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Lovitt v. Warden 585 S.E.2d 801 (Va. 2003)

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I. Facts

Early in the morning on November 18, 1998, Robin M. Lovitt ("Lovitt") stabbed Clayton Dicks ("Dicks") repeatedly and robbed Champion Billiards Hall where Dicks worked the late-night shift.[1] A jury convicted Lovitt and returned a death verdict against him for the capital murder of Dicks "in the commission of robbery, in violation of [Virginia] Code § 18.2-31, and [the jury also convicted Lovitt] of robbery, in violation of [Virginia] Code § 18.2-58."[2] The Supreme Court of Virginia affirmed the conviction and sentence.[3] Pursuant to section 8.01-654, Lovitt filed a habeas petition.[4] In his petition, Lovitt asserted, in part, that his trial counsel were ineffective, "that the prosecution suppressed exculpatory evidence in violation of *Brady v. Maryland*,"[5] and that his due process rights were impinged when trial exhibits were destroyed "preventing adequate review of his habeas corpus petition."[6] Under order from the Supreme Court of Virginia, the circuit court conducted a habeas hearing and produced a report containing "its findings of fact and recommended conclusions of law."[7]

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1. Lovitt v. Warden, 585 S.E.2d 801, 805–08 (Va. 2003) (quoting Lovitt v. Commonwealth, 537 S.E.2d 866, 870–73 (Va. 2000)).

2. *Lovitt*, 585 S.E.2d at 805; *see* VA. CODE ANN. §18.2-31 (Michie Supp. 2003) (defining the offenses that constitute capital murder); VA. CODE ANN. § 18.2-58 (Michie 1996) (defining the punishment for robbery).

3. *Lovitt*, 537 S.E.2d at 881, *cert denied*, 534 U.S. 815 (2001); *see also* Matthew S. Nichols, Case Note, 13 CAP. DEF. J. 435 (2001) (analyzing Lovitt v. Commonwealth, 537 S.E.2d 866 (Va. 2000)).

4. *Lovitt*, 585 S.E.2d at 805; *see* VA. CODE ANN. § 8.01-654 (Michie 2000) (outlining the procedures and qualifications for obtaining a writ of habeas corpus).

5. 373 U.S. 83 (1963).

6. *Lovitt*, 585 S.E.2d at 805; *see* Brady v. Maryland, 373 U.S. 83, 87 (1963) (holding that due process violations occur when the prosecution withholds, upon request, evidence favorable to the accused that is material to guilt or innocence, regardless of whether the prosecution acted in good or bad faith).

7. *Lovitt*, 585 S.E.2d at 805; *see* VA. CODE ANN. § 8.01-654(C) (requiring the circuit court to conduct a hearing and "report its findings of fact and recommend conclusions of law to the Supreme Court [of Virginia]" when a petitioner is held under a sentence of death if directed to do so by the Supreme Court of Virginia).

A. Habeas Hearing Testimony

1. Ineffective Assistance of Counsel

During the habeas proceeding, several members of Lovitt's family testified regarding his family history and background.[8] Additionally, Lovitt's trial counsel testified about their trial strategy during both the guilt and sentencing phases.[9] Counsel testified that they were concerned about the jury's reaction to Lovitt's family situation and determined that "the jury could conclude that Lovitt's family background increased his future danger to society."[10] The decision not to introduce evidence of Lovitt's family history, according to the lower court, was strategic.[11] Further, counsel testified that they made a strategic decision "not to pursue additional DNA testing of the bloody scissors and Lovitt's jacket[ ] [which allowed them] to argue that an unknown assailant killed Dicks."[12] The circuit court found that, during the penalty phase, the defense team's tactic was to "humanize" Lovitt by illustrating he was no longer a danger.[13] The circuit court noted that trial counsel had within their control many of Lovitt's criminal and medical records as well as the pre-sentence report.[14] Additionally, Lovitt never told his counsel that he suffered "sexual or physical abuse by his stepfather."[15]

2. Brady *Claims*

a. Dr. Pierre-Louis

Dr. Marie-Lydie Y. Pierre-Louis ("Dr. Pierre-Louis"), a medical examiner, performed Clayton Dicks's autopsy.[16] She examined two pairs of scissors while performing the autopsy and concluded that neither pair inflicted the wounds that caused Dicks's death.[17] Dr. Pierre-Louis told a colleague "that she would have to examine the bloody scissors [(a third pair of scissors)] before she could reach a conclusion [as to] whether those scissors were the source of Dicks'[s] wounds."[18] Dr. Pierre-Louis's statements regarding the first two pairs of scissors,

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8. *Lovitt*, 585 S.E.2d at 813. Testimony by Lovitt's family members generally concentrated on the abusive relationship between Lovitt and his stepfather. *Id.* at 824.

9. *Id.* at 813.

10. *Id.* Testimony concerning Lovitt's alcohol and drug abuse was offered that had the potential of being viewed by the jury as either aggravating or mitigating evidence. *Id.* at 824–25.

11. *Id.* at 814.

12. *Id.* at 813.

13. *Id.* at 814.

14. *Lovitt*, 585 S.E.2d at 814.

15. *Id.*

16. *Id.* at 810.

