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Richmond v. Polk 375 F.3d 309 (4th Cir. 2004)

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I. Facts

Early in the morning of November 2, 1991, Earl Richmond, Jr., after a night of drinking and doing drugs, went to the trailer of Helisa Hayes, his best friend's wife. Richmond raped and strangled Hayes, then murdered her two children, Phillip and Darien. Richmond evaded capture for three months until his sister, Andrea Knight, told police that she had driven her brother to a spot near Hayes's trailer early on November 2. Upon police request, Richmond submitted DNA for a suspect rape kit. That DNA matched the semen found in Hayes's body. On April 3, 1992, Richmond heard about the DNA match and confessed to the murders.[1]

On July 6, 1992, Richmond was indicted by a North Carolina grand jury on one count of first-degree rape and three counts of first-degree murder.[2] Before Richmond's trial for the Hayes murders, federal prosecutors charged him with the murder of Lisa Ann Nadeau in the United States District Court for the District of New Jersey.[3] Richmond had strangled Nadeau on April 4, 1991, at Fort Dix military base.[4] On May 28, 1993, a jury convicted Richmond of Nadeau's murder and sentenced him to life imprisonment without the possibility of parole.[5] Prior to trial for Hayes's murder, the North Carolina trial court ruled to allow the State to introduce evidence of Richmond's prior federal murder conviction.[6] In response, Richmond "requested the court's permission to ask potential jurors during *voir dire* whether 'if . . . knowing that [Richmond] had a previous first-degree murder conviction, they could still consider mitigating circumstances . . . in determining what their ultimate recommendation as to life or death is going to be.' "[7] The court denied the question and instructed Rich-

1. Richmond v. Polk, 375 F.3d 309, 314–16 (4th Cir. 2004).

2. *Id.* at 316; *see* N.C. GEN. STAT. § 14-27.2(a)(2)(b) (2003) (stating that "[a] person is guilty of rape in the first degree if the person engages in vaginal intercourse . . . [w]ith another person by force and against the will of the other person, and . . . inflicts serious personal injury upon the victim"); N.C. GEN. STAT. § 14-7 (2003) (stating that "[a] murder . . . which shall be committed in the perpetration or attempted perpetration of . . . rape or a sex offense . . . shall be deemed to be murder in the first degree . . . and . . . shall be punished with death or imprisonment in the State's prison for life without parole").

3. *Richmond*, 375 F.3d at 316.

4. *Id.*

5. *Id.*

6. *Id.*

7. *Id.* (quoting State v. Richmond, 495 S.E.2d 677, 683 (N.C. 1998)).

mond's attorneys to ask broader questions in order to ascertain the potential jurors' opinions about the death penalty.[8] During the trial, Richmond attempted to secure a voluntary intoxication jury instruction by introducing evidence concerning his alcohol abuse.[9] The trial court refused to give the instruction because Richmond "failed to produce substantial evidence showing that he was 'utterly incapable of forming a deliberate and premeditated purpose to kill.' "[10]

On May 24, 1995, the jury found Richmond guilty on all charges.[11] A sentencing hearing was scheduled for the next day.[12] Richmond moved for a jury instruction that his sentence on the federal murder charge made him ineligible for parole.[13] Stating that "North Carolina law . . . does not allow jurors to consider parole eligibility when making sentencing decisions," the trial court denied the motion.[14] The jury found five mitigating factors and three aggravating factors, and imposed the death sentence for Richmond's murder convictions and life imprisonment for the rape conviction.[15]

The Supreme Court of North Carolina affirmed Richmond's convictions and death sentence on direct appeal, and the United States Supreme Court denied certiorari.[16] On September 13, 1999, Richmond filed a motion for appropriate relief ("MAR") in the Superior Court for Cumberland County, claiming that he had received ineffective assistance of counsel ("IAC") in both the guilt and

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8. *Id.*

9. *Richmond*, 375 F.3d at 317. Richmond's sisters testified that he drank beer regularly and had consumed a large amount before attending the party on November 1, 1991. *Id.* at 316–17. They also stated that he had drunk a good deal of hard liquor, taken a hit of crack cocaine, and consequently became "extremely obnoxious," which they stated was an unusual reaction for him. *Id.* at 316.

10. *Id.* at 317(quoting *Richmond*, 495 S.E.2d at 689). In their closing argument, Richmond's attorneys mentioned Richmond's intoxication on the morning of the murders to suggest that he "did not act with premeditation and deliberation." *Id.* The State responded that there could be no reasonable doubt that Richmond had acted with premeditation and deliberation because he "went to Ms. Hayes' [sic] home at 3:45 a.m. with the sole purpose of raping her, and that once he murdered her, he purposely searched out her children . . . and killed them so as to ensure that there would be no witnesses." *Id.* at 318.

11. *Id.* at 318.

12. *Id.*

13. *Id.*

14. *Id.*

15. *Richmond*, 375 F.3d at 319. The jury found as mitigating factors that: "(1) Richmond committed the crimes while suffering from mental or emotional disturbance; (2) Richmond committed the crimes while under the influence of alcohol; (3) Richmond suffers from severe personality disorder; (4) Richmond's use of alcohol and drugs had an effect on his behavior; and (5) Richmond's father mentally abused him." *Id.* at 319 n.2; *see* N.C. GEN. STAT. § 15A-2000(f) (2003) (listing the mitigating factors a jury might find in a capital sentencing proceeding).

