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Johnson v. Moore
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I. Facts [1]

The Fourth Circuit reported the facts as follows.[2] While traveling alone, heading south through the Carolinas in his recreational vehicle, C. Daniel Swansen ("Swansen") befriended Richard Charles Johnson ("Johnson") and offered Johnson a ride, which Johnson accepted. Later, the two encountered Curtis Harbert ("Harbert") and Connie Hess ("Hess") at a rest stop. Harbert and Hess joined Swansen and Johnson in the RV and all proceeded south together. That evening, in Clarendon County, South Carolina, Johnson shot and killed Swansen, hiding his body under a mattress in the rear of the RV. With Johnson, who had been drinking, the remaining threesome continued on the road. They were subsequently stopped in Jasper County by South Carolina Trooper Bruce K. Smalls ("Trooper Smalls"), who had been alerted by a motorist that an RV was being driven erratically on Interstate 95. During the roadside questioning, Trooper Smalls was shot six times and killed.[3]

In February 1986, a Jasper County jury convicted Johnson of the capital murder of Trooper Smalls, and sentenced him to death. Johnson's sentence and conviction were reversed on direct appeal in 1987. A subsequent Jasper County jury again convicted him of capital murder. During the penalty phase of the retrial Johnson made this statement to the jury:

> I haven't been before you during the guilt phase of this trial or until now because there was no defense for my actions, I realize that now . . . I have no defense for anything or the tragedies that have occurred. All I have is a sorrow [for] the lives that I have ruined. I realize that there were many that I have ruined.[4]

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1. This is an unpublished opinion which is referenced in the "Table of Decisions Without Reported Opinions" at 164 F.3d 624 (4th Cir. 1998), *cert. denied*, No. 98-7820, 1999 WL 45390 (U.S. Mar. 29, 1999).

2. New evidence calls into question or contradicts the reported facts.

3. Johnson v. Moore, Nos. 97-33, 97-7801, 1998 WL 708691, at *1 (4th Cir. Sept. 24, 1998).

4. *Id.*, at *3.

The jury sentenced him to death. The Supreme Court of South Carolina affirmed the conviction and sentence, and the United States Supreme Court denied certiorari.[5]

In March 1986, Johnson entered pleas of guilty, in Clarendon County, to murder and armed robbery in connection with Swansen's murder and the continued use of Swansen's RV after the murder. Johnson received a life sentence and twenty-five years respectively for the convictions. Johnson did not appeal the Clarendon County convictions and sentences.[6]

Johnson sought post-conviction relief ("PCR") in state court, filing separate petitions concerning the Jasper and Clarendon County convictions. The PCR court consolidated the petitions and conducted an evidentiary hearing. The PCR court subsequently denied relief, eliminating most of Johnson's claims by interpreting a short line of South Carolina cases to the effect that any admission of guilt operates as a waiver of any guilt-related errors. Certiorari was denied by the Supreme Court of South Carolina.[7]

Johnson then filed federal habeas petitions for both convictions. The district court held the majority of Johnson's claims to be procedurally defaulted and the remaining balance of claims reasonably decided by the state courts.[8] Johnson then requested a certificate of appealability from the Fourth Circuit, which was granted with one panel member concluding that Johnson "made a substantial showing of the denial of a constitutional right."[9] Johnson raised several claims, relating to both convictions, before the Fourth Circuit.[10]

II. Holding

In a split decision, the Fourth Circuit held that all of Johnson's claims relating to the guilt phase of the Jasper County conviction were procedurally defaulted and that his ineffective assistance of counsel claims for both the Clarendon proceedings and the Jasper county sentencing proceedings lacked merit.[11] One judge dissented, finding a due process violation concern-

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5. *Id.*, at *1.
6. *Id.*
7. *Id.*
8. *Id.*, at *2.
9. *Id.*, at *1.
10. *Id.*, at *2.
11. *Id.*, at *14. The PCR court stated that the credibility of Johnson's medical expert witnesses was undermined due to their reliance on hearsay statements in forming their opinions, instead of actually meeting with Johnson. Johnson assigned an ineffective assistance of counsel claim because counsel allowed the experts to form opinions based on hearsay statements and not interviews with Johnson. Counsel are urged to foreclose such summary dismissal of expert testimony by having experts perform personal interviews with the accused. *Id.*, at *12.

