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FACTS

Coleman Gray was indicted for the capital murder of Richard McClelland in the commission of robbery,[1] the robbery and abduction of McClelland, the use of a firearm in the commission of each of those felonies, and the arson of McClelland's car.[2] The Commonwealth's evidence tended to show that during the early morning hours of May 3, 1986, a car occupied by Gray and Melvin Tucker intercepted a vehicle driven by McClelland. Gray forced McClelland into his car, and then drove to McClelland's place of employment, a Murphy's Mart, and forced him to open the store.[3]

After stealing approximately $13,000 from the store, Gray drove to an isolated road and parked his car. Ushering McClelland out of the car, Gray forced him to lie face down on the ground. After answering McClelland's pleas with assurances that he would not be harmed, Gray rapidly fired six shots into the back of McClelland's head. Gray and Tucker then returned to McClelland's car and, in an attempt to destroy the evidence of the abduction, doused the inside with gasoline and set the car on fire.[4]

The guilt phase of Gray's capital murder trial began on December 2, 1985. On the day trial began, Gray's counsel asked the court to order the Commonwealth to disclose any evidence it planned to introduce at the sentencing phase to prove future dangerousness if Gray was found guilty. The prosecuting attorney stated that the Commonwealth would introduce "evidence of statements [Gray] ha[d] made to other people about other crimes he ha[d] committed of which he ha[d] not been convicted."[5] Specifically, the Commonwealth represented that it intended to use statements Gray allegedly made to co-defendant Tucker that Gray was the triggerman in McClelland's murder and statements made to the effect that Gray was responsible for the murder of Lisa Sorrell and her daughter.[6] Upon further questioning by defense counsel, the Commonwealth's attorney also represented that Tucker's testimony, as well as the testimony of other inmates, would be the only evidence bearing on the Sorrell murders.[7]

At the close of all the evidence, the jury convicted Gray on all counts. The night before the sentencing phase was to begin, the Commonwealth's attorney contacted defense counsel and informed him that the prosecution was going to introduce further evidence, beyond Gray's own admissions, connecting Gray to the Sorrell murders. The additional evidence to be introduced included: photographs of the crime scene and bodies of the victims, testimony of the detective who investigated the murders and testimony of the medical examiner who had performed the autopsies on the Sorrells' bodies.[8]

The next morning, Gray's counsel asked the court to exclude any evidence related to any felony for which Gray had not been indicted because it exceeded the "scope of unadjudicated-crime evidence admissible for sentencing under Virginia law."[9] Gray's counsel also stated that he was taken by complete surprise and was unprepared to rebut any evidence other than the alleged statements made by Gray. The court denied defense counsel's request. The Commonwealth then presented graphic evidence of the Sorrell murders through the testimony of Detective Slezak and medical examiner, Dr. Presswalla. The jury subsequently sentenced Gray to death based on both the future dangerousness and vileness predicates.[10]

Gray's conviction and sentence were affirmed on direct appeal, and his state *habeas corpus* petition was dismissed, with the United States Supreme Court twice denying certiorari.[11]

Gray then petitioned for a writ of *habeas corpus* in federal court.[12] The district court vacated Gray's sentence, holding that the "acts of the prosecution" regarding the additional Sorrells' murder evidence deprived the defendant of fair notice and violated due process by undermining the reliability of the penalty trial proceeding.[13] The Commonwealth appealed the issuance of the writ to the United States Court of Appeals for the Fourth Circuit.[14]

The court of appeals, based on the "new rule" doctrine of *Teague v. Lane*,[15] reversed, ordering Gray's federal *habeas corpus* petition be dismissed.[16] Gray then applied for a stay of execution and petitioned for writ of certiorari to the United States Supreme Court.[17] The Court

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[1] Va. Code Ann. § 18.2-31(d).

[2] *Gray v. Commonwealth*, 233 Va. 313, 319, 356 S.E.2d 157, 160, *cert. denied*, 484 U.S. 873 (1987).

