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Young v. Catoe Nos. 99-6, 99-8, 2000 WL 245318 (4th Cir. Feb. 29, 2000)

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I. Facts

On the night of August 31, 1988, Kevin Dean Young ("Young") with two cohorts, William Bell ("Bell") and John Glenn ("Glenn"), accosted and attempted to rob elementary school principal Dennis Hepler ("Hepler") in Anderson, South Carolina. Hepler was fatally shot in the back during the melee. Young was apprehended, tried, and convicted of murder in the course of an armed robbery. The jury subsequently recommended death. Due to evidentiary errors tainting the sentencing procedure, a second jury was called to recommend a sentence for Young's capital murder conviction; it likewise recommended the death penalty.[1]

Young exhausted all of his avenues of state relief and applied for a federal writ of habeas corpus in the district court. The Director of the South Carolina Department of Corrections and the state's Attorney General moved for summary judgment on this application. A magistrate judge considered this motion and concluded that Young's application should be denied. On subsequent de novo review, the district court also denied Young's application for habeas relief.[2] Young appealed from this determination of the district court to the United States Court of Appeals for the Fourth Circuit for consideration of the following assertions: (1) his lawyer's deficient representation violated Young's Sixth Amendment right to effective assistance of counsel; and (2) the court's refusal at resentencing to instruct the jury that a recommendation of life imprisonment for Young would mandate his serving at least thirty years in prison prior to his parole eligibility violated his due process rights of the Fourteenth Amendment and the Eighth Amendment protection against cruel and unusual punishment.[3]

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1. Young v. Catoe, Nos. 99-6, 99-8, 2000 WL 245318, at *1 (4th Cir. Feb. 29, 2000).

2. Motions for summary judgment may properly be heard before a magistrate judge initially. *See* 28 U.S.C. § 636(b)(1)(B) (1999). However, upon a timely filed written objection to the determination of the magistrate, a petitioner is entitled to de novo review by the district court. *See* 28 U.S.C. § 636(b)(1) (1999).

3. *Young*, 2000 WL 245318, at *2.

II. Holding

The Fourth Circuit, finding no ground upon which to grant Young a writ of habeas corpus, affirmed the decision of the district court and denied his application.[4]

III. Analysis/Application in Virginia

Young's two constitutional claims argued before the Fourth Circuit were first heard and rejected by both the South Carolina Court of Common Pleas ("PCR court") and the Supreme Court of South Carolina.[5] The Fourth Circuit's review of these claims was limited by changes to federal habeas law caused by the Antiterrorism and Effective Death Penalty Act of 1996 ("AEDPA").[6] 28 U.S.C. § 2254(d) permits federal courts to grant a writ of habeas corpus on an issue adjudicated in state courts *only if* the proceedings resulted in either (1) a decision contrary to clearly established federal law or (2) a decision based upon an unreasonable determination of the facts considering the evidence presented at trial.[7] Since the court determined that minimal factual dispute existed, the Fourth Circuit was required to find fault with the state's application of the relevant Supreme Court authorities to the facts in order to grant federal habeas relief.[8]

A. Ineffective Assistance of Counsel

1. Trial Strategy Background and the Strickland *Standard*

Young was represented by attorney James Robert Mann ("Mann"), a former prosecutor retained by Young's family.[9] Ascertaining that the case against Young was strong, Mann decided to adopt a trial strategy of being straightforward with the jury on the issue of guilt and emphasizing Young's remorse in order to enhance Mann's own credibility and that of his client in hopes of avoiding a death sentence.[10] However, Mann's opening statement to the jury contained two blatant misstatements of South Carolina law–that Young had no right to plead guilty and that malice, a necessary element of capital murder in South Carolina, could be presumed from

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4. *Id.*, at *12.

5. *Id.*, at *2.

6. *See* Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. Title 153); 28 U.S.C. § 2254 (1999).

7. 28 U.S.C. § 2254.

8. *Young*, 2000 WL 245318, at *3.

9. *Id.*, at *4.

