Capital Defense Journal

Volume 9 | Issue 2 Article 12

Spring 3-1-1997

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FACTS

In March of 1992, the partially nude body of Timothy Jason Hall was found in Newport News, Virginia. Physical evidence indicated that he may have been sodomized, and that he had been stabbed 143 times. Walter Mickens, Jr. was eventually arrested and charged with Hall's murder. At trial, the most incriminating evidence consisted of DNA evidence and statements Mickens had made to a cellmate while awaiting trial.[1]

Mickens was convicted of capital murder in the commission of attempted forcible sodomy.[2] Based upon both "vileness" and "future dangerousness," he was sentenced to death. On direct appeal, the Supreme Court of Virginia affirmed.[3] The Supreme Court of the United States, however, granted Mickens's petition for a writ of certiorari and remanded to the Supreme Court of Virginia.[4] The remand was ordered in light of the Supreme Court's contemporaneous holding in *Simmons v. South Carolina*[5] that a capital defendant has the right to present evidence that, if sentenced to life imprisonment, he will never be eligible for parole.[6]

In turn, the Supreme Court of Virginia remanded the case to the trial court for a new sentencing hearing at which Mickens would be allowed to present his evidence of parole ineligibility.[7] In February of 1996, the trial court held a new sentencing hearing at which evidence of the crime was limited to the testimony of two witnesses, a police technician and an assistant medical examiner.[8] In addition, the state established that Mickens had been convicted of six prior felonies, including two separate convictions for sodomy, and that he had been on parole at the time Hall was murdered. Two victims of Mickens's prior offenses also testified.[9]

In mitigation, Mickens called three witnesses. The first was a correctional officer who testified that Mickens was cooperative and that he had no "personal apprehension" of him. The second was a prison counselor who found him receptive to counseling. Mickens's third witness was his mother, who testified that Mickens had grown up without a father figure and that he had begun to get into trouble in his early teens. She pled for her son's life.[10]

After considering the testimony, the jury again fixed punishment at death, based upon both the "vileness" and the "future dangerousness" aggravating factors.[11]

HOLDING

On direct appeal of Mickens's death sentence, the Supreme Court of Virginia again affirmed, holding that (1) the trial court did not err in refusing to remove a prospective juror for cause;[12] (2) the trial court did not err in refusing to grant a bill of particulars;[13] and (3) the sentence was neither imposed under the influence of passion, prejudice, or any other arbitrary factor, nor disproportionate to the penalty in similar cases.[14]

ANALYSIS/APPLICATION IN VIRGINIA

Although the Supreme Court of Virginia's treatment of most of Mickens's assignments of error were cursory at best,[15] a few points about the case deserve mention.

I. Evidence of Mitigation

Mickens, after pursuing his claim all the way to the Supreme Court of the United States, and after succeeding in procuring a new sentencing hearing, was able only to put on three ineffective witnesses in mitigation. None of the witnesses could offer the jury an explanation as to why

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[1] *Mickens v. Commonwealth*, 247 Va. 395, 399-401, 442 S.E.2d 678, 681-82 (1994) (*Mickens I*). For a more complete discussion of the facts of this case, *see* case summary of *Mickens*, Capital Defense Digest, Vol. 7, No. 1, p. 23 (1994).

[2] *Id.* at 398, 442 S.E.2d at 681. Specifically, Mickens was convicted of violating Va. Code § 18.2-31(5).

[3] *Id.* at 412, 442 S.E.2d at 689.

[4] *Mickens v. Virginia*, 115 S.Ct. 307 (1994).

[5] 512 U.S. 154 (1994).

[6] *Id.* at 168-69.

[7] *Mickens v. Commonwealth*, 249 Va. 423, 425, 457 S.E.2d 9, 10 (1995) (*Mickens II*). *See also* case summary of *Mickens II*, Capital Defense Digest, Vol. 8, No. 1, p. 23 (1995).

[8] *Mickens v. Commonwealth*, 252 Va. 315, 317, 478 S.E.2d 302, 304 (1996) (*Mickens III*).

[9] *Id.* at 318-19, 478 S.E.2d at 304-05.

[10] *Id.* at 319, 478 S.E.2d at 305.

[11] *Id.* at 317, 478 S.E.2d at 303.

[12] *Id.* at 322, 478 S.E.2d at 306.

[13] *Id.*

[14] *Id.* at 322-23, 478 S.E.2d at 307.

[15] The court rejected many of the defendant's assignments of error in brief, conclusory language, often citing their previous rulings on the issue in *Mickens I*. Issues in this category which will not be addressed in this summary include: (1) the death penalty constitutes cruel and unusual punishment, (2) Virginia fails to provide meaningful appellate review, (3) defendant was entitled to additional peremptory jury strikes, and (4) photographic evidence of the victim's body were admitted in error. Additionally, Mickens unsuccesfully argued that Virginia's "vileness" aggravating factor is unconstitutionally vague. *See* case summary of *Mickens I*, Capital Defense Digest, Vol. 7, No. 1, p. 23. Nonetheless, defense counsel is to be commended for preserving these and the "proportionality" issues for later federal appeal.

Mickens also argued on appeal that the trial court erred in denying his motion for a bill of particulars seeking the information upon which the Commonwealth would rely at the new sentencing hearing. The Supreme Court of Virginia rejected this argument, holding that there is no right to a bill of particulars and that the discretion to grant or deny one rests with the trial court. *Mickens III*, 252 Va. at 322, 478 S.E.2d at 306. The court suggested that defense counsel should accept the Commonwealth's assurances that "the evidence . . . [would] be substantially the same as the evidence . . . produced [in the first trial]." *Id.* at 322, 478 S.E.2d at 307. The court declined to address the statutory basis of Mickens's request. For an argument that Virginia law requires that a bill of particulars be granted, at least whenever additional information is necessary to support a motion to suppress evidence or dismiss the indictment on constitutional grounds, see case summary of *Goins*, Capital Defense Journal, Vol. 9, No. 1, p. 44 (1996).

