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BARNES v. THOMPSON 58 F.3d 971 (4th Cir. 1995) United States Court of Appeals, Fourth Circuit

they be meaningful. Indeed, it would violate *Furman* to say that once in the category of people for whom the death penalty is possible, the jury could be given arbitrary factors to use in choosing whom to actually impose that penalty upon. Thus, where a state chooses to impose an additional narrowing, as Virginia does in requiring an aggravating factor to be found, that narrowing must also be meaningfully guided. That guidance can only come from an adequate definition.

This constitutional requirement recently was reiterated by the United States Supreme Court in *Tuilaepa v. California*.[16] In *Tuilaepa*, the Court addressed the question of whether certain statutory factors given to the sentencer to consider after a defendant was found death-eligible were unconstitutionally vague.[17] In order to avoid being vague and therefore unconstitutional, the Court concluded that the factor must have some "'common-sense core of meaning . . . that criminal juries should be capable of understanding.'"[18]

Although the Court upheld the statutory factors at issue in *Tuilaepa*, it still did so only after subjecting them to vagueness analysis. In *Tuggle*, the Fourth Circuit was faced with an incomplete version of a vileness instruction that, even in its complete form, has serious vagueness problems. To the extent the Fourth Circuit was arguing that a non-vague definition of vileness was not required because the defendant had already been convicted of capital murder, its argument would violate the teachings of *Tuilaepa* and *Furman*.

Summary and analysis by:
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[16] 114 S. Ct. 2630 (1994).
[17] *Id.* at 2626.
[18] *Id.* (quoting *Jurek v. Texas*, 428 U.S. 262, 279 (1976) (White, J., concurring in judgment)).

BARNES v. THOMPSON

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FACTS

Using an employee of Bon's Supermarket as a shield, Herman Barnes and accomplice James Corey forced their way into the Hampton store on June 27, 1985.[1] Owner Clyde Jenkins, age seventy-three, struggled with Barnes. Barnes shot him twice. Store employee Mohammed Afifi, running from the back of the store, jumped on Barnes. Barnes shot and killed Afifi after shaking him off his back. Jenkins then tried to get up but Barnes shot him again. When police arrived, they found an unfired gun under or near Jenkins' body. Jenkins died in the hospital two weeks later.[2]

Jenkins' gun was admitted into evidence at Barnes' trial, but no witness gave any testimony as to exactly where it was found. The Circuit Court for the City of Hampton convicted Barnes of capital murder and subsequently sentenced him to death based on the "vileness" aggravating factor.[3] The Supreme Court of Virginia affirmed the conviction and death sentence[4] and the United States Supreme Court denied certiorari.[5] Barnes filed a petition with the Commonwealth for writ of habeas corpus. The Circuit Court for the City of Hampton dismissed the petition and the Supreme Court of Virginia denied Barnes' petition for appeal.[6] The United States Supreme Court denied certiorari.[7]

Barnes next filed a habeas petition in federal court, raising the same issues he had in state court. He also raised a new claim, charging that the Commonwealth had violated his right to due process under *Brady v. Maryland*[8] and *United States v. Bagley*[9] by failing to disclose the specific location of Jenkins' gun.[10] Barnes moved to dismiss his first petition and filed a new one in state court, raising the *Brady* claim.[11] The state court dismissed it on the ground that, pursuant to Virginia Code section 8.01-654(B)(2), writs are not to be granted based on facts the petitioner knew about and could have included in previous petitions.[12]

Barnes filed his second federal habeas petition in 1992. The district court dismissed seven of his ten assignments of error, but ordered an evidentiary hearing on the other three: the *Brady* claim; an ineffective assistance of counsel claim; and a claim that the death penalty had been improperly imposed if the victim had been armed.[13] The court granted Barnes relief on the *Brady* claim, finding that although the suppression of the evidence concerning the victim's gun was not sufficient to undermine confidence in Barnes' capital murder conviction, it was sufficient to undermine confidence in the death sentence. The district court vacated the sentence accordingly, finding specifically that if Barnes had had evidence of the gun's location at trial, the trial court might not have found he had committed an aggravated battery and might not have found "vileness."[14] The district court denied Barnes relief on his ineffective assistance of counsel claim. The Commonwealth appealed, contending that the district court had erred in failing to find that Barnes had procedurally defaulted the *Brady* claim under Virginia Code section 8.01-654(B)(2).[15] Barnes cross-appealed the denial of his ineffective assistance of counsel claim.[16]

