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Chandler v. Lee 89 Fed. Appx. 830 (4th Cir. 2004)

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I. Facts

A North Carolina jury found Frank Ray Chandler guilty of the first-degree murder of Doris Poore, and the trial judge sentenced Chandler to death.[1] Circumstantial evidence provided the primary basis for Chandler's conviction.[2] The evidence linking Chandler to the crime included Chandler's palmprints and fingerprints on Poore's kitchen door, testimony from Chandler's cousin that Chandler had tried to fabricate an alibi on the night of the murder, and the testimony of Jeffrey Kyle Wilson that Chandler had described the killing to him while they were cellmates in prison.[3] The Supreme Court of North Carolina affirmed the sentence and convictions on direct appeal.[4] A state trial court denied Chandler's motion for appropriate relief ("MAR"), and the Supreme Court of North Carolina denied Chandler's petition for a writ of certiorari.[5] In August 1999 Chandler filed a petition for a writ of habeas corpus in the United States District Court for the Middle District of North Carolina.[6] The district court denied Chandler's habeas petitions, and the United States Court of Appeals for the Fourth Circuit granted a certificate of appealability ("COA") to review four issues that the district court denied.[7]

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1. Chandler v. Lee, 89 Fed. Appx. 830, 833 (4th Cir. 2004) (opinion not selected for publication); *see* N.C. GEN. STAT. § 15A-2000(b) (2003) (instructing the jury to make sentencing recommendation to the trial judge, who then imposes a sentence of death only if the jury's recommendation is unanimous). The United States Supreme Court denied Chandler's petition for a writ of certiorari. Chandler v. Polk, No. 04-5904, 2004 WL 2202438, at *1 (U.S. Oct. 4, 2004).

2. *Chandler*, 89 Fed. Appx. at 833.

3. *Id.*

4. *Id.*; *see* State v. Chandler, 467 S.E.2d 636, 649 (N.C. 1996) (affirming conviction and sentence); N.C. GEN. STAT. § 15A-2000(d)(1) (2003) (requiring automatic review by the Supreme Court of North Carolina of all death sentences).

5. Chandler v. French, 252 F. Supp. 2d 219, 226 (M.D.N.C. 2003); *see* N.C. GEN. STAT. § 15A-1411(a) (2003) ("Relief from errors committed in the trial division, or other post-trial relief, may be sought by a motion for appropriate relief."). Chandler alleged "that (1) the prosecution had knowingly allowed Wilson to testify falsely, (2) the prosecution failed to disclose evidence that would have impeached Wilson's testimony, and (3) one of his attorneys had previously represented Wilson, and thus was laboring under a conflict of interest in violation of Chandler's Sixth Amendment rights." *Chandler*, 89 Fed. Appx. at 833.

6. *Chandler*, 89 Fed. Appx. at 834.

7. *Id.*; *see* 28 U.S.C. § 2253(c)(1)(A) (2004) ("Unless a circuit justice or judge issues a certificate of appealability, an appeal may not be taken to the court of appeals from the final order in a habeas corpus proceeding in which the detention complained of arises out of process issued

II. Holding

The Fourth Circuit affirmed the district court's denial of Chandler's habeas petition.[8] Reviewing the state court's rulings under the provisions of 28 U.S.C. § 2254(d), the court held that the state courts did not err in finding that the prosecution did not violate *Napue v. Illinois*[9] by knowingly using false testimony, the prosecution did not violate *Brady v. Maryland*[10] by withholding various pieces of evidence, Chandler's attorney did not have an actual conflict of interest by previously representing the prosecution's star witness, and the trial court was not required to give the jury an "extreme emotional disturbance" instruction during sentencing.[11] Thus, the court found that the state court's legal determinations were not "contrary to" or "an unreasonable application of" federal law and that the state court's factual determinations were not unreasonable in light of the facts presented to the state court.[12]

III. Analysis

A. Standard of Review

The Fourth Circuit reviewed the state court's decision under 28 U.S.C. § 2254(d)(1) because the North Carolina state courts adjudicated Chandler's claims on the merits and Chandler exhausted his remedies in the state courts.[13] Pursuant to § 2254(d)(1), courts may grant a writ of habeas corpus only if a state

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by a State court."; part of AEDPA); *see also* 4TH CIR. R. 22(a) (stating the Fourth Circuit's procedures for requesting a COA). *See generally* Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 635 (2004) (analyzing 4TH CIR. R. 22(a)).

