Capital Defense Journal

Volume 4 | Issue 1 Article 4

Fall 11-1-1991

COLEMAN v. THOMPSON 111 S. Ct. 2546 (1991)

of juror impartiality. To find manifest error the Court must determine "'whether the jurors . . . **had such fixed opinions** that they could not judge impartially the guilt of the defendant.'" *Mu'Min*, 111 S. Ct. 1899, 1908 (quoting *Patton*, 467 U.S. at 1035)(emphasis added). In the present case, the Court found that there was no manifest error because "the *voir dire* examination conducted by the trial court in this case was by no means perfunctory." *Mu'Min*, 111 S. Ct. at 1908. Thus, it is clear that the Court requires a fact specific showing of manifest error in voir dire to prove that a defendant's constitutional rights **were violated** rather than a constitutionally mandated inquiry in voir dire using content questions to insure that his constitutional rights **are not** violated.

In dissent, Justice Kennedy stated, "the trial judge should have substantial discretion in conducting the *voir dire*, but, in my judgement, findings of impartiality must be based on something more than the mere silence of the individual in response to questions asked *en masse*." 111 S. Ct. at 1919. Kennedy believed that "a juror's acknowledgement of exposure to pretrial publicity initiates a **duty** to assess that individual juror's ability to be impartial" which mandates a "sufficient colloquy with the individual juror . . . ." *Id.* at 1919 (emphasis added). Kennedy was concerned with the "actual impartiality of the seated jurors, and . . . an adequate examination of those . . . jurors . . . ." *Id.* at 1918.

The fact that content questions are not constitutionally guaranteed does not foreclose defense counsel from requesting that content questions be asked on voir dire in highly publicized cases. As the majority and the dissent note, the trial judge is afforded ample discretion on *voir dire*. Prior to jury selection, evidence of **all** pretrial publicity should be offered and it should be forcefully argued that fairness demands a more probing inquiry than the constitutional minimum permitted by *Mu'Min*.

If content questioning is denied and there are additional adverse rulings affecting jury selection, including further restrictions on voir dire, these denials can be evidence of an aggregate violation of the sixth amendment right to a fair and impartial jury and the right to effective assistance of counsel.

Issues which could affect a defendant's constitutional rights should be alleged individually and in the aggregate. For example, denial of a change of venue or of individual voir dire standing alone may not constitute a sixth amendment violation but if considered with restrictions on voir dire, such as in Mu'Min's case where the court also denied his motion for additional peremptory challenges, all of these denials may add up to an error of constitutional magnitude. The Virginia Capital Case Clearinghouse has available a model composite motion addressing the denial of change of venue, additional peremptory challenges, individual voir dire and other voir dire restrictions.

Summary and analysis by:
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COLEMAN v. THOMPSON

111 S. Ct. 2546 (1991)
United States Supreme Court

FACTS

Roger Keith Coleman was sentenced to die as a result of his conviction for rape and capital murder. The Virginia Supreme Court affirmed both the convictions and the sentence. *Coleman v. Commonwealth*, 226 Va. 31 (1983). Coleman appealed to the United States Supreme Court, but was denied certiorari. *Coleman v. Virginia*, 465 U.S. 1109 (1984).

Coleman then filed a writ of habeas corpus in state court, raising numerous federal constitutional claims, including some that he had not raised on direct appeal. The Circuit Court did not provide any relief. Coleman then filed a notice of appeal with the Circuit Court 33 days after entry of final judgment and subsequently filed a petition for appeal in the Virginia Supreme Court.

The Commonwealth filed a motion to dismiss Coleman's appeal on the ground that it violated Virginia Supreme Court Rule 5:9 which provides that no appeal shall be allowed unless a notice of appeal is filed with the trial court within 30 days of final judgment. The Virginia Supreme Court did not act immediately on the Commonwealth's motion, and both parties filed several briefs on the subject of the motion to dismiss and on the merits of the claims in Coleman's petition. Nonetheless, the Virginia Supreme Court dismissed Coleman's appeal. The court order recited the procedural history of Coleman's appeal and stated only that "upon consideration whereof, the motion to dismiss is granted and the petition for appeal is dismissed." The United States Supreme Court again denied certiorari. *Coleman v. Bass*, 484 U.S. 918 (1987).