10. *Id.* The evidence causing Mann's bleak view of the defense case consisted of (1) Young's oral confession to the police that he and Bell had both shot Hepler, (2) the autopsy report revealing that the gunshot to Hepler's back, not the one to his head, had been fatal, and (3) Young's confession to Mann that he had fired the shot into Hepler's back. *Id.*

Young's use of a deadly weapon.[11] Throughout the trial, Mann either chose not to cross-examine or to cross-examine only briefly the state's witnesses.[12] Mann later called Young to the stand where Young testified to both the chance meeting with Hepler, which resulted in his accidental shooting of Hepler, and Bell's subsequent shooting in the direction of Hepler's head.[13] Mann then attempted to call Glenn, who immediately invoked his Fifth Amendment privilege against self-incrimination.[14] The defense then rested. In his closing statement, Mann continued to argue that, although Young was technically guilty, he never planned to kill Hepler and that this was not the type of murder that should warrant the death penalty.[15]

The Fourth Circuit relied on the standard of review of ineffective assistance of counsel set forth in *Strickland v. Washington*.[16] *Strickland* requires a petitioner making an ineffective assistance of counsel claim to show both (1) that counsel's performance was indeed deficient and (2) that the petitioner suffered prejudice due to counsel's errors.[17] The performance prong of the test requires an evaluation of whether the performance "fell below an objective standard of reasonableness."[18] The *Young* court noted the strong presumption in counsel's favor manifest within this prong.[19] To meet the prejudice requirement, a petitioner "must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."[20]

2. *Concession of Guilt and Malice*

Young's first claim of deficient counsel was based upon Mann's concession of Young's guilt during his opening and closing statements.[21] The

11. *Id.*, at *5. In South Carolina, any defendant can enter a valid plea of guilty and forgo trial. *See* S.C. CODE ANN. § 17-23-80 (Law. Co-op. 1985). The presumption of malice from use of a deadly weapon was rejected by the Supreme Court of South Carolina six years prior to the argument of Young's case. *See* State v. Elmore, 308 S.E.2d 781, 784 (S.C. 1983), *overruled on other grounds by* State v. Torrence, 406 S.E.2d 315, 328 n.5 (S.C. 1991) (Toal, J., concurring). The proper treatment of malice in a deadly weapon case after *Elmore* is that the factfinder "may" imply malice from the use of such a weapon. *Id.* at 784.

12. *Young*, 2000 WL 245318, at *5.

13. *Id.*, at *5.

14. *Id.*

15. *Id.*, at *6.

16. 466 U.S. 668 (1984).

17. Strickland v. Washington, 466 U.S. 668, 687 (1984).

18. *Id.* at 688 (internal quotation marks and citation omitted).

19. *Young*, 2000 WL 245318, at *6.

20. *Strickland*, 466 U.S. at 694. The Fourth Circuit noted that this "probability" was defined in *Strickland* as a "probability sufficient to undermine confidence in the outcome." *Young*, 2000 WL 245318, at *6 (quoting *Strickland*, 466 U.S. at 694) (internal quotation marks omitted).

21. *Young*, 2000 WL 245318, at *7.

Fourth Circuit rejected this claim at the first step of the *Strickland* test, recognizing that case law supports such a line of defense when "there is overwhelming evidence of the defendant's guilt."[22] The Court recognized that the decision of the PCR court that counsel's actions were reasonable was founded upon such case law which can be read for the proposition that, "on occasion, it is best to risk losing the battle in the hope of winning the war."[23] Thus, the Fourth Circuit found the lower court's decision to be consistent with the applicable jurisprudence. That is all that is required under the standard of review mandated by AEDPA.[24]

3. *Concession of Fatal Shot*

Young likewise alleged deficient counsel because Mann admitted during the trial that Young had fired the fatal shot.[25] The Fourth Circuit accepted the decision of the PCR court, finding this concession reasonable because Mann was forced to depict Young as having fired the shot at Hepler's back in order for the wound to be consistent with Mann's trial theory that Young had shot Hepler by accident.[26] The Fourth Circuit further noted that forcing the state to prove that Young fired the fatal shot would not have helped his case since South Carolina has adopted the "hand of one, hand of all" doctrine which states that "when two or more persons aid, encourage, and abet each other in the commission of a crime, all being present, all are principals and equally guilty."[27]

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22. *Id.*, at *8 (quoting Bell v. Evatt, 72 F.3d 421, 429 (4th Cir. 1995)) (internal quotation marks omitted); *see also* Clozza v. Murray, 913 F.2d 1092, 1099 (4th Cir. 1990) (finding that remarks distancing counsel from the defendant were a valid trial strategy designed to maintain counsel's credibility with the jury despite the short-term harm to the defendant).

