Capital Defense Journal

Volume 15 | Issue 1 Article 19

Fall 9-1-2002

McWee v. Weldon 283 F.3d 179 (4th Cir. 2002)

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I. Facts

On July 6, 1991, in a rural South Carolina convenience store, Jerry McWee ("McWee") shot and killed a store clerk. Afterwards, he and his accomplice, George Wade Scott, stole some cigarettes, a gun, and money from the cash register. Later, McWee admitted to shooting the clerk twice— the first time by "accident," and the second time by "mistake."[1] The jury found McWee guilty of murder and armed robbery, and imposed the death sentence.[2]

Before jury selection began, McWee's attorneys asked the court for permission to question potential jury members about their understanding of the terms "life imprisonment" and "parole eligibility." During that conversation, the trial judge initially indicated that he would later charge the jury on the meaning of parole eligibility.[3] The trial judge, the prosecutor, and McWee's attorneys all agreed that if the jury requested the statute, its request would be granted.[4] The statute would have informed the jury that McWee could have faced death or life imprisonment; life imprisonment required a mandatory minimum term of imprisonment for thirty years.[5] The conversation continued and the trial judge reserved judgment on whether he would instruct the jury on parole eligibility. The judge continued to bar McWee's attorneys from discussing parole eligibility during the jury selection.[6]

During the penalty phase, McWee's attorneys decided not to delve into McWee's mental illness and instead focused upon McWee's sense of responsibility and remorse for his actions. To that end, McWee himself testified during the penalty phase that he felt "regret" for his actions and that he was "extremely remorseful for the course of events." Based upon this strategy, the attorneys decided to conduct only a limited investigation into McWee's background. They

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1. State v. McWee, 472 S.E.2d 235, 237 (S.C. 1996) ("*McWee I*").

2. McWee v. Weldon, 283 F.3d 179, 182 (4th Cir. 2002) ("*McWee II*").

3. *Id.* at 182.

4. Joint Appendix at 17, McWee v. Weldon, 283 F.3d 179 (4th Cir. 2002) (No. 01-21) (this fact is not recited in the court's opinion).

5. *See* S.C. CODE ANN. § 16-3-20(A) (Law. Co-op. Supp. 1993) (providing that a person convicted of murder must be punished by death, life imprisonment, or by a mandatory minimum term of imprisonment for thirty years).

6. *McWee II*, 283 F.3d at 182.

did not explore McWee's family medical record, which later revealed an extensive family history of mental illness that could have been used as mitigating evidence.[7]

McWee's attorneys did put on some mental health mitigating evidence. They called Dr. John Whitley, a psychiatric expert who had examined McWee eight times. He opined that McWee suffered from "severe depression," "psychosis," and "command hallucinations." Dr. Whitley did not express an opinion that McWee lacked an understanding of the judicial proceedings or the ability to determine moral or legal right from wrong.[8] The defense counsel also questioned a state psychiatrist, Dr. Donald Morgan, who testified that it was his opinion that McWee was malingering.[9]

The trial judge instructed the jury to give plain and ordinary meaning to the terms "life imprisonment" and "death penalty."[10] Two minutes into the jury's sentencing deliberations, it asked the court how many years a defendant would have to serve before he became parole eligible.[11] The judge did not give an instruction regarding the statutory thirty year minimum; rather, he repeated that life and death were to be given their ordinary meanings. Defense counsel took exception and the exception was overruled.[12] At the close of the penalty phase, McWee was sentenced to death.[13]

On direct appeal to the Supreme Court of South Carolina, McWee claimed that his due process and Eighth Amendment rights were violated when the trial judge refused to charge the jury with an explanation of parole eligibility.[14] The Supreme Court of South Carolina ruled that the judge's initial vacillation did not influence voir dire, jury selection, or the presentation of the defendant's case-in-chief.[15] The court further held that because a life sentence for McWee could have included the possibility of parole, *Simmons v South Carolina*[16] did not require the trial judge to explain parole eligibility to the jury.[17]

In the state post-conviction review proceeding, McWee claimed that his attorneys were ineffective because they failed to raise the issues of incompetency

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7. *Id.* at 187-88.