16. *Richmond*, 375 F.3d at 319; *Richmond*, 495 S.E.2d at 683.

sentencing phases of his trial.[17] He also filed motions on October 10, 1999, for the appointment of substance abuse and sexual abuse experts.[18] Although the superior court granted his requests for experts, it denied his MAR on the pleadings on November 22, 1999.[19] The court held that the IAC claims were without merit and that Richmond had procedurally defaulted them by failing to attach evidentiary affidavits as required by North Carolina General Statute Section 15A-1420(b)(1).[20] Richmond attempted to cure his procedural default with an amended MAR accompanied by affidavits and by filing a motion for reconsideration on December 2, 1999.[21] The superior court denied his motion, and the Supreme Court of North Carolina denied his petition for a writ of certiorari on these issues.[22]

Pursuant to 28 U.S.C. § 2254, Richmond filed a petition for a writ of habeas corpus in the United States District Court for the Eastern District of North Carolina on April 28, 2000.[23] The district court granted the State's motion for summary judgment on the petition but granted Richmond a certificate of appealability ("COA") on four claims.[24] The United States Court of Appeals for the Fourth Circuit granted Richmond an additional COA for one more claim.[25] Richmond ultimately presented three categories of claims to the Fourth Circuit: (1) his attorneys rendered ineffective assistance in both the guilt and penalty phases of his trial by failing to present expert testimony regarding his substance

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17. *Richmond*, 375 F.3d at 319; *see* N.C. GEN. STAT. § 15A-1420 (2003) (requiring a defendant seeking relief of a judgment to file claims in the trial court in which he was convicted).

18. *Richmond*, 375 F.3d at 320.

19. *Id.*

20. *Id.* at 320, 322; *see* N.C. GEN. STAT. § 15A-1420(b)(1) (providing that "[a] motion for appropriate relief made after the entry of judgment must be supported by affidavit or other documentary evidence if based upon the existence or occurrence of facts which are not ascertainable from the records . . . or which are not within the knowledge of the judge who hears the motion").

21. *Richmond*, 375 F.3d at 320.

22. *Id.*

23. *Id.*; *see* 28 U.S.C. § 2254 (2000) (outlining the requirements for a federal court to grant habeas corpus relief; part of AEDPA). Because Richmond filed his habeas petition after the 1996 effective date of AEDPA, the Act's provisions applied in his case. *Richmond*, 375 F.3d at 321.

24. *Richmond*, 375 F.3d at 320. The district court granted the COA on Richmond's *Morgan* claim, his IAC claim for counsel's failure to present testimony regarding his substance abuse during the guilt phase, his IAC claim for counsel's failure to present testimony regarding his substance abuse during the sentencing phase, and his *Simmons* claim. *Id.*

25. *Id.*; *see* 28 U.S.C. § 2253(c)(2) (2000) (defining the requirements for a federal habeas corpus appeal to the courts of appeals; part of AEDPA). Richmond filed a motion "to extend the time to file a request to expand his certificate of appealability to include three additional claims." *Richmond*, 375 F.3d at 320. The Fourth Circuit granted him the time extension and allowed him to include his IAC claim for counsel's failure to "retain a sexual abuse expert and . . . request that childhood sexual abuse be presented to the jury as a possible mitigating factor." *Id.*

abuse and his alleged childhood sexual abuse; (2) the state court violated *Morgan v. Illinois*[26] by not allowing his specific question in voir dire; and (3) the state court violated *Simmons v. South Carolina*[27] by denying him a jury instruction that made clear that he was ineligible for parole.[28]

II. Holding

The Fourth Circuit affirmed the district court's denial of Richmond's petition for a writ of habeas corpus.[29] The court stated that under *Coleman v. Thompson*[30] it could not consider Richmond's IAC claims because he had procedurally defaulted them in state court.[31] It further held, under the Anti-Terrorism and Effective Death Penalty Act of 1996 ("AEDPA"), that the Supreme Court of North Carolina's denial of Richmond's *Morgan* claim "was neither contrary to nor an unreasonable application of clearly established federal law."[32] Although the court did find the Supreme Court of North Carolina's treatment of Richmond's *Simmons* claim to be an unreasonable application of federal law, it held that such an application was harmless error under *Brecht v. Abrahamson*.[33]

III. Analysis

A. Standard of Review

The Fourth Circuit noted that it must "review *de novo* a district court's decision on a petition for a writ of habeas corpus based on a state record."[34] The Fourth Circuit clarified its standard of review by explaining the limits that

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26. 504 U.S. 719 (1992).

27. 512 U.S. 154 (1994).

28. *Richmond*, 375 F.3d at 320; *see* Morgan v. Illinois, 504 U.S. 719, 738 (1992) (stating that due process requires disqualification of "[a]ny juror who states that he or she will automatically vote for the death penalty [in every murder case] without regard to the mitigating evidence"); Simmons v. South Carolina, 512 U.S. 154, 156 (1994) (holding that "where the defendant's future dangerousness is at issue, and state law prohibits the defendant's release on parole, due process requires that the sentencing jury be informed that the defendant is parole ineligible").

