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SPENCER v. MURRAY (SPENCER I) 5 F.3d 758 (4th Cir. 1993)

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sistent advocacy in the face of judicial resistance can produce unexpected rewards, and the Virginia capital defense bar should take note that whether such claims are preserved or defaulted can often be a matter of life or death for many capital defendants.

Summary and analysis by:
John M. DelPrete

SPENCER v. MURRAY

(SPENCER I)

5 F.3d 758 (4th Cir. 1993)
United States Court of Appeals, Fourth Circuit

FACTS

Late in the evening on September 18 or early in the morning on September 19, 1987, Timothy Wilson Spencer went to the home of Debbie Dudley Davis. Spencer bound Davis's hands with shoestrings, raped her and then strangled her to death with a "ligature and ratchet-type" device, which he made out of a sock and vacuum cleaner hose.

Upon discovering the body, investigators found two hairs in the victim's pubic hair and determined that they were "consistent with" Spencer's underarm hair. Investigators also found semen stains on the victim's bedclothes. The presence of spermatozoa was further found when vaginal and rectal swabs of the victim were taken. Forensic analysis of the semen stains determined that the stains had been deposited by a secretor whose blood characteristics matched those of only thirteen percent of the North American population. Spencer's blood and saliva samples indicate that he is a member of that population group.

A semen sample from the victim's bedclothes and a sample of Spencer's blood were subjected to DNA analysis. The analysis was performed by Lifecodes, a private laboratory, which found that the DNA molecules extracted from the semen stains matched the DNA molecules extracted from Spencer's blood. Evidence presented at trial established that the statistical likelihood of finding a duplication of Spencer's particular DNA pattern in the population of African Americans who live in North America is only one in seven hundred five million. Further, the evidence established that Spencer is one of only ten million black males living in North America.

On September 22, 1988, a Richmond jury unanimously found Spencer guilty of rape, burglary and capital murder, and sentenced him to death. The Supreme Court of Virginia affirmed the death sentence on direct appeal.[1] Spencer next filed a petition for habeas corpus with the state trial court, which was dismissed. The Supreme Court of Virginia refused to grant his petition for appeal when Spencer failed by one day to meet the time limit established by Rule 5:17(a)(1) of the Rules of the Supreme Court of Virginia.[2] Spencer filed a motion to extend the time for filing that petition for appeal, but the Supreme Court of Virginia denied the motion. Spencer next filed a petition for writ of habeas corpus with the United States District Court for the Eastern District of Virginia. The district court denied his petition on the ground that Spencer had failed to exhaust all available state remedies.[3]

Next, Spencer filed an appeal with the United States Court of Appeals for the Fourth Circuit. Spencer based his appeal on the following five grounds: (1) DNA evidence in this case is unreliable; (2) defense counsel was denied an opportunity to adequately defend against the DNA evidence because the trial court denied a discovery request for Lifecodes' worknotes and memoranda, the trial court refused to provide funds for an expert defense witness, and the prosecution did not reveal evidence of problems with Lifecodes' testing methods; (3) the trial court should not have admitted the DNA evidence; (4) the prosecution improperly struck Miss Chrita Shelton from the jury for racially-motivated reasons as prohibited by *Batson v. Kentucky*;[4] and (5) the future dangerousness aggravating factor in Virginia's capital sentencing scheme is unconstitutionally vague.

HOLDING

The United States Court of Appeals for the Fourth Circuit held that many of Spencer's issues and claims were precluded from federal habeas review because they were procedurally defaulted.

First, two claims were precluded because Spencer filed the state habeas petition with the Supreme Court of Virginia one day past the mandatory filing deadline set forth in Supreme Court of Virginia Rule 5:17(a)(1).[5] Those two claims alleged the unreliability of the DNA evidence and that the defense could not adequately prepare because the trial court did not provide a defense expert.

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[1] *Spencer v. Commonwealth*, 238 Va. 295, 384 S.E.2d 785 (1989).

[2] Rule 5:17(a)(1) of the Rules of the Supreme Court of Virginia states:

> Time for Filing. In every case in which the appellate jurisdiction of this Court is invoked, a petition for appeal must be filed with the Clerk of this Court:
> (1) in the case of an appeal direct from a trial court, not more than three months after entry of the order appealed from . . . .

