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Truesdale v. Moore 142 F.3d 749 (4th Cir. 1998)

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I. Facts

Louis Joe Truesdale was linked by circumstantial evidence to the rape and murder of Rebecca Eudy.[1] He admitted raping and abducting the victim, but denied murdering her.[2] Truesdale was tried for kidnapping, criminal sexual conduct, and murder in December, 1980.[3] He initially pled not guilty, but changed his plea to guilty after the jury was selected.[4] The jury recommended death, but the sentence was vacated on direct appeal and a new trial was ordered.[5] At his second trial, Truesdale pled not guilty to all charges.[6] After being convicted of the murder, Truesdale unsuccessfully sought to introduce evidence showing his ability to adapt to prison life. The jury recommended death.[7] Although he was denied relief on direct appeal and in collateral proceedings,[8] the United States Supreme Court granted Truesdale's petition for a writ of certiorari and vacated his death sentence on the ground that *Skipper v. South Carolina*[9] entitled him to introduce evidence of his adaptability to prison life.[10] Truesdale was resentenced to death in 1987.[11] The South Carolina Supreme Court affirmed the death sentence[12] and the United States Supreme Court denied certiorari.[13] Truesdale was likewise denied state post-conviction relief.[14] The district court dismissed

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1. Truesdale v. Moore, 142 F.3d 749, 751-52 (4th Cir. 1998).
2. *Truesdale*, 142 F.3d at 751.
3. *Id.*
4. *Id.*
5. *Id.* (citing State v. Truesdale, 296 S.E.2d 528 (1982) (ordering new trial on ground that sentencing phase of capital proceeding in which defendant entered a plea of guilty was, pursuant to state law, improperly tried to jury)).
6. *Truesdale*, 142 F.3d at 752.
7. *Id.*
8. State v. Truesdale, 328 S.E.2d 53 (1984); Truesdale v. South Carolina, 471 U.S. 1009 (1985); Truesdale v. Aiken, 289 S.C. 488, 347 S.E.2d 101 (1986).
9. 476 U.S. 1 (1986) (holding exclusion of evidence that defendant has adjusted well to incarceration between arrest and trial violates 8th and 14th Ammendments).
10. Truesdale v. Aiken, 480 U.S. 527 (1987)
11. Truesdale v. Moore, 142 F.3d 749, 752 (4th Cir. 1998).
12. *Id.* (citing State v. Truesdale, 393 S.E.2d 168 (1990)).
13. *Id.* (citing Truesdale v. South Carolina, 498 U.S. 1074 (1991)).
14. *Id.* at 753. On state postconviction review in 1993, Truesdale introduced several pieces of new evidence regarding the circumstances of the crimes of which he was convicted. In addition, he raised numerous legal claims, many of which were dismissed or barred on procedural grounds. All other claims, including the contention that his 1987 resentencing counsel was ineffective, were

Truesdale's federal habeas petition.[15] On appeal to the Fourth Circuit, Truesdale claimed, among other things, that he was denied effective counsel due to the fact that his trial attorney failed to present mitigating evidence and failed to make a challenge to the jury array.[16]

II. Holding

The Fourth Circuit affirmed denial of all Truesdale's claims.[17]

III. Analysis/Application in Virginia[18]

A. Ineffective Assistance of Counsel

In his appeal, Truesdale charged his counsel with a variety of errors, which the Fourth Circuit grouped into two general categories: (1) the failure to present evidence either in mitigation or that would rebut the State's case on the aggravat-

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denied on the merits. Both the South Carolina Supreme Court and the United States Supreme Court denied Truesdale's petitions for a writ of certiorari. *Id.* (citing Truesdale v. Moore, 117 S.Ct. 527 (1996)).

15. *Truesdale*, 142 F.3d at 753.

16. *Id.*

17. *Id.* at 753-761.

18. Several issues, although raised by Truesdale and addressed by the court of appeals, will not be discussed in detail in this case note. Some turned on facts particular to the case; others were dismissed in a summary fashion. These include:

(1) Right to Remain Silent. At trial, a police officer related to the jury that while Truesdale was in custody, and before Eudy's death was generally known, Truesdale blurted out that he "hadn't killed any girl" upon waking from a nap. The problematic remark came thereafter, when the officer told the jury that Truesdale did not respond when asked what girl he was talking about. The court found that even if this remark was a constitutional violation under *Doyle v. Ohio*, 426 U.S. 610 (1976) (recognizing that introduction of evidence that the defendant invoked his right to remain silent largely vitiates that right), such a violation was harmless under *Brecht v. Abrahamson*, 507 U.S. 619 (1993). *Truesdale*, 142 F.3d at 756-57.

