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BURDEN v. ZANT 114 S. Ct. 654 (1994)

It is important to note that the jury in *Schiro* acquitted on intent to kill at the guilt phase and then unanimously recommended life at the penalty phase of the trial. The jury never found intent to kill. At the penalty phase, the jury could have found intent to kill and still recommended life due to the mitigating evidence presented at the penalty phase. Unfortunately, that part of the record was not discussed by the majority and furthermore, there is no indication that at the penalty phase any evidence was presented on that issue. Although the issue of insanity was argued by defense counsel in his plea for clemency, it is unclear from the opinion whether any **evidence** as to Schiro's intent to kill was presented at the penalty phase. It may have only been presented at the guilt phase, when it was only relevant to the relationship of insanity and intent to kill. The Court held that the jury could have "grounded its verdict on an issue other than Schiro's intent to kill."[24] The Court stated that the jury could have thought that they were only able to return one verdict: "[O]n this record," noted Justice O'Connor, "it is impossible to tell which of these statements the jury relied on." The Court mentioned that the judge gave an instruction which did not differentiate for the jury between the two types of murder (intentional murder and felony murder). This line of reasoning appears to be questionable. Justice O'Connor's argument implies that the jury may have relied upon statements made by the attorney rather than on the judge's jury instructions. The law, however, presumes that a jury will rely solely upon the judge's jury instructions for the law upon which to base its verdict.[25] The Court's reasoning suggests that the jury relied both on the attorney's statements as well as the judge's charge.

Overall, this decision does not have any direct application to Virginia criminal law and procedure. This is true primarily because Virginia's aggravating circumstances, unlike Indiana's, do not specifically duplicate elements of any of the sections of Indiana's capital murder statute.[26] *Schiro* suggests, however, that under collateral estoppel, in those cases where it can be determined that factual issues have necessarily been decided against the Commonwealth at the guilt phase, the Commonwealth is precluded at the penalty trial from offering evidence alluding to the matters that have been decided adversely to it.[27]

After *Schiro*, certain Double Jeopardy claims which have been pursued in capital cases are proven invalid. In Virginia, the Commonwealth is required to accept a defendant's plea of guilty at any point at which he proffers it.[28] For example, it has been argued that if a defendant pleads guilty to first degree murder under *Grady v. Corbin*,[29] the Commonwealth would be barred from pursuing the capital murder charge. This is the case, it was argued, because the offense involves **conduct** for which the defendant has been previously found guilty. *Grady* has recently been overruled, but even if it had not been, *Schiro* makes clear that in a capital case, the guilt phase and sentencing phase is a single proceeding for constitutional purposes. "The state is entitled to 'one fair opportunity' to prosecute a defendant, and that opportunity extends not only to prosecution at the guilt phase, but also to present evidence at an ensuing sentencing proceeding."[30] Thus, the Court makes clear that there are some legal issues which may be kept out at a penalty phase; however, any attempt to plead to a lesser included offense and claim double jeopardy is now clearly futile.

A less significant but permissible alternative to this discredited approach is to request a jury instruction that the jury is first to consider the predicate offense. If they acquit for that offense, then they would not go on to consider the offense of capital murder.

Summary and analysis by:
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[24] *Id.* at 791.

[25] The only major exception to this presupposition is a very limited one found in *Bruton v. United States*, 391 U.S. 123 (1968) (ruling that a jury instruction to consider co-defendant's confession only against him at jury trial is insufficient).

[26] Indiana, unlike Virginia, includes intentionality of the killing within its aggravating circumstances scheme. *See* note 2, *supra*.

[27] An example of this point is a defendant charged with two counts of capital murder, one being in commission of rape, and the other in the commission of a robbery. If the jury acquits as to the rape count, and convicts as to the robbery count, the Commonwealth at the penalty phase is precluded from any argument or use of the rape evidence.

[28] *See* Va. Code Ann. § 19.2-283: "No person shall be convicted of a felony unless by his confession of guilt in court, or by his plea, or by the verdict of a jury, accepted and recorded by the court, or by judgment of the court trying the case without a jury according to law."

[29] 110 S. Ct. 2084 (1990) (holding that the Double Jeopardy Clause bars a subsequent prosecution if, to establish an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted), overruled by *United States v. Dixon*, 113 S. Ct. 2849 (1993).

