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I. Facts

Johnile L. Dubois ("Dubois") was sentenced to death after pleading guilty to capital murder and other offenses related to the shooting of Philip C. Council ("Council").[1] One of three employees working at a convenience store on November 20, 1991, Council was shot in the chest once by Dubois who entered the store with three accomplices. Dubois and the accomplices took approximately $400 from the store's register and fled.[2]

After being indicted for capital murder and related charges, Dubois entered into a plea agreement with the Commonwealth. Dubois agreed to plead guilty to all crimes charged and to cooperate with the Commonwealth in its prosecution of Dubois's co-defendants in exchange for the Commonwealth's promise not to seek the death penalty.[3] Dubois's arraignment occurred on August 4, 1992. Dubois plead guilty to all charges, indicating that he understood the possible consequences of a guilty plea.[4] Dubois reaffirmed his guilty plea following the Commonwealth's summary of the evidence it would have presented at the guilt phase of the trial. At this juncture, the court found that Dubois had knowingly, intelligently and voluntarily entered his guilty pleas and that the evidence supported the pleas. At the end of the arraignment hearing, the court ordered a pre-sentencing report.[5]

At the sentencing hearing, Dubois stated that he had read and comprehended the sentencing report. Dubois declined the court's invitation to question the probation officer or to present any mitigating evidence. During arraignment, Dubois's counsel asserted the inappropriateness of the death penalty due to the lack of support in the record and the defendant's compliance with the plea agreement, including cooperation with the police. The Commonwealth, pursuant to the plea agreement, did not ask the judge to impose the death penalty and did not provide any showing of proof as to the aggravating factors, but instead urged the court to impose the greatest sentence possible in accordance with the plea agreement. Based on the record before it, the trial court sentenced Dubois to death.[6]

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1. Dubois v. Greene, No. 97-21, 1998 WL 276282, at *1-2 (4th Cir. May 26, 1998), *cert. denied*, 119 S. Ct. 25 (1998).
2. *Dubois*, 1998 WL 276282, at *1.
3. *Id.*
4. *Id.*
5. *Id.* at *2.
6. *Dubois*, 1998 WL 276282, at *2.

The United States Supreme Court denied *certiorari* after the Supreme Court of Virginia affirmed Dubois's conviction and sentence on direct appeal in September, 1993. The Supreme Court of Virginia denied Dubois's state habeas petition on March 15, 1996. On January 2, 1997, Dubois filed a federal habeas petition which the district court dismissed on June 30, 1997.[7] Dubois appealed to the Fourth Circuit.

II. Holding

The United States Court of Appeals for the Fourth Circuit held that most of Dubois's claims were procedurally barred or defaulted via the rules established in *Slayton v. Parrigan*[8] and *Anderson v. Warden*,[9] respectively.[10] In accordance with the standard set out in 28 U.S.C. § 2254(d),[11] the court proceeded to Dubois's state adjudicated claims, reviewing claims it had declared procedurally defaulted and others not defaulted. The court failed to provide a rationale for all its rulings on claims brought by Dubois, but stated that Dubois failed to establish a denial of a constitutional right and therefore was not entitled to habeas relief.[12]

III. Analysis/Application in Virginia

A. The Guilty Plea in Capital Cases

The Fourth Circuit, interpreting only Virginia law, held that the trial court had the right to impose the death sentence even though Dubois entered into a plea agreement with the government which stated that the government would not ask for a death sentence. The Fourth Circuit stated that Dubois had not cited to any United States Supreme Court cases or other precedent which contra-

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7. *Id.* at *1. After the Fourth Circuit denied relief, the United States Supreme Court denied certiorari. *Dubois*, 119 S. Ct. at 25. Johnile L. Dubois was executed by the Commonwealth of Virginia in August of 1998.

8. 205 S.E.2d. 680 (Va. 1974) (holding that a state habeas petitioner is prevented from presenting claims that could have been, but were not, presented at trial or on direct appeal).

9. 281 S.E.2d. 885 (Va. 1991) (holding that a state habeas petitioner is prevented from making contradictory assertions after establishing the adequacy of his court-appointed counsel and the voluntariness of his guilty plea).

10. *Dubois*, 1998 WL 276282, at *5.

11. Antiterrorism and Effective Death Penalty Act, 28 U.S.C. § 2254(d) (Supp. 1997). Section 2254(d) states that any federal claim that was adjudicated in state court on the merits shall not be reviewed at the federal level:

> 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; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding.

