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DOBBS v. ZANT 113 S. Ct. 835 (1993)

met without uttering the magic words 'harmless error,'. . .[but] the reverse is not true."[22] In other words, the Supreme Court requires a "'principled explanation' of how the [state] court reached [its] conclusion."[23] This high level of scrutiny set forth by Justice O'Connor is reinforced in her majority opinion in *Richmond*.

With the aid of *Stringer*, *Sochor*, *Espinosa* and now *Richmond*, Virginia attorneys should be better equipped to battle the indifference of the Virginia Supreme Court on the issue of specificity in aggravating factor instructions. The cases provide clear authority for the requirement that at some point in the Virginia sentencing scheme, an express and specific use of properly named aggravating factors must be made evident. Defense attorneys should be prepared to argue the importance of these cases and how the Eighth Amendment requires a level of individualized consideration that Virginia does not currently provide.

Summary and analysis by:
Lesley Meredith James

22 *Id.* at 2123 (O'Connor, J., concurring).

23 *Id.*

DOBBS v. ZANT

113 S. Ct. 835 (1993)
United States Supreme Court

FACTS

Wilburn Dobbs was found guilty of murder and was sentenced to death by a Georgia jury. In his first federal habeas petition, Dobbs argued that he had received ineffective assistance of counsel at his sentencing hearing, particularly citing the closing argument made by his court-appointed attorney. At an evidentiary hearing held on the matter, the State was unable to produce a transcript of counsel's closing argument, so the court relied on the testimony of the attorney himself as to the content of his closing arguments. The district court found Dobbs had received effective assistance.[1] The Court of Appeals for the Eleventh Circuit affirmed, relying once again on counsel's testimony at the evidentiary hearing regarding his closing argument in mitigation.[2]

Subsequently, the State located a transcript of the closing argument, which varied in some degree from counsel's recollection.[3] Nevertheless, the court of appeals denied the petitioner's motion to supplement the record with the sentencing transcript. In affirming that denial, the Eleventh Circuit found that the "law of the case" doctrine prevented it from reconsidering its prior rejection of the ineffective assistance of counsel claim.[4] Although the court acknowledged the manifest injustice exception to the law of the case doctrine,[5] the court refused to apply the exception, reasoning in Catch-22 fashion that without the transcript, petitioner would be unable to show an injustice.[6]

Petitioner Dobbs filed a petition for a writ of certiorari.

HOLDING

The United States Supreme Court granted the writ of certiorari and reversed the decision of the Eleventh Circuit.[7] Citing *Gardner v. Florida*[8] and *Gregg v. Georgia*,[9] the Court emphasized the importance of reviewing capital sentences on a complete record.[10] The Court went on to consider the transcript's key relevance here (i.e., the factual predicate for deciding the ineffective assistance of counsel claim) and found that a complete record would have allowed the appeals court to waive the law of the case doctrine by applying the manifest injustice exception.[11] Further, the Court held that the exclusion of the transcript was not justified by the delay between the original determination of effective assistance and the discovery of the transcript, because the delay resulted from the State's erroneous representations and not the petitioner's actions.[12] Finally, although the Court speculated that an inadequate or harmful closing argument, coupled with a failure to present mitigating evidence, could produce harmful results, the Court followed its normal practice of letting the courts more familiar with a case conduct the harmless error analysis.[13] Therefore, the case was remanded for further proceedings consistent with the opinion.[14]

1 Civ. Action No. 80-247 (ND Ga., Jan. 13, 1984), p. 24.

2 *Dobbs v. Kemp*, 790 F.2d 1499, 1514, and n. 15 (1986).

3 The majority wrote that the newly found transcript "flatly contradicted the account given by counsel in key respects." *Dobbs v. Zant*, 113 S. Ct. at 835 (1993). However, in his concurring opinion, Justice Scalia objected to this characterization of the transcript. At the evidentiary hearing, defense counsel thought he had raised two issues in his closing argument: the death penalty is improper in any case, and the killing was impulsive. Counsel testified that he was "'sure' he had argued the impulsive-killing point," that he "assume[d] [he] argued it," and that "a lot of this is really not from actual recollection." Tr. 70-71 (Nov. 10, 1982). The transcript revealed that counsel made only the impropriety of the death penalty argument.

4 *Dobbs v. Zant*, 963 F.2d 1403, 1409 (1991).

5 Under the policy of "law of the case," an appellate court's determination of a legal question (here petitioner's ineffective assistance of counsel claim) will generally be found binding on both trial courts on remand and appellate courts on subsequent appeals. Since it is policy and not law, it is general practice to disregard law of the case when to hold otherwise would work manifest injustice.

6 *Dobbs*, 963 F.2d at 1409.

7 *Dobbs v. Zant*, 113 S. Ct. 835 (1993).

8 430 U.S. 349, 361 (1977) (emphasizing the importance of a complete record in reviewing capital sentences).

9 428 U.S. 153 (1976) (finding that the provision requiring transmittal of a complete transcript and record on appeal provides an important "safeguard against arbitrariness and caprice").

10 *Dobbs*, 113 S. Ct. at 836.

11 *Id.*

12 *Id.*

13 *Id.*, at 836, n. 1.

14 *Id.* at 836.

