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WILLIAMS v. DIXON 961 F.2d 448 (4th Cir. 1992)

two sentence opinion ordering that the current stay of execution entered by the United States Court of Appeals in that case be vacated. The final sentence of the decision simply states that, "[n]o further stays of Robert Alton Harris' execution shall be entered by the federal courts except upon order of this Court."[14] This decision, again, reflects the growing impatience of the Court. It is becoming more and more apparent that the United States Supreme Court is no longer going to tolerate extensive and lengthy appeals in capital cases.

Although these opinions are directed more toward the courts than attorneys, it is important to bear in mind the increasing lack of patience that the current Supreme Court is exhibiting.[15] The new "tone" of the Supreme Court regarding the granting of stays has the potential to drastically increase the execution rate in Virginia. Attorneys must not depend on last-minute stays of execution nor count on cases drifting through the circuit courts for extended periods of time. Instead, attorneys must aggressively pursue all potential claims at every step of the process and ensure that they are fully presented. There will be few, if any, second chances.

Summary and analysis by:
Lesley Meredith James

[14] *Id.* The stay being vacated was the last in a series of stays given by the Ninth Circuit during the night leading up to Harris' execution the next morning.

[15] The United States Court of Appeals for Fourth Circuit has demonstrated similar impatience in the area of administrative delays. *See Spann v. Martin*, 963 F.2d 663 (1992). *See* case summary of *Spann*, Capital Defense Digest, this issue.

WILLIAMS v. DIXON

961 F.2d 448 (4th Cir. 1992)
United States Court of Appeals, Fourth Circuit

FACTS

Douglas Williams, Jr. was arrested on August 2, 1981 and charged with the murder of one-hundred year old Adah Herndon Dawson. Under the influence of drugs and alcohol, Williams had entered the Dawson home looking for a place to sleep. When Dawson surprised him in the kitchen, Williams struck her with a stick he had picked up on the porch. He laid her on the floor and proceeded to ransack the house. He then returned to the kitchen and forced a mop handle into Dawson's vagina.

During the guilt phase of the trial, the medical examiner testified that Dawson suffered numerous lacerations to her head, neck, arms, vagina and rectum, together with fractures of the face, skull, pubic bone and hip bone. The medical examiner further testified that Dawson died as a result of the multiple injuries.

Williams offered no evidence at the guilt phase of trial. The jury found him guilty under North Carolina law of first degree murder in the perpetration of first degree burglary, in the perpetration of a sex offense, and with malice, premeditation and deliberation.

At the sentencing phase, the state relied upon the evidence presented at the guilt phase, as well as a written psychological report finding that Williams did not suffer any mental defect or disorder which would have prevented him from distinguishing right from wrong at the time of the killing. The report further concluded that intoxication would not have relieved Williams of responsibility for the crime. Williams introduced evidence of his past criminal record, as well as evidence that he was mildly retarded, with poor reading skills and possible organic brain impairment.

Based upon the evidence presented during the sentencing phase, the jury was presented with four possible aggravating factors and five possible mitigating factors. The jury was instructed that it could consider the mitigating factors **only** if they **unanimously** agreed to do so. After the sentencing phase, the jury returned a recommendation for a sentence of death, and the judge sentenced Williams to death.

The North Carolina Supreme Court upheld Williams' conviction on appeal.[1] The United States Supreme Court denied both certiorari and a request for rehearing.[2] In May 1984, Williams filed a state habeas petition. The state court denied the request in June, 1985, and the North Carolina Supreme Court denied review. On October 13, 1987, Williams filed a Petition for Writ of Habeas Corpus in the United States District Court for the Eastern District of North Carolina. The judge denied the petition without a hearing.

Williams appealed to the Fourth Circuit Court of Appeals arguing, among other issues, that the sentencing instruction requiring unanimity for considering mitigating factors was unconstitutional.[3]

HOLDING

The Fourth Circuit affirmed Williams' conviction for first degree murder.[4] However, relying upon the United States Supreme Court's ruling in *McKoy v. North Carolina*,[5] the court found that "the unanimity requirement [regarding mitigating circumstances] given to the jury at Williams' sentencing proceedings . . . was unconstitutional."[6] Because the court further found that Williams' claim was not barred by the Supreme Court's general ban on retroactive application of new rules to habeas corpus claims in *Teague v. Lane*[7], the court vacated Williams' sentence and remanded the case to the district court.[8]

The Fourth Circuit also established a second, independent reason for vacating Williams' death sentence. Concluding that "*Teague*'s

[1] *State v. Williams*, 301 S.E.2d 335, 338 (1983).

