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I. Facts

On April 28, 1983, Susan Kennedy and David Scott Piechowicz died of multiple gunshot wounds while working in the lobby of the Warren House Motel in Baltimore County, Maryland.[1] At the state trial, the prosecution presented the testimony of several witnesses that linked Vernon Lee Evans, Jr. ("Evans") to the crimes.[2]

Evans was convicted in state court on two counts of first degree murder, conspiracy to commit murder, and the use of a handgun to commit a felony or violent crime.[3] The jury sentenced Evans to death on both counts of murder.[4] The convictions were affirmed on direct appeal.[5] In the state post-conviction proceeding, the Circuit Court for Worcester County found that the form used in sentencing Evans was unconstitutional and ordered re-sentencing.[6] At re-sentencing, the jury sentenced Evans to death for both murder convictions.[7] The convictions were then upheld in the second state post-conviction proceeding.[8] Evans then filed a petition for federal habeas corpus relief, which was denied.[9] The district court also denied Evans's motion to stay its consideration while he exhausted his claim based upon

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1. Evans v. Smith, 220 F.3d 306, 309 (4th Cir. 2000). Susan Kennedy was working in place of her sister Cheryl Piechowicz. The Piechowiczes were supposed to testify against Anthony Grandison in a federal narcotics case. The defendant, Vernon Lee Evans, Jr., allegedly was hired by Grandison to kill the Piechowiczes. *Id.*

2. *Id.* at 310.

3. *Id.* at 309-10. In federal district court, Evans was convicted of witness tampering and interfering with the Piechowiczes' right to testify against Grandison. Evans was sentenced to life plus ten years in prison for these offenses. *Id.* at 309.

4. *Id.* at 310. The jury sentenced Evans to life in prison for the conviction of conspiracy to commit murder and twenty years in prison for the use of a handgun in the crime. *Id.*

5. Evans v. State, 499 A.2d 1261, 1288 (Md. 1985).

6. *Evans*, 220 F.3d at 310.

7. *Id.* Evans's counsel stressed mitigation evidence during the re-sentencing hearing. *Id.* The sentences at re-sentencing were affirmed on direct appeal. *Id.*; *see* Evans v. State, 637 A.2d 117, 136 (Md. 1994).

8. *Evans*, 220 F.3d at 310-11; *see* Evans v. State, 693 A.2d 780, 780 (Md. 1997).

9. *Evans*, 220 F.3d at 311; *see* Evans v. Smith, 54 F. Supp. 2d 503, 539 (D. Md. 1999). Evans claimed that the prosecution used peremptory challenges based on racial considerations and that his counsel was ineffective at re-sentencing. *Evans*, 220 F.3d at 311.

Brady v. Maryland[10] in the state courts.[11] After Evans exhausted his state remedies, he filed a second petition for federal habeas relief, containing only the *Brady* claim, simultaneously with a request to file the petition for habeas relief as a second or successive petition.[12] The United States Court of Appeals for the Fourth Circuit denied the second habeas petition.[13] Evans appealed the district court's denial of habeas relief and challenged the Fourth Circuit's denial of his request for leave to file the second federal habeas petition. Evans made the following arguments: (1) the prosecution unlawfully used peremptory challenges to discriminate against African-American jurors; (2) defense counsel's performance at re-sentencing constituted ineffective assistance of counsel; (3) the district court erred by denying his motion to stay the federal habeas proceedings until he exhausted his *Brady* claim in state court; and (4) Evans was exempt from the prohibition against second or successive habeas petitions.[14]

II. Holding

The United States Court of Appeals for the Fourth Circuit rejected all of Evans's claims, affirmed the district court's denial of Evans's first habeas corpus petition and the district court's denial of the stay of the first habeas proceeding.[15] The court concluded that Evans was prohibited from presenting a second petition for writ of habeas corpus.[16]

III. Analysis / Application in Virginia

The Fourth Circuit analyzed Evans's habeas claim pursuant to the standard mandated by the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA").[17] The Fourth Circuit noted that it would assume that

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10. 373 U.S. 83 (1963).

