Capital Defense Journal

Volume 10 | Issue 2 Article 8

Spring 3-1-1998

EATON v. ANGELONE 1998 WL 128570 (4th Cir. Mar. 24, 1998) United States Court Of Appeals, Fourth Circuit

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FACTS

On February 20, 1989, Dennis Wayne Eaton shot and killed Walter Custer, Jr., and Ripley Marston. Eaton took Marston's wallet, containing $15, and Marston's car. Eaton returned home, picked up his girlfriend, Judy Ann McDonald, and the pair fled Shenandoah County, driving south on Interstate Highway 81. At approximately 11:30 p.m., Virginia State Trooper Jerry L. Hines pulled Eaton and McDonald over on the suspicion that McDonald, who was driving the car, was intoxicated. Hines requested assistance because "he was having a problem with a drunk driver."[1] Virginia State Trooper Allen K. Golleher, Jr., responded to Hines's request. Golleher arrived at the scene at 11:55 p.m. He found Hines dead, shot in the neck and the head. In Hines's police cruiser, Golleher found a summons citing McDonald for a traffic offense and the registration card for Marston's car. Golleher radioed this information to the dispatcher who broadcast a lookout for Marston's car. At 1:30 a.m., Salem Police Officer Michael E. Green found the suspect car in a fast food parking lot in Salem. When Green identified himself, Eaton, now driving Marston's car, fled. A high speed chase ensued through city streets and ended when Eaton crashed into a street lamp post. As police surrounded the wrecked car, Eaton shot McDonald in the left temple, killing her, and then tried, unsuccessfully, to kill himself, by shooting himself in the head.[2]

On May 1, 1989, Eaton was indicted by a Rockbridge County grand jury, for the willful, deliberate, and premeditated murder of Trooper Hines.[3] Prior to the Hines murder trial, Eaton pled guilty in Shenandoah County to the murder of Custer, the capital murder and robbery of Marston, and other related offenses.[4] He was sentenced to three consecutive life sentences, plus 44 years, and accepted the provisions of Virginia Code Section 53.1-151(B1)[5] making him ineligible for parole.[6] Eaton subsequently pled guilty to the murder of McDonald in the Circuit Court of the City of Salem and received another life sentence.[7] Eaton pled not guilty to the murder of Hines, but, after a four day trial, the jury convicted him.[8] After a sentencing hearing, the jury sentenced Eaton to death based on a finding of future dangerousness.

Eaton appealed his conviction and sentence to the Supreme Court of Virginia. The Supreme Court of Virginia affirmed both.[9] After the United States Supreme Court denied certiorari,[10] Eaton sought post-conviction relief in state court. The state court denied Eaton's habeas corpus petition without a hearing.[11] The Supreme Court of Virginia affirmed the state court's denial of post- conviction relief, finding some claims of error procedurally defaulted and rejecting the others on the merits.[12] Again, the United States Supreme Court denied certiorari.[13]

Eaton next filed a petition for a writ of habeas corpus in federal district court on April 13, 1995, alleging errors in the guilt and sentencing phases of his capital trial, in the state post-conviction process, and claiming ineffective assistance of counsel. The district court refused Eaton's request for an evidentiary hearing and found many of Eaton's claims, including his ineffective assistance of counsel claim, procedurally barred.[14] The district court rejected the rest of Eaton's claims on the merits.

On appeal to the United States Court of Appeals for the Fourth Circuit, Eaton raised numerous claims of error, including: (1) the district court's finding that his ineffective assistance of counsel claim was procedurally defaulted;[15] (2) the trial court's refusal to inform the jury during the sentencing phase that he had been sentenced to life imprisonment without the possibility of parole;[16] and (3) the lack of any standard of proof requirement for evidence of unadjudicated acts.[17]

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[1] *Eaton v. Commonwealth,* 240 Va. 236, 241, 397 S.E.2d 385, 388 (1990).

[2] *Eaton,* 240 Va. at 240-42, 397 S.E.2d at 387-88.

[3] *Eaton v. Angelone,* No. 97-15, 1998 WL 128570, at *1 (4th Cir. March 24, 1998). Eaton was indicted under Virginia Code Section 18.2-31(f), which is now section 18.2-31(6).

[4] *Eaton,* 240 Va. at 243, 397 S.E.2d at 389.

[5] *See infra,* note 31.

[6] *Eaton,* 240 Va. at 243, 397 S.E.2d at 389.

[7] *Eaton,* 1998 WL 128570, at *1.

[8] *Id.*

[9] *Eaton,* 240 Va. at 260, 397 S.E.2d at 399.

[10] *Eaton v. Commonwealth,* 502 U.S. 824 (1991).

