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Chichester v. Taylor No. 98-15, 1999 WL 3736 (4th Cir. Jan. 6, 1999)

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I. Facts

On August 16, 1991, two black men, wearing dark clothes, masks, and gloves and both wielding pistols, entered a pizza restaurant located in Manassas, Virginia. One of the men was approximately three inches taller than the other. The shorter of the two men jumped over the counter, took money from the register, and ordered the restaurant manager to open a second register. The taller of the two men stayed on the customer side of the counter. The manager was unable to open the register. One of the men shot and killed the manager.[1]

Because both men were masked, none of the four eyewitnesses to the murder were able to identify either of the men. However, another witness in the vicinity at the time, Jack Burdette ("Burdette"), told police that he saw two men running from the direction of the restaurant and identified one of the men as Carl Chichester ("Chichester"). Of the three eyewitnesses who testified at trial, Denise Matney ("Matney"), said that the man on the customer side of the counter, purportedly Chichester, was the triggerman in the murder, but she originally told police she was unsure who actually shot the store manager. Another of the eyewitnesses, Patricia Eckert, originally told police that the man on the employee side of the counter, Chichester's accomplice, was the triggerman, but at trial she testified that she was unsure of who pulled the trigger. A fourth eyewitness, sixteen-year old William Fruit ("Fruit"), was unavailable to testify at trial, but originally told police that he thought the man on the employee side of the counter was the shooter.[2]

To establish an alibi, the defense introduced evidence that Chichester was in Washington, D.C., at his job with his family's janitorial business on the evening of the murder. Chichester's mother testified that Chichester was penciled in to work on the evening of the murder, but she and Chichester's sister, also scheduled to work the night of the murder, testified that they had no recollection of whether Chichester actually worked or not on the night of the murder.[3]

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1. Chichester v. Taylor, No. 98-15, 1999 WL 3736, at *1 (4th Cir. Jan. 6, 1999). The Commonwealth of Virginia executed thirty-six year old Carl Hamilton Chichester on April 13, 1999. Peter Bacque, *Chichester is Executed; Fifth this Year*, RICHMOND TIMES-DISPATCH, April 14, 1999, at B1.

2. *Chichester*, 1999 WL 3736, at *1.

3. *Id.*, at *2.

Chichester was found guilty of capital murder, robbery, and firearms charges in September 1993. The jury recommended the death sentence after finding the future dangerousness aggravating factor. In December, the trial judge adopted the jury's recommendation and sentenced Chichester to death. Chichester's subsequent appeals to the courts of Virginia and the Supreme Court of the United States were all denied. On June 19, 1997, Chichester filed a petition for writ of habeas corpus in the United States District Court for the Eastern District of Virginia. The district court dismissed the petition. From that order of dismissal, Chichester appealed.[4]

II. Holding

The United States Court of Appeals, Fourth Circuit, made the following rulings: (1) Chichester's counsel was not constitutionally ineffective for failing to investigate and present evidence that Chichester was not the triggerman, to explore testimony regarding the gun used in the murder, and to impeach certain witnesses; (2) the district court's denial of Chichester's motion for an expert to assist in developing evidence of prejudice resulting from his trial counsel's actions was not improper because Chichester had failed to show that any of his trial counsel's actions were unreasonable, thus there was no need to examine any resulting prejudice; (3) Fruit's pretrial statement that the man on the employee side of the counter was the triggerman was not new evidence as defined in *Schlup v. Delo*,[5] and therefore Chichester did not establish a probability of innocence as contemplated in *Schlup*; and (4) the admission of evidence of a prior robbery at a pizza restaurant in a nearby town, of which Chichester was convicted, did not violate the Virginia rule barring the admission of prior crimes to show a propensity to commit the crime charged where the robbery was committed in a very similar manner.[6]

III. Analysis / Application in Virginia

A. Ineffective Assistance of Counsel

1. Investigation of Triggerman Evidence

Chichester claimed that his trial counsel was constitutionally ineffective for failing to investigate and present evidence suggesting that Chichester was

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4. *Id.*, at *2 (citing Chichester v. Commonwealth, 448 S.E.2d 638 (Va. 1994); Chichester v. Virginia, 513 U.S. 1166 (1995)).