[30] *Schiro*, 114 S. Ct. at 792.

BURDEN v. ZANT

114 S. Ct. 654 (1994)
United States Supreme Court

FACTS

In March 1982, a Georgia jury convicted Jimmie Burden, Jr. of the previously unsolved 1974 murders of a woman and her three children. A complex series of events, including a possible conflict of interest by defense counsel, led to Burden's conviction, and led also to his ineffective assistance claim at federal habeas.

The case began in 1981 when Burden was arrested on suspicion of having burglarized his sister's house. The court appointed Kenneth Kondritzer, a local public defender, to represent Burden. While awaiting trial, Burden's nephew, Henry Lee Dixon, accused Burden of having participated in the 1974 murders. After warrants were issued for Burden and Dixon in connection with these murders, Kondritzer began representing Dixon. Kondritzer represented Dixon in a hearing held in November 1981, where the court ruled that there was insufficient evidence to hold Dixon for the crimes.

The state indicted Burden for the murders on December 7, 1981. Kondritzer continued to act as his counsel until he left the office of the public defender at the end of December 1981 and Kondritzer's partner, Michael Moses, took over. At trial, the prosecutor's only substantive evidence linking Burden to the murders was Dixon's testimony. Though the record fails to unequivocally establish that Dixon testified under a grant

of immunity, there is every indication that he did so.[1] If Burden's assertion is true, then, at some point, while representing both Burden and Dixon, Kondritzer negotiated an arrangement where Dixon would testify against Burden in exchange for immunity — a clear conflict of interest.

On federal habeas, Burden claimed that he had not received effective assistance of counsel because his counsel labored under a conflict of interest. The district court rejected this claim because while Kondritzer had a conflict, Burden, according to the court, had not shown that the conflict affected the performance of Moses, his trial counsel.[2] The Eleventh Circuit, finding the record incomplete, remanded the case for an evidentiary hearing on the conflict of interest issue.[3]

At the evidentiary hearing Kondritzer testified that he did have an understanding with the State that Dixon would be immune from prosecution. The court concluded that there was no conflict of interest however. The Eleventh Circuit affirmed, holding that habeas relief was not warranted because Kondritzer's alleged conflict never had an impact on Burden's representation.[4] More importantly the court held that there was no factual support for the suggestion that Kondritzer negotiated immunity for Dixon in exchange for testimony against his client Burden.[5]

The United States Supreme Court reversed the Eleventh Circuit's judgment.[6] The Court held that the Eleventh Circuit failed to give proper weight to the trial court's report that Dixon had testified under a grant of immunity.[7] According to 28 U.S.C. § 2254(d), determinations of fact by a state court shall be presumed correct by a reviewing federal habeas court.

Upon remand the Eleventh Circuit denied relief once again.[8] The court ruled that the trial court's statements in the post-conviction report that Dixon testified under immunity were not "factual findings"[9] because the fact that Dixon testified under a grant of immunity was not a fact "reached after a full and fair evidentiary hearing"[10] and therefore was not adequately developed according to 28 U.S.C. § 2254(d)(3).[11] Once again Burden appealed to the United States Supreme Court claiming that the Eleventh Circuit erred in its interpretation of 28 U.S.C. § 2254.

HOLDING

The United States Supreme Court reversed the decision of the Eleventh Circuit and remanded the case for the second time.[12] The Court held that "the decision of the Court of Appeals was grounded on manifest mistake."[13] The Court remanded the case in order to determine whether there had been an actual conflict of interest based on attorney Kondritzer's dual representation.

ANALYSIS/APPLICATION IN VIRGINIA

The unceasing determination of the Eleventh Circuit to somehow disregard the trial court's finding that Dixon had indeed testified under a grant of immunity is significant for a number of reasons. Most importantly, it underscores the inconsistency in federal courts' application of 28 U.S.C. § 2254. The federal courts apply this statute strictly in cases when doing so works to the defendant's detriment, and yet here, in order to stifle an otherwise valid habeas claim, the federal courts are reluctant to give the trial court findings their proper presumption.[14]

In Burden's case, the record included the post-trial report of the trial court which stated that Dixon had testified under a grant of immunity. The Eleventh Circuit repeatedly attempted to narrowly construe what constitutes a "factual issue" warranting a presumption of correctness according to 28 U.S.C. § 2254. The Supreme Court, however, was unwilling to allow the Court of Appeals to deny a fact that was evidently clear to everyone connected with the trial.