[11] *Eaton,* 1998 WL 128570, at *3.

[12] *Id.*

[13] *Eaton v. Murray,* 513 U.S. 966 (1994).

[14] *Eaton,* 1998 WL 128570, at *3.

[15] *Id.* at *4.

[16] *Id.* at *6.

[17] *Id.* at *9. Eaton raised, and the court of appeals considered, several other alleged errors which will not be discussed in this article. These claims include: (1) the trial court's failure to inform the jury of its duty to consider specific, statutorily identified mitigating factors as well as the court's failure to define the concept of mitigation; *Id.* at *3. (2) ineffective assistance of Eaton's trial counsel; *Id.* at *4. and (3) the district court's failure to grant Eaton an evidentiary hearing. *Id.* at *5. The first of these claims is essentially identical to the claim raised and rejected by the United States Supreme Court in *Buchanan v. Angelone,* 118 S.Ct. 757, 762-63 (1998). *See* Case Summary of *Buchanan,* Cap. Def. J., this issue.

HOLDING

The Court of Appeals affirmed the district court's denial of relief.[18]

ANALYSIS/ APPLICATION IN VIRGINIA

Rather than rule on whether Eaton's ineffective assistance of counsel claim was procedurally defaulted, the court rejected the claim on the merits.[19] The court of appeals further held that Eaton's case was constitutionally indistinguishable from *O'Dell v. Netherland*[20] and thus he was not entitled to the benefit of the rule announced in *Simmons v. South Carolina.*[21] Finally, the court held that the practice of admitting unadjudicated acts violence to prove future dangerousness is constitutional.[22]

I. Procedural Default of Ineffective Assistance of Counsel Claim

The district court found that Eaton had procedurally defaulted his ineffective assistance of counsel claim on his state habeas appeal to the Supreme Court of Virginia. One of Eaton's assignments of error in his state habeas appeal to the Supreme Court of Virginia stated, "'[t]he trial court erred in dismissing without a hearing Appellant's claim that he was denied reasonably effective assistance of counsel.'"[23] The Supreme Court of Virginia rejected the claim on the merits and made no explicit finding of procedural default.[24] The district court interpreted this assignment of error as a challenge to the state habeas court's refusal to grant an evidentiary hearing on Eaton's ineffective assistance of counsel claim. Eaton contended that the assigned error challenged the state habeas court's substantive ruling on the merits of his ineffective assistance of counsel claim. In support of its interpretation, the district court relied heavily on *Yeatts v. Murray.*[25] There, the Supreme Court of Virginia read a nearly identical assignment of error as a challenge to the denial of the state evidentiary hearing only, not to the substantive underlying claims of ineffective counsel.[26]

The district court's reliance upon Yeatts was, however, fraught with infirmities. The Supreme Court of Virginia in *Yeatts* specifically found that Yeatts procedurally defaulted his ineffective assistance of counsel claim. In Eaton's case, however, the Supreme Court of Virginia purported to rule on the merits and "made no explicit finding of procedural default."[27] The court of appeals also observed that Yeatts was handed down months after the Supreme Court of Virginia dismissed Eaton's state habeas appeal. Moreover, a federal magistrate has found[28] that Yeatts is not precluded from federal review of his ineffective assistance of counsel claims because *Yeatts* announced a new rule of procedural default.[29] In short, the district court's finding of procedural default of Eaton's ineffective assistance of counsel claims required the retroactive application of a new rule of procedural default.

The district court's application of *Yeatts* as a procedural bar to Eaton's claims, though not dispositive of his claims in the instant case, is an important lesson for habeas practitioners in Virginia. As a general lesson, the treatment of Eaton's claims shows the eagerness with which procedural bars are applied. The Supreme Court of Virginia stated that it rejected Eaton's claim on the merits. Moreover, another assignment of error in Eaton's state habeas appeal specifically challenged the state habeas court's failure to grant a plenary hearing on his petition. Still, the district court interpreted Eaton's assignment of error, and the Supreme Court of Virginia's rejection of it, as involving the failure of the state habeas court to hold an evidentiary hearing simply because the defendant used the language "without a hearing" in describing his substantive claim. As a specific lesson, *Eaton* and *Yeatts* put Virginia counsel on notice that in the future the inclusion of the language "without a hearing" in a description of a substantive ineffective assistance of counsel claim, will be interpreted as a challenge only to the denial of a state evidentiary hearing.

