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## *I. Facts*

In February 1983, Gregory Esparza ("Esparza") entered a store in Toledo, Ohio. At gunpoint, he ordered Melanie Gerschultz ("Gerschultz") to open the cash register. Simultaneously, James Barailloux ("Barailloux") escaped through a rear door in the store and alerted the store owner, Evelyn Krieger ("Krieger"). While alerting Krieger to the robbery of the store, Barailloux heard a gunshot. Barailloux and Krieger returned to the store and discovered Gerschultz fatally wounded on the floor and approximately $110 missing from the cash register.[1]

Esparza was charged with and convicted of "aggravated murder during the commission of an aggravated robbery."[2] The jury recommended a sentence of death for the murder conviction and the trial judge accepted this recommendation.[3] Additionally, the trial judge "sentenced [Esparza] to 7 to 25 years' imprisonment for aggravated robbery, plus 3 years for the firearm specification."[4] The Supreme Court of Ohio affirmed Esparza's convictions and sentences.[5]

During state post-conviction review, Esparza argued "for the first time, that he had not been convicted of an offense for which a death sentence could be imposed under Ohio law."[6] The indictment charged Esparza with aggravated murder in the commission of an aggravated robbery but failed to charge him as a "principal offender" as required under Ohio law.[7] Holding that literal statutory compliance was unnecessary, the Ohio Court of Appeals rejected this claim.[8]

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1. Mitchell v. Esparza, 124 S. Ct. 7, 9 (2003) (per curiam).

2. *Id.*; *see* OHIO REV. CODE ANN. § 2903.01 (Anderson 2003) (defining the crime of aggravated murder); OHIO REV. CODE ANN. § 2911.01 (Anderson Supp. 2003) (defining the crime of aggravated robbery).

3. *Esparza*, 124 S. Ct. at 9; *see* OHIO REV. CODE ANN. § 2929.03(D)(2) (Anderson 2002) (providing that "[i]f the trial jury unanimously finds, by proof beyond a reasonable doubt, that the aggravating circumstances the offender was found guilty of committing outweigh the mitigating factors, the trial jury shall *recommend* to the court that the sentence of death be imposed on the offender" (emphasis added)).

4. *Esparza*, 124 S. Ct. at 9.

5. State v. Esparza, 529 N.E.2d 192, 200 (Ohio 1988).

6. *Esparza*, 124 S. Ct. at 9.

7. *Id.*; OHIO REV. CODE ANN. § 2929.04(A)(7) (Anderson 1997) (providing in part that "[i]mposition of the death penalty for aggravated murder is precluded, unless . . . [t]he offense was committed" while attempting aggravated robbery "and either the offender was the principal offender in the commission of the aggravated murder or, if not the principal offender, committed the aggravated murder with prior calculation and design").

8. *Esparza*, 124 S. Ct. at 10. The court further stated that "where only one defendant is

Esparza then filed a second petition for post-conviction relief.[9] In this petition, Esparza alleged, among other things, that his counsel was ineffective for not arguing "that the State's failure to comply with its sentencing procedures violated the Eighth Amendment."[10] The Ohio Court of Appeals denied this claim.[11] According to the court's decision, Esparza "failed to prove he was prejudiced because any error committed by counsel was harmless."[12]

After exhausting state avenues for relief, Esparza filed a federal habeas petition in the United States District Court for the Northern District of Ohio.[13] The district court granted Esparza's "petition in part and issued a writ of habeas corpus as to the death sentence."[14] The court determined "that the Ohio Court of Appeals'[s] decision was an unreasonable application of clearly established federal law."[15] Further, the district court concluded that the state court's decision was contrary to the Supreme Court's decisions in *Apprendi v New Jersey*[16] and *Sullivan v Louisiana*.[17] The United States Court of Appeals for the Sixth Circuit affirmed the district court's decision and held that "the Eighth Amendment precluded [Esparza's] death sentence and that harmless-error review was inappropriate."[18] The United States Supreme Court granted Ohio's petition for a writ of certiorari.[19]

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named in an indictment alleging felony murder, it would be redundant to state that the defendant is being charged as the principal offender. Only where more than one defendant is named need the indictment specify the allegation 'principal offender.' " State v. Esparza, No. L-90-235, 1992 WL 113827, at *1, *9 (Ohio Ct. App. May 29, 1992).

9. *Esparza*, 124 S. Ct. at 10.

10. *Id.*

11. *Id.*; *see* State v. Esparza, No. L 84-225, 1994 WL 395114, at *5 (Ohio Ct. App. July 27, 1994) (denying post-conviction relief).

