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I. Facts[1]

On February 21, 1994, Tony Leslie Fry ("Fry") murdered Leland A. Jacobs ("Jacobs"), an automobile salesman, by shooting Jacobs eleven times and dragging him behind the Ford Explorer which Fry and his accomplice, Brad Hinson, planned to steal during a test drive.[2] Fry pled guilty to capital murder, robbery, and two counts of illegal use of a firearm before a Chesterfield County Circuit Court judge.[3] The judge sentenced Fry to death based upon Virginia's "vileness" aggravating factor.[4]

On direct appeal before the Supreme Court of Virginia, Fry claimed only that his sentence was excessive and disproportionate to sentences in similar cases.[5] The Supreme Court of Virginia affirmed the conviction and sentence and the United States Supreme Court denied Fry's petition for certiorari.[6] Fry then filed a petition for state habeas relief, raising nine claims,[7] which the Supreme Court of Virginia summarily denied.[8] Fry next

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1. This is an unpublished disposition which is referenced in the "Table of Decisions Without Reported Opinions" at 165 F.3d 18 (4th Cir. 1998).

2. Fry v. Angelone, No. 98-8, 1998 WL 746859, at *1 (4th Cir. Oct. 26, 1998), *cert. denied*, 119 S.Ct. 921 (1999). Tony Leslie Fry was executed by the state of Virginia on February 4, 1999. Frank Green, *Fry Executed for Killing Car Salesman*, Richmond Times-Dispatch, Feb, 5, 1999, at B1.

3. *Fry*, 1998 WL 746859, at *1.

4. *Id. See* VA. CODE ANN. § 19.2-264.2 (Michie 1998). In this case, the finding of "vileness" was based upon the theory that Fry's conduct constituted an aggravated battery to the victim.

5. *Fry*, 1998 WL 746859, at *1.

6. Fry v. Commonwealth, 463 S.E.2d 433 (Va. 1995), *cert. denied*, 517 U.S. 1110 (1996).

7. *Fry*, 1998 WL 746859, at *1. Fry's nine claims were as follows:

> (I) Virginia's capital sentencing statute was unconstitutional as applied; (II) the sentencing court adopted an unconstitutional presumption in favor of death and used an unauthorized weighing system for sentencing; (III) the court unconstitutionally considered unadjudicated criminal conduct during sentencing; (IV) the Supreme Court of Virginia conducted inadequate appellate review; (V) statements made by Fry after he was taken into custody were improperly introduced into evidence during the penalty phase; (VI) Fry was denied constitutionally effective assistance of trial and appellate counsel; (VII) the Supreme Court of Virginia failed to require counsel to submit a brief in compliance with *Anders v. California*, 386 U.S. 738 (1967); (VIII) Virginia disproportionately and discriminatorily

petitioned the federal district court for federal habeas relief. The district court concluded Fry's ineffective assistance of counsel claim had no merit and that all other claims were procedurally barred from federal review.[9] Fry then appealed to the Fourth Circuit.[10]

II. Holding

The Fourth Circuit denied Fry a certificate of appealability and dismissed his petition.[11]

III. Analysis / Application in Virginia

A. Denial of Trial and Appellate Assistance Claim

For purposes of this section, only one claim will be analyzed: Fry's claim of ineffective assistance of counsel.[12] At federal habeas Fry made a claim of ineffective assistance of trial and appellate counsel, citing a failure to raise any appellate issues on direct appeal.[13] Fry argued that appellate counsel's failure to raise any claim on appeal was the equivalent to a withdrawal.[14] Withdrawal requires the filing of an *Anders* brief discussing possible appellate issues and reasons why those issues were meritless.[15] Fry's federal habeas counsel's argument can be simplified to an either/or argument: either appellate counsel's actions essentially equaled a withdrawal, and therefore an *Anders* brief was required, or the appellate counsel's actions did not constitute a withdrawal and appellate counsel failed to provide effective assistance to Fry by failing to raise any appellate issues on direct appeal.[16] The result of either circumstance would have resulted in

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applied the death penalty to Fry; and (IX) the death penalty is cruel and unusual punishment.

Id.

8. *Id.*, at *2.

9. *Id.*

10. *Id.*

11. *Id.*, at *5.

12. *See supra* note 7 (the ineffective assistance of counsel claim is listed as "VI"). The other claims that Fry presented at the federal habeas level were found to be procedurally defaulted, although the 4th Circuit did address the merits of some of these claims in conclusory fashion.

13. *Fry*, 1998 WL 746859, at *4.

14. *Id.*

15. *Id. See* Anders v. California, 386 U.S. 738, 744 (1967) (stating that when appointed appellate counsel wishes to withdraw from a case, counsel must first submit a brief to his client and the court outlining all possible appellate issues, the court must then give the defendant an opportunity to raise any further issues, and the court must find that all appellate issues would be frivolous if brought on appeal).