II. Distinguishing Eaton's Case From O'Dell

Eaton challenged the trial court's refusal to inform the jury at the penalty phase that he had been sentenced to life imprisonment without the possibility of parole.[30] Prior to the trial for the murder of Hines, Eaton pled guilty to the murders of Custer, Marston, and McDonald, receiving a total of four life sentences. As part of his guilty plea for the murders of Marston and Custer, he accepted the provisions of Virginia Code Section 53.1-151(B1) making him ineligible for parole.[31] In *Simmons*, the Supreme Court held "that where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due

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[18] *Eaton,* 1998 WL 128570, at *10.

[19] *Id.* at *4.

[20] 117 S.Ct. 1969 (1997).

[21] 512 U.S. 154 (1994). *See Eaton,* 1998 WL 128570, at *6, for the court of appeals' holding.

[22] *Eaton,* 1998 WL 128570, at *9.

[23] *Eaton,* 1998 WL 128570, at *10 n.1 (emphasis added) (citation omitted).

[24] *Id.*

[25] 249 Va. 285, 455 S.E.2d 18 (1995).

[26] *Yeatts,* 249 Va. at 290-91, 455 S.E.2d at 21-22. *See also Eaton,* 1998 WL 128570, at *10 n.1.

[27] *Eaton,* 1998 WL 128570, at *10 n.1.

[28] *Yeatts v. Angelone,* No. 95-0638-R, Magistrate's Report and Recommendation (W.D. Va. May 29, 1997).

[29] The magistrate's finding of a "new rule" of procedural default in Yeatts relied, in part, on the Supreme Court of Virginia's failure in Eaton's case on state habeas appeal to find a procedural default under nearly identical language in the assignment of error. Eaton, 1998 WL 128570, at *10 n.1.

[30] *Eaton,* 1998 WL 128570, at *6.

[31] Virginia Code Section 53.1-151(B1) states, "Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole." Va. Code Ann. § 53.1-151(B1) (Michie 1994).

process requires that the sentencing jury be informed that the defendant is parole ineligible."[32] The *O'Dell* court held that *Simmons* constituted a "new rule" within the meaning of *Teague v. Lane*,[33] and that O'Dell was not entitled to the benefit of the *Simmons* rule because his conviction was final in 1988, six years before *Simmons* was decided.[34] Eaton's conviction became final in October of 1991, three years before *Simmons* was decided.[35] Eaton advanced three arguments to distinguish his case from *O'Dell*, but the court of appeals rejected all three, holding that *O'Dell* foreclosed Eaton's claim.[36]

A. Two Supreme Court decisions between 1988 and 1991 compelled Simmons

Defendant's essential argument was as follows. The Supreme Court decided two cases, *Boyde v. California*[37] and *Payne v. Tennessee*,[38] between the time that O'Dell's conviction became final and the time that Eaton's did. Eaton argued that these two cases "articulate[d] such broad conceptions of what evidence may be relevant to capital sentencing that they 'compelled' the result" in *Simmons*.[39] Thus, while the *Simmons* rule was not compelled at the time of O'Dell's conviction in 1988, these two intervening decisions compelled the rule by the time Eaton's conviction became final in October of 1991.

The court of appeals rejected the defendant's argument regarding the effect of these two cases. The court stated that *Simmons* hardly relied on *Boyde*, that it did not mention *Payne*, and that neither case bears on the specific issue of informing the jury of the defendant's parole ineligibility.[40] *Boyde* basically dealt with whether two different jury instructions precluded the sentencer from considering the history and background of the defendant as mitigating evidence. *Payne* held that the Eighth Amendment does not bar the admission of victim impact during the sentencing phase of a capital murder trial.[41] Although *Boyde* "reflect[s] the view that a broad range of evidence may be relevant to the sentencing determination,"[42] the court of appeals concluded that such a proposition was too vague to find that it compelled the specific rule in *Simmons*.[43] As to *Payne*, the court of appeals stated that it "signaled absolutely no change in the scope of evidence that the defendant was constitutionally permitted to introduce."[44]

Although the defendant cited *Boyde* and *Payne* for their broad conception of what is relevant in capital sentencing and not for the specific holding upon which the Fourth Circuit focused, the court's ultimate conclusion, that these two cases did not compel Simmons, is reasonable. Given that in *O'Dell* the Court concluded that *Simmons* was not compelled by existing precedent,[45] despite the fact that the *Simmons* Court stated that its decision was compelled by two prior decisions, it seems highly unlikely that the Supreme Court would conclude that *Simmons* was compelled by *Boyde* and *Payne*.

