290

A-874
No. 00-9285

IN THE
SUPREME COURT OF THE UNITED STATES

WALTER MICKENS, JR.,

Petitioner,

v.

DIRECTOR, VIRGINIA DEPARTMENT OF CORRECTIONS,

Respondent.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
for the Fourth Circuit and
Application for Stay of Execution

RESPONDENT'S BRIEF IN OPPOSITION

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STATEMENT OF THE CASE

A. Prior Proceedings

Mickens was convicted in a jury trial in the Newport News Circuit Court in 1993 of the capital murder of 17 year old Timothy Jason Hall in the commission of an attempted forcible sodomy, and was sentenced to death. The Virginia Supreme Court affirmed Mickens' convictions and death sentence, Mickens v. Commonwealth (Mickens I), 442 S.E.2d 678 (Va. 1994), but this Court remanded the case to the state court following the decision in Simmons v. South Carolina, 512 U.S. 154 (1994), see Mickens v. Virginia, 513 U.S. 922 (1994), and the Virginia Supreme Court ordered a new sentencing hearing. Mickens v. Commonwealth (Mickens II), 457 S.E.2d 9 (Va. 1995).

A second jury again sentenced Mickens to death in February 1996. The sentence was affirmed on direct appeal, Mickens v. Commonwealth (Mickens III), 478 S.E.2d 302 (Va. 1996), cert. denied, 520 U.S. 1269 (1997). After unsuccessfully pursuing state habeas corpus relief, Mickens filed his federal habeas petition in the district court in June 1998, for the first time raising a claim that one of his court-appointed trial counsel had a conflict of interest because he previously had represented the victim of Mickens' capital crime.

Notwithstanding Mickens' state court default, the district court appointed an investigator, ordered extensive discovery and held an evidentiary hearing in January 1999. On November 5, 1999, the district court ordered the petition dismissed, finding that the potential conflict of interest never ripened into an actual conflict and did not impair counsel's advocacy on behalf of Mickens. Mickens v. Greene, 74 F. Supp. 2d 586, 615 (E.D. Va. 1999).

Mickens appealed and, on September 14, 2000, a divided panel of the United States Court of Appeals for the Fourth Circuit reversed, directing the district court to grant the writ

because, in contradiction of the district court's factual findings, the panel majority believed "Mickens' lead trial counsel had a conflict of interest that the judge appointing counsel failed to look into." Mickens v. Taylor, 227 F.3d 203, 218 (4th Cir. 2000). On October 20, 2000, the Fourth Circuit granted rehearing *en banc*. On February 16, 2001, the *en banc* Fourth Circuit affirmed the denial of federal habeas corpus relief in a 7-3 decision, concluding that Mickens had failed to demonstrate that the alleged conflict of interest adversely affected counsel's performance. Mickens v. Taylor, 240 F.3d 348 (4th Cir. 2001) (*en banc*). On March 13, 2001, the Fourth Circuit denied Mickens' petition for rehearing of the rehearing *en banc*.

On March 2, 2001, pursuant to Virginia Code § 53.1-232.1, the Newport News Circuit Court set Mickens' execution for April 17, 2001. Mickens' motion for a stay of execution was denied by the Fourth Circuit on March 26, 2001. Mickens v. Taylor, ___ F.3d ___ (4th Cir. 2001) (*en banc*).

B. The Facts of the Crimes

The Virginia Supreme Court found the facts of Mickens' crimes as follows:

> On March 28, 1992, Timothy Jason Hall, age 17, resided with 14-year-old Raheem Gordon and Gordon's father in an apartment located at 28th and Washington Streets in the City of Newport News. Hall and Gordon were roommates, and they often exchanged clothes, including shoes.
>
> That day, between 7:00 and 8:00 p.m., Hall gave Gordon a ride, in Hall's automobile, to a party at the nearby Towers apartment building. At the time, Hall was wearing a pair of Gordon's Nike brand "Cross Trainer" tennis shoes. He also was wearing blue jeans and a shirt imprinted with either the word, "Duke," or the words, "Miami Hurricanes." Hall had intended to return to the party, but he never did. Neither Gordon nor his father ever saw Hall after that evening.
>
> Vincent West and Bruce Mitchell also attended the party. About 8:00 p.m., they left the party and went to a nearby convenience store. After purchasing a few items and leaving the store, they sat in a park adjacent to the Towers apartment building. While sitting there, West and Mitchell saw a man with a bicycle, hiding in some bushes and looking at them. The man later was identified as the defendant, Mickens.

The following day, Gordon saw Hall's automobile. It was parked on West Avenue, near 28th Street, close to the Towers apartment building and in the same place it had been parked the previous night.

