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HOKE v. NETHERLAND 92 F.3d 1350 (4th Cir. 1996) United States Court of Appeals, Fourth Circuit

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FACTS

Ronald Lee Hoke, Sr. was convicted in 1986 of capital murder in the robbery, rape and abduction of Virginia Stell. Stell and Hoke were seen together at the European Restaurant in Petersburg, Virginia, in early October 1985, and Stell's nude body was discovered in the bedroom of her apartment a few days later. Stell had been bound, gagged, and stabbed twice. Semen was found in her vagina and anus, and margarine was smeared on her anal ring. Stell's apartment was in disarray, with the contents of dresser drawers and two purses—including empty pill containers— strewn upon the floor.[1]

Hoke confessed to the murder on three separate occasions. He consistently denied rape, a predicate offense necessary to capital murder. His story remained more or less the same: after meeting Stell at the restaurant, he went to her apartment, where the two had consensual vaginal and anal sex. The anal sex was Stell's idea. He then bound, gagged, and stabbed her. Before fleeing, he decided to look around the apartment for drugs, and upon finding prescription medication in her purse, he stole some pills.[2] The only major inconsistency in his confessions concerned when he formed his intent to kill. In his third confession, Hoke told police that he had decided to kill Stell before they arrived at her apartment; in his other confessions and at trial, he stated that he "flew into a rage when Stell slapped him over some sort of transgression."[3]

In their investigation of the murder, the Petersburg police interviewed numerous potential witnesses in both Stell's apartment building and the European Restaurant. Louella Robinette, a patron of the restaurant, told police that she "saw Hoke and Stell hugging and kissing at the restaurant, and the pair later left together."[4] The police further learned that Stell was known to be sexually promiscuous. "Several witnesses stated that Stell would 'go with anyone.'"[5] "A few witnesses even named names, which led the police to interview three men:" James Henry Jones, Lowell Eastes, and Dale Griesert.[6] Eastes admitted to having vaginal sex with Stell on several occasions, the last time about three weeks before the murder.[7] Griesert stated that he and Stell had engaged in vaginal sex and (on one occasion) anal sex, that the "anal sex had been at Stell's behest, and that she had provided Vaseline as a lubricant."[8] Jones admitted to a single sexual encounter with Stell.[9]

None of this information was turned over to Hoke prior to his trial. On August 5, 1986, Hoke was convicted of capital murder in the commission of robbery, rape, and abduction and sentenced to death based upon, as reported by the court of appeals, the "future dangerousness" or "vileness" aggravating factors.[10] The Supreme Court of Virginia affirmed Hoke's conviction and sentence, and the United States Supreme Court denied certiorari.[11] Hoke subsequently filed and was denied a petition for state habeas relief, a second petition for certiorari, and a second petition for state habeas relief.[12]

Hoke then filed a federal habeas petition, which was originally dismissed by the district court without an evidentiary hearing. "At this point, Hoke still did not know about the suppressed witness statements."[13] Upon a petition for reconsideration, the district court vacated its earlier dismissal, and permitted Hoke to amend his petition to assert an equal protection claim.[14] An evidentiary hearing was set for November 1994, and the district court ordered the Commonwealth to provide it with the prosecution's file from the state court proceedings. The Commonwealth produced the Petersburg Police Department files, which included the witness interviews with Jones, Eastes, Griesert, and Robinette.[15]

The revelations in the police file prompted Hoke to again amend his federal habeas petition to claim that the prosecution had (1) knowingly withheld exculpatory evidence in violation of *Brady v. Maryland*,[16] and (2) knowingly used perjured testimony in violation of *Napue v. Illinois*[17] when it presented the trial testimony of Hoke's fellow inmate, Emmet Sallis.[18] The district court granted the writ, holding that (1) neither of the newly added claims was procedurally barred because the facts in support of them were not known to Hoke; (2) even if the claims were defaulted, the *Brady* claim could stand because Hoke could show cause and prejudice, and the *Napue* claim could stand because it was tied to a claim of actual innocence of the predicate crimes of robbery and abduction; and

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[1] *Hoke v. Netherland*, 92 F.3d 1350, 1352-53 (4th Cir. 1996).

[2] *Id.* at 1353.

[3] *Id.* at 1365-66 (Hall, J., dissenting).

[4] *Id.* at 1365 (Hall, J., dissenting).

[5] *Id.* at 1366 (Hall, J., dissenting).

[6] *Id.*

[7] *Id.*.

[8] *Id.* at 1354.

[9] *Id.* at 1366 (Hall, J., dissenting).