29. *Richmond*, 375 F.3d at 314.

30. 501 U.S. 722 (1991).

31. *Richmond*, 375 F.3d at 322; *see* Coleman v. Thompson, 501 U.S. 722, 750 (1991) (stating that a federal habeas court cannot review claims procedurally defaulted "pursuant to an independent and adequate state procedural rule . . . unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law"); *see also* Wainwright v. Sykes, 433 U.S. 72, 87 (1977) (holding that a state court's denial of a claim on "an independent and adequate state procedural ground" bars review in the federal courts).

32. *Richmond*, 375 F.3d at 336 (citing 28 U.S.C. § 2254(d)(1) (2000)).

33. *Id.* at 334–35 (citing Brecht v. Abrahamson, 507 U.S. 619, 622 (1993)).

34. *Id.* at 320–21.

AEDPA places on a court's consideration of federal habeas corpus cases.[35] It pointed out that a federal court cannot grant a habeas corpus petition unless "the state court's holding 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' "[36] The Fourth Circuit also mentioned AEDPA's fact-finding standard that a federal court, finding no contrary or unreasonable application of federal law, could not grant a writ of habeas corpus unless "the state court's holding . . . '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.' "[37]

B. Ineffective Assistance of Counsel Claims

Richmond presented three IAC claims in his appeal to the Fourth Circuit.[38] First, he claimed that his counsel were ineffective in the guilt phase by not presenting expert and lay testimony that he was so intoxicated on the morning of the murders that he could not have premeditated the murders.[39] He argued that his counsel's failure in this matter prevented the court from giving the jury an instruction on voluntary intoxication.[40] Second, he asserted that his counsel were ineffective in the penalty phase for not presenting similar testimony and additional evidence that his substance abuse made it impossible for him to control his rage while intoxicated.[41] Such testimony, he claimed, would have provided the jury with additional mitigating evidence and allowed them to find that the comparison of mitigating and aggravating circumstances warranted a sentence of life.[42] Richmond's final IAC claim involved his defense counsel's failure to obtain a sexual abuse expert and present, during the penalty phase of

35. *Id.* at 321.

36. *Id.* (quoting 28 U.S.C. § 2254(d)(1)).

37. *Id.* (quoting 28 U.S.C. § 2254(d)(2)).

38. *Richmond*, 375 F.3d at 321–22.

39. *Id.* at 326.

40. *Id.* Richmond provided expert evidence that he "suffered from severe personality disorders and chronic depression, grew up in a dysfunctional family and suffered from mixed substance abuse disorder." *Id.* at 318–19. Richmond's attorneys argued, in light of this evidence, that Richmond "had a diminished capacity to control his behavior outside of a structured environment, and had a diminished capacity to appreciate the criminality of his conduct and conform his behavior to the requirements of the law." *Id.* at 319. The State rebutted this evidence with experts of its own, who testified that "despite his severe personality disorder and likely drug and alcohol consumption, [Richmond] was goal-oriented and thoughtful" the morning of the murders and that he could "appreciate the criminality of his conduct and conform to the requirements of the law." *Id.*

41. *Id.* at 321–22. Richmond claimed that the rage resulted from sexual abuse he suffered as a child. *Id.*

42. *Id.* at 327.

the trial, evidence concerning Richmond's alleged childhood sexual abuse.[43] Richmond argued that his counsel had notice of such abuse from Richmond's sister and thus should have pursued this evidence in mitigation.[44]

The Fourth Circuit noted that North Carolina law requires a defendant to file an MAR in order to bring a claim for IAC in postconviction proceedings.[45] If the MAR contains claims " 'based upon the existence or occurrence of facts which are not ascertainable from the records and any transcripts of the case or which are not within the knowledge of the judge who hears the motion,' " the movant must support the MAR " 'by affidavit or other documentary evidence.' "[46] The Superior Court for Cumberland County held that Richmond procedurally defaulted his first two IAC claims because they did not contain the proper supporting affidavits and that he defaulted his third claim because the affidavit "did not actually support" the claim.[47]

The Fourth Circuit noted that *Coleman* bars a federal court from granting a habeas corpus claim that has been procedurally defaulted in state court if the default relies on " 'an independent and adequate state procedural rule . . . unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law.' "[48] *Murray v. Carrier*[49] holds that if "cause" and "prejudice" cannot be shown, the court will not excuse a default except where failure to do so would cause a " 'fundamental miscarriage of justice.' "[50] In Richmond's case, the Fourth Circuit, citing *Johnson v. Mississippi*[51] and *Ake v. Oklahoma*,[52] stated that "[a] state procedural rule is 'adequate' if it is firmly established and regularly or consistently applied by the state court, and 'independent' if it does not depend on a federal constitutional ruling."[53] The court found that the North Carolina rule requiring that a MAR be supported by an evidentiary affidavit was an "adequate" state procedural rule because North Carolina had

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43. *Id.* at 322.