17. *Id.*

18. *Id.*

those that she examined, and her comments that those scissors could not have caused Dicks's death, did not appear in the autopsy report.[19] Lovitt claimed that Dr. Pierre-Louis's statement regarding the scissors she examined was exculpatory and should have been disclosed.[20] The circuit court found that once DNA results confirmed "Dicks'[s] blood on the bloody scissors," Dr. Pierre-Louis acknowledged that she was incorrect.[21] Additionally, the circuit court found that Lovitt's trial counsel had full "access to the bloody scissors, the autopsy report, and to Dr. Pierre-Louis prior to Lovitt's trial."[22]

b. Casel Lucas

i. Prior Cooperation with Authorities

While incarcerated, Lovitt was housed in the same unit as Casel Lucas ("Lucas").[23] Over the two months they lived together, the two became close friends.[24] Lucas provided statements to police to be used in connection with Lovitt's trial.[25] These statements recounted the events of November 18, 1998 as Lovitt had told them to Lucas.[26] Before trial, the Commonwealth provided Lovitt's trial counsel with Casel Lucas's criminal record, but the Commonwealth did not disclose "that Lucas had provided information to various police departments in four previous criminal cases."[27] As appreciation for the aid he provided in a prior criminal trial, Lucas had received a reduction in his sentence for a pending criminal offense.[28] The circuit court found at the habeas proceeding that the prosecution did not inform Lovitt's counsel, nor did Lovitt's trial counsel know, that Lucas had participated in other cases by providing information.[29]

ii. Prior Inconsistent Statements

At the habeas hearing, Lovitt's habeas counsel presented the court with a handwritten affidavit signed by Lucas.[30] The affidavit contained statements that conflicted with Lucas's trial testimony.[31] At the habeas hearing, Lucas testified

19. *Id.*
20. *Lovitt*, 585 S.E.2d at 817.
21. *Id.* at 811.
22. *Id.*
23. *Lovitt*, 537 S.E.2d at 872.
24. *Id.*
25. *Lovitt*, 585 S.E.2d at 812.
26. *Lovitt*, 537 S.E.2d at 872.
27. *Lovitt*, 585 S.E.2d at 811–12.
28. *Id.*
29. *Id.* at 812.
30. *Id.*
31. *Id.* The affidavit stated, among other things, that Lucas received a reduced sentence in

that he did not thoroughly read the affidavit he signed.[32] "Additionally, Lucas stated that Lovitt was his sole source of information concerning the testimony he gave at Lovitt's trial."[33] "The circuit court found that Lucas had 'disavowed' the affidavit written by Lovitt's habeas counsel," and that Lucas did not make statements prior to Lovitt's trial "that were inconsistent with his trial testimony."[34]

3. Destruction of Evidence

Testimony during the habeas proceeding revealed that an order was drafted for the destruction of Lovitt's trial exhibits in April 2001 by the Circuit Court of Arlington County Chief Deputy Clerk, Robert C. McCarthy ("McCarthy").[35] McCarthy testified that he received "a mandate from [the Supreme] Court [of Virginia] indicating that Lovitt's convictions were affirmed" and interpreted this statement to be authorization to destroy the exhibits.[36] McCarthy, without consulting anyone, "drafted the evidence destruction order."[37] The circuit court found that the destruction order was drafted before the effective date of sections 19.2-270.4:1 and 19.2-327.1 of the Virginia Code.[38] McCarthy delivered the destruction order along with "15 and 20 other such orders, to the chambers of Judge Paul F. Sheridan" where they were subsequently entered.[39] The trial exhibits were destroyed shortly thereafter.[40]

Two deputy clerks testified at the hearing that they warned McCarthy, who was their immediate supervisor, that Lovitt's evidence should not be destroyed.[41] Both testified that McCarthy responded that because Lovitt's appeals had ended,

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exchange for his cooperation in another criminal case, and that he learned what he knew regarding Dicks's murder from the television show "Crime Stoppers." *Id.* at 813. Lucas signed his initials next to every paragraph of the affidavit at habeas counsel's request. *Id.*

32. *Id.* at 813. Lucas also testified that he had a tooth extracted that day and did not feel well during the three-hour interview. *Id.*

33. *Lovitt*, 585 S.E.2d at 813.

34. *Id.*

35. *Id.* at 808.

36. *Id.*

37. *Id.* at 809. The circuit court noted that McCarthy did not consult the Commonwealth Attorney's office, the Arlington Police, the circuit court, or Lovitt's trial or habeas counsel. *Id.*

38. *Id.*; *see* VA. CODE ANN. § 19.2-270.4:1 (Michie Supp. 2003) (outlining the procedures for the storage of biological evidence in felony cases); VA. CODE ANN. §19.2-327.1 (Michie Supp. 2003) (stating the procedures that convicted felons need to utilize to have scientific analysis performed on newly discovered or previously untested evidence).

39. *Lovitt*, 585 S.E.2d at 809.

40. *Id.*

41. *Id.* Both deputies testified that they warned McCarthy because the case was a "capital case" and Lovitt had not been executed. *Id.*

the evidence could be destroyed.[42] McCarthy testified that in drafting the destruction order he relied on the mandate from the Supreme Court of Virginia affirming Lovitt's conviction and did not review Lovitt's file himself.[43] "He further testified that at the time the destruction order was entered, he was not aware of any change in the law concerning the preservation of human biological evidence."[44] The circuit court found no signs of bad faith "with the intent to destroy exculpatory evidence" on the part of any official with the Commonwealth.[45] Further, the circuit court's findings indicated that McCarthy truthfully believed he was acting within his power in destroying Lovitt's trial evidence after receiving the mandate from the Supreme Court of Virginia.[46]

II. Holding

The Supreme Court of Virginia dismissed Lovitt's habeas petition.[47] The court concluded that: (1) Lovitt's trial counsel were not ineffective; and (2) "Lovitt's *Brady* claim [was] without merit."[48] Additionally, "Lovitt . . . failed to advance any valid basis for habeas corpus relief arising from the destruction of the trial exhibits in his case."[49]

III. Analysis

A. Ineffective Assistance of Counsel

Lovitt asserted that his trial counsel were ineffective in both the guilt and penalty phases of his trial.[50] With respect to the guilt phase of his trial, Lovitt argued, in part, that his trial counsel were ineffective because they: (1) failed "to have additional DNA tests performed on the bloody scissors and the jacket that he wore when he was arrested"; (2) "failed to conduct a reasonable investigation of the alleged murder weapon"; (3) did not fully investigate Lucas; and (4) "failed to request a jury instruction on the credibility of 'jailhouse informants.' "[51] With respect to the penalty phase, Lovitt contended that his counsel were ineffective for failing to investigate fully his family situation and background, which, he

