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GARDNER v. DIXON 1992 U.S. App. LEXIS 28147

ANALYSIS/APPLICATION IN VIRGINIA

Writing in *Dobbs*, the Court was adamant in its support of the complete record doctrine as set forth in *Gardner*. The Court added little new law in this opinion because the case is premised on rather unusual facts. However, *Dobbs* does provide defense counsel with additional support for arguing the importance of a complete record upon appeal. Therefore, defense counsel facing obstacles upon appeal with supplementing the record will want to use *Gardner* in conjunction with *Dobbs* to argue that the appellate court must have a full record before it in order to decide the case.

Summary and analysis by:
Roberta F. Green

GARDNER v. DIXON

1992 U.S. App. LEXIS 28147
United States Court of Appeals, Fourth Circuit

FACTS

In September 1983, John Sterling Gardner was convicted of first-degree murder in the deaths of two restaurant workers during a robbery. The court imposed the death penalty. The North Carolina Supreme Court affirmed both the conviction and sentence on direct appeal, and the United States Supreme Court denied review.[1] Gardner commenced state habeas proceedings but was denied relief.[2] Gardner then filed a writ of habeas corpus in federal court. Both the district court and the Fourth Circuit Court of Appeals denied relief.[3] Gardner's requests for rehearing were denied.

In August 1992, Gardner filed a motion for relief from the federal district court's judgment pursuant to Rule 60(b) of the Federal Rules of Civil Procedure.[4] Gardner specifically requested relief under Rule 60(b)(2) and (6) and submitted supporting affidavits which he claimed showed newly discovered evidence of alcohol and drug abuse by his attorney, Bruce Fraser, during his murder trial and sentencing. Gardner's execution was stayed by the Superior Court of Forsyth County until October 23, 1992.

The district court denied Gardner's motion for relief and Gardner appealed to the Fourth Circuit. He also filed an application for a stay of execution and a certificate of probable cause to appeal the district court's ruling.

HOLDING

The Fourth Circuit Court of Appeals affirmed the district court's ruling and denied Gardner's request for a stay of execution.[5] Noting the "difficulty of prevailing on successive habeas petitions"[6], the court specifically addressed the use of a Federal Rules of Civil Procedure Rule 60(b) motion as "the newest weapon in capital-habeas litigation, in part because it has the tendency to compel a court to address a petitioner's claims on the merits."[7] In conformity with its treatment of an appeal of a Rule 60(b) denial in *Jones v. Murray*[8], the court treated Gardner's appeal as: "(1) a petition for writ of habeas corpus, (2) a successive petition, and (3) a legitimate Rule 60(b) motion addressing the final judgment of the district court."[9]

The court held: (1) because Gardner failed to show cause and prejudice or actual innocence, his claim of ineffective assistance of counsel was procedurally barred;[10] (2) Gardner's claim failed under the abuse of the writ doctrine because he did not present the alleged new evidence in his prior habeas petition and he failed to show cause and prejudice or actual innocence;[11] and (3) the district court did not err in denying relief under Rule 60(b) because there is no evidence the outcome of the trial or sentencing would have been different absent trial counsel's alleged misconduct.[12]

ANALYSIS/APPLICATION IN VIRGINIA

As the Fourth Circuit noted, it is very difficult for a petitioner to prevail in successive habeas corpus petitions. In its treatment of Gardner's petition as both a writ of habeas corpus and a successive petition, the court illustrated its point.

The Fourth Circuit found that Gardner's habeas claim was procedurally barred by North Carolina General Statute Section 15A-1419(a)(3), which provides that a motion for appropriate relief may be denied if "upon a previous appeal the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so."[13] Similarly, in treating Gardner's petition as a successive habeas petition, the Fourth Circuit relied upon the standards of review set forth in *McCleskey v. Zant*.[14] Under *McCleskey*, in order to excuse a failure to raise a claim in a prior habeas petition, a petitioner must show cause for failing to raise it or show that a "fundamental miscarriage of justice would result from a failure to entertain the claim."[15]

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[1] *State v. Gardner*, 319 S.E.2d 591, 594-96 (N.C. 1984), *cert. denied*, 469 U.S. 1230 (1985).