44. *Richmond*, 375 F.3d at 328.

45. *Id.* at 322; *see* N.C. GEN. STAT. § 15A-1420 (2003) (outlining the procedure for postconviction relief).

46. *Richmond*, 375 F.3d at 322 n.4 (quoting N.C. GEN. STAT. § 15A-1420(b)(1)).

47. *Id.* at 322. The Fourth Circuit stated that "[t]he Cumberland County Superior Court concluded that Dr. Lisak's affidavit did not support Richmond's claim because, in addition to containing cumulative speculation, it acknowledged that Richmond did not recall being sexually abused as a child by his father and that Richmond's father adamantly denied sexually abusing him." *Id.*

48. *Id.* (quoting *Coleman*, 501 U.S. at 722).

49. 477 U.S. 478 (1986).

50. *Richmond*, 375 F.3d at 323 (quoting Murray v. Carrier, 477 U.S. 478, 495–96 (1986)).

51. 486 U.S. 578 (1988).

52. 470 U.S. 68 (1985).

53. *Richmond*, 375 F.3d at 323 (citations omitted) (citing Johnson v. Mississippi, 486 U.S. 578, 587 (1988); Ake v. Oklahoma, 470 U.S. 68, 75 (1985)).

regularly applied the rule before considering Richmond's claim.[54] The court determined that section 15A-1420(b)(1) was independent because it did not "depend on any federal constitutional ruling."[55]

Upon finding North Carolina's procedural default of Richmond's IAC claims to be valid, the Fourth Circuit turned to whether Richmond was able to show cause and actual prejudice.[56] The court relied on *Murray* for the rule that in order to show cause the defendant must " 'show that some objective factor external to the defense impeded counsel's efforts to comply with' " the local rule.[57] Richmond argued that the superior court acted as the outside factor by not appointing his substance and sexual abuse experts in time to provide supporting affidavits and by not notifying his counsel "that a ruling was imminent."[58] The Fourth Circuit rejected these claims as insufficient to show cause and found that Richmond had "sufficient time to work with, and obtain an adequate affidavit" from his experts.[59] Richmond's counsel, the court continued, could have moved for the experts earlier, worked with them more quickly, and filed the MAR later.[60] The court further found that the superior court "was not obligated to notify [Richmond] that it was preparing to rule on his MAR."[61] The Fourth Circuit thus determined that Richmond did not show cause for his default.[62]

Despite finding no cause, the Fourth Circuit went on to state that Richmond had also not shown actual prejudice resulting from his IAC claims.[63] To show actual prejudice, the court stated, Richmond would have needed to demonstrate " 'that the errors at his trial . . . worked to his actual and substantial disad-

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54. *Id.* at 323–24 (citing State v. Ware, 482 S.E.2d 14, 16 (N.C. 1997); State v. Payne, 325 S.E.2d 205, 219 (N.C. 1985); State v. Parker, 300 S.E.2d 451, 453 (N.C. Ct. App. 1983)).

55. *Id.* at 324. Although Richmond did not claim that North Carolina's MAR rule was inadequate or dependent upon a federal ruling, he did argue that North Carolina had applied the rule in a "haphazard manner." *Id.* at 323 n.5. He claimed that the superior court haphazardly defaulted his MAR because it ignored the fact that Richmond cured the default with an amended motion that included an affidavit; it granted his requests for expert assistance, thus implying to his counsel that it would not rule on the unamended MAR; and North Carolina courts usually take a year and a half to rule on MARs. *Id.* Finding that the superior court's decisions on reconsideration and ruling time were completely within its discretion, the Fourth Circuit dismissed Richmond's arguments. *Id.* at 323–24 n.5.

56. *Id.* at 324; *see Coleman*, 501 U.S. at 750 (holding that a procedurally defaulted claim "is barred unless the prisoner can demonstrate cause for the default and actual prejudice as a result of the alleged violation of federal law").

57. *Richmond*, 375 F.3d at 324 (quoting *Murray*, 477 U.S. at 488).

58. *Id.* at 325.

59. *Id.*

60. *Id.* Richmond filed for the original MAR on September 13, moved for his experts on October 10, and filed the amended MAR on November 23. *Id.* at 319–20.

61. *Id.* at 325.

62. *Id.*

63. *Richmond*, 375 F.3d at 325–26.

vantage, infecting his entire trial with error of constitutional dimensions.' "[64] Despite the evidence of Richmond's copious consumption of alcohol and drug use on the morning of the murders, the Fourth Circuit relied on the Supreme Court of North Carolina's finding that " 'there [was] little evidence of the degree of his intoxication at the time of the murders.' "[65] The Fourth Circuit found that Richmond's proposed expert testimony would not have helped him prove that he was too intoxicated to premeditate or deliberate.[66] Consequently, the court found that Richmond did not satisfy the actual prejudice requirement for his guilt phase IAC claim.[67]

