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SCHAD v. ARIZONA 111 S. Ct. 2491 (1991)

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S. Ct. 1246 at 1265. In the Rehnquist opinion, the Court differentiated between potentially harmless errors which affect only the procedure of the trial, and structural errors which violate due process requirements so severely that their commission can never be harmless. Formerly, coerced confessions were generally held to be in the latter category and so automatically invalidated the conviction. *Payne v. Arkansas*, 356 U.S. 560 (1958). The portion of the opinion authored by the Chief Justice held that coerced confessions, once considered institutional violations of the accused's due process rights, now may be scrutinized under the more lenient "harmless error" standard. The portion of the Court's opinion delivered by Justice White applied the harmless error standard, held that the confession to Sarivola was not harmless under these facts, and affirmed the Arizona supreme court's reversal and remand of Fulminante's conviction.

ANALYSIS / APPLICATION IN VIRGINIA

Arizona v. Fulminante is important because it changes what had been a well established principle of criminal law. For nearly half a century any reliance on a coerced confession invalidated the conviction even if there existed enough evidence apart from the confession to convict the defendant. See 111 S. Ct. at 1253 (dissenting opinion of Justice White providing history of decisions leading up to this case). The majority specifically reversed this tenet of law: "It is evident from a comparison of the constitutional violations which we have held subject to harmless error, and those which we have held not, that involuntary statements or confessions belong in the former category." *Id.* at 1265.

However, the majority decision authored by Justice White applied the harmless error ruling to Fulminante's case and held that the admission of the confession to Sarivola in the prison was not harmless. *Id.* at 1257. The Court noted that in order to determine that a constitutional error is harmless, the Court must be satisfied on *de novo* review that the federal constitutional error was "harmless beyond a reasonable doubt". *Id.*, citing *Chapman v. California*, 386 U.S. at 24 (1967). The Court expressly stated that a confession where the defendant discloses the motive and means of a crime requires the

reviewing court to "exercise extreme caution before determining that the admission of the confession at trial was harmless" because of the temptation it creates in the mind of the jury to find guilt. 111 S. Ct. at 1258. In addition to looking at the prejudicial effect of the confession upon the fact finder, the Court looked at the likelihood that the confession prejudiced the defendant at the sentencing phase of the trial. The Court also pointed out that in Fulminante's case, the sentencer relied on the defendant's confession to establish otherwise uncorroborated aggravating factors necessary for a capital sentence. *Id.* at 1260.

The importance of this decision on the capital defense bar is not inconsequential, especially when taken in conjunction with other recent Supreme Court Decisions. The Court, even as it scales back the scope of reversible error, is maintaining real constitutional protections through strict scrutiny of harmless error issues. *Yates v. Evatt*, 111 S. Ct. 1884 (1991) and *Satterwhite v. Texas*, 486 U.S. 249 (1988), with *Fulminante*, demonstrate the difficulty of the state's showing that a constitutional error is harmless. In *Yates v. Evatt* the Court held that unconstitutionally prejudicial jury instructions shifting the burden of proof to the defendant are subject to harmless error review. The state in this case, however, was unable to meet the burden of showing that the error was not harmless, and relief was granted. Likewise, *Satterwhite v. Texas* held that violations of a sixth amendment right to counsel during psychiatric examination are subject to harmless error evaluation, but that the state had failed to carry its burden of proof.

Counsel should be aware that although they may encounter harmless error evaluation of constitutional error on direct appeal, it is by no means a losing position. The Supreme Court has consistently held against the state if it cannot demonstrate that the error was harmless beyond a reasonable doubt. A defendant's case is even stronger, and counsel should argue even more forcefully, when the constitutional error violates fundamental rights. As the division of the Court in this case demonstrates, where errors affecting these rights are concerned, defendants may successfully argue for relief.

Summary and analysis by:
Peter T. Hansen

SCHAD v. ARIZONA

111 S. Ct. 2491 (1991)
United States Supreme Court

FACTS

A highway worker discovered the decomposed body of Lorimer Grove, strangled with a rope around his neck, on the side of an Arizona highway. The victim had last been seen eight days earlier driving his Cadillac. The next month, New York State Police stopped Edward Schad, Jr. for speeding in Grove's Cadillac. Schad explained that he was transporting the car for a friend named Larry Grove. Schad was later arrested in Utah for a parole violation and possession of a stolen vehicle. Police found several of the victim's belongings in the Cadillac, in Schad's wallet, and in an abandoned rental car which Schad had rented several months earlier and never returned.