[2] *Gardner v. State*, 361 S.E.2d 598 (N.C. 1986), *cert. denied*, 486 U. S. 1061 (1987).

[3] *Gardner v. Dixon*, No. 91-4010, slip op. at 19 (unpublished), 1992 U.S. App. LEXIS 12971 (4th Cir. June 4, 1992). *See* case summary of *Gardner*, Capital Defense Digest, Vol. 5, No. 1, p. 30 (1992).

[4] Fed. R. Civ. P. 60(b) provides, in pertinent part: "On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order or proceeding for the following reasons: . . . (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); . . . (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order or proceeding was entered or taken."

[5] *Gardner v. Dixon*, No. 92-4013 (unpublished), 1992 U.S. App. LEXIS 28147, at *2 (4th Cir. October 21, 1992). Gardner was executed by lethal injection on October 23, 1992.

[6] *Id.* at *7.

[7] *Id.* at *8.

[8] 976 F.2d 169 (4th Cir. 1992). *See* case summary of *Jones*, Capital Defense Digest, this issue.

[9] *Gardner*, 1992 U.S. App. LEXIS 28147, at *8-*9.

[10] *Id.* at *9-*10.

[11] *Id.* at *10-*15.

[12] *Id.* at *35-*36.

[13] N.C. Gen. Stat. § 15A-1419(a)(3) (Michie 1992).

[14] 111 S.Ct. 1454 (1991).

[15] *Id.* at 1470.

Gardner attempted to show that he could not have discovered the new evidence about his attorney's drug abuse at the time of his prior petition because he could not compel his attorney's former wife to give testimony and because he had been unaware of Fraser's problems. The Fourth Circuit refused to accept these excuses as just cause for his failure to raise the issue earlier. The court specifically doubted Gardner's allegation of ignorance of the abuse: "[W]e find it peculiarly interesting that Gardner never previously raised this allegation that Fraser was suffering from alcohol or cocaine abuse during his representation—where such abuse would have been pellucidly obvious to those individuals, including Gardner, connected with the trial and sentencing."[16] The court also pointed to evidence that Gardner's current counsel knew of Fraser's abuse as early as 1986.[17]

The court also found that the dismissal of Gardner's petition would not result in a miscarriage of justice. The court noted that in order to show a fundamental miscarriage of justice, Gardner must show that he was "actually innocent" of the death penalty.[18] The court concluded that Gardner's new evidence failed to meet this burden because it "does not attack any aggravating circumstance or other eligibility provision for the death penalty, but rather attacks the quantum of mitigating evidence that was before the jury."[19]

Because of the recognized difficulty in prevailing on habeas petitions, Federal Rule of Civil Procedure 60(b) is now being used to force the reviewing court to consider the merits of a petitioner's claims. In order to prevail on a claim of newly discovered evidence, a party must show that the evidence: "(1) is material and not merely cumulative, (2) could not have been timely discovered through the exercise of due diligence, and (3) would probably have changed the outcome embodied in the judgment."[20]

In Gardner's case, his "newly discovered evidence" took the form of numerous affidavits supporting his claim of ineffective assistance of counsel by showing that Fraser, his attorney, suffered drug and alcohol impairment during the time of his representation of Gardner. The court's opinion detailed the substance of some of those affidavits. First, the court reviewed the affidavit of Bruce Fraser's former wife:

