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GRAY v. THOMPSON

58 F.3d 59 (4th Cir. 1995)
United States Court of Appeals, Fourth Circuit

FACTS

Richard McClelland, the manager of Murphy's Mart store in Portsmouth, worked late the evening of May 2, 1985. At approximately 9:30 p.m., Coleman Wayne Gray and Melvin Tucker, both "high" on cocaine, entered the parking lot of Murphy's Mart in Gray's automobile to observe the store.[1]

Shortly before midnight, McClelland left the store in his automobile. At a stop sign, Gray pulled his automobile in front of McClelland's car and directed McClelland to get out of his automobile and into Gray's. Gray then drove back to the Murphy's Mart and forced McClelland at gunpoint into the store while Tucker waited outside.[2] Approximately one-half hour later, Gray and McClelland emerged from the store with three gym bags filled with money.[3]

Gray drove McClelland and Tucker down a small side road and ordered McClelland to get out of the automobile. As McClelland lay face down on the ground, Gray fired six pistol shots into McClelland's head.[4] Gray then returned to McClelland's car, doused the car with gasoline, and set fire to it.[5]

The guilt phase of Gray's capital murder trial began on December 2, 1985. In response to a defense request for the Commonwealth to reveal the evidence it planned to use to prove future dangerousness if the defendant was found guilty, the Commonwealth's Attorney stated that he would introduce statements that Gray had made about other crimes, including the murders of a mother and daughter named Lisa and Shanta Sorrell.[6]

Three days later, on December 5, the jury convicted Gray on all counts. That evening, the Commonwealth's Attorney informed the defense that despite his earlier pledge to introduce only statements at the penalty phase which was scheduled to begin the next morning, he now intended to offer actual evidence of the Sorrell murders in addition to the incriminating statements. This evidence consisted of testimony by the police detective who investigated the Sorrell murders and by the state medical examiner who performed the victims' autopsies. The additional evidence was also to include photographs and forensic evidence of the crime scene.[7]

The following morning the penalty phase began. During an in-chambers conference, Gray's counsel asked the court to exclude the additional Sorrell evidence on the ground that it exceeded the scope of corroborating evidence permissible under state law and that the defense, having learned of it just the evening before, was unprepared to rebut it that day. The court denied Gray's motion to exclude the additional Sorrell murder evidence.[8] The jury sentenced Gray to death.[9]

Gray's conviction and sentence were affirmed on direct State appeal[10] and his State habeas corpus petition was dismissed,[11] with the United States Supreme Court twice denying certiorari.[12]

Gray then filed a petition for a writ of habeas corpus in federal court. The United States District Court for the Eastern District of Virginia held an evidentiary hearing and heard testimony from trial counsel and the prosecution witnesses as to the events at sentencing. The district court granted the writ and vacated Gray's sentence, finding that the prosecution had "violated the moral standards of fair play embodied in the Due Process Clause" by unfairly surprising the defense with additional evidence of Gray's unadjudicated acts.[13] The Commonwealth appealed to the United States Court of Appeals for the Fourth Circuit.[14]

HOLDING

The Fourth Circuit reversed the district court's granting of the writ of habeas corpus.[15] The court held that the Commonwealth's use of the supplemental evidence of the Sorrell murders as proof of future dangerousness was not an unconstitutional violation of due process.[16]

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[1] *Gray v. Commonwealth*, 233 Va. 313, 340, 356 S.E.2d 157, 172 (1987). Less than two months prior, McClelland had fired Gray's wife from her job at the store. Eleven days after the firing Gray stole a .32-caliber pistol from a friend's home. Gray told one witness several times that he was "going to get" McClelland for firing his wife. *Id.* at 331, 356 S.E.2d at 167.

[2] *Id.* at 341, 356 S.E.2d at 172.

[3] *Id.* The gym bags contained between $12,000 and $13,000. *Id.* at 342, 356 S.E.2d at 173.

[4] *Id.* at 341, 356 S.E.2d at 173.

[5] *Id.* at 341-42, 356 S.E.2d at 173.

