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I. Facts

On September 22, 1993, the nude body of Sarah Wisnosky ("Wisnosky") was found floating in the LaFayette River, in Norfolk, Virginia.[1] Wisnosky was a student at Old Dominion University ("ODU"). Derek Barnabei ("Barnabei"), petitioner, moved to the Norfolk area in August 1993. He claimed to be a member of Tau Kappa Epsilon ("TKE") at Rutgers University and moved into a boarding house with TKE members from ODU. Barnabei and Wisnosky met and she spent the night at his house on several occasions. While Barnabei said that they had never had sex, Wisnosky said that "he [was] alright, but [she had] had better."[2] When Barnabei was told about this comment, he became "agitated" and claimed to have only engaged in oral sex with Wisnosky.[3]

On September 22, 1993 at 1:00 a.m., a TKE pledge drove Barnabei home and saw that Wisnosky was waiting there. Members of Barnabei's boarding house claimed to have heard loud music coming from Barnabei's locked room and noticed that he appeared agitated. In the morning a shoe, later identified as Wisnosky's, was found near the rear of Barnabei's car.[4] That afternoon, Barnabei went to Towson, Maryland. On September 23, the police searched Barnabei's room and discovered blood stains that matched Wisnosky's. DNA tests also revealed that sperm samples taken from Wisnosky's body were most likely Barnabei's. Barnabei was arrested in Ohio in December 1993.[5]

On June 14, 1995, a Virginia jury convicted Barnabei of raping and murdering Wisnosky, and sentenced him to death.[6] After exhausting his state remedies, Barnabei filed a petition for federal habeas relief which the

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1. Barnabei v. Angelone, 214 F.3d 463, 465-66 (4th Cir. 2000). An autopsy revealed that Wisnosky had suffered a fractured skull as a result of no less than ten severe blows to the head, inflicted by a heavy blunt object. *Id.* Wisnosky's autopsy further revealed bruising to the abdomen, neck, and larynx, as well as manifestations of mechanical asphyxia. *Id.* Additionally, injuries to Wisnosky's vaginal and anal areas were discovered. *Id.* The head injuries were the primary cause of death and mechanical asphyxia was a contributing factor. *Id.*

2. *Id.* at 466.

3. *Id.*

4. *Id.* Barnabei was also seen carrying a duffle bag that had a very strong odor. Barnabei claimed that it was his laundry. *Id.* at 467.

5. *Id.* at 466-68.

6. *Id.* at 465.

district court dismissed.[7] Barnabei sought to raise in the United States Court of Appeals for the Fourth Circuit the following challenges to his conviction, sentence, and subsequent proceedings in state court: (1) the district court abused its discretion in refusing to order forensic testing of certain evidence;[8] (2) the district court applied an incorrect standard of review in evaluating his claims;[9] (3) he was denied effective assistance of counsel at trial by his counsel's failure to counter the forensic evidence of rape;[10] (4) he was denied effective assistance of counsel by his attorney's failure to object to the verdict form;[11] (5) the "vileness" aggravating factor was unconstitutionally vague;[12] (6) admission of his ex-wife's testimony containing unadjudicated criminal conduct during sentencing violated his right to due process; [13] and (7) the trial court was constitutionally required to inform the jury that a life sentence would have rendered Barnabei ineligible for parole for twenty-five years.[14]

II. Holding

The Fourth Circuit denied Barnabei's request for a certificate of appealability and affirmed the dismissal of his federal habeas petition.[15]

III. Analysis / Application in Virginia

A. Abuse of Discretion

Barnabei contended that the district court abused its discretion by refusing to order additional DNA and forensic testing.[16] Specifically, he argued that blood on fingernail clippings taken from Wisnosky should have been tested because they may have implicated another suspect.[17] Barnabei also maintained that over twenty hairs, a bloody pair of moccasins, and two bloody towels should also have been tested.[18]

The Fourth Circuit looked to Rule 6(a) of the rules governing section 2254 cases and found that a district court has the discretion to order addi-

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7. *Id.*
8. *Id.* at 474.
9. *Id.*
10. *Id.* at 470-71.
11. *Id.* at 471-72.
12. *Id.* at 472.
13. *Id.* at 472-74.
14. *Id.* at 474.
15. *Id.* at 465.
16. *Id.* at 474.
17. *Id.*
18. *Id.*

tional discovery in a section 2254 case for good cause shown.[19] Barnabei failed to meet the "good cause" requirement.[20] The cases Barnabei cited in support of his argument were distinguishable because, unlike in the present case, those defendants offered compelling support for a credible alternative theory of the crime for which they were convicted.[21] The Fourth Circuit decided that Barnabei's showing did not meet this standard.[22] It is important to note that a high burden, "compelling support for a credible alternative theory," must be met to show good cause before a district court will order additional forensic discovery.