> 3. At the same time that Bruce was involved in the use and sale of drugs, he maintained a law practice in Winston-Salem. Bruce had a tendency to go on binges and his law cases would suffer because of this. By binges, I mean that Bruce would use drugs all night and sometimes for days on end. . . .
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> 4. I recall when Bruce was appointed as counsel for the defense in the John Gardner case... [O]n one occasion, I drove Bruce to the jail to visit with Gardner. I often drove Bruce when he was not able to drive because of either having used too much cocaine or because he was afraid of getting a DUI.
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> . . . .
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> 6. At the time . . . , as well as during the entire time that he was on the Gardner case, Bruce had a serious addiction to cocaine. He used cocaine and alcohol on a daily basis. Bruce would call home from his office to say that he was on his way home. Then, I would not see him for as much as three days at a time. Bruce would go for days without sleep and without eating during these periods.
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> . . . .
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> 8. During the week of the Gardner trial, there was a small party at our house with about 6 other people present. There was a great deal of cocaine being used and a lot of alcohol being used. . . . Bruce continued to drink and use cocaine the rest of the night. The next morning, Bruce was so loaded that he couldn't drive. I had to drive Bruce to the courthouse so that he could appear for the Gardner trial.
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> 9. At the time of the Gardner trial, Bruce had been counsel for the Hell's Angels. . . . During the Gardner trial, it was speculated in the press that the Hell's Angels had something to do with the murders for which Gardner was later convicted. . . . Mark (who I understood to be the President of the Hell's Angels) discussed this with Bruce at our house. Mark said he didn't like all the bad press that the Hell's Angels were getting around the murders. I remember Bruce told Mark that Gardner was a loser and that he would be found guilty. . . .[21]

Another affidavit was submitted by Fraser's babysitter from 1981 to 1983 (Gardner's trial was in 1983):

> 4. I know the Frasers were serious drug users during the period between 1981 through 1983 . . . :
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> a. They would not return from their nights out until 3 or 4:00 in the morning, even on the weeknights. When they would arrive, they would be drunk and stoned. I could smell the alcohol, smell the marijuana and see their bloodshot eyes. Also, they would act as if they did not know where they were.
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> b. They would leave the butt ends of marijuana cigarettes ("roaches") in their ashtrays. I was a passenger in Bruce Fraser's car many times and observed "roaches" in his car ashtrays. His car reeked of marijuana.
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> c. When they would return from a car trip, I could see and smell the marijuana smoke pouring out of the car when they would open the doors. . . .
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> d. On one occasion in 1981 or 1982, I accidentally discovered under their doormat a plastic sandwich bag half-filled with cocaine. . . .
>
> e. When I would clean their home, I would find thousands of dollars (sometimes as much as $5,000 - 6,000) and bags of pot stuffed in drawers and in closets.
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> . . . .
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> g. I am aware of Bruce Fraser's reputation in the neighborhood from 1981 through 1983 and thereafter. It was common knowledge that Bruce Fraser was a "coke head," which means that he stayed high on cocaine.[22]

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16 *Gardner*, 1992 U.S. App. LEXIS 28147, at *14.

17 *Id.*

18 "[T]o show 'actual innocence' one must show by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law." *Sawyer v. Whitley*, 112 S.Ct. 2514, 2517 (1992). *See* case summary of *Sawyer*, Capital Defense Digest, Vol. 5, No. 1, p. 18 (1992).

19 *Gardner*, 1992 U.S. App. LEXIS 28147, at *15.

20 *Id.* at *17.

21 *Id.* at *18-*20 (quoting Petitioner's Motion for Relief from Judgment, Exh. 2, pp. 3-4).

22 *Id.* at *20-*22 (quoting Akers' Affidavit attached to Petitioner's Objections to the Magistrate Judge's Report and Recommendation).

