Capital Defense Journal

Volume 5 | Issue 1 Article 14

Fall 9-1-1992

ADAMS v. AIKEN 965 F.2d 1306 (1992)

Follow this and additional works at: https://scholarlycommons.law.wlu.edu/wlucdj

 Part of the Law Enforcement and Corrections Commons

Recommended Citation

ADAMS v. AIKEN 965 F.2d 1306 (1992), 5 Cap. Def. Dig. 25 (1992).
Available at: https://scholarlycommons.law.wlu.edu/wlucdj/vol5/iss1/14

This Casenote, U.S. Fourth Circuit is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

that a court must address it *sua sponte* if not raised."[35] The court then addressed whether the State's failure to raise the defense at the district court level amounted to a waiver.

First, the court considered the general rule that "claims not adjudicated below, and in particular defenses that have not been raised in a pleading, by motion, or at trial, normally will be considered waived and cannot be heard for the first time on appeal."[36] In habeas proceedings, the court found that waiver usually takes the form of procedural default, resulting in a bar to a claim not presented to the state court "unless the petitioner can show cause for the default and actual prejudice."[37] The court concluded that such procedural default applies equally to the defendant and to the State. Therefore, if a claim or defense is not raised in the court below, it will be barred on appeal.[38]

In *Williams*, because the State failed to raise a retroactivity defense at the district court level, or at the first argument before the court of appeals, it was deemed to have waived its *Teague* defense to the application of the *Mills/McKoy* rule.

III. Application in Virginia.

Defense counsel should be fully aware of the implications of the *Teague* rule. Timing on appeal, as well as preserving all appealable issues throughout the pre-trial, trial and post-trial processes, becomes increasingly important in obtaining all potential constitutional benefits for a capital defendant. Opinions such as *Williams* make it clear that defense counsel need to remain aware and informed as to potential or pending issues before the courts of appeal and/or Supreme Court. Because a defendant's conviction does not become final for *Teague* purposes until the end of the direct appeals process, the longer one takes in that process, the better one's chances for benefitting from a "new rule." Unfortunately, timing may be all that separates one defendant from another in benefitting from the recognition of new constitutional interpretations or applications.

When the Supreme Court announced the *Teague* retroactivity rule, the Court appeared to signal an end to the potential benefits of new rules for defendants on collateral appeal. Very few defendants were expected to find themselves the beneficiaries of one of *Teague*'s narrow exceptions. The Fourth Circuit's holding in *Williams*, however, provides encouragement for future findings of exceptions to the *Teague* rule. Of particular benefit to Virginia defendants is the Fourth Circuit's apparent willingness to ferret out a basis for finding a *Teague* exception. If defense counsel has diligently preserved and presented all potential constitutional claims throughout the appeals process, a defendant may still reap the benefits of future Supreme Court decisions.

The most important practical aspect of *Williams* to Virginia practitioners may be the Fourth Circuit's recognition that procedural default can work against the state. While taking care to preserve and protect the defendant's claims for relief on appeal, defense counsel should also be aware of the Commonwealth's failure to raise defenses during the appeals process. Certainly, defense counsel should take care **not** to alert the Commonwealth to any omissions at early stages of the appeals process, particularly involving a *Teague* defense of retroactivity. If the Fourth Circuit consistently applies its ruling in *Williams*, defendants may profit from new rules simply by the failure of the Commonwealth to raise the retroactivity defense, thus broadening the scope of potential benefits in spite of *Teague*.

Summary and analysis by:
Susan F. Henderson

---

35 *Id.* at 458. *See also Collins v. Youngblood*, 497 U.S. 37 (1990) (declaring *Teague* rule "is not 'jurisdictional'").

36 *Id.* (citing *Nat'l Treasury Employees Union v. Internal Revenue Service*, 765 F.2d 1174, 1176, n.1 (D.C.Cir. 1985)).

37 *Id.* (citing *Bassette v. Thompson*, 915 F.2d 932, 937 (4th Cir. 1990)). *See* case summary of *Bassette*, Capital Defense Digest, Vol. 3, No. 2, p. 8 (1991).

38 *Id.* at 459.

ADAMS v. AIKEN

965 F.2d 1306 (1992)
United States Court of Appeals, Fourth Circuit

FACTS

After his first conviction and sentence of death was reversed, Sylvester Lewis Adams was retried and then convicted of kidnapping, murder and housebreaking and given a death sentence. Subsequently, the state circuit court denied Adams' request for postconviction relief, and both the South Carolina and United States Supreme Court denied certiorari.[1] The United States magistrate recommended denial of the federal writ of habeas corpus that Adams then filed, which had alleged numerous errors at the trial court level. The United States District Court for the District of South Carolina accepted the magistrate's recommendation and denied Adams' petition.

