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Brown v. Lee

319 F.3d 162 (4th Cir. 2003)

I. Facts

On March 6, 1983, a clerk was reported missing from a convenience store in Williamston, North Carolina. Police arrived and discovered that money was missing from the cash register and the store's safe; the clerk's car had also disappeared. Less than an hour later, police officers stopped Willie Brown ("Brown") who was driving the clerk's car. The car contained the clerk's purse, a .32 caliber six-shot revolver, a paper bag containing about ninety dollars in cash, and a toboggan cap with eye holes cut out of it. That afternoon, the clerk's body was discovered on a muddy road outside of town. Firearms tests revealed that the body had been shot six times with the .32 caliber revolver discovered on Brown.¹

Brown was charged with and convicted of first-degree murder and robbery with a dangerous weapon. During his sentencing phase, the jury was presented with three aggravating circumstances and it found all three to be present. The jury was also presented with seven possible mitigating circumstances. The jury did not find any mitigating circumstances and sentenced Brown to death.²

II. Procedural History

On direct appeal, the Supreme Court of North Carolina affirmed Brown's conviction and sentence of death.³ On March 9, 1987, Brown filed a motion for appropriate relief ("MAR") in part because the trial court had instructed the jury that it must agree unanimously on any mitigating factor.⁴ The court concluded that Brown was procedurally barred from raising the unanimity issue because he had not raised it on direct appeal.⁵ In 1990, the United States Supreme Court decided *McKoy v. North Carolina*,⁶ which held that a jury must not be instructed to find unanimously the presence of a mitigating factor because such an instruction prevents each juror from considering all of the relevant mitigating evidence.⁷

1. Brown v. Lee, 319 F.3d 162, 165 (4th Cir. 2003).

2. *Id.* at 165-66.

3. *Id.* at 166.

4. *Id.*

5. *Id.*

6. 494 U.S. 433 (1990).

7. *McKoy v. North Carolina*, 494 U.S. 433, 435 (1990) (holding that a jury shall not be required to find a mitigating circumstance unanimously).

Based on the *McKoy* decision, Brown filed an amended MAR in 1994 and re-raised the unanimity issue.⁸ In 1996, the state MAR court determined that the 1987 order which procedurally barred Brown's unanimity claim was a final judgment; therefore, in 1997 Brown's amended MAR was denied.⁹ Brown filed a second MAR in 1997 and raised the unanimity issue again, but it too was rejected.¹⁰ Brown sought review of the state court's MAR decisions from the Supreme Court of North Carolina and the United States Supreme Court, but he was unsuccessful.¹¹

Brown then petitioned the federal district court for habeas relief and raised eleven constitutional issues, including the unanimity claim. Brown and the State both filed for summary judgment and the district court granted summary judgment to the State. The district court did not review Brown's unanimity claim on the merits because the state court had procedurally barred it. In 2002, Brown filed an application for a certificate of appealability ("COA") in part to contest the district court's decision that it was procedurally barred from hearing his unanimity claim. The district court granted Brown a certificate of appealability on this decision. Brown also requested a COA on the denial of his ineffective assistance of counsel claim, which the district court refused to issue.¹²

III. Holding

The United States Court of Appeals for the Fourth Circuit held that there was no procedural bar to Brown's unanimity claim for habeas relief and it remanded the case to the district court to be heard on the merits.¹³ The Fourth Circuit also refused to grant Brown a COA regarding his claim of ineffective assistance of counsel.¹⁴

8. *Brown*, 319 F.3d at 166.

9. *Id.* at 166-67.

10. *Id.* at 167.

11. *Id.*

12. *Id.*

13. *Id.* at 164

14. *Brown*, 319 F.3d at 164. Brown claimed that counsel had not thoroughly investigated possible mitigating circumstances. *Id.* at 175. Brown presented this claim to the state MAR court and on federal habeas review. *Id.* at 176. Both courts held an evidentiary hearing, and both courts concluded that counsel had not been ineffective. *Id.* The Fourth Circuit also reviewed the record and concluded that there was not a "substantial showing" of a denial of a constitutional right; therefore, the court denied Brown's request for a COA on this issue. *Id.* at 177. The United States Supreme Court recently clarified the standard for issuing a COA in *Miller-El v. Cockrell*. *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003); see Priya Nath, Case Note, 15 CAP. DEF. J. 407 (2003) (analyzing *Miller-El v. Cockrell*, 123 S. Ct. 1029 (2003)). The Court held that a petitioner makes a "substantial showing" if he demonstrates that reasonable jurists could disagree with the district court's application of AEDPA to his constitutional claim. *Miller-El*, 123 S. Ct. at 1034; see 28 U.S.C. § 2253(c)(2) (stating that a certificate of appealability may not issue unless the applicant makes a "substantial showing of the denial of a constitutional right"; part of AEDPA). The Court pointed out that this standard should require only a threshold inquiry into the merits of the claim. *Miller-El*, 123 S. Ct.