5. 513 U.S. 298 (1995) (holding that new reliable evidence, showing that a constitutional violation probably resulted in the conviction of one who is actually innocent, can establish actual innocence of the underlying offense). *See also* Barbara Anna Pohl, Case Note, CAP. DEF. J., Spring 1995, at 4 (analyzing Schlup v. Delo, 115 S. Ct. 851 (1995)).

6. *Chichester*, 1999 WL 3736, at *2-8. Chichester's claims relating to failure of trial counsel to impeach Burdette, the sufficiency of Fruit's statement to satisfy the *Schlup* standard, and the introduction of evidence of the prior robbery will not be discussed at length in this summary. The court's rulings on these issues appear correct, are briefly stated, and provided little useful insight for defense counsel.

not the triggerman in the shooting. The court applied the two-prong test of *Strickland v. Washington*[7] to counsel's failure to both investigate and present triggerman evidence. In each instance, the court found that trial counsel's failures did not satisfy the objective unreasonableness prong of *Strickland*.[8]

The court ruled that trial counsel's failure to investigate triggerman evidence was not unreasonable based on language in *Strickland* and its interpretation by the Fourth Circuit in *Barnes v. Thompson*.[9] In *Barnes*, the Fourth Circuit held that trial counsel may rely on the truthfulness of his client and those whom he interviews in deciding how to pursue his investigation.[10] Since Chichester told trial counsel that he was elsewhere on the night of the murder,[11] the court ruled that Chichester's trial counsel could rely on that statement in determining what lines of defense to pursue. Since investigation of any triggerman evidence conflicted with an alibi defense, the court ruled that it was reasonable for trial counsel not to investigate triggerman evidence.[12]

The court's ruling on the failure to investigate triggerman evidence may be correct under applicable case law. However, the fact that the failure to investigate triggerman evidence was not unreasonable as a matter of law does not mean that the failure to investigate triggerman evidence was necessarily the best approach. Trial counsel had evidence suggesting doubt that Chichester was the triggerman. This evidence included the statements from Fruit, Eckert and Matney, all of whom told the police or testified at some point to the following: (1) that they were unsure who the triggerman was or (2) that the man on the employee side of the counter was the shooter. In Virginia, the status of not being the triggerman in a capital murder case means the difference between life and death. Under section 18.2-18 of the Virginia Code, in a murder perpetrated by two or more defendants, only the person who inflicted the lethal blow, the "triggerman," may be convicted of capital murder.[13]

Under *Strickland*, the court excused counsel's failure to pursue the triggerman defense as a tactical decision based on a conflict with defendant's

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7. 466 U.S. 668 (1984) (holding counsel's performance to be constitutionally ineffective if (1) counsel's performance was objectively unreasonable and (2) counsel's deficient performance was prejudicial to the defendant).

8. The court ruled that the failure to present triggerman evidence at trial was not constitutionally ineffective because Chichester's counsel presented an alibi defense. Had counsel presented evidence that Chichester was not the triggerman, counsel would had to have conceded that Chichester may have been at the scene of the crime, a concession inconsistent with an alibi defense. For this reason, the court ruled that trial counsel's choice not to present triggerman evidence was not unreasonable under *Strickland v. Washington*, 466 U.S. 668 (1984). *Chichester*, 1999 WL 3736, at *3.

9. 58 F.3d 971 (4th Cir. 1995).

10. Barnes v. Thompson, 58 F.3d 971, 979-80 (4th Cir. 1995).

11. *Chichester*, 1999 WL 3736, at *4.

