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GASKINS v. MCKELLAR 916 F.2d 941 (1990)

CAGE v. LOUISIANA

111 S. Ct. 328 (1990)
United States Supreme Court

FACTS

On April 16, 1986, Tommy Cage attacked two college students wearing medallions on gold chains. When one of the students attempted to flee, Cage shot him in the lower back with a .38 caliber gun. The jury found that Cage then fatally shot the victim in the head, took the medallion, and ran into a nearby housing project. As a result, the Louisiana trial court convicted Cage of first-degree murder and sentenced him to death.

On appeal to the Supreme Court of Louisiana, Cage argued that the reasonable doubt instruction used in the guilt phase of his trial was constitutionally defective under the United States Supreme Court opinion *In re Winship*, 397 U.S. 358 (1970) (holding that the accused is protected against conviction under the fourteenth amendment except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). The instruction Cage challenged stated in relevant part:

> If you entertain a reasonable doubt as to any fact or element necessary to constitute the defendant's guilt, it is your duty to give him the benefit of that doubt and return a verdict of not guilty. Even where the evidence demonstrates a probability of guilt, if it does not establish such guilt beyond a reasonable doubt, you must acquit the accused. This doubt, however, must be a reasonable one; that is one that is founded upon a real tangible substantial basis and not upon mere caprice and conjecture. *It must be such doubt as would give rise to a grave uncertainty*, raised in your mind by reasons of the unsatisfactory character of the evidence or lack thereof. A reasonable doubt is not a mere possible doubt. *It is an actual substantial doubt.* It is a doubt that a reasonable man can seriously entertain. What is required is not an absolute or mathematical certainty, but a *moral certainty. State v. Cage*, 554 So.2d 39, 41 (La. 1989) (emphasis added).

The Supreme Court of Louisiana concluded that "taking the charge as a whole, reasonable persons of ordinary intelligence would understand the definition of 'reasonable doubt.'" *Id.* The United States Supreme Court granted Cage's petition for a writ of certiorari, and in a *per curiam* opinion, vacated Cage's sentence and remanded the case to the Supreme Court of Louisiana.

HOLDING

The Supreme Court held that the wording of the jury instruction could lead a reasonable juror to find guilt based on a degree of proof lower than that required by the Due Process Clause. The Court reasoned that "the words 'substantial' and 'grave,' as they are commonly understood, suggest a higher degree of doubt than is required for acquittal under the reasonable doubt standard." *Cage v. Louisiana*, 111 S. Ct. 328, 329-330 (1990). When those words are considered with the requirement that the defendant be found guilty by a "moral certainty," as opposed to an evidentiary certainty, jurors could easily find the defendant in this case guilty.

ANALYSIS/APPLICATION IN VIRGINIA

In this case the Court returned to a previously employed standard of review for ambiguous jury instructions: A standard different from the one only recently announced in *Boyde v. California*, 110 S. Ct. 1190 (1990). *See* case summary of *Boyde v. California*, Capital Defense Digest, Vol. 3, No. 1, p. 11, (1990). The *Cage* Court held that when reviewing an ambiguous jury instruction, the Court should consider "how reasonable jurors could have understood the charge as a whole." *Cage*, 111 S. Ct. at 329. This standard is consistent with the approach previously established in *Francis v. Franklin*, 471 U.S. 307 (1985). Conversely, the *Boyde* Court had framed the question as "whether there is a reasonable likelihood that the jury has applied the challenged jury instructions in a way that prevents the consideration of constitutionally relevant evidence." *Boyde*, 110 S. Ct. at 1196.

The Virginia Supreme Court, when reviewing challenged jury instructions, has also engaged in the "taking the charge as a whole" analysis which the Louisiana Supreme Court utilized in upholding Cage's conviction. For example, the Virginia Supreme Court has said that even though a challenged instruction was not artfully drawn, "we are of the opinion that, read as a whole, it fairly expounds the thrust of the statute." *M. Smith v. Commonwealth*, 219 Va. 455, 480, 248 S.E.2d 135, 150 (1978), *Pope v. Commonwealth*, 234 Va. 114, 360 S.E.2d 352 (1987), *Turner v. Commonwealth*, 234 Va. 543, 364 S.E.2d 483 (1988), *Buchanan v. Commonwealth*, 238 Va. 389, 384 S.E.2d 757 (1989), *Spencer v. Commonwealth*, 238 Va. 275, 384 S.E.2d 785 (1989). This standard response, that the instruction "read as a whole" is fair, did not prevail in the *Cage* decision.

The former *Boyde* standard of review, that examined the likely manner in which the jury as a whole applied the challenged instruction, made it more difficult for the defendant to obtain relief. Thus, the U.S. Supreme Court's apparent return to a "reasonable juror" evaluation standard may indicate that the Court will be more willing to examine potentially unconstitutional jury instructions.

