

In The
Supreme Court of the United States

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GERALD K. WASHINGTON,
ACTING WARDEN, Sussex I State Prison,

Petitioner;

v.

WILLIAM WILTON MORRISETTE, III,

Respondent.

—◆—
**On Petition For A Writ Of Certiorari
To The Supreme Court Of Virginia**

—◆—
PETITIONER'S REPLY

—◆—
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**CAPITAL CASE
QUESTIONS PRESENTED**

1. Does defense counsel perform ineffectively under the Sixth Amendment if, at the time of trial, he failed to foresee changes to settled state law which the appellate court would make in the future?
2. May a court reviewing a claim of ineffective assistance of counsel presume prejudice from counsel's failure to foresee changes to settled state law which the appellate court would make in the future?

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PETITIONER'S REPLY ARGUMENT

Nothing in the brief in opposition casts doubt on the need for this Court to grant review and reverse the judgment of the Virginia Supreme Court. The respondent does not seriously dispute that the lower court's judgment conflicts with the decisions of various federal circuits, state supreme courts and this Court. His attempt to deflect attention away from the questions presented by discussion of the precedential value of an advisory opinion of the Virginia Supreme Court on lower state courts is wholly misplaced.

1. Trial Counsel's Prior Representation Of Atkins Proves He Cannot Have Acted Ineffectively In Morrisette's Trial.

Morrisette relies on the fact that one of his trial counsel previously had represented Daryl Atkins in two capital murder trials in which the trial court utilized non-statutory verdict forms. That fact only demonstrates why a reasonably competent counsel would elect in the future, as Atkins' counsel did when he subsequently represented Morrisette, to use the statutory verdict form. In Atkins' first trial, the Virginia Supreme Court vacated the death sentence on direct appeal because the trial court inadvertently *omitted* part of the statutory verdict form offered by the defense. *Atkins v. Commonwealth*, 510 S.E.2d 445, 456 (1999). *Atkins* contained no criticism of the statutory verdict form. A reasonably competent defense attorney, especially one who had experienced the state court's views on the matter in his own case, quite properly would believe that the statutory verdict form was a safe bet.

Powell v. Commonwealth, 552 S.E.2d 344 (Va. 2001), issued shortly before Morrisette's trial, criticized the verdict form in Powell's case in an advisory opinion, but did not even recite the language it was criticizing or provide the language preferred by the court. *Powell*, 552 S.E.2d at 361-63. Without knowing the language being

criticized, an attorney reading the opinion would be able to rely only upon the decision itself. That advisory opinion made only one point with any clarity: Powell's verdict form did not give the jury the option of imposing a fine along with a life sentence, *as the statutes allowed. Powell*, 552 S.E.2d at 362-63.

What followed that point, however, was anything but clear. In the next four short paragraphs, the court stated that Powell had made a request to include language in his verdict forms providing for a life sentence if aggravating factors were found, but did not state what words Powell requested. The court stated that, in *Atkins*, unlike in Powell's case, the jury was provided with forms allowing for a life sentence if aggravators were found. *Powell*, 552 S.E.2d at 363. But how were the forms used in Powell's case different from the ones used in *Atkins*' case? The court's generalized, even ambiguous, language does not answer that question with any certainty.

Morrisette's counsel knew from personal experience that the forms used in *Atkins* were deficient because they did *not* contain the statutory verdict-form language. And he certainly knew from precedent which pre-existed *Atkins*, *Powell* and Morrisette's case that the Virginia Supreme Court always had rejected arguments that the statutory form did not allow the jury both to return a life sentence and find aggravating factors. *See Mueller v. Commonwealth*, 422 S.E.2d 380, 396-97 (Va. 1992); *Roach v. Commonwealth*, 468 S.E.2d 98, 105 (Va. 1996).¹ Using hindsight, with the advantage of the state court's detailed analysis in *Morrisette v. Warden*, 613 S.E.2d 551 (Va. 2005), it has become clear what the court in *Powell* found unwise about the statutory verdict form: its language, "and having considered all of the evidence in aggravation

¹ The Virginia Supreme Court admitted in *Morrisette v. Warden* that this precise argument had been raised and rejected in *Mueller* and *Roach*. (Pet. App. at 19-21).

and mitigation of such offense, fix his punishment at imprisonment for life” (Pet. App. 55), does not also state, “and having found an aggravating factor.”

