IN THE COURT OF APPEALS OF MARYLAND

NO. 30

SEPTEMBER TERM, 1996

FLINT GREGORY HUNT

V.

STATE OF MARYLAND

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*Murphy, C. J.
Eldridge
Rodowsky
Chasanow
Karwacki
Bell
Smith, Marvin H. (retired, specially assigned),
JJ.

DISSENTING OPINION BY BELL, J.

FILED: March 18, 1997

*Murphy, C.J., now retired, participated in the hearing and conference of this case while an active member of this Court; after being recalled pursuant to the Constitution, Article IV, Section 3A, he also participated in the decision and adoption of this opinion.

The petitioner, Flint Gregory Hunt, was sentenced to death, in 1988. Subsequently, it was discovered that two members of the jury intentionally withheld information pertinent to their qualifications to serve on that jury, despite having been examined on the voir dire concerning the subject. One of the jurors, Diana Void, withheld information that she had been charged with misdemeanor theft, which, if known, absolutely and without any doubt whatever, would have resulted in her disqualification from service not only in the Hunt case, but in any case. Ms. Void withheld the information on two occasions - during the jury orientation process, at which she was asked whether she was the subject of any pending charges, and during the voir dire process. The other juror, Patrick Russ, withheld information that he had been a victim of a burglary within the past year. Rather than being automatically disqualifying, that information rendered Mr. Russ subject to being stricken for cause. Because neither Ms. Void nor Mr. Russ answered the questions honestly, and the petitioner had no idea that their answers were false, neither was challenged by the petitioner and, thus, they were permitted to serve on the jury that sentenced him to death.

The majority holds that the petitioner may not, at this late date, assert the right to an impartial jury; according to it, that right being one that does not have to comply with the Johnson v. Zerbst[1] standard, i.e., be knowing and voluntary, the petitioner

[1] Johnson v. Zerbst, 304 U.S. 458, 464, 58 S.Ct. 1019, 1023, 82 L.Ed. 1461, 1466 (1938). See also Fay v. Noia, 372 U.S. 391,

has waived that right, essentially by inaction - by not discovering the jurors' lack of candor prior to taking a direct appeal. It also holds that, in any event, in order to be entitled to a new capital sentencing hearing, the petitioner must prove that jurors Void and Russ "actually" were biased, which he failed to do. The majority is wrong on both accounts.

I

Maryland's post-conviction statute, Maryland Code (1957, 1996 Repl. Vol.) Art. 27, § 645A(c), provides:

> When allegation of error deemed to have been waived.--
> (1)For the purposes of this subtitle, an allegation of error shall be deemed to be waived when a petitioner could have made, but intelligently and knowingly failed to make, such allegation before trial, at trial, on direct appeal (whether or not the petitioner actually took such an appeal), in an application for leave to appeal a conviction based on a guilty plea, in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, unless the failure to make such an allegation shall be excused because of special circumstances. The burden of proving the existence of such special circumstances shall be upon petitioner.
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> (2) When an allegation of error could have been made by a petitioner before trial, at trial, on direct appeal (whether or not said petitioner actually took such an appeal), in an application for leave to appeal a conviction based on a guilty plea, in any habeas corpus or coram nobis proceeding actually instituted by said petitioner, in a prior petition under this subtitle, or in any other proceeding actually instituted by said petitioner, but was not in fact so made, there shall be a rebuttable presumption that said petitioner intelligently and knowingly failed to make such allegation.

439, 83 S. Ct. 822, 849, 9 L.Ed.2d 837, 869 (1963).

This Court has interpreted this section as only applicable when fundamental rights are involved. Curtis v. State, 284 Md. 132, 149-50, 395 A.2d 464, 474 (1978). In that case, we stated:

> [W]e believe that the Legislature, when it spoke of 'waiver' in subsection (c) of Art. 27, § 645A, was using the term in a narrow sense. It intended that subsection (c), with its 'intelligent and knowing' standard, be applicable only in those circumstances where the concept of Johnson v. Zerbst and Fay v. Noia was applicable. Other situations are beyond the scope of subsection (c), to be governed by case law or any pertinent statues or rules.