If nothing else, *Burden* represents a demand by the Supreme Court that the federal courts apply habeas rules consistently. If federal courts are going to deny habeas relief by relying on United States Code section 2254's presumption of correctness, they must apply that presumption in the defendant's favor when appropriate.

To avoid entanglement in the factual presumption controversy altogether (or at least in part), Virginia attorneys should make any objections based on federal grounds both at the pretrial and trial stages. Once those

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[1] The prosecutor's closing argument, Dixon's testimony on cross-examination, and the trial court's post-trial report all indicate that Dixon testified under a grant of immunity.

[2] *Burden v. Zant*, 690 F. Supp. 1040, 1045 (M.D. Ga. 1988).

[3] *Burden v. Zant*, 871 F.2d 956 (11th Cir. 1989).

[4] *Burden v. Zant*, 903 F.2d 1352, 1359 (11th Cir. 1990). According to the Eleventh Circuit, nothing in Kondritzer's brief concurrent representation of Dixon prejudiced Burden: "the conflict never became actual in the sense that Kondritzer's representation of Dixon's interests required him to compromise Burden's interests." *Id.*

[5] *Id.* at 1359-60.

[6] *Burden v. Zant*, 111 S. Ct. 862 (1991).

[7] *Id.* at 864-65.

[8] *Burden v. Zant*, 975 F.2d 771, 775-76 (11th Cir. 1992).

[9] *Id.* at 772 n.1.

[10] *Id.* at 775-76.

[11] "In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue . . . shall be presumed correct, unless the respondent shall admit . . . (3) that the material facts were not adequately developed at the State court hearing . . . ." 28 U.S.C. § 2254(d)(3).

[12] *Burden v. Zant*, 114 S. Ct. 654 (1994).

[13] *Id.*

[14] It is true that federal courts have occasionally applied 28 U.S.C. § 2254 in a manner favorable to defendants. *See, e.g., Waters v. Zant*, 979 F.2d 1473 (11th Cir. 1992) (upholding ineffective assistance of counsel claim because state court findings of fact on defense counsel's previous capital experience were not "fairly supported by the record" under 28 U.S.C. § 2254). Courts will not apply the presumption of correctness in many ineffective assistance of counsel cases if the ultimate decision requires a finding of law as well as of fact. *See, e.g., Clozza v. Murray*, 913 F.2d 1092 (4th Cir. 1990); *Cave v. Singletary*, 971 F.2d 1513 (11th Cir. 1992).

In the vast majority of capital cases, however, federal courts use 28 U.S.C. § 2254 to the defendant's disadvantage. *See Adams v. Aiken*, 965 F.2d 1306 (4th Cir. 1992) (ruling that state court findings on competency entitled to presumption of correctness); *Poyner v. Murray*, 964 F.2d 1404 (4th Cir. 1992) (holding that facts relating to interrogation, adverse to the defendant's position, are presumed to be correct); *Washington v. Murray*, 952 F.2d 1472 (4th Cir. 1991) (holding that state court finding that defendant's confession was voluntary is entitled to presumption of correctness); *Jones v. Murray*, 947 F.2d 1106 (4th Cir. 1991) (holding that previous state court findings relating to defendant's acceptance of a plea agreement are presumed correct); *Maynard v. Dixon*, 943 F.2d 407 (4th Cir. 1991) (holding that state court findings rejecting a *Brady* claim presumed correct).

A similar trend is apparent from a survey of Eleventh Circuit capital cases. *See Rogers v. Zant*, 13 F.3d 384 (11th Cir. 1994) (upholding state court finding of fact in capital case); *White v. Singletary*, 972 F.2d 1218 (11th Cir. 1992) (ruling that state court finding that defense counsel was not under the influence of drugs or alcohol is entitled to the presumption of correctness). *See also Bush v. Singletary*, 988 F.2d 1082 (11th Cir. 1993); *Hance v. Zant*, 981 F.2d 1180 (11th Cir. 1993); *Horton v. Zant*, 941 F.2d 1449 (11th Cir. 1991).

