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SATCHER v. PRUETT 126 F.3d 561 (4th Cir. 1997) United States Court Of Appeals, Fourth Circuit

barred, pointing to a line of South Carolina Supreme Court cases that have permitted the issue of competence to be introduced during collateral, or PCR, proceedings.[71]

In response, the court rejected Plath's rebuttal attempt, including the supporting cases, distinguishing between a state court allowing the unraised issue to be included in a PCR application, and a federal court deliberating it on habeas review.[72] Even in light of the cases cited by Plath, the court refused to go beyond the limitations of habeas review established by the principles of comity. This is yet another example of the stringency of the *Strickland* standard, and consequently evidence of the dire necessity of raising all potential issues at trial in order to preserve them for appeal.

Summary and analysis by:
Mary K. Martin

[71] *Id.* at 602.
[72] *Id.* at 602.

SATCHER v. PRUETT

126 F.3d 561 (4th Cir. 1997)[1]
United States Court Of Appeals, Fourth Circuit

FACTS

Around 7:00 p.m. on the evening of March 31, 1991, Deborah Abel was riding her bicycle along a path which runs parallel to Lee Highway in Arlington County, Virginia.[2] As she entered a relatively secluded area on the path, she noticed an "unthreatening man" walking toward her as she rode.[3] As she passed this man, they made eye contact.[4] Two or three seconds later, the man grabbed Abel from behind, knocked her eye-glasses off, pulled her off of her bicycle, dragged her into a ditch along the path, and began beating her about the face and head.[5] In the ensuing struggle, the man managed to pull her pants part way down.[6] While Abel was being assaulted, Mark Polemani was riding his bicycle along the same stretch of path. Polemani observed a man, who appeared to be punching the ground, kneeling just off the path near a prone bicycle.[7] Polemani got off of his bicycle and approached the man. As he did so, however, the man grabbed Abel's purse and ran away. Polemani briefly chased the man but eventually returned to assist Abel.

Abel and Polemani each gave the police a description of Abel's attacker. Abel described him as "a stocky black male between twenty-five and thirty years old, about 5'9" or 5'10" and 190 to 200 pounds" with a "short 'Afro' haircut" and no facial scars.[8] A police artist made a sketch based on Abel's description. Polemani gave a similar description and an "almost identical" sketch was drawn.[9] Upon seeing both sketches, Polemani commented that the sketch based on Abel's description was "better."[10]

On the same evening that Abel was attacked, Ann Borghesani was attacked as she was walking along the same stretch of path.[11] Borghesani's partially nude body was discovered shortly after 8:00 a.m. the next morning at the bottom of a stairwell in an Air Force Association building located alongside the bike path less than 100 yards from where Abel was attacked.[12] Borghesani had been raped and stabbed twenty-one times with a "sharp-tipped object."[13] Additionally, her purse and some of her jewelry were missing.[14] A few days later, Borghesani's purse and Abel's purse were found together in some bushes located about two blocks from the Air Force Association building.[15]

Michael Satcher was arrested five months later, on August 18, 1990, for trying to attack three different women along a different bike path in Arlington County that morning.[16] At the time of his arrest, Satcher, who is African-American, was twenty-one years old, 5'6" tall, weighed 152 pounds, had short hair, and a facial scar.[17] Satcher voluntarily gave the police blood, hair, and saliva samples.[18] The blood test revealed that Satcher's blood type, which occurs in seven percent of the population, was the same type as the

[1] The United States Supreme Court denied Satcher's petition for a writ of certiorari on December 2, 1997. *Satcher v. Pruett,* 118 S.Ct. 595 (1997). Michael Satcher was executed by lethal injection on December 9, 1997.
[2] *Satcher v. Pruett,* 126 F3d 561, 563 (4th Cir. 1997).
[3] *Satcher,* 126 F3d at 563.
[4] *Id.*
[5] *Id.* at 563-64.
[6] *Id.* at 564.
[7] *Satcher,* 126 F3d at 564.
[8] *Id.*
[9] *Id.*
[10] *Id.* The descriptions given by Abel and Polemani differed "somewhat" from Satcher's actual appearance. *Id.* at 564-65. *See infra* note 17 and accompanying text.
[11] *Satcher,* 126 F3d at 564.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Satcher,* 126 F3d at 564.
[16] *Id.*
[17] *Id.* at 564. Satcher's actual appearance differed from Abel and Polemani's descriptions in four out of the six characteristics they described. Satcher's age, height, weight and facial scar were all inconsistent with their descriptions. The only portions of the descriptions which fit Satcher were "black male" and "short...hair." *See, supra,* note 10 and accompanying text.
[18] *Id.*