8. *Chandler*, 89 Fed. Appx. at 834, 842.

9. 360 U.S. 264 (1959).

10. 373 U.S. 83 (1963).

11. *Chandler*, 89 Fed. Appx. at 836–42; *see* Napue v. Illinois, 360 U.S. 264, 269 (1959) (holding that the State deprives a defendant of due process when the prosecutor knowingly obtains a conviction through the use of false evidence or allows false evidence to go uncorrected when it appears at trial); Brady v. Maryland, 373 U.S. 83, 86–87 (1963) (holding that the State violates a defendant's due process rights when it suppresses exculpatory evidence, and the evidence is material to the outcome of the trial).

12. *Chandler*, 89 Fed. Appx. at 832–42; *see* 28 U.S.C. § 2254(d)(1) (2000) (discussing the standard of review for federal courts reviewing a habeas corpus petition on issues of law that the state courts adjudicated on the merits; part of AEDPA); 28 U.S.C. § 2254(d)(2) (discussing the standard of review for federal courts reviewing a habeas corpus petition on factual issues that the state courts adjudicated on the merits; part of AEDPA).

13. *Chandler*, 89 Fed. Appx. at 834; *see* 28 U.S.C. § 2254(c), (d)(1) (making § 2254(d)(1) the standard of review when the state court adjudicated an issue of law on the merits and the defendant exhausted all state remedies; part of AEDPA). The Supreme Court of North Carolina affirmed Chandler's conviction on direct appeal, and the United States Supreme Court denied a writ of certiorari. *Chandler*, 252 F. Supp. 2d at 225–26. The trial court's denial of Chandler's MAR and the Supreme Court of North Carolina's denial of Chandler's writ of certiorari left Chandler with no available remedies in the state court system. *Id.*

court's decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[14] Interpreting § 2254(d)(1), the United States Supreme Court in *Williams v. Taylor*[15] stated that a "decision is 'contrary to' Supreme Court precedent . . . when 'the state court applies a rule that contradicts the governing law set forth in [Supreme Court] cases,' " or a " 'state court confronts a set of facts that are materially indistinguishable from a decision of [the Supreme] Court and nevertheless arrives at a result different from [the Court's] precedent.' "[16] Additionally, *Williams* held that a state court decision is an "unreasonable application" of Supreme Court precedent when " 'the state court identifies the correct governing legal principle from [the] Court's decisions but unreasonably applies that principle to the facts of the prisoner's case.' "[17]

B. Napue *Claim*

Chandler first claimed that the prosecution knowingly allowed Wilson, the jailhouse snitch, to testify falsely that he did not ask the prosecution for lenience on his pending charges in exchange for information regarding Chandler.[18] In analyzing Chandler's claim, the Fourth Circuit cited *Napue*, which held that the State deprives a defendant of due process when the prosecutor knowingly obtains a conviction through the use of false evidence or allows false evidence to go uncorrected when it appears at trial.[19] The court noted that, in order to warrant a new trial, the false testimony must be material, meaning that there must exist " 'a reasonable likelihood that the false testimony' " affected the jury's determination.[20]

Chandler claimed that various pieces of evidence that the prosecution withheld proved that Wilson testified falsely at trial.[21] The withheld evidence included Special Agent Perry's testimony on Wilson's behalf at Wilson's parole revocation hearing, Wilson's statement asking what was in it for him in initial interviews with investigators, and initial police reports listing Wilson's pending charges.[22] The MAR court denied Chandler's claims, ruling that there was no agreement between Wilson and the State to exchange leniency for Wilson's

14. 28 U.S.C. § 2254(d)(1).

15. 529 U.S. 362 (2000).

16. *Chandler*, 89 Fed. Appx. at 834 (quoting Williams v. Taylor, 529 U.S. 362, 405–06 (2000)).

