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SULLIVAN v. LOUISIANA 113 S. Ct. 2078 (1993)

require the defendant to testify.[12] Instead, the Court noted that the prosecution would have been content with testimony by acquaintances of the defendant.[13] Finally, the Court addressed charges from the dissent that the holding weakened the presumption of innocence: "Once the defendant has been convicted fairly in the guilt phase of the trial the presumption of innocence disappears."[14]

ANALYSIS/APPLICATION IN VIRGINIA

The United States Supreme Court held in *Lashley* that, even assuming the application of the presumption of innocence at a capital penalty trial, defendants are not entitled to an instruction to any greater degree than those that have not yet been convicted. Referring to the guilt/innocence portion of the trial, the Court ruled that "[u]nder our precedents, the instruction would have been constitutionally required only if the circumstances created a genuine risk that the jury would conclude, from factors other than the state's evidence, that the defendant had committed other crimes."[15]

The fact that the defendant does not have a criminal history is a statutory mitigating factor under both Missouri and Virginia law.[16] Missouri, however, places the burden of proof on the defendant as to the existence of this mitigating factor. It is also worth noting that, while juries cannot be limited to consideration of only statutorily enumerated mitigating factors, instructions should be requested to the effect that the Virginia legislature has highlighted a certain element such as a lack of criminal history as mitigating.[17] It is not irrational to argue that *Lashley*'s holding (that no instruction is required in the absence of evidence) means that an instruction is **required** when the evidence exists.

After *Lashley*, it is clear that an attorney may be forced to prove that something did not happen. Virginia law permits counsel to offer proof by use of any form of admissible evidence.[18] In a similar situation to Lashley's, a defense attorney could ask the Commonwealth's attorney to stipulate to the lack of criminal history. If the Commonwealth's attorney refuses, the defense attorney may then subpoena the custodians of the records in every jurisdiction where the defendant has resided in order to prove the necessary elements.

Summary and analysis by:
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12 *Id.*
13 *Id.*
14 *Id.* at 1226.
15 *Id. See, e.g., Kentucky v. Whorton*, 441 U.S. 786, 788-89 (1979).
16 Mo. Rev. Stat. § 565.012.3(1) (Vernon 1979) (current version Mo. Rev. Stat. § 565.032.2(1) (Vernon Supp. 1993)); Va. Code Ann. § 19.2-264.4(B)(i) (1990).
17 These elements are found in Va. Code Ann. § 19.2-264.4(B) (1990).
18 In *Bunch v. Commonwealth*, 225 Va. 423, 436-37, 304 S.E.2d 271, 278 (1983), the Supreme Court of Virginia held that, once the trial court deemed the evidence (photographs of the deceased) admissible, the defense could not preclude use of the pictures by offering to stipulate that the victim had been murdered in the way that the prosecution claimed; therefore, the prosecution had the right to offer the photographs.

SULLIVAN v. LOUISIANA

113 S. Ct. 2078 (1993)
United States Supreme Court

FACTS

The Louisiana Criminal District Court, Parish of Orleans, convicted John Sullivan of first-degree murder in the course of committing an armed robbery and sentenced him to death. Michael Hillhouse, a convicted felon and his alleged accomplice, identified Sullivan at trial as the murderer. Hillhouse testified pursuant to a grant of immunity. Of the many people at the bar during the crime, only one — who had not been able to identify Hillhouse or Sullivan at a lineup — testified that the two had committed the robbery and that she had seen Sullivan hold a gun to the victim's head. Other circumstantial evidence tended to show that Sullivan had been the triggerman. Defense counsel argued that there was reasonable doubt concerning both the murderer's identity and intent.

In instructing the jury, the trial judge defined "reasonable doubt" in a way that was, as the State conceded, essentially identical to the definition found unconstitutional in *Cage v. Louisiana*.[1] The Supreme Court of Louisiana held on direct appeal that the erroneous instruction was harmless beyond a reasonable doubt.[2] The United States Supreme Court granted Sullivan's petition for certiorari.

HOLDING

The United States Supreme Court reversed the conviction and held that a constitutionally deficient reasonable doubt instruction cannot be harmless error.[3] The Court based its holding on two settled principles. First, the Sixth Amendment right to a trial by jury is fundamental. Its most important element is the right to have the jury, not the judge, find guilt.[4] Second, the Due Process Clause requires that the prosecution bear the burden of proving all elements of the offense and the facts necessary to establish each element "beyond a reasonable doubt."[5]

ANALYSIS/APPLICATION IN VIRGINIA

The Court concluded that the Sixth Amendment right to have a jury find the defendant guilty is interrelated with the Due Process requirement of proof beyond a reasonable doubt. The Sixth Amendment would be violated if a judge were allowed to determine that the defendant was guilty beyond a reasonable doubt after the jury had determined only that he was **probably** guilty. The instruction given to the *Sullivan* jury

1 498 U.S. 39 (1990) (per curiam). The instruction in *Cage* said in part: **"It must be such doubt as would give rise to a grave uncertainty, ...It is an actual substantial doubt.** ...What is required is not an absolute or mathematical certainty, but a **moral certainty**." *Id.* at 40. *See* case summary of *Cage*, Capital Defense Digest, Vol. 3, No. 2, p. 5 (1991).
2 *State v. Sullivan*, 596 So.2d 177, 186 (La. 1992).
3 *Sullivan v. Louisiana*, 113 S. Ct. 2078, 2083 (1993).
4 *Id.* at 2080.
5 *Id.* (citing *In re Winship*, 397 U.S. 358, 361-364 (1970)).

did not produce a jury verdict of guilt beyond a reasonable doubt. It was, therefore, constitutionally deficient; it denied Sullivan his Sixth Amendment right to a jury trial.