B. Standard of Review

Barnabei argued that because the Supreme Court of Virginia cited little federal law in its rejection of his claims on direct appeal and no federal law in its summary order on state habeas, the district court should have reviewed his federal habeas claims de novo.[23] The Fourth Circuit determined that "even a perfunctory state court decision constitutes an adjudication 'on the merits' for the purposes of federal habeas review."[24] The court found that the district court independently ascertained whether the record revealed a violation of Barnabei's rights, and in doing so, struck the proper balance between recognizing the legal effect of the prior state court adjudication and reviewing the issues raised.[25] Thus, in the instant case, de novo review by a federal habeas court is inappropriate under 28 U.S.C. § 2254(d).[26]

C. Ineffective Assistance -- Forensic Evidence of Rape

Barnabei contended that his counsel rendered ineffective assistance by failing to present medical evidence to contradict the Commonwealth's

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19. *Id.*; *see* Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, § 104, 110 Stat. 1214, 1218-19 (1996) (codified as amended at 28 U.S.C. § 2254 (Supp. III 1997)).

20. *Barnabei*, 214 F.3d at 474.

21. *Id.*; *see* Jones v. Wood, 114 F.3d 1002, 1012 (9th Cir. 1997) (reversing denial of discovery of forensic evidence when there was specific evidence linking another suspect to the murder); Toney v. Gammon, 79 F.3d 693, 697 (8th Cir. 1996) (reversing denial of discovery of DNA evidence in rape case in which both victim and witness offered consistent physical descriptions of attacker that did not match petitioner).

22. *Barnabei*, 214 F.3d at 474.

23. *Id.* at 469.

24. *Id.*

25. *Id.*

26. *Id.*; *see* 28 U.S.C. § 2254(d) (1996) (allowing a federal court to grant an application for habeas relief on a claim that was previously adjudicated on the merits in state court only if that adjudication (1) resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law as determined by the Supreme Court; or (2) resulted in a decision that was based on an unreasonable determination of the facts in light of the evidence presented in the state court proceeding).

assertion that Wisnosky's vaginal injuries were the result of rape.[27] Barnabei cited two medical texts, studies, and affidavits of two physicians to support the contention that Wisnosky's injuries were also consistent with consensual sex or certain non-sexual activities.[28] The evidence of the vaginal bruise was particularly important because rape was the predicate offense on which the capital murder charge was based.[29]

The Fourth Circuit examined Barnabei's claim under the two prong standard set forth in *Strickland v. Washington*.[30] Barnabei argued that counsel's failure to consult medical texts and experts was unreasonable and prejudicial under *Strickland*.[31] The Fourth Circuit affirmed the trial court's finding that counsel's failure to investigate one of the Commonwealth's expert witnesses was unreasonable, but that the defendant was not prejudiced as required by *Strickland*'s second prong.[32]

The court determined that the evidence presented at trial, taken as a whole, made it a virtual certainty that Barnabei raped Wisnosky.[33] Barnabei wanted each item of evidence to be considered in isolation, but the court said that the evidence must be evaluated as a whole.[34] Thus, trial counsel was not held to be ineffective on the issue of forensic evidence of rape.[35]

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27. *Barnabei*, 214 F.3d at 469-70.

28. *Id.* at 470.

29. *Id.*

30. *Id.*; *see* Strickland v. Washington, 466 U.S. 668, 687-88, 694 (1984) (holding that a finding of ineffective assistance of counsel may be made if (1) counsel's performance fell below an objective standard of reasonableness in light of prevailing professional norms, and (2) there is a reasonable probability that but for counsel's errors, the result of the proceeding would have been different).

