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I. Facts

On the afternoon of January 14, 1993, the bodies of Katherine Tafelski ("Katherine") and her daughter Ashley Tafelski ("Ashley") were found in Katherine's house. In addition, Katherine's son Andrew Tafelski ("Andrew") and a family friend, Chelsea Brothers ("Chelsea"), were found alive inside the house. They too had been assaulted. The police search of the room where Katherine's body was found uncovered a blue washcloth that contained spermatozoa. Tool marks consistent with marks on the bodies of the victims were found on the back door. In the backyard a foot print was discovered.[1]

Several times during the police investigation of the crime scene, a man later identified as Russel Burket ("Burket"), was observed on the porch of a neighboring house. On one occasion Burket began to walk toward the officers investigating the scene and was told to return to his home. A detective interviewed Burket later that day. Burket told the detective that he often performed odd jobs at the Tafelski house and that he was outside of his residence around midnight on the night of the murders but had not seen anything unusual.[2] From tests later performed on the spermatozoa samples from the blue washcloth, it was determined that Burket's DNA was consistent with the samples.[3] On January 20, 1993, Burket accompanied detectives to police headquarters. Burket was advised that he was not under arrest and was free to leave at any time. Burket's interview was both audio and video taped. Burket ultimately gave detectives a detailed confession to the murders of Katherine and Ashley and the assaults on Andrew and Chelsea.[4]

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1. Burket v. Angelone, 208 F.3d 172, 177-79 (4th Cir.), *cert. denied*, 120 S. Ct. 2761 (2000). The tool was subsequently identified as a "rusty metal prybar" or an automotive tool. The footprint in the backyard was later determined to belong to the defendant. *Id.* at 179.

2. *Id.* at 179.

3. *Id.* Approximately 7.8% of the Caucasian population possess the same HLA Dqa type as that identified from the washcloth sample. *Id.*

4. *Id.* at 195-98. During the interview, Burket was falsely informed that the police had at that time physical evidence connecting him to the scene and that the children had seen Burket inside the Tafelski house on the night of the murders. Twice during the interview and prior to Burket's confession, Burket indicated that he would need a lawyer. *Id.* The United States Court of Appeals for the Fourth Circuit found these statements to be equivocal and not exercises of Burket's right to counsel. *Id.*

On July 6, 1993, Burket was indicted on charges of malicious wounding, statutory burglary, inanimate object sexual penetration, and capital murder.[5] The capital count was based on the willful and premeditated murders of Katherine and Ashley as part of the same act or transaction.[6] On January 19, 1994, Burket pleaded guilty to capital murder, but reserved the right to appeal the admissibility of his taped confession.[7] The trial court found the presence of both aggravating factors, future dangerousness and vileness, and sentenced Burket to death.[8]

On direct appeal, the Supreme Court of Virginia affirmed Burket's convictions and sentences.[9] The United States Supreme Court denied certiorari on April 3, 1995.[10] On August 30, 1995, Burket filed his state habeas petition in the Supreme Court of Virginia.[11] On July 19, 1996, Burket filed an amended state habeas petition alleging the following: (1) trial counsel operated under several conflicts of interest; (2) trial counsel abdicated his role to investigate, prepare, and defend Burket; (3) Burket's guilty pleas were not knowingly, intelligently, and voluntarily made; (4) the trial court failed to inquire about Burket's competency and to conduct a competency hearing; (5) Burket was incompetent during all critical stages of the trial; (6) the trial court's refusal to suppress Burket's confession violated his rights under *Miranda*; (7) Burket was deprived of effective assistance of counsel; (8) trial counsel unreasonably utilized mental health experts; (9) Burket was deprived of his right to the effective assistance of competent mental health experts; and (10) the Commonwealth engaged in various

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5. *Id.* at 179-80.

6. *Id.* at 180; *see* VA. CODE ANN. § 18.2-31(7) (Michie 1996).

7. *Burket*, 208 F.3d at 180.

8. *Id.*

9. Burket v. Commonwealth, 450 S.E.2d 124 (Va. 1994). On direct appeal, Burket raised the following claims: (1) his confession was inadmissable under *Miranda v. Arizona*; (2) his right to counsel was violated; (3) his rights under *Miranda* were violated when police continued to question him after he had been advised of his *Miranda* rights; (4) the state trial court erred in finding Burket's waiver of *Miranda* was voluntary, knowing, and intelligent; (5) Burket's rights under *Miranda* were violated when police continued to question him after his statements indicating he did not want to continue the interview; (6) the imposition of the death penalty violates the Cruel and Unusual Clause of the Eighth Amendment and the Due Process Clause of the Fourteenth Amendment; (7) his right to a jury trial was denied because he could not tell the jury how much time he would serve if given a life sentence; (8) the trial court erred in finding the Commonwealth's expert more credible than the defendant's expert witness; (9) the trial court failed to properly consider his mitigating evidence; (10) the trial court erred in not allowing Katherine's husband to testify at the penalty phase of the trial. *Id.*; *see Miranda v. Arizona*, 384 U.S. 436, 478-80 (1966).

