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Fisher v. Lee 215 F.3d 438 (4th Cir. 2000)

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I. Facts

On April 2, 1992, Willie Ervin Fisher ("Fisher") broke into the home of his girlfriend, Angela Johnson ("Johnson"), broke her cheek and jaw, and stabbed her approximately thirty-two times. During the attack, he also stabbed her fourteen-year-old daughter, Shemika, in the arm. The police arrived and Shemika and Johnson were taken to the emergency room. Johnson was pronounced dead as a result of her stab wounds at 7:30 a.m.[1]

Later that afternoon Fisher turned himself in to Winston-Salem police, waived his Miranda rights, and made voluntary statements concerning the murder. At trial, Fisher pursued a voluntary intoxication defense by asserting that his alcohol and crack cocaine use prevented him from forming the specific intent necessary to be convicted of first degree murder. Fisher claimed to have "blacked out" during the actual stabbing.[2]

The jury convicted Fisher of first degree murder on the basis of malice, premeditation and deliberation and under the felony murder rule. He was also convicted of burglary and assault with a deadly weapon inflicting serious injury.[3] At the sentencing hearing the jury found that the offense was committed during the commission of a burglary and that the murder was especially heinous, atrocious, or cruel.[4] The jury also found the presence of several mitigating circumstances, including that Fisher was under the influence of mental or emotional disturbance during the commission of the capital felony.[5] However, none of the jurors found that Fisher's capacity to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired.[6] Fisher received a sentence of death, fifteen years for burglary, and three years for the assault.[7]

The Supreme Court of North Carolina affirmed the conviction and sentence and the United States Supreme Court denied certiorari.[8] Fisher

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1. Fisher v. Lee, 215 F.3d 438, 441-42 (4th Cir. 2000).
2. *Id.* at 443. Fisher contended that he was unaware of his actions between the time that Johnson attempted to take the knife from him and the moment a shotgun, fired by a neighbor, was discharged. *Id.*
3. *Id.*
4. *Id.*; *see* N.C. GEN. STAT. §§ 15A-2000(e)(5), (e)(9) (1999).
5. *Fisher*, 215 F.3d at 444; *see* N.C. GEN. STAT. § 15A-2000(f)(2) (1999).
6. *Fisher*, 215 F.3d at 444; *see* N.C. GEN. STAT. § 15A-2000(f)(6) (1999).
7. *Fisher*, 215 F.3d at 444.
8. *Id.*; *see* Fisher v. North Carolina, 513 U.S. 1098 (1995) (mem.).

filed a motion for appropriate relief in Forsyth County Superior Court. The court held an evidentiary hearing on claims that had not been procedurally defaulted and ultimately denied each of them. The Supreme Court of North Carolina denied certiorari. Fisher then filed a petition for writ of habeas corpus in federal district court. The writ was denied.[9] On appeal to the United States Court of Appeals for the Fourth Circuit, Fisher raised the following two claims for habeas relief: (1) that trial counsel was ineffective during the guilt and sentencing phases;[10] and (2) that the state trial court's instruction on the "especially heinous, atrocious, or cruel" aggravator was unconstitutionally vague.[11]

II. Holding

The Fourth Circuit concluded that Fisher failed to make a substantial showing of the denial of a constitutional right, denied his request for a certificate of appealability and dismissed the appeal.[12]

III. Analysis / Application in Virginia

A. Ineffective Assistance Claims

Fisher first contended that his counsel was ineffective for failing to introduce additional evidence in support of his voluntary intoxication defense, both at trial and at sentencing, in order to support the mitigating factors.[13] While this case was tried in North Carolina, the mitigating circumstances in that state are the same as the statutory mitigators in Virginia. In particular, Fisher asserted that there was additional evidence to support his claim that (1) he committed the crime while under the influence of mental disturbance ("(f)(2) factor"), and (2) that his capacity to appreciate the criminality of his conduct or to conform to the requirements of the law

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9. *Fisher*, 215 F.3d at 444.

10. *Id.* at 444-55.