Id.

12. *Dubois*, 1998 WL 276282, at *7-11.

dicted or illustrated unreasonable application of the Supreme Court of Virginia's holding.[13]

It is truly remarkable that nowhere in the appellate history of *Dubois* is there discussion of the possible application of the United States Supreme Court holding in *Lankford v. Idaho*.[14] The Fourth Circuit discussed the surprise death penalty from many perspectives, but *Lankford* is missing. In *Lankford*, at all pertinent times Idaho statutes provided notice that a trial judge could impose a death sentence despite the prosecutor's unwillingness to recommend the death penalty.[15] Nevertheless, the United States Supreme Court set aside the death sentence because it found that with respect to sentencing, the adversarial process had broken down.[16] *Lankford* boils down to a due process lack of notice that the death penalty was still an issue during the sentencing phase of the trial, leading to a breakdown in the adversarial process.[17]

In *Dubois*, the Fourth Circuit found that a questionable colloquy between the judge and Dubois provided the notice of the court's authority to sentence Dubois to death. The trial judge questioned Dubois in regard to Dubois's

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13. *Dubois*, 1998 WL 276282, at *7. The court stated that such a showing of contradictory precedent was required by the Antiterrorism and Effective Death Penalty Act ("AEDPA"). 28 U.S.C. § 2254(d)(1) (Supp. 1997).

14. 500 U.S. 110 (1991) (holding that defendant's lack of notice that trial judge was considering death penalty lead to an impermissible breakdown of the adversarial process).

15. Lankford v. Idaho, 500 U.S. 110, 118 (1991). Idaho Code section 19-2515 provides the trial court with guidelines for fulfilling its responsibility of sentencing a defendant convicted of capital murder. IDAHO CODE § 19-2515 (1997). The statute states that the trial judge, upon a finding of one of many possible aggravating factors, has the ability to impose the death sentence. *Id.* Idaho Code section 18-4004 states that "every person guilty of murder in the first degree shall be punished by death or by imprisonment for life." IDAHO CODE § 18-4004 (1997). Section 19-2515(G) states that "[u]pon making the prescribed findings, the court shall impose sentence within the limits fixed by law." IDAHO CODE § 19-2515(G) (1997). Section 19-2515, in general, details the limits fixed by law, giving the trial judge the discretion to make appropriate findings and sentence the defendant. IDAHO CODE § 19-2515 (1997).

16. *Lankford*, 500 U.S. at 127. The defense and the prosecution entered into a plea agreement with the following conditions: the defendant would plead guilty in return for the government's request for an indeterminate sentence with a ten year minimum, subject to the court's commitment to this arrangement. The trial court refused to agree to the plea bargain terms, and the case went to trial. After conviction, the government stated that it would not recommend the death penalty. The trial court proceeded with all sentencing requirements, but never suggested the continuing possibility of a death sentence. The defense did not prepare a case in mitigation relating to the death penalty. At the sentencing hearing the prosecution offered no evidence and the defense offered evidence with which it hoped to achieve the shortest imprisonment sentence possible. The Supreme Court stated that, with respect to the death sentence, the adversarial process became ineffective because neither party to the trial believed death was a consideration. *Id.* Neither party provided evidence supporting or contradicting the imposition of the death penalty. The court held that this situation lead to an impermissible risk of error. *Id.* A defendant's rights and interests cannot be protected when there are reasonable indications that those interests and rights are not in question. Lankford and counsel were not aware that the death penalty was being considered by the trial court. They therefore did not prepare a defense in relation to this issue.

17. *Id.*

knowledge of the possible penalty associated with capital murder and also asked if Dubois understood that he (the trial judge) could *"sentence* [Dubois] to a *term* greater than [the prosecutor] may be recommending?"[18] This quote from the guilty plea colloquy is ambiguous regarding the trial court's intention. The trial judge asked Dubois if he knew what the maximum penalty for capital murder was, which Dubois answered as the death penalty. But this line of questioning is contradicted by the question quoted in the text above, which indicates that the trial court would be sentencing Dubois to a "term," suggestive of a number of years imprisonment, not the availability of the death penalty.