16. *Fry*, 1998 WL 746859, at *4-5.

error: either a contradiction of United States Supreme Court precedent,[17] or a violation of the Sixth Amendment constitutional right to counsel at trial and on direct appeal.

The Fourth Circuit disagreed with this reasoning, first stating that Fry misapplied *Anders* because counsel did not withdraw, and second by citing appellate counsel's brief and argument concerning the Supreme Court of Virginia's proportionality review as ample assistance to Fry during his direct appeal process.[18] The court disregarded the Supreme Court of Virginia's statutory requirement to provide proportionality review whether or not a brief regarding proportionality review is submitted by the defendant. In fact, the court applauded trial counsel's strategic choice in presenting, what counsel considered, the strongest appellate issue.[19]

While discharging Fry's ineffective assistance of counsel claim, the Fourth Circuit offered some advice to counsel on how to prepare issues for appeal. The court stressed "the importance of winnowing out weaker arguments on appeal and focusing on one central issue if possible."[20] While such streamlining may make a jurist's work easier and may even be appropriate in non-capital cases, it is deadly advice in a capital case and absolutely no attention should be paid to the Fourth Circuit dicta.

Two primary reasons exist for a rule of total inclusion when assigning errors during the appellate process. First, any claim not raised below will not be considered above. Second, but related to the first, it is impossible to tell which claim might later be deemed meritorious by a court in the federal system, no matter how many times the claim has been turned down at the state level. An example of this pattern would be *Simmons v. South Carolina*,[21] which held that a defendant had the right to inform the jury of his ineligibility for parole. This issue had been repeatedly denied by state courts as a matter of course, but was finally accepted on certiorari by the United States Supreme Court and overturned. As long as the issue is preserved, the defendant may take advantage of any positive ruling while his case is at trial or on direct appeal. An example of a current issue repeatedly denied at the state level but ripe for reversal by the United States Supreme Court is the application of the narrowing construction of the aggravating factor of vileness.[22]

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17. *See Anders*, 386 U.S. at 744.

18. *Fry*, 1998 WL 746859, at *4-5.

19. *Id.*

20. *Id.*, at *5 (citing Jones v. Barnes, 463 U.S. 745, 751 (1983) (internal quotation marks omitted)).

21. 512 U.S. 154 (1994).

22. *See* Matthew K. Mahoney, Case Note, 11 CAP. DEF. J. 457 (1999) (analyzing Reid v. Commonwealth, 506 S.E.2d 787 (Va. 1998)).

B. Guilty Pleas in Cases Involving Inflammatory Circumstances

Faced with a case involving inflammatory circumstances, a guilty plea and call for mercy may seem reasonable. It is these very cases, however, that should either be concluded by a non-capital plea agreement or brought to a jury. A guilty plea eliminates and procedurally bars virtually all appellate issues once the plea has been accepted and a death sentence imposed. The benefits of a plea are often outweighed by the number of rights forfeited. No guilty plea should be entered without a strong formal or very strong informal indication from the judge that the sentence will not be death. Especially in what appears to be an aggravated case, there is little reason to believe that a judge who will not give any assurance that the death penalty will not be imposed is a better choice than a full scale defense.

Having said that, not all matters are foreclosed by a plea of guilty. The Fourth Circuit's decision cited the Supreme Court of Virginia's summary denial at the state habeas level, in which the Supreme Court of Virginia cited *Peyton v. King*[23] for the proposition that all non-jurisdictional challenges to a conviction are waived when the defendant voluntarily enters a plea of guilty.[24] This statement is not as broad and all inclusive as a first reading may appear. While a guilty plea does foreclose numerous possible appellate issues, an admission of guilt is obviously not a waiver of claims or an acceptance of unlawful sentencing procedures. Should a guilty plea be absolutely necessary, a sentence of death may still be challenged based on errors occurring at the sentencing phase of the trial. The Supreme Court of Virginia's proportionality review may also be challenged.[25]

Matthew K. Mahoney

23. 169 S.E.2d 569 (Va. 1969).

24. *Fry*, 1998 WL 746859, at *2. *See* Peyton v. King, 169 S.E.2d 569, 571 (Va. 1969).

25. *See* Alix M. Karl, Case Note, 11 CAP. DEF. J. 449 (1999) (analyzing Payne v. Commonwealth, 509 S.E.2d 293 (4th Cir. 1999) and Jason L. Solomon, Case Note, 11 CAP. DEF. J. 197 (1998) (analyzing Jackson v. Commonwealth, 499 S.E.2d 538 (Va. 1998)).