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Brown v. Luebbers 344 F.3d 770 (8th Cir. 2003)

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I. Facts

In 1991, a Missouri jury found Vernon Brown ("Brown") guilty of first degree murder for strangling Synetta Ford to death in her basement apartment.[1] In the sentencing phase of the trial Brown sought to introduce as mitigation a letter from his brother, Darius Turner ("Turner"), a member of the United States Army then serving in Saudi Arabia during Operation Desert Shield.[2] In the letter Turner recounted how, as a child, Brown had been a zealous guardian of his little brother and his little brother's friends and claimed that he still cared for Brown a great deal, perhaps more than he cared for any other of his family members.[3] The trial judge found the letter to be inadmissible hearsay and declined to admit it into evidence.[4] Subsequently, the jury sentenced Brown to death.[5]

Pursuant to Missouri Supreme Court Rule 29.15(a), Brown moved for post-conviction relief in the trial court.[6] The trial court denied the motion.[7] The Missouri Supreme Court affirmed the trial court's decisions in a consolidated appeal.[8] Thereafter, Brown sought habeas relief in federal district court.[9] The district court declined to grant relief on any of the thirty-one grounds Brown presented but issued a certificate of appealability ("COA") on eleven of those

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1. State v. Brown, 998 S.W.2d 531, 537 (Mo. 1991).
2. *Id.* at 549.
3. Brown v. Luebbers, 344 F.3d 770, 784–85 (8th Cir. 2003).
4. *Id.* at 785.
5. *Id.* at 773.
6. *Id.* After conviction of a felony in a Missouri state court, if the convicted person claims the sentence was contrary to Missouri or federal law, was in excess of the maximum sentence authorized by such laws, was imposed outside the sentencing court's jurisdiction, or was imposed on that person after a trial in which she did not have the benefit of effective assistance of counsel, that person "may seek relief in the sentencing court pursuant to the provisions of this Rule 29.15." MO. SUP. CT. R. 29.15(a).
7. *Brown*, 344 F.3d at 773.
8. *Brown*, 998 S.W.2d at 537.
9. *Brown*, 344 F.3d at 773.

grounds.[10] Brown appealed to the United States Court of Appeals for the Eighth Circuit.[11]

II. Holding

Because the Supreme Court of Missouri failed to rule on Brown's claim that the trial judge's refusal to admit his brother's letter into evidence violated his constitutional rights under the Eighth and Fourteenth Amendments, the Eighth Circuit considered the constitutional question on its merits.[12] The Eighth Circuit found that the trial court violated Brown's constitutional rights by excluding the letter.[13] The court also concluded that the error was not harmless.[14] Therefore, the Eighth Circuit overturned the district court and granted Brown's petition for a writ of habeas corpus.[15]

III. Analysis

The Eighth Circuit declined to apply the stringent standard of review found in 28 U.S.C. § 2254(d) to Brown's habeas claim.[16] By its own terms, § 2254 only applies to claims "adjudicated on the merits in State court proceedings."[17] Although Brown argued that the trial judge's refusal to admit the letter violated his rights under the Eighth and Fourteenth Amendments, the Supreme Court of Missouri considered the claim only in light of state evidentiary law and noted that the " 'exclusion does not in the context of this case seem prejudicial.' "[18] Because there was no state decision within the meaning of § 2254 to which that section's

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10. *Id.*; *see* 28 U.S.C. § 2253(c)(1) (2000) (allowing a district judge to issue a COA on a petitioner's habeas claim after denying that claim; part of AEDPA); 4TH CIR. R. 22(a)(2) (stating that a district judge may issue a COA after denying a petitioner habeas relief). For a complete discussion of the new 4TH CIR. R. 22(a), *see generally* Maxwell C. Smith, Rule Note, 16 CAP. DEF. J. 635 (2004) (analyzing 4TH CIR. R. 22(a)).