ing *Brady*[12] claims that Johnson made in regard to his Jasper County conviction and rejecting the conclusion that these claims were waived by Johnson's statement at the penalty trial.[13]

III. Analysis / Application in Virginia

A. Admissions of Guilt as a Procedural Bar

Johnson presented what would appear to be a massive, valid *Brady* claim.[14] The exculpatory evidence detailed the recantation of testimony by one of the two main witnesses for the defense, Hess.[15] Originally Hess had told authorities that Harbert had killed both Swansen and Trooper Smalls.[16] However, during Johnson's trial, Hess (as did Harbert) testified that Johnson had murdered both men.[17] Both Hess and Harbert had been indicted for the murder of Trooper Smalls, but the charges were dropped after they provided testimony implicating Johnson.[18] Between Johnson's two Jasper County trials, Hess notified her attorney, who in turn notified the Clarendon County Sheriff, that Harbert killed both men and that she would be willing to testify to that effect.[19]

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12. Brady v. Maryland, 373 U.S. 83 (1963) (holding that due process is denied when exculpatory evidence material to guilt or sentence is not disclosed to the defendant by the prosecutor).

13. *Johnson*, 1998 WL 708691, at *14, 24.

14. *Id.*, at *2. Johnson's *Brady* claim consisted of the following:

> With respect to the Jasper County conviction for the murder of Trooper Smalls, Johnson argue[d] that (1) the State violated his right to due process under *Brady v. Maryland*, 373 U.S. 83 (1963), by failing to inform him prior to his 1988 retrial in Jasper County that Hess, who had testified in the first trial that Johnson had killed Swansen and Trooper Smalls, had recanted a portion of her testimony and had instead indicated that Harbert was the murderer; (2) the State failed to disclose immunity agreements with Harbert and Hess and to correct the false impression created by Harbert's testimony that no such agreement existed; (3) the State failed to reveal, or correct a false impression with respect to, the full extent of Ronnie Dale Stevenson's prior record, involvement as an informant with law enforcement, and unreliability; (4) Stevenson acted as a State agent such that Johnson's Sixth Amendment rights were violated when Stevenson questioned Johnson with respect to the murder of Trooper Smalls; (5) the cumulative failure of the State to disclose the exculpatory material deprived Johnson of a fair trial in violation of the Sixth, Eighth, and Fourteenth Amendments[.]

Id.

15. *Id.*, at *2, 22-23.

16. *Id.*, at *10.

17. *Id.*

18. *Id.*, at *22.

19. *Id.*, at *23. The Fourth Circuit suggested that Hess's recantation would only apply to the non-capital murder in Clarendon County. *Id.*, at *11. However, the government's theory hinged on Johnson committing both murders, the second one, of Trooper Smalls, committed in order to continue the concealment of Swansen's murder. The issue of whether

Though other Fourth Circuit panels have recently cautioned against delving into the intricacies of state procedural law,[20] this panel willingly did so in order to avoid facing the merits of a very strong *Brady* claim. The court parsed South Carolina cases and concluded, erroneously, as illustrated by Judge Ervin in dissent, that any sort of admission of guilt was a waiver of all appealable guilt issues under South Carolina law.[21]

The majority considered and relied upon South Carolina cases involving *guilty pleas*.[22] As Judge Ervin observed, there are constitutionally required procedural safeguards in the guilty plea context to ensure that admissions are made knowingly, intelligently and voluntarily.[23] In *McCarthy v. United States*[24] and *Boykin v. Alabama*[25] the United States Supreme Court provided minimum requirements for accepting guilty pleas in all criminal cases. Stating that a plea of guilty amounted to a waiver of several federal constitutional rights, the Court determined that the government must demonstrate in an affirmative manner that the defendant's plea is both intelligent and voluntary.[26] When a court removes these constitutional rights from a defendant who pleads guilty without receiving an affirmative acknowledgment from the defendant that his plea was entered into knowingly and voluntarily, that defendant's Eighth and Fourteenth Amendment due process rights are violated and the guilty plea is put aside. No such representation was required of Johnson during his supposed admission of guilt during the penalty phase of his trial.[27] Logically, it would follow that it was impossible for him to be giving up the rights commonly associated