17. *Id.* (quoting *Williams*, 529 U.S. at 413).

18. *Id.* At trial, when questioned whether he asked for leniency in exchange for his testimony, Wilson said, "I ain't asked these people [the prosecution] for personal gain whatsoever. I never brung [up] my charges . . . in any of our conversations." *Id.*

19. *Id.* at 835 (citing *Napue*, 360 U.S. at 269).

20. *Id.* (quoting Kyles v. Whitley, 514 U.S. 419, 433 n.7 (1995)).

21. *Id.*

22. *Chandler*, 89 Fed. Appx. at 835.

testimony.[23] In federal habeas proceedings, Chandler contended that the existence of an agreement was not the issue and that the real issue was whether Wilson testified falsely in saying that he never brought up his charges during negotiations.[24] Chandler argued that he did and that the prosecution violated *Napue* by allowing Wilson to testify falsely about not bringing up his charges.[25]

The Fourth Circuit cited the MAR court's finding that Wilson did not initiate a discussion regarding his pending charges with the investigators or the prosecution.[26] The court concluded that Wilson testified truthfully in denying that he ever brought up his charges during negotiations because he never actually initiated discussions about those charges.[27] Thus, the court held that the state court's factual determinations were not erroneous under 28 U.S.C. § 2254(d)(2) or § 2254(e)(1).[28] Further, the court did not discuss the interplay of § 2254(d)(2) and § 2254(e)(1) because the MAR court's decision did not violate either section.[29]

C. Brady *Claim*

Chandler claimed that the prosecution committed six *Brady* violations.[30] The Fourth Circuit stated that *Brady* held that the State violates a defendant's due process rights when it suppresses evidence that is favorable to the defense and the evidence is material to the outcome of the trial.[31] The court noted that evidence favorable to the defense includes evidence relating to the credibility of witnesses.[32] The court added that materiality depends on whether there is a

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23. *Id.*

24. *Id.* at 835–36.

25. *Id.* at 834.

26. *Id.* at 836.

27. *Id.*

28. *Chandler*, 89 Fed. Appx. at 836 n.5; *see* 28 U.S.C. § 2254(d)(2) (2000) (prohibiting a federal court from granting habeas corpus petition unless the state court's factual determination is "an unreasonable determination of the facts in light of the evidence presented in the State court proceeding"; part of AEDPA); 28 U.S.C. § 2254(e)(1) (2000) (instructing a federal court to presume a state court's factual determination correct unless the defendant rebuts that "presumption of correctness by clear and convincing evidence"; part of AEDPA).

29. *Chandler*, 89 Fed. Appx. at 836 n.5.

30. *Id.* at 837–39. The defense discovered the *Brady* evidence after examining law enforcement filings pursuant to N.C. Gen. Stat. § 15A-1415(f), which gives the defendant access to all law enforcement filings during postconviction proceedings. Petition for a Writ of Certiorari at 13, Chandler v. Polk, 2004 WL 2202438 (U.S. Oct. 4, 2004) (No. 04-5904) (available with author upon request) (citing N.C. GEN. STAT. § 15A-1415(f) (2003)). The trial prosecutors did not claim to have an open file policy; they only claimed to disclose evidence that they needed to reveal under the law. *Id.* at 12.

31. *Chandler*, 89 Fed. Appx. at 836 (citing *Brady*, 373 U.S. at 87).

32. *Id.* (citing Giglio v. United States, 405 U.S. 150, 154–55 (1972)).

reasonable probability that the undisclosed evidence, taken as a whole, would have affected the outcome of the trial had the prosecution disclosed the evidence.[33] Further, Chandler raised issues that the MAR court did not address, and the court reviewed those issues de novo.[34]

1. "What's in it for me?"