11. *Brown*, 344 F.3d at 773. This case note will only address Brown's claim that his brother's letter should have been admitted into evidence. The court denied relief on the remainder of Brown's claims. *Id.* at 784.

12. *Id.* at 784–86.

13. *Id.* at 786.

14. *Id.*

15. *Id.* at 787.

16. *Id.* at 785; *see* 28 U.S.C. § 2254(d) (2000) (limiting a federal judge's ability to grant habeas relief to instances in which the petitioner shows that a state court decision on the merits of the claim "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 "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"; part of AEDPA).

17. 28 U.S.C. § 2254(d); *Brown*, 344 F.3d at 785.

18. *Brown*, 344 F.3d at 785 (quoting *Brown*, 998 S.W.2d at 550).

standards could be applied, the Eighth Circuit heard Brown's constitutional argument on its merits.[19]

The Eighth Circuit held that the trial court's exclusion of Turner's letter violated both the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment.[20] The Eighth Circuit noted that the Supreme Court held in *Lockett v. Ohio*:[21]

> "[T]he Eighth and Fourteenth Amendments require that the sentencer, in all but the rarest kind of capital case, 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."[22]

Additionally, the Court previously held in *Green v. Georgia*[23] that the exclusion of substantially reliable evidence, " 'highly relevant to a critical issue in the punishment phase of the trial,' " violated the Due Process Clause of the Fourteenth Amendment.[24] Finally, failure to admit mitigating evidence in violation of the Eighth and Fourteenth Amendments is reversible error unless the error was harmless.[25]

The Eighth Circuit noted that the authenticity of the letter was not in doubt.[26] Therefore, the exclusion of the letter violated due process "if it was highly relevant to a critical issue."[27] The Eighth Circuit found that the letter was relevant because it referred to Brown favorably and showed Turner's affection for him.[28] The court concluded that exclusion of the letter violated both due process and the Eighth Amendment.[29] The court found that this error constituted grounds for habeas relief because it was not harmless.[30] The Eighth Circuit

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19. *Id.*

20. *Id.* at 786.

21. 438 U.S. 586 (1978).

22. *Brown*, 344 F.3d at 785 (quoting Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)); *Lockett*, 438 U.S. at 604; *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted."); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (adopting the rule of *Lockett*).

23. 442 U.S. 95 (1979).

24. *Brown*, 344 F.3d at 785 (quoting Green v. Georgia, 442 U.S. 95, 97 (1979) (per curiam)); *see* U.S. CONST. amend. XIV, § 1 (stating that no state shall "deprive any person of life, liberty, or property, without due process of law").

25. *Brown*, 344 F.3d at 786 (citing Hitchcock v. Dugger, 481 U.S. 393, 399 (1987)).

26. *Id.* at 785.

27. *Id.* at 785–86.

28. *Id.* at 786.

29. *Id.* The court did not explain why it found that the Eighth Amendment was violated, but apparently the rule from *Lockett* encompassed this case as it constituted a capital case in which a sentencer was precluded from considering a mitigating factor. *Id.* at 785–86.

30. *Id.* at 786.

reasoned that because Brown's character was the pivotal issue at this phase of the trial and the letter sought to directly contradict the State's claim that Brown's life was not worth saving by illustrating his importance to his brother, exclusion of the letter was not harmless.[31] Moreover, the court found that the letter was all the more compelling because Turner was a member of the armed forces, the trial was held during Operation Desert Shield, and the trial judge frequently lauded the service of the armed forces in that engagement in the presence of the jury.[32] Therefore, the court granted Brown a writ of habeas corpus.[33]

IV. Application in Virginia

In Virginia, the admissibility of Turner's letter would have been governed by section 19.2-264.4(B) of the Virginia Code. That section reads, in pertinent part:

> In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.
>
> Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any other facts in mitigation of the offense.[34]

Although the wording of the second sentence of the statute implies that only relevant mitigating evidence must satisfy the rules of evidence, the Supreme Court of Virginia has recently held that it applies to both mitigating and aggravating evidence.[35] Under Virginia law, Turner's letter would have been hearsay and

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31. *Brown*, 344 F.3d at 786. Judge Bowman vigorously dissented on this point. *Id.* at 787–89 (Bowman, J., dissenting). He believed that the aggravating evidence was so powerful that exclusion of the mitigating evidence was "harmless beyond a reasonable doubt." *Id.* at 788. (Bowman, J., dissenting).

