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Brown v. French 147 F.3d 307 (4th Cir. 1998)

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I. Facts

David Brown ("Brown") worked as a chef in a hotel in Pinehurst, North Carolina. On Sunday, August 24, 1980, Brown disc-jockeyed a party, drinking a substantial amount of alcohol and taking at least five amphetamines during the party. Brown regularly wore a distinctive silver ring; however, he averred that he took the ring off while playing records at the party.[1]

Around 11:30 p.m. Sunday night, Brown left the party and went to a night-club with some friends. Around 2:10 a.m. Monday morning, police officers observed Brown walking barefoot, staggering, and carrying his shoes on a highway outside of the nightclub. Brown was given a ride to the Pinehurst Hotel, his place of employment, and entered the kitchen of the hotel around 2:45 a.m. Brown was seen making a telephone call shortly after arriving at the hotel, and left the hotel at approximately 3:00 a.m. Brown testified that he arrived back at the hotel at 6:00 a.m., but a co-worker of Brown's testified that he arrived back at the hotel at 7:00 a.m., and that Brown was not wearing his distinctive silver ring.[2]

Diane Chalfinch ("Diane"), and her nine-year-old daughter Christina, lived in the same apartment complex as Brown and were last seen alive at approximately 1:00 a.m. on Monday morning. Brown developed testimony at an evidentiary hearing that suggested that Diane and Christina were seen as late as 5:00 a.m. on Monday morning. Diane did not show up at work on Monday or Tuesday morning, at which point her co-workers telephoned the police. When the police arrived at the Chalfinches' apartment, they discovered both Diane and Christina had been stabbed to death.[3]

Several pieces of physical evidence connected Brown to the murders. Perhaps the most damning piece of evidence was the discovery, during autopsy, of Brown's distinctive silver ring beneath Diane's liver. In December of 1980, Brown was tried and convicted of first-degree murder of both Diane and Christina. At the sentencing phase of trial, the jury sentenced Brown to death for both murders. Brown's appeals were all denied.[4]

Brown filed a federal habeas corpus petition in 1987 in the Western District of North Carolina. The district court denied Brown's claims of error from the

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1. Brown v. French, 147 F.3d 307, 309 (4th Cir. 1998).
2. *Brown*, 147 F.3d at 309.
3. *Id.* at 309-10.
4. *Id.* at 310.

guilt phase, granted the writ on three of his penalty phase claims, and did not decide ten other penalty phase claims.[5] The United States Court of Appeals, Fourth Circuit, affirmed the denials of the guilt phase claims, reversed the granting of the writ on the three penalty phase claims, and ordered a remand for consideration of the ten claims not ruled on by the district court.[6] The court also ordered that new evidence, which had become available to Brown's habeas counsel, be considered on remand.[7]

On remand, a United States magistrate recommended denial of the ten remaining claims. The district court adopted the recommendation and denied the writ. Brown then filed a motion to reconsider, treated by the district court as a Rule 59(e)[8] motion to alter or amend the judgment, which was denied.[9] Brown appealed to the Fourth Circuit.

II. Holding

The United States Court of Appeals, Fourth Circuit, held that: (1) the state's actions in withholding or concealing information from the defense did not deprive Brown of due process of law under *Brady v. Maryland*;[10] (2) the accumulation of the prosecutor's misconduct did not, under *Kyles v. Whitley*,[11] deprive Brown of his Sixth Amendment right to the effective assistance of counsel; and (3) whether the introduction at the penalty phase, after having not been introduced at the guilt phase, of Brown's cellblock confession violated or did not violate Brown's rights under the Eighth and Fourteenth Amendments, under *Teague v. Lane*,[12] the claim was barred.[13]

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5. *Id.*

6. *See* Brown v. Dixon, 891 F.2d 490, 501 (4th Cir. 1989).

7. *Brown*, 891 F.2d at 501.

8. FED. R. CIV. P. 59(e).

9. *Brown*, 147 F.3d at 310.

10. 373 U.S. 83 (1963).

11. 514 U.S. 419 (1995).

