

Fall 11-1-1991

YATES v. EVATT 111 S. Ct. 1884 (1991)

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Recommended Citation

YATES v. EVATT 111 S. Ct. 1884 (1991), 4 Cap. Def. Dig. 10 (1991).

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and adversarial functions are concerned, the *Lankford* Court cited *Strickland v. Washington*, 466 U.S. 668 (1984) (holding that a capital sentencing hearing is enough like a trial to warrant the same adversarial standards as a trial). The Court reasoned, therefore, that without notice of the issues to be litigated at the penalty stage, the benefit of the adversarial process is negated. Since in *Lankford* the trial judge was silent as to the principal issue to be litigated (i.e. a possible death sentence), the Court found that the adversarial process may have malfunctioned.

Since federal law requires that narrowing construction be given to the three "vileness factors" (i.e. "torture, depravity of mind or aggravated battery to the victim" Va. Code Ann. §19.2-264.4(C)), Virginia defense counsel need to know upon which of the three factors the Commonwealth intends to rely during the penalty phase of a capital murder trial and what

narrowing construction will be applied. Thus, after *Lankford*, pretrial litigation of Virginia's "vileness factors" becomes even more important. See Lago, *Litigating the "Vileness" Factor in Virginia*, Capital Defense Digest, this issue. Filing a Bill of Particulars allows defense counsel to acquire notice of factor(s) upon which the Commonwealth intends to rely.

The purpose of presentencing orders, the Court noted, is "to eliminate the need to address matters that are not in dispute, and thereby save the valuable time of judges and lawyers." 111 S. Ct. at 1729. Thus, the Bill of Particulars will not only provide notice of the issues to be litigated at the sentencing phase of the capital trial, it will promote judicial efficiency as well.

Summary and analysis by:
Wendy Freeman Miles

YATES v. EVATT

111 S. Ct. 1884 (1991)
United States Supreme Court

FACTS

Dale Robert Yates was charged with murder during the commission of a robbery in Greenville County, South Carolina. Yates, armed with a handgun, and Henry Davis, an accomplice, armed with a knife, entered a store and accosted the proprietor. After acquiring the money, Yates shot twice, wounding the proprietor slightly. Yates then fled. Davis remained and scuffled with the proprietor. As the two struggled, the proprietor's mother intervened. Davis stabbed her once and she died almost immediately. The proprietor then drew a pistol and killed Davis. Yates was found guilty of murder as an accomplice and sentenced to death. The Supreme Court of South Carolina affirmed the conviction. *State v. Yates*, 280 S.C. 29, 310 S.E.2d 805 (1982).

Yates sought relief at state habeas asserting that the burden-shifting effect of a jury instruction was unconstitutional. The instruction to which Yates objected dictated that malice is implied or presumed from (1) the "willful, deliberate, and intentional doing of an unlawful act" or (2) the "use of a deadly weapon." Although the state court denied relief, the Supreme Court of the United States remanded for further consideration in light of its decisions in *Sandstrom v. Montana*, 442 U.S. 510 (1979) and *Francis v. Franklin*, 471 U.S. 307 (1985). *Yates v. Aiken*, 474 U.S. 896 (1985). On remand, the state supreme court failed to apply retroactively the principles settled in those decisions. The United States Supreme Court granted certiorari and remanded again for further proceedings. *Yates v. Aiken*, 484 U.S. 211 (1987).

Upon second remand, the Supreme Court of South Carolina recognized that the two charges regarding implied malice were erroneous; however, it again denied relief, holding that the error was harmless. *Yates v. Aiken*, 301 S.C. 214, 391 S.E.2d 530 (1989). In that opinion, the state court claimed that the error was harmless because the jury did not have to rely on the presumption of malice given the "facts" which the reviewing court mistakenly posed as Davis lunging at the mother and stabbing, giving her multiple wounds.

For the third time, the United States Supreme Court granted certiorari to review the case.

