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Fitzgerald v. Greene 150 F.3d 357 (4th Cir. 1998)

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I. Facts

On January 29, 1993, at approximately 6:00 a.m., thirteen year-old Claudia White was awakened by the sound of Ronald Lee Fitzgerald entering her home.[1] Shortly thereafter, Fitzgerald saw Coy White, Claudia's father, drive into the driveway.[2] When White entered the front door, he saw Fitzgerald and demanded to know what he was doing with his daughter.[3] Fitzgerald told White to get on the floor.[4] As White was doing so, Fitzgerald shot him in the neck, severing White's spinal cord and killing him.[5] Fitzgerald then pointed the gun at Claudia and ordered her to get her father's wallet and car keys.[6] Claudia complied.[7] Fitzgerald took her to a rural location and raped her. [8]

At approximately 7:45 a.m. the same morning, Fitzgerald hailed a taxicab driven by Hugh Morrison in which Kathryn Davis was a passenger.[9] Davis testified that Morrison drove off with Fitzgerald after she arrived at her destination.[10] Douglas Shelton discovered Morrison's body in a nearby creek later that morning. [11]

Fitzgerald next appeared at Tiffany Lovelace's home driving a taxicab.[12] Fitzgerald took Lovelace and her children to a motel in Altavista, Virginia where he raped her.[13] Fitzgerald then asked Sonya and John Covington, guests of the motel, for a ride.[14] The couple agreed and took Fitzgerald, Lovelace, and her children to Lovelace's home.[15] Lovelace and the children got out of the car, but Fitzgerald asked the Covingtons to take him to the courthouse.[16] When Fitzgerald and the Covingtons arrived at the courthouse, Fitzgerald pointed a gun into his mouth and pulled the trigger.[17] The gun malfunctioned, however, and failed

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1. Fitzgerald v. Greene, 150 F.3d 357, 360 (4th Cir. 1998).
2. *Fitzgerald*, 150 F.3d at 361.
3. *Id.*
4. *Id.*
5. *Id.*
6. *Fitzgerald*, 150 F.3d at 361.
7. *Id.*
8. *Id.*
9. *Id.*
10. *Fitzgerald*, 150 F.3d at 361.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Fitzgerald*, 150 F.3d at 361.
15. *Id.*
16. *Id.*
17. *Id.*

to fire.[18] Sonya jumped out of the car, and John took the gun from Fitzgerald.[19] Shortly thereafter, the police apprehended Fitzgerald.[20]

On January 29, 1994 a Virginia jury found Ronald Lee Fitzgerald guilty of murdering Coy White during the commission of a robbery, murdering Hugh Morrison during the commission of a robbery, abducting and raping thirteen year-old Claudia White, abducting and raping Tiffany Lovelace, and breaking and entering into Coy White's residence.[21] In the penalty phase of the bifurcated proceeding, the jury recommended Fitzgerald be sentenced to death for the murders of Coy White and Morrison due both to his future dangerousness to the community and the vileness of his crimes.[22] On May 10, 1994, the trial court imposed a sentence of death.[23] On March 3, 1995, Fitzgerald's convictions and sentence were affirmed by the Supreme Court of Virginia.[24] After exhausting his state appeals, Fitzgerald petitioned the United States District Court for the Western District of Virginia for a writ of habeas corpus.[25] The District Court denied the writ by an order dated November 20, 1997. [26] Fitzgerald appealed to the Fourth Circuit.[27]

On appeal, Fitzgerald raised four claims: (1) that he was denied a fair and impartial jury in violation of the Sixth and Fourteenth Amendments; (2) that the Commonwealth failed to provide exculpatory information as required by *Brady v. Maryland*[28] and its progeny, in violation of the Fourteenth Amendment; (3) that the trial court failed to instruct the jury that he was parole ineligible in violation of the Eighth and Fourteenth Amendments; and (4) that he was denied effective assistance of counsel in violation of the Sixth Amendment.[29]

II. Holding

The court of appeals found all of Fitzgerald's claims to be defaulted or without merit.

