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BUNCH v. THOMPSON 949 F.2d 1354 (1991)

BUNCH v. THOMPSON

949 F.2d 1354 (1991)
United States Court of Appeals, Fourth Circuit

FACTS

Timothy Bunch was sentenced to die following his conviction for capital murder during the commission of an armed robbery. Va. Code Ann. § 18.2-31(d) (now 4). Bunch, a sergeant in the United States Marine Corps, killed and robbed Su Cha Thomas while he was stationed at Quantico in Virginia.

A Virginia investigator and a Commonwealth attorney traveled to Japan, Bunch's permanent station, in order to question him about the murder. Bunch signed a consent form and agreed to talk with them. Bunch claimed that during the interrogation, he requested counsel "approximately a dozen times," whereas the Virginia officials maintain that he stated only once that "he felt like he might want to talk to a lawyer." Regardless of which account was true, Bunch decided to cooperate and revealed the location of the murder weapon. However, the Virginia officials themselves determined that an additional consent form would be necessary before proceeding any further. Bunch refused to sign the form, and the interrogation ended.

Military personnel transported Bunch to Virginia and turned him over to state authorities. During the ride to the police station, the Virginia investigator asked Bunch "if he felt he was ready to sit down and go over the case." Bunch agreed to talk, signed a consent form, and confessed to the murder.

At Bunch's trial, the court suppressed the incriminating statement which Bunch made in Japan, holding that it was obtained in violation of his right to counsel. The court admitted the Virginia confession, however, concluding that Bunch had waived his rights. The jury found Bunch guilty. At the penalty phase, defense counsel called only Bunch's mother in mitigation. The jury sentenced Bunch to die based on the vileness of the crime. Va. Code Ann. § 19.2-264.2. The Virginia Supreme Court affirmed the conviction and sentence. *Bunch v. Commonwealth*, 225 Va. 423, 304 S.E.2d 271 (1983). The Virginia courts denied relief in state habeas proceedings. The federal district court denied Bunch's petition for a writ of habeas corpus, and this appeal followed.

Bunch claimed, *inter alia*, that the admission of his confession violated his right to counsel, relying on *Edwards v. Arizona*, 451 U.S. 477 (1981). *Edwards* held that once a defendant asserts his right to counsel, law enforcement officials are prohibited from initiating further interrogation and that, if they do, subsequent statements are inadmissible. Bunch also claimed ineffective assistance of counsel on several grounds, some of which were not specifically raised on state habeas. One such claim which was raised in state proceedings was that defense counsel was ineffective by failing to call several potential mitigation witnesses. Bunch also asserted that the Virginia vileness predicate in its death penalty statute is unconstitutionally vague and that the trial court erred in failing to provide a limiting instruction.

Bunch assigned numerous other errors. Some of these the court treated in a conclusory fashion. Others did not involve death penalty law or are unlikely to arise often because they revolved around facts peculiar to the case. These issues, which will not be discussed in this summary, include: whether Bunch had knowingly and intelligently waived his *Miranda* rights; whether the Virginia investigators had "scrupulously honored" Bunch's assertion of his right to remain silent; the admissibility of autopsy photographs and a photograph of the murdered victim at the scene of the crime; the sufficiency of evidence to show that the murder was committed during the commission of a robbery; the constitutionality of the trial court's failure to provide Bunch with funds to hire a pathologist; the admissibility of prejudicial statements made by the defendant; the sufficiency of jury instructions which did not require the jury to unanimously agree as to which of the three statutory vileness predicates existed; and whether the trial court erred in failing to strike two jurors who were biased in favor of the death penalty.