The first alleged *Brady* violation was the prosecution's failure to disclose that Wilson had asked what was in it for him in his initial interview with an investigating officer.[35] Although the court recognized that the evidence had some exculpatory value concerning Wilson's motives for testifying, the court found that the evidence was not material because there had been no deal between the prosecution and Wilson and because Chandler's attorney thoroughly cross-examined Wilson.[36] Thus, the Fourth Circuit did not grant a new trial because the evidence was not reasonably likely to affect the outcome of the trial.[37]

2. Police Reports

Chandler next claimed that *Brady* required the prosecution to turn over police reports made after initial interviews with Wilson which included statements indicating that Wilson brought up his charges with investigators.[38] Chandler claimed that the reports undermine Wilson's testimony that he did not bring up his pending charges with the prosecution.[39] The Fourth Circuit adopted the MAR court's determination that Wilson only mentioned the charges listed on the police report in response to a question by the investigating officer.[40] Thus, the evidence showed that Wilson testified truthfully when he stated that he never brought up his charges with the prosecution, and the evidence was not favorable to the defense in terms of *Brady*.[41]

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33. *Id.* (citing *Kyles*, 514 U.S. at 433–34, 436).

34. *Id.* at 836 n.6; *see also* Fullwood v. Lee, 290 F.3d 663, 692 (4th Cir. 2002) (finding that, in a federal habeas action, courts should conduct de novo review of claims raised in state courts but not adjudicated on the merits).

35. *Chandler*, 89 Fed. Appx. at 837. The Fourth Circuit ruled on this issue de novo because Chandler raised this issue with the MAR court but the court did not make a ruling. *Id.* at 837 n.7.

36. *Id.* at 837.

37. *Id.*; *see Kyles*, 514 U.S. at 433–34 (defining evidence as material if there is a reasonable probability that it would have affected the outcome of the trial had it been disclosed to the defense).

38. *Chandler*, 89 Fed. Appx. at 837.

39. *Id.*

40. *Id.* The MAR court made this finding after the investigating officer, Perry, testified that he initiated the conversation regarding Wilson's pending charges. *Id.*

41. *Id.*

3. Attendance at Parole Revocation Hearing

Additionally, Chandler asserted that the prosecution failed to turn over a report, which stated that Perry and the Sheriff of Surry County, the county where Wilson's charges were pending, attended Wilson's parole revocation hearing and that Perry testified at the revocation hearing.[42] Chandler claimed that the report was favorable to his case because it showed that Wilson expected something from the State in exchange for testifying.[43] The court found that the report was not material because the jurors knew of Perry's testimony at the parole hearing when they made their decision.[44] Additionally, the court found that the Sheriff's presence at the trial was not material because there was nothing unusual about a Sheriff's presence at a parole revocation hearing in his own jail.[45]

4. Reward Money

Next, Chandler claimed that due process required the prosecution to turn over a proclamation by the State announcing a $5,000 monetary award for information about Poore's murder.[46] Chandler argued that the State had to turn over the proclamation because it suggested Wilson's motivations for fabricating his testimony.[47] The court noted, however, that the Fourth Circuit in *United States v. Kelley*[48] held that the prosecution did not need to turn over evidence that the defense could obtain through reasonable diligence.[49] The court rejected Chandler's claim because the proclamation was made public and defense counsel had access to it.[50]

5. Sentence in Police Report

A police report made after Wilson's initial interview with an investigating officer disclosed that Wilson stated, "Chandler never said that he touched or fondled [Poore] in any way."[51] The MAR court found that this statement

42. *Id.* at 837–38. The Fourth Circuit ruled on the issues de novo because the MAR court did not adjudicate the claim on the merits. *Id.* at 838 n.8.

43. *Id.* at 837–38.

44. *Chandler*, 89 Fed. Appx. at 838. Specifically, Perry testified at trial that he was present and testified at Wilson's parole revocation hearing. *Id.* at 837. Also, Wilson testified at trial that he requested Perry to appear at the hearing in hopes that Perry's appearance would help his case for parole. *Id.*

45. *Id.* at 838.

46. *Id.* Wilson received half of the reward money following Chandler's conviction. *Id.*

47. *Id.* at 838.

48. 35 F.3d 929 (4th Cir. 1994).

49. *Chandler*, 89 Fed. Appx. at 838 (citing United States v. Kelly, 35 F.3d 929, 937 (4th Cir. 1994)).

