

# Wishing Petitioners to Death: Factual Misrepresentations in Fourth Circuit Capital Cases

Sheri Lynn Johnson

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# WISHING PETITIONERS TO DEATH: FACTUAL MISREPRESENTATIONS IN FOURTH CIRCUIT CAPITAL CASES

*Sheri Lynn Johnson*†

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† Professor of Law at Cornell Law School and Assistant Director of the Cornell Death Penalty Project. I thank my Cornell colleagues, John H. Blume and Trevor Morrison, for comments on this Article, and Fourth Circuit capital defense counsel colleagues for their outrage and encouragement. I argued *Howard v. Moore*, 131 F.3d 399 (4th Cir. 1997), and *Drayton v. Moore*, 168 F.3d 481 (4th Cir. 1999), in the Fourth Circuit, and my colleague and co-counsel John Blume argued *Johnson v. Moore*, 164 F.3d 624, Nos. 97-33, 97-7801, 1998 WL 708691 (4th Cir. Sept. 24, 1998), and *Matthews v. Evatt*, 105 F.3d 907 (4th Cir. 1997). Professor Blume and I were both briefly involved in the postconviction investigation of Bell's claims before *Bell v. Ozmint*, 332 F.3d 229 (4th Cir. 2003), reached the Fourth Circuit.

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#### INTRODUCTION

You just think happy thoughts, they lift you into the air.<sup>1</sup>  
 Step on a crack,  
 You break your mother's back.  
 Ring around the rosey,  
 A pocketful of posey,  
 Ashes, ashes,  
 We all fall down.

Children are notorious for their ability to pretend, and concomitantly, their vulnerability to magical thinking. Sometimes the belief that wishing makes a thing so, or that a particular ritual causes seemingly unrelated results, is charming. Other times, the world of fantasy takes a morbid turn: Fail to watch the sidewalk carefully enough and a fracture ensues; play a circle game and reenact death by plague. Still other times, coincidence horribly distorts the significance of random magical thoughts—for example, when a jealous child wishes for the death of a sibling that subsequently occurs, leaving the child to suffer enormous guilt.

It is supposed to be otherwise with adults. While some of us engage in games of king and queen or astronauts with our children, and some of us daydream about winning the lottery or becoming a Supreme Court nominee, we know that we are neither royalty nor space travelers, and that no ritual will guarantee either instant wealth or a call from the President. Moreover, both our civil and criminal laws enshrine these adult—and Western— notions of causation and responsibility. If I paint and publicize pictures of my competitor's plant burning to the ground after a lightning strike, he cannot sue me for his losses even if he suffers the very damage I conjured. Likewise, if I pray for the President's death because he did not tap me to become a Supreme Court Justice, and the President dies before his choice can

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<sup>1</sup> HOOK (Sony Pictures 1991).

take the oath of office, I need not fear prosecution should my prayers be discovered.

Although in either case I may incur social disapproval, my legal immunity is secure and based upon two premises. The first is normative: Bad thoughts—standing alone—should not be punished. The second is empirical: Neither wishing, pretending, imagining, nor a ritualistic action by itself causes events to happen. Unfortunately, the empirical premise is wrong when a United States Court of Appeals does the wishing. When the Fourth Circuit wishes facts were other than they are, the wished-for facts become dispositive, and in capital cases, those wished-for facts dispose of the petitioner as well as the petition.

The title of this Article reflects my belief that, when convenient, the Fourth Circuit plays fast and loose with the facts in capital cases, and that its misrepresentations of facts permit functionally unreviewable legal conclusions that lead to executions.

I do not mean to paint the entire Fourth Circuit with one brush. In the past, Judges Francis Dominic Murnaghan, Jr., John Decker Butzner, Jr., and Samuel James Ervin III were clear exceptions. Even today, Judges M. Blane Michael, Diana Gribbon Motz, Roger L. Gregory, and Robert B. King do not fit the Fourth Circuit mold. Judge Allyson K. Duncan is new, but likewise appears to be less extreme than the rest of the circuit. Nonetheless, viewed as a body, the Fourth Circuit is the “black hole of capital litigation.”<sup>2</sup>

Part I of this Article will establish the phenomenon of false factual assertions in Fourth Circuit capital cases. Part II will consider the extent to which such false factual assertions evade Supreme Court oversight, and whether such evasion should be a cause for concern. Part II also will address the extent to which motivation matters in assessing whether the harm done by factually inaccurate opinions is serious. Finally, Part III will briefly consider possible remedies.

## I

### OMISSIONS, FIBS, AND WHOPPERS

It is likely impossible to prove intent to deceive conclusively, and I do not claim to be able to do so. Thirty years of experience with the intentional discrimination standard suggest that governmental actors rarely reveal forbidden motivations.<sup>3</sup> Instead, I hope to show the ana-

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<sup>2</sup> Brooke A. Masters, *A Chance to Tip Scales of Justice*, WASH. POST, April 26, 1998, at B5 (quoting John H. Blume, Assoc. Professor of Law, Cornell Law School, and Dir., Cornell Death Penalty Project).

<sup>3</sup> *Washington v. Davis*, 426 U.S. 229 (1976), is the first Supreme Court case to hold that an equal protection violation requires a showing of intentional discrimination. A vast literature criticizes this requirement as virtually impossible to satisfy, both on the ground

logue to discriminatory impact: assertions that *objectively* mislead, whether by omission, distortion, or flat-out falsity. Although I infer intent to deceive by some judges, at least on several occasions, some readers may instead attribute the accumulation of such factual errors to general sloppiness, selective indifference, or even malevolent clerks. In Part II, I address the extent to which motivation matters in assessing whether the harm done by factually inaccurate opinions is serious; in Part III, I consider whether peering into the minds of the judges is a prerequisite to altering their troubling behavior. In the meantime, I focus on factual accuracy and not motivation.

### A. Exemplary Fiction

Although I began to imagine this Article after I read a Fourth Circuit opinion that is particularly egregious in its misrepresentation of facts,<sup>4</sup> the reader unfamiliar with the Fourth Circuit would be likely to dismiss a single outrageous example as an aberration. Similarly, if I were to provide multiple examples that all stem from the same species of claim, a reader might legitimately ask whether the factual misrepresentations in those cases reflected a pattern of hostility toward the doctrine governing such claims, rather than a pattern of “wishing petitioners to death.” Consequently, I discuss in some detail three examples, one from each of the most common species of claims in capital cases,<sup>5</sup> and augment these examples with briefer descriptions of a second case containing that species of claim.<sup>6</sup> I then consider the overall record of outcomes in Fourth Circuit capital cases for the light it sheds on the question of how best to interpret this anecdotal evidence of misrepresentation.

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that intentional discrimination is difficult to ferret out and on the broader ground that intentional discrimination encompasses too limited a vision of the goal of equality embodied in the Fourteenth Amendment. *See, e.g.*, Theodore Eisenberg & Sheri Lynn Johnson, *The Effects of Intent: Do We Know How Legal Standards Work?*, 76 CORNELL L. REV. 1151, 1161–62 (1991). A parallel discussion has arisen in the peremptory-challenge context, in which many have argued that practical problems of proof eviscerate the right against racial discrimination. *See Miller-El v. Dretke*, 545 U.S. \_\_\_, \_\_\_, 125 S. Ct. 2317, 2340–44 (2005) (Breyer, J., concurring) (reviewing the literature and concluding that the only way to eliminate racial discrimination in the exercise of the peremptory challenge is to eliminate the peremptory challenge altogether).

<sup>4</sup> *See Drayton v. Moore*, 168 F.3d 481, No. 98-18, 1999 WL 10073 (4th Cir. Jan. 12, 1999) (unpublished table decision).

<sup>5</sup> The three most common species of claims in capital cases are ineffective assistance of counsel claims, *Batson* claims, and *Brady* claims.

<sup>6</sup> The reader to whom this seems like overkill is invited to skip however many examples seem superfluous.

### 1. *Lawyerly Lies*

Ineffective assistance of counsel claims are extremely common in capital habeas corpus cases,<sup>7</sup> but these claims are difficult to win even without factual distortions by a federal circuit court.<sup>8</sup> In addition to the heavy burden habeas itself imposes on all petitioners' claims,<sup>9</sup> the petitioner who raises an ineffective assistance of counsel claim must first overcome the strong presumption that trial counsel's conduct fell within "the wide range of reasonable professional assistance."<sup>10</sup> A "strong presumption"<sup>11</sup> gives due deference to the strategic choices made by counsel.<sup>12</sup> If the petitioner clears this first hurdle, the petitioner must then demonstrate "a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different."<sup>13</sup>

#### a. *Drayton v. Moore*

Although both prongs of an ineffective assistance of counsel claim are ordinarily difficult to meet, Leroy "Ricky" Drayton's claims in habeas corpus were unusual in at least two respects: the extremity of his counsel's derelictions and the bizarre nature of the review of

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<sup>7</sup> See, e.g., VICTOR E. FLANGO, *HABEAS CORPUS IN STATE AND FEDERAL COURTS* 45 (1994); Lawrence J. Fox, *Making the Last Chance Meaningful: Predecessor Counsel's Ethical Duty to the Capital Defendant*, 31 *HOFSTRA L. REV.* 1181, 1190 (2003); Ira Mickenberg, *Ineffective Counsel*, NAT'L L.J., Aug. 4, 2003, at S9; Kathleen M. Ridolfi, *Not Just an Act of Mercy: The Demise of Post-Conviction Relief and a Rightful Claim to Clemency*, 24 *N.Y.U. REV. L. & SOC. CHANGE* 43, 72-73 (1998); Kenneth Williams, *The Antiterrorism and Effective Death Penalty Act: What's Wrong with It and How to Fix It*, 33 *CONN. L. REV.* 919, 943 (2001); Ronald F. Wright, *Parity of Resources for Defense Counsel and the Reach of Public Choice Theory*, 90 *IOWA L. REV.* 219, 242 (2004); Michael D. Hintze, Note, *Attacking the Death Penalty: Toward a Renewed Strategy Twenty Years After Furman*, 24 *COLUM. HUM. RTS. L. REV.* 395, 433 n.86 (1993).

<sup>8</sup> See John H. Blume & Sheri Lynn Johnson, *The Fourth Circuit's "Double-Edged Sword": Eviscerating the Right to Present Mitigating Evidence and Beheading the Right to the Assistance of Counsel*, 58 *MD. L. REV.* 1480 (1999) (arguing that the Fourth Circuit's brand of the ineffective assistance of counsel doctrine permitted it to deny relief in cases that other circuits would not); see also Fox, *supra* note 7; Mark D. Rosenbaum & Daniel P. Tokaji, *No Equal Justice: Race and Class in The American Criminal Justice System*, 98 *MICH. L. REV.* 1941, 1948 (2000); Alyson Dinsmore, Comment, *Clemency In Capital Cases: The Need To Ensure Meaningful Review*, 49 *UCLA L. REV.* 1825, 1837 (2002). Here, however, I focus not on doctrinal aberrations but on factual errors that affected the outcomes of cases.

<sup>9</sup> In particular, 28 U.S.C. § 2254 precludes issuance of a writ of habeas corpus in a state case absent either a finding that the state court decision was "contrary to, or involved an unreasonable application of, clearly established federal law, as determined by the Supreme Court of the United States" or a finding that the state determination was "based on an unreasonable determination of the facts in light of the evidence presented in the State court proceeding." 28 U.S.C. § 2254(d) (2000).

<sup>10</sup> *Strickland v. Washington*, 466 U.S. 668, 689 (1984).

<sup>11</sup> *Id.*

<sup>12</sup> *Id.* at 690-91.

<sup>13</sup> *Id.* at 694.

those claims in state court.<sup>14</sup> Drayton's claims did not receive the review they deserved, however. Instead, the Fourth Circuit responded with only cursory treatment of Drayton's ineffective assistance of counsel claims in an opinion that misleads through misstatement and omission.<sup>15</sup> The Fourth Circuit opinion also transforms a trial that was a parody of adversarial testing into something that appears quite ordinary.

The opinion begins with a reasonably fair rendition of the facts as presented at trial:

On February 11, 1984, Drayton, who was armed with a revolver, abducted Rhonda Smith from the Kayo gas station where she worked. After Drayton forced Smith to drive them around for a short while, they came back to the station, where Smith attended to customers who had been awaiting her return. Thereafter, Drayton abducted Smith again. This time, the two drove to an abandoned coal trestle, where, according to Drayton's confession, he accidentally shot Smith to death when he lost his balance and his gun struck a railing and discharged. The ensuing investigation revealed that money was missing from the gas station. These events led to Drayton's conviction for murder, kidnapping, and armed robbery, and he was sentenced to death.<sup>16</sup>

The opinion's treatment of counsel's performance and the postconviction proceedings, however, are far from fair.

i. *Fact and Fiction Regarding Counsel's Performance*

Although Drayton's habeas petition complained about a variety of derelictions on the part of trial counsel, it focused on three that were particularly damaging: trial counsel's failure to introduce evidence of the prior relationship between the defendant and the victim;<sup>17</sup> trial counsel's failure to introduce mitigation evidence of the defendant's alcoholism,<sup>18</sup> heavy drinking on the day of the offense,<sup>19</sup> cognitive impairments,<sup>20</sup> and hypoglycemia;<sup>21</sup> and trial counsel's abysmal closing argument that invited the jury to sentence the defendant to death.<sup>22</sup> The Fourth Circuit panel responded to each of these is-

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<sup>14</sup> See *Drayton v. Moore*, 168 F.3d 481, No. 98-18, 1999 WL 10073, at \*1 (4th Cir. Jan. 12, 1999) (unpublished table decision).

<sup>15</sup> See *infra* Part I.A.1(a)(i).

<sup>16</sup> *Drayton*, 1999 WL 10073, at \*1.

<sup>17</sup> See Brief of Appellant at 8-25, *Drayton*, 1999 WL 10073 (No. 98-18) [hereinafter *Drayton Brief*].

<sup>18</sup> *Id.* at 32-33.

<sup>19</sup> *Id.* at 33.

<sup>20</sup> *Id.* at 31-33.

<sup>21</sup> *Id.* at 34-35.

<sup>22</sup> *Id.* at 46-49.

sues with grossly misleading characterizations, each of which I will consider in turn below.

a. *The Prior Relationship*<sup>23</sup>

Regarding evidence of a prior relationship between Drayton and Smith, the panel said:

Drayton mainly contests his lawyer's failure to introduce evidence of his relationship with Rhonda Smith. Before trial Drayton told his lawyer, William Runyon, that he had known Smith before the night of her murder and that he had met her on Bonds Avenue, where he had kept "her from being ripped off . . . by some folks in a drug deal." Drayton told Runyon that he and Smith "were friendly" after that and that "he would go by the Kayo station [where she worked]." Runyon, however, did not introduce evidence of Drayton's relationship with Smith at trial.<sup>24</sup>

The court then acknowledged in a footnote that several witnesses had testified at the postconviction hearing that there was a romantic relationship between Drayton and the victim, but the court did not comment on the strength or persuasiveness of that evidence.<sup>25</sup> Instead, the court concluded that "Drayton has not met either the performance or prejudice prong of *Strickland*."<sup>26</sup> However, the court could not have made either of these determinations without substantial factual distortion and falsehood.

According to the panel, the "decision not to introduce evidence of Drayton and Smith's relationship was a reasonable strategic choice and was not the result of oversight, carelessness, or failure to investigate the case properly."<sup>27</sup> Why was it reasonable strategy not to introduce evidence of a prior relationship? The Fourth Circuit first noted that trial counsel "wanted to pursue a different strategy than the one pursued at the first trial,"<sup>28</sup> and that he "wanted to avoid placing Drayton at the crime scene altogether."<sup>29</sup> Moreover, according to the Fourth Circuit, counsel believed that the trial court was going to exclude petitioner's confession, leaving the prosecution with only a circumstantial case.<sup>30</sup>

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<sup>23</sup> Drayton v. Moore, 168 F.3d 481, No. 98-18, 1999 WL 10073, at \*2-3 (4th Cir. Jan. 12, 1999) (unpublished table decision).

<sup>24</sup> *Id.* at \*2 (alteration in original).

<sup>25</sup> *Id.* at \*2 n.1.

<sup>26</sup> *Id.* at \*2.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.* *But see infra* notes 63-65 and accompanying text (explaining that evidence of the prior relationship could not have been presented at the first trial). Drayton's first death sentence was reversed by the South Carolina Supreme Court.

<sup>29</sup> Drayton, 1999 WL 10073, at \*2.

<sup>30</sup> *Id.*



However, counsel's own testimony demonstrates that this "strategy" was implausible. Counsel admitted that he recognized that the victim, Ms. Smith, "apparently left voluntarily with whoever she left with."<sup>31</sup> Although evidence of the decision to leave voluntarily would have negated the aggravating circumstances of kidnapping and armed robbery,<sup>32</sup> counsel, even before speaking to Drayton, adopted the theory that "[Drayton] didn't do it,"<sup>33</sup> and wanted to "make [the prosecution] prove it."<sup>34</sup> At the same time, counsel correctly perceived that

[w]e didn't have a real defense . . . in the sense we could place him somewhere else. He readily told us that. Yes, he was there at the trestle. Yes, she'd gone with him. Yes, she had the money there. Yes, he had the gun, and, yes, she was shot and he had the gun in his hand when she was shot. So, *it was not possible to prove that someone else did it, or that he was not there.*<sup>35</sup>

Counsel also stated that he did not pursue this line of investigation because he felt it would be hard to find witnesses to the original drug transaction between Drayton and Smith two years after that transaction.<sup>36</sup> However, this directly contradicted counsel's testimony that he had decided to forego presenting evidence of a relationship even before learning about the drug deal.<sup>37</sup> Second, even when counsel learned about how Drayton met Smith,<sup>38</sup> he failed to follow up with any investigation despite the fact that Drayton gave him the name of a witness to their prior relationship.<sup>39</sup> Furthermore, counsel did not need to prove how Drayton became involved with Smith;<sup>40</sup> in-

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<sup>31</sup> Joint Appendix at 1845, *Drayton*, 1999 WL 10073 (No. 98-18) [hereinafter *Drayton* Joint Appendix]. Based on the accounts of people who saw Smith at the Kayo Station, counsel concluded that "[s]he certainly wasn't under any threat, or duress, or being held under gunpoint . . . . I mean, all the circumstances made it appear she was going off with someone she trusted and she knew." *Id.* at 1933. *Drayton* and Kayo station customers all indicated that there was at least some type of relationship, and trial counsel believed so. *See, e.g., id.* at 248-49, 260, 275-79, 301, 307, 1891-93.

