Capital Defense Journal

Volume 6 | Issue 2 Article 7

Spring 3-1-1994

SMITH v. DIXON 14 F.3d 956 (4th Cir. 1994)

V. Clemency

On January 14, 1994, Earl Washington, Jr., accepted a conditional pardon from Virginia Governor L. Douglas Wilder, commuting his sentence to life imprisonment. The grant of clemency came on the last day of Wilder's term.[28]

VI. Conclusion

All attorneys should be aware that a claim of ineffective assistance of counsel is not a personal attack. Even the most experienced attorney can overlook or not understand forensic evidence, but every attorney can independently seek help or can make an *Ake*[29] motion for appointment of an expert to help in understanding the significance of forensic reports.

Likewise, attorneys should educate themselves about mental retardation. It is not the same thing as insanity,[30] and a qualified evaluation of a defendant's level of mental retardation is a necessity.[31]

Summary and analysis by:
Barbra Anna Pohl

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[28] Peter Baker, *Death-Row Inmate Gets Clemency: Agreement Ends Day of Suspense*, The Washington Post, Jan. 15, 1994, at A1.

[29] *Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that the right to appointment of a mental health expert attaches once an indigent defendant shows that sanity will be a significant factor in his defense; lower courts have expanded this right to include more than mental health experts). *See* case summary of *Spencer v. Murray (Spencer II)*, Capital Defense Digest, this issue.

[30] For example, at Washington's penalty trial, the defense called an expert for the purpose of showing defendant's low level of intellectual functioning. On cross-examination, the Commonwealth's attorney was permitted, over objection, to testify that Washington knew the difference between right and wrong. This, obviously, is a question relevant to the complete defense of insanity, rather than the mitigating sentencing factor of mental retardation. The colloquy suggests, however, that the prosecutor and court may not have understood the distinction. *Washington v. Commonwealth*, 228 Va. at 546, 323 S.E.2d at 585.

[31] *See* Silvia Linda Simpson, *Confessions and the Mentally Retarded Capital Defendent: Cheating to Lose*, Capital Defense Digest, this issue.

SMITH v. DIXON

14 F.3d 956 (4th Cir. 1994)
United States Court of Appeals, Fourth Circuit

FACTS

A jury sentenced Kermit Smith, Jr. 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 consideration by the jury. The jury found the aggravating circumstances in support of the imposition of the death penalty on all four bases submitted.[1]

On appeal of his conviction and sentence Smith did not challenge the constitutionality of the "especially heinous, atrocious or cruel" aggravating factor. The Supreme Court of North Carolina affirmed Smith's conviction and sentence,[2] and when the United States Supreme Court denied his request for certiorari,[3] his conviction became final on November 29, 1982.

In June 1983, Smith filed his first application for post-conviction relief with the superior court and raised for the first time the argument that the "especially heinous, atrocious, or cruel" statutory aggravating factor was unconstitutionally vague, in violation of the Eighth and Fourteenth Amendments. Smith also claimed that the jury was not charged on a constitutionally limiting definition of this factor and that his attorneys rendered ineffective assistance of counsel during his trial and appeal.[4] Without conducting a hearing or requesting a response from the State, the superior court entered an order denying Smith's request for relief.[5] Subsequent petitions for certiorari to the Supreme Court of North Carolina[6] and the United States Supreme Court[7] were summarily denied.

Smith's second motion for relief was filed in superior court in North Carolina and was again denied.[8] Both the Supreme Court of North

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[1] The four aggravating circumstances found were that the murder was committed while (1) raping, (2) robbing, and (3) kidnapping Collins, and (4) that the murder was "especially heinous, atrocious or cruel." *Smith v. Dixon*, 996 F.2d 667, 670 (4th Cir. 1993). *See* case summary of *Smith*, Capital Defense Digest, Vol. 6, No. 1, p. 18 (1993) [hereinafter *Smith I*].

[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 fifty-seven issues grouped into five "Claims", with his challenge to the "heinous, atrocious or cruel" factor being Claim No. IV and his ineffective assistance of counsel claim being Claim No. V.

