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United States v. Roane 378 F.3d 382 (4th Cir. 2004)

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I. Facts

In August 1990 Richard Tipton and Cory Johnson brought their New Jersey drug trafficking business to Richmond, Virginia. After police in New Jersey shut down the Trenton wing of the operation in the summer of 1991, James Roane joined Tipton and Johnson in expanding the Richmond business throughout the Central Gardens and Newtowne areas of the city. The operation's business included garnering powdered cocaine from New York City, "cooking" it to create crack cocaine, and distributing the crack among sellers in Richmond. At the beginning of 1992, in what was apparently a series of retaliatory responses to deals gone wrong, unwanted competition, and personal affronts, Tipton, Johnson, and Roane combined to murder ten people in Richmond.[1]

Federal prosecutors charged Tipton, Johnson, and Roane with capital murder under 21 U.S.C. § 848(e) for intentionally killing the ten people in furtherance of a continuing criminal enterprise ("CCE").[2] After a trial in the United States District Court for the Eastern District of Virginia, the jury convicted Tipton on six of eight capital murder charges.[3] The jury also convicted him of conspiracy to possess cocaine base with the intent to distribute, engaging in a CCE, committing acts of violence in the aid of racketeering activity, using a firearm in relation to a crime of drug-trafficking, and possessing cocaine base

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1. United States v. Roane, 378 F.3d 382, 389–90 (4th Cir. 2004). According to the direct appeal opinion, from January 4 through February 19, 1992, the following killings occurred: (1) Tipton stabbed Douglas Talley eighty-four times, shot Douglas Moody and Curtis Thorne, and observed while Johnson shot Dorothy Armstrong, Anthony Carter, Bobby Long, and Linwood Chiles; (2) Johnson shot Peyton Johnson ("P. Johnson"), Louis Johnson ("L. Johnson"), Torrick Brown, Armstrong, Carter, Long, Chiles, and Thorne; and (3) Roane held Talley while Tipton stabbed him, stabbed Moody eighteen times, shot Brown, and observed while Johnson shot P. Johnson and L. Johnson. *Id.* at 390–91; *see* United States v. Tipton, 90 F.3d 861, 903 (4th Cir. 1996) (affirming all capital convictions and sentences).

2. *Roane*, 378 F.3d at 391; *see* 21 U.S.C. § 848(e) (2000) (stating that "any person engaging in or working in furtherance of a continuing criminal enterprise . . . who intentionally kills or counsels, commands, induces, procures, or causes the intentional killing of an individual . . . may be sentenced to death"); *see also* 21 U.S.C. § 848(c) (defining "continuing criminal enterprise" as a felony violation of Chapter 13 of Title 21 of the United States Code that is "part of a continuing series of violations . . . which are undertaken . . . in concert with five or more other persons with respect to whom [the violator] occupies a position of organizer, a supervisory position, or any other position of management, and from which such person obtains substantial income or resources").

3. *Roane*, 378 F.3d at 389, 391. The jury convicted Tipton of the capital murders of Talley, Armstrong, Long, Carter, Chiles, and Thorne. *Id.* at 391. The court dismissed the capital charge for the murder of L. Johnson, and the jury acquitted Tipton of the murder of Moody. *Id.*

with the intent to distribute.[4] Johnson was convicted of seven capital murders and the same noncapital offenses as Tipton.[5] The jury also convicted Roane on three capital murder charges and the same noncapital charges as his co-defendants.[6]

After the sentencing hearing, the jury recommended three death sentences for Tipton, seven death sentences for Johnson, and one death sentence for Roane.[7] The district court sentenced the three accordingly.[8] On direct appeal, the United States Court of Appeals for the Fourth Circuit affirmed the capital convictions and death sentences.[9] The court affirmed all of the other convictions except for those involving conspiracy.[10]