[10] *Id.* at 1353. Note that imprecision in the verdict can have appellate significance. Even though either aggravating factor would be sufficient to support a death sentence, it is important to know whether the jury found one or both, and if only one, which one. *See Clemons v. Mississippi*, 494 U.S. 738 (1990); *Stringer v. Black*, 503 U.S 222 (1992). For information as to how to frame these facts into an appellate issue, please contact the Virginia Capital Case Clearinghouse.

[11] *Hoke*, 92 F.3d at 1353.

[12] *Id.* at 1353-54.

[13] *Id.* at 1368 (Hall, J., dissenting).

[14] *Id.* Hoke asserted that racial animus was at the root of the Commonwealth Attorney's decision to seek the death penalty against him. *Id. See infra*, Part II.B.2.

[15] *Id.* at 1354.

[16] 373 U.S. 83 (1963).

[17] 360 U.S. 264 (1959).

[18] *Hoke*, 92 F.3d at 1354. "Sallis testified as follows:"

> [Hoke] said he had a murder charge. And he said the charge that it happened on Union Street and that he was living in Maryland and he came down here on different occasions because he knew the woman. He sold drugs to the woman or somebody in that apartment complex. And he said that they had went out that day and when he came back, because he was supposed to sell some drugs to her and he found out that she had ripped him off, so he found out he couldn't get his stuff back so he killed her.

(3) the *Brady* violation rendered invalid Hoke's predicate rape conviction and the *Napue* violation rendered invalid both the predicate robbery and abduction convictions.[19]

The Commonwealth appealed the district court's order for a new trial, arguing that none of Hoke's predicate offense convictions of rape, robbery, and abduction (any one of which is sufficient to sustain Hoke's capital murder conviction) was subject to constitutional challenge.[20]

HOLDING

The United States Court of Appeals for the Fourth Circuit reversed the grant of relief, and reinstated Hoke's convictions and death sentence. A majority of the panel held that: (1) the prosecution did not violate *Brady* by failing to disclose the witness interviews because such information was "reasonably available " to Hoke[21] and not "material" exculpatory evidence;[22] and (2) the record did not support the finding that Hoke was "actually innocent" of the predicate offenses of robbery and abduction.[23]

ANALYSIS/APPLICATION IN VIRGINIA

I. The *Brady* Claim

A. *Brady* Obligation is Independent of "Reasonable Investigation" by Defense Counsel

In holding that the prosecution did not violate *Brady* by withholding the statements of Jones, Eastes, and Griesert, the court of appeals stated,

> The strictures of *Brady* are not violated, however, if the information allegedly withheld by the prosecution was reasonably available to the defendant. As we held in *United States v. Wilson*,[24] "where the exculpatory information is not only available to the defendant but also lies in a source where a reasonable defendant would have looked, a defendant is not entitled to the benefit of the *Brady* doctrine."[25] Here, there is little doubt that had Hoke undertaken a "reasonable and diligent" investigation, he would have learned of Jones, Eastes, Griesert, and their relationships with Stell.[26]

In making such a statement, the court of appeals quoted only itself and one Eleventh Circuit case as authority for the proposition that *Brady* does not require the prosecution to disclose evidence available to the defendant from other sources, including diligent investigation by the defense.[27]

Eight of the Courts of Appeals (1st, 2nd, 3rd, 4th, 5th, 7th, 9th, and 11th Circuits) have concluded that there exists, at least in name, a "due diligence" exception to the State's obligation under the Due Process Clause to disclose exculpatory evidence to a defendant. However, with the exception of the Fourth Circuit, each has limited the exception to cases in which the defense actually possessed the evidence, or at a minimum, had all the information needed to obtain the evidence.[28] The District of Columbia and Tenth Circuit have explicitly rejected the idea of any "due diligence" exception to the *Brady's* mandate.[29]

Although the question whether the evidence was "reasonably available" to the defendant may be relevant to the materiality of withheld information, it is not relevant to the overall scope of the *Brady* doctrine. The *Brady* doctrine is grounded in an affirmative obligation of the state to afford the defendant a trial that comports with due process. The prosecution thus cannot be relieved of its affirmative duty to disclose exculpatory evidence to the defense, though it can be saved from the consequences of its breach by a hindsight determination that its breach of duty does not "undermine confidence in the outcome of the trial."[30] *Brady* and its progeny thus stand for the proposition that when the defense asks the prosecution whether the prosecution has any exculpatory evidence, the prosecution must turn over such evidence, **even if reasonable defense counsel could find the evidence by other means.** Moreover, in *United States v. Agurs*,[31] the Supreme Court held that the prosecutor has an affirmative duty to disclose obviously exculpatory evidence even without specific request by defense counsel.[32] In sum, the Supreme Court has **never** stated that a defendant loses the benefits of *Brady* if the information at issue could be obtained by the defendant through reasonably diligent investigation.[33]

