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Strickler v. Pruett Nos. 97-29, 97-30, 1998 WL 340420 (4th Cir. June 17, 1998)

Strickler v. Pruett[1]
Nos. 97-29, 97-30, 1998 WL 340420
(4th Cir. June 17, 1998)[2]

I. Facts

At approximately 6:45 p.m. on January 5, 1990, James Madison University sophomore Leanne Whitlock was returning her boyfriend's car to him at the Valley Mall in Harrisonburg.[3] Anne Stolzfus would later testify that at around 6:00 P.M. that same day she and her daughter entered the Music Land store in the Valley Mall. Stolzfus would claim that she saw a blond woman and two men, one of whom was "revved up" and impatient. The man, whom she would identify as Tommy David Strickler, was behaving in such a loud, rude, and boisterous manner that she watched him with apprehension.[4]

Shortly thereafter, Stolzfus and her daughter were stopped in the Valley Mall parking lot when a car driven by a "beautiful," "well dressed," "happy," "singing," "bright eyed," and "rich college kid" drove past.[5] Stolzfus would later testify that she got a good look at the driver and identified her as Whitlock. Stolzfus would also testify that Whitlock had pulled in front of her and stopped for traffic when the "revved up" man from the music store came out of the Valley Mall and proceeded to bang on vehicles in front of Whitlock's car. He then turned to the Mercury Whitlock was driving and pounded on the passenger side window.[6] Whitlock leaned over as if to lock the door, but Strickler wrenched the door open and jumped into the car, facing Whitlock.[7] The second man and the blond woman seen earlier in the Valley Mall tried to enter the car also.[8] Whitlock accelerated and "laid on the horn."[9] Strickler hit Whitlock repeatedly on her shoulder

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1. On September 14, 1998, the Supreme Court of the United States granted a stay of execution. Strickler v. Greene, 119 S. Ct. 27 (1998). On October 5, 1998, the Court granted Strickler's petition for writ of certiorari limited to the following questions: (1) Whether the State violated *Brady v. Maryland*, 373 U.S. 83 (1963), and its progeny; (2) If so, whether the State's non-disclosure of exculpatory evidence and the State's representation that its open file contained all *Brady* material establishes the requisite "cause" for failing to raise a *Brady* claim in state proceedings; and (3) Whether petitioner was prejudiced by non-disclosure. Strickler v. Greene, 119 S.Ct. 40 (1998).

2. This is an unpublished opinion which is referenced in the "Table of Decisions Without Reported Opinions" at 149 F.3d 1170 (4th Cir. 1998).

3. Strickler v. Murray, 452 S.E.2d at 649 (Va. 1995).

4. *Strickler*, 452 S.E.2d at 649.

5. Strickler v. Pruett, Nos. 97-29, 97-30, 1998 WL 340420, at *5 (4th Cir. June 17, 1998).

6. *Strickler*, 1998 WL 340420, at *1.

7. *Id.*

8. *Id.* *6.

9. *Id.*

and head. When the car stopped, Strickler opened the passenger door, and the other two got into the backseat.[10] The second man, whom Stolzfus later identified as Ronald Henderson, handed his coat to Strickler who put it on the floor and "fiddled with it [for] what seemed like a long time."[11] Stolzfus testified that she then pulled parallel to Whitlock's car, got out, and walked over to the Mercury.[12] As she approached the vehicle, Henderson "laid over on the seat to hide from" her.[13] Stolzfus then returned to her car, faced Whitlock, and asked her three times "are you O.K?"[14] Each time Whitlock looked at Stolzfus and then down to her right.[15] Whitlock mouthed a word that Stolzfus did not understand. She later claimed Whitlock had said "help."[16] Stolzfus pulled away and told her daughter to go inside the Valley Mall and get security.[17] The daughter refused.[18] Whitlock drove past Stolzfus very slowly, "went up over the curb . . . so the car really tilted," and "laid on the horn again."[19] Stolzfus told her daughter to write the license number down on an index card. Stolzfus claimed she remembered the plate, West Virginia NKA 243, with a trick, "No Kids Alone 243"[20] or "No Kids After 2-43,"[21] but for some reason did not report the incident to law enforcement. She was approached by Detective Dan Claytor of the Harrisonburg Police Department only after a JMU student whom she had told about the incident informed law enforcement.[22]

Eight days later, police searched the cornfield into which two witnesses had seen a car similar to Whitlock's turn.[23] Police found Henderson's wallet, Strickler's hair, Whitlock's clothing, and Whitlock's body.[24] On February 27, 1990, Strickler was indicted by an Augusta County grand jury for the robbery and abduction of Whitlock.[25] On April 23, 1990, Strickler was indicted by an Augusta

10. *Strickler*, 1998 WL 340420, at *6.
11. *Id.*
12. *Id.*
13. *Id.*
14. *Strickler*, 1998 WL 340420, at *6.
15. *Id.*
16. *Id.*
17. *Id.*
18. *Strickler*, 1998 WL 340420, at *6.
19. *Id.*
20. *Id.*
21. *Id.*
22. *Strickler*, 1998 WL 340420, at *6 n.7.
23. *Id.* at *2.
24. Investigators later discovered Strickler had taken Whitlock's driver's license, identification card, bankcard, watch, and earrings. Investigators also located hairs matching Strickler's on Whitlock's clothing. They also found that the shirt Strickler had worn on the day of the murder contained human blood stains and semen stains consistent with Stickler's semen. Unidentified semen was also taken from Whitlock's body. *Id.* at *2-3.
25. Whitlock was abducted in Rockingham County and murdered in Augusta County. Strickler was charged with grand larceny, robbery and abduction in Rockingham county, but the Rocking-

