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I. Facts

Dennis Mitchell Orbe ("Orbe") was convicted of capital murder and sentenced to death for robbing and killing a convenience store clerk in York County, Virginia.[1] On direct appeal, the Supreme Court of Virginia upheld Orbe's death sentence.[2] Orbe unsuccessfully sought certiorari from the United States Supreme Court.[3] After the Supreme Court of Virginia dismissed his state habeas petition, Orbe filed a petition for federal habeas relief in May of 2002.[4] The district court dismissed Orbe's habeas petition and declined to grant him a certificate of appealability ("COA").[5]

Upon application to the United States Court of Appeals for the Fourth Circuit, Orbe was granted a COA for five habeas claims.[6] The Fourth Circuit certified the following claims: (1) whether the prosecutor improperly considered Orbe's race in deciding to seek a death sentence ("Race Claim"); (2) whether the court improperly excused a potential juror ("Juror Claim"); (3) whether Orbe's trial counsel rendered ineffective assistance by failing to act properly in response to the prosecutor's unfair race considerations ("IAC Race Claim"); (4) whether Orbe's trial counsel rendered ineffective assistance for "failing to challenge the exclusion of the venireman" ("IAC Juror Claim"); and (5) whether defense counsel's failure to investigate adequately and present mitigating evidence constituted ineffective assistance of counsel ("IAC Mitigation Claim").[7]

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1. Orbe v. True, No. 03-4, 2003 WL 22920337, at *1 (4th Cir. Dec. 11, 2003) (per curiam) (opinion not selected for publication). For a more complete discussion of the facts surrounding the crime, *see generally* Robert H. Robinson, Jr., Case Note, 12 CAP. DEF. J. 261 (1999) (analyzing Orbe v. Commonwealth, 519 S.E.2d 808 (Va. 1999)).

2. *Orbe*, 2003 WL 22920337, at *3 (citing *Orbe*, 519 S.E.2d at 810).

3. Orbe v. Virginia, 529 U.S. 1113 (2000) (mem.).

4. *Orbe*, 2003 WL 22920337, at *3; *see* 28 U.S.C. § 2254 (2000) (discussing the procedures for review of habeas corpus petitions in federal court; part of AEDPA). *See generally* Orbe v. True, 233 F. Supp. 2d 749 (E.D. Va. 2002) [hereinafter *Orbe II*] (dismissing Orbe's federal habeas petition).

5. *Orbe*, 2003 WL 22920337, at *3.

6. *Id.*

7. *Id.*

II. Holding

The Fourth Circuit affirmed the district court's denial of Orbe's habeas petition and rejected each of the five claims for which it had granted a COA.[8] The court found that Orbe failed to show cause for procedurally defaulting the Race and Juror Claims and to demonstrate that his trial counsel was constitutionally ineffective as alleged in the IAC Race, Juror, and Mitigation Claims.[9] In addition, the Fourth Circuit declined to decide whether defendants may use ineffective assistance of counsel ("IAC") claims as cause to excuse the procedural default of the underlying substantive claims.[10]

III. Analysis

A. Race and Juror Claims

Orbe argued that the prosecutor's decision to seek the death penalty was race based.[11] As support, Orbe relied on an alleged statement made by the prosecuting attorney to Orbe's defense counsel in which the prosecutor indicated her unwillingness to agree to a plea that would result in a life sentence.[12] The prosecutor stated that she recently had sought a death sentence against an African American man and believed that she should not treat Orbe, who is white, any differently.[13] Orbe raised this claim for the first time on state habeas review before the Supreme Court of Virginia.[14] Orbe also raised his second claim, that the trial court improperly excluded a potential juror, for the first time in his state habeas proceeding.[15] According to Orbe, the trial court improperly dismissed Velma Conner ("Conner") from jury service based on her answers during death qualification questioning.[16]

In accordance with the rule announced in *Slayton v. Parrigan*,[17] the Supreme Court of Virginia ruled that both the Race Claim and the Juror Claim were procedurally barred because Orbe failed to raise them at trial or on direct appeal.[18] The Fourth Circuit agreed with the district court's determination that