The applicable Arizona statute defines first degree murder as "murder which is . . . wilful, deliberate or premeditated . . . or which is committed . . . in the perpetration of, or attempt to perpetrate . . . robbery." Ariz. Rev. Stat. Ann. § 13-452 (Supp. 1973). Schad was convicted of first degree murder and sentenced to death. The conviction was set aside on collateral review and remanded for further proceedings. 142 Ariz. 619, 691 P.2d 710 (1984). At Schad's retrial, the prosecutor advanced theories of both premeditated murder and

felony-murder in support of conviction and the death penalty. Schad's defense was that the circumstantial evidence proved him at most a thief, but not a killer. Schad's attorney requested a jury instruction on the lesser-included offense of theft, but the court refused. The court did, however, instruct the jury on the offense of second-degree murder. The court also instructed the jury that a verdict convicting the defendant of first degree murder had to be unanimous, but the court did not require unanimity as to whether the defendant was guilty of premeditated murder or felony-murder. Under the court's instructions, the jury found Schad guilty and sentenced him to death.

At his appeal, Schad claimed, *inter alia*, that his federal constitutional rights under the sixth, eighth, and fourteenth amendments were violated, in that: (1) the court failed to require unanimity regarding the separate crimes of premeditated murder and felony-murder, and (2) the court failed to instruct the jury on robbery, a lesser-included offense of felony-murder, as required by *Beck v. Alabama*, 447 U.S. 625 (1980). The Arizona Supreme Court rejected Schad's arguments and affirmed the second conviction. *Schad v. State*, 163 Ariz. 411, 788 P.2d 1162 (1989). As to the defendant's first claim, the court ruled that first-degree murder was "one crime regardless whether

it occurs as a premeditated murder or a felony murder.” *Id.* at 417, 788 P.2d 1168. As a result, the court determined that Schad was “not entitled to a unanimous verdict on the precise manner in which the act was committed.” *Id.* (emphasis added). The court also rejected Schad’s claim that *Beck* required a jury instruction on the lesser-included offense of robbery. *Id.* at 416-417, 788 P.2d 1167-1168.

HOLDING

The United States Supreme Court granted certiorari and affirmed the lower court’s holding in a 5-4 decision. Justice Souter wrote for himself and three others in a plurality opinion regarding the failure to require unanimity between premeditated murder and felony-murder. Justice Scalia filed a separate concurring opinion on that issue. Justice Souter wrote for a five member majority on the issue of whether *Beck v. Alabama* required a jury instruction on robbery.

The plurality upheld the Arizona Court’s ruling with respect to the first issue, embracing that court’s questionable rationale that premeditated murder and felony-murder are “mere means” of accomplishing the same crime. *Schad v. Arizona*, 111 S. Ct. at 2497 (1991). In support of this theory, Justice Souter relied on his conclusion that premeditated murder and felony-murder are actually “alternative mental states, the one being premeditation, the other the intent required for murder combined with the commission of an independently culpable felony.” *Id.* (emphasis added). Souter then analogized the case to a line of cases holding that a jury need not agree as to means of satisfying the *actus reus* element of an offense. The plurality announced that due process is satisfied without requiring unanimity on differing “means” of committing an offense, so long as those means are of “equivalent blameworthiness or culpability.” *Id.* at 2503. In the opinion of four justices, premeditated murder and felony-murder satisfied this “moral equivalence” test. *Id.*

Justice Scalia’s concurrence criticized the plurality’s reasoning. As he pointed out, the “moral equivalence” test would permit a jury to convict under a single charge that “the defendant assaulted either X on Tuesday or Y on Wednesday.” *Id.* at 2507 (Scalia, J., concurring in part and concurring in the result). According to Scalia, such a charge would be impermissible despite the obvious “moral equivalence” of the two acts. Under Scalia’s view, Schad’s conviction comported with due process simply because the dual charge which includes premeditated murder and felony-murder is a historical practice. *Id.* Justice Scalia’s philosophy is that traditions and past practices themselves define what “process” is “due.” *Id.* Commenting that the dual charge of *Schad* has been common in most states since before the adoption of the fourteenth amendment itself, Justice Scalia found that the practice satisfied due process. *Id.*

On the second issue, a majority of five held that Schad was not entitled to a jury instruction on robbery under *Beck v. Alabama*, 447 U.S. 625 (1980). In *Beck*, the court held that a statute which prohibits any instruction on a lesser-included offense in a capital case is unconstitutional. At Schad’s trial, the court instructed the jury on the lesser-included offense of second-degree murder, but refused to instruct on the lesser-included offense of robbery. Schad claimed that there was evidence of theft or robbery and that the due process principles underlying *Beck* entitled him to an instruction on every lesser-included offense which was supported by the evidence.

