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McFARLAND v. SCOTT 114 S. Ct. 2568 (1994) United States Supreme Court

Amendment "vagueness" claim[38] against the vileness factor. As applied in the Virginia capital scheme, the constitutionality of the vileness factor is one of the last and most promising issues not yet expressly ruled upon by the United States Supreme Court. Contact the Virginia Capital Case Clearinghouse for assistance in litigating these issues.

Summary and analysis by:
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Accordingly, a defendant is denied due process when the Commonwealth fails to produce a narrowing construction for the vileness factor which is both comprehensible to the jury and specific enough so that the defense may proceed with preparation of its case. *See, e.g., Clark*, 201 Va. 201, 257 S.E.2d 784 (1979) (capital defendant in Virginia can not rely on vileness as having one specific meaning and seek to defend himself on those grounds).

[38] In addition to the clarity required in order to give defendant an opportunity to defend against an eligibility factor, the jury is entitled to be instructed in language that has a commonsense core of meaning. Not all purportedly narrowing constructions have been found sufficient to meet this requirement. *See, e.g., Shell v. Mississippi*, 498 U.S. 1 (1990) (The limiting construction of the Mississippi "vileness" factor was unconstitutionally vague. The construction could be construed by sensible jurors to characterize nearly all murders. Therefore, discriminative and individualized imposition of the death penalty was not attainable by applying the indiscriminate limiting construction.).

McFARLAND v. SCOTT

114 S. Ct. 2568 (1994)
United States Supreme Court

FACTS

The State of Texas convicted Frank Basil McFarland of capital murder and sentenced him to death on November 13, 1989. The Texas Court of Criminal Appeals affirmed[1] and the United States Supreme Court denied certiorari.[2] Subsequently, the trial court set McFarland's execution for September 23, 1993.

McFarland, desiring to initiate a state habeas corpus proceeding, moved the trial court to stay or withdraw his execution date so that the Texas Resource Center would have time to find counsel for the proceeding. Texas contended that the trial court had no jurisdiction to stay the execution since McFarland had not filed an application for a writ of habeas corpus. Though declining to appoint counsel for McFarland, the trial court moved the execution date to October 27, 1993.[3]

The Texas Resource Center could not obtain counsel for McFarland and on October 16, 1993 asked the court to appoint counsel. The trial court declined to do so and further refused to modify the execution date, deciding that McFarland was not entitled to appointment of counsel for state habeas corpus proceedings in Texas.[4] The Texas Court of Criminal Appeals subsequently denied McFarland's *pro se* motion requesting a stay and remand for appointment of counsel.[5]

On October 22, 1993, McFarland filed a *pro se* motion to obtain federal habeas corpus relief in the United States District Court for the Northern District of Texas. He also requested appointment of counsel[6] and a stay of execution to allow time for that attorney to file a federal habeas corpus petition. The District Court denied the motion on October 25, 1993.[7] Concluding that McFarland's claim had not triggered a "post conviction proceeding" under the federal habeas corpus statute,[8] that court decided that McFarland was therefore not entitled to appointment of counsel and that the District Court had no jurisdiction to enter a stay. The District Court also denied a certificate of probable cause to appeal.[9]

Meanwhile, a federal magistrate judge had found an attorney for McFarland. The magistrate judge suggested the attorney file a cursory petition for writ of habeas corpus so that the District Court might appoint the attorney and grant McFarland a stay. The attorney did so, but the District Court held the petition insufficient and also denied the motion for stay.[10]

The Fifth Circuit Court of Appeals also denied McFarland's application for a stay on October 26, 1993, the day before his scheduled execution.[11] That court decided that although federal courts could stay