[2] *Williams v. North Carolina*, 464 U.S. 865 (1983), *reh'g denied*, 464 U.S. 1004 (1983).

[3] Williams also argued that (1) the constitution prohibits the imposition of the death penalty upon a mildly retarded defendant; (2) he received ineffective assistance of counsel; and (3) the evidence was insufficient to support the verdict. These issues will not be addressed in this summary.

[4] *Williams v. Dixon*, 961 F.2d 448 (4th Cir. 1992).

[5] 494 U.S. 433 (1990). In *McKoy*, the court struck down a jury instruction requiring unanimity for considering mitigating circumstances during penalty phase deliberations as unconstitutional.

[6] *Williams*, 961 F.2d at 452.

[7] 489 U.S. 288 (1989).

[8] *Williams*, 961 F.2d at 450.

retroactivity analysis is not jurisdictional in nature and is an affirmative defense that must be asserted below or else be waived,"[9] the court ruled that the State of North Carolina had waived its right to raise a retroactivity defense by failing to assert it at the district court level or at the first hearing before the court of appeals.[10]

ANALYSIS/APPLICATION IN VIRGINIA

I. The *McKoy* rule is entitled to retroactive application as an exception to *Teague*.

In *McKoy*, the Supreme Court struck down the North Carolina requirement that a jury unanimously agree upon the existence of a mitigating factor before it may be considered in sentencing.[11] The jury in *Williams* was instructed on the same unanimity requirement found to be unconstitutional in *McKoy*.[12] Because Williams' conviction became final in 1983,[13] prior to the decision in *McKoy*,the Fourth Circuit had to determine whether Williams was entitled to retroactive application of the *McKoy* rule.[14]

In *Teague v. Lane*,[15] the Supreme Court established the general rule that "'new rules' . . . should not be applied retroactively to cases on collateral review." A case is deemed to announce a new rule "if the result was not dictated by precedent existing at the time the defendant's conviction became final."[16]

The *Teague* court also established two exceptions to the rule. The first is that "a new rule should be applied retroactively if it places 'certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to pro-scribe.'"[17] The second exception is that a new rule should be applied retroactively if it would "'alter our understanding of the **bedrock procedural elements** that must be found to vitiate the fairness of a particular conviction'"[18] and "without which the likelihood of an accurate conviction is seriously diminished."[19] *Penry v. Lynaugh*[20] applied the *Teague* rule to capital cases.

Because the Fourth Circuit found that *Teague*'s second exception applied to *Williams*,[21] it declined to address whether *McKoy* established a "new rule".[22] In applying the second *Teague* exception in *Williams*, the Fourth Circuit first looked at the *McKoy* rule to determine if it improved the accuracy of capital sentencing. Citing the Supreme Court's decision in *Sawyer v. Smith*,[23] the court found that the *McKoy* rule easily met that requirement: "'All of our Eighth Amendment jurisprudence concerning capital sentencing is directed toward the enhancement of reliability and accuracy in some sense.'"[24]

The Fourth Circuit also found that the *McKoy* rule "alter[ed] our understanding of the bedrock procedural elements that must be found to vitiate the fairness of a particular conviction."[25] Relying upon the Supreme Court's emphasis in *Woodson v. North Carolina*[26] and *Sumner v. Shuman*[27] on the need for reliable individualized sentencing in the capital context, the Fourth Circuit concluded "that a rule striking down a unanimity requirement for mitigating circumstances is 'implicit in the concept of ordered liberty.'"[28]

The Fourth Circuit also relied upon *Mills v. Maryland*[29] in finding arbitrary any sentencing scheme which requires unanimity to consider mitigating evidence because such a scheme allows a sole juror to prevent consideration of such evidence.[30] Justice Kennedy's concurring opinion in *McKoy* also pronounced such a sentencing scheme "arbitrary."[31] Consequently, the *Williams* court found that the sentencing scheme struck down in *McKoy* had been arbitrary and capricious.

