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LANKFORD v. IDAHO 111 S. Ct. 1723 (1991)

notice to pursue the *Massiah* claim in his first federal habeas petition, as he had done in his first state petition. *Id.* at 1473.

In its installation of the cause and prejudice standard, the Court also dispensed with the argument that the State's withholding of the Evans statement was misconduct. Because the State turned over the 21-page document upon request in 1987, the District Court had found no wrongful conduct in the State's failure to hand it over earlier, and the "document [was] not critical to McCleskey's **notice** of a *Massiah* claim anyway." *Id.* at 1474 (emphasis added).

In response to this decision, it is appropriate to raise on habeas **every** federal claim **remotely** suggested by the trial evidence or subsequent investigation in hopes that further investigation will strengthen it. Second, the trial record should show detailed inquiry concerning the existence of *Massiah* relationships, as well as *Giglio* and *Brady* materials. If possible, the Commonwealth's attorney should be required to deny on the record the existence of any such evidence.

Summary and analysis by:
Anne E. McInerney

LANKFORD v. IDAHO

111 S. Ct. 1723 (1991)
United States Supreme Court

FACTS

In 1983, Lankford was convicted as an aider and abettor to a robbery and double murder under Idaho's felony-murder statute. At his arraignment, the judge had informed Lankford that the maximum punishment he could receive if convicted was either life imprisonment or the death penalty.

Prior to his sentencing hearing Lankford requested, and the trial court ordered, that the State give notice of whether it intended to seek the death penalty and, if so, what aggravating circumstances the State would offer in support of the death penalty. The State responded that it would not seek the death penalty. Lankford proceeded to file numerous motions with the trial court. The court failed to mention the possibility of imposing the death penalty at all proceedings after the arraignment.

At the sentencing hearing, Lankford was represented by a new attorney who was denied access to the trial transcript that included the arraignment. The prosecutor offered no evidence, relied on the trial record, and explained why he had not recommended the death penalty. Lankford's counsel made no reference to the death penalty. The trial judge stated that he found Lankford's testimony to be unworthy of belief and that the State's recommendation of an indeterminate life sentence was too lenient. Following a weekend recess, the trial judge sentenced Lankford to death.

Lankford appealed on the grounds that the trial court had violated due process by not giving notice that it intended to consider the death penalty despite the State's notice that it would not ask for the death penalty. The trial court responded that Lankford was provided notice through the Idaho Code and that the prosecutor's intent not to seek the death penalty was not controlling. The Idaho supreme court affirmed and the United States Supreme Court granted certiorari.

HOLDING

The Supreme Court reversed the Idaho court's holding and remanded. The Court held that "the sentencing process in this case violated the Due Process clause of the Fourteenth Amendment because at the time of the sentencing hearing, Lankford and his counsel did not have adequate notice that the judge might sentence him to death." 111 S.Ct. 1723, 1724 (1991). The Court held that lack of notice to Lankford created an impermissible risk that the adversary process may have malfunctioned.

The Court found that the notice provided by the Idaho statute and the arraignment did not survive the State's response to the court order because the order limited the issues in further proceedings.

The Court further found that the trial judge's silence following the State's response to the order "had the practical effect of concealing from the parties the principal issue to be decided at the hearing." *Id.* at 1723.

ANALYSIS / APPLICATION IN VIRGINIA

The Supreme Court began its reasoning by stating that the issue in this case was one of procedure rather than one of substantive power. Therefore, pursuant to Idaho's substantive law, a trial judge's power to disregard a prosecutor's recommendation as to sentencing is not limited by this decision.

The Court stated that the trial court's presentencing order was analogous to a pretrial order limiting the issues to be tried in that it ordered the parties to state the aggravating and mitigating factors on which they intended to rely at the penalty hearing.

