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An Attempt to Level the Playing Field: Obtaining Resources in State and Federal Habeas

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I. Introduction

Of all the capital cases reviewed in federal habeas proceedings between 1976 and 1991, nearly half (46%) were found to contain federal constitutional error.[1] With this disturbing statistic lurking in the background, counsel providing habeas representation to persons convicted of capital murder have their work cut out for them. Because many constitutional errors cannot be detected by simply reviewing the trial transcript, habeas counsel must re-investigate the entire case to determine potential sources of constitutional error. To expect one or even two attorneys to adequately perform this task without assistance is simply asking too much.

This article examines the interrelationship between habeas in Virginia and federal habeas, concentrating on the necessary steps which state habeas counsel must take to preserve federal claims for review in the federal courts. It then explores the ways in which federal habeas counsel may obtain government funding for investigative, expert and other services sought during the course of representation in federal habeas proceedings. The goal is to obtain such services simply to allow habeas counsel to adequately and effectively represent a death-sentenced prisoner in this last step of the legal process before execution.

II. Habeas Corpus in the Virginia Courts

In theory, state habeas in Virginia exists for defendants[2] whose trials contained constitutional error.[3] In practice, however, habeas corpus proceedings in Virginia are nothing more than a dangerous formality because, although relief at

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1. James S. Liebman, *More Than 'Slightly Retro:' The Rehnquist Court's Rout of Habeas Corpus Jurisdiction in* Teague v. Lane, 18 N.Y.U. REV. L. & SOC. CHANGE 537, 541 n.15 (1990-1991).

2. Although a convicted criminal defendant assumes the role of "petitioner" when filing a petition for a writ of habeas corpus, this article simply refers to the convicted criminal as "defendant" regardless of the stage of the proceedings.

3. Slayton v. Parrigan, 205 S.E.2d 680 (Va. 1974).

this point is highly unlikely, the possibility for procedural default of valid federal claims is very real.

In 1995, Virginia amended its habeas procedures for persons convicted of capital murder.[4] All habeas petitions for capital defendants must be filed with the Supreme Court of Virginia.[5] The court has the authority to either dismiss the petition or order the circuit court to conduct an evidentiary hearing on specific issues.[6] To date, the Supreme Court of Virginia has never ordered an evidentiary hearing, instead granting the Attorney General's motion to dismiss the petition in every case.

In light of these facts, the realistic objective of state habeas representation in Virginia may well be one of preserving federal claims rather than obtaining relief on the merits. Because of the importance of properly presenting federal claims in state habeas, this section briefly discusses the basics of Virginia habeas law.

By the time state habeas counsel takes a case, multiple claims may already be procedurally defaulted. The Supreme Court of Virginia adheres strictly to its rule that all claims not properly preserved at trial, assigned as error, and briefed to the court on direct appeal are procedurally defaulted and not cognizable on state habeas review.[7] It is well settled that failure to follow a state procedural rule which results in a federal claim being procedurally defaulted in state court constitutes an independent and adequate state ground which bars federal habeas review of the claim.[8] This bar to federal review of federal claims created by the independent and adequate state grounds doctrine is not relaxed in capital cases.[9]

All claims of constitutional error which can be gleaned from the trial record must be raised on direct appeal.[10] If this is done properly, then these claims will be preserved for federal habeas review because claims considered on direct appeal cannot be raised in state habeas.[11] Thus, the state habeas petition should

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4. *See* Gregory J. Weinig, *Virginia's New State Habeas: What Every Attorney Needs To Know*, CAP. DEF. DIG., vol. 8, no. 1, p. 31 (1995).

5. VA. CODE ANN. § 8.01-654(C)(1) (Michie 1998).

6. *Id.*

7. *Slayton*, 205 S.E.2d at 682.

8. Coleman v. Thompson, 501 U.S. 722, 729 (1991). *See* Carey L. Cooper, *The Never Ending Story: Combating Procedural Bars In Capital Cases*, CAP. DEF. J., vol. 9, no. 2, p. 38 (1997) (discussing procedural default barriers to review in Virginia and offering suggestions for avoidance of these pitfalls).

9. In *Coleman*, the defendant was convicted of capital murder and sentenced to death. The Supreme Court of Virginia affirmed the conviction and sentence. Coleman v. Commonwealth, 307 S.E.2d 864 (Va. 1983). The Circuit Court denied Coleman's state habeas petition. Coleman's state habeas attorney filed his notice of appeal with the Supreme Court of Virginia three days after the filing deadline. The Supreme Court of Virginia held that all of the defendant's claims were procedurally defaulted. The U.S. Supreme Court applied the independent and adequate state grounds doctrine and held that the federal courts could not hear Coleman's constitutional claims. *Coleman*, 501 U.S. at 757.

10. Claims of ineffective assistance are not cognizable on direct appeal and therefore must be raised for the first time in state habeas. Roach v. Commonwealth, 468 S.E.2d 98, 105 n.4 (Va. 1996), *cert. denied*, 117 S.Ct. 365 (1996).