42. *Id.*
43. *Id.*
44. *Id.*
45. *Lovitt*, 585 S.E.2d at 809.
46. *Id.* at 810.
47. *Id.* at 827.
48. *Id.* at 817, 819.
49. *Id.* at 817.
50. *Id.* at 819.
51. *Lovitt*, 585 S.E.2d at 819.

contended, could have influenced their decision not to introduce "extensive mitigation evidence to the jury."[52]

In response to Lovitt's assertions, the Warden argued that Lovitt's trial counsel were effective and the choices they made in the presentation of their case were part of a deliberate trial strategy.[53] Counsel's decisions were calculated to illustrate to the jury the weakness in the prosecution's case, namely that DNA evidence did not conclusively link Lovitt to the murder.[54] Further, the Warden argued that Lovitt's trial counsel were sufficiently acquainted with Lovitt's family situation and reasonably decided not to introduce evidence of Lovitt's family circumstances during the penalty phase because the jury could have used that testimony to support the contention that he was a future danger.[55]

"A defendant's right to counsel under the Sixth Amendment includes the right to effective assistance of counsel."[56] According to the two-part test announced in *Strickland v. Washington*,[57] a petitioner claiming ineffective assistance of counsel ("IAC") must prove both that " 'counsel's representation fell below an objective standard of reasonableness' " and that " 'there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different.' "[58] Courts are not required to find counsel deficient in order to dispose of IAC claims; if it is easier, they are free to dispose of claims on the ground that there is a lack of sufficient prejudice.[59] "The

52. *Id.* at 820.

53. *Id.*

54. *Id.*

55. *Id.*

56. *Id.* (citing Strickland v. Washington, 466 U.S. 668, 685–86 (1984)); *see* U.S. CONST. amend. VI ("In criminal prosecutions, the accused shall enjoy the right to . . . have the assistance of counsel for his defence."); *Strickland*, 466 U.S. at 685–86 (discussing that "the right to counsel is the right to the effective assistance of counsel" (internal quotation marks omitted)); *see also* Roe v. Flores-Ortega, 528 U.S. 470, 477 (2000) (extending the *Strickland* test "to claims . . . that counsel was constitutionally ineffective for failing to file a notice of appeal"); United States v. Cronic, 466 U.S. 648, 654 (1984) (stating that "[i]f no actual 'Assistance' 'for' the accused's 'defence' is provided, then the constitutional guarantee has been violated"); Sheikh v. Buckingham Corr. Ctr., 570 S.E.2d 785, 788–89 (Va. 2002) (illustrating a *Strickland* application to counsel's failure to present mitigating evidence at sentencing).

57. 466 U.S. 668 (1984).

58. *Lovitt*, 585 S.E.2d at 820–21 (quoting *Strickland*, 466 U.S. at 687–88, 694); *see* Wiggins v. Smith, 123 S. Ct. 2527, 2535 (2003) (endorsing the *Strickland* test for claims that counsel was ineffective in failing to pursue mitigating evidence); Bell v. Cone, 535 U.S. 685, 695 (2002) (applying the *Strickland* test to petitioner's "claim that his counsel rendered ineffective assistance at [his] sentencing hearing"); Williams v. Taylor, 529 U.S. 362, 390 (2000) (applying the *Strickland* test to Williams's contention "that he was denied his constitutionally guaranteed right to the effective assistance of counsel when his trial lawyers failed to investigate and to present substantial mitigating evidence to the sentencing jury").

59. *Lovitt*, 585 S.E.2d at 821; *see* Hedrick v. Warden, 570 S.E.2d 840, 847 (Va. 2002) (explaining that it is easier to dispose of IAC claims based on lack of sufficient prejudice). *See generally* Priya

reviewing court must make its prejudice determination by considering the totality of evidence before the trier of fact."[60] When examining a habeas corpus petition, courts afford " 'a strong presumption that counsel's conduct falls within the wide range of reasonable professional assistance.' "[61]

First, the Supreme Court of Virginia rejected Lovitt's claim that his trial counsel fell below a reasonable standard when they failed to request DNA testing on the bloody scissors and jacket.[62] The court concluded that based on the findings of the circuit court, counsel's trial strategy meant to "underscore[ ] the alleged deficiency in the Commonwealth's proof while avoiding the possibility that further testing of the scissors and jacket would yield results further implicating Lovitt in the murder."[63] Therefore, the court found that trial counsel's performance was not objectively unreasonable.[64]

The Supreme Court of Virginia found no merit in the contention that Lovitt's counsel was ineffective for not pursuing a more extensive investigation on the murder weapon.[65] The circuit court found that trial counsel did consult a forensic expert and did investigate whether the bloody scissors could have caused Dick's injuries.[66] Due to the circuit court's findings, the Supreme Court of Virginia found trial counsel's performance reasonable with respect to this claim.[67]

The court then addressed Lovitt's argument that his trial counsel were ineffective for not requesting a continuance to investigate Lucas further after learning he would be a witness for the Commonwealth.[68] The court found no merit to this assertion because trial counsel investigated Lucas and obtained significant impeachment evidence.[69] "Given this extensive impeachment evidence obtained . . . trial counsel's investigation of Lucas constituted an objectively reasonable exercise of professional judgment . . . ."[70]

Nath, Case Note, 15 CAP. DEF. J. 479 (2003) (analyzing Hedrick v. Warden, 570 S.E.2d 840 (Va. 2002)).

60. *Lovitt*, 585 S.E.2d at 821 (citing *Strickland*, 466 U.S. at 695).

61. *Id.* at 820 (quoting *Strickland*, 466 U.S. at 689).

62. *Id.* at 822.

63. *Id.*; *see Strickland*, 466 U.S. at 687–88 (stating that in order for trial counsel to be ineffective under the first prong of *Strickland*, counsel's performance must fall below an objective reasonableness standard).

