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I. Facts

On May 28, 1983, Andrew Smith ("Smith"), armed with a pistol and a knife, went to the home of Christy and Corrie Johnson, ages eighty-six and eighty-two respectively, to see if he could borrow their car. After Mr. Johnson refused, Smith attacked Mr. and Mrs. Johnson. In the course of the attack, Smith stabbed Mr. Johnson twenty-seven times, and he stabbed Mrs. Johnson seventeen times. In addition to the stabbings, both Johnsons had injuries consistent with being struck by a pistol. After the attack, Smith took the Johnsons' car and left the scene.[1]

The police arrested Smith and charged him with the murders of Mr. and Mrs. Johnson. After waiving his *Miranda* rights, Smith confessed to the killings. The State indicted Smith for two counts of murder in October of 1983, and notified Smith of its intent to seek the death penalty. Prior to trial, the court conducted a hearing to determine Smith's competency to stand trial. At the hearing, Dr. Joel Sexton, a forensic pathologist who performed autopsies on the Johnsons, testified that most of the Johnsons' wounds and injuries were inflicted before death and during consciousness. Additionally, a psychiatrist at the South Carolina Department of Mental Health testified that he found Smith to be capable of assisting his counsel and competent to stand trial. Based on this testimony and other evidence, the trial court found Smith to be competent to stand trial.[2]

At trial, Smith raised an insanity defense and presented the testimony of Dr. Helen Clark, a clinical psychologist. In response, the State introduced the testimony of Dr. Spurgeon Cole, a clinical psychologist originally retained by Smith. Cole testified that Clark misinterpreted the test results which provided the basis for her testimony. Five days after trial commenced, the jury rejected the insanity defense and found Smith guilty on both counts. At the conclusion of the penalty phase, the trial court adopted the jury's recommendation of death.[3]

On direct appeal, the Supreme Court of South Carolina affirmed Smith's convictions and death sentences.[4] After Smith's petition for a writ of certiorari was rejected,[5] Smith filed an application for post-conviction relief ("PCR") in state court. The court rejected Smith's application as to the guilt phase, but relying on *Skipper v. South Carolina*,[6] ordered Smith's re-sentencing.[7] At the re-

1. Smith v. Moore, 137 F.3d 808, 812 (4th Cir. 1998).
2. *Smith*, 137 F.3d at 813.
3. *Id.*
4. State v. Smith, 334 S.E.2d 277 (S.C. 1985).
5. Smith v. South Carolina, 475 U.S. 1031 (1986).
6. 476 U.S. 1 (1986) (holding that a defendant's Eighth and Fourteenth Amendment rights

sentencing trial, the jury again recommended the death sentence, which the court adopted. Smith's appeals were denied and Smith eventually filed a federal habeas petition. A United States magistrate recommended denial of Smith's petition, and the district court adopted this recommendation and denied Smith's petition.[8]

On appeal of this denial to the Fourth Circuit, Smith contended that: (1) South Carolina's "physical torture" aggravating circumstance was unconstitutional; (2) his counsel was ineffective for failing to present certain evidence in mitigation of punishment at Smith's re-sentencing trial; (3) he was incompetent to stand trial; (4) the state violated his Sixth Amendment right to counsel; (5) the grand jury and the petit jury were selected in violation of the Equal Protection Clause of the Fourteenth Amendment; (6) the trial court's instructions on expert testimony and insanity violated the Sixth Amendment; and (7) the trial court erroneously instructed the jury that its sentencing recommendation had to be unanimous.[9]

II. Holding

The United States Court of Appeals, Fourth Circuit, approved denial of the writ, finding all of Smith's claims to be without merit or procedurally barred.[10]

III. Analysis/Application in Virginia

A. Claim of Unconstitutionality of South Carolina's Physical Torture Aggravating Circumstance

Smith claimed that the South Carolina "physical torture" aggravating circumstance[11] did not genuinely narrow the class of persons eligible for the death

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were violated if the sentencing court refused to admit evidence of his adaptability to prison life.).

