



Fall 9-1-2004

Burns v. Warden 597 S.E.2d 195 (Va. 2004)

Follow this and additional works at: <https://scholarlycommons.law.wlu.edu/wlucdj>



Part of the [Law Enforcement and Corrections Commons](#)

Recommended Citation

Burns v. Warden 597 S.E.2d 195 (Va. 2004), 17 Cap. DEF J. 205 (2004).

Available at: <https://scholarlycommons.law.wlu.edu/wlucdj/vol17/iss1/15>

This Casenote, Va. Supreme Ct. is brought to you for free and open access by the Law School Journals at Washington and Lee University School of Law Scholarly Commons. It has been accepted for inclusion in Capital Defense Journal by an authorized editor of Washington and Lee University School of Law Scholarly Commons. For more information, please contact christensena@wlu.edu.

Burns v. Warden

597 S.E.2d 195 (Va. 2004)

I. Facts

A jury found William Joseph Burns guilty of capital murder in the commission of rape and forcible sodomy and recommended a sentence of death.¹ The trial court then sentenced Burns to death.² In March 2001 the Supreme Court of Virginia conducted its mandatory review of Burns's death sentence and affirmed his convictions and sentences.³ More than a year later, on June 20, 2002, the United States Supreme Court decided *Atkins v. Virginia*.⁴ *Atkins* held that executing the mentally retarded constitutes "cruel and unusual punishment" in violation of the Eighth Amendment to the United States Constitution.⁵ Shortly after *Atkins*, Burns filed a petition for a writ of habeas corpus with the Supreme Court of Virginia claiming, *inter alia*, that the Commonwealth could not execute him because he was mentally retarded.⁶

On October 23, 2003, the Supreme Court of Virginia decided that Burns's mental retardation claim was not frivolous and granted his petition for a writ of

1. *Burns v. Commonwealth*, 541 S.E.2d 872, 877 (Va. 2001); *see* VA. CODE ANN. § 18.2-31(5) (Michie 2004) (defining murder as capital if the murder takes place during the commission of rape or forcible sodomy). The jury sentenced Burns to death because he posed a future threat to society and his conduct was "outrageously or wantonly vile, horrible or inhuman." *Burns*, 541 S.E.2d at 877; *see also* VA. CODE ANN. § 19.2-264.2 (Michie 2004) (stating the findings required for a judge or jury to recommend death).

2. *Burns*, 541 S.E.2d at 877.

3. *Id.*; *see* VA. CODE ANN. § 17.1-313 (Michie 2003) (providing the procedures for the Supreme Court of Virginia's mandatory review of death sentences). *See generally* Jeffrey D. Fazio, Case Note, 14 CAP. DEF. J. 131 (2001) (analyzing *Burns v. Commonwealth*, 541 S.E.2d 872 (Va. 2001)).

4. *Atkins v. Virginia*, 536 U.S. 304, 304 (2002). For a complete discussion and analysis of *Atkins*, *see generally* Kristen F. Grunewald, Case Note, 15 CAP. DEF. J. 117 (2002) (analyzing *Atkins v. Virginia*, 122 S. Ct. 2242 (2002)).

5. *Atkins*, 536 U.S. at 321; *see* U.S. CONST. amend. VIII ("Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.").

6. *Burns v. Warden*, 597 S.E.2d 195, 195 (Va. 2004); *see* VA. CODE ANN. § 8.01-654 (Michie 2000) (describing the procedures for seeking a writ of habeas corpus in Virginia state courts and giving the Supreme Court of Virginia exclusive jurisdiction over a petition for a writ of habeas corpus by a person sentenced to death); VA. CODE ANN. § 8.01-654.1 (Michie 2000) (listing the provisions for filing a timely habeas corpus petition in a capital case with the Supreme Court of Virginia); VA. CODE ANN. § 8.01-654.2 (Michie Supp. 2004) (providing the procedures for the Supreme Court of Virginia to hear the mental retardation claim of a defendant who did not raise the issue at trial and was sentenced to death before April 29, 2003).

habeas corpus regarding that claim.⁷ The court dismissed the other issues that Burns raised.⁸ The Supreme Court of Virginia then remanded the matter for a jury to determine Burns's mental retardation claim.⁹ The Warden of the Sussex I State Prison ("Warden") sought a rehearing, asserting that the court should not have given Burns the right to a jury determination on remand.¹⁰ The Warden claimed that the court instead should have remanded the case for a judge to determine Burns's mental retardation claim.¹¹ The Supreme Court of Virginia granted the Warden's motion for rehearing and temporarily vacated its prior order to remand Burns's claim.¹²

