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I. Facts

On December 19, 1983, Michael Edmondson and Sheila Bland were beaten to death at Young's Cleaners in Bethel, North Carolina during a robbery.[1] At trial, the State's evidence tended to show that appellant, Harvey Green, entered Young's Cleaners on December 19, 1983, armed with a toy gun, intending to rob the store.[2] Bland, the clerk, was in the store alone preparing to close for the night when Green entered. Edmondson's entrance surprised Green, and a scuffle ensued involving all three persons. Green subdued both Edmondson and Bland and took some money from behind the counter. Green then demanded money from Edmondson and Bland, and the scuffle began again. This time Green used a metal pipe to subdue them, and in so doing, beat them to death.[3]

Within a matter of weeks, Green confessed to the crimes. He showed the police the location of the murder weapon, which tested positive for blood and the victims' hair, and he turned over to police the pair of blood-splattered pants he wore at the time of the killings.[4] On January 16, 1984, the grand jury of Pitt County, North Carolina returned an indictment of Green on two counts each of first-degree felony murder and robbery. Green pled guilty on all counts. At the capital sentencing hearing, held pursuant to N.C.G.S. § 15A-2000,[5] the jury recommended Green be sentenced to death for each murder.[6]

On direct appeal, the North Carolina Supreme Court remanded the case to the Superior Court of Pitt County for a hearing to determine whether Green's death sentences were unconstitutionally tainted by racial discrimination in jury selection in violation of *Batson v. Kentucky*,[7] which had been decided by the United States Supreme Court subsequent to Green's trial.[8] A *Batson* hearing was held,

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1. State v. Green, 443 S.E.2d 14, 21 (N.C. 1994).
2. *Id.*
3. *Id.*
4. Green v. French, 143 F.3d 865, 868 (4th Cir. 1998).
5. N.C.G.S. § 15A-2000 states in pertinent part that "[u]pon conviction or adjudication of guilt of a defendant of a capital felony, the court shall conduct a separate sentencing proceeding to determine whether the defendant should be sentenced to death or life imprisonment. A capital felony is one which may be punishable by death." N.C.G.S. § 15A-2000(a)(1).
6. *Green*, 443 S.E.2d at 21.
7. 476 U.S. 79 (1986) (holding that in jury selection, peremptory challenges may not be used for a racially discriminatory purpose).
8. State v. Green, 358 S.E.2d 60 (N.C. 1987).

wherein the lower court determined that there had been no racial discrimination in the selection of Green's jury.[9]

Unsatisfied with the lower court's implementation of the *Batson* hearing, the North Carolina Supreme Court remanded the case to the Superior Court for a second *Batson* hearing.[10] The lower court made more detailed findings of fact and concluded again that no *Batson* error had occurred.[11]

While Green's sentence was being appealed for the third time, the North Carolina Supreme Court remanded for resentencing in light of the intervening United States Supreme Court case of *McKoy v. North Carolina*.[12] At Green's second capital sentencing hearing, the jury again recommended death sentences for each of the two first-degree felony murders.[13] On Green's fourth appeal, the North Carolina Supreme Court affirmed the death sentences,[14] and the United States Supreme Court denied certiorari.[15]

Green then unsuccessfully sought to challenge his sentences through North Carolina's post-conviction relief procedures. After that motion was denied,[16] Green filed a petition for a writ of habeas corpus on October 3, 1996, before the United States District Court for the Eastern District of North Carolina.[17] Green asserted nineteen separate claims for relief, but none were granted by the court.[18] Green appealed to the United States Court of Appeals for the Fourth Circuit.

II. Holding

The United States Court of Appeals for the Fourth Circuit affirmed the district court's denial of the petition for a writ of habeas corpus, holding that: (1) the requirement that habeas petitioners be able to demonstrate inconsistency with "clearly established Federal law" is not equivalent to the *Teague v. Lane*[19] anti-retroactivity doctrine; (2) the requirement that such clearly established law stem from United States Supreme Court did not violate separation of powers principles or suspension clause; (3) the state court's denial of Green's request for allocution did not warrant habeas relief; (4) the alleged coercion of the jury at

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9. *Green*, 143 F.3d at 868.