[6] *Gray v. Thompson*, 58 F.3d 59, 61 (4th Cir. 1995). The Sorrell murders were accomplished in a manner strikingly similar to the execution style of the McClelland murder. The body of Lisa Sorrell had been found slumped in the front seat of a partially burned automobile. Lisa Sorrell was killed by six gunshot wounds to the head, apparently inflicted by a .32-caliber firearm. In the trunk of the automobile was the body of Lisa's three-year-old child, Shanta Sorrell. Shanta Sorrell died of carbon monoxide inhalation. Gray denied any involvement in the Sorrell murders. *Gray v. Commonwealth*, 233 Va. at 345-46, 356 S.E.2d at 175.

[7] *Gray v. Thompson*, 58 F.3d at 61.

[8] *Id.*

[9] *Id.* at 62.

[10] *Gray v. Commonwealth*, 233 Va. at 354, 356 S.E.2d at 180.

[11] *Gray v. Thompson*, 58 F.3d at 62.

[12] *Gray v. Virginia*, 484 U.S. 873 (1987) and *Gray v. Thompson*, 500 U.S. 949 (1991).

[13] *Gray v. Thompson*, 58 F.3d at 62. The district court further found that the evidence linking Gray to the Sorrell murders "was very questionable." *Gray v. Thompson*, No. 3:91CV693, slip op. at 16 (E.D. Va. Aug. 25, 1994), *rev'd*, 58 F.3d 59 (4th Cir. 1995). According to the court, "[t]he [Sorrell] murders were the most highly publicized crimes in [the] history of this [locale], and the primary connection between . . . Gray and the Sorrell slayings was the testimony of . . . Gray's co-defendant." *Id.* The district court pointed out that Tucker "had escaped prosecution for capital murder in exchange for his testimony." *Id.* at 8. Under such circumstances, such information should be viewed "with caution." *Id.* at 16. The district court also noted that aside from Tucker's testimony incriminating Gray, "most of the evidence . . . support[ed] the Commonwealth's original theory: [that] Timothy Sorrell[, the husband and father of the victims,] committed the Sorrell murders." *Id.*

[14] *Gray v. Thompson*, 58 F.3d at 62.

[15] *Id.* at 67.

ANALYSIS/APPLICATION IN VIRGINIA

I. The Use of Undisclosed Evidence to Show Future Dangerousness

A. Collateral Review of State Habeas Law

The Fourth Circuit stated that before a federal court can consider the merits of a habeas claim, that court must first analyze whether the habeas petitioner seeks to expand the boundaries of existing law. The court found that the district court never acknowledged this requirement in its final order. Therefore, the Court of Appeals addressed the question, and found that Gray's rule would be a novel claim barred from consideration on federal review.[17]

Gray relied heavily on *Gardner v. Florida*[18] to argue that that the Commonwealth's use of the "surprise" Sorrell evidence violated Due Process. In *Gardner*, the sentencing judge had relied upon confidential portions of a presentence report in deciding to sentence the defendant to death, but did not disclose that information to the defense until judgment was entered.[19] Because the defendant was sentenced "on the basis of information that he had no opportunity to deny or explain," the sentencing proceeding was unconstitutional.[20]

The Fourth Circuit, however, held that *Gardner* did not dictate the conclusion that Gray had a constitutional right to some minimum level of advance notice of the particulars of the prosecution's penalty case.[21] The court observed that Gray had not been sentenced on the basis of any secret information, but rather, the evidence of his future dangerousness was advanced in open court with Gray afforded the chance to cross-examine the adverse witnesses.[22]

Moreover, the Court of Appeals pointed out that defense counsel had been informed of the additional evidence the evening before it was introduced and that defense counsel interviewed an adverse witness that evening. The court stated that if the defense had felt unprepared to undertake effective cross-examination, it should have made a formal motion for continuance; instead, counsel had moved only that the evidence be excluded. Finally, the Fourth Circuit added that after this supplemental Sorrell evidence was presented, Gray took the stand and directly addressed the jury. The court stated, "[p]lainly, [Gray] had an opportunity to explain or deny the evidence."[23]

The Court of Appeals thus distinguished Gray's case from *Gardner*, noting that *Gardner* itself warned against broad expansions of its holding.[24] The court then characterized Gray's claim as an attempt to use *Gardner* as an entitlement to advance notice of witness statements and corroborating evidence. The Fourth Circuit stated that it knew of no cases in which lack of notice, even at the trial on guilt and innocence phase, had been found to offend the Due Process Clause.[25] And, in light of the fact that *Gardner* expressly avoided importing even established trial rights into sentencing, the court found it implausible that it created sentencing rights that are nonexistent at trial.[26]

