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MU'MIN v. PRUETT 1997 WL 597978 (4th Cir. Aug. 18, 1997) United States Court of Appeals, Fourth Circuit

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deadly trap for their clients. As unpalatable and unjust as it is, under the current fourth circuit interpretation, caution dictates that defense attorneys file a writ of habeas corpus within the 180 day time period.

Summary and Analysis by:
Craig B. Lane

949 F. Supp. 1255 (E.D. Va. 1996); *Wright v. Angelone*, 944 F. Supp. 460 (E.D. Va. 1996); *Satcher v. Netherland*, 944 F. Supp. 1222 (E.D. Va. 1996); & *Zuern v. Tate*, 938 F. Supp. 468 (S.D. Ohio 1996).

MU'MIN v. PRUETT

1997 WL 597978 (4th Cir. Aug. 18, 1997)
United States Court of Appeals, Fourth Circuit

FACTS

Dawud Majid Mu'Min was convicted of capital murder and sentenced to death for killing a store owner. The murder occurred while Mu'Min was out on work detail from a state correctional facility, where he was serving 48 years imprisonment for first-degree murder.[1] Prior to trial, Mu'Min's counsel moved for a change of venue, based upon potentially harmful pretrial publicity.[2] The trial judge deferred action on the change of venue motion, and after finding that an impartial jury had been impaneled, the judge denied the motion.[3] The judge also denied Mu'Min's motion in limine to exclude an order memorializing his previous first-degree murder conviction.[4] During the sentencing phase, the jury sent a note to the judge inquiring as to the meaning of "life imprisonment."[5] The judge declined to answer the question and advised the jury not to concern itself with the issue.[6] Mu'Min's counsel did not object to the court's refusal to answer the jury's question.[7] Upon finding both the future dangerousness and vileness predicates,[8] the jury imposed a sentence of death.[9]

On direct appeal to the Supreme Court of Virginia, Mu'Min did not challenge either the judge's denial of his motion for change of venue or the judge's failure to answer the jury's written question, but did challenge the judge's denial of his motion in limine, arguing that the prejudicial impact of the order outweighed its probative value.[10] The supreme court denied relief and upheld the conviction and sentence.[11] The United States Supreme Court granted *certiorari* to consider an unrelated issue and ultimately concluded that the trial court had not erred.[12]

Mu'Min next sought relief on state habeas, asserting ineffective assistance of counsel and several other claims.[13] The state habeas court found Mu'Min's ineffective assistance of counsel claim to be without merit and found that the remainder of his claims had either been previously determined, and thus could not be heard in a state habeas hearing, or were procedurally defaulted.[14] Subsequently, the Supreme Court of Virginia denied review, and the United States Supreme Court denied Mu'Min's petition for a writ of *certiorari*.[15]

In his petition for a writ of habeas corpus in United States District Court, Mu'Min challenged, as violations of his Sixth and Fourteenth Amendment Rights to a fair trial and due process, the trial court's denial of his motion for a change of venue, admission of the order that memorialized his first-degree murder conviction, and refusal to respond to the jury's question.[16] The magistrate recommended that the district court dismiss Mu'Min's petition based on the state supreme court's reliance on the *Slayton v. Parrigan*[17] procedural default rule, which, in essence, dictates that issues not properly raised at trial or on direct appeal are procedurally defaulted and may not be considered in habeas.[18] The magistrate also found that because Mu'Min had not excused his defaults, his claims did not merit habeas review. The district court followed the magistrate's recommendation and dismissed Mu'Min's petition.

[1] *Mu'Min v. Pruett*, 1997 WL 597978 (4th Cir. Aug. 18, 1997) at *1.

[2] *Mu'Min*, 1997 WL 597978, at *1.

[3] *Id.*

[4] *Id.* Most likely, the prosecutors sought to admit this order to establish Mu'Min's status as an escapee at the time of the commission of the crime.

[5] *Id.* at *2.

[6] *Mu'Min*, 1997 WL 597978, at *2.

[7] *Id.*

[8] *See* Va. Code § 19.2-264.2 (1995).

[9] *Mu'Min*, 1997 WL 597978, at *2.

[10] *Id.*

[11] *Id. See Mu'Min v. Commonwealth*, 239 Va. 433, 389 S.E.2d 886 (1990).

[12] *Mu'Min*, 1997 WL 597978, at *2. *See Mu'Min v. Virginia*, 500 U.S. 415, 111 S.Ct. 1899, 114 L.Ed.2d 493 (1991), *rehearing denied*, 501 U.S. 1269, 112 S.Ct. 13, 115 L.Ed.2d 1097 (1991).