On March 30, 1992, about 12:30 p.m., Chris Basford was walking along the James River between 25th and 30th Streets when he saw a body beneath an abandoned construction company building. The body of a male Caucasian was lying face down on a mattress under a sheet of plywood. The body was nude from the waist down, except for white athletic socks, and its legs were spread apart approximately 12 inches. The victim was identified as Timothy Jason Hall.

Pubic hairs were recovered from the victim's buttocks. Bloody "transfer" stains were evident on the outsides of the victim's thighs, and a white liquid substance was observed close to the victim's anus. Cigarette butts lying near the mattress also were recovered, and the mattress cover was seized for scientific examination. Nearby, the police found a pair of men's blue jeans and white underwear shorts that had washed up in the surf of the river. Gordon identified the clothes as those worn by Hall on the evening of March 28, 1992.

An autopsy revealed 143 separate "sharp force injuries" to the victim's body. Of the injuries, 62 were paired stab injuries that could have been caused by a multiple-blade knife, 13 were single stab wounds, and three were paired incised wounds.

The medical examiner who performed the autopsy concluded that the victim had bled to death and that 25 of the 143 wounds were fatal. The fatal wounds included four pairs of stab wounds that punctured the right lung, three single stab wounds that punctured the left lung, seven stab wounds to the skull that penetrated the brain, a stab wound to the forehead that also penetrated the brain, one pair of stab wounds that perforated the liver, and a pair of stab wounds to the right neck that severed the carotid artery and the jugular vein.

The medical examiner opined that the fatal wounds may not have caused instant death. Instead, she estimated that the victim could have lived as long as 30 to 40 minutes after infliction of the last wound and that, during this time, the victim may have been conscious.

On the evening of April 4, 1992, the police were informed that a black male, wearing a blue and white jacket and riding a bicycle, had assaulted a juvenile. Responding to this information, Police Officer D. A. Seals and Detective Dallas Mitchell found Mickens riding a bicycle in the parking area of the abandoned construction company building.

Seals exited the police car, displayed his badge, and approached Mickens. Mickens, thereupon, fled on his bicycle. Shortly thereafter, Seals and Mitchell again came

upon Mickens as he was being detained by other police officers. Mickens was arrested at 7:00 p.m. on the charges involving the juvenile.

Mickens agreed to talk with the police after being advised of his Miranda rights. Officer Mitchell told Mickens that he knew Mickens had killed Hall, but the officer did not tell Mickens how Hall had been murdered. In denying involvement in Hall's murder, Mickens said, "You didn't find any knife on me; did you?"

The following morning, warrants were obtained charging Mickens with Hall's murder and attempted sodomy. When Officer Seals handed Mickens copies of the warrants, Mickens said, "I accept the warrants, I accept the charges." Seals asked Mickens what was meant by that statement, and Mickens responded, "Mother f___r, if I told you I accept the warrants that means I'm guilty, don't it?"

On April 7, 1992, the police found Michael Jacobs wearing the Nike brand "Cross Trainer" tennis shoes that Hall had been wearing when Gordon had last seen Hall alive. Jacobs told the police that he had bought the shoes from Mickens for $5.00 the previous week.

An examination of the pubic hairs removed from Hall's buttocks revealed that they were from an African-American and were alike in "all identifiable microscopic characteristics" to the pubic hair sample taken from Mickens. The expert who examined the hairs further testified that the hairs could not have originated from Hall because he was a Caucasian. The witness also stated that tissue was attached at the roots of the hairs, indicating the hairs had been forcibly removed, possibly by the rubbing of the genitals against Hall's buttocks.

An examination of a stain found on the mattress cover revealed human sperm. Through DNA analysis (RFLP type) of the sperm and of blood samples taken from Hall and Mickens, the expert determined that Hall could not have produced the stain. The expert determined further that Mickens' DNA pattern matched the DNA pattern in the stain on the mattress cover. The witness also stated that the approximate percentages of the population that could have deposited the stain was one in 27,000 Caucasians, one in 6,000 African-Americans, and one in 2,000 Hispanics.

The cigarette butts and certain other hairs recovered at the crime scene also were subjected to DNA analysis (PCR type). Both Hall and Mickens had D.Q. Alpha type 1.2, 4. The expert making the comparisons determined that Mickens could not be eliminated as the source of the hairs and of the saliva on the cigarette butts. Mickens smoked cigarettes, and Hall was never known to smoke cigarettes.