At the time of Morrisette’s trial, not only had that explication not yet been made, but the *omission* of the same language later found objectionable in the decision below actually had caused *reversal* in *Atkins*, the case known personally to Morrisette’s counsel. The Virginia Supreme Court’s decision to lay fault at counsel’s feet for not seeing into the future simply cannot be squared with *Strickland v. Washington*, 466 U.S. 668, 689 (1984) (distorting effects of hindsight must be eliminated). Its decision to join other jurisdictions where the *Strickland* standard is being weakened compels the grant of certiorari.

2. Morrisette’s Jury Cannot Have Been Confused.

Morrisette’s argument regarding the petitioner’s second question – whether a court may presume prejudice on an ineffective assistance claim involving a claimed error of state law – only makes the case for a grant of certiorari. Under *Strickland*, the alleged error by counsel – here the failure to object to the statutory verdict form – actually must have prejudiced the defense. 466 U.S. at 694. Morrisette thus was required to demonstrate that, but for the failure to object, there is a reasonable probability that “the result of the proceeding would have been different.” *Id.*

The Virginia Supreme Court, however, automatically assumed prejudice when it concluded summarily that a jury is “likely to be confused” when it is not given a verdict form with an additional paragraph “expressly stating” that it could select a life sentence along with an aggravating factor. (Pet. App. 24). Without any showing by Morrisette of a reasonable probability that such confusion happened in his case, or any discussion by the court of it happening in Morrisette’s case, the court found “implicit confusion” and, based on that implied circumstance alone, a reasonable probability that the jury would not have imposed a

death sentence if it had not been given the statutory verdict form. Morrisette does not deny that the court found prejudice based on an alleged error by counsel which “might” cause jury confusion without the required demonstration under *Strickland* that the alleged error probably did result in juror confusion in his case such that it caused the jury to reject a life sentence it otherwise would have imposed.

Morrisette’s jury could not have been confused. It specifically was instructed that, if it found an aggravating circumstance, it must decide whether to “reduce” the “punishment” after considering all mitigation factors. (Pet. App. 56). Morrisette and the Virginia Supreme Court ignore this specific instruction. His jury also specifically was instructed in the identical manner as Douglas Buchanan’s jury had been instructed, an instruction which this Court found to direct the jury it may return a life sentence even if it finds an aggravating circumstance. *See Buchanan v Angelone*, 522 U.S. 269, 277 n.4 (1998).² Morrisette’s jury was given the statutory verdict form which expressly told the jury it could find an aggravating circumstance and sentence him to death or sentence him to life after considering all aggravating and mitigating evidence. (Pet. App. 54-55).

Morrisette says he presented compelling mitigating evidence and thus was “a good candidate” for a life sentence. He does not explain how such alleged facts, even if true, meant that his jury was confused, and certainly not to the extent that it imposed a death sentence out of a mistaken belief it had no option to sentence him to life. He says he was a model prisoner, decorated veteran, too old to be dangerous anymore, had an alcohol problem, a loving family, unfairly was tried 21 years after the crime and the

² The only difference between Morrisette’s and Buchanan’s instructions was that Morrisette’s instruction additionally directed the jury that it could impose a fine along with a life sentence.

evidence of rape was insufficient. (BIO at 20). The evidence the jury heard and saw, however, established that Morrisette was a vicious killer who, in addition to the horrendous assault and stabbing murder of Ms. White, had abducted, maimed and burgled others. In one case, Morrisette violently attacked his female victim in the same manner as Ms. White, but she luckily escaped death due to passers-by. (Pet. App. 38-39). Morrisette's contentions regarding unfairness from delay and the sufficiency of rape were rejected on direct appeal (Pet. App. 39-43, 46-47); neither contention would have been allowed as grounds to consider during a penalty phase in Virginia. *See Johnson v. Commonwealth*, 591 S.E.2d 47, 57 (Va. 2004) (challenges to guilt not admissible in sentencing phase), *rev'd on other grounds*, 125 S.Ct. 1589 (2005).

