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GRAY v. NETHERLAND 99 F.3d 158 (4th Circuit 1996) United States Court of Appeals, Fourth Circuit

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GRAY v. NETHERLAND

99 F.3d 158 (4th Circuit 1996)
United States Court of Appeals, Fourth Circuit

FACTS

Coleman Gray was indicted for the capital murder of Richard McClelland during the commission of robbery.¹ The evidence presented by the Commonwealth tended to show that during the early morning hours of May 3, 1985, Gray and an accomplice, Melvin Tucker, abducted McClelland, the manager of Murphy's Mart, as he was driving home from work. At gunpoint, Gray forced McClelland into his vehicle, drove back to the convenience store, and ordered McClelland to unlock the door.²

After stealing approximately \$13,000 in cash, Gray drove to an isolated road and parked. He ushered McClelland out of the car, forcing him to lie face down on the ground behind the vehicle. As McClelland begged for his life, Gray rapidly fired six shots into the back of his head. Gray and Tucker then returned to McClelland's car, and, in an attempt to destroy the evidence, doused the automobile with gasoline and set it on fire.³

On December 2, 1985, the morning the guilt phase of Gray's capital murder trial was to begin, defense counsel requested the court to order the Commonwealth to reveal all the evidence it planned to use at the sentencing phase to prove future dangerousness should Gray be convicted. The prosecutor indicated that the Commonwealth would only introduce "evidence of statements [Gray] ha[d] made to other people about other crimes he ha[d] committed of which he ha[d] not been convicted."⁴ In particular, the Commonwealth indicated that it was prepared to introduce statements Gray allegedly made to co-defendant Tucker, as well as other inmates, in which he admitted to being the triggerman in the murder of Lisa Sorrell and her daughter.⁵ Upon further questioning by defense counsel, the Commonwealth's attorney flatly stated that, outside of statements Gray had made to other people, no other evidence would be presented regarding the uncharged misconduct.⁶

The jury found Gray guilty of capital murder. The night before the sentencing hearing was to begin, the Commonwealth's attorney notified Gray's counsel that it would be introducing additional evidence tending

to show that the manner in which Lisa Sorrell and her daughter were killed resembled McClelland's murder. Specifically, the Commonwealth planned to introduce: photographs of the crime scene; pictures of the bodies of Lisa and Shanta Sorrell; testimony of Detective Slezak who investigated the murders; and testimony of the medical examiner, Dr. Presswalla, who had performed the autopsies on the Sorrells' bodies.⁷

Before the sentencing phase began, defense counsel attempted to have the additional evidence excluded, arguing that it "exceeded the scope of unadjudicated-crime evidence admissible for sentencing under Virginia law."⁸ Likewise, Gray's counsel stated that the "[d]efense was taken by surprise" and "not prepared to try the Sorrell murders."⁹ Gray's counsel further argued that due to the assurances made by the Commonwealth's attorney before trial, the defense was unprepared to rebut any evidence other than the statements allegedly made by Gray.¹⁰ The trial court denied defense counsel's request, finding that "the Sorrell murders evidence was 'admissible at this stage of the trial.'"¹¹ All of the evidence was admitted, and the jury sentenced Gray to death finding both the future dangerousness and vileness aggravating factors.¹²

On direct appeal, Gray's conviction and sentence were affirmed. His state habeas corpus petition was dismissed, and the United States Supreme Court denied certiorari twice.¹³

Gray petitioned for a writ of habeas corpus in the federal district court. The district court granted the writ, and subsequently vacated Gray's sentence.¹⁴ The court held that "due process rights were violated 'because the Commonwealth failed to provide fair notice that evidence concerning the Sorrell murders would be introduced at his penalty phase.'"¹⁵ The Commonwealth appealed the issuance of the writ to the United States Court of Appeals for the Fourth Circuit.¹⁶

The circuit court reversed, ordering that, based on the "new rule" doctrine of *Teague v. Lane*,¹⁷ Gray's federal habeas corpus petition must be dismissed.¹⁸ Gray then applied for a stay of execution, and petitioned for a writ of certiorari to the United States Supreme Court.¹⁹ The Court granted certiorari, finding that Gray's due process claim actually contained two distinct claims: a notice-of-evidence claim and a misrepresenten-

¹ Gray was charged under former Va. Code Ann. § 18.2-31(d), currently Va. Code Ann. § 18.2-31(4).