11. Hawks v. Cox, 175 S.E.2d 271 (Va. 1970). *Hawks* operates as a collateral estoppel rule

only include claims of ineffective assistance of counsel, failure to disclose exculpatory evidence under *Brady v. Maryland*,[12] misconduct involving jurors and the trial judge and claims of innocence tied to constitutional error.[13] Of course, it is essential that the state habeas petition include such claims because they will otherwise be unreviewable at federal habeas.[14]

The very nature of the claims that are cognizable at state and federal habeas reveals the need for resources in investigating and presenting these claims in habeas proceedings. The basis for all of these claims can be discovered only through a re-investigation of the entire case. In light of this, habeas counsel's need for investigative and expert resources during state and federal habeas proceedings is clear.

A realistic assessment of state habeas in Virginia must recognize that the Supreme Court of Virginia will almost certainly deny all requests for resources in state habeas proceedings.[15] However, to maximize the chances that expert and investigative resources will be granted at federal habeas, state habeas counsel should file a request with the Supreme Court of Virginia for expert and investigative assistance in the preparation of the petition. Counsel should then renew the request for expert and investigative resources when the state habeas petition is filed. Of course, the odds are overwhelming that the Supreme Court of Virginia will deny the motion for pre-petition resources and then grant the Attorney General's motion to dismiss the petition, thus rendering moot the post-petition request for resources. However, by raising all potential claims in the state habeas petition and requesting that the Supreme Court of Virginia authorize the appointment of expert and investigative services, the state habeas counsel will accomplish two very important goals. First, the federal claims will be preserved for review in federal habeas proceedings. Second, the defendant will be able to show that he has not "failed" to develop the factual basis for the federal claims in the state proceedings.[16]

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rather than a procedural default rule. Thus, it does not prevent federal review of federal claims properly preserved through the direct appeal stage of the proceedings. Turner v. Williams, 35 F.3d 872, 890 (4th Cir. 1994). Under *Turner*, when a claim is properly raised on direct appeal, state habeas counsel need not include the claim in the state habeas petition as it is already preserved for federal habeas review.

12. 373 U.S. 83 (1963).

13. *See infra* Section III, Part E.

14. Take, for example, a claim of ineffective assistance of counsel. Under *Roach*, this claim cannot be raised on direct appeal. However, if state habeas counsel does not raise the claim, and the claim is subsequently presented during federal habeas proceedings, the federal court will dismiss the claim because it has not been exhausted in the state courts. *See* Rose v. Lundy, 455 U.S. 509 (1982). Upon remand, the claim will be dismissed by the Supreme Court of Virginia as procedurally defaulted and further federal court review will thus be precluded.

15. Virginia's new state habeas procedures for death-sentenced prisoners went into effect in 1996. Under the new procedures, the Supreme Court of Virginia has never granted a defendant's request for resources in habeas proceedings.

16. The potential significance of this point is discussed in Section III, Parts D and E, *infra*.

III. Obtaining Resources in Federal Habeas Corpus Proceedings

A. Introduction

Habeas counsel representing indigent defendants in federal habeas proceedings are presented with a formidable task. After sifting through the "accumulating and often Byzantine restrictions"[17] that the federal courts and Congress have imposed on federal habeas corpus review, defense counsel must determine what federal claims have not been procedurally defaulted and also whether any defaulted federal claims might be resurrected for consideration on the merits by the federal district court. All this, of course, is merely the precursor to further investigation of viable claims and preparation of the petition for a writ of habeas corpus.

This part of the article examines the availability of federal funding to defense counsel for resources in connection with federal habeas cases involving capital defendants. Such resources, while not available in all federal habeas capital cases, are more readily obtainable than in state habeas proceedings before the Supreme Court of Virginia. Particular attention is paid to those provisions of 28 U.S.C. § 2254 recently amended by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA")[18] and the potential effect of these amended sections on the availability of resources in federal habeas proceedings. Finally, this section examines the ways in which procedurally defaulted claims may be resurrected for consideration on the merits by the federal courts and suggests ways in which the federal resource statutes may aid in this endeavor.

B. The Federal Resource Statutes[19]

Federal law provides compensation for defense counsel representing defendants convicted of capital offenses in federal habeas proceedings and federal funds for services obtained in connection with the representation:

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17. McFarland v. Scott, 512 U.S. 1256, 1263 (1994) (Blackmun, J., dissenting from denial of writ of certiorari).

18. Pub. L. No. 104-132, 110 Stat. 1214. This article addresses only those provisions of AEDPA which may be relevant to requests for resources; however, the effects of AEDPA are far-reaching. *See* Jeanne-Marie Raymond, *The Incredible Shrinking Writ, Part I: Habeas Corpus Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, CAP. DEF. J., vol. 9., no. 1, p. 52 (1996); & Mary Eade, *The Incredible Shrinking Writ, Part II: Habeas Corpus Under the Anti-Terrorism and Effective Death Penalty Act of 1996*, CAP. DEF. J., vol. 9., no. 2, p. 55 (1997).