B. Eighth Amendment Right to Inform the Jury of Parole Ineligibility

Eaton next tried to distinguish *O'Dell* on the ground that while *Simmons* was based on the Due Process Clause of the Fourteenth Amendment, he had an Eighth Amendment right to inform the jury of his parole ineligibility.[46] In other words, Eaton argued, *O'Dell* decided only whether *Simmons* was a "new rule" within the meaning of *Teague*. *Simmons* was based on the Fourteenth Amendment right to rebut future dangerousness. Eaton's claim was based on the Eighth Amendment right to introduce relevant mitigating evidence. Therefore, Eaton contended, *O'Dell* did not control his claim.

The court of appeals rejected the Eighth Amendment distinction, holding, "*O'Dell* squarely and specifically resolves the new rule issue adversely to Eaton's claims."[47] If, by this statement, the court of appeals meant that *O'Dell* controlled Eaton's Eighth Amendment argument, then it was simply wrong. In *Simmons*, not only did seven of the justices clearly state the rule in terms of the Due Process right to rebut future dangerousness, the plurality went a step further in a footnote, adding, "[w]e express no opinion on the question whether the result we reach today is also compelled by the Eighth Amendment."[48] *O'Dell* is limited to whether the *Simmons* rule, i.e. the Due Process rule, is a new rule under *Teague*. Thus, *O'Dell* does not control Eaton's argument.

The court of appeals equates Eaton's argument, that he has an Eighth Amendment right to introduce mitigating evidence, with the Due Process right announced in *Simmons*, by calling the two "functionally indistinguishable."[49] These two rights are functionally indistinguishable, according to

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[32] *Simmons*, 512 U.S. at 156 (plurality opinion). Justice O'Connor's concurrence states that, "due process requires that the defendant be allowed to . . . [inform the jury of the defendant's parole ineligibility] in cases in which the only available alternative sentence to death is life imprisonment without possibility of parole and the prosecution argues that the defendant will pose a threat to society in the future." Id. at 177 (O'Connor, J., concurring).

[33] 489 U.S. 288 (1989).

[34] *O'Dell*, 117 S.Ct. at 1971.

[35] *Eaton*, 1998 WL 128570, at *6.

[36] *Id.*

[37] 494 U.S. 370 (1990).

[38] 501 U.S. 808 (1991).

[39] *Eaton*, 1998 WL 128570, at *6.

[40] *Id.* at *7.

[41] *Payne*, 501 U.S. at 811, 830.

[42] *Eaton*, 1998 WL 128570, at *7.

[43] *Id.*

[44] *Id.* (citing *Payne*, 501 U.S. at 826-27).

[45] *O'Dell*, 117 S.Ct. at 1975-77.

[46] *Eaton*, 1998 WL 128570, at *8.

[47] *Id.*

[48] *Simmons*, 512 U.S. at 162 n.4 (emphasis added).

[49] *Eaton*, 1998 WL 128570, at *8.

the court, because "just like Simmons, Eaton seeks the right to inform the sentencing jury that the alternative to the death penalty in his case really means life imprisonment, without parole."[50] It is true that both rights attempt to inform the jury that life imprisonment means life imprisonment without parole. But a careful examination of these two rights demonstrates that they are clearly distinguishable.[51]

The Due Process right to inform the jury of the defendant's parole ineligibility is only triggered if the prosecution argues that the defendant presents a future danger.[52] The Simmons rule is essentially a right to rebut the future dangerousness argument. The rule's underlying principle originates in the Supreme Court case of *Gardner v. Florida,*[53] where the Court held that the defendant was denied due process "when the death sentence was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain."[54]

Alternatively, the Eighth Amendment right to inform the jury of the defendant's parole ineligibility does not rely on the Commonwealth's decision to argue future dangerousness. Rather it is based on *Lockett v. Ohio,*[55] which held "that the Eighth and Fourteenth Amendments require that the sentencer, ... not be precluded from considering, as a mitigating factor, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death."[56] In other words, the Eighth Amendment gives the defendant the right to introduce any relevant evidence, and relevant evidence is any evidence of the defendant's history or record or circumstances of the crime that call for a sentence less than death. Even if the vileness aggravator is the sole basis for imposing death, the jury is still deciding the defendant's punishment and the defendant's actual duration in prison is clearly relevant to selecting the proper punishment. Thus, while under both the Eighth Amendment and Fourteenth Amendment the defendant has a right to inform the jury that he or she is parole ineligible, they are two distinct rights.[57]

The other possible interpretation of the conclusion by the court of appeals, that *O'Dell* resolves Eaton's claim, is that *O'Dell* is persuasive of how the Supreme Court would resolve Eaton's Eighth Amendment argument. In other words, even if Eaton has an Eighth Amendment right to inform the jury of his parole ineligibility, the reasoning in *O'Dell* persuasively demonstrates that such a right would be a "new rule" within the meaning of *Teague.* This conclusion may be true, given how narrowly the Court in *O'Dell* read *Simmons* and the precedent in support of it.[58] But that is another issue and not the one presented by *Eaton.* The court of appeals never answered the question whether Eaton has an Eighth Amendment right to inform the jury of parole ineligibility and erroneously held that *O'Dell* controlled Eaton's claim.

