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Fourth Circuit Case Summaries: January 25 and 28, 2019

Petitioner met 'exacting' standard for actual innocence exception to procedural default; error to dismiss habeas without hearing on the merits

Finch v. McKoy, 914 F.3d 292 (Jan. 25, 2019). This habeas appeal from the Eastern District of North Carolina arose out of the petitioner's 1976 conviction for first-degree murder in Wilson, NC. He was originally sentenced to death, but the state supreme court later commuted it to a life sentence. In 2015, he filed in federal court, alleging actual innocence (among other claims). The Antiterrorism and Effective Death Penalty Act ("AEDPA") normally gives state prisoners one year to pursue federal habeas, measured from the date that the state court judgment has become final (including the direct appeal process, or the time in which such appeal could have been taken). The petitioner's claim here clearly fell outside that window. However, the AEDPA statute of limitations may be overcome where the petitioner alleges actual innocence. "This rule, or fundamental miscarriage of justice exception, is grounded in the equitable discretion of habeas courts to see that federal constitutional errors do not result in the incarceration of innocent persons." Slip op. at 3.

The State's case against the petitioner at trial rested on the testimony of Mr. Jones, an employee of the murder victim. He was present in the convenience store at the time of the robbery and murder. He provided descriptions of the suspects to police, and identified the petitioner in several line-ups, as well as at trial. Another witness, Mr. Harris, testified that he saw the petitioner and spoke to him at the store shortly before the murder. A shotgun shell was recovered from the petitioner's car the same evening. An expert for the state testified at trial that the victim died from injuries inflicted by shotgun "slugs", and Jones also indicated that one of the robbers had a sawed-off shotgun. The petitioner presented alibi evidence from three witnesses at trial. He also presented evidence that Jones had "cognitive issues", including memory problems and alcoholism. The petitioner's son also testified that his father's vehicle had been purchased only recently as a used car, and that when cleaning the car, he found a shotgun shell that had apparently already been inside the car before it was purchased. The jury convicted.

Petitioner pointed to new evidence supporting his claim of innocence. Harris provided a new sworn statement, recanting his claim of having seen the petitioner at the store right before the murder. He indicated he informed the deputy of this "uncertainty" at the time, and that he was pressured by that officer and the prosecutor to lie. Deputy Owens, an investigating officer in the case, disclosed for the first time in state post-conviction proceedings that his attention was drawn to the petitioner as a suspect in the killing because an informant had told him a robbery was being planned among the petitioner and others. "[Owens] admitted that armed robbery was not consistent with [the petitioner's] background but nonetheless, he still had [the petitioner] in mind even before he had arrived at [the victim's] store." *Id*. Additionally, the petitioner pointed to new expert evidence. In 2013, the chief medical examiner for North Carolina testified that the "slugs" referenced in the expert's report from the 1976 trial actually referred to gunshots generally, and not shotgun shells specifically. He also indicated that the wounds on the victim likely could not have come from a shotgun at all. The original expert from

1976 also gave a statement concurring that "the autopsy report should have used the term 'gunshot wounds' instead of 'shotgun wounds.'" *Id*. at 9-10. Another ballistics expert opined that the shell found in petitioner's car did not match bullets at the crime scene. Finally, another new expert opined in 2013 that the line-up procedures used to identify the petitioner at the time were impermissibly suggestive. Because the petitioner was the only person wearing a coat similar to that described by the eyewitness during the lineups, and because the petitioner was placed in three back-to-back lineups (among other deficiencies), "there was a significant risk of witness misidentification. . ." *Id*. at 11. The district court denied the petition as time-barred and alternatively found it failed to meet the standards for actual innocence.

On appeal, the Fourth Circuit first noted the rules surrounding innocence claims in this context:

> Courts have consistently emphasized that actual innocence . . . is a procedural mechanism rather than a substantive claim. A valid actual innocence claim 'requires petitioner to support his allegations of constitutional error with new reliable evidence'. . . A petitioner must also 'demonstrate that the totality of the evidence would prevent any reasonable juror from finding him guilty beyond a reasonable doubt, such that his incarceration is a miscarriage of justice. *Id*.

If this "exacting" standard is met, the district court proceeds to consider the otherwise time-barred claims on their merits. When undertaking such review, the court is not bound by the rules of evidence that would apply at trial, and must consider all of the evidence, including new evidence.