19. This article focuses solely on 21 U.S.C. § 848(q)(9) as a source of resources in federal habeas proceedings. Another source of federal funding for resources is found under 18 U.S.C. §3006 A(e). Section 3006 provides for the appointment of investigative, expert, and other services *necessary* for adequate representation for defendants unable to afford such services. Section 3006 presents two main disadvantages when compared to section 848 as a source of resources for defendants facing the death penalty. First, section 3006 requires a threshold showing by the defendant that the services sought are *necessary* for the representation, while section 848 requires only that the services be *reasonably necessary*. Second, and more importantly, section 3006 authorizes only up to $1,000 to be awarded for all services in a case. In contrast, section 848 authorizes

> [i]n any post conviction proceeding under section 2254 or 2255 of Title 28, seeking to vacate or set aside a death sentence, any defendant who is or becomes financially unable to obtain adequate representation or investigative, expert, or other reasonably necessary services shall be entitled to the appointment of one or more attorneys and the furnishing of such other services in accordance with paragraphs . . . (9).[20]

Subparagraph (9), referred to above, provides that:

> [u]pon a finding that investigative, expert, or other services are reasonably necessary for the representation of the defendant, whether in connection with issues relating to guilt or the sentence, the court may authorize the defendant's attorneys to obtain such services on behalf of the defendant and, if so authorized, shall order the payment of fees and expenses therefor under paragraph (10).[21]

Section 848(q)(4)(B) grants capital defendants unable to obtain adequate representation a mandatory right to counsel in section 2254 postconviction proceedings.[22] This right to counsel is absolute and, as such, cannot be conditioned on the potential merits of the defendant's federal habeas claims.[23]

In sum, habeas counsel may obtain funds for investigative, expert, or other services under 21 U.S.C. § 848(q)(9) upon a showing that (1) the defendant is financially unable to pay for the services for which funds are sought and (2) the services are "reasonably necessary" for the representation of the defendant.[24]

Section 848 does not provide a definition of "reasonably necessary," and the courts have failed to develop a uniform standard, instead evaluating requests for resources on an ad hoc basis. One general principle which emerges from the

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expenses of up to $7,500 in an individual case. The only potential advantage to using section 3006 is that, once the defendant shows that the services requested are necessary for adequate representation, the court has a mandatory duty to authorize payment for such services. Under section 848, the district court's authorization of payment for services is discretionary even where the defendant shows that such services are reasonably necessary for the representation. Section 848 originally placed a mandatory duty on district courts to authorize payment for resources shown by defendants to be reasonably necessary. AEDPA amended the section to make this duty discretionary. However, this author was unable to find any case law which either (1) discusses any changes in standards to be applied by the federal courts based on the newly discretionary status of section 848 or (2) found services to be reasonably necessary but exercised discretionary authority and refused to authorize the provision of such services.

20. 21 U.S.C. § 848(q)(4)(B).

21. 21 U.S.C. § 848(q)(9).

22. *McFarland*, 512 U.S. at 854. Compensation for counsel appointed under section 848(q)(4)(B) is set by statute. The current maximum rate is $125 per hour for in-court and out-of-court time. 21 U.S.C. § 848(q)(10)(A).

23. Weeks v. Jones, 100 F.3d 124, 127 (11th Cir. 1996).

24. As noted, a cap of $7,500 is placed on fees and expenses paid for expert, investigative, and other reasonably necessary services awarded under section 848(q)(9). Expenditures in excess of this amount may be awarded with the approval of the chief judge of the circuit. 21 U.S.C. § 848(q)(10)(B).

case law is that the "reasonably necessary" analysis differs depending on whether resources are sought before or after the filing of the petition. As the following discussion of these standards shows, counsel are almost always better off requesting resources before filing the petition.

C. *Requests for Resources Before Filing The Petition*

When resources are requested under section 848(q)(9) before the petition is filed, the analysis of whether such services are reasonably necessary will depend on whether defense counsel is seeking investigative or expert services.

1. *Investigative Services*

A request for an investigator must include an explanation of: *(1) the necessity of an investigator, (2) the exact duties to be performed by the investigator and (3) the reasons why the attorneys cannot perform the investigation.*[25] Under this three-part requirement, the district court in *DeLong v. Thompson*[26] found that an investigator was not reasonably necessary to probe into the "professional and personal" backgrounds of the defendant's trial attorneys or the presiding judge's potential conflicts of interest.[27] *DeLong* thus provides little guidance into the relative weight of each of the three factors.

However, as a re-investigation of the case outside of the trial transcript is necessary to discover possible constitutional errors in the defendant's conviction and death sentence, it seems that the "necessity for an investigator" stems directly from the need to provide competent representation. Furthermore, due to the massive amount of work required to competently investigate the case, it should also be clear why habeas counsel cannot perform all parts of the investigation without assistance.

2. *Expert Services*

In *Wright v. Angelone*,[28] the Fourth Circuit held that expert services are reasonably necessary to the representation under section 848(q)(9) when a "substantial question exists over an issue requiring expert testimony for its resolution and the defendant's position cannot be fully developed without professional assistance."[29] The defendant in *Wright* sought the services at federal habeas of a court-appointed neurologist to determine whether the defendant suffered from an organic brain disorder. The neurologist's services were apparently sought in connection with a penalty trial ineffective assistance of counsel

25. DeLong v. Thompson, 790 F. Supp. 594, 617 (E.D. Va. 1991).

26. 790 F. Supp. 594 (E.D. Va. 1991).

27. *DeLong*, 790 F. Supp. at 617.

28. 151 F.3d 151 (4th Cir. 1998).