Id. See also State v. Calhoun, 306 Md. 692, 703, 511 A.2d 461, 466 (1986).

The Sixth Amendment to the United States Constitution guarantees that "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." This provision is made applicable to the states through its Fourteenth Amendment. Gideon v. Wainwright, 372 U.S. 335, 342, 83 S.Ct. 792, 795, 9 L.Ed.2d 799 (1963) (holding "a provision of the Bill of Rights which is 'fundamental and essential to a fair trial' is made obligatory upon the states by the Fourteenth Amendment"). See also Irvin v. Dowd, 366 U.S. 717, 722, 81 S.Ct. 1639, 1642, 6 L.Ed.2d 751, 755 (1961) (stating that the failure to provide an impartial jury "violates even the minimal standards of due process"). In that regard, this Court has stated that "[t]here can be no doubt that in this country and in this State there is . . . the fundamental right to a fair and impartial jury trial. . . ." Davidson v. Miller, 276 Md. 54, 68-69, 344 A.2d 422, 431-32

(1975).

Quite clearly, the petitioner is asserting the right to an impartial jury, a right that is "fundamental and essential to a fair trial." Accordingly, because that is an unquestionably fundamental right, applying § 645A (c), its waiver cannot be accomplished unless two elements are met: (1) the petitioner must have been able to assert the claim previously and (2) he must have "intelligently" and "knowingly" failed to do so. Neither element has been met in this case.

The petitioner could not have raised this claim previously. It was not until, as a last ditch effort to save the petitioner, a Federal Public Defender investigator just happened to run an unrequired record check on the jurors, that he was made aware that there was a basis for such a claim. Surely, this Court cannot conclude that it is possible for one to assert a right when he or she has absolutely no knowledge that it exists. Only Ms. Void and Mr. Russ knew that they had withheld information material to the voir dire process. The petitioner simply had no way of knowing when the jury was impaneled that it was violative of the fundamental right to an impartial jury. As soon as knowledge that the process was flawed became known to him, he moved, on that basis, for a new sentencing hearing. In short, the petitioner could not have raised the impartial jury issue prior to his second post conviction petition.

To hold that the petitioner's counsel could have found the

information by running a background check on all the jurors using the same system that the investigator used is preposterous. Such a holding would indicate that counsel and defendants can no longer rely on the integrity of the jury selection process.

And because the petitioner was completely unaware that his right to an impartial jury had been infringed, he could not have "intelligently and knowingly" waived it. See Curtis, 284 Md. at 139, 395 A.2d at 468-69 (a defendant may not intelligently and knowingly waive a post conviction claim unless he or she both was previously aware of, and understood, it); Washington v. Warden, 243 Md. 316, 321-22, 220 A.2d 607, 610 (1966)(facts showing a lack of comprehension by the petitioner adequately rebuts the presumption of an intelligent and knowing waiver).

Again, the petitioner was completely ignorant of the fact that two members of the jury withheld pertinent information pertaining to their qualifications to serve, during both jury orientation and voir dire. A person cannot intelligently and knowingly waive that which is not known to exist. To hold otherwise makes a mockery of, and undermines, the entire justice system.

II

Because, by failing to answer truthfully all questions put to them on voir dire, they both knowingly concealed information bearing on their qualification to serve as jurors in the case being tried, jurors Void and Russ must be presumed to have been biased as