<sup>32</sup> *See* S.C. CODE ANN. § 16-3-25(c) (1976).

<sup>33</sup> *Drayton* Joint Appendix, *supra* note 31, at 1900, 1894, 1930-31.

<sup>34</sup> *Id.* at 1910. Although counsel claimed that he did not want to mimic what had been tried at the first trial, it should be noted that at the first trial petitioner's counsel *did not* present evidence that petitioner was involved with Smith. *Drayton* Brief, *supra* note 17, at 8. Instead, counsel simply argued that the shooting was accidental. *Id.* at 31. Without establishing the relationship, however, counsel at the first trial had no explanation for why Smith would have left her post to be with petitioner. *Id.* at 8-9.

<sup>35</sup> *Drayton* Joint Appendix, *supra* note 31, at 1900-01 (emphasis added).

<sup>36</sup> *Id.* at 1897.

<sup>37</sup> *Id.* at 1894-95, 1930.

<sup>38</sup> *Id.* at 1897.

<sup>39</sup> *Id.* Due diligence failures of this sort with respect to witnesses have served as the basis for successful ineffective assistance of counsel claims in the past. *See, e.g., State v. Terry*, 601 So. 2d 161 (Ala. Crim. App. 1992) (finding counsel ineffective due to his failure to locate two people about whom the defendant told him, even though counsel feared that those witnesses would not be credible).

<sup>40</sup> *Drayton* Brief, *supra* note 17, at 18.

stead, he would have needed to establish only the fact of the relationship.<sup>41</sup>

Counsel also claimed that he relied on getting Drayton's statement suppressed.<sup>42</sup> However, counsel offered no explanation as to why he did not pursue alternative theories, such as Drayton and Smith's relationship, which would have been consistent with the goal of having the statement suppressed. Furthermore, counsel would not have needed to make a decision on whether to introduce evidence of the relationship until long after the court had decided the suppression issue.<sup>43</sup> More importantly, however, counsel understood—rightly—that the state could have tried and convicted Drayton even if the confession *had* been suppressed.<sup>44</sup> After all, one witness selected Drayton's photograph from a photo array,<sup>45</sup> and other Kayo station customers identified Drayton in court as being the black man seen driving around with Smith or standing in the cashier's area with her.<sup>46</sup> Anthony Jerome "Kojak" Washington, the state's immunized co-indictee, testified that Drayton took him to the scene of the shooting and that he accompanied Drayton to New York to get rid of the gun and car,<sup>47</sup> testimony that a relative of Drayton who lived in New York corroborated.<sup>48</sup> Finally, and quite conclusively, Drayton's fingerprints were identified on a beer can found in the employee's restroom of the convenience store.<sup>49</sup>

After the trial judge declined to suppress Drayton's statement,<sup>50</sup> counsel's "strategy" collapsed completely.<sup>51</sup> In addition to the numerous witnesses who placed Drayton at the center of the night's events,<sup>52</sup>

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<sup>41</sup> *Id.*

<sup>42</sup> Drayton Joint Appendix, *supra* note 31, at 1890, 1898, 1901–02, 1923–25.

<sup>43</sup> Counsel should have moved pretrial to have the judge rule on the admissibility of the statement. That way, counsel would not have been caught, as he was, without any fallback plan in the middle of a trial. Moreover, even without a pretrial motion, counsel would have known at the close of the state's case whether the confession had been admitted and need not have made a decision on whether to introduce evidence of the relationship until that point. *See* Glenn v. Tate, 71 F.3d 1204, 1207 (6th Cir. 1995) (finding counsel ineffective in part for not seeking an advance ruling on the admissibility of questionable evidence).

<sup>44</sup> Drayton Joint Appendix, *supra* note 31, at 1926.

<sup>45</sup> *Id.* at 518, 1158.

<sup>46</sup> *See, e.g., id.* at 248–49, 258, 260.

<sup>47</sup> *Id.* at 1322, 1329. At no point, however, did Washington ever report Drayton as saying that the shooting was anything but an accident. In fact, in his statement of February 15, 1984, Washington told police that Drayton had stated: "I ain't had no intention of doin['] no [expletive] like that." *Id.* at 2630–31.

<sup>48</sup> *Id.* at 1297–99.

<sup>49</sup> *Id.* at 236, 301, 307.

<sup>50</sup> Drayton Brief, *supra* note 17, at 21.

<sup>51</sup> *Id.*

<sup>52</sup> *Id.*

the jury now had Drayton's own statement.<sup>53</sup> Remarkably, counsel stubbornly continued to maintain that Drayton did not go with Smith to the trestle.<sup>54</sup> Worse, counsel argued to the jury that his own client was lying about many aspects of the incident: "Twenty-seven pages rife with bad guesses, incorrect information, and things that are outright lies; and you have got to sort through the lies."<sup>55</sup>

Counsel understood that he needed some explanation for calling his own client a liar. Without presenting any evidence, he speculated that someone else had killed Smith and that Drayton had accepted responsibility out of fear of Washington.<sup>56</sup> Counsel also speculated that the details in Drayton's statement were inaccurate because he had not been at the Kayo station at all; rather, he had become involved only once Washington tried to get rid of the car, and thus Drayton "got roped in by Washington."<sup>57</sup> Counsel himself admitted that he had no evidence to support his fanciful hypothesis.<sup>58</sup> Thus, as he attempted to explain his failure to investigate the prior relationship, counsel contradicted himself at every turn. The panel opinion, which deems trial counsel's strategic decision reasonable, does not mention any of these contradictions.

The opinion is equally deceptive in its discussion of the prejudice prong.<sup>59</sup> According to the court, evidence at the postconviction proceedings did not demonstrate prejudice, because "Drayton initially indicated to the police that he did not know Smith,"<sup>60</sup> and therefore, "even if [counsel] had introduced evidence of a relationship between [Drayton] and Smith, [counsel] would have been faced with trying to reconcile that evidence with [Drayton's] earlier statements to the contrary."<sup>61</sup> This seems an odd reason for finding no prejudice. Under the theory counsel pursued, counsel had to disavow Drayton's entire statement, rather than only one fact in it. More importantly, this "the-

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<sup>53</sup> *Id.*

<sup>54</sup> *Id.*

<sup>55</sup> Drayton Joint Appendix, *supra* note 31, at 1468; *cf.* Harris v. Wood, 64 F.3d 1432, 1437-38 (9th Cir. 1995) (finding counsel ineffective for calling his client a liar in his summation); Commonwealth v. Triplett, 500 N.E.2d 262, 267 (Mass. 1986); Ferguson v. State, 507 So. 2d 94, 97 (Miss. 1987) (finding counsel ineffective for denouncing his client as a liar).

<sup>56</sup> Drayton Brief, *supra* note 17, at 22.

<sup>57</sup> Drayton Joint Appendix, *supra* note 31, at 1482-83.

<sup>58</sup> Drayton Brief, *supra* note 17, at 22. At the conclusion of the sentencing phase, counsel asked the court to charge the jury that the defendant was an accomplice in a murder committed by another person and that the defendant acted under duress. *Id.* In a bench conference, counsel confessed to the trial judge that he had presented no evidence of either the involvement of another person or the presence of duress. Drayton Joint Appendix, *supra* note 31, at 1544-45.

<sup>59</sup> See Drayton v. Moore, 168 F.3d 481, No. 98-18, 1999 WL 10073, at \*2-3 (4th Cir. Jan. 12, 1999) (unpublished table decision).

<sup>60</sup> *Id.* at \*2.

<sup>61</sup> *Id.*

ory” misses the entire point of the prior relationship evidence, a point that was hammered on repeatedly in the appellate briefs:<sup>62</sup> If the victim knew Drayton previously, she may well have left with him voluntarily. Indeed, the evidence of a prior relationship dovetailed with the uncontradicted evidence that the victim was calm when she left the Kayo station, never raised an alarm, and even returned to the store with Drayton without in any way showing distress or seeking help. If the victim had left voluntarily with Drayton, this would have disproved or at least called into question both the kidnapping and robbery aggravators, without which the jury could not have sentenced Drayton to death. The factual connection between a prior relationship, the state’s evidence, and the aggravating factors is nowhere to be found in the opinion.

The *Drayton* court was not content with this misleading omission, but finished its discussion of prejudice with an affirmative misrepresentation. According to the court, “Drayton’s first trial, at which evidence of his relationship with Smith was introduced, resulted in a conviction and a death sentence.”<sup>63</sup> While it is true that Drayton’s first trial ended in a conviction and death sentence,<sup>64</sup> it is simply untrue that any evidence of a prior relationship was presented at the first trial. Indeed, it would have been impossible to present such evidence, because trial counsel had not gathered it!<sup>65</sup>

#### b. *The Mitigation Evidence*

The Fourth Circuit accurately reported that “Drayton allege[d] that Runyon improperly failed to investigate Drayton’s mental state, alcohol and substance abuse, learning disabilities, and hypoglycemia.”<sup>66</sup> The court did not review or summarize this evidence at all, perhaps because the evidence was both strong and uncontradicted.<sup>67</sup>

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<sup>62</sup> See, e.g., Drayton Brief, *supra* note 17, at 8–25.

<sup>63</sup> *Drayton*, 1999 WL 10073, at \*2.

<sup>64</sup> *Id.*

<sup>65</sup> See Drayton Brief, *supra* note 17, at 18–22.

<sup>66</sup> *Drayton*, 1999 WL 10073, at \*3.

<sup>67</sup> See Drayton Brief, *supra* note 17, at 35–39. Drayton’s learning difficulties in school and the wide spread between the verbal and performance parts of his IQ scores were early indicators of organic problems. *Id.* at 32. Additional factors contributing to, or exacerbating, his brain damage included his chronic alcoholism and substance abuse, his hypoglycemia, and head injuries sustained while boxing. *Id.*; see also Drayton Joint Appendix, *supra* note 31, at 1767, 1779 (state court hearing testimony of psychologist James Evans of the University of South Carolina confirmed that Drayton suffered from a severe learning disability, including dyslexia, which suggests that Drayton could have missed many subtle social cues); *id.* at 1820, 1821, 1828–29 (testimony of clinical pharmacologist Dr. John Charles Voris, who said that as a result of Drayton’s alcohol abuse, it is like that his decision-making ability would be impaired and his cognitive functions would also suffer); *id.* at 1840–44, 1845–46, 1850 (testimony of neuropsychologist Dr. Robert Edward Deysach, who confirmed that Drayton suffered from an organic brain dysfunction and testified that organic

Instead, the opinion credits trial counsel's decision not to present this clearly mitigating information as legitimate trial strategy:

Again, Runyon testified that his strategy was to present Drayton in a "positive" light (as did the lawyers at Drayton's first trial, for the most part). Runyon believed he had a very good jury for his client, and he said that he didn't want to "rock the boat" with negative testimony. Given the circumstances of this case, we cannot say that this approach was unreasonable.<sup>68</sup>

Most capital defense attorneys would quarrel with a decision to forego such extraordinarily mitigating evidence in order to present a defendant in a supposedly positive light. However, for the purposes of this Article, that is not the problem. The problem—the deception—lies in the court's clear<sup>69</sup> implication that counsel in fact *did* try to present Drayton in a positive light.<sup>70</sup> However, counsel by no means presented Drayton in a favorable light.<sup>71</sup> He presented no evidence of good character or good deeds.<sup>72</sup> Worse yet, as detailed below, counsel actually attacked Drayton in his closing argument.

### c. *The Closing Argument*

With respect to the closing argument, the court was even terser.<sup>73</sup> The opinion neither alludes to what counsel said nor hints at the substance of Drayton's complaint about those remarks, but simply states, "Even assuming deficient performance . . . there is not a reasonable probability that the outcome would have been different."<sup>74</sup> In this case, failure to report the content of counsel's comments was a crucial omission, given the extraordinary nature of his remarks. Counsel did not merely fail to make available arguments;<sup>75</sup> he affirmatively in-

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brain damage can affect a person's ability to control his inhibitions and can impair social judgment and behavior); *id.* at 2045, 2050, 2603–04 (testimony of Dr. John A. Aycock, the physician at the Charleston County Jail who administered a glucose tolerance test to Drayton and testified that glucose levels like the ones he saw in Drayton might cause someone "to become disoriented, to exhibit bizarre behavior, and to act in a way that is dangerous to [oneself] or to others").

<sup>68</sup> *Drayton*, 1999 WL 10073, at \*3.

<sup>69</sup> The implication is clear because if counsel had not in fact presented Drayton in a favorable light, there would have been no strategic reason to abjure the presentation of otherwise mitigating evidence that might have diminished the hypothesized favorable light.

<sup>70</sup> *Drayton*, 1999 WL 10073, at \*3.

<sup>71</sup> *See, e.g.*, *Drayton Joint Appendix*, *supra* note 31, at 1900, 1903, 1938.

<sup>72</sup> *See, e.g.*, *Drayton Brief*, *supra* note 17, at 4–5 ("[I]n his closing argument, counsel attacked his client's character.").

<sup>73</sup> *Drayton*, 1999 WL 10073, at \*3.

<sup>74</sup> *Id.*

<sup>75</sup> *Cf. Yarborough v. Gentry*, 540 U.S. 1 (2003) (holding that effective assistance of counsel requirements apply to closing arguments, but that counsel was not ineffective when he failed to present *all* of the available arguments).

creased the likelihood that the jury would impose a sentence of death.<sup>76</sup>

Counsel's closing argument was nothing short of abominable. Rather than plead for his client's life, counsel belittled and distanced himself from Drayton,<sup>77</sup> contradicted the little mitigating evidence he had presented,<sup>78</sup> and even created a harmful false impression about Drayton.<sup>79</sup> Counsel did not articulate a single coherent argument as to why Drayton should receive a life sentence, instead commenting rather confusingly that taking life is "not the natural human state," "[a]nd therefore the death penalty must be imposed."<sup>80</sup> Moreover, counsel's references to possible reasons for a life sentence were bizarre. When he finally asked the jury to impose a life sentence, the only reason he gave was that an execution would not "solve [Drayton's] problem" but would "only make him go away."<sup>81</sup> Absent some explanation of how the jury might "solve [Drayton's] problem," this "reason" defies comprehension.<sup>82</sup> Given that "making him go away" is probably the foremost goal of sentencing jurors, a competent argument would have pointed out that life imprisonment fulfills this aim rather than suggesting that a death sentence is the way to ensure that result.

Counsel not only spouted this nonsense, but also explicitly disclaimed arguments that could have influenced the jury to impose a life sentence instead of the death penalty.<sup>83</sup> For example, counsel dismissed the fact of Drayton's impoverished and deprived background as unworthy of the jury's consideration:

We can't stand up here and say he did this or was involved in this because of being poor or what have you. Because everybody has been poor. People have worked their way up . . . . He is probably as far down the rung of our society as we can get. And he has had every opportunity to climb up that ladder, if he wanted; and he didn't do it. Couldn't do it. Didn't work out that way.<sup>84</sup>

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<sup>76</sup> See Drayton Brief, *supra* note 17, at 46–49.

<sup>77</sup> See *id.* at 46–47; see also *Horton v. Zant*, 941 F.2d 1449, 1463 (11th Cir. 1991) (noting, in a case in which the defense attorney attacked the defendant's character and otherwise distanced himself from the defendant in his closing argument, "counsel's argument to the jury raises the distinct possibility that portions of the closing argument encouraged rather than discouraged the jury to impose the death penalty").

<sup>78</sup> See Drayton Brief, *supra* note 17, at 46–47; Drayton Joint Appendix, *supra* note 31, at 1559–60.

<sup>79</sup> See Drayton Brief, *supra* note 17, at 46–47.

<sup>80</sup> Drayton Joint Appendix, *supra* note 31, at 1557.

<sup>81</sup> *Id.* at 1562.

<sup>82</sup> *Id.*

<sup>83</sup> See Drayton Brief, *supra* note 17, at 48.

<sup>84</sup> Drayton Joint Appendix, *supra* note 31, at 1561–62.

What is most offensive about this passage is that counsel knew that Drayton suffered from learning disabilities<sup>85</sup> and therefore did not have “every opportunity to climb up that ladder.”<sup>86</sup> Counsel might have argued that the existence of statutory mitigating circumstances warranted mercy, but instead he dismissed consideration of the applicable mitigating circumstances.<sup>87</sup> Moreover, in dismissing mitigating circumstances, counsel undercut the little that he had done by presenting the testimony of several members of his client’s family;<sup>88</sup> indeed, counsel’s closing argument failed to contain even a single reference to this testimony.

The utter failure of counsel to present a meaningful reason for a life sentence in his closing argument was aggravated by counsel’s inability even to avoid self-contradiction. At the postconviction hearing, co-counsel Ronald Schneider testified as to the strategy that had shaped the closing argument: “[W]e wanted him to be shown as, you know, as nice a fellow as possible under the circumstances and please don’t kill him.”<sup>89</sup> In fact, lead counsel’s arguments actively thwarted the goal of not killing Drayton, and presented Drayton as far from a “nice . . . fellow.”<sup>90</sup> After reviewing some of the relevant law,<sup>91</sup> counsel began his closing by reminding the jury that he and Schneider were “appointed advocates for this defendant, and you know there is not a whole lot you can say.”<sup>92</sup> Later, he described Drayton as “not . . . a great pillar of the community,” and speculated, “[y]ou know, I don’t even know how many times he has paid taxes.”<sup>93</sup> Subsequently, counsel observed that the members of the jury were not really Drayton’s peers because his true peers were people who have “problems with the law.”<sup>94</sup> But of everything counsel said, the most appalling was the nonchalant suggestion to the jury that they could put Drayton in a “hellhole” like the prison system, but “[i]f that’s being nice to him, then don’t do that. *Sentence him to death, okay.*”<sup>95</sup>

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<sup>85</sup> See *supra* note 20 and accompanying text.

<sup>86</sup> Drayton Joint Appendix, *supra* note 31, at 1561–62.

<sup>87</sup> See *id.* at 1560 (“All this stuff about statutory mitigating circumstances, the simple fact of the matter is it will be up to each and every one of you to make the decision.”).