10. Burket v. Virginia, 514 U.S. 1053 (1995).

11. *Burket*, 208 F.3d at 180. Appointed counsel for the state habeas proceedings became seriously ill in November 1995. Burket then filed a motion requesting appointed counsel from the Virginia Capital Representation Resource Center, which was granted on March 8, 1996. *Id.*

forms of misconduct, including the manner in which Burket's confession was obtained and the Commonwealth's introduction of expert testimony regarding Burket's future dangerousness.[12]

On August 26, 1996, the Commonwealth moved to dismiss the amended state habeas petition.[13] Burket's reply to the Commonwealth's motion to dismiss was filed on September 30, 1996.[14] Two affidavits accompanied the reply. The first affidavit was unexecuted, but was prepared for Burket's father, Lester Burket, Jr. The second affidavit was executed by Susan Brown, a paralegal in the Virginia Capital Representation Resource Center. Brown stated in her affidavit that Burket's father had relayed to her the information contained in the unexecuted affidavit, but he did not want to sign the affidavit because it contained information that upset his wife and he thought it would hurt his son Lester Burket, III.[15] On November 20, 1996, the Supreme Court of Virginia dismissed Burket's amended state habeas petition.[16]

On petition for a writ of habeas corpus from the United States District Court for the Eastern District of Virginia, Burket asserted all claims from his amended state habeas petition and requested an evidentiary hearing. After counsel filed Burket's petition for federal habeas relief, Burket filed *pro se* motions to abandon further review of his death sentence and to schedule his execution. The district court denied his motions to withdraw the federal habeas petition and directed a United States Magistrate Judge to consider the petition and issue a report and recommendation.[17] The Magistrate Judge recommended that Burket's request for an evidentiary hearing be denied and that his petition for habeas corpus be dismissed.[18] The district

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12. *Id.* at 181.

13. *Id.*

14. *Id.*

15. *Id.*

16. *Id.* at 182. The Supreme Court of Virginia dismissed claims (1), (2), and (3) under the authority of *Anderson v. Warden*. *See* Anderson v. Warden, 281 S.E.2d 885, 888 (Va. 1981) (holding that petitioner on state habeas may not call into question the truthfulness of petitioner's statements made during trial regarding the adequacy of counsel and the voluntariness of guilty pleas without a valid reason). With respect to claims (3) through (6), (9), and (10), the Supreme Court of Virginia dismissed the claims under the authority of *Slayton v. Parrigan*. *See* Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974) (holding that claims that could have been raised at trial or on direct appeal but were not, are not cognizable on state habeas). Portions of claims (6) and (10) challenging the voluntariness of Burket's confession were dismissed under the authority of *Hawks v. Cox*. *See* Hawks v. Cox, 175 S.E.2d 271, 274 (Va. 1970) (holding that claims decided against the petitioner on direct appeal are not cognizable on state habeas). Claims (7) and (8) were found to lack merit. Burket's motion for an evidentiary hearing was denied. The Commonwealth's motion to strike Burket's affidavits was granted. *Burket*, 208 F.3d at 181-82.

17. *Burket*, 208 F.3d at 182.

18. *Id.*

court accordingly denied the request and dismissed the petition.[19] Burket moved to set aside, or in the alternative to alter, the district court's judgment. The district court denied the request and Burket noted a timely appeal. On August 25, 1999, Burket filed a certificate of appealability to the United States Court of Appeals for the Fourth Circuit. On petition for a certificate of appealability, Burket renewed the claims made in his amended state habeas petition.[20]

II. Holding

The Fourth Circuit held the following: (1) Virginia's *Anderson* rule would not be applied to establish procedural default; (2) Burket failed to establish a conflict of interest rendering trial counsel's performance ineffective; (3) Burket failed to establish ineffective assistance of counsel in the context of his guilty pleas; (4) counsel's decision not to raise competency claims on appeal was not ineffective assistance of counsel; (5) no *Miranda* warnings were required when Burket stated "I'm gonna need a lawyer;" (6) police were not required to cease interrogation after Burket's statement; (7) Burket impliedly waived his *Miranda* rights; and (8) certain of Burket's statements did not constitute unequivocal requests to remain silent.[21] The application for a certificate of appealability was denied and the appeal was dismissed.[22]

III. Analysis / Application in Virginia

A. The Anderson *Rule as an Adequate and Independent State Ground for Purposes of Procedural Default*

Anderson v. Warden[23] held that a petitioner is not permitted to challenge on state habeas the truth and accuracy of representations made by him as to the adequacy of counsel or the voluntariness of petitioner's plea unless petitioner offers a valid reason why he should be permitted to controvert his earlier statements.[24] The Supreme Court of Virginia rejected Burket's claims of ineffective assistance of counsel based on the holding in *Anderson*.[25] Under the rules of procedural default, a federal court cannot question a state court's application of a state procedural rule because a state court's

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19. *Id.* at 182-83.

