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I. Facts

On March 19, 1995, Heath William Burch ("Burch") broke into the home of Robert and Cleo Davis in order to steal items he could sell for drug money. When the Davises attempted to thwart Burch's effort, Burch attacked the elderly couple, apparently using a pair of scissors. When a friend discovered the couple the following day, Mr. Davis had succumbed to thirty-three wounds, eleven of which could be attributed to the scissors. Mrs. Davis was still alive and transported to a hospital where she died eight days later due to complications from blunt force trauma.[1]

On April 21, 1995, a grand jury in Prince George's County, Maryland, indicted Burch for first degree murder in the deaths of Mr. and Mrs. Davis. In addition to Burch's confession, police found blood on Burch's clothing which matched blood found in the Davis home and a boot in Burch's home matching a footprint found at the Davis home. Moreover, Burch's brother testified to the grand jury that Burch came to his home and admitted to the killings. Two and a half months after obtaining the indictment, the State notified Burch of its intent to seek the death penalty.[2]

Following a ten-day jury trial in March of 1996, Burch was convicted of both counts of first degree murder, as well as burglary and robbery charges in connection with the killings. The court then conducted four days of sentencing proceedings and instructed the jury on sentencing. The court also gave the jury a verdict form to assist in its deliberations; however, the verdict form referred to the circumstances of the crime in the singular, rather than the plural.[3] Burch's attorney did not object, however, to the verdict form; on March 29, 1995, the jury recommended a death sentence. Since the verdict form did not specify whether the jury intended to recommend a death sentence for each count of first degree murder, Burch's attorney argued that the court could impose only one

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1. Burch v. Corcoran, 273 F.3d 577, 580 (4th Cir. 2001).

2. *Id.* at 581.

3. *Id.* The court noted that "[t]he Verdict Form generally referred to issues in the singular sense: inter alia, 'the murder,' 'the victim,' and 'the sentence.'" *Id.* For instance, one of the statutory mitigators included on the Verdict Form asked the jury "whether *'[t]he murder* was committed while the capacity of the defendant to appreciate the criminality of his or her conduct or conform his or her conduct to the requirements of law was substantially impaired as a result of mental incapacity, mental disorder or emotional disturbance." *Id.* (emphasis in original).

death sentence. The trial court dismissed this argument and imposed two death sentences on Burch.[4]

The Court of Appeals of Maryland affirmed each conviction, but vacated one of Burch's death sentences because of the singular construction of the verdict form. Burch then filed a petition for a writ of certiorari in the United States Supreme Court, which was denied on December 1, 1997. Thereafter, Burch sought state court habeas relief, which was unsuccessful and terminated with a denial of certiorari from the United States Supreme Court on April 19, 1999. Burch then sought, and was granted, a certificate of appealability in the United States District Court for the District of Maryland. His subsequent petition for a writ of habeas corpus was denied.[5]

II. Holding

The United States Court of Appeals for the Fourth Circuit held that Burch's claims were meritless and unanimously affirmed Burch's death sentence.[6]

III. Analysis / Application in Virginia

A. The Apprendi *Claim*

Burch first challenged the constitutionality of Maryland's death penalty statute under the United States Supreme Court's landmark decision in *Apprendi v New Jersey*.[7] In *Apprendi*, the Court held that any fact, other than a prior conviction, which increases the available penalty beyond that permitted by statute must be submitted to the jury and proven beyond a reasonable doubt.[8] Burch contended that because the Maryland death penalty required the jury in sentencing to determine by a preponderance of the evidence whether aggravating factors outweighed mitigating factors, the sentencing statute violated the *Apprendi* mandate.[9]

1. Apprendi *May Not Be Applied Retroactively*

The Fourth Circuit noted that Burch initially raised this claim in seeking federal habeas review and that his judgment of conviction was final more than two years prior to the Supreme Court's ruling in *Apprendi*, thereby implicating the *Teague v Lane*[10] rule of retroactive application of constitutional rules of procedure on collateral review.[11] *Teague* prohibits the retroactive application of new consti-

4. *Id.*
5. *Id.* at 582.
6. *Id.* at 580.
7. Apprendi v. New Jersey, 530 U.S. 466 (2000).
8. *Id.* at 476.
9. *Burch*, 273 F.3d at 583-84.
10. 489 U.S. 288 (1989).
11. *Burch*, 273 F.3d at 584; *see* Teague v. Lane, 489 U.S. 288 (1989).

tutional rules unless they fit within one of two exceptions: either the new rule precludes punishment for the conduct in question, or the rule so alters the common concept of fair process that it could be called a "watershed rule of criminal procedure."[12] The court then explained that the Fourth Circuit had determined in *United States v Sanders*[13] that *Apprendi* did not meet with either of the *Teague* factors and, therefore, could not be applied retroactively to Burch's case.[14]

2. *The Application of* Apprendi *to Capital Cases*

Although the court passed on the merits of Burch's *Apprendi* claim, it did note in footnote six of its opinion that the claim would likely fail because the *Apprendi* court had explained that its ruling would not render state capital sentencing schemes unconstitutional.[15] Writing for the majority in *Apprendi*, Justice Stevens relied on *Walton v Arizona*[16] in predicting that *Apprendi* would not disturb state capital punishment statutes.[17]

