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FACTS

On August 29, 1985, Chinh Le disappeared on her way home from work in Greenville, South Carolina. Ronnie Howard confessed multiple times to her murder, the first confession occurring on October 3, 1985. Howard and his co-defendant, Dana Weldon, were tried and convicted of murder on June 5, 1986, and subsequently sentenced to death.[1] The South Carolina Supreme Court upheld Howard's death sentence on direct appeal.[2] The United States Supreme Court denied Howard's petition for certiorari[3] and his petition for rehearing.[4] The state court denied Howard post-conviction relief,[5] and the South Carolina Supreme Court denied certiorari,[6] as did the United States Supreme Court.[7]

Howard filed this habeas corpus action in the United States District Court for the District of South Carolina on September 17, 1993.[8] The state's motion for summary judgment was granted on June 16, 1995, and Howard appealed to the United States Court of Appeals for the Fourth Circuit.[9]

HOLDING

The United States Court of Appeals for the Fourth Circuit held that: 1) Howard's confession was admissible;[10] 2) the redactions of the confession were proper in both the guilt phase[11] and the penalty phase;[12] 3) section 106 of the Antiterrorism and Effective Death Penalty Act ("AEDPA") did not apply to Howard's case;[13] 4) there was no valid claim of juror discrimination;[14] 5) the failure to repeat the manslaughter jury instruction did not prejudice defendant;[15] 6) Howard had no valid ineffective assistance of counsel claim;[16] 7) the prosecutor made no improper comment on defendant's failure to testify at the sentencing hearing;[17] and 8) no impermissible ex parte communication between the prosecutor and the jury occurred.[18]

ANALYSIS/APPLICATION IN VIRGINIA

I. Claims Regarding Howard's Confession

A. The Edwards Claim

On September 12, 1985, Howard was arrested on a charge unrelated to the murder of Le. On September 16, defense counsel was appointed for Howard, and on October 2, Howard's defense counsel made it clear to all authorities involved that Howard would not make any statements. On October 3, Howard, still in police custody and without the presence of counsel, met with his parole officer, Polk, and confessed to the murder of Le. During the conversation, Howard asked to be put in touch with the Federal Bureau of Investigation ("FBI"), in the hope that his confession may enable him to receive lesser punishments for his crimes. On October 7 and 8, Howard, still without the benefit of counsel, met with Agent Battle of the FBI, signed waivers of his rights under *Miranda v. Arizona*[19] and confessed to the murder of Le in great detail.[20]

On appeal to the United States Court of Appeals for the Fourth Circuit, Howard argued that his confession should be suppressed because it was obtained in violation of *Edwards v. Arizona*.[21] The basic holding of *Edwards* is that "an accused, . . . having expressed his desire to deal with the

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[1] *State v. Howard*, 369 S.E.2d 132, 134 (S.C. 1988).
[2] *Howard*, 369 S.E. 20 at 138.
[3] *Howard v. South Carolina*, 490 U.S. 1113 (1989).
[4] *Howard v. South Carolina*, 492 U.S. 932 (1989).
[5] *Howard v. Moore*, 131 F.3d 399, 406 (4th Cir. 1997).
[6] *Howard*, 131 F.30 at 406.
[7] *Howard v. South Carolina*, 508 U.S. 917 (1993).
[8] *Howard*, 131 F.3d at 406.
[9] *Id.*
[10] *Id.* at 409.
[11] *Id.* at 415.
[12] *Howard*, 131 F.3d at 420.
[13] *Id.* at 403.
[14] *Id.* at 406.
[15] *Id.* at 420. Howard alleged that, upon a request by the jury that the judge repeat the murder instruction, it was error for the judge not to also repeat the manslaughter instruction. The court of appeals found that, even were the claim not defaulted for lack of a contemporaneous objection, "[w]e readily dismiss Howard's claim, concluding that Howard was in no way prejudiced by the trial court's refusal to recharge a manslaughter instruction that was not requested and previously had been charged." *Id.*
[16] *Howard*, 131 F.3d. at 421.
[17] *Id.*
[18] *Id.* at 422. In order to provide the jury with writing paper in the jury room, the county clerk created bound pads of paper from scrap paper on hand. However, the clerk's source of scrap paper was old letters from the prosecutor to former jury members, thanking them for their service.

