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FACTS

Lucia Aimar was shot and killed on the evening of October 29, 1984 in Charleston, South Carolina. On the night of the murder, Aimar and her boyfriend, Eric Burn, were eating dinner in a parked car in a lot next to a drive-through restaurant. They were approached by Earl Matthews Jr., who robbed them and shot both Aimar and Burn, fatally wounding Aimar.[1]

A jury convicted Matthews of capital murder under § 16-3-20(C)(a)(1)(e) of the South Carolina Code for murder in the commission of armed robbery. The jury sentenced Matthews to death. On direct appeal, the Supreme Court of South Carolina affirmed his conviction, but vacated his death sentence due to a violation of *Skipper v. South Carolina*.[2] The case was remanded for a new sentencing trial.[3]

On remand, Matthews was once again sentenced to death by the jury. This time, the Supreme Court of South Carolina affirmed the sentence.[4] Matthews petitioned the United States Supreme Court for a writ of certiorari. The petition was denied.[5]

On August 24, 1992, Matthews filed an application for post-conviction relief, which was denied by the state trial court. The Supreme Court of South Carolina denied discretionary review. The Supreme Court of the United States denied Matthews's second petition for a writ of certiorari on May 31, 1994.[6]

Matthews then filed a petition for a writ of habeas corpus in the United States District Court for the District of South Carolina on August 30, 1994. The district court adopted the magistrate's report and denied Matthews's petition after *de novo* review of the record.[7] Matthews appealed, raising claims of racial discrimination by the prosecution,[8] racial discrimination by the prosecution during voir dire,[9] ineffective assistance of counsel,[10] and a violation of his right to a fair trial caused by the sentencing judge's refusal to submit to voir dire.[11]

HOLDING

The United States Court of Appeals for the Fourth Circuit, finding no error in the record, affirmed the district court's denial of Matthews's petition for a writ of habeas corpus.[12]

ANALYSIS/APPLICATION IN VIRGINIA

I. Claim of Racial Discrimination by Prosecutor Procedurally Barred

Matthews raised a claim of prosecutorial abuse of discretion, based upon an assertion that the Commonwealth sought the death penalty in a racially discriminatory manner. The court of appeals held that this claim against Charles Condon, a state prosecutor, now Attorney General of South Carolina, was procedurally barred because Matthews failed to raise it in state court.[13] The court's discussion of default is important because it illustrates the current highly technical nature of procedural bars upheld by the Fourth Circuit.

The court in *Matthews* based its decision on the premise that the state court has an interest in having the first opportunity to consider alleged constitutional violations occurring in the defendant's state trial and sentencing. Accordingly, Matthews was required to "exhaust" all of his state remedies before seeking relief in federal district court. The court stated that a federal habeas court will consider only those claims which have been "fairly presented" to the state courts. The court then defined "fairly presented" as those claims in which "both the operative facts and the 'controlling legal principles' [were] presented to the state court."[14]

The court ruled that Matthews had not exhausted his prosecutorial abuse of discretion claim for two reasons. First, the court ruled that it had not been presented to the Supreme Court of South Carolina. Second, the claim presented to the state court was different than his claim presented on appeal. The court viewed Matthews's state claim as a "very broad assertion" that the South Carolina Death Penalty Statute was in violation of the Equal Protection Clause because the prosecutor was given too much discretion in seeking the death penalty. The court reasoned that this claim was substantively different from Matthews's claim before the court of appeals that the prosecutor had abused his discretion by seeking the death penalty on racially motivated grounds.[15]

The *Matthews* court required the petitioner to express the claim **exactly** as it was expressed at state court. Although Matthews's claim was closely related, the court ruled it was a different claim and, therefore,

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[1] *Matthews v. Evatt*, 105 F.3d 907, 909-10 (4th Cir. 1997).

[2] 476 U.S. 1, 4-8 (1986) (holding that the Eighth and Fourteenth Amendments are violated where sentencing court refuses to admit evidence of the defendant's adaptability to prison, including pretrial incarceration).

