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I. Facts

On February 11, 1987, Robert Bacon ("Bacon") fatally stabbed Glennie Clark ("Glennie"), the husband of his lover, Bonnie Sue Clark ("Clark"). In 1986, Clark left her marriage because of Glennie's abusive behavior. She moved in with Bacon and thereafter the two planned Glennie's murder. Clark was the beneficiary of Glennie's life insurance policy.[1]

On the night of the murder, Clark and Bacon drove to Glennie's home. Glennie became angry because Bacon was present and called Bacon a "nigger." This prompted Bacon to stab Glennie sixteen times. Clark and Bacon then drove to a movie theater parking lot and set up a robbery to conceal the murder. Pursuant to this plan, Bacon knocked Clark unconscious and placed Glennie's body in the passenger seat.[2]

Later that evening, police found Clark and Glennie in Clark's car. Clark told the police that they were sitting in the car when she heard the car doors open and was knocked unconscious. At 1:20 a.m. the following morning, police went to Bacon's home where they discovered bloody clothes, shoes, and other evidence. Bacon then confessed to the murder. Bacon denied that Clark was part of the murder. Later, Bacon admitted that parts of his story were untrue and that Clark was involved.[3]

Bacon was convicted of first-degree murder and conspiracy to commit murder.[4] The jury recommended a death sentence, which the court imposed.[5] The Supreme Court of North Carolina affirmed the conviction, but remanded the case for resentencing because evidence of Bacon's role in the police's apprehension of Clark warranted a jury instruction on the North Carolina Statutory mitigating factor ("the (f)(8) factor") of "aiding in the apprehension of another capital felon."[6] The instruction was not given.[7] At the resentencing hearing, the State did not introduce testimony given by the

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1. Bacon v. Lee, 225 F.3d 470, 473 (4th Cir. 2000).
2. *Id.*
3. *Id.* at 473-74.
4. *Id.* at 474.
5. *Id.* Clark was convicted on the same charges and sentenced to life imprisonment. *Id.* at 474 n.1.
6. *Id.* at 474; *see* N.C. GEN. STAT. § 15A-2000(f)(8) (1999) (providing that evidence of aiding in the apprehension of a capital felon is a mitigating factor).
7. *Bacon*, 255 F.3d at 474.

investigating officers.[8] The (f)(8) mitigating factor was not submitted to the jury because the State presented no evidence regarding Bacon's statements to the police or his role in the apprehension of Clark.[9]

This second jury also recommended a sentence of death and the Supreme Court of North Carolina affirmed.[10] Bacon filed a Motion for Appropriate Relief ("MAR") on September 25, 1995, in the Superior Court of Onslow County.[11] He also filed a "Notice of Intention to Amend" in which he listed claims not addressed in his MAR because they needed further investigation.[12] Bacon's MAR was denied on November 20, 1995.[13] On February 15, 1996, Bacon filed a motion to reconsider the denial of his MAR and for permission to amend it.[14] The state MAR court granted these requests and heard oral arguments on the claims in both his original and amended motions.[15] The court then denied all claims, stating that it did not "have the authority to amend, modify, or vacate the [November 20, 1995] order."[16] The court said that in effect, Bacon was attempting to file a second MAR because there was no actual pending MAR to amend.[17]

Because the November 20, 1995 order was final, Bacon's claims in the amended MAR were procedurally defaulted.[18] Bacon was then denied certiorari in the Supreme Court of North Carolina and the Supreme Court of the United States.[19] Bacon next filed a petition for federal habeas relief on twenty-eight claims.[20] The district court granted summary judgment for the State on all issues except Bacon's claim of ineffective assistance of his counsel based on counsel's failure to present evidence of the (f)(8) mitigating factor at resentencing.[21] The district court determined that Bacon received ineffective assistance, which made the result of his resentencing "fundamentally unfair, or at the very least, unreliable."[22]

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8. *Id.* at 474.

9. *Id.* at 474-75.

10. *Id.* at 475.

11. *Id.* The North Carolina Motion for Appropriate Relief is similar to Virginia's state habeas proceedings.

12. *Id.*

13. *Id.* (internal citation omitted).

14. *Id.*

15. *Id.* (internal citation omitted).

16. *Id.* (internal citation omitted).

17. *Id.*

18. *Id.*; *see* N.C. GEN. STAT. § 15A-1419(a)(1) (1999) (mandating that where defendant filed a previous motion and was in a position to adequately raise the ground or issue underlying the present motion but did not do so, he is subject to denial of a MAR).

19. *Bacon*, 225 F.3d at 475; *see* State v. Bacon, 483 S.E.2d 179-80 (N.C. 1997) (state court denial of certiorari); Bacon v. North Carolina, 522 U.S. 843 (1997) (denial of certiorari).

20. *Bacon*, 225 F.3d at 475.