64. *Lovitt*, 585 S.E.2d at 822.

65. *Id.* at 821.

66. *Id.*

67. *Id.*

68. *Id.* at 822.

69. *Id.*

70. *Lovitt*, 585 S.E.2d at 822; *see Strickland*, 466 U.S. at 687–88 (stating counsel's performance will be held adequate if "objectively reasonable"); *see also Wiggins*, 123 S. Ct. at 2535 (stating that the Court gives deference to trial strategy and judgments "in terms of the adequacy of the investigations

The Supreme Court of Virginia also dismissed Lovitt's claim that his counsel were "ineffective for failing to request a jury instruction regarding the 'credibility of jailhouse informants.'" [71] Citing an Oklahoma case, Lovitt argued that the jury should have been instructed that the testimony of Lucas, as an informant, must be weighed more carefully than the testimony of an "ordinary" witness.[72] The Supreme Court of Virginia held that this argument was "without merit because the law of this Commonwealth does not require a fact finder to give different consideration to the testimony of a government informant than to the testimony of other witnesses."[73]

Next, the Supreme Court of Virginia examined Lovitt's claim that his trial counsel were ineffective during the penalty phase of the trial due to their failure to investigate fully and present mitigation in light of the United States Supreme Court's recent decisions in *Wiggins v. Smith*[74] and *Williams v. Taylor*.[75] Lovitt contended that trial counsel's failure to investigate extensively his family history and social background, which contained evidence of sexual and drug abuse, fell below an objective standard of reasonableness.[76] Using *Strickland* as a guide, the Supreme Court of Virginia first examined "whether Lovitt suffered prejudice sufficient to undermine confidence in the outcome of his sentencing."[77] Distinguishing Lovitt's case from the facts in *Wiggins*, the court stated that "[u]nlike the record in *Wiggins*, the record from Lovitt's trial show[ed] that counsel presented some recent personal history as mitigation evidence at the penalty phase of the trial."[78] Additionally, the court noted that Lovitt's counsel did present some

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supporting those judgments").

71. *Lovitt*, 585 S.E.2d at 822. *See generally* C. Blaine Elliott, *Life's Uncertainties: How to Deal with Cooperating Witnesses and Jailhouse Snitches*, 16 CAP. DEF. J. 1 (2003) (offering remedies and reforms in the area of cooperating witness testimony and how to handle jailhouse informants).

72. *Lovitt*, 585 S.E.2d at 822; *see* Dodd v. State, 993 P.2d 778, 784 (Okla. Crim. App. 2000) (adopting "a procedure to ensure complete disclosure so that counsel will be prepared to cross-examine an informant-witness").

73. *Lovitt*, 585 S.E.2d at 822.

74. 123 S. Ct. 2527 (2003).

75. *Lovitt*, 585 S.E.2d at 822; *see Wiggins*, 123 S. Ct. at 2541–42 (holding that "[c]ounsel's investigation into Wiggins'[s] background did not reflect reasonable professional judgment"); *Williams*, 529 U.S. at 396, 399 (finding prejudice where counsel failed to fulfill their obligation to investigate completely their client's background). *See generally* Terrence T. Egland, Case Note, 16 CAP. DEF. J. 101 (2003) (analyzing Wiggins v. Smith, 123 S. Ct. 2527 (2003)).

76. *Lovitt*, 585 S.E.2d at 822.

77. *Id.*; *see Strickland*, 466 U.S. at 694 ("The defendant must show that there is a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome."); *see also Wiggins*, 123 S. Ct. at 2541–42 (holding that "[c]ounsel's investigation into Wiggins'[s] background did not reflect reasonable professional judgment").

78. *Lovitt*, 585 S.E.2d at 823; *see Wiggins*, 123 S. Ct. at 2532–33 (describing Wiggins's trial counsel's failure to compile a social history report and their attempt to " 'retry[ ]the factual case' "

family history during the penalty phase "through the testimony of Lamanda Jones, Lovitt's stepsister."[79] Evidence presented at the habeas hearing illustrated that most of Lovitt's family members made general comments with respect to abuse directed at Lovitt by his stepfather but offered few specific instances of abuse.[80] By examining the records introduced at the habeas hearing, the court concluded that a jury could view the records as "either evidence in aggravation or in mitigation of the offense."[81]

In reviewing the prejudice claim, the court must " 'reweigh the evidence in aggravation against the totality of available mitigating evidence.' "[82] The court stated that the evidence in aggravation included the brutality of the attack, Lovitt's past criminal history, Lovitt's discipline problems while incarcerated, and the fact that he was on parole when he murdered Dicks.[83] The court stated that evidence in mitigation included Lovitt's home life, his stepfather's alcoholism and abuse, and Lovitt's aid and protection of his siblings from their abusive father figure.[84] With respect to the evidence of Lovitt's drug abuse, antisocial disorder, juvenile and other records, the court concluded that this evidence could be coined " 'double edge.' "[85] Noting that there was no evidence that Lovitt was mentally evaluated, the court stated that there was "a failure of proof regarding Lovitt's contention that he was prejudiced by trial counsel's failure to present extensive evidence of his family and social history at the penalty phase proceeding."[86] The court concluded "that Lovitt . . . failed to demonstrate that his defense was prejudiced by trial counsel's failure to investigate and present the available mitigation evidence."[87]

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of Wiggins's trial during sentencing to the exclusion of presenting mitigating evidence).

79. *Lovitt*, 585 S.E.2d at 823. Lamanda Jones testified that Lovitt helped raise his brothers and sisters and stated that due to her stepfather's alcoholism, he was not allowed to be around the children most of the time. *Id.*

80. *Id.* at 824.