Coleman next filed a habeas petition in federal court, presenting four federal constitutional claims that he had raised on direct appeal in the Virginia Supreme Court and seven claims that he had raised for the first time in state habeas. The United States District Court concluded that the dismissal of his appeal in state habeas had the effect of a procedural default for Coleman's seven claims.

The United States Court of Appeals for the Fourth Circuit also held that Coleman had defaulted all of the claims that he had raised for the first time in state habeas and affirmed the lower court's decision. *Coleman v. Thompson*, 895 F.2d 139 (1990). Coleman argued that under *Harris v. Reed* the federal courts could not treat the Virginia Supreme Court's denial as a procedural default because the court had not "clearly and expressly" specified the basis of its opinion. The Fourth Circuit held that the Virginia Supreme Court's decision rested on adequate and independent state procedural grounds and that Coleman had not shown cause to excuse the default. The United States Supreme Court granted certiorari.

HOLDING

The United States Supreme Court cited the concerns of federalism and comity in affirming the lower court's decision. The Court held that the Virginia Supreme Court's decision "fairly appears" to rest primarily on state law because the dismissal does not mention federal law and because the underlying dismissal motion was based solely upon state procedural grounds of failure to give timely notice of appeal.

More broadly, the Court held that review of a federal claim defaulted in state court on adequate and independent state grounds is barred unless the petitioner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law, or demonstrate that failure to consider the claim will result in a fundamental miscarriage of justice.

The Court also rejected Coleman's contention that late filing by his attorney could serve as "cause" for the default. The Court responded that attorney error can serve as "cause" only if it is deemed ineffective assistance of counsel violative of the sixth amendment, and that since there

is **no** constitutional right to an attorney in state post-conviction proceedings, Coleman could not succeed on a claim of ineffective assistance of counsel.

ANALYSIS / APPLICATION IN VIRGINIA

This lengthy decision represents a deference to state court decisions ostensibly because of concerns over federalism and comity. The decision is made clearer by focusing upon the distinction between direct review and habeas review.

It is helpful to observe that claims on direct appeal usually contest the merits of the lower court decision. A denial of certiorari from direct appeal is often a matter of jurisdiction. A federal court cannot review a state decision if it is based solely upon state law. Further, a federal court cannot "review a matter of federal law decided by a state court if the decision of that court rests on a state law ground that is independent of the federal question and adequate to support the judgment." *Coleman* 111 S.Ct. at 2553-54.

In contrast, when a federal district court reviews a state prisoner's habeas corpus petition it must decide whether the petitioner is imprisoned in violation of the Constitution. While a colorable federal claim is required, review at federal habeas is discretionary. Indeed, federal courts have jurisdiction over a habeas claim **even** if it is raised in violation of state procedural rules. This discretion, however, is rarely exercised.

A problem exists when state court decisions are not clear as to the basis for their opinion. The Supreme Court established a presumption of jurisdiction in *Michigan v. Long* for those cases where "the adequacy and independence of any possible state law ground is not clear." 463 U.S. 1032, 1040-41 (1983). The presumption created in Long is that federal jurisdiction exists if adequate and independent state grounds are not apparent. Review is permissible even if such grounds are available but not asserted.

Federal review is barred only if the state supreme court asserts a non-federal (state) ground which adequately and independently supports its decision. The point is that jurisdiction is not based on the presence of a federal question, rather, jurisdiction is disallowed with the presence of an adequate and independent state ground. *Long* is a rule of exclusion.

Long was a direct review case. The first application of this doctrine to a federal habeas case was *Harris v. Reed.* 489 U.S. 255 (1989). *Harris* adopted the tenor of the *Long* decision when it held that federal review is not barred unless the state court issues a "plain statement" that its judgment rests on a state procedural bar. *Harris*, 489 U.S. at 263.