Tyrone Brister testified that, when he and Mickens shared a holding cell at the courthouse on March 26, 1993, he asked Mickens why he was in the cell. Mickens answered, "They said I stabbed somebody 140 something times in the head." Mickens then lowered his voice and said, "which I did." Mickens also told Brister

that "they" said he also sodomized the victim and stole his sneakers. Again, Mickens lowered his voice and said, "which I did."

Mickens v. Commonwealth (Mickens I), 442 S.E.2d at 681-683 (footnotes omitted).

C. The Facts of the Resentencing

In the 1996 resentencing, the Commonwealth again presented the evidence of Mickens' prior convictions. He was convicted of attempted larceny from the person in 1973; sodomy, robbery and grand larceny from the person in 1973; and sodomy and robbery in 1980. Mickens v. Commonwealth (Mickens III), 478 S.E.2d at 304.

> The evidence also established that Mickens had been paroled from prison three times. His initial parole on October 30, 1973, was revoked on August 16, 1974, because he had been convicted of robbery, grand larceny from the person, and sodomy. Mickens' second parole on July 1, 1979, was revoked on April 11, 1980, because he had been convicted of sodomy and robbery. His third parole commenced on December 19, 1991, and he was on parole when Hall was murdered.
>
> Charles Edward Siron, one of Mickens' sodomy victims, testified that, on February 14, 1974, when he was 18 years old, he and Mickens were incarcerated in the Newport News City Jail. While Siron was sleeping, Mickens put a razor blade to Siron's throat and forced him out of bed and into the shower area where Mickens attempted to sodomize him.
>
> Ruby Bunn, one of Mickens' robbery victims, testified that, on February 7, 1974, she was teaching her second grade class at Erwin School in the City of Newport News. Mickens appeared at the class-room door holding a knife and demanding her pocketbook. Bunn went to get her money from her purse, and, when she looked up, she saw Mickens standing near a small boy and holding the knife a few inches from the boy's head. Bunn gave Mickens her money, and he left the classroom.

Mickens v. Commonwealth, 478 S.E.2d at 304-305.

D. The Facts of Counsel's Prior Representation of Hall

The district court found the following facts concerning the prior representation. Mickens v. Greene, 74 F. Supp. 2d at 599-600, 614. On February 21, 1992, Timothy Hall's mother swore out a complaint against her son for assault and battery. She alleged that on February 16, Hall

grabbed her and shoved her to the ground. On March 13, 1992, Hall was charged with possession of a concealed weapon (a serrated bread knife wrapped in newspaper). The juvenile court's records indicate that both the assault and battery and concealed weapon charges were presented in a detention hearing on March 20, 1992. Substitute Juvenile Court Judge Criver appointed Brian Saunders to represent Hall and continued the hearing to April 3, 1992.

Between March 20 and March 28, Hall met one time with Saunders at the attorney's office for 15-30 minutes. Hall was last seen alive on March 28, 1992, a Saturday, and his body was found on Monday, March 30, 1992. The juvenile court's records show that on Friday, April 3, 1992, before any hearing was conducted, a different Juvenile Court Judge, Foster, noted on the docket sheet, "removed from docket" and "Def. Deceased." On the same day, Saunders appeared at the juvenile court for the scheduled hearing on Hall's charges and was told by someone that Hall was dead and the charges had been dismissed. This information was not a matter Saunders learned in court and most likely came from a court clerk.

Mickens was arrested on Saturday April 4, 1992, and on Monday April 6, 1992, Judge Foster appointed Saunders and Warren Keeling to represent Mickens. Keeling had no knowledge of Saunders' prior representation of Hall at the time of Mickens' trial, sentencing and resentencing.

E. The District Court's Findings of No Actual Conflict or Adverse Effect.

The district court conducted a full evidentiary hearing and found the following facts supporting its determination that Mickens had failed to demonstrate an actual conflict of interest:

"Saunders' representation of Hall was very limited in scope and duration." Mickens v. Greene, 74 F. Supp. 2d at 604. The representation of Hall did not involve the same subject matter as the charges facing Mickens and did not involve the same criminal transactions or

events. Id. Mickens failed to show that Hall was a prostitute, or that he had consented to sexual relations with Mickens. Id. "Mickens has failed to demonstrate a correlation, much less a substantial and particular relationship, between Saunders' representation of Hall for assault and possession of a concealed weapon and his representation of Mickens on attempted forcible sodomy and capital murder charges." Id. at 605.

The district court strongly stated its disapproval of Saunders' failure to appreciate the ethical issues posed in these circumstances but, after hearing the testimony and considering petitioner's evidence, found that Mickens failed to establish that Saunders possessed a personal interest in concealing the alleged ethical conflict in representing Mickens. "[T]he evidence shows that, regrettably, Saunders never struggled with the ethical issues envisioned by Mickens." Mickens v. Greene, 74 F. Supp. 2d at 605. "[T]he Court is unconvinced that ... 'selfish loyalties or interests' existed, much less motivated Saunders' silence" about the prior representation of Hall. Id. at 612.