50. *Id.*

51. *Id.*

indicated that Chandler never mentioned to Wilson whether he did or did not touch or fondle Poore.[52] The MAR court did not consider the statement favorable to Chandler and held that withholding the statement did not violate *Brady*.[53] The Fourth Circuit gave deference to the MAR court's factual determination under 28 U.S.C. § 2254(d)(1) and found that the State did not violate Chandler's due process rights by not disclosing the statement.[54]

6. Lab Report

Chandler's final *Brady* contention involved the prosecution's failure to disclose a lab report comparing Wilson's handwriting with handwriting in a letter allegedly written by Wilson.[55] The letter noted that Wilson "never [spoke] to a district attorney or the court concerning Chandler, that Wilson would not testify at [Chandler's] trial," and that Wilson would lie concerning his pending charges.[56] Chandler claimed that the report was favorable to the defense because it would have prompted him to obtain further analysis potentially linking Wilson to the letter.[57] The Fourth Circuit rejected Chandler's *Brady* claim and stated that, in order to obtain relief, Chandler had to show that the additional analysis would have established Wilson as the letter's author.[58] Further, in dicta, the court questioned whether the North Carolina Rules of Evidence allowed the introduction of handwriting analysis to impeach witness testimony.[59]

D. Defense Attorney's Conflict of Interest

Chandler's next claim alleged that his trial attorney's prior representation of Wilson violated Chandler's right to counsel under the Sixth Amendment.[60] James Gillespie, one of Chandler's attorneys, had a potential conflict of interest because he previously represented Wilson on forgery charges to which Wilson eventually

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52. *Id.*

53. *Id.*

54. *Id.* at 838–39.

55. *Chandler*, 89 Fed. Appx. at 839. Both the prosecution and the defense had copies of the letter during trial, but Chandler's attorneys did not attempt to use the letter at trial. *Id.*

56. *Id.*

57. *Id.*

58. *Id.*

59. *Id.*; *see* N.C. R. EVID. 608(b) (prohibiting the use of extrinsic evidence to prove specific instances of conduct to attack a witness's credibility); *see also* Fed. R. Evid. 608(b) (prohibiting the use of extrinsic evidence to prove specific instances of conduct to attack a witness's credibility); United States v. Westmoreland, 312 F.3d 302, 311 n.5 (7th Cir. 2002) (noting that Federal Rule of Evidence 608(b) does not allow expert testimony regarding handwriting in a letter to corroborate a witness's testimony).

60. *Chandler*, 89 Fed. Appx. at 840; *see* U.S. CONST. amend. VI ("In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence.").

pled guilty.[61] During jury selection, Gillespie notified his co-counsel and Chandler of the conflict.[62] Gillespie did not believe it was a conflict of interest and did not inform the court or have Chandler execute a waiver.[63] The MAR court held that the conflict did not violate Chandler's Sixth Amendment right because, although a potential conflict existed, an actual conflict never developed.[64]

In order for a conflict of interest to violate a defendant's Sixth Amendment right to counsel, the court stated, a defendant who did not object to the conflict at trial must show that " 'an actual conflict of interest adversely affected his lawyer's performance.' "[65] The court noted that " 'a mere theoretical division of loyalties' is insufficient."[66] Although a court presumes prejudice when a defendant proves a conflict of interest, the court noted that the United States Supreme Court has not ruled decisively on whether a presumption of prejudice arises in a case of successive representation.[67] The court identified four factors that are relevant, but not necessary, in determining whether successive representation results in an actual conflict of interest.[68] The factors were as follows: (1) if there is a substantial relationship between the current and former cases; (2) whether the former client disclosed confidential information to the attorney; (3) the time between the successive representations, particularly if the first representation ceased by the time the second representation started; and (4) whether the attorney has a monetary interest in representing the previous client in the future.[69]

In concluding that there was no actual conflict of interest, the court pointed to the MAR court's findings that Gillespie's prior representation of Wilson was unrelated to Wilson's pending charges, Gillespie's representation of Wilson ceased prior to the start of Chandler's trial, Gillespie could not recall the details of Wilson's case or confidential information regarding Wilson, and no evidence

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61. *Chandler*, 89 Fed. Appx. at 839.