The Fourth Circuit applied its same flawed reasoning to note that Hoke's *Brady* claim was defaulted in any event pursuant to Virginia Code § 8.01-654(B)(2).[34] According to the court, under section 801-654(B)(2), a "petitioner is barred from raising any claim in a successive petition if the facts as to that claim were either known 'or available' to the petitioner at the time of his original petition."[35] Section 8.01-654(B)(2),

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[19] *Id.* at 1359, 1354.

[20] *Id.* at 1359.

[21] *Id.* at 1355-56.

[22] *Id.* at 1357.

[23] *Id.* at 1365.

[24] 901 F.2d 378 (4th Cir. 1990).

[25] *Id.* at 381.

[26] *Hoke*, 92 F.3d at 1355.

[27] *See, e.g., Stockton v. Murray*, 41 F.3d 920, 927 (4th Cir. 1994) and case summary of *Stockton*, *Capital Defense Digest*, Vol. 7, No. 2, p. 10 (1995).

[28] *See, e.g., United States v. White*, 970 F.2d 328, 337 (7th Cir. 1992) (holding that there is no duty of disclosure when the information is "'fully available'" to the defense) (citations omitted); *United States v. Perdomo*, 929 F.2d 967, 973 (3rd Cir. 1991) (finding a *Brady* violation based upon the Government's failure to disclose the criminal records of its witness, even though the Office of the Public Defender, which represented the defendant, had previously represented the witness); *United States v. Todd*, 920 F.2d 399, 405 (6th Cir. 1990) (holding that there is no *Brady* violation when the defendant is made aware "of the essential facts that would enable him to take advantage of the exculpatory evidence"); *United States v. Hicks*, 848 F.2d 1, 4 (1st Cir. 1988) (holding that the government has no *Brady* burden when evidence is readily available to the defense); *United States v. Esposito*, 834 F.2d 272, 275-76 (2d Cir. 1987) (holding no *Brady* violation occurred where the defense actually had the transcripts and failed to follow up on that information); *United States v. Davis*, 785 F.2d 610, 618 (8th Cir. 1986) (holding no *Brady* violation when information contained in a medical report was actually in defendant's possession); *United States v. Milstead*, 671 F.2d 950, 953 (5th Cir. 1982) (finding no *Brady* violation because defense failed to follow up on information that bank might have exculpatory statement).

[29] *See, e.g., Marshall v. United States*, 436 F.2d 155 (D.C. Cir. 1970); *Banks v. Reynolds*, 54 F.3d 1508 (10th Cir. 1995).

[30] *United States v. Bagley*, 473 U.S. 667, 678 (1985).

[31] 427 U.S. 97 (1976).

[32] *Agurs*, 427 U.S. at 110. At the time the decision to disclose or withhold is made, the prosecution will seldom know the state of defense counsel's knowledge or investigation concerning the information.

[33] To the contrary, the Court has reminded prosecutors that the pretrial decision to withhold evidence falling within the ambit of *Brady* is made at their peril. *Kyles v. Whitely*, 115 S.Ct. 1555, 1567 (1995).

[34] *Hoke*, 92 F.3d at 1354, n. 1.

[35] *Id.*

however, reads that "[n]o writ shall be granted on the basis of any allegation the facts of which petitioner **had knowledge** at the time of filing any previous petition."[36] The statute does **not** provide that any allegation the facts of which petitioner **could have known** will prevent a writ from issuing. As it has done in other cases, the court read the "could have known" requirement into the statute.[37]

Defense counsel in Virginia should not accept the court's erroneous interpretation of both the scope of *Brady* and the bounds of Va. Code § 8.01-654(B)(2). Attorneys should strenuously attempt to persuade trial judges, state habeas judges, and federal district court judges that the Fourth Circuit's doctrine is simply not the law. In any event, one may hope that if a proper record is made, the United States Supreme Court will one day rule on the issue.