The court of appeals looked to *United States v. Cheek*, 94 F.3d 136 (4th Cir. 1996) for guidance. Cheek stated that in order for a party to establish a prima facie case for ex parte juror contact, the party must introduce competent evidence that there was an extrajudicial communication or contact, and that it was "'more than innocuous interventions.'" Cheek, 94 F.3d at 141 (quoting *Haley v. Blue Ridge Transfer Co.*, 802 F.2d 1532, 1537 n.9 (4th Cir. 1986)). In Howard's case the court found that "the form letters were nothing 'more than innocuous interventions.'" Howard, 131 F.3d at 422 (quoting Cheek, 94 F.3d at 141).
[19] 384 U.S. 436 (1966).
[20] *Howard*, 131 F.3d at 404.
[21] 451 U.S. 477 (1981).

police only through counsel, is not subject to further interrogation by authorities until counsel has been made available to him, unless the accused himself initiates further communication, exchanges, or conversations with the police."[22] Howard contended that he did not initiate the meeting with Polk, and thus the resulting confession violated *Edwards* and could not be admitted against him. In fact, the confession to Polk was not used against Howard, rather it was the subsequent confession to Battle, made possible by the Polk-Howard interrogation, that was admitted against Howard. Howard argued to the court of appeals that the confession to Battle should also have been suppressed because it was a fruit of the poisonous tree,[23] existing only because of the *Edwards* violation that occurred when Polk interrogated Howard.[24]

The dissent stated that the factual issue of who initiated the Polk-Howard meeting should be remanded to district court for determination.[25] In contrast, the majority held "that it is immaterial whether Polk's interrogation of Howard constituted an *Edwards* violation . . . .The 'tainted fruits' doctrine is simply inapplicable absent a constitutional violation."[26] The question of whether a violation of the prophylactic rule is a violation of the underlying (in this case constitutional) rule was addressed in *Michigan v. Tucker*.[27] There, the Court established that a violation of the *Miranda* rules[28] is not necessarily a violation of the Fifth Amendment, but rather a violation of the prophylactic rules designed to protect the defendant's Fifth Amendment rights. The *Howard* majority stated that "an *Edwards* violation, like a *Miranda* violation, is not itself a constitutional violation,"[29] rather it is a mere technical violation of a prophylactic rule.

The criminal defense bar should be very careful to note that the majority's opinion seriously curtails the application of *Edwards* in the Fourth Circuit. The dissent describes the circumvention of *Edwards* created by the majority:

> Even though a jailed suspect has invoked his right to counsel, the police can now send in an interrogator who gets a confession (without counsel present) that is not coerced under traditional Fifth Amendment analysis. This allows the police to send in (still without counsel present) additional interrogators who get *Miranda* waivers and new, "untainted" confessions. The later confessions are admissible because the first was not coerced, even though all were obtained in blatant violation of *Edwards*.[30]

The dissent's position has unequivocal support within the *Edwards* decision itself. In *Edwards*, Edwards invoked his *Miranda* rights by requesting counsel. The police later initiated an interrogation of Edwards without his counsel present, obtained a confession, and used it to convict him.[31] The United States Supreme Court declared that "the use of Edward's confession against him at his trial violated his rights under the Fifth and Fourteenth Amendments. . . ."[32] This statement, made after the *Tucker* decision, certainly casts doubt on the continued validity of the *Tucker* holding. Though the court of appeals' decision in *Howard* appears to be in direct contradiction to the United States Supreme Court's statement in *Edwards*, counsel should be aware of the court of appeals' interpretation, as it is currently controlling in the Fourth Circuit. Counsel should argue against the court of appeals' interpretation of *Edwards* so as to preserve the issue for appeal to the United States Supreme Court.

B. The Redacted Confessions in the Guilt Phase

Howard was tried jointly with his co-defendant, Dana Weldon. In accordance with *Bruton v. United States*,[33] the prosecutor redacted from Howard's confession the portions that incriminated Weldon. Howard asserted that the redacted portions were exculpatory with respect to himself, because they showed he had no specific intent to kill, and because they cast doubt on which defendant actually committed the murder. Noting that under South Carolina law malice aforethought can be either express or implied,[34] the court held that "because South Carolina does not require that a defendant have specific intent to commit murder, nothing in Howard's original [unredacted] confessions was exculpatory for Fifth Amendment purposes and in no way diminished Howard's legal blameworthiness for the murder."[35]

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[22] *Edwards*, 451 U.S. at 484-85.

[23] *See Wong Sun v. United States*, 371 U.S. 471 (1963) (holding that the "fruits" of police conduct which actually infringed a defendant's Fourth Amendment rights must be suppressed). The rule of Wong Sun has been expanded beyond the Fourth Amendment, encompassing the Fifth Amendment.

[24] *Howard*, 131 F.3d at 411.

[25] *Id.* at 426 (Michael, J., dissenting).