semen sample taken from Borghesani's body.[19] Tests on the hair samples were inconclusive.[20] The Commonwealth also conducted a DNA analysis on Satcher's blood which "showed that Satcher's DNA matched the DNA from swabs taken from Borghesani's body and clothing."[21]

In late June 1991, more than 15 months after Abel's attack and a mere 15 days before trial, the police brought Abel and Polemani in to view a lineup.[22] Prior to viewing the lineup, both Abel and Polemani refreshed their memories using the sketch based on Abel's description.[23] Polemani was unable to pick anyone out of the lineup with certainty.[24] Abel narrowed it down to number two and number four, but ultimately chose number two because he looked "unthreatening."[25] Satcher was number four in the lineup.

When Satcher's trial began, Abel was in the courtroom for two days during jury selection and observed Satcher being brought into the courtroom, sitting at defense table, and leaving the courtroom.[26] After a few hours of observing Satcher **in court,** Abel determined that Satcher was the man who attacked her. At trial, the judge allowed Abel to identify Satcher as her attacker.[27] On redirect examination, Abel explained that she determined Satcher was her attacker based on her **in court,** observations.[28]

Satcher was convicted of the robbery, assault and battery, and attempted rape of Abel and of the robbery, rape, and capital murder of Borghesani.[29] The jury[30] recommended the death penalty based on both the "vileness" and "future dangerousness" aggravators[31] and the Circuit Court of Arlington County sentenced Satcher to death.[32] The Supreme Court of Virginia affirmed Satcher's conviction and sentence on direct appeal[33] and the United States Supreme Court denied certiorari.[34] Satcher filed a motion for rehearing on the petition for certiorari which was also denied.[35] Satcher filed a petition for a writ of habeas corpus in the Circuit Court of Arlington County in November 1993. This petition was dismissed by the circuit court, but the clerk's office failed to notify Satcher's state habeas counsel of the dismissal until after the deadline to file his appeal in the Supreme Court of Virginia had already passed. In an attempt to rectify its mistake, the circuit court entered a new order dismissing the complaint. The Supreme Court of Virginia, however, dismissed the appeal as untimely after holding that the circuit court lacked the power to take such remedial measures.[36] The United States Supreme Court denied certiorari on state habeas.[37]

Satcher then filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of Virginia.[38] The district court granted the writ on the ground that the in-court identification of Satcher by Abel denied Satcher due process under the Fourteenth Amendment.[39] The district court also noted that, under Virginia law, compelling a defendant to use a peremptory challenge to remove a juror who should have been removed for cause was prejudicial error.[40] The Commonwealth appealed the granting of the writ to the United States Court of Appeals for the Fourth Circuit arguing that, even if the admission of the in-court identification testimony was erroneous, it was harmless error. Satcher cross-appealed arguing several issues including that (1) the district court erred in holding that Teague barred his due process claim for the trial court's refusal to excuse a potentially biased juror for cause; (2) the existence of new DNA evidence showed his actual innocence and thus allowed the court of appeals to consider his previously defaulted claims; and (3) his claims for ineffective assistance of trial counsel were not defaulted due to the ineffective assistance of state habeas counsel.[41]

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[19] *Satcher,* 126 F.3d at 564. Based on this seven percent figure, there were more than 3,000 men in the Washington, D.C. area whose blood types would have matched the semen sample.

[20] *Id.*

[21] *Id.* Satcher did not have the opportunity to conduct independent DNA testing until 1995. *Id.* at 570. It does not appear that Satcher's trial counsel requested the appointment of an expert in DNA analysis for use at trial.

[22] *Id.* at 565.

[23] *Satcher,* 126 F.3d at 565.

[24] *Id.* At trial Polemani said he was "pretty sure" that Satcher was Abel's attacker. *Id.*

[25] *Id.* Abel picked number two despite commenting that number four, Satcher, "looked 'almost identical' to the sketch." *Id.*

[26] *Id.*

[27] *Satcher,* 126 F.3d at 565. Trial counsel objected to this testimony but his objection was overruled.