[3] *State v. Matthews*, 353 S.E.2d 444, 450 (S.C. 1986).

[4] *State v. Matthews*, 373 S.E.2d 587, 596 (S.C. 1988).

[5] *Matthews v. South Carolina*, 489 U.S. 1091 (1989).

[6] *Matthews v. South Carolina*, 511 U.S. 1138 (1994).

[7] *Matthews*, 105 F.3d at 910.

[8] *Id.*

[9] *Id.* at 917.

[10] *Id.* at 919.

[11] *Id.* at 921.

[12] *Id.* at 922. Matthews also claimed ineffective assistance of counsel under *Strickland v. Washington*, 466 U.S. 668 (1984). He alleged that he was denied effective assistance of counsel because his attorney failed to investigate and present evidence that he lived in a lead contaminated house which resulted in his brain damage. The court ruled that Matthews's claim failed the *Strickland* ineffective assistance of counsel standard. *Matthews*, 105 F.3d at 920.

[13] *Id.* at 912. The federal district court had found the claim was not barred because it was raised and denied in a pretrial motion. Matthews argued in his pretrial motion that the South Carolina death penalty statute was unconstitutional and violated the Equal Protection Clause by giving the prosecutor "'the complete and unbridled discretion in the first instance as to whether the death penalty will be sought in any particular case.'" *Id.* at 912 n.2. The Fourth Circuit disagreed because Matthews had not presented the claim in his pretrial motion to the Supreme Court of South Carolina and, in any event, the court found that the claim in the pretrial motion was different from the one being urged at federal habeas.

[14] *Id.* at 911 (citing *Verdin v. O'Leary*, 972 F.2d 1467, 1474 (7th Cir. 1992) (quoting *Picard v. Connor*, 404 U.S. 270, 277 (1971))).

[15] *Id.* at 912.

not exhausted.[16] This requirement is becoming more common in Virginia cases. It is employed by both the Fourth Circuit and the Supreme Court of Virginia to avoid deciding claims on their merits.

Virginia courts, in fact, have recently extended the boundaries of the "not the same claim" basis for default.[17] In *Goins v. Commonwealth*,[18] the Supreme Court of Virginia held that two of Goins's claims were defaulted on appeal because a **different argument** was made on appeal than had been made at trial. The *Goins* court relied on Virginia Supreme Court Rule 5:25 to support its decision.[19] Rule 5:25 states that "[e]rror will not be sustained to any ruling of the trial court or the commission before which the case was initially tried unless the objection was stated with reasonable certainty at the time of the ruling."[20] The requirement, therefore, is **reasonable certainty** when an objection is made. The rule does not state that **any variation** in the initial objection will lead to default on appeal.[21] *Goins* demonstrates the new spin the Supreme Court of Virginia is currently putting on procedural default.

Similarly, in *Clagett v. Commonwealth*,[22] the Supreme Court of Virginia employed the same "default twist" used in *Goins*. In *Clagett*, the court held that the petitioner's assignment of error had been procedurally defaulted because a different argument was used on appeal than that used at trial. As in *Goins*, the court in *Clagett* somehow interpreted Rule 5:25 as a requirement that counsel advance the exact same argument on appeal as that advanced at trial.[23]

The *Matthews* court relied principally on *Picard v. Connor*,[24] though that case is not the only one providing guidance on the extent to which a claim must have been presented "face-up" to the state court. The Supreme Court of the United States, in *Picard*, stressed the importance of the exhaustion policy,[25] which is codified in the federal habeas statute.[26] Reasons for the exhaustion policy include federal-state comity and the interest of the state in hearing a petitioner's claims. The Court emphasized the rule that claims must be "fairly presented" to the state court, requiring "a state prisoner to present the state courts with the same claim he urges upon the federal courts."[27]