The jury found Morrisette to be both a "future danger" to society and his crime to have been "vile" in that it involved torture, aggravated battery or depravity of mind. It selected a death sentence. There is no evidence ever shown from which a court could conclude the jury was confused or misled into thinking it could not impose a life sentence. The Virginia Supreme Court did not address the effect of instructions and verdict forms on Morrisette's actual case; rather, it found prejudice in the abstract from the error it perceived in the verdict form. That presumption of prejudice is impermissible under the Sixth Amendment. The lower court's application of the wrong standard conflicts with the majority of other lower courts and follows a number of recent jurisdictions which have decided to weaken the strong standard enunciated in *Strickland* for providing relief on collateral review.

3. The "One-Juror" Argument Is Contrary To *Strickland*.

Morrisette argues that, if his jury had been given a proper verdict form, "at least one juror" would have held out for a life sentence. (BIO at 19-20). The Court should

not be misled by the superficial logic of this assertion. In *Strickland*, this Court made clear that the prejudice inquiry “must exclude the possibility of arbitrariness, whimsy, caprice, ‘nullification,’ and the like.” 446 U.S. at 695.

The assessment of prejudice should proceed on the assumption that the decisionmaker is reasonably, conscientiously, and impartially applying the standards that govern the decision. It should not depend on the idiosyncrasies of the particular decisionmaker, such as unusual propensities toward harshness or leniency.

Id. Indeed, “the actual process of decision . . . should not be considered in the prejudice determination.” To say, as Morrisette has, that a single juror may have voted for life, is, while potentially *factually* possible, not *legally* cognizable. *Strickland* requires a “reasonable person” objective test when it comes to prejudice. Is there a reasonable probability of a different result that the *jury*, not one *juror*, would have voted differently had it been given a different verdict form? The “single juror” test would, essentially, eviscerate *Strickland’s* prejudice test because a court always can say it is possible, even probable, that there is a single juror somewhere who may have voted differently. The “reasonable probability” test obviously requires more.

4. The *Powell* Advisory Opinion Cannot Establish Ineffective Assistance.

Morrisette’s brief in opposition is devoted almost exclusively to proving that *Powell* must have had binding effect on the lower courts at the time Morrisette was tried. The petitioner does not dispute that all published decisions of the Virginia Supreme Court bind the Virginia lower courts. The issue Morrisette fails to confront head-on, however, is whether the language in that advisory opinion would have put a reasonably competent defense attorney on notice of the highly-specific, detailed directive about verdict forms which the Virginia Supreme Court later explicated in *Morrisette v. Warden* such that a court

could conclude with any measure of confidence that the attorney's performance was so greatly deficient as to constitute a Sixth Amendment violation. The answer to that question must be "no."

Morrisette admits that the verdict-form language in *Powell* was an advisory opinion not relating to the holding of the case (which reversed Powell's conviction for an improperly amended indictment). (BIO at 2). He acknowledges that, at the time that advisory opinion was published, other recent, pre-existing opinions from the Virginia Supreme Court – endorsing in *non-advisory holdings* the very same statutory verdict form used in Morrisette's case – were not overruled expressly until the state court did so in *Morrisette v. Warden*. (BIO at 10). He does not dispute the Virginia Supreme Court's acknowledgment in *Morrisette v. Warden* that the statutory verdict form – the one used in Morrisette's trial – was re-enacted without significant change by the Virginia General Assembly after the ***Powell*** advisory opinion criticizing the statutory verdict form had been published. (Pet. App. 13, note 4).³

Instead of addressing the obvious implications of these significant, undisputed facts as they relate to trial counsel's knowledge at the time of Morrisette's trial and counsel's consequent lack of objection to the statutory verdict form, Morrisette tries to prove that *Powell* actually overruled those pre-existing precedents without doing so expressly; indeed, without even discussing them. Morrisette relies on an inapplicable 1989 Virginia Supreme Court case relating to the statute of frauds and partnership agreements which held that, in 1910, the court had overruled *sub silentio* a case from 1810. (BIO at 10). He contends that, just as in the frauds case, the Virginia

³ The only change the Virginia legislature made to the statutory verdict form after *Powell* was to add the option of imposing a fine along with a life sentence.