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18. *Fitzgerald*, 150 F.3d at 361.
19. *Id.*
20. *Id.*
21. *Id.* at 360.
22. *Fitzgerald*, 150 F.3d at 361.
23. *Id.* at 360. The jury also recommended Fitzgerald be sentenced to: life imprisonment for the two robberies and the abduction and rape of Claudia White; two forty-year sentences for the abduction and rape of Lovelace; and a thirty-year sentence for the breaking and entering conviction. The court adopted the jury's recommendations. *Id.* at 360 n.1.
24. *Id.* at 361. *See* Fitzgerald v. Commonwealth, 249 Va. 299, 455 S.E.2d 506 (1995), *cert. denied*, 516 U.S. 1179 (1996).
25. *Id.*
26. *Fitzgerald*, 150 F.3d at 361.
27. *Id.*
28. 373 U.S. 83 (1963).
29. The court noted that because Fitzgerald filed his federal habeas petition after enactment of the Anti-Terrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214, the AEDPA's more deferential standards of review applied to his claims. *Fitzgerald*, 150 F.3d at 362.

III. Analysis/Application in Virginia

A. Juror Dishonesty

During voir dire, the trial court asked James Bradshaw if "[he] or any member of [his] immediate family [had] been the victim of a rape, robbery, or abduction?"[30] Bradshaw answered in the negative.[31] The court later asked him if he knew of any reason that he could not give Fitzgerald a fair trial based solely upon the evidence presented and the law.[32] Bradshaw agreed that he could render a fair verdict. Bradshaw subsequently was seated on the jury.[33]

While the jurors were considering the last of the non-capital offenses of which Fitzgerald had been convicted, the abduction and rape of Tiffany Lovelace, Bradshaw disclosed to the jury that he had no sympathy for rapists because his granddaughter had been molested as a child. He then made a motion that the jury impose a life sentence upon Fitzgerald for the rape of Tiffany Lovelace.[34] The motion failed, and the jury imposed a forty-year sentence for the crime.[35]

After the jury announced its verdict and sentences, but before the trial court imposed its sentence, the jury foreman reported the Bradshaw incident to the court.[36] The trial court subsequently conducted a post-trial hearing at which both counsel and the court questioned Bradshaw regarding his partiality.[37] At the conclusion of the hearing, the trial court denied Fitzgerald's motion for a mistrial.[38]

The right to an impartial jury derives from the Sixth Amendment's guarantee that "[i]n all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury."[39] This right is applicable to the states via the Fourteenth Amendment.[40] The Supreme Court has held that due process requires "a jury capable and willing to decide the case solely on the evidence before it."[41]

Fitzgerald argued that James Bradshaw's presence on his jury deprived him of his constitutional right to a fair and impartial jury for two reasons.[42] First, he asserted that Bradshaw's failure to disclose certain relevant information during voir dire denied him the opportunity to strike Bradshaw for cause.[43] Second, Fitzgerald contended that even if Bradshaw's voir dire responses were truthful,

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30. *Id.* at 363.
31. *Id.*
32. *Id.*
33. *Fitzgerald*, 150 F.3d at 361.
34. *Id.*
35. *Id.*
36. *Id.*
37. *Fitzgerald*, 150 F.3d at 361.
38. *Id.*
39. U.S. CONST. amend. VI.
40. Irvin v. Dowd, 366 U.S. 717 (1961).
41. Smith v. Phillips, 455 U.S. 209, 209 (1982).
42. *Fitzgerald*, 150 F.3d at 363-65.
43. *Id.* at 363-64.

Bradshaw's statement during sentencing deliberations that he had no sympathy for a rapist demonstrated his bias against Fitzgerald.[44] The Fourth Circuit declined to grant relief on both counts.[45] In order to prevail on a claim in which juror dishonesty during voir dire is alleged, a petitioner must show: (1) a juror failed to answer honestly a material question on voir dire; and (2) a correct response would have provided a valid basis for a challenge for cause.[46] The Supreme Court of Virginia had found that Fitzgerald failed to prove the first requirement, concluding Bradshaw "testified truthfully during the voir dire. No one asked Bradshaw during voir dire whether his granddaughter had been molested. Rather, he was asked whether any member of his immediate family had been raped."[47] The Fourth Circuit noted that under the federal rules it was bound to consider the state court's finding that Bradshaw's responses during voir dire were honest and factually accurate absent convincing evidence to the contrary.[48] Accordingly, it declined to provide relief for Bradshaw's conduct during voir dire.[49]

The court of appeals then turned to Fitzgerald's second claim, that Bradshaw's statement during sentencing deliberations was evidence of juror bias.[50] The court first noted that failure to satisfy the requirements of *McDonough Power Equip., Inc. v. Greenwood*[51] does not end the court's inquiry when a petitioner asserts a Sixth Amendment claim challenging the partiality of a juror based on additional circumstances occurring outside voir dire.[52] As Justice Blackmun explained in his concurrence in *McDonough*:

