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I. Facts

On June 3, 1993, Herman Smith, Sr. ("Smith") was watching television in his recliner when Edward Ernest Hartman ("Hartman") shot him at close range in the back of the head. Hartman lived with the elderly Smith in Northampton County, North Carolina. After the murder, Hartman left Smith in the recliner for several days as he tried to cash forged checks and to sell some of Smith's valuables. Hartman was arrested and eventually confessed to murdering Smith.[1]

The State charged Hartman in a short-form indictment that identified the crime as "murder." Prior to trial, the State informed Hartman at a motions hearing that it intended to prosecute him for first degree murder, and, if convicted, it would seek the death penalty by alleging that he committed the murder during a robbery. Hartman moved to dismiss the indictment because it did not allege all the elements of first-degree murder. His motion was denied; he was convicted of first-degree murder and sentenced to death.[2]

On direct appeal, the Supreme Court of North Carolina rejected Hartman's constitutional challenge to the short-form indictment. Hartman filed for federal habeas relief on the same grounds— that the indictment was insufficient because it did not allege all of the essential elements of first-degree murder. This argument was rejected by the district court and Hartman appealed to the United States Court of Appeals for the Fourth Circuit.[3]

II. Holding

The United States Court of Appeals for the Fourth Circuit held that the Supreme Court of North Carolina's decision to reject Hartman's challenge to the short-form indictment neither contradicted nor unreasonably applied United States Supreme Court precedent.[4] It held that the North Carolina short-form indictment, which alleges only the common law elements of murder, is constitutionally sufficient.[5]

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1. State v. Hartman, 476 S.E.2d 328, 331-32 (N.C. 1996).
2. Hartman v. Lee, 283 F.3d 190, 193 (4th Cir. 2002).
3. *Id.*
4. *Id.* at 199; *see* 28 U.S.C. § 2254(d)(1) (2000) (codified as amended by Anti-Terrorism and Effective Death Penalty Act of 1996) (stating that a writ of habeas corpus pursuant to a state court decision can only be granted if the state court decision was "contrary to" or "an unreasonable application of, clearly established federal law").
5. *Hartman*, 283 F.3d at 199; *see also* N.C. GEN. STAT § 15-144 (1999) (stating that "it is

III. Analysis

Hartman made two arguments against the North Carolina short-form indictment. First, he argued that the Sixth Amendment and the Due Process Clause require that the State's charging document list all the essential elements of the charged offense.[6] The court relied on *Davis v. Territory of Utah*[7] and *Bergemann v. Backer*[8] to uphold the constitutionality of short-form murder indictments.[9] *Davis* and *Bergemann* essentially stated that a short-form murder indictment that only alleges the common law elements of murder is constitutionally sufficient.[10] The indictment need not list the distinguishing elements between first-degree and second-degree murder because those elements are circumstances of aggravation.[11] Therefore, the distinguishing elements are a distinction between degrees of punishment, not a distinction between offenses.[12]

Hartman's second argument was that first and second-degree murder are separate offenses requiring different essential elements.[13] The Fourth Circuit found that the Supreme Court of North Carolina clearly stated in *State v. Davis*[14] that murder had one definition— the intentional and unlawful killing of a human being with malice aforethought— and was divided into two degrees in order for murder in the first degree to carry a greater punishment.[15] Based on *Davis*, the

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sufficient in describing murder to allege that the accused person feloniously, willfully, and of his malice aforethought, did kill and murder" the victim).

6. *Hartman*, 283 F.3d at 194.

7. 151 U.S. 262 (1894).

8. 157 U.S. 655 (1895).

9. *Hartman*, 283 F.3d at 196-97; *see* Davis v. Territory of Utah, 151 U.S. 262, 266 (1894) (holding that the short-form indictment did not need to include the elements that distinguished first-degree murder from second-degree murder because they were statutorily the same crime that had been divided into two classes so that the punishment may be adjusted "with reference to the presence or absence of circumstances of aggravation"); Bergemann v. Backer, 157 U.S. 655, 658 (1895) (holding that elements which distinguished murder in the first degree and murder in the second degree "created no new crimes, but merely made a distinction with a view to a difference in the punishment between the most heinous and the less aggravated grades of the crime of murder"). The Fourth Circuit did not apply the holdings of *Apprendi v. New Jersey* or *Jones v. United States* because it ruled in *United States v. Sanders* that they were new rules that could not be applied retroactively on collateral review. *See Hartman*, 283 F.3d at 192 n.2 (citing United States v. Sanders, 247 F.3d 139, 151 (4th Cir. 2001)). *See generally* Apprendi v. New Jersey, 530 U.S. 466 (2000); Jones v. United States, 526 U.S. 227 (1999).

10. *Davis*, 151 U.S. at 266-67; *Bergemann*, 157 U.S. at 658.