The Fourth Circuit found that the petitioner met the standard and reversed. His evidence regarding the suggestibility of the line-up procedures supported Due Process claims under the Fourteenth Amendment for unreliable identification. This evidence would have likely had a significant impact on the jury, given the lack of physical evidence implicating the petitioner. When coupled with the new evidence regarding what kind of bullet killed the victim and that the shell found in petitioner's car didn't match bullets at the crime scene, "[t]his new evidence not only undercuts the State's physical evidence, but it also discredits the reliability of Jones, who testified he saw [the petitioner] use a sawed-off shotgun . . ." *Id*. at 14. Harris's new affidavit further cast significant doubt upon Jones's and Deputy Owens's trial testimony. "Finch has overcome the exacting standard for actual innocence through sufficiently alleging and providing evidence of a constitutional violation and through demonstrating that the totality of the evidence, both old and new, would likely fail to convince any reasonable juror of his guilty beyond a reasonable doubt." *Id*. at 19. The case was therefore remanded to district court for merits review.

Government's breach of plea agreement required plea to be vacated

U.S. v. Edgell, 914 F.3d 281 (Jan. 25, 2019). In this case from the Northern District of West Virginia, the defendant pled guilty to distributing methamphetamine and unlawful possession of a firearm pursuant to a plea agreement. As a part of the bargain, the government stipulated that the defendant had "less than five (5) grams of substances containing a detectable amount of methamphetamine," which would have resulted in a guideline range of 10 to 16 months. After the agreement was signed but before sentencing, lab results of the drugs revealed that the substance at issue was "actual methamphetamine." This information was shared with probation and increased the defendant's guidelines range to 30 to 37 months. The government argued for this higher range at sentencing, and

the defendant was ultimately sentenced to 30 months. The defendant appealed, arguing that it was improper for the government to share the lab results with the probation office and court and that the government failed to honor the plea agreement by seeking a higher sentence.

The Fourth Circuit disagreed that the government breached the plea bargain by informing the probation office of the lab result. "[E]ven where a plea agreement binds the government to certain sentencing recommendations, the government retains a duty 'to ensure that the court has complete and accurate information, enabling the court to impose an appropriate sentence.'" Slip op. at 7. Here, the plea bargain explicitly stated that the government had the right to share with the court and probation office and relevant sentencing information. Sharing the information was "consistent with both the parties' plea agreement and the government's broader duty to provide complete and accurate information to the sentencing court." *Id*. at 8.

However, the court found the government's conduct at sentencing violated the terms of the plea agreement. "Although the Government has a duty to provide the sentencing court with relevant factual information and to correct misstatements, it may not hide behind this duty to advocate a position that contradicts its promises in a plea agreement." *Id.* (internal citations omitted). By seeking a sentence in excess of what was contemplated by the stipulation, the government "affirmatively undermined the plea agreement . . ." *Id*. at 9. The court rejected the government's argument that the defendant assumed the risk of the government discovering the more-pure substance, finding that the government took the risk of entering into the stipulation before the lab results were available. This was plain error and prejudicial.

In most cases of a breached plea agreement, the remedy is within the discretion of the district court judge. Where, however, the defendant seeks specific performance of the agreement (as opposed to withdrawal of the plea), "then the court should honor that election and remand with the direction that the defendant be resentenced before a different judge." *Id*. at 15. The sentence was therefore vacated and the matter remanded for resentencing before a different trial judge.

Habeas grant vacating death sentence for failure to investigate mitigation evidence affirmed

Williams v. Stirling, 914 F.3d 302 (Jan. 28, 2019; amended Feb. 5, 2019). The petitioner was convicted of capital murder in South Carolina and sentenced to death. He brought a habeas petition under 28 U.S.C. § 2254 alleging ineffective assistance of counsel ("IAC") based on the failure of trial counsel to investigate mitigation evidence, among other claims. The district court granted relief on the IAC claim, and the government appealed.

The petitioner was represented at trial by two defense lawyers with experience in capital cases. Trial counsel obtained the services of a social worker, neurologist, neuropsychologist, clinical psychiatrist, and forensic psychiatrist in preparation for sentencing. In the course of her investigation, the social worker received information that the petitioner's mother drank alcohol while pregnant with the petitioner. The other mental health professionals determined that the petitioner had neurological impairments from frontal lobe trauma and diagnosed him with bipolar disorder, as well as obsessive-compulsive disorder. All of this evidence was presented to the jury during the penalty phase, in addition to evidence of the petitioner's "troubled childhood—including his mother's alcoholism. . ." Slip op. at 5. The jury ultimately returned a death verdict after initial deadlock.