HOLDING

The United States Supreme Court held that the Supreme Court of South Carolina applied the wrong standard in determining whether the challenged instructions constituted harmless error. The Court also found that the Supreme Court of South Carolina misread the trial court record to which the standard was applied.

Under the United States Supreme Court's analysis based on *Sandstrom* and *Francis*, the malice instruction given in *Yates* was erroneous because it did not require the state to establish all elements of the crime beyond a reasonable doubt. See *In re Winship*, 397 U.S. 358 (1970) (holding that the fourteenth amendment protects the accused from conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged). The instructions given to the jury in this case may not be excused as harmless error because they erroneously shifted the burden of proof to the defendant, thus violating *Mullaney v. Wilbur*, 421 U.S. 684 (1975).

The United States Supreme Court found that the state court's inquiry into the constitutionality of the jury's malice instruction did not satisfy the proper harmless error standard as promulgated in *Chapman v. California*, 386 U.S. 18 (1967). An error is harmless only if it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Id.* at 24 (emphasis added). The state court employed improper analysis in determining merely that it was not necessary for the jury to rely on the unconstitutional presumption created by the malice instruction.

ANALYSIS / APPLICATION IN VIRGINIA

A. Jury Instruction Erroneous

The due process clause of the fourteenth amendment requires that the prosecution establish every element of a crime beyond a reasonable doubt before an accused may be convicted. *In re Winship*, 397 U.S. 358 (1970). Instructions which shift this burden of proof on the issue of intent to the defendant are unconstitutional. *Mullaney*, 421 U.S. 684 (1975). This rule was developed further in *Sandstrom v. Montana*, 442 U.S. 510 (1979). In *Sandstrom*, the jury was given an instruction that "the law presumes that a person intends the ordinary consequences of his voluntary acts." *Id.* at 513, 524. This instruction was held unconstitutional as a violation of both the *Winship* and *Mullaney* requirements. The Court applied the same principle in *Francis v. Franklin*, 471 U.S. 307 (1985). The *Francis* instructions stated that "the acts of a person of sound mind and discretion are presumed to be the product of the person's will" and that a person "is presumed to intend the natural and probable consequences of his acts." *Id.* at 316-318. These instructions, like those given in *Sandstrom*, fail to comply with the requirements of *Winship* and *Mullaney*.

In *Yates*, the charge instructing the jurors on the issue of malice was two-fold. The trial judge told the jury that malice is to be implied or presumed upon (1) the willful, deliberate & intentional doing of an unlawful act, and (2) the use of a deadly weapon.

In the first instruction for implying or presuming malice on the part of the defendant, the trial judge warned the jury that the presumption was a rebuttable one. However, the United States Supreme Court rejected the instruction despite this cautionary advice given by the judge. The Court's concern was that jurors, while considering evidence tending to rebut presumptions, continue to give weight to presumptive assertions rather than disregarding them in favor of the evidence alone.

As to the second instruction for implying or presuming malice on the part of the defendant, the court warned the jury that admission of evidence as to the circumstances surrounding use of a deadly weapon may remove the presumption. This instruction is inherently contradictory and confuses more than clarifies. As the Court pointed out, "language that merely contradicts and does not explain a constitutionally infirm instruction will not suffice to absolve the infirmity." *Francis*, 471 U.S. at 322.

B. Harmless Error Standard

When an error has been committed in the finding of guilt of an accused, the United States Supreme Court has ruled that a test may be applied to determine whether it appears "beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at 24 (emphasis added). The *Chapman* test is a two step analysis in which the court first must ask what evidence the jury actually considered in reaching its verdict. Then, the court must weigh the probative force of that evidence as against the probative force of the error standing alone.

The Supreme Court of South Carolina, however, applied a different analysis in its treatment of harmless error. The state court's goal was to determine whether it was beyond a reasonable doubt that the jury would have found it unnecessary to rely on the unconstitutional presumptions. See *Rose v. Clark*, 478 U.S. 570, 583 (1986) (holding that *Sandstrom* error can be harmless). Based on this language, the state did not find the constitutional error in its instruction to be a reversible error.