[1] *McFarland v. State*, 845 S.W.2d 824 (Tex. Crim. App. 1992).
[2] *McFarland v. Texas*, 113 S. Ct. 2937 (1993).
[3] *McFarland v. Scott*, 114 S. Ct. 2568, 2570 (1994).
[4] *McFarland*, 114 S. Ct. at 2570.
[5] *Id.*
[6] McFarland relied on 21 U.S.C. § 848(q)(4)(B)(q) (1988):
In any post conviction proceeding under section 2254 or 2255 of title 28 seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs (5), (6), (7), (8), and (9).
[7] *McFarland*, 114 S. Ct. at 2571.
[8] 28 U.S.C. §§ 2254-2255 (1988).
[9] *McFarland v. Scott*, 114 S. Ct. at 2571.
[10] *McFarland v. Collins*, 7 F.3d 47 (5th Cir. 1993).
[11] *Id.*

executions while habeas proceedings were "pending," no habeas proceeding was "pending" in McFarland's case because he had not yet filed a petition.[12] The Fifth Circuit's denial of stay on October 26 left McFarland without a stay and without a petition.

On October 27, 1993, the U.S. Supreme Court granted a stay pending decision on certiorari.[13] The Court later granted certiorari.[14]

HOLDING

The Supreme Court reversed the Fifth Circuit's judgment, holding that capital defendants may invoke their statutory right to federal habeas proceedings by filing a motion to request appointment of habeas counsel, and that federal courts have jurisdiction to enter stays whenever necessary to effectuate that right.[15]

ANALYSIS/APPLICATION IN VIRGINIA

The Supreme Court's decision clarified a capital defendant's right to counsel during federal habeas proceedings. Capital defendants may now obtain counsel for federal habeas proceedings **before** filing their federal habeas petition simply by filing a motion to request appointment of such counsel with the United States District Court. Further, such courts may now enter stays of execution to effectuate the defendant's right to counsel to prepare the habeas petition.[16]

To understand the necessity of this decision it must be placed within the larger framework of right to counsel decisions concerning all stages of capital cases. In *McCleskey v. Zant*[17] the Supreme Court held that federal habeas corpus petitioners must include every claim in the original habeas petition, effectively meaning that federal courts should dismiss as "successive and abusive" any subsequent petition raising a new claim.[18] Under this standard capital defendants must ensure that their original habeas petition contains all contemplated claims; otherwise, federal courts will dismiss these claims.

The initial federal petition is thus, in all but the rarest instances, the capital defendant's only chance for federal habeas relief. The importance of ensuring its accuracy and adequacy becomes paramount. Without assistance of counsel the petitioner could either fail to state a federal claim or omit claims. His right to a federal habeas proceeding, and his statutory right to counsel at that proceeding, would be rendered meaningless. *McCleskey* therefore effectively requires a right to counsel before filing a federal habeas petition if access to federal habeas proceedings is to be at all meaningful.

McFarland was facing an important change in Texas practice. Formerly, capital defendants had been able to obtain counsel by filing a perfunctory petition. Counsel would thereafter flesh out the document. Texas would not seek dismissal of the "amended" petition for abuse of the writ under the *McCleskey* doctrine and under Federal Habeas Rule 9. However, a capital defendant had filed such a petition in *Gosch v. Collins*,[19] one month before McFarland's scheduled execution. The District Court denied petitioner Gosch a stay and also dismissed the petition on the merits.[20] The Fifth Circuit affirmed.[21] When Gosch later filed an adequate petition, the District Court dismissed it as "successive and abusive."[22]

Virginia practice differs from the Texas practices facing McFarland in several respects. It is the Commonwealth's practice to acquiesce in appointment of counsel for state habeas proceedings. The Commonwealth began this practice after the United States Supreme Court's decision in *Murray v. Giarratano*,[23] where the Court decided that the Constitution did not require that states appoint counsel to indigent capital defendants for state habeas corpus proceedings. Justice Kennedy concurred in the 5-4 judgment. He decided that the Court was ill-equipped to promulgate rules for right to counsel at state habeas proceedings, which task properly belonged to state legislatures. He also noted, however, that Virginia capital defendants had never been unable to obtain counsel for collateral proceedings.[24] Most likely out of concern for Justice Kennedy's position and to avoid future problems at state habeas, the Commonwealth routinely agrees to the appointment of counsel for capital state habeas proceedings.