C. Factual Distinction between Eaton's case and O'Dell

Eaton argued that unlike both *Simmons* and *O'Dell,* his sentence of life imprisonment without the possibility of parole was a settled fact and not a consequence of the jury's decision not to impose the death penalty.[59] In *O'Dell,* the Court focused on the fact that while *Gardner* and *Skipper* involved historical facts (i.e. the defendant's past behavior), *Simmons* and *O'Dell* were prevented from informing the jury of the effect of the state post-sentencing law.[60] This distinction by the Court was, in the court of appeals' words, "the feature of Simmons that made the rule new."[61] Prior to the Hines murder trial, Eaton pled guilty to the murders of Custer and Marston and to the robbery of Marston. He agreed to three life sentences and to the provisions of Virginia Code Section 53.1-151(B1)[62] which made him ineligible for parole. Thus, Eaton argued, his sentence of life imprisonment without the possibility of parole was a historical fact, not the consequence of the jury's decision not to impose death, and distinguishable from *O'Dell.*

The court of appeals recognized the historical fact/operation of state post-sentencing law distinction as being what made *Simmons* a new rule, but concluded that Eaton's pre-trial sentence of life imprisonment without the

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[50] *Id.*

[51] The court of appeals' reasoning, that because two constitutional rights are "functionally indistinguishable" a decision on one controls an open question on the other, is quite troubling and surely unique, to say the least. Consider how its rationale would apply in a slightly different context. Suppose that the police, without probable cause, searched the home of a person suspected of murder and found what was eventually determined to be the murder weapon. The police then arrest the defendant and elicit a confession in violation of *Miranda.* Pretrial the defendant moves to suppress the confession, under both the Fourth Amendment, that it was a fruit of the poisonous tree of the illegal search of his house, and the Fifth Amendment, that the confession was obtained in violation of *Miranda.* Under the court of appeals' rationale, since the defendant is seeking the same thing under both arguments, i.e. to suppress his confession, a decision on the Fourth Amendment argument forecloses the Fifth Amendment argument.

[52] *O'Dell,* 117 S.Ct. at 1971. *See supra,* note 32.

[53] 430 U.S. 349 (1977).

[54] *Id.* at 362. *See also Skipper v. South Carolina,* 476 U.S. 1, 5 n.1 (1986) (holding that where the prosecution relies on future dangerousness in seeking the death penalty, due process requires that the defendant not be sentenced to death based on information which he or she had no opportunity to deny or explain).

[55] 438 U.S. 586 (1978).

[56] *Lockett,* 438 U.S. at 604 (emphasis in original).

[57] *See* Jenio, "'Life'= Life: Correcting Juror Misconceptions," Cap. Def. J., Vol. 10, No. 1, p. 40 (discussing effective use of *Simmons* and its underlying reasoning).

[58] *See* Case Summary of *O'Dell,* Cap. Def. J., Vol. 10, No. 1, p.4.

[59] *Eaton,* 1998 WL 128570, at *8.

[60] *See O'Dell,* 117 S.Ct. at 1976, where the Court states, "It is a step from a ruling that a defendant must be permitted to present evidence of [the defendant's past behavior] to a requirement that [the defendant] be afforded an opportunity to describe the extant legal regime."

[61] *Eaton,* 1998 WL 128570, at *8.

[62] *See supra,* note 31.

possibility of parole fit into the operation of state post-sentencing law category.[63] The court first stated not only that Eaton was "never sentenced to 'life imprisonment without parole,'" but that the Virginia Code does not even contemplate such a sentence.[64] The court reached this remarkable conclusion because "like Simmons, Eaton was made ineligible for parole by operation of a special provision of state law separate from the section defining his offense and punishment."[65] The court added further, that "in seeking to inform the jury of their parole eligibility both Eaton and Simmons sought to present to the jury evidence not about themselves, their character or record, but about the operation of state postsentencing law."[66] In short, the court of appeals held that Eaton's situation was identical to *Simmons* in all crucial respects and thus *O'Dell* controlled.

A careful examination of the facts in the case and the cases of *Gardner* and *Skipper* demonstrate that the court of appeals' conclusion, that Eaton sought to introduce evidence not about himself, his character or record but about the operation of state postsentencing law, was simply wrong. Eaton's sentence to life imprisonment without the possibility of parole was not the result of what would happen if the jury chose not to impose death, but rather was the result of a plea agreement prior to the Hines murder trial. It was thus clearly part of his criminal record and not one of the jury's options. Since defendant was bound by the terms of the earlier plea agreement, the issue of how Virginia Code Section 53.1-151(B1) would operate on a sentence of life imprisonment in the present case is academic.