<sup>88</sup> Drayton Brief, *supra* note 17, at 48.

<sup>89</sup> Drayton Joint Appendix, *supra* note 31, at 1959; see also *id.* at 1904 (testimony of Mr. Runyon) (indicating that he wanted “some sort of positive image” of Drayton). Except under extraordinary circumstances, this strategy itself is utterly unrealistic, and hence unreasonable and incompetent under the circumstances of a capital trial. No jury that has just convicted a man of capital murder is prepared to give any weight to the unelaborated testimony of the defendant’s family that he is really a “nice . . . fellow.”

<sup>90</sup> See *id.* at 1959.

<sup>91</sup> Drayton Brief, *supra* note 17, at 49.

<sup>92</sup> Drayton Joint Appendix, *supra* note 31, at 1556.

<sup>93</sup> *Id.* at 1561.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 1558 (emphasis added).

In short, this was not run-of-the-mill inartfulness or stammering delivery. This was not advocacy at all, unless it was the advocacy of a second prosecutor. Under these circumstances, when counsel has totally abdicated his role and the jury knows *the defendant's lawyer* would just as soon see him die as live, prejudice arguably should be *presumed*. Even if courts will not presume prejudice from abandonment of the advocacy role, they at least should *analyze* prejudice after acknowledging the extreme facts presented by the case. Counsel's statements, taken as a whole, contributed to the case for death. Moreover, they did so in a case that was not open and shut. This case did not involve rape, torture, or multiple murders, and the existence of the kidnapping aggravator was doubtful. This is precisely the kind of case in which advocacy matters, and Drayton got none. If the panel had reported the facts, it would have had to take the prejudice analysis seriously; instead, the panel's factual omissions permitted a blithe announcement of the absence of prejudice.<sup>96</sup>

ii. *Fact and Fiction Regarding Postconviction Proceedings*

Counsel's mockery of the advocacy role during his closing statement<sup>97</sup> is not the only shocking fact omitted in the panel's opinion. The uninformed reader of the portion of the opinion that addresses the state court's postconviction treatment of Drayton's ineffective assistance of counsel claims might be confused regarding the substance of Drayton's complaint. This confusion may stem from the Fourth Circuit's cryptic opinion,<sup>98</sup> which states, "Drayton . . . contend[ed] that he [was] entitled to an evidentiary hearing in federal court because the judge who conducted his state post-conviction review proceedings was racially biased."<sup>99</sup> Without explaining the basis for the claim, the Fourth Circuit summarily declared:

It appears to us that Drayton had a full and fair hearing in state court. The evidence and testimony were developed fully and were adequate to enable the state judge to make his findings; although the judge did not believe witness testimony about the intimate nature of Drayton and Smith's relationship, we do not find the judge's disbelief to be indicative of underlying racial animus. Because the state court's judgment is supported by the record and because we believe Drayton had a full and fair hearing at the state court level,

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<sup>96</sup> See *Drayton v. Moore*, 168 F.3d 481, No. 98-18, 1999 WL 10073, at \*2 (4th Cir. Jan. 12, 1999) (unpublished table decision).

<sup>97</sup> See *supra* Part I.A.1(a)(i)(c).

<sup>98</sup> The district court opinion was even more opaque and managed to dismiss Drayton's claim of racially biased credibility determinations without ever referring to race.

<sup>99</sup> *Drayton*, 1999 WL 10073, at \*6.



we affirm the district court's denial of Drayton's request for an evidentiary hearing.<sup>100</sup>

The truth, however, like the truth about the closing argument, is not nearly so mundane. The postconviction judge's racial discrimination against black witnesses and his refusal to recuse himself in the face of evidence of his bias<sup>101</sup> rendered Drayton's state postconviction hearing egregiously unfair.

Drayton was black; the victim was white.<sup>102</sup> At the state postconviction relief hearing, Drayton's new counsel presented as witnesses a number of friends, peers, and acquaintances, all of whom were black.<sup>103</sup> Although these witnesses gave detailed testimony concerning many different events and perceptions,<sup>104</sup> three consistent points, all central to Drayton's ineffective assistance of counsel claim, emerged from their testimony. First, Drayton knew the victim;<sup>105</sup> second, Drayton was a chronic alcoholic;<sup>106</sup> and third, Drayton was intox-

<sup>100</sup> *Id.*

<sup>101</sup> The evidence that the postconviction judge's credibility determinations were biased based on race was both varied and compelling. *See, e.g.*, Drayton Joint Appendix, *supra* note 31, at 2542-43, 2551; *infra* notes 124-25 and accompanying text.

<sup>102</sup> Drayton Brief, *supra* note 17, at 54.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.*

<sup>105</sup> Six African American witnesses testified that Drayton knew and had an ongoing relationship with Rhonda Smith. Drayton Joint Appendix, *supra* note 31, at 1650, 1658-59, 1674, 1724, 1797. This testimony was consistent with Drayton's statement years earlier to his trial counsel that he knew the victim. *Id.* at 1894-95. Conversely, the State presented only one witness who could possibly have had—or even claimed to have—any first-hand knowledge of the lack of a relationship between Drayton and the victim. *See id.* at 1873, 1875. That witness, Sandra Merritt, who was white, testified that she was a friend of the victim, and that she did not believe the victim knew Drayton. The reliability of this impression was impeached by the contradiction between Merritt's claim that the victim shared everything with her and the fact that Merritt was unaware of the victim's suicide attempt. *See id.* at 1873, 1875, 1879, 2456.

The postconviction judge was surprisingly gullible in accepting at face value trial counsel's explanation for his failure to investigate Drayton's claim of a prior relationship. Evidence of a relationship between Drayton and the victim would have cast doubt on the aggravating circumstances of kidnapping and armed robbery, would have been consistent with the State's evidence presented at trial, and would in no way have conflicted with the defense that counsel claimed to be pursuing. Nevertheless, the judge did not probe counsel's patently illogical explanation for his failure; he appears not to have considered the possibility that counsel's own predisposition led him to prematurely reject the possibility of a relationship between the black defendant and the white victim, even though the existence of such a relationship would have been enormously helpful to the case.

<sup>106</sup> The state court was no more evenhanded in its evaluation of the testimony presented by counsel concerning Drayton's intoxication and alcoholism. The court rejected all such testimony, despite the fact it was consistent with Drayton's statement, admitted over his objection at trial, that he had been drinking at a party earlier in the evening and had had one or more beers at the gas station. In the face of overwhelming and unrefuted testimony of Drayton's alcohol abuse and intoxication on the night of the offense, the postconviction judge summarily dismissed these claims. *See, e.g., id.* at 1650-51 (testimony of C'Ella Holmes); *id.* at 1660 (testimony of Jacquelyn Cooper); *id.* at 1671, 1680 (testimony of William Arthur Holmes). The postconviction judge similarly rejected expert

icated on the night of the offense.<sup>107</sup> The postconviction judge rejected every part of every black witness's testimony.<sup>108</sup> He also rejected expert testimony that was predicated on the accuracy of the black lay witnesses' testimony about Drayton's alcoholism, intoxication, and prior relationship with the victim.<sup>109</sup> In contrast, the postconviction judge accepted all the testimony of the state's white witnesses.<sup>110</sup> The postconviction judge painstakingly criticized the testimony of black witnesses,<sup>111</sup> but he declined to extend the same scrutiny to the testimony of white witnesses.<sup>112</sup> Thus, the record from the postconviction hearing reflected, at the least, a grossly disparate impact based on race.

While such evidence of disparate impact might not rise to the "stark pattern" level, which, *standing alone*, would prove intentional racial discrimination,<sup>113</sup> it is strong evidence of racial discrimination, worthy at least of comment by a reviewing court. The record in *Drayton*, however, provided two additional reasons to infer intentional racial discrimination, one fairly ordinary for race discrimination claims, and the other quite extraordinary.

*Arlington Heights*, which first laid out the indicia of racial discrimination in government action, lists "[d]epartures from the normal procedural sequence" as another factor probative of intentional discrimination.<sup>114</sup> The postconviction judge's credibility determinations presented the Fourth Circuit with not one but at least three departures from the normal procedural sequence. First, as previously discussed, the judge applied different standards to black witnesses than he applied to the state's white witnesses in resolving conflicting testimony on the issue of the prior relationship.<sup>115</sup>

Second, on the issues of Drayton's alcohol history and intoxication on the night of the offense, the postconviction judge disbelieved testimony from close friends and experts,<sup>116</sup> relying upon the absence of testimony concerning alcohol and drug abuse in the two previous trials to discredit those witnesses.<sup>117</sup> This procedure for weighing evi-

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psychiatric testimony relying on testimony by Drayton's black witnesses that Drayton abused alcohol, he was intoxicated on the night of the offense, and he had a prior relationship with the victim. *See id.* at 2551.

<sup>107</sup> *See supra* note 106.

<sup>108</sup> *See* Drayton Brief, *supra* note 17, at 51.

<sup>109</sup> *See* Drayton Joint Appendix, *supra* note 31, at 2551.

<sup>110</sup> *See* Drayton Brief, *supra* note 17, at 51.

<sup>111</sup> *See id.* at 54.

<sup>112</sup> *See id.*

<sup>113</sup> *See* Vill. of Arlington Heights v. Metro. Hous. Dev. Corp., 429 U.S. 252, 266 (1977).

<sup>114</sup> *See id.* at 267.

<sup>115</sup> *See supra* notes 108–12 and accompanying text.

<sup>116</sup> Drayton Brief, *supra* note 17, at 57–58.

<sup>117</sup> *See id.*

dence was extremely unusual for two reasons. Most strikingly, there was no contradiction between the trial testimony and the postconviction testimony. None of the trial witnesses upon whose testimony the postconviction judge purportedly relied actually stated that Drayton did not have a problem with alcohol; they simply did not state that he did.<sup>118</sup> Moreover, even if these “omissions” permitted some very weak inference that perhaps the trial witnesses were unaware of a drug or alcohol problem, the trial testimony came from obviously inferior sources.<sup>119</sup> The trial witnesses relied upon by the postconviction judge were not intimately acquainted with Drayton;<sup>120</sup> in contrast, those who testified at the postconviction relief hearing were neighbors, relatives, and friends—persons whom one would ordinarily expect to have far better information about a problematic use of alcohol and drugs.<sup>121</sup>

A third deviation from normal procedures lies in the fact that the postconviction judge disbelieved every one of the black witnesses, but failed to articulate a compelling motive—or any motive at all—for this alleged wholesale lying by the black witnesses.<sup>122</sup> The final order’s failure to address this issue suggests the possibility that the postconviction judge believed what prosecutors occasionally argue, but courts rightly condemn—that African Americans are likely to be lying when they testify for each other.<sup>123</sup>

If the disparate impact and the deviations from ordinary procedures left the federal court panel with any doubt that race influenced the state postconviction judge’s credibility determinations, it is hard to imagine that the state judge’s legislative career and private life would not eliminate that doubt.<sup>124</sup> The judge’s legislative career evinces longstanding, consistent, and extreme support for racially discriminatory public policies.<sup>125</sup> This support, standing alone, does not

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<sup>118</sup> Several witnesses said they had seen him drinking, although one said she had not seen him drunk, and the others were not specifically questioned about Drayton’s drinking habits. *Id.* at 59. The fact that ineffective counsel failed to pursue inquiry into Drayton’s alcohol and drug abuse hardly proves that there was none.

<sup>119</sup> *See id.*

<sup>120</sup> *See id.*

<sup>121</sup> *See id.*

<sup>122</sup> *See* Drayton Brief, *supra* note 17, at 59.

<sup>123</sup> *Id.*; *see also* Sheri Lynn Johnson, *Racial Imagery in Criminal Cases*, 67 TULANE L. REV. 1739, 1755–1756 (1993) (reviewing cases).

<sup>124</sup> *See* Drayton Brief, *supra* note 17, at 60.

<sup>125</sup> *See, e.g.*, Journal of the Senate of South Carolina 95 (Jan. 17, 1967) (showing that the state judge supported a resolution in favor of a paid state holiday on Robert E. Lee’s birthday); Journal of the Senate of South Carolina 568 (Mar. 8, 1960) (describing the state judge’s involvement in a resolution commending eighteen U.S. Senators from the South on “their courageous stand in opposing the proposed ‘Civil rights’ Legislation pending in the United States Senate” and calling the federal civil rights legislation an “iniquitous program”); Journal of the House of Representatives of South Carolina 104 (Jan. 10, 1957) (showing that the state judge supported a bill to authorize the South Carolina Archives

demonstrate racially biased decision making in every case in which this judge was the factfinder. However, this support leads to the conclusion that in Drayton's case, a racially tainted evaluation of credibility best explains the strong disparate impact apparent on the face of the record and the deviations from normal judicial procedures. The Fourth Circuit avoided the inquiry demanded by the facts and the pleadings—one concerning the effect of racial bias upon credibility determinations made by the postconviction judge—by embarking upon an unauthorized inquiry into the presence or absence of "racial animus" in the postconviction judge.<sup>126</sup> The Fourth Circuit thus avoided the discrimination claim—the one commanded by the Supreme Court's equal protection doctrine—through mischaracterization of the nature of the claim and failure even to consider the omission of remarkable and relevant facts about the factfinder.

It cannot be reasonably supposed that the use of the phrase "racial animus" was merely an unfortunate choice of words. If the Fourth Circuit had been applying the *Arlington Heights* standard, analysis of the ample evidence presented by Drayton would have been necessary. In fact, the Fourth Circuit cited no equal protection cases and did not even allude to the Equal Protection Clause.<sup>127</sup> Moreover, the Fourth Circuit, in the single sentence it devoted to Drayton's discrimination claim, confined itself to the evidence regarding Drayton's prior relationship with the victim; the opinion fails even to mention Drayton's claim that race also influenced the state postconviction judge's deter-

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Commission to acquire a site and erect an archives building to house the state's archives and Confederate relics).

None of these facts was disputed by the postconviction judge when he denied the motion to recuse himself. Even more probative, however, is the one allegation the postconviction court did dispute—that the postconviction judge *sponsored* legislation that would have required the classification of blood by race. See Journal of the Senate of South Carolina 911, 941–42 (Mar. 28, 1962).

<sup>126</sup> See *Drayton v. Moore*, 168 F.3d 481, No. 98-18, 1999 WL 10073, at \*6 (4th Cir. Jan. 12, 1999) (unpublished table decision). If a prosecutor admits that he struck black jurors because of their race, it does not matter if he did so because he hates black jurors, because he believes they are less likely to convict, or because he believes they are less likely to trust police officers. Regardless of emotional state, stereotyping and generalizations based upon race are not permitted. Similarly, it matters not whether the postconviction judge harbored animosity toward black witnesses, whether he believed it was "natural" racial solidarity for black people to lie for each other, or whether he believed that black people are inherently less truthful. What matters under the Equal Protection Clause is that race influenced his decision, and a federal court may not give deference to findings of fact that were not color-blind. See, e.g., Robin West, *Toward an Abolitionist Interpretation of the Fourteenth Amendment*, 94 W. VA. L. REV. 111, 135 (1991) ("Colorblindness, although perhaps a condition of formal, equal justice, is simply not the nub of equal protection. Rather, protection is."). But see *Regents of Univ. of Cal. v. Bakke*, 438 U.S. 265, 355 (1978) (Brennan, White, Marshall, & Blackmun, JJ., concurring in part) ("Our Constitution is color-blind' has never been adopted . . . by [the Supreme Court] as the proper meaning of the Equal Protection Clause.").

<sup>127</sup> See *Drayton*, 1999 WL 10073 at \*6.

mination that testimony regarding his alcoholism and intoxication was not credible. Of course, had the opinion focused on the correct issue and addressed the facts, the Fourth Circuit would have been hard pressed not to conclude that the postconviction judge's findings manifested disparate treatment on the basis of race. This conclusion, in turn, would have required the Fourth Circuit to forgo reliance on that judge's findings of fact and to order an evidentiary hearing to determine facts reliably, in a manner not tainted by racial prejudice.<sup>128</sup>

b. *Howard v. Moore*

The Fourth Circuit's opinion in *Drayton* is an egregious example of an opinion in which the court deceives either by intention or through carelessness. *Howard v. Moore*,<sup>129</sup> however, is an even clearer example of the Fourth Circuit Court of Appeals making erroneous statements in order to reject claims of ineffective assistance of counsel. In at least three contexts, the court's mischaracterizations of counsel's failures to present powerful mitigating evidence are tantamount to falsehood.

First, the court stated that "counsel's decision not to introduce [Ronnie Howard's] military and school records into evidence was not deficient."<sup>130</sup> This statement defies the uncontradicted evidence that counsel did not make such a decision.<sup>131</sup> Indeed, counsel could not have made a strategic decision not to introduce evidence regarding Howard's military and school records because counsel failed to conduct a timely investigation into these records.<sup>132</sup> Trial counsel did not even attempt to obtain Howard's school records until one week prior to trial and, as a result, did not receive these records until after trial.<sup>133</sup> Even more dramatically, trial counsel testified that he did not receive Howard's military records until four days after Howard received his death sentence.<sup>134</sup> Without the necessary familiarity with Howard's military and school records, counsel was not in any position to make a "decision" about whether to introduce them at trial.

Second, in disposing of Howard's ineffective assistance of counsel claim, the court also stated that "Howard's counsel offered into evi-

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<sup>128</sup> See *Rose v. Mitchell*, 443 U.S. 545, 563 (1979) (holding that "[t]he claim that the court has discriminated on the basis of race in a given case brings the integrity of the judicial system into direct question" and therefore provides a particularly compelling justification for extending federal habeas corpus review).

<sup>129</sup> 131 F.3d 399 (4th Cir. 1997) (en banc).

<sup>130</sup> *Id.* at 421.

<sup>131</sup> Brief of Appellant at 65, *Howard*, 131 F.3d 399 (No. 95-4017), 1996 WL 3341833, at \*65 [hereinafter *Howard Brief*].

<sup>132</sup> *Id.* at 60-61.

<sup>133</sup> *Id.* at 5.

<sup>134</sup> *Id.* at 60.

dence several witnesses who testified that Howard was capable of adapting to prison life.”<sup>135</sup> This too was simply false: None of the very few witnesses trial counsel presented testified that Howard was capable of adapting to prison life.<sup>136</sup> This misstatement by the court is especially hard to understand, given the testimony of the trial counsel who had been delegated the exclusive responsibility for presenting mitigating evidence that he did nothing to develop the issue of adaptability:

Q: Mr. Acker, what did you do to develop the issue of future adaptability to prison of your client, Mr. Howard?