IV. Analysis

In order to determine if Brown's unanimity claim was rightfully barred, the Fourth Circuit considered whether the state rule which barred the claim was an "independent and adequate state procedural rule."¹⁵ North Carolina General Statutes Section 15A-1419(a)(3) controlled the state MAR court's decision to bar procedurally Brown's unanimity claim.¹⁶ Section 15A-1419(a)(3) states that a court may deny a MAR if the defendant was in a position to raise the issue on a previous appeal.¹⁷ North Carolina General Statutes Section 15A-1419(b) makes the denial mandatory unless the defendant can demonstrate good cause and actual prejudice or if a miscarriage of justice would occur if the claim is not heard.¹⁸ Because Brown could have raised his unanimity claim on direct appeal, Section 15A-1419(a)(3) barred the state MAR courts from hearing his claim.¹⁹

When Brown filed for federal habeas relief in district court, these state procedural bars were still controlling.²⁰ The Fourth Circuit explained that under the doctrine of procedural default, a habeas court cannot consider constitutional claims that the state refused to hear "pursuant to an independent and adequate state procedural rule, . . . unless the [petitioner] can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claims will result in a fundamental miscarriage of justice."²¹ In short, Brown did not raise the unanimity claim on direct appeal; therefore, the state MAR courts determined that the claim was procedurally barred under Section 15A-1419(a)(3). Because the MAR courts decided that the claim was procedurally barred under state law, the federal habeas court was precluded from hearing it.²² In order to overcome this hurdle, the habeas petitioner must prove that the original default was done for cause and

at 1034. The Fourth Circuit made a threshold inquiry into Brown's claim and determined that he did not make a substantial showing of a denial of a constitutional right. *Brown*, 319 F.3d at 177. This portion of *Brown* is not discussed further in this case note.

15. *Brown*, 319 F.3d at 169 (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991) (explaining the doctrine of procedural default)).

16. *Id.* at 168 (citing N.C. GEN. STAT. § 15A-1419(a)(3) (2001) (explaining when it is appropriate for a state MAR court to deny relief)).

17. *Id.* at 169 (quoting § 15A-1419(a)(3)).

18. *Id.* at 169-70 (citing N.C. GEN. STAT. § 15A-1419(b) (2001) (making application of § 15A-1419(a)(3) mandatory in most cases)).

19. *See* § 15A-1419(a)(3) (stating that denial of relief is appropriate when a claim could have been raised on a previous appeal).

20. *See Brown*, 319 F.3d at 170.

21. *Brown*, 319 F.3d at 177 (quoting *Coleman*, 501 U.S. at 750) (alteration in *Brown*).

22. *See Coleman*, 501 U.S. at 750 (explaining situations in which federal habeas courts are precluded from hearing a claim).

resulted in prejudice or he must prove that the underlying state rule—Section 15A-1419(a) and (b)—is not “independent or adequate.”²³

The court clarified that a state rule is adequate if it is “firmly established” and “consistently applied” by the state courts.²⁴ The rule is independent if it “does not ‘depend[] on a federal constitutional ruling.’”²⁵ The Fourth Circuit has generally found Sections 15A-1419(a) and (b) to be both adequate and independent grounds for habeas preclusion.²⁶ The court continued and stated that this fact does not end the inquiry.²⁷ In order to assess adequacy, the court must determine if Sections 15A-1419(a) and (b) have been consistently applied to the specific type of constitutional claim at issue—in this case, unanimity claims.²⁸ The court must look to other cases and determine if “‘the particular procedural bar is applied consistently to cases that are *procedurally* analogous—here, cases in which *the particular claim* raised could have been raised previously but was not.’”²⁹ Accordingly, the Fourth Circuit considered cases in which the unanimity claim could have been raised on direct appeal, but was not.³⁰

The State and Brown provided the court with ten cases which fit this profile and the court reviewed each example.³¹ Of the ten cases, six defendants had their unanimity claims heard on the merits, five in state court and one in federal habeas.³² Four defendants found their claims procedurally barred under Section 15A-1419(a).³³ This evidence convinced the Fourth Circuit that Section 15A-1419(a) had not been applied consistently to unanimity claims; therefore, the state MAR court’s decision to bar the claim was not based on an adequate and independent state law.³⁴ Without an adequate and independent state law ground, there is no procedural bar to federal habeas review on the merits.³⁵ The Fourth Circuit remanded the case to the federal district court to be heard on the merits.³⁶

23. See *id.* (explaining situations in which federal habeas courts are not precluded from hearing a claim).

24. *Brown*, 319 F.3d at 169 (citing *Johnson v. Mississippi*, 486 U.S. 578, 587 (1988) (defining when a state rule is “adequate”).

25. *Id.* (quoting *Ake v. Oklahoma*, 470 U.S. 68, 75 (1985) (defining when a state rule is “independent”)) (alteration in *Brown*).

26. *Id.* at 170.

27. *Id.*

28. *Id.*

29. *Id.* (quoting *McCarver v. Lee*, 221 F.3d 583, 589 (4th Cir. 2000)) (second emphasis in *Brown*).

30. *Brown*, 319 F.3d at 171.

31. *Id.*

32. *Id.* at 171-72.

33. *Id.* at 171.

34. *Id.* at 175.

35. *Id.*

36. *Brown*, 319 F.3d at 177.

V. Application in Virginia

Presumably, Brown's attorneys on direct appeal did not raise the unanimity claim because the Supreme Court of North Carolina had recently held that a unanimity instruction on mitigators was appropriate.³⁷ This decision resulted in a sixteen-year battle to be heard on the merits. The applicable lesson for capital defense attorneys is to raise each possible constitutional claim on direct appeal, regardless of the Commonwealth's current stance on the issue. The situation in which the United States Supreme Court overrules the Commonwealth and a defendant is procedurally barred from relief should be avoided.

Nevertheless, *Brown* details exactly how to make a successful "adequate and independent" state ground argument. Defense attorneys should tailor their arguments to the applicable language of "consistently applied" and "procedurally analogous." Moreover, attorneys must research and present evidence of inconsistent applications of the rule to the same type of claim they are raising. The Fourth Circuit in this case relied heavily on the state court's inconsistent applications to reach a decision. If there are examples in which the barred claim could have been raised appropriately, but was not, and was nonetheless heard on the merits, attorneys can overcome the procedural default doctrine in federal habeas review.

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37. *Id.* at 167-68 (citing *State v. Kirkley*, 302 S.E.2d 144, 156-57 (N.C. 1983) (finding no error in a trial court's jury instruction which required unanimity on each mitigating circumstance)).