11. *Id.* at 455-59.

12. *Id.* at 459.

13. *Id.* at 448. Prior to reaching Fisher's substantive ineffective assistance claims, the court briefly dismissed Fisher's assertion that these claims were not adjudicated on the merits in state court and thus, the deferential standard of review set forth in 28 U.S.C. § 2254(d) was not applicable. *Id.* at 445; *see* Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (1996) (codified as amended at 28 U.S.C. § 2254 (Supp. III 1997)). In particular, Fisher complained (1) that the state court did not carefully consider his motion for appropriate relief, (2) the order contained erroneous factual findings, and (3) that the state court's order was so summary in nature that it overlooked his claims of ineffective assistance. *Fisher*, 215 F.3d at 445-46. The Fourth Circuit determined that the state court did adjudicate on the merits, thus a deferential standard of review under § 2254(d) was appropriate. *Id.* The court next looked to identify the "clearly established Federal law" which governs such claims. *Id.* This led the court to its ineffective assistance of counsel analysis.

was impaired ("(f)(6) factor").[14] Fisher claimed that counsel should have presented the testimony of several lay witnesses that Fisher was drinking during the afternoon and evening.[15] Fisher also claimed that additional experts should have testified to support both the defense of voluntary intoxication and the mitigators, as well as a statement made by Johnson after Fisher's first attack.[16]

The Fourth Circuit reviewed the evidence produced at trial to support the voluntary intoxication defense and the two mitigators.[17] The court found that the testimony of Cliff Foster, a friend of Fisher's who used crack cocaine with him in the hours preceding the murder, and Dr. Hoover, a psychiatrist, constituted sufficient evidence to support a jury instruction on voluntary intoxication at the conclusion of the guilt phase, and to support the submission of numerous statutory mitigators, including the (f)(2) and (f)(6) factors, during sentencing.[18] The court reviewed Fisher's ineffective assistance claims under the two prong analysis set out in *Strickland v. Washington*,[19] and were satisfied that Fisher's counsel's presentation of lay testimony, expert testimony and other evidence in support of Fisher's voluntary intoxication defense and the (f)(2) and (f)(6) mitigators, was not deficient.[20] The court also determined that there was no reasonable probability that absent the alleged errors, the jury would have ruled differently.[21]

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14. *Fisher*, 215 F.3d at 445-46; *see* §§ 15A-2000(f)(2), (f)(6).

15. *Fisher*, 215 F.3d at 448.

16. *Id.* Two corollary claims, that trial counsel failed to have the defense expert offer an opinion as to Fisher's ability to adjust to incarceration, and that Johnson said that Fisher was acting out of character, were summarily dismissed by the court. *Id.* at 452-53. The court determined that based on the cumulative mitigating evidence, counsel's performance did not fall below an objective standard of reasonableness. *Id.* at 453. The court further stated that there was no reasonable probability that, absent the alleged errors, the jury would have decided not to impose a death sentence. *Id.*

17. *Id.* at 448-49.

18. *Id.* at 451. Fisher contended that more lay persons should have testified about Fisher's alcohol consumption during the afternoon and early evening in order to bolster his voluntary intoxication defense. *Id.* at 449. He also contended that Dr. Hoover failed to testify in the exact words of North Carolina General Statute § 15A-2000(f)(6) that Fisher's "capacity to appreciate the criminality of his conduct [and] to conform his conduct to law was impaired" by his alcohol and drug use. *Id.* at 451; *see* N.C. GEN. STAT. § 15A-2000(f)(6). The court dismissed these contentions because Foster testified about their crack cocaine use and Dr. Hoover thrice offered the opinion that Fisher was in an alcohol and drug induced black-out state when he committed the murder and so was incapable of forming a plan to murder Johnson. *Id.* at 449-50.

19. 466 U.S. 668 (1984).

20. *Fisher*, 215 F.3d at 453; *see* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that a finding of ineffective assistance of counsel may be made if (1) counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms, and (2) there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different).