A: I don't have any present recollection of anything I specifically did, personally did.<sup>137</sup>

Finally, the en banc majority's comments regarding trial counsel's failure to introduce Howard's prison record are also indefensible. The court asserted that introducing Howard's prison record could be a “double-edged sword”<sup>138</sup> because it risked alerting the jury to Howard's federal armed robbery conviction.<sup>139</sup> Given that the State introduced evidence of the armed robbery as an aggravating factor in the penalty phase, however, there was nothing to be lost by the introduction of Howard's prison records; they contained nothing the jury did not already know.

## 2. *White*<sup>140</sup> *Lies About Race*

*Batson v. Kentucky* prohibits a prosecutor from exercising peremptory challenges based on race and sets forth a three-stage inquiry to determine whether a prosecutor has engaged in discriminatory behavior in jury selection.<sup>141</sup> The first stage requires the defendant to establish a prima facie case of racial discrimination, which generally depends upon the number or proportion of minority-race jurors the

<sup>135</sup> See *Howard*, 131 F.3d at 421.

<sup>136</sup> Howard Brief, *supra* note 131, at 62.

<sup>137</sup> *Id.* at 59.

<sup>138</sup> See *Howard*, 131 F.3d at 421.

<sup>139</sup> *Id.*

<sup>140</sup> I use the adjective “white” advisedly. At the time it issued its opinion in *Howard v. Moore*, the Fourth Circuit was the only Court of Appeals in the country that was entirely white. See, e.g., *Justices Delayed: Republicans Stall Nominees*, CHARLESTON GAZETTE (W.V.), Oct. 28, 1999 (“Earlier [in 1999], Clinton nominated James Wynn Jr., who was nominated to serve on the 4th Circuit Court of Appeals . . . Wynn would be the only black judge on the 4th Circuit, which is notoriously conservative. But the Senate won't vote on his confirmation.”); Bill Clinton, U.S. President, Remarks to the American Bar Association in Atlanta, Ga. (Aug. 16, 1999) (“It's difficult to believe that in 1999, despite the fact that more African-Americans live in the Fourth Circuit than any other appellate jurisdiction, the U.S. Court of Appeals for the Fourth Circuit has never had an African-American judge.”).

<sup>141</sup> 476 U.S. 79, 84 (1986).

prosecutor strikes.<sup>142</sup> In the second stage, the prosecutor must come forward with race-neutral reasons explaining the strikes.<sup>143</sup> In the third stage, the judge must determine, based on all the evidence, whether the defendant has established racial discrimination.<sup>144</sup> In this third stage, the prosecutor's failure to strike similarly situated white jurors raises an inference of racial motivation,<sup>145</sup> as does a false statement about the characteristics of a juror. Both tend to suggest that the racially neutral reason offered for striking minority-race jurors was merely a pretext for racial discrimination.<sup>146</sup>

a. *Howard v. Moore*

Of the first forty-two qualified jurors available in *Howard v. Moore*, thirty-five of whom were white and seven of whom were black,<sup>147</sup> Howard's prosecutor struck six black jurors and only four white jurors.<sup>148</sup> When the alternates were selected from an additional eight jurors,<sup>149</sup> Howard's prosecutor struck two more black jurors and no white jurors.<sup>150</sup> The prosecutor's initial response to a *Batson* motion was to assert that *Batson* did not apply, because he had left one black juror on the panel.<sup>151</sup> When the judge disabused him of this belief and ruled that Howard had established a prima facie case,<sup>152</sup> the prosecutor then claimed that race-neutral reasons supported each challenge.<sup>153</sup> With respect to two of the stricken black jurors, the prosecutor cited only their attitudes toward the death penalty.<sup>154</sup> Howard claimed, however, that those black jurors expressed their views toward the death penalty in terms virtually identical to those of white jurors the prosecutor accepted and that an inference of discrimination therefore arose from the prosecutor's action.<sup>155</sup> With respect to the two additional black jurors, the prosecutor cited several reasons for his strikes, while Howard claimed that the record belied all of

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<sup>142</sup> See *id.* at 96–97.

<sup>143</sup> See *id.* at 97.

<sup>144</sup> See *id.* at 98.

<sup>145</sup> See, e.g., *Miller-El v. Dretke*, 542 U.S. \_\_\_, \_\_\_, 125 S. Ct. 2317, 2325 (2005).

<sup>146</sup> See, e.g., *Purkett v. Elem*, 514 U.S. 765, 768 (1995) (noting that in the third step of the *Batson* inquiry “implausible or fantastic justifications may (and probably will) be found to be pretexts for purposeful discrimination”).

<sup>147</sup> *Howard v. Moore*, 131 F.3d 399, 407 (4th Cir. 1997) (en banc).

<sup>148</sup> *Id.*

<sup>149</sup> Howard Brief, *supra* note 131, at 33.

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

<sup>154</sup> *Id.* at 33–34.

<sup>155</sup> *Howard v. Moore*, 131 F.3d 399, 408 (4th Cir. 1997) (en banc).

those reasons.<sup>156</sup> In the course of dismissing Howard's claim, the Fourth Circuit told not one, but many white lies.

i. *Fact and Fiction About Death Penalty Views*

The Fourth Circuit's primary reason for affirming the district court's dismissal of the claims relating to black jurors Edward Wood and Charles Copeland is terse:

[T]he prosecutor . . . must be allowed to make credibility determinations when exercising peremptory challenges . . . . [C]ounsel may consider . . . "tone, demeanor, facial expression, emphasis—all those factors that make the words uttered by the prospective juror convincing or not."<sup>157</sup>

In a subsequent brief paragraph, the opinion offered an alternative reason.<sup>158</sup> It stated without explanation or elaboration that "[a]lthough white jurors Richard Ashmore, Sharon Lunny, and Floyd Rohm were ambivalent about the death penalty, Wood's and Copeland's anti-death penalty sentiments were much stronger."<sup>159</sup> Either reason—differences in demeanor or differences in responses—would have been an adequate basis for denying relief, had either been based on fact. However, they were not.<sup>160</sup>

Certainly, a prosecutor is entitled to rely upon demeanor and similar factors in assessing the import of a juror's responses.<sup>161</sup> Concomitantly, trial courts may rely upon their own observations to assess the credibility of prosecutors' assertions about jurors' demeanors.<sup>162</sup> In this case, however, neither the prosecutor nor the trial court referred to the credibility of Wood or Copeland or, more specifically, to any aspect of their demeanor, such as tone, facial expression, or emphasis. Indeed, there is no mention in the state court record of demeanor at all.

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<sup>156</sup> Howard Brief, *supra* note 131, at 34.

<sup>157</sup> *Howard*, 131 F.3d at 408 (quoting *Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994)).

<sup>158</sup> *See id.*

<sup>159</sup> *Id.*

<sup>160</sup> *See Howard Brief*, *supra* note 131, at 37.

<sup>161</sup> *See, e.g.*, *United States v. Elliott*, 89 F.3d 1360, 1366–67 (8th Cir. 1996) (prosecutor cited juror's unresponsiveness and hostility); *United States v. Jenkins*, 52 F.3d 743, 746 (8th Cir. 1995) (prosecutor described juror as scowling and uninterested); *United States v. Diaz*, 26 F.3d 1533, 1542–43 (11th Cir. 1994) (prosecutor explained that juror was inattentive during voir dire and focused on the defendant); *Brown v. Kelly*, 973 F.2d 116, 119–21 (2d Cir. 1992) (prosecutor offered "relatively detailed accounts" of hostile, flippant, and timid demeanors); *Dunham v. Frank's Nursery & Crafts*, 967 F.2d 1121, 1124–25 (7th Cir. 1992) (prosecutor cited demeanor and juror's appearing to look at opposing party); *United States v. Lance*, 853 F.2d 1177, 1181 (5th Cir. 1988) (prosecutor cited eye contact).

<sup>162</sup> *See, e.g.*, *Miller-El v. Cockrell*, 537 U.S. 322, 339 (2003) ("Credibility can be measured by, among other factors, the prosecutor's demeanor . . .").



The reader unfamiliar with *Batson* and its progeny may hesitate here: Is it possible that the Fourth Circuit did not intend its statements about demeanor to imply that there was some basis *in the record* for concluding that the prosecutor was responding to demeanor? In other words, might the Fourth Circuit have meant merely that it was possible that some reason relating to demeanor (even though unarticulated) had motivated the prosecutor, and might the court therefore have permitted the lower courts to uphold his strike even though the prosecutor had not articulated any reason related to demeanor?

The answer must be “No,” unless one is willing to hypothesize that the entire circuit<sup>163</sup> was unfamiliar both with the Supreme Court’s rationale in *Batson* and its progeny in other courts of appeals. *Batson* itself provides that, once established, a prima facie case can be rebutted only by the prosecutor’s *articulation* of a race-neutral explanation for his choice to strike jurors.<sup>164</sup> If the evidence in the record shows that the prosecutor’s explanation is pretextual,<sup>165</sup> it follows that an appellate court may not augment the record with its speculation that “tone, demeanor, facial expression, [or] emphasis” may have influenced the prosecutor’s judgment of the juror’s credibility or other attributes; such an approach would stand the role of appellate courts on its head.

No federal circuit had ever held or has since held that appellate courts may uphold apparently discriminatory strikes based on the possibility that the prosecutor relied upon demeanor-type evidence to distinguish black jurors from white jurors, when neither the prosecutor’s explanations nor the trial judge’s comments refer to demeanor. Indeed, at the time of the *Howard* decision, several circuits had held that even when the prosecutor expressly relies upon demeanor-type evidence, reviewing courts should be skeptical given the ease with which a demeanor explanation may cover racially discriminatory conduct.<sup>166</sup>

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<sup>163</sup> *Howard* was heard en banc. Although there was a dissenting opinion on two other issues, there were no dissents on either the *Batson* issue or the ineffective assistance of counsel issue discussed in the previous section. See *Howard*, 131 F.3d at 423–30 (Michael, J., dissenting). This case was heard prior to the appointment of Judge Roger L. Gregory, the only African American sitting on the Fourth Circuit Court of Appeals. See, e.g., THE WHITE HOUSE OFFICE OF COMM’NS, FACT SHEET ON APPOINTING GREGORY TO THE U.S. COURT OF APPEALS FOR THE FOURTH CIRCUIT (2000), 2000 WL 1883392 (stating that Judge Gregory was the first African American to sit on the Fourth Circuit Court of Appeals); see also Brooke A. Masters, *Battle Brewing Over 4th Circuit Nominees*, WASH. POST, May 5, 2001, at A6; Alison Mitchell, *Senators Confirm 3 Judges, Including Once-Stalled Black*, N.Y. TIMES, July 21, 2001, at A16. See generally Carl Tobias, *Federal Judicial Selection in The Fourth Circuit*, 80 N.C. L. REV. 2001 (2002).

<sup>164</sup> See *Batson v. Kentucky*, 476 U.S. 79 (1986).

<sup>165</sup> See *supra* notes 145–46 and accompanying text.

<sup>166</sup> See *Diaz*, 26 F.3d at 1543 (holding that “trial judges should fully develop the record regarding the specific behavior by a [stricken] venireperson . . . and should verify that [it] was conspicuously different from that of the other venirepersons”); *Kelly*, 973 F.2d at 121

Moreover, were it proper for an appellate court to make such unsupported conjectures, there could never be substantive review of denied *Batson* claims, for it would always be possible that a juror's demeanor explained a prosecutor's strike that appeared to be invidious discrimination based on the record.

Finally, it is noteworthy that the *Howard* court, immediately after pronouncing that demeanor might explain the prosecutor's strikes, cited a Ninth Circuit case that clearly required record evidence to support such an assertion.<sup>167</sup> A reader familiar with court decisions in this area would therefore likely be misled to conclude that the prosecutor in *Howard* had cited the demeanor of the potential jurors to explain away an apparent racial pattern. Of course, he had not.

The alternative disposition of the claims relating to black potential jurors Wood and Copeland is no less deceptive. According to the en banc court, "Wood's and Copeland's anti-death penalty sentiments were much stronger" than those of the white jurors Ashmore, Lunny, and Rohm, all of whom held more "ambivalent" views about the death

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(holding that because impressions are susceptible to abuse, the specific behavior of a prospective juror should be noted when a prosecutor considers striking the juror for reasons of demeanor); *United States v. Sherrills*, 929 F.2d 393, 395 (8th Cir. 1991) (holding that subjective assessments, such as demeanor or appearance, must be carefully scrutinized because they are susceptible to abuse); *see also* *United States v. Cooper*, 19 F.3d 1154, 1161 (7th Cir. 1994) (upholding demeanor-based strikes in part because of trial court's on-the-record comments confirming prosecutor's race-neutral interpretation); *Bernard v. State*, 659 So. 2d 1346, 1348 (Fla. Dist. Ct. App. 1995) (reversing reliance on demeanor absent specific record support for prosecutor's allegation); *Chew v. State*, 562 A.2d 1270, 1277 (Md. 1989) (urging trial courts to make specific findings regarding demeanor allegations); *Hatten v. State*, 628 So. 2d 294, 298 (Miss. 1993) (same).

<sup>167</sup> *See Howard*, 131 F.3d at 408 (quoting *Burks v. Borg*, 27 F.3d 1424, 1429 (9th Cir. 1994)). *Burks* does state that trial counsel may make credibility determinations and take into account a juror's "tone, demeanor, facial expression, [and] emphasis" in doing so. 27 F.3d at 1429. The prosecutor in *Burks*, however, unlike the prosecutor in *Howard*, gave his subjective impression as a reason for striking the black jurors when he stated that he "didn't believe they would impose the death penalty." *Id.* Additionally, in discussing this very aspect of *Burks* in a subsequent case, the Ninth Circuit quoted the language cited by the Fourth Circuit and stated that if counsel is taking account of "'tone, demeanor, facial expression, emphasis[.]" . . . a prosecutor must give some expression to those instincts." *Turner v. Marshall*, 121 F.3d 1248, 1254 (9th Cir. 1997). Moreover, in *Turner*, where the prosecutor had not "given expression" to his observations of demeanor or subjective impressions, the Ninth Circuit explicitly refused to entertain a hypothesis as to why similar answers might have been perceived differently by the prosecutor, and held that where "reluctance to view photographic evidence was the only reason actually proffered for [the black juror's] exclusion, and . . . the voir dire transcript does not support a contrary inference, we find the failure to challenge the similarly situated white juror to be fatal to the prosecutor's explanation." *Id.* at 1253-54. Thus, the citation of *Burks* was completely inapposite in a case in which the prosecutor made no mention of demeanor as a basis for his strike—unless, of course, the purpose was to mislead.

penalty.<sup>168</sup> An examination of the record demonstrates that this assertion, too, was baseless.<sup>169</sup>

ii. *Fact and Fiction About Conglomerate Justifications*

The prosecutor in Ronnie Howard's case gave a combination of reasons to support the strikes of four other black jurors—Antonio Golden, Jeffrey Dunbar, Gladys McElrath, and Amanda Fuller.<sup>170</sup> The Fourth Circuit cited these reasons seriatim as adequate support for the conclusion that none of the strikes was racially motivated.<sup>171</sup> With respect to Golden and Fuller, however, the record belies all of the reasons cited by the prosecutor.

The prosecutor said that he struck Golden because she had an unemployed husband, because of her erratic work history, and as a strategy to reach white juror Debra Ann Bradley.<sup>172</sup> The record undercuts all three of these reasons.<sup>173</sup> Golden's husband did not hold a job because he was disabled, a circumstance that made Golden's situation not appreciably different from that of white jurors the prosecutor accepted who had spouses who were "unemployed" because they were retired, housewives, or students.<sup>174</sup> Claims that Golden's work history was "erratic" were undermined by the fact that she had a six-month-old child, whose birth explains the four-month gap in her work history.<sup>175</sup> The prosecutor also claimed to have struck Golden in order to reach Bradley, a white juror the prosecutor asserted had stronger views in support of the death penalty than Golden.<sup>176</sup> However, the record demonstrates that, on the contrary, Golden supported the death penalty more strongly than Bradley.<sup>177</sup>

The prosecutor also claimed to have struck potential juror Fuller for a combination of reasons: her allegedly unstable work history, her young age, and her statement that she was "indifferent" to the death penalty.<sup>178</sup> The first reason is simply inaccurate.<sup>179</sup> Additionally, even if one assumed that the inaccurate claim of an erratic work history was

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<sup>168</sup> *Howard*, 131 F.3d at 408.

<sup>169</sup> See *Howard* Brief, *supra* note 131, at 45–47 (comparing the wording of the responses of black and white jurors).

<sup>170</sup> See *id.* at 39–48.

<sup>171</sup> *Howard*, 131 F.3d at 408.

<sup>172</sup> See *Howard* Brief, *supra* note 131, at 40–42.

<sup>173</sup> See *id.*

<sup>174</sup> See *id.* at 40–41.

<sup>175</sup> See *id.* at 41.

<sup>176</sup> See *id.*

<sup>177</sup> See *id.* at 41–42.

<sup>178</sup> See *id.* at 43–45.

<sup>179</sup> See *id.*

made in good faith,<sup>180</sup> an erratic work history would not set Fuller apart from accepted white juror Emily Bagwell, who was unemployed, was twenty-two, and gave entirely comparable responses to questions on the death penalty.<sup>181</sup> The second reason stated by the prosecution, Fuller's age, adds nothing, for there were three accepted white jurors—Emily Bagwell, Tasha Mathis, and Debra Bradley—who were the same age as or younger than Fuller.<sup>182</sup> The third reason, Fuller's purported "indifference" to the death penalty, was directly traceable to the prosecutor's racially differentiated phrasing of his question, and therefore is an impermissible basis for a strike.<sup>183</sup> Finally, the record reveals that Fuller's attitudes were indistinguishable from those of at least two accepted white jurors.<sup>184</sup>

In reviewing Howard's *Batson* claim, the Fourth Circuit relied on multiple fictions: the fiction that there was reason to believe that potential jurors Wood and Copeland by their demeanors gave the prosecutor reason to strike them;<sup>185</sup> the fiction that Wood's responses to questions about the death penalty were "much stronger" in a negative direction than were those of seated white jurors;<sup>186</sup> the parallel fiction that Copeland's responses to such questions distinguished him from seated white jurors;<sup>187</sup> the fiction that the three reasons cited by the prosecutor for striking Golden were uncontradicted by the record;<sup>188</sup> and the fiction that Fuller could be distinguished by either demographic or attitudinal characteristics from seated white jurors.<sup>189</sup> In addition to these affirmatively misleading fictions, the Fourth Circuit

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<sup>180</sup> This assumption of good faith would be dubious given the number of "errors" made by the prosecutor regarding the qualifications of black jurors.