The Court found that Picard had defaulted his equal protection claim, not because he had altered the factual allegations put before the trial court, but because he did not expressly frame the issue as a federal Equal Protection Clause claim. The Court held that Picard was not required to cite "book and verse" the federal constitution. The Court ruled, however, that "the substance of a federal habeas corpus claim must first be presented to the state courts."[28] This requirement is not as strict as that set out in *Goins*, *Clagett*, and *Matthews* where the court is requiring the exact language used at trial, not merely the same substance of the issue, to avoid procedural default.[29]

The United States Supreme Court has also been more forgiving on this question. In *Taylor v. Illinois*,[30] the petitioner made a Sixth Amendment compulsory process claim when the court barred testimony of a defense witness. At trial and on direct appeal, Taylor never mentioned the Sixth Amendment Compulsory Process Clause, but two of the Illinois cases that he cited on direct appeal **did** refer to and cite United States Supreme Court compulsory clause cases. The *Taylor* Court found this citation was enough to present the federal claim to the Illinois court.[31]

However, in *Duncan v. Henry*,[32] the Court cited *Picard* for the proposition that a defendant seeking federal habeas relief must clearly assert his claim as a federal constitutional violation at the trial level. Even if the defendant makes a factual allegation that would support a due process claim, it is important to identify the claim specifically as one arising under the Due Process Clause of the United States Constitution.[33]

Justice Stevens, in his dissent in *Duncan*, stated that *Picard* required the defendant to state the **substance** of his federal claim. According to Stevens, *Picard* made it clear that "the prisoner need not place the correct label on his claim, or even cite the Federal Constitution, as long as the substance of the federal claim has been fairly presented."[34] Stevens criticized the new rule set out in *Duncan* as "hypertechnical and unwise," leading to lengthy litigation absent any valid purpose. Stevens reasoned that "[i]f the state courts have considered and rejected such a claim on state-law grounds, nothing is to be gained by requiring the prisoner to present the same claim under a different label to the same courts who have already found it insufficient."[35]

Although Stevens's rationale may be of some rhetorical help in instances where controlling state law is **identical** to federal law on the issue, his view has not prevailed. Accordingly, every effort must be made to conform exactly to Virginia's procedural requirements. Also, because of the holding in *Duncan*, defense counsel should assert a claim on every conceivable ground, broadly and narrowly at trial and on appeal, to avoid default.[36]

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[16] In Virginia cases, failure to exhaust is the functional equivalent of default.

[17] For a comprehensive treatment of this subject, *see* Cooper, *The Never Ending Story: Combating Procedural Bars in Capital Cases*, Capital Defense Journal, this issue.

[18] 251 Va. 442, 470 S.E.2d 114 (1996).

[19] *Goins*, 251 Va. at 463, 470 S.E.2d at 129.

[20] Va. Sup. Ct. R. 5:25.

[21] For an in-depth analysis of default in *Goins*, *see* case summary of *Goins*, Capital Defense Journal, Vol. 9, No. 1, p.44 (1996).

[22] 252 Va. 79, 472 S.E.2d 263 (1996).

[23] *Clagett*, 252 Va. at 85-86, 472 S.E.2d at 266-67, *see also* case summary of *Clagett*, Capital Defense Journal, Vol. 9, No. 1, p.48 (1996).

[24] 404 U.S. 270 (1971).

[25] *Id.* at 275.

[26] 28 U.S.C. §§ 2254(b)(c).

[27] *Picard*, 404 U.S. at 275-76.

[28] *Id.* at 278.

[29] For a further discussion of procedural bars, *see*, Cooper, *The Never Ending Story: Combating Procedural Bars in Capital Cases*, Capital Defense Journal, this issue.

[30] 484 U.S. 400 (1988).

[31] *Id.* at 406-07 n.9.

[32] 115 S. Ct. 887 (1995).

[33] *Id.* at 888.

[34] *Id.*

[35] *Id.* at 889.