29. Wright v. Angelone, 151 F.3d 151, 163 (4th Cir. 1998) (quoting Williams v. Martin, 618 F.2d 1021, 1026 (4th Cir. 1980)).

claim. In affirming the district court's denial of this request, the Fourth Circuit relied entirely on the fact that the defendant had been examined by three mental health experts before trial.[30] All three experts had determined that the defendant was not brain damaged. Therefore, the court held that the services of a fourth expert were not reasonably necessary to research an issue that had been "thoroughly investigated, presented to the jury, and ultimately resolved at trial."[31]

Wright is troubling for several reasons. First, the reasonably necessary standard adopted by the court is the same standard previously used to determine whether an expert is constitutionally required to assist an indigent defendant in the preparation and presentation of an adequate defense.[32] This standard was adopted prior to the promulgation of section 848(q)(9) and does not reflect the arguably more lenient statutory standard. In addition, it can be argued that if the section 848(q)(9) reasonably necessary standard is based on the constitutional standard for appointment of experts then its definition would be a fluid one, changing in conjunction with the evolution of constitutional law.[33]

Burris v. Parke,[34] a case cited by the court in *Wright*, sheds some light on the application of the reasonably necessary standard in the context of an ineffective assistance of counsel claim. In *Burris*, the defendant raised an ineffective assistance of counsel claim challenging the performance of his counsel at the penalty phase of his trial. The defendant's habeas counsel sought the appointment of a mental health expert to determine whether the defendant was suffering from a brain injury at the time of the offense as a result of previously being shot in the head -- an argument not raised by defense counsel in the penalty phase.

The Seventh Circuit held that the appointment of a mental health expert was not reasonably necessary and upheld the district court's denial of the defendant's request.[35] In reaching this conclusion, the court of appeals found that the findings of an expert appointed for habeas proceedings would be irrelevant so long as the performance of trial counsel did not fall beneath the standard of

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30. *Wright*, 151 F.3d at 163.

31. *Id.* A very real question remains, however, concerning the qualifications of particular experts to diagnose particular conditions. *See* Case Note on *Wright v. Angelone*, 11 CAP. DEF. J. 185 (1998).

32. In *Williams v. Martin*, 618 F.2d 1021 (4th Cir. 1980), the court of appeals held that the trial court's denial of the defendant's request for an expert constituted a denial of the defendant's 14th Amendment equal protection rights. *Williams*, 618 F.2d at 1027. In *Wright*, the Fourth Circuit adopted this standard verbatim to define the section 848(q)(9) requirement that federal funding is available only for experts which are reasonably necessary to the defendant's representation.

33. For example, in *Ake v. Oklahoma*, 470 U.S. 68 (1985), the Supreme Court held that when a defendant demonstrates that his sanity at the time of the offense will be a "significant factor" at trial, the trial court must appoint a competent psychiatrist to assist the defense. *Id.* at 83. Although it may appear that characterization of an issue as a "substantial question" under *Wright* or a "significant factor" under *Ake* is nothing but an exercise in semantics, even such minor differences in language may be interpreted inconsistently by the courts.

34. 116 F.3d 256 (7th Cir. 1997).

35. Burris v. Parke, 116 F.3d, 256, 259-60 (7th Cir. 1997).

reasonableness required by the Sixth Amendment.[36] As the defendant had been subjected to three separate mental examinations -- two before trial and one before sentencing -- the court of appeals found that the failure of trial counsel to seek further mental examinations of the defendant was not objectively unreasonable.[37] Since there was no colorable ineffective assistance of counsel claim, the appointment of experts to develop such a claim was not reasonably necessary.[38]

This analysis has been applied by other federal courts. Thus, it is accepted that the appointment of an expert is not reasonably necessary where the constitutional claim for which such expert assistance is sought cannot be reviewed on the merits or the claim would not be successful on the merits regardless of the expert's finding.[39]

Wright and *Burris* should be strictly limited to their facts. At most they stand for the proposition that the appointment of an expert is not reasonably necessary when multiple experts have previously researched the exact issue which a defendant seeks to raise in the federal habeas proceedings. Thus, *Wright* should not bar the appointment of an expert for federal habeas proceedings, even where an identical expert was utilized at trial, so long as the habeas expert researches an issue unexplored by the trial expert. Additionally, the appointment of experts may be reasonably necessary when no such expert was obtained by trial counsel.

Habeas counsel may take advantage of the sparse case law regarding application of the reasonably necessary standard to seek the services of any and all experts who will potentially be able to assist in the development of viable constitutional claims. The standards articulated in *DeLong* and *Wright* are flexible and may be adapted to allow many types of requests for expert and investigative assistance depending on the facts and creative thinking of habeas counsel.

D. Requests For Resources After Filing Petition

Should habeas counsel wait until after the petition is filed to seek funding for expert or investigative services such services will be much harder to come by than if requested prior to the filing of the petition. Since the only role for such "post-petition" experts would be to testify at an evidentiary hearing, the appointment of an expert is reasonably necessary only when the defendant is entitled to an evidentiary hearing.[40] AEDPA places new restrictions on the authority of district courts to grant evidentiary hearings. Thus, habeas counsel must be familiar with this new standard to make a colorable argument that an evidentiary

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36. *Burris*, 116 F.3d at 259. *See infra* Section III, Part E (discussing the *Strickland v. Washington*, 466 U.S. 668 (1984), standard for ineffective assistance of counsel under the Sixth Amendment).

