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I. Facts

A North Carolina jury convicted Clifton Allen White ("White") of first-degree murder, first-degree kidnapping, larceny of an automobile, robbery with a dangerous weapon, and second-degree burglary. The jury imposed the death sentence based upon the following aggravators: murder in the commission of a first-degree kidnapping, second-degree burglary, robbery with a dangerous weapon; and an "especially heinous, atrocious, or cruel" murder.[1] The jury weighed mitigating and aggravating factors and found that the mitigating factors did not outweigh the aggravators. The jury recommended the imposition of the death penalty.[2] The Supreme Court of North Carolina affirmed White's conviction and death sentence.[3] The United States Supreme Court denied certiorari.[4] White sought collateral relief from the Mecklenburg Superior Court, which denied his request. The Supreme Court of North Carolina then denied certiorari. White filed a petition for writ of habeas corpus with the federal district court. The district court denied the petition. White filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit pursuant to 28 U.S.C. § 2253(c)(2).[5]

II. Holding

The United States Court of Appeals for the Fourth Circuit denied White's petition for writ of habeas corpus.[6]

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1. White v. Lee, No. 00-3, 2000 WL 1803290, at *2 (4th Cir. Dec. 8, 2000); *see* N.C. GEN. STAT. §§ 15A-2000(e)(5), (9) (2000) (providing two aggravating factors: a capital felony committed in the commission of a robbery, burglary or kidnapping; and a capital felony which was "especially heinous, atrocious, or cruel").

2. *White*, 2000 WL 1803290, at *2; *see* N.C. GEN. STAT. § 15A-2000(c)(3) (2000) (requiring jury to find that mitigating circumstances do not outweigh aggravating circumstances prior to imposing death penalty).

3. State v. White, 471 S.E.2d 593, 596-97 (N.C. 1996).

4. White v. North Carolina, 519 U.S. 936, 936 (1996).

5. *White*, 2000 WL 1803290, at *2; *see* 28 U.S.C. § 2253(c)(2) (Supp. IV 1998) (requiring petitioner to make a substantial showing of a denial of a constitutional right to a federal appellate court prior to the court granting a certificate of appealability).

6. *White*, 2000 WL 1803290, at *11.

III. Analysis / Application in Virginia

The United States Supreme Court's decision in *Williams v. Taylor*[7] interpreted the recent amendments to 28 U.S.C. § 2254(d) as a substantial limitation on the federal court's ability to grant a state prisoner's habeas petition.[8] A federal court may grant habeas relief for a state prisoner only if the state court unreasonably applied federal law or the state court decision was contrary to federal law.[9] The Fourth Circuit applied this standard to White's five claims for habeas relief, two of which are addressed in this case note.[10] White claimed that the statutory aggravating factor of a "heinous, atrocious, or cruel" murder was unconstitutionally vague.[11] White also claimed that his trial attorney violated his Sixth Amendment right to effective assistance of counsel because counsel chose to call a psychiatrist who testified that White had a personality disorder which manifested itself through habitual lying.[12]

A. Whether the Trial Court's Jury Instruction was Unconstitutionally Vague

A North Carolina statute provides that a jury may impose the death sentence if the "capital felony was especially heinous, atrocious, or cruel."[13] The Fourth Circuit previously held this language to be unconstitutionally vague, but permitted a limiting instruction to cure the constitutional defect.[14] If the language setting forth an aggravating factor is unconstitutionally vague, the statute fails because it does not provide guidance for the jury to distinguish a murder deserving of capital punishment from other murders.[15] The trial court provided the jury with a limiting instruction at

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7. 120 S. Ct. 1495 (2000).

8. *White*, 2000 WL 1803290, at *3; *see* Williams v. Taylor, 120 S. Ct. 1495, 1523 (2000) (interpreting language of 28 U.S.C. § 2254(d)); 28 U.S.C. § 2254 (Supp. IV 1998).

9. 28 U.S.C. § 2254(d).