7. Skipper v. South Carolina, 476 U.S. 1, 4-5 (1986).

8. *Smith*, 137 F.3d at 814.

9. *Id.*

10. For the purposes of this case note, the court's ruling on Smith's second, fifth, sixth, and seventh contentions of error will not be discussed. The court's opinion denying these claims provides little guidance. The court's ruling on Smith's ineffective assistance of trial counsel claim is worth noting.

On the ineffective assistance of trial counsel claim, the court held that in order to find for Smith, "Smith [would have to] show that the deficient performance of [trial counsel] prejudiced his defense to the point that he was deprived of a fair trial." *Smith*, 137 F.3d at 817 (citation omitted). The court supposedly based this ruling on the standard announced in *Strickland v. Washington*, 466 U.S. 668 (1984). Its interpretation of *Strickland* seems to require the defendant to prove, that, in fact, he was deprived of a fair trial. However, in *Strickland*, the Supreme Court of the United States went to great lengths to declare that a defendant need not actually show that it was more likely than not that his counsel's actions deprived him of a fair trial. According to *Strickland*, all a defendant has to show is that there was a reasonable probability, sufficient to undermine confidence in the outcome, that counsel's errors affected the outcome of the trial. *Strickland*, 466 U.S. at 694. If this is shown, then the defendant has been deprived of a fair trial; he need not actually prove anything. Thus, the Fourth Circuit's requirement that Smith has to actually prove that he was deprived of a fair trial is illustrative of how the court has misapplied the standard set forth in *Strickland*.

11. S.C. CODE ANN. § 16-3-20(C)(a)(1)(h) (Law Co-op. 1997).

penalty because it did not require an intent to torture apart from the intent to kill.[12] Smith's claim was based largely on the case of *Godfrey v. Georgia*.[13] Under *Godfrey*, to satisfy the Eighth and Fourteenth Amendments, a state's capital sentencing scheme must channel or limit the jury's discretion in imposing the death penalty by statutory language which provides "clear and objective standards" that make "rationally reviewable the process for imposing a sentence of death."[14] The use of aggravating factors, such as torture, depravity of mind, or aggravated assault, is one constitutionally acceptable method of limiting jury discretion, with certain limitations.[15] Whether an aggravating factor suitably limits jury discretion depends on whether it narrows the class of persons eligible for the death penalty such that the sentencer cannot fairly conclude that the aggravating circumstance applies to every capital murderer.[16] Smith argued that the South Carolina aggravating factor of "physical torture" did not sufficiently narrow the class of persons because it did not require an intent to torture separate from an intent to kill.

The Fourth Circuit rejected Smith's claim. The court implicitly accepted that a separate intent to torture was needed for the physical torture aggravating factor to be constitutional. However, the court rejected Smith's claim because the court concluded that the South Carolina torture aggravator did require a separate intent to torture.[17] Although South Carolina had never statutorily defined torture, prior cases had interpreted "physical torture" to include an intent to torture.[18] Relying on these cases, and on the trial judge's instruction to the jury that to find torture it must find an intentional infliction of abuse before death, the court held that the torture aggravating circumstance required a separate intent to torture and that the jury knew about this requirement.[19] Thus, the court held, this aggravating circumstance narrowed the class of persons eligible for the death penalty and complied with *Godfrey*.[20]

1. Virginia's Application of Vileness Factor is Suspect

The fact that the Fourth Circuit raised the question of the need for a separate intent to torture brings into doubt the constitutionality of Virginia's use

12. *Smith*, 137 F.3d at 814.

13. 446 U.S. 420 (1980).

14. Godfrey v. Georgia, 446 U.S. 420, 428 (1980) (footnotes and citations omitted).

15. *See* Walton v. Arizona, 497 U.S. 639 (1990) (finding that "especially heinous, cruel or depraved" aggravating factor, as construed by Arizona Supreme Court, furnishes sufficient guidance to the sentencer to satisfy the Eighth and Fourteenth Amendments).