11. *Evans*, 220 F.3d at 311; *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (finding suppression of evidence a due process violation when evidence is favorable to the defendant and material to guilt or punishment).

12. *Evans*, 220 F.3d at 311; *see* 28 U.S.C. § 2244(b)(2)(A), (B) (2000) (requiring dismissal of a second or successive habeas corpus application unless the claim is based on a new constitutional law, or the facts supporting the claim could not have been discovered earlier despite due diligence and, if proven, would establish by clear and convincing evidence that no reasonable fact-finder would have found the defendant guilty of the offense). Evans also requested that the district court consider his second habeas petition as a motion to reopen his first habeas petition. *Evans*, 220 F.3d at 311; *see* FED. R. CIV. P. 60(b).

13. *Evans*, 220 F.3d at 311; *see In re* Evans, No. 00-1 (4th Cir. Feb. 16, 2000) (order by the Fourth Circuit denying defendant permission to file second habeas petition).

14. *Evans*, 220 F.3d at 312, 316, 321, 322-23.

15. *Id.* at 325.

16. *Id.*

17. *Id.* at 311-12; *see* Anti-Terrorism and Effective Death Penalty Act, Pub. L. No. 104-132, 110 Stat. 1214 (1996) (amending 28 U.S.C. Title 153). When reviewing a claim that has

the factual findings of the state court were correct unless clear and convincing evidence was presented to refute this assumption.[18]

A. Constitutionality of Peremptory Challenges

Evans's first claim was that the prosecution employed its peremptory challenges in a racially discriminatory manner.[19] *Batson v. Kentucky*[20] provided a three-step test for determining whether the jury selection process was racially discriminatory.[21] First, the defendant must present a prima facie case that the prosecution has employed peremptory challenges in a racially discriminatory fashion.[22] Second, if defendant provides a prima facie case, the State must show that its motivation in choosing the jury was race neutral.[23] In order to do this, the prosecutor is required to give a "clear and reasonably specific explanation of his legitimate reasons for exercising the challenges."[24] The Fourth Circuit also noted that the explanation for the peremptory challenge "does not demand an explanation that is persuasive, or even plausible."[25] The State is required to give a reason that affords equal protection, but not one that necessarily makes sense.[26] Third, if the prosecution provides a race neutral explanation, the court must determine whether the defendant has shown that the prosecutor purposefully discriminated against jurors based on race.[27] The *Evans* court stressed that it must afford deference to the trial court's decision regarding the discriminatory nature of the peremptory challenges because the decision will often depend

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already been decided on the merits in state court, federal habeas relief can only be granted if the state proceeding either "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal Law, as determined by the Supreme Court of the United States," or "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." *Evans*, 220 F.3d at 313 (quoting 28 U.S.C. § 2254 (d)(1), (2)).

18. *Evans*, 220 F.3d at 312; *see* 28 U.S.C. § 2254(e)(1) (2000) (state court factual finding will be presumed correct when applicant for writ of habeas corpus is in custody pursuant to a state court judgment).

19. *Evans*, 220 F.3d at 312.

20. 476 U.S. 79 (1986).

21. Batson v. Kentucky, 476 U.S. 79, 93-98 (1986) (finding that prosecutor's challenge of jurors on racial considerations alone was unconstitutional).

22. *Id.* at 96-97.

23. *Id.* at 97.

24. *Id.* at 98.

25. *Evans*, 220 F.3d at 312 (citing Purkett v. Elem, 514 U.S. 765, 767-68 (1995) (finding prosecutor's claim that peremptory challenge was exercised because of juror's moustache, beard, and hair style constituted a nondiscriminatory explanation for use of peremptory challenge)).

26. *Purkett*, 514 U.S. at 768-69.