HOLDING

The United States Court of Appeals for the Fourth Circuit reversed the judgment of the district court as to the *Brady* claim, finding that Barnes had procedurally defaulted it, and had failed to show cause for the

[1] *Barnes v. Thompson*, 58 F.3d 971, 973 (4th Cir. 1995).
[2] *Id.*
[3] *Id.*
[4] *Barnes v. Commonwealth*, 234 Va. 130, 360 S.E.2d 196 (1987).
[5] *Barnes v. Virginia*, 484 U.S. 1036 (1988).
[6] *Barnes v. Thompson*, 58 F.3d at 973.
[7] *Barnes v. Thompson*, 497 U.S. 1011 (1990).
[8] 373 U.S. 83 (1963).
[9] 473 U.S. 667 (1985).
[10] *Barnes v. Thompson*, 58 F.3d at 973.
[11] Under *Rose v. Lundy*, 455 U.S. 509 (1982), Barnes had to exhaust all his state remedies before proceeding to federal court. Since he had not raised the *Brady* claim previously at the state level, he had to do so before bringing his entire case to federal court. The *Brady* claim is referred to as a "*Bagley* claim" by the Court of Appeals throughout its opinion. *Barnes*, 58 F.3d at 974.
[12] *Id.* at 973.
[13] *Id.*
[14] *Id.* at 973-74.
[15] *Id.* at 974.
[16] *Id.* at 979.

default.[17] The court also affirmed the district court's denial of relief on the ineffective assistance of counsel claim and ordered reinstatement of the death sentence.[18]

ANALYSIS/APPLICATION IN VIRGINIA

The Fourth Circuit's opinion informatively demonstrates inconsistent treatment of the same issue arising in three distinct contexts. Procedural default, prosecutorial failure to turn over exculpatory evidence (i.e., *Brady* violations), and ineffective assistance of counsel all involve questions of "cause" (including the reasonableness of a defense attorney's conduct) and "prejudice" as to the potential impact of an error on the outcome of a proceeding. In evaluating the trial attorney's conduct in light of these three issues, the Fourth Circuit inconsistently characterized the attorney's actions as "unreasonable" under its analysis of procedural default and the *Brady* claim, but "reasonable" under its analysis of the ineffective assistance of counsel claim.

I. Procedural Default

A. The "Default" Itself

Under *Wainwright v. Sykes*,[19] if a habeas petitioner procedurally defaults a claim to a state court, and if the state court denies relief because the default constituted an adequate and independent state ground for that denial, a federal habeas court will not hear the claim unless the petitioner can show both cause and prejudice for the default.[20] *Sykes*, in essence, defined "cause" as a reasonable excuse for failure to present the claim in an earlier petition, and "prejudice" as the effect of the error on which a petitioner based his claim.[21]

Before proceeding to the cause and prejudice analysis, however, it must first be established that petitioner truly defaulted the issue. The district court decided that Barnes had defaulted his *Brady* claim, but granted him relief from the default.[22] The court held that Barnes had demonstrated cause by showing that the *Brady* violation had prevented him from knowing about the potential claim when preparing his first petition, which constituted a reasonable excuse for not including the claim in that petition.[23] The district court also found that Barnes had demonstrated prejudice by showing the *Brady* violation's potential effect on the trial court's application of the "vileness" aggravating factor. Barnes had argued that the prosecution's withholding of the gun's location prevented Barnes from using that information to rebut the Commonwealth's contention that the alleged aggravated battery proved "vileness." In other words, had the prosecution disclosed the location of the gun, Barnes could have shown that the shooting of Jenkins was not vile.[24]

However, the district court could have, and as Circuit Judge Murnaghan's concurrence in *Barnes* illustrates, should have, found that Barnes did not default his claim at all. Virginia Code section 8.01-654(B)(2)[25], the statute relied upon by the Supreme Court of Virginia to default Barnes' claim, states that "[n]o writ shall be granted on the basis of any allegation the facts of which petitioner **had knowledge** at the time of filing any previous petition."[26] The statute does **not** provide that any allegation the facts of which petitioner **should have known** will prevent a writ from issuing. Thus, the only relevant inquiry should have been whether Barnes **actually knew** about the gun's location at the time of the first petition. In the district court, whether or not Barnes urged that there was no default was irrelevant. As a practical matter, the result was the same. The district court heard the *Brady* claim on the merits.