HOLDING

The Fourth Circuit affirmed the dismissal of Bunch's petition, holding that *Edwards* did not clearly dictate the result advocated by Bunch at the time his conviction became final. *Bunch v. Thompson*, 949 F.2d 1354, 1360 (4th Cir. 1991). The court relied on *Teague v. Lane*, 489 U.S. 288 (1989), and *Butler v. McKellar*, 494 U.S. 407 (1990), which held that a "new rule" does **not** apply to cases which are final before that new rule is announced. Although Bunch's *Edwards* claim is clearly meritorious under current law, the court found that the particular application of *Edwards* to the admissibility of a confession was "susceptible to debate among reasonable minds" when Bunch's conviction became final. *Bunch*, 949 F.2d at 1360. In particular, the court found that *Edwards* was unclear as to what actions constitute "initiation" of a conversation. As a result, the court refused to apply *Edwards* to Bunch's conviction. The court ruled against some aspects of Bunch's ineffective assistance of counsel claim and found the other aspects procedurally defaulted. *Bunch*, 949 F.2d at 1363-65. Finally, the court rejected Bunch's attacks on the Virginia vileness factor and the trial court's failure to provide a limiting instruction. *Id.* at 1367.

ANALYSIS / APPLICATION IN VIRGINIA

A. *Edwards* claim

In *Teague v. Lane*, the Supreme Court limited the retroactive application of any "new rule," barring the use of such a rule on habeas corpus where the petitioner's conviction became final before the new rule was announced. *Teague*, 489 U.S. at 310. The Court defined a "new rule" as one which "breaks **new ground** or imposes a **new obligation** on the States or the Federal Government . . . [or] if the result was **not dictated by precedent** at the time the defendant's conviction became final." *Id.* at 301 (emphasis added). *Teague* prevents habeas courts from applying newly settled principles of law when those principles were not in place during the defendant's direct appeal. The result is that habeas courts examine the validity of a conviction based on precedent which existed at the time when the petitioner's conviction became final.

The Court extended this doctrine in *Butler v. McKellar*, holding that an existing rule is "new" when the issue was "**susceptible to debate** among reasonable minds" when the defendant's conviction became final. 494 U.S. at 415 (emphasis added). *See* case summary of *Butler*, Capital Defense Digest, Vol. 3, No. 1, p.2 (1990). The effect of *Butler* is to require a habeas corpus petitioner to show that the state court interpretation of a rule of law on direct appeal was not only incorrect, but unreasonably so. Ironically, by their own terms both *Teague* and *Butler* announce "new rules" which nevertheless are applied retroactively to **limit** the grounds for habeas relief to criminal defendants.

The Fourth Circuit's application of *Teague* and *Butler* demonstrates the extent to which the court is willing to go in calling a settled principle of law a "new rule." The court found that the rule prohibiting state-initiated interrogation following the defendant's invocation of his/

her right to counsel was "'susceptible to debate among reasonable minds'" when Bunch's conviction became final. *Bunch*, 949 F.2d at 1360 (quoting *Butler*, 494 U.S. at 415). The court thus refused to apply the rule in considering Bunch's habeas petition.

Edwards, decided before Bunch committed the murder, held that an accused, "having expressed his desire to deal with the police only through counsel, is not subject to further interrogation by the authorities until counsel has been made available to him, **unless the accused himself initiates** further communication, exchanges, or conversations with the police." 451 U.S. at 484-85 (emphasis added). Bunch was convicted based on a confession which an investigator obtained after Bunch invoked his right to counsel. The investigator initiated the conversation which led to Bunch's confession. However, the *Bunch* court finds *Edwards* to be less than the "bright-line rule" that it purports to be, pointing to state court decisions which refused to apply *Edwards* at the time. The court found that *Edwards* was **not** clear in defining the type of actions which would constitute "initiation" of a conversation. According to the majority, it was not until *Solem v. Stumes*, 465 U.S. 638 (1984), that the holding in *Edwards* became clear. Since *Solem* was announced after Bunch's conviction became final, the court refused to apply it.

