Capital Defense Journal

Volume 13 | Issue 2 Article 9

Spring 3-1-2001

Mickens v. Taylor No. 00-4, 2001 WL 133196, at "1 (4th Cir. Feb. 16, 2001)

Mickens v. Taylor
No. 00-4, 2001 WL 133196, at *1
(4th Cir. Feb. 16, 2001)

I. Facts

The body of seventeen-year-old Timothy Hall ("Hall") was discovered on March 30, 1992, partially nude, lying face down on a mattress under an abandoned building. Autopsy reports revealed that Hall was stabbed more than 143 times. Pubic hairs from an African-American were recovered from Hall's buttocks and human semen was found on the mattress. Five days after his body was discovered, police responded to complaints that a man riding a bicycle in the area near the abandoned building assaulted a juvenile. Police officers arrived at the scene and found Walter Mickens ("Mickens") riding a bicycle. Police detained Mickens and later arrested him on charges related to the assault. After receiving his *Miranda* warnings, Mickens agreed to talk to police. Officers questioned Mickens about Hall's death. Detective Dallas Mitchell ("Mitchell") told Mickens that police knew he had killed Hall. Mitchell did not tell Mickens how Hall had been killed, but Mickens responded, "You didn't find any knife on me, did you?"[1] The next day police obtained warrants charging Mickens with the attempted sodomy and murder of Hall.[2]

At trial the Commonwealth introduced expert testimony that the foreign pubic hairs collected from Hall's body were similar to pubic hair samples taken from Mickens.[3] Analysis of stains found on the mattress at the crime scene revealed the presence of human sperm. An RFLP type DNA analysis revealed that the sperm could not have come from Hall, but was consistent with Mickens's DNA pattern.[4] Additionally, Tyrone Brister ("Brister") testified that he and Mickens shared a courthouse holding cell on March 26, 1993. Brister testified that when he asked Mickens why he was there, Mickens answered, "They said I stabbed somebody 140 something

---

1. Mickens v. Taylor, 227 F.3d 203, 206 (4th Cir. 2000), *rev'd en banc*, No. 00-4, 2001 WL 133196, at *1 (4th Cir. Feb. 16, 2001).

2. *Id.* On April 7, 1992, Michael Jacobs ("Jacobs") was found wearing the shoes that Hall had been wearing when last seen alive. Jacobs testified that he purchased the shoes from Mickens for five dollars the week that Hall's body was found. *Id.*

3. *Id.*

4. *Id.*

times in the head."[5] According to Brister, Mickens then lowered his voice and added "which I did."[6] A jury convicted Mickens of capital murder and sentenced him to death.[7]

Mickens's first petition for certiorari to the United States Supreme Court was granted.[8] The Court remanded his case in light of the recent decision in *Simmons v. South Carolina*.[9] On remand the Supreme Court of Virginia determined that a resentencing was required.[10] At the resentencing in February of 1996, the jury again recommended that Mickens be sentenced to death.[11] The Supreme Court of Virginia affirmed the sentence and the United States Supreme Court denied certiorari.[12] Mickens's petition for a writ of habeas corpus was denied by the Supreme Court of Virginia on December 15, 1997.[13] Mickens was then appointed federal habeas counsel by the United States District Court for the Eastern District of Virginia.[14]

Mickens's federal habeas counsel discovered that Mickens's lead trial counsel, Bryan Saunders ("Saunders"), represented the victim prior to his death.[15] A clerk in the Newport News Juvenile and Domestic Relations ("JDR") Court gave habeas counsel access to Hall's confidential juvenile records, which revealed that Saunders represented Hall at the time Hall was killed.[16] Habeas counsel further discovered that Judge Aundria Foster of the JDR court dismissed the charges pending against Hall on April 3, 1992, and then appointed Saunders to represent Mickens in his trial for the capital murder of Hall only four days after Hall's death.[17] Judge Foster did not

---

5. *Id.*

6. *Id.* at 207. Brister testified that Mickens also told Brister that he sodomized the victim and stole his shoes. *Id.*

7. *Id.*; *see* VA. CODE ANN. § 18.2-31(5) (Michie 2000) (defining capital murder as a "willful, deliberate, and premeditated killing of any person in the commission of, or subsequent to, rape or attempted rape, forcible sodomy or attempted forcible sodomy or object sexual penetration").