² *Gray v. Commonwealth*, 233 Va. 313, 340-41, 356 S.E.2d 157, 172 (1987).

³ *Id.* at 341-42, 356 S.E.2d at 172-73.

⁴ *Gray v. Netherland*, 116 S. Ct. 2074, 2078 (1996).

⁵ *Id.* Lisa Sorrell and her daughter were murdered approximately five months before McClelland was killed. Lisa Sorrell was shot six times in the back of the head and left slumped in the front seat of her partially burned car. Three year-old Shanta, found locked in the truck of the car, died from carbon monoxide inhalation. *Gray v. Commonwealth*, 233 Va. at 345-46, 356 S.E.2d at 175.

⁶ *Gray v. Netherland*, 116 S. Ct. at 2078. The following conversation took place in-chambers between defense counsel and the prosecutor before the trial began:

MR. MOORE: Is it going to be evidence or just his statements?

MR. FERGUSON: Statements that your client made.

MR. MOORE: Nothing other than statements?

MR. FERGUSON: To other people, that's correct. Statements made by your client that he did these things. *Id.* at 2086. (Ginsburg, J., dissenting) (emphasis in original).

⁷ *Id.* at 2078.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Id.*

¹¹ *Id.* at 2087 (Ginsburg, J., dissenting) (citations omitted).

¹² *Id.* at 2078-79.

¹³ *Gray v. Netherland*, 99 F.3d 158, 160 (4th Cir. 1996) (citations omitted).

¹⁴ *Gray v. Thompson*, 58 F.3d 59, 62 (4th Cir. 1995) (citations omitted).

¹⁵ *Gray v. Netherland*, 116 S. Ct. at 2088 (Ginsburg, J., dissenting) (citations omitted).

¹⁶ *Gray v. Thompson*, 58 F.3d at 62 (citations omitted).

¹⁷ 489 U.S. 288 (1989).

¹⁸ *Gray v. Thompson*, 58 F.3d at 67. See discussion of *Teague v. Lane* analysis, case summary of *Gray v. Netherland*, Capital Defense Journal, Vol. 9, No. 1, pp. 5-6 (1996).

¹⁹ *Gray v. Netherland*, 116 S. Ct. at 2080.

tation claim.²⁰ The Court found that Gray's notice-of-evidence claim required a "new rule" under *Teague*, and, consequently, did not provide him with a basis for relief.²¹ With regard to the misrepresentation claim, the Court concluded that the Commonwealth may have affirmatively misled the defense. Because the procedural posture of this claim was unclear, however, the Court remanded the case directly to the United States Court of Appeals for the Fourth Circuit to determine if the claim was defaulted and, if not, to decide it.²²

HOLDING

On remand, the United States Court of Appeals for the Fourth Circuit held that Gray's misrepresentation claim was not raised or addressed prior to being raised before the United States Supreme Court. It was, therefore, defaulted. Hence, the court dismissed Gray's habeas corpus petition.²³

ANALYSIS/APPLICATION IN VIRGINIA

I. What Level of Specificity is Required to Adequately Raise a Constitutional Claim in the State Court to Ensure Federal Review?

The *Gray* court held that in order for habeas corpus relief to be granted, petitioner's misrepresentation claim "must include reference to a specific federal constitutional guarantee, as well as a statement of the facts which entitle the petitioner to relief."²⁴ Likewise, the court held that "[w]hen the appeal is to a constitutional guarantee as broad as 'due process,' it is incumbent upon a habeas petitioner to refer to the 'particular analysis developed in the cases' and not just to due process in general in order to present his claim."²⁵ Relying on *Picard v. Conner*,²⁶ the court further stated that a "statement of facts sufficient to support a constitutional claim without reference to the legal basis for that claim is not sufficient."²⁷

