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GRAHAM v. COMMONWEALTH 250 Va. 79,459 S.E.2d 97 (1995) Supreme Court of Virginia

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FACTS

During the early morning hours, Sheryl L. Stack and Edward Martin were seated in Stack's car in a restaurant parking lot when Andre L. Graham approached the car.[1] Graham had a gun and told them to get out of the vehicle. Graham told Martin to hand over his wallet and car keys to Graham's unarmed companion. While Graham held the gun on Stack and Martin, the other man entered Martin's car. Graham told Stack and Martin to lie down on the parking lot and close their eyes. Both victims were shot in the head as they lay on the ground.[2]

Stack never regained consciousness and died some time later in the hospital. Although Martin had been shot in the head and suffered extensive brain injuries, he survived and was able to testify.[3] He stated that although he did not remember how long after he closed his eyes that he was shot, Graham was the last person he saw with a gun.[4]

At trial it was discovered that the Commonwealth had withheld exculpatory evidence that Martin, the surviving witness, had misidentified Graham's accomplice in a photo array. Graham used this uncovered evidence in the cross-examination of Martin, but did not immediately object upon learning of the evidence that his due process rights had been violated by the Commonwealth's withholding of this information.[5] The trial court rejected Graham's proffered jury instructions regarding eyewitness testimony.[6] Graham was convicted of capital murder[7] and sentenced to death.[8]

HOLDING

The Supreme Court of Virginia held, *inter alia*,[9] that the trial court did not err in rejecting Graham's proffered instruction on eyewitness identification and that Graham waived any alleged *Brady* errors by not seeking a mistrial or other remedy upon his discovery of undisclosed evidence during cross-examination of a Commonwealth witness.[10]

ANALYSIS/APPLICATION IN VIRGINIA

I. Jury Instruction on Eyewitness Identification

The Supreme Court of Virginia concluded that the circuit court did not err in refusing to give Graham's proposed instruction on eyewitness testimony.[11] Graham described his proffered jury instruction as a "cautionary eyewitness identification instruction."[12] This instruction would have directed the jury to consider certain common-sense factors in assessing the credibility of Martin's eyewitness testimony, such as: (1) the witness's ability to see, hear, or know the things about which the witness testified; (2) how well the witness was able to recall and describe those things; (3) the witness's manner while testifying; (4) whether the witness had any interest in the outcome of the case or any bias or prejudice concerning any party or any matter involved in the case; (5) the reasonableness of the witness's testimony considered in light of all the evidence in the case; and (6) whether the witness's testimony was contradicted by what that witness has said or done at another time, or by the testimony of other witnesses, or by other evidence.[13]

The Supreme Court of Virginia had rejected a similar claim in *Satcher v. Commonwealth*.[14] In *Satcher*, the court had held that since the jury was fully instructed on the presumption of innocence and reasonable doubt, a separate instruction on identity was not required.[15] Because *Graham's* jury had been fully instructed on the presumption of innocence, the Commonwealth's burden of proving guilt beyond a reasonable doubt, the consideration of circumstantial evidence, and the assessment of the credibility of witnesses and the weight of the evidence, the court found that the proposed instruction was not required, and that the trial court did not err in refusing to grant it.[16]

In *United States v. Holley*,[17] the Fourth Circuit prospectively adopted a rule that in cases that contain no evidence of identification except the eyewitness testimony of one witness, the trial judge should

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1 *Graham v. Commonwealth*, 250 Va. 79, 83, 459 S.E.2d 97, 99 (1995).

2 *Id.*

3 *Id.* at 82, 459 S.E.2d 99.

4 *Id.* at 83, 459 S.E.2d 99.

5 *Id.* at 87, 459 S.E.2d 101.

6 *Id.* at 86, 459 S.E.2d 100.

7 *Id.* at 80, 459 S.E.2d 97. Graham was also convicted of seven other offenses including one charge of attempted robbery, two charges of robbery and malicious wounding, and four charges of the threatening use and display of a firearm during the commission of a felony. *Id.* at 80-81, 459 S.E.2d 97-98.

8 *Id.* at 81, 459 S.E.2d 98.

9 The court rejected some of the defendant's assignments of error in brief, conclusive language. The rulings provide little if any guidance because they apply broad, settled principles of law to facts that are specific to the case being reviewed. Issues in this category that will not be addressed in this summary include: (1) failure to guide the jury's discretion in its consideration of the "vileness" and "future dangerousness" aggravating factors; (2) use of evidence of prior convictions to impose the sentence of death constitutes double jeopardy; (3) the death penalty, per se, constitutes cruel and unusual punishment under current standards of decency; (4) failure to give adequate jury instructions on mitigation, use of model jury instructions, and jury verdict forms inhibit the jury from giving independent weight to aspects of the defendant's character and record and to circumstances of the offense that are proffered in mitigation; (5) failure of Virginia to provide for meaningful appellate review deprives the defendant of statutory rights and due process of law; (6) whether the Commonwealth had a duty to negate Graham's hypothesis that he was not the trigger man, given the lack of any evidence to support Graham's hypothesis; and (7) whether Graham's death sentence was excessive or disproportionate. *Id.* at 84-85, 459 S.E.2d at 100.