[36] The *Matthews* court also rejected other bases urged by Matthews for avoiding default:

1. The court held that Matthews's claim was not exhausted under the South Carolina rule of *in favorem vitae* review (in favor of life). Under this type of review, the Supreme Court of South Carolina reviews "'the entire record for legal error, and assume[s] error when unobjected-to-but technically improper arguments . . . are asserted by the defendant on appeal in demand for reversal or a new trial.'" *Matthews*, 105 F.3d at 912 (citation omitted). *In favorem vitae* review, however, does not exist in Virginia.

2. Based on *Beam v. Paskett*, 3 F.3d 1301 (9th Cir. 1993), Matthews argued that the South Carolina court must have passed on his racial discrimination claim when it conducted mandatory review of sentencing for "any arbitrary factor." The Fourth Circuit held that even if the reasoning in *Beam* were adopted, the claim did not appear in the record, could not have been decided as part of the statutory review, and, therefore, was defaulted. 105 F.3d at 915. Although Idaho, the state involved in *Beam*, South Carolina, and Virginia all contain essentially the same language in their statutorily mandated review, using *Beam* in

II. A Better-*Batson* Claim

Matthews also claimed that the prosecutor violated *Batson v. Kentucky*[37] by using all of his peremptory challenges to exclude five black prospective jurors. Evaluating a *Batson* claim involves a three part test. First, the party asserting the *Batson* claim must make out a prima facie case of discrimination. Second, if the prima facie case is made, the burden shifts to the party being accused of the *Batson* violation to advance a racially neutral explanation for the challenge to the prospective juror. Finally, if parts one and two are met, the trial court must determine whether the party asserting the *Batson* violation has proven purposeful discrimination.[38]

The prosecutor in *Matthews* claimed that the five black prospective jurors were struck for the following reasons: Carl Ellis because he had a criminal record and stated that he would follow the Lord's advice on deciding whether to impose the death penalty; Nellie Frazier because she was the mother of a state law enforcement official who was a friend of a prospective state witness; Joe Ann Hunt because she had been convicted of check fraud numerous times; Patricia Middleton because she was unsure whether she could impose the death penalty; and Rebecca McDonald because she lived on the same street as the defendant and knew his family.[39] The lower court found the explanations acceptable, and the Fourth Circuit agreed.

Under *Purkett v. Elem*,[40] the conclusion that the prosecutor's reasons for striking these prospective jurors were racially neutral is unremarkable. In *Purkett*, the United States Supreme Court held that the second step of *Batson* "does not demand an explanation that is persuasive, or even plausible."[41] For a prosecutor to violate step two in *Batson*, the discriminatory intent must be inherent in the prosecutor's justification.[42]

However, Matthews's counsel did not simply rely on a challenge to the race neutrality of the prosecutor's justification. Counsel went further by claiming that similarly situated white jurors were not struck. The court dismissed this claim by stating that "*Batson* is not violated whenever two veniremen of different races provide the same responses and one is excused and the other is not."[43] The court reasoned that counsel is entitled to consider the characteristics, tone, demeanor, and facial expressions of prospective jurors when exercising peremptory challenges.[44]

The court's interpretation, carried to its logical extreme, would result in no two jurors ever being similarly situated and would effectively preclude any successful equal protection claim. Nevertheless, it is advised that defense counsel follow the path taken in *Matthews*, go beyond challenging explanations, and be alert to claims based on disparate treatment of similarly situated prospective jurors.[45]

III. Refusal of Judge to Submit to Voir Dire

Matthews also claimed that the trial judge's refusal to submit to voir dire violated his constitutional right to a fair trial. Matthews made a motion requesting that the sentencing judge submit to voir dire on issues regarding the judge's attitude toward the death penalty in general; whether death was appropriate in Matthews's case; what public statements the judge may have made on the death penalty; whether he, while a member of the legislature, voted on legislation concerning the death penalty; whether the judge had any connection with the victim's family; whether he had any knowledge of the case that would effect his decision on the proper penalty; and whether the judge could consider a sentence of life imprisonment based on the facts of Matthews's case.[46]

