateness of a death sentence rested not on them but with the Mississippi Supreme Court on review, was inconsistent with the Eighth Amendment's heightened need for reliability in the determination that specific death sentences are appropriate), and the Sixth Amendment (ineffective assistance of counsel and right to cross-examine), all of which were denied.

[6] 996 F.2d at 670-71 (citing *State v. Smith*, Nos. 80 CRS 15265, 15266, 15271 (N.C. Super. Ct. Aug. 19, 1983)).

[7] *State v. Smith*, 333 S.E.2d 495 (N.C. 1985).

[8] *Smith v. North Carolina*, 474 U.S. 1026 (1985).

[9] *State v. Smith*, Nos. 80 CRS 15265, 15266, 15271 (N.C. Super. Ct. Mar. 9, 1987).

[10] *State v. Smith*, 364 S.E.2d 668 (N.C. 1988).

[11] *Smith v. North Carolina*, 485 U.S. 1030 (1988).

[12] 111 S. Ct. 1899 (1991). *See* case summary of *Coleman*, Capital Defense Digest, Vol. 4, No. 1, p. 4 (1991).

[13] *Smith v. Dixon*, 766 F.Supp. 1370, 1376 (E.D.N.C. 1991).

[14] 486 U.S. 356 (1988).

[15] 489 U.S. 288 (1989) (holding that a petitioner cannot receive the retroactive benefit of a decision if such decision establishes a "new rule," does not place certain kinds of primary conduct beyond the power of the criminal law-making authority to proscribe, and is not a rule essential to the fundamental fairness of the proceeding). (Applied to capital cases in *Sawyer v. Smith*, 110 S. Ct. 2822 (1990). *See* case summary of *Sawyer*, Capital Defense Digest, Vol. 3, No. 1, p. 4 (1990).)

[16] *Smith*, 766 F.Supp. at 1379-86.

[17] *Id.* at 1386.

[18] *Id.* at 1386-96.

[19] *Smith v. Dixon*, No. 88-337 (E.D.N.C. Aug. 14, 1991).

[20] *Id. See Clemons*, 494 U.S. 738 (1990). *See also* case summary of *Clemons*, Capital Defense Digest, Vol. 3, No. 1, p. 8 (1990).

[21] *State v. Smith*, 412 S.E.2d 68 (N.C. 1991).

decision into effect, granting Smith a new sentencing hearing.[22]

Both Smith and the State appealed.

HOLDING

The Court of Appeals held that, because the superior court decision did not include an adequate statement that its decision rested on a state procedural bar,[23] and because nothing in the surrounding circumstances indicated that the superior court rested its decision on such a bar,[24] the district court correctly determined that Smith was not procedurally barred from federal habeas review of his claim challenging the limiting construction of the "heinousness" factor. On the merits, the State conceded that the construction was insufficient. Additionally, the court held that the North Carolina Supreme Court had not cured the vagueness error,[25] and that only the North Carolina Supreme Court could cure the error in the first instance.[26]

ANALYSIS/ APPLICATION IN VIRGINIA

This case highlights the treacherous nature of procedural default in federal habeas proceedings. It is unusual and noteworthy that a federal court asked itself whether a habeas petitioner had defaulted his federal claims at the state level, and answered "no." Here, Smith could have, and should have, raised his vagueness challenge to the "heinousness" factor at trial and on direct appeal to the North Carolina Supreme Court. Under North Carolina law, a Motion for Appropriate Relief may be denied when "upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so."[27] Smith, by not raising his constitutional challenge in a timely fashion, provided the superior court with the very grounds upon which it could deny his petition.[28]

Virginia practitioners should note Smith's unique circumstances and good fortune. Because North Carolina calls an appeal from a denial of state habeas relief a petition for certiorari, denial of that petition is not a judgment. Virginia has similar procedure, but the appeal from denial of state habeas review is called a petition for appeal. If that petition is not made, the claims denied habeas relief are defaulted. Likewise, if the Supreme Court of Virginia denies the petition for appeal, the federal habeas court will look to that denial, which is a judgment, to determine if denial rests on a procedural bar. Therefore, were Smith a similarly situated Virginia appellant, his claims would almost certainly have been defaulted. State supreme courts are typically much better at articulating the grounds for denial of relief than trial courts are, as was particularly true of the North Carolina trial court in this case.