[5] The order stated:

> This matter was heard on a paperwriting entitled "Motion for Appropriate Relief" filed June 6, 1983 by [Smith's attorneys].
>
> The court has read the paperwriting and considered the arguments in support of the claims set out therein. The court finds as a fact that the Claims No. I, II, III, and IV, set forth no probable grounds for relief.
>
> It is concluded that the matters alleged in Claim[] No. V constitute a sufficient showing to require a plenary hearing . . . .
>
> NOW THEREFORE, IT IS ORDERED THAT:
>
> 1. Claims No. I, II, III, and IV are denied.
>
> 2. A plenary hearing in Claim[] No. V is to be held.

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

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

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

Carolina[9] and the United States Supreme Court[10] subsequently denied certiorari.

Smith petitioned the United States District Court for the Eastern District of North Carolina for habeas relief in May of 1988. The district court rejected the State's contentions that Smith was barred from pursuing claims other than his ineffective assistance of counsel claims and those raised by him on direct appeal.[11] The district court held that Smith could pursue those issues raised for the first time in his motion for appropriate relief because the superior court, in denying relief, had not stated "clearly and expressly" that it based its decision "on a state procedural bar."[12]

On the merits, the district court concluded that Smith's sentencing jury had been instructed to weigh an unconstitutionally vague aggravating factor during the penalty phase of his trial.[13] It further held that the Supreme Court of North Carolina had not cured this error by reweighing the evidence or conducting a constitutional harmless error analysis.[14] The district court then determined that, as a federal court, it lacked the authority to review for harmless error.[15] Consequently, it concluded that the writ must issue unless the Supreme Court of North Carolina proceeded to cure the error.[16] The Supreme Court of North Carolina subsequently denied the State's request for clarification of its earlier opinion that had rejected the issues raised in Smith's direct appeal, stating that it lacked the jurisdiction to do so.[17] The district court then ordered its decision into effect, granting Smith a new sentencing hearing.[18]

Both Smith and the State appealed, with Smith arguing that the district court erred in failing to find that the additional grounds he had advanced also provided a basis for relief. A panel of the Fourth Circuit affirmed the district court in all respects, holding that because the superior court decision did not include an adequate statement that its decision rested on a state procedural bar,[19] and because nothing in the surrounding circumstances indicated that the superior court rested its decision on such a bar,[20] the district court had 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 Supreme Court of North Carolina had not cured the vagueness error,[21] and that only the Supreme Court of North Carolina could cure the error in the first instance.[22] Thereafter, the Fourth Circuit granted the State's motion for en banc consideration.

HOLDING

The full Court of Appeals reversed the panel decision and reinstated Smith's sentence, holding that because the summary order denying relief on Claims I through IV of Smith's motion did not fairly appear to rest primarily on federal law or to be interwoven with federal law, but rather, fairly appeared to rest on an independent state procedural bar,[23] Smith had procedurally defaulted those issues raised for the first time in Claims I through IV.[24] The court also held that federal courts considering a federal habeas petition may properly conduct reweighing and harmless error review of trial errors, including the error occasioned by an unconstitutionally vague instruction on an aggravating sentencing factor.[25] Finally, Smith's claims of ineffective assistance of counsel were not barred, but the court found they did not provide the basis for habeas relief.[26]

ANALYSIS/APPLICATION IN VIRGINIA

I. Procedural Default

The decision of the Fourth Circuit illustrates some of the hazards inherent in federal habeas review. Here, Smith should have raised his vagueness challenge to the "heinousness" factor at trial and on direct appeal to the North Carolina Supreme Court, thereby avoiding the pitfall of procedural default.

In *Michigan v. Long*[27] the Supreme Court established a presumption of federal jurisdiction on direct review for cases where "the adequacy and independence of any possible state law ground is not clear."[28] This presumption meant that jurisdiction existed if adequate and independent state grounds for a decision were not apparent. In *Harris v. Reed*[29] this presumption was extended to federal habeas review where the Court 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.[30]

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

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

[11] *Smith v. Dixon*, 766 F. Supp. 1370, 1376-77 (E.D.N.C. 1991). If the State's position had been sustained, Smith's "heinous, atrocious or cruel" claim would have been barred.

