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Oken v. Corcoran 220 F.3d 259 (4th Cir. 2000)

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I. Facts

At midnight on Sunday, November 1, 1987, Keith Garvin ("Keith") arrived at the United States Navy base in Oceana, Virginia. He had just spent the weekend with his wife, Dawn Garvin ("Garvin"), at their apartment in Maryland. Upon his arrival to the base, he made several unsuccessful attempts to call her. Concerned, Keith telephoned his father-in-law, Frederick Romano ("Romano"), and asked him to check on Garvin. Romano arrived at his daughter's apartment to find the door ajar, lights on, and the television blaring. Upon entering the apartment, he found Garvin in the bedroom, lying on the bed nude with a bottle protruding from her vagina. Romano attempted to perform CPR and observed bleeding from Garvin's forehead. He called the paramedics, who attempted to administer CPR, but Garvin was dead.[1]

At 2:30 a.m. that morning, Detective James Roeder ("Roeder") of the Baltimore County Police Department arrived at Garvin's apartment. He testified that when he entered the apartment he observed clothing strewn about the living room, including a pair of pants turned inside out and a brassiere that was ripped and not unhooked. Roeder also found a piece of rubber from a pair of tennis shoes in the living room. In the bedroom, Roeder found two spent .25 caliber shell casings. The autopsy of Garvin's body revealed that she died as a result of two contact gunshot wounds to the head.[2]

The State's evidence against Steven Howard Oken ("Oken") consisted primarily of the murder weapon, which was found in his home, and the piece of rubber found in Garvin's apartment that matched Oken's shoe. Several witnesses testified that Oken had attempted to gain entry into residences in the vicinity of Garvin's apartment a few days before the murder. Oken entered pleas of not guilty and not criminally responsible. On January 18, 1991, a jury in the Circuit Court for Baltimore County found Oken guilty of murder in the first degree, first degree sexual offense, burglary, and use of a handgun in a crime of violence.[3] The jury acquitted

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1. Oken v. State, 612 A.2d 258, 261 (Md. 1992) (reviewing Oken's convictions and sentences).

2. *Id.* at 261.

3. MD. CODE ANN., CRIMES & PUNISHMENT § 407 (1999) ("[a]ll murder . . . perpetrated by . . . wilful, deliberate, and premeditated killing shall be murder in the first degree"). The State sought the death penalty for the murder Oken committed because the murder was committed "while committing or attempting to commit . . . a sexual offense in the first degree." MD. CODE ANN., CRIMES & PUNISHMENT § 413(d)(10) (1999). This Maryland

Oken of the robbery charge.[4] He elected a bench trial on the issue of criminal responsibility in which Judge Smith concluded that Oken was criminally responsible.[5]

On January 25, 1991, the same jury unanimously sentenced Oken to death based upon the aggravating circumstance that the murder was committed in the commission of a first degree sexual offense.[6] The jury returned a verdict sheet indicating that less than twelve jurors found as mitigating circumstances a preexisting life sentence in Maine,[7] sexual sadism, and substance abuse. Judge Smith imposed a sentence of life imprisonment for the first degree sexual offense, and consecutive terms for the burglary and handgun violation.[8]

On direct review, the Court of Appeals of Maryland affirmed Oken's convictions for first degree murder and first degree sexual offense, as well as his sentence of death, but reversed his conviction for burglary.[9] The court also rejected Oken's challenges to his conviction and sentence on collateral review, affirming the lower court's denial of Oken's petition for habeas relief.[10] The federal district court denied Oken's petition for writ of habeas corpus.[11]

II. Holding

The United States Court of Appeals for the Fourth Circuit affirmed the federal district court's denial of petitioner's application for federal habeas relief.[12] The court found that Oken procedurally defaulted his *Morgan*[13] claim because he failed to raise the claim on direct appeal in the Court of Appeals of Maryland and failed to demonstrate special circumstances that would excuse the waiver.[14] The court also concluded that the

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statute is comparable to capital murder under § 18.2-31(5) of the Virginia Code. VA. CODE ANN. § 18.2-31(5) (Michie 2000). An important difference is that the Maryland statute is applied at the sentencing phase of the trial and the jury must find the aggravating circumstance beyond a reasonable doubt. § 413(d).

4. Oken v. State, 681 A.2d 30, 35 (Md. 1996).

5. *Id.* Criminal responsibility in Maryland is the proceeding that assesses mental capacity. *Id.*

6. *Id.*; *see* § 413(d)(10); *supra* note 3.

7. *Oken*, 681 A.2d at 34. Less than two weeks after Oken murdered Garvin, he sexually assaulted and murdered his sister-in-law, Patricia Hirt in his Maryland home. He then fled to Maine where he murdered a desk clerk at a Maine hotel. A Maine court sentenced Oken to life without parole for first degree murder. Oken was then returned to Maryland to face separate prosecutions for the Garvin and Hirt homicides. *Id.*

8. *Id.* at 35.

