IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1987

No. 87 - 5038

RICHARD L. WHITLEY,

Petitioner,

v.

RAYMOND M. MUNCY, Warden,
Virginia State Penitentiary,

and

The HONORABLE MARY SUE TERRY,
Attorney General of the
Commonwealth of Virginia,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

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QUESTION PRESENTED

1. WHETHER PETITIONER MAY BE EXECUTED WITHOUT HAVING BEEN HEARD ON THE MERITS OF THE MAJORITY OF HIS CONSTITUTIONAL CLAIMS DUE TO THE INEFFECTIVENESS OF HIS STATE HABEAS COUNSEL.

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PETITION FOR WRIT OF CERTIORARI TO
THE UNITED STATES COURT OF APPEALS
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Petitioner Richard L. Whitley, a capitally-sentenced inmate scheduled to be executed by the Commonwealth of Virginia on July 6, 1987, requests that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Fourth Circuit in Whitley v. Muncy, No. 87-4001 (July 2, 1987).

CITATION TO OPINION BELOW

The opinion of the Court of Appeals was rendered on July 2, 1987 (copy of Order and Opinion attached as Appendix A).

JURISDICTION

Jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). The judgment appealed from was rendered on July 2, 1987.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

This case involves the Sixth, Eighth and Fourteenth Amendments to the United States Constitution. In addition, it

TABLE OF AUTHORITIES

Statutes:

involves 28 U.S.C. § 2254(a), which provides that federal courts shall entertain an application for a writ of habeas corpus "in behalf of a person in custody pursuant to the judgment of a state court only on the ground that he is in custody in violation of the Constitution or laws or treaties of the United States."

HOW THE ISSUE WAS RAISED BELOW

The issue in the Question Presented was raised by petition for writ of habeas corpus in the district court and raised on appeal to the United States Court of Appeals for the Fourth Circuit.

STATEMENT OF THE CASE[1/]

A) Course of Proceedings

On May 13, 1981, a jury convicted Whitley of capital murder in the commission of a robbery, while armed with a deadly weapon. Va. Code § 18.2-31(d) (1982). The jury fixed Whitley's punishment at death. The Virginia Supreme Court affirmed both the conviction and the sentence in Whitley v. Commonwealth, 223 Va. 66, 286 S.E.2d 162 (1982). This Court denied Whitley's petition for a writ of certiorari. Whitley v. Virginia, 459 U.S. 882 (1982). A timely-filed Petition for Rehearing was denied on January 10, 1983. Whitley v. Virginia, 459 U.S. 1137 (1983).

On May 27, 1983, Whitley filed a petition for a writ of habeas corpus in the Circuit Court of Fairfax County. The circuit court dismissed the majority of Whitley's claims due to his failure to raise them at trial or on direct appeal. On August 27, 1984, following an evidentiary hearing on certain of

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1/ Petitioner will be referred to as "Whitley" throughout and the respondents will be denominated as "the Commonwealth."

the issues, the circuit court dismissed in its entirety Whitley's petition for a writ of habeas corpus.

On appeal from this dismissal of his state habeas corpus petition, Whitley's state habeas counsel raised only two issues in the Virginia Supreme Court: (1) whether the circuit court erred in dismissing Whitley's claim that his trial counsel had failed to conduct adequate voir dire of the jury; and (2) whether the circuit court erred in finding that Whitley's trial counsel was not ineffective during the sentencing phase of Whitley's trial in failing to investigate and present available evidence in mitigation of the death penalty. On April 16, 1985, the Virginia Supreme Court, in a brief opinion, refused Whitley's petition for appeal, finding that the circuit court had committed no reversible error. See Whitley v. Bass, No. 84-1767 (Va. April 16, 1985). This Court subsequently denied Whitley's petition for a writ of certiorari. Whitley v. Bair, ____ U.S. ____, 106 S. Ct. 398 (1985).

On November 27, 1985, Whitley filed a petition for writ of habeas corpus in the U.S. District Court for the Eastern District of Virginia. By Order of December 10, 1985, the district court concluded that the majority of Whitley's constitutional claims were not cognizable in federal court because Whitley's state habeas counsel had procedurally defaulted those claims by failing to appeal them to the Virginia Supreme Court in the state habeas proceeding. See Wainwright v. Sykes, 433 U.S. 72 (1977).