[3] *Spencer v. Murray*, No. 3:91CV00391 (E.D. Va. April 30, 1992). The petition was dismissed on the grounds that missing a filing deadline does not count towards the exhaustion of state remedies, despite the fact that the missed deadline renders it impossible for a defendant to further avail himself of state remedies. As noted *infra*, failure to exhaust that is occasioned by failure to follow state procedural rules is also procedural default, which can bar consideration of the claims in federal court.

[4] 476 U.S. 79 (1986).

[5] *Spencer v. Murray*, No. 910055 (Va. March 18, 1991) (two documents).

Second, the court ruled that Spencer's claim that the defense could not adequately prepare because the trial court refused to grant his request for discovery of Lifecodes' worknotes and memoranda was properly raised on direct appeal. Still, the claim was held to be defaulted because it was not raised again in the federal district court in Spencer's petition for federal habeas relief.[6]

Third, the court refused to consider Spencer's claim that the defense could not adequately prepare because the prosecution and its expert agent, Lifecodes, failed to disclose any problems with Lifecodes' testing methods that they knew or should have known existed. The court held this issue was defaulted because Spencer never raised it in any state court.[7]

The court also decided several issues on the merits. First, the court held that the prosecutor provided a racially neutral reason for striking a black juror, thus satisfying the *Batson* test. Second, the court ruled that Spencer failed to meet the threshold test for his actual innocence claim.[8] Lastly, the court summarily considered and rejected Spencer's claim that the future dangerousness aggravating factor has not been meaningfully construed by the Supreme Court of Virginia, and thus the factor fails to guide the jury's discretion during decisionmaking.

ANALYSIS/APPLICATION IN VIRGINIA

Many of the issues raised by *Spencer I*, including some that were held to be defaulted, are of importance to Virginia defense attorneys. They include: (1) the trial court's refusal to appoint a defense expert to test the reliability of the DNA evidence; (2) the failure of the trial court to order disclosure to the defense of Lifecodes' notes and memoranda that explained the DNA testing procedures used in this case; (3) admissibility of DNA evidence; (4) *Batson* claim based on the prosecutor's use of peremptory strike on the basis that the prosecutor was concerned about the educational and literacy level of a potential juror who had heard nothing about the facts of the highly publicized case and nothing about DNA testing; and (5) the Fourth Circuit's denial of Spencer's claims of actual and/or factual innocence.

I. Denial of Defense DNA Expert

The court did consider and reject Spencer's claims that the DNA evidence in his trial should not have been admitted. In doing so, it implicitly decided a defaulted claim challenging the reliability of DNA evidence.

The court cited *O'Dell v. Commonwealth*[9] for the proposition that DNA evidence in general is considered reliable and thus admissible. The Fourth Circuit found that Spencer failed to meet his burden of showing that the DNA tests in this case were not reliable. Quoting the Supreme Court of Virginia's opinion in Spencer's direct appeal, the court stated: "The record is replete with uncontradicted expert testimony that no 'dissent whatsoever [exists] in the scientific community' concerning the reliability of the DNA printing technique. Unrebutted expert testimony further established that the testing procedure performed **in this case** was conducted in a reliable manner."[10] Thus, any attacks of unreliability against DNA evidence must be specifically directed at the methodology used in performing these particular tests.

It is difficult to discern from the court's opinion whether the defense attorney actually requested a DNA expert, or whether he merely suggested to the judge that he might want an expert at some unspecified time in the future.[11] If there was an actual request by defense counsel, it is problematic that the judge would not appoint an expert unless defense counsel could demonstrate prior to the appointment that the testimony of the expert would be helpful to the defense.

In *Ake v. Oklahoma*,[12] the United States Supreme Court held that Fourteenth Amendment Due Process entitles an indigent capital defendant to an expert(s) if the defendant makes a preliminary showing that the issue for which the expert is needed is likely to be a significant factor at trial. Spencer clearly passed this threshold test, as all of Spencer's claims of error (except for the *Batson* claim) depend upon the admissibility of the DNA evidence and thus whether these particular tests were conducted correctly. When making an *Ake* motion, defense counsel must make a qualified showing of the type of expert she wants (i.e., DNA expert) and should disclose the type of work the expert will do. But *Ake* does not require that defense counsel must first specify the conclusions made by the expert before the court may appropriate funds to obtain that expert. In fact, the purpose of *Ake* is that the defendant does not merely have to take the Commonwealth's assertions as true. Instead, the defendant is entitled to a "second opinion" regarding the correctness of the Commonwealth's evidence, provided that the evidence is of sufficient importance to the case.

