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Royal v. Taylor 188 F.3d 239 (4th Cir. 1999)

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I. Facts

On February 21, 1994, Thomas Lee Royal, Jr. ("Royal"), Yancy Mitchener ("Mitchener"), Willie Cardell Sanders ("Sanders"), and Eldred Acklin ("Acklin") gathered in the parking lot of a shopping center in Hampton, Virginia. In his recorded confession, Royal indicated that he gave .25-caliber guns to both Mitchener and Acklin, a .32-caliber gun to Sanders, and kept for himself a .380-caliber gun.[1] Once armed, the four men, who had been drinking and smoking marijuana, left the shopping center parking lot to find and kill Hampton Police Officer Curtis Cooper.[2]

Instead, the four men ran into Officer Wallace. Although he realized that the officer in the police car was not Officer Cooper, Royal fired two shots into the car and then walked away. Both Mitchener and Acklin also fired shots into the police car. After hearing the shots, a nearby resident found the driver's door to Officer Wallace's car wide open, the driver's window shattered, glass on the ground under the open door, and Officer Wallace seated in the driver's seat with several gunshot wounds to the head.[3]

Officer Wallace died four days after the shooting. An autopsy report indicated that Officer Wallace was shot twice in the head and concluded that one of the bullets was fatal. A forensic expert later determined that the fatal bullet was consistent with a .380-caliber weapon, but the Commonwealth neither recovered any fingerprints from the used cartridges found at the scene nor ever found the murder weapon.[4]

Royal confessed to the murder of Officer Wallace in a videotaped conversation with investigators and later pleaded guilty to capital murder and a related firearms offense. The court found the future dangerousness aggravating factor and sentenced Royal to death. Royal's subsequent appeals to the Supreme Court of Virginia and the United States Supreme Court were denied.[5] After the Supreme Court of Virginia denied Royal's state

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1. Royal v. Taylor, 188 F.3d 239, 242 (4th Cir. 1999). Royal first told investigators that Sanders also used a .380-caliber weapon; he later insisted that he alone had used a .380 that night. *Id.*

2. *Id.*

3. *Id.*

4. *Id.*

5. *Id.* (citing Royal v. Commonwealth, 458 S.E.2d 575 (Va. 1995); Royal v. Virginia,

habeas petition, he filed a federal habeas petition which the district court ultimately dismissed.[6] On appeal to the Fourth Circuit, Royal claimed he was entitled to habeas relief on the following grounds: (1) he was actually innocent of capital murder; (2) the Commonwealth violated *Brady v. Maryland*[7] by failing to reveal exculpatory evidence in a timely manner; (3) his trial counsel were ineffective for (a) failing to pursue a triggerman defense or obtain experts, the omission of which misled Royal into pleading guilty, and (b) failing to investigate and put forth mitigating evidence at the sentencing hearing; (4) the district court erred in denying him discovery; and (5) the district court erred in refusing to allow him a full year to file his federal habeas petition.[8] Because Royal filed his federal habeas petition after the effective date of the Antiterrorism and Effective Death Penalty Act of 1996, his claims were reviewed under that Act.[9]

II. Holding

The United States Court of Appeals for the Fourth Circuit made the following rulings: (1) Royal failed to produce sufficient evidence indicating that he was factually innocent;[10] (2) because Royal failed to raise his *Brady* claim prior to the federal habeas proceedings, it was procedurally defaulted and thus not entitled to review on its merits;[11] (3) Royal's counsel was not constitutionally ineffective in failing to investigate and present evidence that Royal was not the triggerman, to obtain independent experts, or to develop and present mitigation evidence at sentencing;[12] (4) the district court did not err in denying Royal's discovery request;[13] and (5) any error by the district court in refusing to allow Royal a full year in which to file his federal habeas petition was harmless.[14]

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516 U.S. 1097 (1996)).

6. *Id.* (citing Royal v. Netherland, 4 F. Supp. 2d 540 (E.D. Va. 1998)).

7. 373 U.S. 83, 87 (1963) (holding that failure by prosecution to disclose evidence favorable to accused upon request violates due process when the evidence is material to guilt or punishment).

8. *Royal*, 188 F.3d at 243.

9. Pub.L.No. 104-132, 110 Stat. 1214 (amending 28 U.S.C. Title 153). *See* 28 U.S.C.A. § 2254 (West 1994 & Supp. 1999).

10. *Royal*, 188 F.3d at 245.