The petitioner claimed trial counsel's failure to investigate signs that he suffered from Fetal Alcohol Syndrome ("FAS") constituted IAC, given the information they had about his mother's alcohol use during pregnancy and his brain damage. Three experts in FAS testified in state post-conviction proceedings, all indicating that the petitioner either had FAS, or had symptoms consistent with it. Further, they all acknowledged that "a widely recognized protocol to forensically assess FAS in the criminal content had not yet been developed . . ." at the time of petitioner's trial. Trial counsel did not recall investigating FAS and had no explanation for why such investigation was not done. Despite the lack of a fully developed forensic protocol for the diagnosis, the diagnosis was available at the time of trial, and FAS was listed in the American Bar Association ("ABA") Guidelines for defense counsel in capital cases as a potential mitigating factor well before petitioner's trial. Trial counsel acknowledged that he should have spotted the FAS issue based on the information about the mother as well as the "developmental delays and learning problems exhibited" by the petitioner. *Id*. at 8. The state post-conviction court found that trial counsel made a strategic decision not to present FAS evidence (despite trial counsel's inability to articulate a reason for the decision), and that trial counsel's strategy was to focus on the troubled childhood and other mental health diagnoses, rather than presenting FAS evidence. The court also found that the information was unlikely to have affected the sentence and denied relief.

After exhausting state remedies, the petitioner filed in federal court. A magistrate judge recommended the petition be granted as to the IAC claim, finding the state court's conclusion that trial counsel made a strategic decision to be unreasonable based on trial counsel's testimony at the state post-conviction hearing. It also found such error was prejudicial: "[B]ecause the State put forward only one aggravating factor and 'the jury was deprived of powerful [mitigating] evidence,' a reasonable probability existed that the jury would have returned a life sentence had this additional mitigating evidence been presented and credited by the jury." *Id*. at 11. The district court adopted the magistrate's recommendation and the government appealed.

Where the state post-conviction court has adjudicated the petitioner's claims on the merits (as occurred here), the federal court may not grant habeas relief unless the state post-conviction court unreasonably applied clearly established federal law, or where the state court made unreasonable factual determinations in light of the evidence presented. Under either prong of that test, the state court's ruling must be "more than incorrect or erroneous. The state court's application must have been objectively unreasonable." *Id*. at 13. Here, the petitioner demonstrated he was entitled to relief under both prongs. In addition to the ABA guidelines, under *Wiggins v. Smith,* 539 U.S. 510 (2003), "an inadequate investigation into potentially mitigating evidence can be, itself, sufficient to establish deficient performance." *Id*. at 17. The defense team failed to recognize the potential FAS diagnosis as a potential mitigating factor and therefore could not have made a strategic decision to not pursue it. The state court's determination that trial counsel made a strategic decision in not focusing on FAS was therefore an unreasonable application of *Strickland*. It was also an unreasonable determination of the facts—"the [state post-conviction court] could not reasonably find trial counsel made a strategic decision in accord with *Strickland* where counsel was unaware of the decision." *Id*. at 23. Further, the state court relied the lack of an "established protocol assessment of FAS" at the time of trial to find that FAS was not a well-known diagnosis at the time. The then-existing ABA guidelines, as well as the testimony from trial counsel indicating their general awareness of the diagnosis, undercut this finding.

The state court also found that the petitioner could not meet *Strickland's* prejudice prong—in the words of that court, the FAS evidence "would have 'merely resulted in a 'fancier' mitigation case, [with] no

effect on the outcome of the trial.'" *Id*. at 25. *Strickland* prejudice requires only that the evidence carried a "reasonable probability" of affecting the outcome. The FAS evidence could have showed both the cause and effect of the petitioner's behavior and went directly to the petitioner's culpability. Further, the state offered only one aggravating factor at sentencing. "[H]ad this solitary aggravating factor been weighed against the totality of the mitigating evidence . . ., there is a reasonable probability that the jury would have determined the balance of factors did not warrant a death sentence." *Id*. at 27. This was particularly so in light of the initial jury deadlock at sentencing.

> Given the aggravating and mitigating evidence in the context of this particular case, it is evident that the presentation of the FAS evidence would have resulted in, at a minimum, a reasonable probability of a different sentence, even if it did not guarantee one. This is all the law requires. As a result, the district court properly found that the [state court's'] prejudice determination was unreasonable. *Id*. at 28-29.

The case was therefore affirmed and the death sentence vacated.