8. *Id.* at 185.

9. *Id.*

10. *Id.* at 183.

11. *McWee I*, 472 S.E.2d at 238; *see* Appendix at 252, *McWee* (No. 01-21) (asking "under South Carolina law is there a minimum number of years that must be served of a life sentence before eligibility for parole").

12. *McWee I*, 472 S.E.2d at 238; *see* Appendix at 253, 255, *McWee* (No. 01-21).

13. *McWee II*, 283 F.3d at 182.

14. *McWee I*, 472 S.E.2d at 238.

15. *Id.*

16. 512 U.S. 154 (1994).

17. *McWee I*, 472 S.E.2d at 238; *see* Simmons v. South Carolina, 512 U.S. 154, 169 (1994) (holding that when the defendant is parole ineligible and future dangerousness has been introduced, due process requires that the defendant be allowed to bring his parole ineligibility to the attention of the jury).

and insanity.[18] Dr. Whitley testified again, and this time emphasized that, in fact, McWee was *not* competent to stand trial and lacked the capacity to tell right from wrong at the time of the shooting. Dr. Whitley stated that McWee's attorneys never inquired about their client's competency to stand trial or the possibility of an insanity defense.[19] The post-conviction review court held a specific factual determination and concluded that McWee's attorneys had indeed asked Dr. Whitley "if there were any mental health defenses available to McWee."[20] The post-conviction review court also found that, given the attorneys' strategy of responsibility and regret, their cursory investigation of McWee's background had been reasonable.[21] McWee appealed this decision to the Supreme Court of South Carolina and lost. After being denied a writ of habeas corpus in federal district court, McWee sought a certificate of appealability in the United States Court of Appeals for the Fourth Circuit.[22]

II. Holding

The United States Court of Appeals for the Fourth Circuit denied the motion for a certificate of appealability.[23] It found that McWee was not entitled to a writ of habeas corpus because the state court decisions were neither contrary to, nor an unreasonable application of, federal law.[24] First, the court held that the state court's refusal to charge the jury with specific parole eligibility instructions did not contradict *Simmons*.[25] Second, the court concluded that the state post-conviction review court properly applied *Strickland v. Washington*[26] in determining that counsel was not ineffective.[27]

III. Analysis / Application in Virginia

A. Due Process

The Fourth Circuit rejected McWee's claim that his due process rights were violated when the trial judge, despite his initial indication to the contrary, refused

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18. *McWee II*, 283 F.3d at 184.

19. *Id.* at 185.

20. *Id.* at 186.

21. *Id.* at 188.

22. *Id.* at 182.

23. *Id.*

24. *McWee II*, 283 F.3d at 182; *see* 28 U.S.C. § 2254(d)(1) (2000) (stating that a writ of habeas corpus pursuant to a state court decision can only be granted if the state court decision was contrary to or an unreasonable application of clearly established federal law; part of the Anti-Terrorism and Effective Death Penalty Act of 1996).

25. *McWee II*, 283 F.3d at 184; *see Simmons*, 512 U.S. at 156.

26. 466 U.S. 668 (1984).

27. *McWee II*, 283 F.3d at 186; *see* Strickland v. Washington, 466 U.S. 668, 687 (1984) (holding that a Sixth Amendment violation requires that the defendant "must show that counsel's performance was deficient").

to define parole eligibility.[28] The court found that McWee mischaracterized the judge's statements and that the judge had never made a promise.[29] Moreover, the Fourth Circuit did not find error in the Supreme Court of South Carolina's conclusion that the trial judge's initial indication had "no influence on voir dire, jury selection, or presentation of the evidence."[30] McWee's claim arose primarily from the last statement the trial judge made about giving the requested charge, "[W]e'll address . . . at a later time whether or not you want that in your general charge."[31] The Fourth Circuit did not consider that the words "you want" could have left an impression with the defense counsel that they would be able to choose whether parole eligibility would be mentioned in the jury charge. Nor did the court explain how it reached the conclusion that this statement had no influence on the ensuing proceedings. As a practical matter, the court seems to be saying that in Due Process review it is not necessary to reconsider any evidence of actual prejudice.