The Fourth Circuit applied a different prejudice standard to Richmond's sentencing phase IAC claims. Relying on the Supreme Court's definition of actual prejudice in *Strickland v. Washington*,[68] the court demanded that Richmond show " 'a reasonable probability that, absent the errors, the sentencer . . . would have concluded that the balance of aggravating and mitigating circumstances did not warrant death.' "[69] The Fourth Circuit pointed out, in addressing Richmond's second IAC claim, that a good deal of evidence about "Richmond's substance abuse and its effect on his behavior was sufficiently put before the jury" and that the jury found several mitigating factors based on that evidence.[70] The Fourth Circuit noted that despite the evidence and finding of mitigation, the jury nonetheless imposed the death penalty.[71] Consequently, the court found that the probability that the outcome would have been different was too low to meet the *Strickland* prejudice standard.[72]

The Fourth Circuit also rejected Richmond's third IAC argument of counsel's failure to obtain a sexual abuse expert and to present evidence of sexual abuse in mitigation.[73] According to the court, these failures did not cause actual prejudice because the proposed evidence was too weak to undermine confidence in the outcome.[74] Because Richmond could show neither cause nor prejudice,

64. *Id.* at 326 (quoting McCarver v. Lee, 221 F.3d 583, 592 (4th Cir. 2000)).

65. *Id.* (quoting *Richmond*, 495 S.E.2d at 688 (alteration in original)).

66. *Id.* at 327.

67. *Id.* at 327, 328–29.

68. 466 U.S. 668 (1984).

69. *Richmond*, 375 F.3d at 327 (quoting Strickland v. Washington, 466 U.S. 668, 695 (1984)). *Strickland* defines a "reasonable probability" as "a probability sufficient to undermine confidence in the outcome." *Strickland*, 466 U.S. at 694.

70. *Richmond*, 375 F.3d at 327–28.

71. *Id.* at 328.

72. *Id.*

73. *Id.*

74. *Id.* The court noted the following: (1) Richmond's sister only believed that he had been sexually abused by their father; (2) that belief was not supported by evidence; (3) Richmond did not remember any sexual abuse; and (4) "Richmond's father has vehemently denied ever sexually abusing him." *Id.*

the Fourth Circuit held that it could not rule on the merits of any of his three IAC claims.[75]

C. Morgan *Claim*

Richmond argued that under *Morgan*, he had a right to ask potential jurors, " 'if . . . knowing that [Richmond] had a previous first-degree murder conviction, could they still consider mitigating circumstances . . . in determining their ultimate recommendation as to life or death.' "[76] The Fourth Circuit pointed out that *Morgan* expands "[t]he Sixth and Fourteenth Amendments['] 'guarantee [that] a defendant on trial for his life [has] [a] right to an impartial jury.' "[77] According to *Morgan*, capital defendants may use voir dire to empanel a jury that does not believe that " 'death should be imposed *ipso facto* upon conviction of a capital offense,' " that will not " 'impose death regardless of the facts and circumstances of conviction,' " and that will "be able to follow the court's instructions and [its] oath."[78] To ascertain the prospective jurors' views on the death penalty, Richmond's counsel asked the court to allow them to ask the specific question concerning Richmond's prior federal murder conviction.[79] The trial court rejected this question as too narrow and found it to be a " 'stakeout' question aimed at determining a prospective juror's answers to legal questions before being informed of the legal principles applicable to their sentencing recommendation."[80] The Supreme Court of North Carolina agreed that Richmond's proposed question was an improper "stakeout" question and ruled that the trial court did not violate *Morgan* by disallowing the question.[81]

To rule for Richmond on this claim, the Fourth Circuit would have needed to find that the Supreme Court of North Carolina's treatment of *Morgan* " 'was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States.' "[82] The

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75. *Id.* at 328–29.

76. *Richmond*, 375 F.3d at 329 (quoting *Richmond*, 495 S.E.2d at 683); *see Morgan*, 504 U.S. at 732 (holding "that a sentence of death cannot be carried out if the jury that imposed or recommended it was chosen by excluding veniremen for cause simply because they voiced general objections to the death penalty or expressed conscientious or religious scruples against its infliction") (citing Witherspoon v. Illinois, 391 U.S. 510, 520–23 (1968)).

77. *Richmond*, 375 F.3d at 329 (quoting *Morgan*, 504 U.S. at 728).

78. *Id.* (quoting *Morgan*, 504 U.S. at 728, 735); *see* Lockhart v. McCree, 476 U.S. 162, 170 n.7 (1986) (stating that a party "must be given the opportunity to identify [problematic] prospective jurors by questioning them at *voir dire* about their views of the death penalty").

79. *Richmond*, 375 F.3d at 329.

80. *Id.*

81. *Id.* at 329–30. The Supreme Court of North Carolina held that such a question would serve to " 'indoctrinate [jurors] regarding potential issues before the evidence has been presented and [they] have been instructed on the law.' " *Id.* at 330 (quoting *Richmond*, 495 S.E.2d at 683).