12. *Esparza*, 124 S. Ct. at 10. On brief to the United States Supreme Court, Esparza maintained that the Ohio court concluded that because he was the sole individual charged with committing the offense, the jury must have found that he was the principal offender. *Id.*

13. *Id.*

14. *Id.*

15. *Id.*

16. 530 U.S. 466 (2000).

17. *Esparza*, 124 S. Ct. at 10; *see* Apprendi v. New Jersey, 530 U.S. 466, 490 (2000) (holding that except for prior convictions "any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt"); Sullivan v. Louisiana, 508 U.S. 275, 281 (1993) (stating that " 'beyond a reasonable doubt' factual finding cannot be made where the instructional error consists of a misdescription of the burden of proof, which vitiates *all* the jury's findings").

18. *Esparza*, 124 S. Ct. at 10.

19. *Id.* In addition, the Court granted Esparza's motion to proceed in forma pauperis. *Id.*

## *II. Holding*

The United States Supreme Court reversed the judgment of the Sixth Circuit and remanded the case for further consideration consistent with its opinion.[20] The Court concluded that "the Sixth Circuit exceeded its authority under § 2254(d)(1)" when it held "that harmless-error review is not available for this type of Eighth Amendment claim," and it failed to rely on precedent in reaching its decision.[21] Further, the Court held that the Ohio Court of Appeals's determination was not an " 'unreasonable *application* of clearly established Federal law.' "[22]

## *III. Analysis*

In order for a federal court to grant a state habeas petitioner relief for a claim that was adjudicated in state court on the merits, the adjudication must have " '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.' "[23] For a state court decision to be "contrary to" clearly established Federal law, it must apply a rule that is contradictory to the governing law set forth by the United States Supreme Court or address a set of facts that is indistinguishable from a decision of the United States Supreme Court but not withstanding, arrive at a different result than that of the precedent.[24] The Sixth Circuit neglected to cite or apply 28 U.S.C. § 2254(d)(1).[25] Moreover, a state court's decision is not " 'contrary to . . . clearly established Federal law' " merely as a result of failure to cite Supreme Court precedent.[26] The state court does not even need to be aware that Supreme Court precedent exist " 'so long as neither the reasoning nor the result of the state-court decision contradicts them.' "[27]

The Sixth Circuit stated that Ohio's failure to charge Esparza as "a 'principal' was the functional equivalent of 'dispensing with the reasonable doubt requirement.' "[28] The Supreme Court held that its precedent did not support this

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20. *Id.* at 12.

21. *Id.* at 11.

22. *Id.* at 12 (quoting 28 U.S.C. § 2254(d)(1) (2000)).

23. *Id.* at 10 (quoting 28 U.S.C. § 2254(d)(1)); *see* 28 U.S.C. § 2254(d)(1) (limiting a federal court's ability to issue writs of habeas corpus with respect to state court decisions; part of AEDPA).

24. 28 U.S.C. § 2254(d)(1); *see* Williams v. Taylor, 529 U.S. 362, 405–06 (2000) (interpreting the meaning of "contrary to clearly established Federal law").

25. *Esparza*, 124 S. Ct. at 10.

26. *Id.* (alteration in original) (quoting 28 U.S.C. §2254(d)(1)); *see* Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (stating that a state court's failure to cite Supreme Court precedent does not make the state court's decision contrary to clearly established Supreme Court precedent).

27. *Esparza*, 124 S. Ct. at 10 (quoting *Early*, 537 U.S. at 8).

28. *Id.* at 11 (quoting Esparza v. Mitchell, 310 F.3d 414, 421 (6th Cir. 2002)).

conclusion.[29] "In noncapital cases, [the Supreme Court has] often held that the trial court's failure to instruct a jury on all of the statutory elements of an offense is subject to harmless-error analysis."[30] The Court distinguished *Sullivan* from *Neder v. United States*[31] by stating that the error in *Sullivan* of failing "to instruct the jury that the State must prove the elements of an offense beyond a reasonable doubt—'vitiate[d] *all* the jury's findings,'" whereas the error in *Neder*, failing to instruct the jury on a single element of the offense, did not.[32] The Court reasoned that merely because the omission in this case occurred in the capital context, Supreme Court precedent set forth in cases like *Neder* did not dictate a contradictory result.[33] "Where the jury was precluded from determining only one element of an offense, [the Court] held that harmless-error review is feasible."[34]