The sentencing judge answered some of Matthews's questions, but then refused to answer any further questions on the grounds that a judge is required to be impartial, and, therefore, voir dire is unnecessary. The *Matthews* court held that there is no authority requiring a judge to submit to voir dire and that recusal procedures are available for a biased judge. The court concluded that Matthews's right to a fair trial was not violated.[47]

Although Matthews's claim was denied, it demonstrated good trial strategy because a defendant is entitled to a fair and impartial judge under the Sixth Amendment of the United States Constitution.[48] Further, the increased politicization of judges related to capital cases increases the chance that this fundamental right will be denied.[49]

IV. Equal Protection Revisited

Both Matthews's defaulted "racial discriminatory abuse of discretion" claim and his *Batson* claims were grounded in the Equal Protection Clause of the Fourteenth Amendment. As to the first claim, Matthews proffered evidence of specific racist acts alleged to have been committed by Condon, inside and outside the courtroom.[50]

Swain v. Alabama,[51] the precursor to *Batson*, makes such evidence relevant. In *Swain*, the United States Supreme Court stated that the denial of prospective black jurors "on account of race" violated the Equal Protection Clause.[52] The Court held that there is a presumption that the

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Virginia to avoid procedural default may **not** be advisable respecting some claims. Please contact the Virginia Capital Case Clearinghouse if this is an issue in your case.

3. Finally, the court noted that Matthews's procedural default would be forgiven if he could prove cause for the default, actual prejudice that would result from the alleged violation, a "fundamental miscarriage of justice" if the claim was not considered, or evidence that he was actually innocent of the death penalty. The court dealt with this briefly by stating that Matthews had proven none of these. 105 F.3d at 916.

[37] 476 U.S. 79 (1986).

[38] *Matthews*, 105 F.3d at 917.

[39] *Id.* at 917-18.

[40] 115 S.Ct. 1769 (1995).

[41] *Id.* at 1771.

[42] *Batson*, 476 U.S. at 96-97.

[43] *Matthews*, 105 F.3d at 918.

[44] *Id.*

[45] For a discussion of this and other means of making more effective use of *Batson*, *see* Rice and Youell, *Toward More Effective Use of Batson in Virginia Capital Trials*, Capital Defense Journal, this issue.

[46] *Matthews*, 105 F.3d at 921.

[47] *Id.* at 922.

[48] For a more in-depth analysis of the need for an impartial judge, *see* DelPrete, *Not Holding the Balance Nice, Clear and True: The Right to an Impartial Judge*, Capital Defense Digest, Vol. 7, No. 2, p. 47 (1995).

[49] For a further discussion of this issue, *see* Stephen B. Bright & Patrick J. Keenan, *Judges and the Politics of Death: Deciding Between the Bill of Rights and the Next Election in Capital Cases*, 73 B.U. L. Rev. 759 (1995).

[50] *Matthews*, 105 F.3d at 910.

[51] 380 U.S. 202 (1965).

[52] *Id.* at 204.

prosecution is exercising its peremptory challenges to acquire a fair and impartial jury, not for racially discriminatory purposes. This presumption, however, can be overcome when the defendant shows that the prosecution has systematically challenged prospective jurors on the basis of race.[53] *Swain*, therefore, provides defense counsel with a legal basis for establishing an Equal Protection Clause claim for racially discriminatory practices by the prosecution through evidence of specific acts over time.

Intentional discrimination based on race is reprehensible.[54] It is even more so where the life of the accused is at stake. Counsel should not hesitate in an appropriate case to undertake the issues and questions authorized by *Swain*.

Summary and analysis by:
Deborah A. Hill

[53] *Id.* at 223-24.

[54] *See* case summary of *Hoke*, Capital Defense Journal, this issue.