10. White's claims for habeas relief are as follows: (1) the trial court's instruction as to a statutory aggravating factor was unconstitutionally vague; (2) the ineffectiveness of his counsel violated the Sixth Amendment; (3) the trial court improperly instructed the jury on the defense of voluntary intoxication; (4) the trial court erred in submitting to the jury the mitigation evidence and then rejecting one of the mitigating circumstances; and (5) defendant should have been allowed to question prospective jurors during voir dire concerning their beliefs about parole eligibility and the court should have instructed the jury of the impact of a life sentence. *White*, 2000 WL 1803290, at *4-10.

11. *Id.*, at *4.

12. *Id.*, at *5.

13. N.C. GEN. STAT. § 15A-2000(e)(9) (2000) (listing one of the 11 aggravating circumstances that may be considered by a sentencing body in a capital sentencing proceeding).

14. *White*, 2000 WL 1803290, at *5; *see* Smith v. Dixon 14 F.3d 956, 974 (4th Cir. 1994) (en banc) (holding that language of § 15A-2000(e)(9) may facilitate imposition of death penalty in an arbitrary and capricious manner and is unconstitutional in the absence of limiting jury instruction).

15. *White*, 2000 WL 1803290, at *4; *see* Godfrey v. Georgia, 446 U.S. 420, 427-28 (1980)

sentencing offering definitions of "especially heinous, atrocious, and cruel."[16] The Supreme Court of North Carolina rejected the vagueness challenge because the limiting instruction narrowed the language of the statute to prevent the arbitrary imposition of the death penalty.[17] The Fourth Circuit held that the Supreme Court of North Carolina's rejection of the constitutional challenge to the aggravating factor was neither contrary to nor an unreasonable application of relevant United States Supreme Court precedent.[18]

The Fourth Circuit also addressed a similar claim of vagueness in *Frye v. Lee*.[19] The court in *Frye* noted that a jury instruction, which attempted to cure the defect of the vagueness of Section 15A-2000(e)(9), may also be unconstitutionally vague if the limiting instruction does not provide sufficient guidance to the jury.[20] However, the Fourth Circuit in *Frye* did not find the state court's decision contrary to federal law or an unreasonable application of federal law.[21]

The Virginia Code provides that a jury may impose the death penalty if "the [defendant's] conduct in committing the offense was outrageously or wantonly vile, horrible or inhuman, in that it involved torture, depravity

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(finding that state's capital sentencing scheme must offer adequate guidance to provide meaningful basis for distinguishing between murder deserving of the death penalty and other murders).

16. *White*, 2000 WL 1803290, at *4. The jury instruction read as follows:

> Was this murder especially heinous, atrocious or cruel? In this context "heinous" means extremely wicked, shocking. "Atrocious" means outrageously wicked and vile. "Cruel" means designed to inflict a high degree of pain with utter indifference to, or even for the enjoyment of, the suffering of others. However, it is not enough that the murder was heinous, atrocious, and cruel as those terms have been defined, but this murder must have been especially heinous, atrocious, and cruel, and not every murder is especially so. For this murder to have been especially heinous atrocious, and cruel any brutality which was involved in it must have exceeded that which is normally present in any killing, or this killing must have been a [conscienceless] or pitiless crime which was unnecessarily torturous to the victim.

Id.

17. *Id.*; *see* State v. Syriani, 428 S.E.2d 118, 141 (N.C. 1993) (holding that the limiting instructions cured the unconstitutionally vague aggravating factor).

18. *White*, 2000 WL 1803290, at *5.

19. Frye v. Lee, 235 F.3d 897, 907-08 (4th Cir. 2000) (holding that the limiting instruction that accompanied the statutory aggravator cured the constitutional vagueness).

20. *Id.* at 902-03. The Fourth Circuit failed to identify factors by which the jury instruction may be measured to determine what constitutes sufficient guidance to a jury and what instructions remain unconstitutionally vague, possibly invoking an arbitrary imposition of the death sentence; *see* VA. MODEL JURY INSTRUCTIONS CRIMINAL No. 33.122 (Lexis Law Publishing 1999) (providing the precise language of § 19.2-264.4(C) to the jury with the additional explanation that the conduct be "beyond the minimum necessary to accomplish the act of murder").