20. *Id.* at 183.

21. *Id.* at 195. Burket's claims related to counsel's failure to raise competency claims on appeal were held to be procedurally barred. *Id.* The admission of Burket's confession was not found to be contrary to, or an unreasonable application of, clearly established federal law. Burket's claims of violations of *Miranda* and its progeny were rejected on similar grounds. *Id.* at 197.

22. *Id.* at 201.

23. 281 S.E.2d 885 (Va. 1981).

24. Anderson v. Warden, 281 S.E.2d 885, 888 (Va. 1981); *see Burket*, 208 F.3d at 188.

25. *Burket*, 208 F.3d at 188.

finding of procedural default is not reviewable if it is based on an adequate and independent state ground.[26] A rule is "adequate" if it is regularly and consistently applied by the state courts.[27] A rule is "independent" if it does not depend on a federal constitutional ruling.[28] In *Royal v. Taylor*,[29] the Fourth Circuit found the *Anderson* rule not to be an independent and adequate state ground for procedural default.[30] The court in *Royal* declined to apply *Anderson* because the application of *Anderson* by the Supreme Court of Virginia was found to be inconsistent.[31] Based on *Royal*, the Fourth Circuit declined to consider *Anderson* an adequate and independent state ground for procedural default of Burket's claims.[32]

B. The Strickland *Test as Applied to Claims of Conflict of Interest*

Because the Fourth Circuit declined to apply *Anderson*, the court reached the merits of Burket's claim of ineffective assistance of counsel.[33] Burket's claim of ineffective assistance of counsel was based on a claim that trial counsel operated under a conflict of interest.[34] Claims of ineffective assistance of counsel are analyzed under the two-part test set forth in *Strickland v. Washington*.[35] To satisfy the *Strickland* test, the petitioner must establish that trial counsel's performance was objectively unreasonable and that the petitioner was prejudiced by counsel's unreasonable performance.[36] The performance prong is proved when trial counsel's acts fall outside the realm of objectively reasonable performance.[37] The court does not second-guess counsel's trial strategy, but analyzes counsel's actions with great deference.[38] The prejudice prong is satisfied when it can be established that but for counsel's deficient performance, the result at trial would have been different.[39] When a petitioner claims that trial counsel labored under a conflict of interest, the *Strickland* test for ineffective assistance of counsel

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26. *Id.* at 183 (citing Harris v. Reed, 489 U.S. 255, 262 (1989)).
27. *Id.* (citing Johnson v. Mississippi, 486 U.S. 578, 587 (1988)).
28. *Id.* (citing Ake v. Oklahoma, 470 U.S. 68 (1985)).
29. 188 F.3d 239 (4th Cir.), *cert. denied*, 120 S. Ct. 165 (1999).
30. Royal v. Taylor, 188 F.3d 239, 248 (4th Cir.), *cert. denied*, 120 S. Ct. 165 (1999).
31. *Id.*
32. *Burket*, 208 F.3d at 184.
33. *Id.*
34. *Id.*
35. *See* Strickland v. Washington, 466 U.S. 668 (1984).
36. *Id.* at 687-88.
37. *Id.* at 687; *see Burket*, 208 F.3d at 183.
38. *Burket*, 208 F.3d at 183.
39. *Strickland*, 466 U.S. at 694.

is different.[40] The performance prong is proved when petitioner has established that counsel was involved in an actual conflict of interest.[41] Prejudice to the petitioner is presumed once petitioner has established that a conflict of interest in fact exists.[42]

The Fourth Circuit found that Burket's trial counsel did not operate under a conflict of interest.[43] Burket's claim rested primarily on the two affidavits stricken by the Supreme Court of Virginia in the state habeas petition.[44] The first affidavit was never executed by the affiant.[45] The second affidavit was clearly hearsay.[46] The Fourth Circuit found that the affidavits were not admissible, and found no error in the Supreme Court of Virginia's striking of the affidavits.[47] The affidavits were not considered in the court's analysis of Burket's claim of ineffective assistance of counsel. With only the evidentiary record from the pre-trial investigation and the trial records before the court, the Fourth Circuit determined that Burket failed to establish his claim that trial counsel performed under a conflict of interest.[48] Although the Fourth Circuit did not apply *Anderson* as an independent and adequate state procedural ground, Burket failed in his federal habeas petition to get into the record any evidence to support his claim of ineffective assistance of counsel.[49]

C. *The* Strickland *Test as Applied to Guilty Pleas*

Burket claimed that because his counsel was ineffective, his guilty pleas were not made knowingly and voluntarily.[50] The Supreme Court of Virginia dismissed this claim under the authority of *Anderson*.[51] The Supreme Court of Virginia also dismissed the claim under the authority of *Slayton v. Parrigan*.[52] *Slayton* held that claims that could have been raised at trial or

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40. *Burket*, 208 F.3d at 184 (citing U.S. v. Tatum, 943 F.2d 370, 375 (4th Cir. 1991)); *see Strickland*, 466 U.S. at 692.