B. The Merits of Gray's Contention

Intriguingly, after the Court of Appeals went to great pains to establish that it was precluded from reaching Gray's claim, the court nevertheless evaluated the merits of Gray's contention, and found that it "[rang] hollow on its facts."[27] The court maintained that Gray had not advanced any meaningful contention as to how he would have proceeded any differently at the penalty phase had he known about the photographs, the autopsy report, and the like sooner than the night before the penalty phase was to begin. The Court of Appeals found it likely that Gray's case would have unfolded in much the same fashion that it did.[28]

The opinion's message is that capital defense attorneys should object strongly and in as many ways possible, pointing out on the record the prejudice suffered in terms of due process violations under *Brady* and ineffective assistance of counsel. Indeed, one area of prejudice that developed after trial was that Timothy Sorrell was the prime suspect in the Sorrell murders.[29] Gray argued that had he known that fact, he could have better defused, during the penalty phase, the charge leveled at him. However, the Court of Appeals, ignoring its earlier blitheful claim that the defendant would have proceeded no differently had he had adequate notice, went no further in determining the materiality of this exculpatory evidence, because it "refuse[d] to be dragged into a mini-trial on the respective strengths of the cases against [Timothy] Sorrell and [Gray]."[30]

C. Lack of Notice and Ineffective Assistance of Counsel

Despite the Fourth Circuit's ruling, lack of notice can be extremely debilitating, especially in preparing to rebut Commonwealth evidence of unadjudicated acts at the penalty phase. If given last minute notice, defense counsel should object not only on due process grounds, but also on the grounds that without sufficient notice counsel cannot provide effective assistance. This claim clearly does have the long-standing precedent, dating back to *Powell v. Alabama*,[31] that the Fourth Circuit found lacking in Gray's due process claim.

In *Powell* the Court stated that the time leading up to trial is, in terms of assistance of counsel, "perhaps the most critical period of the proceedings against [the] defendant[], . . . when consultation, thorough-going investigation and preparation [are] vitally important. . . ."[32] The *Powell* Court further observed that prejudice can exist even where defense counsel proceeded with their case. "It is not enough to assume that counsel . . . exercised their best judgment in proceeding to trial without preparation. Neither they nor the court could say what a prompt and thorough-going investigation might disclose as to the facts. No attempt was made to investigate. No opportunity to do so was given."[33]

While noting the "grave evil[]" of inexcusable delays and continuances, the *Powell* Court stated that a defendant must not be stripped of

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[16] *Id.* at 66. The court rejected other claims by the defendant. Issues that will not be addressed in this summary include: (1) the constitutionality of the "vileness" element as applied in Virginia; (2) whether due process requires the appointment of a private investigator for the defense; (3) whether the evidence was sufficient to support conviction; and (4) whether Gray had defaulted another claim that the prosecution had failed to disclose evidence, separate and distinct from the Sorrell evidence, that would tend to impeach yet another prosecution witness.

[17] *Id.* at 64 (citing *Caspari v. Bohlen*, 114 S. Ct. 948, 953 (1994)).

[18] 430 U.S. 349 (1977).

[19] *Id.* at 353.

[20] *Id.* at 362.

[21] *Gray v. Thompson*, 58 F.3d at 64.

[22] *Id.*

[23] *Id.*

[24] *Id.* Although *Gardner* extended due process to the sentencing context, the extension was carefully circumscribed. The fact that due process applied at sentencing did not transport into that phase of capital proceedings "'the entire panoply of criminal trial procedural rights.'" *Id.* at 64-65 (quoting *Gardner*, 430 U.S. at 358 n.9).

[25] *Id.* at 64-65.

[26] *Id.*

[27] *Id.* at 66.

[28] *Id.*

[29] *Id.* at 66 n.3.

[30] *Id.*

[31] 287 U.S. 45 (1932).

[32] *Powell*, 287 U.S. at 57.