27. *Batson*, 476 U.S. at 98.

on the behavior and credibility of the attorney making the peremptory challenges.[28]

Evans argued that the state courts did not apply *Batson* and that the analysis employed did not comply with the requirements mandated by *Batson*.[29] Therefore, Evans concluded that he was entitled to a new trial because the state court decisions were "contrary to . . . clearly established Federal law."[30] According to the Fourth Circuit, the state courts' analyses were consistent with the *Batson* analysis.[31] The court noted that at trial, the prosecution was warned against using peremptory challenges based on racial considerations.[32] After the defense objected to the prosecution's use of peremptory challenges, the prosecutor offered a race-neutral explanation for the challenges.[33] The Fourth Circuit noted that *Batson* did not require individualized explanations for peremptory challenges.[34] Evans provided no further support for his claim of purposeful discrimination.[35] The trial court, evidencing its belief that the peremptory challenges were not used in a racially impermissible fashion, overruled Evans's objection.[36] The Fourth Circuit noted that the Maryland Court of Appeals used an analysis similar to *Batson* in its rejection of Evans's claim.[37] The court noted that disturbing the trial court finding would require the Fourth Circuit to render judgment on issues that the trial court was uniquely positioned to determine.[38] It refused to do so and upheld the state court adjudications.[39]

B. Ineffective Assistance of Counsel

Evans claimed that at his re-sentencing he was denied effective assistance of counsel guaranteed to him by the Sixth Amendment.[40] In *Strick-*

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28. *Evans*, 220 F.3d at 313.

29. *Id.*

30. *Id.*; *see* 28 U.S.C. § 2254(d)(1) (2000).

31. *Evans*, 220 F.3d at 313.

32. *Id.* at 313-14. The Fourth Circuit also noted that the jury selection occurred two years before the *Batson* decision. *Id.* at 314.

33. *Id.* at 314. The trial court gave the prosecution an opportunity to explain its use of peremptory challenges. The prosecutor claimed that challenges were based on background, age, occupation, and answers during voir dire, not race. The court overruled Evans's objections and the defense did not request further explanation. *Id.*

34. *Id.*

35. *Id.*

36. *Id.*

37. *Id.* at 315; *see* Evans v. State, 499 A.2d 1261 (Md. 1985).

38. *Evans*, 220 F.3d at 316.

39. *Id.*

40. *Id.*; *see* U.S. CONST. amend. VI. The Sixth Amendment to the United States Constitution reads, in relevant part: "In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense." *Id.*

land v. Washington,[41] the United States Supreme Court established the standard for determining ineffective assistance of counsel.[42] To prove ineffective assistance of counsel, a defendant must show that counsel's conduct did not meet an objective standard of reasonableness and that counsel's performance prejudiced the defendant.[43] This analysis should accord a high degree of deference to defense counsel's performance.[44] Evans argued that re-sentencing counsel did not meet the objective standard of reasonableness required because they did not conduct an adequate investigation of Evans's probable federal parole date.[45] Evans claimed that if his counsel had investigated adequately his likely parole date on his federal convictions and used expert testimony at re-sentencing, it is reasonably probable that the jury would not have sentenced him to death.[46]

Doering v. State[47] allows consideration at sentencing of the defendant's parole eligibility if a life sentence is imposed, regardless of whether defendant is parole ineligible.[48] In *Simmons v. South Carolina*,[49] the United States Supreme Court decided that refusing to allow the defendant to advise the jury of his parole ineligibility violated due process when the death penalty was imposed, in part, because of future dangerousness.[50] *Doering*'s reach is more broad than future dangerousness.[51] Parole evidence may be a mitigating circumstance because it is relevant to the jury's determination of whether a life sentence should be imposed.[52]

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41. 466 U.S. 668 (1984).

42. Strickland v. Washington, 466 U.S. 668, 687 (1984) (requiring a showing that counsel was deficient and defendant was prejudiced by counsel's performance in order to prove ineffective assistance of counsel).

43. *Id.* at 687.

44. *Id.* at 689.

45. *Evans*, 220 F.3d at 320. Evans also argued that defense counsel were deficient for failing to interview witnesses whose testimony may have shown that Evans was not the principal in the shootings. *Id.* at 317. However, the Fourth Circuit found that defense counsel did not perform below an objective standard of reasonableness by not interviewing the additional witnesses. *Id.*

46. *Id.* at 321. Defense counsel learned from the federal penitentiary, where Evans was serving his federal sentences, that Evans's possible date of parole would be in 1993 or 1996. *Id.* at 320. As a result of the closeness to this date, Evans's counsel did not discuss his federal parole at re-sentencing. *Id.*

47. 545 A.2d 1281 (Md. 1988).