16. *See* Zant v. Stevens, 462 U.S. 862, 876-78 (1983).

17. State v. Smith, 381 S.E.2d 724, 726 (S.C. 1989).

18. *Id. See also* State v. Elmore, 308 S.E.2d 781, 785 n.2 (S.C. 1983).

19. *Smith*, 137 F.3d at 814-15.

20. In *Godfrey*, the Supreme Court of the United States ruled that Georgia had sufficiently limited jury discretion through aggravating factors. However, the Court also held that Georgia had failed to apply this limitation in Godfrey's case, thus his death sentence was constitutionally invalid. *Godfrey*, 446 U.S. at 434.

of the torture factor as an aggravating factor. Similar to the South Carolina physical torture aggravating circumstance, a Virginia defendant can be sentenced to death if he commits a murder that is "outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity of mind, or aggravated battery to the victim."[21] Virginia courts have created definitions for both the depravity of mind and aggravated battery factors. However, unlike South Carolina, neither the legislature of Virginia, nor its courts have even defined "torture," much less made it clear that a separate intent to torture is required. In contrast, the Virginia Supreme Court proceeds to determine whether torture existed by examining the facts of each individual case on a post hoc basis as needed to uphold the finding of the torture factor. For example, there are cases involving physical abuse where it appears that a properly instructed jury might have inferred a separate intent to torture. In *Mu'Min v. Commonwealth*,[22] the Supreme Court of Virginia found the existence of torture where the defendant inflicted "multiple and grievous" wounds upon the victim prior to death.[23] Similarly, in *Tuggle v. Commonwealth*,[24] the Supreme Court of Virginia found torture where the defendant severely beat and bit one of the victims while the victim was still alive.[25] Finally, in *Stamper v. Commonwealth*,[26] the court determined that torture existed where the victim was beaten and cut before being killed.[27] On the other hand, in *Poyner v. Commonwealth*,[28] the Supreme Court of Virginia had to resort to a post-hoc definition of torture that included mental torture. The Virginia law lacks an intent to torture, an element which the Fourth Circuit acknowledged as necessary, and it lacks any instruction to the jury of such a requirement. Thus, while South Carolina's torture aggravating circumstance may have met the requirements of *Godfrey* and the line of cases following it, Virginia's torture factor does not.

These failures in application of the torture component are but another aspect of the deficiencies in Virginia's vileness aggravator. These issues should be raised and preserved in spite of the absence of relief from the courts to date. Further, at trial, when the Commonwealth's evidence could not fairly raise torture, or another component of vileness, motions in limine should be used to strike them from the jury's consideration.

2. The Court's Reservations About Its Ruling

Smith further contended that even if the court found that the torture aggravating circumstance required an intent to torture, there was not enough

21. VA CODE ANN. § 19.2-264.4(C) (Michie 1998).
22. 389 S.E.2d 886 (Va. 1990).
23. Mu'Min v. Commonwealth, 389 S.E.2d 886, 896-97 (Va. 1990).
24. 323 S.E.2d 539 (Va. 1984), *vacated on other grounds*, 471 U.S. 1096 (1985).
25. Tuggle v. Commonwealth, 323 S.E.2d 539, 553 (Va. 1984).
26. 257 S.E.2d 808 (Va. 1979).
27. Stamper v. Commonwealth, 257 S.E.2d 808, 819-20 (Va. 1979).
28. 329 S.E.2d 815 (Va. 1985).

evidence to support a finding of such an intent.[29] The court found the evidence sufficient to support the torture aggravator. For some reason, however, the court undertook a lengthy harmless error analysis on the possibility that the factor had been erroneously applied.[30]

The court noted the other aggravating factors found by the jury, namely that Smith committed the murders while in the commission of a felony.[31] The court ruled that in a non-weighing state,[32] if a jury finds at least one other valid aggravating factor, then the jury's reliance on an invalid aggravating factor may be harmless error if it satisfies the test announced in *Tuggle v. Netherland*.[33] However, under *Stringer v. Black*,[34] the Supreme Court of the United States assumed that the determination of harmless error, even in a non-weighing state, is to be done by the state appellate court, and not by a federal court.[35] The Fourth Circuit ruled that South Carolina is a non-weighing state, and that under *Tuggle*, any error which would have resulted from use of an invalid aggravating factor was harmless.[36] This departure from principles of comity and federalism may be explained by the fact that the court did not concede that the factor had been improperly applied. It might be wise for appellate counsel, however, to request remand to the state courts in the event the court finds an aggravating circumstance to be invalid.