The Court held that the Sixth Circuit exceeded its authority under § 2254(d)(1) by relying on the absence of precedent in the capital context and by determining that harmless-error review was not "available for this type of Eighth Amendment claim."[35] Because a federal court is precluded from overruling a state court for reaching a result contrary to the result that the federal court might itself have reached regarding an issue about which Supreme Court precedent is "at best, ambiguous," the Ohio Court of Appeals's decision was not " 'contrary to . . . clearly established Federal law.' "[36]

The Court further held that the Ohio Court of Appeals's decision was not an " 'unreasonable *application* of clearly established Federal law.' "[37] A constitutional error such as presented in this case is deemed to be harmless only if " 'it appears beyond a reasonable doubt that the error complained of did not contrib-

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29. *Id.*

30. *Id.* (citing Neder v. United States, 527 U.S. 1, 19 (1999)). In *Neder*, the Court stated that harmless error analysis is appropriate when the defendant is unable to bring forth facts showing that the jury verdict would have been different if the omitted element was presented and the court is unable to conclude otherwise. *Neder*, 527 U.S. at 17, 19.

31. 527 U.S. 1 (1999).

32. *Esparza*, 124 S. Ct. at 11 (quoting *Neder*, 527 U.S. at 11, 13–15 (internal quotation marks omitted)).

33. *Id.*; *see* Ring v. Arizona, 536 U.S. 584, 609 n.7 (2002) (stating that in a capital case "[w]e do not reach the State's assertion that any error was harmless because a pecuniary gain finding was implicit in the jury's guilty verdict"); Arizona v. Fulminante, 499 U.S. 279, 310 (1991) (holding that in a capital case the admission of an involuntary confession can be subject to harmless-error analysis); Clemons v. Mississippi, 494 U.S. 738, 752–54 (1990) (stating that unconstitutionally overbroad jury instructions during the sentencing phase of a capital trial can be analyzed under harmless error); Satterwhite v. Texas, 486 U.S. 249, 256–59 (1988) (finding that during the sentencing stage of a capital case admission of evidence in violation of the Sixth Amendment right to counsel can be analyzed under harmless error).

34. *Esparza*, 124 S. Ct. at 11.

35. *Id.*

36. *Id.* (alteration in original) (quoting 28 U.S.C. § 2254(d)(1) (2000)).

37. *Id.* at 11–12 (alteration in original) (quoting 28 U.S.C. § 2254(d)(1)).

ute to the verdict obtained.' "[38] Granting a habeas petition is only appropriate if the state court applied harmless-error scrutiny in an " 'objectively unreasonable' manner."[39] The Court stated that the Ohio Court of Appeals's determination was "hardly objectively unreasonable."[40] In *State v. Chinn*,[41] the Supreme Court of Ohio defined " 'principal offender' as 'the actual killer.' "[42] Moreover, in *Esparza*, the trial judge instructed the jury not only as to the elements of aggravated murder but also "that it must determine 'whether the State has proved beyond a reasonable doubt that the offense of Aggravated Murder was committed while the Defendant was committing Aggravated Robbery.' "[43] The Supreme Court concluded that due to these instructions, the jury verdict would have been the same if the jury had been instructed additionally to find that Esparza was the "principal" actor in the offense.[44] Because the Supreme Court could not find that the state court's conviction of Esparza of a capital offense was unreasonable, it was prohibited from setting aside the state court's decision on habeas review.[45]

### *IV. Application in Virginia*

It appears that the law as it is developing, although not yet based on Supreme Court precedent, would produce the same result as that in *Esparza*. Fourth Circuit precedent—*United States v. Jackson*[46] and *United States v. Higgs*[47]—permits aggravating factors to be inferred from the substantive counts of an indictment.[48] In *Jackson*, the Fourth Circuit adopted the reasoning of the district court that "[w]hile the language of the indictment is not identical to the

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38. *Id.* at 12 (quoting *Neder*, 527 U.S. at 15) (internal quotation marks omitted); *see also* Chapman v. California, 386 U.S. 18, 24 (1967) (setting forth the harmless-error analysis for constitutional violations).

39. *Esparza*, 124 S. Ct. at 12 (quoting Lockyer v. Andrade, 538 U.S. 63, 76 (2003)).

40. *Id.*

41. 709 N.E.2d 1166 (Ohio 1999).

42. *Esparza*, 124 S. Ct. at 12 (quoting State v. Chinn, 709 N.E.2d 1166, 1177 (Ohio 1999) (internal quotation marks omitted)).

