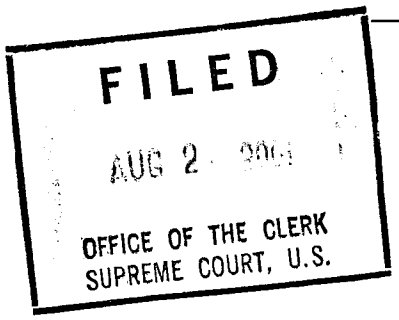
NO. 01-6047

IN THE
SUPREME COURT OF THE UNITED STATES
OCTOBER TERM 2000



RONALD WAYNE FRYE,

Petitioner,

v.

R. C. LEE,
WARDEN, CENTRAL PRISON
RALEIGH, NORTH CAROLINA,

Respondent.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

ROY COOPER
ATTORNEY GENERAL

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**Counsel of Record

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No. 01-6047

IN THE SUPREME COURT OF THE UNITED STATES

FILED
AUG 2 2001
OFFICE OF THE CLERK
SUPREME COURT, U.S.

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IN RE RONALD WAYNE FRYE,

Petitioner,

****

ORIGINAL PETITION FOR
WRIT OF HABEAS CORPUS

AND

FOR STAY OF EXECUTION

****

Marilyn G. Ozer
Counsel of Record
William F. W. Massengale
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Counsel for Petitioner

August 28, 2001

CAPITAL CASE
EXECUTION DATE: 8/31/01 AT 2:00 a.m.

QUESTIONS PRESENTED

The petitioner Ronald Frye was convicted of first degree murder and sentenced to death after trial in the Superior Court of Catawba County, North Carolina.

Tom Portwood was appointed as one of two attorneys to represent Frye. The attorneys divided their responsibilities. Portwood was responsible for developing and presenting evidence for the penalty phase. Portwood testified under oath that he consumed at least 375 ml (12 ounces) of 80 proof rum every weekday night and more on weekends. Portwood testified that while he did not drink during court, he began drinking rum as soon as the trial proceedings ended each day until he fell into bed at about 10 p.m. He would wake up at 4 or 5 a.m., work out at a spa, stop at his office and then appear in court for the start of that day's proceedings. So complete was his out-of-courtroom devotion to alcohol that he had no time to investigate the petitioner's early history of child abuse or to find and prepare witnesses. If a rudimentary investigation had been done, it would have been discovered that Frye had endured a horrific chain of abuse and neglect and that this history was well-documented. Credible witnesses, including the chief of police, could have testified in support of the mitigation.

On August 14, 2001, lead counsel Theodore Cummings, swore to facts in an affidavit which substantially refute his own testimony at the 1997 evidentiary hearing. The order of the Catawba Superior Court was based in large part on this now refuted testimony. Opinions of the federal district court and the Fourth Circuit were based on the findings of the Catawba Court. Petitioner was unable to have a hearing in North Carolina courts concerning this newly discovered evidence.

1. Whether newly discovered evidence renders the facts of this case so indistinguishable from those of Williams v. Taylor that a great injustice would be done if this evidence was not considered and Petitioner granted a new sentencing hearing based on the denial of his Sixth Amendment right to effective assistance of counsel?

2. Whether the newly discovered evidence in this case and the opinion in *Burdine v. Johnson* provide an opportunity for this court to consider whether the appointment and representation of an attorney whose alcoholism completely disables him from adequately investigating and presenting mitigating circumstances constitutes a per se violation of the defendant's Sixth Amendment right to effective "Assistance of Counsel for his defense"?

CONSTITUTIONAL AMENDMENTS INVOLVED

The questions presented implicate the Fifth, Sixth, Eighth and Fourteenth Amendments to the U.S. Constitution. The pertinent parts of these provisions are:

U.S. Const., amend. V: . . .nor be deprived of life, liberty, or property, without due process of law; . . .

U.S. Const., amend. VI: In all criminal prosecutions, the accused shall enjoy the right . . . to have the assistance of counsel for his defense.

U.S. Const., amend. VIII: Excessive bail shall not be required, nor excessive fines imposed, nor cruel and unusual punishments inflicted.

U.S. Const., amend. XIV: No state shall . . . deprive any person of life, liberty, or property, without the due process of law. . .

STATEMENT OF THE CASE

A Procedural History

The judgments of conviction and death sentence challenged here by Petitioner were entered on November 15, 1993, in the Superior Court of Catawba County, North Carolina. Petitioner timely appealed his convictions and sentence of death to the Supreme Court of North Carolina. By opinion issued September 28, 1995, and judgment entered October 18, 1995, that Court filed an opinion affirming Mr. Frye's convictions and death sentence. The North Carolina Supreme Court's opinion is published at *State v. Frye*, 341 N.C. 470, 461 S.E.2d 664 (1995). This Court denied certiorari review on April 1, 1996. *Frye v. North Carolina*, 517 U.S. 1123 (1996). A Motion for Appropriate Relief (hereinafter MAR) was filed on November 18, 1996 in Catawba County Superior Court. An amendment to the MAR was filed on March 17, 1997. An evidentiary hearing was

heard before the Honorable Forrest A. Ferrell during the October 13, 1997 session of Criminal Superior Court in Catawba County. On April 24, 1998, Judge Ferrell filed an order denying relief. (Exhibit 5) A petition was filed to the North Carolina Supreme Court on June 18, 1998. On April 8, 1999 the North Carolina Supreme Court meeting in conference denied *certiorari* review. The order denying *certiorari* review was entered on April 9, 1999. This Court denied a petition for certiorari. *Frye v. North Carolina*, 528 U.S. 897 (1999)