[13] *Id.*

[14] *Id.*

[15] *Mu'Min*, 1997 WL 597978, at *2. *See Mu'Min v. Murray*, 511 U.S. 1026, 114 S.Ct. 1416, 128 L.Ed.2d 87 (1994).

[16] *Id.* Mu'Min based his claim that the court had erred in refusing to respond to the jury's question upon *Simmons v. South Carolina*, 512 U.S. 154 (1994) (holding that when future dangerousness is at issue, the defense counsel should be permitted to introduce evidence pertaining to a defendant's parole eligibility or ineligibility).

[17] 215 Va. 27, 29-30, 205 S.E.2d 680, 682 (1974) (issues not properly raised at trial or on direct appeal are thus procedurally defaulted and may not be considered in habeas).

[18] *Mu'Min*, 1997 WL 597978, at *2.

On appeal to the United States Court of Appeals for the Fourth Circuit, Mu'Min advanced two arguments in support of his assertion that his claims were not procedurally defaulted.[19] First, Mu'Min contended that because the *Slayton* procedural default rule precludes consideration of claims that are independent of federal law, his claims, grounded in the Sixth and Fourteenth Amendments, should not be defaulted. Second, Mu'Min argued that even if the *Slayton* rule did constitute an adequate and independent state law basis for a decision, the Supreme Court of Virginia's mandatory review of his death sentence pursuant to Virginia law constituted an implicit consideration and rejection of his claims.[20] Finally, Mu'Min argued that even if his claims were procedurally defaulted, he had established cause and prejudice to excuse the default by virtue of his counsel's ineffective assistance on direct appeal.[21]

HOLDING

In an unpublished opinion, the United States Court of Appeals, Fourth Circuit, reaffirmed several of its previous cases deeming the *Slayton* procedural default rule to be an adequate and independent state law ground for decision.[22] Further, the court reaffirmed the propriety of applying *Slayton* to federal constitutional claims which, although they might have been raised on appeal, were not.[23] The court of appeals found that the state supreme court's reliance on *Slayton* nullified Mu'Min's argument of implicit consideration under the statutory mandatory review.[24] The court of appeals declined to apply *Simmons* because Mu'Min's conviction became final before *Simmons* was decided. It indicated that even if the rule enunciated in *Simmons* applied, it would not have obliged the trial court to answer the jury's question concerning life imprisonment.[25] The court of appeals held that the trial court had not erred in refusing to allow Mu'Min's counsel to question potential jurors regarding the content of pretrial publicity to which they had been exposed.[26] Finally, the court held that Mu'Min's failure to particularize his claim of ineffective assistance of counsel on state habeas by citing his counsel's failure to raise a particular issue on direct appeal (in this instance, the due process violation resulting from the trial court's admission of the 1973 order) nullified his assertion of that claim to show cause for procedural default.[27] In considering Mu'Min's claim of prejudice resulting from the two issues eligible for its consideration, counsel's failure to appeal the denial of his motion for change of venue and to object to the court's refusal to define "life imprisonment," the court found that Mu'Min showed neither prejudice with regard to the former nor a right to relief with regard to the latter.[28]

ANALYSIS/APPLICATION IN VIRGINIA

I. About Virginia Code Section 17-110.1-(C)(1)

A. What is Mandatory about the Supreme Court of Virginia's Review Pursuant to Virginia Code Section 17-110.1(C)(1)?

Virginia Code Section 17-110.1(C)(1) has not generated a substantial amount of controversy or commentary since its enactment in 1977. The provision requires the Supreme Court of Virginia in any case in which the death penalty has been imposed to review the trial record to ascertain whether "the sentence of death was imposed under the influence of passion, prejudice or any other arbitrary factor."[29] Not surprisingly, the Supreme Court of Virginia's mandatory review under this statute has, almost without exception, yielded the simple conclusion that nothing in the record indicates that the death sentence was imposed under the influence of passion, prejudice, or any other arbitrary factor. The supreme court's reluctance to find the influence of such a factor is evidenced by the factual circumstances as described in the few opinions in which the court actually comments upon the content of its mandatory review before rejecting the defendant's claim under this statute.[30]

In Mu'Min's case, the court of appeals set forth a rather narrow interpretation of the obligation imposed upon the supreme court by the statute. The court of appeals stated that, "in conducting its mandatory review of the death sentence pursuant to § 17-110.1(C)(1), the Supreme Court of Virginia ascertains only whether the imposition of the death penalty was influenced by improper considerations; the provision simply does not require the court to examine the record for constitutional errors not specified on appeal."[31] The court restricted the meaning of the statutory language in order to reach its desired conclusion: a defendant should not have the ability to revive procedurally defaulted claims, even in the face of clear constitutional error, by virtue of a statute requiring the supreme court's automatic review of the imposition of death sentences.

