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EVANS v. MUNCIE 916 F.2d 163 (1990)

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Even though this third claim did not succeed, the Fourth Circuit agreed that "evidence of a prior-vacated death penalty is of limited, if any, relevance to the jury's decision whether to impose the death penalty." *Id.* However, the court held that this information was not so "constitutionally impermissible or totally irrelevant to the sentencing process" as to rise to a *Booth* violation. *Id.* (quoting *Zant v. Stephens*, 462 U.S. 862 (1983)).

South Carolina v. Gathers, 109 S. Ct. 2207 (1989), supports the even broader proposition that comments made by the prosecution to the jury about the victim's character are irrelevant to the sentencing decision and a violation of the defendant's eighth amendment rights. "For the purposes of imposing the death penalty . . . the defendant's punishment must be tailored to his personal responsibility and moral guilt." *Gathers*, 109 S. Ct. 2207, 2210 (quoting *Enmund v. Florida*, 458 U.S. 782 (1982)). It seems reasonable to argue that any evidence, including evidence of a prior vacated death sentence, which does not relate to a heightened degree of personal culpability is also irrelevant. This theory of relevancy is only true of information about Gaskins' previous sentences, and obviously does not apply to revelation of Gaskins' prior murder convictions.

Both *Booth* and *Gathers* were 5 to 4 decisions with different Court memberships. During this past term, the U.S. Supreme Court as currently constituted initially agreed to reconsider *Booth* and *Gathers* in *Ohio v. Huertas*, 1991 WL 3926 (U.S.). However, the Court ultimately dismissed the state's petition for certiorari as improvidently granted and failed to rule on the Ohio Supreme Court's finding that admission of victim impact evidence violated the defendant's constitutional right to have the sentencing decision made by the jury and judge.

Summary and analysis by:
Anne E. McInerney

EVANS v. MUNCIE

916 F.2d 163 (1990)
United States Court of Appeals, Fourth Circuit

FACTS

Wilbert Lee Evans shot and killed a deputy sheriff while attempting to escape from state custody. He was convicted of capital murder and sentenced to death in 1981. This sentence was vacated when the Commonwealth confessed error on the sentencing proceedings. A new jury was impaneled and subsequently recommended the death penalty based upon a finding of "future dangerousness." *Evans v. Commonwealth*, 228 Va. 468, 323 S.E.2d 114 (1984).

Evans was denied relief at the state habeas level, and in his first federal habeas petition. *Evans v. Thompson*, 881 F.2d 117 (4th Cir. 1989); *see also* case summary of *Evans v. Thompson*, Capital Defense Digest, Vol. 2, No. 1, p. 10 (1989). After his second habeas petition at the federal level, the district court for the Eastern District of Virginia granted a stay of execution. The Commonwealth appealed this decision, and the United States Court of Appeals for the Fourth Circuit vacated the stay of execution.

HOLDING

Evans raised two claims in support of his motion to stay his execution. His first claim was that the eighth and fourteenth amendments prohibit the execution of a defendant when his behavior subsequent to sentencing casts doubt upon the existence of the sole aggravating factor supporting the death sentence. Evans also asserted that the Commonwealth violated the eighth and fourteenth amendments by refusing to provide a forum to hear and decide his first claim. Evans presented, for the purpose of demonstrating that he lacked the aggravating factor of "future dangerousness," evidence that he was instrumental in protecting the lives of prison employees during an escape attempt by several death row inmates.

The United States Court of Appeals for the Fourth Circuit held that these claims constituted "new rules" which federal courts may not use in collateral proceedings to overturn a final state conviction. The court also held that his claims did not allege a constitutional violation remediable by a federal court.

ANALYSIS / APPLICATION IN VIRGINIA

The "new rule" doctrine states that "habeas corpus cannot be used as a vehicle to create new constitutional rules of criminal procedure unless those rules would be applied retroactively to all defendants on collateral review." *Teague v. Lane*, 489 U.S. 288 (1989). The *Teague* Court defined a new rule as one "not dictated by precedent existing at the time the defendant's conviction became final." 489 U.S. at 301 (emphasis in original). The purpose of the "new rule" doctrine is to allow state courts to issue their decisions based upon a faithful application of well established constitutional standards existing at the time the case is heard, even though later decisions may modify those standards. *Butler v. McKellar*, 110 S.Ct. 1212, 1217 (1990); *see also* case summary, *Butler v. McKellar*, Capital Defense Digest, Vol. 3, No. 1, p. 2 (1990).