[28] *Id.*

[29] *Id.*

[30] Satcher also raised an issue regarding the trial court's refusal to dismiss an arguably biased juror from the venire for cause which forced Satcher to remove the juror by using a peremptory challenge. The juror at issue, Mr. Middle, admitted that his close relationship with some Arlington County police officers "might" affect his ability to be impartial. *Id.* at 573. This issue is discussed, *infra,* at note 63 and accompanying text.

[31] *Satcher,* 126 F.3d at 565. *See* Va. Code § 19.2-264.2 (1995). The mitigating evidence presented by Satcher consisted entirely of the testimony of friends and family regarding his "history and background." *Id.* at 572.

[32] *Id.* at 565.

[33] *Satcher v. Commonwealth,* 244 Va. 220, 421 S.E.2d 821 (1992).

[34] *Satcher v. Virginia,* 507 U.S. 933 (1993).

[35] *Satcher v. Virginia,* 507 U.S. 1046 (1993).

[36] *Satcher v. Pruett,* 126 F.3d 561, 565 (4th Cir. 1997).

[37] *Satcher v. Netherland,* 513 U.S. 1193 (1995).

[38] *Satcher v. Netherland,* 944 F.Supp. 1222 (E.D.Va. 1996).

[39] *Satcher,* 944 F.Supp at 1303.

[40] *Id.* at 1277. The district court ultimately concluded that the "new rule" doctrine of *Teague v. Lane,* 489 U.S. 288 (1989), barred collateral review of this issue. It noted, however, that, notwithstanding Teague, it would have concluded that the trial court's failure to exclude Mr. Middle was clear error.

[41] Satcher also alleged that trying him jointly for both the attack on Abel and the murder of Borghesani violated due process. The court of appeals held that this claim was procedurally defaulted because in state court, on either direct appeal or state habeas, Satcher "failed to mention the federal constitution or cite any cases examining the right to be tried separately under the due process clause." *Satcher,* 126 F.2d at 573. Defense counsel must be careful to make objections and present claims which are couched in both state and federal terms to avoid procedural default.

HOLDING

The Fourth Circuit held (1) the admission of the in-court identification testimony constituted only harmless error;[42] (2) the district court's Teague analysis regarding the trial court's refusal to dismiss a juror for cause was correct;[43] (3) Satcher could not establish cause and prejudice under Strickland and thus his claims for ineffective assistance of trial claims were defaulted;[44] and (4) the new DNA evidence did not establish actual innocence, but merely showed, at best, that the Commonwealth's evidence was inconclusive.[45] Thus, it reversed the district court and denied the writ of habeas corpus.[46]

ANALYSIS/APPLICATION IN VIRGINIA

I. In-Court Identification

Traditionally, a habeas court reviewing the admission in the trial court of identification testimony must engage in a two-step analysis. First, it must determine "whether the identification procedure [was] unnecessarily suggestive."[47] A procedure is "unnecessarily suggestive if a positive identification is likely to result from factors other than the witness's own recollection of the crime."[48] Second, if the procedure was unnecessarily suggestive, a court must consider whether the identification testimony was nevertheless reliable when viewed in light of the "totality of the circumstances."[49] Factors which comprise the "totality of the circumstances" include:

> (1) the witness's opportunity to view the perpetrator at the time of the crime; (2) the witness's degree of attention at the time of the offense; (3) the accuracy of the witness's prior description of the perpetrator; (4) the witness's level of certainty when identifying the defendant as the perpetrator at the time of confrontation; and (5) the length of time between the crime and confrontation.[50]

The combined force of these factors must then be "weighed against the 'corrupting effect of the suggestive identification itself.'"[51] Combined with the examination of the "totality of the circumstances," a reviewing court "may also consider other evidence of the defendant's guilt when assessing the reliability of the in-court identification."[52]