ANALYSIS/APPLICATION IN VIRGINIA

Writing in *Dobbs*, the Court was adamant in its support of the complete record doctrine as set forth in *Gardner*. The Court added little new law in this opinion because the case is premised on rather unusual facts. However, *Dobbs* does provide defense counsel with additional support for arguing the importance of a complete record upon appeal. Therefore, defense counsel facing obstacles upon appeal with supplementing the record will want to use *Gardner* in conjunction with *Dobbs* to argue that the appellate court must have a full record before it in order to decide the case.

Summary and analysis by:
Roberta F. Green

GARDNER v. DIXON

1992 U.S. App. LEXIS 28147
United States Court of Appeals, Fourth Circuit

FACTS

In September 1983, John Sterling Gardner was convicted of first-degree murder in the deaths of two restaurant workers during a robbery. The court imposed the death penalty. The North Carolina Supreme Court affirmed both the conviction and sentence on direct appeal, and the United States Supreme Court denied review.[1] Gardner commenced state habeas proceedings but was denied relief.[2] Gardner then filed a writ of habeas corpus in federal court. Both the district court and the Fourth Circuit Court of Appeals denied relief.[3] Gardner's requests for rehearing were denied.

In August 1992, Gardner filed a motion for relief from the federal district court's judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.[4] Gardner specifically requested relief under Rule 60(b)(2) and (6) and submitted supporting affidavits which he claimed showed newly discovered evidence of alcohol and drug abuse by his attorney, Bruce Fraser, during his murder trial and sentencing. Gardner's execution was stayed by the Superior Court of Forsyth County until October 23, 1992.

The district court denied Gardner's motion for relief and Gardner appealed to the Fourth Circuit. He also filed an application for a stay of execution and a certificate of probable cause to appeal the district court's ruling.

HOLDING

The Fourth Circuit Court of Appeals affirmed the district court's ruling and denied Gardner's request for a stay of execution.[5] Noting the "difficulty of prevailing on successive habeas petitions"[6], the court specifically addressed the use of a Federal Rules of Civil Procedure Rule 60(b) motion as "the newest weapon in capital-habeas litigation, in part because it has the tendency to compel a court to address a petitioner's claims on the merits."[7] In conformity with its treatment of an appeal of a Rule 60(b) denial in *Jones v. Murray*[8], the court treated Gardner's appeal as: "(1) a petition for writ of habeas corpus, (2) a successive petition, and (3) a legitimate Rule 60(b) motion addressing the final judgment of the district court."[9]

The court held: (1) because Gardner failed to show cause and prejudice or actual innocence, his claim of ineffective assistance of counsel was procedurally barred;[10] (2) Gardner's claim failed under the abuse of the writ doctrine because he did not present the alleged new evidence in his prior habeas petition and he failed to show cause and prejudice or actual innocence;[11] and (3) the district court did not err in denying relief under Rule 60(b) because there is no evidence the outcome of the trial or sentencing would have been different absent trial counsel's alleged misconduct.[12]

ANALYSIS/APPLICATION IN VIRGINIA

As the Fourth Circuit noted, it is very difficult for a petitioner to prevail in successive habeas corpus petitions. In its treatment of Gardner's petition as both a writ of habeas corpus and a successive petition, the court illustrated its point.

The Fourth Circuit found that Gardner's habeas claim was procedurally barred by North Carolina General Statute Section 15A-1419(a)(3), which provides that a motion for appropriate relief may be denied if "upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so."[13] Similarly, in treating Gardner's petition as a successive habeas petition, the Fourth Circuit relied upon the standards of review set forth in *McCleskey v. Zant*.[14] Under *McCleskey*, in order to excuse a failure to raise a claim in a prior habeas petition, a petitioner must show cause for failing to raise it or show that a "fundamental miscarriage of justice would result from a failure to entertain the claim."[15]

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[1] *State v. Gardner*, 319 S.E.2d 591, 594-96 (N.C. 1984), *cert. denied*, 469 U.S. 1230 (1985).

[2] *Gardner v. State*, 361 S.E.2d 598 (N.C. 1986), *cert. denied*, 486 U. S. 1061 (1987).

[3] *Gardner v. Dixon*, No. 91-4010, slip op. at 19 (unpublished), 1992 U.S. App. LEXIS 12971 (4th Cir. June 4, 1992). *See* case summary of *Gardner*, Capital Defense Digest, Vol. 5, No. 1, p. 30 (1992).

[4] Fed. R. Civ. P. 60(b) provides, in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken."

[5] *Gardner v. Dixon*, No. 92-4013 (unpublished), 1992 U.S. App. LEXIS 28147, at *2 (4th Cir. October 21, 1992). Gardner was executed by lethal injection on October 23, 1992.

[6] *Id.* at *7.

[7] *Id.* at *8.

[8] 976 F.2d 169 (4th Cir. 1992). *See* case summary of *Jones*, Capital Defense Digest, this issue.

[9] *Gardner*, 1992 U.S. App. LEXIS 28147, at *8-*9.

[10] *Id.* at *9-*10.

[11] *Id.* at *10-*15.

[12] *Id.* at *35-*36.

[13] N.C. Gen. Stat. § 15A-1419(a)(3) (Michie 1992).

[14] 111 S.Ct. 1454 (1991).

[15] *Id.* at 1470.