Supreme Court in *Powell* must have overruled its prior precedents *sub silentio* because the parties argued those prior precedents in their briefs and because the court's membership, which largely was the same as when the prior precedents had been decided, must have known it was ruling in *Powell* contrary to those prior precedents. The respondent ignores the fact that, whatever may have been the internal thinking of the court in *Powell*, if it was not published – and none of Morrisette's *sub silentio* theory was published – it was not available for review by the practicing Bar and certainly was not known to Morrisette's trial counsel.

The issue of what Morrisette's trial counsel *did* know is the only germane question. His counsel knew that the Virginia Code addressed the mandatory form to use for verdicts in the penalty phase of a capital murder trial. They knew that the verdict form had been approved by both the Virginia Supreme Court and by this Court. They knew that published decisions of the Virginia Supreme Court upholding the statutory forms had not been overruled expressly. They knew, according to their affidavits filed below, that *Powell v. Warden* had been published. If they read it within the two months before Morrisette's trial – there is no evidence on this point – they knew that *Powell* contained an obviously advisory opinion which questioned the use of the verdict forms used in Powell's case but failed to clarify exactly what those objectionable forms contained or to describe precisely the court's objection. One of Morrisette's attorneys personally was aware that the Virginia Supreme Court had found error in the *failure* to use the statutory form in *Atkins*, his own case.

Consequently, in a case where there was any doubt about what form to use, attorneys acting reasonably would have opted to use – as they did in Morrisette's case – the forms mandated by Virginia law in the Code of Virginia. The Virginia Supreme Court's later proclamation in Morrisette's habeas case that a Sixth Amendment

violation flowed from circumstances in which the attorneys did not think ahead to how the state court finally would resolve an evolving legal issue, and, indeed, reasonably reacted to existing events and then-current law, cannot constitute ineffective assistance under *Strickland*.⁴

⁴ In his BIO under the heading, "Statement," Morrisette makes misleading and false representations of fact which are wholly irrelevant to the issues presented in the Warden's petition. He states that Morrisette and Ms. White were "lovers." (BIO at 2, note 1). He also states that "Bill Anthony . . . was widely known to be [Ms.] White's lover. . . ." (BIO at 1). However, it is undisputed that, at the time of the murder, Morrisette denied he ever had had sexual relations with Ms. White and denied that he ever had been alone with her. (*See* Warden's appendix to brief in opposition, page 33, *Morrisette v. Washington*, No. 05-8227, pending before this Court). Morrisette had seen Ms. White only when he went to her home in the presence of his employer, Bill Anthony, and when he washed Ms. White's car at Anthony's place of business. (*Id.* at 14-15). Morrisette never has presented any evidence implicating Anthony in the murder. Morrisette gave the police an elaborate alibi, placing him away from Ms. White's residence, but he refused to take a polygraph test. (*Id.* at 15-17). At trial, Morrisette did not allege he ever had sexual relations with his victim and the medical examiner testified that the rape occurred close in time to the murder. (*Id.* at 10-11).

In his habeas proceeding below, Morrisette alleged for the first time he was Ms. White's "lover" but did not support it with anything but hearsay affidavits from his friends. Morrisette never has explained how he could have reconciled at trial his own statements, made contemporaneously at the time of the murder denying such a relationship, with the 24-years-after-the-fact hearsay stories of his friends. He never has explained how he could have turned the obvious evidence of rape (half naked victim sprawled on kitchen floor with clothing pushed up and severe stab wounds, including defensive wounds) into any sort of consensual act. He never has presented any evidence to demonstrate that anyone other than Ms. White's rapist – Morrisette – murdered her.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully Submitted,

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