The district court considered five claims on the merits, including Whitley's claim of ineffective assistance of counsel at the sentencing phase. The district court held that counsel's performance during the sentencing phase of his trial was outside the range of competence required of attorneys in capital cases. Nevertheless, applying the two-part test that the Supreme Court

enunciated in Strickland v. Washington, 466 U.S. 668 (1984), the district court held that this incompetence was not sufficiently "prejudicial" to Whitley's defense to warrant relief. The district court rejected the remainder of the claims considered on the merits and dismissed Whitley's habeas corpus petition.

On appeal to the Fourth Circuit, Whitley raised two issues. First, he claimed that the district court improperly denied his claim of ineffective assistance of counsel at sentencing. He also argued that the district court erred in finding a procedural default as to the majority of his constitutional claims. The court of appeals upheld the district court. Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986). A timely-filed petition for rehearing was denied on November 6, 1986. This Court denied Whitley's petition for a writ of certiorari on March 30, 1987. Whitley v. Bair, ___ U.S. ___, 107 S. Ct. 1618 (1987).

On June 17, 1987, Whitley filed a Petition for Declaration of Insanity or Feeblemindedness in the Circuit Court of Fairfax County, seeking a declaration pursuant to Va. Sec. 19.2-177 that he is feebleminded and should therefore be transferred to a mental hospital. The petition and accompanying application for stay of execution were denied by the Circuit Court on June 27, 1987. The Virginia Supreme Court denied Whitley's petition for appeal and application for stay following oral argument on July 2, 1987.

On June 18, 1987, Whitley filed a second Petition for Writ of Habeas Corpus in the Eastern District of Virginia. In this petition, Whitley asserted that a recent opinion in Giarratano v. Murray, No. 85-0655-R, (E.D. Va., Dec. 18, 1986) provided a new basis for his arguing that the ineffectiveness of state habeas counsel constituted "cause" under Wainwright. Thus, Whitley sought again to have the merits of his constitutional

claims, as yet unheard by any court, adjudicated. The District Court denied the petition on June 29, 1987. In a brief Order and Opinion, that court stated that a recent opinion of this court, Pennsylvania v. Finley, ___ U.S. ___, 107 S. Ct. 1990 (1987), foreclosed Whitley's argument entirely. The District Court stated that there is no constitutional right to counsel in state habeas proceedings, and therefore the ineffectiveness of state habeas counsel can never constitute "cause" under Wainwright. The United States Court of Appeals for the Fourth Circuit affirmed the district court on July 2, 1987. Whitley v. Muncy, No. 87-4001 (4th Cir., July 2, 1987).

Mr. Whitley is scheduled for execution on July 6, 1987.

B) Factual Background

On May 13, 1981, Whitley was convicted of the capital murder of Phoebe Parsons, age 63, his neighbor. Evidence adduced at trial indicated that he had choked the victim and slit her throat. Evidence also showed that he had sexually abused the victim's body following her death. Finally, the evidence showed that Whitley took certain items from the victim's home. The murder was accordingly charged and prosecuted as a capital murder on the basis of murder committed during the course of a robbery, as set forth in Va. Code § 18.2-31(d).

Because of the defendant's indigence, the Circuit Court of Fairfax County appointed Warren McClain to represent him. At the time of the trial, McClain had never been involved in a murder trial. The Court also appinted a more experienced practitioner, Ian Rodway, to assist McClain. See Clark v. Townley, C.A. No. 84-1271-AM (E.D. Va., June 24, 1985), aff'd., No. 88-6601 (4th Cir., June 5, 1986) (finding that Clark, a capitally-sentenced inmate, was entitled to new sentencing due to constitutionally ineffective representation by Ian Rodway and co-counsel).

Although it was clear from the nature of the crime, Whitley's history of mental problems, and an apparent suicide attempt by Whitley immediately preceding the murder, that a psychiatric defense might well be implicated, McClain's investigation of such information was very limited. Although McClain obtained a state evaluation of the petitioner, pursuant to Va. Code § 19.2-169, the doctors evaluating Whitley for the state did not examine any records from his previous incarcerations and thus were completely unaware of past diagnoses of emotional and psychological disturbances. Trial counsel neither explored the basis of the doctors' conclusions nor determined whether they had reviewed his previous history.

Nor did McClain seek a state-appointed independent psychiatric expert to assist in the defense. The value of such an independent expert was demonstrated by the testimony of a clinical psychologist and psychiatrist during the state habeas petition and the subsequent petition for declaration of insanity or feeblemindedness, which established that Whitley suffers from an organic brain disorder and an antisocial personality disorder. Testimony showed that each of Whitley's mental disorders impair his ability to reason, make judgment or control impulses. See Whitley v. Bair, 802 F.2d 1487, 1495 (4th Cir. 1986).