<sup>181</sup> Howard Brief, *supra* note 131, at 45.

<sup>182</sup> *See id.* at 43.

<sup>183</sup> *Id.* at 43–44. For contemporaneous cases holding that the prosecutor must ask black and white prospective jurors similar questions in order to rely on their responses to those questions as race-neutral reasons to support peremptory challenges, see *Devose v. Norris*, 53 F.3d 201, 204–05 (8th Cir. 1995) (holding that where a stricken black juror's response to a specific question is claimed to distinguish him from accepted white jurors, the prosecutor's failure to ask white jurors the precipitating question is evidence of pretext) and *Ford v. Lockhart*, 861 F. Supp. 1447, 1463–65 (E.D. Ark. 1994) (holding that in order to rely upon a white juror's favorable characteristics, the prosecutor must have questioned the stricken black juror on those characteristics as well), and compare *United States v. Scott*, 26 F.3d 1458, 1466 (8th Cir. 1994) (holding that no inference of discrimination arises from the prosecutor's failure to question white jurors about a cited negative characteristic if a black juror volunteered it).

<sup>184</sup> *See* Howard Brief, *supra* note 131, at 43–44 (comparing responses of accepted white jurors, one of whom was Fuller's age).

<sup>185</sup> *See* Howard v. Moore, 131 F.3d 399, 407–08 (4th Cir. 1997) (en banc).

<sup>186</sup> *See id.* at 408.

<sup>187</sup> *See id.* at 407–08.

<sup>188</sup> *See id.* at 408.

<sup>189</sup> *See id.*

indulged in significant “oversights” in discussing the justifications for the strikes of two more black jurors.<sup>190</sup>

b. *Bell v. Ozmint*

*Bell v. Ozmint* quotes the language of *Howard* concerning demeanor<sup>191</sup> and so immediately raised my suspicion. I obtained the record in *Bell* and found that in *Bell*, as in *Howard*, neither the prosecutor nor the trial court ever mentioned demeanor. I then wondered whether this pattern occurred in the Fourth Circuit predecessor to *Howard*, *Matthews v. Evatt*.<sup>192</sup> Counsel for Matthews has since confirmed that the record in *Matthews*, like the records in *Howard* and *Bell*, contains no support for an inference of differences in demeanor between stricken black jurors and seated white jurors.<sup>193</sup> Differences in all three cases exist only in the imaginations of the Fourth Circuit judges.

3. *Unforgivable Lies*<sup>194</sup>

It is beyond my comprehension how a federal judge could distort the facts *in a case involving a claim of innocence*—innocence either of any crime or of the death-eligible crime with which the petitioner is charged. Nevertheless, this type of distortion is exactly what the following two examples show.

Because it is unclear whether a free-standing claim of innocence is cognizable on habeas corpus,<sup>195</sup> the most common vehicle for asserting an innocence claim in federal habeas corpus is a *Brady* claim. *Brady v. Maryland* held that “suppression by the prosecution of evidence favorable to an accused . . . violates due process where the evidence is material either to guilt or to punishment, irrespective of the good faith or bad faith of the prosecution.”<sup>196</sup> Suppressed evidence is material when “there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding

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<sup>190</sup> See *Howard* Brief, *supra* note 131, at 45–47. The Fourth Circuit, however, merely recited that the “prosecutor’s observation that Dunbar had twice stated he could not vote for the death penalty was accurate,” without addressing whether the record demonstrated that this statement was a deliberate mischaracterization of Dunbar’s views. See *Howard*, 131 F.3d at 408.

<sup>191</sup> 332 F.3d 229, 241 (4th Cir. 2003). This second example of Fourth Circuit fiction in a *Batson* case is so similar to *Howard* that it need not keep us long.

<sup>192</sup> 105 F.3d 907 (4th Cir. 1997).

<sup>193</sup> Counsel for Matthews was my colleague at Cornell Law School, Professor John Blume.

<sup>194</sup> I do not intend the title of this section to suggest that the misrepresentations of fact discussed above are excusable—they are not.

<sup>195</sup> See *Herrera v. Collins*, 506 U.S. 390, 418 (1993) (assuming but not deciding that a claim of innocence without an independent claim of constitutional error may be cognizable in federal habeas corpus).

<sup>196</sup> 373 U.S. 83, 87 (1963).

would have been different.”<sup>197</sup> My first example demonstrating the Fourth Circuit’s distortion of facts in a claim-of-innocence case involves a *Brady* claim that the suppressed evidence was material to the sentence; my second example involves a claim that the suppressed evidence was material to guilt.

a. Hoke v. Netherland

Ronald Hoke was convicted of the capital murder of Virginia Stell, based upon three capital predicates—robbery, rape, and abduction with intent to extort pecuniary benefit—and was sentenced to death.<sup>198</sup> According to the dissent in *Hoke v. Netherland*, “This case has two villains: The first, of course, is the 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.”<sup>199</sup> The *third* villain in this case, the panel majority, however, reversed numerous district court findings of fact that were not clearly erroneous,<sup>200</sup> substituted its own findings, which were not supported by the record—and indeed were contradicted by the record<sup>201</sup>—and even cited evidence that did not exist at all.<sup>202</sup>

*Hoke* is different from the other cases I discuss because it includes a lengthy dissent that reveals the majority’s mendacity. We should start, however, with facts that were not disputed: Hoke was released from a mental hospital shortly before the crime,<sup>203</sup> and had planned to leave the hospital for Hagerstown, Maryland, to be near his family and to receive follow-up treatment.<sup>204</sup> Instead, he cashed in his bus ticket and bought drugs and alcohol.<sup>205</sup> Either that day or the next, Hoke met fifty-six-year-old Virginia Stell at the European Restaurant in Petersburg, Virginia.<sup>206</sup> Stell, whose nude body was found about three days later in her apartment,<sup>207</sup> had been bound, gagged, and stabbed to death.<sup>208</sup> Semen was found in her vagina and anus, and margarine was smeared on her anal ring.<sup>209</sup>

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197 United States v. Bagley, 473 U.S. 667, 682 (1985) (Blackmun, J., concurring).

198 Hoke v. Netherland, 92 F.3d 1350, 1352 (4th Cir. 1996).

199 *Id.* at 1365 (Hall, J., dissenting).

200 *See id.* at 1352 (majority opinion), 1358, 1365.

201 *See id.* at 1358, 1365.

202 *See id.* at 1363.

203 *Id.* at 1365 (Hall, J., dissenting).

204 *Id.*

205 *Id.*

206 *Id.* at 1365 n.1.

207 *Id.* at 1365.

208 *Id.*

209 *Id.*

Meanwhile, Hoke had gone back to the mental hospital,<sup>210</sup> but was soon released and returned to Hagerstown.<sup>211</sup> A week later, he confessed to a police officer that he had killed a woman in Petersburg.<sup>212</sup> Through three confessions,<sup>213</sup> his story remained more or less the same: He went to Stell's apartment, where the two had consensual sex.<sup>214</sup> The anal sex was Stell's idea.<sup>215</sup> He then bound, gagged, and stabbed her.<sup>216</sup> Before fleeing, he stole some pills.<sup>217</sup> The only significant inconsistency in Hoke's statements concerned *when* his intent to kill was formed.<sup>218</sup> In his third and final confession, Hoke stated that he had decided to kill Stell before they ever got to her apartment, but on the other occasions and at trial, he stated that he flew into a rage when Stell slapped him over "some sort of transgression."<sup>219</sup>

A public defender, Richard Beck, initially represented Hoke.<sup>220</sup> Beck withdrew from Hoke's case at the preliminary hearing because of a conflict of interest: He also represented Emmett Sallis, a Petersburg jail inmate, who was a prospective witness against Hoke.<sup>221</sup>

John Maclin was then appointed to represent Hoke.<sup>222</sup> Maclin went several times to the European Restaurant to try to find out about Stell, but was met with silence and hostility, including at least one physical threat.<sup>223</sup> He learned only that Stell had a bad reputation, but was unable to obtain any details.<sup>224</sup> Maclin filed discovery requests for exculpatory evidence on either the issue of guilt or punishment.<sup>225</sup> The prosecutor responded that he was unaware of any exculpatory evidence other than Hoke's "alleged drug problem."<sup>226</sup>

At Hoke's one-day trial,<sup>227</sup> one of the prosecution witnesses, Emmett Sallis, recounted a conversation he had supposedly had with Hoke in the Petersburg jail:

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210 *Id.*

211 *Id.*

212 *Id.*

213 *Id.*

214 *Id.*

215 *Id.*

216 *Id.*

217 *Id.*

218 *Id.*

219 *Id.* at 1365-66.

220 *Id.* at 1366.

221 *Id.*

222 *Id.*

223 *Id.*

224 *Id.*

225 *Id.*

226 *Id.*

227 *Id.*

"I was in the same cellblock with [Hoke] and I asked him about his charge . . . . He 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."<sup>228</sup>

Aside from Sallis's statement, there was no evidence that Hoke and Stell were acquainted prior to the crime.<sup>229</sup> Hoke testified consistently with his first two statements, and explained that the discrepant statement was a result of his self-destructive desire to seek punishment.<sup>230</sup>

For the jury to find Hoke guilty of capital murder, it needed to determine that at least one of the alleged aggravating factors—rape, robbery, or abduction with intent to extort pecuniary benefit—was present.<sup>231</sup> The testimony of Sallis clearly supported the robbery aggravator and perhaps the abduction with intent to extort aggravator in that it provided necessary evidence that the intent to steal preceded the homicide.<sup>232</sup> The closing argument of the prosecutor<sup>233</sup>—as well as the age of the victim—suggested that she would not have consented to sex with a stranger, particularly not to anal sex, thus supporting the rape aggravator. The jury found the presence of all three aggravators.<sup>234</sup>

Hoke's conviction and penalty were upheld on direct appeal and on state collateral review.<sup>235</sup> He then filed an action under 28 U.S.C. § 2254.<sup>236</sup> The district court ordered discovery on the issue of the victim's sexual history that produced a wealth of undisclosed exculpatory evidence.<sup>237</sup> At the conclusion of the evidentiary hearing, the district court granted a writ based upon its finding that the prosecutor had suppressed exculpatory evidence as to the rape and had knowingly presented the false testimony of a jailhouse snitch, testimony

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<sup>228</sup> *Id.* at 1366–67 (alteration in original).

<sup>229</sup> *Id.* at 1365.

<sup>230</sup> *Id.* at 1366 n.2.

<sup>231</sup> See VA. CODE ANN. § 18.2-31 (1985) (listing predicate offenses for capital murder).

<sup>232</sup> See *Hoke*, 92 F.3d at 1369 n.7 (Hall, J., dissenting). If the intent to steal had not been formed until after the murder, as Hoke testified, the elements of robbery would not be met. See *id.*

<sup>233</sup> See *id.* at 1367.

<sup>234</sup> *Id.* at 1353 (majority opinion).

<sup>235</sup> *Id.*

<sup>236</sup> *Id.* at 1354.

<sup>237</sup> *Id.* ("These files included witness interviews with three men—James Henry Jones, Lowell Eastes, and Dale Griesert—who claimed they had previously had sex with Stell.").



that was false with respect to both its substance and facts that would impeach the witness's credibility.<sup>238</sup>

i. *Fact and Fiction About the Alleged Rape*

Soon after the murder, the police began interviewing potential witnesses.<sup>239</sup> Their efforts focused on the other residents of Stell's apartment building and the regular patrons of the European Restaurant.<sup>240</sup> The police learned that Stell was sexually promiscuous.<sup>241</sup> A few witnesses even named names, which led police to interview three men, all of whom admitted to having intercourse with Stell.<sup>242</sup> Another witness also told police she had observed Hoke and Stell openly hugging and kissing at the European Restaurant.<sup>243</sup>

It might seem that with this evidence, "the Brady issue [was] easy."<sup>244</sup> Judge Kenneth Keller Hall observed in his dissenting opinion:

The jury was told that Stell was your average, kindly 56-year-old woman, and the very thought that she had had anal sex with a man half her age, using margarine as a lubricant, probably closed the book on the rape predicate to capital murder. 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.<sup>245</sup>

How did the majority justify the opposite decision? In short, by omission, mischaracterization, and invention. The panel found that undisclosed evidence of the victim's prior sexual conduct was not exculpatory, in part because it could have been discovered by defense counsel and also because it was inadmissible.<sup>246</sup>

Rejecting the *factual finding* by the district court that "defense counsel made a concerted effort to contact and interview potential witnesses who had knowledge of Stell's sexual history,"<sup>247</sup> the panel found that counsel did not "undertake a reasonable investigation"

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<sup>238</sup> *Id.*

<sup>239</sup> *Id.* at 1366 (Hall, J., dissenting).

<sup>240</sup> *Id.*

<sup>241</sup> *Id.*

<sup>242</sup> *Id.* One of the men stated that they had engaged in oral, vaginal, and (on one occasion) anal sex. *Id.* at 1354 (majority opinion). He testified that the anal sex was Stell's idea, and she brought vaseline along for that purpose. *Id.*

<sup>243</sup> *Id.* at 1366 (Hall, J., dissenting).

<sup>244</sup> *Id.* at 1369.

<sup>245</sup> *Id.*

<sup>246</sup> *Id.* at 1355 (majority opinion)

<sup>247</sup> Brief for Petitioner, *Hoke*, 92 F.3d 1350 (Nos. 95-4012, 95-4013) [hereinafter *Hoke* Brief] (on file with author).

into this issue.<sup>248</sup> Without saying how many trips to the European Restaurant would have been “reasonable,” the panel concluded that counsel’s trips, which gained only general reputation evidence, were insufficient.<sup>249</sup>

The panel held Hoke’s counsel responsible for not discovering the most important witness, Dale Griesert, because a witness he *did* interview—Sarvis—told *the police* that Stell “‘had mentioned a male named ‘Dale,’”<sup>250</sup> despite the fact—unmentioned by the panel—that the lead investigator testified that Griesert and the other witnesses were discovered simply because the police “got lucky.”<sup>251</sup> Thus, the panel substituted its own *fact finding* for that of the district court even though in doing so it had to ignore the testimony of the Commonwealth’s lead investigator.<sup>252</sup>

The police used their greater resources to identify the persons for whom counsel was searching, displayed photographs that counsel did not even know existed throughout Petersburg and adjoining areas, ran DMV license checks, relied on tips from anonymous concerned citizens, and searched official records to which the defense would have had no access.<sup>253</sup> Even with all of those resources, the police found one of Stell’s partners because *he* contacted *them*.<sup>254</sup> Griesert and another paramour were found by unidentified “further investigation.”<sup>255</sup> There is no basis for finding clearly erroneous the *factual finding* of the district court that a “reasonable investigation” by defense counsel would not have discovered evidence that the police could find only because of their unique resources—and even then, only with “luck.”<sup>256</sup>

Having imagined that Hoke’s counsel was responsible for not discovering these witnesses, the panel rejected yet another well-supported factual finding by the district court—that “it is unlikely that continued efforts to contact witnesses would have been fruitful,” in light of the fact that they were reluctant to discuss their sexual relationships with the victim when questioned by the police and did so only when “pressed.”<sup>257</sup> The only “evidence” upon which the panel relied for supplanting the district court’s factual finding—which was

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<sup>248</sup> *Hoke*, 92 F.3d at 1355.

<sup>249</sup> *Id.*

<sup>250</sup> *Id.* at 1355 n.2.

<sup>251</sup> *Hoke* Brief, *supra* note 247, at 4. The record flatly contradicts the panel’s speculations—this time that “[i]t may well be . . . that Hoke’s attorney simply did not pursue the information provided by Sarvis.” *Id.* at 4 n.2.

<sup>252</sup> *Id.* at 5.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.* at 5–6.

<sup>255</sup> *Id.* at 6.

<sup>256</sup> *Id.*

<sup>257</sup> *Id.*

supported by both the police file and the testimony of the detective—with its own was the alleged testimony of Hoke's counsel that "he himself believed people would be willing to speak about their prior relationships with Stell."<sup>258</sup> In fact, the record is devoid of any such testimony.<sup>259</sup>

The panel also concluded that the sexual conduct evidence was not material, because Virginia's rape shield statute rendered it inadmissible.<sup>260</sup> However, as both the district court and the dissent pointed out, the Virginia courts themselves recognize that the rape shield statute is constrained by the Constitution.<sup>261</sup> Moreover, the evidence was admissible under the statute itself, which allows the introduction of evidence of prior sexual conduct tending to explain physical evidence.<sup>262</sup>

The Commonwealth relied upon the presence of margarine on the anal ring, suggesting that this fifty-six-year-old woman would not have engaged in anal intercourse willingly.<sup>263</sup> The testimony of Griesert, however, would have explained that evidence, as he told the police that when he engaged in *consensual* anal intercourse with Stell, she brought along the lubricant.<sup>264</sup> Thus, Griesert's statement provided an innocent explanation for physical evidence that the Commonwealth used to show lack of consent. Moreover, the statement corroborated to a remarkable degree Hoke's otherwise dubious statement that Stell had suggested the anal intercourse and had provided the lubricant.<sup>265</sup>

Finally, the panel reasoned that the evidence of rape was in any event "overwhelming."<sup>266</sup> Its review of the "overwhelming evidence" failed to mention that there was no vaginal or related trauma.<sup>267</sup> The only other reliable<sup>268</sup> evidence offered at trial not undermined by the

<sup>258</sup> *Id.*

<sup>259</sup> *Id.* Counsel testified only to his attempts to identify witnesses with knowledge of Stell's sexual practices and that he was "going to give it [his] best shot" to have that evidence admitted, if he found it. *Id.* at 6 n.5. Moreover, counsel's *beliefs* were not probative in any event, particularly since these married witnesses had to be "pressed" by the police before they had "renewed" memory. *Id.* at 6.