In the instant case, the Fourth Circuit determined that Evans was asking for a new rule. However, Evans purposely phrased his claim in a manner that he hoped would place it within one or both of the recognized exceptions to the *Teague* new rule doctrine. Nonetheless, the court found that neither of the exceptions applied. While the Fourth Circuit's holding may be correct, the reasoning employed deserves some discussion, particularly with regard to future cases.

The first exception to *Teague* is substantive in that it allows the application of a new rule on collateral review if the new rule places "certain kinds of conduct beyond the power of the criminal lawmaking authority to proscribe." *Evans*, 916 F.2d at 166, quoting *Teague*, 489 U.S. at 311. According to the Fourth Circuit, Evans' claim advocated the new rule that "the Constitution requires a state to reestablish the validity of an error-free sentence because a prisoner desires to present character evidence based on his post-sentencing conduct." *Evans*, 916 F.2d at 165. On that characterization of his claim, the court held that the first exception had nothing to do with the new rule being sought.

The claim that Evans put forward could have received deeper analysis. A recent decision by the United States Supreme Court stated that the first exception includes cases where the imposition of a particular form of punishment is prohibited on a certain class of individuals. *Penry v. Lynaugh*, 109 S.Ct. 2934, 2952-53 (1989). The irrelevance of a first exception claim by Evans seems less apparent when it is phrased in terms of *Penry*. The more favorable characterization of Evans' claim is that he belongs to a class of persons who may not be executed. His specific argument is that the Constitution protects individuals sentenced to death solely upon the aggravating factor of future dangerousness if their conduct subsequent to conviction demonstrates a lack of future dangerousness.

At this writing, however, the Court has recognized only one post-sentence occurrence that can spare death sentenced prisoners from

execution. *Ford v. Wainwright*, 477 U.S. 399 (1986), held that insanity will prohibit the carrying out a of death sentence. In a footnote, the *Evans* court limited post-conviction review to the circumstance of insanity. *Evans*, 916 F.2d 166, n. 1.

The second exception to the *Teague* new rule doctrine is procedural in nature, permitting a new rule to be applied retroactively if it is a "watershed" rule that is essential to the fundamental fairness of the proceeding. *Sawyer v. Smith*, 110 S.Ct. 2822, 2831 (1990). Evans asserted that no procedure exists whereby his first exception claim might be heard. The nature of his second claim is such that it falls with the first. The lack of procedure to hear a first exception claim is moot when the first exception claim is found not to have merit. Nonetheless, the second *Evans* claim brings up an interesting distinction between reliability and "fundamental fairness."

The court analogizes Evans' second exception claim to several cases involving new evidence relevant to the conviction or sentencing of the defendant. Their reasoning does not entirely address Evans' claim regarding a change in his death qualification after sentencing. A typical *Teague* second exception claim would involve the inability of the accused to present evidence at the guilt or sentencing phase of a trial, or fundamental procedural impediments affecting reliability. Evans asserts that the rule regarding accuracy of conviction should also apply to death qualification, which in the case of a conviction based solely upon future dangerousness could involve matters after sentencing.

The "watershed rule" definition of the second *Teague* exception is a narrow reading in that "fundamental fairness" seems to exclude anything but a glaring deprivation of rights during trial. In the name of finality in judicial decision-making, the *Sawyer* decision all but eliminates the second exception as a means of federal habeas relief. (*See* case summary of *Sawyer v. Smith*, Capital Defense Digest, Vol. 3, No. 1, p. 4 (1990)). Historically, the purpose of habeas corpus has been protection of the wrongly accused. Capital punishment based upon future dangerousness raises the question of whether one may be "innocent" of the death penalty. *Cf. Smith v. Murray*, 477 U.S. 527, 537 (1986).