In addition to the failure to investigate Whitley's mental history and current mental status, McClain failed to explore his personal background, although he knew that such information would be highly relevant to the sentencing determination. Uncontradicted testimony at the evidentiary hearing from Whitley's sister, Patricia Soberg, revealed that Whitley's childhood was scarred by physical abuse, neglect and abandonment by his parents, alcoholism, poverty and severe head injuries and that Whitley's criminal involvement was

significantly affected by influence from his older brother, the only male influence in his family almost from the time of his birth. Whitley v. Bair, 802 F.2d at 1494-95.

The pattern set by counsel's inadequate investigation continued during the pre-trial period and during the trial itself. Even though Whitley's mental capacity was clearly in doubt, counsel failed to investigate the conditions under which Whitley gave certain uncounselled confessions, failed to interview the officers taking those confessions, failed to request the tape from which the principal confession had been transcribed by law enforcement officers, and failed to follow up on why the confessions were not signed by their client. During the voir dire of potential jury members, trial counsel failed to ask for individual voir dire, failed to ask any rehabilitating questions of jurors who indicated scruples against the death penalty, and failed to challenge for cause a juror who worked for the FBI when they knew that the prosecution would be presenting important fingerprint evidence through an FBI employee.

At trial, Ian Rodway began his opening statement for the defense by admitting that Whitley had killed the victim and told the jury that he had been appointed by the Court to represent Whitley, thereby undermining his status as an advocate for his client.[2/] During the trial, counsel did not object to various inadmissible items of testimonial and physical evidence, failed to offer jury instructions, failed to present any defense theory of the murder, failed to challenge an improper instruction on the critical element of "malice," and produced only one witness, employer Gary Monahan. In his closing argument, McClain did not

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2/ See Goodwin v. Balkcom, 684 F.2d 794, 806 (11th Cir. 1982) ("Reminding a jury that the undertaking is not by choice, but in service to the public, effectively stacks the odds against the accused.").

even explain to the jury the prosecutor's burden of proof. Defense counsel told the jury that Whitley was "guilty" and offered their jury nothing in mitigation of the crime. Counsel told the jurors that the issue of punishment was the narrow issue before them.

At the sentencing phase, McClain produced only one witness, the state psychologist who found Whitley competent without reviewing his history of mental deficiency. McClain failed to introduce any corroborating evidence, allowing the testimony of this sole witness to be completely undermined by cross-examination which estabished that the doctor's conclusions as to Whitley's emotional disturbances depended solely on Whitley's own statements.

Defense counsel failed to offer any jury instructions for the sentencing jury and failed to object to an instruction which, contrary to state law, allowed the jury to impose the dealth penalty upon a finding that the murder "involved depravity of mind or aggravated battery" without having to reach unanimous agreement on one or the other basis. Quintana v. Commonwealth, 224 Va. 127, 152-155, 295 S.E.2d 643 (1982) (Poff, J., concurring and dissenting), cert. denied 460 U.S. 1029 (1983). After jury instructions which focused on the critical role of aggravating and mitigating circumstances in determining punishment, McClain told the jury "as far as . . . mitigating factors, I'd be less than candid if I said there were a few." The jury sentenced Whitley to death. At a sentencing hearing held before the trial judge after the jury had returned its verdict, counsel introduced no new evidence for the judge to consider in deciding whether "good cause" existed for the death sentence to be changed to life imprisonment, under Va. Code § 19.2-264.5. The trial court appointed McClain to continue in his representation of Whitley on direct appeal.

Following the affirmance of Whitley's conviction and sentence, and the denial of his petition for a writ of certiorari by this Court, Whitley received the volunteer legal assistance of Jaclyn L. McKenney and Robert T. Hall in order to initiate state habeas corpus proceedings. The Circuit Court considered only eight of thirty-seven claims presented at state habeas and determined that the rest were barred by Virginia's procedural default doctrine due to McClain's failure to raise them earlier. See Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), cert. denied, 419 U.S. 1108 (1974).

McKenney alone took responsibility for the preparation of an appeal to the Virginia Supreme Court. To Whitley's great detriment, she erroneously believed that claims denied by the Circuit Court did not have to be raised on appeal to be preserved. Affidavit of Jaclyn McKenny (Dec. 10, 1986) (attached as Exhibit D to this federal habeas petition, Appendix E hereto). Despite having just seen the devastating effect of the preclusion by procedural default of several of Whitley's claims, McKenney unreasonably decided not to guarantee the preservation of these other claims by including them in the appeal. As stated above, McKenney raised only two issues on appeal. Seven days before argument on the petition, McKenney withdrew as Whitley's counsel. McKenney has since stated that she wanted to withdraw prior to the appeal due to the pressures she was feeling and the demoralized state she was in as a result of an adverse ruling she received in another Virginia death case. McKenney was replaced by Timothy Michael Kaine, Whitley's present counsel.