32. *Id.* at 786. The judge said, "I suppose that there is only one type of service that a citizen can render to his government or to society above jury duty is that which is now being enacted in the Gulf area, war, that's the highest duty that a citizen owes to his country." *Id.* He also stated that "[s]erving your country in times of conflict and things of that nature is the only service a citizen can perform that is greater than serving on jury duty," and "I know we will all keep our troops in the Persian Gulf in mind when we say our prayers." *Id.*

33. *Id.*

34. VA. CODE ANN. § 19.2-264.4(B) (Michie Supp. 2003).

35. *Id.*; *see* Jackson v. Commonwealth, 590 S.E.2d 520, 526 (Va. 2004) (finding that § 19.2-264.4(B) does not allow otherwise inadmissible hearsay evidence to be admitted during the sentencing phase of trial); Powell v. Commonwealth, 590 S.E.2d 537, 555–56 (Va. 2004) ("Powell's assertion that Code § 19.2-264.4(B) permits the introduction of hearsay evidence not otherwise subject to an exception is simply wrong."); Lovitt v. Warden, 585 S.E.2d 801, 826 (Va. 2003) (noting that affidavits by the petitioner's family members would not be admissible in the sentencing phase of the trial because, "[u]nlike some other jurisdictions, Virginia does not permit the admission of

excluded.[36] This result is at odds with the United States Supreme Court precedent discussed in *Brown v. Luebbers*.[37] The Supreme Court has repeatedly affirmed its decision in *Lockett* and stated that under the Eighth Amendment, as applied to the states, in a capital case a sentencer must be allowed to consider all mitigating factors including aspects "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."[38] Therefore, under Supreme Court precedent, section 19.2-264.4(B) is unconstitutional to the extent it precludes a capital sentencer from considering such relevant evidence in mitigation.

Additionally, section 19.2-264.4(B), as recently construed by the Supreme Court of Virginia, could violate a defendant's due process rights as defined by the Supreme Court in *Green*. Because the rule announced in *Green* is not nearly as broad as the one in *Lockett*, state courts have applied it, in varying degrees of severity, to admit normally inadmissible evidence during the sentencing phase if the evidence is relevant and reliable.[39] In *Green*, the Court noted that " 'the hearsay rule may not be applied mechanistically to defeat the ends of justice.' "[40]

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such hearsay evidence during penalty phase proceedings"); Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 533 (2004) (analyzing (Jerry) Jackson v. Commonwealth, 590 S.E.2d 520 (Va. 2004)); Terrence T. Egland, Case Note, 16 CAP. DEF. J. 591 (2004) (analyzing Powell v. Commonwealth, 590 S.E.2d 537 (Va. 2004)); Meghan H. Morgan, Case Note, 16 CAP. DEF. J. 573 (2004) (analyzing Lovitt v. Warden, 585 S.E.2d 801 (Va. 2003)). Please contact the Virginia Capital Case Clearinghouse at (540) 458-8557 for a motion to bar the introduction of hearsay aggravating evidence during the sentencing phase of a capital trial and a motion to declare section 19.2-264.4(B) of the Virginia Code unconstitutional as applied to mitigating elements.

36. *See* Taylor v. Commonwealth, 502 S.E.2d 113, 117 (Va. Ct. App. 1998) ("Hearsay is an out-of-court statement offered to prove the truth of the matter asserted." (internal quotation marks omitted)); CHARLES E. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 18-1 (6th ed. 2003) (defining hearsay in Virginia as a statement not made by a testifying declarant during trial offered in an attempt to prove the matter asserted in the statement); *see also Lovitt*, 585 S.E.2d at 826 (finding that affidavits from defendant's family members to be used as mitigation would have been inadmissible hearsay at trial).