It seems apparent that *Edwards* unequivocally prohibited the type of interrogation which occurred in *Bunch*. As Judge Sprouse states in his dissenting opinion in *Bunch*, *Edwards* "could not have been any clearer in its holding." *Bunch*, 949 F.2d at 1368 (Sprouse, J., dissenting). The court engages in a truly convoluted argument in order to find that the *Edwards* rule did **not** dictate the result advocated by Bunch at the time of his direct appeal. The majority points to early state court decisions which misapplied *Edwards* as dispositive proof that the rule was not then clear. As Judge Sprouse notes, "[t]he majority opinion here . . . would interpret *Teague* as allowing lower courts to render a clear decision of the Supreme Court unclear." *Bunch*, 949 F.2d at 1370 (Srouse, J., dissenting). However, the Supreme Court in *Butler* invited this type of analysis by relying on lower court confusion in finding a rule "susceptible to debate among reasonable minds." *Butler*, 494 U.S. at 415.

There simply is not much that defense attorneys can do to overcome the negative effects of *Teague* and its progeny. Judge Sprouse is arguably correct in dissenting in *Bunch*, but the Supreme Court has indicated its willingness to stretch *Teague* in order to prevent a reversal on collateral review. Like any meritorious issue, an *Edwards* claim should be recognized and preserved for review. However, there is very little to prevent a habeas court from finding some nuance of a legal issue that was unclear at the time of the finality of the habeas petitioner's conviction. Such a finding allows the habeas court to deny relief. *Teague* places a heavy burden on habeas petitioners to show that (1) a principle of law entitles him/her to relief, and (2) that principle was clear in all respects at the time of the petitioner's direct appeal. Significantly, the latest version of the federal crime bill includes a legislative reversal of *Teague*. Should this bill become law, all rules, both well-established and "new," will apply with equal force to all criminal defendants.

B. Ineffective Assistance of Counsel Claim

Bunch illustrates the deference which a court will exercise in evaluating decisions made by defense counsel. In collateral proceedings, Bunch claimed that he was denied his sixth amendment right to effective assistance of counsel due to his attorney's failure to call several mitigation witnesses. Although defense counsel presented a mitigation case consisting of only one witness, the defendant's mother, the court rejected Bunch's ineffective assistance of counsel claim. *Bunch*, 949 F.2d at 1363.

Bunch claimed that four witnesses in particular would have strengthened his case for clemency at the penalty phase: (1) the examining psychiatrist; (2) military officers who had supervised Bunch; (3) the defendant's father; and (4) the defendant's ex-wife. The court found a tactical reason for the trial attorney's decision not to call each witness. The court concluded that the examining psychiatrist's testimony would have forced testimony on cross-examination of the defendant's self-destructive and sexually oriented behavior. *Id.* at 1364. Similarly, the military officers on cross would have revealed Bunch's poor working relations with others and facts relating to his drug addiction. *Id.* The father's testimony would have contradicted that of the mother, undermining the cornerstone of Bunch's mitigation case. *Id.* Finally, the court found it reasonable for the attorney not to contact the defendant's ex-wife, since Bunch himself requested that the attorney not contact her. *Id.* at 1365.

Essentially, if a reviewing court can assign a **tactical** reason for decisions made by trial counsel, the court will not find that the defendant lacked the effective assistance of counsel. This reinforces the importance of effective advocacy at trial. Appellate courts, particularly in collateral proceedings, are increasingly deferential in reviewing capital convictions.

It is clear that compliance with a client's wishes in failing to contact potential mitigation witnesses satisfies the sixth amendment's guarantee of the effective assistance of counsel. Putting the constitutional issue aside, however, the Virginia rules of professional responsibility do not **prevent** counsel from contacting witnesses against the client's will. The attorney, not the client, is responsible for making strategic decisions such as which witnesses to call to the stand. Especially in a capital case, attorneys should investigate all avenues of mitigation, even where the client would prefer to leave potential witnesses alone and hope for an acquittal.

Bunch also raised several ineffective assistance of counsel claims which were omitted from his state habeas petition. The court held that these issues were procedurally defaulted as a result of that omission. *Id.* Thus, a general ineffective assistance of counsel claim does not preserve every alleged deficiency in trial counsel's performance. A state petition for a writ of habeas corpus must contain **every** alleged defect. Those allegations which are not specifically asserted in state collateral proceedings are waived and may not be claimed thereafter in federal court.