A third and fourth affidavit came from two of Fraser's neighbors from 1981 through 1985, stating that "they had seen Fraser intoxicated, 'reeking of marijuana,' and impaired by drugs."[23]

Another affidavit was submitted by an attorney who had been co-counsel with Fraser on a number of criminal cases in the early 1980's:

> It was common knowledge among the profession that during the early 1980's Bruce Fraser had a substance abuse problem . . . . I had several candid discussions with Bruce about changing his pattern of substance abuse which I feared was and would continue to harm his personal and professional life. His inability to change his personal habits was very sad to me. It was at this time that my active professional relationship with Bruce ceased . . . .[24]

Gardner also submitted the affidavit of a psychiatrist specializing in substance abuse disorders, who stated:

> A significant disabling impact of a substance abuse problem is not limited to a situation where the professional is ingesting the mind-and-behavior-altering substances while actually engaging in the practice or profession. Rather, "repeated use of cocaine produces subacute mental impairment that persists for substantial duration, even after the acute 'high' has abated."[25]

In its response to the motion, the state submitted twelve affidavits. The court briefly summarized the contents of the affidavits:

> Superior Court Judge George M. Fountain presided at Gardner's trial. He observes that Fraser was "pleasant, affable . . . businesslike . . . fully lucid and sharp" . . . . Judge Fountain recalls "nothing during the trial which suggests that Mr. Fraser was impaired due to alcohol, drugs, lack of sleep, or injury." He attests that he "certainly would not have allowed any lawyer to go forward in any case, especially a capital one, if the lawyer appeared in the least impaired."[26]
>
> Other persons who observed Fraser at close range during the course of the proceedings confirm the fact that Fraser displayed absolutely no sign of substance abuse. The affiants state vigorously that Fraser was "punctual," professional," "articulate," "knowledgeable," "thorough," and "effective" in his representation of Gardner . . . .[27]
>
> Fraser's long-time legal secretary avers that Fraser's serious drug problems arose in 1985, not in 1983. She states, "if Bruce Fraser had been substantially impaired by alcohol or drugs during the preparation and trial of the Gardner trial, I believe I would have known about it . . . ."[28]

After reviewing the above evidence, the court assumed, without deciding, that "this 'newly discovered evidence' is material . . . and could not have been discovered with the exercise of due diligence."[29] The court was then left with the question whether the new evidence would have dictated a different result in the district court's prior ruling.

In order to show that he received ineffective assistance of counsel, Gardner had to demonstrate that: (1) "counsel's representation fell below an objective standard of reasonableness";[30] and (2) "there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[31]

The court admitted that in its prior review of Gardner's case, when it considered Fraser's representation **without** allegations of drug use, it had concluded that "whether Fraser acted reasonably under the circumstances surrounding his representation of Gardner presented a close question."[32] But the court was not convinced that Gardner's new evidence now made Fraser's representation ineffective. The court dismissed Gardner's evidence of drug and alcohol abuse by his attorney by finding that "Gardner simply does not identify, in any way or manner, any action that Fraser could have taken to enhance his chance of success."[33] The court took the position that none of the new evidence related to Fraser's actual performance at the trial and that the state's affidavits actually supported the finding of a competent performance by Fraser. Therefore, the court ruled that its prior finding of reasonable representation by Fraser would not be affected by Gardner's new evidence.[34]

The court further found that "there also has been no showing that the alleged substance abuse by Fraser resulted in prejudice to Gardner."[35] The court found that the fact that Fraser may have failed to present certain mitigating evidence to the jury during the sentencing phase would not have altered the outcome. The fact that he may have failed to present such evidence because he was drug or alcohol impaired made no difference to the court: "[W]ithout direct evidence that the result would have been a sentence of less than death, we are constrained to conclude there was no prejudice and the claim of ineffective assistance of counsel is without merit."[36]

The Fourth Circuit's apparent willingness to consider a Rule 60(b) motion in the capital context is quickly obliterated by its refusal to recognize Gardner's claim of ineffective assistance of counsel. What is disturbing is that even once the court treated the allegations of drug abuse as true, it was unwilling to find that such abuse tipped the scales to ineffectiveness in a case where the court had already found the issue of ineffectiveness to be a "close one." The fact that court participants did not see obvious signs of drug abuse does not answer the question of what Fraser did not do because of his drug habits. Indeed, his drug abuse may even have enhanced his self-esteem and given him a false sense of security and confidence in pursuing his practice. But just such a heightened sense of confidence may have directly led to Fraser's failure to fully and adequately ·tigate all possible mitigating evidence to be presented on Gardner's behalf during the sentencing phase.