8. *Id.*; *see* Mickens v. Virginia, 513 U.S. 922 (1994).

9. *See Mickens*, 513 U.S. 922 (1994). The United States Supreme Court vacated Mickens's sentence and remanded to the Supreme Court of Virginia to consider the implication of the holding in *Simmons v. South Carolina*. *Id.*; *see* Simmons v. South Carolina, 512 U.S. 154, 171 (1994) (holding that when the state raises the specter of defendant's future dangerousness due process requires that the jury be instructed that life imprisonment means life without the possibility of parole).

10. Mickens v. Commonwealth, 457 S.E.2d 9, 10 (Va. 1995).

11. *Mickens*, 227 F.3d at 207.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Id.* at 207-08.

16. *Id.* Counsel discovered that Saunders represented Hall on charges of assault and carrying a concealed weapon. *Id.*

17. *Id.*

make any inquiry into whether Saunders had a conflict of interest in representing Mickens.[18]

On June 25, 1998, Mickens filed a federal petition for habeas corpus under 28 U.S.C. § 2254.[19] The petition alleged that Saunders labored under a conflict of interest because he had previously represented Hall.[20] The United States District Court for the Eastern District of Virginia denied the petition and Mickens appealed to the United States Court of Appeals for the Fourth Circuit.[21] On appeal, Mickens raised the following issues: (1) trial counsel operated under a conflict of interest rendering counsel constitutionally ineffective; (2) trial counsel was ineffective for failure to conduct an adequate pre-trial investigation and failure to request a psychiatric examination prior to resentencing; and (3) the evidence was insufficient to prove attempted forcible sodomy.[22]

The Fourth Circuit panel held the following: (1) that Mickens established cause to excuse his failure to raise the conflict of interest claim in state habeas proceedings;[23] (2) that the JDR judge knew or should have known that a conflict of interest existed and had a duty to inquire;[24] (3) that Mickens did not waive his right to conflict-free counsel;[25] and (4) that trial counsel labored under an actual conflict of interest.[26] The court found Mickens's claim that the evidence was insufficient to prove an attempted sodomy to be defaulted.[27] The Fourth Circuit also held that trial counsel's failure to conduct an adequate pre-trial investigation and failure to obtain a mental health expert did not constitute ineffective assistance of counsel.[28] The judgment of the district court was reversed and a certificate of appealability was issued.[29] The Fourth Circuit directed the district court to grant the writ of habeas corpus unless the Commonwealth elected to retry the defendant within 180 days.[30] The Commonwealth was then granted a

18. *Id.*

19. *Id.* at 208; *see also* Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 107(a), 110 Stat. 1214, 1221 (1996) (codified as amended at 28 U.S.C. § 2254 (2000)) (governing federal habeas petitions in death penalty cases).

20. *Mickens*, 227 F.3d at 208.

21. *Id.*

22. *Id.*

23. *Id.* at 209.

24. *Id.* at 209-11.

25. *Id.*

26. *Id.* at 212.

27. *Id.* at 218.

28. *Id.*

29. *Id.*

30. *Id.*

petition for rehearing en banc and the case was re-argued on December 5, 2000.[31]

II. Holding

The Fourth Circuit *en banc* affirmed the decision of the district court.[32] The court determined that Mickens established cause to excuse his procedural default, but held that Mickens failed to demonstrate an adverse effect resulting from trial counsel's conflict of interest.[33] The court held that the Supreme Court's decision in *Wood v. Georgia*[34] does not relieve a defendant from the burden of establishing that his attorney's conflict of interest adversely affected his representation.[35] As a result, the Fourth Circuit affirmed Mickens's conviction for capital murder.[36]

III. Analysis / Application in Virginia

A. Showing Cause and Actual Prejudice to Overcome Exhaustion and Procedural Default

Cuyler v. Sullivan[37] holds that the Sixth Amendment right to effective assistance of counsel includes the right to representation free of conflicts of interest.[38] Mickens argued two theories to support his conflict of interest claim: (1) the JDR court failed to inquire into defense counsel's conflict of interest when it knew, or should have known, that the conflict existed; and (2) trial counsel labored under an actual conflict of interest that prejudiced the defendant.[39] The Commonwealth argued that Mickens's claims were

---

31. *Mickens*, 2001 WL 133196, at *4.