> regardless of whether a juror's answer is honest or dishonest, it remains within a trial court's option, in determining whether a jury was biased, to order a post-trial hearing at which the movant has the opportunity to demonstrate actual bias, or in exceptional circumstances, that the facts are such that bias is to be inferred.[53]

In *Smith v. Philips*[54] the United States Supreme Court explained "the remedy for allegations of jury partiality is a hearing in which the defendant has the opportunity to prove actual bias."[55] Pursuant to that mandate, the trial court

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44. *Id.*
45. *Id.* at 366.
46. McDonough Power Equip., Inc. v. Greenwood, 464 U.S. 548, 556 (1984).
47. *Fitzgerald*, 150 F.3d at 364 (quoting Fitzgerald v. Commonwealth, 455 S.E.2d 506, 511-12 (1995)).
48. *Id.* (citing 28 U.S.C.A. § 2254(e)(1)).
49. *Id.*
50. *Id.*
51. 464 U.S. 548 (1984).
52. *Fitzgerald*, 150 F.3d at 362-63.
53. *Id.* at 363 (quoting McDonough Power Equip., Inc. v. Greenwood , 464 U.S. 548 (1984) (Blackmun, J., concurring) (citing Coughlin v. Tailhook Ass'n, 112 F.3d 1052, 1062 (9th Cir. 1997) & Gonzales v. Thomas, 99 F.3d 978, 985 (10th Cir. 1996)).
54. 455 U.S. 209 (1982).
55. Smith v. Phillips, 455 U.S. 209, 215 (1982).

afforded Fitzgerald such a hearing, during which Bradshaw stated that his granddaughter's molestation had no effect on his voting to convict or sentence Fitzgerald for any of his crimes. Because the Fourth Circuit was bound to defer to the trial court's factual finding of no actual bias, Fitzgerald argued that under the doctrine of "implied bias" the court could infer Bradshaw's bias as a matter of law based on the record before it.[56]

The court first noted that Justice O'Connor explained in *Smith v. Philips* that "a revelation that the juror is an actual employee of the prosecuting agency, that the juror is a close relative of one of the participants in the trial or the criminal transaction, or that the juror was a witness or somehow involved in the criminal transaction"[57] were the types of "exceptional" and "extraordinary" situations that might require a finding of implied bias.[58] Finding neither Bradshaw nor anyone in his family was personally connected to any of the parties in his case, the court found no support for a presumption of bias.[59] In addition, the Fourth Circuit questioned the viability of the implied bias doctrine,[60] and acknowledged the extremely narrow window of circumstances in which it may offer relief: "[T]he doctrine of implied bias is limited in application to those extreme situations where the relationship between a prospective juror and some aspect of the litigation is such that it is highly unlikely that the average person could remain impartial in his deliberations under the circumstances."[61]

Furthermore, the court of appeals held that even if there were error, there was no evidence it "'had substantial and injurious effect or influence in determining the . . . verdict,'"[62] and as such was harmless.[63] In conducting its harmless error analysis, the court noted that at the time of Bradshaw's statement, the jury had already voted to convict Fitzgerald on all counts and unanimously agreed to recommend the death sentence for the murders of White and Morrison.[64] The court also noted that during the post-trial hearing Bradshaw stated that his granddaughter's experience did not affect his voting to convict or sentence Fitz-

56. *Fitzgerald*, 150 F.3d at 363-65 (citing *Smith*, 455 U.S. at 221 (O'Connor, J., concurring) (asserting that "implied bias" may also provide a basis for relief under certain circumstances); United States v. Wood, 299 U.S. 123, 133 (1936) (explaining "[t]he bias of a prospective juror may be actual or implied; that is, it may be bias in fact or bias conclusively presumed as matter of law.")).

57. *Id.* at 365 (citing *Smith*, 455 U.S. at 221, (O'Connor, J., concurring)).

58. *Id.* (citing *Smith*, 455 U.S. at 221, (O'Connor, J., concurring)).

59. *Id.*

60. *Fitzgerald*, 150 F.3d at 365 (citing Person v. Miller, 854 F.2d 656, 664 (4th Cir.1988) (questioning the viability of the implied bias doctrine); *See also* Tinsley v. Borg, 895 F.2d 520, 527 (9th Cir.1990) (acknowledging that "[t]he Supreme Court has never explicitly adopted or rejected the doctrine of implied bias")).

