

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

GEORGE JOYNER,	)	
	)	
Petitioner,	)	
	)	
v.	)	CIVIL ACTION NO. 86-0197-R
	)	
DAVID A. GARRAGHTY, WARDEN,	)	
<u>et al.</u> ,	)	
	)	
Respondents.	)	

MEMORANDUM

Petitioner, a Virginia State prisoner proceeding by counsel, brings this petition for a writ of habeas corpus pursuant to 28 U.S.C. § 2254. On August 15, 1986, the Court denied respondents' motion to dismiss the petition for failure to exhaust some of the claims. Then, on October 24, 1986, the Supreme Court of Virginia dismissed a habeas petition of Joyner setting forth all of the present allegations. By order dated December 11, 1986, this Court directed counsel for each party to advise it of which claims had been raised in the earlier state petition. Counsel have now done so, and the issues raised in the petition are ripe for consideration. This matter is currently before the Court on petitioner's motion for a plenary hearing and on respondents' supplemental motion to dismiss.

Petitioner was convicted in the Circuit Court of the City of Petersburg

on April 17, 1984 of armed robbery, attempted murder, and two counts of use of a firearm in the commission of a felony. He was sentenced to thirty-four years in the penitentiary.

Petitioner attacks the validity of his conviction on the following grounds:

(a) He was denied his rights to due process and a fair trial because the court refused to grant him a continuance;

(b) He did not testify at trial because no one advised him that he could do so and because he had not obtained the cooperation of previous counsel;

(c) He was denied effective assistance of counsel on appeal because of a deliberate conflict of interests;

(d) He was forced to represent himself because his lawyer had failed to advise him of any defenses in the case and had instead simply counseled him to seek a plea agreement;

(e) He was denied effective assistance of counsel on appeal in that his lawyer failed to assign certain matters as error;

(f) Because of a deliberate conflict of interests, counsel refused to prosecute the "petition for a writ of error coram nobis" filed by petitioner during the pendency of the direct appeal;

(g) The evidence was insufficient to establish petitioner's requisite criminal intent;

(h) He was denied a full and fair opportunity to present his various claims on direct appeal and in his state habeas corpus petition because:

(1) there was a conflict of interest between his trial and appellate counsel; and,

(2) the Supreme Court of Virginia improperly denied and dismissed his prior petition for a writ of habeas corpus;

(i) He was not adequately warned of the dangers of self-representation and did not represent himself voluntarily.

The only allegations found by the Supreme Court of Virginia in its

ruling of October 24, 1986 not to have been procedurally defaulted as a result either of petitioner's failure to advance it on direct appeal or failure to include it in his initial state habeas petition were allegations (a), (f), and (h)(2).<sup>1</sup> Petitioner has not advanced a legitimate reason for his noncompliance with Virginia procedures. See Smith v. Murray, 477 U.S. \_\_\_\_, 91 L. Ed. 2d 434, 106 S. Ct. 2661 (1986). Application of the cause and prejudice test in this case will not result in a fundamental miscarriage of justice. Id at \_\_\_\_, 91 L. Ed. 2d at 446, 106 S. Ct. at 2668. Therefore, in view of the concerns of comity and finality that underpin Wainwright v. Sykes, 433 U.S. 72 (1977), and its progeny, see, e.g., Whitley v. Bair, 802 F.2d 1487 (4th Cir. 1986), claims (b), (c), (d), (e), (g), (h)(1), and (i) are barred from federal habeas corpus review.<sup>2</sup>

---

<sup>1</sup>The Supreme Court of Virginia dismissed the petition "[a]pplying the mandate of Code § 8.01-654(B)(2) to petitioner's allegations b, c, e and h(1)(denial of fair trial and appeal because of conflict of interest of trial and appellate counsel); the rule in Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680 (1974), to petitioner's allegations d, g and i; the rule in Hawks v. Cox, 211 Va. 91, 175 S.E.2d 271 (1970), to petitioner's allegations a and f; and the rule in Howard v. Warden, 232 Va. \_\_\_\_, \_\_\_\_ (decided September 5, 1986) to petitioner's allegation h(2) (Supreme Court improperly denied and dismissed prior petition for writ of habeas corpus), ..." Joyner v. Warden, Record No. 860425 (Va. Sup. Ct. October 24, 1986). Petitioner's state petition "had the same exact language and issues" as his federal petition. Response (to this Court's December 11, 1986 order) from Petitioner, at 2.

<sup>2</sup>To the extent that the Court's order of August 15, 1986 may have suggested that the Court would review the merits of all petitioner's claims, even the defaulted ones, so long as the exhaustion requirement was fulfilled, it is hereby VACATED. Although federal courts at all times retain the power to look beyond state procedural defaults, the exercise of that power ordinarily is inappropriate unless the defendant succeeds in showing both "cause" for noncompliance with the state rule and "actual prejudice" resulting from the alleged constitutional violation. Smith v. Murray, 477 U.S. \_\_\_\_, 91 L. Ed. 2d 434, 443-44, 106 S. Ct. 2661, (1986). Petitioner here has failed to meet that burden.

Notwithstanding their survival of state procedural bars, claims (a), (f), and (h)(2) do not warrant federal habeas relief. Claim (a), which concerns the trial court's alleged refusal to grant petitioner a continuance, raises nothing more than a state procedural question. It is well settled in this circuit that "[m]atters of state law not involving federal constitutional issues are not appropriate grounds for federal habeas corpus relief, Grundler v. North Carolina, 283 F.2d 798 (4th Cir. 1960)." Chance v. Garrison, 537 F.2d 1212, 1215 (4th Cir. 1976). Claim (f), which concerns petitioner's counsel's failure to prosecute a petition for a writ of error coram nobis during the pendency of a direct appeal, was not raised in his previous federal petition in this Court. Accordingly, it should be dismissed as an abuse of the writ pursuant to Rule 9(b), Rules Governing Title 28 Section 2254 Cases. That the previous petition was not dismissed on the merits does not affect this conclusion. See Douglas v. Garraghty, Civil Action No. 84-0031-R (E.D. Va. Sept. 25, 1984), aff'd, No. 84-6616 (4th Cir. May 10, 1985). Finally, in his claim (h)(2) petitioner is attempting to use this habeas corpus proceeding to attack a prior habeas proceeding. His complaints have nothing to do with the validity of his convictions in the state circuit court. This claim is clearly not reviewable. See Welborn v. Cox, 337 F. Supp. 16 (W.D. Va. 1970); Chance v. Garrison, 537 F.2d 1212.

For these reasons, the petition for a writ of habeas corpus must be DISMISSED. The Court also DENIES the petitioner's motion for a plenary hearing.

An appropriate order shall enter.

---

UNITED STATES DISTRICT JUDGE

IN THE UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF VIRGINIA  
Richmond Division

GEORGE JOYNER, )  
 )  
 Petitioner, )  
 )  
 v. ) Civil Action No. 86-0197-R  
 )  
 DAVID A. GARRAGHTY, WARDEN, )  
 et al., )  
 )  
 Respondents. )

FINAL ORDER

This matter is before the Court on the petitioner's motion for a plenary hearing and on the respondents' supplemental motion to dismiss. For the reasons stated in the accompanying memorandum opinion, the Court DENIES the petitioner's motion and GRANTS the respondents' motion, and hereby DISMISSES the petition.

Let the Clerk send a copy of this order and the accompanying memorandum opinion to all counsel of record.

\_\_\_\_\_  
DATE

\_\_\_\_\_  
UNITED STATES DISTRICT JUDGE