Based upon its review of the above cases, the Fourth Circuit found that the rule in *McKoy* was a "bedrock procedural element" and that it was "implicit in ordered liberty."[32] The court, therefore, held that the *McKoy* rule fell within the second *Teague* exception and "should be applied retroactively."[33]

II. *Teague* claims are subject to procedural default by the state.

The Fourth Circuit added another reason for vacating Williams' death sentence. Noting the importance of the chronology of decisions affecting Williams' federal habeas petition, the court found that the State of North Carolina had failed to raise the retroactivity defense against his unanimity claim until after the Supreme Court's decision in *McKoy*.[34] Williams, on the other hand, had raised the claim from the beginning based on the Supreme Court's earlier holding in *Mills v. Maryland*. Indeed, the State did not raise the retroactivity issue until well after the first oral argument before the court of appeals.

After reviewing conflicting decisions of several other circuits, the Fourth Circuit held that "the *Teague* rule is not jurisdictional, in the sense

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9 *Id.* at 456.

10 *Id.* at 459.

11 494 U.S. 433. Under current Virginia law, defense counsel will not be faced with a *McKoy* problem because there is no requirement of unanimity for considering a mitigating factor.

12 *Williams*, 961 F.2d at 452, 456.

13 A conviction is final when: (1) judgment has been rendered; (2) available direct appeals have been exhausted; and (3) time for petition for certiorari has expired. *Allen v. Hardy*, 478 U.S. 255, 258, n.1 (1986). In Williams' case, certiorari was denied in 1983. *State v. Williams*, 301 S.E.2d 335, *cert. denied*, 464 U.S. 865, *reh'g denied*, 464 U.S. 1004 (1983).

14 After *McKoy*, the North Carolina Supreme Court held that the decision did not completely invalidate the state's death penalty statute. *See State v. McKoy*, 394 S.E.2d 426 (N.C. 1990). Therefore, Williams' sentence was not automatically reduced to life imprisonment. *Williams*, 961 F.2d at 452.

15 489 U.S. 288, 305, 310.

16 *Id.* at 301.

17 *Id.* at 307.

18 *Id.* at 311 (quoting *Mackey v. United States*, 401 U.S. 667, 693-694 (Harlan, J., concurring in part and dissenting in part)) (emphasis added).

19 *Id.* at 313.

20 492 U.S. 302 (1989). *See* case summary of *Penry*, Capital Defense Digest, Vol. 2, No. 1, p. 2 (1989).

21 The first exception does not apply because the proscribed conduct is capital murder and *McKoy* does not prohibit its prosecution. *Williams*, 961 F.2d at 453-454.

22 *Id.* at 453. In an earlier case, however, a Fourth Circuit panel indicated that *McKoy* was a "new law" decision. *See McDougall v. Dixon*, 921 F.2d 518 (4th Cir. 1990).

23 497 U.S. 227 (1990) (holding that in order to apply retroactively under a *Teague* exception, a new rule must do more than simply improve the accuracy of the trial process). *See* case summary of *Sawyer*, Capital Defense Digest, Vol. 3, No. 1, p. 4 (1990).

24 *Williams*, 961 F.2d at 454 (qutoing *Sawyer*, 110 S.Ct. at 2831).

25 *Id.* at 455 (citing *Mackey v. United States*, 401 U.S. 667, 693 (1971)).

26 428 U.S. 280 (1976).

27 483 U.S. 66 (1987).

28 *Williams*, 961 F.2d at 455 (citations omitted).

29 486 U.S. 367 (1988). *See* case summary of *Mills*, Capital Defense Digest, Vol. 1, No. 1, p. 11 (1988).

30 *William*, 961 F.2d at 456 (citing *Mills* at 374).

31 *Id.* (citing *McKoy*, 494 U.S. at 452-457 (Kennedy, J., concurring)).

32 *Id.* at 456.

33 *Id.*

34 *Id.* at 457.

that a court must address it *sua sponte* if not raised."[35] The court then addressed whether the State's failure to raise the defense at the district court level amounted to a waiver.

First, the court considered the general rule that "claims not adjudicated below, and in particular defenses that have not been raised in a pleading, by motion, or at trial, normally will be considered waived and cannot be heard for the first time on appeal."[36] In habeas proceedings, the court found that waiver usually takes the form of procedural default, resulting in a bar to a claim not presented to the state court "unless the petitioner can show cause for the default and actual prejudice."[37] The court concluded that such procedural default applies equally to the defendant and to the State. Therefore, if a claim or defense is not raised in the court below, it will be barred on appeal.[38]

In *Williams*, because the State failed to raise a retroactivity defense at the district court level, or at the first argument before the court of appeals, it was deemed to have waived its *Teague* defense to the application of the *Mills/McKoy* rule.