21. *Frye*, 235 F.3d at 908.

of mind or aggravated battery to the victim."[22] The Supreme Court of Virginia has repeatedly held that the vileness aggravating factor is not unconstitutionally vague.[23] The practitioner should continue to argue that Virginia's vileness statute and corresponding jury instruction remain unconstitutionally vague because the jury has no meaningful basis by which to distinguish between classes of murders that warrant the death penalty and those that do not. The Supreme Court of Virginia will probably summarily dismiss the argument based on precedent, but raising the argument preserves the issue for federal appeal. The practitioner should also draft alternative jury instructions other than the Model Jury Instructions in an attempt to guide the jury more adequately.[24]

B. Whether White's Counsel's Introduction of Psychiatrist's Testimony Amounted to Ineffective Assistance of Counsel

White's counsel introduced expert testimony from a psychiatrist who testified that White has a personality disorder and habitually lies as a result of his disorder. White argued that this testimony undermined the mitigation testimony of his remorse, effectively denying him the right to testify at sentencing.[25] The state court applied the two-part *Strickland v. Washington*[26] test for a Sixth Amendment violation of the right to effective assistance of counsel.[27] The test requires that a defendant show that his counsel's representation "fell below an objective standard of reasonableness" and absent the deficient performance, there is a reasonable probability of a different outcome.[28] The state court rejected White's ineffective assistance of counsel claim because White's trial counsel's decision that the mitigation

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22. VA. CODE ANN. § 19.2-264.4(C) (Michie 2000) (requiring the capital sentencing body to impose a life sentence unless the Commonwealth proved, beyond a reasonable doubt, that the defendant presents a future danger to society or that the conduct of the offense was vile).

23. *See, e.g.*, Walker v. Commonwealth, 515 S.E.2d 565, 569 (Va. 1999) (rejecting the argument that the vileness aggravating factor is unconstitutionally vague); Turner v. Commonwealth, 364 S.E.2d 483, 552 (Va. 1988) (same).

24. *See Virginia Capital Case Clearinghouse Verdict Forms*, 13 CAP. DEF. J. 449 (2001); Melissa A. Ray, *"Meaningful Guidance": Reforming Virginia's Model Jury Instructions on Vileness and Future Dangerousness*, 13 CAP. DEF. J. 85, 96 (2000) (offering alternative jury instructions that further define the elements of vileness).

25. *White*, 2000 WL 1803290, at *5.

26. 466 U.S. 668 (1984).

27. *See* Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that defendant must show counsel's deficient performance and that the deficient performance prejudiced the defense before a sentence or conviction will be overturned on ineffective assistance of counsel claim).

28. *White*, 2000 WL 1803290, at *5 (quoting *Strickland*, 466 U.S. at 688, 694).

testimony offered by the psychiatrist outweighed the negative aspects of the psychiatrist's testimony was reasonable trial strategy.[29]

The Fourth Circuit held that the state court's rejection of White's ineffective assistance of counsel claim did not amount to an unreasonable application of federal law or a conclusion contrary to federal law.[30] The court relied upon the language in *Strickland* that requires courts to "indulge in a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance."[31] Trial counsel's decision to present the expert testimony at sentencing fell within the scope of counsel's trial strategy and was not unreasonable.[32]

IV. Conclusion

The *Williams v. Taylor* decision delineated the narrow scope of federal review of a state prisoner's habeas petition.[33] The Supreme Court of Virginia has held consistently that the vileness aggravator is not unconstitutionally vague. However, the practitioner should tirelessly raise the claim that the vileness aggravator is unconstitutionally vague because the case may arise in which the federal courts or the Supreme Court of Virginia may find that the aggravator does not give proper guidance to the jury. The difficulties of receiving relief due to an unconstitutionally vague statute emphasize the defense attorney's duty to devote a significant amount of time thoroughly preparing for sentencing to defeat the claim of vileness.

Jeremy P. White

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29. *Id.*

30. *Id.* (applying the standard set forth in Williams v. Taylor, 120 S. Ct. 1495, 1523 (2000)); *see supra* notes 7-8 and accompanying text.

31. *Id.* (quoting *Strickland*, 466 U.S. at 689).

32. *Id.*, at *7.

33. *Williams*, 120 S. Ct. at 1523 (holding that the language of 28 U.S.C. § 2254(d) limits the power of a federal court to grant a state prisoner's habeas petition to instances in which the state court unreasonably applied federal law or the state court decision was contrary to federal law).

CASE NOTES:

Supreme Court of Virginia