On appeal to the Fourth Circuit, Adams raised a number of errors at various stages of the trial.[2] At voir dire, Adams claimed error because one of the prospective jurors stated that he would accept the testimony of a police officer over the testimony of a private citizen. In response, the trial judge inquired whether the prospective juror could make a decision based on the evidence presented and on the instructions given him by the court. When the prospective juror answered in the affirmative, the trial judge qualified him over Adams' objection. At the time, Adams had two peremptory strikes remaining.

At the guilt stage, the trial judge, in his instructions to the jury, defined reasonable doubt as "synonymous" with "proof to a moral certainty" and a "substantial doubt, a doubt for which you can give a reason." Adams argued that the instruction violated his due process rights.

---

1 *Adams v. Aiken*, 476 U.S. 1109 (1986).

2 Adams raised several errors that will not be discussed in this case summary, including claims that (1) Adams' conviction violated due process due to his mental incompetence during portions of the trial, (2) his death sentence violated the Eighth Amendment, as the jury failed to find the murder occurred during the commission of the kidnapping and housebreaking, (3) the trial judge's failure to limit definition of aggravating factors in his instructions to the jury violated Adams' Eighth Amendment rights.

In his closing statement at the sentencing phase, the prosecutor mentioned four words that he felt were the qualities of a person able to live in society: "rapport, coping, love, and repentance." Adams claimed that the prosecutor's urging of the jury to consider whether Adams would ever be capable of handling any of these four requisites was in effect improperly telling the jury to consider his mitigating evidence of mental impairment as an aggravating factor.

At the sentencing phase, Adams also alleged error based on the judge's response to the jury when they inquired whether a confession by Adams was a mitigating factor. The judge had responded that it was not a statutorily mitigating factor but told them they could "consider the case in its entirety."

HOLDING

In affirming the denial of Adams' writ of habeas corpus, the Fourth Circuit conceded that precedent existed for finding the trial court's definition of reasonable doubt to be a violation of due process.[3] The court held, however, that it could not apply the necessary case law retroactively to *Adams*.[4] In considering Adams' claim of error at voir dire, the court found that Adams would have first needed to use all of his preemptory challenges to eliminate objectionable jurors before he would be able to complain of a violation of his constitutionally protected right to impartial jurors;[5] because Adams had used only nine of his ten challenges, the court found that Adams did not have a legally cognizable complaint.[6] The court also found that the trial court's handling and explanations of mitigating and aggravating factors effectively conveyed to the jury the information it needed to adequately consider both aggravating and mitigating factors. Finally, the Fourth Circuit concluded that comments made by the prosecution during closing remarks were not prejudicial, in the sense of leading the jury to treat mitigating evidence as an aggravating factor.

ANALYSIS/APPLICATION IN VIRGINIA

I. Reasonable Doubt and *Teague*'s New Rule Doctrine

In its analysis of the trial judge's definition of reasonable doubt, the appeals court found possible error in his equating of "beyond a reasonable doubt" with "to a moral certainty" and "substantial doubt."[7] Citing *Cage v. Louisiana*,[8] the court compared language that the Supreme Court found unconstitutional with the language the trial judge used in *Adams*. The court determined that the instruction given in *Adams* impermissibly "diluted the reasonable doubt standard,"[9] such that Adams, like Cage, was held to a higher standard than that allowed under due process.

Despite finding a constitutional violation, the court proceeded to state that it could not provide a remedy because of the "new rule doctrine." In *Teague v. Lane*,[10] the source of the new rule doctrine, the Supreme Court held that a case on collateral review generally cannot receive the benefit of rules that did not exist at the time the conviction became final. Therefore, because the Supreme Court decided *Cage* in 1990 after Adams' conviction was final (in 1983), the court stated *Cage* could not be retroactively applied.