Moreover, the defendant's agreement to a sentence of life imprisonment without the possibility of parole does reflect on his character. As part of his plea agreement, the defendant accepted the provisions of Virginia Code Section 53.1-151(B1) which made him parole ineligible. It was not, however, inevitable that section 53.1-151(B1) would have applied to Eaton. For section 53.1-151(B1) to apply, the Commonwealth would have had to prove that the murder of Custer and the murder and robbery of Marston were not part of a common act, transaction, or scheme.[68] Thus, Eaton's acceptance of a sentence of life imprisonment reflects an ability to take responsibility and accept punishment for his actions. In short, Eaton's sentence of life imprisonment without the possibility of parole is part of his record which shows something about his character.

A brief examination of *Gardner* and *Skipper* bolster the conclusion that Eaton's case falls within the historical record and character category. *Gardner* stands for the proposition that Due Process is violated when the defendant has no opportunity to deny or explain information upon which a sentence of death is imposed.[69] In *Gardner*, the judge imposed a death sentence based in part on a presentence report that was not made available to the defendant. In Eaton's case, the Commonwealth introduced a copy of Eaton's plea agreement to the murders of Custer and Marston in order to prove future dangerousness.[70] Any reference to Eaton's parole ineligibility was stricken from the copy of the plea agreement. Eaton was given no opportunity to explain to the jury that while he committed the murders, he had also accepted responsibility for doing so by agreeing to a sentence of life imprisonment without the possibility of parole.

Eaton's case is similarly in line with *Skipper*. In *Skipper*, the prosecution argued that the defendant, if sentenced to life imprisonment, would pose a threat to other prisoners.[71] The defendant was prevented from introducing evidence of his prior good adjustment to prison life.[72] Skipper's evidence both rebutted the prosecution's argument and was mitigating, by showing his good character, in and of itself. In the instant case, the prosecution argued that the defendant would pose a future danger to society. Eaton was precluded from showing that because of his prior criminal record that he would never be released from prison and that he had accepted responsibility for his prior actions. Eaton's evidence of his prior record rebutted the Commonwealth's argument of future dangerousness, and was mitigating, in that it showed the character trait of accepting responsibility. In short, Eaton's case is more clearly in line with *Gardner* and *Skipper* than with either *Simmons* or *O'Dell*, where the sentence of life imprisonment without parole was the effect of the jury's decision not to impose death.

Due to the factual uniqueness of Eaton's case, it probably does not have wide applicability to practitioners in Virginia. Its limited effect, however, does not make the court of appeals' erroneous conclusion, any more acceptable. If, as the court of appeals states, the effect of state post-sentencing law and evidence specifically related to the defendant is the distinction that makes *Simmons* a new rule, then Eaton should get the benefit of *Simmons*. A careful review of the facts in Eaton's case and a comparison of *Gardner*, *Skipper*, *Simmons*, and *O'Dell*, demonstrate that Eaton's evidence falls within the evidence of the defendant's character and record category. *O'Dell*, therefore, does not control Eaton's case.

III. Standard of Proof for Unadjudicated Conduct

In the sentencing phase, the Commonwealth offered the evidence of the three murders to which Eaton pleaded guilty and the testimony of three jailhouse inmates. One inmate, Chadwick Holley, "testified that Eaton said he would blame Hines' death on Judy MacDonald and joked that he

[63] *Eaton*, 1998 WL 128570, at *8.
[64] *Id.*
[65] *Id.*
[66] *Id.* (emphasis added).
[67] *See supra*, note 31.
[68] Va. Code Ann. § 53.1-151(B1) (Michie 1994). The trial court found that the murder of Custer and the murder and robbery of Marston were not part of a common act, transaction, or scheme in the course of accepting the defendant's plea agreement, but that was after the defendant had so stipulated.
[69] *Gardner*, 430 U.S. at 362.
[70] *Eaton*, 1998 WL 128570, at *2.
[71] *Skipper*, 476 U.S. at 3.
[72] *Id.*

could get away with this because McDonald was dead."[73] Two other inmates claimed that Eaton had made a weapon out of wire and a shower curtain rod, "which he planned to use to overpower a guard, take his weapon, and escape from prison."[74] Eaton contended that the Constitution requires a standard of proof for evidence of unadjudicated acts, and that the failure of the Virginia's "future dangerousness" aggravator to require a standard of proof rendered it unconstitutional.[75]