61. *Id.* (citing Person v. Miller, 854 F.2d 656, 664 (4th Cir.1988)).

62. *Id.* (citing Brecht v. Abrahamson, 507 U.S. 619 (1993) (quoting Kotteakos v. United States, 328 U.S. 750, 776 (1946))).

63. *Id.* (citing Remmer v. United States, 347 U.S. 227 (1954); Smith v. Phillips, 455 U.S. 209 (1982)).

64. *Fitzgerald*, 150 F.3d at 365.

gerald.[65] Based on these factors, the Fourth Circuit found Bradshaw's presence on the jury did not result in actual prejudice to Fitzgerald,[66] and as such he was not entitled to habeas relief.[67]

In spite of the result in *Fitzgerald*, the case suggests that there is indeed a narrow opportunity to challenge juror impartiality after the jury has been seated. Of particular value in a given case may be the opportunity for an evidentiary hearing. Counsel should not hesitate to seek time and resources necessary to make such a hearing meaningful so that it serves as more than a vehicle for the jurors' expected conclusory denials of bias.

B. Brady *Claim*

Fitzgerald next claimed the Commonwealth failed to provide exculpatory information as required under *Brady v. Maryland*[68] and its progeny.[69] Specifically, Fitzgerald claimed the Commonwealth failed to disclose that Girard Younger, a Commonwealth witness during both the guilt and sentencing phases, was a convicted felon working as an informant for the Commonwealth in other unrelated cases.[70] Fitzgerald maintained this evidence could have been used to impeach Younger.[71]

On state habeas review, the Supreme Court of Virginia concluded that Fitzgerald could have raised this issue on direct appeal, but failed to do so, and therefore dismissed the claim as procedurally defaulted under *Slayton v. Parrigan.*[72] Absent a showing of cause and prejudice or a miscarriage of justice to excuse the procedural default, the Fourth Circuit could not address the claim.[73] Because Fitzgerald did not attempt to demonstrate any such excuse, the Fourth Circuit adopted the district court's finding that Fitzgerald's claim was procedurally defaulted.[74] Defense counsel should note that this does not in any way contradict the rule that, under *Kyles v. Whitley*[75] and *Pyles v. Johnson*,[76] the defendant is clearly entitled to information that a "jailhouse snitch" has a history as an informant in other cases.

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65. *Id.*

66. *Id.* (citing *Brecht*, 507 U.S. at 637 (holding that an error does not have a substantial and injurious effect on a jury verdict unless "it resulted in 'actual prejudice'" to the habeas petitioner (quoting United States v. Lane, 474 U.S. 438, 449 (1986))).

67. *Id.*

68. 373 U.S. 83 (1963).

69. *Fitzgerald*, 150 F.3d at 366.

70. *Id.*

71. *Id.*

72. *Id.* (citing Slayton v. Parrigan, 215 Va. 27, 205 S.E.2d 680, 682 (1974)).

73. *Fitzgerald*, 150 F.3d at 366 (citing Harris v. Reed, 489 U.S. 255, 262 (1989)).

74. *Id.* (citing Gilbert v. Moore, 134 F.3d 642, 656 n. 10 (4th Cir. 1998) (en banc), *cert. denied*, 119 S.Ct. 103 (1998).

75. 514 U.S. 419 (1995).

76. 136 F.3d 986 (5th Cir. 1998)(finding fact that jailhouse snitch has a history as an informant in other cases is within scope of *Kyles*).

C. Denial of Proposed Jury Instruction

During the penalty phase of Fitzgerald's trial, defense counsel requested that the following instruction be given to the jury:

> The court instructs the jury that under Virginia law any person convicted of three separate felony offenses of murder, rape or robbery by the presenting of firearms or other deadly weapon or any combination of the offenses of murder, rape or robbery when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.[77]

The trial court denied the motion without determining if the murder of Coy M. White and the rape and murder of Claudia Denise White constituted "a common act, transaction, or scheme." Relying on *Simmons v. South Carolina*,[78] which held that a state deprives a defendant in a capital case of due process if it "conceal[s] from the sentencing jury the true meaning of its noncapital sentencing alternative, namely, that life imprisonment mean[s] life without parole,"[79] Fitzgerald challenged the trial court's denial on direct appeal.[80] The Supreme Court of Virginia rejected Fitzgerald's claim, "concluding that (1) parole eligibility in Virginia is a question of law to be determined by the judge, not the jury, and (2) as a matter of law, Fitzgerald would have been eligible for parole because his crimes were part of a common act."[81] As a result, the Supreme Court of Virginia found *Simmons* inapplicable to the case.[82] The Fourth Circuit found that the Supreme Court of Virginia's decision was "neither contrary to nor an unreasonable application of *Simmons*" and hence rejected Fitzgerald's claim.[83]