Coleman argued that the absence of a plain statement for the grounds of his dismissal triggered the presumption of *Long* and *Harris* in favor of federal review. The Supreme Court responded that Coleman took language out of context and that "[a] predicate to the application of the *Harris* presumption is that the decision of the last state court to which the petitioner presented his federal claims must fairly appear to rest primarily on federal law or to be interwoven with federal law." *Coleman*, 111 S. Ct. at 2557. A reading of *Long* and *Harris* portrays a different story.

The *Coleman* "predicate" is derived from language that the Court extracts from *Long*. Unfortunately this quote is lifted from the last of several examples of how a coexistent federal basis may help the reviewing body determine whether the **state** basis is adequate and independent. The *Coleman* Court would have us believe that both *Harris* and *Long* contain a federal issue predicate because the Court in *Harris* says that "[f]aced with a common problem, we adopt a common solution." *Coleman* 111 S. Ct. at 2556, quoting *Harris*, 489 U.S. at 263. This broad statement from *Harris* is misapplied to a prior example in the decision in order to craft the Coleman "predicate."

The *Long* decision wrestled with ambiguous decisions by lower courts. This ambiguity may exist because no grounds were identified for the state court decision or because several grounds were present. *Long* discusses the ramifications of a state court decision citing a federal issue as one of several grounds. For example, if a state court used its understanding of federal law (correct or not) in order to construe its own state law, then the state ground is deemed not independent and thus federal review is permissible. In another scenario *Long* said that federal review is **permissible** if the state ground is interwoven with federal law or the state ground is insufficient to support the decision. The theme throughout this discussion in *Long* is that federal grounds, if present, are used to assess whether the state grounds are adequate and independent. *Long* and *Harris* do not **require** the existence of a federal ground in order to trigger the presumption.

The Court's application and justification for its decision in *Coleman* seems contrived to exclude habeas petitions from the *Harris* presumption. The Court describes the *Harris* presumption as a "per se" rule and that "[p]er se rules should not be applied . . . in situations when the generalization is incorrect as an empirical matter." *Coleman*, 111 S. Ct. at 2558. After a discussion of the benefits and burdens of the *Harris* presumption to the state and federal courts, the Court apparently concludes that federal habeas claims warrant stricter scrutiny than those from direct appeal.

The Court goes on to look beyond the face of the state court order to determine whether the circumstances warrant the application of the *Harris* presumption. This method obviously involves more time and effort by a reviewing court. Despite the observation that extensive review was a burden upon state and federal courts, the Court is apparently willing to engage in this extra effort if the petition is in federal habeas.

In sum, relying upon an atypical quote from earlier case and somewhat convoluted reasoning, this decision ends up getting around the "plain statement" rule as applied to federal habeas. A further impact of the decision is that federal courts may now look beyond the face of a state court order or opinion to determine whether federal or state grounds fairly appear.

Petitioner was three days late in the filing of a notice of appeal back to the Circuit Court which first examined his state habeas petition. The paperwork filed to the reviewing court was timely. Indeed, the Virginia Supreme Court took briefs on the issues before electing to dismiss on the procedural filing rule.

If the concerns of federalism and comity include the desire to allow state courts to correct their mistakes and do the right thing, it seems in this case that such concerns were met. The state was not denied an opportunity to rule on Coleman's claims. It seems odd to bar consideration of petitioner's claim over this kind of default when the claims were in fact presented to the Virginia court.

The circumstances leading up to this decision make clear that counsel must be very familiar with the court system's rules on default, waiver and timeliness. Most forms of appellate relief depend upon counsel's ritualistic preservation of issues at trial and the timely filing of post-conviction paperwork.

The *Coleman* predicate is a distortion of *Long* and *Harris*. Even if its origins were established in precedent, it seems illogical to have the *Coleman* predicate exist side by side with the *Harris* presumption. Query whether one can have a requirement that a federal issue "fairly appear" to obtain federal review along side a rule that says petitioner may have federal review unless there exists a "plain statement" of adequate and independent state grounds. Be that as it may, the Supreme Court's extreme deference to states that bar federal claims on procedural grounds further limits the possibility of federal review of a federal claim.

Summary and analysis by:
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