After the Fourth Circuit rejected their appeals, Tipton, Johnson, and Roane sought habeas corpus relief under 28 U.S.C. § 2255 in the United States District Court for the Eastern District of Virginia.[11] The district court denied their motion for leave to interview jurors and granted a limited discovery motion.[12] Although the district court granted Roane an evidentiary hearing on his ineffective assistance of counsel ("IAC") and actual innocence claims, the court granted summary judgment in the United States' favor on all of the petitioners' other claims.[13] During the June 21, 2002 evidentiary hearing, the court heard evidence sufficient to convince it that Roane's counsel had rendered ineffective

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4. *Id.* at 391; *see* 21 U.S.C. § 846 (2000) (subjecting "[a] person who . . . conspires to commit any offense defined in this subchapter . . . to the same penalties as those prescribed for the offense, the commission of which was the object of the . . . conspiracy"); 21 U.S.C. § 848(a) (defining the punishments for engaging in a CCE); 18 U.S.C. § 1959 (2000) (proscribing violent crimes in aid of racketeering activities); 18 U.S.C. § 924(c) (2000) (prescribing penalties for the use of a firearm in commission of a crime of violence or drug trafficking); 21 U.S.C. § 841(a)(1) (2000) (making it illegal for "any person knowingly or intentionally–to . . . possess with intent to manufacture, distribute, or dispense, a controlled substance").

5. *Roane*, 378 F.3d at 391. Johnson's capital convictions were for the murders of L. Johnson, Long, Carter, Armstrong, Thorne, Chiles, and P. Johnson. *Id.*

6. *Id.* at 391–92. The jury found that Roane had murdered Moody, P. Johnson, and L. Johnson. *Id.* at 391.

7. *Id.* at 392.

8. *Id.*; *see* 21 U.S.C. § 848(l) (2000) (stating that "[u]pon the recommendation that the sentence of death be imposed, the court shall sentence the defendant to death"). Tipton received the death penalty for his murders of Talley, Chiles, and Thorne; Johnson received death sentences for all of his capital convictions; and Roane received a death sentence for his murder of Moody. *Roane*, 378 F.3d at 392.

9. *Roane*, 378 F.3d at 392; *see Tipton*, 90 F.3d at 903 (affirming death sentences).

10. *Roane*, 378 F.3d at 392; *see Tipton*, 90 F.3d at 891 (vacating conspiracy convictions for violating double jeopardy).

11. *Roane*, 378 F.3d at 392; *see* 28 U.S.C. § 2255 (2000) (providing the parameters for habeas corpus relief from a federal conviction; part of AEDPA).

12. *Roane*, 378 F.3d at 392–93.

13. *Id.* at 393.

assistance with respect to Roane's guilt or innocence on the one homicide count for which he was sentenced to death.[14] The district court therefore vacated Roane's conviction and death sentence as to that count.[15] The United States appealed the court's grant of relief to Roane, and Roane cross-appealed.[16]

Despite its grant of summary judgment to the United States, the district court granted certificates of appealability ("COA") on all of Tipton and Johnson's claims.[17] The Fourth Circuit consolidated all of the defendants' appeals for consideration.[18] The court characterized the defendants' claims as falling within six categories: (1) unconstitutional discrimination during jury selection; (2) challenges to the sufficiency of evidence proving a CCE; (3) "claims of prosecutorial misconduct during trial"; (4) claims that the district court conducted habeas corpus proceedings incorrectly; (5) IAC claims; and (6) claims of mental retardation.[19]

II. Holding

The Fourth Circuit affirmed the district court's grant of summary judgment to the United States on Tipton and Johnson's claims and reversed the lower court's grant of relief to Roane.[20] The court held that the district court had erred in finding that Roane's counsel had not done a reasonable investigation of Roane's alibi defense, reversed the district court's grant of relief, and reinstated Roane's death sentence.[21] The court ultimately concluded that the actions of Tipton, Johnson, and Roane warranted the death penalty for all three.[22]

III. Analysis

A. Flawed Indictments

Tipton, Johnson, and Roane argued, under *Ring v. Arizona*,[23] that they could not constitutionally be put to death because their indictments did not allege statutory aggravating factors sufficient to render the charges against them death-eligible.[24] Under *Ring*, any fact that could increase the maximum sentence to

14. *Id.* at 393–94.

