Capital Defense Journal

Volume 2 | Issue 1 Article 6

Fall 9-1-1989

DUGGER v. ADAMS 109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989) United States Supreme Court

sible to have a jury instruction indicating that the jurors were not to be swayed by sympathy or passion as long as they were still able to consider legitimate mitigating factors. Conversely, in a situation similar to the one in *Gathers* a jury should *not* be swayed or influenced by emotion or sympathy for the victim or victim's family, but instead should focus on the acts and intentions of the defendant.

Upon review the Court concluded that evidence regarding factors about which the accused was unaware and that did not influence his decision to kill were inadmissible during the sentencing phase of a capital trial. Therefore, the Court held that the death sentence must be reversed and the defendant granted a new sentencing hearing. *Gathers* at 2211. It should be noted that Justice White, who filed the dissenting opinion in *Booth*, filed a separate concurring opinion in *Gathers*. Justice White's concurrence was apparently based solely on his refusal to overrule the Court's prior holding in *Booth*. *Id.*

Justice O'Connor filed a dissenting opinion in which Chief Justice Rehnquist and Justice Kennedy joined. In the dissent Justice O'Connor argued that the holding of the majority was a broad reading of *Booth* that effectively barred the admission of any evidence pertaining to the victim. *Gathers* at 2212. This assertion is made in spite of the majority's statement that, "Our opinion in *Booth* . . . left open the possibility that the kind of information contained in victim impact statements could be admissible if it 'related directly to the circumstances of the crime.'" *Id.* at 2211. Thus, while limiting the type of evidence pertaining to the victim and circumstances under which it is admissible, the majority opinion has *not* totally barred the admission of such evidence.

It should be noted that even prior to the holding in *Gathers*, Virginia law barred prosecutorial commentary on the "harm" the accused's acts caused the victim's family. *Dingus v. Commonwealth*, 153 Va. 846, 149 S.E. 414 (1929). In *Dingus*, the prosecutor stated that if it were not for the act of the defendant, the victim's wife would not be a widow. *Id.* at 850. In reversing the verdict of guilty and remanding for a new trial, the Court in *Dingus* stated, "Whatever liberties are permitted to counsel . . . to appeal for mercy for their clients . . . the prosecutor has no corresponding liberty . . . the Commonwealth does not rely either upon prejudice or sympathy for the enforcement of its laws." *Id.* This bar on prosecutorial commentary is effective, despite the fact that such evidence may be admissible during the guilt phase to prove, for example, that the victim was not the aggressor.

As stated previously, the *Gathers* error occured during the prosecution's closing arguments offered in the sentencing phase of Gathers' trial. Attorneys representing capital defendants in Virginia should consider that the longstanding custom of not objecting to an opponent's closing argument is *not*, as *Gathers* demonstrates, applicable in a capital proceeding. The arguments of the Commonwealth Attorney may also be objectionable on additional grounds. (*See*, discussion of *Caldwell v. Mississippi* in the summary of *Dugger v. Adams*-[this issue]). Further, capital defense attorneys should recognize that failure to contemporaneously object to the arguments of the Commonwealth Attorney could effectively bar appellate review of potential Constitutional errors.

Summary and analysis by: Thomas Marlowe

DUGGER v. ADAMS
109 S. Ct. 1211, 103 L. Ed. 2d 435 (1989)
United States Supreme Court

FACTS

In 1978 Adams was brought to trial for first-degree murder and the state of Florida sought to impose the death penalty. At voir dire, the trial judge informed the veniremen that their recommendations were not binding on the court: "The Court is not bound by your recommendation. ... You are merely an advisory group to me in Phase Two. ... So that this conscience part of it as to whether or not you're going to put the man to death or not, that is not your decision to make. ..." 109 S. Ct. at 1213. "In addition, the judge interrupted counsel's voir dire on two occasions to repeat that the court, not the jury, was responsible for sentencing, and again instructed the jury to that effect before it began its deliberations. Defense counsel did not object at any point to these instructions." *Id.* Veniremembers ultimately selected for the trial heard the judge's explanation of the law at least once and several heard it more than once. *Id.* On direct appeal and in his initial state and federal motions for habeas relief Adams did not cite these instructions as error on either state or federal grounds.