III. Application in Virginia.

Defense counsel should be fully aware of the implications of the *Teague* rule. Timing on appeal, as well as preserving all appealable issues throughout the pre-trial, trial and post-trial processes, becomes increasingly important in obtaining all potential constitutional benefits for a capital defendant. Opinions such as *Williams* make it clear that defense counsel need to remain aware and informed as to potential or pending issues before the courts of appeal and/or Supreme Court. Because a defendant's conviction does not become final for *Teague* purposes until the end of the direct appeals process, the longer one takes in that process, the better one's chances for benefitting from a "new rule." Unfortunately, timing may be all that separates one defendant from another in benefitting from the recognition of new constitutional interpretations or applications.

When the Supreme Court announced the *Teague* retroactivity rule, the Court appeared to signal an end to the potential benefits of new rules for defendants on collateral appeal. Very few defendants were expected to find themselves the beneficiaries of one of *Teague*'s narrow exceptions. The Fourth Circuit's holding in *Williams*, however, provides encouragement for future findings of exceptions to the *Teague* rule. Of particular benefit to Virginia defendants is the Fourth Circuit's apparent willingness to ferret out a basis for finding a *Teague* exception. If defense counsel has diligently preserved and presented all potential constitutional claims throughout the appeals process, a defendant may still reap the benefits of future Supreme Court decisions.

The most important practical aspect of *Williams* to Virginia practitioners may be the Fourth Circuit's recognition that procedural default can work against the state. While taking care to preserve and protect the defendant's claims for relief on appeal, defense counsel should also be aware of the Commonwealth's failure to raise defenses during the appeals process. Certainly, defense counsel should take care **not** to alert the Commonwealth to any omissions at early stages of the appeals process, particularly involving a *Teague* defense of retroactivity. If the Fourth Circuit consistently applies its ruling in *Williams*, defendants may profit from new rules simply by the failure of the Commonwealth to raise the retroactivity defense, thus broadening the scope of potential benefits in spite of *Teague*.

Summary and analysis by:
Susan F. Henderson

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35 *Id.* at 458. *See also Collins v. Youngblood*, 497 U.S. 37 (1990) (declaring *Teague* rule "is not 'jurisdictional'").

36 *Id.* (citing *Nat'l Treasury Employees Union v. Internal Revenue Service*, 765 F.2d 1174, 1176, n.1 (D.C.Cir. 1985)).

37 *Id.* (citing *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990)). *See* case summary of *Bassette*, Capital Defense Digest, Vol. 3, No. 2, p. 8 (1991).

38 *Id.* at 459.

ADAMS v. AIKEN

965 F.2d 1306 (1992)
United States Court of Appeals, Fourth Circuit

FACTS

After his first conviction and sentence of death was reversed, Sylvester Lewis Adams was retried and then convicted of kidnapping, murder and housebreaking and given a death sentence. Subsequently, the state circuit court denied Adams' request for postconviction relief, and both the South Carolina and United States Supreme Court denied certiorari.[1] The United States magistrate recommended denial of the federal writ of habeas corpus that Adams then filed, which had alleged numerous errors at the trial court level. The United States District Court for the District of South Carolina accepted the magistrate's recommendation and denied Adams' petition.

On appeal to the Fourth Circuit, Adams raised a number of errors at various stages of the trial.[2] At voir dire, Adams claimed error because one of the prospective jurors stated that he would accept the testimony of a police officer over the testimony of a private citizen. In response, the trial judge inquired whether the prospective juror could make a decision based on the evidence presented and on the instructions given him by the court. When the prospective juror answered in the affirmative, the trial judge qualified him over Adams' objection. At the time, Adams had two peremptory strikes remaining.

At the guilt stage, the trial judge, in his instructions to the jury, defined reasonable doubt as "synonymous" with "proof to a moral certainty" and a "substantial doubt, a doubt for which you can give a reason." Adams argued that the instruction violated his due process rights.

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1 *Adams v. Aiken*, 476 U.S. 1109 (1986).

2 Adams raised several errors that will not be discussed in this case summary, including claims that (1) Adams' conviction violated due process due to his mental incompetence during portions of the trial, (2) his death sentence violated the Eighth Amendment, as the jury failed to find the murder occurred during the commission of the kidnapping and housebreaking, (3) the trial judge's failure to limit definition of aggravating factors in his instructions to the jury violated Adams' Eighth Amendment rights.