15. *Id.* at 394.

16. *Id.* at 395.

17. *Id.*

18. *Roane*, 378 F.3d at 389.

19. *Id.* at 395–96.

20. *Id.* at 411.

21. *Id.*

22. *See id.* at 411 (affirming the district court's summary judgment against the defendants and reversing its grant of relief to Roane).

23. 536 U.S. 584 (2002).

24. *Roane*, 378 F.3d at 396 n.8 (citing Ring v. Arizona, 536 U.S. 584, 589 (2002)); *see* 21 U.S.C.

death must be presented to the jury and proven beyond a reasonable doubt.[25] The Fourth Circuit pointed out that in federal cases subject to the Indictment Clause of the Fifth Amendment, *United States v. Higgs*[26] expanded *Ring*'s requirements to mandate inclusion of any element, including statutory aggravating factors, in the indictment.[27] The Fourth Circuit, however, following the recent United States Supreme Court decision in *Schriro v. Summerlin*,[28] found that *Ring* created a new procedural rule that did not apply retroactively to cases like this one that were already final on direct appeal when *Ring* was decided.[29] The court therefore dismissed this claim.[30]

B. Discrimination Against Women in Jury Selection

Tipton, Johnson, and Roane claimed that the prosecution used its peremptory strikes in jury selection to discriminate against women jurors.[31] The three noted that the prosecution used only two of its strikes against men and eight against women and argued that under *J.E.B. v. Alabama*[32] the prosecution may not use peremptory strikes to discriminate against potential jurors on the basis of gender.[33] Stating that the defendants "had produced no evidence to support their claim, other than 'raw figures' of men versus women stricken by the prosecution," the Fourth Circuit rejected it.[34] The court further found that the defendants had raised and lost on the discrimination claim on direct appeal, and it therefore refused to reconsider its original rejection of the claim.[35]

Tipton, Johnson, and Roane also alleged that their counsel's failure to object to the prosecution's allegedly discriminatory actions against female venire members during jury selection constituted ineffective assistance.[36] The Fourth Circuit

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§ 848(n)(1)–(12) (2000) (listing aggravating factors that make a person convicted under 21 U.S.C. § 848(e) eligible for the death penalty).

25. *Ring*, 536 U.S. at 589.

26. 353 F.3d 281 (4th Cir. 2003).

27. *Roane*, 378 F.3d at 396 n.8 (citing United States v. Higgs, 353 F.3d 281, 297 (4th Cir. 2003)). For a complete discussion of *Higgs*, see generally Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 499 (2004) (analyzing United States v. Higgs, 353 F.3d 281 (4th Cir. 2003)).

28. 124 S. Ct. 2519 (2004).

29. *Roane*, 378 F.3d at 396 n.8 (citing Schriro v. Summerlin, 124 S. Ct. 2519, 2523 (2004)). For a more complete discussion of *Summerlin*, see generally Tamara L. Graham, Case Note, 17 CAP. DEF. J. 253 (2004) (analyzing Schriro v. Summerlin, 124 S. Ct. 2519 (2004)).

30. *Roane*, 378 F.3d at 396 n.8.

31. *Id.* at 396–97.

32. 511 U.S. 127 (1994).

33. *Roane*, 378 F.3d at 396–97 (citing J.E.B. v. Alabama, 511 U.S. 127, 129 (1994)).

34. *Id.* at 397.

35. *Id.*; *see Tipton*, 90 F.3d at 881 (finding insufficient evidence to support a claim of gender discrimination).