While Adams was still pursuing his first round of federal habeas appeals, the U.S. Supreme Court decided *Caldwell v. Mississippi*, 472 U.S. 320, 105 S. Ct. 2633, 86 L. Ed. 2d 231 (1985), holding that "it is constitutionally impermissible to rest a death sentence on a determination made by a sentencer who has been led to believe that the responsibility for determining the appropriateness of the defendant's death rests elsewhere". When his initial habeas motion failed, Adams filed a second motion for postconviction relief in which he challenged, for the first time, the statements of the trial judge on *Caldwell* grounds. Adams, in this second motion, argued that "the judge's instructions violated the Eighth Amendment by misinforming the jury of its role under Florida law. According to respondent, although the Florida death penalty statute provided that the jury's recommendation was only advisory, the Florida Supreme Court had held that a trial judge could only override the jury's verdict if the facts were '"so clear and convincing that virtually no reasonable person could differ.'... Since the trial judge ... told the jurors that the sentencing responsibility was solely his and failed to tell them that he could override their verdict only under limited circumstances, respondent argued, the judge misled the jury in violation of *Caldwell*." *Adams*, 109 S. Ct. at 1214, *citing Tedder v. State*, 322 So. 2d 908, 910 (Fla. 1975). The Florida Supreme Court, on grounds that Adams did not raise the argument on direct appeal, refused to address the merits of the *Caldwell* argument, and in a second federal habeas petition the District Court held the *Caldwell* claim to be procedurally barred, and in the alternative, that it was without merit. The Eleventh Circuit reversed, holding that "respondent's *Caldwell* claim 'was so novel at the time of ... trial in ... 1978 and his sentencing and appeal in early 1979 that its legal basis was not reasonably available at that time'." *Adams v. Wainwright*, 816 F.2d 1493, 1498 (11th Cir. 1987).

HOLDING

The United States Supreme Court did not decide whether the trial judge's action violated *Caldwell* due to its determination that there was no acceptable excuse for Adams' failure to object to the judge's action at trial and thereby give the Florida court a chance to rule on the matter. As the 11th Circuit decided, there is a recognized excuse for failing to raise claims at trial and so preserve them on

appeal if the legal basis for the claim was not reasonably available at the time. However, the Supreme Court decided that since Adams had not objected on the state law grounds available to him at trial under the ruling in *Tedder v. Florida*, and where the state law objection was a "necessary ingredient" of the subsequently available *Caldwell* claim, the latter is now barred. 109 S. Ct. at 1217. The *Adams* Court made it explicit that the holding did not imply that "...whenever a defendant has any basis for challenging particular conduct as improper, a failure to preserve that claim under state procedural law bars any subsequently available claim arising out of the same conduct." *Id.* at 1217. Still, the holding leaves open that possibility in a given case where the basis for state and federal claims are closely related.

ANALYSIS

This case illustrates once again that Virginia attorneys must read all applicable state and federal law, make all appropriate objections on all available state and federal grounds, and preserve them on direct appeal. This is because of the difficulty imposed by habeas law. It is important to note that, on *certiorari*, the State addressed only the claim of procedural bar. *Adams*, n.4 at 1215. The Court did not reach the merits of Adams' *Caldwell* claim, *id.*, but instead saw the issue as one of exercising the Court's "equitable power to overlook respondent's state procedural default." 109 S. Ct. at 1216 - 1217.

To address this "threshold" issue, the Court reviewed the requirements set out in *Wainwright v. Sykes*, 433 U.S. 72, 97 S. Ct. 2497, 53 L. Ed. 2d 598 (1977). Under *Sykes*, habeas petitioners must show cause for the default and prejudice, i.e., a real possibility of a different result, before federal courts will review claims found to be procedurally defaulted by state courts.