[3] *Id.* at 340, 356 S.E.2d at 172.

[4] *Id.* at 341-342, 356 S.E.2d at 172-173.

[5] *Gray v. Netherland*, 116 S. Ct. 2074, 2078 (1996).

[6] *Id.*

[7] *Id* at 2079 (citations omitted). The following conversation took place between defense counsel and the prosecutor in-chambers before the guilt phase began:

"MR. MOORE: Is it going to be evidence or just his statement?

MR. FERGUSON: Statements that your client made.

MR. MOORE: Nothing other than statements?

MR. FERGUSON: To other people, that's correct. Statements made by your client that he did these things." *Id.* at 2086 (Ginsburg, J., dissenting).

[8] *Id.* at 2078. The Commonwealth also gave notice of additional testimonial evidence it intended to present to show that the manner used to kill Lisa Sorrell and her three-year-old daughter was very similar to that used to kill McClelland. *Id.* Lisa Sorrell was shot six times in the back of the head and left slumped in the front seat of her partially burned car. Her daughter, Shanta, was found in the trunk of the car, where she died from carbon monoxide inhalation. *Gray v. Commonwealth*, 233 Va. at 345-346, 356 S.E.2d at 175.

[9] *Gray v. Netherland*, 116 S. Ct. at 2078.

[10] *Id.* at 2078-2079.

[11] *Id.* at 2079 (citations omitted).

[12] *Gray v. Thompson*, 58 F.3d 59 (4th Cir. 1995) (citations omitted).

[13] *Id.* at 62 (citations omitted).

[14] *Id.* (citations omitted).

[15] 489 U.S. 288 (1989). *See* discussion of *Teague v. Lane*, *infra* part II.

[16] *Gray v. Thompson*, 58 F.3d at 67.

[17] *Gray v. Netherland*, 116 S. Ct. at 2080.

granted certiorari, agreeing to consider, in addition to Gray's notice-of-evidence claim, his claim that the Commonwealth had breached its obligation to disclose exculpatory evidence under the doctrine of *Brady v. Maryland*,[18] with respect to the Sorrell murders.[19]

HOLDING

The United States Supreme Court dismissed the *Brady* claim on the ground that it had been procedurally defaulted.[20] The Court also determined that Gray's due process claim of surprise regarding the Sorrell murders actually contained two distinct claims: a misrepresentation claim and a notice-of-evidence claim.[21] Because the Court found that Gray's notice-of-evidence claim required a "new rule" under *Teague*, it held that the claim did not provide him a basis for which he could seek federal *habeas* relief.[22] With regard to the misrepresentation claim, finding that the Commonwealth may have affirmatively misled the defense and that the procedural posture of this claim was unclear, the Court remanded the case to determine if the claim was defaulted and, if not, to decide it.[23]

ANALYSIS/APPLICATION IN VIRGINIA

I. Procedural Default of *Brady* Claim.

In *Wainwright v. Sykes*,[24] the Supreme Court held that a petitioner is procedurally barred from raising a claim in a federal *habeas corpus* proceeding if that issue could have been presented on direct appeal or in a state *habeas* proceeding, unless he can show cause for the default and prejudice resulting therefrom.[25] Similarly, under the current federal law the courts will not entertain a second or subsequent *habeas* petition unless the defendant can satisfy two conditions.[26] First, the petitioner must allege a new ground for relief; and, second, the petitioner must satisfy the judge that he did not deliberately withhold the claim earlier or "otherwise abuse the writ."[27]

Although defense counsel made a request for all exculpatory evidence pursuant to *Brady v. Maryland*,[28] the prosecution did not reveal evidence tending to show that Timothy Sorrell, not Gray, committed the murder of Lisa and Shanta Sorrell.[29] Because Gray did not present the *Brady* issue on direct appeal or in state *habeas*, the district court found that the claim was procedurally barred.[30] Because Gray did not make an attempt to show cause or prejudice for his default, the Supreme Court agreed with the district court, holding that the *Brady* claim was defaulted.[31]

