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**GILBERT v. MOORE 134 F.3d 642 (4th Cir. 1998) United States
Court Of Appeals, Fourth Circuit**

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needed. A criminal conviction carries with it the reliability that comes from having to produce a sufficient quantity of credible evidence to overcome the defendant's presumption of innocence and convince a jury of the defendant's guilt beyond a reasonable doubt. An unadjudicated act, without a corresponding standard of proof, lacks many of these attributes. Without a standard of proof requirement, the jury is left in the dark as to how convinced it must be that the defendant actually committed the unadjudicated acts. The jury is uninformed about whether it has to be convinced beyond a reasonable doubt, whether more likely than not is sufficient, or whether it simply has to decide which witness it believes more. Without any guidance, the jury's determination too easily devolves into the last inquiry. This is especially troubling given the defendant's complete lack of credibility. Unlike at the guilt phase of a trial where the defendant has a presumption of innocence, the capital defendant at the sentencing phase has absolutely no credibility with the jury, given that he or she has just been convicted of a capital murder. Without any guidance, coupled with the defendant's complete lack of credibility, the current practice in Virginia makes it far too easy for a jury's decision to impose death to rest on flimsy and suspect evidence.

The testimony of the jailhouse inmates in Eaton's sentencing hearing manifests this fear. Two inmates testified that Eaton had fashioned a weapon which he planned to use to overpower a guard and escape from prison. Nothing in the court's opinion indicates the presence of physical

evidence, such as the weapon, to corroborate the testimony of these inmates. Essentially, it was Eaton's word against the word of these jailhouse inmates. Although in the instant case criminal convictions of violence were also offered to prove future dangerousness, nothing in Virginia's statutory scheme prevents a death sentence from being imposed solely on the basis of unadjudicated acts. A mere swearing contest between convicts hardly satisfies the constitutional requirement of a heightened degree of reliability in a jury's decision to impose life or death.

IV. Conclusion

This case epitomizes everything that is troubling about the Fourth Circuit's current death penalty jurisprudence. On the one hand, the court of appeals, through re-characterization and dismissive language, bends over backwards to uphold what has been deemed an unconstitutional practice and prevent the jury from considering relevant and indisputably accurate evidence. On the other hand, the court, again by re-characterizing the defendant's claim, avoids answering the defendant's Due Process objection, and thus permits the admission of relevant but inadequate and highly dubious evidence. At some point fairness must prevail.

Summary and analysis by:
Tommy Barrett

GILBERT v. MOORE

134 F.3d 642 (4th Cir. 1998)

United States Court Of Appeals, Fourth Circuit

FACTS

Half brothers Larry Gilbert and J.D. Gleaton were convicted of capital murder and sentenced to death in South Carolina state court for the 1977 shooting and stabbing of a service station worker.¹ The South Carolina Supreme Court affirmed both convictions but vacated the sentences and remanded for resentencing.² A second jury sentenced Gilbert and Gleaton to death on remand. On appeal, the South Carolina Supreme Court affirmed their sentences, and, subsequently, the United States Supreme Court denied certiorari.³ The half brothers next sought post-conviction relief (hereinafter PCR) from their convictions and sen-

tences in state court. The state PCR court rejected their claims, and both the South Carolina Supreme Court and the United States Supreme Court denied certiorari.⁴

Gilbert and Gleaton requested habeas relief from the United States District Court, Fourth Circuit. In 1985, a federal magistrate recommended a grant of summary judgment in favor of the State on all claims. In 1988, the court adopted that recommendation, granting summary judgment and dismissing the petitions. Gilbert and Gleaton filed motions requesting the court to vacate the judgment and allow an amendment to their petitions. In 1991, the court vacated the judgment and permitted the half brothers to amend their petitions. The cases were remanded to the magistrate judge.⁵

¹*Gilbert v. Moore*, 134 F.3d 642, 645 (4th Cir. 1998). The half brothers were under the influence of illegal drugs at the time of the murder. They also robbed the service station.

²*Gilbert*, 134 F.3d at 645.

³*Id.* at 645-46. See *State v. Gilbert*, 456 U.S. 984 (1982).

⁴*Gilbert*, 134 F.3d at 646.

⁵*Id.* at 646. The court remanded the case with instructions for the magistrate to hold the case in abeyance for sixty days to allow Gilbert and Gleaton to pursue additional remedies in state court.