48. *Evans*, 220 F.3d at 320; *see* Doering v. State, 545 A.2d 1281, 1295 (Md. 1988) (allowing capital defendants to present parole eligibility testimony if a life sentence is imposed).

49. 512 U.S. 154 (1994).

50. Simmons v. South Carolina, 512 U.S. 154, 161-62 (1994) (finding that when future dangerousness is considered, due process requires that the jury be informed of the defendant's parole eligibility).

51. *Doering*, 545 A.2d at 1294.

52. *Id.*

Rather than focusing on parole evidence stemming from Evans's federal convictions, defense counsel offered testimony that indicated that Evans was unlikely to be paroled on his state convictions, but that in any event he would not be paroled for several decades.[53] The Fourth Circuit refused to disturb the state court's decision, finding that defense counsel acted reasonably by depending on the information provided by the federal penitentiary and focusing on Evans's state sentences and likely parole ineligibility.[54] However, even assuming that defense counsel's strategy was deficient, the court concluded that Evans was not prejudiced by the strategy.[55] The Fourth Circuit determined that expert testimony regarding Evans's federal parole ineligibility would not have altered the decision of the re-sentencing jury because defense counsel had provided evidence that Evans would likely spend the remainder of his life in prison.[56] In conclusion, the court found that it could not say that the state court's adjudication of Evans's claim in the state habeas proceedings was contrary to, or an unreasonable application of, federal law.[57]

C. District Court's Failure to Stay Federal Habeas Proceedings

Evans next argued that the district court erred in refusing to stay his federal habeas proceeding pending the exhaustion of his *Brady* claim in state court.[58] The Fourth Circuit implied that the following circumstances might permit a federal court to stay habeas proceedings until a petitioner's claim has been adjudicated in state court: (1) the threat of imminent execution; (2) the need for a stay in order to preserve opportunity for federal review; and (3) the disjointed proceeding resulting from a denial of the stay would result in prejudice to the petitioner that outweighed the considerations of finality and prompt adjudication required in habeas proceedings.[59] However, none of these circumstances were present in Evans's case.[60] First, there was no threat of imminent execution. The State agreed not to pursue execution while the defendant was arguing his *Brady* claim in state court or

53. *Evans*, 220 F.3d at 320. The defense argued that Evans would become eligible for parole at eighty years of age. *Id.*

54. *Id.*

55. *Id.*

56. *Id.*

57. *Id.*

58. *Id.* The Fourth Circuit's review of the district court decision was based on an abuse of discretion standard. *Id.* at 322. Evans's *Brady* claim was based on the account of a witness who would testify that she saw an African-American man in the lobby prior to the shootings who had been seated near a tan duffel bag. According to the witness, the man was approximately 5'7" or 5'8". *Id.* at 323. Evans's height is 5'2". *Id.* at 317.

59. *Id.* at 322.

60. *Id.*

his federal habeas petition.[61] Second, Evans was not precluded from requesting permission to file a second federal habeas petition if the state court were to reject his *Brady* claim.[62] Finally, the court ruled that the district court justifiably weighed the interests of finality and prompt adjudication and determined that they outweighed Evans's interest in receiving a stay.[63] The Fourth Circuit also rejected Evans's argument that he should be exempt from the prohibition against filing successive federal habeas petitions.[64]

IV. Implications for Virginia Capital Practice

Defense counsel in Virginia should note that *Evans* is not a Virginia case. However, the decision does have implications for capital litigation in Virginia. First, individualized explanations for peremptory challenges are not required.[65] Second, if a petitioner wants to stay a federal habeas proceeding until the petitioner's state court claim has been adjudicated, counsel should argue that there is a threat of imminent execution, a stay is necessary to preserve opportunity for federal review, or that the petitioner would be prejudiced from the disjointed proceeding created by a failure to stay, this prejudice outweighing considerations of finality and prompt adjudication.[66]

Third, and most important, is the role that evidence of prison life plays in determining future dangerousness.[67] A defendant has the right to "deny or explain" any information that the Commonwealth uses to seek a penalty