II. Notice of Evidence Claim

In *Teague*, the Court concluded that the application "of constitutional rules not in existence at the time a conviction became final seriously undermines the principle of finality which is essential to the operation of our criminal justice system,"[32] and generally should not be applied retroactively.[33] However, because the defendant's life and liberty are at stake in a criminal proceeding, retroactive application of a "new rule" will apply if: 1) it places "certain kinds of primary, private individual conduct beyond the power of the criminal law-making authority to proscribe"; or, 2) it violates "watershed rules of criminal procedure."[34] If a court determines that a defendant has requested a "new rule" and neither exception applies, the application of the *Teague* doctrine will bar a decision on the merits of a claim.

Although dicta in the *Gray* majority opinion suggests it might not look favorably on what it termed the "notice" claim,[35] this suggestion is even less forceful because of the narrow construction the Court gave to what it saw as the rule being requested by Gray. In spite of apparently contrary indications in the record,[36] the Court found that no request for

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18 373 U.S. 83 (1963).

19 *Gray v. Netherland*, 116 S. Ct. at 2080.

20 *Id.*

21 *Id.* at 2080-2081. By dividing Gray's due process claim into two separate issues, the Court was able to disregard some of the support for a due process violation with little comment. For example, Gray cited *In re Ruffalo*, 390 U.S. 544 (1968), which concerned a defendant's right to notice of charges against him. Although *Ruffalo* contained language which would have bolstered Gray's due process argument, the Court merely held that, "[w]hether or not *Ruffalo* might have supported petitioner's notice-of-evidence claim, . . . it does not support the misrepresentation claim for which petitioner cites it." *Id.* at 2082.

22 Id. at 2083-2084.

23 Id.

24 433 U.S. 72 (1977).

25 *Id.* at 87.

26 *McClesky v. Zant*, 499 U.S. 467, 489-495 (1991).

27 *Id.*

28 373 U.S. 83 (1963).

29 *Gray v. Netherland*, 116 S. Ct. at 2089 n.8. Specifically, the prosecution did not turn over evidence that tended to show: 1) the police designated Mr. Sorrell as the sole suspect on evidence sent to the crime lab; 2) forensic evidence collected tended to link Timothy Sorrell to the killings; 3) the police knew that Timothy Sorrell had obtained a life insurance policy on Lisa two weeks before the killing that named him as the beneficiary, creating an apparent motive for the killings; and, 4) Lisa Sorrell was unhappy and angry with her husband because she had recently learned that he was involved in a stolen merchandise ring at his work. *Id.* at 2088-2089.

30 *Id.* at 2080 (citations omitted). The district court dismissed the *Brady* claim because the "factual basis for the claim was available to [Gray] at the time he litigated his state *habeas* petition," but the issue was not raised. *Id.* (citations omitted).

31 *Id.* at 2080-2081.

32 *Teague*, 489 U.S. at 309.

33 *Id.* at 310.

34 *Id.* at 311-313.

35 *Gray v. Netherland*, 116 S. Ct. at 2083-2084. For example, the Court cites *Weatherford v. Bursey*, 429 U.S. 545 (1977). The issue in *Weatherford* was whether a defendant's due process rights had been violated when it was determined that he had been convicted with the aid of surprise testimony of an accomplice who was an undercover agent. *Id.* at 549. The Court rejected defendant's claim, holding that "there is no general constitutional right to discovery in a criminal case and *Brady* did not create one. . . ." *Id.* at 559. It is important to note, however, as was emphasized by the dissent in *Gray*: the defendant in *Weatherford* was not misled by the prosecution; *Weatherford* did not concern the sentencing phase of a capital trial, "a stage at which reliability concerns are most vital"; nor did the defendant in *Weatherford* object to the surprise witness, or later demonstrate how he was prejudiced by the informant's testimony. 116 S. Ct. at 2092 n.12 (citations omitted).

