Calderon v. Coleman 119 S. Ct. 500 (1998)

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I. Facts

On September 5, 1979, Shirley Hill's ("Hill") ex-husband drove her from her home in San Francisco to nearby Daly City where she was to attend real estate classes.[1] Hill planned to return by bus, and, while en route to Daly City, they discussed the route she would take home.[2] Hill was seen in classes from noon to 3:00 or 3:15 p.m., and was last seen at 3:30 at the Westlake Shopping Center in Daly City.[3] Her body was found the afternoon of September 6, 1979, in a bungalow adjoining the Mission High School football field.[4] The field was several miles from the Westlake Shopping Center, but only a few blocks from a bus transfer stop which Hill would have used on her way home from Daly City.[5]

After a trial in a California state court, a jury convicted Russell Coleman ("Coleman") of the rape, sodomy, and murder of Shirley Hill.[6] The jury's findings as to rape and sodomy made Coleman eligible for the death penalty.[7] During the penalty phase of the bifurcated proceeding, the trial judge gave the jury what is known as a "*Briggs* instruction." The *Briggs* instruction, then required under California law,[8] was intended to inform the jury of the governor's power to commute a sentence of life without the possibility of parole.[9] After giving the standard *Briggs* instruction, the trial

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1.   People v. Coleman, 759 P.2d 1260, 1264 (1988).
2.   *Id.*
3.   *Id.*
4.   *Id.*
5.   *Id.*
6.   Calderon v. Coleman, 119 S. Ct. 500, 501 (1998).
7.   *Id.*
8.   The *Briggs* instruction, although still codified under section 190.3 of the California Penal Code, was declared unconstitutional under the state constitution in *California v. Ramos*, 689 P.2d 430 (Cal. 1984). *See* CAL. PENAL CODE § 190.3 (West 1998).
9.   The full text of the court's instruction was as follows:

> You are instructed that under the State Constitution, a Governor is empowered to grant a reprieve, pardon or commutation of a sentence following conviction of the crime. Under this power, a Governor may in the future commute or modify a sentence of life imprisonment without the possibility of parole to a lesser sentence that would include the possibility of parole. So that you will have no misunderstandings relating to a sentence of life without possibility of parole, you have been informed generally as to the Governor's commutation modifica-

judge, for reasons which are unclear, then instructed the jury that it was not to consider the governor's commutation power in reaching its verdict.[10]

After exhausting direct appeals, Coleman petitioned the federal district court for a writ of habeas corpus. After recognizing that the *Briggs* instruction was not facially unconstitutional,[11] the district court granted the writ on the ground that the instruction given in Coleman's case was inaccurate as applied because it failed to mention a limitation on the governor's power to commute the sentence.[12] This failure, the court found, violated the Eighth and Fourteenth Amendments by "g[iving] the jury inaccurate information and potentially divert[ing] its attention from the mitigation evidence presented"[13] and, in the context of the prosecutor's arguments for future dangerousness, "prevent[ing] the jury from giving due effect to Coleman's mitigating evidence."[14] Although the court did not expressly consider the effect of the instruction requiring the jury not to consider commutation, it noted that the Ninth Circuit had held in a similar case, *Hamilton v. Vasquez*,[15] "that the trial court did not cure the error by instructing the jury not to consider commutation."[16]

In affirming the district court, the Ninth Circuit—in what the United States Supreme Court later termed a "sweeping pronouncement"[17]—concluded that "[a] commutation instruction is unconstitutional when it is inaccurate."[18] The court of appeals then turned to the state's

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tion power. You are now instructed, however, that the matter of a Governor's commutation power is not to be considered by you in determining the punishment for this defendant. You may not speculate as to if or when a Governor would commute the sentence to a lesser one which includes the possibility of parole. I instruct you again that you are to consider only those aggravating and mitigating factors which I have already read to you in determining which punishment shall be imposed on this defendant.

Coleman, 119 S. Ct. at 501 (citing Respondent's Opposition to Motion to Amend Petition for Writ of Habeas Corpus in No. C89-1906 (N.D. Cal.), p. 7, Record, Doc. No. 267, quoting Tr. 1059-1060).

    10.   *Id.* at 501.

    11.   *Id.* at 502 (citing No. C89-1906 (N.D. Cal., Mar. 28, 1997), App. to Pet. for Cert. A-146, A-151 (citing California v. Ramos, 463 U.S. 992 (1983) (upholding *Briggs* Instruction under federal constitution)).