Neither does Supreme Court of Virginia Rule 3A:11 on discovery require that defense counsel ascertain the expert's opinions and conclusions before asking the court to foot the bill. Instead, Rule 3A:11 implic-

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[6] *Spencer v. Murray*, No. 3:91CV00391 (E.D. Va. April, 30, 1992).

[7] *Spencer v. Murray*, 5 F.3d 758, 762 (4th Cir. 1993) [hereinafter *Spencer I*].

[8] Spencer's "actual innocence" claim was not a separate allegation of error in itself, but was put forward as an excuse for default.

[9] 234 Va. 672, 364 S.E.2d 491, *cert. denied*, 488 U.S. 871 (1988).

[10] *Spencer I*, 5 F.3d at 763 (quoting *Spencer v. Commonwealth*, 238 Va. at 314, 384 S.E.2d at 797).

[11] In a footnote, the court explained: "When Spencer's counsel argued his motion for funds for an expert on August 2, 1988, the attorneys advised the court that 'the motion was filed merely to put the Court on notice that we will be making the motion.'" *Spencer I*, 5 F.3d at 760 n. 2.

However, the conversation between defense counsel and the court that followed is extremely confusing at best. The judge, explaining what kind of expert he would allow, seems to say that he would only approve an expert who would actually aid the defense. Implicitly, the judge states that he does not want to expend funds on an independent expert who may ultimately agree with the prosecution that the DNA evidence is reliable in this case. The relevant portion of the judge's remarks to defense counsel is as follows:

> I want to know what the experts are going to say before I appropriate funds.
>
> ....
>
> If you have got somebody to say, an expert, DNA is not a reliable test, I would think that would be a proper issue for the jury to believe, which is what you want....
>
> ....
>
> So when you come in, get your expert, what his credentials are to become an expert. [Y]ou will certainly talk to him, what he is going to say or what he can possibly say. We can find that out.
>
> I have so many experts. I believe there is a handwriting expert. It was supposed to be out in the west. The lady at the trial delayed the trial for three months, sent it out west and came back and said he [expert] would testify to the one thing before trial. And he eventually said, the State expert is exactly right. I agree with him 100 percent. That's what I am talking about.
>
> When you get that, you let me know.

Id. at 761 n.2.

[12] 470 U.S. 68 (1985).

itly enables the defendant to acquire an **independent** expert regardless of his professional finding. This inference is based on the language of the Rule, which provides that experts' opinions must be disclosed to the prosecution only in the event that the defense intends to introduce the findings into evidence at the trial or sentencing. Rule 3A:11 (c), "Discovery by the Commonwealth", provides in relevant part:

> If the court grants relief sought by the accused . . . under . . . this Rule, it shall, upon motion of the Commonwealth, condition its order by requiring that:
>
> (1) The accused shall permit the Commonwealth within a reasonable time but not less than ten (10) days before trial or sentencing, as the case may be, to inspect, copy or photograph any written reports or autopsy examinations, ballistic tests, fingerprint, blood, urine and breath analyses, and other scientific tests that may be within the accused's possession, custody or control and **which the defense intends to proffer or introduce into evidence at trial or sentencing.**

(emphasis added). Thus, according to the Rule, a defendant may use an expert who will make an independent determination about the test results. If the expert ultimately agrees with the prosecution expert, the remedy for the defense is to forego calling that expert as a defense witness. In such a situation, the Commonwealth is not entitled to discover the expert's opinion. The concerns of *Ake* will have been met, however, as the evidence will have been tested in the manner envisioned by Due Process.

II. Denial of Discovery of Lifecodes' Worknotes and Memoranda

Spencer's most important claim focused on the court's denial of his discovery request for Lifecodes' worknotes and memoranda. Its importance lies in the fact that all of Spencer's other claims (excepting the *Batson* issue) are inextricably tied to this one. As mentioned above, the effect of the *O'Dell* opinion has been that defendants may only attack reliability of particularized DNA tests. Thus, Spencer needed access to the worknotes as those notes were the only records detailing the methodology used in conducting the tests.