The Fourth Circuit, however, decided that Barnes had indeed defaulted his claim under Virginia Code section 654(B)(2). As it has done in other cases, the Fourth Circuit read the "should have known" requirement into the statute.[27] One would expect the legislature to be explicit when it intends to bar claims on the basis that a defendant "should have known" a given fact. The legislature did not do so here.

Judge Murnaghan, concurring in the court's judgment, made several important observations. First, he noted that "Barnes did not discover the location of the gun, and the nondisclosure, until after his first habeas petition had been denied."[28] He understood that Barnes did not know about the gun's location and thus could not have defaulted the issue. As to the majority's opinion that Barnes "should have known" about the gun's location, Judge Murnaghan stated that "[w]hether one uses Black's or Webster's, the words `had knowledge' do not mean `either knew or had available.'"[29]

The *Barnes* majority further compounded its error by incorrectly claiming that once the state had rejected Barnes' claim on procedural **grounds**, federal courts could not look beyond that finding and had to proceed to the cause and prejudice analysis.[30] The court ignored the requirement that the state finding of default must be supported by evidence. Judge Murnaghan challenged the majority's finding on this point,[31] noting that state procedural grounds for default are entitled to deference only if the record contains evidence to support the default under 28 U.S.C. Section 2254(d)(8).[32] In other words, the record had to contain evidence that Barnes knew about the gun for Barnes to have defaulted his claim.

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[17] *Id.* at 974.

[18] *Id.* at 979.

[19] 433 U.S. 72 (1977).

[20] *Sykes*, 433 U.S. at 87.

[21] *Id.*

[22] *Barnes*, 58 F.3d at 972.

[23] *Id.* at 973-74.

[24] *Id.* at 974. As the Fourth Circuit observed, Barnes did not testify that he saw the gun. The Fourth Circuit seemed satisfied to assume from this fact that Barnes did not see the gun. No court discussed the difficulty in simply assuming from the absence of testimony that Barnes did not see it, since he had no obligation and could not be compelled to testify at trial. U.S. Const. Amend. V.

[25] *Id.* at 974.

[26] Va. Code Ann. § 8.01-654(B)(2) (Supp. 1994) (emphasis added).

[27] *See, e.g., Stockton v. Murray*, 41 F.3d 920 (4th Cir. 1994), and case summary of *Stockton*, Capital Defense Digest, Vol. 7, No. 2, p. 10 (1995).

[28] *Barnes*, 58 F.3d at 985.

[29] *Id.* at 984, note 5.

[30] *Barnes*, 58 F.3d at 974, note 2.

[31] *Barnes*, 58 F.3d at 986, note 9.

[32] That statute states in relevant part:

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, 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— . . .

(8) . . . that part of the record of the State court proceeding in which the determination of such factual issue was made . . . is not fairly supported by the record. . .

B. Cause for Default

Having concluded that Barnes actually defaulted his *Brady* issue, the Fourth Circuit proceeded to the cause and prejudice analysis under *Sykes*. Since it had read the "should have known" requirement into the statute, the court consequently found that Barnes "should have known," i.e., should have been able to find out, the location of Jenkins' gun. The court also found that "no external factor existed to excuse Barnes' failure to present this claim,"[33] and thus concluded that Barnes had failed to show "cause" for the default under *Sykes*.[34] Since Judge Murnaghan thought Barnes had not defaulted the issue, he stated that the majority incorrectly analyzed Barnes' claim under the "cause" analysis of *Sykes*, using the same arguments he had used to challenge the majority's finding of default.

C. Prejudice from Default

The Fourth Circuit also found that the *Brady* violation occasioned no prejudice to the application of the vileness factor. The court first noted that Barnes never claimed he saw the gun. Then the court interpreted Virginia law to read that the fact Jenkins was armed was irrelevant to the finding that Barnes had committed an aggravated battery (upon which the trial court based its determination of "vileness"). This finding is certainly defensible, even under a constitutionally acceptable definition of aggravated battery. The majority in *Barnes*, however, defined it even more incorrectly than the Supreme Court of Virginia has in the past. The court decided that the gravamen of aggravated battery "is the number of wounds and the lapse of time between the first wound and the wound that immediately causes the death."[35] By using this definition, the court defeated the purpose of an aggravating factor such as "vileness."