10. State v. Green, 376 S.E.2d 727, 728 (N.C. 1989).

11. *Green*, 143 F.3d at 868.

12. 494 U.S. 433 (1990) (holding that it was a violation of the Eighth Amendment for a North Carolina court to instruct a capital sentencing jury that it must unanimously find the existence of any mitigating circumstances).

13. *Green*, 143 F.3d at 868.

14. State v. Green, 443 S.E.2d 14 (N.C. 1994).

15. Green v. North Carolina, 513 U.S. 1046 (1994).

16. 473 S.E.2d 621 (N.C. 1996).

17. Green v. French, 978 F. Supp. 242, 247 (1997).

18. *Id.*

19. 489 U.S. 288 (1989) (holding that rules of law which are found to be "new" by a reviewing court are not to be retroactively applied, absent two narrow exceptions).

sentencing did not warrant habeas relief; (5) Green was not deprived of effective assistance of counsel; (6) the trial court's refusal to instruct the sentencing jury as to certain nonstatutory mitigating circumstances, if erroneous, was harmless error; (7) Green's *Batson* claim was procedurally barred; and (8) Green's claim of racial discrimination in seeking the death penalty by state and county did not warrant habeas relief.

III. Analysis/Application in Virginia [20]

A. Parsing of AEDPA

The United States Court of Appeals for the Fourth Circuit stated as a preliminary matter that because Green filed his petition for a writ of habeas corpus on October 3, 1996, the provisions of the Anti-Terrorism and Effective Death Penalty Act of 1996[21] ("AEDPA"), amending 28 U.S.C. § 2254,[22] apply to Green's petition.[23] Section 2254(d)(1), as amended by AEDPA, now provides, in pertinent part, that such a petition:

> shall not be granted with respect to any claim that was adjudicated on the merits in State court proceedings unless the adjudication of the claims--(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 . . . .[24]

Amended section 2254(d)(1) therefore places at least three limitations upon the availability of federal habeas relief. The petitioner must demonstrate that the state court's adjudication of his federal claim was (1) contrary to or an unreasonable application of (2) clearly established federal law (3) as determined by the Supreme Court of the United States.[25] The court then stated that the proper

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20. Green asserted that at his second sentencing hearing the judge unconstitutionally coerced the jury into entering a death sentence by pressuring holdout jurors into voting in favor of the death penalty. This claim presents an interesting combination of an *Allen v. United States*, 164 U.S. 492 (1896), "dynamite" jury charge issue and juror unanimity issues raised in *McKoy v. North Carolina*, 494 U.S. 433 (1990), but will not be discussed here because (1) the claim turns on facts unique to Green's case, and (2) *McKoy* is particularly pertinent to North Carolina's sentencing scheme, but not Virginia's.

21. The Anti-Terrorism and Effective Death Penalty Act of 1996, Pub. L. No. 104-132, 110 Stat. 1214 (codified as amended in scattered sections of 28 U.S.C.). For a detailed discussion of AEDPA and its effects upon habeas law, *see* Jeanne-Marie S. Raymond, *The Incredible Shrinking Writ:* Habeas Corpus *under the Anti-Terrorism and Effective Death Penalty Act of 1996*, CAP. DEF. J. vol. 9, no. 1, p. 52 (1996) and Mary E. Eade, *The Incredible Shrinking Writ, Part II:* Habeas Corpus *under the Anti-Terrorism and Effective Death Penalty Act of 1996*, CAP. DEF. J. vol. 9, no. 2, p. 55 (1997).

22. 28 U.S.C. § 2254 contains the federal law as it relates to federal habeas corpus petitions by prisoners in state custody.

23. *See* Lindh v. Murphy, 521 U.S. 320 (1997) (holding that the provisions of AEDPA amending 28 U.S.C. § 2254 only govern habeas petitions filed after April 24, 1996).

24. 28 U.S.C. § 2254(d)(1) (1998).