32. *Id.*, at *14.

33. *Id.*

34. 450 U.S. 261 (1981).

35. *Mickens*, 2001 WL 133196, at *14; *see* Wood v. Georgia, 450 U.S. 261, 269-74 (1981) (holding that when trial court knows or reasonably should know of a potential conflict of interest the trial court is obligated to inquire into the potential conflict).

36. *Mickens*, 2001 WL 133196, at *14.

37. 446 U.S. 335 (1980).

38. Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980) (holding that a defendant may establish a claim of ineffective assistance of counsel based on counsel's conflict of interest once the defendant can demonstrate an actual conflict of interest and an adverse effect on counsel's representation based on that conflict); *see also* Holloway v. Arkansas, 435 U.S. 475, 484 (1978) (holding that trial court's failure to appoint separate counsel for multiple defendants in the face of repeated assertions by counsel that potential for conflict of interest existed violated defendants' due process rights).

39. *Mickens*, 2001 WL 133196, at *5. The Fourth Circuit identified three grounds upon which Mickens based his conflict of interest argument. The court found that Mickens based his claims on the following: (1) the trial court's failure to inquire into conflicts of interest which the court knew or reasonably should have known about required automatic reversal of the conviction; (2) if the trial court's failure did not require automatic reversal then it

barred under the exhaustion doctrine and were procedurally defaulted.[40] The exhaustion doctrine precludes argument of a claim that is raised for the first time in a petition for federal habeas corpus relief.[41] Procedural default bars a claim when the petitioner fails to exhaust available state remedies and presentation of the claim to the state courts would be barred by the exhaustion doctrine.[42] Exhaustion and procedural default can be overcome by showing cause and actual prejudice.[43] One way in which the petitioner can establish cause is by demonstrating that the factual basis of the petitioner's claim did not exist when the petition for habeas was filed.[44] The Fourth Circuit agreed with the district court that Mickens established cause to overcome his failure to exhaust the claim in state court.[45] The Commonwealth argued that if federal habeas counsel was able to discover the factual basis for Mickens's claim, then Mickens could have done the same when preparing his state habeas petition.[46] The Fourth Circuit was not persuaded, noting that federal habeas counsel was able to uncover the basis for

---

relieved Mickens of having to show an adverse effect from counsel's conflict of interest; and (3) that Mickens established both a conflict of interest and an adverse effect resulting therefrom, thus satisfying the two elements of the *Sullivan* test. *Id.*

40. *Id.*, at *6.

41. *Id.* (citing Breard v. Pruett, 134 F.3d 615, 619 (4th Cir. 1998) (holding that a prisoner must exhaust all available state court remedies before applying for federal habeas relief and that presentation of new legal theories or factual claims for the first time in his federal habeas petition does not satisfy the exhaustion doctrine)).

42. *Id.*; *see also* Coleman v. Thompson, 501 U.S. 722, 735 n.1 (1991) (discussing limitations placed upon federal courts conducting habeas corpus review). The Court in *Coleman* noted that federal courts may not address a claim if petitioner "failed to exhaust state remedies and the court to which the petitioner would be required to present his claims in order to meet the exhaustion requirement would now find the claims procedurally barred." *Id.* The Court also found that in "such a case there is a procedural default for purposes of federal habeas regardless of the decision of the last state court to which the petitioner actually presented his claims." *Id.*

43. *Mickens*, 2001 WL 133196, at *6; *see also* Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 107(a), 110 Stat. 1214, 1221 (1996) (codified as amended at 28 U.S.C. § 2254 (2000)) (governing federal habeas petitions in death penalty cases).