a matter of law.[2] In Clark v. United States, 289 U.S. 1, 53 S.Ct. 465, 77 L.Ed. 993 (1933), the Supreme Court recognized that a presumption of bias may arise when a juror knowingly conceals information. The Court stated, albeit in dicta, that disingenuous concealment by a juror or a "willfully evasive or knowingly untrue" answer furnishes the basis for a finding of bias and for declaring the trial a "mere sterility." Id. at 11, 53 S.Ct. at 468, 77 L.Ed. at 998. See United States v. Wood, 299 U.S. 123, 133, 57 S.Ct. 177, 179, 81 L.Ed. 78, 81-82 (1936)(bias of a juror may and under certain circumstances must be presumed as a matter of law); Smith v. Phillips, 455 U.S. 209, 222, 102 S.Ct. 940, 948, 71 L.Ed.2d 78, 89 (1982) (O'Connor, J., concurring) (the implied bias standard should be applied in appropriate circumstances; "in certain instances a hearing may be inadequate for uncovering a juror's biases, leaving serious question whether the trial court had subjected the defendant to manifestly unjust procedures resulting in a miscarriage of justice").

In McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1984), the Supreme Court developed a two-part test for determining whether a juror's

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[2] In the case of juror Void, it is of some consequence to this discussion that she was the subject of some controversy during the impanelling of the resentencing jury. It was the petitioner's contention that she was a pro-death juror. The majority concluded that, while she was confused and often inconsistent, she was not a pro-death juror. Hunt v. State, 321 Md. 387, 418-19, 583 A.2d 218, 233 (1990).

untruthful voir dire responses warranted the grant of a new trial:

> [T]o obtain a new trial in such a situation, a party must first demonstrate that a juror failed to answer honestly a material question on voir dire, and then further show that a correct response would have provided a valid basis for a challenge for cause.

Id. at 556, 104 S.Ct. at 850, 78 L.Ed.2d at 671. In a concurring opinion, Mr. Justice Brennan observed, "[b]ecause the bias of a juror will rarely be admitted by the juror himself, . . . it necessarily must be inferred from surrounding facts and circumstances." Id. at 558, 104 S.Ct. at 851, 78 L.Ed.2d at 673. Thus, under McDonough, juror bias is conclusively shown whenever a juror knowingly fails to disclose material information giving rise to a challenge for cause.[3]

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[3]Prior to the decision in McDonough Power Equipment, Inc. v. Greenwood, 464 U.S. 548, 104 S.Ct. 845, 78 L.Ed.2d 663 (1983), the United States Court of Appeals for the Fourth Circuit, recognizing the injustice that may occur when a juror gives false or misleading answers during voir dire, applied a similar test to reach the same result. United States v. Bynum, 634 F.2d 768 (4th Cir. 1980). In that case, a juror who served on two separate panels in different criminal cases had a brother who had been convicted of bank robbery, a sister-in-law convicted of narcotics violations, and a nephew convicted of bank robbery. During the voir dire examination in the first case, the juror did not respond to the question whether any person to whom he felt close had ever been a defendant or victim of a crime. Likewise, in the second case, he failed to answer, on voir dire, whether he or any close family relatives had ever been convicted of a crime or subject to any criminal investigation. After guilty verdicts were returned in both cases,the juror's failure to disclose came to the court's attention and special hearings on the matter were held. Despite the juror's testimony that he did not feel especially close to his brother, nephew or sister and therefore had responded truthfully to the questions, the court concluded that the juror knew the questions required him to at least reveal his brother's conviction. Accordingly, it reversed both convictions, reasoning that "when possible non-objectivity is secreted and compounded by the

Several courts have adopted the McDonough standard. State v. Thomas, 830 P.2d 243, 245-46 (Utah 1992) (juror bias presumed because juror failed to disclose prior crime of violence against her son); Burton v. Johnson, 948 F.2d 1150, 1158 (10th Cir. 1991); United States v. Colombo, 869 F.2d 149, 151 (2nd Cir. 1989); United States v. Scott, 854 F.2d 697, 699-700 (5th Cir. 1988) (a juror may not conceal material facts disqualifying him simply because he sincerely believes that he can be fair in spite of them); United States v. Perkins, 748 F.2d 1519 (11th Cir. 1984). See also Burkett v. State, 21 Md.App. 438, 319 A.2d 845 (1974) (implying that a juror's intentional withholding of information during voir dire leads to a presumption of bias).