Gilbert and Gleaton filed their second PCR petitions in state court, and the court rejected all but two of their claims, deeming them successive.⁶ The two undismissed claims were that a jury instruction regarding presumed malice constituted reversible error and that the State had systematically removed prospective black jurors from the venire in violation of the Sixth Amendment right to a jury consisting of a fair cross-section of the community.⁷ After conducting an evidentiary hearing on these two issues, the state PCR court determined that the jury instruction, while unconstitutional, constituted harmless error and that the fair cross-section claim was successive.⁸ The South Carolina Supreme Court denied certiorari, and while those proceedings were pending, the district court complied with the state's request to waive exhaustion as to the remaining issues and resume the federal proceedings.⁹

On federal habeas, the United States District Court, Fourth Circuit, determined that the jury instruction impermissibly shifted the burden of proof on the issue of malice in violation of the Fourteenth Amendment and that the error was not harmless, thus entitling Gilbert and Gleaton to habeas relief.¹⁰ The court rejected the remainder of their claims, which included a conflict of interest claim against defense counsel, an ineffective assistance of counsel claim, and a due process claim based upon the systematic removal of blacks from the venire.¹¹ A panel of the United States Court of Appeals, Fourth Circuit, affirmed the district court's decision.¹² Subsequently, "a majority of the judges in active service" voted to rehear the appeals en banc.¹³

⁶*Id.*

⁷Under South Carolina's statutory scheme, malice is one element of the offense of murder. South Carolina Code Annotated Section 16-3-10 defines murder as "the killing of any person with malice aforethought, either express or implied." See *Yates v. Evatt*, 500 U.S. 391 (1991) (holding that jury instruction to presume malice from use of a deadly weapon constituted unconstitutional burden-shifting and was not harmless error in context of defendant's defense and jury's likely interpretation of unconstitutional instruction).

⁸*Gilbert*, 134 F3d at 646.

⁹*Id.*

¹⁰*Id.*

¹¹*Id.* at 652-57. Gleaton asserted three additional claims. He contended that the trial court allowed the jury to weigh what was essentially the same aggravating factor twice in violation of the Eighth and Fourteenth Amendments; that the court's failure to exclude for cause jurors who indicated they could not consider lack of a criminal record as a mitigating circumstance violated his Sixth, Eighth, and Fourteenth Amendment rights; and that the trial court should have issued jury instructions sua sponte to the effect that the jury should not draw a negative inference with respect to Gleaton's guilt from his exercise of his Fifth Amendment right to remain silent and that the jury should not treat Gilbert's confession as evidence of Gleaton's guilt. *Id.* at 657.

¹²*Gilbert*, 134 F3d at 645. See *Gilbert v. Moore*, 121 F3d 144 (4th Cir. 1997).

¹³*Gilbert*, 134 F3d at 645.

HOLDING

The United States Court of Appeals, Fourth Circuit, upheld the finding that the jury instruction on malice unconstitutionally shifted the burden of proof on that element from the prosecution to the defense but determined that this error was harmless.¹⁴ The court rejected the petitioners' conflict of interest argument based on joint representation, finding that the petitioners had not demonstrated the existence of any actual conflict of interest at the guilt phase and that they had waived their right to conflict-free counsel at the sentencing phase.¹⁵ Additionally, the court found that Gilbert and Gleaton had received effective assistance of counsel and that even if they had not, they could not satisfy the prejudice prong of *Strickland v. Washington*,¹⁶ and thus could not obtain relief on that ground.¹⁷ Because none of the jurors that Gleaton claimed to be improperly qualified were seated on the jury, the court rejected Gleaton's argument that he had been denied his right to an impartial jury by the trial court's refusal to strike for cause jurors who had indicated that they could not consider lack of a criminal record as a mitigating circumstance.¹⁸ Finally, the court determined that the remaining three claims were procedurally defaulted.¹⁹

ANALYSIS/APPLICATION IN VIRGINIA

I. The Fourth Circuit Serves Up Its Special: Harmless Error of Constitutional Magnitude

The court of appeals accepted South Carolina's concession that the jury instruction concerning the element of malice impermissibly shifted the burden of proof from the prosecution to the defense and constituted an error of constitutional magnitude. Thus, the court proceeded to the question of whether the error was harmless. Emphasizing the great extent to which federal courts have traditionally deferred to state conviction and sentencing decisions, the court reaffirmed previous holdings concerning the proper standard for appellate review of constitutional error com-

¹⁴*Id.*

¹⁵*Id.* at 652.

¹⁶466 U.S. 668 (1984) (holding that standard for determining ineffectiveness of counsel was whether defendant received reasonably effective assistance of counsel and, if not, whether there was a reasonable probability that the outcome would have been different had defense counsel not committed the errors rendering his or her assistance ineffective).

¹⁷*Gilbert*, 134 F3d at 655.