25. *Green*, 143 F.3d at 869.

constructions of these limitations are matters of first impression in the Fourth Circuit, and consequently the court set out its construction.

1. "Contrary to" and "Unreasonable Application of"

The court held that a state court decision is "contrary to" precedent only when, either through a decision of pure law or the "application of law to facts indistinguishable in any material way from those on the basis of which the precedent was decided, that decision reaches a legal conclusion or a result *opposite to and irreconcilable with* that reached in the precedent that addresses the identical issue."[26] In contrast, the court held that a state court decision represents a "unreasonable application of" precedent only when

> that decision applies a precedent in a context different from the one in which the precedent was decided and one to which extension of the legal principle of the precedent *is not reasonable*, when that decision fails to apply the principle of a precedent in a context where such failure *is unreasonable*, or when that decision recognizes the correct principle from the higher court's precedent, but *unreasonably applies* that principle to the facts before it . . . .[27]

Summarizing the two standards together, the court stated that habeas relief is authorized only when the state courts have "decided the question by interpreting or applying the relevant precedent in a manner that reasonable jurists would all agree is unreasonable."[28] The court cited with approval to the Seventh Circuit case *Lindh v. Murphy*,[29] which suggested that the purpose of the "unreasonable application of" clause is, not unlike *Teague*, to validate reasonable, good-faith state court interpretations of existing precedents.[30]

The court's interpretation leaves open the possibility that a federal court may be forced to uphold a state court decision with which it does not agree, solely because that state court decision is neither "opposite to and irreconcilable with," nor an unreasonable application of, applicable Supreme Court precedent. Because the set of state court decisions which are "opposite to and irreconcilable with," or an unreasonable application of, applicable Supreme Court precedent is potentially smaller than the set of state court opinions with which a reviewing federal court disagrees, the court of appeals' interpretation of 2254(d)(1) makes it more difficult for habeas petitioners to gain relief. Applied in Virginia, it further cedes resolution of federal constitutional issues to a state court that virtually never decides those issues in favor of death-sentenced prisoners.

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26. *Id.* at 870 (emphasis added).
27. *Id.* (emphasis added).
28. *Id.*
29. 96 F.3d 856, 870 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. 320 (1997).
30. *Green*, 143 F.3d at 871.

2. *"Clearly Established Federal Law"*

Green asserted that the language of section 2254(d)(1) which provides that relief may be granted when the state court "adjudication . . . *was* contrary to . . . clearly established Federal law," essentially codifies the anti-retroactivity doctrine of *Teague*.[31] The court conceded that, similar to the effect of the *Teague* doctrine, the above-quoted language of the section "imports an anti-retroactivity principle into federal habeas law by requiring a habeas petitioner to demonstrate that the state court's resolution of his claim was inconsistent with federal law that was clearly established at the time his conviction became final."[32] However, the court refused to accept Green's interpretation of section 2254(d)(1), citing three differences between the section and the *Teague* doctrine. First, the *Teague* doctrine has two exceptions not applicable to section 2254(d)(1): an exception for new rules which place certain kinds of activity beyond the power of the law to proscribe, and an exception for new rules which are watershed rules of criminal procedure.[33] Second, the section nowhere employs the "new rule" language of *Teague*, even though other provisions of AEDPA do so unmistakably. And, finally, the anti-retroactivity doctrine of *Teague* is applicable in contexts where the limitations of section 2254(d)(1) are not.[34] Defense counsel should be aware that despite the striking similarities between the *Teague* doctrine and the above-quoted language from section 2254(d)(1), the Fourth Circuit has held that they are not equivalent, and thus appears to hold that the exceptions available under *Teague* are not available to habeas petitioners.

However, the court did not discuss the possibility that the *Teague* exceptions are so narrow, and of such constitutional stature that either (1) state court errors out of respect to them would always call for federal court relief even under the relaxed AEDPA standard of review, or (2) congress is without power to prevent relief.