Aggravating factors are meant to narrow the class of persons available for the death penalty and guide sentencing discretion by singling out those who are most culpable in the commission of their offense.[36] Accordingly, in the past the Supreme Court of Virginia has defined an aggravated battery as one that "qualitatively and quantitatively, is more culpable that the minimum necessary to accomplish an act of murder."[37] Arguably, the "qualitative" portion of the definition accomplishes the narrowing and guiding functions by identifying which batteries are more culpable than others. Yet the Fourth Circuit's definition does not include any "qualitative" instruction; it defines an aggravated battery based on the **quantitative** factors of number of wounds and amount of time between the first wound and the wound causing death.[38] The Fourth Circuit's definition does not serve any narrowing function.

Judge Murnaghan did not address the prejudice issue as to Barnes' alleged default; however, he did address the prejudice issue as to the *Brady* claim itself. It should be noted, however, that there is no analytical difference between prejudice as to default and prejudice as to a *Brady* claim. In other words, Judge Murnaghan's analysis of prejudice as to the default would have been the same as his analysis as to the *Brady* claim, had he actually discussed the former issue.[39]

II. *Brady/Bagley* Claim

In reality, there is nothing analogous to a "cause" requirement in the law of exculpatory evidence disclosure as set forth by the United States Supreme Court in *Brady* and *Bagley*. The prosecution is required to disclose evidence that falls within the ambit of *Brady* and its progeny, whether or not defense counsel could have found the evidence or information otherwise.[40] The Fourth Circuit's majority added a new requirement to *Brady*, built on its own prior erroneous decisions, but not United States Supreme Court precedent. The court read in a provision that there is no *Brady* violation if defense counsel could have located the evidence or information with reasonable diligence.[41] The Fourth Circuit said this is true even when the prosecution told the defense in writing that it had no exculpatory evidence. It should be noted that once Barnes was told that the Commonwealth had no exculpatory evidence, Barnes' attorney was no longer obligated to ask the Commonwealth for such evidence.[42]

There is what amounts to a "prejudice" requirement in *Brady* and *Bagley*. That is, a defendant must show a reasonable probability that but for the *Brady* violation, the outcome of the proceeding would have been different.[43] A reasonable probability is defined as sufficient to undermine confidence in the proceeding's outcome.[44] It is an easier showing than required by the "more likely than not" standard.[45]

Unfortunately, though he disagreed with the majority's findings as to default and cause, Judge Murnaghan rejected Barnes' claim on its merits under the "prejudice" analysis.[46] Though he found that Barnes satisfied the first part of the *Brady/Bagley* test by showing that the Commonwealth had failed to disclose the exculpatory evidence as to the gun's location, he also concluded that Barnes had failed to show "materiality." The majority could thus have legitimately concluded as Judge Murnaghan did, that though Barnes had not defaulted his *Brady* claim, he failed to show the requisite prejudice under *Bagley*.

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[33] *Barnes*, 58 F.3d at 974.

[34] *Id.* at 974-75.

[35] *Id.* at 978.

[36] *Godfrey v. Georgia*, 446 U.S. 420 (1980); *Zant v. Stephens*, 462 U.S. 862 (1983).

[37] *Smith v. Commonwealth*, 219 Va. 455, 478, 248 S.E.2d 135, 149 (1978), *cert. denied*, 441 U.S. 967 (1979).

[38] The Fourth Circuit's definition actually reads out the "qualitative" portion from the definition of aggravated battery which it supposedly follows. The court quoted from *Boggs v. Bair*, 892 F.2d 1193, 1197 (4th Cir. 1989), *cert. denied*, 495 U.S. 940 (1990), which stated "that **the number or nature** of the batteries inflicted upon the victim is a proper test as to whether the defendant's conduct was outrageous or wantonly vile, horrible, or inhuman in that it involved an aggravated battery." *Boggs*, 892 F.2d at 1197 (emphasis added). The *Boggs* definition thus included a qualitative element ("nature of the batteries"), while the Fourth Circuit's definition in *Barnes* did not.

[39] *Barnes*, 58 F.3d at 986-87.

[40] *See Kyles v. Whitley*, 115 S. Ct. 1555 (1995), and case summary of *Kyles*, Capital Defense Digest, this issue.

