Capital Defense Journal

Volume 5 | Issue 2 Article 9

Spring 3-1-1993

JONES v. MURRAY 976 F.2d 169 (4th Cir. 1992)

particularly one who is facing the death penalty. If the affidavits presented by Gardner are true, then he was denied the assistance of counsel who was in complete control of his mental and physical capacities and who was fully capable of exercising the skills his training afforded.[37]

If the court had been presented with evidence Fraser had never attended law school or passed the bar, and his performance had been the same in this case, would the court still hold that Gardner received effective assistance of counsel? If the answer to that question is no, as one would assume, the court's ruling would not hinge on Fraser's courtroom performance, but instead would focus on his lack of education and formal training upon which he could rely in representing his clients. The concern would be that he did not do all that a properly trained lawyer would have done in the case and, therefore, the adversarial system had broken down.

If an attorney is unable to rely upon his education and training because of drug impairment, is the situation really any different? The result should be the same. If the attorney is not able to call upon the proper education and training with which to represent a criminal client's interests, for whatever reason, then the client, and the judicial system, have been adversely affected and justice demands the opportunity for a new trial.

Summary and Analysis By:
Susan F. Henderson

[37] It is interesting to note that despite the court's conclusion here that Fraser was not ineffective in Gardner's case, Fraser was suspended from the practice of law in 1990 for a period of three years on unrelated matters. However, the Order of Discipline from the Disciplinary Hearing Commission of the North Carolina State Bar, No. 89 DHC D2, specifically found that Fraser was an alcoholic and was abusing alcohol and using illegal drugs in 1988 and 1989, that his "misconduct constituted a pattern of neglect and failure to communicate," and that he had received a prior Private Reprimand for neglect **in 1983.** The Complaint filed by the North Carolina State Bar in that matter also alleged that Fraser was convicted of driving while impaired in 1985, 1988, and 1989. Fraser was disbarred on January 13, 1993, as the result of complaints alleging that he misappropriated client funds in 1989 and 1990.

JONES v. MURRAY

976 F.2d 169 (4th Cir. 1992)
United States Court of Appeals, Fourth Circuit

FACTS

Following his conviction on two counts of capital murder, Willie LeRoy Jones was sentenced to death in January 1984. As Jones had no prior criminal record, the prosecution in the case argued only one aggravating factor: Jones' conduct was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."[1]

Testimony given at Jones' trial indicated that in May 1983, Graham and Myra Adkins, an elderly couple living in Charles City County, were found murdered and incinerated in their home. Graham Adkins had been shot in the face at close range and had apparently died from that wound prior to the fire. Myra Adkins, on the other hand, had received a non-fatal head wound and, after having been bound, gagged, set on fire, and left in a closet, died of smoke inhalation. Both Mr. and Mrs. Adkins had been doused with accelerant, as had been their home. Also found on the premises was a safe with its door removed and its contents missing.

After Jones' conviction was upheld by the Virginia Supreme Court,[2] the United States Supreme Court denied certiorari.[3] Jones then filed a petition for a writ of habeas corpus in the Virginia state courts, which was denied, as was his appeal to the Virginia Supreme Court[4] and his petition for certiorari to the United States Supreme Court.[5] Subsequently, Jones filed a habeas petition in the United States District Court for the Eastern District of Virginia, which, after a report from the magistrate, was denied. Jones then filed a motion to alter or amend the judgment,[6] which also was denied.

Next, Jones filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's judgment.[7] Jones then filed a petition for rehearing, which was denied. He applied again to the United States Supreme Court for a writ of certiorari, which was denied,[8] as was his petition for rehearing.[9]

On August 10, 1992, Jones filed a second state habeas petition, arguing that Virginia's vileness aggravating factor had been applied to him in an unconstitutionally vague manner. In support of his position, Jones cited two recent United States Supreme Court cases: *Stringer v. Black*[10] and *Sochor v. Florida.*[11] On August 24, 1992, the Commonwealth filed a motion to dismiss, which the circuit court granted three days later, finding not only that relitigation of Jones' claim was procedurally barred under state law, but also that Jones had failed to show how *Stringer* and *Sochor* mandated the relief he sought. On September 8, Jones filed an appeal in the Virginia Supreme Court, which scheduled oral arguments for September 14, the day before Jones' scheduled execution.

[1] *See* Va. Code Ann. § 19.2-264.2 (1990).

[2] *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554, 554 (1984).

[3] *Jones v. Virginia*, 472 U.S. 1012 (1985).

[4] *Jones v. Bair*, No. 86-1152 (June 15, 1987).

[5] *Jones v. Bair*, 484 U.S. 959, 108 S. Ct. 358 (1987).

[6] Jones' motion was made pursuant to Fed. R. Civ. P. 59(e).