C. Constitutional Challenge to Virginia "Vileness" Factor

Furman v. Georgia, 408 U.S. 238 (1972), requires that a capital sentencing scheme must establish a meaningful method of differentiating between those few cases where the death penalty is warranted and the many cases where it is not. Several states have followed the Model Penal Code in attempting to make this distinction based on the "vileness" of the crime. Model Penal Code section 210.6(3) allows a capital sentence if the murder was "especially heinous, atrocious or cruel, manifesting exceptional depravity."

In *Godfrey v. Georgia*, 446 U.S. 420 (1980), the Supreme Court struck the application of the Georgia "vileness" factor as unconstitutionally vague because nothing in the factor, without more, evinced any inherent restraint on the sentencer. The statute in *Godfrey* allowed imposition of the death penalty where the offense was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim." *Id.* at 432.

The Court reasserted the importance of this issue in *Maynard v. Cartright*, 486 U.S. 356 (1988) (requiring a narrowing construction of Oklahoma "vileness" factor). *See* case summary of *Maynard*, Capital Defense Digest, Vol. 1, No. 1, p. 15 (1988). The Oklahoma statute permitted capital punishment where the crime was "especially heinous, atrocious and cruel." The Court held that this language, standing alone, gave no more guidance than the statute found constitutionally deficient in *Godfrey*. *Maynard*, 486 U.S. at 363-64.

Since *Maynard*, many states have defined the statutory terms within their respective "vileness" factors in order to provide the narrowing construction that *Godfrey* and *Maynard* require. Such a narrowing construction must **itself** provide meaningful guidance to the sentencer in

order to withstand constitutional scrutiny. *Shell v. Mississippi*, 111 S.Ct. 313 (1990) (finding a narrowing construction for a component of the Mississippi "vileness" factor to be unconstitutionally vague). *See* case summary of *Shell*, Capital Defense Digest, Vol. 3, No. 2, p. 3 (1991).

Virginia allows a death sentence if the murder was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or aggravated battery to the victim." Va. Code Ann. § 19.2-264.2. The Virginia statute precisely mirrors the words found to be constitutionally deficient (as applied) in *Godfrey*. Thus, under current law, Virginia may apply its "vileness" factor only if the courts monitor its use and provide narrowing constructions of the vague language. *Maynard*, 486 U.S. at 356.

While Virginia does **not** require that narrowing constructions be provided for the sentencing jury, *Clark v. Commonwealth*, 220 Va. 201, 257 S.E.2d 784 (1979), the Virginia Supreme Court has defined two of the three factors in its vileness predicate. The court has defined "depravity of mind" as "a degree of moral turpitude and psychic debasement surpassing that inherent in the definition of legal malice and premeditation." *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 148-49 (1978), *cert. denied*, 441 U.S. 967 (1979). The court defined "aggravated battery" as "a battery which is qualitatively and quantitatively more culpable than the minimum necessary to accomplish an act of murder." *Id.* In a recent case, *Jones v. Murray*, 947 F.2d 1106 (1991), the Fourth Circuit Court of Appeals approved the Virginia narrowing constructions announced in *Smith*. *See* case summary of *Jones*, Capital Defense Digest, this issue.

Bunch relied on *Godfrey* and *Maynard* in his attack on the Virginia vileness factor. Bunch asserted both that the Virginia vileness factor was unconstitutionally vague and that the trial court erred in refusing to provide a limiting instruction. The Virginia Supreme Court did not explicitly monitor Bunch's conviction to discern whether its narrowing constructions of the "vileness" factor had been satisfied. In the absence of the application of a narrowing construction, Bunch's position is correct as a matter of law. *See* Lago, *Litigating the "Vileness" Factor in Virginia*, Capital Defense Digest, Vol. 4, No. 1, p. 24 (1991); Falkner, *The Constitutional Deficiencies of Virginia's "Vileness" Aggravating Factor*, Capital Defense Digest, Vol. 2, No. 2, p. 19 (1989).