The *Smith* court noted, however, that it is not enough that the superior court could have relied on procedural bar; it must have actually based its decision on procedural bar in order to prevent federal habeas review.[29] Because North Carolina law[30] allows a state court to decide claims on the merits despite the availability of procedural bar, the court reasoned that Smith's motion could have been procedurally barred **or** decided on the merits.[31]

At this point, a brief history of the law governing federal habeas review of such state decisions is informative. In *Michigan v. Long*, the Supreme Court established a presumption of jurisdiction on direct review for cases where "the adequacy and independence of any possible state law ground is not clear."[32] The presumption meant that federal jurisdiction existed if adequate and independent state grounds for a decision were not apparent.[33]

That presumption was extended to federal habeas review in *Harris v. Reed*.[34] *Harris* held that federal habeas review is not barred unless the state court issues a "plain statement" that its judgment rests on a state procedural bar.[35]

This line of precedent was interrupted somewhat disturbingly by the Supreme Court's decision in *Coleman v. Thompson*.[36] Coleman argued that the absence of a plain statement of the grounds of his dismissal triggered the presumption of *Long* and *Harris* in favor of federal habeas review. The Court responded that "[a] predicate to the application of the *Harris* presumption is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law."[37] No longer was the test for denial of federal habeas review the presence of a "plain statement" of procedural bar. The Court found that the Virginia supreme court decision at the bar "fairly appear[ed]" to rest primarily on state law.[38]

The *Smith* court noted this sea change in the law of reviewability of state-court-denied federal claims. However, it analogized *Smith* to a case previously distinguished from *Coleman* in which an examination of circumstances surrounding the last state decision, as undertaken in *Coleman* to parse a state law ground for decision, was inconclusive.[39] The *Smith* majority reasoned that because these circumstances provided no guidance, and because North Carolina law provided alternative grounds for the decision, the decision of the North Carolina superior court fairly appeared to be interwoven with federal law.[40] For example, the majority noted that, "[c]ertainly Smith's challenge to the constitutional adequacy of North Carolina's appellate review of death sentences . . . was denied on the merits. . . ."[41] It could not have been defaulted, the court reasoned, because the first time Smith could raise the issue was in his habeas petition.[42]

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22 *Smith v. Dixon*, No. 88-337 (E.D.N.C. Dec. 2, 1991).

23 *Smith*, 996 F.2d at 674.

24 *Id.* at 675.

25 *Id.* at 676.

26 *Id.* at 677.

27 N.C. Gen. Stat. § 15A-1419(a)(3) (1983).

28 Though the North Carolina Supreme Court denied certiorari following the superior court's decision on Smith's motion, the Court of Appeals found that the "last state court judgment" for *Coleman* purposes is the superior court's denial of the Motion for Appropriate relief, not the denial of certiorari. 996 F.2d at 672 n.5 (citing *Felton v. Barnett*, 912 F.2d 92, 94-95 (4th Cir. 1990) (holding that "certiorari is a discretionary form of review and is not one of right," and "[t]he rules and procedures of the North Carolina Supreme Court regarding writs of certiorari are substantially similar to those of the United States Supreme Court," i.e., denial of certiorari is not a "judgment.")).

29 *Smith*, 996 F.2d at 672. *See Caldwell v. Mississippi*, 472 U.S. 320 (1985).

30 N.C. Gen. Stat. § 15A-1419(b) (1983).

31 996 F.2d at 672 n.6.

32 463 U.S. 1032, 1040-41 (1983).

33 *See* case summary of *Coleman*, Capital Defense Digest, Vol. 4, No. 1, p. 5 (1991).

34 489 U.S. 255 (1989). Habeas proceedings, like *Smith*, present a different question from that decided in *Michigan v. Long*, though the clarity of the statement of state law grounds for decisions below is relevant to both. Federal courts in habeas proceedings have **jurisdiction** over defaulted claims. For reasons of comity and federalism, however, they generally decline to hear them.

35 *Id.* at 263.

36 111 S. Ct. 2546 (1991).

37 *Id.* at 2557.

38 *Id.*

39 *Nickerson v. Lee*, 971 F.2d 1125 (4th Cir. 1992).

40 996 F.2d at 674.