Summary and analysis by:
Ginger M. Jonas

GASKINS v. MCKELLAR

916 F.2d 941 (1990)
United States Court of Appeals, Fourth Circuit

FACTS

Donald Henry Gaskins, who was serving ten life sentences, nine of which were for murder, was convicted and sentenced to death for the capital murder of fellow death row inmate Rudolph Tyner. Gaskins appealed to the South Carolina Supreme Court which affirmed both his conviction and sentence. *State v. Gaskins*, 284 S.C. 105, 326 S.E.2d 132 (1985), *cert. denied*, 471 U.S. 1120 (1985). Gaskins' subsequent efforts to obtain state post-conviction relief also failed. *See Gaskins v. State*, No. 85-CP-40-3466, Letter Order (S.C. Jan. 7, 1987), *cert. denied*, 482 U.S. 909 (1987).

Gaskins sought federal review under 28 U.S.C. §2254 (1990) in the United States District Court for the District of South Carolina. The district court denied the writ without an evidentiary hearing. Gaskins

then initiated this appeal to the United States Court of Appeals for the Fourth Circuit.

HOLDING

The court of appeals affirmed the district court's denial of an evidentiary hearing on Gaskins' habeas petition and the dismissal of his petition for failure to show entitlement to federal collateral relief. *Gaskins v. McKellar*, 916 F.2d 941 (1990). While Gaskins asserted several grounds for relief, the holdings of the Fourth Circuit which may be of particular interest to Virginia attorneys are the following: (1) the trial court's refusal to exclude a juror for cause did not violate Gaskins' sixth amendment right to an impartial jury even though the juror admitted during voir dire that, in his opinion, Gaskins should have been sentenced to death for his prior unrelated murder convictions; (2) the trial court's instructions to the jury on the standard of proof necessary to convict, which equated reasonable doubt with a substantial doubt, did not violate due process; and (3) testimony during the sentencing phase concerning Gaskins' prior-vacated death sentence did not violate the eighth amendment.

ANALYSIS/APPLICATION IN VIRGINIA

(A) JURY SELECTION

Gaskins unsuccessfully challenged one juror for cause but did not use an available peremptory challenge against him. That juror admitted on voir dire that in his "honest opinion . . . [Gaskins] was found guilty of those earlier murders, [and] he should have been executed at that time." *Gaskins*, 916 F.2d at 949 (brackets in original). Additionally, the juror stated that "if Gaskins were found guilty of Tyner's murder, and that if it were shown that Gaskins had killed before, [the juror] would be predisposed to impose a death penalty." *Id.* After reviewing the juror's voir dire testimony, the Fourth Circuit held that the district judge did not err in concluding that the juror could be impartial. Relying on *Witherspoon v. Illinois*, 391 U.S. 510 (1968), the Fourth Circuit declared that the most that can be asked of a jury member is that he not be "irrevocably committed" to one view of capital punishment. *Gaskins*, 916 F.2d at 949 (quoting *Witherspoon v. Illinois*, 391 U.S. 510 (1968)).

However, *Wainwright v. Witt*, 469 U.S. 810 (1985) superseded *Witherspoon*. In *Witt*, the U.S. Supreme Court adopted a less stringent standard to exclude a juror for cause, asking only whether the juror's view would "prevent or substantially impair the performance of his duties in accordance with his instructions and oath." *Id.* In addition, the Court declared that the judgment of a trial court will be entitled to a presumption of correctness. *Id.*

While the Fourth Circuit's reliance on *Witherspoon*, which has not been overruled but only superseded, may not be wrong, it raises the issue of what standard the Virginia and other Fourth Circuit courts will apply in the future, particularly whether the court will find that prospective jurors who oppose the death penalty are nevertheless qualified unless one expresses an irrevocable commitment against it. *See* Balske, *The Demise of the Witherspoon Test and Other Important Developments in Death-Penalty Defense*, The Champion, April, 1985, for a full discussion of how *Witt* changed the *Witherspoon* standard for exclusion of potential jurors.

(B) JURY INSTRUCTIONS - STANDARD OF PROOF

The trial court, in its instructions to the jury, defined reasonable doubt, the absolute standard of proof necessary to convict, as "a doubt for which you can give a reason[,] [i]t is a substantial doubt." *Gaskins*, 916 F.2d at 952 (brackets in original). Gaskins asserted that this definition relieved the prosecution of proving every element of the crime beyond a reasonable doubt as required by *In re Winship*, 397 U.S. 358 (1970), in violation of due process. *Gaskins*, 916 F.2d at 952.