[12] *Id.* at 1376 (quoting *Harris v. Reed*, 489 U.S. 255, 263 (1989)).

[13] *Smith*, 766 F. Supp. at 1383. *See also* Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest, Vol. 2, No. 1, p. 19 (1989).

[14] *Smith*, 766 F. Supp. at 1386. *See Clemons v. Mississippi*, 494 U.S. 738 (1990) (holding that the United States Constitution does not prevent a state appellate court from upholding a death sentence that is based in part on an invalid or improperly applied aggravating circumstance, as long as the appellate court either reweighs the aggravating and mitigating evidence or conducts harmless error review). *See also* case summary of *Clemons*, Capital Defense Digest, Vol. 3, No. 1, p. 8 (1990).

[15] *Smith*, 766 F. Supp. at 1386.

[16] *Id.* at 1386, 1396.

[17] *State v. Smith*, 412 S.E.2d 68 (N.C. 1991). *See also Clemons*, 494 U.S. at 754, which held that state appellate courts are not required to engage in reweighing or harmless error analysis when errors have occurred in a capital sentencing proceeding, and that in some instances a state appellate court may conclude that peculiarities in a case make appellate reweighing or harmless error analysis extremely speculative or impossible. Nevertheless, that decision is for state appellate courts to make.

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

[19] *Smith v. Dixon*, 996 F.2d 667, 674 (4th Cir. 1993).

[20] *Id.* at 675.

[21] *Id.*

[22] *Id.* at 676.

[23] *Smith v. Dixon*, 14 F.3d 956, 963 (4th Cir. 1994) [hereinafter *Smith II*].

[24] *Id.* at 973.

[25] *Id.* at 974.

[26] *Id.* at 982.

[27] 463 U.S. 1032 (1983).

[28] *Id.* at 1040-41.

[29] 489 U.S. 255 (1989).

[30] *Id.* at 263. *Long* dealt with the question of federal jurisdiction and held that federal courts have no jurisdiction if the issue was decided on adequate and independent state law grounds. For example, a federal court would not have jurisdiction if an issue was decided on Fourth Amendment grounds under the Virginia Constitution, as opposed to the Fourth Amendment of the United States Constitution. Federal courts in habeas proceedings, however, have jurisdiction over defaulted claims if the state law ground is a state procedure, such as failure to follow a state requirement that the issue be raised at trial and on direct appeal. For reasons of comity and federalism, however, federal courts generally decline to hear such claims. Counsel should note that it is usually state default rules or filing deadlines that are asserted as "adequate and independent state law grounds" in capital habeas litigation.

The reasoning of *Long* and *Harris* was undermined in *Coleman v. Thompson*,[31] where it was held that a predicate to the application of the *Harris* presumption in favor of allowing federal habeas review is that the last state court rendering a judgment on defendant's federal claims must fairly appear to rest its rejection of the claims primarily on federal law or be interwoven with federal law.[32] Thus, after *Coleman* the test for denial of federal habeas review was no longer simply the presence of a "plain statement" of procedural bar, and the importance of federalizing and preserving issues at the pre-trial and trial stages was further heightened.

The *Smith* court, focusing on the limiting nature of *Coleman*, stated that "the failure of the superior court order to mention federal law must be the focus of our inquiry",[33] and such failure was "extremely significant" and "compelling evidence" that the summary order did not fairly appear to rest on federal law or to be interwoven with federal law.[34] The court also found that the circumstances surrounding entry of the summary order by the superior court indicated reliance by the superior court on a state procedural bar as the basis for its decision.[35]

The predicament permitted by *Coleman* and *Smith* can best be avoided by the Virginia capital defense attorney by simply not defaulting. Additionally, at pre-trial, a Bill of Particulars requesting a narrowing construction should be filed. *Defending a Capital Murder Case in Virginia*, published by the Virginia Capital Case Clearinghouse, contains many of the appropriate motions and supporting memoranda that can and should be filed at this crucial pre-trial stage in order to preserve claims for federal review.