82. *Id.* at 321 (quoting 28 U.S.C. § 2254(d)(1) (2000)).

court pointed out that the United States Supreme Court held in *Williams v. Taylor*[83] that "contrary to" and "unreasonable application of" were two distinct categories.[84] To define "contrary to," the Fourth Circuit relied on *Bell v. Cone*,[85] which provided that "[a] state court decision is contrary to clearly established federal law 'if the state court applies a rule different from the governing law set forth in [the Supreme Court's] cases, or if it decides a case differently than [the Supreme Court has] on a set of materially indistinguishable facts.' "[86] *Bell* also provided that an unreasonable application occurs when a "state court correctly identifies the governing legal principle . . . but unreasonably applies it to the facts of the particular case."[87] The Fourth Circuit noted that an unreasonable application need not be merely wrong, but it " 'must also be unreasonable.' "[88]

The court found that the Supreme Court of North Carolina's treatment of Richmond's voir dire claim "was neither 'contrary to' nor 'an unreasonable application' of *Morgan*."[89] It noted that *Morgan* did not require that a defendant be able to ask questions in order to determine "what a prospective juror's sentencing decision will be if presented with a specific state of evidence or circumstances."[90] Instead, *Morgan* allowed for broad questions to determine " 'the [prospective] jurors' ability to give due consideration to mitigating evidence at sentencing.' "[91] The court found that Richmond was able to ask voir dire questions that solicited jurors' views on the death penalty, their ability to give consideration to mitigation evidence, their openness to a life sentence, and their inclination to impose the death penalty automatically in cases of capital murder.[92] Because Richmond's voir dire allowed him "to identify prospective jurors holding the misconception that 'death should be imposed *ipso facto* upon conviction of a capital offense,' " the Fourth Circuit concluded that the Supreme Court of North Carolina had applied *Morgan* in accord with federal law.[93]

D. Simmons *Claim*

Richmond argued that the trial court erred in denying him a *Simmons* instruction and that the Supreme Court of North Carolina unreasonably applied *Simmons*

83. 529 U.S. 362 (2000).

84. *Richmond*, 375 F.3d at 321 (citing Williams v. Taylor, 529 U.S. 362, 404–05 (2000)).

85. 535 U.S. 685 (2002).

86. *Richmond*, 375 F.3d at 321 (quoting Bell v. Cone, 535 U.S. 685, 694 (2002)) (alteration in original).

87. *Bell*, 535 U.S. at 694.

88. *Richmond*, 375 F.3d at 321 (quoting *Williams*, 529 U.S. at 411).

89. *Id.* at 330 (quoting 28 U.S.C. § 2254(d)(1) (2000)).

90. *Id.*

91. *Id.* (quoting Oken v. Cocoran, 220 F.3d 259, 274 (4th Cir. 2000)).

92. *Id.* at 330–31.

93. *Id.* at 331 (quoting *Morgan*, 504 U.S. at 735).

in affirming his death sentence.[94] Because of his 1993 federal murder conviction, Richmond was already under a life sentence with no possibility of parole when his trial for the Hayes murders began.[95] Richmond pointed out that *Simmons* requires that the jury be informed of a defendant's parole ineligibility when the prosecution argues that he will pose a future danger to society.[96] The Supreme Court of North Carolina found that the trial court did not err by failing to instruct the jury on this point because the prosecution limited its argument to Richmond's future dangerousness in prison.[97] The State argued further that *Simmons* should not apply when the parole ineligibility arises from a federal conviction.[98]

The Fourth Circuit found that the Supreme Court of North Carolina's application of *Simmons* in Richmond's case was unreasonable.[99] The court did not accept the state court's conclusion that the prosecution's statements about Richmond's life in prison eliminated the prejudice of its closing argument that " 'there is only one way you can ensure that this defendant does not kill again, and that is to impose the penalty that he has earned and worked for and deserves.' "[100] The Fourth Circuit likened this statement to the jury argument in *Simmons* that imposing a death sentence would be " 'an act of self defense.' "[101] The court concluded that the jury would not have seen the prosecution's comments about prison life as limiting its future-dangerousness claim and that the prosecution was in fact arguing about the danger Richmond posed to society outside of prison.[102] The court rejected the State's claim that *Simmons* did not apply because Richmond's previous conviction was federal and stated that "the Court's holding in *Simmons* stands for the principle of law that elemental due process requires that capital defendants . . . have the opportunity to inform the jury of their parole ineligibility irrespective of how it came about."[103] Finding that the prosecution did put at issue Richmond's future dangerousness outside of prison, the court held the Supreme Court of North Carolina's application of *Simmons* unreasonable.[104]

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94. *Richmond*, 375 F.3d at 331.

95. *Id.* at 316.

96. *Id.* at 331.

97. *Id.* at 332; *see Simmons*, 512 U.S. at 177 (stating that "the prosecution is free to argue that the defendant would be dangerous in prison").

98. *Richmond*, 375 F.3d at 333.

99. *Id.* at 334.

100. *Id.* at 332 (quoting *Richmond*, 495 S.E.2d at 696).

101. *Id.* at 332 n.11 (quoting *Simmons*, 512 U.S. at 157).

102. *Id.* at 332–33.

103. *Id.* at 333.

104. *Richmond*, 375 F.3d at 332.