11. *Id.* at 246.

12. *Id.* at 249.

13. *Id.*

14. *Id.* at 249-50.

III. Analysis / Application in Virginia

A. Actual Innocence Claim

Royal's claim of actual innocence centered around new evidence suggesting that Royal did not actually fire the shot that killed Officer Wallace. Under Virginia law, only the triggerman can be convicted of capital murder.[15] The court, however, refused to grant Royal's habeas petition on the basis of his actual innocence claim because such a claim is not a ground for federal habeas relief absent some independent constitutional violation in the state criminal proceeding.[16] Relying on *Herrera v. Collins*,[17] the court concluded that the proper forum for considering claims of innocence based on new facts alone is through a state clemency proceeding.[18] The court noted that clemency exists in Virginia, but it did not mention that clemency is rarely granted and that there are no procedural safeguards in the clemency process.[19]

While actual innocence standing alone is an insufficient ground for federal habeas relief, actual innocence may be used to open the door to an otherwise defaulted claim. The court explained that, when new evidence is at issue, a petitioner may be able to use an innocence claim as a "procedural gateway"[20] under *Schlup v. Delo*.[21] To successfully pass through the gateway, "the petitioner must show that it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[22] Meeting this standard has the effect of reviving claims that would otherwise be defaulted. The court found undisputed the evidence that Royal was the only one who carried a .380-caliber weapon that night and that a .380-caliber weapon fired the fatal shot.[23] Thus, the court refused to conclude that no

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15. VA. CODE ANN. § 18.2-18 (Michie 1999). Murder for hire and murder by direction are the two exceptions to the triggerman rule. *Id.*

16. *Royal*, 188 F.3d at 243 (citing Herrera v. Collins, 506 U.S. 390, 400 (1993) (holding that claim of actual innocence predicated upon new evidence is not ground for federal habeas relief)).

17. 506 U.S. 390 (1993).

18. *Royal*, 188 F.3d at 243 (citing *Herrera*, 506 U.S. at 411, 417).

19. *See* Brian S. Clarke, *In Search of Clemency Procedures We Can Live With: What Process is Due in Capital Clemency Proceedings After* Ohio Adult Parole Authority v. Woodard?, 11 CAP. DEF. J. 5 (1998) (discussing the need for procedural safeguards such as a hearing and an impartial decision maker in state clemency proceedings).

20. *Royal*, 188 F.3d at 243.

21. 513 U.S. 298 (1995).

22. Schlup v. Delo, 513 U.S. 298, 327 (1995).

23. *Royal*, 188 F.3d at 244-45. In support of his actual innocence claim, Royal pointed to evidence suggesting that one of the .380-caliber shells found at the scene did not come from the same gun as the other .380 shells. Although experts could not positively determine if the shells came from the same gun, the court essentially accepted that they did. *Id.* at 244.

reasonable juror would have convicted Royal based on the new evidence presented.

While claims of actual innocence may often get lost among stacks of motions and appeals, capital defense attorneys should investigate such claims and present new evidence as early in the process as possible. While the *Schlup* standard may be demanding, once it is met it opens the door for the court to consider defaulted constitutional claims on their merits. Given the technical ease with which a claim may be defaulted, any doctrine that rescues such claims should be used.

B. Brady *Claim*

In response to Royal's *Brady* claim, the court agreed with the Supreme Court of Virginia's ruling that the claim was procedurally barred by *Slayton v. Parrigan*[24] because it could have been raised on direct appeal.[25] For the court to review Royal's *Brady* claim on its merits, Royal would have had to show both cause for the default and actual prejudice, or that failure to consider the claims would result in a "fundamental miscarriage of justice."[26]

After Royal pleaded guilty, the Commonwealth informed Royal's counsel of a .380-caliber gun planted at the crime scene by a state trooper. Further, after Royal filed his direct appeal with the Supreme Court of Virginia, the Commonwealth again informed Royal's counsel of planted evidence–this time a .25-caliber cartridge planted by the same trooper.[27] Royal argued that the delays in reporting the planted evidence and the refusal by the Commonwealth to give him access to statements made by the other gunmen established sufficient cause to overcome the default of his *Brady* claim.[28] The court did not explicitly rule on whether or not Royal had shown cause through state interference; instead, the court found that the existence of cause was irrelevant because Royal failed to show that the *Brady* violation caused actual prejudice.[29]

C. Ineffective Assistance of Counsel

Chief among Royal's claims of ineffective assistance of counsel was his claim that he would not have pleaded guilty to capital murder had his trial counsel investigated and presented a triggerman defense or obtained quali-

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24. 205 S.E.2d 680 (Va. 1974). The court found that *Slayton* was a valid state procedural rule. *Royal*, 188 F.3d at 245.