Saunders considered his representation of Hall ended when the juvenile charges were dismissed. Mickens v. Greene, 74 F. Supp. 2d at 605. Saunders did not perceive any "actual conflict," did not think he had received any confidential communications from Hall, and saw no connection between the two cases. Id. at 606. "[T]he Court concludes that, as a factual matter, Saunders did not believe that any "continuing duties to a former client might interfere with his consideration of all facts and options for his current client." Id.(internal punctuation omitted).

"[T]he record here confirms that Saunders did not learn any confidential information from Hall that was relevant to Mickens' defense either on the merits or at sentencing." Mickens v. Greene, 74 F. Supp.2d at 606. Hall's record of juvenile charges was not relevant to Mickens' defense because Mickens' testimony foreclosed any theory of self-defense. Id. at 606, n.15.

The District Court also carefully considered and rejected Mickens' allegations of an "adverse effect":

A "consent defense" was an "implausible alternative theory" foreclosed by the evidence, including choke marks found on the victim's neck, blood stains on Hall's thighs, 143 stab wounds, and Mickens' own insistence to his attorneys and in his testimony that *he did not know Hall and had no involvement in these crimes.* Mickens v. Greene, 74 F. Supp. 2d at 607. "Saunders discarded consent as a strategy not because of any loyalty to Hall, but because neither the facts nor Mickens' testimony was compatible with such a strategy." Id. The Fourth Circuit specifically upheld these findings. Mickens, 240 F.3d at 361-362.

Using "negative information" about Hall at sentencing, based on the premise that it would mitigate the severity of a capital murder, was inconsistent with Mickens' own statements of innocence and sympathy and would have appeared disingenuous. Mickens v. Greene, 74 F. Supp. 2d at 608. After "diligent investigation by federal habeas counsel," Mickens failed to uncover any evidence to show that Hall was a male prostitute. Id. Such evidence would have been useful only in connection with the unavailable consent defense, and "the propensity of that approach to backfire made it an unreasonable alternate strategy or tactic at sentencing." Id. Even if such "negative information" existed and could be considered as offering a plausible strategy, it was Mickens' second lawyer, Keeling, and not Saunders, who was in charge of preparing for sentencing. Keeling was aware of Hall's juvenile charges and other circumstances of his life from a newspaper report, and he did not consider any of that information relevant. Id. The Fourth Circuit specifically upheld these findings. Mickens, 240 F.3d at 361-362.

Saunders did not engage in extensive plea negotiations because the Commonwealth's Attorney had rejected any plea agreement for a sentence less than death. Mickens v. Greene, 74

F. Supp. 2d at 608-609. Using information about Hall's juvenile charge of assaulting his mother to "rebut" her 1996 victim impact statement containing assertions of grief would have been inconsistent with Mickens' statements of sympathy and not a viable tactic in the context of Virginia's sentencing process. Id. at 609-610. The Fourth Circuit specifically upheld these findings. Mickens, 240 F.3d at 361-362.

Mickens' allegations that Saunders conducted a deficient investigation into leads about other possible suspects had no connection to the alleged actual conflict. "Mickens may carry this burden by showing that pursuit of those leads was inherently in conflict with Saunders' other loyalties or interests or by other probative evidence that he did not pursue the leads because of those interests. This he has failed to do." Mickens v. Greene, 74 F. Supp. 2d at 612 (citation and internal punctuation omitted). The Fourth Circuit also specifically upheld these findings. Mickens, 240 F.3d at 361-362.

REASONS WHY THE WRIT AND APPLICATION FOR A STAY OF EXECUTION SHOULD BE DENIED

Mickens asks this Court to stay his execution and grant certiorari in this collateral case to review his defaulted claim that a state judge failed to conduct an inquiry into a possible conflict of interest which he asserts was required by this Court's decision in Wood v. Georgia, 450 U.S. 261 (1981). Mickens presents his claim of conflict as if it were being raised on direct appeal and as if the fact of an attorney's prior representation of a defendant's victim alone constitutes a *per se* conflict.[1] This Court, however, never has suggested that any particular combination of

[1] Claims of a Sixth Amendment violation have been rejected in circumstances where the alleged conflict involved an attorney's prior representation of a defendant's victim. See Crisp v. Duckworth, 743 F.2d 580, 588 (7th Cir. 1984) (finding no conflict when defense counsel previously represented murder victim in unrelated criminal action); Kirkpatrick v. Butler, 870 F.2d 276, 284 (5th Cir. 1989) (finding no conflict where defense counsel had friendship with,

*243 F.3d 870, *; 2001 U.S. App. LEXIS 4926, **

WALTER **MICKENS**, JR., Petitioner - Appellant, versus JOHN B. **TAYLOR**, Warden, Sussex I State Prison, Respondent - Appellee.