36. *Roane*, 378 F.3d at 397.

found that it was not unreasonable for counsel to fail to object because the United States Supreme Court had not yet ruled on gender discrimination in *J.E.B.*[37] The court cited its own previous ruling in which it had refused to extend *Batson v. Kentucky*[38] to apply to peremptory challenges exercised on the basis of gender.[39] The Fourth Circuit concluded that counsel could not be deficient for failing to anticipate new rulings and "for following controlling circuit precedent at [the] time of trial."[40]

C. Continuing Criminal Enterprise Claims

The Fourth Circuit laid out the elements for convicting a defendant of an offense in furtherance of a CCE.[41] Under 21 U.S.C. § 848(c) and *United States v. Ricks*,[42] the prosecution needs to prove beyond a reasonable doubt that " '[the] defendant committed a felony violation of the federal drug laws . . . [as] part of a continuing series of violations of the drug laws.' "[43] The prosecution must also prove that the series involved five or more persons and that the " 'defendant served as an organizer or supervisor' " and received " 'substantial income or resources from the [crimes].' "[44]

Anticipating the Supreme Court's decision in *Richardson v. United States*,[45] which held that the court must give a jury instruction requiring unanimity as to the crimes constituting a series in a CCE, Tipton, Johnson, and Roane claimed on direct appeal that the court's failure to advise the jury on unanimity prejudiced them.[46] The Fourth Circuit originally rejected this claim on direct appeal because it found that the jury " '[b]y its verdict . . . unanimously found each [defendant] guilty of at least five predicate violations.' "[47] In its reconsideration of the defendants' claim on habeas appeal, the Fourth Circuit relied on its previous decisions to define the lack of a *Richardson* instruction as a procedural defect

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37. *Id.*

38. 476 U.S. 79 (1986).

39. *Roane*, 378 F.3d at 397 (citing United States v. Hamilton, 850 F.2d 1038, 1042 (4th Cir. 1988)); *see* Batson v. Kentucky, 476 U.S. 79, 84 (1986) (prohibiting race-based use of peremptory strikes in jury selection).

40. *Roane*, 378 F.3d at 397 (citing United States v. McNamara, 74 F.3d 514, 517 (4th Cir. 1996)).

41. *Id.* at 398.

42. 882 F.2d 885 (4th Cir. 1989).

43. *Roane*, 378 F.3d at 398 (quoting United States v. Ricks, 882 F.2d 885, 890 (4th Cir. 1989)); *see also* 21 U.S.C. § 848(c) (2000) (defining the elements of a CCE).

44. *Roane*, 378 F.3d at 398 (quoting *Ricks*, 882 F.2d at 890–91).

45. 526 U.S. 813 (1999).

46. *Roane*, 378 F.3d at 398; *see* Richardson v. United States, 526 U.S. 813, 816 (1999) (requiring a jury instruction that unanimity on the specific crimes is required for finding a CCE).

47. *Roane*, 378 F.3d at 398 (quoting *Tipton*, 90 F.3d at 885).

subject to harmless error analysis.[48] Undertaking such an analysis, the court concluded that the defendants did not show that they were prejudiced by the district court's failure to instruct the jury that it needed to agree unanimously on the CCE predicates.[49]

Tipton and Johnson further claimed that the district court should have instructed the jury on three other aspects of the CCE offense.[50] First, they argued that the jury needed to know that it must agree unanimously on the identities of the five persons whom the defendants supervised in the CCE.[51] They next claimed that the district court should have told the jury "that certain categories of persons (i.e., drug kingpins) cannot as a matter of law be supervisees, and that certain types of relationships (i.e., buyer-seller) cannot constitute supervision."[52] Finally, they asserted that the district court should have instructed the jury that the prosecution needed to prove "management" to prove a CCE offense.[53] The Fourth Circuit stated that Tipton and Johnson had defaulted the first two of these arguments by not raising them at trial or on direct appeal.[54] In rejecting the third claim, the Fourth Circuit found that the court had properly instructed the jury on the supervision element required by 21 U.S.C. § 848(c).[55]

