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Parole Eligibility in Goins v. Angelone, 226 F.3d 312 (4th Cir. 2000) and Bacon v. Lee, 225 F.3d 470 (4th Cir. 2000)

Parole Eligibility *in* Goins v. Angelone, 226 F.3d 312 (4th Cir. 2000) *and* Bacon v. Lee, 225 F.3d 470 (4th Cir. 2000)

Goins v. Angelone[1] and *Bacon v. Lee*[2] provide capital defense counsel guidance on parole eligibility instructions. Christopher Goins ("Goins") was convicted of one count of capital murder, four counts of first-degree murder, two counts of malicious wounding and seven counts of illegal use of a firearm.[3] He was sentenced to death on the capital murder charge and to four life terms plus seventy-eight years for the non-capital offenses.[4] Robert Bacon ("Bacon") was convicted of first-degree murder and conspiracy to commit murder.[5] He received a death sentence.[6] At trial, both men sought to have the jury instructed on their parole eligibility.[7]

I. Goins's Claim

Goins argued that he had a right to tell the jury during voir dire and sentencing about the nature and possibility of parole.[8] Goins contended that the trial court should have permitted inquiry during voir dire regarding the juror's perceptions of life sentences.[9] Goins's counsel attempted to instruct the venire on the meaning of a life sentence in Virginia.[10] In particular, counsel sought an instruction specifying that if Goins were convicted of a Class One felony, he would serve at least thirty years in prison.[11]

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1. 226 F.3d 312 (4th Cir. 2000).

2. 225 F.3d 470 (4th Cir. 2000).

3. Goins v. Angelone, 226 F.3d 312, 318 (4th Cir. 2000). For further discussion of the facts and claims raised, see Christina S. Pignatelli, Case Note, 13 CAP. DEF. J. 385 (2001) (analyzing Goins v. Angelone, 226 F.3d 312 (4th Cir. 2000)).

4. *Goins*, 226 F.3d at 318-19.

5. Bacon v. Lee, 225 F.3d 470, 474 (4th Cir. 2000). For further discussion of the facts and claims raised, see Christina S. Pignatelli, Case Note, 13 CAP. DEF. J. 379 (2001) (analyzing Bacon v. Lee, 225 F.3d 470 (4th Cir. 2000)). Because Bacon was decided in North Carolina, first degree murder carries a potential death sentence.

6. *Bacon*, 225 F.3d at 475.

7. *See Goins*, 226 F.3d at 326; *Bacon*, 225 F.3d at 485-86.

8. *Goins*, 226 F.3d at 326.

9. *Id.*

10. *Id.*

11. *Id.*; *see* VA. CODE ANN. § 53.1-151(D) (Michie 1994) (mandating that "a person who has been sentenced to two or more life sentences . . . shall be eligible for parole after serving

Goins contended that because the trial court did not permit such inquiry, he was deprived of the right to a fair and impartial jury.[12]

The United States Court of Appeals for the Fourth Circuit looked to *Simmons v. South Carolina*,[13] wherein the Supreme Court of the United States held that a capital defendant must be permitted to instruct the jury on the defendant's parole ineligibility when: "(1) if sentenced to life imprisonment, he will never become eligible for parole; and (2) the prosecution argues that he presents a future danger."[14] Goins argued that *Simmons* should be applied to his situation because he would not be parole eligible for thirty years.[15] The Fourth Circuit, relying on previous decisions, rejected Goins's argument because "*Simmons* does not require that a jury be instructed on the effects of parole for a parole-eligible defendant."[16]

II. Bacon's Claim

Bacon argued that his Eighth and Fourteenth Amendment rights were violated because the trial court did not permit a jury instruction regarding Bacon's eligibility for parole in twenty years if sentenced to life in prison.[17] In order to rebut the State's future dangerousness arguments, at resentencing, Bacon's counsel presented testimony of witnesses who said that Bacon would be welcomed back into the community if he received a

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twenty years of imprisonment, except that if either such sentence, or both, was or were for a Class 1 felony violation, and he is not otherwise ineligible for parole . . . he shall be eligible for parole only after serving thirty years"). For capital murders committed after 1995, life imprisonment means life in prison without parole. Prior to 1995, the Virginia Code denied a defendant parole in two instances. *See* VA. CODE ANN. § 53.1-151 (Michie 1994). A defendant was parole-ineligible if convicted of a third rape, murder or robbery (or any combinations of these three) so long as the third crime was not part of the same act or transaction. VA. CODE ANN. § 53.1-151(B1) (Michie 1994). A defendant was also parole ineligible if paroled from a previous life sentence and then sentenced to life imprisonment again for the commission of a second crime. VA. CODE ANN. § 53.1-151(E) (Michie 1994). The General Assembly of Virginia subsequently abolished parole for all felony offenses committed on or after January 1, 1995. VA. CODE ANN. § 53.1-165.1 (Michie 1998).

12. *Goins*, 226 F.3d at 326. Goins further asserted that the Due Process clause of the Fourteenth Amendment required that he be allowed to present evidence of the nature of a life sentence during sentencing. *Id.*; *see* U.S. CONST. amend. XIV, § 1.