MUELLER v. MURRAY

252 Va. 356, 478 S.E.2d 542 (1996)
Supreme Court of Virginia

FACTS

In the early morning hours of October 6, 1990, ten year old Charity Powers was abducted from a fast food restaurant near the skating rink where her mother had earlier dropped her off. Her body was found the following February buried 900 feet from the home of Everett Lee Mueller. During interrogation, Mueller confessed to enticing Powers into his car with the promise of a ride home; instead, he took her to his house. Mueller claimed that Powers consented to sex with him and that afterwards he strangled her to keep her from reporting the incident. The state's evidence, however, tended to prove that Powers was raped and that her throat had been slit.[1]

The jury found Mueller guilty of capital murder, rape, and abduction with intent to defile.[2] At the sentencing phase of the trial, four women, including Mueller's sister, testified that they had been raped by Mueller. Mueller had been convicted of two of these rapes. Mueller's own expert testified that he lacked a "working conscience."[3] Mueller was sentenced to death based upon the jury's finding of both "vileness" and "future dangerousness."[4]

The Supreme Court of Virginia affirmed the judgment,[5] and the United States Supreme Court denied a writ of certiorari.[6] Mueller then petitioned for state habeas relief; his petition was dismissed in part and denied in part. The Supreme Court of Virginia granted review but limited it to the issue of whether Mueller's constitutional rights were violated by the trial court's refusal to inform the jury that Mueller would be ineligibile for parole if he received a life sentence.[7]

HOLDING

The Supreme Court of Virginia held that the United States Supreme Court's decision in *Simmons v. South Carolina*[8] was a "new rule"under *Teague v. Lane*,[9] and that consequently Mueller was not entitled to the benefit of the *Simmons* holding. The court affirmed the lower court's denial of Mueller's petition.[10]

ANALYSIS/APPLICATION IN VIRGINIA

I. *Teague* Analysis

The decision in *Teague* was intended, in the interest of finality and federal-state comity, to prevent application of "new" rules of criminal procedure to defendants whose convictions were final before the new rule was announced.[11] The Supreme Court stated that "a case announces a 'new' rule if the result was not dictated by precedent existing at the time the defendant's conviction became final."[12] *Teague* requires a three step analysis: first, determining whether the defendant's conviction became final before the date on which the new rule was announced; second, surveying the legal landscape as of the date of final conviction to determine whether a state court examining the issue **at that time** would have felt compelled by precedent to conclude that the rule was constitutionally required; and finally, the court must decide whether the new rule falls within one of two narrow exceptions to the *Teague* doctrine.

[1] *Mueller v. Murray*, 252 Va. 356, 358-60, 478 S.E.2d 542, 544-45 (1996).

[2] *Id.* at 360, 478 S.E.2d at 545. The capital murder convictions were based upon Va. Code § 18.2-31(5) (murder in commission of a rape) and former Va. Code § 18.2-31(8) (murder of child under 12 in the commission of an abduction with intent to defile).

[3] *Id.*

[4] *Id.*

[5] *Mueller v. Commonwealth*, 244 Va. 386, 414, 422 S.E.2d 380, 398 (1992).

[6] *Mueller v. Commonwealth*, 507 U.S. 1043 (1993).

[7] *Mueller v. Murray*, 252 Va. 356, 358, 478 S.E.2d 542, 544 (1996).

[8] 512 U.S. 154, 162 (1994) (ruling that the defendant has a constitutional right to rebut the state's evidence of future dangerousness with the fact that the defendant would be parole ineligible if sentenced to life instead of death).

[9] 489 U.S. 288, 310 (1989) (finding that habeas prisoners generally not entitled to benefit of new favorable Supreme Court decisions).

[10] *Mueller*, 252 Va. at 367, 478 S.E.2d at 549.

[11] *Id.* at 361, 478 S.E.2d at 546 (explaining that *Teague* and its progeny have determined that the defendant's conviction becomes final on the date of denial of certiorari or of other final disposition by the United States Supreme Court).

[12] *Teague*, 489 U.S. at 301.