3. *"Determined by the Supreme Court of the United States"*

The court stated that AEDPA limits the source of "clearly established . . . law" to that "determined by the Supreme Court of the United States."[35] Green asserted that this limitation unconstitutionally restricts the habeas jurisdiction of the federal courts in two ways.

First, Green asserted that, to the extent AEDPA limits the source of law cognizable on habeas petitions to Supreme Court precedent, it violates the separation of powers by vesting federal courts with jurisdiction to decide disputes and then "dictating the judiciary's determination of governing law."[36] The court

31. 28 U.S.C. § 2254(d)(1) (emphasis added).
32. *Green*, 143 F.3d at 873.
33. *See* Teague v. Lane, 489 U.S. 288, 311-12 (1989).
34. *Green*, 143 F.3d at 873-74.
35. *Id.* at 874 (citing 28 U.S.C. § 2254(d)(1)).
36. *Id.*

declined to adopt Green's interpretation, stating instead that section 2254(d)(1) "does not limit any inferior court's independent interpretive authority to determine the meaning of federal law in any Article III case or controversy."[37] While admitting that the section does restrict the scope of relief available to the courts, the court stated that "regulating relief is a far cry from limiting the interpretive power of the courts," and that "such limitation . . . is entirely ordinary and unexceptional."[38]

Second, Green asserted that the section's limitation on cognizable law violates the Suspension Clause of Article I, which provides that "[t]he Privilege of the Writ of Habeas Corpus shall not be suspended, unless when in Cases of Rebellion or Invasion the public Safety may require it."[39] The court, however, stated that the section's limitation does not suspend the privilege of the writ, but rather represents a "modest congressional alteration of the standards pursuant to which the writ issues."[40] For support, the court cited to the United States Supreme Court case of *Felker v. Turpin*,[41] where the Court rejected a Suspension Clause challenge to a provision of AEDPA that limited successive habeas petitions.[42]

Further, the court looked to the history of the writ of habeas corpus, finding that at the time the Suspension Clause was written, the writ was much more limited than it is today. Thus, the court reasoned that AEDPA's "modest constriction" on the writ does not violate the Suspension Clause, as it was originally understood.[43]

The court appears to create a situation wherein inferior federal courts are free to interpret the law in a way which calls for relief, but are forbidden in many of the same cases from granting that relief. It is difficult to understand how this constriction on the great writ can be described as "modest."

B. Allocution

Green asserted that the trial court denied him due process of law by rejecting his request for an allocution. The court defined an allocution as the "'formality of a court's inquiry of defendant as to whether . . . he would like to make a statement on his behalf and present any information in mitigation of sentence.'"[44]

During Green's second sentencing hearing, he moved the court for an order allowing him an "allocution at the appropriate time before the jury retires to

37. *Green*, 143 F.3d at 875.

38. *Id.* (citing Lindh v. Murphy, 96 F.3d 856, 872 (7th Cir. 1996), *rev'd on other grounds*, 521 U.S. (1997)).

39. U.S. CONST. art. I § 9.

40. *Green*, 143 F.3d at 875.

41. 518 U.S. 651 (1996).

42. *Green*, 143 F.3d at 875.

43. *Id.* at 876.

44. *Id.* at 877 (quoting BLACK'S LAW DICTIONARY 76 (6th ed. 1990)).

deliberate."[45] Green wished to read to the jury an approximately ten page statement containing mitigating evidence. The judge denied his request, but allowed the statement to be placed in the record.

As a preliminary matter, the court of appeals observed that the North Carolina Supreme Court concluded that, on the facts of Green's case, there is no constitutional right to allocution. Thereafter, the court of appeals declined to analyze the question fully on its own, but instead applied the "contrary to, or involv[ing] an unreasonable application of, clearly established Federal law" standard to the decision of the North Carolina Supreme Court.[46]

Green cited to three Supreme Court opinions in support of his assertion: *Green v. United States*,[47] *United States v. Behrens*,[48] and *Hill v. United States*.[49] In *Green*, the Court analyzed Rule 32(a) of the Federal Rules of Criminal Procedure, which then required the court to "'afford the defendant an opportunity to make a statement in his own behalf and to present any information in mitigation of punishment.'"[50] Justice Frankfurter, writing for the majority, stated that, "'as a matter of good judicial administration,' sentencing judges should 'unambiguously address themselves to the defendant' when complying with the requirements of Rule 32(a)."[51] The court of appeals, arguing that Justice Frankfurter based his instruction merely upon "good judicial administration" and not constitutional law, concluded that *Green* did not "clearly establish" a due process right to allocution.