Spencer included this issue in his petition for state habeas relief filed with the Supreme Court of Virginia. Unfortunately, that court refused to hear the petition on the ground that Spencer missed the filing deadline by one day. Supreme Court of Virginia Rule 5:17(a)(1) provides a three month deadline for filing after entry of an order from the trial court. This deadline is mandatory and cannot be waived, regardless of the justice of turning the claims down on the merits.[13] A motion to extend the filing deadline will be entertained only if the court finds that to deny the extension in a particular case would abridge a Constitutional right.[14] As noted above, the *Spencer I* court decided that no such error occurred here.[15]

In its discussion of the need to preserve claims for habeas review, the Fourth Circuit clarified a precedent on a matter which could prove to be immensely helpful to Virginia defense attorneys. The Commonwealth enforces its default rules rigorously.[16] Federal habeas courts, relying on the principles of comity and federalism, refuse to hear defaulted claims on their merits.[17] Prior to the *Spencer I* decision, capital petitioners have proceeded very cautiously, presenting claims in state habeas that had been rejected on the merits by the Supreme Court of Virginia on direct appeal. At state habeas the court consistently relied on *Hawks v. Cox*[18] and ruled that it was precluded from hearing those issues and granting relief. *Hawks* held that a "previous determination of the issues by either state or federal courts will be conclusive."[19]

The *Spencer I* court, however, made it clear that claims presented to the Supreme Court of Virginia and rejected on direct appeal were still procedurally eligible to be considered on the merits by federal habeas courts. Quoting *Grundler v. North Carolina*,[20] the court stated : "If a question is presented and adjudicated by the state's highest court once, it is not necessary to urge it upon them a second time under an alternate procedure."[21] Thus, the *Spencer I* court indicates that the *Hawks* argument taken by the Attorney General (i.e., that no **state** habeas relief is available on claims previously rejected on direct appeal to the Supreme Court of Virginia) is still valid. Therefore, **bypassing** state habeas has several distinct advantages: First, any further findings of fact necessary to the claim will be made by the federal court, as opposed to the circuit court at state habeas. At least to those facts then, there is not the problem of the requirement under 28 U.S.C. § 2254(d)[22] that the federal court defer to

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[13] *Coleman v. Thompson*, 111 S. Ct. 2546 (1991). *See also* case summary of *Coleman*, Capital Defense Digest, Vol. 4, No. 1, p. 4 (1991); *Smith v. Dixon*, 14 F. 3d 956 (4th Cir. 1994), and case summary of *Smith*, Capital Defense Digest, this issue; *Condrey v. Childress*, 203 Va. 755, 127 S.E.2d 150 (1962).

[14] *Tharp v. Commonwealth*, 211 Va. 1, 175 S.E.2d 277 (1970).

[15] *Spencer I*, 5 F.3d at 763.

[16] *See, e.g., Cheng v. Commonwealth*, 240 Va. 26, 393 S.E.2d 599 (1990) and case summary of *Cheng*, Capital Defense Digest, Vol. 3, No. 1, p. 20 (1990); *Mu'Min v. Commonwealth*, 239 Va. 433, 389 S.E.2d 886 (1990) and case summary of *Mu'Min*, Capital Defense Digest, Vol. 3, No. 1, p. 17 (1990); *Hoke v. Commonwealth*, 237 Va. 303, 377 S.E.2d 595 (1989) and case summary of *Hoke*, Capital Defense Digest, Vol. 2, No. 1, p. 18 (1989); *Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196 (1987).

[17] *See Coleman v. Thompson*, 111 S. Ct. 2546 (1991); *see also* case summary of *Coleman*, Capital Defense Digest, Vol. 4, No. 1, p. 4 (1991); *Justus v. Murray*, 897 F.2d 709 (4th Cir. 1990) and case summary of *Justus*, Capital Defense Digest, Vol. 3, No. 1, p. 14 (1990).

[18] 211 Va. 91, 175 S.E.2d 271 (1970).

[19] *Id.* at 95, 175 S.E.2d at 274. For a summary of state habeas law in Virginia prior to the *Spencer I* ruling, *see* Hobart, *State Habeas in Virginia: A Critical Transition*, Capital Defense Digest, Vol. 3, No. 1, p. 23 (1990).

[20] 283 F.2d 798 (4th Cir. 1960).

[21] *Id.* at 800.