Because *Teague* does not bar retroactive application of new cases which merely rearticulate or apply an older rule, Adams had argued that *Cage* did not articulate a new rule, but instead was simply an application of *In re Winship*.[11] After considering the meaning of the term "new rule" under *Teague* and the nature of the *Cage* "reasonable doubt" rule, however, the appeals court concluded that *Cage* presented a new rule.[12] The court reasoned that although much case law criticizes how courts have defined and diluted "reasonable doubt," *Cage* was the first case reversed for just such a violation.[13]

Moreover, the court rejected Adams' argument that even if a new rule, *Cage* should be seen as falling within *Teague*'s exception for "new rules that 'require the observance of those procedures that... are implicit in the concept of ordered liberty.'"[14] While the court found that *Cage* would improve the accuracy of the trial, it concluded that it did have an impact on bedrock elements regarding fairness. Therefore, the court declined to apply *Cage* retroactively.[15]

Although the court found Adam's *Cage* claim to be *Teague*-barred, the court did acknowledge that the definition of reasonable doubt used in the jury instruction violated due process. Therefore, *Cage* seems to offer significant authority and encouragement for challenges on the question of reasonable doubt. Virginia practitioners should be prepared to object to such instructions and to proffer instructions in their stead.

II. Voir Dire and the Right to an Impartial Jury

In evaluating the impartiality of the juror who stated he would take the word of a police officer above that of a private citizen, the Fourth Circuit turned to the federal statute and supporting case law governing review of state trial court findings.[16] Under 28 United States Code Section 2254(d), fact determinations made by the trial court are entitled to a "presumption of correctness" in federal habeas corpus cases. Supporting case law cited by the court showed that this presumption of correctness extends to the trial court's determination of juror impartiality.[17] Therefore, the appeals court saw its only task as determining whether, given the presumption of correctness, the trial record supported

---

3 *Adams v. Aiken*, 965 F.2d 1306, 1311 (4th Cir. 1992) (relying on *Cage v. Louisiana*, 111 S.Ct. 328 (1990)). *See* case summary of *Cage*, Capital Defense Digest, Vol. 3, No. 2, p. 5 (1991).

4 *Adams*, 965 F.2d at 1311 (citing *Teague v. Lane*, 498 U.S. 288 (1989)).

5 *Id.* at 1317.

6 *Id.*

7 *Id.* at 1310.

8 111 S.Ct. 339 (1990).

9 *Adams*, 965 F.2d at 1311.

10 489 U.S. 288, 305-10 (1989). The "new rule" doctrine was intended "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." Case summary of *Cage v. Louisiana*, Capital Defense Digest, Vol. 3, No. 2, p. 6 (1991).

11 397 U.S. 358 (1970) (holding that the prosecution must prove each element of the crime beyond a reasonable doubt).

12 *Adams*, 965 F.2d at 1312. The *Teague* Court found that "'a case announces a new rule when it breaks new ground or imposes a new obligation on the States or the Federal Government' or 'if the result was not dictated by precedent existing at the time the defendant's conviction became final.'" *Adams*, 965 F.2d at 1311 (citing *Teague*, 489 U.S. at 301; *Butler v. McKellar*, 494 U.S. 407, 415 (1990); *Saffle v. Parks*, 494 U.S. 484, 488 (1990)). *See* case summary of *Butler*, Capital Defense Digest, Vol. 3, No. 1, p. 2 (1990); and case summary of *Saffle*, Capital Defense Digest, Vol. 3, No. 1, p. 3 (1990).

13 *Adams*, 965 at 1312.

14 *Id.* ("This exception is limited to 'those new procedures without which the likelihood of an accurate conviction is seriously diminished,' ... [that] both improve the accuracy of trial and 'alter our understanding of the **bedrock procedural elements** essential to the fairness of a proceeding.'") (qutoing *Teague*, 489 U.S. at 311, 313; *Sawyer*, 110 S. Ct. at 2831) (emphasis in original).

15 *Id.*

16 *Id.* at 1317.

17 *Id.* (citing *Patton v. Yount*, 467 U.S. 1025, 1036-38 (1984) (finding that trial court determination as to juror impartiality also is entitled to presumption of correctness in federal habeas corpus cases)).

the trial court's finding. They concluded that it did.

The appeals court also suggested that even if the juror was not impartial, Adams suffered no legally cognizable prejudice.[18] The court held that because Adams had an opportunity to excuse the juror with a peremptory challenge but chose not to do so, he may not now object to the judge's refusal to excuse any particular juror for cause. The court concluded that Adams could have claimed error only if he first exercised all of his peremptory challenges, and **then** an unqualified juror was allowed to sit.

In light of *Adams* and the United States Supreme Court's recent ruling in *Morgan v. Illinois*,[19] Virginia practitioners should consider voir dire carefully. *Morgan*'s constitutionally guaranteed reverse-*Witherspoon* questions may limit the need for peremptory challenges, but practitioners will want to make sure they use all of their peremptory challenges in order to clear the way for prejudice arguments. *Morgan* and *Adams* also stress the need for practitioners to develop a record on attempted voir dire questions and to make clear their reasons why certain jurors should be struck for cause whom the judge is allowing to sit.