Despite the confidence with which the court of appeals set forth this standard, counsel should note that the United States Supreme Court has not clearly articulated the level of specificity required to permit federal court review. In fact, the Court in *Taylor v. Illinois*, held that general reference to a constitutional guarantee may be adequate for habeas corpus relief in some instances.²⁸

In *Taylor*, the State argued that the United States Supreme Court should deny jurisdiction over Taylor's Sixth Amendment claim "because it was inadequately presented in the state court."²⁹ Although the Court noted that Taylor did not "specifically articulate his [Sixth Amendment] claim based on the Compulsory Process Clause until he filed for rehearing in the Illinois Appellate Court" and that on direct appeal he "expressly asserted only a due process violation," the Court, neverthe-

less, concluded that Taylor's use of a quotation from a state case, which cited and relied on two United State Supreme Court Compulsory Process Clause cases, adequately presented his Sixth Amendment claim to the state courts.³⁰ The Court held:

A generic reference to the Fourteenth Amendment is not sufficient to preserve a constitutional claim based on an unidentified provision of the Bill of Rights, but in this case the authority cited by petitioner and the manner in which the fundamental right at issue has been described and understood by the Illinois courts make it appropriate to conclude that the constitutional question was sufficiently well presented to the state courts to support our jurisdiction.³¹

Hence, the level of specificity required to adequately present a constitutional claim before a State court to ensure federal habeas review may be adequate as long as the "issue has been described and understood by the [state] courts."³²

It is important to note, however, that the *Picard* Court required that in order to exhaust his state remedies a petitioner must "present the state courts with the same claim he urges upon the federal courts."³³ Although the Court noted that a petitioner's federal claim does not have to cite "'book and verse o[f] the federal constitution,'" the constitutional claim inherent in the facts must be first brought to the attention of the state courts before a federal habeas corpus writ will be issued.³⁴ Because *Picard* did not raise his equal protection claim until it was "injected" by the court of appeals, the Court found that the claim had not been raised in state proceedings and was, therefore, barred.³⁵ Therefore, until the United States Supreme Court addresses this issue directly, defense counsel should articulate each federal claim with the greatest specificity possible to ensure that such claim is adequately presented to the state courts, and not later defaulted.

II. The Misrepresentation Claim

A. The State Record

The court of appeals first reviewed the proceedings in the state courts to determine if Gray had previously presented his misrepresentation claim. After reviewing the record of the sentencing hearing, the court concluded that if "Gray believed he had been misled, he never indicated as much to the trial judge."³⁶ Although the court admitted that Gray was "surprised" by the prosecutor's actions, it found that Gray simply argued that he had not been given adequate notice and that the evidence should be excluded, "[r]ather than claiming that he had been tricked or affirmatively misled by the prosecution."³⁷

Mississippi, 410 U.S. 284 (1973). The *Rayford* court held that "the use of the preclusion sanction in criminal cases should be limited to extreme situations because in criminal cases 'due process require[d] that a defendant be permitted to offer testimony of witnesses in his defense.'" *Taylor*, 484 U.S. at 407 n.9 (emphasis in original).

²⁰ *Id.* at 2081.

²¹ *Id.* at 2083-84.

²² *Id.* at 1082-83. See also, case summary of *Gray v. Netherland*, Capital Defense Journal, Vol. 9, No. 1, p. 5 (1996).

²³ *Gray v. Netherland*, 99 F.3d at 159.

²⁴ *Id.* (quoting *Gray v. Netherland*, 116 S. Ct. at 2081).

²⁵ *Id.*

²⁶ 404 U.S. 270 (1971).

²⁷ *Gray v. Netherland*, 99 F.3d at 162 (citations omitted).

²⁸ 484 U.S. 400, 406 n.9 (1988).

²⁹ *Id.*

³⁰ *Id.* Taylor's quotation from *People v. Rayford*, 356 N.E.2d 1274 (1976), cited *Washington v. Texas*, 388 U.S. 14 (1967), and *Chambers v.*

³¹ *Id.*

³² *Id.*

³³ *Picard*, 404 U.S. at 276.

³⁴ *Id.* at 278 (citations omitted).