The compelling gap in the Fourth Circuit's discussion is the fact that it never addressed the separate promise the judge made to charge the statute upon request of the jury. This promise was not retracted, clearly affected an issue at the forefront of the jury's deliberation, and was ignored in the Fourth Circuit's opinion. The court emphasized that *Simmons* does not require an explicit instruction if the defendant is parole eligible.[32] *Simmons* goes on, however, to state that a "plain and ordinary" meaning explanation "does nothing to dispel the misunderstanding reasonable jurors may have about the way in which any particular state defines 'life imprisonment.'"[33] The jury's question regarding the terms of life imprisonment indicated that it had a reasonable misunderstanding as to how South Carolina defined life imprisonment. If a plain and ordinary meaning explanation was inadequate to satisfy a questioning jury's confusion surrounding the term life imprisonment, it is unclear how the same instruction is adequate to explain the terms of parole eligibility. The fact that the jury asked such a specific question indicates that, given the knowledge that McWee would not be released at least until the age of seventy-one, it might have sentenced him differently. The jury in this case might have made a "false choice."[34] The implications of this void in the court's discussion point out that the Fourth Circuit will not consider actual jury confusion as proof of a Due Process violation.

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28. *McWee II*, 283 F.3d at 183.

29. *Id.*

30. *Id.*

31. *Id.*

32. *Id.* at 184.

33. *Simmons*, 512 U.S. at 170.

34. *Id.* at 161 (stating that "to the extent this misunderstanding pervaded the jury's deliberations, it had the effect of creating a false choice between sentencing petitioner to death and sentencing him to a limited period of incarceration").

B. *The* Simmons *Instruction*

The Fourth Circuit emphasized that when the defendant is parole eligible, that eligibility nullifies any requirement for a life-means-life instruction.[35] This issue generally does not arise in Virginia. The Supreme Court of Virginia's mandate in *Yarbrough v Commonwealth*[36] requires a life-means-life instruction in the prosecution of all capital murders committed after the abolition of parole.[37] Nevertheless, the Fourth Circuit's decision not to require a parole-eligibility instruction could come up in the event of a "cold hit" on a murder committed prior to January 1, 1995. If the police enter a current felony suspect's DNA or fingerprints into the state database and receive a "cold hit" linking the suspect to a capital crime committed prior to January 1, 1995, the defendant would still be parole eligible.[38] In this instance, the suspect could be treated much the same way as McWee— because he is parole-eligible, the judge cannot instruct that life-means-life and apparently is not required to instruct on parole eligibility. Defendants who are charged with crimes committed prior to 1995 should not expect to be granted an instruction on parole eligibility.

C. *Application of* Strickland

1. *Competency / Sanity*

The Fourth Circuit applied the *Strickland* standard to address McWee's Sixth Amendment claims.[39] On McWee's first purported violation, that counsel failed to contest the defendant's competency or sanity, the court set out the two-part *Strickland* standard.[40] The Fourth Circuit relied on 28 U.S.C. § 2254(e)(1) to defer

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35. *McWee II*, 283 F.3d at 184.

36. 519 S.E.2d 602 (Va. 1999).

37. Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (holding that, upon the defendant's request, the trial court must instruct the jury that life imprisonment means life imprisonment without parole); VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) (providing that, upon the defendant's request, the jury will be instructed that the defendant shall not receive parole if sentenced to life in prison for a crime committed after January 1, 1995).