31. *Barnabei*, 214 F.3d at 470. According to Barnabei, if counsel had reviewed medical literature, cross-examination would have been more effective, independent evidence rebutting prosecution expert's conclusions would have been presented, and a proffer sufficient to convince the trial court to appoint a defense expert might have been formulated. *Id.*

32. *Id.* Specifically, the trial court found that counsel's failure to investigate the Commonwealth expert's medical findings was unreasonable. *Id.*

33. *Barnabei*, 214 F.3d at 470. The evidence included the following: vaginal and anal injuries sustained by Wisnosky; testimony that Wisnosky was at Barnabei's house shortly before two a.m. on the night of her murder; the presence of Wisnosky's blood in Barnabei's bedroom; and the presence of Barnabei's semen on a vaginal swab taken from Wisnosky's body. *Id.*

34. *Id.* at 471. Barnabei contended that a woman could incur a vaginal bruise during consensual sex; that she could have incurred an anal tear shortly before she was murdered but not have been vaginally raped around the same time; and that she could have had consensual sex with a partner who murdered her shortly thereafter. *Id.* The court rejected Barnabei's contention that these "extraordinarily unlikely circumstances" converged in this case and viewed the evidence as a whole. *Id.* The court also noted that trial counsel was able to elicit on cross-examination a concession from the Commonwealth's expert that the bruise could be consistent with consensual sex. *Id.*

35. *Id.*

D. Ineffective Assistance -- Verdict Form

Barnabei asserted that he was denied effective assistance by his counsel's failure to object to the verdict form.[36] In Virginia, a defendant may be sentenced to death if the jury finds beyond a reasonable doubt that one of two aggravating factors, vileness or future dangerousness, exists.[37] In Barnabei's trial, the jury submitted its verdict on a form which stated that a unanimous finding on the first aggravating factor (future dangerousness) "and/or" the second aggravating factor (vileness) was made.[38] Barnabei contended that the use of "and/or" permitted the jury to sentence him to death without unanimity on either one of the two aggravators.[39] He claimed that counsel's failure to object to the "and/or" language was prejudicial.[40]

The Supreme Court of Virginia found no merit in Barnabei's claim that counsel's failure to object to the form amounted to ineffective assistance.[41] Because the objection to the verdict form was a state law issue, the Fourth Circuit deferred to the judgement of the state courts.[42] The court further stated that the Virginia courts have consistently upheld the use of "and/or" verdict forms and declined to overturn death sentences when they could not determine whether the juries unanimously agreed on either of the two aggravators.[43]

E. "Vileness" Aggravator

Barnabei contended that the "vileness" aggravator was unconstitutionally vague.[44] The Fourth Circuit summarily dismissed this claim based upon recent precedent.[45] The court also noted that the constitutional challenge to the vileness aggravator had been raised on numerous occasions, but rejected each time.[46]

F. Denial of Due Process

Barnabei asserted that he was denied due process during sentencing when his ex-wife, Paula Barto ("Barto"), testified that on one occasion

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36. *Id.*

37. VA. CODE ANN. § 19.2-264.2 (Michie 2000); *see Barnabei*, 214 F.3d at 471.

38. *Barnabei*, 214 F.3d at 471; *see* VA. CODE ANN. §§ 19.2-264.2, 19.2-264.4(C), (D) (Michie 2000).

39. *Barnabei*, 214 F.3d at 471.

40. *Id.*

41. *Id.*

42. *Id.* at 471-72.

43. *Id.* at 472. *See generally* M. Kate Calvert, *Obtaining Unanimity and a Standard of Proof on the Vileness Sub-Elements with* Apprendi v. New Jersey, 13 CAP. DEF. J. 1 (2000) (for suggested argument).

44. *Barnabei*, 214 F.3d at 472.

45. *Id.* (citing Breard v. Pruett, 134 F.3d 615 (4th Cir. 1998); Bennett v. Angelone, 92 F.3d 1336 (4th Cir. 1996); Tuggle v. Thompson, 57 F.3d 1356 (4th Cir. 1995)).