In light of Mu'Min's argument that the Supreme Court of Virginia had implicitly considered his constitutional claims by virtue of its mandatory review under this statute, this semantic juggling is quite transparent. A review of the record in search of the impermissible influence of passion, prejudice, and other arbitrary factors, by definition, would arguably include the requisite constitutional inquiry of fundamental fairness. It would seem that a proper determination of whether such

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[19] *Id.* at *3.

[20] Va. Code § 17-110.1(C)(1) (1996). This statute mandates the Virginia Supreme Court's review of a death sentence to determine whether "the sentence of death was imposed under the influence of passion, prejudice, or any other arbitrary factor." *See infra*, Part I.

[21] *Mu'Min*, 1997 WL 597978, at *5. *See Strickland v. Washington*, 466 U.S. 668 (1984) (setting forth the standard for constitutionally effective assistance of counsel).

[22] *Id.* at *4. *See Bennett v. Angelone*, 92 F.3d 1336 (4th Cir. 1996), *cert. denied*, 65 USLW 3396, 117 S.Ct. 503, 136 L.Ed.2d 395 (1996); *Turner v. Williams*, 35 F.3d 872 (4th Cir. 1994), *overruled in part on other grounds by O'Dell v. Netherland*, 95 F.3d 1214 (4th Cir. 1996) (*en banc*), *aff'd*, 117 S.Ct. 1969 (1997). *See also* case summary of *Bennett v. Angelone*, *Cap. Def. J.*, Vol. 9, No. 1, p. 26.

[23] *Mu'Min*, 1997 WL 597978, at *4.

[24] *Id.* The Supreme Court of Virginia's consideration (albeit implicit) of Mu'Min's constitutional claims would have preserved these claims and disarmed the Commonwealth's claim that *Slayton* barred the court's consideration of his claims. Here, the court of appeals specifically stated that in conducting its mandatory review pursuant to Section 17-110.1(C)(1), the Supreme Court of Virginia considers "only whether the imposition of the death penalty was influenced by improper considerations; the provision simply does not require the court to examine the record for constitutional errors on appeal." *Id.* Ostensibly, the court made this remarkable statement to indicate that the scope of the supreme court's mandatory review is rather narrow and may not be interpreted more broadly in support of a defendant's claim that a constitutional issue was considered and rejected.

[25] *Mu'Min*, 1997 WL 597978, at *6.

[26] *Id.*

[27] *Id.* at *5.

[28] *Mu'Min*, 1997 WL 597978, at *5, *6.

[29] Va. Code § 17-110.1(C)(1) (1996).

[30] *See Dubois v. Commonwealth*, 246 Va. 260, 435 S.E.2d 636 (1993), *cert. denied*, 511 U.S. 1012, 114 S.Ct. 1389, 128 L.Ed.2d 63 (1994); *Stockton v. Commonwealth*, 241 Va. 192, 402 S.E.2d 196, *cert. denied*, 502 U.S. 902, 112 S.Ct. 280, 116 L.Ed.2d 231 (1991).

[31] *Mu'Min*, 1997 WL 597978, at *4 (emphasis added).

constitutional errors existed necessarily would have included an assessment of the trial court's entry of the order and denial of the motion for change of venue, both of which Mu'Min sought to challenge before the court of appeals based upon their prejudicial impact. Yet, even if the supreme court did undertake the requisite inquiry at the time, it did not explicitly recognize such issues as "his claims," for he had not yet made those claims. Thus, it is worth noting that the court of appeals probably could have achieved its desired result on that basis, without resorting to the argument that it utilized which denied that the supreme court should have considered the very issues that Mu'Min asked the court to deem preserved.