Inconsistent with the Fourth Circuit's finding of notice, there were many indications that the adversary process had broken down at the sentencing phase of Dubois's trial.[19] In addition to the ambiguous colloquy cited above, several events occurring at the sentencing hearing suggest that the adversarial process was no longer functioning. Dubois offered no mitigating evidence, nor did he choose to question the findings of the probation officer who prepared the sentencing report.[20] The Commonwealth provided no aggravating factor evidence, but merely "urged the court to impose the maximum sentence possible consistent with the agreement."[21] These circumstances provide ample indicia of a trial in which the adversaries no longer fulfilled their roles in providing either the best defense possible or the active representation on behalf of the Commonwealth in pursuing the greatest penalty.[22]

In any event, Dubois, and many other cases make it clear that under no circumstances should a defendant be permitted to enter a plea of guilty to capital murder without an express formal, or very strong informal, assurance from the trial judge that the sentence will not be death.

B. Judicial Finding Aggravating Factor Necessary for Death Sentence Eligibility

Dubois's first claim centered around a denial of due process, citing the Virginia court's lack of authority or power to impose the death penalty.[23] In question was the court's finding, based on the record, that one of the two aggravating factors existed. Under Virginia law, these factors are identical to elements of an offense with respect to authority to impose a death sentence.

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18. *Dubois*, 1998 WL 276282, at *8 (emphasis added).

19. There are many possible reasons for an adversarial environment to break down. At Dubois's trial the process broke down because the defense was not aware (lacked notice) that the death penalty was being considered by the trial judge. The defense, therefore, did not present an argument against imposition of the death sentence. This lack of awareness was also exhibited by the prosecutor, who did not present any evidence in support of the death penalty.

20. *Dubois*, 1998 WL 276282, at *2.

21. *Id.*

22. If the adversarial process had been intact, it would follow that Dubois might have at least had a good claim of ineffective assistance of counsel based on his attorney's lack of preparation and presentation of any mitigating evidence.

23. *Dubois*, 1998 WL 276282, at *7.

Unless one aggravating factor is proven beyond a reasonable doubt, a defendant is not eligible for a death sentence. In accord with the plea agreement, the Commonwealth made no offer of proof of either aggravating factor, vileness or future dangerousness.[24]

The actions of the trial judge directly contradicted the provisions of Virginia's capital sentencing law. Section 19.2-264.4 provides that "[t]he penalty of death shall not be imposed unless *the Commonwealth shall prove beyond a reasonable doubt*" one or both of the aggravating factors: future dangerousness or vileness.[25] If, in conjunction with a plea agreement, the Commonwealth offers no proof of the aggravating factors, then the Commonwealth has failed to meet its burden of proof and the requirements of Virginia state law are left unfulfilled.[26]

In addition to finding that this claim was defaulted because the precise claim had not been raised in state court, itself an erroneous requirement,[27] the court observed that Dubois had failed to cite any United States Supreme Court precedent which the Supreme Court of Virginia had contradicted or applied unreasonably. One obvious United States Supreme Court precedent is a bedrock criminal law case holding due process "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged."[28] Only after such a proof has been offered by the Commonwealth may the trial court impose the death penalty.[29]

Should future counsel be confronted with a similar circumstance, at the very least counsel must move to withdraw the plea when the trial judge begins to undertake the prosecutor's function, as happened in Dubois. This moment occurred in Dubois when the trial judge began to recite the aggravating factors that he had found present, even though the prosecution had not proffered any evidence of aggravating factors.

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24. *Id.*

25. VA. CODE ANN. § 19.2-264.4(C) (Michie Supp. 1997) (emphasis added).

26. *Dubois*, 1998 WL 276282, at *7.

27. *See* Taylor v. Illinois, 484 U.S. 400, 406 n. 9 (1988) (holding that a petitioner's due process claim need not be asserted expressly as a Sixth Amendment violation in order for the issue to be preserved for review by a federal court).

28. *In re Winship*, 397 U.S. 358, 364 (1970) (holding that every fact required to constitute a finding of guilt in a criminal proceeding must be proved beyond a reasonable doubt by the prosecution). *See also* Sawyer v. Whitley, 505 U.S. 333 (1992) (holding that a capital defendant must be guilty of a death penalty eligibility factor in order to be sentenced to death). These two cases combined demonstrate the need for the Commonwealth to prove beyond a reasonable doubt an aggravating circumstance required by Section 19.2-264.4(C) of the Virginia Code which makes the defendant eligible for the death penalty. In Virginia, the aggravating factors required by the statute are facts necessary to establish eligibility for death. A jury (or alternatively the judge if he is acting as the trier of fact) must be presented with facts of the existence of an aggravating factor. It is also important to remember that Dubois's plea of guilty only relieved the Commonwealth of its burden to prove the offense of capital murder. He admitted nothing with respect to sentence.