62. *Id.*

63. *Id.* Gillespie maintained that he did not remember the specifics of his prior representation of Wilson or any confidential information obtained during his representation of Wilson. *Id.* Also, Gillespie did not cross-examine Wilson because he thought his co-counsel was better at conducting cross-examination. *Id.*

64. *Id.* at 840.

65. *Id.* (quoting Cuyler v. Sullivan, 446 U.S. 335, 348 (1980)); *see also* Strickland v. Washington, 466 U.S. 668, 688 (1984) (holding that the Sixth Amendment right to effective assistance of counsel includes counsel with no conflicts of interest).

66. *Chandler*, 89 Fed. Appx. at 840 (quoting Mickens v. Taylor, 535 U.S. 162, 171 (2002)).

67. *Id.* at 840 n.12; *see Cuyler*, 466 U.S. at 349–50 (stating, in a case involving simultaneous representation, that if a defendant establishes an actual conflict of interest, the defendant does not need to establish prejudice).

68. *Chandler*, 89 Fed. Appx. at 840.

69. *Id.* (citing Perillo v. Johnson, 205 F.3d 775, 798 (5th Cir. 2000); United States v. Agosto, 675 F.2d 965, 971 (8th Cir. 1982)).

showed that Gillespie planned to represent Wilson in the future.[70] Also, the court stated that, even if there was an actual conflict of interest, no prejudice resulted because the conflict did not affect Gillespie's performance.[71] The court found that the cross-examination of Wilson, conducted by Gillespie's co-counsel, was thorough and included questions on Wilson's prior convictions, history of drug abuse, and motivations for testifying against Chandler.[72] Thus, the court adopted the federal magistrate judge's conclusion that Chandler did not prove any failings by his counsel and that no evidence connected the alleged failings with Gillespie's potential conflict of interest.[73]

E. Trial Court's Failure to Instruct on Mitigating Circumstances

Finally, Chandler claimed that the trial court erred in refusing to instruct the jury on the mitigating circumstance that "[t]he capital felony was committed while the defendant was under the influence of mental or emotional disturbance."[74] The Supreme Court of North Carolina held that, *inter alia*, evidence of Chandler's drinking on the night of the murder, his history of drug abuse, and his mixed-personality disorder did not entitle him to that instruction.[75] Chandler claimed that the trial court's failure to give the instruction violated his "constitutional rights by limiting the jury's consideration of mitigating evidence."[76]

The Fourth Circuit agreed that a trial court cannot preclude the jury from considering personal characteristics or circumstances surrounding the offense that provide reasons for sentencing the defendant to life instead of death.[77] However, the Fourth Circuit noted that "the Constitution does not dictate the *manner* in which a jury considers and gives effect to mitigating evidence."[78] The court found that "the instructions given by the trial court . . . provided at least three avenues" for the jury to consider the effects of Chandler's drinking, drug

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70. *Id.* at 841.

71. *Id.*

72. *Id.*

73. *Id.*; *see Chandler*, 252 F. Supp. 2d at 248–50 (rejecting Chandler's assertions that his trial counsel's adverse performance resulted in prejudice to Chandler).

74. *Chandler*, 89 Fed. Appx. at 841 (quoting N.C. GEN. STAT. § 15A-2000(f)(2) (2001)). *See generally* N.C. GEN. STAT. § 15A-2000(b) (2003) (stating that in cases in which "the death penalty may be authorized, the judge shall include in his instructions to the jury that it must consider any . . . mitigating circumstance . . . which may be supported by the evidence, and shall furnish to the jury a written list of issues relating to such . . . mitigating circumstance").

75. *See Chandler*, 467 S.E.2d at 636, 644–45 (stating that Chandler did not support his claim by substantial evidence that he was under severe emotional disturbance at the time of the murder).

76. *Chandler*, 89 Fed. Appx. at 841.

77. *Id.* at 842 (citing Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion)).