¹⁸*Id.* The court noted that his use of peremptory challenges to remove those jurors did not constitute a violation of his right to an impartial jury.

¹⁹*Id.* at 656. This case marks yet another instance in which the Fourth Circuit has met en banc to reverse a previous decision that was somehow favorable to a capital defendant. For what has proven to be a premature celebration of the victory that the court's previous decision represented for capital defendants, see footnote 39 of the Case Summary of *Arnold*, Cap. Def. J., Vol. 10, No. 1, p. 7. See also Case Summary of *Mackall*, this issue.

mitted at the state trial court level. The court stated that a federal court may not grant habeas relief based upon a trial error of constitutional magnitude unless that error "had substantial and injurious effect or influence in determining the . . . verdict," or, at least, the appellate court entertains grave doubt as to whether the error had such effect.²⁰

The court of appeals set forth the legal definition of "malice" and subsequently considered the evidence before the jury to determine what effect the erroneous instruction may have had upon the jury.²¹ The court considered Gilbert's confession along with evidence of the nature and number (eight) of the wounds inflicted upon the victim and determined that the jury was presented with "overwhelming evidence of malice."²² The court de-emphasized the fact that the wounds were inflicted in the course of a struggle and that neither defendant had demonstrated an intention to use a weapon before the struggle with the service station attendant ensued. Based upon its take on the evidence, the court concluded, "there can be no doubt that the erroneous instruction had no effect whatsoever on the verdicts, much less a substantial and injurious one."²³ The court stated that based upon the evidence before it, no reasonable jury could have found that the killing was not intentional or, by implication, committed without malice, and thus, the court deemed the error harmless.²⁴

This retrospective analysis of the jury's decision presupposed the correctness of the outcome of the trial and failed to recognize the dynamic nature of jury decision-making. The court of appeals did not inquire as to how the jury might have proceeded in making its decision if it had not received the presumed malice instruction. For example, the jury might have focused upon the fact that the wounds were inflicted after the struggle began—a fact that was dispositive for the *Yates* Court, which reached a result that was opposite from the outcome in this case.²⁵ As unfair as it may seem, the court's harmless error analysis illustrates the exceedingly difficult standard that must be met by defense counsel who hope to use trial error of constitutional magnitude as grounds for obtaining relief for a capital defendant.

²⁰*Gilbert*, 134 F3d at 647 (quoting *Kotteakos v. United States*, 328 U.S. 750, 776 (1946) (holding that trial error of constitutional magnitude that had substantial and injurious effect upon the trial's outcome may not be considered harmless)). See *O'Neal v. McAnich*, 513 U.S. 432, 437 (1995) (holding that federal habeas court must grant relief if the court entertains grave doubt as to whether trial error of constitutional magnitude had a substantial and injurious effect upon the jury's verdict).

²¹*Gilbert*, 134 F3d at 647-52.

²²*Id.* at 650.

²³*Id.*

²⁴*Id.* at 652.

²⁵See *supra* note 7.

II. Joint Representation in Capital Cases

The defendants claimed that their joint representation had violated their Sixth Amendment right to effective assistance of counsel, which encompassed the right to conflict-free representation.²⁶ The court of appeals found that the defendants did not demonstrate the existence of an actual conflict of interest. The court noted that their unified guilt phase strategy had been to challenge the voluntariness of their confessions and that their interests with respect to all legal and factual issues did not "diverge."²⁷ A good-faith analysis of whether joint representation creates an actual conflict should necessarily include consideration of the relationship between the fact of joint representation and the nature of co-defendants' guilt phase strategies. Under the requisite scrutiny, co-defendants' unified trial strategies may prove to be a function of joint representation and, perhaps, not in the best interest of one or both of the co-defendants. This court did not engage in such an analysis.

The court noted that at the sentencing phase, Gilbert and Gleaton had knowingly waived their right to conflict-free counsel. Additionally, the court explained that "the record demonstrates that Petitioners decided that they did not wish to cast blame upon each other and that they instead wanted to pursue a joint defense."²⁸ Again, perhaps if Gilbert and Gleaton had not been represented by the same attorney and had consulted someone other than that attorney as to the advisability of maintaining a unified strategy, they would have opted to pursue different strategies at the sentencing phase and might have obtained different results.

The mandates of fundamental fairness dictate that trial courts hearing capital cases of jointly represented defendants should appoint an amicus to talk to each individual defendant about the advisability of joint representation from the perspective of that individual defendant's interests. Courts have shown a willingness to provide this service in other contexts. The heightened obligations imposed upon courts in capital cases would seem to justify the allowance of such a minimal protection.