County grand jury for capital murder.[26]

One day before trial, an article appeared in the Roanoke Times containing an interview with an unidentified prosecution witness, whom the Fourth Circuit found was "obviously Stolzfus," summarizing the circumstances of Whitlock's abduction.[27] This summary "closely tracked" Stolzfus' eventual trial testimony.[28] It also, however, revealed a fact about which she would not testify: that she had contacted Whitlock's boyfriend and viewed photographs of Whitlock.[29] Following a jury trial in Augusta County Circuit Court, Strickler was convicted of all three charges.[30] Based upon findings of Strickler's future dangerousness and the vileness of the murder, Strickler was sentenced to death.[31]

After being denied relief on direct appeal and in collateral proceedings, Strickler filed a petition for writ of habeas corpus pursuant to 28 U.S.C. § 2254 in the United States District Court for the Eastern District of Virginia.[32] During discovery, Strickler's new defense team subpoenaed Harrisonburg Detective Danny Claytor, who had interviewed Stolzfus on approximately five occasions prior to trial.[33] Detective Claytor took notes during, and typed reports of, his interviews with Stolzfus.[34] In addition, Claytor received letters and "summaries" from Stolzfus.[35] These documents –referred to by the parties as the "Stolzfus materials" and labeled exhibits one through eight in the District Court proceeding – were kept in Harrisonburg Police Department files.[36] The Commonwealth attorney, Ervin, claimed Claytor had sent him three of the eight Exhibits, which he had placed in his "open file" freely accessible to the defense. He said he never saw the other five exhibits, nor did he know they existed.[37] Defense counsel claimed never to have seen the documents either.[38]

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ham charges were *nolle prosequi* as a result of the Augusta County indictment. *Id.* at *3, *3 n.3, n. 4.

26. *Strickler*, 1998 WL 340420, *3.

27. *Id* at *6.

28. *Id.*

29. *Id.*

30. *Strickler*, 1998 WL 340420, at *3.

31. *Id.*

32. Because Strickler's petition for writ of habeas corpus was filed prior to the April 24, 1996 enactment of the Anti-Terrorism and Effective Death Penalty Act (AEDPA) of 1996, Pub.L. No. 104-132, 110 Stat. 1214, the Chapter 153 amendments of the AEDPA did not apply to Strickler's case. *Id.* at *1 n. 1.

33. *Id.* at *7.

34. *Strickler*, 1998 WL 340420, at *7.

35. *Id.*

36. *Id.*

37. Tom Campbell, *Conviction, Death Sentence Nullified In Abduction, Death*, Richmond Times-Dispatch, October 16, 1997, at B3.

38. Lee Ervin, the Commonwealth's attorney in Strickler's case, stated that he reviewed only Exhibits two, seven, and eight and those exhibits were in his prosecution file and were disclosed to defense counsel pursuant to the open file policy. William Bobbitt, Jr., one of Strickler's trial counsel, stated that he had never seen any of the Stolzfus materials prior to, or during, Strickler's trial,

Whatever the detective's reasons for not disclosing them,[39] the five docu-

notwithstanding the open file policy. Similarly, Humes J. Franklin, Jr., Henderson's trial counsel, stated in his affidavit that he had no recollection of seeing any of the Stolzfus materials in Ervin's files. However, Thomas Roberts, Strickler's other trial counsel, stated in his affidavit that, although he could not recall if he had seen the Stolzfus materials, he did recall the 'information contained in them.' Roberts also stated that he had discussed with Bobbitt the 'possibility that Ms. Stolzfus may not be a credible witness because she had not come forward immediately and her story had become much more detailed over time.' According to Roberts, '[i]t seemed too good to be true.' The district court never resolved this dispute because the district court concluded that even if Exhibits two, seven, and eight were disclosed to Strickler, his rights under *Brady v. Maryland*, 373 U.S. 83 (1963) were violated. *Strickler*, 1998 WL 340420, at *7 n. 8.

39. In regard to Detective Claytor's discriminatory forwarding policies, Ervin explained: "I have no idea why they didn't send them to me . . . I don't think it was intentional. He probably didn't think they were important." Claytor maintained he never handed over the notes to the prosecution because they were not part of his formal investigation. Instead he claimed the notes were letters Stolzfus wrote to him. Laura Fasbach, *Prosecutor: I Won't Let JMU Case Get Away: Court Overturned 1990 Murder Conviction Last Month*, Roanoke Times & World News, November 29, 1997, at B1.