21. *Id.*

22. *Id.*

Based on the district court's determinations, this cross-appeal was filed in the United States Court of Appeals for the Fourth Circuit.[23] North Carolina argued that Bacon's ineffective assistance claim was procedurally defaulted because he did not raise the claim in his first MAR.[24] Bacon entered several cross-claims, each of which was denied by the Fourth Circuit.[25]

II. Holding

The Fourth Circuit reversed the district court's grant of habeas corpus, and affirmed the court's rulings rejecting Bacon's other claims.[26] The court determined that in light of the tactical decisions that Bacon's attorneys had to make at resentencing, their failure to introduce the (f)(8) mitigating factor did not constitute ineffective assistance.[27] Thus, the Fourth Circuit reversed the district court's determination that Bacon received ineffective assistance of counsel at resentencing.[28]

III. Analysis / Application in Virginia

A. Avoidance of Procedural Default

North Carolina argued that Bacon's ineffective assistance claim based on counsel's failure to present the (f)(8) mitigating factor at resentencing was

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23. *Id.* at 473.

24. *Id.* The state alternately contended that Bacon's claim of ineffective assistance of counsel failed on the merits. *Id.* at 477.

25. *Id.* at 479-86. Bacon first contended that the district court erred in rejecting his claims of ineffective assistance based on the following: (1) counsel's failure to investigate fully mitigating evidence; (2) counsel's decision to present videotaped testimony referring to his possibility of parole; (3) counsel's decision to tell the jury that Bacon had been sentenced to death at the first sentencing hearing; and (4) counsel's decision to read portions of Bacon's testimony from the first sentencing. *Id.* at 479. The court addressed each claim on the merits and rejected each in turn. *Id.* at 480-85.

Bacon next claimed that his sentencing hearing was "infected" by racial prejudice, depriving him of due process and a fair trial. *Id.* at 485. The court summarily affirmed the district court's denial of this claim. *Id.*

Bacon finally contended that his Eighth and Fourteenth Amendment rights were infringed upon because the trial court did not instruct the jury that if Bacon was sentenced to life imprisonment, he would not be eligible for parole for twenty years. *Id.* at 485-86. The court determined that because he would be eligible for parole under North Carolina law, he was not allowed a *Simmons* instruction on parole eligibility. *Id.* at 486; *see* Simmons v. South Carolina, 512 U.S. 154, 165 (1994) (requiring instruction about parole ineligibility when the defendant will never be eligible for parole). For further discussion of the court's treatment of this claim, see Christina S. Pignatelli, Case Note, 13 CAP. DEF. J. 403 (2001) (analyzing the court's treatment of parole eligibility in *Bacon* and in Goins v. Angelone, 226 F.3d 312 (4th Cir. 2000)).

26. *Bacon*, 225 F.3d at 486.

27. *Id.* at 479.

28. *Id.*

procedurally defaulted because Bacon did not raise it in his first MAR.[29] The Fourth Circuit looked to *Coleman v. Thompson*[30] and determined that a federal habeas court cannot review a claim when a state court has decided not to review it on the merits based on an "independent and adequate state procedural rule."[31] According to *Ake v. Oklahoma*,[32] a state procedural rule is deemed "independent" if it does not "depend . . . on a federal constitutional ruling."[33] A state procedural rule is deemed "adequate" if it is "regularly and consistently" applied by the state court.[34]

The Fourth Circuit found that the state MAR court relied on Section 15A-1419(a) of the North Carolina Criminal Procedure Act, which provides that when a "defendant is in a position to raise . . . the issue" in a previous MAR, but fails to do so, the court is entitled to deny the defendant's current MAR.[35] Bacon agreed with North Carolina that Section 15A-1419(a)(1) "generally" provides a basis for procedural default, but contended that in his case the application of the statute was not "firmly established."[36] Bacon further argued that his amended MAR effectively renewed his original MAR with amendments as of February 15, 1996, when the court granted his motion for reconsideration.[37] North Carolina alternately contended that the state MAR court was "deprived of its authority" to renew the original MAR because the motion for reconsideration was late.[38] Because of this untimeliness, the State argued that the common law rule that a "judgment cannot be altered after the end of the term of court in which it is issued" should be applied in Bacon's case.[39]

Bacon responded to this contention by producing cases in which a MAR court granted reconsideration after the term of court was ended.[40] Because the MAR court had reopened consideration of the original MAR after its term expired, the Fourth Circuit doubted whether this state proce-

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29. *Id.* at 476.

30. 501 U.S. 722 (1991).

31. *Bacon*, 225 F.3d at 476; *see* Coleman v. Thompson, 501 U.S. 722, 731-32 (1991) (barring review of a claim that state court declined to review based on an "independent and adequate" state procedural rule).

32. 470 U.S. 68 (1985).

33. Ake v. Oklahoma, 470 U.S. 68, 75 (1985); *Bacon*, 225 F.3d at 476.

34. Johnson v. Mississippi, 486 U.S. 578, 587 (1988); *Bacon*, 225 F.3d at 476.

35. *Bacon*, 225 F.3d at 476; N.C. GEN. STAT. § 15A-1419(a)(1) (1999) (providing appropriate grounds for denial of MAR).

36. *Bacon*, 225 F.3d at 476.

37. *Id.* at 476-77.

38. *Id.* at 477.