Despite this conclusion, the Fourth Circuit nevertheless denied habeas relief on the grounds that the error was harmless.[105] The court noted that the United States Supreme Court has not decided if a court may apply the *Brecht* harmless error test to a *Simmons* violation, but it nonetheless chose to do so in this case.[106] In *Brecht*, the Supreme Court held that a federal court cannot grant "habeas relief to state prisoners for constitutional errors committed in state court absent a showing that the error 'had a substantial and injurious effect or influence in determining the jury's verdict.' "[107] If the federal court had "grave doubt" about the effect of the error, it would be required to grant relief.[108] Noting that the jury heard evidence that Richmond raped his best friend's wife and then brutally killed her and her young children, that he showed no remorse for the crimes, and that he attempted to shift the blame to others, the Fourth Circuit disavowed any "grave doubt" about the outcome of the sentencing hearing and found "it highly unlikely that the jury, had it received a *Simmons* instruction, would have declined to sentence Richmond to death."[109] The court concluded, therefore, that the *Simmons* error was indeed harmless and denied Richmond relief.[110]

IV. Application in Virginia

A. Procedural Default

Defense counsel should note the ways in which a procedural default can damage a federal habeas corpus case. *Richmond* illustrates the difficulty of making the kind of cause and prejudice showing that will overcome a state court procedural error and allow a federal court the opportunity to review an important claim. Ineffective assistance of counsel is often an essential claim in collateral appeals, but Richmond's default in state court precluded the district court from seriously considering his IAC arguments.[111] One could argue that the procedural default of the IAC claims in itself merits an IAC claim, but because the Constitution does not guarantee the right to counsel—effective or otherwise—in collat-

105. *Id.* at 336.

106. *Id.* at 335; *see Brecht*, 507 U.S. at 623 (defining the "harmless error" standard for federal consideration of habeas corpus relief).

107. *Richmond*, 375 F.3d at 335 (quoting *Brecht*, 507 U.S. at 623).

108. *Id.*

109. *Id.*

110. *Id.* at 336.

111. Had his attorneys not defaulted their IAC claims, for example, Richmond might have argued that his trial counsel violated *Wiggins v. Smith* by not investigating the potential mitigating value of Richmond's alleged sexual abuse when they learned of it from Richmond's sister. *See* Wiggins v. Smith, 539 U.S. 510, 527 (2003) (holding that when considering the effectiveness of counsel's presentation of mitigation evidence in a death penalty case, "a court must consider not only the quantum of evidence already known to counsel, but also whether the known evidence would lead a reasonable attorney to investigate further").

eral appeals and because AEDPA precludes relief on the basis of the ineffectiveness of state or federal habeas counsel, Richmond would find no relief in such a claim.[112] Virginia practitioners should take heed of Richmond's dilemma and avoid the kinds of procedural errors that will undercut their clients' chances for federal as well as state review of the merits of their claims.

B. Morgan

The *Morgan* issue in *Richmond* raises a serious question about the defendant's ability in voir dire to ascertain prospective jurors' beliefs about the death penalty in the context of specific factual circumstances. Richmond attempted a question that used the specifics of his own case, and the court rejected it as a "stakeout" question.[113] In the Virginia case of *Satcher v. Commonwealth*,[114] the defendant requested a question that was tied more closely to the details of his own case than Richmond's question was.[115] In *Satcher*, defense counsel sought to ask, "if we have a situation in which a young woman is raped, robbed by a person armed with a deadly weapon, stabbed twenty-one times, beaten and murdered, . . . in that type of situation do any of you believe that the imposition of the death penalty would be the most appropriate sentence?"[116] In affirming the circuit court's denial of this question, the Supreme Court of Virginia cited cases in which the defendant attempted to ask if the jurors believed that the death penalty is " 'ordinarily the proper punishment' " for capital murder.[117] The court also pointed to questions that asked if the death penalty was " ' the only appropriate punishment for capital murder.' "[118] In these cases, the Supreme Court of Virginia approved the lower courts' rejection of the questions, and it found the *Satcher* question to be similarly inappropriate.[119]

Although the *Richmond* and *Satcher* questions might have been too fact-specific to survive, they raise a question about the validity of asking prospective jurors if they would *ipso facto* vote for death given a specific statutory aggravator.

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112. *See* Murray v. Giarratano, 492 U.S. 1, 12 (1989) (holding that a defendant has no Constitutional right to counsel in habeas proceedings); 28 U.S.C. § 2254(i) (2000) (stating that "[t]he ineffectiveness or incompetence of counsel during Federal or State collateral post-conviction proceedings shall not be a ground for relief in a proceeding arising under section 2254"; part of AEDPA).

113. *Richmond*, 375 F.3d at 329–30.

114. 421 S.E.2d 821 (Va. 1992).

115. *See* Satcher v. Commonwealth, 421 S.E.2d 821, 829 (Va. 1992) (affirming the trial court's denial of a capital defendant's voir dire question that referred specifically to the facts of the defendant's own case).

116. *Id.* at 829.

117. *Id.* (quoting Patterson v. Commonwealth, 283 S.E.2d 212, 214 (Va. 1981)).

118. *Id.* (quoting Buchanon v. Commonwealth, 384 S.E.2d 757, 764 (Va. 1989)).