<sup>260</sup> See *Hoke v. Netherland*, 92 F.3d 1350, 1356 n.3 (4th Cir. 1996); Hoke Brief, *supra* note 247, at 10.

<sup>261</sup> Hoke Brief, *supra* note 247, at 10; *Hoke*, 92 F.3d at 1369 (Hall, J., dissenting) (both citing *Neeley v. Commonwealth*, 437 S.E.2d 721, 725-27 (Va. Ct. App. 1993)).

<sup>262</sup> VA. CODE ANN. § 18.2-67.7 (1985). Inexplicably, the panel also ignored the indications by the trial judge that he might have admitted evidence of actual sexual conduct. See Hoke Brief, *supra* note 247, at 10 n.7.

<sup>263</sup> See Hoke Brief, *supra* note 247, at 10.

<sup>264</sup> See *id.*

<sup>265</sup> See *id.* at 11 n.8.

<sup>266</sup> *Hoke*, 92 F.3d at 1357-58.

<sup>267</sup> Hoke Brief, *supra* note 247, at 12.

<sup>268</sup> Since the expert testimony was in dispute, credibility was an issue and the district court made no findings as to that testimony. At the very least, the circuit court should have

suppressed evidence was that the victim had been bound, which need not have been associated with the intercourse.<sup>269</sup>

ii. *Fact and Fiction About the Alleged Robbery*

Two days after the informant Sallis was charged with forgery and larceny, he met with the prosecutor, and two days after that, Beck withdrew as Hoke's counsel, apparently perceiving a conflict of interest between his two clients.<sup>270</sup> Sallis pled guilty to the charges within three weeks, but his sentencing was continued.<sup>271</sup> That Sallis had made a deal with the State became clear after his testimony: The State agreed that Sallis should be *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.<sup>272</sup> On cross-examination in *Hoke*, however, Sallis not only grossly understated his criminal history, but also flatly denied that the Commonwealth had offered "any deals" or "a time cut."<sup>273</sup> The State did not correct this testimony.<sup>274</sup>

This, too, looks straightforward. The dissent's response is certainly straightforward:

Upon reaching the merits . . . I again find the result an easy call. Sallis lied, [the prosecutor] let him lie, and the lie undermines confidence in the validity of the robbery and abduction predicates for capital murder.<sup>275</sup>

Again, however, the majority had three reasons for resisting this conclusion, and again, none of these reasons had support in the record. First, the majority held that no false evidence was presented knowingly;<sup>276</sup> second, it agreed with the district court that the claim had

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remanded the case to the district court for findings on credibility before that evidence could have been considered. *See id.* at 12 n.9.

<sup>269</sup> *See id.* at 12.

<sup>270</sup> *Hoke*, 92 F.3d at 1367 (Hall, J., dissenting).

<sup>271</sup> *Id.*

<sup>272</sup> *Id.*

<sup>273</sup> *Id.*

<sup>274</sup> *Id.*

<sup>275</sup> *Id.* at 1370. Except for Sallis's fabrication that Hoke killed Stell to "get his stuff [i.e., drugs] back," *id.* at 1359 (majority opinion), there is no evidence from which a rational trier of fact could find that Hoke killed Stell in hopes that he could later find a few pills. Indeed, on direct appeal, the Virginia Supreme Court relied on Sallis's testimony to affirm the robbery predicate. *Hoke v. Commonwealth*, 377 S.E.2d 595, 599-600 (Va. 1989). Furthermore, the abduction predicate hangs by an even thinner thread. A murder during an abduction is punishable by death only where the intended purpose of the abduction is "to extort money or a pecuniary benefit." VA. CODE ANN. § 18.2-31(1) (1985) (emphasis added). If the restraint used was no greater than that required to commit the rape or robbery, the defendant cannot be convicted of all three. *See Cardwell v. Commonwealth*, 450 S.E.2d 146, 152-53 (Va. 1994). Even with Sallis's testimony, the evidence of abduction with intent to extort money or drugs is thin indeed. Without Sallis's testimony, there is no evidence at all.

<sup>276</sup> *Hoke*, 92 F.3d at 1358.

been defaulted;<sup>277</sup> and third, it rejected the district court's conclusion that Hoke had made the showing of "actual innocence,"<sup>278</sup> which would have permitted relief even in the presence of a default.<sup>279</sup>

The panel held that the testimony of Sallis was not necessarily false,<sup>280</sup> because he testified only to an alleged confession that Hoke might actually have given.<sup>281</sup> Even if this were correct, it would not matter: A prosecutor's use of Sallis's testimony to establish the truth of its content—that is, that Hoke had had prior drug dealings with Stell and had killed her when she had "ripped him off"<sup>282</sup>—knowing the content to be false, would also violate due process.<sup>283</sup> There was both direct testimony and overwhelming circumstantial evidence establishing that Hoke had never known or dealt drugs with Stell,<sup>284</sup> and thus that the content of the statement reported by Sallis was false, whether or not Sallis actually heard the statement.

Relatedly, the district court found that Sallis had committed perjury concerning his criminal record,<sup>285</sup> a finding that both established an independent constitutional violation and rendered it extremely likely that Sallis was also lying about having heard Hoke make statements containing highly damaging and untrue assertions. The Fourth Circuit majority, however, rejected the district court's finding that Sallis committed perjury concerning his criminal record, substituting its own reassuring inference that any omissions were attributable to confusion.<sup>286</sup> The panel excused his misstatements by focusing on the omission of his two Petersburg convictions rather than his *seven* recent felony convictions in Colonial Heights.<sup>287</sup> It ignored his response to a direct inquiry into any misdemeanor convictions—that he had "[n]othing but a car offense, driving license, something like that,"<sup>288</sup> whereas he had, *inter alia*, *seven recent* petty larceny convictions, as well as a conviction for obstruction of justice.<sup>289</sup> Sallis could hardly have forgotten his *fourteen* felony and misdemeanor convictions,<sup>290</sup> because his sentence was predicated on his continuing cooperation as a wit-

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<sup>277</sup> See *id.* at 1359.

<sup>278</sup> The dissent questioned the default finding, but agreed with the district court that, in any event, Hoke had satisfied the actual innocence exception. *Id.* at 1370 (Hall, J., dissenting).

<sup>279</sup> *Id.* at 1362.

<sup>280</sup> See *id.* at 1359 (majority opinion).

<sup>281</sup> See *id.* at 1362 n.11.

<sup>282</sup> *Id.* at 1359.

<sup>283</sup> *Id.* at 1355.

<sup>284</sup> Hoke Brief, *supra* note 247, at 14–15.

<sup>285</sup> *Id.* at 15.

<sup>286</sup> See *Hoke*, 92 F.3d at 1361.

<sup>287</sup> Hoke Brief, *supra* note 247, at 15.

<sup>288</sup> *Hoke*, 92 F.3d at 1361.

<sup>289</sup> Hoke Brief, *supra* note 247, at 15–16.

<sup>290</sup> *Id.* at 16.

ness against Hoke.<sup>291</sup> Plainly, the district court was not unreasonable to conclude, as a *factual* matter, that Sallis's omissions were not inadvertent.<sup>292</sup> Moreover, the circuit court gave no reason for displacing the credibility determination of the district court, as one might expect, given that the district court, unlike the panel, had had the opportunity to hear the testimony of both Sallis and the prosecutor and to make credibility determinations.<sup>293</sup>

There was also false testimony from Sallis that there was no "deal."<sup>294</sup> In fact, however, as a result of the Commonwealth's motion based on the "interests of justice," Sallis was suddenly released on a *personal recognizance bond*, while facing sentencing on one felony and a "show cause order" on another, after wholesale violations of his probation conditions and his arrest for a failure to appear.<sup>295</sup> He had substantial prison time suspended on the specific condition that he cooperate with the police, including on the Hoke case, and the Petersburg prosecutor promised he would help him for that cooperation.<sup>296</sup>

Next, the circuit court panel held that this portion of Hoke's misconduct claim was defaulted because the falsity of Sallis's testimony was apparent at trial, but not raised then.<sup>297</sup> I do not tarry here long except to note that this too seems forced. As the dissent pointed out after expressing doubts that any default occurred:

Hoke knew that Sallis' testimony was false, but, until the disclosure of the police file, he didn't know that [the prosecutor] knew it was false. The prosecutor is not a guarantor of his witnesses' credibility; he must merely refrain from presenting evidence that he knows or believes to be false. Moreover, some of the falsity of Sallis' testimony—most notably his denial that he had any deals with [the prosecutor] and the extreme understatement of his criminal history—was by no means apparent at trial.<sup>298</sup>

Finally, the panel majority concluded that Hoke could not meet the actual-innocence standard that would permit consideration of his claim on the merits.<sup>299</sup> The panel reasoned that "even absent Sallis' testimony, it simply cannot be said that Hoke has established by clear and convincing evidence that no reasonable juror would have convicted him" of murder during the commission of a robbery or abduc-

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291 *Id.*

292 *See id.*

293 *Id.* at 18 n.14.

294 *Id.* at 17.

295 *Id.* Hoke's expert testified that he has often seen such circumstances and it means there is a deal for the snitch's testimony. *Id.* at 17 n.13.

296 *Id.* at 17.

297 *See Hoke v. Netherland*, 92 F.3d 1350, 1358–59 & n.7 (4th Cir. 1996).

298 *Id.* at 1370 (Hall, J., dissenting).

299 *See id.* at 1365 (majority opinion).

tion for pecuniary gain.<sup>300</sup> The majority expends several pages describing the evidence that Hoke stole property and noting that whether the robbery occurred before or after the killing is irrelevant.<sup>301</sup> All this is true but beside the point.

The question is this: What was the evidence that Hoke planned to rob Stell before he killed her?<sup>302</sup> Here, the majority omits two very probative facts: First, Sallis's testimony was the only evidence of the requisite intent to rob that either the Commonwealth or the Virginia Supreme Court could or did cite as evidence of the requisite prior intent.<sup>303</sup> Second, the trial judge almost dismissed the robbery predicate as unsupported by the evidence *even with Sallis's testimony*.<sup>304</sup> Thus, as dissenting Judge Hall concluded, a complete review and rendition of the facts would have led to the conclusions that "there is much more than a reasonable likelihood; it is all but certain that the error affected the verdict as to the robbery and abduction predicates for capital murder."<sup>305</sup>

#### b. Johnson v. Moore

I suppose that there may be some readers whose response to the factual misrepresentations in *Hoke* is that they were not "unconscionable," because Hoke was, after all, guilty, though perhaps not guilty of an offense punishable by death. The gap between such a reader and me is really a gulf, but in an attempt to bridge it, I offer the story of Richard Johnson.<sup>306</sup>

When the Fourth Circuit panel majority first reviewed Johnson's case, it found all guilt-phase claims procedurally barred based on its ruling that, under South Carolina law, an "admission" made by the defendant in the course of a penalty-phase allocution to the jury acts as a forfeiture of all challenges to the conviction.<sup>307</sup> In the alternative,

<sup>300</sup> *Id.* at 1364.

<sup>301</sup> *See id.* at 1363.

<sup>302</sup> The Commonwealth was required to prove that "robbery was the  *motive*  for the killing." *Whitley v. Commonwealth*, 286 S.E.2d 162, 166-67 (Va. 1982) (emphasis added); *see also Bunch v. Commonwealth*, 304 S.E.2d 271, 280-81 (Va. 1983) (same).

<sup>303</sup> *Hoke* Brief, *supra* note 247, at 19 (citing *Hoke v. Commonwealth*, 377 S.E.2d 595, 600 (Va. 1989)).

<sup>304</sup> *Id.* at 19-20.

<sup>305</sup> *Hoke*, 92 F.3d at 1370 (Hall, J., dissenting).

<sup>306</sup> *See Johnson v. Moore*, 164 F.3d 624, Nos. 97-33, 97-7801, 1998 WL 708691 (4th Cir. Sept. 24, 1998) (unpublished table decision).

<sup>307</sup> *See id.* at \*4. In a vehement dissent, Judge Samuel James Ervin III deemed the majority's procedural-default finding "unconscionable" and argued that it "violates the most basic notion of fairness that our Constitution provides." *See id.* at \*24 (Ervin, J., concurring in part and dissenting in part). He was further outraged because Johnson stood convicted of murder and was sentenced to die based on the testimony of two people, the first of whom has since recanted her testimony and the second of whom has now been identified as the murderer by the first. *Id.* It is even more disturbing that the State may

the panel addressed the merits of only one claim, the recantation by one of Johnson's co-indictees, Connie Sue Hess, finding that the recantation was not materially exculpatory.<sup>308</sup>

Many of the facts were undisputed. Daniel Swansen and Richard Johnson left North Carolina in Swansen's recreational vehicle on September 25, 1985.<sup>309</sup> They intended to drive to Florida.<sup>310</sup> However, the pair made it only to the southern part of North Carolina by late the next afternoon.<sup>311</sup> Johnson drank heavily and used drugs throughout the trip.<sup>312</sup> While stopped at a rest area, Swansen picked up two destitute hitchhikers: Connie Sue Hess and Curtis Harbert.<sup>313</sup> Several hours after Swansen and Johnson picked up Hess and Harbert, Swansen was shot and killed.<sup>314</sup>

Johnson, Hess, and Harbert then continued south on I-95.<sup>315</sup> Because Johnson was drinking heavily, he drove erratically.<sup>316</sup> Hess "flashed" passing traffic, raising her shirt to expose her breasts.<sup>317</sup> This activity was reported to South Carolina Trooper Bruce K. Smalls, who pulled over the vehicle.<sup>318</sup> Trooper Smalls was shot and killed.<sup>319</sup>

What was disputed was who shot Swansen and who shot Trooper Smalls. Hess and Harbert gave statements to law enforcement blaming Johnson for the shooting.<sup>320</sup> Their statements were inconsistent in several significant respects.<sup>321</sup> In one statement, for example, Hess indicated that Harbert was the trigger person.<sup>322</sup>

The prosecution agreed not to prosecute Harbert if he testified for the State, a fact that the jury did not know.<sup>323</sup> Harbert's testimony was essential to any hope the prosecution had of securing a conviction—much less a death sentence—because the physical and circumstantial evidence did not show that Johnson was the triggerman; indeed, the physical and circumstantial evidence suggested that Har-

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have had knowledge of the first witness's recantation, but concealed that information from the defense during Johnson's trial. *Id.*

<sup>308</sup> See *id.* at \*9 (majority opinion).

<sup>309</sup> *Id.* at \*1.

<sup>310</sup> *Id.*

<sup>311</sup> *Id.*

<sup>312</sup> *Id.*

<sup>313</sup> *Id.*

<sup>314</sup> Brief of Appellant at 10–11, *Johnson*, Nos. 97-33, 97-7801, 1998 WL 708691 [hereinafter *Johnson Brief*] (on file with the author).

<sup>315</sup> *Id.* at 11.

<sup>316</sup> *Id.*

<sup>317</sup> *Id.*

<sup>318</sup> *Id.*

<sup>319</sup> *Id.*

<sup>320</sup> *Id.*

<sup>321</sup> *Id.*

<sup>322</sup> *Id.*

<sup>323</sup> *Id.* at 12.



bert was.<sup>324</sup> The defense called Hess because of her inconsistent statements.<sup>325</sup> Hess, however, maintained at trial that Johnson, not her boyfriend Harbert, was the triggerman in both crimes.<sup>326</sup> Three days after Johnson's first trial, the state dropped all charges against Harbert and Hess.<sup>327</sup>

A little more than a year later, after Hess had returned to Nebraska, she called her Clarendon County lawyer, Marion Riggs, and told him that she wanted to "correct the mistakes."<sup>328</sup> She informed him that her testimony at trial was not true, because Harbert, not Johnson, was the triggerman in both killings, and she asked Riggs to make this information known to the Sheriff.<sup>329</sup> Riggs dutifully mailed a letter to the Sheriff of Clarendon County, Horace Swilley, apprising the sheriff of Hess's recantation,<sup>330</sup> stating that "she would be willing to participate fully to that extent."<sup>331</sup> Sheriff Swilley testified that, to the best of his recollection, he passed the letter on "to proper channels," to the chief South Carolina Law Enforcement Division (SLED) agent involved in the case, Sonny Riley, "or whoever was in charge of the case or the Solicitor."<sup>332</sup> However, neither the letter nor its contents were ever made known to defense counsel in either Clarendon or Jasper County.<sup>333</sup> The failure to provide the information to Johnson and Brown is especially significant because Hess's recantation occurred *prior to Johnson's second trial*, which commenced on March 6,

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<sup>324</sup> See *id.* For example, Johnson had been with Swansen for approximately twenty-four hours, completely without incident, prior to picking up the hitchhikers Harbert and Hess, but within a few hours of Harbert's arrival, Swansen was killed. *Id.* In addition, after the arrest, swabs were taken of Johnson's hands for gunpowder residue. *Id.* The test was negative, even though, as South Carolina Law Enforcement Division (SLED) agent Joe Powell admitted, the samples were taken from Johnson well within the time frame in which gunpowder residue should have been present on Johnson's hands *if* he had fired a gun. *Id.* Harbert, for reasons unapparent from the record, was not tested until approximately three hours after Johnson's samples were taken. *Id.* While Harbert's test was also negative, agent Powell admitted that this result was expected due to the amount of time that elapsed before Harbert's test was conducted. *Id.* He referred to Harbert's test as a "shot in the dark." *Id.* It is also undisputed that Johnson was severely intoxicated, with a blood alcohol level in excess of .20, at the time of Trooper Smalls's homicide. *Id.* Harbert, on the other hand, by his own admission, was not intoxicated. *Id.* Both Harbert and Johnson were in possession of jewelry that belonged to Swansen, so this fact did not distinguish them. *Id.* The authorities in West Virginia, however, wanted Harbert, thus giving him an additional reason to resist arrest by Trooper Smalls. *Id.* Finally, the physical evidence indicated that someone had had anal intercourse with Swansen, and Hess's statements reveal that it was Harbert. *Id.* at 13 n.10.

<sup>325</sup> *Id.* at 13.

<sup>326</sup> *Id.*

<sup>327</sup> *Id.*

<sup>328</sup> *Id.* at 14.

<sup>329</sup> *Id.*

<sup>330</sup> *Id.*

<sup>331</sup> *Id.* at 13.

<sup>332</sup> *Id.* at 14-15.