The *Caldwell* holding in itself is worth noting by Virginia attorneys. Although the trial court is not likely to mislead the jury about its role and responsibility, the Commonwealth's attorney in his closing argument might do so. At that point it is the responsibility of the defense to interrupt and object on *Caldwell* grounds.

Summary and analysis by: Thomas O. Burkhalter

HILDWIN v. FLORIDA
109 S. Ct. 2055, 104 L. Ed. 2d 728 (1989)
United States Supreme Court

FACTS

Petitioner Hildwin was convicted of first degree murder. The jury returned a unanimous advisory verdict of death and the judge imposed the death sentence. The trial judge, in imposing sentence, found four aggravating circumstances which were set forth in writing as required under Florida law. The jury made no specific finding as to aggravating circumstances. Florida law requires that at least one aggravating circumstance must be found before the death sentence may be imposed. Petitioner argued before the Florida Supreme Court "that the Florida capital sentencing scheme violates the Sixth Amendment because it permits the imposition of death without a specific finding by the jury that sufficient aggravating circumstances exist to qualify the defendant for capital punishment." *Hildwin*, 109 S. Ct. at 2056. The Florida Supreme Court rejected this argument without discussion and Hildwin petitioned the U.S. Supreme Court.

HOLDING

The Sixth Amendment does not require that specific findings authorizing the death sentence be made by a jury. Petitioner argued before the Florida Supreme Court that the Sixth Amendment requires a specific finding, by the jury, of aggravating factors support a sentence of death. The Florida Supreme Court found this argument meritless. On appeal, the U.S. Supreme Court noted that in *Spaziano v. Florida*, 468 U.S. 447, 104 S. Ct. 3154, 82 L. Ed. 2d 340 (1984), it had rejected any Sixth Amendment requirement of a jury trial on sentencing issues. The Court also referred to *McMillan v. Pennsylvania*, 477 U.S. 79, 106 S. Ct. 2411, 91 L. Ed. 2d 67 (1986), which held that "there is no Sixth Amendment right to jury sentencing even where the sentence turns on specific findings of fact." *Hildwin*, 109 S. Ct. at 2057. "The existence of an aggravating factor ... is not an element of the offense but ... is `a sentencing factor that comes into play only after the defendant has been found guilty.'" *Id.*

ANALYSIS

Va. Code Ann. §19.2-264.4(D), requires that a jury returning a death sentence do so on a form specifying what aggravating factors have been found. In Virginia, unlike Florida, the jury's determination is not advisory; a life sentence is binding upon the judge, and a death sentence may be set aside only for good cause. Virginia's statute, therefore, exceeds the Sixth Amendment requirements of *McMillan* and *Spaziano* as cited in *Hildwin*. However, the Virginia Supreme Court has held that a jury need not specify which aggravating factor it used where both factors could have been found. See *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979); *Hoke v. Commonwealth*, 237 Va. 303, 377 S.E.2d 595 (1989). A unanimous death verdict is all the Virginia Supreme Court has required, despite the statutory requirement of unanimity as to aggravating factors. *Hildwin*, therefore, does not foreclose a Fourteenth Amendment due process challenge to the Virginia Supreme Court's interpretation. In *Clark* and *Hoke*, the Supreme Court of Virginia acknowledged a distinction between factors required to prove the elements of an offense and factors affecting sentencing; objections to the lack of specificity in the jury's findings were based on statutory interpretation rather than the Sixth or Fourteenth Amendment. The Supreme Court of Virginia noted that other courts construing similar statutes treated the aggravating factors as a single unit. *Clark* at 213. Hoke argued on appeal that no distinction was made between the "future danger" and "vileness" predicates. The Virginia Supreme Court found that the facts in the case were sufficient to support either finding, *id.* at 316 - 317, and that since the jurors were unanimous in their verdict of death for all three underlying felonies, Hoke's argument was meritless.

Summary and analysis by: Thomas O. Burkhalter