[22] 28 U.S.C. § 2254(d) states, in relevant part:

> In any proceeding instituted in a Federal court by an application for a writ of habeas corpus . . . evidenced by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct, unless the applicant shall establish or it shall otherwise appear, or the respondent shall admit—
>
> (1) that the merits of the factual dispute were not resolved in the State court hearing;
> (2) that the factfinding procedure employed by the State court was not adequate to afford a full and fair hearing;
> (3) that the material facts were not adequately developed at the State court hearing;
> (4) that the State court lacked jurisdiction of the subject matter or over the person of the applicant in the State court proceeding;
> (5) that the applicant was an indigent and the State court, in deprivation of his constitutional right, failed to appoint counsel to represent him in the State court proceeding;
> (6) that the applicant did not receive a full, fair, and adequate

state court findings of fact.[23] Second, the common assertion by the Commonwealth that the claim is defaulted because it is not the same claim that was rejected on direct appeal will be decided initially by the federal court, rather than by a state court that often has a vested interest in preserving the trial results.[24] Needless to say, however, before bypassing state habeas, defense counsel should ensure that the claim is indeed protected by the holdings of *Spencer I* and *Grundler.*

III. Admissibility of DNA Evidence

Spencer listed seven problems that may have occurred during the DNA analysis performed in his case.[25] First, he claimed that bandshifting of the DNA may have occurred because the restriction fragments of the DNA were placed on different slabs of gel which may have performed differently during electrolysis. Second, because Lifecodes failed to record the voltage used during gel electrophoresis, it is impossible to verify the accuracy of the results. A shift would cause the DNA fragments to move farther or less than their true length would normally move under ideal conditions. Third, two of Spencer's claims centered around the possibility that environmental contaminants or cross-contaminants may have affected the DNA and skewed the test results. Fourth, he argued that because DNA analysis technology is relatively new, there are no available data as to the reliability of testing on forensic samples that have degraded over the passage of time. Fifth, Lifecodes used a visual comparison for pattern similarity in the DNA samples based on mere subjective opinion rather than objective analysis. Sixth, Spencer claimed that test results could have been skewed through the use of Lifecodes' various probes. Other claims dealt with misleading the jury with statistics about the reliability of the results and the probability of finding someone else with the same DNA makeup, and the lack of standards and licensure requirements covering the labs.

Due to the importance of these issues and the fact that courts generally admit DNA evidence as reliable, it is essential for defense attorneys to request independent DNA experts who can verify or refute the results of these tests. Discovering and presenting any errors in the tests done is crucial during trial, direct appeal and state habeas. Due to the principle of comity, federal courts are reluctant to reconsider issues concerning the admissibility of evidence. Quoting *Grundler*, the *Spencer I* court reiterated:

> Normally, the admissibility of evidence, the sufficiency of evidence, and instructions to the jury in state trials are matters of state law and procedure not involving federal constitutional issues. It is only in circumstances impugning fundamental fairness or infringing specific constitutional protections that a federal question is presented. The role of a federal habeas corpus petition is not to serve as an additional appeal.[26]

IV. *Batson v. Kentucky* Issue

The Fourth Circuit held that Spencer's claim based on *Batson v. Kentucky*[27] was not defaulted as it had been raised on direct appeal to the Supreme Court of Virginia. The *Batson* Court held that in order for a defendant to make a *prima facie* case of purposeful racial discrimination during jury selection, he must demonstrate two things: (1) the defendant is a member of a cognizable racial group and (2) the prosecution has used peremptory challenges to remove members of the defendant's race from the venire. On this showing, a *prima facie* case is made that the prosecutor sought to exclude the venire members from the jury solely because of race. Then, the burden shifts to the prosecution to articulate a satisfactory race-neutral reason for the strike.

> hearing in the State court proceeding; or
> (7) that the applicant was otherwise denied due process of law in the State court proceeding;
> (8) or unless that part of the record of the State court proceeding in which the determination of such factual issue was made, pertinent to a determination of the sufficiency of the evidence to support such factual determination, is produced as provided for hereinafter, and the Federal court on a consideration of such part of the record as a whole concludes that such factual determination is not fairly supported by the record . . . .

[23] For an interesting example of refusal to honor state court factfinding when doing so would aid a capital petitioner, *see* case summary of *Burden v. Zant*, Capital Defense Digest, this issue.