Thus, while the right to counsel is constitutionally required only at trial and on direct appeal,[25] it is Virginia practice to appoint counsel at

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[12] *Id.*

[13] *McFarland v. Collins*, 114 S. Ct. 374 (1993).

[14] *McFarland v. Collins*, 114 S. Ct. 544 (1993).

[15] *McFarland v. Scott*, 114 S. Ct. at 2574. Justice O'Connor filed an opinion concurring in part and dissenting in part. While agreeing that 21 U.S.C. § 848 guaranteed a capital defendant the right to an attorney's assistance in preparing a federal habeas petition, and that practically speaking, federal courts should have the power to enter stays to effectuate that right, Justice O'Connor nonetheless concluded that 28 U.S.C. §2251 did not allow federal courts to stay executions before counsel's preparation of a federal habeas petition. *Id.* at 2574-76. Justice Thomas filed a dissenting opinion, in which Chief Justice Rehnquist and Justice Scalia joined. Justice Thomas concluded that a capital defendant had to file a habeas petition to trigger his entitlement to counsel, since both 21 U.S.C. § 848 and 28 U.S.C. § 2251 contemplated entitlement to counsel only when a habeas proceeding had commenced. Justice Thomas further opined that such proceedings "commence" only when the petition has already been filed. *Id.* at 2576-81.

[16] *McFarland v. Scott*, 114 S. Ct. at 2571.

[17] 499 U.S. 467 (1991). *See* case summary of *McCleskey*, Capital Defense Digest, Vol. 4, No. 1, p. 7 (1991).

[18] *Id.*

[19] *Gosch v. Collins*, No. SA-93-CA-731, 1993 WL 484624 (W.D. Tex., Sept. 15, 1993).

[20] *Id.*

[21] *Gosch v. Collins*, 8 F.3d 20 (5th Cir. 1993).

[22] *Gosch v. Collins*, No. SA-93-CA-736 (W.D. Tex., Oct. 12, 1993).

[23] 492 U.S. 1 (1989). *See* case summary of *Murray*, Capital Defense Digest, Vol. 2, No. 1, p. 8 (1989).

[24] *Murray*, 492 U.S. at 14-15 (Kennedy, J., concurring).

[25] *Gideon v. Wainwright*, 372 U.S. 335 (1963) (Sixth Amendment requires counsel at trial); *Evitts v. Lucey*, 469 U.S. 387 (1985) (if a state provides direct appeal, the right to counsel attaches). There is no right, however, to counsel to petition the United States Supreme Court for certiorari—either after the direct appeal to the Supreme Court of Virginia, or after state or federal habeas proceedings. This was suggested in *Murray v. Giarratano*, 492 U.S. 1 (1989), and *Pennsylvania v. Finley*, 481 U.S. 551 (1987). Both these decisions dealt with whether access to courts requires the right to counsel at collateral proceedings, but never mentioned the possibility of right to counsel at the Supreme Court level, either on direct appeal or on appeal from collateral proceedings.

state habeas proceedings in the trial court and on appeal to the Supreme Court of Virginia. The right to counsel at federal habeas proceedings is statutory.[26] Additionally, although the right to counsel does exist at most stages of capital litigation, the Sixth Amendment right to **effective** assistance of counsel does not. That right applies only at trial and on direct appeal, where its basis is constitutional. It does not apply to state or federal habeas corpus proceedings.[27]

There is no statutory time limit in Virginia to file state or federal habeas proceedings. However, the Commonwealth often petitions courts to set execution dates when it feels the defense is delaying the filing of a state habeas corpus petition too long. After such action, or in lieu of it, the Commonwealth and the defense will usually agree on when the defendant must file the petition. Regarding federal petitions, Justice Blackmun noted for the majority in *McFarland* that federal courts could exercise their discretion against granting stays if a "dilatory" capital defendant squandered the time available to obtain counsel to prepare the habeas corpus petition.[28]