Whitley raised in his first federal habeas petition the claims he had raised at state habeas, among others. As noted above, the district court held procedurally barred any claim which either had not been presented to the Virginia Supreme Court or had been held by the state courts to be procedurally barred.

Thus, as a result of McKenney's misunderstanding of the technicalities of Virginia law and her unreasonable decision not to guarantee preservation of constitutional claims of a death-sentenced petitioner, many of Whitley's constitutional claims have never been heard by any court.

REASONS FOR GRANTING THE WRIT

I. PETITIONER MAY NOT BE EXECUTED WHILE SUBSTANTIAL CONSTITUTIONAL CLAIMS REMAIN UNREVIEWED DUE TO THE INCOMPETENCE OF COUNSEL

Petitioner Richard Lee Whitley is scheduled for execution on July 6, 1987. Unless this Court acts, petitioner will die without any court having reviewed substantial constitutional claims. The only reason those claims have not been heard is the ineffectiveness of state habeas counsel. This result flies in the face of the death penalty jurisprudence of this Court and blatantly contradicts the well-established principles of Wainwright v. Sykes, 433 U.S. 72 (1977), recently reiterated in Murray v. Carrier, ___ U.S. ___, 106 S. Ct. 2639 (1986).

This petition does not present the issue of whether the Constitution requires the states to appoint counsel to represent indigent prisoners in state habeas proceedings. Whitley was represented by volunteer counsel in state habeas proceedings. The sole issue this petition presents, in stark and compelling terms, is whether a defendant may be executed without having been heard on constitutional claims as a result of the ineffectiveness of his state habeas counsel.

In this second federal habeas petition, Whitley requests a hearing on the merits of constitutional claims ruled procedurally barred by the district court in his first federal habeas proceeding. Whitley claims that the ineffectiveness of his state habeas counsel constitutes "cause" for his procedural default under Wainwright v. Sykes, 433 U.S. 72 (1977).

In denying habeas relief, the district court below found that Pennsylvania v. Finley, ___ U.S. ___, 107 S. Ct. 1990 (1987) rejects any constitutional argument that the states must provide appointed counsel to represent indigent petitioners in state habeas proceedings. For lack of a constitutional right to state habeas counsel, the district court concluded that "the acts or omissions of state habeas counsel cannot constitute 'cause' under Wainwright v. Sykes," citing Murray v. Carrier, ___ U.S. ___, 106 S. Ct. 2639 (1986). The Fourth Circuit affirmed on that ground. The district court and the Fourth Circuit held, in short, that state habeas petitioners have no protection against the preclusion of constitutional claims from judicial review by the incompetence of state habeas counsel.

That result is not, and cannot be, dictated by the holding of Murray v. Carrier; nor is this outcome necessitated by Pennsylvania v. Finley.

In the Carrier case, this Court addressed in some detail the issue of what acts or omissions by an attorney could constitute cause to excuse a procedural default. Carrier alleged that his counsel had inadvertently omitted to list one of seven claims of trial court error in his direct appeal petition, and that this slip constituted "cause" for the resulting procedural default. See Murray v. Carrier, 106 S. Ct. at 2642-43. Significantly, Carrier was not sentenced to death nor did he allege ineffectiveness of counsel in his petition before this Court.

Reviewing a decision by the Fourth Circuit in Carrier's favor, this Court first briefly reiterated the principle underlying the procedural default rule of Wainwright and its cause-and-prejudice exception: a habeas petitioner will be bound by his counsel's non-exhaustion of state remedies unless he can show the federal courts cause to excuse the default and resulting

prejudice. Turning to the issue of attorney error, this Court held that "we discern no inequity" in holding defendants bound by the actions of their counsel unless counsel's performance fell below the "professionally competent" assistance standard of Strickland v. Washington, 466 U.S. 668, 690 (1984). Attorney incompetence of that gravity, the Carrier court held, would constitute "cause" to excuse the procedural default. Murray v. Carrier, 106 S. Ct. at 2646.