The Fourth Circuit acknowledged that a definition such as this could be confusing. Indeed, the court stated that at some point, "a reasonable doubt definition may be so incomprehensible or potentially prejudicial that it requires reversal." *Id; see also United States v. Moss*, 756 F.2d 329, 333 (1985). However, after reviewing the context of the entire instruction in conjunction with other jury instructions, the court held that the trial judge's use of a lower standard of proof was not "likely to mislead the jury into finding no reasonable doubt, if there was some in fact." *Gaskins*, 916 F.2d at 952 (quoting *Smith v. Bordenkircher*, 718 F.2d 1273, 1277 (1983)).

Since the Fourth Circuit opinion in *Gaskins*, the U.S. Supreme Court reversed a conviction where a reasonable juror could have interpreted the reasonable doubt instruction to allow a finding of guilt based on a degree of proof below that required by due process. *Cage v. Louisiana*, 111 S.Ct. 328 (1990). *See* case summary of *Cage v. Louisiana*, Capital Defense Digest, this issue. The trial court provided a jury instruction strikingly similar to the one given in the present case which equated reasonable doubt with a substantial doubt. Just as in *Gaskins*, the appellate court similarly argued that, taking the instruction as a whole rather than out of context, reasonable persons of ordinary intelligence would understand the definition of reasonable doubt. *Cage*, 111 S.Ct. at 329 (quoting *State v. Cage*, 554 So.2d 39, 41 (1989)).

Unfortunately, the Supreme Court decided *Cage* after Gaskins was convicted and while he was seeking habeas review. It remains to be seen whether Gaskins will now get the benefit of this decision. In *Teague v. Lane*, 489 U.S. 288 (1989), the Supreme Court adopted a theory of retroactivity which bars retroactive application of court decisions which break new legal ground or whose "result was not dictated by precedent existing at the time the defendant's conviction became final." *Id.* The purpose of the "new rule" doctrine is to promote finality based on faithful application of well established constitutional standards existing at the time the case is heard, even though later decisions may modify these standards. *Butler v. McKellar*, 110 S. Ct. 1212 (1990). *See* case summary of *Butler v. McKellar*, Capital Defense Digest, Vol. 3, No. 1, p. 2 (1990).

An alternative basis for relief exists for Gaskins. In *Francis v. Franklin*, 471 U.S. 307 (1985), the Supreme Court held that a jury instruction that shifted the burden of persuasion on the element of intent was not harmless error where the intent was at issue and the state's evidence on intent was not overwhelming. Similarly, where it is the jury's duty to convict only if the state has proven its case beyond a reasonable doubt, lowering the standard of proof can not be harmless error. Arguably, *Cage* was "dictated" by *Winship* and *Francis*.

(C) SENTENCING - INTRODUCTION OF ARBITRARY FACTORS

During the penalty phase of Gaskins' trial, the state introduced evidence of Gaskins' prior death sentence, vacated when the South Carolina Supreme Court declared its death penalty statute unconstitutional. Gaskins argued that this information implied that, regardless of whether Gaskins should be sentenced to death for the murder of Tyner, the jury could properly reimpose the earlier death sentence, vacated, after all, on a technicality. *Gaskins*, 916 F.2d at 954. Gaskins argued that this testimony introduced arbitrary factors in the sentencing decision in violation of *Booth v. Maryland*, 482 U.S. 496 (1987) (introduction of a victim impact statement or evidence describing personal characteristics of the victim, the emotional impact of the crime on the victim's family, and the family members' opinions and characterizations of the crimes and the defendant violates the eighth amendment because this information is irrelevant to the sentencing decision).

Even though this third claim did not succeed, the Fourth Circuit agreed that "evidence of a prior-vacated death penalty is of limited, if any, relevance to the jury's decision whether to impose the death penalty." *Id.* However, the court held that this information was not so "constitutionally impermissible or totally irrelevant to the sentencing process" as to rise to a *Booth* violation. *Id.* (quoting *Zant v. Stephens*, 462 U.S. 862 (1983)).

South Carolina v. Gathers, 109 S. Ct. 2207 (1989), supports the even broader proposition that comments made by the prosecution to the jury about the victim's character are irrelevant to the sentencing decision and a violation of the defendant's eighth amendment rights. "For the purposes of imposing the death penalty . . . the defendant's punishment must be tailored to his personal responsibility and moral guilt." *Gathers*, 109 S. Ct. 2207, 2210 (quoting *Enmund v. Florida*, 458 U.S. 782 (1982)). It seems reasonable to argue that any evidence, including evidence of a prior vacated death sentence, which does not relate to a heightened degree of personal culpability is also irrelevant. This theory of relevancy is only true of information about Gaskins' previous sentences, and obviously does not apply to revelation of Gaskins' prior murder convictions.