Rounding out their CCE claims, Tipton and Johnson argued that their counsel had been ineffective for not objecting to, or requesting instructions on, any of the elements of the CCE offense.[56] The Fourth Circuit affirmed the district court's dismissal of these IAC claims and stated that the defendants had not proven that the lack of a *Richardson* instruction and the lack of an instruction defining "supervision" had prejudiced them.[57] The court also found "that *Richardson* did not change the rule 'that the jury need not unanimously agree on which five persons were organized, supervised, or managed by the defendant.'"[58] The Fourth Circuit therefore concluded that Tipton and Johnson's counsel could not have been deficient for not requesting a jury instruction on that point.[59]

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48. *Id.* (citing United States v. Stitt, 250 F.3d 878, 883 (4th Cir. 2001); United States v. Brown, 202 F.3d 691, 699 (4th Cir. 2000)).

49. *Id.*

50. *Id.* at 399.

51. *Id.*

52. *Id.*

53. *Roane*, 378 F.3d at 400 n.11.

54. *Id.* at 399.

55. *Id.* at 400 n.11; *see* 21 U.S.C. § 848(c) (2000) (defining the elements of a continuing criminal enterprise).

56. *Roane*, 378 F.3d. at 398–400.

57. *Id.* at 399–400.

58. *Id.* at 399 (quoting *Stitt*, 250 F.3d at 886).

59. *Id.*

D. Erroneous Denial of Juror Interviews

Tipton and Johnson argued that the district court abused its discretion in not allowing them to interview the jurors from their trial to ascertain if they had been improperly influenced by media coverage of the trial.[60] Finding that the court had rejected one of the specific claims on direct appeal, the defendants had procedurally defaulted another by not raising it at trial or on appeal, and the defendants had not provided evidence that the district court's cautionary instructions to the jury to ignore outside influences had failed, the Fourth Circuit rejected this claim.[61] The court concluded that Tipton and Johnson had not presented the district court with any reason to allow the interviews and thus could not claim error on this ground.[62]

E. IAC Claims

1. Failure to Investigate Gang Activity

In their first claim that their counsel were ineffective, Tipton, Johnson, and Roane contended that their lawyers failed to investigate gang activities in New York and New Jersey that would have led to impeachment evidence against many of the prosecution's witnesses.[63] The Fourth Circuit dismissed this claim on the prejudice prong of *Strickland v. Washington*.[64] The court concluded that the evidence trial counsel could have gathered would have been more damning than beneficial and would not have undermined the "overwhelming evidence . . . that the Defendants were involved in a CCE in the Richmond area, and that their enterprise had distributed illegal drugs and killed on several occasions in order to ensure its success."[65] The Fourth Circuit therefore found that trial counsel's failure was neither deficient nor prejudicial.[66]

2. Failure to Request Morgan *Voir Dire*

Tipton and Johnson also asserted that their counsel failed by not requesting, under *Morgan v. Illinois*,[67] a "reverse-*Witherspoon*" question of jurors during voir

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60. *Id.* at 403.

61. *Id.* at 403–04.

62. *Roane*, 378 F.3d at 404.

63. *Id.* at 405.

64. *Id. See generally* Strickland v. Washington, 466 U.S. 668 (1984) (providing the standard for a court's evaluation of IAC claims).

65. *Roane*, 378 F.3d at 405.