11. *Bergemann*, 157 U.S. at 658.

12. *Id.*

13. *Hartman*, 283 F.3d at 194.

14. 290 S.E.2d 574 (N.C. 1982).

15. *Hartman*, 283 F.3d at 198; *see* State v. Davis, 290 S.E.2d 574, 588 (N.C. 1982) (concluding "that the law of this jurisdiction recognizes no offense of felony murder in the second degree").

Fourth Circuit held that there is only one common law crime of murder in North Carolina; first-degree and second-degree murder are not separate offenses.[16]

IV. Application in Virginia

Because murder indictments in Virginia need not allege the elements of first-degree or second-degree murder, they are similar to the indictment at issue in this case.[17] In Virginia, the short form of the indictment is sufficient to allege first-degree murder.[18] A Virginia defendant in the same position, making a similar claim that the indictment was insufficient, could expect the same outcome in the Fourth Circuit. However, in Virginia, the indictment used in *Hartman* could not charge capital murder, because in Virginia capital murder is a separate statutory offense.[19] Because of this statutory difference, the exact situation that arose in *Hartman* could not arise in Virginia.

The situation that may arise in Virginia, relevant to *Hartman*, is a capital murder indictment that is insufficient because it does not allege the aggravating sentencing factors.[20] Virginia defense attorneys can argue that the United States Supreme Court's holding in *Ring v Arizona*[21] requires that the rulings in *Apprendi v New Jersey*[22] and *Jones v United States*[23] apply to all capital murder indictments.[24]

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16. *Hartman*, 283 F.3d at 198-99.

17. *See* Ward v. Commonwealth, 138 S.E.2d 293, 296 (Va. 1964) (explaining that "[i]t is not necessary that the indictment should charge murder in the first degree or use that description which, according to the statute, constitutes that degree of offense").

18. *See* Hobson v. Youell, 15 S.E.2d 76, 78 (Va. 1941) (stating that "the sufficiency of the short form of the indictment to support a conviction of murder in the first degree has been repeatedly questioned and just as repeatedly and emphatically answered in the affirmative by this court").

19. *See generally* VA. CODE ANN. § 18.2-31 (Michie Supp. 2002) (defining the offense of capital murder).

20. Such an indictment raises two questions. It can be attacked as insufficient to charge capital murder. Alternatively, the defense can move to strike death from the case on the ground that the indictment charges all of the elements of a capital murder which will support a life sentence, but that it does not charge a capital offense which will support a sentence of death. *See* VA. CODE ANN. § 19.2-217 (Michie 2000) (providing statutory right to indictment). For a copy of the Motion to Dismiss Capital Murder Indictments for Failure to Allege Aggravating Elements or a copy of the Motion to Strike Death from the Capital Murder Penalty Phase, please contact the Virginia Capital Case Clearinghouse or visit our website at http://vc3.org and click on "downloads."

21. 122 S. Ct. 2428 (2002).

22. 530 U.S. 466 (2000).

23. 526 U.S. 227 (1999).

24. *See generally* Ring v. Arizona, 122 S. Ct. 2428 (2002) (applying *Apprendi* and *Jones* to capital murder cases); Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (explaining that in cases in which facts will increase the penalty of a crime beyond the statutory maximum, those facts must be proven to a jury beyond a reasonable doubt); Jones v. United States, 526 U.S. 227, 243 n.6 (1999) (finding that a carjacking statute that listed three acts with three different penalties must be treated as three distinct offenses and each offense "must be charged in an indictment, submitted to a jury, and proven beyond a reasonable doubt").

Ring, through *Jones*, requires that aggravators be included in federal indictments.[25] While there is no constitutional right to a grand jury or an indictment in the states generally, Virginia does provide a statutory right to both.[26] Through this statutory right and the Sixth Amendment notice clause, attorneys can argue that the holdings in *Jones* and *Apprendi* require Virginia capital indictments to include the aggravators.[27] However, even if this argument is successful, it leaves unanswered the question of whether or not the right to an indictment that alleges the aggravators can be invoked retroactively on appeal.

If a Virginia attorney does try to apply the implications of *Ring* retroactively in a habeas proceeding, *Hartman* becomes relevant because it is a harbinger of how the Fourth Circuit will rule.[28] Whether or not *Ring* will be applied retroactively depends on whether *Ring* meets one of the two *Teague v Lane*[29] exceptions.[30] In *Hartman*, however, the Fourth Circuit stated that even if *Apprendi* and *Jones* could be applied on collateral review, their application would be barred by statutory habeas requirements.[31] The Fourth Circuit then interpreted *Williams v Taylor*[32] to mean that "a federal habeas court may only consider the holdings of the Supreme Court as they existed at the time of the state court ruling."[33] This is a dubious reading of *Williams*, which states that "whatever would qualify as an old rule under our *Teague* jurisprudence will constitute 'clearly established Federal law, as determined by the Supreme Court of the United States' under 2254(d)(1)."[34] The Fourth Circuit seems to be interpreting this language to mean that new rules, as defined under *Teague*, will not constitute clearly established federal law and therefore cannot be applied in a federal habeas review. However, *Williams* does

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25. *Jones*, 526 U.S. at 243 n.6.