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the Jasper County prosecutor was responsible, under *Brady*, for knowing of and disclosing important exculpatory evidence in the hands of Clarendon law enforcement may be resolved in *Strickler v. Pruett*, Nos. 97-29, 97-30, 1998 WL 340420 (4th Cir. June 17, 1998), now pending before the United States Supreme Court. Like Johnson, the evidence in *Strickler* was in the hands of law enforcement officials in another county, but the circumstances of the charge clearly put the prosecution on notice and pointed to the other jurisdiction. It is clear that prosecutors are not relieved of their *Brady* obligation simply because they are in fact unaware of exculpatory information. *See* Kyles v. Whitley, 514 U.S. 419, 437 (1995) (stating that an "individual prosecutor has a duty to learn of any favorable evidence known to the others acting on the government's behalf in the case, including the police").

20. *See* Matthew K. Mahoney, Case Note, 11 CAP. DEF. J. 393 (1999) (analyzing Yeatts v. Angelone, 166 F.3d 255 (4th Cir. 1999)); Douglas R. Banghart, Case Note, 11 CAP. DEF. J. 329 (1999) (analyzing Fisher v. Angelone, 163 F.3d 835 (4th Cir. 1998)).

21. *Johnson*, 1998 WL 708691, at *3-9, 14-22.

22. *Id.*, at *5-7.

23. *Id.*, at *17.

24. 394 U.S. 459 (1969).

25. 395 U.S. 238 (1969).

26. *See* McCarthy v. United States, 394 U.S. 459, 466 (1969); Boykin v. Alabama, 394 U.S. 238, 240-42 (1969).

27. *Johnson*, 1998 WL 708691, at *3.

with a properly administered guilty plea, including the right to contest on appeal any issue incident to the guilt phase of his trial.

Further, aside from the fact, also noted by Judge Ervin, that it is doubtful that Johnson's penalty trial statement *was* an admission that he was the triggerman as opposed to an accomplice, there are other constitutional problems with the majority's conclusion. That the supposed admission of guilt occurred during the sentencing phase of a capital trial also relates to the ability of an appellate court to foreclose appellate review and the subsequent implications of that result on presentation of mitigating evidence. The current holding in this case suggests that future defendants would be restricted from presenting mitigating evidence relating to their remorse or sorrow in relation to the crime for which they have been found guilty. Defendants would have to choose between pleading for mercy in front of the jury or preserving issues for appeal. Such a restriction on presentation of mitigation evidence directly contradicts United States Supreme Court precedent, beginning with *Lockett v. Ohio*,[28] requiring that any sentencing phase scheme allow for presentation to, and consideration by, the jury of any aspect of the defendant's character, record or involvement in the crime as mitigating evidence proffered to avoid a sentence of death.[29] Counsel should object and preserve for appeal any issue arising out of a restriction on mitigation evidence presentation.

In the unlikely event that the situation discussed in *Johnson* should arise in Virginia, it should be opposed as an unconstitutional barrier to presentation of mitigating evidence.[30] Forcing a convicted defendant, who has not pled guilty, to choose between permitting fundamental errors tainting the verdict and expressing remorse at sentencing very likely contravenes the holdings in *Lockett v. Ohio*,[31] *Eddings v. Oklahoma*,[32] *Mills v. Maryland*[33] and *McKoy v. North Carolina*.[34]

Matthew K. Mahoney

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28. 438 U.S. 586 (1978).

29. *Johnson*, 1998 WL 708691, at *18 (citations omitted). *See also* Mills v. Maryland, 486 U.S. 367 (1988); McCoy v. North Carolina, 494 U.S. 433 (1990).

30. No Virginia case deals with admissions other than guilty pleas.

31. 438 U.S. 586 (1978) (holding that proper death penalty schemes must allow consideration of any mitigating factor related to defendant's character or record or any of the circumstances of the offense that defendant profers).

32. 455 U.S. 104 (1982) (holding constitutional error where court refused to consider defendant's turbulent family history as a mitigating factor during sentencing phase).

33. 486 U.S. 367 (1988) (holding unconstitutional any barrier in determining presence of mitigating circumstances predicated on an unanimous finding by jury of the presence or absence of mitigating evidence).

34. 494 U.S. 433 (1990) (reaffirming Mills v. Maryland, 486 U.S. 367 (1988)).