[41] The court correctly cited *McCleskey v. Zant*, 499 U.S. 467 (1991), as far as that case related to **default**. Specifically, that case held that if a defendant actually defaulted a claim, the defendant could not show "cause" for the default if the basis for the omitted claim was reasonably available. However, the Fourth Circuit in *Barnes* then immediately changed this rule about cause for default into an unsupported pronouncement about the scope of the *Brady* rule, and thus grafted a new requirement on to the law of *Brady*. *Barnes*, 58 F.3d at 975, n. 3.

[42] *See infra* text accompanying note 66.

[43] *Bagley*, 473 U.S. 667, 682 (1985).

[44] *Id.*

[45] *Strickland v. Washington*, 466 U.S. 668, 696 (1984). *Bagley* expressly adopted *Strickland*'s definition of prejudice. *Bagley*, 473 U.S. at 682.

[46] *Barnes*, 58 F.3d at 983. Judge Murnaghan referred to Barnes' failure to establish "materiality." This is the language of *Brady* and *Bagley* that is, in reality, a prejudice requirement. There is a *Brady* violation when material evidence is improperly withheld. Evidence is material when its absence undermines confidence in the outcome, as explained in *Bagley* and *Strickland*.

III. Ineffective Assistance of Counsel

Under *Strickland v. Washington*,[47] the seminal ineffective assistance of counsel decision, habeas petitioners must demonstrate two elements. The first, analogous to the "cause" criterion of procedural default claims, is a requirement that petitioner show that his attorney's assistance was not reasonable under prevailing professional norms (often called the "performance" prong).[48] The second requirement is that petitioner must show that the attorney's failure prejudiced him (the "prejudice" prong).[49] This standard is identical to the *Bagley* standard for prejudice from *Brady* violations.[50]

A. Mitigating Evidence

Barnes' ineffective assistance of counsel claim involved allegations beyond and unconnected to his trial attorney's failure to find out about the location of Jenkins' gun. The attorney also failed to investigate certain potential mitigating evidence, specifically Barnes' family background and mental history. At the habeas proceeding, Barnes' trial attorney testified that he did not investigate Barnes' family background and mental history, first because Barnes had told him there was nothing to investigate, and second, because he feared that the investigation would uncover information which could be used against Barnes to find the "future dangerousness" aggravating factor.[51]

The Fourth Circuit characterized this as a "tactical decision."[52] Neither of the attorney's explanations should have been accepted, however. Attorneys should always investigate the possibility of mitigating evidence in family background and mental history, whatever the client's wishes; this is one of the most basic and important parts of a defense attorney's job.[53] This is especially important when the client is impaired.

More importantly, Barnes' trial was a bench trial. Trial judges must be presumed to know not to treat mitigation evidence as aggravation evidence. In *Penry v. Lynaugh*,[54] the United States Supreme Court held that states must have a vehicle by which juries can give independent weight to evidence if desiring to consider it as evidence of mitigation, even if it might also be seen as evidence of aggravation.[55] In other words, Barnes' attorney's fear that potential mitigation evidence could be used against Barnes was overstated. Judge Murnaghan stated in his concurrence that he would have found "prejudicial the failure to raise evidence of Barnes' mental defects and his past responsiveness to a juvenile rehabilitation program."[56] He noted that such evidence could only have helped Barnes, not hurt him, since it was not the kind of evidence that would indicate future dangerousness.[57]

B. Location of Store Owner's Gun

Barnes' attorney also failed to investigate the location of Jenkins' gun, as the Fourth Circuit itself stated when analyzing Barnes' *Brady/Bagley* claims. Yet the majority simply affirmed the district court's denial of Barnes' ineffective assistance of counsel claims, without discussing at all Barnes' claim that his trial attorney's failure to investigate the location of the gun constituted ineffective assistance of counsel. The only reference the majority made to the gun evidence was to characterize the attorney's failure to investigate it as a "tactical decision" during its discussion of the *Brady* issue.[58]

As Judge Murnaghan noted in his concurrence, the majority thus effectively held that although the attorney's failure to investigate the gun evidence was unreasonable under *Brady* and *Bagley*, it was reasonable under *Strickland*.[59] In other words, the majority gave three contradictory holdings concerning defense efforts to learn about the gun evidence withheld by the prosecution. As to the default, the majority held that defense counsel was unreasonable in that he should have known about the failure to disclose at the time of the first habeas petition. As to the merits of the *Brady* claim, the majority decided that defense counsel was unreasonable because he did not find the evidence which "reasonably diligent" investigation would have revealed. Finally, as to the ineffective assistance of

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[47] 466 U.S. 668 (1984).