37. *Burris*, 116 F.3d at 259.

38. *Id.*

39. *See* Weeks v. Angelone, 4 F. Supp.2d 497, 519 (E.D.Va. 1998).

40. Lawson v. Dixon, 3 F.3d 743, 753 (4th Cir. 1993).

hearing is allowed under AEDPA and the court is therefore permitted to authorize the provision of services under section 848(q)(9).

As amended by AEDPA, 28 U.S.C. § 2254(e)(2) provides:

> *If the applicant has failed* to develop the factual basis of a claim in State court proceedings, the court shall not hold an evidentiary hearing on the claim unless the applicant shows that-
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> (A) the claim relies on
>
> (i) a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
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> (ii) a factual predicate that could not have been previously discovered through the exercise of due diligence; and
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> (B) the facts underlying the claim would be sufficient to establish by clear and convincing evidence that but for the constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.[41]

Under this section of AEDPA, defendants who have failed to develop a factual basis for their claims must make two showings to obtain an evidentiary hearing. The first showing can be satisfied in one of two ways -- either the claim relies on new Supreme Court constitutional law or it is based on a previously undiscoverable factual predicate. In addition, the defendant must show his or her probable innocence of the underlying offense.[42] Unquestionably, this standard will prevent most, if not all, of the defendants subject to its strictures from obtaining an evidentiary hearing for their federal habeas petitions.

This is not as bad as it might seem. The heavy burden created by section 2254(e)(2) is placed only on defendants who have failed to develop facts in state court proceedings. In *Cardwell v. Greene*,[43] the Fourth Circuit held that a habeas defendant who diligently seeks to develop the factual basis of a claim for habeas relief, but has been denied the opportunity to do so by the state court, is not precluded under section 2254(e)(2) from obtaining an evidentiary hearing in federal court.[44] Ironically, the Supreme Court of Virginia's categorical rejection of requests for resources in state habeas proceedings will actually prove beneficial in avoiding the requirements of section 2254(e)(2) as interpreted by the *Cardwell* court.

The facts of *Cardwell* are illustrative. After affirmance of his death sentence by the Supreme Court of Virginia, Cardwell raised a claim of ineffective assistance of counsel in his state habeas petition. The Supreme Court of Virginia denied Cardwell's motion for appointment of experts and summarily denied the petition.[45] The Fourth Circuit held that, under these circumstances, Cardwell had

41. 28 U.S.C. § 2254(e)(2)(emphasis added).

42. This provision of AEDPA apparently modifies *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), by requiring a habeas defendant to show both cause for the failure to develop the facts in state proceedings *and* probable innocence.

43. 152 F.3d 331 (4th Cir. 1998). *See* Case Note on *Cardwell v. Greene*, 11 CAP. DEF. J. 77 (1998).

44. Cardwell v. Greene, 152 F.3d 331, 337 (4th Cir. 1998).

45. *Cardwell*, 152 F.3d at 335.

not failed to develop the facts of his claim in the state proceedings and was not subject to the requirements of section 2254(e)(2).[45]

The *Cardwell* court recognized that section 2254(e)(2) presents an "initial hurdle" for habeas defendants.[46] The defendant can clear this hurdle by showing either that he or she did not fail to develop facts in state court proceedings or by meeting the dual requirements of section 2254(e)(2)(A)-(B). However, "even if [the defendant's] claim is not precluded by section 2254(e)(2), that does not mean that he is entitled to an evidentiary hearing–only that he may be."[47] Once the defendant clears the section 2254(e)(2) hurdle, the district court will then consider whether an evidentiary hearing is either appropriate or required by applying pre-AEDPA law.[48]

Under *Cardwell*, when the Supreme Court of Virginia denies a state habeas defendant's request for expert or investigative services and summarily dismisses the petition, that defendant has not failed to develop the facts of the constitutional claim within the meaning of section 2254(e)(2). The defendant may then argue either that the sixth circumstance of *Townsend* requires an evidentiary hearing or that the district court should exercise its discretionary authority to conduct a hearing. However, in order to take advantage of this rule, it is essential that *state* habeas counsel raising an ineffective assistance of counsel claim request that the Supreme Court of Virginia appoint experts or investigators to aid in the preparation of the petition. This will allow the defendant to avoid the rigid requirements of section 2254(e)(2) and preserve the defendant's right to a federal habeas evidentiary hearing.[49] Once the defendant's right to an evidentiary hearing

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45. *Id.* at 338.

46. *Id.* at 337.

47. *Id.* at 338 (quoting McDonald v. Johnson, 139 F.3d 1056, 1059-60 (5th Cir. 1998)).

48. *Cardwell*, 152 F.3d at 337. The court in *Cardwell* cited *Townsend v. Sain*, 372 U.S. 293 (1963), and *Keeney v. Tamayo-Reyes*, 504 U.S. 1 (1992), as the controlling pre-AEDPA law governing the ability of the district court to grant evidentiary hearings. A federal court possesses the discretionary authority to conduct an evidentiary hearing "where an applicant for a writ of habeas corpus allege[d] facts which, if proved, would entitle him to relief." *Townsend*, 372 U.S. at 312. Furthermore, an evidentiary hearing is required where: "(1) the merits of the factual dispute were not resolved in the state hearing; (2) the state factual determination is not supported by the record as a whole; (3) the fact-finding procedure employed by the state court was not adequate to afford a full and fair hearing; (4) there is a substantial allegation of newly discovered evidence; (5) the material facts were not adequately developed at the state court hearing; or (6) for any reason it appears that the state trier of fact did not afford the habeas applicant a full and fair fact hearing." *Id.* at 313.