[7] *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1591 (1992). *See* case summary of *Jones*, Capital Defense Digest, Vol. 4, No. 2, p. 5 (1992).

[8] *Jones v. Murray*, 112 S. Ct. 1591 (1992).

[9] *Jones v. Murray*, 112 S. Ct. 2295 (1992).

[10] 112 S. Ct. 1130 (1992) (reemphasizing that "the use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or re-weighing in the state judicial system"). *See* case summary of *Stringer*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).

[11] 112 S. Ct. 2114 (1992) (finding that a trial court may weigh an impermissibly vague statutory aggravating factor if the highest state court has previously given constitutionally acceptable narrowing constructions of the factor, but that where the sentencer has relied upon an **invalid** aggravating circumstance, the reviewing state court must either independently reweigh the valid factors or apply harmless error analysis). *See* case summary of *Sochor*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).

While his second state habeas petition was still pending, Jones filed on August 20, 1992 a motion under Federal Rule of Civil Procedure 60(b) in the United States District Court in Norfolk, raising the issue of the unconstitutionality of the vileness criterion and requesting a stay of execution. On September 8, the district court denied the Rule 60(b) motion, as Jones had not exhausted his state remedies given the pendency of his appeal to the Virginia Supreme Court. Further, the court found Jones' constitutional challenge to be both procedurally barred and without merit as a matter of law.

Jones appealed the decision of the District Court denying his stay of execution and his Rule 60(b) motion to the Fourth Circuit.[12] Jones also sought review of the decision denying habeas relief and relied on *Shell v. Mississippi*[13] for the proposition that the Virginia death penalty statute is unconstitutionally vague as applied to him and that the limiting instructions offered by Virginia are themselves impermissibly vague. Jones further argued that *Stringer* and *Sochor* require that the jury unanimously determine at sentencing each aggravating factor upon which it is basing its sentence.

HOLDING

The Fourth Circuit concluded that the limiting instructions based upon *Smith v. Commonwealth*[14] which were given at Jones' request were sufficiently specific and provided adequate guidance for the jury in its determination of vileness.[15] The court thus ruled against Jones' *Shell* argument, finding that the *Smith* limiting instructions used at trial, unlike the dictionary definitions in dispute in *Shell*, met the requirements of *Godfrey* and were constitutional.[16]

Moving to Jones' *Stringer* and *Sochor* arguments, the Fourth Circuit dismissed the arguments out of hand, finding that the holdings in *Stringer* and *Sochor* applied only to states in which there is a weighing scheme.[17] Finally, the court found that even if *Stringer* and *Sochor* applied to Virginia, Jones' arguments failed because they were predicated on a finding that Virginia's statute is unconstitutionally vague, a notion the court had earlier rejected under its *Smith* analysis.[18]

ANALYSIS/APPLICATION IN VIRGINIA

The Fourth Circuit's rapid dismissal of Jones' *Stringer* and *Sochor* arguments raises questions regarding the use of the two new United States Supreme Court cases in Virginia. The Fourth Circuit in *Jones* dismissed their applicability in part because the court viewed them as not applying to a non-weighing jurisdiction. If the Fourth Circuit is correct in its questionable assumption that Virginia is a non-weighing state,[19] are *Stringer* and *Sochor* crafted so narrowly as to restrict their use to jurisdictions that formally rely on a weighing process?

While *Sochor*'s specific impact can be seen as primarily aimed at weighing jurisdictions, *Stringer* reaffirms the importance of *Godfrey* safeguards for *all* capital punishment schemes. Indeed, there is some irony in the *Jones* court's finding that *Stringer* did not apply to non-weighing states like Virginia, since part of *Stringer*'s holding was the rejection of Mississippi's argument that the constitutional strictures governing non-weighing schemes did not apply to a weighing state. In rejecting the argument, Justice Kennedy wrote, "[T]o the extent that the differences are significant, they suggest that application of the *Godfrey* principle to the Mississippi sentencing process follows, *a fortiori*, from its application to the Georgia system.... That Mississippi is a weighing State *only gives emphasis to* the requirement that aggravating factors be defined with some degree of precision."[20] As this excerpt illustrates, the *Stringer* opinion works to bolster and reaffirm *Godfrey* standards in non-weighing, as well as in weighing, states.