12. 489 U.S. 288 (1989). *Teague* essentially held that a capital defendant at federal habeas is entitled only to the benefits of good law which existed at the end of the defendant's direct appeal. Thus, any new obligation on the state, which did not exist at the end of the defendant's direct appeal, that is asserted by the defendant at the federal habeas stage will not be a valid ground for granting the writ, absent two narrow exceptions not at issue in this case.

13. The court also ruled on a contention raised by the state. According to the state, Brown's notice of appeal appeared to cover only the district court's denial of his Rule 59(e) motion to alter or amend the judgment, and not the underlying order that denied the writ of habeas corpus. Thus, the state argued, the standard of review under Rule 59(e) is abuse of discretion and that standard should be applied to Brown's appeal, rather than the de novo review normally conducted at habeas appeal. *See* Temkin v. Frederick County Comm'rs, 945 F.2d 716, 724 (4th Cir. 1991). The court ruled against the state and held that the standard of review would be de novo and not abuse of discretion. The language of the notice of appeal given by Brown stated that Brown appealed "the Order entered on July 29, 1997, denying Petitioner's motion for relief from the final judgment under Rule 59(e) and reaffirming the May 2, 1997, Order dismissing a petition for a writ of habeas corpus filed pursuant to 28 U.S.C. § 2254, and each and every part of that order." *Brown*, 147 F.3d

III. Analysis/Application in Virginia

Brown claimed that the prosecutor's efforts to withhold and conceal information from the defense deprived him of his right to due process of law.[14] The court held that to succeed on this claim, Brown had to meet the standard articulated in *Brady v. Maryland*.[15] Brown alleged three instances in which the prosecutor withheld or attempted to conceal material, exculpatory evidence from the defense.[16]

Brown first claimed that his rights under *Brady* were violated when the prosecutor withheld the statements of a store owner who claimed to have seen Diane Chalfinch alive with her daughter in his store around 4:45 a.m. on Monday morning. The court held that if the statement were believed, it would only have reduced the time frame in which Brown could have committed the murders.[17] Accordingly, the court ruled that the withheld statements did not satisfy the *Brady* requirement of materiality, which was defined in *United States v. Bagley*[18] as a reasonable probability that the result of the proceeding would have been different if the new evidence had been admitted at trial.[19]

Brown next contended that the state failed to conduct an investigation into David Martin ("Martin"), a former boyfriend of Diane Chalfinch, who left a "terse" note at the Chalfinches' door the Saturday before the murders. According to Brown, had the police investigated Martin, they would have found that Martin fit the description of a man seen jumping out of the Chalfinches' apartment building one day after the Chalfinch murders. However, at the time of the crime, witnesses placed Martin in Macon, Georgia, where he attended law school. The court quickly dismissed this claim because any connection there may have been between the note and the jumper was not enough to undermine confidence in the outcome of the trial.[20]

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at 310. The court stated that it would liberally construe such language in the notice of appeal to indicate an intent to appeal the original order dismissing the habeas petition. The court's holding here shows that defense counsel may make an appeal of both the order dismissing the habeas petition and any order regarding a motion similar to a Rule 59(e) motion. The court will still apply the more liberal de novo review standard, rather than an abuse of discretion standard. *Id.* at 311.

The court's ruling on Brown's third contention of error will not be discussed further in this summary. It provides no new insight into capital law in Virginia. The court held that Brown's claim that his Eighth and Fourteenth Amendment rights were violated by the introduction of his cellblock confession at the penalty phase had no precedent to support it. Thus, the court ruled that to find for Brown would require the creation of a new rule. The court ruled that such a finding is barred by *Teague*. *Id.* at 314.

14. *Brown*, 147 F.3d at 311.

15. 373 U.S. 83 (1963) (holding that the government violates a defendant's constitutional right to due process when it withholds material, exculpatory evidence from the defense).

16. *Brown*, 147 F.3d at 311.

17. *Id.*

18. 473 U.S. 667 (1985).

19. *Brown*, 147 F.3d at 311-12.

20. *Id.* at 312.