In closing, the Court of Appeals labeled Evans' claim as a plea for executive clemency clothed as a petition for habeas relief. The *Evans* decision does not further narrow federal habeas review but it does demonstrate that few avenues of relief are available after sentencing and direct appeal. Although evidence that long term predictions of future dangerousness are unreliable continues to mount (*See* Marquart and Sorensen, *A National Study of the Furman-commuted Inmates: Assessing the Threat to Society from Capital Offenders*, 23 Loyola L.A.L. Rev. 5 (1989)), practically speaking there is simply no procedure for assessing claims that a sentencing jury erred in its finding.

Summary and analysis by:
Christopher J. Lonsbury

BASSETTE v. THOMPSON

915 F.2d 932 (1990)
United States Court of Appeals, Fourth Circuit

FACTS

Herbert Russell Bassette was convicted of the 1979 murder of a sixteen-year-old night attendant during the robbery of a gas station in Richmond. Three participants in the robbery testified that Bassette shot the victim while he begged for mercy. This case arises from Bassette's federal habeas corpus petition.

Bassette presented thirty-six grounds for relief to the United States District Court for the Eastern District of Virginia. That court found that all but seven of these claims were barred by a Virginia state rule that prevents the hearing of a claim by a federal court if it has not been brought previously to a state court. The U.S. Court of Appeals for the Fourth circuit decided that under a new line of cases, all but three of Bassette's claims for habeas corpus relief are barred.

HOLDING

Bassette asserted many grounds for relief but the holdings of the U.S. Court of Appeals which merit discussion in this summary are limited to those which are not bound by the specific facts of the case.

The Court held that the district court read *Harris v. Reed*, 489 U.S. 255 (1989) and *Teague v. Lane*, 489 U.S. 288 (1989) too narrowly, and should not have heard seven of Bassette's claims. *Bassette v. Thompson*, 915 F.2d 932, 936 (1990). *Harris* holds that when it is contended that an appellant is barred from presenting a claim to the federal court because of state procedural rules, the federal court may still elect to consider the federal questions involved unless the state court has specifically stated it found against appellant based on a procedural bar. *Harris*, 489 U.S. at 261. *Teague* addressed, among other things, the issue that a claim, when it has never been raised in state court, is barred from federal consideration when there is no mention of the claim in the state opinion. *Teague*, 489 U.S. at 299. The Fourth Circuit decided that the *Harris* rule is limited by *Teague* because it would be illogical to expect a state court to invoke specifically a state bar to void a claim it has not heard either in court or in brief. The court decided that Bassette could have brought his claims to the state court, and therefore the procedural bar contained in Va. Code Ann. § 8.01-654(B)(2) prevents him from bringing his claims before the federal court in habeas corpus. This statute provides that a claim shall not be heard "on the basis of any allegation of facts of which petitioner had knowledge at the time of filing any previous petition."

ANALYSIS/APPLICATION IN VIRGINIA

Despite holding that Bassette's claims were barred, the court went on to issue advisory opinions on several of them. Bassette claimed that he should have been advised of his *Miranda* rights prior to a post conviction interview. During this interview, which was conducted by parole and probation officers, Bassette maintained his innocence. The prosecution used these statements to argue that Bassette was not entitled to mitigation of the death sentence because his failure to accept responsibility for the murder was evidence of future dangerousness. Despite the judge's certification that he did not rely on Bassette's statements from this interview when affirming the jury's death sentence, Bassette urged *Miranda* had been violated. *Estelle v. Smith*, 451 U.S. 454 (1981) supports his position by holding that use of statements by defendants undergoing court ordered examinations where defendants are not advised of their *Miranda* warnings violates the fifth, sixth and fourteenth amendments. The Court of Appeals stated that 28 U.S.C. §§ 2245 and 2254 (1988) support the proposition that a judge's affidavit is sufficient to create a presumption of truth that supports a finding of harmless error. *Id.* at 938. The court seems to misuse the statutes. 28 U.S.C. §2245 is procedural in nature and requires that judges certify the facts concerning their findings at sentencing hearings in order to complete the trial level record. 28 U.S.C. § 2254(d) is also a procedural statute. It acknowledges the