Keeney modified *Townsend*'s fifth circumstance, holding that where a defendant's failure to develop the critical facts relevant to his federal claim was attributable to inexcusable neglect, an evidentiary hearing is required only if the defendant can show cause for the failure and actual prejudice resulting from that failure. *Keeney*, 504 U.S. at 11.

49. The fact that a defendant has additional expert opinions to present in federal habeas proceedings does not, by itself, require the district court to grant an evidentiary hearing. *Cardwell* recognizes that the district court may simply expand the record to include the expert reports. *Cardwell*, 152 F.3d at 338-39. Thus, to maximize the chances that an evidentiary hearing will be

is established, the district court may then authorize the appointment of experts under section 848.[51]

E. Using Section 848(q)(9) to Resurrect Procedurally Defaulted Claims

The frequency with which federal habeas courts apply the independent and adequate state grounds doctrine to avoid hearing federal claims on the merits in capital cases is alarming. This is especially true given the fact that almost half of these cases contain federal constitutional error.[52] A recent examination of thirty-three capital cases in Virginia over a ten year period revealed a total of ninety-eight claims which the Supreme Court of Virginia held to be procedurally barred.[53] Of course, any federal claims included among the ninety-eight were forever precluded from federal review.[54]

Given this situation, federal habeas counsel will often begin their representation at a disadvantage as colorable constitutional claims will have been defaulted at various stages of the state proceedings. This section explains the methods by which procedurally defaulted federal claims may be resurrected for review on the merits. It also explores whether resources available under section 848(q)(9) may be "reasonably necessary" to resurrect defaulted claims.

It may seem unconventional to ask a federal court for expert or investigative services to assist in the groundwork necessary for the resurrection of a procedurally defaulted federal claim. However, the language of section 848(q)(9) is arguably broad enough to encompass such endeavors. Under section 848(q)(9), a court may authorize habeas counsel to obtain investigative, expert, or other services upon a finding that such services are "reasonably necessary *for the representation of the defendant*...."[55] A colorable argument exists that adequate representation of the defendant includes not only the investigation and preparation of viable federal claims but also a full investigation into the possibilities of overcoming procedural defaults.

Two general mechanisms allow the resurrection of procedurally defaulted federal claims for consideration on the merits. Generally, a federal court may hear the claim if the defendant shows either (1) cause for the default and actual prejudice arising therefrom or (2) that failure to consider the claim will result in a fundamental miscarriage of justice.[56] Each will be considered in turn.

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granted, defense counsel should attempt to develop a genuine issue of material fact relating to the expert opinion which requires an evidentiary hearing for resolution.

51. *See supra* note 40.

52. *See supra* note 1.

53. Carey L. Cooper, *The Never Ending Story: Combating Procedural Bars In Capital Cases*, CAP. DEF. J., vol. 9, no. 2, p. 38 (1997).

54. *See supra* note 7.

55. 21 U.S.C. § 848(q)(9) (1991) (emphasis added).

56. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

1. Cause and Actual Prejudice

A federal court may consider a procedurally defaulted federal claim if the defendant can demonstrate "cause for the default and actual prejudice as a result of the alleged violation of federal law."[57] Constitutionally ineffective assistance of counsel constitutes cause for the default.[58]

Strickland v. Washington [59] set forth the well-known two-part ineffective assistance of counsel analysis. The defendant must show that the performance of trial counsel fell below an objective standard of reasonableness[60] and that the defendant was prejudiced by the deficient performance.[61] A defendant establishes prejudice under *Strickland* where there is a reasonable probability that but for counsel's error, the result of the proceeding would have been different and confidence in the outcome is thereby undermined.[62] Specifically, when a capital defendant challenges the performance of counsel in the selection part of the trial's penalty phase, the defendant must show that there exists a "reasonable probability that absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death."[63]

A defendant who establishes "cause" under *Murray* (by meeting the *Strickland* test for ineffective assistance of counsel) must next satisfy *Murray*'s "actual prejudice" requirement. Of course, the defendant has already shown the existence of prejudice under the second prong of *Strickland*. Actual prejudice, however, requires the defendant to raise *Strickland* prejudice to a higher level by showing that the constitutional error worked to the defendant's "actual and substantial disadvantage."[64]

In sum, a defendant seeking to raise a procedurally defaulted claim under *Murray* must show that he or she received ineffective assistance of counsel (*Strickland* cause and prejudice) and then prove that the prejudice can be charac-

57. *Coleman*, 501 U.S. at 750.

58. Murray v. Carrier, 477 U.S. 478, 488 (1986). Claims of ineffective assistance of counsel must be predicated on the performance of trial or direct appeal counsel. As there is no constitutional right to counsel in state or federal habeas proceedings, there is no corresponding right to effective assistance of counsel in habeas proceedings. Murray v. Giarratano, 492 U.S. 1 (1989). This principle extends to claims which are not cognizable on direct appeal and may be raised for the first time in state habeas. Mackall v. Angelone, 131 F.3d 442 (4th Cir. 1997).