36 *Id.* at 2083 n.4, 2092 n.11 (citations omitted). Not only, as the district court emphasized, did defense counsel plead with the court "for additional time to prepare" but counsel openly stated that, due to the Commonwealth's late notice to introduce additional evidence, he "was not prepared to try the Sorrell murders" that day. *Id.* at 2092 n.11 (citations omitted).

a continuance had been made, perhaps for tactical reasons.[37] Consequently, the Court characterized Gray's "new rule" being sought as follows: 1) a right to "receive more than a day's notice of the Commonwealth's evidence";[38] 2) a right to a continuance, whether or not it was requested; or, 3) if a continuance was not granted, exclusion of the evidence as the only plausible remedy.[39]

Determining that Gray's notice-of-evidence claim would amount to the imposition of a new constitutional rule, the Court then turned its attention to whether this new rule falls within an exception to the basic *Teague* rule.[40] The Court focused on the exception "for 'watershed rules of criminal procedure' implicating the fundamental fairness and accuracy of the criminal proceeding."[41] The Court explained that an "[e]xample of a watershed rule of criminal procedure is the requirement that counsel be provided in all criminal trials for serious offenses,"[42] the rule decided in *Gideon v. Wainwright*.[43] The court dismissed Gray's "new rule" because "it ha[d] none of the primacy and centrality of the rule adopted in *Gideon* or other rules which may be thought to be within the exception."[44]

Dismissing the majority's reasoning that a new rule was required, Justice Ginsburg, in dissent, illustrated that the Court in *Gardner v. Florida*[45] had held that "the sentencing phase of a capital trial 'must satisfy the requirements of the Due Process Clause.'"[46] Because of this fundamental right, "[t]here is nothing 'new' in a rule that a capital defendant must be afforded a meaningful opportunity to defend against the State's penalty phase evidence."[47] Consequently, the *Teague* doctrine did not apply in this case.[48]

The majority unconvincingly distinguished *Gardner* on the basis that the defendant in that case had no opportunity to see the confidential information, whereas Gray had the opportunity to hear the testimony of and cross examine Officer Slezak and Dr. Presswalla in open court.[49] The fact that Gray was able to hear the testimony of Officer Slezak and Dr. Presswalla during the sentencing phase of his trial did not afford him any more of an opportunity to refute the Commonwealth's evidence than the defendant in *Gardner* had to contest the confidential report he never saw. Following the Court's reasoning, there would be a difference between being shot in the back of the head versus being shot while staring into the barrel of a gun the instant before the trigger is pulled. Undoubtedly, Gray's due process right, like Gardner's, was violated.

III. Misrepresentation Claim

The Supreme Court began its discussion of Gray's misrepresentation claim by commenting on the three cases cited by Gray in support of his argument: *In re Ruffalo*,[50] *Raley v. Ohio*,[51] and *Mooney v. Holohan*.[52] However, before the merits of Gray's misrepresentation claim were addressed, the Court held that it first must be determined whether Gray presented the misrepresentation claim in the district court or in the court of appeals.[53] According to the Court, if the claim had been presented or addressed in a lower federal court *habeas* proceeding, but was not raised on direct appeal or in state *habeas*, it might have been procedurally barred under *Sykes*.[54] However, the Commonwealth would have been required to assert procedural default as an affirmative defense or be barred from asserting it thereafter.[55]

Although there was little doubt that the Commonwealth affirmatively misled the defense, the Supreme Court concluded that it was impossible to ascertain whether the misrepresentation claim was raised in the district court or the court of appeals. Consequently, the Court was unable to determine whether the Commonwealth had lost its affirmative defense of procedural default. Because of this ambiguity, the Supreme Court remanded the misrepresentation claim to the court of appeals to determine whether it was raised and, if it was, whether the Commonwealth had preserved any defenses to the claim.[56]

IV. Application in Virginia

In spite of the fact that the Court voted five to four to deny relief to Gray, this decision contains many helpful implications for capital defense counsel at the trial level.