In the present case, the court of appeals refused to consider either the "suggestiveness" of Abel's in-court identification of Satcher or the *Biggers* factors for "totality of the circumstances."[53] In doing so, the court of appeals stated "[w]e find it unnecessary to resolve the question of whether Abel's in-court identification was unreliable under all of the circumstances and thus inadmissible under the due process clause."[54] Instead, the court of appeals determined that "Abel's in-court identification testimony, if erroneous, was harmless error."[55] In refusing to even consider the reliability of Abel's in-court identification, the court of appeals seems to be approaching a "clearly guilty" standard of review. The court of appeals virtually ignored what the district court recognized as the "profound impact" that an in-court victim identification of the defendant has on the jury.[56]

Instead, the court of appeals focused on the other "solid and persuasive identification evidence" used at trial by the Commonwealth.[57] This "solid persuasive" evidence, however, consisted of a police sketch based on descriptions of the perpetrator which were, at best, flawed and testimony regarding the lineup fifteen days before trial in which neither Abel nor Polemani positively identified Satcher. Based on this "solid persuasive" evidence and the unreliability of Abel's in-court identification, the district court concluded that the in-court identification had a "profound impact" on the jury. Based on

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[42] *Satcher,* 126 F.2d at 566-67.

[43] *Id.* at 575.

[44] *Id.* at 572-73.

[45] *Id.* at 570-71.

[46] *Satcher,* 126 F.3d at 563.

[47] *Id.* at 566 (citing, *Manson v. Brathwaite,* 432 U.S. 98, 110 (1977) & *Neil v. Biggers,* 409 U.S. 188, 198-99 (1972)).

[48] *Id.* (citing *United States v. Peoples,* 748 F.2d 934, 935-36 (4th Cir. 1984) (noting that the in- court identification of "the only young black male in the courtroom" might have been unnecessarily suggestive)).

[49] *Id.* (citing *Manson,* 432 U.S. at 100 & *Biggers,* 409 U.S. at 198).

[50] *United States v. Wilkerson,* 84 F.3d 692, 695 (4th Cir. 1996) (citing *Biggers,* 409 U.S. at 199- 200).

[51] *Wilkerson,* 84 F.3d at 695 (quoting *Manson,* 432 U.S. at 114).

[52] *Id.* See, e.g., *United States v. Lau,* 828 F.2d 871, 875 (1st Cir. 1987), cert. denied, 486 U.S. 1005 (1988); *United States v. DiTommaso,* 817 F.2d 201, 214 n.17 (2d Cir. 1987); & *United States v. Bell,* 812 F.2d 188, 193 (5th Cir. 1987). This aspect of "totality of the circumstances" analysis is akin to a "harmless error" analysis. The difference, however, is that the factors outlined in *Manson* and *Biggers* should be considered before any weight is given to the other evidence in the case.

[53] *Satcher,* 126 F.3d at 567.

[54] *Id.*

[55] *Id.* Under "harmless error" analysis, a trial court's error can only be reversed if "the error 'had substantial and injurious effect or influence in determining the jury's verdict.'" *Id.* (quoting *Brecht v. Abramson,* 507 U.S. 619, 637 (1993)). If, however, a reviewing court has "grave doubt" about whether an error had a "substantial and injurious effect or influence" and finds itself in "virtual equipoise" on the issue, "the error [was] not harmless." *Id.* (quoting *Cooper v. Taylor,* 103 F.3d 366, 370 (4th Cir. 1996) (en banc)). In conducting harmless error review, the court reviewed the trial record de novo. *Id.* (citing *Correll v. Thompson,* 63 F.3d 1279, 1291 (4th Cir. 1995)). Clearly, de novo review by the court of appeals gives absolutely no deference to the district court on the crucial issue of impact on the jury, an issue that the district court is in a much better position to decide.

[56] *Satcher,* 126 F.3d at 566.

[57] *Id.* at 568.

this same evidence, however, the court of appeals concluded that the in-court identification "neatly tied together the more important identification evidence ... but it was not the cornerstone of the identification testimony" and could have had no "substantial and injurious effect" on the jury.[58]

The court of appeals' analysis of the evidence in this case virtually ignores the reasoning of the Supreme Court in *Kotteakos v. United States*[59] which is quoted extensively to justify its decision. In *Kotteakos*, the Court reasoned that "[t]he question is ... what effect [could] the error ... reasonably [have been] taken to have had upon the jury's decision."[60] The *Kotteakos* Court went on to say that "[o]ne must judge others' reactions not by his own, but with allowance for how others **might react** and not be regarded generally as acting without reason."[61] Thus the evidence had a "substantial and injurious effect" on the jury's verdict if it **could have reasonably affected** the jury's determination. Based on the type of evidence involved in this case, the district court's determination that there was a reasonable probability that the jury was affected was entirely appropriate.