41 *Id.*

42 *Id.*

The dissent raised an aspect of the default issue which is also important to Virginia attorneys. Judge Wilkins maintained that Smith could have raised his claim of denial of meaningful appellate review in his direct appeal, did not, and should therefore be barred from raising it.[43] This is true with respect to a **systemic** challenge that the North Carolina appellate review scheme is flawed, a claim the North Carolina Supreme Court had often entertained. Such a claim could, and should, be raised properly on direct appeal. Such a challenge in Virginia is contained in the Virginia Capital Case Clearinghouse "Motion to Prevent the Imposition of the Death Penalty," available from the Virginia Capital Case Clearinghouse, **and should be made at trial and on direct appeal.**

The Fourth Circuit majority was also correct, however, when it found that, because Smith could only raise the issue of the state's appellate review system **as it applied to him** in collateral proceedings, after the state supreme court conducted that review, it could not have been procedurally defaulted on direct appeal.[44]

The clear implication is that it is imperative that counsel raise both a pre-trial constitutional objection to the state appellate scheme as a whole, and a subsequent objection on habeas against the appellate process as applied to the defendant, or risk procedural bar at the hands of dueling interpretations.

In reaching the merits of the State's appeal of the district court's holding that North Carolina's narrowing construction was infirm, the Fourth Circuit noted that the State conceded the unconstitutionality of its construction on appeal. The State claimed that the North Carolina Supreme Court had saved the sentence, however, on Smith's direct appeal, by performing harmless-error analysis as required by *Clemons v. Mississippi*.[45] The court rejected this argument, as the North Carolina Supreme Court had failed to cite any of its narrowing constructions or any other case applying North Carolina's narrowed definition,[46] and had declined the opportunity to clarify its decision.

In *Clemons*, the United States Supreme Court held that, upon invalidation of one aggravating circumstance relied upon by a sentencing jury, an appellate court in a "weighing" state may salvage the death sentence by conducting harmless-error analysis or by reweighing the aggravating and mitigating circumstances.[47]

In *Stringer v. Black*,[48] the Court described the distinction between "weighing" and "non-weighing" states, and highlighted its importance in this context. In a non-weighing state, the formal process of determining the appropriateness of a death sentence is not infected by the presence of an invalid aggravating factor, so long as the sentencing body finds at least one other valid factor, as well. However, the Court also stated, **"[a]ssuming 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."**[49] Thus, *Stringer* requires at least harmless-error analysis in the presence of an invalid factor even in non-weighing states such as Virginia.

In a weighing state, a reviewing court may not assume that it would have made no difference had the invalid factor not been introduced. The Supreme Court concluded, "only constitutional harmless-error analysis or reweighing at the trial or appellate level suffices to guarantee that the defendant received an individualized sentence."[50]

The North Carolina Supreme Court denied the state's petition to clarify the basis for the decision it entered in *Smith*. In denying jurisdiction to hear the matter, the court effectively refused to perform the analysis required to save the death sentence under *Clemons* and *Stringer*. Though it has not yet been called upon to do so, the Supreme Court of Virginia may make the same denial of jurisdiction to perform the requisite analysis. This possibility provides further cause to challenge the Virginia "vileness" factor in every instance.

Finally, the district court in *Smith* refused to perform the *Clemons* harmless-error analysis itself. Finding the re-weighing of aggravating and mitigating circumstances to be a question of state law, and therefore not cognizable in federal habeas proceedings, the Fourth Circuit held that first instance harmless-error review is properly performed in the state appellate system.[51]

Summary and analysis by:
H. Ernest Stone

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43 *Id.* at 684 n. 3 (Wilkins, C.J., dissenting).

44 996 F.2d at 674.

45 494 U.S. 738 (1990).

46 996 F.2d at 675-76.

47 494 U.S. at 751-52. A "weighing state" is one whose capital murder statutory scheme specifically and formally requires the sentencer to weigh the import of the mitigating factors and aggravating factors found in the penalty phase of the trial in determining whether to impose the death penalty. Though Virginia's scheme does not employ this language, it is a de facto "weighing state," because a jury finding the presence of aggravating factors may disregard them in the face of mitigating evidence and choose to impose life in prison.

48 112 S. Ct. 1130 (1992).

49 *Id.* at 1137(emphasis added).

50 *Id.*

51 996 F.2d at 677. The federal court's refusal to perform harmless-error review in the first instance is due in part to the Supreme Court's holding in *Brecht v. Abrahamson*, 113 S. Ct. 1710 (1993). The *Brecht* court held that trial-type constitutional errors are subject to a lower standard of harmless-error analysis on federal habeas review ("actual prejudice") than on direct state appeal ("harmless beyond a reasonable doubt"). Thus, the state gets a "better deal" on habeas review than on direct review. As noted by the Fourth Circuit in *Smith*, "[the Supreme Court] intended not to apply the *Brecht* anomaly in cases tainted by invalid aggravating factors." 996 F.2d at 677 n. 13.