(2) Reasonable Doubt Instruction. Truesdale challenged the trial court's reasonable doubt instruction, in which it used the term "substantial doubt" to define "reasonable doubt." The Fourth Circuit found that although substituting "substantial doubt" for "reasonable doubt" might violate due process, the mere use of the words "substantial doubt" when contrasting "substantial doubt" with "weak doubt," "slight doubt," and "whimsical, fanciful or imaginary doubt" did not do so. *Truesdale*, 142 F.3d at 757 (citing Victor v. Nebraska, 511 U.S. 1, 19-20 (1994)).

(3) Juror Exclusion. Truesdale challenged the exclusion of two potential jurors on the basis of their alleged unwillingness to impose the death penalty. The Fourth Circuit found the trial court's exclusion of these veniremen to be consistent with the standard set forth in *Witherspoon v. Illinois* 391 U.S. 510, 521-522 (1968) (holding "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") and *Lockhart v. McCree*, 476 U.S. 162, 174 (1986) (holding Constitution does not prohibit the removal for cause, prior to the guilt phase of a bifurcated capital trial, of prospective jurors whose opposition to the death penalty is so strong that it would prevent or substantially impair the performance of their duties as jurors at the sentencing phase of the trial) and that the statements of McCluney and Powell evidenced at a minimum ambiguity to sentence another to death. *Truesdale*, 142 F.3d at 757-58.

ing factors of kidnapping and sexual assault; and (2) the failure to raise the claim that African Americans were underrepresented in the jury pool in violation of the Sixth and Fourteenth Amendments.[19] The court found that neither of these claims provided a basis for habeas relief.[20]

1. Failure to Present Evidence

In his first ineffective assistance claim, Truesdale contended it was unreasonable for his 1987 resentencing counsel not to uncover and present certain evidence,[21] first uncovered and presented at his 1993 state post-conviction relief proceeding, to counter the State's case in aggravation.[22] Applying *Strickland v. Washington*,[23] the court concluded that Truesdale's resentencing counsel pursued a reasonable strategy of attempting to downplay the nature of the crimes committed against Eudy and to portray Truesdale as a normal person with a single aberrant episode of violence.[24]

2. Challenges to the Array

In his second *Strickland* claim, Truesdale alleged he was afforded constitutionally ineffective assistance due to his resentencing counsel's failure to object to South Carolina's procedure for selecting jury venires.[25] In that state, venires are drawn at random from voter registration lists.[26]

In order to succeed on a Sixth Amendment "fair cross section" claim, a petitioner must show that: (1) the group alleged to be excluded is a distinctive group in the community; (2) that the group's representation in the source from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation results from systematic exclusion of the group in the jury-selection process.[27]

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19. *Truesdale*, 142 F.3d at 753.

20. *Id.*

21. *Id.* Truesdale "presented the testimony of numerous witnesses, including family, friends, acquaintances, attorneys, and experts. These witnesses testified to, among other things, his claimed prior romantic relationship with Eudy, the alleged inconclusiveness of the forensic evidence that he raped Eudy or that he and she had any sexual relations at all, the fact that bloody fingerprints on Eudy's car did not match Truesdale's, and the claim that Truesdale suffered from organic brain dysfunction." *Id.*

22. *Id.*

23. 466 U.S. 668, 689 (1984).

24. *Truesdale*, 142 F.3d at 754 (citing Strickland v. Washington, 466 U.S. 668, 689 (1984)).

25. *Id.* at 755.

26. *Id.* Truesdale alleged this error tainted: (1) the jury that sentenced him to death in 1980; (2) the jury that convicted him and again sentenced him to death in 1983; and (3) the jury that finally sentenced him to death in 1987. *Id.*

27. *Id.* (citing Duren v. Missouri, 439 U.S. 357, 364 (1979)).

In *Duren v. Missouri*,[28] the Supreme Court found that the petitioner demonstrated that underrepresentation was "systematic--that is, inherent in the particular jury-selection process utilized" because he showed: (a) a large discrepancy occurred in every weekly venire for a period of nearly a year; and (b) established where in the selection process the exclusion took place.[29] Unlike the petitioner in *Duren*, Truesdale did not advance any direct evidence showing where in the jury selection process systematic exclusion occurred; instead he sought to infer exclusion from the fact that African Americans were substantially underrepresented on the voter registration lists. The Fourth Circuit found this showing inadequate.[30]