Lack of notice to Lankford, the Court found, also inhibited his counsel from presenting evidence of mitigating factors unique to imposition of the death penalty. For example, Lankford had taken two polygraph tests before the trial which tended to support his contention that he did not do the actual killing. Under *Lockett v. Ohio*, 438 U.S. 586 (1978), Lankford argued, these tests would have been admissible at the penalty phase of his trial since they would have shown that his degree of participation was not that of the actual killer. This evidence, the Court held, might have influenced the trial court's deliberations as to whether to impose the death penalty. Therefore, *Lankford* recognizes the continued validity of cases such as *Green v. Georgia*, 442 U.S. 95 (1979) (holding that some evidence is admissible at the penalty stage of a capital murder trial that would not be admissible under ordinary rules of evidence) and *Enmund v. Florida*, 458 U.S. 782 (1982) (holding that in some circumstances the death penalty may not be constitutionally imposed on an accomplice). These issues arise **only** in the context of a capital penalty trial. It is imperative that Virginia defense counsel know what issues are to be litigated at the penalty stage in order to meet prosecution evidence in aggravation and to offer mitigating evidence to the sentencer. Notice of the issues to be litigated also allows defense counsel to make use of favorable law relevant to the presentation of mitigating evidence at the sentencing hearing.

Although the Court noted that the presentencing order "did not expressly place any limits on counsel's preparation," 111 S. Ct. at 1729, the question is whether "counsel had adequate notice of the critical issue that the judge was actually debating." *Id.* at 1729. The Court quoted Justice Frankfurter: "The validity and moral authority of a conclusion largely depend on the mode by which it was reached ... No better instrument has been devised for arriving at the truth than to give a person in jeopardy of serious loss notice of the case against him and opportunity to meet it." *Joint Anti-Fascist Refugee Committee v. McGrath*, 341 U.S. 123 (1951).

It is well established that one vital function of the adversarial process of the guilt phase of a capital trial is truth-seeking. To reiterate the equivalency of the sentencing hearing to the guilt phase as far as counsel

and adversarial functions are concerned, the *Lankford* Court cited *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that a capital sentencing hearing is enough like a trial to warrant the same adversarial standards as a trial). The Court reasoned, therefore, that without notice of the issues to be litigated at the penalty stage, the benefit of the adversarial process is negated. Since in *Lankford* the trial judge was silent as to the principal issue to be litigated (i.e. a possible death sentence), the Court found that the adversarial process may have malfunctioned.

Since federal law requires that narrowing construction be given to the three "vileness factors" (i.e. "torture, depravity of mind or aggravated battery to the victim" Va. Code Ann. §19.2-264.4(C)), Virginia defense counsel need to know upon which of the three factors the Commonwealth intends to rely during the penalty phase of a capital murder trial and what narrowing construction will be applied. Thus, after *Lankford*, pretrial litigation of Virginia's "vileness factors" becomes even more important. *See* Lago, *Litigating the "Vileness" Factor in Virginia*, Capital Defense Digest, this issue. Filing a Bill of Particulars allows defense counsel to acquire notice of factor(s) upon which the Commonwealth intends to rely.

The purpose of presentencing orders, the Court noted, is "to eliminate the need to address matters that are not in dispute, and thereby save the valuable time of judges and lawyers." 111 S. Ct. at 1729. Thus, the Bill of Particulars will not only provide notice of the issues to be litigated at the sentencing phase of the capital trial, it will promote judicial efficiency as well.

Summary and analysis by:
Wendy Freeman Miles

YATES v. EVATT

111 S. Ct. 1884 (1991)
United States Supreme Court

FACTS

Dale Robert Yates was charged with murder during the commission of a robbery in Greenville County, South Carolina. Yates, armed with a handgun, and Henry Davis, an accomplice, armed with a knife, entered a store and accosted the proprietor. After acquiring the money, Yates shot twice, wounding the proprietor slightly. Yates then fled. Davis remained and scuffled with the proprietor. As the two struggled, the proprietor's mother intervened. Davis stabbed her once and she died almost immediately. The proprietor then drew a pistol and killed Davis. Yates was found guilty of murder as an accomplice and sentenced to death. The Supreme Court of South Carolina affirmed the conviction. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982).