All constitutional errors do not, however, require reversal.[6] In concluding that a *Sullivan*-type error is not amenable to harmless-error analysis, the Court distinguished a situation such as that found in *Sandstrom v. Montana*.[7] The *Sandstrom* trial court — at the request of the state and over the objection of the defendant — instructed the jury that "[t]he law presumes that a person intends the ordinary consequences of his voluntary acts."[8] On appeal, the United States Supreme Court held that the instruction was unconstitutional because the jury might have interpreted the presumption as being conclusive, or as shifting the burden of persuasion, and either interpretation would have violated the Fourteenth Amendment's requirement that the State prove every element of a criminal offense beyond a reasonable doubt.[9] The *Sullivan* court explained that when the jury is instructed to presume an element of the offense, it must still make a finding beyond a reasonable doubt as to the facts upon which the presumption is based. Therefore, if the predicate facts are closely related to the presumed fact, and no reasonable juror could find one without finding the other, the court may be able to conclude that the presumption did not influence the jury's findings.[10]

The *Sullivan* court further articulated a standard for determining whether constitutional errors are indeed harmless: "The inquiry ... is not whether, in a trial that occurred without the error, a guilty verdict would surely have been rendered, but whether the guilty verdict actually rendered in **this** trial was surely unattributable to the error."[11] Because in the *Sullivan* case there was in effect no jury verdict of guilty beyond a reasonable doubt, there can be no meaningful question of whether the **same** verdict of guilty beyond a reasonable doubt would have been rendered without the constitutional error.

Sullivan should not present many issues for Virginia practitioners. Virginia's Model Jury Instructions which deal with capital murder, instructions 34.100 and 34.120, each mention "prove beyond a reasonable doubt" three times, but do not attempt to define the term. Instruction 2.100 however, entitled "Reasonable Doubt and Presumption of Innocence," makes a cursory attempt at a definition: "A reasonable doubt is a doubt based upon your sound judgment after a full and impartial consideration of all the evidence in the case." The Supreme Court of Virginia has discouraged attempts at reducing or defining what reasonable doubt is any further. The court has wisely warned that attempting to do so tends to cloud rather than clarify the issue.[12] Since there is no constitutional reason to expressly define such a term, and since Virginia discourages such attempts at definition, a *Sullivan* error should not occur here unless a judge goes further than is customary. If it becomes an issue, an objection can, and indeed should, be made to instructions that resemble the ones given in *Cage* and *Sullivan*.

The reasonable doubt issue does suggest another possible issue, however. Virginia Code section 19.2-264.4(C) requires the Commonwealth to prove the existence of an aggravating factor beyond a reasonable doubt before the jury can impose the death penalty. Without asking for a **definition** of reasonable doubt, defense counsel should consider requesting an instruction to the effect that the Commonwealth must erase all reasonable doubt about the aggravating factors from the minds of the jurors before they can impose death, as well as further instructions that make the jury aware that there is in no instance a duty to sentence to death, even if aggravating factors are found beyond a reasonable doubt.[13]

Summary and analysis by:
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6 *Chapman v. California*, 386 U.S. 18 (1967) (holding that even errors of constitutional magnitude may be harmless, but that a reviewing court must consider the error's actual effect on the jury verdict to determine whether it was harmless).

7 442 U.S. 510 (1979).

8 *Id.* at 512.

9 *Id.* at 514-527.

10 *Sullivan*, 113 S. Ct. at 2082.

11 *Id.* at 2081.

12 *See Strawderman v. Commonwealth*, 200 Va. 855, 108 S.E.2d 376 (1959), and *Smith v. Commonwealth*, 155 Va. 1111, 156 S.E. 577 (1931). *See also McCoy v. Commonwealth*, 133 Va. 731, 112 S.E. 704 (1922); *Manetta v. Commonwealth*, 231 Va. 123, 340 S.E.2d 828 (1986); *Cooper v. Commonwealth*, 2 Va.App. 497, 345 S.E.2d 775 (1986).

13 The Virginia Capital Case Clearinghouse offers the following instruction as a guideline:

> Members of the jury, I will now instruct you on the manner in which you are to consider the evidence that has been presented in this sentencing proceeding.
>
> Before you may fix the punishment of defendant at death, you must find, unanimously and beyond a reasonable doubt, the existence of the aggravating circumstance(s) about which I have previously instructed you.
>
> In order to fix the punishment of defendant at life imprisonment, you are not required to reach a unanimous decision as to the existence of any particular fact in mitigation. You are not required to find any fact in mitigation beyond a reasonable doubt.
>
> I further instruct you that, under our law, you are permitted to fix the punishment of defendant at life if you find that to be the appropriate sentence, even if you find unanimously and beyond a reasonable doubt the existence of the aggravating circumstance(s) about which I have previously instructed you.

MUELLER v. VIRGINIA

113 S. Ct. 1880 (1993)
United States Supreme Court

FACTS

Authorities arrested Everett Lee Mueller for the rape and murder of ten-year old Charity Powers after her body was found in a shallow grave near his home. The police advised the defendant of his *Miranda* rights and he agreed to talk to authorities. At one point during the questioning Mueller asked the detective, "[D]o you think I need an attorney here?" The detective shook his head and shrugged. He then said, "[y]ou're just talking to us." Shortly thereafter, Mueller confessed to the rape and murder.

The defendant moved to suppress the confession, claiming it was obtained in violation of *Edwards v. Arizona*.[1] The trial court denied the

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1 451 U.S. 477, 484-85 (1981) (holding that once defendant invokes right to counsel, all police questioning must cease until counsel has been provided).