[48] *Id.* at 688.

[49] *Id.* at 692.

[50] *Bagley*, 473 U.S. at 682. In fact, *Bagley* expressly adopted for *Brady* violations the same test for prejudice used in *Strickland*. *Id.*

[51] *Barnes*, 58 F.3d at 980.

[52] *Id.* The Fourth Circuit also stated that "Barnes ... is the paradigm of `a defendant [who] has given counsel reason to believe that pursuing certain investigations would be fruitless or even harmful.'" *Id.* (citing *Strickland*, 466 U.S. at 691).

[53] The Fourth Circuit relied on *Strickland* to find the actions of Barnes' trial attorney reasonable. "If counsel does not conduct a substantial investigation into each of several plausible lines of defense, assistance may nonetheless be effective ... `when counsel's assumptions are reasonable given the totality of the circumstances and when counsel's strategy represents a reasonable choice based upon those assumptions, counsel need not investigate lines of defense that he has chosen not to employ at trial.'" *Strickland*, 466 U.S. at 681 (quoting *Strickland v. Washington*, 693 F.2d 1243, 1255 (5th Cir. 1982). Despite this pronouncement, the defense attorney should investigate a client's mental history for two very important reasons. First, the attorney must inquire into that history since the attorney cannot know if the client is impaired until he or she investigates. Second, an attorney is presented with an ethical problem when a client tells an attorney not to investigate the client's mental history. *See* Henderson, *Presenting Mitigation Against the Client's Wishes: A Moral or Professional Imperative?*, Capital Defense Digest, Vol. 6, No. 1, p. 32 (1993). Though Barnes did not forbid his trial attorney from investigating his mental history, he did mislead the attorney by stating that there was nothing to investigate. But if an attorney has an ethical duty to investigate even when a client forbids it, then that duty would certainly extend to cases where a client misleads an attorney by saying that there is nothing to find. This is especially true since an attorney cannot know if a client is capable of making such decisions without investigating.

[54] 492 U.S. 302 (1989).

[55] The Court in *Penry* also noted that though mental retardation might indicate future dangerousness, juries still must be allowed to spare defendants based on mental retardation, if they so choose. *See* case summary of *Penry*, Capital Defense Digest, Vol. 2, No. 1, p. 2 (1989).

[56] *Barnes*, 58 F.3d at 987.

[57] *Id.* at 987-88.

[58] *Id.* at 977. The majority's failure to discuss this issue is very strange. Barnes clearly raised the claim in the district court, since the majority briefly mentions the fact that the district court rejected the claim. *Id.*

[59] *Id.* at 987. Judge Murnaghan additionally noted that the attorney could not possibly have made a "tactical decision" not to investigate since the Commonwealth's assertion that it had no *Brady* material was the reason the attorney was not required to investigate the evidence concerning Jenkins' gun.

counsel claim, the majority held that defense counsel's decision not to investigate the gun evidence was tactically reasonable.[60]

IV. Application in Virginia

The Fourth Circuit chose to deny Barnes relief on questionable grounds; it could have rejected his claims for more plausible reasons. Having acted as it did, the court left several lessons for Virginia attorneys. First, counsel are urged not to concede prematurely that a defendant has defaulted a given issue, especially where Virginia Code section 8.01-654 is concerned. Counsel should raise objections to findings of procedural default which have no evidentiary basis and preserve their denial as error. Such findings do **not** constitute defaults and thus are **not** entitled to deference by federal courts.[61] Counsel should not concede this issue once it arrives in the federal courts by arguing that defendant had cause and prejudice for the default under *Wainwright v. Sykes*.[62]

Second, counsel are advised to monitor closely what courts use to define "aggravated battery," "vileness," and aggravating factors in general. Attorneys should strenuously attempt to confine what trial courts use to define these terms to those factors showing increased culpability on the part of a defendant. Attorneys should object, for instance, when the court tries to define aggravated battery without including a qualitative element (how the battery was committed) as well as a quantitative one (the number of wounds).