Counsel should also object at trial when the jury is instructed on the vileness factor. If a death sentence is handed down based on "vileness", defense counsel should assign it as error on appeal and brief it before the Supreme Court of Virginia.[36]

Once the Supreme Court of Virginia rejects the appeal on the merits, however, counsel is **not** encouraged to include the claim in a state habeas petition. Instead, the claim is at that point exhausted and ready to present in federal habeas. The acceptability of this strategy, where a claim has been preserved on federal grounds and rejected on direct appeal, was clarified by the recent decision in *Spencer v. Murray*,[37] where the court held that once a claim raised on direct appeal before the Supreme Court of Virginia has been rejected on the merits, counsel may forego state habeas as to that claim, as state remedies have been exhausted.[38]

II. Harmless Error Review by Federal Habeas Courts

The court offered four justifications for its conclusion that federal habeas courts have the authority to review the error in application of the "heinousness" factor for harmlessness. First, the court stated that the Supreme Court has specifically approved of federal courts conducting harmless error analysis on habeas review, even in capital sentencing.[39] Second, the Supreme Court has always analyzed the propriety of applying harmless error analysis based on the **type** of error at issue, not on the particular court conducting the analysis.[40] Third, in characterizing the error presented in Smith's "heinousness" claim as the type that may be assessed for harmlessness, the United States Supreme Court has acknowledged that this type of error is a "trial error."[41] Fourth, the court stated that it must be authorized and qualified to assess the prejudicial impact of an unconstitutionally vague instruction on an aggravating factor since it was already required to conduct the same type of evaluation in determining prejudice in ineffective assistance of counsel claims under *Strickland v. Washington*,[42] and in deciding whether to excuse Smith's procedural default of his "heinousness" claims, as set out in *Wainwright v. Sykes*.[43] The Fourth Circuit also stated that concerns of "comity and federalism" weighed in favor of concluding that federal courts on habeas review are authorized to conduct harmless error analysis for the type of error at issue in *Smith*.[44]

The reasoning of the court here seems to be at odds with *Stringer v. Black*,[45] a case where the Court stated that "[i]t will be a strange rule of federalism that ignores the view of the highest court of a state as to the meaning of its own laws",[46] thereby recognizing the necessity of allowing state courts to develop state law. Similarly, in *Richmond v. Lewis*[47] the Court held that "where the death sentence has been infected by a vague or otherwise constitutionally invalid aggravating factor, the state

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[31] 111 S. Ct. 2546 (1991) (holding that an appeal one day late from denial of state habeas corpus bars review of the merits of habeas claim).

[32] *Coleman*, 111 S. Ct. at 2557.

[33] *Smith II*, 14 F.3d at 964.

[34] *Id.*

[35] *Id.* at 965. In reaching this determination it should be noted that the majority delved deeply into the intent of North Carolina law to conclude that default was the basis of the cursory denial order (*see* note 6, *supra*), even though, unlike in *Coleman*, the state did not urge default and in fact was not even called upon to respond.

[36] All of these steps are necessary to avoid default. *See* Lago, *Litigating the "Vileness" Factor*, Capital Defense Digest, Vol. 4, No. 1, p. 25 (1991).

[37] 5 F.3d 758, 761 (1993). *See* case summary of *Spencer I*, Capital Defense Digest, this issue.

[38] This position is consistent with that taken by the Attorney General in *Hawks v. Cox*, 211 Va. 91, 175 S.E.2d 271 (1970), where the Commonwealth argued that Va. Code Ann. § 8-605 modifies the common law rule that *res judicata* does not apply to habeas corpus proceedings and that the statute should be construed to prohibit frivolous use of habeas corpus petitions. This denies indigent petitioners the right to litigate endlessly, at state expense, issues which have previously been resolved. *See also Grundler v. North Carolina*, 283 F.2d 798 (4th Cir. 1960) (holding that if a question is presented and adjudicated by a state's highest court once, it is not necessary for a state prisoner seeking federal relief to urge it upon the court a second time under an alternate procedure before he can be deemed to have exhausted his state remedies).

[39] *Smith II*, 14 F.3d at 976.