9. *Oken*, 612 A.2d at 283.

10. Oken v. Corcoran, 220 F.3d 259, 263 (4th Cir. 2000); *see Oken*, 681 A.2d at 33.

11. *Oken*, 220 F.3d at 263.

12. *Id.* at 262.

13. 504 U.S. 719 (1992).

14. *Oken*, 220 F.3d at 264; *see* Morgan v. Illinois, 504 U.S. 719, 733-34 (1992) (providing

Court of Appeals of Maryland's decision to deny petitioner's *Simmons*[15] claim was not an "unreasonable application of" or "contrary to" clearly established federal law.[16]

III. Analysis / Application in Virginia

The Fourth Circuit conducted review of Oken's habeas petition and applied the United States Supreme Court's recent construction of 28 U.S.C. § 2254(d)(1)'s federal standard of review.[17] *Williams* provides that a federal court may grant a petition for a writ of habeas corpus only in the following situations: (1) the decision of the state court is contrary to federal law when a decision of law or application of law to fact is indistinguishable from the precedent yet reaches a conclusion that is opposite and irreconcilable with the identical issue addressed in the precedent; or (2) the decision of the state court is an unreasonable application of federal law because it extends precedent to a context which is not appropriate or fails to extend precedent to a

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that petitioner's only method for removing biased jurors who would "unwaveringly impose death after a finding of guilt" is full and proper voir dire). The constitutional requirement of an impartial jury under the Sixth and Fourteenth Amendments demands that defendant receive an adequate voir dire to identify unqualified jurors. The identification of unqualified jurors is achieved by sufficient inquiry into "whether the view of prospective jurors on the death penalty would disqualify them from sitting." *Morgan*, 504 U.S. at 732. Oken asserted that the trial court did not permit proper voir dire. *Oken*, 220 F.3d at 264.

15. 390 U.S. 377 (1968).

16. *Oken*, 220 F.3d at 267; *see* Simmons v. United States, 390 U.S. 377, 394 (1968) (finding that when defendant gives testimony at a suppression hearing, the "testimony thereafter may not be admitted against him at trial on the issue of guilt unless he makes no objection" because it "is intolerable that one constitutional right should have to be surrendered in order to assert another"); *see also* Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (1996) (codified as amended at 28 U.S.C. § 2254 (Supp. III 1997)).

Oken's other claims, which were denied, are not addressed in this case note. Oken claimed insufficiency of the evidence to sustain the conviction of the first degree sexual offense. He also claimed ineffective assistance of counsel under the following theories: (1) trial counsel failed to move for a mistrial after the prosecution's closing argument; (2) trial counsel erroneously advised Oken to enter a conditional guilty plea for the murder in Maine; (3) trial counsel failed to present sufficient evidence of Oken's parole ineligibility under Maine law; (4) and trial counsel failed to adduce sufficient evidence of Oken's substance abuse at the time of the Garvin murder. The Fourth Circuit denied all of these claims because the state court decision was not "contrary to," or an "unreasonable application of," federal law under *Strickland v. Washington*. *Oken*, 220 F.3d at 268-71; *see* Strickland v. Washington, 466 U.S. 668, 694 (1984) (holding that counsel is ineffective if there is a "reasonable probability that, but for the counsel's unprofessional errors, the result of the proceeding would have been different").

17. *Oken*, 220 F.3d at 263; *see* § 2254(d)(1); Williams v. Taylor, 120 S. Ct. 1495 (2000) (construing the language found in § 2254, which provides that a federal court is prohibited from granting a petition for writ of habeas corpus unless the state court decision was an "unreasonable application of" clearly established federal law or "contrary to" clearly established federal law); *see also* Jeremy P. White, Case Note, 13 CAP. DEF. J. 123 (2000) (analyzing Williams (Terry) v. Taylor, 529 U.S. 362 (2000)).

context which would be appropriate.[18] Put another way, a federal court may grant habeas relief if the state court identified the correct legal principal but unreasonably applied that principle to the facts of the prisoner's case.[19]

A. Petitioner's Morgan *Claim*

Although the court held that Oken defaulted his *Morgan* claim,[20] the court alternatively applied the *Williams* standard of review to the merits of Oken's claim that the state trial court's voir dire questions were constitutionally inadequate under *Morgan v. Illinois*.[21] The Fourth Circuit said that the Court of Appeals of Maryland's decision did not "unreasonably apply," nor was it "contrary to," the federal law as promulgated in *Morgan*.[22] The

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18. *Oken*, 220 F.3d at 263-64.

19. *Id.* at 264.