B. Incompetence to Stand Trial

Smith claimed that he was incompetent to stand trial because he was taking the drug Mellaril.[37] At trial, Smith had contended that he would be incompetent if he were taken off of Mellaril.[38] Smith was taken off of Mellaril at trial and no

29. *Smith*, 137 F.3d. at 815.

30. *Id.* at 815-17.

31. *Id.* at 815.

32. A non-weighing state is one whose procedures do not explicitly require the sentencer to formally balance aggravating factors against mitigating factors. Virginia is formally a non-weighing state. In practice, of course, Virginia is a weighing state. Because proof of one statutory aggravating factor is a prerequisite of death eligibility and mitigating evidence must be considered before the jury imposes a sentence of either death or life in prison, "weighing" necessarily takes place.

33. 79 F.3d 1386 (4th Cir. 1996), *cert. denied*, 117 S.Ct. 237 (1996). In *Tuggle*, the court held that factors to be examined in determining if use of an invalid aggravator was harmless error or not include:

> (1) the strength of the remaining aggravating circumstance; (2) the evidence admitted ... at the sentencing hearing to establish the invalid aggravating circumstance; (3) the evidence improperly excluded at the sentencing hearing; (4) the nature of any mitigating evidence; (5) the closing argument of the prosecutor; and (6) any indication that the jury was hesitant or entertained doubt in reaching its sentencing determination.

Tuggle v. Netherland, 79 F.3d 1386, 1393 (4th Cir. 1996).

34. 503 U.S. 222 (1992).

35. Stringer v. Black, 503 U.S. 222, 231-32 (1992).

36. *Smith*, 137 F.3d at 816-817.

37. *Id.* at 818.

38. *Id.*

psychoses appeared.[39] As a result, Smith did not raise the issue of incompetence on direct appeal, and he did not raise the issue in his first PCR application.[40] Rather, defense counsel raised the issue in Smith's second PCR application, where the state PCR judge dismissed the claim as procedurally defaulted.[41] The United States Court of Appeals, Fourth Circuit, ruled that, because Smith did not properly present the claim in state court, Smith was procedurally barred from raising the claim at federal habeas review.[42] However, Smith argued that under *Pate v. Robinson*[43] and *Drope v. Missouri*[44] competence to stand trial can never be waived.

The court ruled against Smith's claim. According to the court, *Pate* and *Drope* stood only for the proposition that an incompetent defendant cannot knowingly or intelligently waive his rights.[45] The court held that waiver had no bearing on the procedural default of this issue. Accordingly, the court concluded that a claim of incompetency to stand trial "asserted for the first time in a federal habeas petition is subject to procedural default."[46]

However, *Pate* and *Drope* arguably stand for more than simply the proposition that an incompetent defendant cannot knowingly or intelligently waive his rights. In *Drope*, the Supreme Court of the United States noted that "we have expressed doubt that the right to further inquiry upon the question [of competence to stand trial] can be waived."[47] It is quite plausible to read *Drope* as declaring that the right to raise the issue of competency to stand trial can never be waived. In *Bundy v. Dugger*,[48] the United States Court of Appeals, Eleventh Circuit, held that "a defendant can challenge his competency to stand trial for the first time in his initial habeas petition."[49] However, the court in *Smith* ruled that there is a difference between waiver and default, and thus waiver of such a claim was inapposite to the *Smith* situation.