[26] *Id.* at 413.

[27] 417 U.S. 433 (1974).

[28] In particular, the Court stated in *Miranda v. Arizona*, 384 U.S. 436, 444 (1966), that in a custodial interrogation, "[p]rior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make may be used as evidence against him, and that he has a right to the presence of an attorney, either retained or appointed." *Miranda*, 384 U.S. at 444. The Court further stated that the defendant could waive these rights, but any waiver must be made "voluntarily, knowingly and intelligently." *Id.* Any statements made outside the bounds of Miranda may not be used against the person by the state. *Id.*

[29] *Howard*, 131 F.3d at 414.

[30] *Id.* at 426.

[31] *Edwards v. Arizona*, 451 U.S. 477, 479-80 (1981).

[32] *Id.* at 480.

[33] 391 U.S. 123 (1968) (holding that the introduction of a jointly tried, non-testifying co-defendant's statement violates the Sixth Amendment Confrontation Clause if the statement contains evidence that incriminates the defendant).

[34] S.C. Code Ann. § 16-3-10 (Law Co-op 1985) (defining murder as the killing of any person with malice aforethought, either express or implied).

[35] *Howard*, 131 F.3d at 418.

C. The Redacted Confessions in the Penalty Phase

Howard asserted to the court of appeals that even if the redacted version of his confession was admissible at the guilt phase, the entire confession should have been heard at the penalty phase. The majority recounted the key portion of the confession as follows: "Howard stated that he placed the plastic over Le's head and held her 'until she was still.' He thought Le was just 'playing possum' and claimed that he 'felt a pulse.'"[36] Howard then told how Weldon reapplied pressure with the plastic, and Howard later realized Le was dead.[37] Despite the fact that the confession was evidence that Howard had no intent to kill Le, the majority agreed with the trial court judge, and stated that "[n]othing in the redactions altered Howard's personal culpability for Le's death. [N]othing in the redactions could be construed as mitigating evidence in Howard's favor."[38]

These statements by the majority evidence little respect for the theme that "underlies the *Lockett [v. Ohio]*[39] and *Eddings [v. Oklahoma]*[40] line of cases: the sentencing jury alone, armed with the complete story, must decide the question of the capital defendant's moral culpability."[41] Due to the fact that "'the penalty of death is qualitatively different'" than any other sentence, the defendant is given wide latitude in the introduction of mitigating evidence.[42] The United States Supreme Court has established the general rule that the jury must consider any mitigating evidence, that is, "any aspect of a defendant's character or record or any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[43]

Though it seems clear that both the trial judge and the court of appeals "step[ped] into the jury box,"[44] it is equally clear that both parties felt entitled to do so, and thus will likely continue to do so in the future. It appears that defense counsel should be prepared to establish the mitigating character of penalty phase evidence to the court as well as to the jury.

II. Applicability of AEDPA

Following the United States Supreme Court in *Lindh v. Murphy*,[45] the court stated that the "more deferential standards of review" set forth in section 106 of the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA")[46] did not apply to Howard's appeal.[47] Lindh held that the section did not apply to appeals filed before AEDPA was signed into law, April 26, 1996. Howard's appeal was filed prior to that date.

III. A Batson Example

The court of appeals' handling of Howard's claim of a violation of *Batson v. Kentucky*[48] is a textbook example of how Batson challenges typically progress. Forty-two persons qualified as jurors through the voir dire process, thirty-five whites and seven blacks. The prosecutor struck six of the seven black jurors, but only one of the thirty-five white jurors. The trial judge agreed with Howard that these facts established a prima facie case of a *Batson* violation, but then found that the prosecutor met its consequent burden to show a race-neutral reason for striking each juror.[49]

The court of appeals approved the trial judge's decision, quoting itself for the proposition that the prosecutors "explanation need not be 'persuasive, or even plausible,' as long as it is [race] neutral."[50]

IV. Ineffective Assistance of Counsel

Howard contended that he was denied effective assistance of counsel in violation of the Sixth Amendment[51] when defense counsel failed to present mitigating evidence regarding his adaptability to prison and his military and school records.[52] The court of appeals cited *Strickland v.*

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[36] *Id.* at 418-19 (quoting J.A. at 559).

[37] *Id.* at 419.

[38] *Id.* at 410-20.

[39] 438 U.S. 586 (1978).

[40] 455 U.S. 104 (1982).

[41] *Howard,* 131 F.3d at 429 (Michael, J., dissenting).

[42] See *Lockett,* 438 U.S. at 604 (quoting *Woodson v. North Carolina,* 428 U.S. 280, 304 (1976)).