B. What Constitutes "Reasonable Investigation"?

Even those circuit courts which have relieved the prosecution of its *Brady* obligation when the exculpatory information was in possession of or readily available to the defense have not gone as far as the Fourth Circuit. In describing the inadequacy of Hoke's investigation into Stell's prior relationships and sexual history, the court of appeals stated that the "entirety of the investigation entailed perhaps as few as two, and no more than four, visits to the European Restaurant by Hoke's attorney, during which he interviewed as few as five, and no more than seven, people."[38] The court also stated that Hoke's attorney did not attempt to interview Stell's neighbors and friends in her apartment complex, which, according to the court, were "some of the first persons an attorney would reasonably be expected to contact in a case such as this."[39] The court concluded that because the police learned the names of Jones, Eastes, and Griesert "from sources with whom Hoke's attorney spoke or from persons 'readily accessible' to Hoke," Hoke could have learned of all three of the men had he undertaken a "reasonable investigation."[40]

However, as pointed out by Judge Hall in his dissent, Hoke's attorney tried, but was precluded from conducting an investigation comparable to that done by the police. As stated by Judge Hall, "[Hoke's attorney] went to the European Restaurant to try to find out about Stell, but was met with tight lips and outright hostility, including at least one physical threat."[41] The frustration on the part of Hoke's attorney is evidenced by his response to the district court's questioning at the evidentiary hearing as to why he did not do more: "'I would have probably run out of names or run out of people other than just standing at the European lunch... [A]t that point I didn't have anybody else other than standing on the street corner asking.'"[42]

Further, in answering Hoke's discovery requests for exculpatory evidence on either the issue of guilt or punishment, prosecutor Joseph Preston stated falsely that the Commonwealth was unaware of any exculpatory evidence other than Hoke's "'alleged drug problem.'"[43] In *United States v. Bagley*,[44] the Supreme Court acknowledged that "[a]n incomplete response to a specific request not only deprives the defense of certain evidence, but also has the effect of representing to the defense that the evidence does not exist," and indicated that defense counsel could reasonably rely on such nondisclosure for "pretrial and trial decisions on the basis of [the] assumption" that such evidences does not exist.[45] Thus, according to the Supreme Court, Hoke's attorney reasonably relied on the information given by prosecutor Preston, and whether Hoke could have found the information at issue through "reasonably diligent investigation" should have been irrelevant.

In Hoke's case, however, the court of appeals relied on its conclusion that Hoke had not conducted a "reasonably diligent investigation," and applied its erroneous interpretation of *Brady* to deny its benefits to Hoke, as well as its erroneous reading of Va. Code §8.01-654(B)(2) to find the *Brady* claim defaulted. It is interesting to compare the court's finding of "inadequate investigation" in Hoke to its treatment of what constitutes "reasonable investigation" when assessing an ineffective assistance of counsel claim. For example, in *Stout v. Netherland*,[46] the Fourth Circuit held that the defendant did not receive ineffective assistance of counsel despite the fact that his counsel failed to interview any possible mitigation witnesses and to present any of the possible mitigation evidence which the district court had characterized as "'overwhelming.'"[47] Similarly, in *Turner v. Williams*,[48] the Fourth Circuit concluded that although the defendant's attorney "'could have perhaps investigated the facts of the case more thoroughly and with more diligence,' and perhaps could have prepared more thoroughly for the resentencing proceeding, [the defendant did] not show that [his attorney's] performance fell below an objective standard of reasonableness."[49]

Thus, in terms of what constitutes a "reasonably diligent investigation," the Fourth Circuit has set the bar much higher for the evaluation of an investigation under its erroneous interpretation of the strictures of *Brady* than it requires for the evaluation of an investigation under an ineffective assistance of counsel claim.[50]

C. What Constitutes "Material"?

The court also found Hoke's *Brady* claim to be meritless because the statements of Jones, Eastes, and Griesert could not be considered "material." In so holding, the court overturned the district court's finding that the statements of Jones, Eastes, and Griesert were material because they "'cast into serious doubt the Commonwealth's theory that the sexual encounter between Stell and [Hoke] was non-consensual.'"[51]

According to *United States v. Bagley*, evidence is "material" "only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different."[52] Furthermore, "[a] 'reasonable probability' of a different result is shown when the Government's evidentiary suppression 'undermines confidence in the outcome of the trial.'"[53]

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[36] Va. Code § 8.01-654(B)(2).

[37] *See Barnes v. Thompson*, 58 F.3d 971 (4th Cir. 1995) and case summary of *Barnes*, Capital Defense Digest, Vol. 8, No. 1, p. 11 (1995); *Stockton v. Murray*, 41 F.3d 920 (4th Cir. 1994), and case summary of *Stockton*, Capital Defense Digest, Vol. 7, No. 2, p. 10 (1995).

[38] *Hoke*, 92 F.3d at 1355.