23. *Young*, 2000 WL 245318, at *8.

24. *Id.* The court found Young's claim to fall short of the prejudice requirement of *Strickland* as well, finding that the testimony of the arresting officer and Young himself introduced similar evidence, thereby destroying the possibility of any substantial prejudice caused by this third evidentiary source of Young's guilt. *Id.*, at *9. Note that the court was not required to consider prejudice under the *Strickland* analysis because Young failed to meet the performance prong and *both* prongs must be met in order to sustain a claim of deficient counsel.

25. *Id.*, at *9.

26. *Id.* Note, however, that the state's evidence proved inconclusive on this point. *Id.*

27. *Id.* (quoting State v. Hicks, 185 S.E.2d 746, 748 (S.C. 1971)) (internal quotation marks omitted). The Fourth Circuit also noted Young's failure to prove any prejudice caused by this concession. Since Young had already admitted to the arresting officer that he had shot Hepler, a fact to which the officer testified in court, and because Young admitted on the stand that he had shot Hepler in the back, the effect of Mann's concession could not have significantly prejudiced Young's case. *Id.*

B. Simmons *Extension*

Young also contended that the court erred during resentencing for its failure to instruct the jury that, were Young to be sentenced to life imprisonment, he would not be parole eligible for thirty years.[28] Young advanced two arguments to support this allegation of constitutional error. First, Young argued that his proposed instruction was mandated by the United States Supreme Court in *Simmons v. South Carolina*,[29] which held that jurors must be told, if parole is unavailable, that "life means life."[30] This argument is grounded in the Eighth Amendment, as incorporated by the Fourteenth Amendment, which prohibits states from limiting sentencers' consideration of any relevant fact that might cause them to decline to impose the death penalty.[31]

The holding in *Simmons* was limited to the context in which a state seeks to show that the defendant will be a future danger to society, then and only then requiring an instruction informing the jury that the defendant will never be paroled if a life sentence is given in a jurisdiction where "life means life."[32] Although the Fourth Circuit noted that the prosecution relied to some extent on a finding of future dangerousness during resentencing, the court also noted its prior rejection of such a *Simmons*-extension claim in *Roach v. Angelone*.[33] Thus, the court rejected this Eighth Amendment argument.[34]

Young's second argument was based upon juror confusion during the voir dire. Young argued that the record showed that some jurors thought he might receive less than the thirty years in prison if sentenced to life

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28. *Id.*, at *10.

29. 512 U.S. 154 (1994).

30. Simmons v. South Carolina, 512 U.S. 154, 156 (1994).

31. *Young*, 2000 WL 245318, at *10 (citing Payne v. Tennessee, 501 U.S. 808, 824 (1991)). This right to an informed jury is only one of the procedural protections guaranteed by the Eighth Amendment. For a detailed discussion of the various substantive and procedural protections guaranteed by the Eighth Amendment, see Kimberly A. Orem, *Evolution of an Eighth Amendment Dichotomy: Substantive and Procedural Protections within the Cruel and Unusual Punishment Clause in Capital Cases*, 12 CAP. DEF. J. 345 (2000).

32. *Simmons*, 512 U.S. at 156. Note that the requirement of a "life means life" instruction has recently been held to apply to non-future dangerousness cases in Virginia. *See* Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (holding that "in the context of a capital murder trial a jury's knowledge of the lack of availability of parole is necessary" to prevent a harsher sentence recommendation by the jury than would have been given had the jury known that "life means life").

33. *Young*, 2000 WL 245318, at *10-11; *see* Roach v. Angelone, 176 F.3d 210, 220 (4th Cir. 1999) (noting that "[i]n a state in which parole is available, the Constitution does not require (or preclude) jury consideration of that fact"); *see also* Kimberly A. Orem, Case Note, 12 CAP. DEF. J. 227 (1999) (analyzing *Roach*).