The Court stated that *Beck*’s fundamental concern was that a jury convinced of the defendant’s guilt in committing a violent crime but not convinced of the defendant’s guilt of the capital crime itself, might nevertheless convict the defendant of the capital crime where the sole alternative was to set the defendant free. *Schad*, 111 S. Ct. at 2504. *Beck* held unconstitutional a mandatory all-or-nothing choice between conviction for capital murder and innocence. Considered in this light, the Court rejected Schad’s argument based on the fact that

at his trial, there was no such all-or-nothing choice. *Id.* at 2505. Because the jury had the option of convicting Schad of second degree murder, and chose not to, the court determined that no *Beck* problem existed. *Id.*

ANALYSIS / APPLICATION IN VIRGINIA

The plurality opinion represents at best an inordinate degree of deference to an unreasonable state court ruling, and at worst a gross abandonment of the principle embodied within *In re Winship*, 397 U.S. 358, 364 (1970), that due process requires “proof beyond a reasonable doubt of every fact necessary to constitute the crime with which [the defendant] is charged.” Justice Souter’s opinion holds that it is not necessary for a convicting jury to determine whether the defendant is guilty of (1) premeditated murder, with the elements of an unlawful killing, malice and premeditation, or (2) felony-murder, with the elements of an unlawful killing during a felony. Under the trial court’s instructions to the jury at Schad’s trial, it is quite possible that six jurors believed the defendant innocent of felony-murder, while six others believed that he lacked premeditation. The court’s instructions did not require proof of every element of either offense. Instead, they mix two distinct and separate crimes together and permit the jury to convict based on an unknowable combination of elements. Allowing a conviction to stand under such circumstances flies in the face of *Winship*.

Fortunately, this portion of the *Schad* opinion will be of no consequence to Virginia attorneys. Every component of the Virginia capital murder statute requires both a finding of a “willful, deliberate, and premeditated killing,” and one of nine other circumstances, most of them felonies in themselves. Va. Code Ann. § 18.2-31 (1990). Thus, the alternative dual charge which gave rise to the court’s ruling in *Schad* could not meet the requirements of Virginia’s statute.

On its face, the majority’s reasoning with respect to the *Beck* issue seems tenable, but it neglects a major fact. The majority concludes that there is no danger that the jury convicted Schad in an “all-or-nothing” type scenario because it had the option to convict him of second degree murder. However, Schad was charged with both premeditated murder and felony-murder, yet second degree murder is a lesser-included offense of premeditated murder only. If the jury believed that Schad was innocent of premeditated murder, but guilty of a violent robbery, then the instructions did indeed present the jury with an all-or-nothing dilemma. Under such a scenario, a juror’s only options, consistent with his/her oath, were (1) to convict Schad of capital murder, or (2) to set him free. This is exactly the situation sought to be remedied by *Beck*. The majority completely ignores this fact and allows the conviction and sentence to stand.

Again, this ruling is not likely to affect any aspect of a Virginia attorney’s practice. The reason that *Beck* did not afford relief to defendant Schad was that Arizona’s statutory scheme allowed the prosecution to proceed under alternative theories of either premeditated murder or felony-murder, and the court instructed the jury as to a lesser-included offense for only one of them. In Virginia, both premeditation and a felony are required for the commission of a capital offense. It would be impossible for a court to instruct on a lesser-included offense for only one of two potential capital murder theories when only one combined theory is available. A capital defendant in Virginia must necessarily be charged with a willful, deliberate, premeditated killing in the commission of one of nine felonies. Va. Code Ann. § 18.2-31 (1990). Nevertheless, attorneys should take note of the point emphasized in *Beck* and altered somewhat by *Schad*. A capital defendant is entitled to a jury instruction for a lesser-included offense, where that offense is supported by the evidence, in order to eliminate the threat of an all-or-nothing choice for the jury.

A recent example of an appropriate lesser-included offense instruction in Virginia is *Moats v. Commonwealth*, 404 S.E.2d 244 (Va. App. 1991). In *Moats*, the appellant held a store clerk at gunpoint, demanded money, and shot and killed the victim. Moats was indicted for capital murder but convicted for first degree murder under an instruction for that lesser-included offense. Moats claimed that the evidence did not support the first degree murder instruction. However, the jury could have found that Moats fired **without** premeditation, perhaps as a fearful response to an action of the store clerk. The court thus correctly found that the instruction on first degree murder (here, felony-murder) was supported by the evidence and properly given. *Id.* While unpremeditated felony murder is not

capital murder in Virginia, evidence in a particular case may suggest it as a lesser-included offense of capital murder.

Attorneys should continue to request lesser-included offense instructions for first degree murder, second degree murder and the underlying felony when the evidence supports such instructions. When appropriate, attorneys should request an instruction requiring a determination on the underlying felony before the jury proceeds to the capital murder charge.