³⁵ *Id.* at 277-78.

³⁶ *Gray v. Netherland*, 99 F.3d at 162.

³⁷ *Id.*

After Gray's motion to exclude the additional Sorrell evidence had been denied by the trial court, the prosecution called Detective Slezak to the stand.³⁸ Again, Gray objected to the presentation of this evidence, reiterating that he "had no notice of this" evidence and "had been 'taken by surprise.'"³⁹ Gray's counsel emphasized that "[w]hat the prosecutor 'is going to do today' . . . 'is not what he said he was going to do at the beginning of the trial.'"⁴⁰ In granting Gray's motion for federal habeas corpus relief, the district court found that "[t]he only Sorrell murder evidence which [Gray's lawyers] were prepared to challenge' . . . 'was the evidence [the prosecutor] indicated he would introduce at the outset of the trial,'" and that the "prosecutor's surprise move had disarmed Gray's counsel, . . . with the result that the Sorrell murders evidence 'carrie[d] no assurance of reliability.'"⁴¹ Although one could plausibly argue that Gray did not claim he was "affirmatively misled" during the sentencing phase of his trial, the more sensible interpretation of the facts is that he did.

After concluding that Gray did not properly present a misrepresentation claim at the trial level, the court turned to whether the claim was properly raised on direct appeal in the Supreme Court of Virginia. Gray argued that he "placed the issue of misrepresentation before the Virginia courts" when he stated in his Brief on Direct Appeal that the Commonwealth withheld the additional Sorrell murders evidence from him "upon the conclusion of the guilt trial," after he was earlier assured that only statements from inmates would be introduced.⁴² Dismissing Gray's contention, the court concluded that "Gray d[id] not allege that the Commonwealth Attorney's misrepresentation . . . caused him injury. . . . Rather, he state[d] a claim that the Commonwealth did not comply with the 'preferred practice' of providing the defendant notice of penalty phase evidence."⁴³ This, held the court, was the exact argument that the "Supreme Court held 'would require the adoption of a new constitutional rule.'"⁴⁴

Because the court determined Gray had not raised the misrepresentation claim at any time prior to his state habeas corpus proceeding, and that he was aware of the facts which made up his claim, Va. Code Ann. § 8.01-654(B)(2)⁴⁵ prevented the court from reviewing "the misrepresentation claim on its merits."⁴⁶ The court reiterated that Gray had previously argued that he lacked notice to respond to the additional Sorrell evidence, not that "he was somehow lulled or tricked by the Commonwealth Attorney's initial indication that he would present only witnesses who would testify that Gray told them he committed the Sorrell murders."⁴⁷ The court acknowledged, however, Gray's assertion that the prosecution's actions were "simply outrageously unfair and made a mockery of Gray's rights to due process of law under the Fourteenth Amendment."⁴⁸ Nevertheless, the court concluded that this assertion was "much too vague to meet the specificity requirement of *Anderson v. Harless* . . . and was inadequate to 'provide the [Virginia] courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing on his constitutional claim."⁴⁹

As the court noted, even if Gray had procedurally defaulted his misrepresentation claim, it may have been "excused on a showing of 'cause and prejudice.'"⁵⁰ The court determined, however, that Gray did not state any cause for his failure to raise his misrepresentation claim. Even if Gray had shown cause, however, the court held that Gray "failed to demonstrate that he was prejudiced by the Commonwealth's Attorney's allegedly misleading notice" because the lack of such notice did not work "to his actual and substantial disadvantage, infecting his [sentencing] with error of constitutional dimensions."⁵¹

To demonstrate that Gray would have been unable to meet the required level of prejudice to excuse his default, the court focused on Gray's claim that had he not been misled, he "would have been able to discover various exculpatory evidence as to [his] involvement in the Sorrel[l] murders," specifically, investigating the possible role the victim's estranged husband played in those murders.⁵² Because Gray did not investigate the claim further in the twenty-one days between his sentencing hearing and the day his sentence became final, the court concluded that this demonstrated "that the Commonwealth Attorney's supposed misrepresentation concerning the scope of the Sorrell murder evidence did not prejudice [Gray]."⁵³ The court missed the mark.