38. Ramdass v. Angelone, 530 U.S. 156, 159 (2000) (holding that a *Simmons* instruction need not be extended to defendants whose parole ineligibility is not yet final). The prosecutor in *Ramdass* argued future dangerousness and the defendant was sentenced to death; during the sentencing proceedings, the defendant was found guilty of armed robbery in a separate proceeding which eventually made him ineligible for parole under Virginia's three-strikes rule. *Id.* at 162-63. The armed robbery conviction was not, however, a final judgment at the time of the defendant's capital sentencing; therefore, the defendant was not considered parole ineligible and a *Simmons* instruction was not given. *Id.* at 167.

39. *McWee II*, 283 F.3d at 186.

40. *Id.* at 186-88; *see Strickland*, 466 U.S. at 687 (defining the two-part test as a "showing that counsel made errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment . . . [and] that the deficient performance prejudiced the defense").

to the state court's finding of fact.[41] The state court concluded that McWee's attorneys had indeed sought out Dr. Whitley's opinion regarding mental health defenses.[42] The court then turned to the merits of McWee's claim. It pointed briefly to the fact that McWee was twice evaluated and twice declared competent before trial began.[43] The court then focused on McWee's conduct during the trial and found that the trial record indicated that McWee was "unquestionably" competent to stand trial.[44] Therefore, counsels' decision not to contest competency was reasonable and McWee's Sixth Amendment rights were not violated.[45] The court held that the post-conviction review court reasonably applied *Strickland* when it rejected this claim.[46]

However, the court did not address the fact that *Strickland* urges that counsels' decisions be reviewed in light of the facts counsel had at the time the decision was made.[47] McWee's competence at trial could not have factored into counsels' pre-trial competency decision; yet, his competence factored into the court's determination that counsel made a reasonable decision.[48] The Fourth Circuit gave the weight of its attention to factors that could not possibly have entered into counsels' pre-trial decision— McWee's consultations with his lawyers during the trial and his testimony on the stand— and used these factors to contribute to its holding that counsels' initial decision fell within "reasonable professional assistance."[49]

The Fourth Circuit continued to apply *Strickland* as it evaluated McWee's second claim— that counsels' decision not to put forward an insanity defense violated his Sixth Amendment right to effective counsel.[50] The court relied on McWee's statements to his attorneys regarding right and wrong and pointed out that Dr. Whitley did not change his testimony until the post-conviction stage.[51] The court found that the "heavy measure of deference to counsel's judgments" required in *Strickland* cast counsels' strategic decision to focus on McWee's remorse as reasonable assistance.[52] Therefore, the Fourth Circuit found that the

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41. *McWee II*, 283 F.3d at 186; *see* 28 U.S.C. § 2254(e)(1) (2000) (stating that when a defendant applies for a writ of habeas corpus, state court determinations of fact are presumed to be correct and the petitioner must rebut the presumption by clear and convincing evidence).

42. *McWee II*, 283 F.3d at 186.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.*

47. *Strickland*, 466 U.S. at 690 (stating that "a court deciding an actual ineffectiveness claim must judge the reasonableness of counsel's challenged conduct on the facts of the particular case, viewed as of the time of counsel's conduct").

48. *McWee II*, 283 F.3d at 186.

49. *Id.* at 185 (quoting *Strickland*, 466 U.S. at 689).

50. *Id.* at 186-87.

51. *Id.* at 187-88.

52. *Id.* at 188 (quoting *Strickland*, 466 U.S. at 691).

post-conviction review court reasonably applied *Strickland* in rejecting this portion of McWee's ineffective assistance of counsel claim.[53]

2. Mitigation

McWee claimed that his attorneys should have investigated further into his family to uncover a history of mental illness to use as mitigating evidence, and that their decision not to do so constituted ineffective assistance of counsel. The Fourth Circuit found that counsels' scarcity of time and resources while preparing for the penalty phase bolstered their decision to pursue remorse as their most effective course for mitigation.[54] The court based its finding on *Strickland*'s directive that counsel has a duty to make reasonable investigations or reasonable decisions to limit investigation.[55]