<sup>333</sup> *Id.* at 15.

1988.<sup>334</sup> In fact, at trial, one of the prosecutors informed the court and defense counsel that his inquiries revealed that Hess was in an institution in Nebraska and suggested that her testimony from the previous trial be used in lieu of bringing her back to South Carolina.<sup>335</sup> Defense counsel, without the knowledge of Hess's recantation,<sup>336</sup> agreed to this procedure,<sup>337</sup> and Johnson's second jury convicted Johnson and sentenced him to death.<sup>338</sup>

i. *Fact and Fiction Concerning the Merits of the Recantation Claim*

The Fourth Circuit panel majority concluded that a jury would not have found "Hess' position that Johnson was not responsible for the Swansen murder . . . to be exculpatory with respect to Trooper Smalls' murder, especially in view of the fact that the jury was aware that Hess had changed her story on several previous occasions."<sup>339</sup> By narrowly limiting its scrutiny to the bare contents of the letter, the panel overlooked Marion Riggs's testimony that Hess told him that Harbert was responsible for both killings.<sup>340</sup>

Judge Ervin found this reasoning faulty for two reasons. First, the capital prosecution was premised on a theory that Johnson murdered Trooper Smalls to prevent the officer from discovering that he had previously murdered Swansen.<sup>341</sup> By itself, evidence that Johnson had not committed the Swansen murder would have attacked the heart of the prosecution's theory.<sup>342</sup>

Second, had counsel for Johnson been given Riggs's letter, they certainly would have contacted Hess in Nebraska prior to the second Jasper County trial. Once in contact with Hess, they would have

<sup>334</sup> *Id.*

<sup>335</sup> *Id.*

<sup>336</sup> *Id.* During the state postconviction proceedings, Johnson's Jasper County trial counsel, Gary Brown, testified, "I have never seen this [Hess's recantation] until right now. And it is a hell of a shock." *Id.* Mr. Brown also confirmed that the State had not disclosed the letter prior to the second trial and emphasized that if he known about the letter, he would have made sure that Hess returned to South Carolina to testify again. *Id.* Johnson's second lawyer, Tom Johnson, also confirmed that the State had not provided that document prior to the retrial. *Id.* at 16. Tom Johnson also stressed the materiality of the recantation because the strategy at the guilt phase was to argue that Harbert was the killer: "It was all the case he had. I mean when you boil everything down to it, this WAS our defense." *Id.*

<sup>337</sup> *Id.* at 15.

<sup>338</sup> *Id.*

<sup>339</sup> *Johnson v. Moore*, 164 F.3d 624, Nos. 97-33, 97-7801, 1998 WL 708691, at \*11 (4th Cir. Sept. 24, 1998) (unpublished table decision).

<sup>340</sup> See *Johnson Brief*, *supra* note 314, at 14.

<sup>341</sup> *Johnson*, 1998 WL 708691, at \*23 (Ervin, J., concurring in part and dissenting in part).

<sup>342</sup> *Id.*; see also *State v. Johnson*, 410 S.E.2d 547, 551 (S.C. 1991) (noting that the State's theory was that the trooper was murdered to avoid detection for the murder of Swansen).

learned that she was willing to testify that Harbert shot both Swansen and Trooper Smalls.<sup>343</sup> Furthermore, as Judge Ervin explained, Hess's recantation would have been especially material given that what physical evidence there was pointed to Harbert and exonerated Johnson.<sup>344</sup>

With respect to the supposed unreliability of Hess's recantation, the panel majority stated that Hess "had changed her story on several previous occasions."<sup>345</sup> This statement was both misleading and literally false. In fact, in just one of her three statements to the police did Hess identify Harbert as the shooter. More importantly, as explained in Judge Ervin's dissenting opinion, Hess's 1987 recantation, unlike her 1985 statements to law enforcement officials, was made under circumstances supporting its reliability.<sup>346</sup> Hess was back in Nebraska at the time she made the statement and thus was no longer incarcerated in the same facility with Curtis Harbert.<sup>347</sup> Nor were there any charges pending against her that could have been used to shape testimony favorable to the prosecution.<sup>348</sup> Furthermore, her telephone call to Riggs was unsolicited.<sup>349</sup> Hess made the effort to contact Riggs to prevent an injustice.<sup>350</sup> She had nothing to gain by coming forward, and, in fact, placed herself in legal jeopardy in the form of a potential perjury charge.<sup>351</sup> In sum, Hess's 1987 statement was supported by multiple indicia of reliability; it therefore was not merely cumulative to her later-repudiated pretrial statement indicating that Harbert was the killer.<sup>352</sup>

## ii. *Fact and Fiction Concerning Procedural Default*

The panel majority ruled that the *Brady* claim based on the prosecution's failure to disclose Hess's recantation, along with all other guilt-phase claims—including the *Brady* claim based on the State's undisclosed deals with Harbert and Hess for their testimony—were pro-

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<sup>343</sup> *Johnson*, 1998 WL 708691, at \*23 (Ervin, J., concurring in part and dissenting in part); see also *Johnson* Brief, *supra* note 314, at 15–16 (discussing the testimony of trial lawyers maintaining that they would have done everything in their power to bring Hess back to South Carolina had they known of the recantation because that would have been the core of the defense).

<sup>344</sup> *Johnson*, 1998 WL 708691, at \*23 (Ervin, J., concurring in part and dissenting in part); see also *Kyles v. Whitley*, 514 U.S. 419, 421 (1995) ("[I]t is significant that the physical evidence remaining unscathed would . . . hardly have amounted to overwhelming proof that [the defendant] was the murderer.").

<sup>345</sup> *Johnson*, 1998 WL 708691, at \*11.

<sup>346</sup> See *Johnson* Brief, *supra* note 314, at 18.

<sup>347</sup> *Id.*

<sup>348</sup> *Id.*

<sup>349</sup> *Id.*

<sup>350</sup> *Id.*

<sup>351</sup> *Id.*

<sup>352</sup> See *id.*

cedurally barred under South Carolina law because of Johnson's "admission of guilt."<sup>353</sup> There were two problems with this assertion: First, Johnson did not admit his guilt; and second, an admission of guilt would not bar all guilt-phase claims under South Carolina law.

At the penalty phase of his trial, Johnson had an opportunity to make a statement to the jury. He said:

"I haven't been before you during the guilt phase of this trial or until now because there was no defense for my actions, I realize that now . . . I have no defense for anything or the tragedies that have occurred. All I have is a sorrow [for] the lives that I have ruined. I realize that there were many that I have ruined."<sup>354</sup>

Thus, Johnson's statement was not an assertion that he had committed the crime with which he was charged, but rather, as explained by trial counsel, a reference to the fact that Johnson had no actual memory of what happened and thus could not have assisted trial counsel in showing that Harbert was the actual shooter.<sup>355</sup> Moreover, Johnson's high level of intoxication<sup>356</sup> and his post-arrest behavior, which evidenced no consciousness of guilt or attempt to flee, but only stupor, made this absence of memory credible.<sup>357</sup> Finally, Johnson made the statement after the court had convicted him of capital murder when he was pleading for his life in the unsworn statement permitted by South Carolina law during the penalty phase. Under all of these circumstances, an inference that Johnson was confessing his guilt to the actual shooting—and knowingly waiving all his guilt-phase claims—seems farfetched.

It would be a strange state where apologizing for one's role in a tragedy is tantamount to admitting full responsibility for that tragedy, and it turns out that South Carolina is not nearly so strange. As appalling as it was to distort Johnson's expression of remorse for whatever role he had in the murders into an unqualified admission of guilt to capital murder, distorting South Carolina law to include a rule that an

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<sup>353</sup> Johnson v. Moore, 164 F.3d 624, Nos. 97-33, 97-7801, 1998 WL 708691, at \*3 (4th Cir. Sept. 24, 1998) (unpublished table decision).

<sup>354</sup> *Id.* (alterations in original).

<sup>355</sup> See Johnson Brief, *supra* note 314, at 75.

<sup>356</sup> It is undisputed that Johnson was severely intoxicated, with a blood alcohol level in excess of .20, at the time of Smalls's homicide. *Id.* at 12 n.10. The evidence of alcohol use in the RV included empty cases of beer, empty bottles of wine, and large empty bottles of liquor. *Id.* at 18 n.67. Some green pills were also found. *Id.* George Tanzel, who was working for the SLED at the time of the investigation, testified that Johnson's fingerprints were found on wine bottles, a Boles liquor bottle, an Arbor House liquor bottle, and cans of beer. *Id.*

<sup>357</sup> One witness described Johnson as "out of it," which had also been obvious to Trooper Smalls, who announced that the RV was being impounded for being operated by a driver who was under the influence. *Id.* at 81 n.67. When the arresting officers stopped on the highway to question Johnson, he did not try to flee but just stood there with a "glazed look in his eye." *Id.* at 81 n.67.

admission of guilt at sentencing waives all guilt-phase claims was even more inexcusable. As Judge Ervin railed in his dissent, the majority's strained reading of South Carolina's procedural-default law was an interpretation clearly designed to create an adequate and independent state ground for denying relief out of a rule that the South Carolina Supreme Court had never applied in a capital case.<sup>358</sup> It was especially bizarre to read South Carolina law to find waiver of all of Johnson's guilt-phase claims *when the state supreme court had reviewed Johnson's guilt-phase claims on the merits during the appeal of his first conviction, despite a similar statement to the jury during the penalty phase of that trial.*<sup>359</sup> The ins and outs of South Carolina law are not worth pursuing here,<sup>360</sup> but even if we grant honest-but-inept confusion between waiver and harmless error doctrine, what happened next was indefensible.

Because the majority's procedural-default holding was so clearly out of step with South Carolina procedural rules, Johnson subsequently filed a habeas corpus petition in the original jurisdiction of

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<sup>358</sup> See *Johnson*, 1998 WL 708691, at \*23 (Ervin, J., concurring in part and dissenting in part). As I have argued, I do not believe there is any such thing as an "admission of guilt" procedural rule in South Carolina. Even if there is such a rule, the South Carolina courts' interpretation of that rule demonstrates that it has not been, and cannot be, consistently applied. The Fourth Circuit majority attempts to save this so-called rule by whittling away those decisions which render its invocation inconsistent, leaving us with a rule of procedure that has been applied by South Carolina courts in only three reported cases. See *id.* at \*3 (majority opinion). As dissenting Judge Ervin argued, however:

[A] state may not insulate important constitutional claims from federal review by categorizing harmless error review as a rule of procedure, then making application of the "rule" contingent upon both the substance of the closing argument at the sentencing phase of trial and a case-by-case determination of the prejudice that resulted from the constitutional error alleged by the defendant. If South Carolina's so-called procedural rule exists, it has not been consistently applied, and therefore it is not an adequate and independent state law holding to which we as a federal court must defer.

*Id.* at \*21 (Ervin, J., concurring in part and dissenting in part).

<sup>359</sup> Johnson Brief, *supra* note 314, at 76. Because the state supreme court reversed his first conviction despite a similar closing statement, Johnson's statement at his second trial cannot operate as a procedural bar. Similarly, in *State v. Matthews*, 373 S.E.2d 587 (S.C. 1988), the state court addressed the merits of the defendant's guilt-phase claims even though he had submitted an affidavit admitting his guilt. Also, in *State v. Hyman*, 281 S.E.2d 209 (S.C. 1981), the defendant had expressed remorse during the penalty phase of his trial. Despite Hyman's expression of remorse, that is, his "admission," the court reversed his conviction due to a defective instruction on implied malice. See *Hyman v. Aiken*, 824 F.2d 1405 (4th Cir. 1987). Thus, even if this can be construed as a "procedural" ruling, it was obviously not consistently applied, as is required of any independent state ground. *James v. Kentucky*, 466 U.S. 341, 348-49 (1984).

<sup>360</sup> This alleged "admission" stands in contrast to the state cases relied upon by the lower court in which the defendant explicitly acknowledged guilt by describing his actions, see *State v. Sroka*, 230 S.E.2d 816 (S.C. 1976), or in which the defendant conceded that even if his guilty plea were vacated he would again plead guilty. See *Whetsell v. State*, 277 S.E.2d 891 (S.C. 1981). These cases are more easily understood as harmless-error cases, which is how the state supreme court ultimately interpreted them.

the South Carolina Supreme Court asking it to address the forfeiture upon which the panel majority relied.<sup>361</sup> The state supreme court took the extraordinary step of granting oral argument and addressing that question. In its opinion, the state court left no doubt that the panel majority had grievously erred in its interpretation of state law and that the default rule used to deny all guilt-phase challenges was in fact nonexistent under state law.<sup>362</sup> Given the state court's complete rejection of the premise underlying the panel opinion and the fact that the panel did not provide any analysis of the other substantial challenges to the conviction, Johnson moved to recall the mandate to avoid a miscarriage of justice.<sup>363</sup>

However, instead of acknowledging its pervasive mistake in the handling of Johnson's first and only federal habeas petition, a Fourth Circuit quorum rebuffed Johnson's motion to recall its undeniably tainted mandate. The quorum instead mischaracterized Johnson's motion as "the functional equivalent of a second or successive habeas application," and expressly stated that the quorum was denying the motion "on the basis that Johnson seeks to relitigate claims previously presented to the federal courts."<sup>364</sup> Of course, most of Johnson's claims had not been litigated at all; they had been deemed defaulted. Least honest, however, was the court's rationale that a mandate could not be recalled for what it characterized as a "change" in state procedural rules. That may sound reasonable, except for the fact that nowhere in the South Carolina state court's opinion was there a reference to changing its laws. Rather, it simply confirmed what has always been true—that the purported default rule relied upon by the panel majority to avoid confronting the unreliability of Johnson's capital conviction and sentence of death never existed.

Johnson then petitioned for rehearing, or in the alternative, rehearing en banc.<sup>365</sup> Unfortunately for Johnson, and all subsequent capital habeas petitioners in the Fourth Circuit, the only judge then a member of that court whose attention could be captured and whose

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<sup>361</sup> See *Johnson v. Catoe*, 520 S.E.2d 617 (S.C. 1999).

<sup>362</sup> *Johnson*, 520 S.E.2d at 357–59.

<sup>363</sup> *Johnson v. Moore*, Nos. 97-33, 97-7801, at 2 (4th Cir. Sept. 21, 1999) (order denying motion to recall mandate) (on file with author).

<sup>364</sup> *Id.* at 4.

<sup>365</sup> Petition for Rehearing Pursuant to FRAP 40, or in the Alternative, Suggestion for Rehearing *En Banc* Pursuant to FRAP 35, *Johnson v. Moore*, Nos. 97-33, 97-7801 (4th Cir. Oct. 1999) (on file with author). In my judgment, the reader who is not outraged by now is either not paying attention, or is fundamentally impaired in his or her capacity for outrage.

capacity for outrage was relatively intact<sup>366</sup> had died.<sup>367</sup> The court denied Johnson's petition without an opinion,<sup>368</sup> and the state of South Carolina subsequently executed Johnson.<sup>369</sup>

I would not want the reader to assume that these six examples of claims disposed of by factual misrepresentation are the iceberg; I am convinced they are the tip. I believe this in part because of how difficult such omissions, fibs, and lies are to discover. In five of the six cases discussed above, it was only through personal involvement in the case that I became aware of the disingenuity of the Fourth Circuit court's opinion.<sup>370</sup> When I mentioned that I was writing this Article, the record in *Hoke* came to my attention. In addition to these cases, I am aware of two juror misconduct cases in which the Fourth Circuit opinions significantly misrepresent the facts.<sup>371</sup>

## B. Outlier Rates of Relief

Even if the foregoing examples have led readers, as they have led me, to conclude that the Fourth Circuit's factual statements are not to be trusted, some readers may wonder whether these examples are isolated aberrations, or, with another kind of skepticism entirely, to doubt whether they are unique to the Fourth Circuit. In my view, the

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<sup>366</sup> See John H. Blume, *Twenty-Five Years Of Death: A Report of the Cornell Death Penalty Project on the "Modern" Era of Capital Punishment in South Carolina*, 54 S.C. L. REV. 285, 370 app. G (2002). It may be that the Fourth Circuit Court of Appeals impairs the capacity for outrage of all who serve on it, if only by wearing them down. Thus, those otherwise sensitive to injustice may have believed that a vote for rehearing en banc or any other form of protest would have been futile.

<sup>367</sup> See, e.g., Ellen Robertson, *Judge Murnaghan of 4th Circuit Dies*, RICHMOND TIMES-DISPATCH, Sept. 2, 2000, at B6 ("Known for his questioning legal mind and viewed by some as a champion of constitutional rights, Judge Murnaghan produced opinions widely admired for style as well as legal content.").

<sup>368</sup> See Rick Brundrett & Cliff LeBlanc, *Lethal Injection Ends Life of Convicted Killer*, STATE (S.C.), May 4, 2002, at A1 ("[A] divided court [in 2001] said Johnson didn't deserve a new trial, ruling that Hess, who suffers from mental illness, wasn't a credible witness because she gave numerous conflicting statements.").

<sup>369</sup> See *id.* This is not a technical argument of possible innocence. *The State*, the most prominent South Carolina newspaper—and a very conservative one—urged the governor to grant clemency because of doubts about Johnson's guilt. Obviously, these are doubts a jury with the full facts—rather than a governor faced with pressure from the state troopers association—should have resolved. See Editorial, *Governor Should Commute Sentence of Richard Johnson*, STATE (S.C.), Apr. 30, 2002, at A6 ("We believe that Gov. Jim Hodges should commute Mr. Johnson's death sentence to life in prison not because we oppose the death penalty, but because we support the death penalty, when judiciously applied.").

<sup>370</sup> I argued *Howard* and *Drayton* in the Fourth Circuit, and my colleague and co-counsel John Blume argued *Johnson* and *Matthews*. We were both briefly involved in the post-conviction investigation of Bell's claims before the case reached the Fourth Circuit.

<sup>371</sup> See *Jones v. Cooper*, 311 F.3d 306 (4th Cir. 2002); *Fisher v. Lee*, 215 F.3d 438 (4th Cir. 2000). The rehearing petitions in these cases, which provide page citations to conflicts in the record, are on file with the author.

available data provides additional support for the theory that the Fourth Circuit—in particular—is “wishing petitioners to death.”