Both *Booth* and *Gathers* were 5 to 4 decisions with different Court memberships. During this past term, the U.S. Supreme Court as currently constituted initially agreed to reconsider *Booth* and *Gathers* in *Ohio v. Huertas*, 1991 WL 3926 (U.S.). However, the Court ultimately dismissed the state's petition for certiorari as improvidently granted and failed to rule on the Ohio Supreme Court's finding that admission of victim impact evidence violated the defendant's constitutional right to have the sentencing decision made by the jury and judge.

Summary and analysis by:
Anne E. McInerney

EVANS v. MUNCIE

916 F.2d 163 (1990)
United States Court of Appeals, Fourth Circuit

FACTS

Wilbert Lee Evans shot and killed a deputy sheriff while attempting to escape from state custody. He was convicted of capital murder and sentenced to death in 1981. This sentence was vacated when the Commonwealth confessed error on the sentencing proceedings. A new jury was impaneled and subsequently recommended the death penalty based upon a finding of "future dangerousness." *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984).

Evans was denied relief at the state habeas level, and in his first federal habeas petition. *Evans v. Thompson*, 881 F.2d 117 (4th Cir. 1989); *see also* case summary of *Evans v. Thompson*, Capital Defense Digest, Vol. 2, No. 1, p. 10 (1989). After his second habeas petition at the federal level, the district court for the Eastern District of Virginia granted a stay of execution. The Commonwealth appealed this decision, and the United States Court of Appeals for the Fourth Circuit vacated the stay of execution.

HOLDING

Evans raised two claims in support of his motion to stay his execution. His first claim was that the eighth and fourteenth amendments prohibit the execution of a defendant when his behavior subsequent to sentencing casts doubt upon the existence of the sole aggravating factor supporting the death sentence. Evans also asserted that the Commonwealth violated the eighth and fourteenth amendments by refusing to provide a forum to hear and decide his first claim. Evans presented, for the purpose of demonstrating that he lacked the aggravating factor of "future dangerousness," evidence that he was instrumental in protecting the lives of prison employees during an escape attempt by several death row inmates.

The United States Court of Appeals for the Fourth Circuit held that these claims constituted "new rules" which federal courts may not use in collateral proceedings to overturn a final state conviction. The court also held that his claims did not allege a constitutional violation remediable by a federal court.

ANALYSIS / APPLICATION IN VIRGINIA

The "new rule" doctrine states that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review." *Teague v. Lane*, 489 U.S. 288 (1989). The *Teague* Court defined a new rule as one "not dictated by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (emphasis in original). The purpose of the "new rule" doctrine is to allow state courts to issue their decisions based upon a faithful application of well established constitutional standards existing at the time the case is heard, even though later decisions may modify those standards. *Butler v. McKellar*, 110 S.Ct. 1212, 1217 (1990); *see also* case summary, *Butler v. McKellar*, Capital Defense Digest, Vol. 3, No. 1, p. 2 (1990).

In the instant case, the Fourth Circuit determined that Evans was asking for a new rule. However, Evans purposely phrased his claim in a manner that he hoped would place it within one or both of the recognized exceptions to the *Teague* new rule doctrine. Nonetheless, the court found that neither of the exceptions applied. While the Fourth Circuit's holding may be correct, the reasoning employed deserves some discussion, particularly with regard to future cases.

The first exception to *Teague* is substantive in that it allows the application of a new rule on collateral review if the new rule places "certain kinds of conduct beyond the power of the criminal lawmaking authority to proscribe." *Evans*, 916 F.2d at 166, quoting *Teague*, 489 U.S. at 311. According to the Fourth Circuit, Evans' claim advocated the new rule that "the Constitution requires a state to reestablish the validity of an error-free sentence because a prisoner desires to present character evidence based on his post-sentencing conduct." *Evans*, 916 F.2d at 165. On that characterization of his claim, the court held that the first exception had nothing to do with the new rule being sought.

The claim that Evans put forward could have received deeper analysis. A recent decision by the United States Supreme Court stated that the first exception includes cases where the imposition of a particular form of punishment is prohibited on a certain class of individuals. *Penry v. Lynaugh*, 109 S.Ct. 2934, 2952-53 (1989). The irrelevance of a first exception claim by Evans seems less apparent when it is phrased in terms of *Penry*. The more favorable characterization of Evans' claim is that he belongs to a class of persons who may not be executed. His specific argument is that the Constitution protects individuals sentenced to death solely upon the aggravating factor of future dangerousness if their conduct subsequent to conviction demonstrates a lack of future dangerousness.

At this writing, however, the Court has recognized only one post-sentence occurrence that can spare death sentenced prisoners from