The Fourth Circuit summarily rejected Bunch's attacks. *Bunch*, 949 F.2d at 1367. The court cited *Clozza v. Murray*, 913 F.2d 1092, 1105 (4th Cir. 1990), in support of its holding. The Fourth Circuit rejected a *Godfrey* challenge to the Virginia statute in *Clozza*, also in a conclusory fashion. *Id.* The *Bunch* court attempts to minimize this important issue by addressing it with only one unsupported sentence. *Bunch*, 949 F.2d at 1367.

Although the Fourth Circuit continues to ignore the constitutional attacks on the Virginia "vileness" factor, attorneys should not. The *Godfrey*, *Maynard* and *Shell* issues can be raised and preserved in the defendant's motion to prohibit the imposition of the death penalty, in a motion for a bill of particulars requiring the Commonwealth to disclose any aggravating factor and any narrowing construction upon which it intends to rely, and by appropriate objections at the penalty trial when the jury is instructed.

Summary and Analysis by:
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JONES v. MURRAY

947 F.2d 1106 (1991)
United States Court of Appeals, Fourth Circuit

FACTS

In 1984, Willie Leroy Jones was tried in York County, Virginia for the 1983 capital murders of Myra and Graham Adkins. Evidence at trial showed that both victims had been shot in the head at close range by Jones. The medical examiner testified that only Mr. Adkins died quickly. Mrs. Adkins' gunshot wound, according to the medical examiner, would have allowed her to live for several hours. Both Mr. and Mrs Adkins had been covered with fire accelerant and Mrs. Adkins, who was still alive, had been bound, gagged and set on fire.

Jones was examined, prior to his trial, by three state doctors pursuant to a court order to determine Jones' competency to stand trial. Two of the doctors also examined Jones with specific attention to mitigating mental factors. The examining doctors found Jones competent to stand trial; the doctors also found no evidence of mental mitigating factors.

Immediately before Jones' trial began, the Commonwealth's Attorney offered two consecutive life terms with additional time for the arson charge in exchange for Jones' pleading guilty to capital murder and arson. Jones' attorney told him of the offer and reviewed the strengths and weaknesses of the Commonwealth's case as well as the evidence against Jones. Counsel told Jones that it was his opinion that there was a seventy percent chance of conviction and a forty to fifty percent chance of Jones receiving the death penalty. Jones' attorney made no recommendation to his client and completely left the decision of whether or not to accept the plea bargain to Jones. Jones, stating that he was innocent, rejected the Commonwealth's offer. Jones was found guilty of capital murder and sentenced to death.

After Jones' direct appeals and state habeas claims were exhausted, he petitioned the District Court for a writ of habeas corpus. The District Court denied relief. Jones appealed to the Fourth Circuit, claiming *inter alia* that he had not received effective assistance of counsel and that the jury instructions at the penalty stage of his trial resulted in unconstitutional application of the aggravating factor used to support his death sentence.

Jones claimed ineffective assistance of counsel based on two allegations: Jones argued that his attorney neither recommended that he accept the Commonwealth's plea bargain, nor attempted to persuade him to accept the plea bargain, and that his counsel failed to investigate mitigating evidence that could have been used during the penalty phase of his trial.

Jones also contended that the jury instructions that dealt with the "vileness" aggravating factor given during the sentencing phase of his trial were unconstitutional. He argued that because the three "vileness" factor components ("torture, depravity of mind or aggravated battery to the victim" Va. Code Ann. §19-2-264.2(C)) were phrased disjunctively on the jury forms and in the instructions, there was "no assurance that his sentencing jury reached a unanimous decision as to which component of vileness was presented by his crimes." 947 F.2d 1106, 1116 (4th Cir., 1991).

Jones also argued that the Virginia vileness aggravating factor was unconstitutionally vague in that a constitutionally sufficient narrowing construction of it had not been applied pursuant to *Godfrey v. Georgia*, 446 U.S. 420 (1980), and its progeny.

Jones assigned numerous other errors. Some of these the court treated conclusively. Others did not involve death penalty law or are