II. Holding

On rehearing, the Supreme Court of Virginia reinstated its initial order remanding the case for a jury to determine Burns's mental retardation claim.¹³ The court found that Virginia Code section 8.01-654.2 did not preclude a jury from determining the claim and noted that Virginia Code section 19.2-264.3:1 permitted a jury to make such a determination.¹⁴ The court ordered the trial court to conduct the jury hearing in accordance with various sections of the Virginia Code.¹⁵

7. *Burns*, 597 S.E.2d at 195; see VA. CODE ANN. § 8.01-654.2 (permitting the Supreme Court of Virginia to consider a writ of habeas corpus on a petitioner's mental retardation claim after determining that the claim is not frivolous).

8. *Burns*, 597 S.E.2d at 195.

9. *Id.*; see VA. CODE ANN. § 19.2-264.3:1.1(C) (Michie 2004) (requiring a jury to determine whether the defendant is mentally retarded in a capital proceeding); see also VA. CODE ANN. § 8.01-654(C) (permitting the Supreme Court of Virginia to remand the case to the trial court that imposed the sentence of death).

10. *Burns*, 597 S.E.2d at 195.

11. *Id.*

12. *Id.*

13. *Id.* at 197.

14. *Id.* at 196; see VA. CODE ANN. § 19.2-264.3:1.1(C) ("In any case in which the offense may be punishable by death and is tried before a jury, the issue of mental retardation . . . shall be determined by the jury as part of the sentencing proceeding required by § 19.2-264.4.").

15. *Burns*, 597 S.E.2d at 197; see VA. CODE ANN. § 8.01-654 (Michie 2000) (allowing the Supreme Court of Virginia to remand factual determinations that arise on habeas review). The court instructed the circuit court to make its determination in accordance with the following statutes: VA. CODE ANN. § 8.01-654.2 (Michie Supp. 2004) (instructing circuit courts to conduct evidentiary hearings by order of Supreme Court of Virginia in habeas cases); VA. CODE ANN. § 18.2-10 (Michie 2004) (limiting sentence of defendant convicted of a Class 1 felony to life imprisonment upon finding of mental retardation); VA. CODE ANN. § 19.2-175 (Michie 2004) (governing fees for court appointed expert); VA. CODE ANN. § 19.2-264.3:1 (Michie 2004) (listing provisions for obtaining court appointed expert when defendant's mental condition is relevant to capital sentencing); VA. CODE ANN. § 19.2-264.3:1.1 (Michie 2004) (listing procedures for determining if capital defendant is mentally retarded); VA. CODE ANN. § 19.2-264.3:1.2 (Michie 2004) (listing provisions for appointment of expert when capital defendant's mental retardation is at issue); VA.

III. Analysis

On rehearing, the Warden argued that Virginia Code section 8.01-654.2 only permits the Supreme Court of Virginia to remand a mental retardation claim for a jury determination when a defendant's case is on direct appeal.¹⁶ In opposition to the Warden's argument, Burns claimed: (1) the language of the statute does not preclude a jury from determining the issue of mental retardation when the defendant raises the claim in a petition for a writ of habeas corpus to the Supreme Court of Virginia; (2) allowing a jury to determine some mental retardation claims and not others would violate the Equal Protection Clause; and (3) *Ring v. Arizona*¹⁷ and *Apprendi v. New Jersey*¹⁸ require a jury to determine the issue of mental retardation because the absence of mental retardation is a factual determination necessary for the court to impose a sentence of death.¹⁹ The court proceeded to analyze Virginia Code section 8.01-654.2 in terms of Burns's first two arguments and did not discuss whether the Warden's interpretation of the statute would violate *Ring* and *Apprendi*.²⁰

To begin its analysis, the court stated that it would presume that Virginia Code section 8.01-654.2 is constitutional and attempt to construe the statute "in a manner that avoids constitutional infirmity."²¹ The court first analyzed the Warden's interpretation of Virginia Code section 8.01-654.2 under the Equal Protection Clause.²² The court stated that the issue of mental retardation is a factual determination for the jury to decide and held that the Warden's interpretation of the statute "would treat similarly situated persons differently in violation of the Equal Protection Clause."²³ The court found it impermissible for a statute to deprive some defendants of a jury trial on a factual issue solely because they

CODE ANN. § 19.2-264.3:3 (Michie 2004) (placing limitations on the use of statements made by a defendant during an evaluation); VA. CODE ANN. § 19.2-264.4 (Michie 2004) (explaining the sentencing procedures for capital cases).

16. *Burns*, 597 S.E.2d at 196.