66. *Id.*

67. 504 U.S. 719 (1992).

dire.[68] The Supreme Court in *Witherspoon v. Illinois*[69] held that the prosecution may strike any juror who would refuse to impose the death penalty.[70] *Morgan* requires that a defendant be allowed to determine that prospective jurors will not apply the death penalty automatically, and hence Tipton and Johnson claimed that their counsel should have pursued this line of questioning to ensure a fair jury.[71] The Fourth Circuit rejected this IAC claim based on a lack of prejudice because it determined that the district court made a sufficient effort to ensure that the jury contained no automatic-death jurors in violation of *Morgan*.[72]

3. Failure to Present Mitigation Evidence Concerning Prison Conditions

Tipton and Johnson further argued that their counsel were ineffective for failing to present evidence in mitigation that prison life would not be all cable television and literary groups.[73] Tipton and Johnson contended that their counsel should have responded to the prosecution's painting of life in prison as pleasurable with evidence of actual prison conditions.[74] The Fourth Circuit found that trial counsel had made a reasonable tactical choice not to introduce such evidence in an effort to avoid the prosecution's asserting that Tipton and Johnson would be dangerous in prison and comparing prison life to the lives of the victims that the two had critically wounded during their violent crimes.[75] The court concluded, therefore, that trial counsel were not ineffective on this ground.[76]

4. Waiver of Roane's Presence During Jury Selection

Roane next claimed that his counsel failed by waiving Roane's right to be present during jury selection.[77] Roane argued that *Near v. Cunningham*[78] stands for the proposition that "a capital defendant may not waive his presence at trial."[79] Roane asserted that had he been present throughout jury selection, he would

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68. *Roane*, 378 F.3d at 405 (citing Morgan v. Illinois, 504 U.S. 719, 733 (1992)); *see also* Witherspoon v. Illinois, 391 U.S. 510, 520 (1968) (allowing the prosecution to use voir dire to eliminate any juror who would never impose a death sentence).

69. 391 U.S. 510 (1968).

70. *Witherspoon*, 391 U.S. at 520.

71. *Roane*, 378 F.3d at 405 (citing *Morgan*, 504 U.S. at 733).

72. *Id.* at 405–06.

73. *Id.* at 406.

74. *Id.*

75. *Id.*

76. *Id.*

77. *Roane*, 378 F.3d at 408.

78. 313 F.2d 929 (4th Cir. 1963).

79. *Roane*, 378 F.3d at 408 (citing Near v. Cunningham, 313 F.2d 929, 931 (4th Cir. 1963)).

have demanded that his counsel remove three jurors whose presence on the jury ultimately prejudiced his defense.[80] The Fourth Circuit declined to review this claim because it had rejected it previously on direct appeal under plain error review.[81]

F. Mental Retardation Claims

Johnson's final claims were that his status as mentally retarded precluded the Government from executing him and that his counsel were ineffective for failing to argue his mental retardation during sentencing.[82] Title 21 of the United States Code § 848(l) states that "[a] sentence of death shall not be carried out upon a person who is mentally retarded."[83] The district court determined that an I.Q. of 75 or below classifies a person as mentally retarded.[84] Johnson claimed that his I.Q. score of 77 was inflated and that his actual I.Q. fell below the mental retardation cut-off of 75.[85] He argued that his attorney was ineffective in not asserting that his score of 77 was inflated.[86] The Fourth Circuit found instead that his original I.Q. score was valid and that his counsel could not be faulted for failing to "second-guess" the report from their appointed mental health expert.[87] The court therefore dismissed this claim.[88]

G. The Government's Appeal

In its original consideration of Roane's habeas corpus petition, the district court granted him relief on his IAC claim that his counsel had failed to investigate his alibi defense adequately.[89] The district court found that Roane's attorney missed evidence that he could have used to confirm Roane's alibi for the Moody murder.[90] In its de novo review of the district court's grant of relief for IAC, the Fourth Circuit concluded that Roane's counsel had done a "reasonable and thorough" investigation of Roane's alibi that he had been at a hotel with

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80. *Id.*

81. *Id.*

82. *Id.*

83. 21 U.S.C. § 848(l) (2000); *see* Atkins v. Virginia, 536 U.S. 304, 321 (2002) (concluding that the execution of a mentally retarded person would constitute a violation of the Eighth Amendment).