In the present case, both jurors knowingly withheld information pertinent to their qualifications to serve as jurors during the voir dire examination. Indeed, had they answered the questions honestly, the petitioner could have moved to exclude juror Void as a matter of right and sought to have Russ struck for cause.

III

Alternatively, in this case, there are two additional, independent bases upon which the bias of the jurors must be presumed.

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deliberate untruthfulness of a potential juror's answers on voir dire, the result is deprivation of the defendant's rights to a fair trial." Id at 771.

First, Void's bias must be presumed because the information she withheld during voir dire would have disqualified her, statutorily, from jury service. By enacting Maryland Code, (1957, 1996 Repl. Vol.) § 8-207 (b)(5) of the Courts & Judicial Proceedings Article, the Maryland General Assembly has sought to protect a defendant's right to trial by an impartial jury by prohibiting certain categories of persons from sitting on juries. That section provides:

> (b) Grounds for disqualifications. - A person is qualified to serve as a juror unless he:
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> (5) Has a charge pending against him for a crime punishable by a fine of more than $500, or by imprisonment for more than six months, or both,or has been convicted of such crime and has received a sentence of a fine of more than $500, or of imprisonment for more than six months,or both, and has not been pardoned;
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> * * *

Courts have recognized that bias must be presumed and a new trial ordered when an individual who falls within the category of statutorily disqualified persons serves on a jury and that fact was not revealed during voir dire. See Gladhill v. General Motors Corp., 743 F.2d 1049, 1050-51 (4th Cir. 1984) (new trial ordered where a juror was legally disqualified from serving on the jury regardless of the jurors subjective qualifications; showing of actual bias not required; bias presumed because the law itself precluded the individual from sitting on the jury); Thomas v. Texas, 796 S.W.2d 196 (Tex. Crim. 1990) (new trial ordered in

capital murder case without a showing of actual prejudice where jury included juror who was statutorily disqualified); Commonwealth v. Kelly, 609 A.2d 175, 251-52 (Pa. Super. 1992) (defendant entitled to a new trial without showing of actual prejudice where juror falsely stated that he had never been convicted of a crime, when in reality he had and was therefore statutorily disqualified); State v. Williams, 462 A.2d 182 (N.J. Super. 1983)(new trial granted where statutorily disqualified juror sat on jury; defendant not required to show actual prejudice).

This Court, like those just mentioned, should defer to the legislative determination that persons, like Void, charged with prescribed criminal conduct, are unfit to sit on a jury and, as a consequence, grant the petitioner a new capital sentencing hearing. Indeed, had Void revealed during voir dire that she had been charged with theft, she automatically would have been struck, as she was statutorily disqualified.

A similar result obtains in the case of Russ, who concealed the fact that he was a victim of a violent crime. It is well established that, where there are similarities between the juror's experiences and the facts at trial, the juror's bias may be presumed. Hunley v. Godinez, 975 F.2d 316, 319 (7th Cir. 1992) ("courts have presumed bias in cases where the prospective juror has been the victim of a crime or has experienced a situation similar to the one at issue in the trial.") See Burton v. Johnson, 948 F.2d 1150 (10th Cir. 1991) (bias presumed where juror who was

victim of spousal abuse sat in a murder trial and the defendant's defense was battered wife syndrome); United States v. Eubanks, 591 F.2d 513, 517 (9th Cir. 1979) (court presumed bias where juror's sons were heroin users and in the case being tried defendants were charged with distributing heroin); United States ex rel. De Vita v. McCorkle, 248 F.2d 1, 8 (3rd Cir. 1957) (in a robbery case the court presumed bias where juror was a victim of robbery).

Here, Russ was a victim of a violent crime. His past experience, which occurred within only one year of his jury service, connects Russ to the case in a way that will most likely prevent him from being impartial. Moreover, the State has not offered any evidence to indicate his impartiality.