81. *Id.* The court gave the example that Lovitt's medical records showed he "had an antisocial personality disorder and 'polysubstance' dependence." *Id.* Records showed that Lovitt began drinking at the age of five and began to use marijuana at eight. *Id.* Additionally, the court noted that his juvenile records showed a lack of remorse for crimes he committed as well as evidence from caseworkers that his family environment was stable. *Id.*

82. *Id.* at 824–25 (quoting *Wiggins*, 123 S. Ct. at 2542); *see also Williams*, 529 U.S. at 397–98 (stating that a judgment of IAC must rest on the "totality of the omitted evidence rather than on the notion that a single item of omitted evidence, no matter how trivial, would require a new hearing").

83. *Lovitt*, 585 S.E.2d at 825.

84. *Id.*

85. *Id.* (quoting *Wiggins*, 123 S. Ct. at 2542).

86. *Id.*

87. *Id.* The court noted that its decision was "not altered by the Supreme Court's decision in *Williams*." *Id.* at 826. The court stated that the evidence in Lovitt's case did not "raise the same concerns that the Supreme Court in *Williams* held 'might well have influenced the jury's appraisal

Lovitt next claimed that the circuit court judge who presided over the habeas hearing improperly excluded several affidavits from Lovitt's family.[88] The court concluded that the trial court did not abuse its discretion in keeping out the affidavits and further dismissed Lovitt's argument that the affidavits would have been admissible in the penalty phase and therefore should have been admitted into evidence during the habeas hearing.[89] The court noted that "Virginia does not permit the admission of such hearsay evidence during the penalty phase proceeding."[90]

Finally, the court addressed Lovitt's contention that he is actually innocent.[91] The court concluded that innocence is an issue decided by a jury and that this claim did not properly fall within the writ of habeas corpus review "which concerns only the legality of the petitioner's detention."[92] Finding the claim improperly asserted, the court dismissed the claim.[93]

B. Brady *Claims*

Lovitt asserted that statements made by Dr. Pierre-Louis concerning the scissors she examined were exculpatory and that the Commonwealth's failure to disclose those statements resulted in a *Brady* violation.[94] Additionally, Lovitt contended that the Commonwealth's failure to disclose "evidence of Lucas'[s] allegedly inconsistent prior statements and his cooperation with different law enforcement authorities" was a *Brady* violation because that information "could

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of [the petitioner's] moral culpability.' " *Id.* (alteration in original) (quoting *Williams*, 529 U.S. at 398); *see Williams*, 529 U.S. at 398 ("Mitigating evidence unrelated to dangerousness may alter the jury's selection of penalty, even if it does not undermine or rebut the prosecution's death-eligibility case.").

88. *Lovitt*, 585 S.E.2d at 826. The court assumed without deciding that affidavits sought to be admitted in a habeas proceeding under section 8.01-654(C) of the Virginia Code are admissible subject to the trial court's discretion. *Id.* Under such an assumption, the court found that the circuit court did not abuse its discretion. *Id.*

89. *Id.*

90. *Id.*; *see* VA. CODE ANN. §19.2-264.4(B) (Michie Supp. 2003) (stating the procedures for a sentencing proceeding in a capital case).

91. *Lovitt*, 585 S.E.2d at 826–27.

92. *Id.* at 827; *see* Virginia Parole Bd. v. Wilkins, 498 S.E.2d 695, 696 (Va. 1998) (stating "[t]he writ [of habeas corpus] is available only where the release of the prisoner from his immediate detention will follow as a result of an order in his favor" (internal quotation marks omitted)); McClenny v. Murray, 431 S.E.2d 330, 331 (Va. 1993) (stating that "the scope of the inquiry [in a habeas proceeding] is limited to the propriety of the prisoner's present detention, that is, whether his detention is by due process of law" (internal quotation marks omitted)).

93. *Lovitt*, 585 S.E.2d at 827.

94. *Id.* at 817; *see Brady*, 373 U.S. at 87 (holding that due process violations occur when the prosecution withholds favorable evidence that has been requested by the defense and that is material to guilt or innocence, regardless of whether the prosecution acted in good or bad faith).

have been used to attack Lucas'[s] credibility at trial."[95] In response to these assertions, the Warden argued that Dr. Pierre-Louis's statements were not exculpatory.[96] Further, the Warden argued that the Commonwealth cannot be required to disclose cooperative witness information when the Commonwealth did not know that the witness cooperated in a different trial at the time of the trial in question.[97]

When analyzing a claim that exculpatory evidence is material, the inquiry is whether "the proceeding would have resulted in a different outcome had the evidence been disclosed to the defense."[98] Additionally, "*Brady* disclosure requirements extend to information that can be used to impeach a witness'[s] credibility."[99] Under the requisite due process analysis, the court is to consider "on an item-by-item basis whether the evidence at issue was exculpatory."[100] When considering undisclosed exculpatory evidence and evaluating its materiality, this determination must be based on the evidence's cumulative effect.[101]

The Supreme Court of Virginia concluded that Dr. Pierre-Louis's comment regarding those scissors that were available while she performed the autopsy was not exculpatory evidence because the scissors she commented on were not those presented into evidence.[102] Additionally, because she changed her position before trial, her first opinion was not exculpatory.[103] The court concluded that the Commonwealth was not required to disclose to Lovitt's trial counsel any information regarding her initial opinion.[104]

Turning to Lucas, the court stated that the Commonwealth was required to provide Lovitt's defense team with information regarding Lucas's cooperation

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95. *Lovitt*, 585 S.E.2d at 817.

96. *Id.*

97. *Id.*

98. *Id.* (citing Strickler v. Greene, 527 U.S. 263, 280 (1999)); *see Strickler*, 527 U.S. at 280 (stating that the duty to disclose evidence encompasses both exculpatory and impeachment evidence); Kyles v. Whitley, 514 U.S. 419, 433 (1995) (outlining three types of situations in which a *Brady* claim could arise).

