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Harris v. French, No. 98-34, 1999 WL 496941 (4th Cir. July 14, 1999) Colvin-El v. Nuth, Nos. 98-27, 98-29, 1999 WL 436776 (4th Cir. June 17, 1999)

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**Harris v. French, No. 98-34, 1999 WL 496941
(4th Cir. July 14, 1999)¹**
**Colvin-El v. Nuth, Nos. 98-27, 98-29, 1999 WL
436776 (4th Cir. June 17, 1999)²**

These two cases provide minimal guidance for situations in which the sentencing jury is not the jury that decided the guilt portion of the trial. In *Harris v. French*,³ a North Carolina trial court empaneled a new jury for sentencing proceedings because of a delay caused when lead defense counsel withdrew after being diagnosed with a fatal illness.⁴ The court discharged the original jury and appointed new counsel.⁵ The new jury recommended that Harris be sentenced to death.⁶ In *Colvin-El v. Nuth*,⁷ the Maryland Court of Appeals vacated the original death sentence and remanded for a new sentence hearing.⁸ The new jury also sentenced Colvin-El to death.⁹

The North Carolina sentencing procedure at issue in *Harris* is similar to that set out in section 19.2-264.4 of the Virginia Code.¹⁰ Harris argued, *inter alia*, that the sentencing proceeding in his case violated the Double Jeopardy clause.¹¹ The Fourth Circuit, relying on *Schiro v. Farley*,¹² held that a sentencing proceeding is not a "subsequent prosecution," a prerequisite for a successful Double Jeopardy claim.¹³ Harris's double jeopardy

1. This is an unpublished opinion which is referenced in the "Table of Decisions Without Reported Opinions" at 182 F.3d 907 (4th Cir. 1999).

2. This is an unpublished opinion which is referenced in the "Table of Decisions Without Reported Opinions" at ___ F.3d ___ (4th Cir. 1999). Colvin-El filed a petition for certiorari with the United States Supreme Court on September 15, 1999.

3. No. 98-34, 1999 WL 496941 (4th Cir. July 14, 1999).

4. *Harris v. French*, No. 98-34, 1999 WL 496941, at *3 (4th Cir. July 14, 1999).

5. *Id.*

6. *Id.*

7. Nos. 98-27, 98-29, 1999 WL 436776 (4th Cir. June 17, 1999).

8. *State v. Colvin*, 548 A.2d 506, 518 (Md. 1988).

9. *Colvin-El v. State*, 630 A.2d 725, 727 (Md. 1993).

10. See VA. CODE ANN. § 19.2-264.4 (Michie 1999).

11. *Harris*, 1999 WL 496941, at *19; U.S. CONST. amend. V.

12. 510 U.S. 222 (1994).

13. *Harris*, 1999 WL 496941, at *19. In *Schiro*, the Supreme Court stated that a state's single opportunity to prosecute a defendant "extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding." *Schiro v. Farley*, 510 U.S. 222, 231-32 (1994).

claim therefore failed.¹⁴ The same result will likely accrue under section 19.2-264.4 of the Virginia Code in cases where a new jury is empaneled.

In *Colvin-El*, there was a subsequent sentencing proceeding, but Colvin-El did not raise a double jeopardy claim.¹⁵ Maryland, like Virginia, has a "triggerman" rule.¹⁶ However, in Maryland the conviction does not depend upon principalship; rather, principalship is a question for the jury during the separate sentencing proceeding.¹⁷ The Fourth Circuit held that permitting the sentencing jury to consider principalship and life/death in a single proceeding did not unconstitutionally prejudice Colvin-El.¹⁸ Although the precise procedural situation in *Colvin-El* cannot arise in Virginia because of the nature of Virginia's triggerman rule, the case appears to support the proposition that subsequent sentencing proceedings can be as broad as the original sentencing proceedings.¹⁹

Ashley Flynn

14. *Harris*, 1999 WL 496941, at *19.

15. *Colvin-El v. Nuth*, Nos. 98-27, 98-29, 1999 WL 436776, at *4 (4th Cir. June 17, 1999).

16. *See* MD. R. CR. 4-343(g); *see also* VA. CODE ANN. § 18.2-18 (Michie 1999).

17. MD. R. CR. 4-343(g).

18. *Colvin-El*, 1999 WL 436776, at *7.

19. Under section 18.2-18 of the Virginia Code, a determination of principalship is made during the guilt phase of the trial. Except in the cases of murder for hire or killing pursuant to direction of one involved in a continuing criminal enterprise, only a principal in the first degree (the "triggerman") may be convicted of capital murder in Virginia. VA. CODE ANN. § 18.2-18 (Michie 1999).