Counsel in Virginia should be very wary of this decision and the steps it takes toward a clearly guilty standard of review. If the Commonwealth attempts to use questionable in-court identification testimony, defense counsel should vigorously cross-examine the witness regarding how he or she arrived at the determination that the defendant is the same person that allegedly committed the act at issue.

II. Failure to Remove a Juror for Cause and Compelled use of Peremptory Challenges

During jury selection one of the venire members, Mr. Middle, indicated that he knew several Arlington County police officers and that this might affect his ability to weigh the facts.[62] Satcher requested that Middle be excused for cause because he was not "without exception"[63] as required by Virginia law.[64] The trial court refused this request and Satcher struck Middle using a peremptory challenge.[65] On direct appeal, the Supreme Court of Virginia determined that Middle was not biased and declined to address the peremptory challenge issue.

On federal habeas, the district court held that collateral review of the issue was barred by *Teague v. Lane*.[66] Despite this holding, the district court determined that Middle was not impartial and the trial court's failure to exclude him was "manifest error" under Virginia law.[67] The court of appeals held that the district court's *Teague* analysis was correct. It found that, based on *Ross v. Oklahoma*,[68] there was no "right (under the Due Process Clause) to exercise peremptory challenges on a panel free from jurors who should have been excused for cause" in existence when Satcher's conviction became final in February 1993.[69]

It is exceedingly well established under Virginia law, however, that it is "prejudicial error to force a defendant to use the peremptory strikes afforded him by [Virginia Code Section 19.2-262] to exclude a venireman who is not free

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[58] *Id.* at 569. In reaching this conclusion, the court of appeals engaged in a truncated "totality of the circumstances" analysis based only on factors one and three from *Biggers*: opportunity to view the perpetrator at the time of the crime and accuracy of the prior description of the perpetrator. *Id.* Its determination that the sketch was "accurate" was based entirely on Abel's statement that it ranked about an eight on a scale of one to ten. *Id.* The court of appeals did not mention the flawed descriptions given to police by Abel and Polemani right after the attack.

[59] 328 U.S. 750 (1946).

[60] *Kotteakos v. United States*, 328 U.S. 750, 764 (1946).

[61] *Kotteakos*, 328 U.S. at 764 (emphasis added).

[62] *Satcher*, 126 F3d at 573. After giving this response and requesting to be excused from the panel, Middle was questioned by the trial judge. The judge then attempted to rehabilitate Middle by asking leading questions regarding his ability to be fair. Middle predictably answered these questions affirmatively. *See Satcher v. Netherland*, 944 FSupp. 1222, 1287 (E.D.Va. 1996). Under Virginia law, a prospective juror's "[m]ere assent to a trial judge's questions or statements, or to counsel's leading inquiry is not enough to rehabilitate a prospective juror who has initially demonstrated a prejudice or partial predisposition." *Griffin v. Commonwealth*, 19 Va.App. 619, 625, 454 S.E.2d 363, 366 (1995). *See also McGill v. Commonwealth*, 10 Va.App. 237, 242, 391 S.E.2d 597, 600 (1990) & *Foley v. Commonwealth*, 8 Va. App. 149, 159-60, 379 S.E.2d 915, 921, *aff'd en banc*, 9 Va.App. 175, 384 S.E.2d 813 (1989).

[63] *See* Va. Code Ann. §§ 8.01-357 (1990). *See also, Griffin v. Commonwealth*, 19 Va.App. 619, 621, 454 S.E.2d 363, 364 (1995); *Justus v. Commonwealth*, 220 Va. 971, 975, 266 S.E.2d 87, 90 (1980); & *Breeden v. Commonwealth*, 217 Va. 297, 300, 227 S.E.2d 734, 737 (1976).

[64] Under Virginia law, "giving unqualified credence to the testimony of a law enforcement officer based solely on the officer's official status constitutes impermissible bias." *Gosling v. Commonwealth*, 7 Va. App. 642, 645, 376 S.E.2d 541, 544 (1989) (citing *Mullis v. Commonwealth*, 3 Va. App. 564, 571, 351 S.E.2d 919, 923 (1987)).