84. *Roane*, 378 F.3d at 408.

85. *Id.* at 408–09.

86. *Id.* at 409.

87. *Id.*

88. *Id.*

89. *Id.*

90. *Roane*, 378 F.3d at 410.

Carmella Cooley on the night of Moody's murder.[91] The court pointed to the facts that Roane's attorney had sought the records of the hotel and had even searched the records himself for information pertaining to the "*only relevant night.*"[92] Despite the fact that Roane's habeas investigator had found exculpatory evidence in the same records, the Fourth Circuit chose to defer to trial counsel's investigation, and "declin[ed] to act as a Monday-morning quarterback and second-guess [trial counsel's] efforts, simply because [the Fourth Circuit was] now armed with more information and the benefit of hindsight."[93] Finding the district court's Monday-morning quarterbacking to be in error, the Fourth Circuit reversed the lower court's decision and reinstated Roane's conviction and death sentence for the murder of Douglas Moody.[94]

IV. Application to Virginia Practice

A. Juror Interviews

The Fourth Circuit found that the district court had not erroneously denied the defendants leave to interview jurors after the trial.[95] Requiring at least "a threshold showing of improper outside influence" to impeach a jury verdict, the court concluded that the defendants' lack of evidence was insufficient to survive summary judgment.[96] The dilemma posed by this standard is that without leave to conduct juror interviews, a defendant will find it difficult to gather enough evidence to make that threshold showing. The defendants knew that their trial had been highly publicized and that the publicity had affected at least two jurors, one of whom the court dismissed.[97] Without the ability to investigate further influences on the jury by asking the jury itself, the defendants were effectively hamstrung in their efforts to prove that the jury had been prejudiced by outside influences.

B. Reversal of Relief

The Fourth Circuit's reversal of the district court's grant of habeas relief to Roane for his IAC claim raises more questions about the subjectivity of the reasonableness standard. The district court found that Roane's attorney's limited attempt to find evidence to support Roane's alibi fell below the kind of investigation a reasonable attorney might make and that it thus prejudiced the

91. *Id.* at 410–11.
92. *Id.* at 411.
93. *Id.* at 394, 411.
94. *Id.* at 411.
95. *Id.* at 404.
96. *Roane*, 378 F.3d at 404.
97. *Id.* at 403.

outcome of Roane's case.[98] In contrast, the Fourth Circuit was impressed that the attorney had gone to the hotel and looked for records himself.[99] The court did not sanction the lower court's view that Roane's attorney should have subpoenaed all of the records from the period in question or expanded his search beyond the single night of the murder.[100] It is odd that given the extreme importance of an alibi that can prove actual innocence, the Fourth Circuit lauded the limited efforts of the attorney. The Fourth Circuit chided the district court for relying on authorities in which the factual circumstances were dissimilar to an extreme, involving attorneys who "neglected to investigate, or [whose] investigation was . . . cursory."[101] One might argue, however, that the information so readily unearthed by the habeas investigator suggests that the investigation that Roane's attorney performed could indeed be classified as cursory.

V. Conclusion

Roane presents the unusual case of a triple federal death sentence. It also highlights the subjectivity that can infect a habeas corpus proceeding. Although the Fourth Circuit readily deferred to the district court's judgment in validating the multiple death sentences for two of the defendants, it scrutinized with extreme care the lower court's grant of relief for the single defendant who had been sentenced to death for only one capital murder. *Roane* illustrates that the ever-slippery *Strickland* standard of what might be reasonable under the circumstances still depends largely upon a judge's own sense of reasonableness without reference to professional norms. The case also calls into question the Supreme Court's recent classification of the *Ring* rule, so crucial in cases in which death is a possibility, as procedural and non-retroactive.

Tamara L. Graham

98. *Id.* at 394.
99. *Id.* at 410.
100. *Id.*
101. *Id.* at 411.