[39] *Id.*

[40] *Id.*

[41] *Id.* at 1366 (Hall, J., dissenting).

[42] *Id.* at 1355.

[43] *Id.* at 1366 (Hall, J., dissenting).

[44] 473 U.S. 667 (1985).

[45] *Id.* at 682, 683.

[46] 1996 WL 496601 (4th Cir. Jul. 8, 1996). *See* case summary of *Stout*, Capital Defense Journal, this issue.

[47] *Stout*, 1996 WL 496601 at *9. The possible mitigating evidence included the alcoholism of Stout's parents, different treatment as a mixed-race child among whites, physical and sexual abuse, and forced migrant labor. Ultimately, the district court stated that it could discern "no conceivable advantage to counsel's approach" to sentencing. *Id.*

[48] 35 F.3d 872 (4th Cir. 1994).

[49] *Id.* at 897.

[50] *See* case summary of *Beaver v. Thompson*, Capital Defense Journal, this issue.

[51] *Hoke*, 92 F.3d at 1356.

[52] *Bagley*, 473 U.S. at 682.

[53] *Kyles v. Whitley*, 115 S. Ct. 1555, 1566 (1995) (citing *Bagley*, 473 U.S at 678).

In concluding that the statements of Eastes and Jones were not "material," the court pointed to the fact that neither Eastes nor Jones stated that they had engaged in anything but vaginal intercourse with Stell.[54] The court was forced to concede that Griesert's account of his anal sexual encounter with Stell was arguably more relevant; however, the majority concluded that Griesert's statement was not "material" given that Stell's body was bruised; that margarine was used instead of a more common lubricant; and that Stell's body was found murdered, bound, and gagged in the position in which she was sodomized.[55]

In *Kyles v. Whitely*,[56] the Supreme Court held that the materiality of evidence must be considered collectively.[57] Thus, although a court's analysis of "materiality" is a matter upon which reasonable minds can differ, a court must consider all of the available evidence in its assessment of materiality. In *Hoke*, however, the majority made no mention of the witness who told police that she had observed Hoke and Stell kissing and hugging in the European Restaurant. As Judge Hall stated in dissent, "Had the jury known of Stell's aggressive promiscuity, including evidence of consensual anal sex, and that she had been seen 'hugging and kissing' Hoke just before her death, it is at least 'reasonably probable' that the result would have been different."[58]

II. The *Napue* Claim

A. *Sawyer* and *Schlup*: Two Different Standards for "Actual Innocence"

Because Hoke did not raise his *Napue* claim that the prosecutor had knowingly allowed Sallis to testify falsely at trial in his two previous state petitions, the claim should have been procedurally defaulted. Nevertheless, the district court allowed Hoke to raise the claim in his federal habeas petition because it concluded that the error went to a claim of "actual innocence" of the predicate crimes of robbery and abduction. To reach this conclusion, "the district court reasoned that Sallis testified falsely (and the prosecution had knowingly suborned that perjury in violation of *Napue)* and that absent Sallis' testimony, which would not have been introduced absent such constitutional error, no reasonable juror could have concluded that Hoke was guilty of murder in the commission of robbery or abduction."[59]

With regard to its finding of "actual innocence," the district court cited both *Sawyer v. Whitely*[60] and *Schlup v. Delo*[61] as support for the proposition that in order to qualify for the "actual innocence" exception to the procedural bar, "a petitioner must show by clear and convincing evidence that but for constitutional error, no reasonable juror would find him **eligible for the death penalty** under [state law]."[62] This is the *Sawyer* test. The *Sawyer* standard was created for cases in which the petitioner claimed he was "actually innocent of the death penalty," and should thus be applied to those factors prescribed by state law which make a defendant eligible for the death penalty. Under Virginia law, then, the *Sawyer* standard is applicable to the aggravating factors that must be found by the jury in order to impose a death sentence: "future dangerousness" and "vileness."

Schlup, on the other hand, allows a court to hear a successive or abusive habeas petition on the merits—when the petitioner cannot establish cause and prejudice—if a petitioner can show that a constitutional violation has "'probably' resulted in the conviction of one who is **actually innocent.**"[63] Thus, this lower "more likely than not" standard is reserved for those defendants who claim to be **innocent of the crime.** In Virginia cases, the *Schlup* standard is arguably applicable to what jurors would have found about the petitioner's innocence or guilt of the crime—i.e., the elements of the crime of capital murder.