As Justice Stevens illustrates in dissent, the "evidence tending to support the proposition that petitioner committed the Sorrell murders was not even sufficient to support the filing of charges against him."[57] Although Gray was never charged, much less a suspect, in the Sorrell murders, the Commonwealth effectively tried him for these unadjudicated acts during the sentencing phase of Gray's trial.

In a criminal trial, a defendant must be acquitted if a jury finds that the evidence does not show that he committed the crime beyond a reasonable doubt. Although the United States Supreme Court has not

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[37] *Id.* at 2083-2084. The Court concluded that Gray's counsel did not request more time to respond to the evidence, he simply moved "'to have excluded from evidence during this penalty trial any evidence pertaining to . . . any felony for which the defendant has not yet been charged.'" *Id.* at 2083. (citations omitted). Based on this finding, the Court determined that "the trial court might well have felt that it would have been interfering with a tactical decision of counsel to order a continuance on its own motion." *Id.* at 2084.

[38] *Id.* at 2083.

[39] *Id.*

[40] *Id.* at 2084. The Court dismissed the exception, which allows for the "retroactive application of a new rule if the rule places a class of private conduct 'beyond the power of the State to proscribe,'" with little discussion. *Id.* (citations omitted).

[41] *Id.* (citations omitted).

[42] *Id.* at 2085 (citations omitted).

[43] 372 U.S. 335 (1963).

[44] *Gray v. Netherland*, 116 S. Ct. at 2085 (citations omitted).

[45] 430 U.S. 349 (1977).

[46] *Gray v. Netherland*, 116 S. Ct. at 2090 (quoting *Gardner*, 430 U.S. at 358). The question presented in *Gardner* was whether a defendant was denied due process when the trial judge sentenced him to death basing his decision in part on a presentence report which contained a confidential portion not disclosed to defense counsel. *Gardner*, 430 U.S. at 350. The Court vacated Gardner's sentence, holding that he "was denied due process of law when the death [penalty] was imposed, at least in part, on the basis of information which he had no opportunity to deny or explain." *Id.* at 362.

[47] *Gray v. Netherland*, 116 S. Ct. at 2090 (Ginsburg, J., dissenting).

[48] *Id.* at 2089-2090 (Ginsburg, J., dissenting).

[49] *Id.* at 2084.

[50] 390 U.S. 544 (1968).

[51] 360 U.S. 423 (1959).

[52] 294 U.S. 103 (1935).

[53] *Gray v. Netherland*, 116 S. Ct. at 2082.

[54] *Id.* at 2080, 2082 (citations omitted).

[55] *Id.*

[56] *Id.* at 2082-2083.

[57] *Id.* at 2085 (Stevens, J., dissenting). Both this reference and the Commonwealth's contention that the Sorrell murders were committed with the same *modus operandi* make it clear that the sentencing jury has the task of deciding whether the defendant committed the unadjudicated act.

definitively stated what standard of proof is necessary for unadjudicated acts used to show future dangerousness, a standard is plainly essential for any disputed issue. Defense counsel should insist that the trial judge give the jury an instruction indicating that some level of proof, even "preponderance of the evidence," must be reached before unadjudicated acts can be considered in support of the future dangerousness aggravating factor. It is imperative that this issue be preserved on the record as a due process claim.

Because Gray's notice-of-evidence claim was rejected on *Teague* grounds, and because of the emphasis on defense counsel's failure to request a formal continuance, *Gray* is no authority for the rejection of due process claims to the right to the identification of the Commonwealth's evidence as set out in the Motion for Bill of Particulars found in the Virginia Capital Clearinghouse Trial Manual. At the same time, based on the way Gray's "new rule" was framed, the Court's ruling does foreclose due process claims to fair notice of inculpatory evidence to be used at the penalty trial, especially with regard to unadjudicated acts used to show future dangerousness.