[24] It is **essential** that the claim presented to the federal courts is the **same** one rejected by the Supreme Court of Virginia. Evidence of this is found in the Fourth Circuit's recent decision in *Edmonds v. Thompson*, 1994 WL 47745 (4th Cir. (Va.)) (unpublished). In *Edmonds*, the trial court failed to order a presentence report prior to entering judgment on the sentence. On federal habeas, the federal district court vacated the death sentence and ordered a new sentencing hearing. The same judge who had sentenced Edmonds to death presided over the new sentencing hearing, and defense counsel failed to request recusal of the judge. Once again, the court sentenced Edmonds to death.

At state habeas, Edmonds made the same claim with regard to ineffective assistance of counsel that he had made on direct appeal. He argued that counsel had failed to object to the content of the trial court's final sentencing order, which had held the Commonwealth to a lower burden of proof than mandated by the death penalty statute, and had also failed to find the essential elements of the future dangerous aggravating factor. At federal habeas, the district court liberally construed Edmonds' claim, finding inherent within it the claim that defense counsel were ineffective because they failed to request recusal of the judge. At an evidentiary hearing on ineffective assistance of counsel, a magistrate judge found that counsel's performance was objectively deficient, and that but for counsel's unprofessional error, there was a reasonable probability that Edmonds would not have been sentenced to death.

On appeal by the warden, the Fourth Circuit held that it could not grant habeas relief to the defendant because the district court had granted relief solely on a claim that had not been raised by Edmonds. The court held:

> The plain, reasonable, and, indeed, only meaning of Edmonds' claim is that counsel was ineffective for failing to object to the content of the sentencing order. To perceive in it a claim that counsel was ineffective for failing to move to recuse the trial judge is to force Edmonds' words to bear more meaning than they are capable of bearing.

1994 WL 47745 at *2. The Fourth Circuit reinstated the death penalty.

Edmonds illustrates that **every claim** on **every ground** should be raised on appeal. Claims should not be "winnowed" for presentation of only the strong ones to the Supreme Court of Virginia. *See* case summary of *Smith v. Dixon*, Capital Defense Digest, this issue.

[25] *Spencer I*, 5 F.3d at 765 n.5. For a thorough explanation of DNA analysis and the procedures used, *see* Lonsbury, *The Current State of DNA Evidence*, Capital Defense Digest, Vol, 4, No. 2, p. 11 (1992).

[26] *Spencer I*, 5 F. 3d. at 762 (quoting *Grundler v. North Carolina*, 283 F.2d at 802).

[27] 476 U.S. 79 (1986).

All *Batson* explicitly prohibits is the use of racially motivated peremptory strikes. Thus any other reasons, however reprehensible, for excluding venire members are legally permissible. In Spencer's case the prosecutor successfully justified his use of a peremptory challenge to strike a black woman, Chrita Shelton, by stating:

> Quite frankly, I am concerned about the literacy and the educational level of someone who has not heard anything about either DNA, or anything about the Southside Strangler, or Timothy Spencer by now in this jurisdiction. The publicity has been extensive, and I am afraid if you heard nothing, as she indicated, she is not an informed citizen. So I did not want that type of individual on the jury.[28]

However, when a *Batson* issue arises, there is more for defense counsel to do than simply evaluate and contest on its face the explanation given by the Commonwealth. Defense attorneys may determine whether there was any disparate treatment in the voir dire questioning or exercise of strikes of white versus black venire members. For example, defense counsel could have considered whether white jurors were examined to the same extent regarding pre-trial publicity, and whether white jurors who had not heard of the Southside Strangler were struck as well.

Case law in other jurisdictions supports the notion that disparate treatment falls within the *Batson* prohibition, despite the facially neutral reason given by the prosecutor for exercising a peremptory challenge. A very useful case supporting this proposition is *Wiese v. State*,[29] in which the Texas Court of Appeals held that questioning of one excluded black juror in a manner different than the questioning of white jurors established that the prosecution had failed to meet its burden of offering a satisfactory race-neutral reason for exercising the peremptory challenge.

V. Actual Innocence

Spencer raised the issue that his claims concerning the problems with the reliability of the DNA evidence should not be procedurally barred on the basis that such evidence is relevant to the consideration of Spencer's actual innocence.[30] Spencer claimed that **but for** the DNA evidence, the Commonwealth would have been unable to convict him. Spencer further argued that because of the potential errors he raised with respect to the methodology of the testing in this case, the DNA tests were flawed and he is "actually innocent."