III. What Effective Assistance of Counsel Means: Is *Strickland* a "Clearly Guilty" Rule?

In this case, the court of appeals considered an astonishing assortment of alleged deficiencies of defense counsel at both the guilt and sentencing phases. Gilbert and Gleaton argued that their counsel had "failed to make an appropriate independent inquiry into the circumstances of the crime; interviewed only two of the seventeen witnesses for the prosecution; failed to examine the physical evidence; met with them for a total of less than three and one-half hours; and failed to study sufficiently the then newly enacted death

²⁶*Gilbert*, 134 F3d at 652.

²⁷*Id.*

²⁸*Id.* at 653.

penalty procedures.”²⁹ The court dismissed these arguments wholesale, noting that the petitioners had failed to show that these deficiencies had impacted their counsel’s performance and thus prejudiced them.³⁰

Gilbert and Gleaton also challenged their counsel’s performance during the resentencing hearing, noting that counsel had failed both to retain either a pharmacological expert or a psychiatric expert and to conduct a sufficient investigation into their background, which they contended would have yielded a number of character witnesses who could have testified as to mitigating circumstances.³¹ The court of appeals found that defense counsel’s failure to retain an expert did not fall outside of the wide range of professionally acceptable conduct. In addressing and rejecting the second component of the petitioners’ complaint, the court noted, “. . . counsel is not constitutionally required to interview every family member, neighbor, or coworker in the search for mitigating evidence.”³²

Ultimately, the court of appeals found that even if Gilbert and Gleaton had demonstrated that their counsel’s conduct fell outside of the acceptable range, they had not demonstrated prejudice. The court concluded, “[t]he evidence that Petitioners argue would have been obtained if counsel had performed competently does not undermine our confidence in the verdict.”³³ Once again, the court presupposed the guilt of the defendants and the appropriateness of the jury’s verdict and sentencing decision. Defense counsel’s omissions at the guilt and sentencing phases may very well have been crucial to the jury’s decision at both phases. Perhaps by interviewing any of the fifteen of the seventeen prosecution witnesses that he did not interview, considering the physical evidence, retaining an expert, or talking to another family member, neighbor, or coworker, defense counsel might have found a crucial bit of evidence that could have produced doubt in a juror’s mind as to the appropriateness of the imposition of the death sentence and thus impacted the jury’s deliberations in a significant way. The court’s disregard for the dynamic nature of pretrial investigation, trial preparation, and jury deliberation is manifest in the appallingly low standard that it sets for the performance of capital defense counsel.

As a whole, the Fourth Circuit has demonstrated its great willingness and propensity to stretch to find effective assistance of counsel. The courts’ ineffective assistance of counsel analyses, however, certainly do not in any sense identify what good or even competent counsel should do in a capital case. As all capital

defense counsel certainly must know, representation of capital defendants entails an enormous amount of legal, moral, and ethical responsibility. What may suffice to insulate an attorney from the charge of ineffective assistance of counsel is often insufficient to provide the quality of representation that defendants on trial for their lives deserve.³⁴

IV. The Unkind World of Procedural Default

The court disposed of three of petitioners’ claims on grounds of procedural default.³⁵ While South Carolina’s procedural default rules differ somewhat from Virginia’s scheme, this case is instructive of the importance of preserving issues on both state and federal grounds at every level of litigation. Specifically, this case highlights the importance of carefully reading jury instructions so as to identify potential arguments and ensure that they are not procedurally defaulted.

Summary and analysis by:
Anne E. Duprey

³⁴According to Standard 4-1.2(c) of the American Bar Association Standards for Criminal Justice, “[s]ince the death penalty differs from other criminal penalties in its finality, defense counsel in a capital case should respond to this difference by making extraordinary efforts on behalf of the accused.” See generally the ABA Guidelines for the Appointment and Performance of Counsel in Death Penalty Cases.

³⁵The court rejected the claims that petitioners were deprived of their due process right by the prosecution’s systematic removal of black prospective jurors from the venire, that the trial court had deprived Gleaton of his Eighth and Fourteenth Amendment rights by its instruction to the jury to consider essentially the same aggravating factor twice, and that the trial court should have issued jury instructions sua sponte ordering the jury not to draw a negative inference from Gleaton’s exercise of his Fifth Amendment right and not to consider Gilbert’s confession as evidence of Gleaton’s guilt. *Gilbert*, 134 F3d at 656.

²⁹*Id.* at 654.

³⁰*Gilbert*, 134 F3d at 654.

³¹*Id.*

³²*Id.* at 655.

³³*Id.*