It is remarkable that the materials deemed "important," the three exhibits which were part of the "formal investigation" turned over by Detective Claytor, were also precisely those likely to prove useful to the prosecution: Exhibit two is a six-page, typed report of Detective's Claytor's interviews with Stolzfus on January 19 and 22, 1990. The report contains a detailed summary of Stolzfus' account of Whitlock's abduction. However, Detective Claytor's report notes that Stolzfus was not sure if she could identify Strickler and Henderson, although Stolzfus indicated she might if she saw Strickler and Henderson in person. Exhibit two also notes that Stolzfus was taken to the police impound lot on January 24, 1990, and shown the car Whitlock had been driving. According to the report, the next day Stolzfus advised police that she *now* recalled the license number, NKA 243, and "had made up a code to help remember the license number after the incident, 'No Kids After 2-43.'"; Exhibit seven is a typed two-page letter dated January 26, 1990, to Detective Claytor and signed by Stolzfus. This letter contains a description of Stolzfus' encounter with Strickler, Henderson, and the blond woman at the music store in the Valley Mall; Exhibit eight is a three-page, typed document, undated and signed by Stolzfus. The document, entitled "Details of Encounter with Mountain Man, Shy Guy and Blond Girl," contains a detailed description of Whitlock's abduction and Stolzfus' encounter with Strickler, Henderson, and the blond woman in the Valley Mall. The summary of Whitlock's abduction in this exhibit "essentially mirrors her trial testimony and the facts set forth in the Roanoke Times article." *Strickler*, 1998 WL 340420, at 7*-8*.

It is equally remarkable that the "unimportant" materials, the five exhibits not part of the "formal investigation" which were not turned over to the prosecution's open file, were those which would likely have proved most useful to defense counsel in impeaching Stolzfus' testimony. Exhibit one is a one-page document containing Detective Claytor's hand-written notes of his initial January 19, 1990 interview with Stolzfus. The notes reveal that Stolzfus could not identify Whitlock. Exhibit three entitled "Observations" was given to Detective Claytor by Stolzfus on January 19, 1990, at 1:00 p.m. In this exhibit, Stolzfus describes the abduction with a set of diagrams; Exhibit four is a typed letter, dated January 22, 1990, to Detective Claytor signed by Stolzfus. In this letter, Stolzfus explains that although she did not initially remember being at the Valley Mall on the evening Whitlock was abducted, her memory was "jogged" when her daughter reminded her of a small purchase at a store in the Valley Mall. In this exhibit, Stolzfus also explains that she was uncertain about portions of the events she claimed to have witnessed the evening of Whitlock's abduction: "I have a very vague memory that I'm not sure of. It seems as if the wild guy that I saw had come running through the door and up to a bus as the bus was pulling off. I have impressions of intense anger, of his going back to where the dark haired guy and girl were standing. Then the guy I saw came running up to the black girl's window? Were those 2 memories the same person?

ments showed that Stolzfus could not initially remember being at the mall, identify Whitlock, Strickler, or Henderson, or remember any details of the event. The notes and letters also showed that some of what she remembered was based on what her 14-year-old daughter, who accompanied her mother to the mall, recalled. For example, in a letter to police dated Jan. 22, 1990, Stolzfus said she initially had no memory of being at the mall that Jan. 5, "[b]ut my 14-year-old daughter Katie remembers different things and her sharing with me what she remembers helped me [jog] my memory." [40] According to the detective's notes, Stolzfus was unable initially to identify either Strickler or Henderson when shown a photo lineup, despite the fact that she testified that she was "100 percent" certain of her identification of the men.[41] Instead, she said Strickler "resembled" one of the men she had seen.[42]

Following the production of the Stolzfus materials pursuant to discovery, Strickler moved for summary judgment on his *Brady v. Maryland* [43] claim.[44] In granting the motion, U.S. District Judge Robert Merhige Jr. wrote: "Whether from good faith or bad, the effect is that these undisclosed materials were suppressed by the prosecution and never disclosed" to Strickler's trial attorney. "[Stolzfus'] memory of the events to which she testified appears muddled at best . . . This information, at a minimum, would likely have been extremely valuable in attacking her credibility with the jury, if counsel were not successful in actually barring her testimony altogether."[45] Merhige's opinion indicated that police records, including notes, interviews, and letters from Stolzfus, "contradicted or impeached her trial testimony in many crucial respects."[46]

Upon finding that without Stolzfus' testimony, other "substantial evidence" presented at trial "could have led a jury to believe that Henderson, rather than Strickler, was the ring-leader in Whitlock's abduction, robbery and death," the district court concluded Strickler's rights were violated under *Brady* and issued a writ of habeas corpus. [47] The court dismissed Strickler's claim concerning the Supreme Court of Virginia's proportionality review of his death sentence.[48] The

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. . . ." Exhibit five is an undated, typed document entitled "Notes for Detective Claytor: My Impressions of the Car." In this exhibit, Stolzfus gives a description of the car driven by Whitlock, but does not mention the license plate or the license plate number. Exhibit six is a hand-written note to Detective Claytor from Stolzfus dated January 25, 1990, 1:45 a.m. In this note, Stolzfus reports that she spent several hours with Whitlock's boyfriend viewing photographs and was certain Whitlock was the black girl she saw on January 5, 1990. *Strickler*, 1998 WL 340420, at *7-8.

40. Tom Campbell, *Judge Nullifies Death Sentence*, Richmond Times-Dispatch, October 17, 1997, at B6.

41. *Id.*

42. *Id.*

43. 373 U.S. 83 (1963).

44. *Strickler*, 1998 WL 340420, at *4.

45. Campbell, *supra* note 39.

46. *Id.*

47. *Strickler*, 1998 WL 340420, at *4.