43. *Id.* (quoting *Esparza*, 310 F.3d at 432 (Suhrheinrich, J., dissenting)) (internal quotation marks omitted).

44. *Id.* The Court reiterated that Esparza was the only defendant charged in the indictment and further stated that until the case was heard in federal district court there was no evidence presented that anyone else was involved in the crime. *Id.* at 12 & n.3.

45. *Id.* at 12.

46. 327 F.3d 273 (4th Cir. 2003).

47. 353 F.3d 281 (4th Cir. 2003).

48. United States v. Jackson, 327 F.3d 273, 303–04 (4th Cir. 2003); United States v. Higgs, 353 F.3d 281, 297–98 (4th Cir. 2003); *see* Meghan H. Morgan, Case Note, 16 CAP. DEF. J. 221 (2003) (analyzing United States v. Jackson, 327 F.3d 273 (4th Cir. 2003)); Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 499 (2004) (analyzing United States v. Higgs, 353 F.3d 281 (4th Cir. 2003)).

language of the notice of intent to seek the death penalty, it contains all the elements necessary under the federal death penalty to charge a capital crime."[49]

In Virginia, in contrast to the federal system, the Fifth Amendment cannot be relied on to require aggravating factors be included in indictments because the Fifth Amendment has not been applied to the states.[50] In Virginia, there is neither a federal nor a state constitutional right to a grand jury. However, Virginia Code section 19.2-217 provides in part that "no person shall be put upon trial for any felony, unless an indictment or presentment shall have first been found or made by a grand jury."[51] Therefore, after *Ring v Arizona*,[52] aggravating factors are elements that must be included in indictments.[53] Because of the statutory language of the Virginia aggravating factors, it is unlikely that the substance of a count will ever be read in a way that allows a *Jackson* inference to be made.[54]

Additionally, capital defense counsel must be aware that, in the absence of direct Supreme Court precedent, a state court can rely on clearly established non-capital federal law as indirect authority to deny a petitioner federal habeas relief. When Supreme Court precedent is "at best, ambiguous," federal courts will be precluded from overruling a state court's decision because such a decision cannot be "contrary to" established Supreme Court precedent.[55] Therefore, the absence of directly controlling precedent is, itself, controlling.

It is also important that Virginia attorneys recognize that a claim based on the absence of a statutory aggravator in the indictment can be procedurally defaulted if not raised at trial. The time at which the issue should be raised involves complex tactical questions. Virginia practitioners are encouraged to consult the Virginia Capital Case Clearinghouse when dealing with this issue.[56]

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49. *Jackson*, 327 F.3d at 282 (Niemeyer, J., concurring).

50. *See* Hurtado v. California, 110 U.S. 516, 534–35 (1884) (holding that the Fifth Amendment right to presentment or indictment of a grand jury does not apply to the states); Benson v. Commonwealth, 58 S.E.2d 312, 313–14 (Va. 1950) (finding that while the Virginia Code prevents the trial of a person on a felony charge except upon an indictment found by a grand jury, this is purely a statutory requirement and is not predicated upon any constitutional guarantee); VA. CODE ANN. § 19.2-217 (Michie 2000) (setting forth the state statutory right to a grand jury for felony offenses).

51. VA. CODE ANN. § 19.2-217.

52. 536 U.S. 584 (2002).

53. *Ring*, 536 U.S. at 609 (standing for the proposition that when a finding of at least one aggravating factor is necessary for the imposition of the death sentence, that aggravating factor is an element of the aggravated offense and must be found by a jury as required by the Sixth Amendment).

54. *See* Morgan, *supra* note 48, at 228–31 (providing a more complete explanation of *Jackson*); *id.* at 230 n.84 (explaining a situation in which a *Jackson* inference could be made in Virginia).

55. *Esparza*, 124 S. Ct. at 11.

56. The Virginia Capital Case Clearinghouse can be reached at (540) 458-8557.

### *V. Conclusion*

Under 28 U.S.C. § 2254(d)(1), a reviewing federal court cannot overturn a state court decision unless that decision was "contrary to, or involved an unreasonable application of, clearly established Federal law."[57] In the context of a death verdict in which the indictment failed to allege one element of the offense, the verdict will survive federal habeas review so long as the jury implicitly found that element when arriving at its decision. Such an error will be analyzed under a harmless-error analysis.

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57. 28 U.S.C. § 2254(d)(1) (2000).

# CASE NOTES:

## United States Court of Appeals for the Fourth Circuit