Unlike Texas, Virginia generally does not seek oppressively quick execution dates for capital defendants. But attorneys for capital defendants should take fullest advantage of the time before state habeas proceedings must be instituted to reinvestigate their case. It is also important that defense counsel agree on a deadline for filing a federal habeas petition, so that counsel will have as much time as possible to investigate important issues for appeal. Examples include withholding of exculpatory evidence and ineffective assistance of counsel claims, which require investigation outside the trial record.[29]

Summary and analysis by:
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[26] 28 U.S.C. §§ 2251, 2254, 2255 (1988).

[27] *Coleman v. Thompson*, 501 U.S. 722, 752-53 (1991). *See* case summary of *Coleman*, Capital Defense Digest, Vol. 4, No. 1, p. 4 (1991).

[28] *McFarland v. Scott*, 114 S. Ct. at 2573.

[29] *See* Hobart, *State Habeas in Virginia: A Critical Transition*, Capital Defense Digest, Vol. 3, No. 1, p. 23 (1990).

ROMANO v. OKLAHOMA

114 S. Ct. 2004 (1994)
United States Supreme Court

FACTS

On the morning of July 19, 1986, John Joseph Romano and David Wayne Woodruff brutally murdered and robbed Romano's friend and former gambling boss Lloyd Thompson.[1] Tried as co-defendants, Romano and Woodruff were convicted of first degree murder and sentenced to death. They immediately appealed to the Court of Criminal Appeals requesting relief on the basis of irreconcilable defenses.[2] While this appeal was pending, Romano stood trial for a separate and earlier capital murder charge arising out of events in October 1985.

On October 16, 1985, Roger Sarfaty was found murdered and robbed in his apartment.[3] The State sought the death penalty against Romano, charging murder in the first degree and robbery with a dangerous weapon. Romano was convicted. During the sentencing phase of the trial, the State sought to prove four aggravating circumstances including that the defendant had previously been convicted of a violent felony and would constitute a continuing threat to society. In an attempt to prove the past and future dangerousness of defendant, the State introduced, over the objections of the defense, a copy of the judgment and sentence from the Thompson murder conviction. The document revealed that the defendant had been convicted of capital murder and sentenced to death. It also showed that defendant intended to appeal the outcome.

The jury found the existence of all four aggravating circumstances and recommended death for the murder conviction and one thousand years imprisonment for the robbery conviction. The trial court sentenced accordingly and Romano appealed.[4] While the appeal in this case was pending, the Court of Criminal Appeals of Oklahoma overturned the conviction for the Thompson murder, holding that Romano's trial should have been severed from that of Woodruff. The Thompson judgment was reversed and remanded for a new trial.[5]

Given this sequence of events, Romano argued on his Sarfaty appeal that the trial court erred when it admitted the documentation of the Thompson conviction and sentence. Romano asserted it was improper to admit the conviction because it was not final at the time of admission and had since been overturned. Furthermore, he argued, the sentence impermissibly reduced the jury's sense of responsibility for its decision under the Eighth Amendment and rendered the sentencing determination so unreliable as to amount to a denial of due process under the Fourteenth Amendment.[6]

The Oklahoma Court of Criminal Appeals affirmed, concluding that although the evidence of the Thompson sentence was **irrelevant**, the

[1] *Woodruff v. State*, 825 P.2d 273 (Okla. Crim. App. 1992).

[2] *Id.* at 274.

[3] *Romano v. State*, 847 P.2d 368, 373 (Okla. Crim. App. 1993).

[4] *Id.*

[5] *Romano v. State*, 827 P.2d 1335, 1336 (Okla. Crim. App. 1992) (Romano was tried a second time for the 1985 Thompson murder and was again found guilty of first degree murder and robbery and sentenced to death.).

[6] *Romano v. Oklahoma*, 114 S. Ct. 2004, 2007 (1994).