48. *Id.*

Commonwealth moved for a stay of the district court's judgment, pending appeal, which the district court granted.[49] Both parties appealed. Before the Fourth Circuit, Strickler claimed the district court: (1) correctly decided his *Brady* claim; and (2) erred in dismissing his proportionality claim.[50] In addition, he sought Judge Luttig's recusal.[51]

II. Holding

The Fourth Circuit determined that Strickler's *Brady* and proportionality claims were procedurally defaulted, that Strickler had failed to show cause and prejudice to excuse the default, and that the claims were, in any event, without merit.[52] Thus, the court of appeals reversed the district court's grant of relief.[53] Judge Luttig refused to recuse himself and wrote a separate opinion on that issue.[54]

III. Analysis/Application in Virginia

A. The Brady *Claim*

Before the Fourth Circuit concluded Strickler's *Brady* claim was meritless, it first found the claim procedurally defaulted, asserting its factual basis was available to him at the time he filed his state habeas petition under its own ruling in *Hoke v. Netherland*[55] and[56] Virginia statute.[57] The court decided that "reasonably competent [state habeas] counsel would have sought discovery in state court in order to examine the Harrisonburg Police Department files concerning Stolzfus' statements to Detective Claytor," and that therefore Strickler was barred from asserting his Constitutional rights to a fair trial.[58] The very existence of such a bar is questionable. Even if the doctrine does exist, it is doubtful that its application by the *Hoke* standard is constitutional.

Brady and its progeny stand for the proposition that the State has an affirmative obligation under the Due Process clause to disclose exculpatory evidence to the defendant.[59] Although the United States Supreme Court has never said,

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49. *Id.*

50. *Id.* at *1.

51. *Strickler*, 1998 WL 340420, at *12.

52. *Id.* at *10.

53. *Id.* at 1.

54. *Id.* at *12-*14.

55. 92 F.3d 1350 (4th Cir 1990).

56. *Strickler*, 1998 WL 340420, at *8 (citing Hoke v. Netherland, 92 F.3d 1350 (4th Cir 1990)).

57. *Id.* (citing VA.CODE ANN. § 8.01-654(B)(2) (1997)). The code reads, in pertinent part: "No writ [of habeas corpus ad subjeciendum] shall be granted on the basis of any allegation the facts of which petitioner *had knowledge* at the time of filing any previous petition." VA.CODE ANN. § 8.01-654(B)(2) (1997) (emphasis added).

58. *Id.* at *8.

59. Brady v. Maryland, 373 U.S. 83 (1963).

much less held, that this duty is affected in any way by the likelihood of the defense finding the evidence itself,[60] nine courts of appeal have created a "due-diligence" exception to the obligation.[61] However, all --aside from the Fourth Circuit-- have limited the exception to evidence the defendant actually had, or to which he at least had easy access.[62] By going further and imposing on defense counsel a duty to affirmatively seek out information in the prosecution or police files, the Fourth Circuit has in effect turned *Brady* on its head.

In *Hoke v. Netherland*, the Fourth Circuit found that under Virginia law, "a petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known or available to petitioner at the time of his original petition."[63] As applied, this formulation widened the Fourth Circuit's "due diligence" exception previously stated in *United States v. Wilson*:[64] "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."[65] It is difficult to square even this narrower rule with the Supreme Court's holding in *United States v. Bagley*[66] that:

> [A]n incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist.[67]

Further, application of the exception so as to relieve the prosecution of its *Brady* burden in circumstances in which the police have sole possession of the information was explicitly rejected by *Kyles v. Whitley*.[68] In *Kyles* the Supreme Court held that the prosecutor remains responsible for his duty under *Brady* to

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60. In *Lugo v. Munox*, 682 F.2d 7, 9-10 (1st Cir. 1982), the First Circuit erroneously concluded the due diligence exception can be grounded in the United States Supreme Court's language in *United States v. Agurs*, 427 U.S. 97, 111 (1976). In *Agurs*, the Supreme Court noted that the standard for *Brady* claims is different than that for claims based on newly discovered evidence because a *Brady* claim concerns "evidence . . . available to the prosecutor and not submitted to the defense," while a newly discovered evidence claim concerns evidence which is "found in a neutral source." 427 U.S. at 111. In doing so, the court was simply distinguishing those cases in which *Brady* does apply (when the prosecution does have the information) and when *Brady* does not apply (when the prosecution does not have the information, i.e. when the defendant "found it in a neutral source").

61. *See e.g.* Lugo v. Munox 682 F.2d 7, 9-10 (1st Cir. 1982); United States v. Payne, 63 F.3d 1200, 1208-09 (2d Cir. 1995); United States v. Perdermo, 929 F.2d 967, 973 (3d Cir. 1991); Westly v. Johnson, 83 F.3d 714, 725-26 (5th Cir. 1996); United States v. Todd, 920 F.2d 399, 405 (6th Cir. 1990); United States v. Morris, 80 F.3d 1151, 1170 (7th Cir. 1996); United States v. Davis, 785 F.2d 610, 619 (8th Cir. 1986); United States v. Brown, 562 F.2d 1144, 1151 (9th Cir. 1977); United States v. Valera, 845 F.2d 923, 927-28 (11th Cir. 1988).

62. Case summary of *Hoke*, CAP. DEF. J., vol. 9, no. 2, p. 6 (1997).

63. Hoke v. Netherland, 92 F.3d 1350, 1354 n. 1 (4th Cir. 1990) (internal quotations omitted).

64. 901 F.2d 378 (4th Cir. 1990).