(1) Consent to knock and talk valid despite agent's statement, "Open the door or we're going to knock it down" (2) No *Miranda* violation where defendant was not in custody at the time of his statements

U.S. v. Azua-Rinconada, 914 F.3d 319 (Jan. 28, 2019). In this case from the Eastern District of North Carolina, Homeland Security agents led a "knock and talk" investigation through a Robeson County mobile home community in early 2016. At least one agent was in a "Police" t-shirt with his badge and gun displayed, and another officer wore a body camera that captured the interactions. When agents approached the defendant's home, they knocked and received no response. An agent said "open the door" in Spanish, and later "Publisher's Clearinghouse." Agents heard voices inside, and knocked again more with more force, stating in Spanish, "Open the door or we're going to knock it down." Slip op. at 3. Inside the home, the defendant and his pregnant fiancée were "scared" but ultimately opened the door. The defendant testified at suppression that "he did not 'believe that they were going to take down the door.'" *Id*. After initially representing that she was the only person present in the home, the fiancée eventually acknowledged she wasn't alone and agreed to let officers inside. Along with the defendant, the defendant's brother in law was present. An agent asked the group if there were any guns inside, and the brother in law acknowledged he rented the home and owned guns. Agents asked for and received consent to search the premise. While the brother in law was filling out the consent form, agents asked the defendant where he was from. When he indicated he was from Mexico, the agent handed him a form listing questions designed to determine immigration status, instructing the defendant to "start filling this out" and "answer every question." *Id*. at 5. Agents had the defendant submit to fingerprinting, which revealed two deportation warrants. The defendant was indicted and convicted of illegal entry following the denial of his motions to suppress. He was ultimately sentenced to time served, and placed in custody of Homeland Security for deportation proceedings. The defendant appealed.

The motions to suppress sought to exclude all evidence obtained inside the home as a Fourth Amendment violation for the knock and talk and all statements to the agents inside as a *Miranda* violation. The magistrate and district court concluded the defendant gave his fiancée knowing and voluntary consent for the officers to enter the home and that the defendant wasn't in custody at the time of his statements to agents (and thus not entitled to a *Miranda* warning). The Fourth Circuit affirmed. As to the knock and talk, the defendant argued that the agent's statement to "knock down the door" showed coercion and a lack of voluntary consent. Voluntariness of consent is determined by

looking at the totality of the circumstances. *Schneckloth v. Bustamonte*, 412 U.S. 218, 233 (1973), Reviewing for clear error, the court found this interaction stood "'in stark contrast' to those cases where consent was found to be involuntary." *Id*. at 8. While the court did not approve of the agent's statements at the door, it was not fatal to voluntary consent here. The body camera footage showed the fiancée open the door, engage in conversation with the agents (who were "calm" and "casual"), and she "freely and with a degree of graciousness invited the officers" inside. *Id*. at 9. She also testified that she consented to the entry. It was therefore not clear error for the district court to find voluntary consent under these circumstances.

As to the alleged *Miranda* violation, the defendant was mostly questioned while on the couch of the living room next to his fiancée, where he chose to sit. The officers were on the other side of the room, their "language, demeanor, and actions were calm and nonthreatening, and the tenor of the interaction remained conversational." *Id*. at 12. The agent's statement to the defendant to fill out the form and answer the questions completely, while couched in terms of a command, was more consistent with explaining how to fill out the form rather than commanding the defendant to complete it.

> [W]hile [the defendant] was undoubtedly intimidated during the interaction by having police in his home, especially in view of his immigration status, that intimidation appeared no great than that which is characteristic of police questioning generally. And 'police questioning, by itself, is unlikely to result in a [constitutional] violation.' *Id*.

The court distinguished these facts from other cases where interactions were found to be custodial. The defendant pointed to the agent's statement that police would knock down the door to support his argument that he thought he was required to comply with the officers' requests. While that statement by police was properly considered as a factor in the custodial analysis, in light of the rest of the defendant's interactions with the agents, it failed to establish a custodial interrogation here. Further, the fact the defendant was never told he was free to leave is likewise only a factor and not dispositive. The court concluded:

> In sum, considering the totality of the circumstances, [the defendant's] 'freedom of action' was not 'curtailed to the degree associated with a formal arrest,' meaning that he was not in custody and *Miranda* warnings were therefore not required. *Id*. at 14.

The district court's judgment was therefore affirmed in all respects. A concurring judge wrote separately to note the opinion does not undercut the general rule in the circuit that "a defendant's alleged consent to a search of his property ordinarily will be deemed invalid when that consent is obtained through 'an officer's misstatement of authority.'" *Id*. at 15. This case was a "rare exception" to the general rule. While the agent's statement he would break down the door was a misstatement of his authority, the subsequent interactions with the occupants of the home were in no way aggressive—the camera footage revealed the opposite, that the interaction was "casual and nonconfrontational, such that any coercive effect of [the agent's] initial statement had dissipated" by the time law enforcement entered the home. *Id*. at 17. Absent this "ameliorating context," the threat to break down the door would have invalidated any purported consent.