Walton, however, is not controlling. In *Walton*, the defendant was convicted of capital murder for kidnapping his victim from a bar, taking him into the desert, robbing and shooting him.[18] Walton was sentenced to death by a *judge* after the judge weighed evidence of aggravating and mitigating factors.[19] Walton's constitutional challenge to the Arizona sentencing scheme was that the finding of aggravating and mitigating factors must be left to the jury.[20] The *Walton* court rejected this argument, holding that the determination of aggravating and mitigating factors is not the equivalent of conviction or acquittal, and that, therefore, a judge is competent to make such a determination.[21]

The *Walton* court, however, did not consider the reasonable doubt question. Justice Stevens relied on *Walton* simply to establish that the *Apprendi* requirement that penalty-enhancing elements be submitted to a jury does not apply in capital cases.[22] This limitation on the holding does not address the question raised by

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12. *Burch*, 273 F.3d at 584; *Teague*, 489 U.S. at 311.

13. 247 F.3d 139 (4th Cir. 2001).

14. *Burch*, 273 F.3d at 584; *see* United States v. Sanders, 247 F.3d 139, 148-49 (4th Cir. 2001) (explaining that "these rules, however, are not the types of watershed rules implicating fundamental fairness that require retroactive application on collateral attack").

15. *Burch*, 273 F.3d at 584 n.6; *see also Apprendi*, 530 U.S. at 496.

16. 497 U.S. 639 (1990).

17. *Apprendi*, 530 U.S. at 496; *see* Walton v. Arizona, 497 U.S. 639, 649 (1989) (holding that states are not required to "denominate aggravating circumstances [as] elements of the offense" which must be determined by a jury). The Supreme Court has granted certiorari to reconsider *Walton* in Ring v. Arizona, 122 S. Ct. 865 (2002).

18. *Walton*, 497 U.S. at 644.

19. *Id.* at 645.

20. *Id.* at 647.

21. *Id.* at 648.

22. *Apprendi*, 530 U.S. at 496.

Burch–whether *Apprendi* permits the jury to determine the existence of aggravating or mitigating factors *by a preponderance of the evidence.*

B. Ineffective Assistance of Counsel

Burch further contended in his habeas petition that his attorney had provided ineffective assistance by failing to seek two verdict forms at sentencing and by failing to present evidence of mitigating factors.[23] The court reviewed these claims under the familiar test for ineffective assistance of counsel established by *Strickland v. Washington*.[24] The court further explained that its review was controlled by *Williams v. Taylor*,[25] which explains that in order for a defendant "to obtain federal habeas relief, he must first demonstrate that his case satisfies the condition set by [28 U.S.C.] § 2254(d)(1)."[26]

The court gave short shrift to Burch's claim that his attorney's failure to request two verdict forms constituted ineffective assistance. Without determining whether the attorney's conduct was unreasonable, the court concluded that counsel's failure to request two verdict forms caused Burch no prejudice.[27]

In considering Burch's claim that his attorney's failure to introduce evidence of mitigating factors constituted ineffective assistance of counsel, the court determined that the state court's findings met the requirements of *Williams* and 28 U.S.C. § 2254(d)(1) and rejected the claim.[28] The state court determined that: (1) counsel did provide mitigating evidence as to Burch's drug use and family background; and (2) counsel's decision to limit presentation of mitigating factors was a reasonable strategic decision and did not constitute deficient performance.[29] On their facts, Burch's claims are similar to those raised by the petitioner in *Williams*, but a comparison of the cases illustrates some important points on which the two cases may be distinguished. In *Williams*, while the trial counsel did introduce some limited character evidence, he neglected to introduce considerable mitigating evidence and offered a closing statement in which he characterized his client as an individual who did not show mercy.[30] Ultimately, the Fourth Circuit agreed with the Supreme Court of Virginia that, despite

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23. *Burch*, 273 F.3d at 587.

24. *Id.* at 588; *see also* Strickland v. Washington, 466 U.S. 668, 687 (1984) (explaining that a defendant must establish that counsel's performance fell below the reasonable level of competence and that counsel's lacking performance caused defendant prejudice).

25. 529 U.S. 362 (2000).

26. *Burch*, 273 F.3d at 588 (quoting Williams v. Taylor, 529 U.S. 362, 403 (2000)); *see also* 28 U.S.C. § 2254(d)(1) (Supp. V 1999) (prohibiting the grant of a writ of habeas corpus when petitioner's claims have been adjudicated on the merits in a state court unless the prior adjudication "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").

27. *Burch*, 273 F.3d at 588.

28. *Id.* at 590.

29. *Id.* at 589.