The court further found that there would not have been a reasonable probability of a different outcome even if counsels' decision had been different.[56] The court reasoned that because counsel had made a strategic decision and some mental health testimony did reach the jury, there was not a reasonable probability that a different outcome would have occurred.[57] Surprisingly, the court made no mention of the United States Supreme Court's decision in *Williams v Taylor*,[58] the leading case on mitigation evidence, which did weigh the probability of a different outcome.[59] McWee did not have the extreme gaps in mitigation evidence that ultimately led to a reversal in *Williams*.[60] McWee did, however, have an argument that there was a reasonable probability that the outcome would have been different, but for the lack of mitigating evidence. The State's psychiatrist testified during the sentencing phase that McWee was malingering.[61] This testimony undermined both the defendant and the testimony of Dr. Whitley. If counsel had presented mitigating evidence to support a strong history of mental illness, it is possible that the testimony of both the defendant and Dr. Whitley would have played a more credible role in the jury's deliberations and the ultimate outcome. The court did not weigh this factor as part of its analysis surrounding

53. *Id.*

54. *McWee II*, 283 F.3d at 188-89.

55. *Id.* at 188 (quoting *Strickland*, 466 U.S. at 691).

56. *Id.* at 189.

57. *Id.* at 188-89.

58. 529 U.S. 362 (2000).

59. *See* Williams v. Taylor, 529 U.S. 362, 396, 399 (2000) (holding that when defense counsel failed to include mitigating evidence there was a reasonable probability of a different outcome and the defendant's constitutional rights to effective counsel had been violated). The omitted mitigating evidence included the following: records that demonstrated the defendant was physically abused by his parents, removed from their care due to criminal neglect, abused in foster care, returned to his parents, found to be borderline mentally retarded, and testimony asserting he helped crack a prison drug ring and returned a prison guard's wallet. *Id.* at 395-96.

60. *Id.* at 399.

61. *McWee II*, 283 F.3d at 185.

a reasonable probability of a different outcome.[62] In so doing, the court conveyed the message that the standard for "reasonable probability" is high; yet, it remains unclear what level of missing mitigation evidence will meet such a standard.

The Fourth Circuit stated, "[T]his is not a case where counsel's failure to thoroughly investigate kept the jury completely in the dark as to McWee's alleged mental problems."[63] The fact that counsel did offer testimony of McWee's mental problems is treated with some importance.[64] The court here implied that perhaps a similar strategic choice that kept the jury from hearing any mental health mitigators would not have met the *Strickland* test.

IV. Conclusion

The chances of a capital defendant being parole eligible have been statutorily diminished; nevertheless, for those who are still covered, a parole eligibility instruction is all but impossible. Even when the jury voiced specific confusion over parole and its effects, the Fourth Circuit refused to apply the benefits of *Simmons*.[65] In Virginia, the three strikes rule required two final judgments in order for a defendant to be considered parole ineligible. The Court in *Ramdass* would not require an instruction to the jury on parole eligibility because the defendant's other convictions had not reached final judgment at the time of capital sentencing.[66] The holding in *Ramdass* informs attorneys that a capital trial should not proceed until a final judgment has been reached on all other offenses. Reading *Ramdass* in conjunction with the court's refusal to instruct on parole eligibility in *McWee* underscores the importance of delaying the capital trial until all other final judgments have been reached.

The Fourth Circuit's application of *Strickland* is equally strict. *Strickland* provides language that grants wide deference to counsel; yet, there are mitigation gaps that constitute ineffective assistance. *McWee* reveals some insight into how the Fourth Circuit applies *Strickland*– that is, counsel has significant freedom to make strategic choices, but counsel may also be expected to reveal potential mental health mitigators to the jury.

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62. *Id.* at 188-89.
63. *Id.* at 189.
64. *Id.*
65. *Id.* at 190; *McWee I*, 472 S.E.2d at 238.
66. *Ramdass*, 530 U.S. at 167.