99. *Lovitt*, 585 S.E.2d at 817 (citing *Strickler*, 527 U.S. at 282 n.21). A due process violation can only occur in the context of suppression of impeachment evidence when a prosecutor suppresses impeachment evidence and this suppression "deprives the defendant of a fair trial under the *Brady* standard of materiality." *Id.* at 818 (citing United States v. Bagley, 473 U.S. 667, 678 (1985)).

100. *Id.* at 818 (citing *Kyles*, 514 U.S. at 436 n.10).

101. *Id.* (citing *Kyles*, 514 U.S. at 436 n.10).

102. *Id.*

103. *Id.* The circuit court's factual findings, bolstered by Detective Chase's testimony, confirmed that Dr. Pierre-Louis changed her opinion before trial commenced. *Id.*

104. *Id.* Because Dr. Pierre-Louis's testimony was not exculpatory the court was not required to consider its materiality. *Id.* The court, however, determined that the statements would not have undermined the court's confidence in the jury's verdict. *Id.*

in the Evans prosecution because Lucas received a benefit for this testimony.[105] However, because Lucas did not receive a benefit for his testimony in other prosecutions, that testimony did not constitute impeachment evidence and was not required to be disclosed by the Commonwealth.[106] Further, Lovitt argued that Lucas's inconsistent statements should have been disclosed.[107] However, because the circuit court, during the habeas hearing, found that such inconsistent statements did not exist, the court concluded that Lovitt failed to demonstrate that the Commonwealth inappropriately withheld statements made by Lucas prior to Lovitt's trial.[108]

Because the Commonwealth did not disclose the impeachment evidence regarding Lucas and his involvement in the Evans case, the court examined the *Brady* effect with respect to this item.[109] The court concluded that the Commonwealth's failure to disclose this information did not undermine the court's confidence in the jury's ultimate verdict.[110] As a result, the Supreme Court of Virginia determined that "Lovitt's *Brady* claim [was] without merit."[111]

C. *Destruction of Evidence*

"Lovitt argue[d] that McCarthy, an agent of the Commonwealth, procured the destruction of the trial exhibits in bad faith, and that the destruction of this evidence violated [Lovitt's] right of due process by preventing meaningful review of his habeas corpus petition."[112] Lovitt argued that the destruction of the trial evidence was untimely and that in death penalty cases DNA evidence cannot be destroyed until the death sentence is executed.[113] From these arguments Lovitt

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105. *Lovitt*, 585 S.E.2d at 818–19. The Evans prosecution was a previous trial at which Lucas gave testimony and received a benefit in return. *Id.*; *see* Giglio v. United States, 405 U.S. 150, 154–55 (1972) (stating that if a government witness receives a benefit in the form of a disposition of a criminal charge pending against him in return for testimony, this fact can be used as impeachment evidence and failure to disclose this detail could violate the accused's due process rights).

106. *Lovitt*, 585 S.E.2d at 819; *see* Collier v. Davis, 301 F.3d 843, 849 (7th Cir. 2002) (stating that without an agreement or understanding between the prosecution and a witness that the witness's testimony is in exchange for leniency, the defense could not establish a *Brady* violation).

107. *Lovitt*, 585 S.E.2d at 819.

108. *Id.*

109. *Id.*

110. *Id.*; *see Strickler*, 527 U.S. at 289 (stating that in order to obtain relief, the petitioner must show a reasonable probability that the trial would have come out differently "if the suppressed documents had been disclosed to the defense").

111. *Lovitt*, 585 S.E.2d at 819.

112. *Id.* at 814.

113. *Id.* Lovitt relied on sections 19.2-270.4 and 19.2-270.4:1 of the Virginia Code when making his assertions regarding the proper timing for evidence destruction. *Id.*; *see* VA. CODE ANN. §19.2-270.4 (Michie Supp. 2003) (stating when destruction of exhibits is authorized); VA. CODE ANN. §19.2-270.4:1 (Michie Supp. 2003) (stating the procedures for storage and retention of

asserted that the death penalty could not be an appropriate punishment because evidence material to his case was destroyed.[114]

Addressing Lovitt's due process claim, the court pointed to the fact that the United States Supreme Court has never held that habeas relief is the proper way to contest the inability further to test DNA.[115] Because no direct authority exists, Lovitt relied on *Arizona v. Youngblood*[116] and *California v. Trombetta*[117] to support his contentions.[118] In those cases, the United States Supreme Court "considered due process claims involving the pre-trial destruction of evidence."[119] In *Youngblood*, the Supreme Court recognized a distinction between failing to disclose extant exculpatory evidence and failing to preserve potentially exonerating evidence.[120] The Court held "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law."[121] Because a major focus of a criminal trial is to allow the accused to see the evidence and confront the charges brought against him, having a materiality policy pre-trial reflects the underlying goal of "fundamental fairness."[122]

The purpose in a habeas corpus proceeding is to ensure that the petitioner's detention is legal and not in violation of any constitutional rights.[123] The Supreme Court of Virginia acknowledged that the "different focus raises the issue [of] whether a due process right may be asserted in a habeas corpus proceeding to challenge the post-trial destruction of evidence."[124] Assuming that Lovitt

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biological evidence in felony cases).

114. *Lovitt*, 585 S.E.2d at 814.

115. *Id.* "[T]he United States Supreme Court has not addressed the question whether due process rights may be asserted against the post-trial destruction of evidence." *Id.*

116. 488 U.S. 51 (1988).

117. 467 U.S. 479 (1984).

118. *Lovitt*, 585 S.E.2d at 814; *see* Arizona v. Youngblood, 488 U.S. 51, 58 (1988) (holding "that unless a criminal defendant can show bad faith on the part of the police, failure to preserve potentially useful evidence does not constitute a denial of due process of law"); California v. Trombetta, 467 U.S. 479, 491 (1984) (holding that the Due Process Clause does not require law enforcement officers to maintain breath samples for possible use at trial).

119. *Lovitt*, 585 S.E.2d at 814.