44. *Mickens*, 2001 WL 133196, at *6; *see also* 28 U.S.C. § 2254(c) (2000) (explaining that "an applicant shall not be deemed to have exhausted the remedies available in the courts of the State, within the meaning of this section, if he has the right under the law of the State to raise, by any available procedure, the question presented"); 28 U.S.C. § 2254(d)(1) (2000) (explaining that application for writ of federal habeas corpus shall not issue if applicant's claim "was adjudicated on the merits in State court proceedings unless the adjudication of the claim . . . resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law); 28 U.S.C. § 2254(d)(2) (2000) (explaining that writ of habeas corpus shall not issue unless adjudication of applicant's claim in state court "resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding").

45. *Mickens*, 2001 WL 133196, at *6.

46. *Id.*

Mickens's claim only through a mistake made by the JDR clerk.[47] As a result, the Fourth Circuit considered the merits of Mickens's conflict of interest claim.[48]

B. Defendant Must Demonstrate an Adverse Effect Resulting from Trial Counsel's Conflict of Interest

The general test for ineffective assistance of counsel was set out by the United States Supreme Court in *Strickland v. Washington*.[49] In order for a petitioner to succeed on a claim of ineffective assistance of counsel, petitioner must establish the following: (1) that counsel's performance was objectively unreasonable; and (2) that the defendant was prejudiced by counsel's unreasonable performance.[50] Within the context of conflict of interest claims, the *Strickland* test is modified so that the petitioner need not establish that the conflict of interest resulted in prejudice.[51] Once the petitioner has demonstrated that a conflict of interest in fact existed and that the conflict adversely affected trial counsel's performance, prejudice is presumed and a new trial is required.[52]

Mickens argued that *Holloway v. Arkansas*[53] required automatic reversal of his conviction.[54] In *Holloway*, the United States Supreme Court held that the trial court's failure to inquire into a conflict of interest despite repeated objections by defense counsel violated the defendant's Sixth Amendment right to a fair trial.[55] The Fourth Circuit rejected Mickens's claim that his conviction should be automatically reversed under *Holloway* because Judge

---

47. *Id.* "The fortuitous circumstances by which federal habeas counsel discovered the truth about Saunders' conflict prove beyond question that Mickens did not fail in his duty to inquire in the state court proceedings." *Id.* (citing Mickens v. Greene, 74 F. Supp. 2d 586, 601 (E.D. Va. 1999)).

48. *Id.*

49. Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that defendant's due process right to effective assistance of counsel is violated when defendant can establish that trial counsel's performance was objectively unreasonable and that counsel's performance resulted in prejudice to defendant).

50. *Id.* at 688, 692.

51. *Mickens*, 2001 WL 133196, at *8. The *Sullivan* court recognized this distinction when it noted that "'[i]n order to establish a violation of the Sixth Amendment, a defendant who raised no objection at trial must demonstrate that an actual conflict of interest adversely affected his lawyer's performance.'" *Id.* (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)).

52. *Id.* (citing United States v. Tatum, 943 F.2d 370, 375 (4th Cir. 1991)).

53. 435 U.S. 475 (1978).

54. *Mickens*, 2001 WL 133196, at *7; *see also* Holloway v. Arkansas, 435 U.S. 475, 484 (1978) (holding that trial court's failure to appoint separate counsel for multiple defendants in the face of repeated assertions by counsel that potential for conflict of interest existed violated defendants' due process rights).

55. *Holloway*, 435 U.S. at 484.

Foster knew or reasonably should have known of Saunders's conflict of interest but failed to inquire into the situation.[56] For the purpose of Mickens's appeal, the court accepted that Judge Foster reasonably should have known of the potential conflict of interest created by Saunders's previous representation of Hall.[57] However, the Fourth Circuit read *Holloway* narrowly to require reversal of a defendant's conviction only when a trial court fails to inquire into potential conflicts of interest when a single attorney represents co-defendants and repeatedly objects to the multiple representation.[58] The court read *Holloway* to require reversal only after an objection is raised by defense counsel at trial.[59]

The Fourth Circuit determined that absent an objection at trial a defendant must satisfy the *Sullivan* two-pronged test.[60] Mickens argued that *Wood v. Georgia*[61] changed the *Sullivan* test and extended the *Holloway* rule of automatic reversal to cases in which the trial court does not address a conflict of interest about which it reasonably should have known, even in the absence of an objection by defense counsel at trial.[62] In *Wood*, the United States Supreme Court remanded to the trial court because the record established that the possibility of a conflict of interest was "sufficiently apparent" so as to require the trial court to determine whether a conflict of interest actually existed.[63] Mickens argued that Judge Foster knew or should have known that Saunders's representation of Hall prior to his appointment as Mickens's counsel created a conflict of interest and therefore that Mickens should have been excused from proving that the conflict resulted in an adverse effect.[64] The Fourth Circuit accepted that the record demon-

---

56. *Mickens*, 2001 WL 133196, at *7.