No. 00-4

UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

243 F.3d 870; 2001 U.S. App. LEXIS 4926

March 26, 2001, Filed

DISPOSITION: **[**1]** ADJUDGED and ORDERED that the motion of Mickens to stay the issuance of our mandate and to stay the sentence of execution by the state court denied.

JUDGES: H. E. Widener, Jr., United States Circuit Judge. Judge Michael, joined by Judge Motz and Judge King, filed a dissenting opinion.

OPINIONBY: H. E. Widener, Jr.

OPINION: **[*870]**

ORDER

We have considered Mickens' motion to stay the issuance of our mandate and to stay the sentence of execution of the state court, which motion was filed in our court March 16, 2001, and we have considered the response thereto filed by the Commonwealth March 19, 2001.

Voting to grant the stay were Judges Michael, Motz and King, and voting to deny the stay were Judges Wilkinson, Widener, Wilkins, Niemeyer, Luttig, Williams and Traxler.

It is accordingly ADJUDGED and ORDERED that the motion of Mickens to stay the issuance of our mandate and to stay the sentence of execution by the state court shall be, and it hereby is, denied.

/s/ H. E. Widener, Jr.

United States Circuit Judge

For the Court

DISSENTBY: MICHAEL

DISSENT: MICHAEL, Circuit Judge, dissenting:

I respectfully dissent from the order of the en banc court denying Walter Mickens's motion to stay the mandate and his **[**2]** execution. Mickens meets the standard for a stay of execution under Barefoot v. Estelle, 463 U.S. 880, 895, 77 L. Ed. 2d 1090, 103 S. Ct. 3383 (1983).

Mickens was tried and sentenced to death for murder with a court-appointed lawyer who had been representing the **[*871]** murder victim at the time of the offense. Mickens did not know about the conflict problem, so he could not object. However, the state judge who appointed the lawyer knew or should have known of the apparent conflict, but failed in her duty to inquire. See Cuyler v. Sullivan, 446 U.S. 335, 347, 64 L. Ed. 2d 333, 100 S. Ct. 1708 (1980) (holding that a trial court must "initiate an inquiry" when it "knows or reasonably should know that a particular conflict exists"). Because the conflict proved to be genuine, the plain language of Wood v. Georgia, 450 U.S. 261, 273-74, 67 L. Ed. 2d 220, 101 S. Ct. 1097 (1981), dictates that Mickens is entitled to a new trial. Indeed, in at least one other circuit Mickens would be granted habeas relief. See Ciak v. United States, 59 F.3d 296, 302 (2d Cir. 1995). For these reasons, Mickens should not be put to death before he has **[**3]** a fair opportunity to seek Supreme Court review.

Judge Motz and Judge King join this dissent.

A Mickens v. Taylor, 532 U.S. 970

Pages: 2

Source: Legal > Cases - U.S. > Federal Court Cases, Combined

Terms: mickens w/10 taylor and date geq (08/08/1998) (Edit Search)

532 U.S. 970; 121 S. Ct. 1651;
*149 L. Ed. 2d 467; 2001 U.S. LEXIS 3202, **

WALTER **MICKENS**, JR. v. JOHN **TAYLOR**, WARDEN

00-9285 (00A874)

SUPREME COURT OF THE UNITED STATES

532 U.S. 970; 121 S. Ct. 1651; 149 L. Ed. 2d 467; 2001 U.S. LEXIS 3202; 69 U.S.L.W. 3670

April 16, 2001, Decided

PRIOR HISTORY: **[*1]** Reported below: 2001 U.S. App. LEXIS 2376.

JUDGES: Rehnquist, Stevens, O'Connor, Scalia, Kennedy, Souter, Thomas, Ginsburg, Breyer.

OPINION: The application for stay of execution of sentence of death presented to the Chief Justice and by him referred to the Court is granted. The motion for leave to proceed *in forma pauperis* is granted. Petition for writ of certiorari to the United States Court of Appeals for the Fourth Circuit granted limited to following question: Did the Court of Appeals err in holding that 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? The stay shall terminate upon the sending down of the judgment of this Court.

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PREV 8 of 98 NEXT

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A Mickens v. Taylor, 532 U.S. 970

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