Although Virginia has now abolished parole and Fitzgerald has been executed, it is worthwhile to take note of the erroneous resolution of this issue. The issue, of course, was whether Fitzgerald's prior offenses were part of a common transaction or scheme. It is disingenuous to hold that this was not a question of fact for the jury. This is especially true considering that Va. Code Ann. § 18.2-31(7) refers to murder of more than one person in the same transaction. Had Fitzgerald been charged under that section, the anomalous situation would have been that the same term presented an issue of fact for the jury on the issue of guilt but not on the crucial sentencing question. Further, even if the issue was

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77. *Fitzgerald*, 150 F.3d at 367. Virginia law, at the time of Fitzgerald's trial, provided as follows:

> Any person convicted of three separate felony offenses of (i) murder, (ii) rape or (iii) robbery by the presenting of firearms or other deadly weapon, or any combination of the offenses specified in subdivisions (i), (ii) or (iii) when such offenses were not part of a common act, transaction or scheme shall not be eligible for parole.

VA. CODE ANN. § 53.1-151(B1) (Michie 1994).

78. 512 U.S. 154 (1994).

79. *Fitzgerald*, 150 F.3d at 367 (quoting Simmons v. South Carolina, 512 U.S. 154, 162 (1994)).

80. *Id.*

81. *Id.* (citing Fitzgerald v. Commonwealth, 249 Va. 299, 455 S.E.2d 506, 510 (1995)).

82. *Id.*

83. *Fitzgerald*, 150 F.3d at 367.

question of law, it should have been determined by the *trial* judge with input from the Commonwealth and defense, rather than by the Supreme Court of Virginia.

D. Ineffective Assistance of Counsel

Fitzgerald claimed that his trial counsel was deficient for failing to request a competency examination after learning that Fitzgerald was "experiencing suicidal ideation, delusional thought processes, and auditory hallucinations" before trial.[84] The Fourth Circuit held that Fitzgerald's counsel was not deficient in failing to move for an independent competency evaluation because: (1) Fitzgerald had in fact been evaluated for competency and sanity at the time of the offense;[85] and (2) counsel stated that he decided that requesting another competency examination would be futile in light of the existing reports, that he found Fitzgerald to be helpful and cooperative, and that Fitzgerald actively participated in his own defense, particularly during jury selection.[86]

Although the Fourth Circuit was probably correct in its interpretation of *Strickland v. Washington*,[87] counsel should be very wary of accepting its advice. Upon any indication of mental retardation, counsel should, for several reasons, actively pursue any avenue which might yield evidence of such disability. First, the rule of economy which dictates that counsel cannot be expected to pursue all lines of evidentiary inquiry simply does not apply in a capital case because the consequences of failing to do so are so much greater than anywhere else. Mental retardation evidence in particular can be valuable because it helps to explain irrational decisions and actions in times of stress and because it is a condition that cannot be faked.[88]

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84. *Id.* at 368. Fitzgerald asserted he received constitutionally ineffective assistance of counsel because: (a) his trial counsel did not request a competency hearing; (b) his trial counsel did not fully investigate and present mitigating evidence during the sentencing phase of the trial; and (c) his appellate counsel failed "to raise valid issues on appeal." *Id.* at 368-69. On state habeas review, the Supreme Court of Virginia dismissed all Fitzgerald's ineffectiveness claims on the merits. *Id.* at 368 (citing *Fitzgerald*, 455 S.E.2d at 510). The Fourth Circuit concluded the state court's decision was not an unreasonable application of the test articulated by the United States Supreme Court in *Strickland v. Washington*, 466 U.S. 668 (1984), to the facts presented. Under *Strickland*, a petitioner must demonstrate both that his trial counsel's representation was deficient and that he was prejudiced thereby. *Fitzgerald*, 150 F.3d at 368 (citing *Strickland*, 466 U.S. at 687).

85. *Id.* These evaluations indicated Fitzgerald was borderline mentally retarded, but that he understood the roles of the participants in the criminal trial process, was not insane, and was competent to stand trial. Trial counsel also had Fitzgerald examined by Dr. Della Williams, a neurosurgeon, to test for the presence of any organic brain injuries. She found no evidence of injury. *Id.*

86. *Id.*

87. 466 U.S. 668 (1984).