57. *Id.*

58. *Id.*

59. *Id.*, at *8. The Fourth Circuit, in a footnote, explained that "[w]hile the cases seem to emphasize the lack of objection, we think the fact of the associated failure to offer to a defendant an opportunity to object to or waive objection to questionable representation is also of consequence." *Id.*, at *8 n.4. However, the court did not address the fact that Mickens was not given the opportunity to object to Saunders's conflict of interest.

60. *Id.*, at *8; *see* Cuyler v. Sullivan, 446 U.S. 335, 345-50 (1980) (holding that a defendant may establish a claim of ineffective assistance of counsel based on counsel's conflict of interest once the defendant can demonstrate an actual conflict of interest and an adverse effect on counsel's representation based on that conflict).

61. 450 U.S. 261 (1981).

62. *Mickens*, 2001 WL 133196, at *8. The footnote reads "Moreover, Sullivan mandates a reversal when the trial court has failed to make an inquiry even though it 'knows or reasonably should know that a particular conflict exists.'" *Id.* (quoting Wood v. Georgia, 450 U.S. 261, 272 n.18 (1981) (remanding to determine if potential conflict of interest was sufficiently apparent so that trial court's failure to inquire into potential conflict of interest required reversal of defendant's conviction)). Mickens urged that the language of a footnote in *Wood* explicitly extended the automatic reversal rule. *Id.*

63. *Mickens*, 2001 WL 133196, at *8.

64. *Id.*, at *7.

strated sufficient reason for the trial judge to suspect a conflict of interest, but rejected Mickens's argument that the decision in *Wood* obviated the requirement that a defendant demonstrate an actual conflict and adverse effect.[65] The Fourth Circuit decided that a literal application of the language of footnote eighteen in *Wood* would lead to application beyond that intended by the Supreme Court.[66] The court reiterated that a defendant must establish both prongs of the *Sullivan* test in order to obtain relief on a claim of conflict of interest.[67]

The Fourth Circuit approved of the district court's articulation of the standard for demonstrating an adverse effect.[68] First, the defendant must show that a plausible defense tactic or strategy existed that counsel could have pursued.[69] Then, the defendant must show that the tactic or strategy was objectively reasonable at the time the decision was made not to pursue that avenue.[70] Finally, the defendant must establish that failure to pursue that tactic or strategy was a result of the attorney's conflict of interest.[71] The Fourth Circuit determined that the district court had correctly evaluated the arguments raised by Mickens.[72] The court agreed that trial counsel failed to raise the defense of consent to the sodomy charge because the strategy was not viable based on the wounds inflicted on Hall and Mickens's denial of ever meeting Hall.[73] The court also found that counsel's failure to present negative information about Hall would have been inconsistent with Mickens's assertion of sympathy for Hall's family.[74] Thus, the court determined that Mickens had not demonstrated an adverse effect as required under *Sullivan* and did not address whether an actual conflict of interest in fact existed.[75] As a result, the Fourth Circuit affirmed the ruling of the district court denying Mickens's petition for habeas relief.[76]

C. *Mickens's Defaulted Claims*

Mickens argued that trial counsel was ineffective for failing to conduct an adequate pre-trial investigation.[77] The district court held that this claim was defaulted because Mickens failed to present fairly the claim to the

---

65. *Id.*, at *9.
66. *Id.*
67. *Id.*
68. *Id.*, at *11.
69. *Id.*
70. *Id.*
71. *Id.*
72. *Id.*, at *13-14.
73. *Id.*
74. *Id.*
75. *Id.*, at *10.
76. *Id.*, at *14.
77. *Id.*, at *13.