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8. *Id.*
9. *Id.* at *4, *16.
10. *Id.* at *5.
11. *Orbe*, 2003 WL 22920337, at *6.
12. *Id.*
13. *Id.*
14. *Id.* at *3.
15. *Id.*
16. *Id.* at *8. The trial court dismissed Conner because she "consistently expressed uncertainty in her ability to act as an unbiased juror capable of imposing the death penalty if Orbe were convicted of capital murder." *Id.*
17. 205 S.E.2d 680 (Va. 1974).
18. *Orbe*, 2003 WL 22920337, at *3; *see* Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974)

Orbe had "procedurally defaulted federal habeas review" of those claims by failing to raise them in his direct appeal to the Supreme Court of Virginia.[19] The Fourth Circuit considered whether Orbe had adequately shown " 'cause for the default and actual prejudice' or 'that failure to consider the claims will result in a fundamental miscarriage of justice.' "[20] Orbe presented evidence of defense counsel's ineffective assistance to establish "cause" for the procedural default of the Race and Juror Claims.[21] The Fourth Circuit noted that Orbe was essentially relying on his IAC Race and IAC Juror Claims to excuse the procedural default of his Race and Juror Claims.[22] Because the state habeas court had adjudicated Orbe's IAC Race and IAC Juror Claims on the merits, 28 U.S.C. § 2254(d)(1) mandated that a federal habeas court apply a deferential standard of review to those claims.[23] However, Orbe argued that the IAC claims deserve de novo review when offered as "cause" for procedural default.[24] The Fourth Circuit declined to decide whether IAC claims that establish "cause" for the procedural default of underlying substantive claims should receive deferential or de novo review.[25] Instead, the court based its decision to dismiss the Race and Juror Claims on its finding that Orbe had failed to establish "cause" because he did not prove that defense counsel was constitutionally ineffective.[26]

B. Ineffective Assistance of Counsel Claims

Orbe argued that defense counsel rendered ineffective assistance by failing to: (1) use the prosecutor's improper consideration of race to the benefit of the defense; (2) object to the exclusion of venireman Conner; and (3) investigate Orbe's background adequately and present mitigating evidence at the sentencing phase of his trial.[27] In denying Orbe's IAC Race Claim, the Fourth Circuit stated that Orbe's defense counsel did not believe that the prosecutor's decision was

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(stating the rule that claims that could have been raised at trial or on direct appeal, but were not, are procedurally defaulted).

19. *Orbe*, 2003 WL 22920337, at *4.

20. *Id.* (quoting Coleman v. Thompson, 501 U.S. 722, 750 (1991)).

21. *Id.*

22. *Id.*

23. *Id.* at *5; *see* 28 U.S.C. § 2254(d)(1) (2000) (preventing federal habeas relief unless the state court's adjudication "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States"; part of AEDPA).

24. *Orbe*, 2003 WL 22920337, at *5; *see Orbe II*, 233 F. Supp. 2d at 757 (addressing the defendant's argument "that the cause-for-default ineffective assistance determination is reviewable by a federal court *de novo*").

25. *Orbe*, 2003 WL 22920337, at *5; *see* discussion *infra* Part IV.A (discussing whether IAC claims that establish cause for procedural default deserve deferential or de novo review).

26. *Orbe*, 2003 WL 22920337, at *5.

27. *Id.* at *3.

racially motivated and that they were not "constitutionally ineffective for failing to raise a selective prosecution claim on appeal or for failing to exploit the prosecutor's mere mention of Orbe's race during the conversation."[28] Similarly, the court found that Orbe failed to establish that defense counsel's decision not to object to the dismissal of Conner constituted ineffective assistance.[29] The Fourth Circuit stated that "a court must indulge a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance" and the decision not to object "might be considered sound trial strategy."[30] Finally, the court rejected Orbe's claim that the failure to investigate properly and present mitigation evidence was sufficient to establish ineffective assistance.[31] Pursuant to the test set forth in *Strickland v. Washington*,[32] the Fourth Circuit determined that counsel's performance was reasonable and that, even if it was deficient, the defense was not prejudiced because additional evidence would have been repetitive.[33] Therefore, the Fourth Circuit affirmed the district court's decision to deny Orbe's IAC claims.[34]

IV. Application in Virginia

A. Ineffective Assistance as "Cause" for Procedural Default

Orbe's IAC Race and Juror Claims were adjudicated on the merits by the Supreme Court of Virginia in the state habeas proceeding.[35] The Fourth Circuit noted that it was precluded from granting federal habeas relief for these claims unless the state court's adjudication " 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme

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28. *Id.* at *7.

29. *Id.* at *10.

30. *Id.* (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).