65. United States v. Wilson, 901 F.2d 378, 381 (4th Cir.1990).

66. 473 U.S. 667 (1985).

67. United States v. Bagley, 473 U.S. 667, 678 (1985).

68. 514 U.S. 419 (1995).

disclose favorable evidence to the defendant, regardless of whether police investigators failed to inform the prosecutor of the existence of evidence, because the prosecutor can establish procedures and regulations to insure communication of all relevant information.[69] The Fourth Circuit quoted with approval its own eloquent defense of this rule in *Boyd v. French*,[70] decided during the *very same term in which* Strickler *was decided*:

> The police are also part of the prosecution, and the taint on the trial is no less if they, rather than the State's Attorney, were guilty of the nondisclosure. If police allow the State's Attorney to produce evidence pointing to guilt without informing him of other evidence in their possession which contradicts this inference, state officers are practicing deception not only on the State's Attorney but on the court and the defendant.[71]

The Fourth Circuit's application of the "due diligence" exception in *Hoke*, at a minimum, came close to violating *Kyles*. In *Hoke*, where rape was the capital murder predicate, the court held that the prosecution did not have a duty to turn over extensive information about the victim's past sexual promiscuity because a "reasonable" investigation by defense counsel into the factual circumstances surrounding the murder would have revealed the same facts as were contained in the police documents.[72] Defense counsel in *Hoke* cut short his factual investigation after his inquiry was met with "tight lips and outright hostility, including at least one physical threat."[73] However, even assuming the *Hoke* rule is good law – which outside the Fourth Circuit it certainly is not – it is nevertheless impossible, without ignoring *Kyles*, to square its application of *Wilson* to the present circumstances. In Strickler's case, unlike Hoke's, it is absolutely clear no amount of investigation into the factual background of the case could have revealed the factual evidence contained in the Stolzfus materials. The key aspects of the Stolzfus materials were Detective Claytor's personal impressions of his first interview with Stolzfus and the fact that, as a whole, the materials demonstrated that Stolzfus' story evolved over the course of a month from a "very vague memory"[74] to a factual pattern about which she was "100 percent" certain[75] at trial. Because Stolzfus' story had completed its transformation two months before-hand, even had defense counsel interviewed Stolzfus on the very day on which Strickler was indicted, defense counsel would still have heard the final version of her story – the incriminating "detailed description"[76] of events –

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69. Kyles v. Whitley, 514 U.S. at 437.

70. 147 F.3d 319 (4th Cir. 1998).

71. Boyd v. French, 147 F.3d 319, 330 (4th Cir. 1998) (quoting with approval Barbee v. Warden, 331 F.2d 842, 846 (4th Cir.1964) (footnote omitted)).

72. *Hoke*, 92 F.3d at 1355-56.

73. *Id.* at 1366 (Hall, J., dissenting).

74. *Strickler*, 1998 WL 340420, at *8.

75. Campbell, *supra* note 39.

76. *Strickler*, 1998 WL 340420, at *8.

rather than the highly suspect "impressions"[77] out of which that story grew.

Moreover, it is, contrary to the Fourth Circuit's *sua sponte* contention, extremely unlikely defense counsel could have obtained the Stolzfus materials (as distinguished from the factual information contained therein) by subpoena. The Supreme Court of Virginia rule cited by the Fourth Circuit states in relevant part:

> (5) Limitations on Discovery in Certain Proceedings. In any proceeding . . . (3) for a writ of habeas corpus . . . (a) the scope of discovery shall only extend to matters which are relevant to the issues in the proceeding and which are not privileged; and (b) no discovery shall be allowed in any proceeding for a writ of habeas corpus . . . without prior leave of the court, which may limit discovery in any such proceeding.[78]

The court of appeals cited no Virginia case or authority in support of its conclusion that Strickler would have, as a matter of course, been granted discovery of the police files had he made such a motion. It seems likely the court erred in its interpretation of this statute. In *Howard v. Warden*[79] the Supreme Court of Virginia noted, apparently with approval, a circuit court decision finding "police files are privileged."[80] In addition, it is difficult to envision how Strickler might possibly have demonstrated the "relevance" of his motion given that the Commonwealth repeatedly insisted all required *Brady* disclosures had been made before trial.

But even if the defense counsel could have obtained the documents, the fact remains that this is precisely the burden *Kyles* places squarely on the prosecution. There, the court explicitly rejected the argument advanced by the State of Louisiana that the burden for finding and disclosing to all parties relevant information falls on anyone except the government:

> The State of Louisiana would prefer an even more lenient rule. It pleads that some of the favorable evidence in issue here was not disclosed even to the prosecutor until after trial . . . and it suggested below that it should not be held accountable . . . for evidence known only to police investigators and not to the prosecutor. To accommodate the State in this manner would, however, amount to a serious change of course from the *Brady* line of cases . . . Since . . . the prosecutor has the means to discharge the government's *Brady* responsibility if he will, any argument for excusing a prosecutor from disclosing what he does not happen to know about boils down to a plea to substitute the police for the prosecutor, and even for the courts themselves, as the final arbiters of the government's obligation to ensure fair trials.[81]

The Fourth Circuit applied similarly problematic reasoning in determining Strickler's *Brady* claim was also procedurally defaulted under Virginia Statute.[82]

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77. *Id.*
78. Virginia Supreme Court Rule 4:1(b)(5).
79. 348 S.E.2d 211 (Va. 1986).
80. Howard v. Warden, 348 S.E.2d 211, 212 (Va. 1986).
81. *Kyles*, 514 U.S. at 438.
82. *Strickler*, 1998 WL 340420, at *8 (citing VA.CODE ANN. § 8.01-654(B)(2)).

