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## HILDWIN v. FLORIDA 109 S. Ct. 2055,104 L. Ed. 2d 728 (1989) United States Supreme Court

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appeal if the legal basis for the claim was not reasonably available at the time. However, the Supreme Court decided that since Adams had not objected on the state law grounds available to him at trial under the ruling in *Tedder v. Florida*, and where the state law objection was a "necessary ingredient" of the subsequently available *Caldwell* claim, the latter is now barred. 109 S. Ct. at 1217. The *Adams* Court made it explicit that the holding did not imply that "...whenever a defendant has any basis for challenging particular conduct as improper, a failure to preserve that claim under state procedural law bars any subsequently available claim arising out of the same conduct." *Id.* at 1217. Still, the holding leaves open that possibility in a given case where the basis for state and federal claims are closely related.

#### ANALYSIS

This case illustrates once again that Virginia attorneys must read all applicable state and federal law, make all appropriate objections on all available state and federal grounds, and preserve them on direct

appeal. This is because of the difficulty imposed by habeas law. It is important to note that, on *certiorari*, the State addressed only the claim of procedural bar. *Adams*, n.4 at 1215. The Court did not reach the merits of Adams' *Caldwell* claim, *id.*, but instead saw the issue as one of exercising the Court's "equitable power to overlook respondent's state procedural default." 109 S. Ct. at 1216 - 1217.

To address this "threshold" issue, the Court reviewed the requirements set out in *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 598 (1977). Under *Sykes*, habeas petitioners must show cause for the default and prejudice, i.e., a real possibility of a different result, before federal courts will review claims found to be procedurally defaulted by state courts.

The *Caldwell* holding in itself is worth noting by Virginia attorneys. Although the trial court is not likely to mislead the jury about its role and responsibility, the Commonwealth's attorney in his closing argument might do so. At that point it is the responsibility of the defense to interrupt and object on *Caldwell* grounds.

Summary and analysis by: Thomas O. Burkhalter

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#### FACTS

Petitioner Hildwin was convicted of first degree murder. The jury returned a unanimous advisory verdict of death and the judge imposed the death sentence. The trial judge, in imposing sentence, found four aggravating circumstances which were set forth in writing as required under Florida law. The jury made no specific finding as to aggravating circumstances. Florida law requires that at least one aggravating circumstance must be found before the death sentence may be imposed. Petitioner argued before the Florida Supreme Court "that the Florida capital sentencing scheme violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment." *Hildwin*, 109 S. Ct. at 2056. The Florida Supreme Court rejected this argument without discussion and Hildwin petitioned the U.S. Supreme Court.

#### HOLDING

The Sixth Amendment does not require that specific findings authorizing the death sentence be made by a jury. Petitioner argued before the Florida Supreme Court that the Sixth Amendment requires a specific finding, by the jury, of aggravating factors support a sentence of death. The Florida Supreme Court found this argument meritless. On appeal, the U.S. Supreme Court noted that in *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), it had rejected any Sixth Amendment requirement of a jury trial on sentencing issues. The Court also referred to *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), which held that "there is no Sixth Amendment right to jury sentencing even where the sentence turns on specific findings of fact." *Hildwin*, 109 S. Ct. at 2057. "The existence of an aggravating factor ... is not an element of the offense but ... is a sentencing factor that comes into play only after the defendant has been found guilty." *Id.*

#### ANALYSIS

Va. Code Ann. §19.2-264.4(D), requires that a jury returning a death sentence do so on a form specifying what aggravating factors have been found. In Virginia, unlike Florida, the jury's determination is not advisory; a life sentence is binding upon the judge, and a death sentence may be set aside only for good cause. Virginia's statute, therefore, exceeds the Sixth Amendment requirements of *McMillan* and *Spaziano* as cited in *Hildwin*. However, the Virginia Supreme Court has held that a jury need not specify which aggravating factor it used where both factors could have been found. See *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979); *Hoke v. Commonwealth*, 237 Va. 303, 377 S.E.2d 595 (1989). A unanimous death verdict is all the Virginia Supreme Court has required, despite the statutory requirement of unanimity as to aggravating factors. *Hildwin*, therefore, does not foreclose a Fourteenth Amendment due process challenge to the Virginia Supreme Court's interpretation. In *Clark* and *Hoke*, the Supreme Court of Virginia acknowledged a distinction between factors required to prove the elements of an offense and factors affecting sentencing; objections to the lack of specificity in the jury's findings were based on statutory interpretation rather than the Sixth or Fourteenth Amendment. The Supreme Court of Virginia noted that other courts construing similar statutes treated the aggravating factors as a single unit. *Clark* at 213. *Hoke* argued on appeal that no distinction was made between the "future danger" and "vileness" predicates. The Virginia Supreme Court found that the facts in the case were sufficient to support either finding, *id.* at 316 - 317, and that since the jurors were unanimous in their verdict of death for all three underlying felonies, *Hoke's* argument was meritless.

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