17. 536 U.S. 584 (2002).

18. 530 U.S. 466 (2000).

19. *Burns*, 597 S.E.2d at 196; see U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws."); VA. CODE ANN. § 8.01-654.2 (providing the procedures for determining a mental retardation claim made for the first time on appeal); *Ring v. Arizona*, 536 U.S. 584, 589 (2002) (holding that a jury must make any factual determination that may increase a defendant's maximum sentence); *Apprendi v. New Jersey*, 530 U.S. 466, 477 (2000) (requiring a jury to determine whether a petitioner is guilty beyond a reasonable doubt for every element of the offense).

20. See *Burns*, 597 S.E.2d at 196-97 (omitting a discussion involving Burns's *Ring* and *Apprendi* claims).

21. *Id.* at 196 (citing *Yamaha Motor Corp. v. Quillian*, 571 S.E.2d 122, 126-27 (Va. 2002)).

22. *Id.*; see U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

23. *Burns*, 597 S.E.2d at 196.

exhausted their direct appeal and must raise their claim in a habeas corpus petition.²⁴ Thus, the court found that a statute would deprive an excluded class of equal protection under the law by prohibiting a jury from determining defendants' mental retardation claims based solely on when they raised their claims.²⁵

The court observed that when a defendant raises a mental retardation claim in a habeas corpus petition and the court finds that the claim is not frivolous, the statute mandates that the court remand the factual determination of mental retardation.²⁶ However, the court found the statute silent on whether a jury shall hear a defendant's mental retardation claim raised for the first time in a habeas corpus petition.²⁷ The court turned to Virginia Code section 19.2-264.3:1.1, which requires a jury to determine whether a defendant is mentally retarded when the defendant's trial is before a jury.²⁸ Thus, the court found that Virginia Code section 8.01-654.2 is constitutional because the statute does not preclude a jury from determining a defendant's mental retardation claim raised in a habeas corpus petition and the applicable statute does permit a jury determination of the issue.²⁹

Additionally, the Warden claimed that allowing a jury to determine the issue of mental retardation would confuse traditional habeas procedures and introduce the right to a jury determination where one previously did not exist.³⁰ The court explained that its holding was limited to Virginia Code section 8.01-654.2, which is a transitional statute implementing a new right available to a very limited number of offenders.³¹ Due to the statute's transitional nature and limited application, the court concluded that providing the right to a jury determination in this one instance will not alter traditional habeas corpus rules.³²

IV. *Application to Virginia Practice*

Virginia Code section 8.01-654.2 is still applicable when a defendant sentenced to death prior to April 29, 2003 wishes to contest his death sentence

24. *Id.*

25. *Id.*; see U.S. CONST. amend. XIV, § 1 ("No State shall . . . deny to any person within its jurisdiction the equal protection of the laws.").

26. *Burns*, 597 S.E.2d at 196; see VA. CODE ANN. § 8.01-654.2 (Michie Supp. 2004) (instructing the Supreme Court of Virginia to remand for a factual determination of mental retardation upon finding that a petitioner's mental retardation claim is not frivolous).

27. *Burns*, 597 S.E.2d at 196.

28. *Id.*; see VA. CODE ANN. § 19.2-264.3:1.1(C) (Michie 2004) (requiring a jury to determine the issue of mental retardation when a capital case is tried before a jury).

29. *Burns*, 597 S.E.2d at 196.

30. *Id.* at 196-97.

31. *Id.* at 197.

32. *Id.*

because he is mentally retarded.³³ Defendants may raise their mental retardation claims before the Supreme Court of Virginia on direct appeal or through a habeas corpus petition.³⁴ The Supreme Court of Virginia then will determine if the mental retardation claim is frivolous.³⁵ If it is not, the Supreme Court must remand the claim to the trial court.³⁶ On remand, a judge or jury will determine the defendant's mental retardation claim depending on whether the initial trial was held before a judge or jury.³⁷ Thus, the procedural posture of the case does not affect defendants' right to a jury determination of their non-frivolous mental retardation claims as long as the defendants were sentenced to death prior to April 29, 2003.³⁸

In reaching this conclusion, the court stated that the Warden's contrary interpretation of the statute would violate the Equal Protection Clause.³⁹ The court's decision implies that any new statute giving defendants the right to a jury determination of a factual issue may violate the Equal Protection Clause if that statute does not provide a jury determination for everyone with a similar claim.⁴⁰ A statute will survive an equal protection challenge "if the classification drawn by the statute is rationally related to a legitimate state interest."⁴¹ The court in *Burns* implied that the Commonwealth's efficiency concerns in limiting the frequency of jury trials is not "rationally related to a legitimate state interest" to justify differential treatment.⁴² As long as the procedure does not result in a gross inefficiency or affect a large number of cases, a statute may grant a temporary right to a jury trial for defendants raising a new claim on habeas review.⁴³