[65] *Satcher v. Pruett*, 126 F3d 561, 573-74 (4th Cir. 1997).

[66] 489 U.S. 288 (1989).

[67] *Satcher v. Pruett*, 944 FSupp. 1222, 1288 (E.D.Va. 1996).

[68] 487 U.S. 81 (1988) (holding that the Sixth Amendment right to an impartial jury is not implicated if a biased juror is not excused for cause but is excused with a peremptory challenge and that a reviewing court should look only at the jury that actually sat in determining a Sixth Amendment claim). The *Ross* Court, however, explicitly declined to "decide the broader question whether, in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause." *Ross*, 487 U.S. at 91 n.4.

[69] *Satcher v. Pruett*, 126 F3d 561, 574 (4th Cir. 1997). Defense counsel may be able to argue, as Satcher did in the present case, that in declining to "decide the broader question whether, in the absence of Oklahoma's limitation on the 'right' to exercise peremptory challenges, 'a denial or impairment' of the exercise of peremptory challenges occurs if the defendant uses one or more challenges to remove jurors who should have been excused for cause," the *Ross* Court impliedly left the determination of this issue up to the States. *Ross*, 487 U.S. at 91 n.4. The court of appeals did not address this argument on the merits in *Satcher*, so it is not explicitly foreclosed. On collateral review, however, the rule sought in this argument is likely to be barred by the *Teague* new rule doctrine. *Satcher*, 126 F3d at 574. Despite this fact, this may be a viable argument on direct appeal or even at the trial level.

from exception."[70] This rule has been operative and enforced in Virginia since before the Civil War.[71] This rule, however, is based exclusively on Virginia constitutional, statutory, and common law.[72]

In light of the limited likelihood of success on the federal level as a result of *Satcher*, *Ross*, and *Teague*, defense counsel must argue this issue in the Virginia courts with added fervor. The rule is very well established in Virginia and should be followed by the courts. In order to leave the courts with little choice but to adhere to this rule, counsel must be especially careful to build an adequate record on voir dire. Defense counsel should ask searching questions which get to the root of potential juror's beliefs and not acquiesce to leading questions by the Commonwealth's Attorney or the trial judge.[73]

III. DNA Evidence

Satcher claimed on appeal that he had discovered "new" DNA evidence which showed he was actually innocent of these crimes. This evidence consisted of an independent analysis of Satcher's DNA which was compared with the DNA tests introduced at Satcher's trial in 1991.[74] Satcher's tests showed that the results of one of the four DNA "probes" used at trial which matched Satcher's DNA to DNA samples from Borghesani's body fell outside of the Commonwealth testing lab's match criterion by as much as one percent. Satcher argued that this new evidence of actual innocence provided a "gateway" through which his previously defaulted claims could pass in order to be considered on appeal.[75]

The court reasoned that before this new evidence could act as a "gateway" for his defaulted claims, Satcher must show "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence."[76] The court went on to say that Satcher's evidence merely showed that the Commonwealth's DNA evidence was inconclusive and that "it does not show that someone else was the source of the DNA at the crime scene."[77] Thus, in order for new evidence to provide a gateway for defaulted claims, the evidence must establish actual innocence to the point that "no reasonable juror" would have convicted the defendant.[78]

When DNA evidence will likely be at issue in any case, defense counsel should request either funds to hire or the appointment of an independent DNA expert to act as a member of the defense team. This expert could be used by defense counsel either to attack the results of the Commonwealth's tests or to conduct independent tests for the defense.[79] If defense counsel requests the appointment of an expert by the court, counsel should investigate potential experts and be prepared to request that the court appoint a particular expert. Otherwise, the court may appoint an expert who may favor the prosecution.