Mickens committed the crime of murder or why he deserved to live. The court's opinion could not, of course, identify difficulties that may have been encountered in presenting the case in mitigation. Nevertheless, especially for a resentencing granted after a lengthy and well-fought appeal, this mitigation evidence seems somewhat skimpy. Counsel who desire assistance in putting together an effective case in mitigation, and who contact the Virginia Capital Case Clearinghouse, can be referred to valuable resources in this field. It is especially important to develop, at an early stage, a coherent theory as to **why** the guilty defendant deserves to live.

II. "Weighing" in Virginia.

Mickens argued that "Virginia's death penalty statutes are unconstitutional because they do not require a jury to find that aggravating circumstances 'outweigh' mitigating circumstances."[16] The Supreme Court of Virginia rejected his claim in conclusory language, citing *Mickens I*, which in turn cited *Zant v. Stephens*.[17] In *Zant*, the Supreme Court of the United States held Georgia's sentencing scheme constitutional despite the fact that Georgia required no weighing of aggravating and mitigating factors.[18] Like Georgia, Virginia is not a statutory "weighing" state. Defense counsel in future cases should avoid using the term "weighing" when fashioning arguments addressed to the many legitimate constitutional flaws in Virginia's death penalty scheme. The use of this term allows the Virginia courts an easy way to dismiss the argument and avoid confronting the real issues.[19]

III. Possible Implications of *Greene v. Georgia*

The Supreme Court of the United States recently held in *Greene v. Georgia*[20] that the Supreme Court of Georgia had incorrectly cited *Wainwright v. Witt*[21] as "controlling authority for a rule that [state] appellate courts must defer to trial courts' findings concerning juror bias."[22] As the Court was careful to point out, *Wainwright v. Witt* is controlling authority for **federal** courts reviewing the decisions of **state** trial courts, but is not a constitutional authority requiring state courts to give deference to their own trial courts.[23]

In *Mickens III*, the defendant argued that the trial court erred in refusing to remove a prospective juror for cause.[24] The Supreme Court of Virginia responded by holding that "[a]n appellate court must give deference to a trial court's decision whether to exclude or retain a prospective juror because the trial court 'sees and hears the juror.'"[25] The court then cited a state case, *Eaton v. Commonwealth*,[26] which quoted *Witt*. Thus, it is unclear whether the court meant that appellate courts "must" give deference to the trial courts because of state law, or because federal law, articulated in *Witt*, mandates it.[27] If the court in *Mickens* believed itself bound by federal law to give deference to the trial court then it erred under *Greene*; if so, Mickens arguably would be entitled to a new hearing to determine if he was denied a juror strike in violation of **state** law.

Summary and Analysis by:
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[16] *Mickens III*, 252 Va at 320, 478 S.E.2d at 305.

[17] 462 U.S. 862 (1983).

[18] *Id.* at 880.

[19] For a discussion of how to argue that the "future dangerousness" aggravating factor (as well as the term "probability") is unconstitutionally vague, *see* Spencer, *Challenging the Future Dangerousness Aggravating Factor*, Capital Defense Journal, Vol. 8, No. 2, p. 33 (1996).

[20] 117 S. Ct. 578 (1996) (*per curiam*).

[21] 469 U.S. 412 (1985).

[22] *Greene*, 117 S. Ct. at 579.

[23] *Id.* at 578-79.

[24] *Mickens III*, 252 Va. at 321, 478 S.E.2d at 306.

[25] *Id.*

[26] 240 Va. 236, 397 S.E.2d 385 (1990).

[27] Virginia law on this issue reveals further ambiguity. For an in-depth discussion of these cases and the ambiguity in Virginia case law, *see* case summary of *Greene*, Capital Defense Journal, this issue.

THE NEVER ENDING STORY: COMBATING PROCEDURAL BARS IN CAPITAL CASES

BY: CAREY L. COOPER

I. Introduction

Although the subject of procedural bar has been treated numerous times, the problem continues to create an obstacle to state and federal appellate review. Recent developments have created new snares and added nuances to old pitfalls. Particularly, the Supreme Court of Virginia has continued to surprise defense counsel with novel default traps.

Over the past ten years, thirty-three capital defendants have been executed in Virginia. All of these cases went before the Supreme Court of Virginia on direct appeal. In those thiry-three cases, ninety-eight claims were held to be procedurally barred.

The Supreme Court of Virginia implements its default and waiver doctrine based upon a policy that elevates procedural regularity above the merits of a claim. Too often, the end result is death by technicality.[1] Whenever a procedural bar applies, the Supreme Court of Virginia will refuse to hear the merits of the claim. Moreover, federal review of the claim will almost certainly be cut off. Additionally, given that the

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[1] The Virginia Court of Appeals tends to apply procedural rules much more liberally in criminal cases than the Supreme Court of Virginia does in capital cases. Although the rules are similar, the interpretations and applications are divergent. For example, the Supreme Court of Virginia interprets Rule 5:25 such that two objections may be required in order to preserve claims based upon the improper granting or denial of a challenge for cause. *See Beavers v. Commonwealth*, 245 Va. 268, 427 S.E.2d 411 (1993). *See also* discussion, Part IV, *infra*. Although Rule 5A:18 is analogous, the Virginia Court of Appeals has never imposed such a requirement in other criminal cases. *See Cudjoe v. Common-*