[40] *Id.*

[41] *Id.* (citing *Clemons*, 494 U.S. at 738, 752).

[42] 466 U.S. 668 (1984). *Strickland* created a two prong test for determining whether counsel's performance was so defective as to deny defendant his constitutional right to counsel. First, the defendant must prove that counsel's performance was incompetent. Incompetency is to be judged by an "objective standard of reasonableness." Second, the defendant must prove that counsel's deficiencies prejudiced him in that the "errors were so serious as to deprive the defendant of a fair trial . . . whose result is reliable." The standard for the element of prejudice is whether "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different." In this context, "reasonable probability" is defined as "a probability sufficient to undermine confidence in the outcome."

Defense counsel should be aware, however, that an arguably more rigorous standard than that required by *Strickland* is applied against capital defendants in the Fourth Circuit. *See* case summary of *Washington v. Murray*, Capital Defense Digest, this issue.

[43] 433 U.S. 72, 87 (1977) (holding that if cause and prejudice are shown, a court may accept a federal habeas petition despite the presence of a state procedural bar).

[44] *Id.*

[45] 112 S. Ct. 1130 (1992). *See* case summary of *Stringer*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).

[46] *Stringer*, 112 S. Ct. at 1139.

[47] 113 S. Ct. 528 (1992). *See* case summary of *Richmond*, Capital Defense Digest, Vol. 5, No. 2, p. 10 (1992).

appellate court or some other state sentencer must actually perform a new sentencing calculus, if the sentence is to stand."[48] As Senior Circuit Judge Sprouse stated in the *Smith* dissent, no amount of grammatical parsing could alter "the clear instruction that the required harmless error analysis must be conducted in the state judicial system."[49] The majority disagreed and used language from *Stringer* to support its analysis. *Stringer* stated that "the use of a vague . . . aggravating factor in the weighing process invalidates the sentence and . . . requires constitutional harmless-error analysis or reweighing in the state judicial system" if the sentence is to stand.[50] The majority reasoned that "the better reading of [*Stringer*] is that 'in the state judicial system' modifies only 'reweighing'—just as 'constitutional' modifies only 'harmless-error analysis.'"[51]

The holding of the court also implicates *Chapman v. California*[52] and *Brecht v. Abrahamson*,[53] two cases that addressed the appropriate scope of review to be utilized on harmless error review. In *Chapman*, the Court stated that before a federal constitutional error could be held harmless on direct appeal, the court would have to find that the error was harmless beyond a reasonable doubt, with the state bearing the burden of proving that an error passed muster under this standard.[54] The *Brecht* court, citing the state's interest in finality of convictions, chose not to apply the *Chapman* standard to federal habeas review and 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").[55] This situation, known as the "*Brecht* anomaly," means the State faces an easier challenge on habeas review than on direct state review. The Supreme Court of North Carolina, assessing the unconstitutionally applied "heinous, atrocious or cruel" factor would have been bound to use the *Chapman* formula. The *Smith* panel had noted that "[the Supreme Court] intended not to apply the *Brecht* anomaly in cases tainted by invalid aggravating factors."[56] This view was rejected by the entire Fourth Circuit.

The Fourth Circuit's claim of authority to intrude into a state's capital scheme by conducting harmless error review is notable for its departure from precedent and should not be accepted. Rather, defense counsel should object to it in hope of obtaining review by the United States Supreme Court.

III. Ineffective Assistance of Counsel

Smith contended that his appellate counsel was ineffective by failing to raise three significant claims on direct appeal.[57] As the subsequent history of the case reveals, the strongest of these was Smith's claim that the "heinous, atrocious or cruel" statutory aggravating factor was unconstitutionally vague in violation of the Eighth and Fourteenth Amendments. Smith's position was that his attorney's default of this error, which was later conceded by the State, constituted ineffective assistance of counsel.