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61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*; *see* 28 U.S.C. § 2244(b)(2)(A), (B) (2000) (allowing second habeas petition if the claim is based on new constitutional law or if the claim could not have been discovered previously and the facts, if proven, would prove by clear and convincing evidence that no reasonable fact-finder could have found the petitioner guilty of the offense). The court found that Evans failed to make a sufficient showing of cause and prejudice that would permit him to file a second habeas petition in federal court. *Evans*, 220 F.3d. at 323. The court found that Evans did not satisfy the cause requirement for failure to discover the evidence and argue the *Brady* claim earlier. *Id.* The court also found that the new evidence clearly was not strong enough to prove by clear and convincing evidence that no fact-finder would have found Evans guilty. *Id.* The Fourth Circuit distinguished two decisions of the United States Supreme Court, *Stewart v. Martinez-Villareal* and *Slack v. McDaniel*, that Evans claimed enabled him to argue his *Brady* claim in a second habeas petition. *Id.* at 324; *see* Stewart v. Martinez-Villareal, 523 U.S. 637, 643 (1998) (finding that a second habeas petition was not prohibited when the petitioner sought a hearing on a claim that had been dismissed from the first petition because it was not ripe); Slack v. McDaniel, 120 S. Ct. 1595, 1604-05 (2000) (finding that a habeas petition was not considered successive when the first petition was dismissed without prejudice).

65. *Evans*, 220 F.3d at 313.

66. *See id.* at 322.

67. *See* Jason J. Solomon, *Future Dangerousness: Issues and Analysis*, 12 CAP. DEF. J. 55, 71-73 (1999) (arguing that prison life evidence rebuts evidence of future dangerousness).

of death.[68] For cases in which future dangerousness is the aggravating factor used to seek the death penalty, the defendant is allowed to proffer evidence to rebut future dangerousness.[69] Prison life evidence can rebut future dangerousness to the extent that the degree of regimentation in prison structure will have an effect on the inmate's ability to commit crimes.[70] Existence of other sentences adversely affects a defendant's in-prison classification, elevating the inmate's status to one in which greater control will be exercised over the inmate. Therefore, these sentences imply that the defendant will be in stricter custody during the sentence to be imposed in capital sentencing than if the defendant were in a less restrictive custodial status. As a result, the defendant is less likely to be a danger to others in prison than he would be had he not had other sentences. In *Cherrix v. Commonwealth*,[71] the Supreme Court of Virginia refused to admit evidence of prison life and its effect on future dangerousness when offered as mitigation.[72] However, evidence of prison life related to the danger the defendant may pose in the future should be admissible as rebuttal to future dangerousness.[73] The evidence should be prospective in nature and should show that the defendant will not be a future danger in prison.[74] If the Virginia courts adopt the *Doering* rule and allow evidence of other sentences, juries will be more informed and more likely to impose fair sentences.

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68. Gardner v. Florida, 430 U.S. 349, 362 (1977) (finding that due process is violated when a defendant has no opportunity to respond to evidence that is relied upon to impose a sentence of death). Evidence pertaining to the future dangerousness of defendant is one aggravating factor used to narrow the class of defendants eligible for the death penalty in Virginia. *See* VA. CODE ANN. § 19.2-264.4(C) (Michie 2000).

69. *See* Skipper v. South Carolina, 476 U.S. 1, 6-7 (1986) (finding that due process requires that the defendant may present evidence to rebut future dangerousness when the prosecution seeks the death penalty based on future dangerousness).

70. A defendant sentenced to life imprisonment will only pose a future danger to the prison community. *See* VA. CODE ANN. § 19.2-264.4(A) (Michie 2000) ("[A] defendant shall not be eligible for parole if sentenced to imprisonment for life.").

71. 513 S.E.2d 642 (Va. 1999).

72. Cherrix v. Commonwealth, 513 S.E.2d 642, 653 (Va. 1999) (finding that evidence of prison life is not admissible as mitigating evidence).

73. *See generally* Solomon, *supra* note 67.

74. *See Cherrix*, 513 S.E.2d at 653 & n.4.