The court applied the same line of analysis to *Behrens*, finding that the Court merely interpreted Rule 32(a), and did not "clearly establish" a due process right to allocution in a state criminal trial.[52]

In *Hill*, the Court found that a trial court's failure to inquire of defendant whether he wished to allocute was in violation of Rule 32(a), but that the error was not constitutional.[53] Green argued that *Hill*, being factually distinguishable from his own case, did not foreclose his claim. The court conceded this point, but responded that the fact that Green's claim has never been specifically disavowed by the Supreme Court does not establish that the lower court's rejection of Green's claim was either "contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court."[54]

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45. *Id.* (citing Joint Appendix vol. II at 449).
46. *Id.* at 877.
47. 365 U.S. 301 (1961).
48. 375 U.S. 162 (1963).
49. 368 U.S. 424 (1962).
50. *Green*, 143 F.3d at 878 (quoting *Green*, 365 U.S. at 303 n.1).
51. *Id.* (quoting *Green*, 365 U.S. at 305).
52. *Id.*
53. *Hill*, 368 U.S. at 428..
54. *Green*, 143 F.3d at 880.

Green's next argument in favor of his allocution claim is more interesting. Green cited to *Ashe v. North Carolina*,[55] where the Fourth Circuit itself held that "when a defendant effectively communicates his desire to the trial judge to speak prior to the imposition of sentence, it is a denial of due process not to grant the defendant's request."[56] Despite the fact that *Ashe* is directly on point, and issued by the court itself, the court of appeals offered three justifications for its finding that the case offers no support to Green's claim.

First, the court cited to the language it interpreted in the first section of the instant opinion: "clearly established Federal law, as determined by the Supreme Court of the United States . . . ." Simply put, though *Ashe* is precedent in the very circuit within which Green is litigating his claim, *Ashe* is not *Supreme Court precedent*, and thus has no bearing on the question of whether the trial court's adjudication was "contrary to, or involved an unreasonable application of clearly established Federal law . . . ."[57]

Second, the court asserted that *Ashe* was a significant expansion of previous Supreme Court precedents and thus reasonable jurists could debate the propriety of that expansion.[58] One wonders if the court would be so self-effacing if a strict enforcement of *Ashe* fit its current agenda.

Third, not content to state merely that *Ashe*, as Fourth Circuit precedent, did not fulfill section 2254(d)(1)'s requirement of Supreme Court precedent, the court went on to state that even if the section permitted the court to award habeas relief based on the inconsistency between Green's trial court decision and *Ashe*, the court still would not award the relief, because the state court decision was not contrary to, nor an unreasonable application of, *Ashe*. In *Ashe*, the defendant was sentenced before a judge, whereas Green, as a capital defendant, had a right to be sentenced before a jury. The court reasoned that capital defendants, because they have a right to take the stand and address the jury at their sentencing hearings, have a "considerably reduced, if not nonexistent" need for the right of allocution.[59]

This idea that capital defendants somehow have a reduced need for vehicles with which to communicate with the jury is at odds with established Supreme Court precedent. In *Woodson v. North Carolina*,[60] the Supreme Court stated that:

> the penalty of death is qualitatively different from a sentence of imprisonment, however long. Death, in its finality, differs more from life imprisonment than a 100-year prison term differs from one of only a year or two. Because of that qualitative difference, there is a corresponding difference in

55. 586 F.2d 334 (4th Cir. 1978).
56. *Id.* at 336.
57. *Green*, 143 F.3d at 882.
58. *Id.*
59. *Id.* at 883.
60. 428 U.S. 280 (1976).