The court of appeals responded to Eaton's argument in two ways, both of which avoided meaningful consideration of Eaton's objection. Initially, the court of appeals re-characterized Eaton's objection as a challenge to the admission of unadjudicated acts as being unconstitutional per se. After first noting that courts "have routinely considered evidence of prior unadjudicated acts in assessing future dangerousness,"[76] it then cited *Jurek v. Texas*[77] as evidence that the Supreme Court has "rejected the claim that the statutory aggravator of future dangerousness impermissibly relied on wholly speculative . . . predictions of defendant's future behavior."[78] It is true that the *Jurek* court rejected the petitioner's claim that because it is impossible to predict future behavior, the future dangerousness aggravator is vague and meaningless. It is also true, as the court of appeals observed,[79] that the Court in *Jurek* held that it "is essential . . . that the jury have before it all possible relevant information about the individual defendant whose fate it must determine."[80]

Neither of these passages from *Jurek* apply to Eaton's objection. Eaton contended that the Due Process Clause requirement of heightened reliability in a jury's life or death decision required a standard of proof to accompany the admission of unadjudicated acts.[81] Eaton did not challenge the constitutionality of future dangerousness as an aggravator; nor did he claim that the Commonwealth should not be allowed to introduce evidence of unadjudicated acts to prove future dangerousness. All Eaton claimed was that if the Commonwealth introduced evidence of unadjudicated acts, the principle of heightened reliability required the evidence to meet some standard of proof. Eaton asked only that the court of appeals recognize that two principles govern capital sentencing- all relevant evidence and heightened reliability- and that these two principles be balanced. As one federal court has recently observed:

> [I]t is Constitutionally essential to assure that the principle of heightened reliability serves as a meaningful limit to the admission of "all relevant evidence" in order to prevent the less stringent concept of relevance from predominating over the cardinal principle of reliability. This necessarily requires a balance to be struck between these two competing doctrines.[82]

The court's other response to Eaton's objection was essentially that relevant evidence should be admitted, and that the jury should be free to assess the weight of the evidence after it is subjected to cross examination and rebuttal evidence. The court of appeals cited *Barefoot v. Estelle*[83] as support for this response.[84] *Barefoot* is clearly not controlling on Eaton's objection. In *Barefoot,* the petitioner argued that psychiatric testimony about future dangerousness is so unreliable that such testimony is per se inadmissible.[85] Eaton's objection was different both in terms of content, alleged unadjudicated acts of violence, and degree, a balancing between two constitutional doctrines instead of a complete ban on clearly relevant evidence. In fact, because unadjudicated acts are different in kind from expert testimony, *Barefoot* is not even persuasive authority.

Prior acts of violence, whether adjudicated or unadjudicated, are different in kind from expert testimony because they are more relevant to determining the defendant's future dangerousness. The language of the future dangerousness aggravator is whether the defendant "would commit criminal acts of violence that would constitute a continuing serious threat to society."[86] Moreover, an expert opinion on future dangerousness often relies, at least in part, on the consideration of previous acts of violence actually or allegedly committed by the defendant. Although an expert's opinion on the likelihood of the defendant committing future criminal acts of violence is relevant, it is not as relevant and persuasive as evidence of previous acts of violence committed by the defendant. In short, the different nature of evidence of prior acts of violence renders *Barefoot* unpersuasive authority for rejecting Eaton's objection.

In fact, the court of appeals' essential response, that the jury should assess the weight to be given to the evidence unconstrained, highlights exactly why a standard of proof is

[73] *Eaton,* 1998 WL 128570, at *2.
[74] *Id.*
[75] *Id.* at *9.
[76] *Id.*
[77] 428 U.S. 262 (1976).
[78] *Eaton,* 1998 WL 128570, at *9 (citing *Jurek,* 428 U.S. at 276).
[79] *Id.*
[80] *Jurek,* 428 U.S. at 276.
[81] The court of appeals does not specify the constitutional basis for Eaton's lack-of- standard-of-proof objection, but Eaton's brief clearly grounded it in the Due Process requirement of heightened reliability in capital jury's life or death determination. Support for the constitutional principle of heightened reliability can be found in *Gregg v. Georgia,* 428 U.S. 153 (1976), *Woodson v. North Carolina,* 428 U.S. 280 (1976), and *Gardner v. Florida,* 430 U.S. 349 (1977). For a detailed discussion of how the principle of heightened reliability applies in the context of unadjudicated acts offered to prove future dangerousness, see Barrett, *A Modest Proposal: Requiring Proof Beyond a Reasonable Doubt for Unadjudicated Acts Offered to Prove Future Dangerousness,* Cap. Def. J., *this issue.*
[82] *United States v. Beckford,* 964 F.Supp. 993, 1000 (E.D.Va. 1997).
[83] 463 U.S. 880 (1983).
[84] *Eaton,* 1998 WL 128570, at *9.
[85] *Barefoot,* 463 U.S. at 883-84.
[86] Va. Code Ann. § 19.2-264.2 (Michie 1995) (emphasis added).