Brown further contended that the prosecutor violated Brown's rights when the prosecutor had a witness moved from one hotel to another to keep defense counsel from gaining access to him and when the prosecutor told the witness not to talk to the defense attorney. The court dismissed this contention because the testimony which the defense attorney could have obtained from the moved witness only duplicated other testimony presented at trial. Thus, the prosecutor's conduct did not undermine the confidence in the outcome of the trial.[21]

Finally, Brown contended that the prosecutor denied defense counsel's request to have access to and to inspect the crime scene. The Fourth Circuit had previously ruled, before remanding the case to the district court, that this action by the prosecutor did not rise to the level of constitutional error, but that it would reconsider the claim if Brown developed additional evidence on remand.[22] Having developed this evidence, in the form of the three other claims rejected above, Brown sought reconsideration of the prosecutor's conduct, arguing that the cumulative effect of all of the actions by the prosecutor violated his Sixth Amendment right to counsel. Acknowledging that his claim was not a typical Sixth Amendment claim, Brown contended that the prosecutor's actions made his trial so unfair that it was impossible for any counsel to assist him effectively. The court ruled against Brown's claim, finding that none of the actions of the prosecutor, by themselves, amounted to a constitutional violation. Nor did the actions, when taken as a whole, undermine the confidence in the outcome of the trial when considered in conjunction with the strong evidence of guilt.[23]

Nevertheless, the court did note that in each of these instances, the prosecutor acted "unethically and improperly" in withholding evidence from the defense.[24] The court aptly categorized the prosecutor's conduct in this case. However, as the court further noted, "however reprehensible we may find the actions of the prosecutor, the focus of a *Brady* claim is not on him, but rather on the character of the evidence that he has withheld."[25]

The court's ruling on the issue of its primary duty regarding prosecutorial misconduct is technically correct.[26] Thus, it is worth noting that defense counsel will not be able to succeed at federal habeas appeal on an issue of this sort simply because the prosecutor's conduct was morally reprehensible. Such conduct, however, can and should be the subject of a bar complaint based on the prosecutor's violation of his ethical duties under the Virginia Code of Professional

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21. *Id.* at 312-13.

22. *See* Brown v. Dixon, 891 F.2d 490, 495 (4th Cir. 1989).

23. *Brown*, 147 F.3d at 313-14.

24. *Id.* at 312.

25. *Id.*

26. *See* United States v. Agurs, 427 U.S. 97, 110 (1976) (holding that if suppression of evidence results in constitutional error, the error is based on the character of the evidence, not the character of the prosecutor).

Responsibility.[27] The unethical actions by the prosecutor would need to be particularly alleged by defense counsel in a bar complaint.

Brown's defense counsel did excellent work to create a federal issue from the prosecutor's misconduct. The allegation that the cumulation of the prosecutor's conduct amounted to a violation of the Sixth Amendment right to counsel was creative, and the court accepted this as at least a possibility for habeas relief.

It is interesting to note that the court ruled that to prevail on his creative ineffective assistance of counsel claim, Brown would have to meet the "high threshold" that, but for the prosecutor's misconduct, it was reasonably probable that the result of the outcome would have been different.[28] In *Strickland v. Washington*,[29] the seminal case announcing the standard for ineffective assistance of counsel claims, the Supreme Court of the United States emphasized that all the defendant must show is a reasonable probability that the result of the proceeding would have been different. This is not a "high threshold" according to the *Strickland* Court. The Court took great pains to make it clear that to meet the standard, the defendant need not show it was certain, or even that it was more probable than not, that the result of the outcome would have been different.[30] It is hardly a "high threshold" to prove a reasonable probability, especially when that probability need not even rise to the level of more probable than not. It cannot hurt to continue to remind courts of the real standard established by *Strickland*. The Fourth Circuit, in particular, does not yet seem to understand it.[31]

Jason J. Solomon

27. *See* VA. SUP. CT. R., Pt. 6, Sec. II (Michie 1997) (providing that in felony cases, a prosecutor is under an ethical duty to turn over all exculpatory evidence and to not obstruct defense access to witnesses).

28. *Brown*, 147 F.3d at 314.

29. 466 U.S. 668 (1984).

30. Strickland v. Washington, 466 U.S. 668, 694 (1984).

31. *See also* Case Note of *Smith v. Moore*, 11 CAP. DEF. J. 129 (1998).