The court read the statute's prohibition on the granting of a writ of habeas corpus ad subjeciendum "on the basis of any allegation the facts of which petitioner *had knowledge* at the time of filing any previous petition"[83] to allow it to forbid the granting of such a writ if the "factual basis of Strickler's *Brady* claim *was available to him* at the time he filed his state habeas petition."[84] As it did in *Hoke*,[85] the court has literally read into the statute language the statute does not itself contain.[86]

B. Cause and Prejudice to Excuse Procedural Default of the Brady *Claim*

After concluding that Strickler's *Brady* claim was procedurally defaulted, the court noted that it could only address the claim upon a finding of cause and actual prejudice.[87]

1. Cause

Strickler asserted he had cause to excuse the default because the *Brady* claim was unavailable to him at the time he filed his state habeas petition and, alternatively, that defense counsel was constitutionally ineffective in not filing a *Brady* motion at trial.[88] The court found that because it had rejected Strickler's assertion that the factual basis for his *Brady* claim was unavailable to him at the time he filed his state habeas petition, he could not establish cause based upon the unavailability of the *Brady* claim.[89]

The Fourth Circuit likewise rejected Strickler's ineffective assistance of counsel argument. The court found that under *Strickland v. Washington*[90] Strickler's trial counsels' action did not fall below an objective standard of reasonableness because, in light of the prosecutor's open file policy, trial counsel were under no obligation to file a *Brady* motion.[91] This result demonstrates how important it is for counsel to file particularized, time-limited, pre-trial *Kyles* motions and the danger of relying on a prosecutor's open-file policy.

Further, in a jurisdiction in which a Commonwealth Attorney maintains an open file policy, there is no reason defense counsel should be denied access to it simply because *Kyles* motions must also be filed and litigated. *Strickler* is proof

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83. VA.CODE ANN. § 8.01-654(B)(2) (emphasis added).

84. *Id.* at *8.

85. *Hoke*, 92 F.3d at 1354.

86. *Strickler*, 1998 WL 340420, at *8.

87. *Id.*

88. *Id.* at *9.

89. *Strickler*, 1998 WL 340420, at *9 (quoting Stockton v. Murray, 41 F.3d 920, 925 (4th Cir.1994) (holding "[e]ven if [the petitioner] had not actually raised or known of the claims previously, he still cannot establish cause to excuse his default if he should have known of such claims through the exercise of reasonable diligence.")).

90. 466 U.S. 668 (1984).

91. *Strickler*, 1998 WL 340420, at *9.

positive that there is no guarantee that the "open file" will contain all the information covered by the prosecutor's obligation to disclose. Commonwealth Attorneys adopting an "either the file or the motions fight" stance may thereby establish governmental interference with the Sixth Amendment right to counsel. They may also violate the Fourteenth Amendment Equal Protection clause by purposefully and arbitrarily establishing two classes of defendants – those who forgo the right to file motions and those who do not.

2. Prejudice

To establish "actual prejudice," Strickler was required to demonstrate "not merely that the errors at his trial created a possibility of prejudice, but that they worked to his actual and substantial disadvantage, infecting his entire trial with error of constitutional dimensions."[92] The court concluded that the Stolzfus materials would have provided little or no help to Strickler in either phase of the trial, and as such found no error.[93]

The court reasoned that because Strickler never contested that he abducted and robbed Whitlock, but instead argued he should only be convicted of first degree murder because Henderson actually killed Whitlock, the Stolzfus' testimony was not critical to the Commonwealth's case.[94] The court likewise concluded that the Stolzfus' testimony would have been of no import during the sentencing phase of the trial because the parties focused their arguments on Strickler's prior criminal record and the way in which Whitlock was killed.[95] As such, it found that failure to disclose any or all of the Stolzfus materials did not undermine its "confidence in the outcome of the trial," and that Strickler had therefore failed to establish prejudice.[96]

The court's reasoning is flawed. Had defense counsel been made aware of the fact that it had materials which, according to the District Court, "contradicted or impeached [Stolzfus'] trial testimony in many crucial respects" and "would likely have been extremely valuable in attacking her credibility with the jury" or, might "actually [bar] her testimony altogether"[97] they might well have pursued an entirely different defense strategy. Had they done so, the outcome of the trial might well have been different. At the very least, the issue of relative involvement of co-defendants is important to the life/death sentencing issue, and Stolzfus' testimony clearly painted Strickler as the ringleader from the outset.

The United States Supreme Court has a number of options in *Strickler*. The court could conclude that: (1) there is no due-diligence exception, that the

92. *Id.* (citing United States v. Frady, 456 U.S. 152, 170 (1982); Satcher v. Pruett, 126 F.3d 561, 572 (4th Cir.1997), *cert. denied*, 118 S.Ct. 595 (1997)).

93. *Id.* at *10.

94. *Id.*

95. *Strickler*, 1998 WL 340420, at *10.

96. *Id.* (citing Kyles v. Whitley, 514 U.S. 419, 434 (1995)).