34. *Young*, 2000 WL 245318, at *11.

imprisonment.[35] The Fourth Circuit also rejected this argument, stating that Young was given "more than he asked for" when the judge instructed the jury that "the terms 'life imprisonment' and 'death sentence' should be understood in their ordinary and plain meaning."[36] Since juries are presumed to follow the instructions of the court, the Fourth Circuit found the trial court's refusal to give Young's proposed instruction reasonable.[37]

C. Application to Capital Representation in Virginia

Although a *Simmons*-extension claim may seem futile in light of the consistent line of Virginia jurisprudence rejecting it, the recent expansion in *Yarbrough v. Commonwealth*[38] suggests a renewed interest in fully informed capital juries.[39]

Another important issue raised by *Young* is whether a concession of guilt is consistent with zealous advocacy.[40] In *Young*, the Fourth Circuit seemed to find acceptable, and even desirable in certain situations, a trial strategy involving a significant concession of guilt when coupled with evidence of remorse.[41] Whether *Young* was an appropriate case for a concession of guilt, or whether the concession was artfully made, may be questioned. Concessions of guilt in specific forms and circumstances are not, however, necessarily inconsistent with zealous representation.[42]

If the Commonwealth will present overwhelming evidence of the defendant's involvement in the homicide, but will have difficulty proving capital murder,[43] an early concession of responsibility for the homicide may

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35. *Id.*

36. *Id.* (internal quotation marks and citation omitted).

37. *Id.*

38. 519 S.E.2d 602 (Va. 1999).

39. Yarbrough v. Commonwealth, 519 S.E.2d 602 (Va. 1999). For an in-depth discussion of *Yarbrough* and its implications in capital cases, see Matthew K. Mahoney, Case Note, 12 CAP. DEF. J. 279 (1999) (analyzing *Yarbrough*).

40. Note that an attorney is required to obtain the defendant's approval prior to making such statements since the statements comprise, essentially, a guilty plea. In cases where consent was not obtained, courts have sustained ineffective assistance of counsel claims of error *even without* a finding of prejudice. *See* Nixon v. Singletary, Nos. SC92006, SC93192, 2000 WL 63415, at *4 (Fla. Jan. 27, 2000).

41. *Young*, 2000 WL 245318, at *8. Mann made the following comments during his opening statement to the jury which Young attacked as concessions of guilt: "He's guilty. He acknowledges his guilt. Technically he's guilty. Morally he's guilty." *Id.*, at *5. These statements can be reconciled with Mann's defensive position of conciliation and his theory of accidental shooting. Note that none of these statements were concessions to Young's guilt for capital murder.

42. The Virginia Capital Case Clearinghouse maintains its position that a plea of guilty should not be entered in a capital case unless there is *very substantial* judicial assurance that a sentence of death will not be imposed.

43. This situation may present itself in cases in which the Commonwealth has strong

be appropriate. The concession diminishes the force of the Commonwealth's homicide evidence and tends to focus the jury's attention on the crucial capital murder issues in the guilt/innocence case. There is also the situation in which (1) the Commonwealth will present overwhelming evidence that the defendant is guilty of capital murder, (2) there is no credible substantive defense evidence, and (3) the Commonwealth's case for death is weak and/or the defense case for life is strong. In such a case, it may be appropriate simply to put the Commonwealth to its proof and forgo the defense of innocence. Doing so avoids facing a jury in the sentencing phase which has already seen and rejected defense evidence. The likelihood is that the jury will then give greater credence to the defendant's mitigation evidence.

There are, no doubt, many other examples. Determining whether to make a concession in any form is a decision which each capital defense attorney must carefully consider, taking into account the strength of the Commonwealth's evidence for guilt and aggravating circumstances and also the strength of any possible defensive postures and mitigation evidence.

Kimberly A. Orem

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evidence of the defendant's involvement in the homicide but lacks evidence suggesting that the defendant was the triggerman in the killing. This strategy may also be acceptable when the Commonwealth has strong evidence of the defendant's commission of the homicide but not of premeditation, a necessary element in all capital murder cases.

Denials of Certificates of Appealability