26. *See* VA. CODE ANN. § 19.2-217 (Michie 2000) (stating that "no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury in a court of competent jurisdiction").

27. *See* Janice L. Kopec, Case Note, 15 CAP. DEF. J. 143 (2002) (analyzing Ring v. Arizona, 120 S. Ct. 2428 (2002)).

28. *See Hartman*, 283 F.3d at 195 n.4.

29. 489 U.S. 288 (1989).

30. Teague v. Lane, 489 U.S. 288, 311 (1989) (holding that there are two instances where new rules of constitutional criminal procedure can be granted retroactive status— if the new rule places primary offense conduct beyond the power of the State to punish or if the new rule is a watershed rule of criminal procedure); *see* Kopec, *supra* note 27.

31. *Hartman*, 283 F.3d at 195 n.4; *see also* § 2254 (stating that a writ of habeas corpus pursuant to any claim heard by a state court shall be denied "unless the adjudication of the claim--(1) 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").

32. 529 U.S. 362 (2000).

33. *Hartman*, 283 F.3d at 195 n.4 (stating that a federal habeas court can only rely on Supreme Court holdings as they existed at the time of the state court's ruling (citing Williams v. Taylor, 529 U.S. 362, 412 (2000))). *But see Williams*, 529 U.S. at 412 (stating that old rules under *Teague* count as clearly established Federal law).

34. *Williams*, 529 U.S. at 412.

not explain what will happen to new rules that have been excepted under the *Teague* analysis and do apply retroactively.[35] In short, attorneys should expect the Fourth Circuit to deny the retroactive application of *Ring* under the Anti-Terrorism and Effective Death Penalty Act ("AEDPA") even if *Ring* is granted retroactive status under *Teague*.[36]

Attorneys can employ *Horn v Banks*[37] to argue that a rule that is considered retroactive under *Teague* should not be barred by AEDPA.[38] The United States Supreme Court stated in *Horn*:

> [I]f our post-AEDPA cases suggest anything about AEDPA's relationship to *Teague*, it is that AEDPA and *Teague* inquiries are distinct. Thus, in addition to performing any analysis required by AEDPA, a federal court considering a habeas petition must conduct a threshold *Teague* analysis . . . .[39]

The Court distinguished between the requirements of AEDPA and an analysis under *Teague* and required that a *Teague* analysis be conducted first.[40] The Court in *Horn* did not allow a federal court to determine that a rule was permissible under AEDPA and then simply forgo a *Teague* analysis that might have precluded the rule.[41] In short, if AEDPA had permitted the use of a rule that was barred under *Teague*, *Teague* would have been controlling. By declaring that when *Teague* is raised properly it becomes a threshold issue, the Court is requiring the *Teague* analysis to be conducted first. This requirement could produce the opposite effect of *Horn*— a rule could be permitted under *Teague* that might be considered impermissible under AEDPA. Nevertheless, the same result should occur— the *Teague* analysis should be controlling. If the federal courts cannot rely on AEDPA to ignore a rule's status as inapplicable under *Teague*, they cannot use AEDPA to ignore its applicable status either. The Court stated that a *Teague* analysis is a threshold issue, distinctive from any analysis required by AEDPA; thus if a *Teague* analysis results in a finding that *Ring* does apply retroactively, the Fourth Circuit should not be able to bar retroactive application through AEDPA.[42]

V. Conclusion

The Fourth Circuit indicated that it will not apply *Apprendi* and *Jones* retroactively; therefore, the court is not likely to apply *Ring* retroactively either. Attor-

35. *Id.*

36. *See* 28 U.S.C. § 2254.

37. 122 S. Ct. 2147 (2002).

38. Horn v. Banks, 122 S. Ct. 2147 (2002) (holding that *Teague* is a threshold issue in a federal habeas proceeding); *see* 28 U.S.C. § 2254; *see also* Kopec, *supra* note 27; Janice L. Kopec, Case Note, 15 CAP. DEF. J. 133 (2002) (analyzing Horn v. Banks, 122 S. Ct. 2147 (2002)).

39. *Horn*, 122 S. Ct. at 2151 (citations omitted).

40. *Id.*

41. *Id.* at 2150.

42. *Id.* at 2150-51.

neys should expect the Fourth Circuit to bar retroactive application of *Ring* under AEDPA even if *Ring* is held to be retroactive under *Teague*. However, the United States Supreme Court's language in *Horn* may be able to defeat an exclusion under AEDPA.

Janice L. Kopec