On July 20, 1999 Petitioner filed a petition for writ of habeas corpus in the Western District of North Carolina. The District Court rejected Petitioner's request for an evidentiary hearing, denied relief, and denied a Certificate of Appealability on March 9, 2000. *Frye v. Lee*, 89 F.Supp.2d 93 (W.D.N.C. 2000). (Exhibit 3) Petitioner's Motion to Alter or Amend was denied on April 3, 2000. An appeal of this decision was dismissed by the Fourth Circuit on December 22, 2000. *Frye v. Lee*, 235 F.3d 897 (4th Cir. 2000). The Petition for Rehearing was denied on January 19, 2001. Defendant-Petitioner filed a Petition for Certiorari with this court on May 21, 2001, which was denied on June 29, 2001.

On August 14, 2001, Defendant-Petitioner filed a Motion for Reconsideration of Motion for Appropriate Relief Based on Newly Discovered Evidence which was denied on August 20, 2001. A Petition for Certiorari was filed with the Supreme Court of North Carolina on August 21, 2001 and denied on August 22, 2001.

B. Exceptional Circumstances Warranting Discretionary Review

Ronald Frye is scheduled to be executed on August 31, 2001. Petitioner has exhausted available remedies in state court. Petitioner presented newly discovered evidence to the state court which renders fundamentally unreliable the April 1998 judgment of the Catawba County Superior Court which formed the basis for the denial of habeas relief from the federal courts.[1] As detailed in the petition for certiorari filed by this defendant on May 21, 2001, this facts of this case make it virtually indistinguishable from *Williams v. Taylor*, 529 U.S. 668 (2000). Since the petition for certiorari was denied on June 29, 2001, crucial new evidence has emerged which renders unreliable the judgment of the superior court and makes unacceptable similar conclusions reached by the Fourth Circuit. The similarity to *Williams v. Taylor* coupled with the newly discovered evidence meets the requirement of "exceptional circumstances warranting the exercise of this Court's discretionary powers" demanded by Rule 20.4(a). Additionally, two cases which have come down within the month which illustrate that courts are beginning to be aware that public opinion no longer tolerates disreputable appointed attorneys in capital cases. This Court explained in *McKlesky* that the constitutionality of the death penalty is related to the evolving standards of the populace:

> In applying this mandate, we have been guided by his statement that "the Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society." *Id., at 101.* Thus, our constitutional decisions have been informed by "contemporary values concerning the infliction of a challenged sanction," *Gregg v. Georgia, 428 U.S., at 173.*

McKlesky v. Kemp, 481 U.S. 279, 300 (1987) The Fifth Circuit seems to have reacted to the outpouring of ridicule that followed an opinion from a three judge panel finding a

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[1] The newly discovered evidence is outlined in an affidavit submitted by lead counsel Theodore F. Cummings, III. This affidavit was sworn to on August 14, 2001. It is

STATE OF NORTH CAROLINA
COUNTY OF CATAWBA

IN THE GENERAL COURT OF JUSTICE
SUPERIOR COURT DIVISION
File Nos. 93-CRS-1884, 3215

STATE OF NORTH CAROLINA)
)
v.)
)
RONALD WAYNE FRYE)

AFFIDAVIT OF THEODORE F. CUMMINGS III

I, Theodore F. Cummings, III being duly sworn, do hereby depose and say:

1. That my name is Theodore F. Cummings III.
2. That I am a practicing attorney, licensed to practice in the State of North Carolina.
3. That I was appointed to represent Ronald Wayne Frye who was charged with Capital Murder in February 1993.
4. That since the time of the trial in November 1993, a Motion for Appropriate Relief was filed in the case. A hearing on this motion was heard in October 1997.
5. That one of the allegations at this hearing was ineffective assistance of counsel.
6. That at the time of the trial I was unaware of substantial and significant factors which detrimentally affected the representation of Ronald Frye.
7. That at the time of Ronnie Frye's trial, I was not aware of critical facts concerning Ronnie's childhood and upbringing, nor was I made aware of the full extent of the subsequently admitted alcoholic condition of my co-counsel and friend Thomas Portwood.
8. That in 1993 my practice in capital cases was to divide the preparation with my co-counsel into two sharply divided parts: guilt-innocence phase and penalty phase. In the Frye case, I assumed responsibility for the guilt-innocence phase, and Attorney Thomas Portwood assumed responsibility for the penalty phase. As a result of my experience in this case, I subsequently changed my approach. In retrospect, it was clear that this division of labor presented critical pitfalls. Specifically, in the Frye case, preparation in the penalty phase was substantially neglected. I now understand that it was and is a serious mistake to approach preparing for a capital trial as two distinct proceedings with each lawyer independently focusing on different phases.
9. That Attorney Portwood and I generally worked separately on the Frye case. As a result, I was unaware of how impaired he was and of the impact that this impairment had on the performance of his duties. It was my assumption that Tom Portwood was doing a thorough preparation for the penalty phase. Even if my client had asked that I not talk with family members, I would have checked social service records and school records. Moreover, I certainly would have checked into the criminal file of the man arrested for criminally abusing Ronnie when he was a child. I would have hired a psychologist early in the process to facilitate the preparation for the penalty phase, and I would have used the psychologist's input and warnings as to the after effects of child abuse. I now recognize that Mr. Frye's history of severe abuse was