13. 512 U.S. 154 (1994).

14. *Goins*, 226 F.3d at 326; *see* Simmons v. South Carolina, 512 U.S. 154, 171 (1994).

15. *Goins*, 226 F.3d at 326-27.

16. *Id.* at 327 (citing Clagett v. Angelone, 209 F.3d 370, 375 n.2 (4th Cir. 2000)); *see* Wilson v. Green, 155 F.3d 396, 408 (4th Cir. 1998) (holding that *Simmons* does not entitle a capital defendant to an instruction about when he would be parole eligible).

17. *Bacon*, 225 F.3d at 485.

life sentence and was later paroled.[18] Bacon then requested an instruction on parole eligibility, which was refused.[19]

On direct appeal, Bacon also relied on *Simmons* and contended that the trial court erred by not giving the requested instruction.[20] The Supreme Court of North Carolina rejected the argument and distinguished *Simmons* from Bacon's case because Bacon might eventually be eligible for parole.[21] The district court agreed that *Simmons* was not applicable to this case.[22] The Fourth Circuit affirmed and found that "*Simmons* applie[d] only to instances where, as a legal matter, there is no possibility of parole if the jury decides the appropriate sentence is life in prison."[23] The Fourth Circuit pointed out that they had never extended *Simmons* to cases in which the defendant was parole eligible.[24] The court concluded that because Bacon was parole eligible, he was not entitled to a *Simmons* instruction.[25]

III. Analysis / Application in Virginia

As of January 1, 1995, parole for all felony offenses was abolished in Virginia.[26] *Simmons* mandated that when the prosecution proceeds on a theory of future dangerousness, the defendant could request a "life means life" instruction regarding his parole ineligibility.[27] *Yarbrough v. Commonwealth*[28] extended the instruction in Virginia to all capital cases regardless of whether the prosecution proceeded on a theory of future dangerousness or

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18. *Id.* One witness was asked, "You think if Robert was given life in prison and served whatever number of years he served and was released, he would be welcomed back in this community?" *Id.* at 482. The witness responded with "I would welcome him. I think his friends would welcome him." *Id.* Another witness was asked, "If the jury does sentence Robert to life in prison and he serves a number of years, and he's released or paroled, would you welcome him back in the community, knowing that he's been convicted of first-degree murder?" *Id.* at 482-83. This witness also answered affirmatively. *Id.* at 483.

19. *Id.* at 485.

20. *Id.*; *see* Simmons v. South Carolina, 512 U.S. 154, 171 (1994).

21. *Bacon*, 225 F.3d at 485; *see* State v. Bacon, 446 S.E.2d 542, 558-59 (N.C. 1994).

22. *Bacon*, 225 F.3d at 485.

23. *Id.* at 486 (citing Ramdass v. Angelone, 120 S. Ct. 2113, 2121 (2000)).

24. *Bacon*, 225 F.3d at 486; *see* Roach v. Angelone, 176 F.3d 210, 220 (4th Cir. 1999) (denial of *Simmons* instruction because defendant was parole eligible); Keel v. French, 162 F.3d 263, 270 (4th Cir. 1998) (same); Fitzgerald v. Greene, 150 F.3d 357, 367 (4th Cir. 1998) (same).

25. *Bacon*, 225 F.3d at 486.

26. *See* VA. CODE. ANN. § 53.1-165.1 (Michie 2000) (abolishing parole for all felony offenses committed on or after January 1, 1995).

27. *See* Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (mandating that "life means life" jury instruction is only required when the prosecution argues for the death penalty on the basis of the defendant's future dangerousness and a life sentence for the defendant would be without possibility of parole).

28. 519 S.E.2d 602 (Va. 1999).

vileness.[29] *Simmons*, *Yarbrough*, and Virginia Code Section 53.1-165.1 effectively require that the court instruct the jury that "life means life" upon the defendant's request. Further, defense counsel should note, that when a non-capital felony carries the possibility of a punishment of life without parole, the defendant is also entitled to a *Simmons* instruction upon request.[30] These rules can greatly affect capital sentencing, especially if non-capital felonies are sentenced before the capital conviction. Defense counsel should ask that the capital charge be sentenced first so that the jury is not persuaded to give a death sentence based upon the fact that it gave a life sentence on the predicate felony.

However, defendants convicted of felony offenses committed prior to January 1, 1995, are parole eligible, and thus, are not permitted to request a "life means life" instruction. In the future, many crimes committed prior to January 1, 1995 may be litigated because of the CODIS database. With this database, recently acquired DNA evidence may be entered into the database and result in a "cold hit," or a match. If this occurs, a defendant could be tried for a crime committed years ago.

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29. *See* Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (finding that the jury must be instructed that "life means life" upon the defendant's request when the defendant has been convicted of capital murder); *see also* VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) (mandating that "[u]pon request of the defendant, a jury shall be instructed that for all Class 1 felonies committed after January 1, 1995, a defendant shall not be eligible for parole if sentenced to imprisonment for life").

30. *See* Fishback v. Commonwealth, 532 S.E.2d 629, 634 (Va. 2000) (mandating that juries should be instructed about parole ineligibility in non-capital cases when the defendant has no chance of being paroled).