97. Campbell, *supra* note 39.

evidence was material to Strickler's guilt or innocence, and as such he is entitled to a new trial; (2) there is no due-diligence exception, that the Supreme Court will not decide materiality, but remand on that question; (3) there is a due diligence exception but its extreme application by the Fourth Circuit is unconstitutional; or (4) the Fourth Circuit was correct. Defense counsel should follow carefully the outcome in *Strickler*, for it is potentially very significant. No matter what the high court rules, the state of the law can not be worse in the Fourth Circuit, and it might get much better.

Attorneys should recognize that this case further demonstrates the necessity of always filing *Kyles* pre-trial motions despite a prosecutor's open file policy. These motions should have the following three elements: (1) detailed and specific requests for information; (2) time limits on compliance by the prosecution; (3) case law which finds that the information being requested is within the scope of *Kyles*. Research into what types of materials have been found to be within the scope of *Kyles* should provide defense counsel a large foundation on which to base such motions.[98]

C. The Proportionality Claim

Strickler presented his proportionality claim for the first time in his state habeas petition where it was found to be procedurally defaulted under the authority of *Slayton v. Parrigan*.[99] The district court likewise held that Strickler's proportionality review claim was procedurally defaulted under *Slayton* and that Strickler failed to establish cause and actual prejudice to excuse the default.[100]

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98. Examples of materials found to be within scope of Kyles:

a. Competency hearing report from trial of a prosecution witness in an earlier unrelated matter. East v. Johnson, 123 F.3d 235 (5th Cir. 1997).

b. Fact that jailhouse snitch has a history as an informant in other cases. Pyles v. Johnson, 136 F.3d 986 (5th Cir. 1998).

c. Presentence reports for witnesses who have federal convictions. Note that if state prosecutor is not charged with the obligation to disclose, the court itself may have a quasi-*Brady* duty to furnish them. U.S. v. Beckford, 962 F.Supp. 780 (E.D. Va 1997)(Beckford I)

d. Evidence of victim's criminal activity, like drug dealing, at time of his or her death. U.S. v. Beckford, 962 F. Supp. 804 (E.D. Va. 1997)(Beckford II).

e. Investigation documents created by law enforcement officers. United States v. Tolliver, 61 F.3d 1189 (5th Cir. 1995).

f. Promise not to oppose co-defendant's witness' parole; allowing co-defendant's witness unsupervised visits from his girl-friend; police report indicating a person had seen someone other than defendant threaten victim over drug debts. Spence v. Johnson, 80 F.3d 989 (5th Cir. 1996)

g. Oral statements of witnesses to police, not recorded by police, when they took written statements. Guerra v. Johnson, 90 F.3d 1075 (5th Cir. 1996).

h. Police reports of interviews with victim witnesses, containing information that would have alerted defendants to defensively significant matters; "Lead Sheets" prepared by police after a composite picture of the suspect was broadcast in news media. Fogarty v. State, 497 S.E.2d 628 (Ga. App. 1998).

99. 215 Va. 27, 205 S.E.2d 680 (1974) (holding that claims that could have been raised at trial or on direct appeal but were not cannot be considered on collateral review).

100. *Strickler*, 1998 WL 340420, at *11.

Therefore the question again before the Fourth Circuit was whether Strickler had cause and actual prejudice to excuse the default.[101]

Strickler contended he established cause because he was unable to raise his proportionality claim until after the Supreme Court of Virginia conducted a proportionality review and affirmed his sentence on direct appeal.[102] The Fourth Circuit rejected this argument on the ground that Strickler failed to employ two rarely used procedural devices. First, it found that because one of the issues before the Supreme Court of Virginia on direct appeal was whether Strickler's death sentence was "excessive or disproportionate to the penalty imposed in similar cases, considering both the crime and the defendant," Stickler had the opportunity to raise a facial challenge to all proportionality review in Virginia.[103] Second, the court found that Strickler could have made an as-applied challenge to the proportionality review he received on direct appeal in a rehearing petition to the Supreme Court of Virginia.[104] Because the court found Strickler had failed to show cause, it concluded he had not excused the procedural default.[105]

The court's opinion indicates that it is no longer premature to file a pre-trial facial challenge to Virginia's proportionality review of death sentences. Defense counsel should cite this case in support of such motions. Moreover, the court has now held, implicitly if not explicitly, that failure to invoke an optional procedural device, the petition for rehearing, may bar defendants on appeal from challenging deficient review in their case. Defense counsel should cite this case in support of petitions for rehearing, or in support of any other motion in which an extraordinary remedy is requested.

D. Strickler's Request for Judge Luttig's Recusal

Strickler filed a motion requesting Circuit Judge Luttig be disqualified from participation in the decision of his case pursuant to 28 U.S.C. § 455.[106] As grounds for disqualification, Strickler cited the "unavoidable parallels" between the murder of Luttig's father and that of Leanne Whitlock.[107]

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101. *Id.*

102. *Id.*

103. *Id.* at *12.

104. *Strickler*, 1998 WL 340420, at *12.

105. *Id.*

106. The statute, in pertinent part, reads as follows: "Any justice, judge, or magistrate of the United States shall disqualify himself in any proceeding in which his impartiality might reasonably be questioned." 28 U.S.C. § 455.