21. *Fisher*, 215 F.3d at 453-54. The Fourth Circuit also summarily dismissed Fisher's

B. Instruction on the "Especially Heinous, Atrocious, or Cruel" Aggravating Circumstance

Fisher also contended that the trial court's instruction on the "especially heinous, atrocious, or cruel" aggravating circumstance was unconstitutionally vague.[22] Because Fisher did not raise the constitutionality of this issue in his direct appeal to the Supreme Court of North Carolina, the state court reviewing his motion for appropriate relief ruled that the claim was defaulted.[23] The Fourth Circuit found that on habeas review the court is precluded from reviewing the merits of a claim that was procedurally defaulted under an "independent and adequate" state procedural rule, "unless the defendant can demonstrate cause for the default and actual prejudice."[24]

In particular, Fisher asserted that the statute cannot operate as an independent and adequate state law ground for procedural default because the Supreme Court of North Carolina was required to conduct an "automatic review" of his death sentence which would have included this claim.[25] The Fourth Circuit relied on *Mu'Min v. Pruett*[26] to reject this claim.[27] The

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claim that he was entitled to an evidentiary hearing on his ineffective assistance claims in the district court. *Id.* The court said that because Fisher failed to demonstrate that he was prohibited from developing the factual basis for his claims in state court, he was not entitled to an evidentiary hearing under 28 U.S.C. § 2254(e)(2). *Id.*; *see* 28 U.S.C. § 2254(e)(2) (mandating that in a proceeding instituted by an application for writ of habeas corpus, if the applicant has failed to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing unless the applicant shows that the claim relies on either a new rule of constitutional law that was previously unavailable or a factual predicate that could not have been previously discovered through the exercise of due diligence, and the facts underlying the claim would be sufficient to establish that but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense). The court also found that the state court conducted a full evidentiary hearing, thus he had ample opportunity to present his claims in state court. *Fisher*, 215 F.3d at 454.

22. *Id.* at 455; *see* § 15A-2000(e)(9).

23. *Fisher*, 215 F.3d at 455.

24. *Id.* (citing Coleman v. Thompson, 501 U.S. 722, 750 (1991)).

25. *Id.* at 455. Fisher pointed to North Carolina statutory provisions which required the North Carolina Supreme Court (1) to consider the punishment imposed as well as any errors assigned on appeal, and (2) to overturn a death sentence if the court determined that the record did not support the jury findings of the aggravators, that sentence was imposed under the influence of passion, prejudice, or arbitrary factor, or that the sentence of death was excessive or disproportionate to the penalty imposed in similar cases. *Id.* at 456; *see* N.C. GEN. STAT. §§ 15A-2000 (d)(1), (d)(2) (1999). Thus, Fisher argued that the North Carolina state court was statutorily required to review the substance of the constitutional challenge to the (e)(9) aggravator and, thus, the review was not independent of federal law. *Fisher*, 215 F.3d at 456.

26. 125 F.3d 192 (4th Cir. 1997).

27. *Fisher*, 215 F.3d at 456; *see* Mu'Min v. Pruett, 125 F.3d 192, 197 (4th Cir. 1997) (considering and rejecting a habeas applicant's constitutional claims during its mandatory review of death sentence because the review procedures only require court to determine if

court found that, like Virginia's mandatory review provision in *Mu'Min*, North Carolina General Statute section 15A-2000(d) imposes no requirement that the court search the record for errors not pursued on direct appeal.[28] Thus, the court found that the North Carolina courts rejected Fisher's challenge to the jury instruction on adequate state law grounds.[29] The court rejected Fisher's claims that the statute did not constitute "independent and adequate" state grounds, and that he had shown cause and prejudice for the default.[30] The Fourth Circuit concluded that Fisher was unable to overcome the default.[31]

Virginia's mandatory review provision does not require the court to find errors. Counsel must make sure to allege all errors in the state court in order to avoid procedural default. Objections must be timely, raised on direct appeal, rely on all possible grounds, and rely on the same set of facts in order to be properly preserved for appeal in subsequent state and federal proceedings.[32]

Next, Fisher urged that his counsel's failure to pursue a challenge to the "heinous, atrocious, or cruel" jury instruction on appeal constituted ineffective assistance.[33] The limiting instruction that was given included specific definitions of heinous, atrocious, and cruel and was taken from the North Carolina Pattern Jury Instructions.[34] The Fourth Circuit found that

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the death penalty was imposed under influence of improper considerations, and not to examine the record for constitutional errors not specified on appeal).