46. *Id.*

Barnabei attempted to force her to have anal sex.[47] Barnabei had requested that the Commonwealth provide notice of its intent to introduce evidence of unadjudicated criminal conduct.[48] The Prosecution responded that "a continuous course of threatening and assaultive conduct against the former Paula Argenio Barnabei" would be proffered.[49] Barnabei claimed that he was unfairly surprised and that Barto's testimony was misrepresented by the Prosecution because the notice provided by the Commonwealth was not specific enough.[50]

The Fourth Circuit began by dismissing the Commonwealth's claim that Barnabei had procedurally defaulted this issue.[51] Barnabei's counsel lodged a strenuous objection, and asked the trial judge to strike the testimony and declare a mistrial.[52] The Prosecution posited that Barnabei's objection was based solely on state law, but the court stated that the objection went to the fundamental fairness of Barto's testimony.[53] Thus, the issue was preserved on constitutional grounds despite the fact that the objection was based on state law.[54] Also, on direct appeal, Barnabei linked the admission of Barto's testimony to a violation of his federal constitutional rights and the Supreme Court of Virginia rejected the argument on the merits.[55] Therefore, the Fourth Circuit determined that it was also appropriate to consider Barnabei's argument on the merits.[56]

In support of his claim of unfair surprise, Barnabei sought to rely on *Gardner v. Florida*.[57] In *Gardner*, the Supreme Court vacated the death sentence, in part, because defendant was denied access to information in the presentence investigation report upon which the court relied to impose its sentence.[58] However, the Fourth Circuit determined that *Gray v. Netherland*[59] was the controlling case.[60] Gray was convicted of capital

47. *Id.*

48. *Id.*

49. *Id.*

50. *Id.*

51. *Id.*

52. *Id.*

53. *Id.*

54. *Id.* The court posited that it was not barred from considering the argument simply because trial counsel, "acting on the spur of the moment," did not cite a particular constitutional provision. *Id.*

55. *Id.*

56. *Id.*

57. *Id.* at 473; *see* Gardner v. Florida, 430 U.S. 349, 362 (1977) (examining a death sentence imposed on basis of information in a presentence investigation report to which the petitioner had been denied access).

58. *Gardner*, 430 U.S. at 362.

59. 518 U.S. 152 (1996).

60. *Barnabei*, 214 F.3d at 472; *see* Gray v. Netherland, 518 U.S. 152, 156-57 (1996) (examining doctrine of "unfair surprise," the court held that a habeas petitioner, who had

murder and argued that his death sentence should be vacated because during sentencing the Prosecution introduced crime scene and medical evidence linking the defendant to an unsolved double murder.[61] The Prosecution had previously assured defense counsel that it would restrict evidence of the double murders solely to testimony and not other sorts of evidence.[62] The Supreme Court said that habeas relief is appropriate only if "a state court considering the [petitioner's] claim at the time his conviction became final would have felt compelled by existing precedent to conclude that the rule [he] seeks was required by the Constitution."[63]

The Court viewed Gray's argument as a claim that he was entitled to more than a day's notice of the Commonwealth's evidence under due process and that "due process required a continuance whether or not [the defendant] sought one, or that, if he chose not to seek a continuance, exclusion was the only appropriate remedy for the inadequate notice."[64] The Court held that only the adoption of a new constitutional interpretation could establish these propositions.[65] Further, the Court distinguished *Gardner* from *Gray* by noting that in *Gardner*, the petitioner had no opportunity to see the confidential information let alone contest it, while in *Gray*, petitioner had opportunity to hear testimony and cross examine the witness.[66]

The Fourth Circuit determined that Barnabei's claim that the Commonwealth's description of "a continuous course of threatening and assaultive conduct" was insufficient to put Barnabei on notice as to the content of Barto's testimony was not sufficiently distinguishable from *Gray* so as to cause the court to disregard *Gray* completely.[67] Rather, the court noted that *Gray*'s holding explicitly rejected the dissent's proposed constitutional rule that a capital defendant must be afforded a meaningful opportunity to explain or deny the evidence introduced against him at sentencing.[68]

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been convicted and sentenced to death, asked that his sentence be vacated because during the penalty phase, the prosecution had introduced crime scene and medical evidence linking the defendant to an earlier, unsolved double murder).

61. *Gray*, 518 U.S. at 156-57.

62. *Id.*

63. *Id.* at 166 (citation omitted). This rule, called the "new rule" doctrine was enunciated in a plurality decision in *Teague v. Lane. Barnabei*, 214 F.3d at 473; *see* Teague v. Lane, 489 U.S. 288, 309-10 (1989) (plurality opinion).