59. 466 U.S. 668 (1984).

60. Strickland v. Washington, 466 U.S. 668, 687-88 (1984).

61. *Strickland*, 466 U.S. at 687.

62. *Id.* at 694.

63. *Id.* at 695. In Virginia capital trials, the "selection" part of the penalty phase occurs after the trier of fact has found the existence beyond a reasonable doubt of one or both of the aggravating factors -- "vileness" or "future dangerousness." At least one aggravating factor must be found for the defendant to be eligible for a death sentence, thus the consideration of the existence of these aggravating factors is referred to as the "eligibility" part of the penalty phase. *See* Case Summary of *Buchanan v. Angelone*, CAP. DEF. J., vol. 10, no. 2, p. 4 (1998) (discussing these two components of the penalty phase).

64. Murray v. Carrier, 477 U.S. 478, 494 (1986).

terized as actual prejudice. Habeas counsel may argue that investigative and expert services are reasonably necessary to develop the ineffective assistance claim[63] and thus are reasonably necessary "for the representation of the defendant."[64]

2. A Fundamental Miscarriage of Justice -- The Actual Innocence Gateway to Resurrection

Apart from showing cause and prejudice under *Murray*, a defendant may also resurrect procedurally defaulted federal claims by demonstrating that a failure to consider such claims will result in a "fundamental miscarriage of justice."[65] Under this principle, a federal habeas court may review the defendant's federal claims if the defendant can show either innocence of the underlying offense[66] or innocence of the death penalty.[67]

a. Innocence of the Underlying Offense

A showing of innocence of the underlying offense exists when a defendant presents "new reliable evidence"[68] that a "constitutional violation has probably resulted in the conviction of one who is actually innocent."[69] This requires that the defendant show that it is "more likely than not that no reasonable juror would have convicted him in light of the new evidence."[70]

In *Schlup*, the U.S. Supreme Court noted three types of new evidence - exculpatory scientific evidence, trustworthy eyewitness evidence and critical physical evidence - which might establish a colorable claim of actual innocence.[71] Investigative, expert, or other services may well be the only way to discover such evidence. As such, these services would arguably be reasonably necessary for the representation.

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63. *See supra* Section III, Part C.

64. In order for a claim of ineffective assistance of counsel to provide cause for a procedural default under *Murray*, the ineffective assistance claim must itself be a valid freestanding claim that has been presented to the state courts. *Murray*, 477 U.S. at 489. The Fourth Circuit has held that a procedurally defaulted ineffective assistance claim cannot serve as "cause" even if counsel is attempting to resurrect an unrelated constitutional claim. Justus v. Murray, 897 F.2d 709 (4th Cir. 1990). The defendant in *Justus* sought to raise several procedurally defaulted claims in his federal habeas petition. The defendant argued that he received ineffective assistance of counsel which constituted "cause" for resurrecting the claims. However, the defendant's ineffective assistance claim was also procedurally defaulted. As such, the court of appeals found that the ineffective assistance claim could not provide cause to resurrect the other defaulted claims. *Justus*, 897 F2d. at 715.

65. Coleman v. Thompson, 501 U.S. 722, 750 (1991).

66. Schlup v. Delo, 513 U.S. 298 (1995).

67. Sawyer v. Whitley, 505 U.S. 333 (1992).

68. *Schlup*, 513 U.S. at 324.

69. *Id.* at 327 (quoting Murray v. Carrier, 477 U.S. 478, 496 (1986)).

70. *Id.* at 330.

71. *Id.* at 324.

It is less certain if the services of a mental expert will be reasonably necessary when the expert is sought to find "new" evidence relating to the defendant's mens rea at the time of the offense. The Fourth Circuit's decision in *Stewart v. Angelone*[74] is illustrative of this problem. In *Stewart*, a mental health expert testified on behalf of Stewart at trial. However, the expert concluded that Stewart did not suffer from any mental illnesses at the time of the offense that would have negated the requisite mens rea. In his federal habeas petition, Stewart presented the affidavit of a pathologist who had reviewed Stewart's case file. The pathologist determined that Stewart "may suffer" from temporal lobe epilepsy. This claim, if proven, would negate the mens rea for capital murder. Such evidence, Stewart argued, established a colorable claim of actual innocence and thus allowed the federal court to consider his procedurally defaulted federal claims on the merits.

The Fourth Circuit rejected Stewart's argument, holding that the pathologist's affidavit did not constitute "new evidence" under *Schlup*.[75] In reaching this conclusion, the court relied on the fact that the pathologist had based his analysis on the same evidence as the trial expert but had reached a different conclusion.[76] Furthermore, the pathologist's conclusion that Stewart might suffer from temporal lobe epilepsy was based "principally" on the report of the trial expert contained in Stewart's file.[77]

Stewart may appear to present a serious obstacle to raising actual innocence claims based on mental state evidence. However, its holding is a limited one and should be recognized as such. *Stewart* does not foreclose the possibility that, under different facts, the findings of a habeas mental expert may constitute "new evidence" under *Schlup*. Such a conclusion might be based on the habeas expert's own preliminary examination of the defendant or on evidence not discovered by the trial expert.

b. Innocence of the Death Penalty

A federal court may review a capital defendant's procedurally defaulted claims if the defendant can show by clear and convincing evidence that "but for a constitutional error, no reasonable juror would have found the defendant eligible for the death penalty under the applicable state law."[78] This gateway to the resurrection of defaulted claims is limited to errors in the eligibility phase of

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74. No. 97-26, 1998 WL 276291, at *1 (4th Cir. May 29, 1998) (unpublished disposition).