41. *Burket*, 208 F.3d at 184.

42. *Id.* at 184-85.

43. *Id.* at 186.

44. *Id.*

45. *Id.*

46. *Id.*

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.* at 188.

51. *Id.*; *see Anderson*, 281 S.E.2d at 888. As discussed in Part A *supra*, the Fourth Circuit declined to apply the *Anderson* rule as an adequate and independent state procedural ground for the purposes of procedural default. *Burket*, 208 F.3d at 188.

52. *See* Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974).

on direct appeal but were not, are not cognizable on state habeas.[53] While the Fourth Circuit did not consider *Anderson* an independent and adequate state ground, the *Slayton* rule is an adequate and independent state ground for the purposes of procedural default.[54] Under the doctrine of procedural default, a federal court on habeas may not review constitutional claims if a state court has declined to consider the merits on the basis of an adequate and independent state procedural rule.[55] Because *Slayton* is an adequate and independent state ground, this claim was procedurally defaulted and the Fourth Circuit was limited to the consideration of whether cause and prejudice existed to excuse the procedural default and whether the state court correctly applied its own rule.[56]

In the context of a guilty plea, the *Strickland* test for ineffective assistance of counsel is whether counsel's performance fell below the objective standard of reasonableness and "that there is a reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial."[57] Deference is given to trial counsel's actions, and the presumption is that counsel's performance is objectively reasonable.[58] The standard is not one of hindsight, "but instead whether counsel at the time acted within the liberal bounds of competent representation."[59] As with Burket's claim of ineffective assistance of counsel based on a conflict of interest, the court refused to consider petitioner's affidavits. The Fourth Circuit's review of the evidence was limited to the trial record.[60] Based on the trial court's extensive plea colloquy with Burket and the court's colloquy with trial counsel, the trial court determined that Burket's pleas of guilty were made "knowingly, intelligently, freely, and voluntarily."[61] The Fourth Circuit concluded on the basis of overwhelming evidence of Burket's guilt that trial counsel's performance was objectively reasonable.[62] In light of the evidence against Burket, the Fourth Circuit concluded that

53. *Burket*, 208 F.3d at 189 (citing *Slayton*, 205 S.E.2d at 682).

54. *Id.* at 188-89.

55. *Id.* at 189.

56. *Id.* at 189; *see also Harris*, 489 U.S. at 262 (holding that a federal court cannot question a state court's application of a state procedural rule if the state court's finding of procedural default is based on an adequate and independent state ground).

57. *Burket*, 208 F.3d at 189 (citing Hill v. Lockhart, 474 U.S. 52, 59 (1985)).

58. *Id.*

59. *Id.* at 190.

60. *Id.*

61. *Id.* The standard for the constitutional validity of guilty pleas comes from *North Carolina v. Alford*. *See* North Carolina v. Alford, 400 U.S. 25, 31 (1970) (holding that a guilty plea must be the product of a free and intelligent choice). In applying the standard, the defendant's plea is given a presumption of truthfulness. Henderson v. Morgan, 426 U.S. 637, 647 (1976) (plurality opinion).

62. *Burket*, 208 F.3d at 190.

counsel's failure to raise the issue of the voluntariness of Burket's pleas did not fall outside of the objectively reasonable standard of performance. The court found that Burket failed to satisfy the prejudice prong of the *Strickland* test as well.[63] The court concluded that, in the face of "the Commonwealth's powerful evidence," a reasonable defendant would not have insisted on going to trial.[64] The court found no cause or prejudice existed to excuse the procedural default.[65]

IV. Conclusion

Burket's case demonstrates the difficulty in making a successful claim of ineffective assistance of counsel. Although the Fourth Circuit was willing to address the merits of Burket's claims that were procedurally defaulted in state habeas under *Anderson*, Burket's unsigned affidavit and hearsay affidavit were insufficient support for his habeas claims. The presumption of reasonableness of trial counsel's performance will not be overcome by this type of evidence. If the court cannot properly consider the evidence, the facts alleged in the inadmissible evidence will not persuade the court when considering the claim on the merits or when the court examines the case to determine if cause and prejudice exist to overcome procedural default.

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63. *Id.*
64. *Id.* at 190-91.
65. *Id.* at 191.