B. Whether the Supreme Court of Virginia's "Review" Complies with the Mandate of *Furman v. Georgia*[32]

In enacting Virginia Code Section 17-110.0(C)(1), the legislature sought to implement *Furman's* mandates. The statute imposes an affirmative obligation upon the state supreme court which is not constitutionally mandated in that specific form. Yet, it is clear that if the supreme court does not recognize an obligation under the statute to consider constitutional errors not specified on appeal, its reading of the statutory provision regarding "prejudice" and "arbitrary factors" is not consonant with *Furman*'s spirit or its enunciation of constitutional requirements. Under the Virginia statutory scheme, the Supreme Court of Virginia is essentially charged with the responsibility of actualizing the constitutional requirements set forth in *Furman*. In essence, the legislature designated the state supreme court as the party responsible for the state's compliance with *Furman*, which entails ensuring that the death penalty is not imposed arbitrarily, discriminatorily, or wantonly. Therefore, if the supreme court does not, as a part of its mandatory review, recognize its obligation to cure any constitutional error covered by *Furman*, regardless of whether such errors were specified on appeal, then the state of Virginia's procedure does not satisfy *Furman's* mandate. The supreme court's willingness to sacrifice constitutional claims of grave importance to procedural default in such an exceedingly facile manner seems violative of the spirit of *Furman*, as well as its explicit mandate.

The intersection (or lack thereof) between *Furman's* mandates and the Supreme Court of Virginia's *de facto* interpretation and conduct of its mandatory review under the state statute seems to be a territory worth exploring in future capital cases. Capital counsel in Virginia should pursue this admittedly complex issue, for such efforts could force the supreme court to conduct a more meaningful statutory and constitutional review.

[32] 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed.2d 346 (1972) (holding that under then-existing state capital sentencing schemes, the death penalty was being imposed arbitrarily, discriminatorily, and wantonly, and therefore the imposition of the death penalty violated the Eight Amendment prohibition against cruel and unusual punishment).

II. The Narrowing Scope of *Simmons*[33]

In *Simmons*, the United States Supreme Court held that when future dangerousness is at issue, the defense counsel should be permitted to introduce evidence pertaining to the defendant's parole eligibility or ineligibility. In *Mu'Min*, the court of appeals did not apply *Simmons* retroactively.[34] The court of appeals did signify that its interpretation of the *Simmons* holding would limit its application to cases in which trial counsel offers evidence of a defendant's parole ineligibility and preclude its application to cases in which the jury requests the information on its own.[35] This restrictive view must be heeded in formulating trial strategy within the Fourth Circuit.[36]

In light of this narrow reading of *Simmons*, when future dangerousness is at issue, trial counsel must initiate the introduction of evidence of the defendant's parole ineligibility.[37] Because *Simmons* was decided relatively recently, it remains to be seen which interpretation of its holding will be sanctioned by the Supreme Court. Thus far, Mu'Min's counsel has not petitioned for *certiorari* on this issue or any other.

III. The Importance of Being Earnest In Seeking to Avoid Waiver

In general, this case underscores the crucial importance of aggressively seeking to preserve issues and avoid waiver.[38] The court of appeals denied Mu'Min's right to present his substantive claims on their merits, attributing this default to his appellate counsel's failure, in asserting the ineffectiveness of trial counsel, to raise with particularity all of the issues that his trial counsel had failed to raise, along with his failure to preserve his substantive claims on federal grounds. Virginia's prevailing statutory scheme, as interpreted and glossed by the courts, is an almost inscrutable maze. All too often, the appellate courts indulge every presumption in favor of default. Thus, capital defense attorneys should strive to be vigilant in seeking to preserve issues for their clients, as the obstacles to establishing both cause and prejudice are, by design, nearly insurmountable. For example, the court found that even if Mu'Min had shown cause, he could not show prejudice.[39] To demonstrate prejudice, Mu'Min would have had to show, at a minimum, that appeal of the motion's denial would have been successful.[40] The court did not set forth a formula by which any court could decide that such an appeal would have been successful. This example illustrates the difficulty of reviving procedurally defaulted claims and emphasizes the importance of preserving issues from the very beginning of a case.

Summary and Analysis by:
Anne E. Duprey

[33] *See supra*, note 16.

[34] *See O'Dell v. Netherland*, 95 F.3d 1214 (4th Circ. 1996) (holding that *Simmons* constituted a new rule).

[35] *Mu'Min*, WL 597978, at *5. The court utilized text from Justice O'Connor's concurrence in setting forth its explication of the case's holding, rather than accepting the majority opinion's text as the definitive indication of the holding.

[36] *Id.*

[37] *See* Jenio, *"Life" = Life: Correcting Juror Misconceptions*, Cap. Def. J., this issue (setting forth the proposition that even when future dangerousness is not at issue, counsel should still strive vigorously to introduce evidence of parole ineligibility in mitigation).

[38] Again, trial counsel must also be aggressive in securing the benefits accorded by favorable Supreme Court decisions such as *Simmons*.

[39] *Mu'Min*, WL 597978, at *5.

[40] *Id.*