In assessing whether Hoke was procedurally barred from raising his *Napue* claim, both the district court and the court of appeals erred, arguably, in applying the higher *Sawyer* standard to their evaluation of whether Hoke was actually innocent of the predicate crimes of robbery and abduction. The applicable standard where elements of a predicate "crime" beyond murder could also be viewed as "death eligibility" elements is an open question that has not yet been addressed by the United States Supreme Court. It is an important issue which appears to have been completely overlooked in *Hoke*. Obviously, habeas attorneys in Virginia should not accept the Fourth Circuit's assumption that *Sawyer* applies but should instead maintain that (1) the *Sawyer* standard is applicable only to the evaluation of whether, absent constitutional error, a reasonable juror would have found "future dangerousness" or "vileness," and (2) the *Schlup* standard is applicable to the evaluation of whether, absent constitutional error, a reasonable juror would have found the defendant guilty of the elements of capital murder.[64]

B. The Record Not Considered by the Majority

1. Different Conclusions on Different Evidence

In evaluating Hoke's habeas petition, the district court concluded that Sallis had presented perjured testimony at Hoke's trial, and that absent Sallis's testimony, Hoke's predicate robbery and abduction charges were unsupported by the evidence. The Fourth Circuit flatly disagreed, and the dissent vehemently disagreed with the majority. In the face of such disagreement, it is interesting to note that the majority and the dissent in *Hoke* seem to have read two different records.

In arguing that Sallis, Hoke's cellmate, offered perjured testimony about his conversation with Hoke,[65] the dissent pointed out that just a week prior to his testimony, Sallis had been sentenced to "17 1/2 years in prison on numerous forgery, uttering, and petit larceny charges, all but five of which were suspended on the condition that **he continue to cooperate with law enforcement authorities.**"[66] As Judge Hall stated

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[54] *Hoke*, 92 F.3d at 1357.

[55] *Id.* at 1357-58.

[56] 115 S. Ct. 1555 (1995).

[57] *Id.* at 1567.

[58] *Hoke*, 92 F.3d at 1369 (Hall, J., dissenting).

[59] *Id.* at 1359.

[60] 505 U.S. 333 (1992). *See also* case summary of *Sawyer*, *Capital Defense Digest*, Vol. 5, No. 1, p. 18 (1992).

[61] 115 S. Ct. 851 (1995). *See also* case summary of *Schlup*, *Capital Defense Digest*, Vol. 7, No. 2, p. 4 (1995).

[62] *Sawyer*, 505 U.S. at 348 (emphasis added).

[63] *Schlup*, 115 S. Ct. at 864 (emphasis added).

[64] Whether a *Sawyer* claim remains viable under the Anti-Terrorism and Effective Death Penalty Act of 1996 is an unsettled question. *See* Raymond, *The Incredible Shrinking Writ: Habeas Corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996*, Capital Defense Journal, Vol. 9, No. 1, p. 52; Eade, *The Incredible Shrinking Writ, Part II: Habeas Corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996*, Capital Defense Journal, this issue.

[65] *See infra*, n. 18.

[66] *Hoke*, 92 F.3d at 1367 (Hall, J., dissenting).

in dissent, "It is obvious that this 'cooperation' meant assistance to [the prosecutor] in Hoke's case."[67] Furthermore, after he pleaded guilty but prior to his sentencing, Sallis was released on a reduced bond, even though he was facing a lengthy prison term and had recently failed to appear on an unrelated grand larceny charge. Finally, during cross-examination, Sallis "grossly understated his criminal history" and "flatly denied that the Commonwealth had offered him 'any deals' or 'time cuts.'" [68]

The majority, on the other hand, stated that the district court's conclusion that Sallis perjured himself when he testified as to his conversation with Hoke "is simply without any support in the record."[69] In reaching its conclusion, the majority pointed to the following, among other things: (1) Sallis never recanted his testimony; (2) Hoke never suggested that he did not have a conversation with Sallis like the one represented by Sallis; (3) Hoke's attorney urged the jury in closing argument to credit a portion of Sallis's testimony, arguing it tended to prove that no robbery had occurred; and (4) Sallis's understatement of his criminal history was attributable to misunderstanding on his part or inartful questioning by defense counsel.[70] The majority made no mention of the deal Sallis made with the prosecution or of his subsequent denial of such a deal during his testimony.