The court declined to hold even that the default violated the "performance" prong of *Strickland*.[58] The court reached this decision based on the fact that "Smith's appellate counsel diligently researched the law and chose to present those grounds on which he believed Smith had the best chance of prevailing."[59]

The notion that counsel in a capital case can choose to "default" issues by winnowing out the weaker claims was approved in *Smith v. Murray*,[60] where it was described by the Court as the "hallmark of effective appellate advocacy."[61] Such "effective appellate advocacy" played a part in the eventual execution of Michael Smith[62] and may play a similar role in the future of Kermit Smith. "Winnowing" of claims has no proper place in capital appellate advocacy.

Counsel should be aware that it is not possible to determine what claims will be recognized as meritorious during the often lengthy pendency of the capital appellate process. The case of Jonathan Dale Simmons is illustrative of this point.[63] On appeal of his conviction for murder, Simmons argued that his Eighth and Fourteenth Amendment rights were violated when the trial judge refused defendant's requested jury instruction that if sentenced to life imprisonment he would be ineligible for parole.[64]

Simmons's petition for certiorari to the United States Supreme Court was granted,[65] and now the Court will consider whether courts must allow juries to be provided with accurate parole law information, both as rebuttal to the state's case for death based on future dangerousness and as mitigation evidence.

This claim, as briefed by the Virginia Capital Case Clearinghouse, has been summarily rejected in many Virginia cases, as the Supreme Court of Virginia has consistently prohibited jury instruction and argument on parole eligibility.[66] Simmons's case is proof, however, that per-

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[48] *Richmond*, 113 S. Ct. at 535 (emphasis added).

[49] *Smith II*, 14 F.3d at 992-93 (Sprouse, J. dissenting).

[50] *Id.* at 977 (quoting *Stringer*, 112 S. Ct. at 1140).

[51] *Id.*

[52] 386 U.S. 18 (1967).

[53] 113 S. Ct. 1710 (1993).

[54] *Chapman*, 386 U.S. at 24.

[55] *Brecht*, 113 S. Ct. at 1719-20. Also, on habeas the defendant bears the burden of establishing the impact of the error.

[56] *Smith I*, 996 F.2d at 677 n.13.

[57] Smith's other claims were that his Sixth Amendment right to cross-examination was violated at trial and that the trial court violated *Caldwell v. Mississippi*, 472 U.S. 320, 328-29 (1985), when it referred to the jury's decision on whether to impose the death penalty as a "recommendation." In *Caldwell*, the Court held that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere."

[58] *Smith II*, 14 F.3d at 982. Further, the majority held that "assuming Smith could show that his counsel's actions were unconstitutionally defective, he nevertheless has utterly failed to demonstrate that he was prejudiced as a result."

[59] *Id.* at 973.

[60] 477 U.S. 527, 536 (1986).

[61] *Id.*

[62] In his state habeas petition Smith argued for the first time that the admission of testimony by his mental health professional concerning the content of an interview conducted to explore the possibility of presenting psychiatric defenses at trial violated Smith's privilege against self-incrimination under the Fifth and Fourteenth Amendments to the United States Constitution. Smith's appointed counsel, however, had failed to raise this claim on direct appeal because he did not believe that Virginia case law would have supported his position at that time. The United States Supreme Court, characterizing defense counsel's choice as a "deliberate, tactical decision", went on to hold that Smith had defaulted his constitutional claim. 477 U.S. at 534. It should also be noted that no justice disputed that Smith's claim had merit, even though the Supreme Court of Virginia had rejected it.

[63] *State v. Simmons*, 427 S.E.2d 175 (S.C. 1993).

[64] *Id.* at 178.

[65] 114 S. Ct. 57 (1993).

[66] *See* Straube, *The Capital Defendant and Parole Eligibility*, Capital Defense Digest, Vol. 5, No. 1, p. 45 (1992).

sistent advocacy in the face of judicial resistance can produce unexpected rewards, and the Virginia capital defense bar should take note that whether such claims are preserved or defaulted can often be a matter of life or death for many capital defendants.

Summary and analysis by:
John M. DelPrete

SPENCER v. MURRAY

(SPENCER I)

5 F.3d 758 (4th Cir. 1993)
United States Court of Appeals, Fourth Circuit

FACTS

Late in the evening on September 18 or early in the morning on September 19, 1987, Timothy Wilson Spencer went to the home of Debbie Dudley Davis. Spencer bound Davis's hands with shoestrings, raped her and then strangled her to death with a "ligature and ratchet-type" device, which he made out of a sock and vacuum cleaner hose.