In order to either be given funds to hire a DNA expert or have one appointed by the court, defense counsel must demonstrate to the trial court that "the subject which necessitates the assistance of the expert is 'likely to be a significant factor in [the] defense' ... and that [the defense] will be prejudiced by the lack of expert assistance."[80] Additionally, defense counsel must show a "particularized need" for the appointment of an expert.[81] The "particularized showing" requires more than a "[m]ere hope or suspicion that favorable evidence" will be produced by the expert.[82] The determination of whether such a "particularized showing" has been made is "a flexible one and must be determined on a case-by-case basis" and lies within the "discretion of the trial judge."[83]

Summary and analysis by
Brian S. Clarke

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[70] *Breeden v. Commonwealth*, 217 Va. 297, 300, 227 S.E.2d 734, 737 (1976) (citing *Dowdy v. Commonwealth*, 50 Va. (9 Gratt.) 727, 737 (1852)). *See also*, *George v. Angelone*, 901 FSupp 1070, 1088 and 1088 n.11 (E.D.Va. 1995) (citing *Breeden*, 217 Va. at 300, and recognizing that under Virginia law it is prejudicial error to force a defendant to use a peremptory challenge to exclude a veniremen who is not free from exception, but determining that under *Ross v. Oklahoma*, 487 U.S. 81 (1988), no federal issue was presented and, further, that the announcement of a federal rule comparable to the Virginia rule would "clearly be breaking new constitutional ground" and was thus barred by *Teague v. Lane*, 489 U.S. 288 (1989)); *Griffin v. Commonwealth*, 19 Va.App. 619, 621, 454 S.E.2d 363, 364 (1995) (citing *Breeden*, 217 Va. at 300, and repeating the rule that it is prejudicial error to force a defendant to use a peremptory challenge to exclude a veniremen who is not free from exception); *Gosling v. Commonwealth*, 7 Va.App. 642, 647-648, 376 S.E.2d 541, 545 (1989) (same); *Justus v. Commonwealth*, 220 Va. 971, 975, 266 S.E.2d 87, 90 (1980) (same); & *Martin v. Commonwealth*, 221 Va. 436, 445, 271 S.E.2d 123, 129 (1980) (same).

[71] *Dowdy v. Commonwealth*, 50 Va. (9 Gratt.) 727, 737 (1852).

[72] *See* Va. Code Ann. §§ 8.01-357 (1990); Va. Sup. Ct. Rule 3A:14; & *Breeden*, 217 Va. at 300, 227 S.E.2d at 737. Although the rule is designed to effectuate the right to an impartial jury embodied in the Sixth Amendment of the U.S. Constitution as well as the corresponding right in the Virginia Constitution, U.S. CONST., amends. VI and XIV & VA. CONST. art. 1, § 8, the grounds for the rule have always been based solely on Virginia law.

[73] *See*, *Griffin*, 19 Va.App. at 622, 454 S.E.2d at 364-65 (stating that "[t]rial courts should not ... accept a venireperson's bare declaration of impartiality without providing the means to assure that the expression reflects the person's true state of mind").

[74] *Satcher v. Pruett*, 126 F.3d 561, 570 (4th Cir. 1997).

[75] *Satcher*, 126 F.3d at 570.

[76] *Id.* (quoting *Schlup v. Delo*, 513 U.S. 298, 327 (1995)).

[77] *Id.*

[78] *Id.* at 571.

[79] *See Ake v. Oklahoma*, 470 U.S. 68 (1985) (holding that when a defendant's mental condition is a significant factor in a criminal proceeding, the defendant is entitled to the appointment of a psychological expert to assist in the defense) & *Husske v. Commonwealth*, 252 Va. 203, 211, 476 S.E.2d 920, 925 (1996) (extending *Ake* rationale to non-psychiatric experts, including DNA experts, in Virginia).

[80] *Husske*, 252 Va. at 212, 476 S.E.2d at 925 (quoting *Ake*, 470 U.S. at 82-83).

[81] *Id.* at 212, 476 S.E.2d at 926. The "particularized showing" requires more than a "[m]ere hope or suspicion that favorable evidence" will be produced by the expert. *Id.* (quoting *State v. Mills*, 420 S.E.2d 114, 117 (N.C. 1992)). The determination of whether such a "particularized showing" has been made is "a flexible one and must be determined on a case-by-case basis" and lies within the "discretion of the trial judge." *Id.*

[82] *Id.* (quoting *State v. Mills*, 420 S.E.2d 114, 117 (N.C. 1992)).

[83] *Id.* (quoting *State v. Mills*, 420 S.E.2d 114, 117 (N.C. 1992)).