107. Luttig recounted the circumstances of his father's death as follows: "My dad was murdered in the driveway of his home in Tyler, Texas, during a carjacking, at approximately 11:00 p.m. on April 19, 1994--more than four years ago now. Upon exiting his vehicle in the garage, my dad was confronted by three armed, black youths, and shot twice in the head with a .45 caliber weapon. A single shot was fired at my mother, but she was not struck. The three perpetrators left my parents' home immediately. No personal items, other than the car, were stolen from my dad or my mother. Nothing was stolen from the interior compartments of my parents' car. At trial, it was shown that the three youths who murdered my dad had contemplated, and actually attempted, other

Section 455(a) requires a judge to recuse himself in any circumstance in which his impartiality *might* reasonably be questioned.[108] This is an objective standard.[109] Luttig declined to recuse himself on the grounds that, in his judgement, the factual and legal issues presented in Strickler's appeal were so different than those concerning his father's death that no one, except those who believe his father's death ought to disqualify him from deciding any murder case, could reasonably question his ability to impartially decide Strickler's case.

Despite Luttig's public statements regarding the emotional torment his father's violent death caused him and his support for imposing the death penalty on the perpetrators,[110] Luttig claimed that the "the natural inference arises that

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carjackings in the immediately preceding days and that they had, on the night of the murder, followed my mother and dad to their home, having the purpose and intent of stealing my parents' vehicle. Although the three who murdered my dad were black, there was no testimony presented of either racial motivation or racial animus. Two of the three youths were convicted in federal court on carjacking charges and in state court on murder charges. The third was convicted of capital murder in state court." *Strickler*, 1998 WL 340420, at *12.

108. *Id.* at 12. In addition to this broad objective standard, the statute, in §455(b), also specifies five circumstances in which the judge must recuse himself:

> b) He shall also disqualify himself in the following circumstances:
>
> (1) Where he has a personal bias or prejudice concerning a party, or personal knowledge of disputed evidentiary facts concerning the proceeding;
>
> (2) Where in private practice he served as lawyer in the matter in controversy, or a lawyer with whom he previously practiced law served during such association as a lawyer concerning the matter, or the judge or such lawyer has been a material witness concerning it;
>
> (3) Where he has served in governmental employment and in such capacity participated as counsel, adviser or material witness concerning the proceeding or expressed an opinion concerning the merits of the particular case in controversy;
>
> (4) He knows that he, individually or as a fiduciary, or his spouse or minor child residing in his household, has a financial interest in the subject matter in controversy or in a party to the proceeding, or any other interest that could be substantially affected by the outcome of the proceeding;
>
> (5) He or his spouse, or a person within the third degree of relationship to either of them, or the spouse of such a person:
>
> (i) Is a party to the proceeding, or an officer, director, or trustee of a party;
>
> (ii) Is acting as a lawyer in the proceeding;
>
> (iii) Is known by the judge to have an interest that could be substantially affected by the outcome of the proceeding;
>
> (iv) Is to the judge's knowledge likely to be a material witness in the proceeding.

109. John M. DelPrete, *Not Holding the Balance Nice Clear and True: The Right to An Impartial Judge*, CAP. DEF. DIG., vol. 7, no. 2, p. 16 (1995).

110. Judge Luttig spoke openly about his feelings to the press. " . . . J. Michael Luttig, was quoted in the Tyler Courier-Times-Telegraph two days later: "I think it is a tragedy when anyone has to receive a sentence of death from the state, but on the other hand, individuals must be held accountable at some point for actions such as this . . . I thought it was a proper case for the death penalty." Beazley, the triggerman, was the only one sentenced to death. Luttig testified at Beazley's trial. "We lived in absolute terror as a family. It is indescribable what this family went through the six weeks before this case was broken . . . There's not a human being who should ever, ever have to experience that . . . My dad was my hero. He still is my hero. I worshiped the ground he walked

the present disqualification motion has been filed not because my dad was the victim of a murder, but, rather, because I am the author of three, and I joined a fourth, of this Circuit's authorities which Strickler's counsel could have reasonably surmised might bear upon the disposition of the appeals sub judice."[111] As such, Luttig declined to recuse himself. Although future attempts to disqualify Luttig will likely fail, particularly in light of the fact that only the United States Supreme Court can review his decision, defense counsel should continue to request his recusal because adjudication by a biased judge is not subject to harmless error review.[112] Furthermore, because the "might reasonably be questioned" standard is an objective one, each time defense counsel requests disqualification is further evidence that Luttig's impartiality is in fact questioned.

Douglas R. Banghart

on. I still do." Fasbach, *supra* note 38.

111. *Strickler*, 1998 WL 340420, at *12. According to Luttig, the cases in which he participated are: Barnes v. Thompson, 58 F.3d 971 (4th Cir.1995) (Luttig, J.), *cert. denied*, 116 S.Ct. 4351 (1995); Hoke v. Netherland, 92 F.3d 1350 (4th Cir.) (Luttig, J.), *cert. denied*, 117 S.Ct. 630 (1996); In re Netherland, No. 97-8 (4th Cir. Apr. 10, 1997) (Luttig, J.) (staying district court's ex parte grant of pre-petition discovery to state prisoner); In re Pruett, 133 F.3d 275 (4th Cir.1997) (Hall, J., joined by Luttig and Motz, JJ.).

112. Chapman v. California, 386 U.S. 18, 24 n.8 (1967).