12. *Id.*

13. VA. CODE ANN. § 18.2-18 (Michie 1998).

alibi defense. *Strickland* held that the reasonableness of the failure to investigate is to be evaluated according to the reason for the decision not to investigate.[14] The *Strickland* rationale permits information supplied by the client to virtually control that evaluation.[15]

As a practical matter, however, *Strickland* is not a guide to the tactical choices required in a capital case. This case is illustrative of that point. As a general proposition, complete reliance on the client is ill-advised. For example, consider the number of times defendants change their stories when confronted with evidence by their police interrogators. In this case, was the tactical decision to go with an alibi rather than a triggerman defense made before or after the weakness of the alibi testimony from Chichester's mother and sister became apparent?[16] It is the practical, if not constitutional, duty of capital defense counsel to investigate every potentially significant defense matter regardless of the wishes or assertions of the client.

2. *Shape of Gun and Ballistics Testimony*

Chichester made two more ineffective assistance of counsel claims, one of which centered around testimony made by Julian Mason ("Mason"), the Commonwealth's ballistics expert, and Matney. Matney testified that the man on the customer side of the counter, purportedly Chichester, was carrying a box-like gun.[17] On appeal, Chichester argued that it was ineffective assistance of counsel not to exploit this testimony because this description would not have fit the gun used in the murder[18] but would have fit the gun used in the prior pizza restaurant robbery[19] of which Chichester had been convicted. To refute Matney's testimony, Mason testified for the Commonwealth that the two types of guns are very similar in appearance and that a description of box-like could fit the handgun used in the crime.[20] The court denied this claim because no evidence contradicting Mason existed, and therefore, the decision of counsel was reasonable.[21] Unfortunately, the court failed to acknowledge that the reason there was no evidence contrary to Mason's testimony, the absence of which made counsel's actions reasonable, was because trial counsel failed to seek or present such

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14. *Strickland*, 466 U.S. at 691.

15. *Id.*

16. Neither Chichester's mother nor his sister could specifically remember if Chichester was actually at work on the night of the murder. *See infra* note 3 and accompanying text.

17. *Id.*, at *5.

18. *Id.* The gun used in the murder was a .380 caliber handgun. *Id.*

19. *Id.* The gun used in the prior pizza restaurant robbery was a nine-millimeter handgun. *Id.*

20. *Id.*

21. *Id.*

evidence. Thus, the court creates an interesting position whereby the failure of trial counsel to refute Mason's testimony meant there was no evidence from which the court could find trial counsel's actions unreasonable.[22]

3. *Denial of an Expert Witness to Help Prove the Prejudice Prong of* Strickland

In relation to his claims of ineffective assistance of counsel, Chichester claimed that the district court incorrectly denied his request for an appointment of an expert to assist in developing his claim of prejudice resulting from trial counsel's actions. The court ruled that since trial counsel's actions were not unreasonable (the first prong of the *Strickland* test), there was no need for the court to appoint an expert to help Chichester develop prejudice (the second prong of the *Strickland* test).[23] In its most technical sense, this ruling seems fairly convincing.

However, had an expert been appointed, this expert would likely have helped prepare evidence on both the prejudice prong of the test and the reasonableness prong. For an expert to assist in showing prejudice, he would first have to know specifically if and how trial counsel's actions had been unreasonable, otherwise he would be unable to testify on how a specific action prejudiced a defendant. Perhaps the error here was in appellate counsel's request for an expert to assist only with the prejudice prong of his claim. Had counsel requested an expert to assist in the development of both prejudice and unreasonableness, the court may have been more willing to grant the expert.