33. VA. CODE ANN. § 8.01-654.2 (Michie Supp. 2004).

34. *Id.*

35. *Id.*

36. *Id.*

37. *Burns*, 597 S.E.2d at 197; see VA. CODE ANN. § 19.2-264.3:1.1 (Michie 2004) ("In any case in which the offense may be punishable by death and is tried before a jury, the issue of mental retardation . . . shall be determined by the jury . . .").

38. When the Supreme Court of Virginia has denied defendants' petitions for a writ of habeas corpus and the defendants have made their direct appeals, the defendants may only bring their mental retardation claims in federal court. VA. CODE ANN. § 8.01-654.2. Thus, the court's holding is limited to cases in which defendants sentenced to death have not exhausted their direct appeals or the Supreme Court of Virginia has not denied their habeas corpus petitions. *Burns*, 597 S.E.2d at 196. The court's holding does not apply to mental retardation claims brought in federal court. *Id.*

39. *Burns*, 597 S.E.2d at 196.

40. See *id.* ("To assign the finding of this fact to the trial court for one group of qualifying defendants and to either a court or jury for another . . . would treat similarly situated persons differently in violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.").

41. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 440 (1985).

42. *Burns*, 597 S.E.2d at 196-97; *Cleburne Living Ctr.*, 473 U.S. at 440.

43. See *Burns*, 597 S.E.2d at 197 (stating that the court's interpretation does not infringe on

Thus, defendants may be able to challenge statutes on equal protection grounds if the statute deprives them of a jury determination based solely on the procedural posture of their case.

Additionally, the court's holding puts the final clause of Virginia Code section 8.01-654.2 into constitutional uncertainty.⁴⁴ Virginia Code section 8.01-654.2 does not permit defendants to bring their mental retardation claims in state court if they were sentenced to death prior to April 29, 2003, they have exercised their direct appeal, and the state court has denied their habeas corpus petition.⁴⁵ If the Commonwealth cannot deprive defendants of a jury trial based on the procedural posture of their cases, it is arguable that defendants would have a similar equal protection interest in bringing their mental retardation claims into state courts. The Commonwealth's interest in not providing a mentally retarded petitioner with a successive state habeas review is minimal compared to the burden it places on condemned individuals ability to assert their Eighth Amendment rights.⁴⁶ However, as a practical matter, this provision may actually favor condemned inmates because federal law provides relatively generous funding for expert assistance to defendants seeking habeas review in federal court.⁴⁷ Further, defense counsel may prefer to bring their clients' claims before a life-tenured federal judge, as opposed to a legislatively-elected state judge, given the potential unpopularity of any finding of mental retardation that prohibits the Commonwealth from executing an offender. Thus, attorneys may have little incentive to challenge the final clause of Virginia Code section 8.01-654.2.

V. Conclusion

The court held that Virginia Code section 8.01-654.2 was silent about a defendant's right to a jury determination of a mental retardation claim initially raised in a habeas corpus petition.⁴⁸ Thus, any defendant whose trial concluded prior to April 29, 2003 who raises a mental retardation claim on habeas review or direct appeal may request a jury to determine his claim on remand if his

the traditional principle of not granting jury determinations on factual issues raised on habeas review because the statute applies to a very limited number of cases).

44. See VA. CODE ANN. § 8.01-654.2 (Michie Supp. 2004) ("If the person has completed both a direct appeal and a habeas corpus proceeding under subsection C of § 8.01-654, he shall not be entitled to file any further habeas petitions in the Supreme Court and his sole remedy shall lie in federal court.").

45. *Id.*

46. See *Walton v. Johnson*, 306 F. Supp. 2d 602, 603 (W.D. Va. 2004) (expressing disapproval of the final clause of Virginia Code section 8.01-654.2 and observing that inconvenience to the State could not outweigh defendants' interests in having the opportunity to assert their claims in court).

47. See 21 U.S.C. § 848(q)(10)(B) (2000) (entitling defendants sentenced to death by either state or federal court to the funds necessary for expert assistance).

48. *Burns*, 597 S.E.2d at 196-97.

original sentencing was held before a jury. Further, *Burns* may open the door for future equal protection challenges when a statute implementing a new right grants a jury determination to some defendants seeking to invoke the right but not to others.

Justin B. Shane