The United States Supreme Court in this decision determined that the Supreme Court of South Carolina misapplied the *Rose v. Clark* standard. The inquiry should not have been whether it was unnecessary for the jury

to rely on the presumption; rather, to determine that the jury did not rely on the presumption and thus no error resulted.

The Court, having set up the parameters of the test, examined the entire record to determine what evidence the jury considered regarding intent, removed from the presumptions themselves. It found that assertions of Davis' "lunging" and inflicting "wounds" were unsubstantiated by the record. The mother died of a single wound and no other evidence tended to prove Davis' malice towards her. On this evidence, the Court concluded that the state court could not infer beyond a reasonable doubt that the presumptions did not contribute to the jury's finding.

C. Impact

Attorneys defending capital clients may learn important lessons from this case. Harmless error is a difficult standard to meet. Given a particular fact pattern, a *Sandstrom* error may be harmless under the *Rose v. Clark* rule. See also *Waye v. Townley*, 871 F.2d 18 (4th Cir. 1989). However, defense attorneys should recognize that an error will not automatically be harmless. Often, even when there is other evidence of guilt, the evidence may not meet the harmless error analysis. For additional analyses of the treatment of harmless error, see case summary of *Arizona v. Fulminante*, Capital Defense Digest, this issue, and case summary of *Satterwhite v. Texas*, Capital Defense Digest, Vol. 1, No. 1, p. 14 (1988) (errors found not to be harmless).

Another important lesson is to review carefully the jury instructions to be given at trial. *Yates* may support a challenge to the Virginia second degree murder instruction on malice. That instruction also raises a presumption but adds that the presumption disappears if a reasonable doubt is raised. The reasonable doubt caveat can be said to contradict but not explain the presumption. This may create the same confusion that the court condemned in *Yates* and lead to a successful challenge to the Virginia malice instruction for defense counsel.

Summary and analysis by:
Laura J. Fenn

ARIZONA v. FULMINANTE

111 S. Ct. 1246, (1991)
United States Supreme Court

FACTS

Defendant Oreste Fulminante was a suspect in the murder of his 11-year-old stepdaughter, who was killed on or around September 14, 1982 in Arizona. No charges were filed against him, and Fulminante left for New Jersey where he was convicted on unrelated federal charges and incarcerated in a federal prison in New York. While in the penitentiary, Fulminante became friends with a former police officer named Anthony Sarivola who was serving time for loansharking. Sarivola was also an informant for the F.B.I. and was posing as an organized crime figure.

Sarivola learned that Fulminante had been suspected of his stepdaughter's murder. The F.B.I. instructed Sarivola to find out more information concerning Fulminante. In October of 1983, Sarivola offered to protect Fulminante from the rough treatment he was beginning to receive from the other inmates, but told Fulminante that he would have to know about Fulminante's involvement in the stepdaughter's murder. Fulminante then admitted to Sarivola that he had taken the stepdaughter to the desert, choked her, sexually assaulted her, made her beg for her life, and then shot her in the head. Fulminante was released from prison in May of 1984 and made a

second confession to Sarivola's fiancée. Fulminante was indicted for the first-degree murder of his stepdaughter on September 4, 1984.

Fulminante moved to suppress the first confession because it was coerced, and the second because it was the fruit of the first confession. The trial court allowed the confessions, convicted Fulminante of first degree murder and sentenced to death. The Arizona State Supreme Court, upon motion for reconsideration, found the confession was coerced, decided that the use of a coerced confession could not be harmless error, and ordered a retrial without use of the confession to Anthony Sarivola. The Supreme Court granted certiorari upon appeal by the State of Arizona.

HOLDING

In an opinion by Justice White, the Court affirmed the Arizona State Supreme Court's decision and held that Fulminante's confession to Anthony Sarivola was coerced. In a second opinion written by Chief Justice Rehnquist, the Court reversed the reasoning of the Arizona high court that use of a coerced confession is always reversible error, and instead held that admission of an involuntary confession is subject to harmless error analysis. *Arizona v. Fulminante*, 111