> the need for reliability in the determination that death is the appropriate punishment in a specific case.[61]

If indeed death penalty cases require an "enhanced reliability," and there seems no doubt from the language of *Woodson*, then it is contrary to Supreme Court precedent to deny to a capital defendant a vehicle for communicating with the jury, when that same vehicle is given to noncapital defendants.

Further, a basis of the court's logic is flawed. In stating that the defendant "is allowed to present evidence as well as take the stand and testify before the jury that will recommend his sentence,"[62] the court assumes that all capital defendants have the right to be sentenced by a jury. In *Spaziano v. Florida*,[63] the Supreme Court explicitly stated the opposite.[64] In fact, the statutory schemes of two states indicate that the capital defendant *cannot* have a jury decide the sentence. The Arizona capital sentencing statute states that "the judge who presided at the trial . . . *shall* conduct a separate sentencing hearing . . . for the purpose of determining the sentence to be imposed."[65] The Colorado statute states that "a panel of three judges . . . *shall* conduct a separate sentencing hearing to determine whether the defendant should be sentenced to death or life imprisonment . . . ."[66] This statutory and case law directly undercuts the reasoning of the court of appeals.

C. Ineffective Assistance of Counsel

Green asserted two claims that he was denied the effective assistance of counsel guaranteed by the Sixth Amendment[67] and *Strickland v. Washington*.[68] The court of appeals stated that because both of the claims were raised and decided on the merits in state post-conviction relief proceedings, "our role is simply to determine whether in either [claim] the state court's refusal to rule in Green's favor constituted an unreasonable application of clearly established Supreme Court case law."[69] With the court's interpretation of section 2254(d)(1), notice the procedural trap that denied Green de novo review of his *Strickland* claim. If he did not raise the claims at state post-conviction proceedings, they would be waived. But if he did, then the federal court will not now "freshly" apply *Strick-*

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61. *Id.* at 305. *See also* Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) (O'Connor, J., concurring) (stating that the Court has gone to *extraordinary measures* to ensure that capital defendants are afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake).

62. *Green*, 143 F.3d at 883.

63. 468 U.S. 447 (1984).

64. *Id.* at 460.

65. ARIZ. REV. STAT. § 13-703(B) (1997) (emphasis added).

66. COLO. REV. STAT. § 16-11-103(1)(a) (1998) (emphasis added).

67. U.S. CONST. amend. VI.

68. 466 U.S. 668 (1984).

69. *Green*, 143 F.3d at 890.

land to the claims, but rather the stricter "contrary to," or "an unreasonable application of," standard.

Looking to the specifics of Green's first ineffective assistance of counsel claim, that his trial counsel "never considered" the diminished capacity defense, the court concluded that the actions of Green's counsel were neither unreasonable nor prejudicial to Green, even though evidence was submitted which tended to establish that his counsel admitted that "he did not fully investigate the diminished capacity defense."[70] Noting that two mental examinations of Green prior to trial found that he was "of average intelligence and capable of abstract thinking, without significant impairment of memory, competent to stand trial, and able to appreciate the distinction between right and wrong,"[71] the court stated that "we cannot conclude that the state court unreasonably applied the first prong of *Strickland* when it concluded that Green's guilt-phase counsel acted within the realm of objectively reasonable professional conduct."[72]

In Green's second claim of ineffective assistance of counsel, he asserted that his counsel did not sufficiently investigate the events surrounding one of his prior violent felony convictions that was used by the State as an aggravating circumstance. The court summarily concluded that "we cannot say that their failure to undertake such efforts rendered their conduct constitutionally deficient under *Strickland*."[73]

D. Judicial Refusal to Instruct as to Certain Non-Statutory Mitigating Circumstances

Next, Green contended that the trial court erred by refusing to instruct the capital sentencing jury as to certain non-statutory mitigating circumstances. On direct appeal, the North Carolina Supreme Court found that, though it may have been error to deny Green the instructions, the State had proven that the errors were harmless beyond a reasonable doubt under the direct review standard of *Chapman v. California*.[74] The court of appeals approved of the state supreme court's finding and stated that "a fortiori, [] the trial court's error was harmless under the less exacting standard for federal habeas review of state court convictions under *Brecht v. Abrahamson*."[75]

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70. *Id.* at 891 (quoting J.A. at 167).