75. Stewart v. Angelone, No. 97-26, 1998 WL 276291, at *4 (4th Cir. May 29, 1998).

76. *Stewart*, 1998 WL 276291, at *4. *See also* Bannister v. Delo, 100 F.3d 610, 618 (8th Cir.), *cert. denied*, 118 S.Ct. 1489 (1997) ("[P]utting a different spin on evidence that was presented to the jury does not satisfy the requirements set forth in *Schlup*.") (quoting Bannister v. Delo, 904 F. Supp. 998, 1004 (W.D. Mo. 1995)).

77. *Stewart*, 1998 WL 276291, at *4.

78. Sawyer v. Whitley, 505 U.S. 333, 336 (1992).

the sentencing proceeding and does not include alleged constitutional errors in the presentation of mitigating evidence during the selection phase.[79] Thus, under Virginia law, a defendant must argue that, but for the constitutional error at the penalty phase, no reasonable juror would have found future dangerousness or vileness beyond a reasonable doubt.[80]

It is important to remember that under Virginia law, a conviction of capital murder is the underlying offense. Evidence negating an element of the capital murder conviction should be considered under *Schlup* rather than the more stringent *Sawyer* standard. For example, evidence negating the rape or robbery predicates of section 18.2-31 of the Virginia Code would be evaluated under *Schlup*. Conversely, evidence negating the defendant's future dangerousness must be considered under *Sawyer*.[81]

3. The Continued Viability of Schlup *and* Sawyer *in Resurrecting Defaulted Claims*

The Commonwealth has attempted to argue in at least one case that AEDPA has abolished the "innocence of the death penalty" method of resurrecting procedurally defaulted claims previously available under *Sawyer*. In *Weeks v. Angelone*,[82] the Commonwealth relied on both 28 U.S.C. § 2264(a) and 28 U.S.C. § 2254(e)(2) to argue that *Sawyer* had been statutorily overruled.[83] The district court rejected this argument.[84] Although section 2264(a) appears to severely limit the ability of a federal court to consider claims not raised in state court, this section is only available to "opt-in" states which meet certain requirements concerning the appointment of qualified counsel to indigent defendants and compensation for such counsel.[85] The Virginia statutory habeas counsel appointment scheme fails to satisfy this requirement and thus the Commonwealth cannot avail itself of the benefits available to "opt-in" states, including section 2264(a).[86] Second, section 2254(e)(2), while applicable to all states, deals only with the ability of federal habeas courts to conduct evidentiary hearings. While an evidentiary hearing may, as a practical matter, increase the chances that a defendant will succeed on the merits of the petition, it does not preclude the federal courts from considering the claim on its merits.[87]

Although the Commonwealth's argument is a loser (unless Virginia becomes an "opt-in" state), habeas counsel should be aware that the Commonwealth may

79. *Sawyer*, 505 U.S. at 345.
80. *See supra* note 61.
81. *See* Case Note on *Calderon v. Thompson*, 11 CAP. DEF. J. 47 (1998).
82. 4 F. Supp.2d 497 (E.D. Va. 1998).
83. *Weeks*, 4 F. Supp.2d at 507.
84. *Id.* at 509.
85. *See* 28 U.S.C. § 2261.
86. *Weeks*, 4 F. Supp.2d at 506.
87. *Id.* at 509.

continue to recycle this argument and be prepared to explain why, under *Weeks*, it lacks merit.[88]

4. Proceeding Through the Innocence Gateway - The Need for Experts

The U.S. Supreme Court formulated the *Schlup* and *Sawyer* standards to deal only with the "extraordinary case."[89] Clearly then, *Schlup* and *Sawyer* will not frequently provide grounds for habeas relief. However, the need for expert or investigative assistance to even raise a colorable *Schlup* or *Sawyer* claim is equally obvious as the grounds for such claims may be found anywhere but the trial transcript.

IV. Conclusion

An unfortunate hallmark of criminal proceedings is the disparity in resources available to the prosecution versus the defense counsel representing an indigent client. This inequity squarely conflicts with the defense counsel's duty to zealously and competently represent his or her client in state and federal habeas proceedings. Section 848(q)(9) is no panacea. It will not be available to habeas counsel in all, or possibly even most, cases. However, zealous representation requires that all potential claims be unearthed and developed as fully as possible for consideration on the merits. In this endeavor, section 848(q)(9) does provide a mechanism through which diligent and creative counsel may attempt to secure meaningful habeas review in the federal courts.

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88. In addition, the recent Supreme Court decision in *Calderon v. Thompson*, 118 S.Ct. 1489 (1998), supports the continued viability of *Sawyer*. *See* Case Note on *Calderon v. Thompson*, 11 CAP. DEF. J. 47 (1998).

89. Schlup v. Delo, 513 U.S. 298, 321 (1995).

CASE NOTES:

United States Supreme Court