78. *Id.* (citing Buchanan v. Angelone, 522 U.S. 269, 276 (1998)).

abuse, and personality disorder.[79] Because the jury heard the mitigation evidence and could consider the evidence through various avenues, the Fourth Circuit held that the trial court's refusal to give the requested instruction did not violate Chandler's constitutional rights.[80]

IV. Application in Virginia

A. Brady *Issues*

In evaluating the alleged *Brady* violations, the Fourth Circuit correctly identified, but failed to apply, *Kyles v. Whitley*[81] as the standard for determining whether the prosecution violated a defendant's due process rights by withholding *Brady* material.[82] The court stated that it must evaluate the cumulative effect of the undisclosed *Brady* material in order to determine whether a new trial is warranted.[83] The court then evaluated the materiality of each individual violation but did not evaluate the *Brady* violations cumulatively.[84] For instance, the Fourth Circuit found that the prosecution's failure to disclose the "What's in it for me?" statement was immaterial because there was no deal between Wilson and the prosecution and Chandler's attorney thoroughly cross-examined Wilson.[85] However, the court did not consider the statement's impeachment value in light of the other undisclosed evidence undermining Wilson's credibility.[86] In his petition for a writ of certiorari to the United States Supreme Court, Chandler emphasized the importance of the evidence undermining Wilson's credibility because Wilson's testimony was the primary factor elevating the crime to a capital murder.[87] Had the court evaluated the cumulative effect of the undisclosed

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79. *Id.* at 841–42. The three avenues by which the jury could consider the mitigating evidence were the following: (1) Chandler's ability " 'to appreciate the criminality of his conduct or to conform his conduct to the requirements of the law was impaired' "; (2) a nonstatutory mitigating circumstance that Chandler's poor choices in life resulted from his prior substance abuse; (3) and the catch-all mitigating circumstance under N.C. GEN. STAT. § 15A-2000(f)(9). *Chandler*, 89 Fed. Appx. at 842 (quoting N.C. GEN. STAT. § 15A-2000(f)(6) (2001)); *see* N.C. GEN. STAT. § 15A-2000(f) (listing the mitigating circumstances that a jury may consider).

80. *Chandler*, 89 Fed. Appx. at 842.

81. 514 U.S. 419 (1995).

82. *Chandler*, 89 Fed. Appx. at 836 (citing *Kyles*, 514 U.S. at 433–34).

83. *Id.* (citing *Kyles*, 514 U.S. at 436).

84. *See id.* at 836–39 ("[W]e examine each of the items of evidence that Chandler claims should have been disclosed to him."); *see also* Petition for a Writ of Certiorari at 23–36, *Chandler* (No. 04-5904) (arguing that the Fourth Circuit cited the correct test but failed to apply it).

85. *Chandler*, 89 Fed. Appx. at 837.

86. *See* Petition for a Writ of Certiorari at 24, *Chandler* (No. 04-5904) ("[T]he Fourth Circuit in this case failed to engage in a 'cumulative effect' analysis required by this Court in its opinion in *Kyles*.").

87. *See id.* at 9 ("Mr. Wilson['s testimony] transformed this case into a death penalty case when it should have been a felony murder case resulting in a life sentence.").

evidence, it is at least arguable that it would have had to acknowledge a reasonable probability that the jurors would have sentenced Wilson to life.[88]

The Fourth Circuit also briefly mentioned that North Carolina Rule of Evidence 608(b) may not allow the use of a handwriting expert's testimony "to impeach a denial of authorship by" a witness.[89] Although Virginia does not have a statute similar to the North Carolina or Federal Rule of Evidence, the Supreme Court of Virginia has held that evidence of specific acts of untruthfulness or bad conduct are not admissible to undermine the credibility of a witness.[90] Yet, Virginia allows parties to use prior inconsistent writings to impeach a witness's testimony and has allowed handwriting experts to testify for the purposes of authenticating documents.[91] Thus, although it is not clear whether Virginia courts will permit the use of a handwriting expert's testimony in order to undermine a witness's credibility, defense attorneys should be aware that federal courts in the Fourth Circuit may not allow such testimony.