The fact that Gray did not undertake an investigation after the sentencing hearing is not determinative as to whether he was prejudiced. In assessing whether Gray was prejudiced, the court should have focused on the effect the prosecutor's actions had on Gray's rights at the sentencing hearing itself. Two points can be made to illustrate this fact. First, at the sentencing hearing the burden is on the Commonwealth to "prove beyond a reasonable doubt that there is a probability based upon evidence of the prior history of the defendant or of the circumstances surrounding the commission of the offense of which he is accused that he would commit criminal acts of violence that would constitute a continuing serious threat to society" such that death is the appropriate penalty.⁵⁴ Before imposing a sentence of death, the court may set aside the verdict if good cause is shown.⁵⁵ The burden, however, no longer rests with the prosecution. It is the defendant who has the burden of demonstrating "good cause." Second, although the United States Supreme Court found that Gray had defaulted his *Brady* claim, it does not mean that the Commonwealth did not have the obligation to produce such evidence. Consequently, Gray's prejudice was not lessened merely because he did not undertake an investigation after the sentencing hearing.

B. The Federal Record

The court held that if Gray had previously raised his misrepresentation claim in the district court and the court of appeals, the Commonwealth would have been required at that time to assert the affirmative defense of procedural bar, or have waived it.⁵⁶ The court concluded, however, that Gray had not previously raised his misrepresentation claim in the lower federal courts; therefore, the "Commonwealth [was allowed

³⁸ *Gray v. Netherland*, 116 S. Ct. at 2087 (Ginsburg, J., dissenting).

³⁹ *Id.* at 2087-88 (citations omitted).

⁴⁰ *Id.* at 2088 (citations omitted).

⁴¹ *Id.* (citations omitted).

⁴² *Gray v. Netherland*, 99 F.3d at 162 (citations omitted).

⁴³ *Id.* at 162-163.

⁴⁴ *Id.* at 163 (quoting *Gray v. Netherland* 116 S. Ct. at 2084).

⁴⁵ Va. Code Ann. § 8.01-654(B)(2) states that "[n]o writ shall be granted on the basis of any allegation the facts of which the petitioner had knowledge at the time of filing any previous petition."

⁴⁶ *Gray v. Netherland*, 99 F.3d at 163.

⁴⁷ *Id.*

⁴⁸ *Id.* (citations omitted).

⁴⁹ *Id.* (quoting *Anderson v. Harless*, 459 U.S. 4, 6 (1982)).

⁵⁰ *Id.* at 164 (quoting *Coleman v. Thompson*, 501 U.S. 722, 750 (1991)).

⁵¹ *Id.* (quoting *Barnes v. Thompson*, 58 F.3d 971, 977 (4th Cir. 1995)). It is difficult to understand the court's use of the word "allegedly" regarding the prosecutor's tactics. Regardless of whether the claim was raised, Gray was plainly misled. See *supra* note 7.

⁵² *Gray v. Netherland*, 99 F.3d at 164.

⁵³ *Id.*

⁵⁴ Va. Code Ann. § 19.2-264.4(C).

⁵⁵ Va. Code Ann. § 19.2-264.5.

⁵⁶ *Gray v. Netherland*, 99 F.3d at 164.

to] assert the procedural bar and foreclose further consideration of Gray's misrepresentation claim."⁵⁷

The court found that Gray did not previously raise his misrepresentation claim in any federal proceeding with "the clarity required by *Picard* and *Harless*."⁵⁸ Following the reasoning discussed in *Picard*, the *Harless* Court, reversing the holdings of the district court and the court of appeals, found that Harless did not "provide the state courts with a 'fair opportunity' to apply controlling legal principles to the facts bearing upon his constitutional claim."⁵⁹ Hence, his federal writ of habeas corpus was, likewise, barred.⁶⁰