If Fraser were drug or alcohol impaired **at any time** during his representation of Gardner, either before or during the trial, then he could not fully rely upon his faculties in preparing, investigating and defending the case. A drug-impaired attorney hardly can be deemed capable of making conscious judgments on behalf of any client,

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23 *Id.* at *22 (quoting Affidavit of John Nieschwitz and Affidavit of Joyce Nieschwitz attached to Petitioner's Objections to the Magistrate Judge's Report and Recommendation).

24 *Id.* at *22-*23 (quoting Affidavit of Joseph Cheshire, V).

25 *Id.* at *23 (quoting Brown Affidavit attached to Petitioner's Objections to the Magistrate's Report and Recommendation).

26 *Id.* at *24-*25 (quoting Fountain Affidavit, attached to State's Response to Petitioner's Motion for Rule 60(b) Relief).

27 *Id.* at *25 (quoting affidavits from the court reporter at trial, the bailiff, the prosecutors, Fraser's law clerk, and the jury foreman).

28 *Id.* (quoting Reece Affidavit, attached to State's Response to Petitioner's Motion for Rule 60(b) Relief).

29 *Id.* at *27.

30 *Strickland v. Washington*, 466 U.S. 668, 688 (1984).

31 *Id.* at 694.

32 *Gardner*, 1992 U.S. App. LEXIS 28147, at *28.

33 *Id.* at *29.

34 *Id.* at *30.

35 *Id.* at *30.

36 *Id.* at 35.

particularly one who is facing the death penalty. If the affidavits presented by Gardner are true, then he was denied the assistance of counsel who was in complete control of his mental and physical capacities and who was fully capable of exercising the skills his training afforded.[37]

If the court had been presented with evidence Fraser had never attended law school or passed the bar, and his performance had been the same in this case, would the court still hold that Gardner received effective assistance of counsel? If the answer to that question is no, as one would assume, the court's ruling would not hinge on Fraser's courtroom performance, but instead would focus on his lack of education and formal training upon which he could rely in representing his clients. The concern would be that he did not do all that a properly trained lawyer would have done in the case and, therefore, the adversarial system had broken down.

If an attorney is unable to rely upon his education and training because of drug impairment, is the situation really any different? The result should be the same. If the attorney is not able to call upon the proper education and training with which to represent a criminal client's interests, for whatever reason, then the client, and the judicial system, have been adversely affected and justice demands the opportunity for a new trial.

Summary and Analysis By:
Susan F. Henderson

[37] It is interesting to note that despite the court's conclusion here that Fraser was not ineffective in Gardner's case, Fraser was suspended from the practice of law in 1990 for a period of three years on unrelated matters. However, the Order of Discipline from the Disciplinary Hearing Commission of the North Carolina State Bar, No. 89 DHC D2, specifically found that Fraser was an alcoholic and was abusing alcohol and using illegal drugs in 1988 and 1989, that his "misconduct constituted a pattern of neglect and failure to communicate," and that he had received a prior Private Reprimand for neglect **in 1983.** The Complaint filed by the North Carolina State Bar in that matter also alleged that Fraser was convicted of driving while impaired in 1985, 1988, and 1989. Fraser was disbarred on January 13, 1993, as the result of complaints alleging that he misappropriated client funds in 1989 and 1990.