Virginia courts.[78] The Fourth Circuit affirmed the holding of the district court with respect to this claim.[79] Mickens also argued that trial counsel was ineffective for failing to obtain a psychiatric expert to perform an evaluation for the resentencing.[80] The court found that Mickens had not shown that a mental health expert would have provided any additional information to counsel.[81] Mickens argued that the evidence was insufficient to prove an attempted forcible sodomy.[82] This argument was rejected by the court because the claim was not fairly presented in the state habeas proceeding.[83] Finally, Mickens argued that the ineffective assistance of state habeas counsel established cause for his failure to raise in state habeas the additional ineffective assistance claims raised for the first time in the federal habeas proceedings.[84] The Fourth Circuit rejected this claim, noting that "ineffective assistance by state habeas counsel fails to establish cause."[85]

IV. Conclusion

The Fourth Circuit reiterated that under *Sullivan* the trial judge has a duty to inquire into situations that might reasonably involve a conflict of interest.[86] *Mickens* indicates that in cases of multiple or successive representation the trial judge is under an affirmative duty to inquire into possible conflicts of interest.[87] However, the Fourth Circuit determined that the trial judge's failure to inquire is subject to harmless error analysis once an actual conflict of interest is claimed.[88] The conflict of interest is almost certain to arise in cases of multiple representation because each defendant's strategy will almost certainly be to implicate his co-defendants. When one attorney represents multiple defendants in the same trial, this strategy

78. *Mickens*, 74 F. Supp. 2d at 598; *see Mickens*, 2001 WL 133196, at *13.

79. *Mickens*, 2001 WL 133196, at *13.

80. *Id.*

81. *Id.* The court also noted that this claim was adjudicated against Mickens on the merits in state court. *Id.* Under 28 U.S.C. § 2254(d)(1), a federal court is prohibited from issuing a writ of habeas corpus for a claim adjudicated on the merits in the state court. Only when the adjudication at the state level results in a decision that is "contrary to, or an unreasonable application of, clearly established federal law" may the federal court grant the application for a writ of habeas corpus. Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 107(a), 110 Stat. 1214, 1221 (1996) (codified as amended at 28 U.S.C. § 2254(d)(1) (2000)) (governing federal habeas petitions in death penalty cases).

82. *Mickens*, 2001 WL 133196, at *14.

83. *Id.*

84. *Id.*

85. *Id.* (citing Mackall v. Angelone, 131 F.3d 442, 449 (4th Cir. 1997) (en banc) (holding that petitioner has no right to effective assistance of counsel in state habeas proceeding and therefore cannot claim that state habeas counsel was constitutionally ineffective in order to establish cause to excuse procedural default)).

86. *Mickens*, 2001 WL 133196, at *8.

87. *Id.*, at *9.

88. *Id.*, at *11.

cannot be pursued by the attorney. The duty owed to each defendant prevents the attorney from engaging in finger-pointing. The majority further held that a defendant must show an adverse effect as a result of the attorney's conflict of interest before his conviction will be reversed.[89] The majority was not persuaded by Judge Michael's dissent which argued that the trial judge's duty under *Holloway* and *Wood* is a constitutional obligation, and that failure to inquire into the potential conflict mandates the reversal of conviction.[90]

Practitioners should note that the Fourth Circuit considered the evidence of the conflict of interest even though the claim was not raised on direct appeal in the state courts. Mickens was allowed to raise the claim notwithstanding the fact that habeas counsel was able to discover the conflict.[91] The court refused to attribute to the defendant his trial counsel's failure to reveal the potential conflict of interest.

V. Epilogue

On April 16, 2001, the United States Supreme Court issued a stay of execution and granted certiorari on the issue of whether "a defendant must show an actual conflict of interest and an adverse effect in order to establish a Sixth Amendment violation where a trial court fails to inquire into a potential conflict of interest about which it reasonably should have known."[92]

Matthew S. Nichols

89. *Id.*, at *10.
90. *Id.*, at *9.
91. *Id.*, at *6.
92. Mickens v. Taylor, No. 00-9285, 2001 WL 348936 (Apr. 16, 2001).