Third, especially at the trial level, and especially after the United States Supreme Court's holding in *Kyles v. Whitley*,[63] attorneys should strenuously attempt to ensure that trial judges understand the magnitude of the Fourth Circuit's error as to its doctrine that *Brady* violations have not occurred where the defense could have discovered evidence or information by reasonably diligent investigation. Attorneys must persuade trial judges that this is simply not the law. Judge Murnaghan's criticisms are useful for this task.[64] The real law is that when the defense asks the prosecution whether the prosecution has any exculpatory evidence, the prosecution must turn over such evidence, **even if reasonable defense counsel could find the evidence by other means.** The majority opinion incorrectly holds just the opposite, despite the fact that such evidence is not "reasonably available" if the prosecution informs the defense that there is no such evidence, as occurred in Barnes' case.[65] Under the majority's erroneous view, when the prosecution tells the defense that it does not have any exculpatory evidence, defense counsel should understand that this effectively means the prosecution has no exculpatory evidence that the defense could not find by some other means.[66]

When making *Brady* requests, then, counsel are advised to make requests as specific as possible.[67] For example, when trying to find out if police investigated other suspects, counsel should not only ask whether there were any other suspects, but also ask exactly what the police did in pursuit of this other investigation. If the police performed such an investigation poorly, persons who otherwise would have been genuine suspects may have been overlooked. This fact may serve to exculpate a client. Such evidence is *Brady* material.[68]

Finally, attorneys can make legitimate tactical decisions about which evidence to **present** in mitigation at the penalty trial. Even *Strickland*, however, subjects decisions not to **investigate** such potential evidence to a reasonableness inquiry. Though *Strickland* did place too much weight on the reliability of the client as a source of information for the attorney, even *Strickland* did not involve an impaired client. Defense counsel cannot know whether a client is impaired without investigating the client's mental history. As such, the safest and most ethical course of action for defense attorneys is to conduct a thorough investigation as to potential mitigation evidence.[69] Only then may counsel make informed decisions about whether actually to present that evidence at trial.

Summary and analysis by:
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[60] Interestingly, Judge Murnaghan would have rejected most of Barnes' claims under *Strickland*'s "performance" analysis and stated that it was unnecessary for him to address the "prejudice" requirement of *Strickland*. He did it address it anyway, specifically finding that the attorney's failure "to raise evidence of past abuse was not prejudicial," *Barnes*, 58 F.3d at 987; but that the failure "to raise evidence of Barnes' mental defects and his past responsiveness to a juvenile rehabilitation program" was prejudicial. *Id.* This is the opposite of the usual way in which courts analyze ineffective assistance of counsel claims; in fact, *Strickland* itself states that "[i]f it is easier to dispose of an ineffectiveness claim on the ground of lack of sufficient prejudice, which we suspect will often be so, that course should be followed." *Strickland*, 466 U.S. at 697. Given the clarity of his analysis of other issues compared with that of the majority, it is puzzling that Judge Murnaghan could find in effect that an attorney could render reasonably effective assistance while at the same time prejudicing his client to the extent of undermining confidence in the outcome.

[61] Recall that a federal court will not defer to a state court's judgment of default if "such factual determination is not fairly supported by the record." *See infra* note 32.

[62] 433 U.S. 72 (1977).

[63] 115 S. Ct. 1555 (1995). *See also* case summary of *Kyles*, Capital Defense Digest, this issue.

[64] *Barnes*, 58 F.3d at 984, note 5.

[65] No United States Supreme Court cases are cited by the majority in support of this proposition. For a United States Supreme Court case contrary to the majority's pronouncement, *see Kyles v. Whitley*, 115 S. Ct. 1555 (1995), and case summary of *Kyles*, Capital Defense Digest, this issue.

[66] *See Barnes*, 58 F.3d 975 at note 3, where the majority basically instructs the prosecution how to accomplish this.

[67] Failure to respond to a specific request has been held to be seldom excusable. Even if the defense makes a general request, the prosecution is bound to turn over obviously exculpatory evidence. *United States v. Agurs*, 427 U.S. 97 (1976). *Brady* material includes inconsistent statements of a witness, *Giglio v. United States*, 405 U.S. 150 (1972); and a host of material identified in *Kyles v. Whitley*, 115 S. Ct. 1555 (1995). *See also* case summary of *Kyles*, Capital Defense Digest, this issue.

[68] *See Kyles v. Whitley*, 115 S. Ct. 1555 (1995), and case summary of *Kyles*, Capital Defense Digest, this issue.

[69] *See supra* note 53.