JONES v. MURRAY

976 F.2d 169 (4th Cir. 1992)
United States Court of Appeals, Fourth Circuit

FACTS

Following his conviction on two counts of capital murder, Willie LeRoy Jones was sentenced to death in January 1984. As Jones had no prior criminal record, the prosecution in the case argued only one aggravating factor: Jones' conduct was "outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of mind or an aggravated battery to the victim."[1]

Testimony given at Jones' trial indicated that in May 1983, Graham and Myra Adkins, an elderly couple living in Charles City County, were found murdered and incinerated in their home. Graham Adkins had been shot in the face at close range and had apparently died from that wound prior to the fire. Myra Adkins, on the other hand, had received a non-fatal head wound and, after having been bound, gagged, set on fire, and left in a closet, died of smoke inhalation. Both Mr. and Mrs. Adkins had been doused with accelerant, as had been their home. Also found on the premises was a safe with its door removed and its contents missing.

After Jones' conviction was upheld by the Virginia Supreme Court,[2] the United States Supreme Court denied certiorari.[3] Jones then filed a petition for a writ of habeas corpus in the Virginia state courts, which was denied, as was his appeal to the Virginia Supreme Court[4] and his petition for certiorari to the United States Supreme Court.[5] Subsequently, Jones filed a habeas petition in the United States District Court for the Eastern District of Virginia, which, after a report from the magistrate, was denied. Jones then filed a motion to alter or amend the judgment,[6] which also was denied.

Next, Jones filed a notice of appeal to the United States Court of Appeals for the Fourth Circuit, which affirmed the district court's judgment.[7] Jones then filed a petition for rehearing, which was denied. He applied again to the United States Supreme Court for a writ of certiorari, which was denied,[8] as was his petition for rehearing.[9]

On August 10, 1992, Jones filed a second state habeas petition, arguing that Virginia's vileness aggravating factor had been applied to him in an unconstitutionally vague manner. In support of his position, Jones cited two recent United States Supreme Court cases: *Stringer v. Black*[10] and *Sochor v. Florida.*[11] On August 24, 1992, the Commonwealth filed a motion to dismiss, which the circuit court granted three days later, finding not only that relitigation of Jones' claim was procedurally barred under state law, but also that Jones had failed to show how *Stringer* and *Sochor* mandated the relief he sought. On September 8, Jones filed an appeal in the Virginia Supreme Court, which scheduled oral arguments for September 14, the day before Jones' scheduled execution.

[1] *See* Va. Code Ann. § 19.2-264.2 (1990).

[2] *Jones v. Commonwealth*, 228 Va. 427, 323 S.E.2d 554, 554 (1984).

[3] *Jones v. Virginia*, 472 U.S. 1012 (1985).

[4] *Jones v. Bair*, No. 86-1152 (June 15, 1987).

[5] *Jones v. Bair*, 484 U.S. 959, 108 S. Ct. 358 (1987).

[6] Jones' motion was made pursuant to Fed. R. Civ. P. 59(e).

[7] *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991), *cert. denied*, 112 S. Ct. 1591 (1992). *See* case summary of *Jones*, Capital Defense Digest, Vol. 4, No. 2, p. 5 (1992).

[8] *Jones v. Murray*, 112 S. Ct. 1591 (1992).

[9] *Jones v. Murray*, 112 S. Ct. 2295 (1992).

[10] 112 S. Ct. 1130 (1992) (reemphasizing that "the use of a vague or imprecise aggravating factor in the weighing process invalidates the sentence and at the very least requires constitutional harmless-error analysis or re-weighing in the state judicial system"). *See* case summary of *Stringer*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).

[11] 112 S. Ct. 2114 (1992) (finding that a trial court may weigh an impermissibly vague statutory aggravating factor if the highest state court has previously given constitutionally acceptable narrowing constructions of the factor, but that where the sentencer has relied upon an **invalid** aggravating circumstance, the reviewing state court must either independently reweigh the valid factors or apply harmless error analysis). *See* case summary of *Sochor*, Capital Defense Digest, Vol. 5, No. 1, p. 11 (1992).