30. *Williams*, 529 U.S. at 369, 369 n.2.

counsel's ineffective performance, Williams failed to show sufficient prejudice to grant a new trial.[31]

The United States Supreme Court reversed the Fourth Circuit in *Williams*, holding that the state court decision was unreasonable because it relied on inapposite precedent when a straightforward application of *Strickland* was the proper analysis.[32] In *Burch*, however, the state court's analysis was consistent with the *Strickland* analysis in that the court is required to show deference to strategic decisions falling in the realm of reasonable and professional conduct.[33] *Williams* is distinguishable because in that case counsel's conduct could not reasonably be described as strategic.[34] On the other hand, the decision of Burch's attorney to focus the presentation of mitigation evidence fairly may be called strategic.

C. *Juror Misconduct*

Burch further requested habeas relief because a juror read from a Bible at length during sentencing deliberations.[35] Without permitting Burch to call jurors to testify, the state court determined that the jury had reached its verdict before the juror read from his Bible and that the Bible reading had no impact on the outcome of sentencing.[36] On federal habeas review, the district court determined that Burch had not received a full and fair adjudication of the issue in state habeas and ordered an evidentiary hearing.[37] The evidentiary hearing revealed that the juror carried the King James Bible with him during deliberations and quoted biblical passages both from memory and by reading.[38] After the hearing, the district court held that, although reading from the Bible could be considered an improper communication, there was no showing that the reading had an impact on the verdict.[39] The court found that the juror did not use the Bible as a source of law and that the juror never suggested, on the basis of his readings, that other jurors should disregard the instructions of the trial court.[40]

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31. *Id.* at 374. For a complete discussion of the procedural history of the *Williams* case, *see* Jeremy White, Case Note, 13 CAP. DEF. J. 123, 124-26 (2000) (analyzing Williams v. Taylor, 120 S. Ct. 1495 (2000)).

32. *Williams*, 529 U.S. at 393.

33. *Burch*, 273 F.3d at 589.

34. *Williams*, 529 U.S. at 397-98 (noting that the Supreme Court of Virginia "was unreasonable insofar as it failed to evaluate the totality of the available mitigation evidence . . . in reweighing it against the evidence in aggravation").

35. *Burch*, 273 F.3d at 590.

36. *Id.* at 590-91.

37. *Id.*

38. *Id.* at 590.

39. *Id.*

40. *Id.* at 590-91.

The Fourth Circuit affirmed the findings of the district court, applying its principle from *Stockton v Virginia*,[41] that the presumption of prejudice attaching to an improper juror communication ought not be "casually invoked."[42] In *Stockton*, during a break in the sentencing proceedings, the jury ate lunch at a diner near the courthouse.[43] While they were eating, the owner of the diner approached the jurors and advised them that they "ought to fry the son of a bitch."[44] The jury later returned a death sentence.[45] The trial court heard some evidence of the communication, but nevertheless entered judgment and imposed the death sentence.[46] Although the Fourth Circuit cautiously applied the presumption of prejudice, the court ultimately reasoned that it was highly unlikely that such an inflammatory comment would have no effect on the jurors.[47] The court noted that the trial court abused its discretion in failing to protect the jurors from such remarks in a public environment charged with emotion concerning the case.[48] *Burch* is easily distinguished from *Stockton* because the improper communications came from within the jury room and appeared to have a negligible effect upon the verdict.[49]

D. Certificate of Appealability

In footnote four, the court noted that the certificate of appealability issued by the district court was defective because it failed to meet the strictures of 28 U.S.C. § 2253(c).[50] Defense counsel has a responsibility to make sure that the district judge issues a certificate of appealability that satisfies the requirements of § 2253(c). The court further noted that "[t]he Warden has not, however, challenged Burch's certificate of appealability."[51] This comment is an invitation to the government to challenge defective certificates.[52] If the court is willing to dismiss these cases because of defective certificates without reaching the merits,

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41. 852 F.2d 740 (4th Cir. 1988).

42. *Burch*, 273 F.3d at 591 (quoting Stockton v. Virginia, 852 F.2d 740, 745 (4th Cir. 1988)).

43. Stockton v. Virginia, 852 F.2d 740, 742 (4th Cir. 1988).

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.* at 746.

48. *Id.*

49. *See Burch*, 273 F.3d at 591 (agreeing with the trial court's finding of fact that "there was 'no reasonable possibility that the jury verdict was influenced by an improper communication in the form of a quotation from the Bible'").

50. *Burch*, 273 F.3d at 582 n.4. Title 28 U.S.C. § 2253(c) provides that the certificate of appealability must "indicate which specific issue or issues satisfy" the petitioner's burden of demonstrating the denial of a constitutional right. 28 U.S.C. § 2253(c)(3) (Supp. V 1999).

51. *Burch*, 273 F.3d at 582 n.4.

52. *Id.*

then it is absolutely crucial that counsel make certain that the district judge understand the § 2253(c) requirements and draft a compliant certificate. The fact that the court reached the merits indicates that this claim will be procedurally defaulted by the state if it neglects to raise it.[53]

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53. *See* Gray v. Netherland, 518 U.S. 152, 166 (1996) (noting that if the basis of a habeas claim that was raised in a prior federal proceeding goes unchallenged for procedural default, the government loses the right to raise procedural default in a subsequent proceeding).