III. Jury Instructions on Mitigation

Adams argued on appeal that the trial judge had violated his rights under the Eighth and Fourteenth Amendments by not instructing the jurors that they could consider as mitigating any aspect of the case that they felt merited it. Virginia requires no jury instruction regarding the absolute liberty that each juror has to consider and give effect to any mitigation,[20] a problem compounded by the statutory verdict forms that make no mention of mitigating factors. In *Adams*, the appeals court felt it had been sufficient to encourage the jury to simply consider the entire case.[21] This was true despite the fact the jury had inquired as to whether a specific piece of evidence—a confession by defendant—could be considered as mitigating and the judge responded with only a generalized reference that the jury could "consider the case in its entirety."

After *Adams*, attorneys facing such a general approach to mitigation and aggravation should take it upon themselves to highlight certain factors during argument as mitigating evidence (e.g., in *Adams*, stressing to the jury that a confession was found mitigating evidence to be considered). During closing arguments, practitioners will want to inform jurors that "all evidence" to be considered in mitigation goes beyond the factors that are statutorily enumerated,[22] that they as jury members should consider fact-specific mitigating factors (perhaps enumerating factors that have come to light throughout the trial), and that they should consider the entire case, including any factors that arise in their deliberations.

IV. Using Mitigating Evidence as Aggravating Factors

Immediately after his indictment, Adams underwent a psychiatric examination at the State Hospital. Although the exam showed Adams to be mildly retarded and suffering from "paranoid trends," the psychiatrist found Adams competent to stand trial. While Adams claimed to be deteriorating mentally, each court found Adams competent. In his closing arguments, the prosecutor used four words—rapport, coping, love, and repentance—to describe the features of a person able to function in society. In so doing, the prosecutor arguably turned Adams' mental disability, a mitigating factor, into an aggravating factor by implying that because of the disability, Adams did not possess the qualities necessary to function in society. At the time, Adams did not object to the remarks nor did he move for a mistrial.

On appeal, Adams argued that the prosecutor's language suggesting that the mental disability was aggravating rather than mitigating violated his Eighth Amendment rights.[23] Cautioning against unsupported inferences and highlighting Adams' failure to object in a timely fashion, the Fourth Circuit found that the comments did not "infect the trial with unfairness that caused the sentence to be a violation of due process."[24]

Practitioners may find it worth noting that in *Adams* the court seemed to imply that prosecution use of mitigating evidence as an aggravating factor would raise constitutional problems—an argument nullified by Adams' failure to object. In light of the court's reasoning, Virginia practitioners must object and move for a mistrial whenever the Commonwealth tries to argue mitigating factors as aggravating evidence. While it is possible that the court may deny such an objection or motion, a failure to act early in the process may later be read as acceptance or may impede a determination of error. Further, practitioners will want to remember *Penry v. Lynaugh*[25] for the proposition that sentencers must be able to give effect to any mitigating factors, regardless of the existence of aggravating ones.

Summary and analysis by:
Roberta F. Green

---

18 *Id.*

19 112 S. Ct. 2222 (1992) (finding voir dire on "reverse-*Witherspoon*" issues constitutionally required). *See* case summary of *Morgan*, Capital Defense Digest, this issue.

20 *Adams*, 965 F.2d at 1319 (citing *Lockett v. Ohio*, 438 U.S. 586 (1978) (holding that the sentencer must be allowed to independently consider all evidence in mitigation that is relevant)).

21 Virginia also does not require instruction of jurors on their responsibility to consider mitigating evidence, on the implications of mitigating evidence, or on the defendant's choice as to whether to present mitigation evidence. *See* Hansen, *Mitigation: An Outline of Law, Method and Strategy*, Capital Defense Digest, Vol. 4, No. 2, p. 29 (1992).

22 Va. Code Ann. § 19.2-264.4. (B) (1990).

23 As articulated by the United States Supreme Court, a defendant's Eighth Amendment right is that "the sentencer [can]... 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." *Lockett v. Ohio*, 438 U.S. 586, 604 (1978) (emphasis in original). *See also, Zant v. Stephens*, 462 U.S. 862, 886 (1983) (finding that attaching an aggravating label to mitigating evidence would require the jury's decision to impose death to be set aside).

24 *Adams*, 965 F.2d at 1320 (citing *Darden v. Wainwright*, 477 U.S. 168, 181 (1986)).

25 109 S.Ct. 2934 (1989). *See* case summary of *Penry*, Capital Defense Digest, Vol. 2, No. 1, p. 2 (1989).