39. *Id.*; *see* State v. Godwin, 187 S.E. 560, 561 (N.C. 1936) (holding that "until the expiration of the term the orders and judgments of the court are *in fieri*, and the judge has power, in his discretion, to make such changes and modifications in them as he may deem wise and appropriate for the administration of justice").

40. *Bacon*, 225 F.3d at 477.

dural rule was actually "firmly established and regularly followed."[41] Thus, whether or not the claim was actually procedurally defaulted was uncertain.[42] For this reason, the Fourth Circuit next reviewed Bacon's ineffective assistance claim on the merits.[43]

The Fourth Circuit's decision to review Bacon's claim on the merits after finding that the procedural default was excused due to the lack of an "independent and adequate" state procedural rule is notable. Generally, the Fourth Circuit has no difficulty finding a state rule to create default and bar review. Counsel should note that there is a potential argument that a rule is not "independent and adequate" when it is not consistently and regularly applied.[44]

B. Judge King's Dissent

Judge King filed a separate dissent based on three of Bacon's claims which the state court found to be procedurally defaulted.[45] Judge King argued that the North Carolina state courts had not given these claims proper consideration.[46] He further disagreed with the finding that they were procedurally barred.[47] In particular, Judge King believed that Bacon's claim that his resentencing counsel failed to introduce mitigating evidence of his adaptability to prison deserved further consideration and could potentially warrant relief.[48]

Judge King examined "adaptability to prison life" as a viable piece of mitigating evidence.[49] He pointed to the use of this mitigating circumstance by other courts and stated that it warranted "respect" as an independent mitigating factor.[50] Bacon possessed considerable evidence about his adapt-

41. *Id.*; *see* Ford v. Georgia, 498 U.S. 411, 423-24 (1991) (requiring that the rule applied must be a firmly established and regularly followed state practice in order to mandate procedural default).

42. *Bacon*, 225 F.3d at 477.

43. *Id.*

44. *See* Royal v. Taylor, 188 F.3d 239, 246-47 (4th Cir. 1999) (finding that the rule articulated in *Anderson v. Warden* (prohibiting a petitioner from challenging on state habeas the truth and accuracy of representations made by him as to the adequacy of counsel or the voluntariness of petitioner's plea unless petitioner offers a valid reason why he should be permitted to controvert his earlier statements) is not consistently applied); *see* Anderson v. Warden, 281 S.E.2d 885, 888 (Va. 1981).

45. *Bacon*, 225 F.3d at 486.

46. *Id.*

47. *Id.* at 486-89.

48. *Id.* at 486, 494. Judge King also looked at the following two claims: (1) that resentencing counsel disclosed to the jury that Bacon previously had received a death sentence; and (2) that counsel failed to investigate and present evidence of Bacon's childhood and background at resentencing. *Id.* at 486.

49. *Id.* at 493.

50. *Id.*

ability to prison, and Judge King believed that in conjunction with other Sixth Amendment claims filed by Bacon, failure to introduce this evidence constituted ineffective assistance of counsel and was potentially prejudicial.[51]

Defense counsel should note that Judge King consistently used the word "adaptability," rather than "adaptation," in his dissent. "Adaptation" would refer to evidence of the defendant's prior conduct in prison. In *Skipper v. South Carolina*,[52] the Supreme Court held that evidence of the defendant's "adaptation" to prison life is proper mitigating evidence.[53] "Adaptability" seems to refer to the defendant's ability in the future to adapt to prison life. If "adaptability" has that meaning, then it would appear that future prison life evidence would be admissible either as a mitigating factor, or evidence which contradicts future dangerousness. However, in *Cherrix v. Commonwealth*,[54] the Supreme Court of Virginia held that testimony regarding prison life is not proper mitigating evidence.[55] Defense counsel may argue that Judge King's dissent implies that evidence of adaptability to prison life is appropriate mitigating evidence despite the rule set out in *Cherrix*. Even if prison life evidence is not appropriate as mitigating evidence, it should still be admissible to contradict the Commonwealth's future dangerousness evidence.[56]

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51. *Id.* at 493-94.

52. 476 U.S. 1 (1986).

53. *See* Skipper v. South Carolina, 476 U.S. 1, 4 (1986) (relying on *Eddings v. Oklahoma*, the Supreme Court found that in capital cases, the sentencer should not be "precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); *see* Eddings v. Oklahoma, 455 U.S. 104, 110 (1982).

54. 513 S.E.2d 642 (Va. 1999).

55. *See* Cherrix v. Commonwealth, 513 S.E.2d 642, 653 (Va. 1999) (holding that prison conditions are not appropriate mitigating circumstances); *see also* Walker v. Commonwealth, 515 S.E.2d 565, 574 (Va. 1999) (prohibiting testimony of the Chief of Operations for the Virginia Department Corrections to attest to life imprisonment in a maximum security facility without parole).

56. *See* Latanya R. White, The Long and Winding Road: The Quest for Admission of Prison Life Evidence in Virginia Capital Sentencing Proceedings, 13 CAP. DEF. J. 359, 370-72 (2001) (analyzing the use of prison life evidence to rebut the Commonwealth's case for future dangerousness).