Although section 19.2-264.3:2 of the Virginia Code requires that the Commonwealth, upon request of the defendant, give notice in writing of unadjudicated acts it intends to use during a sentencing hearing, the statute does not indicate when notice must be given. Consequently, counsel should not only request notice of any unadjudicated acts but continue to press for the Commonwealth's compliance. The sooner counsel learns of the unadjudicated acts, the better prepared he will be to address them. Further, additional motions may be necessary when the Commonwealth's responses are vague or inaccurate.[58]

Finally, although the Court found Gray's *Brady* claim to be defaulted, it clearly recognized that exculpatory materials surrounding allegations of unadjudicated acts are within the ambit of *Brady*.[59] The later case of *Kyles v. Whitley*,[60] makes it clear that all of the evidence presented by the prosecution and police relevant to the Sorrell murders should have been disclosed to Gray's counsel. In *Kyles*, the Court held that the prosecution has an affirmative responsibility to turn over all *Brady* evidence based on the cumulative effect of such evidence.[61] The prosecutor must disclose evidence when there is a reasonable probability that the result of the proceeding may hinge on the disclosure of that evidence.[62] Furthermore, the prosecutor has the affirmative duty to learn of any exculpatory evidence known to others acting on the government's behalf.[63] Consequently, defense counsel should press for timely and particular disclosure, making it clear that if *Brady* or inculpatory penalty trial evidence is turned over too late for effective use of such material, a formal continuance motion will be filed and the responsibility will rest with the prosecution to demonstrate why this evidence was not given earlier. Defense counsel must create an adequate record, including, when appropriate, a representation from the Commonwealth that there is no exculpatory penalty trial evidence, and that a search has been made for it.

Because at least four Justices appear to recognize a defendant's right to contest a state's case for death, and because *Gray* did not rule on the merits of this claim, defense counsel should continue to file a Motion for Bill of Particulars similar to that provided in the Virginia Capital Case Clearinghouse Trial Manual. This issue is not foreclosed and should be preserved.

Because of the harshness of the Virginia default rules,[64] it is also imperative that defense counsel raise every possible issue on as many grounds as possible on direct appeal or on state *habeas*. In order to assure that a claim will not be barred in the future, the claim should be structured in the same manner in which it was originally raised.[65] Although defense counsel may not learn of a *Brady*-type violation until well after the trial has concluded, claims should be raised as soon as discovered, especially due to the new time constraints concerning the filing of state and federal *habeas*.[66]

In an attempt to protect the client, counsel should raise every claim for which there is even a scintilla of supporting evidence. Likewise, because the Attorney General will attempt to divide and rename as many claims as possible for the purpose of asserting that the claim was not previously raised, defense counsel should try to ensure that the claim carries only one possible interpretation.

Summary and Analysis by:
C. Cooper Youell, IV

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[58] *See* Case Summary of *Barnabei v. Commonwealth*, Capital Defense Journal, this issue.

[59] *Gray v. Netherland*, 116 S. Ct. at 2080. *Brady* itself dealt with exculpatory evidence relevant to sentencing. *Brady*, 373 U.S. at 87.

[60] 115 S. Ct. 1555 (1995).

[61] *Id.* at 1567.

[62] *Id.* at 1567-1568.

[63] *Id.*

[64] In Virginia, no writ of *habeas corpus* "shall be granted on the basis of any allegation the facts of which petitioner had knowledge at the time of filing any previous petition." Va. Code Ann. § 8.01-654(B)(2).

[65] Contrary to what the Attorney General will assert, it is not necessary that the appellate or collateral proceedings claim be precisely the same raised at trial. *See Taylor v. Illinois*, 484 U.S. 400, 406-407 n.9 (1988); *But cf.* Case Summaries of *Clagget v. Commonwealth* and *Goins v. Commonwealth*, Capital Defense Journal, this issue.

[66] *See* Raymond, *The Incredible Shrinking Writ: Habeas Corpus Under the Anti-Terrorism & Effective Death Penalty Act of 1996*, Capital Defense Journal, this issue.