88. *Fitzgerald*, 150 F.3d at 368. Fitzgerald also argued his trial counsel was constitutionally ineffective for failing to present mitigating witnesses during the sentencing phase of the trial. The Fourth Circuit held that his counsel's decision not to present these witnesses was reasonable. First, the court found that counsel was entitled to rely upon Dr. Ryan's assessment that Fitzgerald was

Fitzgerald also argued that his appellate counsel was ineffective for failing to brief a claim that Fitzgerald's sentence was excessive and disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant.[89] Fitzgerald's attorneys stated in their brief that Fitzgerald "relies upon this Court's expertise in conducting the automatic review of the sentences of death imposed upon him which is required by Code § 17-110.1 of the Code of Virginia of 1950, as amended, and chooses to make no argument relative to this assignment of error."[90] The Fourth Circuit held that counsel's strategic decision to selectively brief and argue what, in his professional judgment, were Fitzgerald's strongest claims did not render counsel constitutionally deficient under *Strickland*.[91] In addition, the Fourth Circuit found that Fitzgerald could not demonstrate that his counsel's actions prejudiced him in any way.[92] The court's advice that it is acceptable to selectivity brief and argue issues should be ignored in capital cases. It is impossible to tell which issues may later be found meritorious and failure to brief and argue in Virginia constitutes default.[93]

E. Abuse of Discretion to Deny Motion For Evidentiary Hearing

Fitzgerald's final contention was that the district court abused its discretion when it denied his motion for an evidentiary hearing.[94] He claimed that he was entitled to an evidentiary hearing regarding his ineffective assistance of counsel claims because he never received an evidentiary hearing in state court.[95] The Fourth Circuit cited precedent indicating that a defendant is entitled to an evidentiary hearing "only if the state court fact-finding process was deficient in

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sane and competent to stand trial and that therefore counsel's decision not to present additional witnesses was not unreasonable. Second, the court noted that counsel's strategy to focus their case on Fitzgerald's social and educational history, rather than his alleged mental problems in jail, was credible and, therefore, should not be second-guessed. *Id* at 368-69 (citing Bunch v. Thompson, 949 F.2d 1354, 1364 (4th Cir. 1991) (recognizing that "[t]he best course for a federal habeas court is to credit plausible strategic judgments" when evaluating ineffectiveness claims)).

89. *Id.* at 369.

90. *Id.* (quoting Appellant's Brief at 19, Fitzgerald v. Commonwealth, 455 S.E.2d 506 (1995)).

91. *Id.* (citing Griffin v. Aiken, 775 F.2d 1226, 1235 (4th Cir. 1985) (holding that "appellate counsel has no constitutional duty to raise every nonfrivolous issue on appeal if counsel, as a matter of professional judgment, decides not to raise such issue on appeal" (citing Jones v. Barnes, 463 U.S. 745, 751-54 (1983)))).

92. *Fitzgerald*, 150 F.3d at 369. The Fourth Circuit came to this conclusion after: (a) it concluded the Virginia Supreme Court of Virginia conducted a thorough review of his case due to his attorneys' decision to rely upon the court's mandatory review, rather than fully brief the issue; and (b) even if the Virginia Supreme Court of Virginia had failed to conduct a proportionality review, Fitzgerald would not be entitled to habeas relief. *Id.* at 369 (citing Buchanan v. Angelone, 103 F.3d 344, 351 (4th Cir. 1996), *cert. granted in part and aff'd*, 118 S.Ct. 757, (1998)).

93. Briefing and arguing constitutional issues which appeared likely to fail saved the lives of the petitioners in both *Simmons v. South Carolina*, 512 U.S. 154 (1994), and *Skipper v. South Carolina*, 476 U.S. 1(1986).

94. *Fitzgerald*, 150 F.3d at 369.

95. *Id.*

some significant respect."[96] Given this, the court of appeals concluded that just because the state habeas court dismissed Fitzgerald's claims based upon affidavits did not mean the proceeding was less than full and fair.[97] Accordingly, the Fourth Circuit upheld the district court's denial of an evidentiary hearing.[98]

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96. *Id.* (citing Eaton v. Angelone, 139 F.3d 990, 994 (4th Cir.), *cert. denied*, 118 S.Ct. 2338 (1998)).

97. *Id.*

98. *Fitzgerald*, 150 F.3d at 369.