25. *Royal*, 188 F.3d at 245-46.

26. *Id.* at 245 (quoting Coleman v. Thompson, 501 U.S. 722, 750 (1991) (internal quotation marks omitted)).

27. *Id.*

28. *Id.* 245-46.

29. *Id.* at 246.

fied experts.[30] Relying on *Anderson v. Warden*,[31] the Commonwealth argued that the claim was procedurally defaulted because the Supreme Court of Virginia dismissed the claim.[32] The Fourth Circuit found that because the Commonwealth failed to raise procedural default as an affirmative defense at the district court level, it lost the right to do so on appeal.[33] The court also found that, although it had discretion to default the claim, no "obvious" reason existed to do so.[34]

Turning to the merits of Royal's ineffective assistance of counsel claim, the court applied the two-pronged test established by *Strickland v. Washington*.[35] To satisfy the test, the petitioner must offer proof of both ineffective representation and actual prejudice.[36] The court found that Royal failed to meet either prong of the *Strickland* test.[37] While the court did not find Royal's counsel ineffective for failing to investigate and pursue a triggerman defense, obtain experts, or present mitigating evidence at sentencing, this finding does not mean those avenues should not have been pursued by Royal's counsel.[38] A capital defense attorney should investigate all possible avenues. In Royal's case, four .25-caliber shells were recovered near the front of the police car and two .380-caliber shells were found near the rear of the car.[39] The recovery of the extra bullets and the presence of the other gunmen made the triggerman defense a viable possibility in Royal's case. The same point can be made about the failure of Royal's counsel to present certain mitigating evidence at sentencing. If there is mitigating evidence, it should normally be presented.[40]

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30. *Id.*

31. 281 S.E.2d 885, 888 (Va. 1981) (holding that when a state habeas petitioner makes an ineffective assistance of counsel claim, he cannot dispute his assertions of voluntariness and adequacy at the plea colloquy unless he can show an adequate reason why he should be allowed to controvert his prior statements).

32. *Royal*, 188 F.3d at 246.

33. *Id.*

34. *Id.* at 247-48.

35. 466 U.S. 668, 687-88 (1984) (holding counsel's representation to be constitutionally ineffective if it was both objectively unreasonable and prejudicial to the defendant).

36. *Royal*, 188 F.3d at 248 (citing Strickland v. Washington, 466 U.S. 668, 687-88 (1984)).

37. *Id.*

38. *See* Jason J. Solomon, Case Note, 11 CAP. DEF. J. 315 (1999) (analyzing Chichester v. Taylor, No. 98-15, 1999 WL 3736 (4th Cir. Jan. 6, 1999)).

39. *Royal*, 188 F.3d at 244.

40. *See* Susan F. Henderson, *Presenting Mitigation Against the Client's Wishes: A Moral or Professional Imperative?*, CAP. DEF. DIG., Fall 1993, at 32 (discussing implied constitutional and statutory requirements for presenting mitigating evidence and the various standards of professional responsibility which authorize and encourage the presentation of mitigating evidence).

Finally, Royal's case illustrates why pleading guilty to capital murder should be avoided whenever possible. Once a guilty plea is accepted and a death sentence is imposed, many issues are barred from later consideration. Though a guilty plea may be necessary or reasonable in some instances, the circumstances surrounding Royal's case did not mandate a plea of guilty. Guilty pleas, absent agreement that the death penalty will not be recommended or imposed,[41] should be considered only in the most extraordinary cases.

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41. Counsel should understand that even if the prosecution agrees not to recommend the death penalty, the trial court may still impose the death sentence. *See* Dubois v. Commonwealth, 435 S.E.2d 636, 637 (Va. 1993) (Commonwealth, pursuant to a plea agreement, recommended life but the trial judge imposed the death sentence.).