20. *Id.* The court held that Oken's *Morgan* claim was procedurally defaulted because he failed to raise the claim on direct appeal to the Court of Appeals of Maryland, thereby waiving this claim as a matter of state law and because he failed to demonstrate special circumstances which would excuse the waiver. *Id.*; *see* MD. CODE ANN., CRIMES & PUNISHMENT § 645A(c)(1) (1996) ("allegation of error shall be deemed to be waived when petitioner . . . intelligently and knowingly failed to make such allegation . . . on direct appeal . . . unless the failure to make such allegation shall be excused because of special circumstances").

The court found that the waiver of Oken's *Morgan* claim need not be "intelligent and knowing" because the failure to raise a *Morgan* claim on direct appeal is the sort of strategic decision of counsel that the Maryland courts have construed as falling outside the intended scope of section 645A(c). *See Oken*, 681 A.2d at 37 (citing Curtis v. Maryland, 395 A.2d 464, 474 (1978)).

The court also found that the procedural default was properly applied because it was "adequate" and "independent" as required by *Johnson v. Mississippi* and *Coleman v. Thompson*. *Oken*, 220 F.3d at 264-65; *see* Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (finding that a procedural rule is "adequate" because it is "consistently or regularly applied"); Coleman v. Thompson, 501 U.S. 722, 750 (1991) (finding that a procedural rule is "independent" of federal law if the state court decision does not rest on federal law and is not interwoven with federal law).

Oken failed to show that waiver would be a "fundamental miscarriage of justice" or sufficient "cause" or "prejudice" existed to excuse the procedural default. *Id.* at 265; *see Coleman*, 501 U.S. at 750. The only "cause" Oken advanced for the procedural default was his ineffective assistance of counsel claim which was also procedurally defaulted because it was not mentioned in his opening brief to the Court of Appeals of Maryland. *See Oken*, 681 A.2d at 36 n.5.

Consequently, it is worth alerting practitioner to the essential need to preserve claims for federal habeas review by raising all constitutional claims at each level of state proceedings. *See generally* Matthew K. Mahoney, *Bridging the Procedural Default Chasm*, 12 CAP. DEF. J. 305 (2000) (emphasizing the importance of preserving all claims of trial error for appeal and collateral review).

21. *Oken*, 220 F.3d at 264; *see Morgan*, 504 U.S. at 734. In assessing the propriety of voir dire in uncovering the biases of prospective jurors the court held that in order to satisfy the Fourteenth Amendment requirement of an impartial jury, the defendant must be permitted to conduct a sufficient inquiry to "identify those jurors who . . . had predetermined whether to impose the death penalty [upon finding of guilt]." *Morgan*, 504 U.S. at 736.

22. *Oken*, 220 F.3d at 265.

Morgan Court held that voir dire questions which only addressed general fairness and the impartiality of the juror and did not probe into when the juror would or would not impose the death penalty were insufficient.[23] The Fourth Circuit relied on its decision in *United States v. Tipton*,[24] which held that a question that asked about the prospective juror's attitude toward the death penalty was sufficient to satisfy the *Morgan* requirements.[25] The *Oken* court concluded that the questions posed by the trial court during voir dire adequately revealed whether a "potential juror's feelings about the death penalty would prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[26]

In his concurrence, Judge Michael agreed that Oken's *Morgan* claim was procedurally defaulted.[27] However, he disagreed with the majority's conclusion that, had the merits of Oken's *Morgan* claim been reached, habeas relief was not warranted.[28] Judge Michael said, [t]he majority's treatment of the merits of the *Morgan* claim . . . is dictum, but it is dictum that I cannot join. I believe that the voir dire conducted in this case was insufficient to identify jurors who would automatically impose the death penalty upon conviction."[29] He asserted that the focus of the questions strayed from the essential inquiry of whether the juror was able to give "due consideration to mitigating evidence at sentencing" and the trial court failed to explain to the jurors that they would consider mitigating and aggravating

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23. *Id.* at 266.

24. 90 F.3d 861 (4th Cir. 1996).

25. *Oken*, 220 F.3d at 266; *see also* United States v. Tipton, 90 F.3d 861 (4th Cir. 1996) (finding sufficient under the *Morgan* standard one question which asked the jury panel whether potential juror's feelings about the death penalty were "strong").

26. *Oken*, 220 F.3d at 266 (construing *Morgan*, 504 U.S. at 728). The court assessed the following four questions that were initially asked to every member of the Oken's jury panel:

> (1) Do you have any strong feelings, one way or the other, with regard to the death penalty?
>
> (2) Do you feel that your attitude, regarding the death penalty, would prevent or substantially impair you from making a fair and impartial decision on whether the Defendant is not guilty or guilty, based on the evidence presented and the Court's instructions as to the law?
>
> (3) Do you feel your attitude, regarding the death penalty, would prevent or substantially impair you from making a fair and impartial decision on whether the Defendant was or was not criminally responsible by reason of insanity, based on the evidence presented and the Court's instructions on the law?
>
> (4) Do you feel that your attitude, regarding the death penalty would prevent or substantially impair you from sentencing the Defendant, based upon the evidence presented and the Court's instructions as to the law which is applicable?