29. *Dubois*, 1998 WL 276282, at *7.

C. *Ineffective Assistance of Counsel*

Dubois made over thirty independent ineffective assistance of counsel claims relating to counsel's mishandling of the guilty plea arrangement and the trial court sentencing process.[30] The court considered only one of these ineffective assistance of counsel claims, a claim made by Dubois that counsel failed to advise him that under the plea agreement the death penalty could still be imposed.[31] The court held the claim waived because Dubois had not presented it earlier, but then continued to its merits, stating that Dubois had been fully informed by counsel of the scope of the plea agreement.[32]

The Fourth Circuit simply disregarded many of the other claims, stating near the end of the opinion that Dubois improperly presented many of the claims, apparently because he did not separately brief each of twenty five specific allegations of ineffective assistance of counsel. Thus, it would appear necessary in the future for counsel to brief and argue every instance of ineffective assistance, in spite of the fact that they are to be measured individually and cumulatively, against the standards set out in only one case: *Strickland v. Washington*.[33]

D. *The Continuing Issue of Proportionality Review*

One of Dubois's final arguments centered around Virginia's proportionality review standard. Dubois argued that the Supreme Court of Virginia did not provide meaningful proportionality review, in violation of his statutory right and in violation of constitutional due process.[34] In addition to finding the issue defaulted,[35] the Fourth Circuit cited *Pulley v. Harris*[36] which held that there is no constitutional right to proportionality review.[37] The court further held that the Virginia Supreme Court conducted a thorough and adequate proportionality review in compliance with its procedures.[38]

Pulley held that the United States Constitution does not require proportionality review, but it also states that appellate courts have an obligation to provide meaningful appellate review.[39] This claim should be presented in all capital cases and should be raised as a facial challenge to all proportionality review in Virginia.

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30. *Id.* at *2-4.

31. *Id.* at *10.

32. *Id.*

33. Strickland v. Washington, 466 U.S. 688 (1984) (providing the following two prong test for finding ineffective assistance of counsel: (1) whether defendant received reasonable effective assistance, and if not (2) whether a reasonable probability that the outcome would be different had counsel's error no occurred).

34. *Dubois*, 1998 WL 276282, at *9. *See also* U.S. CONST. amend. XIV.

35. *Id.* at *6.

36. 465 U.S. 37 (1984).

37. Pulley v. Harris, 465 U.S. 37, 42-51 (1984).

38. *Dubois*, 1998 WL 276282, at *9.

39. *Pulley*, 465 U.S. at 54 (Stevens, J, concurring).

Additionally, counsel should preserve the issue for federal review as an arbitrary application of a state created right in violation of the Fourteenth Amendment's Due Process Clause.[40] The *Dubois* court, at least, implicitly recognized the existence of this federal ground.[41]

E. Conclusion

The court's discussion of Dubois's proportionality claim, including a finding that it was defaulted because it was not raised at trial or on direct appeal, places an unusual duty on defense counsel. It may also place a burden on the Virginia courts, but that is not the concern of defense counsel. The Fourth Circuit holding means:

1. Motions challenging systemic deficiencies in Virginia's proportionality review are not premature when raised at the trial level.
2. Motions claiming that, if client is convicted and sentenced to death, proportionality review by the Supreme Court of Virginia will be unconstitutional, are not premature when raised at the trial level.
3. All challenges to proportionality review are to be renewed by petitions for rehearing after the Supreme Court of Virginia conducts proportionality review.

All of these actions are apparently *necessary* to avoid default. Defense counsel are urged to give the Fourth Circuit what it wants.

Matthew Mahoney

40. U.S. CONST. amend. XIV. *See* Debbie Hill, *Great Myths: Santa Claus, The Easter Bunny & Virginia's Proportionality Review*, CAP. DEF. J., vol. 10, no. 1, p. 33 (1997); Otto W. Konrad, *How to Look the Virginia Gift Horse in the Mouth: Federal Due Process and Virginia's Arbitrary Abrogation of Capital Defendant's State-Created Rights*, CAP. DEF. DIG., vol 3, no. 2., p. 16 (1991).

41. *Dubois*, 1998 WL 276282, at *6.