31. *Id.* at *15–*16. In particular, Orbe claimed that defense counsel:

> (1) failed to adequately investigate and present to the jury Orbe's history of sexual, physical and emotional abuse; (2) failed to obtain and present additional mitigating evidence from family and friends regarding this abuse, his troubled childhood, and his struggles with mental illness and depression; (3) failed to present evidence that Orbe probably suffered from Bipolar Disorder, instead of or in addition to evidence of his depression and suicidal thoughts; and (4) failed to obtain mental health records that would have demonstrated that Orbe was suicidal and had sought in-patient treatment eight months prior to the murder.

Id. at *11.

32. 466 U.S. 668 (1984).

33. *Orbe*, 2003 WL 22920337, at *14–*16; *see Strickland*, 466 U.S. at 688 (stating that to prove ineffective assistance of counsel a defendant must show "that counsel's representation fell below an objective standard of reasonableness" and that counsel's conduct prejudiced the outcome of the proceeding).

34. *Orbe*, 2003 WL 22920337, at *16.

35. *Id.* at *5.

Court of the United States' or 'resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented.' "[36] The district court properly applied this deferential standard of review to the IAC Race and Juror Claims.[37] By offering these claims as "cause" to excuse default of the substantive Race and Juror Claims, Orbe sought to have the Fourth Circuit review his IAC claims de novo rather than apply the deferential review required by 28 U.S.C. § 2254(d)(1).[38] Thus, Orbe attempted to use the same facts of ineffective assistance in two different ways: "First, he relie[d] on them as cause to excuse the default of the underlying substantive claims . . . and second, he assert[ed] that they are independent grounds for relief in their own right."[39] The Fourth Circuit was presented with the question of whether a federal court should apply de novo or deferential review to IAC claims offered as "cause" for procedural default.[40] Although the court chose to dismiss the substantive claims on the grounds that Orbe failed to show that counsel was ineffective, and therefore failed to show "cause," the standard of review issue is still relevant.[41]

In Orbe's case, the district court stated that "it is logical that the same degree of deference must be accorded to prior state adjudications of ineffective assistance claims, regardless of the procedural posture of the ineffective assistance claims on federal habeas."[42] Yet, if federal courts apply deferential review to "cause" determinations, there is the risk that a "procedurally defaulted federal constitutional claim" might never be heard on the merits in any court.[43] In *Murray v. Carrier*[44] the Supreme Court stated that the question of "cause" is "a question of federal law."[45] The Court echoed this statement in *Johnson v. Mississippi*[46] by announcing that " 'the question of when and how defaults in compliance with state procedural rules can preclude our consideration of a federal question is itself a federal question.' "[47] Along these lines, the Fourth Circuit noted that "at least one other district court has . . . [held] that procedural default remains an independent federal doctrine and, accordingly, that we determine de

36. *Id.* (quoting 28 U.S.C. § 2254(d)(1) (2000)).
37. *Id.*
38. *Id.*
39. *Orbe II*, 233 F. Supp. 2d at 757.
40. *Orbe*, 2003 WL 22920337, at *5.
41. *Id.*
42. *Orbe II*, 233 F. Supp. 2d at 759.
43. *Orbe*, 2003 WL 22920337, at *5.
44. 477 U.S. 478 (1986).
45. Murray v. Carrier, 477 U.S. 478, 489 (1986).
46. 486 U.S. 578 (1988).
47. Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (quoting Henry v. Mississippi, 379 U.S. 443, 447 (1965)).

novo whether a state court defendant has demonstrated cause to excuse his or her failure to raise a constitutional claim before the state courts."[48]

Attorneys should be aware that the Fourth Circuit has not taken a definitive stance on whether it will use deferential or de novo review for "cause" determinations. If the court uses deferential review, the petitioner must prove that the state court's adjudication of the claims offered as "cause" was "contrary to, or involved an unreasonable application of, clearly established Federal law."[49] If the court applies de novo review, petitioners simply need to prove "cause" as they would an independent basis for relief. De novo review is clearly preferable in that it does not restrict the petitioner's ability to establish cause persuasively. In addition, de novo review effectively allows petitioners a second chance to prove IAC by permitting another court to take a fresh look at the IAC claims.