While Justice Souter's *Socher* opinion is generally cast in weighing-state terms,[21] the underlying message remains that at some point within the capital sentencing scheme, any improper use of aggravating factors must be specifically and expressly found harmless by a reviewing court. Without such findings, the Supreme Court has indicated it will not engage in an assumption that any error was harmless.[22]

Therefore, perhaps the broadest and best understanding of *Stringer* and *Sochor* for Virginia practitioners is that these opinions reemphasize each state's obligation to ensure that aggravating factors are used meaningfully to guide the sentencer's discretion. In Virginia, we are led once again to a comparison of *Shell* and *Smith*. In *Shell*, the United States Supreme Court held that paraphrased dictionary definitions of "heinous," "atrocious," and "cruel" were insufficient to cure the defect in the facially vague statute and insufficient to clear the tests set by *Godfrey*.[23] In *Smith*, the Virginia Supreme Court defined "aggravated battery" and "depravity of mind" using terminology that the Fourth Circuit in *Jones* found "make[s] clear that something other than those factors that a juror might expect to find present in an ordinary murder must be present." The Fourth Circuit has found the constructions in *Smith* (relied on by Jones at his trial and given to Jones' jury at his request) to be sufficiently specific and meaningful.

Nevertheless, Virginia practitioners will want to continue raising and preserving claims related to the vagueness of Virginia's vileness

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[12] For a discussion of Rule 60(b), *see* case summary of *Gardner v. Dixon*, Capital Defense Digest, this issue.

[13] 498 U.S. 1 (1990) (requiring that limiting instructions used to cure a facially vague statute must meet the specificity requirements of *Godfrey v. Georgia*, 446 U.S. 420, 443 (1980), that for a sentencer to be adequately guided, there must be a "principled way to distinguish [a] case[] in which the death penalty was imposed[] from the many cases in which it [is] not"). *See* case summary of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991).

[14] 219 Va. 455, 248 S.E.2d 135, 139, 149 (1978), *cert. denied*, 441 U.S. 967, 99 S. Ct. 2419 91979) (defining aggravated battery as "a battery which, qualitatively and quantitatively, is more culpable than the minimum necessary to accomplish an act of murder" and depravity of mind as "a degree of psychical debasement surpassing that inherent in the definition of ordinary legal malice and premeditation").

[15] *Jones v. Murray*, 976 F.2d 169, 175 (4th Cir. 1992).

[16] *Id.* at 174-75.

[17] *Jones*, 976 F.2d at 175.

[18] *See Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991). *See* case summary of *Jones*, Capital Defense Digest, Vol. 4, No. 2, p. 5 (1992).

[19] The Fourth Circuit did add the caveat that they were not necessarily basing their ruling on whether Virginia was a non-weighing state; the caveat may have been added because the Virginia Supreme Court has never clearly stated whether Virginia's scheme is a "weighing" or "non-weighing" one. The sentencer in a weighing state (e.g., Mississippi) must, after finding at least one aggravating factor, weigh that factor against any mitigating factors. In a non-weighing state (e.g., the Fourth Circuit in *Jones* cites Virginia), the sentencer must simply find at least one aggravating factor in order to give death, and only an informal consideration of mitigating factors is required.

For an example of where the Supreme Court has overruled another circuit court's conclusion that a state scheme was non-weighing, *see Richmond v. Lewis*, 113 S. Ct. 528 (1992), and case summary of *Richmond*, Capital Defense Digest, this issue.

[20] *Id.* at 1136 (emphasis added).

[21] "We must determine whether, as petitioner claims, the sentencer in his case *weighed* either of two aggravating factors that he claims were invalid, and if so, whether the State Supreme Court cured the error by holding it harmless." *Sochor*, 112 S. Ct. at 2117 (emphasis added).

[22] *See Richmond v. Lewis*, 113 S.Ct. 528 (1992). *See* case summary of *Richmond*, Capital Defense Digest, this issue.

aggravating factor. For instance, the Fourth Circuit's inability to describe Virginia's narrowing approach beyond stating that it requires "*something other* than those factors . . . present in an ordinary murder" can be seen as continuing to defy the *Godfrey* prescriptions against arbitrariness. If opinions such as *Godfrey, Stringer and Shell* mean anything, they mean courts must ensure that aggravating factors give **specific guidance** or **explanations**. Also, while it is true that the Virginia Supreme Court has defined two of the three factors for vileness—aggravated battery and depravity of mind (torture has not been defined)—the United States Supreme Court has yet to consider the *Smith* constructions approved by the Fourth Circuit in *Jones*.[24]

The Fourth Circuit's decision also addressed the question of whether an appellate court may find an aggravating factor that was not unanimously found by the jury. For example, in *Jones* it is impossible to know if the jury ever unanimously found "depravity of mind" vileness, "aggravated battery" vileness, or split on which type of vileness applied. The Fourth Circuit found it did not matter since the Supreme Court has held that a jury is not essential to capital sentencing.[25] The crucial issue, however, is whether where a jury *is* used by the state's sentencing scheme, may an appellate court find an aggravating factor which the jury did not unanimously find (or, as in *Jones*, use a factor for which it is impossible to tell). Thus, while the Supreme Court has held appellate courts may throw out invalid aggravating factors and reweigh the remainder, it is not so clear, as the Fourth Circuit assumed, that a state appellate court can find aggravating factors in the first instance. The issue appears ripe, therefore, for further litigation.