[43] *Lockett,* 438 U.S. at 604.

[44] *Howard,* 131 F.3d at 429 (Michael, J., dissenting).

[45] 117 S.Ct. 2059 (1997).

[46] Section 106 is codified as 28 U.S.C. § 2254(d) (Supp. 1997).

> (d) An application for a writ of habeas corpus on behalf of a person in custody pursuant to the judgment of a State court shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claim—
>
> (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States; or
>
> (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

[47] *Howard,* 131 F.3d at 403.

[48] 476 U.S. 79 (1986).

[49] *Howard,* 131 F.3d at 407.

[50] *Matthews v. Evatt,* 105 F.3d 907, 917 (4th Cir. 1997) (quoting *Purkett v. Elem,* 514 U.S. 765, 786 (1995)).

[51] In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

U.S. Const. Amend. VI.

[52] *Howard,* 131 F.3d at 420-21.

Washington[53] for the rule that in order "[t]o prove a constitutional claim for ineffective assistance of counsel, a defendant must show both that his counsel's representation was deficient and that he was prejudiced by the deficiency."[54] In applying Strickland, the court found that in none of the challenged decisions was defense counsel deficient under the Strickland standard. The court opined that Howard's past prison record would have been a double-edged sword with the jury, and that Howard's military and school records "were, at best, 'checkered.'"[55]

V. Commentary on Defendant's Failure to Testify

Howard asserted that his Fifth Amendment[56] right against self-incrimination was violated when the prosecutor, in his closing remarks to the sentencing jury, repeatedly asked: "Where is the remorse?"[57] Howard claimed that these statements were an impermissible commentary on his decision not to testify. The court of appeals disagreed, stating that "when a prosecutor's comments are merely a 'fair response to a claim made by a defendant or his counsel,' there is no constitutional violation."[58] The court observed that "those remarks were in direct response to defense counsel's argument that Howard was remorseful for his actions. The court concluded that the comments did not violate Howard's Fifth Amendment rights.[59]

Summary and analysis by:
Craig B. Lane

[53] 466 U.S. 668 (1984).

[54] *Howard,* 131 F.3d at 421 (citing *Strickland,* 466 U.S. at 687).

[55] *Id.*

[56] No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Const. amend. V

[57] *Howard,* 131 F.3d at 421 (quoting App. at 1612-13).

[58] *Id.* (quoting *United States v. Robinson,* 485 U.S. 25, 32 (1988).

[59] *Id.*

HILL v. FRENCH

133 F.3d 915 (4TH CIR. 1997)
United States Court Of Appeals, Fourth Circuit

FACTS

Randall Hill was killed on January 10, 1990, by three bullets to the chest and abdomen. Eyewitness testimony of defendant's wife (also victim's mother) and ballistics evidence established that Zane Brown Hill ("Hill") entered the residence of his estranged wife and son armed with a rifle. Hill introduced evidence that on that day he had ingested twelve beers, four Darvons, a pain reliever, and two Flexorils, a muscle relaxant. Randall Hill, who was in possession of a pistol, attempted to call the police, but was shot and killed by Hill while in the process of doing so. Hill then struck his wife with the butt of the rifle. While he reloaded the rifle, his wife fled the house. Neighbors testified that Hill shot at his fleeing wife but missed her.[1] Hill was charged and convicted of first-degree murder under North Carolina General Statute section 14-17.[2] He was sentenced to death under North Carolina General Statute section 15A-2000.[3]

[1] *State v. Hill,* 417 S.E.2d 765, 769-70 (N.C. 1992).

[2] North Carolina General Statute section 14-17 states in pertinent part:

> A murder which shall be perpetrated by means of poison, lying in wait, imprisonment, starving, torture, or by any other kind of willful, deliberate, and premeditated killing, or which shall be committed in the perpetration or attempted perpetration of any arson, rape or a sex offense, robbery, kidnaping, burglary, or other felony committed or attempted with the use of a deadly weapon shall be deemed to be murder in the first degree, a Class A felony, and any person who commits such murder shall be punished with death or imprisonment in the State's prison for life without parole as the court shall determine pursuant to G.S. 15A-2000....

N.C. Gen. Stat. § 14-17 (Michie 1993 & Supp. 1997).

[3] North Carolina General Statute section 15A-2000 states in pertinent part, with respect to the separate sentencing hearing, the following:

> After hearing the evidence, argument of counsel and instructions of the court, the jury shall deliberate and render a sentence recommendation to the court, based on the following matters:
>
> (1) Whether any sufficient aggravating circumstance or circumstances as enumerated in subsection (e) exist;