Summary and analysis by:
G. Douglas Kilday

PAYNE v. TENNESSEE

111 S. Ct. 2597 (1991)
United States Supreme Court

FACTS

Payne was charged and convicted of the first-degree murders of Charisse Christopher and her two-year-old daughter. He was also convicted of the first-degree assault with intent to murder Christopher's son, Nicholas, who was three years old at the time of the crimes and present during the murders of his mother and sister. At the penalty stage of the trial, the State called Nicholas' grandmother to testify as to the effect the murders had had on the surviving child. During closing arguments, the prosecutor also commented on the effects Nicholas had suffered from witnessing the murders as well as the effects of the loss of his mother and sister. The Tennessee Supreme Court affirmed Payne's conviction and sentence, thereby rejecting his argument that the grandmother's and prosecutor's statements violated his eighth amendment rights set forth in *Booth v. Maryland*, 482 U.S. 496 (1987) and *South Carolina v. Gathers*, 490 U.S. 805 (1989). See case summary of *South Carolina v. Gathers*, Capital Defense Digest, Vol. 2, No. 1 (1991). The Tennessee Supreme Court held that, although the grandmother's testimony was "technically irrelevant," it "did not create a constitutionally unacceptable risk of an arbitrary imposition of the death penalty and was harmless beyond a reasonable doubt." 111 S. Ct. 2597, 2604 (1991).

HOLDING

The Supreme Court overruled both *Booth* and *Gathers*, holding that the eighth amendment does not bar the admission of victim impact evidence during the penalty phase of a capital trial. Although a defendant may offer any mitigating evidence in the sentencing phase, *Woodson v. North Carolina*, 428 U.S. 280, 304, (1976) (holding that capital defendants must be afforded individualized due process), the *Payne* Court reasoned that a defendant is not entitled to "that consideration wholly apart from the crime which he committed." 111 S. Ct. at 2607. *Woodson*, the Court noted, did not hold that a State may not offer evidence pertaining to the life of the victim, the loss to the victim's family and/or the loss to society, *Woodson* merely held that the defense may offer, with virtually no limits, evidence about the defendant's own circumstances. The *Booth* decision, holding that a State may not introduce victim impact evidence, the Court noted, unfairly weighted the process in favor of the defendant.

The Court also held, contrary to *Gathers*, that prosecutors may argue victim impact to the sentencing jury. The Court stated that the decision of whether to allow victim impact evidence is to be left to the individual states.

ANALYSIS / APPLICATION IN VIRGINIA

Booth and *Gathers*, the *Payne* Court reasoned, were based on two premises: that the "blameworthiness" of a defendant is not generally reflected by evidence of harm suffered by a victim of the crime, and that only evidence showing "blameworthiness" is relevant to the decision of whether or not to impose the death penalty. Thus *Booth* held that victim impact statements could only be used as evidence if the statement directly related to the circumstances of the crime or the character of the individual defendant. 482 U.S. at 508. If victim impact statements do not relate directly to the circumstances of the crime or the character of the defendant, they create a risk that capital punishment will be imposed arbitrarily. *Booth*, 482 U.S. at 505. *Gathers* extended the *Booth* rule to prosecutors' penalty phase statements regarding victims.

Yet Justice Rehnquist reasoned that victim impact evidence is "designed to show each victim's 'uniqueness as an individual human being.'" 111 S.Ct. at 2607 (emphasis in original). Victim impact evidence, Rehnquist argued, balances the proceedings by counteracting the mitigating evidence that the defendant is allowed to present at the penalty phase; in fact, Rehnquist argued that victim impact evidence may be "necessary to determine the proper punishment for a first-degree murder." *Id.* at 2608 (emphasis added). Rehnquist noted that the 1987 Federal Sentencing Guidelines use factors that relate to both subjective guilt and the harm caused by the defendant's crime. He also noted today's politically active victims' rights groups.

One theme in Justice Souter's concurring opinion is arguably consistent with *Booth* and *Gathers*: both of those cases required that evidence of aggravating circumstances be relevant to the increased culpability of the defendant. Souter argued first that "murder has foreseeable consequences. When it happens, it is always to distinct individuals, and after it happens other victims are left behind." *Id.* at 2615. The fact that the defendant did not know details of the victim's, or the victim's survivors', lives should not obscure the fact that murder has foreseeable consequences, Souter reasoned.

Souter's second argument was that victim impact-type evidence is heard at the guilt phase of the trial and "will be in the jurors' minds at the sentencing stage." *Id.* at 2617. He failed to mention, however, that the elements of the crime define what evidence is relevant at the guilt phase of a trial. At the penalty phase, other evidence is relevant.

In ruling on what the eighth amendment requires, *Payne*, as a matter of Federal and Constitutional law, now allows victim impact evidence and argument at the penalty stage of a capital trial. The Court left it up to the