    12.   *Id.* Under the state constitution, the governor may commute the sentence of a prisoner who, like Coleman, is a twice-convicted felon only with the approval of four California Supreme Court justices. CAL. CONST., art. 5, § 8.

    13.   *Coleman*, 119 S. Ct. at 502 (citing No. C89-1906 (N.D. Cal., Mar. 28, 1997), App. to Pet. for Cert. A-151).

    14.   *Id.* (citing No. C89-1906 (N.D. Cal., Mar. 28, 1997), App. to Pet. for Cert. A-149).

    15.   17 F.3d 1149 (9th Cir. 1994).

    16.   *Coleman*, 119 S. Ct. at 502 (citing No. C89-1906 (N.D. Cal., Mar. 28, 1997), App. to Pet. for Cert. A-148).

    17.   *Id.*

    18.   *Id.* (quoting Coleman v. Calderon, 150 F.3d 1105, 1118 (9th Cir. 1998)).

argument that, even if the instruction were unconstitutional, it "did not have a 'substantial and injurious effect or influence' on the jury's sentence of death"[19] under *Brecht v. Abrahamson*[20] and was therefore harmless.[21] The court of appeals did not, however, expressly address the *Brecht* test:

> To decide this question, we look to *Boyde v. California*, 494 U.S. 370 (1990). When the inaccuracy undermines the jury's understanding of sentencing options, 'there is a reasonable likelihood that the jury has applied the challenged instruction in a way that prevents the consideration of constitutionally relevant evidence.' *Boyde*, 494 U.S. at 380. We conclude the district court did not err in holding that Coleman was denied due process by the state trial court's inaccurate commutation instruction.[22]

The issue before the Supreme Court was whether the Ninth Circuit's application of *Boyde* was in fact a harmless error analysis as required under *Brecht*.

II. Holding

The Supreme Court found that the Ninth Circuit failed to apply harmless error analysis and therefore remanded the case to the district court for a finding on that issue.[23]

III. Analysis / Application in Virginia

The Supreme Court found that the *Boyde* test was not a harmless error test, but rather a test for determining "whether constitutional error occurred when the jury was given an ambiguous instruction that it might have interpreted to prevent consideration of constitutionally relevant evidence."[24] In such cases, constitutional error exists only if "there is a reasonable likelihood" that the jury so interpreted the instruction.[25] The Court noted that although the *Brecht* and *Boyde* tests are similar in that they both further the public policy "against retrials years after the first trial where the claimed error amounts to no more than speculation,"[26] the *Boyde* analysis does not inquire into whether, in the whole context of the particular case, the result

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19. *Id.* (quoting Coleman, 150 F.3d at 1118).
20. 507 U.S. 619, 637 (1993).
21. *Coleman*, 119 S. Ct. at 502 (citing Brecht v. Abrahamson, 507 U.S. 619, 637 (1993)).
22. Coleman, 150 F.3d at 1119 (9th Cir. 1998) (parallel citations and other citations omitted).
23. *Coleman*, 119 S. Ct. at 503-04.
24. *Id.* at 503 (citing Boyde v. California, 494 U.S. 370, 377, 380 (1990)).
25. *Id.* (citing *Boyde*, 494 U.S. at 377).
26. *Id.* (quoting *Boyde*, 494 U.S. at 380).

of the error was a substantial and injurious effect or influence on the jury's verdict.[27]

Defense counsel in Virginia should be aware that there is no Virginia counterpart to the *Briggs* instruction. Were the Commonwealth to make a motion requesting that the jury be instructed regarding the governor's power to commute a death sentence, the issue should be litigated under the Virginia Constitution[28] and under Virginia case law. For example, pre-*Simmons*[29] cases have held that information regarding parole eligibility is not evidence properly before the jury;[30] and the same rule ought to apply to the governor's power to commute a life sentence. In addition, defense counsel may request an evidentiary hearing at which it may be demonstrated that any power to commute a sentence is in fact a "paper power," that is, one which is virtually never exercised.

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27. *Id.* at 504.

28. A claim under the United States Constitution would fail, of course, because the United States Supreme Court has found the *Briggs* instruction to be constitutional. *See* California v. Ramos, 463 U.S. 992 (1983).

29. Simmons v. South Carolina, 512 U.S. 154 (1994) (holding when future dangerousness is at issue, a capital defendant has due process right under the Fourteenth Amendment to provide evidence indicating his ineligibility for parole).

30. *See* Mueller v. Commonwealth, 422 S.E.2d 380, 394-95 (Va. 1992).

CASE NOTES:
United States Court of Appeals, Fourth Circuit