71. *Id.* (quoting J.A. at 211-12).

72. *Id.*

73. *Green*, 143 F.3d at 892.

74. 386 U.S. 18 (1967). In 1993, the United States Supreme Court rejected the harmless error rule of *Chapman* in collateral attack cases involving constitutional trial error. Brecht v. Abrahamson, 507 U.S. 619, 637 (1993).

75. 507 U.S. 619, 637 (1993) (holding that where there is constitutional trial error, the petitioner must show actual prejudice under the "substantial and injurious effect" rule in order to obtain a reversal).

E. Juror Selection Issues

Finally, Green asserted that the prosecutor in his original jury selection unconstitutionally discriminated against black potential jurors in violation of *Batson v. Kentucky*,[76] and that the prospect of facing an all-white guilt-phase jury unconstitutionally coerced Green into pleading guilty.[77] During state post-conviction review, the claim was ruled procedurally barred. The court of appeals found that the claim was barred under a state procedural rule that is an adequate and independent state law ground,[78] and therefore that the claims were also procedurally defaulted for the purposes of federal habeas review.[79] The court further found that Green did not demonstrate the requisite cause and prejudice or a fundamental miscarriage of justice necessary to excuse procedural default, nor did he establish entitlement to an evidentiary hearing on this claim under 28 U.S.C. § 2254(e)(2).[80]

Green also contended that on the basis of statistical and anecdotal evidence, the State of North Carolina, and Pitt County, North Carolina, generally discriminate on the basis of race in seeking the death penalty in violation of *McCleskey v. Kemp*,[81] and that he is entitled to an evidentiary hearing on this claim.[82] The court of appeals found that the claim was ruled procedurally barred during the state post-conviction review. The court approved of the state supreme court finding and stated that the then-forthcoming statistical study upon which Green wanted to rely did "not appear to establish that the state court's adverse adjudication of this claim was contrary to or an unreasonable application of *McCleskey*.[83]

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76. 476 U.S. 79 (1986).

77. *Green*, 143 F.3d at 894.

78. *See* Ashe v. Styles, 39 F.3d 80 (4th Cir. 1994).

79. *Green*, 143 F.3d at 894.

80. Twenty-eight U.S.C. § 2254(e)(2) states:

> (2) If the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that--
>
> (A) the claim relies on--
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
>
> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
>
> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.

28 U.S.C. § 2254(e)(2) (1998).

81. 481 U.S. 279 (1987) (stating very exacting standards for entitlement to constitutional relief based upon statistical evidence of race-of-defendant and race-of-victim effects and rejecting such a claim based upon the Baldus study).

82. *Green*, 143 F.3d at 894.

83. *Id.*

F. *Conclusion*

The Fourth Circuit consistently denied relief or reversed lower courts grants of relief to death sentenced prisoners *before* the provisions of AEDPA became applicable.[84] The interpretation and application of AEDPA in *Green* represents a further, virtually complete, abdication of authority to state courts. In Virginia, where a state supreme court reversal of a death sentence is indeed a rarity, this abdication dramatically reduces the likelihood of meaningful appellate review. Consequently it becomes critical that death sentences be avoided at the trial level.

Craig B. Lane

84. *See* Arnold v. Evatt, 113 F.3d 1352 (4th Cir. 1997), *cert. denied sub nom.*, Arnold v. Moore, 118 S.Ct. 715 (1998); Murphy v. Netherland, 116 F.3d 97 (4th Cir.), *cert. denied*, 118 S.Ct. 26 (1997); Pope v. Netherland, 113 F.3d 1364 (4th Cir.), *cert. denied sub nom.*, Pope v. Pruett, 118 S.Ct. 16 (1997); Smith v. Angelone, 111 F.3d 1126 (4th Cir.), *cert. denied*, 118 S.Ct. 2 (1997); ad infinitum.