[33] *Id.* at 58.

sufficient time to have his counsel prepare his defense. The Court stated, "[t]o do that is not to proceed promptly in the claim... of regulated justice but to go forward with the haste of the mob...."[34] The Court quoted, "[i]t is vain to give the accused a day in court, with no opportunity to prepare for it, or to guarantee him counsel without giving [counsel] any opportunity to acquaint himself with the facts or law of the case."[35] The Court held, therefore, that due process required the assignment of counsel for an otherwise incapable defendant and that that duty was not discharged by an assignment "under such circumstances as to preclude the giving of effective aid in the preparation and trial of the case."[36] Even Justice Butler, dissenting in *Powell*, conceded that if defendants were "denied the right of counsel, with the accustomed incidents of consultation **and opportunity of preparation for trial**... they were denied due process of law...."[37]

The *Powell* Court's emphasis on the need for trial counsel to have an adequate chance to prepare applies with full force to the Commonwealth's use of unadjudicated crimes to show future dangerousness; the proof of unadjudicated crimes often, as in *Gray*, will resemble a trial in and of itself. Capital defense attorneys, therefore, should strenuously argue that any curtailment of an adequate opportunity for preparation will result in the same ineffective assistance that *Powell* sought to prevent. Defense counsel should point out the prejudice suffered in foregone areas of investigation, unpursued avenues of defense, and lost opportunities for the thorough use of the exculpatory evidence itself. Indeed, think of how different Gray's penalty phase would have been if the defense had known Timothy Sorrell was the prime suspect.

However, to make later claims of prejudice more meaningful and resounding, the defense must make *Brady* requests as specific and all-inclusive as possible. This will help the defense to show that exculpatory evidence that was withheld or that would have been uncovered if given adequate time to prepare would have been material and the case likely would have unfolded in much different fashion that it did.

In *United States v. Cronic*,[38] the United States Supreme Court has given defendants a guide on how to state an ineffectiveness claim because defense counsel has been denied adequate notice. Citing *Powell*, the Court held that in certain circumstances defense counsel may be so handicapped that they could not possibly provide effective assistance of counsel.[39] The Court stated that certain criteria were relevant to this determination:[40] "'(1) [T]he time afforded for investigation and preparation; (2) the experience of counsel; (3) the gravity of the charge; (4) the complexity of possible defenses; and (5) the accessibility of witnesses to counsel.'"[41]

Capital defense attorneys faced with inadequate notice should sculpt their claims in terms of *Powell* and *Cronic*, pointing out how the lack of notice will force them to provide ineffective assistance. The criteria announced in *Cronic* provide the template for crafting the ineffective assistance claim and provide a guide for arguing the materiality of the evidence withheld.

Summary and analysis by:
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[34] *Id.* at 59.
[35] *Id.* (quoting *Commonwealth v. O'Keefe*, 298 Pa. 169, 173, 148 A. 73, 74 (1929)).
[36] *Id.* at 71.
[37] *Id.* at 73-74 (dissenting opinion) (emphasis added).
[38] 466 U.S. 648 (1984).
[39] *Id.* at 659-660.
[40] *Id.* at 663.
[41] *Id.* at 652 (quoting *United States v. Golub*, 638 F.2d 185, 189 (10th Cir. 1980)).

CORRELL v. THOMPSON

63 F.3d 1279 (4th Cir. 1995)
United States Court of Appeals, Fourth Circuit

FACTS

Charles W. Bousman was robbed and murdered August 11, 1985 in Franklin County, Virginia.[1] Walter Milton Correll was arrested and taken to the Roanoke City Police Department on August 16th. Although Correll requested an attorney early into the first interrogation that evening, his request was not honored. He gave two incriminating statements that evening: one to a Roanoke officer and one to Detective Overton of the Frederick County Sheriff's Department, both without the benefit of counsel.[2]

On August 18th, Correll was escorted to Appomattox, Virginia to undergo a polygraph examination.[3] The record did not indicate whether Correll waived his rights before the test. During the examination, the examiner indicated to Correll that an answer indicated deception.[4] Subsequently, Correll was transported to the Franklin County Jail where he asked to speak with Detective Overton in order to explain his polygraph results.[5] Correll waived his rights and gave his third statement regarding the murder.

The two statements given by Correll on August 16th were suppressed at trial, but the third statement following the polygraph examination was admitted into evidence.[6] Correll waived his right to a jury trial and was convicted of capital murder in the commission of robbery. The judge sentenced Correll to death based on the vileness of the crime.

[1] *Correll v. Thompson*, 63 F.3d 1279, 1283 (1995).
[2] *Id.* at 1284.
[3] *Id.*
[4] *Id.* at 1287.
[5] *Id.* at 1284.
[6] *Id.* at 1284.