The Carrier case does not hold that defendants have no protection against loss of constitutional claims by incompetent counsel if the incompetence occurs at a stage in the proceedings at which the state has no constitutional obligation to provide counsel. That issue was not before the court in Carrier, which involved an attorney error on direct appeal. Moreover, such an interpretation would be manifestly irrational. For example, if a defendant is afforded no attorney at all at a criminal trial (a plain Sixth Amendment error), and that constitutional claim is procedurally defaulted by an incompetent attorney on appeal, defendant can later show "cause" in a state habeas hearing -- ineffective assistance on appeal -- and obtain a hearing on the lack of a trial attorney. Under the lower court's reading of Carrier, however, if a defendant is afforded no attorney at trial or direct appeal, and that constitutional claim is procedurally defaulted by an incompetent attorney at state habeas, defendant cannot show "cause" and can never obtain a hearing on the lack of trial counsel.

In short, the existence or non-existence of a substantive "right to counsel" is irrelevant to the Carrier analysis of attorney incompetence as "cause".[3/] Carrier held

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3/ Thus, this petition does not present any issue to which the holding in Pennsylvania v. Finley, 107 S. Ct. 1990 is relevant.

simply that the test used to evaluate attorney incompetence in a "cause" context is the same as that used in a "right to counsel" context: the test established in Strickland.

The district court's ruling and the Fourth Circuit's affirmance are also directly in conflict with a recent Fifth Circuit case. In Jones v. Estelle, 722 F.2d 159, 167 (5th Cir. 1983) cert. denied, 466 U.S. 976 (1984), the Fifth Circuit held that courts should "appl[y] to habeas counsel the same measure of their competence that we apply when the Constitution requires the lawyer's work". Ibid. The district court's ruling in Whitley's case wrongly prevents application of the Strickland measure of incompetence to counsel's conduct on state habeas and thus wrongly bars the majority of Whitley's constitutional claims from receiving a hearing.

* * *

In reviewing Whitley's argument that the ineffectiveness of his state habeas counsel should not bar him from a hearing on his constitutional claims, it cannot be forgotten that Whitley lies under imminent sentence of death. This Court has repeatedly emphasized that the death penalty imbues the criminal process with particular constitutional significance:

> As we have often stated, there is a significant constitutional difference between the death penalty and lesser punishments:
>
> > "[D]eath is a different kind of punishment from any other which may be imposed in this country. . . From the point of view of the defendant , it is different in both its severity and its finality. From the point of society, the action of the sovereign in taking the life of one of its citizens also differs dramatically from any other legitimate state action. . . ."

Beck v. Alabama, 447 U.S. 625, 637-38 (1980), quoting Gardner v. Florida, 430 U.S. 349, 357-358 (1977) (opinion of Stevens, J.).

This Court has stressed that because of its severe and final nature, "the death penalty is qualitatively different from any other punishment, and hence must be accompanied by unique safeguards . . . ." Spaziano v. Florida, 468 U.S. 447, 468 (1984) (Stevens, J., concurring in part and dissenting in part); see also Woodson v. North Carolina, 428 U.S. 280, 303-04 (1976) ("death is a punishment different from all other sanctions in kind rather than degree"); Booth v. Maryland, ___ U.S. ___, 55 U.S.L.W. 4836, 4839 n.12 (June 15, 1987) (same). The heightened review demanded by a death case continues beyond sentencing; post-conviction issues in a capital case must be reviewed under "no less stringent standards than those demanded in any other aspect of a capital proceeding." Ford v. Wainwright, ___ U.S. ___, 106 S. Ct. 2595, 2603 (1986).

Where a man's life is at stake, the issue of attorney ineffectiveness cannot be dismissed without a searching inquiry. In a capital case, the "guiding hand of counsel" is the primary safeguard of the defendant's constitutional rights. Powell v. Alabama, 287 U.S. 45, 69 (1932). Whitley has been denied the competent assistance of that "guiding hand" through the technicalities of Virginia's habeas law. Because of his state habeas counsel's ineffectiveness, Whitley may be executed with no court ever having reviewed the merits of his constitutional claims.[4/]

It is constitutionally unacceptable for the courts to allow Whitley to die with no investigation of the attorney ineffectiveness at issue here. In his habeas petition, Whitley requested a hearing on "cause" and "prejudice" at which he could

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4/ Moreover, as Giarrantano expressly recognized, the significance of attorney ineffectiveness in state habeas proceedings is particularly great in Virginia, where state waiver and procedural default doctrines are particularly difficult. Giarrantano, slip. op. at 4 and 13 n.2.

submit further evidence establishing that his attorney's incompetence rose to the Strickland level. This court should reverse the Fourth Circuit's ruling denying him such a hearing and remand to that court for further proceedings.

CONCLUSION

For the reasons stated herein, petitioner Richard L. Whitley requests that the writ of certiorari issue to review the decision of the court below.

Respectfully submitted,

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