28. *Fisher*, 215 F.3d at 456. *Compare* VA. CODE ANN. § 17.1-313 (Michie 1996) (requiring review of a death sentence to determine "whether it was imposed under the influence of passion, prejudice or any other arbitrary factor") *with* N.C. GEN. STAT. § 15A-2000(d) (1999) (requiring that the Supreme Court of North Carolina automatically review a capital conviction and sentence of death and overturn a death sentence upon a finding that the record does not support the jury's findings of any aggravating circumstance upon which the sentencing court based its sentence of death, or upon a finding that the sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor, or upon a finding that the sentence of death is excessive or disproportionate to the penalty imposed in similar cases).

29. *Fisher*, 215 F.3d at 456.

30. *Id.*

31. *Id.*

32. *See generally* Matthew K. Mahoney, *Bridging the Procedural Default Chasm*, 12 CAP. DEF. J. 305, 318 (2000) (suggesting method by which defense counsel can "make record" and avoid procedural default).

33. *Fisher*, 215 F.3d at 456.

34. *Id.* at 457. The reader should note that the Fourth Circuit found the following limiting instruction sufficient in this case:

> The next issue is "the capital felony was especially heinous, atrocious or cruel." Now in this context heinous means extremely wicked or shockingly evil. Atrocious means outrageously wicked and vile and cruel means designed to inflict a high degree of pain with utter indifference to or even enjoyment of the suffering of others. However, it is not enough that this murder be heinous, atrocious or cruel as these terms have just been defined. This murder must have been

the instruction had already been subjected to a vagueness challenge and determined to provide constitutionally sufficient guidance to the jury.[35] Further, the court found that the limiting instruction emphasized that not every murder is especially "heinous, atrocious, or cruel" and that in order to find this aggravator, the jury must conclude that any brutality involved in the murder must have exceeded that which is normally present in the crime.[36] In light of this, the court found that Fisher's counsel was not ineffective for failing to raise the constitutionality of the limiting instruction on direct appeal and that there was no sufficient probability that had this been done, the result of the proceeding would have been different.[37] Thus, there was no showing of cause or prejudice to support a claim of ineffective assistance of counsel.[38] The procedural default was affirmed.[39]

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> especially heinous, atrocious or cruel and not every murder is especially so. For this murder to have been especially heinous, atrocious or cruel, any brutality which was involved in it must have exceeded that which is normally present in any killing or this murder must have been . . . a conscienceless or pitiless crime which was unnecessarily torturous to the victim.

Id. at 458.

The Virginia Model Instructions do not define the three "vileness" factors. *See* VA. MODEL JURY INSTRUCTIONS CRIMINAL Nos. 33.122, 33.125 (Lexis Law Publishing 1999). In Virginia, because there is no model defining instruction, counsel should prepare and proffer such instructions and preserve objections if the instructions are denied. *See generally* Melissa A. Ray, *Meaningful Guidance: Reforming Virginia's Model Jury Instructions on Vileness and Future Dangerousness*, 13 Cap. Def. J. 85 (2000) (suggesting reform to the Virginia Model Jury Instructions Criminal and offering more detailed instructions on the vileness sub-elements).

35. *Fisher*, 215 F.3d at 458; *see* State v. Syriani, 428 S.E.2d 118, 140-41 (N.C. 1993) (rejecting the challenge because the jury instructions incorporated narrowing definitions adopted by the state court and approved by the Supreme Court, and provided constitutionally sufficient guidance to the jury).

36. *Fisher*, 215 F.3d at 459.

37. *Id.*

38. *Id.*

39. *Id.*