120. *Id.*; *see Youngblood*, 488 U.S. at 57 (stating that "the Due Process Clause requires a different result when we deal with the failure of the State to preserve evidentiary material of which no more can be said than that it could have been subjected to tests, the results of which might have exonerated the defendant").

121. *Lovitt*, 585 S.E.2d at 815 (quoting *Youngblood*, 488 U.S. at 57–58).

122. *Id.*; *see Trombetta*, 467 U.S. at 485 ("Under the Due Process Clause of the Fourteenth Amendment, criminal prosecutions must comport with prevailing notions of fundamental fairness.").

123. *Lovitt*, 585 S.E.2d at 815.

124. *Id.* The court refused to resolve this issue in this case because the court concluded that Lovitt failed to establish that he could meet the *Youngblood* bad faith standard. *Id.*

could assert this due process challenge post-trial, the court assumed that the *Youngblood* standard for pre-trial destruction of evidence would apply post-trial.[125]

In Lovitt's case, the circuit court found no evidence of bad faith on the part of any official and no evidence of intent to destroy potentially exculpatory evidence.[126] Because the circuit court's findings were based on fact and not law, they were given deference by the Supreme Court of Virginia.[127] The Supreme Court of Virginia stated that the "findings concerning the absence of bad faith [were] supported by the evidence and [were] not plainly wrong."[128] Further, the court stated that even if McCarthy was aware that the DNA evidence destroyed could have been tested again, Lovitt failed to meet the *Youngblood* materiality standard because Lovitt could only assert a "possibility that further testing could have exculpated him."[129] Additionally, the circuit court found that McCarthy was unaware of the change in law that was enacted twenty days before the order for destruction was entered.[130]

Lovitt contended that he was "entitled to habeas corpus relief because the destruction of the trial exhibits violated" sections 19.2-270.4 and 19.2-270.4:1 of the Virginia Code.[131] If appeal is taken, section 19.2-270.4(A) allows for the destruction of exhibits after the appellate remedies are exhausted, subject to the limitation of section 19.2-270.4:1.[132] While section 19.2-270.4:1 requires the preservation of all biological specimens until judgment is executed, the statute also accounts for noncompliance by providing that noncompliance " 'shall not form the basis for relief in any habeas corpus or appellate proceeding.' "[133] Based on the "unambiguous statutory proscription," the court found no merit in Lovitt's claim that destruction of his biological evidence entitled him to habeas relief.[134]

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125. *Id.*

126. *Id.*

127. *Id.* at 815–16.

128. *Id.* at 816.

129. *Lovitt*, 585 S.E.2d at 816.

130. *Id.* The new statute, section 19.2-270.4:1 of the Virginia Code, mandates that human biological evidence received in the case of a person sentenced to death be stored until execution of sentence. VA. CODE ANN. §19.2-270.4:1 (Michie Supp. 2003).

131. *Lovitt*, 585 S.E.2d at 816; *see* VA. CODE ANN. § 19.2-270.4 (Michie Supp. 2003) (mandating destruction or return of trial exhibits after execution of judgment or, if appeal is taken, after exhaustion of appellate remedies); VA. CODE ANN. §19.2-270.4:1 (describing standards for the preservation of biological evidence in felony cases).

132. *See* VA. CODE ANN. § 19.2-270.4(A) (stating when the trial court may order the donation or destruction of criminal exhibits).

133. *Lovitt*, 585 S.E.2d at 816 (quoting VA. CODE ANN. §19.2-270.4:1(E)).

134. *Id.*

IV. Application in Virginia

A. Admission of Affidavits in the Habeas Hearing

The Supreme Court of Virginia relied on section 19.2-264.4(B) of the Virginia Code in rejecting Lovitt's assertion "that the affidavits at issue would have been admissible in the penalty phase proceeding and, thus, should have been admitted into evidence on that basis at the habeas hearing."[135] Section 19.2-264.4(B) states in relevant part:

> In cases of trial by jury, evidence may be presented as to any matter which the court deems relevant to sentence, except that reports under the provisions of § 19.2-299, or under any rule of court, shall not be admitted into evidence.
>
> Evidence which may be admissible, subject to the rules of evidence governing admissibility, may include the circumstances surrounding the offense, the history and background of the defendant, and any *other* facts in mitigation of the offense.[136]

To the extent that *Lovitt* relied on section 19.2-264.4(B) to reject flatly the admission of hearsay evidence as mitigation in the penalty phase of a capital trial, the court erred.[137] The question is not whether hearsay evidence must be admitted, but when.[138] Solely because Lovitt's affidavits were hearsay, they were excluded. As a consequence of this exclusion the jury was precluded from hearing relevant mitigating evidence.

B. Writ of Actual Innocence

A habeas petition is not the proper place to assert a claim of actual innocence.[139] According to section 19.2-327.2, the Supreme Court of Virginia has the

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135. *Id.* at 826. The court stated, "Virginia does not permit the admission of such hearsay evidence during penalty phase proceedings." *Id.*

136. VA. CODE. ANN §19.2-264.4(B) (Michie Supp. 2003) (emphasis added).

137. *See* Green v. Georgia, 442 U.S. 95, 97 (1979) (stating "[t]he excluded [hearsay] testimony was highly relevant to a critical issue in the punishment phase of the trial," which constituted a violation of the Due Process Clause of the Fourteenth Amendment); Lockett v. Ohio, 438 U.S. 586, 604 (1978) (plurality opinion) (stating that "the Eighth and Fourteenth Amendments require that the sentencer . . . not be precluded from considering, *as a mitigating factor*, any aspect of a defendant's character or record and any of the circumstances of the offense that the defendant proffers as a basis for a sentence less than death"); Eddings v. Oklahoma, 455 U.S. 104, 110 (1982) (applying the rule announced in *Lockett*).