Upon discovering the body, investigators found two hairs in the victim's pubic hair and determined that they were "consistent with" Spencer's underarm hair. Investigators also found semen stains on the victim's bedclothes. The presence of spermatozoa was further found when vaginal and rectal swabs of the victim were taken. Forensic analysis of the semen stains determined that the stains had been deposited by a secretor whose blood characteristics matched those of only thirteen percent of the North American population. Spencer's blood and saliva samples indicate that he is a member of that population group.

A semen sample from the victim's bedclothes and a sample of Spencer's blood were subjected to DNA analysis. The analysis was performed by Lifecodes, a private laboratory, which found that the DNA molecules extracted from the semen stains matched the DNA molecules extracted from Spencer's blood. Evidence presented at trial established that the statistical likelihood of finding a duplication of Spencer's particular DNA pattern in the population of African Americans who live in North America is only one in seven hundred five million. Further, the evidence established that Spencer is one of only ten million black males living in North America.

On September 22, 1988, a Richmond jury unanimously found Spencer guilty of rape, burglary and capital murder, and sentenced him to death. The Supreme Court of Virginia affirmed the death sentence on direct appeal.[1] Spencer next filed a petition for habeas corpus with the state trial court, which was dismissed. The Supreme Court of Virginia refused to grant his petition for appeal when Spencer failed by one day to meet the time limit established by Rule 5:17(a)(1) of the Rules of the Supreme Court of Virginia.[2] Spencer filed a motion to extend the time for filing that petition for appeal, but the Supreme Court of Virginia denied the motion. Spencer next filed a petition for writ of habeas corpus with the United States District Court for the Eastern District of Virginia. The district court denied his petition on the ground that Spencer had failed to exhaust all available state remedies.[3]

Next, Spencer filed an appeal with the United States Court of Appeals for the Fourth Circuit. Spencer based his appeal on the following five grounds: (1) DNA evidence in this case is unreliable; (2) defense counsel was denied an opportunity to adequately defend against the DNA evidence because the trial court denied a discovery request for Lifecodes' worknotes and memoranda, the trial court refused to provide funds for an expert defense witness, and the prosecution did not reveal evidence of problems with Lifecodes' testing methods; (3) the trial court should not have admitted the DNA evidence; (4) the prosecution improperly struck Miss Chrita Shelton from the jury for racially-motivated reasons as prohibited by *Batson v. Kentucky*;[4] and (5) the future dangerousness aggravating factor in Virginia's capital sentencing scheme is unconstitutionally vague.

HOLDING

The United States Court of Appeals for the Fourth Circuit held that many of Spencer's issues and claims were precluded from federal habeas review because they were procedurally defaulted.

First, two claims were precluded because Spencer filed the state habeas petition with the Supreme Court of Virginia one day past the mandatory filing deadline set forth in Supreme Court of Virginia Rule 5:17(a)(1).[5] Those two claims alleged the unreliability of the DNA evidence and that the defense could not adequately prepare because the trial court did not provide a defense expert.

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[1] *Spencer v. Commonwealth*, 238 Va. 295, 384 S.E.2d 785 (1989).

[2] Rule 5:17(a)(1) of the Rules of the Supreme Court of Virginia states:

> Time for Filing. In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the Clerk of this Court:
> (1) in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from . . . .

[3] *Spencer v. Murray*, No. 3:91CV00391 (E.D. Va. April 30, 1992). The petition was dismissed on the grounds that missing a filing deadline does not count towards the exhaustion of state remedies, despite the fact that the missed deadline renders it impossible for a defendant to further avail himself of state remedies. As noted *infra*, failure to exhaust that is occasioned by failure to follow state procedural rules is also procedural default, which can bar consideration of the claims in federal court.

[4] 476 U.S. 79 (1986).

[5] *Spencer v. Murray*, No. 910055 (Va. March 18, 1991) (two documents).