On a more practical note, a useful tool for preserving challenges to the Virginia vileness factor is a pre-trial motion for a bill of particulars, in which counsel can request that the court direct the Commonwealth to specify the factors upon which it intends to rely in seeking the death penalty. If the vileness factor arises, counsel should request that the Commonwealth identify every narrowing construction upon which it will rely. Should the Commonwealth fail to provide such constructions, counsel can preserve the *Godfrey* "unconstitutionally vague" issue by filing a brief to that point. Should the Commonwealth respond with *Smith*, counsel may want to challenge *Smith*, using *Shell* to argue that the narrowing constructions are themselves unconstitutionally vague.[26]

In summary, the United States Supreme Court has continued to emphasize the importance of giving meaningful guidance to juries, guidance that by necessity must come from narrowing constructions of statutes as vague as Virginia's.[27] While approval of the *Smith* narrowing constructions in cases such as *Jones* might be seen as discouraging Virginia practitioners from pursuing challenges to specificity, *Stringer* and *Sochor* emphasize the continued importance of requesting narrowing instructions and preserving challenges for appeal.

Summary and analysis:
Roberta F. Green

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[23] *See supra* note 6 and accompanying text.

[24] *Id. See also Shell*, 111 S. Ct. 313 (1990), where the modified dictionary definitions were found insufficient to pass constitutional muster. *See* case summary of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991).

[25] *Jones*, 976 F.2d at 175 (citing *Clemons v. Mississippi*, 494 U.S. 738 (1990) (rejecting the argument that a jury need impose the sentence of death or make findings to that end) and *Walton v. Arizona*, 497 U.S. 639 (1990) (rejecting the necessity of a jury deciding aggravating and mitigating factors)0.

[26] *See* Powley, *Perfecting the Record of a Capital Case in Virginia*, Capital Defense Digest, Vol. 3, No. 1, p. 26 (1990), and *see also* case summaries of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991), *Jones*, Capital Defense Digest, Vol. 4, No. 2, p. 5 (1992), *Stringer*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992) and *Sochor*, Capital Defense Digest, Vol. 5, No. 1, p. 1 (1992).

[27] *See* case summaries of *Stringer*, *Sochor* and *Espinosa v. Florida*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992); case summary of *Bunch v. Thompson*, Capital Defense Digest, Vol. 4, No. 2, p. 3 (1992); Lago, *Litigating the "Vileness" Factor in Virginia*, Capital Defense Digest, Vol. 4, No. 1, p. 25 (1991); Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest, Vol. 2, No. 1, p. 19 (1989); Priddy, Comment, *Godfrey v. Georgia: Possible Effects on Virginia's Death Penalty Law*, 15 U. Rich. L. Rev. 951 (1981).

WISE v. WILLIAMS

982 F.2d 142 (4th Cir. 1992)
United States Court of Appeals, Fourth Circuit

FACTS

On November 8, 1984, Joe Louis Wise was convicted of capital murder, grand larceny, armed robbery and use of a firearm in the commission of a felony. At the ensuing penalty hearing the jury found Wise's conduct "outrageously or wantonly vile, horrible or inhuman in that it involved aggravated battery to the victim, beyond the minimum necessary to accomplish the act of murder" and sentenced Wise to death.[1]

The Virginia Supreme Court affirmed Wise's conviction and sentence on November 27, 1985,[2] and on April 7, 1986, the United States Supreme Court denied certiorari.[3] After a hearing, the state circuit court dismissed Wise's state habeas petition on December 11, 1989. Wise did not file a notice of appeal until more than two months after the expiration of the thirty-day time limit. Wise then made a change in his court-appointed counsel and was granted leave to file an appeal. After the Virginia Supreme Court dismissed the petitioner's motion, he filed a petition for federal habeas corpus relief under 28 United States Code Section 2254. The district court granted the Commonwealth of Virginia's motion to dismiss Wise's petition, holding that Wise's claims were procedurally barred from consideration because the Virginia court had based its decision on the "adequate and independent" state ground that he did not file his notice of appeal within the set time limit.

To the Fourth Circuit, Wise challenged this conclusion on four grounds: that the procedural bar was not adequate because the Virginia

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[1] *See* Va. Code Ann. § 19.2-264.2; § 19.2-264.4(C).

[2] *Wise v. Commonwealth*, 230 Va. 322, 337 S.E.2d 715 (1985).

[3] *Wise v. Virginia*, 475 U.S. 1112 (1986).

[4] *Wise v. Williams*, 982 F.2d 142, 146 (4th Cir. 1992).