10 *Id.* at 87-88, 459 S.E.2d at 101.

11 *Id.*

12 *Id.* at 86, 459 S.E.2d at 100.

13 *Id.* at 86, 459 S.E.2d at 100-101.

14 *Id.* at 87, 459 S.E.2d at 101 (citing *Satcher v. Commonwealth*, 244 Va. 220, 256, 421 S.E.2d 821, 843 (1992), *cert. denied*, 113 S. Ct. 1319 (1993)).

15 *Id.*

16 *Id.*

17 502 F.2d 273 (4th Cir. 1974).

give the jury instructions on the assessment of eyewitness identification evidence.[18] The Fourth Circuit announced that it would "view with grave concern the failure to give the substantial equivalent of such an instruction. . . ."[19] The court found that in *Holley*, "the identification testimony . . . was so lacking in positiveness as to strongly suggest the 'likelihood of irreparable misidentification[.]'"[20] Therefore, "the jury should have been specifically instructed to consider the possibility of misidentification under the specific circumstances revealed by the evidence."[21]

The Fourth Circuit's holding in *Holley* provides a clear example to present to a trial court of when other courts have found eyewitness instructions to be desirable.[22] Indeed, at least one court has found that such an instruction in certain circumstances is constitutionally required.[23]

In *United States v. Brooks*,[24] the Fourth Circuit held that defendants are not entitled to such an instruction in every case where there is significant identification testimony. Such a cautionary instruction is required only where evidence in the case strongly suggests the likelihood of irreparable misidentification.[25] Therefore, when faced with a trial court's denial of such an instruction, attorneys should continue to object on the record based on a violation of the defendant's Fourteenth Amendment right to due process.

II. Disclosure of Exculpatory Evidence

Graham also argued that the Commonwealth violated the trial court's order to disclose all exculpatory evidence prior to trial.[26] The alleged exculpatory evidence was Martin's misidentification of the other man present at the scene when presented with a photographic spread of six suspects. This misidentification occurred at the same time Martin picked Graham from another photographic spread.[27] Prior to trial, the Commonwealth advised Graham only that Martin was unable to identify the other man.[28]

Graham "learned of Martin's misidentification during his cross-examination of one of the Commonwealth's witnesses, [but] he failed to bring the matter to the court's attention at that time by way of a motion for mistrial, a motion for a continuance, or a request for other relief. Instead, he used the fact of Martin's misidentification to his own advantage in his argument to the jury and raised the *Brady* issue only after the jury returned an adverse verdict."[29]

Graham claimed that the Commonwealth's failure to disclose this exculpatory evidence deprived him of the due process rights articulated in *Brady v. Maryland*.[30] However, the Supreme Court of Virginia concluded that Graham had waived his *Brady* claim and thus the court would not consider Graham's contention that the trial court erred in refusing to set the verdicts aside and grant a new trial.[31]

Graham makes clear that defense attorneys must raise any *Brady* violation to the court immediately upon discovery. This may require the defense, when discovering the *Brady* violation during cross-examination, to make its objection before continuing with the cross-examination. *Graham* certainly requires the defense to make its objection before the verdict is rendered and the guilt phase is concluded.

Defense objections based on *Brady* should be stated in terms of the defendant's right to due process and should be carefully constructed to fully explain the prejudice incurred. As noted in *Kyles v. Whitley*,[32] the undisclosed *Brady* evidence should be evaluated in light of the potential cumulative effect of the evidence.[33] Attorneys should note that this may include the cumulative effect that the undisclosed evidence might tend to have on any evidence already adduced at trial.

Summary and analysis by:
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[18] *Id.* at 275 (citing *United States v. Telfaire*, 469 F.2d 552, 555, n.5 (D.C.Cir. 1972)).

[19] *Id.*

[20] *Id.* at 276 (citing *Simmons v. United States*, 390 U.S. 377, 384 (1968)).

[21] *Id.*

[22] See also *United States v. O'Neal*, 496 F.2d 368 (6th Cir. 1974); *United States v. Scott*, 578 F.2d 1186 (6th Cir. 1978); *United States v. Hodges*, 515 F.2d 650 (7th Cir. 1975); and *People v. Wright*, 755 P.2d 1049 (Ca. 1988).

[23] *State v. Long*, 721 P.2d 483 (Utah 1986).

[24] 928 F.2d 1403 (4th Cir. 1991).

[25] *Id.* at 1407.

[26] *Graham*, 250 Va. at 87, 459 S.E.2d at 101.

[27] *Id.*

[28] *Id.*

[29] *Id.*

[30] *Id.* (citing 373 U.S. 83 (1963)).

[31] *Id.*

[32] 115 S. Ct. 1555 (1995). *See* case summary of *Kyles*, Capital Defense Digest, this issue.

[33] *Id.* at 1560.