The court found the questions a sufficient inquiry, under the *Morgan* standard, even if not followed-up by any questions. *Id.* (citing *Oken*, 681 A.2d at 38-39).

27. *Oken*, 220 F.3d at 271 (Michael, J., concurring).

28. *Id.* at 274.

29. *Id.*

evidence at a separate sentencing phase.[30] According to Judge Michael, voir dire is inadequate if the questions do not probe into how the prospective juror's "feelings about the death penalty" affect their decision-making.[31] The questions addressed "general fairness" and failed under the *Morgan* standard.[32] It is for these reasons that Judge Michael, had the issue not been procedurally defaulted, would have found the Court of Appeals of Maryland's decision "contrary to" and an "unreasonable application" of federal law.[33]

B. Petitioner's Simmons *Claim*

The Fourth Circuit found that the Court of Appeals of Maryland's decision to deny Oken's *Simmons* claim was not an "unreasonable application of" or "contrary to" the rule set out in *Simmons v. United States*.[34] Oken claimed that his right to testify at the criminal responsibility portion of the proceedings was abridged because the testimony could be used against him at the sentencing phase.[35] His desire to assert his Fifth Amendment right against self-incrimination, at the sentencing phase, allegedly would not be available if he testified at the criminal responsibility portion of the proceedings.[36] The court determined that the *Simmons* holding was limited to the precise facts of that case; a defendant who testified in support of a motion to suppress could not have that testimony used against him at trial.[37] The Fourth Circuit relied heavily upon Supreme Court jurisprudence which permitted the guilt/innocence phase and the sentencing phase of a trial to be conducted by the same jury without a jury instruction that the

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30. *Id.* at 275.

31. *Id.*

32. *Id.* at 274-75. The question in *Morgan* which was held to be proper for determining the attitude of the juror toward the death penalty and mitigating evidence was the following: "If you find [defendant] guilty, would you automatically vote to impose the death penalty no matter what the facts are?" *Morgan*, 504 U.S. at 723; *see Oken*, 220 F.3d at 275. In Oken's trial, the court rejected the following quite similar question: "Are there any murders or any type of murders where no matter what excuses or explanations are offered, you would feel that the person responsible should get the death penalty? What are they?" *Oken*, 220 F.3d at 275. Judge Michael found the questions similar enough to decide that the trial court's rejection of Oken's question should be reversible error. *Id.*

33. *Oken*, 220 F.3d at 276.

34. *Id.* at 267; *see Simmons*, 390 U.S. at 394 (holding that defendant's testimony at suppression hearing cannot be used against him at trial as to guilt/innocence because his prerogative to testify on his behalf should not be used to abridge his Fifth Amendment right against self-incrimination).

35. *Oken*, 220 F.3d at 267 (relying not directly on the holding but on the "broadly worded rationale offered by the *Simmons* court for its holding," the intolerability of having to surrender one constitutional right in order to assert another).

36. *Id.*

37. *Id.* at 267 n.6.

evidence of the first phase cannot be considered at the second phase.[38] The court found no reason to believe that Oken's facts were distinguishable from prior case law and would warrant a different result.[39]

IV. Conclusion

The actual holding of the Fourth Circuit in this case may not provide seismic repercussions for the practitioner; however the court's application of the federal standard of review set forth in *Williams* serves as a guide for potential federal habeas review. This case also proves enlightening as to the competing arguments of the minimum standards for voir dire set forth in *Morgan*. The outcome of a defendant's trial rests heavily voir dire and the defense attorney must tenaciously assert each constitutional claim of trial error to ensure that the defendant receives a constitutionally guaranteed impartial jury.

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38. *Id.* at 267 (intimating that if an instruction to disregard the information at the previous phase of the proceeding were used and determined constitutionally necessary, the outcome of the *Simmons* claim may have been in favor of the petitioner); *see also* Buchanan v. Kentucky, 483 U.S. 402, 417 (1987) (reaffirming that the state's interest in a single jury deciding all the issues in a capital case of sentencing and guilt/innocence without indicating a need for a jury instruction that one portion of evidence may not be considered in another phase of the trial); Lockhart v. McCree, 476 U.S. 162, 180 (1986) (relying upon previous decisions which held that at capital sentencing a jury need not be instructed to disregard evidence given at the guilt/innocence phase).

39. *Oken*, 220 F.3d at 268.