needed. A criminal conviction carries with it the reliability that comes from having to produce a sufficient quantity of credible evidence to overcome the defendant's presumption of innocence and convince a jury of the defendant's guilt beyond a reasonable doubt. An unadjudicated act, without a corresponding standard of proof, lacks many of these attributes. Without a standard of proof requirement, the jury is left in the dark as to how convinced it must be that the defendant actually committed the unadjudicated acts. The jury is uninformed about whether it has to be convinced beyond a reasonable doubt, whether more likely than not is sufficient, or whether it simply has to decide which witness it believes more. Without any guidance, the jury's determination too easily devolves into the last inquiry. This is especially troubling given the defendant's complete lack of credibility. Unlike at the guilt phase of a trial where the defendant has a presumption of innocence, the capital defendant at the sentencing phase has absolutely no credibility with the jury, given that he or she has just been convicted of a capital murder. Without any guidance, coupled with the defendant's complete lack of credibility, the current practice in Virginia makes it far too easy for a jury's decision to impose death to rest on flimsy and suspect evidence.

The testimony of the jailhouse inmates in Eaton's sentencing hearing manifests this fear. Two inmates testified that Eaton had fashioned a weapon which he planned to use to overpower a guard and escape from prison. Nothing in the court's opinion indicates the presence of physical evidence, such as the weapon, to corroborate the testimony of these inmates. Essentially, it was Eaton's word against the word of these jailhouse inmates. Although in the instant case criminal convictions of violence were also offered to prove future dangerousness, nothing in Virginia's statutory scheme prevents a death sentence from being imposed solely on the basis of unadjudicated acts. A mere swearing contest between convicts hardly satisfies the constitutional requirement of a heightened degree of reliability in a jury's decision to impose life or death.

IV. Conclusion

This case epitomizes everything that is troubling about the Fourth Circuit's current death penalty jurisprudence. On the one hand, the court of appeals, through re-characterization and dismissive language, bends over backwards to uphold what has been deemed an unconstitutional practice and prevent the jury from considering relevant and indisputably accurate evidence. On the other hand, the court, again by re-characterizing the defendant's claim, avoids answering the defendant's Due Process objection, and thus permits the admission of relevant but inadequate and highly dubious evidence. At some point fairness must prevail.

Summary and analysis by:
Tommy Barrett

GILBERT v. MOORE

134 F.3d 642 (4th Cir. 1998)
United States Court Of Appeals, Fourth Circuit

FACTS

Half brothers Larry Gilbert and J.D. Gleaton were convicted of capital murder and sentenced to death in South Carolina state court for the 1977 shooting and stabbing of a service station worker.[1] The South Carolina Supreme Court affirmed both convictions but vacated the sentences and remanded for resentencing.[2] A second jury sentenced Gilbert and Gleaton to death on remand. On appeal, the South Carolina Supreme Court affirmed their sentences, and, subsequently, the United States Supreme Court denied certiorari.[3] The half brothers next sought post-conviction relief (hereinafter PCR) from their convictions and sentences in state court. The state PCR court rejected their claims, and both the South Carolina Supreme Court and the United States Supreme Court denied certiorari.[4]

Gilbert and Gleaton requested habeas relief from the United States District Court, Fourth Circuit. In 1985, a federal magistrate recommended a grant of summary judgment in favor of the State on all claims. In 1988, the court adopted that recommendation, granting summary judgment and dismissing the petitions. Gilbert and Gleaton filed motions requesting the court to vacate the judgment and allow an amendment to their petitions. In 1991, the court vacated the judgment and permitted the half brothers to amend their petitions. The cases were remanded to the magistrate judge.[5]

[1] *Gilbert v. Moore,* 134 F3d 642, 645 (4th Cir. 1998). The half brothers were under the influence of illegal drugs at the time of the murder. They also robbed the service station.

[2] *Gilbert,* 134 F3d at 645.

[3] *Id.* at 645-46. *See State v. Gilbert,* 456 U.S. 984 (1982).

[4] *Gilbert,* 134 F3d at 646.

[5] *Id.* at 646. The court remanded the case with instructions for the magistrate to hold the case in abeyance for sixty days to allow Gilbert and Gleaton to pursue additional remedies in state court.