B. Mitigation Investigation

The Fourth Circuit held that despite defense counsel's incomplete investigation, the defense was not prejudiced.[50] The court's decision was based on its belief that additional mitigation evidence would have been repetitive of evidence already presented to the jury.[51] However, in death penalty cases, defense counsel is required by *Wiggins v. Smith*[52] "to undertake reasonable investigations into possible mitigating evidence that could be presented during the penalty phase."[53] Regardless of whether such evidence was cumulative, defense counsel clearly had a duty at least to procure Orbe's mental health records. Thus, although counsel's overall mitigation investigation was extensive, the lack of these records show that the investigation was incomplete. Attorneys should be aware that death penalty cases require "reasonable investigations" and that they should perform all reasonable investigations regardless of whether they plan to use the materials during the sentencing phase.

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48. *Orbe*, 2003 WL 22920337, at *5. *Compare* Holloway v. Horn, 161 F. Supp. 2d 452, 478 n.12 (E.D. Pa. 2001), *and* Holland v. Horn, 150 F. Supp. 2d 706, 747 (E.D. Pa. 2001), *with Orbe*, 233 F. Supp. 2d at 760 (concluding that "Orbe's ineffective assistance claims asserted as cause to excuse default were decided on the merits . . . and thus must be reviewed deferentially pursuant to § 2254(d)").

49. *See* 28 U.S.C. § 2254(d)(1) (2000) (discussing when a federal habeas court may grant relief; part of AEDPA).

50. *Orbe*, 2003 WL 22920337, at *15.

51. *Id.*

52. 123 S. Ct. 2527 (2003).

53. Wiggins v. Smith, 123 S. Ct. 2527, 2535-36 (2003); *Orbe*, 2003 WL 22920337, at *12.

C. *Exclusion of Venireman Conner*

The trial court dismissed Conner because it found that she "could not stand without bias or partiality" based on her answers during the qualification phase.[54] Although the Fourth Circuit disagreed with Orbe that his trial counsel's failure to object to the dismissal constituted ineffective assistance, the court recognized the significance of counsel's inaction.[55] The court stated that, "[w]ere we adjudicating the merits of a claim that the trial court improperly dismissed Venireman Conner over defense counsel's unsuccessful objection, our task would be a more difficult one."[56] The Fourth Circuit observed that "it [was] not unquestionably apparent that Venireman Conner's responses demonstrated that her 'views would prevent or substantially impair the performance of h[er] duties as a juror.' "[57] This acknowledgment signifies the importance of objecting to the exclusion of jurors whose impartiality is at issue. Had Orbe's counsel objected at the time that Conner was excused, Orbe would have had a much stronger claim that the dismissal was improper, especially considering that the record does not unambiguously convey juror bias. In addition, Orbe's trial counsel should have argued that Conner's responses indicated her suitability as a juror. In particular, she stated that "[t]he evidence would have to be very strong" in order for her to impose the death penalty.[58] This remark shows that Conner would have been a good juror precisely because the Commonwealth has the burden to prove a defendant's death eligibility beyond a reasonable doubt. Thus, *Orbe* makes clear that capital defense attorneys should object to the exclusion of potential life jurors.

V. Conclusion

Defense counsel should be aware of the three main issues discussed in this case note. First, defense counsel should note that the Fourth Circuit has not definitively stated whether ineffective assistance as "cause" for procedural default receives deferential or de novo review. Second, defense counsel in a capital case have an obligation to perform a thorough investigation, such as obtaining mental health records, regardless of any intent to use the materials as mitigation evidence. Third, defense counsel should be aware that a failure to object to the exclusion of a potential juror will make it difficult for the defendant to claim that the juror was improperly dismissed on appeal.

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54. *Orbe*, 2003 WL 22920337, at *9.
55. *Id.*
56. *Id.*
57. *Id.* (quoting Wainwright v. Witt, 469 U.S. 412, 424 (1985)).
58. *Id.* at *8.

VI. Epilogue

At 9:13 p.m. on Wednesday, March 31, 2004, Dennis Mitchell Orbe was executed at the Greensville Correctional Center.[59] In last-minute appeals, Orbe's defense counsel argued that Virginia's method of lethal injection constituted cruel and unusual punishment.[60] The United States Supreme Court denied these appeals, and Governor Mark Warner declined to delay Orbe's execution.[61]

Jessie A. Seiden

59. *Man Who Killed Va. Clerk Executed by Lethal Injection*, ROANOKE TIMES, Apr. 1, 2004, at Va. 3.

60. *Id.*

61. *Id.*