138. *Cf.* Buchanan v. Commonwealth, 384 S.E.2d 757, 773 (Va. 1989) (excluding hearsay testimony in the penalty phase of a capital trial because expert witnesses in criminal cases "must testify on the basis of their own personal observations or on the basis of evidence adduced at trial"). For a more thorough analysis of the issues presented in Virginia Code section 19.2-264.4(B), *see generally* Maxwell C. Smith, Case Note, 16 CAP. DEF. J. 615 (2004) (analyzing Brown v. Luebbers, 344 F.3d 770 (8th Cir. 2003)).

139. *See* VA. CODE ANN. § 19.2-327.6 (Michie Supp. 2003) (stating "[a]n action under this

authority to issue writs of actual innocence.[140] Rule 5.7(B) of the Rules of the Supreme Court of Virginia permits a petition for a writ of actual innocence based on unknown or untested scientific evidence so long as the petition is filed within sixty days of the date the exculpatory test results were received by the petitioner and so long as the petition contains a specific list of items.[141] If a convicted capital defendant is successful in obtaining such a writ, "[t]he writ shall lie to the circuit court that entered the felony conviction."[142]

C. Brady *Issues*

The court stated that when a person provides information to the state in exchange for a reduction or disposition of a criminal charge, this information can be utilized for impeachment purposes.[143] Citing *Collier v. Davis*,[144] the court stated that when a person does not receive a benefit in exchange for the information he or she provides, any prior cooperation cannot be the basis of impeachment and therefore need not be disclosed as exculpatory.[145] This statement seems instinctively incorrect. The court's statement appears to reward snitches who try to aid the State but fail in their attempt to gain a sentence disposition. By encouraging these snitches to testify in subsequent criminal trials, the State gains a snitch who will try harder to achieve his ultimate goal of a sentence reduction at the expense of the defendant. These informants should be subject to impeachment just as those who actually obtain the benefit promised.

D. Virginia Code Sections 19.2-270.4 and 19.2-270.4:1

After Lovitt's conviction, but before his habeas appeal, the Virginia General Assembly passed sections 19.2-270.4. and 19.2-270.4:1 of the Virginia Code.[146] In the context of human biological evidence, section 19.2-270.4:1 provides, in part, that when a defendant is sentenced to death, the Division of Forensic Science must "store, preserve, and retain such evidence until the judgment is

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chapter or the performance of any attorney representing the petitioner under this chapter shall not form the basis for relief in any habeas corpus or appellate proceeding").

140. *See* VA. CODE ANN. §19.2-327.2 (Michie Supp. 2003) (providing authority for the Supreme Court of Virginia to issue writs of actual innocence).

141. *See* VA. SUP. CT. R. 5:7(B) (stating the rule respecting petitions for a writ of actual innocence).

142. VA. CODE ANN. § 19.2-327.2.

143. *Lovitt*, 585 S.E.2d at 818–19.

144. 301 F.3d 843 (7th Cir. 2002).

145. *Lovitt*, 585 S.E.2d at 819; *see Collier*, 301 F.3d at 849 (stating that in the absence of an agreement or understanding between the prosecution and a witness that the witness's testimony is in exchange for leniency, a *Brady* violation cannot be established).

146. *Lovitt*, 585 S.E.2d at 809.

executed."[147] In Lovitt's case, his DNA evidence destruction order was entered roughly twenty days after the statutory provision took effect.[148] The Supreme Court rejected Lovitt's contention that his sentence must be vacated because material evidence was destroyed in violation of the applicable statute.[149] Lovitt's argument failed because section 19.2-270.4:1(E) specifically states that a defendant may not seek habeas relief under this section.[150] Due to the specific statutory language, it will be impossible for a defendant to gain any sort of habeas relief from the state's failure to preserve potentially exculpatory biological evidence. The statute, in effect, pronounces that the Commonwealth finds it more important that the sentenced offender be killed than for it to be forced to follow its own laws.

Lovitt also argued that his constitutional due process rights were violated by the destruction of his trial exhibits and that this violation would prevent "meaningful review of his habeas corpus petition."[151] The court applied the *Youngblood* bad faith standard for pre-trial destruction of evidence in Lovitt's case, although the court did not decide the issue of whether a due process claim for destruction of evidence can be brought in a habeas proceeding.[152] Because Lovitt failed to prove both bad faith on the part of the Commonwealth and that further testing would have revealed his innocence, the court rejected Lovitt's claim.[153]

What is ironic about the court's reasoning is that the court relied on *Youngblood*.[154] Twelve years after the Supreme Court's ruling in *Youngblood*, DNA testing revealed that Youngblood was actually innocent.[155] For Youngblood and defendants in his position, bad faith or not, destruction of potentially exculpatory evidence in light of new forensic tests can and, as was evidenced by Youngblood himself, should have made a difference in the ultimate guilt/innocence verdict.

V. Conclusion

The Supreme Court of Virginia dismissed Lovitt's habeas petition. Among other issues, this case encourages unconstitutional applications of section 19.2-264.4(B). Additionally, the case illustrates the impropriety of section 19.2-270.4:1

147. VA. CODE ANN. § 19.2-270.4:1 (Michie Supp. 2003).

148. *Lovitt*, 585 S.E.2d at 809.

149. *Id.* at 816–17.

150. VA. CODE ANN. § 19.2-270.4:1(E) (stating, in part, that "[a]n action under this section or the performance of any attorney representing the petitioner under this section shall not form the basis for relief in any habeas corpus or appellate proceeding").

151. *Lovitt*, 585 S.E.2d at 814.

152. *Id.* at 815.

153. *Id.* at 815–16.

154. *Id.* at 815; *Youngblood*, 488 U.S. at 51.

155. Barbara Whitaker, *DNA Frees Inmate Years After Justices Reject Plea*, N.Y. TIMES, Aug. 11, 2000, at A12, *available at* 2000 WL 25030459.

which, in effect, states that the death of a sentenced defendant who claims the Commonwealth destroyed potentially exculpatory evidence is more important than forcing the Commonwealth to follow its own laws.

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