B. Conflict of Interests

Chandler also noted that an actual conflict of interest does not necessarily exist when the defendant's attorney has previously represented a key prosecutorial witness.[92] In order for a conflict of interest to violate a defendant's Sixth Amendment right, there must be " 'an actual conflict of interest [that] adversely [affects the attorney's] performance.' "[93] The court listed four factors for courts to consider in assessing whether there is an actual conflict of interest.[94] However, the court stated that the presence of a conflict does not weigh entirely on these factors.[95] The important question is whether the counsel's obligations to other clients compromised the representation of the current client.[96] Thus, the

88. *Id.* at 26, 29, 31–32.

89. *Chandler*, 89 Fed. Appx. at 839; *see* N.C. R. EVID. 608(b) ("Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence.").

90. *See* Wynne v. Commonwealth, 218 S.E.2d 445, 446 (Va. 1975) (explaining that Virginia courts allow evidence about general reputation for untruthfulness to impeach a witness but do not allow the use of specific acts of untruthfulness or bad acts for impeachment).

91. *See* VA. CODE ANN. § 19.2-268.1 (Michie 2004) (allowing the cross-examination of a witness regarding previous written statements); Wileman v. Commonwealth, 484 S.E.2d 621, 623–24 (Va. Ct. App. 1997) (permitting the use of a handwriting expert to compare a defendant's handwriting in a forgery case). *See generally* CHARLES E. FRIEND, THE LAW OF EVIDENCE IN VIRGINIA § 15-10 (6th ed. 2003) (discussing the use of expert testimony on handwriting for the authentication of documents).

92. *Chandler*, 89 Fed. Appx. at 840–41.

93. *Id.* at 840 (quoting *Cuyler*, 446 U.S. at 348).

94. *Id.*

95. *Id.* at 840–41.

96. *Id.* (citing *Perillo*, 205 F.3d at 798).

court leaves a muddy picture of what constitutes an actual conflict of interest that adversely affects a lawyer's performance. The primary factors in *Chandler* were the time between representation, the information recalled by the attorney, and the relation of the two defendants' charges.[97] If any number of these factors exist, a court may find that the conflict violated the defendant's Sixth Amendment right.

C. Mitigating Circumstances

In instructing a jury on mitigating circumstances, a court does not violate a defendant's due process rights as long as the judge permits the defense to present certain mitigating evidence, and the court does not preclude the jury from considering that evidence.[98] *Chandler* relied on *Buchanan v. Angelone*,[99] which involved a challenge to a court's failure to instruct a jury to consider particular mitigating evidence.[100] In *Buchanan*, the only instruction to the jury that alluded to mitigating evidence stated in part that "if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment."[101] The Court in *Buchanan* found that the instruction was sufficient because it allowed the jury to give effect to the mitigating evidence presented and "did not foreclose the jury's consideration of any mitigating evidence."[102] *Chandler* and *Buchanan* are potentially damaging to capital defendants because a general instruction such as the one given in *Buchanan* is vague and gives juries little guidance on what mitigation evidence to consider.[103] Defense attorneys should submit specific instructions in order to focus jurors' attentions on specific mitigating circumstances.

V. Conclusion

Chandler held that courts do not need to instruct the jury in any specific way regarding mitigating circumstances, as long as the jury hears the circumstances and is not precluded from considering those circumstances.[104] The Fourth Circuit also set out the basic factors for assessing whether an attorney's prior representation of a prosecution witness results in an actual conflict of interest

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97. *Id.* at 841.

98. *Chandler*, 89 Fed. Appx. at 842.

99. 522 U.S. 269 (1998).

100. *Buchanan*, 522 U.S. at 275.

101. *Id.* at 272–73.

102. *Id.* at 277.

103. *See id.* at 272–73 (stating that the only instruction drawing the jury's attention to mitigating evidence stated in part that "if you believe from all the evidence that the death penalty is not justified, then you shall fix the punishment of the Defendant at life imprisonment").

104. *Chandler*, 89 Fed. Appx. at 842.

that deprives the defendant of the right to counsel.[105] Finally, the court provided some insight into how courts will review *Brady* and *Napue* claims under 28 U.S.C. § 2254(d).[106]

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105. *Id.* at 840.

106. *Id.* at 835–39.