claims are rejected on direct appeal, counsel has exhausted his state remedies, and may proceed directly to federal habeas.[15] Upon federal habeas, the federal court may make factual findings *de novo* and is not bound by previous state court holdings. This strategy strips the state court of another opportunity to make adverse factual findings against the defendant, and defense counsel is urged to employ it. The primary noncapital issue which *Burden* brings to light involves the conflict of interest inherent in the representation of multiple defendants. While defense counsel is not categorically barred from representing clients with potentially adversarial interests, it is strongly discouraged:

> The professional judgment of a lawyer should be exercised within the bounds of the law, solely for the benefit of his client and free of compromising influences and loyalties. Neither his personal interests, **[nor] the interests of other clients** . . . should be permitted to dilute his loyalty to his client.[16]

The Virginia Code of Professional Responsibility specifically warns lawyers about the pitfalls inherent in the representation of multiple clients:

> Maintaining the independence of professional judgment required of a lawyer precludes his acceptance or continuation of employment that will adversely affect his judgment on behalf of or dilute his loyalty to a client. This problem arises whenever a lawyer is asked to represent two or more clients who **may** have differing interests, whether such interests be conflicting, inconsistent, diverse, or otherwise discordant.[17]

When representing capital defendants, attorneys should be cognizant of the delicacy of the proceedings and should, at all costs, avoid representing anyone who might compromise the defense of the capital defendant.

Summary and analysis by:
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[15] *See Spencer v. Murray*, 5 F.3d 758, 761 (1993), and case summary of *Spencer I*, Capital Defense Digest, this issue. Of course, some claims, such as ineffective assistance of counsel and withholding of exculpatory evidence, are properly presented for the first time in most cases at state habeas. State court fact findings on those matters cannot be avoided.

[16] Virginia Code of Professional Responsibility, EC 5-1 (emphasis added).

[17] Virginia Code of Professional Responsibility, EC 5-14 (emphasis added).

WASHINGTON v. MURRAY

4 F.3d 1285 (4th Cir. 1993)
United States Court of Appeals, Fourth Circuit

FACTS

A jury convicted Earl Washington, Jr. of the rape and capital murder of Rebecca Lynn Williams, and the Supreme Court of Virginia affirmed the conviction on direct appeal.[1] Washington, a black man with an I.Q. of 69,[2] had confessed to police.[3] Before trial, Washington's counsel received exculpatory forensic evidence which he did not introduce. The evidence was in the form of blood type test results from semen stains found on a blanket on the bed where the attack occurred; the results excluded Washington as the depositor of the semen.[4] Washington raised the issue of his trial counsel's failure to appreciate the significance of the forensic evidence as an ineffective assistance of counsel claim at federal habeas. The district court denied his petition without an evidentiary hearing, but the Fourth Circuit Court of Appeals remanded.[5] On remand, the district court found that Washington had not received ineffective assistance of counsel.[6] Washington appealed, and the Fourth Circuit Court of Appeals reviewed the case a second time.[7]

HOLDING

The Fourth Circuit affirmed, holding that counsel had failed the performance prong of the *Strickland v. Washington*[8] ineffective assistance of counsel test, but holding that the defendant had failed to show the requisite degree of prejudice caused by the failure.

ANALYSIS/APPLICATION IN VIRGINIA

I. Ineffective Assistance of Counsel

In the landmark *Strickland* case, the United States Supreme Court established the standards of review of ineffective assistance of counsel claims.[9] It formulated a two-prong test to assess the performance of the trial attorney and the prejudice, if any, to the defendant.[10]

As to the performance prong of *Strickland* — which considers "whether counsel's assistance was reasonable considering all the circumstances"[11] — the district court concluded that counsel had made a "strate-

[1] *Washington v. Commonwealth*, 228 Va. 535, 323 S.E.2d 577 (1984), *cert. denied*, 471 U.S. 1111 (1985).

[2] *Washington v. Murray* (*Washington I*), 952 F.2d 1472, 1475 (4th Cir. 1991) ("that of a child in the 10.3 year age group").

[3] *Washington v. Commonwealth*, 228 Va. at 542, 323 S.E.2d at 582.

[4] *Washington I*, 952 F.2d at 1476.

[5] *Id.* at 1475.

[6] *Washington v. Murray* (*Washington II*), 4 F.3d 1285, 1286 (4th Cir. 1993).

[7] *Washington II*, 4 F.3d at 1286.

[8] 466 U.S. 668 (1984).

[9] *Id.*

[10] *Id.* at 687-696.

[11] *Id.* at 688.