Yates sought relief at state habeas asserting that the burden-shifting effect of a jury instruction was unconstitutional. The instruction to which Yates objected dictated that malice is **implied** or **presumed** from (1) the "willful, deliberate, and intentional doing of an unlawful act" or (2) the "use of a deadly weapon." Although the state court denied relief, the Supreme Court of the United States remanded for further consideration in light of its decisions in *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Francis v. Franklin*, 471 U.S. 307 (1985). *Yates v. Aiken*, 474 U.S. 896 (1985). On remand, the state supreme court failed to apply retroactively the principles settled in those decisions. The United States Supreme Court granted certiorari and remanded again for further proceedings. *Yates v. Aiken*, 484 U.S. 211 (1987).

Upon second remand, the Supreme Court of South Carolina recognized that the two charges regarding implied malice were erroneous; however, it again denied relief, holding that the error was harmless. *Yates v. Aiken*, 301 S.C. 214, 391 S.E.2d 530 (1989). In that opinion, the state court claimed that the error was harmless because the jury did not have to rely on the presumption of malice given the "facts" which the reviewing court mistakenly posed as Davis lunging at the mother and stabbing, giving her multiple wounds.

For the third time, the United States Supreme Court granted certiorari to review the case.

HOLDING

The United States Supreme Court held that the Supreme Court of South Carolina applied the wrong standard in determining whether the challenged instructions constituted harmless error. The Court also found that the Supreme Court of South Carolina misread the trial court record to which the standard was applied.

Under the United States Supreme Court's analysis based on *Sandstrom* and *Francis*, the malice instruction given in *Yates* was erroneous because it did not require the state to establish all elements of the crime beyond a reasonable doubt. *See In re Winship*, 397 U.S. 358 (1970) (holding that the fourteenth amendment protects the accused from conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). The instructions given to the jury in this case may not be excused as harmless error because they erroneously shifted the burden of proof to the defendant, thus violating *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The United States Supreme Court found that the state court's inquiry into the constitutionality of the jury's malice instruction did not satisfy the proper harmless error standard as promulgated in *Chapman v. California*, 386 U.S. 18 (1967). An error is harmless only if it appears "beyond a reasonable doubt that the error complained of **did not contribute** to the verdict obtained." *Id.* at 24 (emphasis added). The state court employed improper analysis in determining merely that it was not **necessary** for the jury to rely on the unconstitutional presumption created by the malice instruction.

ANALYSIS / APPLICATION IN VIRGINIA

A. Jury Instruction Erroneous

The due process clause of the fourteenth amendment requires that the prosecution establish every element of a crime beyond a reasonable doubt before an accused may be convicted. *In re Winship*, 397 U.S. 358 (1970). Instructions which shift this burden of proof on the issue of intent to the defendant are unconstitutional. *Mullaney*, 421 U.S. 684 (1975). This rule was developed further in *Sandstrom v. Montana*, 442 U.S. 510 (1979). In *Sandstrom*, the jury was given an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 513, 524. This instruction was held unconstitutional as a violation of both the *Winship* and *Mullaney* requirements. The Court applied the same principle in *Francis v. Franklin*, 471 U.S. 307 (1985). The *Francis* instructions stated that "the acts of a person of sound mind and discretion are presumed to be the product of the person's will" and that a person "is presumed to intend the natural and probable consequences of his acts." *Id.* at 316-318. These instructions, like those given in *Sandstrom*, fail to comply with the requirements of *Winship* and *Mullaney*.

In *Yates*, the charge instructing the jurors on the issue of malice was two-fold. The trial judge told the jury that malice is to be implied or presumed upon (1) the willful, deliberate & intentional doing of an unlawful act, and (2) the use of a deadly weapon.