37. *Brown*, 344 F.3d at 785–86.

38. *See Lockett*, 438 U.S. at 604 (stating that under the Eighth and Fourteenth Amendments, a sentencer in most capital cases must "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"); *Eddings*, 455 U.S. at 110 (applying the rule from *Lockett*); *see also* McKoy v. North Carolina, 494 U.S. 433, 438 (1990) (affirming that a capital sentencer may not be precluded from considering mitigating evidence); Mills v. Maryland, 486 U.S. 367, 374 (1988) (same).

39. *See, e.g.*, People v. Weaver, 29 P.3d 103, 166 (Cal. 2001) (declining to adopt a broad reading of *Green* and allowing the introduction of mitigating evidence which would otherwise violate state evidentiary rules only when the excluded evidence was both "highly relevant and reliable"); Drane v. State, 455 S.E.2d 27, 30–31 (Ga. 1995) (allowing evidence which is both reliable and relevant to be admitted in sentencing phase even if normally the evidence would be inadmissible under state evidentiary rules).

40. *Green*, 442 U.S. at 97 (quoting Chambers v. Mississippi, 410 U.S. 284, 302 (1973)).

Section 19.2-264.4(B) has no exception for highly relevant and reliable mitigating evidence during a capital sentencing phase. The Supreme Court of Virginia has previously upheld a trial court's decision to bar hearsay mitigating evidence in the sentencing phase of trial.[41] On review, the Fourth Circuit determined that the Supreme Court of Virginia had not violated *Green* in finding that the evidence in that case could be excluded as hearsay during the sentencing phase.[42] More recently, in *Louitt v Warden*,[43] the Virginia high court cited section 19.2-264.4(B) for the proposition that affidavits by a petitioner's family members would not be admissible in the sentencing phase of the trial because, "[u]nlike some other jurisdictions, Virginia does not permit the admission of such hearsay evidence during penalty phase proceedings."[44] If the court meant that all mitigating hearsay evidence is inadmissible during the sentencing phase of trial, then the rule in Virginia would clearly run afoul of the Supreme Court's prohibition against the mechanistic application of state hearsay rules to exclude relevant and reliable evidence in mitigation. Relying on *Louitt*, the court stated that "in Virginia, hearsay evidence also is not admissible during a penalty phase proceeding."[45] Therefore, to the extent that it would bar relevant and reliable mitigating evidence during the sentencing phase of a capital trial, section 19.2-264.4(B) is unconstitutional under the Due Process Clause, as delineated by the United States Supreme Court's holding in *Green*.

V. Conclusion

This case illustrates the reasons why section 19.2-264.4(B) is unconstitutional. The cases relied on by the Eighth Circuit to overrule the trial court's exclusion of Turner's letter would apply with equal force to overruling the exclusion of evidence pursuant to section 19.2-264.4(B). Under *Green* and *Lockett*, section 19.2-264.4(B) is unconstitutional to the extent it bars relevant and reliable mitigating evidence during the sentencing phase of a capital trial.

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41. *See* Buchanan v. Commonwealth, 384 S.E.2d 757, 773 (Va. 1989) (upholding the trial court's decision to exclude the defendant's expert witnesses' reports of interviews with others under the hearsay rule).

42. Buchanan v. Angelone, 103 F.3d 344, 348–49 (4th Cir. 1996) (finding that none of the special considerations in *Green* were present in the petitioner's case).

43. 585 S.E.2d 801 (Va. 2003).

44. *Louitt*, 585 S.E.2d at 826.

45. *Jackson*, 590 S.E.2d at 526 (citing *Louitt*, 585 S.E.2d at 826); *see Powell*, 590 S.E.2d at 555–56 (stating that section 19.2-264.4(B) excludes hearsay evidence from the sentencing phase of a capital case).