With regard to the robbery predicate, the district court conceded that pills were taken after Stell's murder and detention, and that Hoke confessed to taking them, but concluded that "absent Sallis's testimony, there was no evidence from which a juror could conclude that Hoke had murdered Stell in the commission of a robbery."[71] The majority flatly disagreed with this conclusion, observing that the evidence established that "Hoke was a drug user, that he had only three dollars in his pocket when he killed Stell, that after killing Stell he ransacked her apartment, and that after ransacking her apartment he stole pills out of her purse."[72]

Finally, with regard to the abduction predicate, the district court concluded that absent Sallis's testimony, there was a dearth of evidence to support Hoke's abduction conviction, as there was a "'lack of *any* evidence demonstrating an intent to extort money or pecuniary gain.'"[73] The majority disagreed, stating that a reasonable juror could conclude that Hoke abducted Stell with the intent to steal drugs, money, or both from Stell from the testimony that Hoke was a drug user, that he had only about three dollars in his pocket when he murdered Stell, that he bound and gagged Stell, and that he ransacked her apartment in search of drugs.[74]

Thus, not only did the majority and dissent reach different conclusions in *Hoke*, they also considered different records. Quite clearly, the majority did not consider the entire record.

2. Unprofessional Conduct of the Prosecutor

Also not addressed by the majority was that part of the record revealing uncontradicted evidence of professional misconduct on the part of the prosecuting attorney. In dissent, Judge Hall began his opinion by stating:

> [T]his case has two villains. The first, of course, is appellee Ronald Hoke, who committed a brutal murder and deserves a fitting punishment. The other villain, prosecutor Joseph Preston, left no legal or ethical corner uncut in his pursuit of Hoke's conviction and death sentence.[75]

Preston withheld the witness statements of Jones, Eastes, Griesert, and Robinette from the defense. Even if Preston was not constitutionally required to disclose such statements under the *Brady* materiality inquiry, he was nonetheless required to disclose them, without regard to their "materiality," under DR 8-102(A)(4) of the Virginia Code of Professional Responsibility, which states, in relevant part:

> A public prosecutor... in criminal litigation shall make timely disclosure to counsel for the defendant... of the existence of evidence, known to the prosecutor... that tends to negate the guilt of the accused, mitigate the degree of the offense, or reduce the punishment.

Furthermore, according to DR 7-102 (A)(3), "a lawyer shall not... conceal or knowingly fail to disclose that which he is required by law to reveal." According to *Lemons v. Commonwealth*,[76] "a prosecutor does not meet his or her ethical duty simply by making a pretrial determination that the information if disclosed, would not likely change the outcome of the trial."[77] Rather, "if in doubt about the exculpatory nature of the material, a prosecutor should submit it to the trial court for an in camera review to determine if it is exculpatory and should be disclosed."[78]

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[67] *Id.* Although there was no evidence in this case that Sallis was a "paid informant" such that his conduct implicated the protections of *United States v. Henry*, 447 U.S. 264, 269-75 (1980) (holding that defendant's incriminating statements made to paid informant who, while confined to same cellblock as defendant, had been told by government agents to be alert to any statements made by federal prisoners but not to initiate conversations with or question defendant regarding the charges against him were inadmissible as being "deliberately elicited" from defendant in violation of his Sixth Amendment right to counsel), a potential *Henry* claim should be investigated whenever there is a snitch. Please contact the Virginia Capital Clearinghouse should you need more information concerning the admissibility of "jailhouse snitch" testimony, including tactics designed to protect against snitches in the first instance.

[68] *Hoke*, 92 F.3d at 1367 (Hall, J., dissenting).

[69] *Id.* at 1360.

[70] *Id.* at 1360-61.

[71] *Id.* at 1362-63. Va. Code § 18.2-31(4) provides that "the willful, deliberate, and premeditated killing of any person in the commission of a robbery while armed with a deadly weapon" constitutes capital murder. The Virginia courts have interpreted §18.2-31(4) to include motive as an element of the crime. Thus, in order to be found guilty of capital murder in the commission of a robbery, one of the defendant's motives must have been the taking of property. *See Whitely v. Commonwealth*, 223 Va. 66, 73; 286 S.E.2d 162, 166 (1982) (holding "the fact that the larceny did not occur until after [the defendant] had killed his victim [did] not prove that his decision to steal was an afterthought. And the jury logically could conclude that... both sex and the robbery motivated his conduct").

[72] *Hoke*, 92 F.3d at 1363.

[73] *Id.* at 1364.

[74] *Id.*

[75] *Id.* at 1365 (Hall, J., dissenting).

[76] 18 Va. App. 617, 446 S.E.2d 158 (1994).

[77] *Id.* at 621, 446 S.E.2d at 161 (quoting *Humes v. Commonwealth*, 12 Va. App. 1140, 1144 n. 2, 408 S.E.2d 553, 555 n. 2 (1991)).