While the court of appeals cites two Fourth Circuit cases which indeed require an affirmative showing of systematic exclusion, neither should be read to support the conclusion that statistical evidence showing a discrepancy between the percentage of registered whites and blacks is by itself insufficient to do so. In both *United States v. Cecil*,[31] and *United States v. Lewis*,[32] the Fourth Circuit noted that were the disparity between the proportions of eligible whites and eligible minority persons selected for the master jury list to exceed twenty percent, systematic exclusion would be presumed.[33]

The Fourth Circuit's reliance on the language in *Barber v. Ponte*[34] stating that "the Supreme Court has never gone so far as to hold that the constitution requires venires to be, statistically, a substantially true mirror of the community" to support the proposition that statistical evidence showing a discrepancy between the percentage of registered whites and blacks is by itself insufficient to demonstrate systematic exclusion is similarly misleading.[35] In *Barber*, the appellant

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28. 439 U.S. 357 (1979).

29. Duren v. Missouri, 439 U.S. 357, 366 (1979).

30. The court of appeals explained:

> We have consistently required more to make out a violation of the "fair cross-section" guarantee. The use of voter registration lists "has been consistently upheld against both statutory and constitutional challenges, unless the voter list in question had been compiled in a discriminatory manner." United States v. Cecil, 836 F.2d 1431, 1445 (4th Cir. 1988) (en banc); *see also* United States v. Lewis, 10 F.3d 1086 (4th Cir. 1993) (approving use of non- discriminatory voter registration lists in jury selection). "The Supreme Court has never gone so far as to hold that the constitution requires venires to be, statistically, a substantially true mirror of the community." *Cecil*, 836 F.2d at 1445-46 (quoting Barber v. Ponte, 772 F.2d 982, 997 (1st Cir. 1985) (en banc)).

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31. 836 F.2d 1431 (4th Cir. 1988) (en banc).

32. 10 F.3d 1086 (4th Cir. 1993).

33. United States v. Cecil, 836 F.2d 1431, 1454 (4th Cir.1988) (en banc) (quoting Foster v. Sparks, 506 F.2d 805, 818 (5th Cir.1975)); United States v. Lewis, 10 F.3d 1086, 1090 (4th Cir.1993). Other cases have found an absolute disparity of 10% significant. *See* United States v. Tuttle, 729 F.2d 1325, 1327 (11th Cir. 1984).

34. 772 F.2d 982 (1st Cir.1985) (en banc).

35. Barber v. Ponte, 772 F.2d 982, 997 (1st Cir.1985) (en banc).

challenged his conviction by a Massachusetts jury on the ground that "young adults," which by his definition were persons of ages 18-34, were "systematically excluded" from the venires.[36] The court's concern in *Barber*, unlike the present case, was whether "young adults" could constitute a distinct class. The court believed arbitrarily defined "young adults" were no more a distinct class than were "yuppies, Rotarians, Eagle Scouts, and an endless variety of other classifications."[37] Because requiring the jury venire be a statistical mirror of the community as to every conceivable demographic variable would, as a practical matter, be impossible, the court found that the appellant's claim failed absent direct evidence that the state deliberately excluded "young people" from the voter registration lists.[38] But the court acknowledged that a totally different rule would apply in a case like Truesdale's when it noted that: "strict statistical analysis [by itself] has been used only in situations where special groups that have been discriminated against [*e.g.* African Americans] are involved."[39]

The Fourth Circuit's implicit conclusion that systematic exclusion can never be inferred from evidence of substantial under-representation is untenable; were it the case that every defendant was required to identify the "smoking gun" to prevail on a Sixth Amendment jury claim, evidence of "substantial under-representation" would be duplicative and therefore superfluous.[40] Instead, evidence of significant under-representation is highly probative evidence of systematic exclusion.[41]

Challenges to the array require work and often will not succeed. Nevertheless, they may be worth the effort. The Supreme Court has granted relief without requiring any showing that confidence in the outcome of the trial was undermined; in other words, prejudice is presumed.[42] In addition, and from a practical standpoint, if a dismissal is granted years after the trial, the ability and willingness of the Commonwealth to retry may be significantly impaired. It is clear that the importance of challenges to the array lies not in the number of instances in which they will succeed, but in the profound consequences when they do.

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36. *Barber*, 772 F.2d at 997.

37. *Id.* at 999.

38. *Id.* at 998.