64. *Gray*, 518 U.S. at 167.

65. *Id.*

66. *Id.* at 168.

67. *Barnabei*, 214 F.3d at 473. Specifically, the court said that if the Commonwealth's description of Barto's testimony was insufficient to put Barnabei on notice, then he effectively got no notice at all, as opposed to the one day notice given to Gray. *Id.* The court also pointed out that the evidence introduced in *Gray* was significantly more "explosive" than the evidence in Barnabei. *Id.*

68. *Id.*

The Fourth Circuit stated that Barnabei failed to identify any intervening precedent that would have allowed the court to ignore *Gray*'s holding.[69] The Fourth Circuit further stated that Barnabei failed to establish that due process requires advance notice of the specific evidence of unadjudicated conduct that the Prosecution intends to introduce during sentencing.[70]

Barnabei also claimed that the Commonwealth's deliberate vagueness in its notice constituted prosecutorial misrepresentation.[71] The court summarily dismissed this claim by distinguishing Barnabei's case from *Mooney v. Holohan*,[72] which Barnabei had cited.[73] The court further stated that the facts, even as alleged by Barnabei, do not support a finding of a constitutional violation based on prosecutorial misrepresentation.[74] Thus, the Commonwealth is not obligated to be extremely specific regarding testimony about unadjudicated criminal conduct.

G. Jury Instruction

Finally, Barnabei argued based on *Simmons v. South Carolina*[75] that his due process and Eighth Amendment rights were violated because the judge refused to give an instruction that, if sentenced to life imprisonment, Barnabei would not be eligible for parole for twenty-five years.[76] The court held that a *Simmons* instruction was only required when the defendant is parole ineligible.[77] Because Barnabei would have been eligible for parole in twenty-five years, the *Simmons* rule did not apply.[78]

Virginia has abolished parole for all felony offenses committed on or after January 1, 1995.[79] For all capital crimes committed after January 1, 1995, a defendant may request a "life means life" instruction.[80] Because the

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69. *Id.*

70. *Id.*

71. *Id.*

72. 294 U.S. 103 (1935).

73. *Barnabei*, 214 F.3d at 474 (distinguishing Mooney v. Holohan, 294 U.S. 103, 110-12 (1935) (discussing a prosecutor's deliberate deception of court and jury by knowingly introducing perjured testimony at trial)).

74. *Id.*

75. 512 U.S. 154 (1994).

76. *Barnabei*, 214 F.3d at 474; *see* Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (mandating that "life means life" jury instruction is only required when the Prosecution argued for the death penalty on the basis of the defendant's future dangerousness and a life sentence for the defendant would be without possibility of parole).

77. *Barnabei*, 214 F.3d at 474.

78. *Id.*

79. VA. CODE ANN. § 53.1-165.1 (Michie 2000).

80. *See* Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999) (finding that the jury must be instructed that "life means life" upon the defendant's request when the defendant has been convicted of capital murder); VA. CODE ANN. § 53.1-165.1 (Michie 2000); *see also* VA. CODE ANN. § 53.1-40.01 (Michie 2000) (eliminating the possibility of geriatric parole

murders in Barnabei's case were committed before January 1, 1995, he was not entitled to a *Simmons* instruction.

H. Epilogue

Barnabei was executed by lethal injection on September 14, 2000, at the Greensville Correctional Center.[81] In the weeks preceding the execution, upon Barnabei's request, Governor Jim Gilmore approved DNA testing of fingernail clippings taken from Wisnosky's body.[82] This evidence was missing from the Norfolk Circuit Court clerk's office and was located three days later in the "wrong room."[83] Governor Gilmore said there was no evidence that the fingernail clippings were tampered with and ordered them to be tested.[84] Barnabei appealed, arguing that his rights were violated when agents of the state tampered with the evidence.[85] This effort failed in federal court.[86] The tests revealed DNA from both Wisnosky and Barnabei on the fingernail clippings, and Governor Gilmore denied a stay of execution.[87]

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for inmates convicted of a class one felony).

81. Frank Green, *Barnabei Executed for Killing Wisnosky*, RICH. TIMES-DISPATCH, Sept. 15, 2000, at A1.

82. *Id.* at A8.

83. *Id.*

84. *Id.*

85. *Id.*

86. *Id.*

87. *Id.*