[78] *Id. See also Kyles v. Whitely*, 115 S. Ct. 1555 (1995).

Second, whether Sallis's testimony regarding his alleged conversation with Hoke was perjured or not, the record demonstrates that Sallis's denial of "any deals" or "time cuts" was false testimony, and Preston had an ethical obligation to correct such testimony pursuant to DR 7-102(A)(4) and (6) as well as DR 7-105(C)(6).[79] Moreover, according to *Alcorta v. Texas*,[80] a defendant is denied due process of law when a witness testifies falsely to the knowledge of the prosecutor.[81]

Third, through calls to the expert's receptionist, Preston obtained a copy of the report drafted by Hoke's psychiatric expert, which is protected by the attorney-client privilege until and unless the defense gives notice of an intent to rely on insanity or mitigating psychological evidence.[82] Preston also later interviewed the psychiatrist. As the dissent pointed out, Preston's actions probably violated both the rule of *Ake v. Oklahoma* [83] as well as state law.[84]

Perhaps most disturbing, however, was the racial animus Preston exhibited toward Hoke. Hoke, who is white, was originally charged with first-degree, but not capital, murder. As described by the dissent, the original prosecutor, Raymond Lupold, (who is also white) "took a look at the results of the investigation—a mentally unstable,[85] intoxicated defendant and a victim of limited repute—and decided he 'didn't have much of an opportunity to seek the death penalty at that stage."[86] However, after Lupold was voted out of office and Joseph Preston (who is black) took over the Hoke case, Hoke was charged with capital murder. Hoke's attorney attempted to plea bargain with Preston, but his offer of a life sentence in return for a guilty plea was refused. Though Preston denied it, the district court found as a fact, and the Fourth Circuit did not disturb the finding, that Preston told Hoke's attorney that he "'*wanted to be the first black man to put a white man in the electric chair.*'"[87] Aside from being a comment unbecoming of a lawyer, such behavior is violative of EC 8-10.[88] In commenting on Preston's behavior, Judge Hall stated in his dissent

> [T]he sins of the white race will not be purged by offering up Ronald Hoke as a sacrifice to a vengeful black prosecutor. I dare-say that if the races of Preston and Hoke were reversed, no court in the land would excuse Preston's racist statement as "posturing" or "mere talk." It is unconstitutional, despicable talk, and if for nothing else, the writ should issue on Hoke's equal protection claim.[89]

Ronald Hoke was executed. Whatever else may be done to combat misconduct as part of the trial process, it is not only an option but an ethical responsibility of an attorney to report such extreme instances of unprofessional conduct to the bar.[90] A complaint against Joseph Preston has been filed.

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[79] DR 7-102(A)(4) states, "a lawyer shall not . . . knowingly use perjured testimony or false evidence."

DR 7-102(A)(6) states, "a lawyer shall not . . . participate in the creation or preservation of evidence when he knows or it is obvious that the evidence is false.

DR 7-105(C)(6) states, "in appearing in his professional capacity before a tribunal, a lawyer shall not... knowingly offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures."

[80] 355 U.S. 28 (1957).

[81] *Id.* at 31.

[82] Va. Code § 19.2-264.3:1(D).

[83] 470 U.S. 68 (1985) (holding that indigent defendant with possible insanity defense is entitled to state-paid psychiatrist to assist in his defense).

[84] *Hoke*, 92 F.3d at 1367-68 (Hall, J., dissenting).

[85] The day of the murder, Hoke was released from a mental hospital, where he had been treated as a voluntary patient for nearly a week for mental problems stemming from extreme drug and alcohol abuse. *Id.* at 1365 (Hall, J., dissenting).

[86] *Id.* at 1366 (Hall, J., dissenting).

[87] *Id.* (emphasis in original). At the evidentiary hearing on the equal protection claim in the district court, Preston "admitted making race-based appeals for support in election campaigns," but he denied making the statement about being the first black man to put a white man in the electric chair. *Id.* at 1368 (Hall, J., dissenting).

[88] EC 8-10 states, in relevant part, "The responsibility of a public prosecutor differs from that of advocate; his duty is to seek justice, not merely to convict."

[89] *Hoke*, 92 F.3d at 1370 (Hall, J., dissenting).

[90] *See* DR 1-103(A), which states, in relevant part, "A lawyer having information indicating that another lawyer has committed a violation of the Disciplinary Rules that raises a substantial question as to that lawyer's honesty, trustworthiness, or fitness to practice law in other respects, shall report such information to the appropriate professional authority."