As my colleague John Blume has reported,<sup>372</sup> overall rates of habeas relief<sup>373</sup> in the Fourth Circuit are significantly lower than in any other circuit.<sup>374</sup> Fourth Circuit grants of relief in capital cases are even stingier. In the last twenty-two years,<sup>375</sup> the Fourth Circuit has entertained the habeas petitions of 229 death-row inmates.<sup>376</sup> Without direct interference from the Supreme Court,<sup>377</sup> the Fourth Circuit has ordered or affirmed the issuance of the writ only three times since 1983.<sup>378</sup> This is remarkably different from the national average of reversals in forty percent of habeas cases.<sup>379</sup>

Subdividing capital cases provides further support for my “wishing” hypothesis. The Fourth Circuit has never granted a death-row inmate relief from either a conviction or a sentence on a *Batson* or a *Brady* claim. Moreover, the Fourth Circuit has only twice granted relief on an ineffective assistance of counsel claim, once ten years ago,<sup>380</sup> and once nearly twenty.<sup>381</sup> Thus, in the most common and fact-intensive types of claims, the Fourth Circuit has always withheld relief. In contrast, all other circuits grant relief at least occasionally based on each of these claims. Given the demographics and history of states included within the Fourth Circuit,<sup>382</sup> as well as the predispositions of the state courts it reviews, it *defies belief* that in the past decade no meritorious claims have been raised on habeas corpus asserting

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<sup>372</sup> John H. Blume, *AEDPA: The “Hype” and the “Bite,”* 91 CORNELL L. REV. 259 (2006).

<sup>373</sup> Here, I combine capital and noncapital cases.

<sup>374</sup> Blume, *supra* note 372, at 282 n.16.

<sup>375</sup> The last twenty-two years represent the post-*Gregg* era. See *Gregg v. Georgia*, 428 U.S. 153 (1976).

<sup>376</sup> Data compiled by the author from Westlaw searches for Fourth Circuit habeas cases from 1983 to 2005.

<sup>377</sup> I exclude cases in which the Fourth Circuit denied relief and the Supreme Court reversed those decisions, such as *Williams v. Taylor*, 529 U.S. 362 (2000), and *Wiggins v. Smith*, 539 U.S. 510 (2003). I also exclude *Williams v. Taylor*, 529 U.S. 420 (2000), in which the Fourth Circuit denied relief, the Supreme Court reversed and remanded for an evidentiary hearing, and the Fourth Circuit ultimately affirmed the district court’s issuance of the writ. Finally, I exclude *Hyman v. Aiken*, 777 F.2d 938 (4th Cir. 1985), which the Supreme Court also remanded.

<sup>378</sup> See *Allen v. Lee*, 366 F.3d 319 (4th Cir. 2004) (en banc); *Thomas-Bey v. Nuth*, 67 F.3d 296, Nos. 95-4000, 95-4001, 1995 WL 561296 (4th Cir. Sept. 22, 1995) (unpublished table decision); *Clark v. Townley*, 791 F.2d 925, No. 85-6601 (4th Cir. June 5, 1986) (unpublished table decision).

<sup>379</sup> JAMES S. LIEBMAN ET AL., *A BROKEN SYSTEM, PART II*, at 9 (2002), available at <http://ccjr.policy.net/proactive/newsroom/release.vtml?pid=26641>.

<sup>380</sup> See *Thomas-Bey*, 1995 WL 561296.

<sup>381</sup> See *Clark*, 791 F.2d 925.

<sup>382</sup> The Fourth Circuit encompasses four death penalty states, Maryland, Virginia, South Carolina, and North Carolina, as well as West Virginia, which does not have the death penalty.



ineffective assistance of counsel, racial discrimination, or suppression of evidence.

It is also instructive to look at the rare capital case in which the Fourth Circuit has issued a writ of habeas corpus. *Allen v. Lee*<sup>383</sup> involved an issue squarely decided by *McKoy v. North Carolina*,<sup>384</sup> which held that an instruction to a capital jury violates the Constitution if it prevents the jury from considering mitigating factors that the jury did not find unanimously.<sup>385</sup> In such a case, factual distortions could not provide the basis for denying a writ of habeas corpus: either there was such an instruction, or there was not. The other two cases—the only other cases—in which the Fourth Circuit independently granted relief are both ineffective assistance of counsel cases. The first, *Clark v. Townley*,<sup>386</sup> from nineteen years ago, is unremarkable save for the panel that decided it, which contained two of the most defendant-friendly judges of the Fourth Circuit—Samuel James Ervin III and Francis Dominic Murnaghan, Jr.—and for the fact that the opinion is unpublished. The second, *Thomas-Bey v. Nuth*,<sup>387</sup> was also an extraordinary panel, one that contained Judges John D. Butzner, Jr. and Francis Dominic Murnaghan, Jr., and it, too, is unpublished. Moreover, *Thomas-Bey*, like *Allen v. Lee*, involves a very clear violation.

The prognosis for future capital defendants in the Fourth Circuit is bleaker still. By far the most pro-defendant Fourth Circuit judge of the modern era, Francis Murnaghan,<sup>388</sup> is dead, while two of the most anti-defendant judges, J. Michael Luttig<sup>389</sup> and Karen Williams<sup>390</sup> are the most influential.<sup>391</sup> I do not want to diminish the importance of

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<sup>383</sup> 366 F.3d 319 (2004).

<sup>384</sup> 494 U.S. 433 (1990).

<sup>385</sup> *See id.* at 444.

<sup>386</sup> 791 F.2d 925.

<sup>387</sup> 67 F.3d 296, Nos. 95-4000, 95-4001, 1995 WL 561296 (4th Cir. Sept. 22, 1995) (unpublished table decision).

<sup>388</sup> Judge Murnaghan voted for capital defendants in slightly more than half of the cases on which he sat: eleven out of twenty-one. *See* Blume, *supra* note 366, at app. G. His closest competitor, Judge Butzner, who voted for a capital habeas petitioner in nine out of twenty-three cases, is retired.

<sup>389</sup> Judge Luttig has voted in favor of the defendant in only two of the fifty-one death row inmate cases on which he has sat. Notably, neither of those cases involved granting a writ of habeas corpus; each was limited to the question of whether an issue should be remanded for an evidentiary hearing. *See id.* It is probably no coincidence that Judge Murnaghan sat on two of the cases discussed above, *Howard* and *Drayton*, and dissented in both, whereas Judge Luttig, who also sat on two, wrote the majority opinion in *Hoke* and joined the majority in *Howard*.

<sup>390</sup> Judge Williams's record is similar: She voted for the defendant only once in forty-six cases. *See id.*

<sup>391</sup> In the last year Judges Luttig and Williams were both named as serious candidates for replacing Justices Rehnquist and O'Connor, respectively. *See, e.g.,* Liz Halloran, *One Down and One to Go*, U.S. NEWS & WORLD REP., Nov. 7, 2005, at 45; Todd S. Purdum, *Strong Ties Bind Players in Battle for Seat on Court*, N.Y. TIMES, July 18, 2005, at A1; Jess Bravin, *High-Court Contenders Trade Barbs*, WALL ST. J., June 27, 2005, at A4; Tony Mauro, *Will Friends in*

judges such as Diana Jane Gribbon Motz, M. Blane Michael, Roger L. Gregory, Robert Bruce King, or Allyson Kay Duncan. Their voting records are not different from those of moderates on other courts. However, as the outcome data make clear, while their votes matter in principle, they are overwhelmed in virtually every case.

## II

### EVADING SUPREME COURT REVIEW

If the reader is convinced that the Fourth Circuit regularly misrepresents the facts to dispose of meritorious claims by capital habeas petitioners, then I hope it will not be difficult to persuade the reader that this is an issue of national significance. Yet because these errors do not raise the sorts of issues that usually provide the basis for grants of certiorari, the decisions have consistently evaded review by the Supreme Court.

#### A. Supreme Court Certiorari Decisions Focus on Legal Error

The first reason that Fourth Circuit factual misrepresentations generally evade Supreme Court review is indisputable: the Supreme Court's criteria for granting certiorari all concern errors or conflicts in legal, rather than factual, rulings.<sup>392</sup> Indeed, it would be difficult to argue that the criteria should be otherwise, at least under ordinary circumstances. The Supreme Court's expertise is in law rather than determinations of fact. Furthermore, Supreme Court review is typically justified by the need to avoid the chaos that would be loosed were each circuit to fight over doctrinal issues without a referee; no such justification exists with respect to factual errors.

A second reason that factual misrepresentations help to evade Supreme Court review of renegade outcomes is the vast number of cases in which litigants seek Supreme Court review each year. During the 2003 Term, 7784 cases were docketed in the Supreme Court, of which the Court reviewed only eighty-seven, or 1.1%.<sup>393</sup> Given that the Supreme Court grants certiorari in such a small portion of petitioned cases, many of which raise issues that are likely to recur nationwide, a clerk would be hard-pressed to justify expending the precious commodity of review on a case whose only consequences are to the parties. Perhaps equally importantly, a clerk,<sup>394</sup> who must review a huge num-

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*High Places Lead to High Court Slot?: On Bush Short-List, Luttig Is Conservative, But Unconventional*, LEGAL TIMES, June 20, 2005.

<sup>392</sup> See SUP. CT. R. 10.

<sup>393</sup> *The Statistics*, 118 HARV. L. REV. 497, 505 (2004).

<sup>394</sup> See, e.g., Chester A. Newland, *Personal Assistants to the Supreme Court Justices: The Law Clerks*, 40 OR. L. REV. 299, 304 (1961); Barbara Palmer, *The "Bermuda Triangle?" The Cert Pool and Its Influence Over the Supreme Court's Agenda*, 18 CONST. COMM. 105, 106 n.4, 119 (2001). But see EDWARD LAZARUS, *CLOSED CHAMBERS: THE RISE, FALL, AND FUTURE OF THE*

ber of certiorari petitions, has limited time to spend on each one; yet, as the length of the foregoing case descriptions illustrates, more time and pages generally are needed to establish misrepresentation of facts than to establish conflicts in the law. Furthermore, even if the clerk does invest the time to read arguments over issues of fact, the clerk would need to consume additional time verifying the petition's factual assertions by comparing them with the record. This is no small task, as the clerk would have to recommend calling for the record, which ordinarily does not even enter the Supreme Court building until after certiorari is granted. One can hardly blame the harried clerk for passing over a petition that requires so much effort yet seems to hold so little promise of broad significance.

A third related reason that factual misrepresentations are likely to fly under the Supreme Court's radar stems from the inexperience—and perhaps even insecurity—of the clerks to whom the task of certiorari petition review is assigned. One can hardly blame such clerks for privileging the factual renditions of a circuit court of appeals over that of an advocate for one of the parties. In addition, most clerks naturally hope that the Court will address issues of national and enduring significance during the Term they clerk, and factual misrepresentation cases do not fit that bill.

The final reason that factual misrepresentations are unlikely to generate Supreme Court review lies in the probable reaction of defense counsel to the above-described realities of certiorari decisions. In light of the criteria for grants of certiorari, counsel are likely to do their best to shape their petitions around legal issues. Counsel who are familiar with Supreme Court practice will understand that sheer outrage is not enough. To be sure, competent counsel may challenge factual determinations in their petitions for certiorari, but they will not focus on those factual determinations unless there are no significant legal issues.

One might argue that all I have established here is that there are reasons to expect that Supreme Court review will not curb factual misrepresentations, but not that it has failed to do so. In response, I point to two facts: First, the Supreme Court did not grant certiorari in any of the cases that I have described. Second, Drayton, Howard, Matthews, Hoke, and Johnson have all been executed; only Bell is left, and he is alive for reasons unrelated to the Fourth Circuit's disposi-

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MODERN SUPREME COURT 31 (1998) (reporting that Justice Brennan received little help from his law clerks in making certiorari evaluations). See generally Margaret Meriwether Cordray & Richard Cordray, *The Philosophy of Certiorari: Jurisprudential Considerations in Supreme Court Case Selection*, 82 WASH. U. L.Q. 389 (2004).

tion of his original habeas petition.<sup>395</sup> Of course, deterrence can be accomplished with far less than one hundred percent enforcement. However, I am unaware of even one single instance in which the Supreme Court granted certiorari in a Fourth Circuit case because of misrepresentation of the facts. Unless there is some reason for Fourth Circuit judges to think that factual misrepresentations are likely to cause grants of certiorari, the prospect of review by the Supreme Court will not serve as a disincentive against the judges' distortions of fact.

#### B. Evasions of Review Facilitated by Factual Misrepresentations Matter

But if misrepresentations of fact evade Supreme Court review because they do not raise issues of national significance, then where is the harm? A majority of the Court has rejected the most obvious answer—that the avoidance of even a single wrongful execution has sufficient nationwide significance to compel certiorari.

Another response, however, is that Congress made clear its intent to make habeas review available in cases with egregious factual errors as well as those with egregious legal errors when it enacted the Anti-terrorism and Effective Death Penalty Act (AEDPA), which limits the availability of federal habeas corpus to a narrow range of cases.<sup>396</sup> While AEDPA amended 28 U.S.C. § 2254(d)(1) to extend the writ to defendants in egregious cases of legal error,<sup>397</sup> amended § 2254(d)(2) permits issuance of the writ if the state court's adjudication of the claim "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."<sup>398</sup> Given that habeas corpus is available to correct both obviously incorrect legal and factual determinations by the state courts, it is hard to see why we should be less concerned about obviously incorrect factual determinations by a federal court.

Additionally, as the landmark case *Cooper v. Aaron* made abundantly clear, the Supreme Court is concerned about defiance of its

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<sup>395</sup> Bell's first habeas petition did not include a mental retardation claim. *Bell v. Ozmint*, 332 F.3d 229 (4th Cir. 2003). After Bell filed his first habeas petition, but before Bell could be executed by the state of South Carolina, the U.S. Supreme Court held that mentally retarded persons cannot be executed. *Atkins v. Virginia*, 536 U.S. 304 (2002). Bell's *Atkins* claim is currently pending in the courts.

<sup>396</sup> See Pub. L. No. 104-132, sec. 104, 110 Stat. 1214, 1218 (1996) (amending 28 U.S.C. § 2254); see also Larry W. Yackle, *A Primer on the New Habeas Corpus Statute*, 44 BUFF. L. REV. 381, 398-401 (1996).

<sup>397</sup> Section 2254(d)(1) provides that a writ of habeas corpus may be granted in those cases in which the state court adjudication "resulted in a decision that was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States." 28 U.S.C. § 2254(d)(1) (2000).

<sup>398</sup> *Id.* § 2254(d)(2).

commands.<sup>399</sup> Defiance of the Court's authority has less chance of spreading when covert, but it is still defiance. Moreover, covert defiance in the form of factual misrepresentations by a federal circuit court shows disrespect not only for the authority of the Supreme Court, but also disregard of the circuit court's own responsibilities and disdain for the rule of law itself.

Finally, "wishing petitioners to death" has an insidious effect on state courts whose decisions the Fourth Circuit reviews. State courts that have previously reviewed a case will be familiar with its facts, will likely read subsequent federal opinions relating to the case, and will recognize falsehoods when they see them. Uncorrected factual misrepresentations suggest to the state courts whose decisions are reviewed that a court can violate federal law with impunity as long as it does so quietly.

### III

#### AVOIDING EVASION

Ashes, ashes  
They all fall down.

Is there a cure, short of drastic reforms that are unlikely to occur, such as changing who reviews certiorari petitions, changing the Supreme Court's docket, or changing the number of Justices who sit on the Court? Part I of this Article has been relatively lengthy and argumentative; Part II has been relatively straightforward; in this Part, I simply float some thoughts.

I had difficulty even coming out of the closet on this issue. Even after I had presented this Article at the *Cornell Law Review's* Symposium on habeas corpus, I still doubted whether I should publish it, because I worried that it might hurt my clients in the future. When I shared this concern with my colleague (and often co-counsel) John Blume, he laughed. How, he asked, could my chances of winning a case go below zero? When I have spoken to other Fourth Circuit capital defense attorneys, some have shared my initial hesitation. Even the stark numbers do not fully disabuse us of our sense that the next case will be different—that we will finally face a court that actually listens to the merits of the case.

Perhaps it would help if some amicus organization became interested in how the Fourth Circuit flouts the law by inventing facts. An amicus brief at certiorari from such an organization could help to overcome the barrier of Supreme Court clerks' focus on doctrinal issues.

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<sup>399</sup> See 358 U.S. 1, 23-25 (1958).

Perhaps more diversity on the Fourth Circuit would reduce the court's inveterate tendency to stick together. The Fourth Circuit prizes collegiality,<sup>400</sup> and breaking with a cohesive group is hard. But then I think of Judge Murnaghan—proof that the Fourth Circuit courthouse does not warp everyone who enters, even those who enter as members of the club.<sup>401</sup> Perhaps what is needed is simply integrity.

Finally, I imagine one remedy that would be worse than the disease: The Supreme Court could shift so far to the right that the Fourth Circuit would no longer need to conceal the substance of its decisions. I can only hope not.

#### CONCLUSION

If the head of a criminal organization wished aloud for the death of a witness in the presence of an underling, and the underling later shot the witness, would not the organization's head be guilty of murder? If a rejected suitor falsely told the husband of the object of his affections that she was "sleeping around," knowing the husband to turn violent when jealous, and the husband then stabbed the wife to death, would not the suitor have helped to wield the knife?

No, it is not the same, but the reason the Fourth Circuit's wishing is not "the same" is that no two homicides are the same. The primary lesson of post-*Gregg*<sup>402</sup> death penalty jurisprudence is that to pass constitutional muster, the imposition of the death penalty requires individualized, reliable determinations of death-worthiness. The Fourth Circuit's factual distortions in death penalty cases render evaluation of the legitimacy of such determinations impossible, and federal court review a sham.

"If wishes were horses, beggars would ride."<sup>403</sup> Beggars cannot ride their wishes, but courts of appeals can, and the horses ridden by the Fourth Circuit pull a hearse. For shame.

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<sup>400</sup> See, e.g., HARRISON L. WINTER, *GOODWILL AND DEDICATION IN THE FEDERAL APPELLATE JUDICIARY IN THE TWENTY-FIRST CENTURY* 168 (Cynthia Harrison & Russell R. Wheeler eds., 1989).

<sup>401</sup> See *supra* notes 366–67 and accompanying text.

<sup>402</sup> See *supra* note 375.

<sup>403</sup> French proverb.