B. Ake *Motions: How They Could Have Been Used in this Case*

In Virginia, expert assistance can be obtained through several procedures, one of which is a motion based on *Ake v. Oklahoma*,[24] *Caldwell v. Mississippi*,[25] and *Husske v. Commonwealth*.[26] In *Ake*, the United States Supreme Court held that if sanity is to be an issue at trial, a defendant has

22. The court employed the same circular rationale to excuse defense counsel's failure to seek and present expert testimony to repute the testimony of Mason and Dr. Frances Field, another Commonwealth expert. They testified that absence of gunshot residue on the victim meant that any gunshots had to have been fired from more than two to three feet away while, "[a]ppellant, however, . . . made no showing that contrary expert opinion exists." *Id.* One further reason no showing could be made was the denial of expert assistance at habeas. *See infra* notes 23-30 and accompanying text.

23. *Id.*, at *6.

24. 470 U.S. 68 (1985) (holding that if sanity is to be an issue at trial, the State is constitutionally required to assure that the defendant has access to a competent psychiatrist).

25. 472 U.S. 320 (1985) (implying that due process may require that a defendant have access to more than just psychiatric experts).

26. 476 S.E.2d 920 (Va. 1996).

the right to "a *competent* psychiatrist who will conduct an *appropriate* examination and assist in evaluation, preparation and presentation of the defense."[27] In *Caldwell*, the Court expanded on the language of *Ake* and implied that due process may require that a defendant have access to experts other than psychiatric experts.[28] In *Husske*, the Supreme Court of Virginia read *Ake* and *Caldwell* together to mean that a defendant is entitled to non-psychiatric expert witnesses if he can show that assistance of such an expert is likely to be a significant factor in his defense and that he will be prejudiced by a lack of expert assistance.[29] This decision gives counsel the opportunity to ask for more than just psychiatric experts. However, the showing needed to get a court to actually appoint an expert under this line of cases is a difficult one. In short, the courts have required that the requested expert be critical to the defendant's case. Nevertheless, courts across the country have appointed experts from many fields under the authority of *Ake*.[30]

In this case, a very good argument could have been made that a firearms or ballistics expert was critical to the defendant s case. As seen above, counsel failed to refute the testimony of Julian Mason, the Commonwealth's ballistics expert. Chichester could have requested a firearms or ballistics expert of his own to refute the Commonwealth's testimony. Such an expert could have been critical to Chichester's case because if the gun he owned was not the gun used in the murder, a very reasonable doubt could have been raised in the minds of the jurors. Although Chichester presented lay testimony on this point, an expert became even more critical to Chichester's case when the Commonwealth presented Mason, an expert, to refute the lay testimony.

Ake appointments are not easy to obtain. Nevertheless, *Ake* is underused in Virginia. Trial counsel are invited to contact the Virginia Capital Case Clearinghouse for assistance in identifying experts and in crafting the necessary showing for the trial court.

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27. Ake v. Oklahoma, 470 U.S. 68, 83 (1985) (emphasis added).

28. Caldwell v. Mississippi, 472 U.S. 320, 323 n.1 (1985).

29. Husske v. Commonwealth, 476 S.E.2d 920, 925-927 (Va. 1996).

30. *See, e.g.*, State v. Eastlack, 883 P.2d 999 (Ariz. 1994) (conviction and sentence reversed because of failure to have psychological assistance appointed); Rey v. State, 897 S.W.2d 333 (Tex. Crim. App. 1995) (defendant entitled to pathologist to evaluate, pursue, and present evidence regarding cause of death); Dingle v. State, 654 So. 2d 164 (Fla. Dist. Ct. App. 1995) (failure to appoint a pediatric expert was reversible error); People v. Lawson, 644 N.E.2d 1172 (Ill. 1994) (a defense fingerprint/shoeprint expert was necessary to refute state's expert); Bright v. State, 455 S.E.2d 37 (Ga. 1995) (funds for a toxicologist were reasonably necessary to defense); Ex Parte Moody, 684 So. 2d 114 (Ala. 1996)(capital defendant entitled to a competent expert in the field of expertise that has been found necessary to his defense); State v. Coffey, 389 S.E.2d 48 (N.C. 1990) (trial court granted funds for expert in hair and fiber analysis).