In concluding that Gray did not raise his misrepresentation claim in the district court or court of appeals, the court was correct. Gray presented adequate facts on which to base his misrepresentation claim in both proceedings, but it was not until he reached the United States Supreme Court that he cited cases which directly supported his misrepresentation claim.⁶¹ Even if the court were to apply the more deferential specificity standard found in *Taylor*, it does not appear that Gray had articulated an adequate constitutional claim of misrepresentation in either the district court or the court of appeals. Thus, the court's finding that Gray had not raised his misrepresentation claim at a lower federal proceeding and that the Commonwealth was, therefore, "free to maintain its defense of procedural default," is adequately supported by precedent.⁶²

⁵⁷ *Id.*

⁵⁸ *Id.* (see *Picard v. Connor*, 404 U.S. 270 (1971); *Anderson v. Harless*, 459 U.S. 4 (1982)).

⁵⁹ *Harless*, 459 U.S. at 6.

⁶⁰ *Id.* at 8.

⁶¹ *Gray v. Netherland*, 99 F.3d at 166. Specifically, Gray cited *Raley v. Ohio*, 360 U.S. 423 (1959) (holding that defendants who detrimentally relied on assurance of committee chairman could not be

III. Application in Virginia

Unfortunately, Gray was executed in spite of what anyone can see as basic unfairness because his attorney did not say "continuance" and did not say "misrepresentation." In other words, Gray was executed because of a technicality.

Gray's legal journey raises some important issues that must be addressed. First, because the Commonwealth, and at times the courts, will try to divide claims for the purpose of asserting that the issues were procedurally defaulted, it is imperative that defense counsel argue all possible claims in both broad and specific terms. Furthermore, more than just the facts must be presented. Each issue should be tied to a constitutional claim with adequate federal precedent supporting each issue.

Although this court did not specifically address the issue, language in the opinion indicates that it may be possible to preserve a claim for default purposes if it is raised at the post-sentence hearing conducted pursuant to Va. Code Ann. § 19.2-264.5.⁶³ Until this issue is decided, counsel should continue to make this argument if it is plausible in a specific case.

Summary and Analysis by
C. Cooper Youell, IV

punished from doing so), and *Mooney v. Holohan*, 294 U.S. 103 (1935) (forbidding prosecution from engaging in "a deliberate deception of court and jury"), as support for his misrepresentation claim. Unfortunately for Gray, however, he had not cited these cases in an earlier proceeding.

⁶² *Id.*

⁶³ Although unclear, a defendant may be able to have a sentence of death set aside with a showing of "good cause." Va. Code Ann. § 19.2-264.5.

BEAVER v. THOMPSON

93 F.3d 1186 (4th Cir. 1996)

United States Court of Appeals, Fourth Circuit

FACTS

On April 12, 1985 Gregory Warren Beaver shot and killed Trooper Leo Whitt of the Virginia State Police during a routine traffic stop. Beaver was charged with the willful, deliberate, and premeditated killing of a law enforcement officer for the purpose of interfering with his official duties under Va. Code § 18.2-31(f).¹ The court appointed John Maclin IV to represent Beaver and granted Maclin's request to appoint T.O. Rainey III as co-counsel. Rainey had a private law practice and was a part-time assistant prosecutor in neighboring Dinwiddie County.²

On July 9, 1985, Beaver pleaded guilty to capital murder. The Commonwealth, in exchange for Beaver's guilty plea, agreed not to argue the defendant's sentence. The trial court found that the Commonwealth had proven future dangerousness beyond a reasonable doubt and sentenced Beaver to death.³ The Supreme Court of Virginia affirmed his conviction and sentence.⁴ The United States Supreme Court denied certiorari.⁵

Beaver, with different court-appointed counsel, filed a petition for a writ of habeas corpus in the circuit court of Prince George County. Beaver raised twelve claims in all, ten of which were flatly denied or

¹ This section has been changed to Va. Code Ann. § 18.2-31(6).

² *Beaver v. Thompson*, 93 F.3d 1186, 1188 (4th Cir. 1996).

³ *Id.* at 1189.

⁴ *Beaver v. Commonwealth*, 232 Va. 521, 352 S.E.2d 342 (1987).

⁵ *Beaver v. Commonwealth*, 483 U.S. 1033 (1987).