39. *Id.*

40. Duren v. Missouri, 439 U.S. 357, 368 (1979); *See also* Taylor v. Louisiana, 419 U.S. 522 (1975).

41. The Fourth Circuit's rejection of Truesdale's claim under the Fourteenth Amendment Equal Protection Clause was unremarkable. Unlike a Sixth Amendment claim, under the Fourteenth Amendment a prima facie case may be rebutted merely by showing an absence of discriminatory intent. Because it found no merit to Truesdale's challenges to the 1987 jury pool, the Fourth Circuit ruled it was not constitutionally ineffective assistance for his counsel not to raise these claims at resentencing. *Truesdale*, 142 F.3d at 756.

42. *See* Vasquez v. Hillary, 474 U.S. 254 (1986).

B. *Judicial Council Order No. 113*

Truesdale's final claim was that Judicial Council Order No. 113, which governs death penalty representation in the Fourth Circuit, was invalid due to the fact that it conflicted with the Anti-Terrorism and Effective Death Penalty Act of 1996 (AEDPA).[43] Truesdale challenged the aspect of the order which imposes on district courts and the circuit court a timetable for deciding petitions brought under 28 U.S.C. §§ 2254-2255, claiming it was: (a) inconsistent with the AEDPA in that it too established a timetable for the disposition of habeas petitions brought by death-sentenced defendants; and (b) promulgated without the public notice and opportunity for comment provided for in 28 U.S.C. § 332(d)(1).[44] The court rejected both claims.[45]

1. AEDPA

The Fourth Circuit found that the Judicial Council's authority to promulgate Order No. 113 was derived from 28 U.S.C § 332(d). This section commands the Council "make all necessary and appropriate orders for the effective and expeditious administration of justice within its circuit,"[46] including those which decide "how long a case may be delayed in decision."[47] Truesdale charged that Order No. 113 disrupted AEDPA's incentive structure by giving states in the Fourth Circuit the benefits of "opting" into Chapter 154 of AEDPA without requiring those states to meet Chapter 154's requirements.[48] The court rejected this contention on several grounds.[49]

First, it found that the order does not decide whether any state within the Fourth Circuit satisfies the requirements of Chapter 154 or remove the incentive for states to acquire the right to bring a mandamus action by meeting Chapter 154 requirements.[50] Similarly, the court found no inconsistency between the aims of AEDPA and Order No. 113, noting both were designed to streamline federal collateral review of capital sentences and guarantee competent representation in capital cases in the federal courts.[51] Given this, the court rejected Truesdale's claim that AEDPA conflicted with Order No. 113.[52]

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43. *Truesdale*, 142 F.3d at 758. *See* Antiterrorism and Effective Death Penalty Act of 1996, Pub.L. No. 104-132, 110 Stat. 1214 (codified as ammended in scattered sections of 28 U.S.C.).

44. *Id.*

45. *Id.* at 758-60.

46. 28 U.S.C. § 332(d) (1998).

47. *Truesdale*, 142 F.3d at 759 (quoting Chandler v. Judicial Council of the Tenth Circuit, 398 U.S. 74, 84 (1970)(construing 28 U.S.C. § 332(d))) .

48. *Id.* at 759. *See* 28 U.S.C. §§ 2261-2266 (1988).

49. *Id. at* 758-60.

50. *Id* at 759. In order to qualify for the benefits of opting into Chapter 154 of AEDPA (shortened deadlines for capital habeas petitions), states must meet Chapter 154's requirements for "opting in" by guaranteeing resources and representation for state habeas petitioners. *Id.* at 759.

51. *Truesdale*, 142 F.3d at 759.

52. *Id.* at 760.

2. Notice And Comment

Truesdale claimed that because Order No. 113 was promulgated without a notice and comment period, it violated 28 U.S.C. § 332(d)(1)'s command that "[a]ny general order relating to practice and procedure shall be made or amended only after giving appropriate public notice and an opportunity for comment."[53] The court concluded that because Order No. 113 addressed an "internal" problem (the delay within the Fourth Circuit in cases involving collateral review of capital sentences) and provided an "internal" solution to that problem (imposition of requirements on judges and courts within the Fourth Circuit), it was not a rule of "practice and procedure" for which notice and comment was required.[54]

Although the Fourth Circuit ultimately rejected Truesdale's claims attacking the Judicial Council Order, defense counsel should take note of the creativity with which they were made. Because so much of the law concerning capital defendants has been (mis)construed against them, making creative arguments such as these is probably of more importance in this than any other area of the law. Further, the issue raised by counsel has important potential consequences. Time is a valuable resource needed at habeas for thorough re-investigation of all cases, and that re-investigation may even establish claims of innocence.[55]

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53. *Id.* (citing 28 U.S.C. § 332(d)(1) (1998)).

54. *Id.*

55. *See* Schlup v. Delo, 11 F.3d 738 (8th Cir. 1993).