The Fourth Circuit denied Spencer's claims on the basis that Spencer failed to meet the extremely high requisite showing required for an actual innocence claim. The court said that Spencer's claim was really one of "factual innocence," i.e. that the DNA tests were flawed and that he was wrongly convicted. Further, the court stated that Spencer's reliance on rulings from other cases and courts and articles from law review and scientific journals did not constitute "newly discovered evidence" that could be considered on a habeas appeal. Even if the evidence was "newly discovered," Spencer did not raise a separate federal constitutional issue.

To succeed in making an actual innocence claim, a defendant must meet the stringent test set forth in *Herrera v. Collins*.[31] In rejecting Spencer's claims, the Fourth Circuit quoted *Herrera*: "Claims of actual innocence based on newly discovered evidence have never been held to state a ground for federal habeas relief absent an independent constitutional violation occurring in the underlying state criminal proceeding."[32]

The Fourth Circuit likewise ruled that Spencer had failed to meet the requirements of the "innocent of the death penalty" exception of *Sawyer v. Whitley*.[33] The *Sawyer* Court created an avenue for defendants by which they could have an otherwise defaulted claim considered on the merits. A claim will be considered once a defendant has shown, "by clear and convincing evidence that but for a constitutional error, no reasonable juror would have found the petitioner eligible for the death penalty under the applicable state law."[34]

Asserting the *Sawyer* test, Spencer unsuccessfully argued that the court should consider his defaulted claims that he was denied an opportunity adequately to defend against the DNA evidence by virtue of the fact that (1) the trial court refused to order the discovery of Lifecodes' worknotes and memoranda; (2) the trial court refused to provide necessary funds for a defense expert; and (3) the prosecution did not provide the defense with evidence of any problems with the DNA testing methods. However, to prevail, Spencer would have had to demonstrate that the particular DNA results obtained in this case were wrong, and that but for those improper results no reasonable juror would have found him eligible for death.[35]

Spencer's failure to make the required showing of actual innocence ties in with his other claims on appeal. The sufficiency of Spencer's actual innocence arguments was affected by his failure to successfully obtain evidence of the methodology used by Lifecodes. His actual innocence claims were also affected by the court's acceptance that the tests were done correctly. In response to Spencer's claims that the DNA tests in this case were performed incorrectly, the Fourth Circuit stated: "After a review of the same record, we think the decisions of the state courts are not only free from constitutional error under the due process clause, no error at all has come to our attention."[36]

Thus, the failure of the trial court to order discovery of Lifecodes' worknotes and memoranda served as the basis for Spencer's failure to adequately defend against the DNA evidence. It is essential for defense attorneys in Virginia to seek this information, and to request an independent defense expert who can serve as a check upon the testing methodology used by the prosecution experts.

Summary and analysis by:
Mari Karen Simmons

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[28] *Spencer I*, 5 F.3d at 764. Thus, the fact that the juror had **not** been exposed to prejudicial pre-trial publicity was an adequate basis for a peremptory strike.

[29] 811 S.W.2d 958 (Tex. Ct. App. 1991).

[30] *Spencer I*, 5 F.3d at 765.

[31] 113 S. Ct. 853 (1993). *See* case summary of *Herrera*, Capital Defense Digest, Vol. 5, No. 2, p. 4 (1993).

[32] *Herrera*, 113 S. Ct. at 860. The *Herrera* court reserved only the **small** possibility that evidence of innocence could be so strong (such as a videotape of someone else committing the crime) that courts, rather than the governor in clemency, would have to consider it.

[33] 112 S. Ct. 2514 (1992). *See* case summary of *Sawyer*, Capital Defense Digest, Vol. 5, No. 1, p. 18 (1992).

[34] *Sawyer*, 112 S. Ct. at 2515. For example, to satisfy the "innocence of the death penalty" standard, a defendant would have to show that the defendant did not commit the crime, or that there was no reasonable evidence of the aggravating factor necessary for a death sentence.

[35] Of course, *Sawyer* also applies to innocence of the offense, in the sense that one who did not commit the crime is not eligible for the death penalty. *See* case summary of *Spencer v. Murray (Spencer II)*, Capital Defense Digest, this issue.

[36] *Spencer I*, 5 F.3d at 763.