119. *Id.*

In *Ring v. Arizona*,[120] the United States Supreme Court held that prosecutors must prove beyond a reasonable doubt every element of the crime and every element, including statutory aggravators, that increase the potential penalty to death.[121] *Ring* relied on the Supreme Court's earlier ruling in *Apprendi v. New Jersey*[122] that a defendant cannot be exposed "to a penalty *exceeding* the maximum he would receive if punished according to the facts reflected in the jury verdict alone."[123] In *Sumner v. Shuman*,[124] the United States Supreme Court squarely held that all mandatory death penalty schemes violate the Eight Amendment.[125] In light of *Ring*, *Apprendi*, and *Shuman*, *Morgan* should disqualify any potential juror who would vote automatically for the death penalty in the presence of a specific statutory aggravator.

C. Simmons

Since *Yarbrough v. Commonwealth*,[126] all Virginia capital defendants should receive an instruction concerning their parole ineligibility regardless of the death-qualifying aggravator.[127] The Supreme Court of Virginia held in *Yabrough* that:

> in the penalty-determination phase of [a capital murder] trial . . . in response to a proffer of a proper instruction from the defendant prior to submitting the issue of penalty-determination to the jury or where the defendant asks for such an instruction following an inquiry from the jury during deliberations, the trial court shall instruct the jury that the words "imprisonment for life" mean "imprisonment for life without the possibility of parole."[128]

Virginia practitioners should take note to request such an instruction during every sentencing hearing for a defendant convicted of capital murder.

Additionally, given the Fourth Circuit's mention of a circuit split, Richmond may have a question for certiorari: must a federal court apply the *Brecht* harmless error test when faced with an unreasonable application of *Simmons*? Richmond may find hope in the United States Supreme Court's 2002 decision in *Kelly v.*

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120. 536 U.S. 584 (2002).

121. Ring v. Arizona, 536 U.S. 584, 602 (2002).

122. 530 U.S. 466 (2000).

123. Apprendi v. New Jersey, 530 U.S. 466, 483 (2000).

124. 483 U.S. 66 (1987).

125. Sumner v. Shuman, 483 U.S. 66, 85 (1987). In *Shuman*, the Court struck down a Nevada statute that mandated death for all life-felon prison inmates who commit a murder in prison. *Id.*

126. 519 S.E.2d 602 (Va. 1999).

127. Yarbrough v. Commonwealth, 519 S.E.2d 602, 616 (Va. 1999).

128. *Id.*

South Carolina,[129] despite the fact that *Kelly* was decided on direct appeal.[130] In *Kelly*, the Court reversed a defendant's death sentence for the state court's violation of *Simmons* without applying any harmless error anaylsis, much less the rigorous habeas standard required by *Brecht*, thereby suggesting that due process requires the *Simmons* instruction when the prosecution argues future dangerousness, regardless of the actual effect on the jurors of the instruction's absence.[131] The Supreme Court stated that "[a] trial judge's duty is to give instructions sufficient to explain the law, an obligation that exists independently of any question from the jurors or any other indication of perplexity on their part."[132] It is thus arguable that a *Simmons* instruction is so fundamental to due process that the United States Supreme Court will not require a harmless error analysis.

Moreover, even if harmless error analysis is appropriate for *Simmons* violations, then the Fourth Circuit's analysis in *Richmond* is potentially inadequate. *Richmond* may be the first case in which a United States Court of Appeals found a *Simmons* error to be harmless. The Fourth Circuit found the error to be harmless without considering any of the mitigating evidence in the case.[133] Although the weight of the evidence in aggravation is surely a relevant factor to consider, the Fourth Circuit failed to appreciate that a *Simmons* instruction may be especially important in highly aggravated cases precisely because it heightens the importance of reassuring the jury that the defendant will be both severely punished and permanently incapacitated if his life is spared. For a jury to make the decision of how harshly to punish a defendant who has committed an especially heinous murder, it must know that the defendant has no possibility of life outside of prison.

V. Conclusion

Despite finding that the Supreme Court of North Carolina erred unreasonably in its application of *Simmons*, the Fourth Circuit denied Richmond's habeas petition because it concluded that the facts of the case presented to the jury weighed so overwhelmingly in favor of a death sentence that the trial court's error in refusing to inform the jury about Richmond's parole ineligibility was

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129. 534 U.S. 246 (2002).

130. *See* Kelly v. South Carolina, 534 U.S. 246, 248 (2002) (emphasizing the *Simmons* holding "that when a capital defendant's future dangerousness is at issue, and the only sentencing alternative to death available to the jury is life imprisonment without possibility of parole, due process entitles the defendant 'to inform the jury of [his] parole ineligibility' "); *see also* Shafer v. South Carolina, 532 U.S. 36, 40 (2001) (reversing defendant's conviction despite the State's argument that the new South Carolina sentencing options made unnecessary a *Simmons* instruction when the prosecutor has argued future dangerousness).

131. *Kelly*, 534 U.S. at 248.

132. *Id.* at 256.

133. *Richmond*, 375 F.3d at 334.

harmless. The case does not, however, resolve the questions about the appropriateness of "harmless error" analysis of *Simmons* violations. Nor does it explore the proper mode of conducting such analysis in cases like this one.

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