A practical problem related to the competency issue can arise from the procedure used to examine competency to stand trial in Virginia. According to section 19.2-169.1 of the Virginia Code, a defendant may have his competency to stand trial determined by a psychiatrist, clinical psychologist, or a master's level psychologist.[50] The evaluator provides the court and the attorneys of record with

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39. *Id.*

40. *Smith*, 137 F.3d at 818.

41. *Id.*

42. *Id.*

43. 383 U.S. 375 (1966) (holding that conviction of an incompetent defendant violates due process).

44. 420 U.S. 162 (1975) (noting that competency is essential to a fair trial).

45. *Smith*, 137 F.3d at 818.

46. *Id.* at 819.

47. Drope v. Missouri, 420 U.S. 162, 176-77 (1975).

48. 816 F.2d 564 (11th Cir. 1987).

49. Bundy v. Dugger, 816 F.2d 564, 567 (11th Cir. 1987).

50. VA. CODE ANN. § 19.2-169.1(A) (Michie 1998).

a report on the defendant's competency. The report must include a determination of: (1) the defendant's capacity to understand the proceedings against him; (2) the defendant's ability to assist his attorney; and (3) the defendant's need for treatment in the event he is found incompetent.[51] After the court receives the report, it may decide whether the defendant is competent or not. At that time, the prosecutor or the defense attorney may request a hearing on the defendant's competency, or the court may require a hearing if it has reasonable cause to believe the defendant will be hospitalized.[52]

Two warning signs for defense counsel arise from the fact that competency is an issue that is of interest to both parties and the court, while sanity and mitigation are adversary issues. First, defense counsel should ensure that the competency evaluation and the court's related order cover only the question of competency, and not questions of insanity or mental mitigation. By limiting the scope of the evaluation and the accompanying order, defense counsel can ensure that no prejudicial information or unauthorized discovery is revealed to the Commonwealth or the court. Second, if a competency hearing is ordered, when presenting evidence either for or against competency, it is important not to allow testimony of psychologists or other witnesses to go beyond the issue of competency. Questions should be limited to those which will only answer the question of competency and which will not inadvertently disclose any defenses based on insanity or any mental mitigation evidence. Failure to ask questions at a competency hearing directed strictly to competency, may allow the prosecutor to obtain free discovery of key information.

C. Violation of Sixth Amendment Right By Commonwealth Calling Psychologist Originally Retained by the Defense

Smith contended that his Sixth Amendment right to effective assistance of counsel was violated when Dr. Cole, originally retained by Smith, testified on behalf of the Commonwealth that Smith was not insane.[53] This claim was not decided on the merits. According to Smith, the attorney-client privilege protected Dr. Cole's testimony.[54] The court held that Smith's claim would have required the court to find that the Sixth Amendment is violated when the state calls a defense-related psychiatrist as a rebuttal witness.[55] According to the court, this rule would have been new, and as a result, subject to *Teague v. Lane*.[56] The court also noted, however, that violation of Smith's attorney-client privilege

51. VA. CODE ANN. § 19.2-169.1(D) (Michie 1998).

52. VA. CODE ANN. § 19.2-169.1(E) (Michie 1998).

53. *Smith*, 137 F.3d at 819.

54. *Id.* at 819.

55. *Id.* at 820.

56. 489 U.S. 288, 301 (1989) (holding a rule is new and cannot be a basis for disturbing a death sentence if "the result was not dictated by precedent existing at the time the defendant's conviction became final); *See also* Case Summary of *O'Dell*, CAP. DEF. J., Vol. 10, No. 1, p. 4.

would not have been a violation of Smith's Sixth Amendment constitutional rights.[57] It is this latter conclusion that is highly questionable. Defense counsel should steadily maintain that the attorney-client privilege is an integral and necessary component of the Sixth Amendment right to effective assistance of counsel. On the merits of the issue, it is unlikely that the Supreme Court of the United States would agree with the Fourth Circuit.

Perhaps the best course of action, however, is to avoid this situation completely. One way might be to contractually obligate defense experts, retained or appointed, not to assist the prosecution.

Jason J. Solomon

57. *Smith*, 137 F.3d at 819.