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STOUT v. NETHERLAND 1996 WL 496601 (4th Cir. 1996)1 United States Court of Appeals, Fourth Circuit

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1996 WL 496601 (4th Cir. 1996)[1]
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FACTS

In February 1987, Larry Allen Stout entered a dry-cleaning store, owned and operated by Jacqueline Kooshian. According to the Commonwealth's evidence, Stout told Kooshian he was there to pick up some clothing. Kooshian turned toward the racks of clothing when Stout approached her from behind and slashed her throat. Kooshian, who subsequently ran out of the store, died before reaching the hospital.[2]

Stout pleaded guilty to the capital murder of Kooshian and the robbery. The trial court accepted Stout's plea and proceeded directly to the sentencing phase. At this stage, the Commonwealth introduced evidence of three unadjudicated robberies and hearsay testimony about a previous murder. In mitigation, defense counsel called two witnesses: a chief correctional officer and Stout's former cellmate who testified that Stout was almost entirely illiterate. Several months later, the sentencing hearing reconvened and the court considered a presentence report. The report described Stout's childhood, portraying him as an uneducated mixed-blood migrant worker whose alcoholic parents subjected him to both physical and sexual abuse. Defense counsel elected not to introduce a psychological report that, in addition to detailing his background and abuse, diagnosed Stout as suffering from antisocial personality disorder. Instead, counsel introduced a letter from Stout's mother describing her son's hard life. At the conclusion of the sentencing phase, the trial court sentenced Stout to death for capital murder, finding both "future dangerousness" and that the murder was vile.[3]

After he was denied relief on direct appeal and in state habeas, Stout filed a federal habeas petition in 1991. He raised twelve claims concerning the voluntary nature of his guilty plea and the effectiveness of his trial counsel. The district court held that Stout's claims alleging an involuntary guilty plea were procedurally defaulted and remanded the remaining claims to a magistrate judge for evidentiary hearings. At these hearings, Stout presented evidence suggesting that his trial counsel failed to present mitigating evidence and that Stout did not understand "premeditation" when he entered his guilty plea. In addition, a law enforcement officer stated that the victim's throat wound supported Stout's description of the murder as an "impulsive act" and not a premeditated one.[4] The magistrate judge recommended that Stout's petition be denied. The district court accepted most of the magistrate's recommendations, but held that trial counsel was ineffective in failing to advise Stout about entering a plea pursuant to *North Carolina v. Alford*[5] and in failing to present mitigating evidence.[6] The district court vacated Stout's guilty plea, allowing him sixty days to enter another plea.[7]

The Commonwealth appealed, claiming that a procedural bar prevented the district court from considering Stout's claim regarding a possible *Alford* plea and challenging the district court's finding that trial counsel was ineffective during the sentencing phase. Stout cross-appealed and challenged the district court's finding that he had procedurally defaulted eight of his claims.[8]

HOLDING

The court of appeals held that Stout did not receive ineffective assistance of counsel during the guilt and sentencing phases of his trial and reversed the district court. In addition, the court rejected Stout's cross-appeal and upheld the district court's finding that his claims were procedurally barred.[9]

ANALYSIS/APPLICATION IN VIRGINIA

I. Ineffective Assistance of Counsel Claims

On appeal, the Commonwealth challenged two of the district court's findings that Stout received ineffective assistance of counsel during the entry of his guilty plea and during the sentencing proceedings. Specifically, the Commonwealth claimed that the district court could not consider a claim of ineffective assistance for trial counsel's failure to advise Stout about an *Alford* plea because such a claim was procedurally barred. In addition, the Commonwealth contested the district court's finding that trial counsel was ineffective in presenting mitigation evidence.[10] The court of appeals evaluated the Commonwealth's claims under the standard established in *Strickland v. Washington*.[11]

A. Failure to Advise Defendant of an *Alford* Plea Option

The district court found Stout's trial counsel had been ineffective in failing to advise Stout about entering an *Alford* claim.[12] Under *North Carolina v. Alford*,[13] a defendant may enter a plea of guilty without admitting all of the elements of the crime. The district court noted that an *Alford* plea would have allowed Stout to deny the element of premeditation. Entering such a plea, the district court found, would have made Stout's later contention of not premeditating the murder more credible. The court held that trial counsel's failure to explain the possibility of an *Alford* plea created a prejudicial strategic disadvantage.[14] On appeal, the Commonwealth argued that a procedural bar prevented the district court

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[1] This case is an unpublished opinion referenced in "Table of Decisions Without Report Opinions," 95 F.3d 42, (1996)

[2] *Stout v. Netherland*, 1996 WL 496601, at * 1 (4th Cir. 1996).

[3] *Id.* at *1-4.

[4] *Id.* at *5. At the sentencing phase, Stout testified that the victim was cut in a physical struggle with Stout.

[5] 400 U.S. 25 (1970) (providing that a defendant may plead guilty without admitting all elements of the crime charged).

[6] *Stout*, 1996 WL 496601, at *6.

[7] *Id.*

[8] *Id.* at *7.

[9] *Id.* at *12. In its opinion, the court of appeals did not consider the prosecutor's obligation under *Brady v. Maryland*, 373 U.S. 83 (1963), and *Kyles v. Whitley*, 115 S.Ct 1555 (1995), to disclose exculpatory evidence concerning unadjudicated acts. If Stout's sentencing trial occurred after the enactment of 19.2-264.3:2 in 1993, he would have been entitled to notice of the Commonwealth's intent to rely on unadjudicated acts during the sentencing.

[10] *Stout*, 1996 WL 496601, at *7.

[11] 466 U.S. 668 (1984).

[12] *Stout*, 1996 WL at *8.

[13] 400 U.S. 25 (1970).

[14] *Stout*, 1996 WL at *8.

from even considering this issue.[15] The court of appeals did not address the effect of a procedural bar, but instead disagreed with district court on the merits.

The court of appeals found that the evidence of Stout's premeditation was so "overwhelming" that the entry of an *Alford* plea would not have bolstered the defendant's credibility.[16] The court speculated that such a plea might even have shown a lack of remorse.[17] Given the possible disadvantages of entering an *Alford* plea, the court found that the recommendation of an unconditional plea was a strategic choice. The court of appeals held that this strategic decision deserved the deference afforded to counsel under *Strickland*, and did not fall outside the bounds of professional competence[18]

The court of appeals also rejected the district court's conclusion that failure to investigate the possibility of an *Alford* claim resulted in the guilty plea being involuntary and unknowing. Lack of premeditation, the district court held, was a "weak defense" at best.[19] The court of appeals found that, given the unlikelihood of success with this defense, trial counsel was under no obligation to further investigate the possible plea. The court further concluded that the low likelihood of success meant any failure to suggest an *Alford* plea did not subject Stout to prejudice from which he could seek relief.[20]

Stout claimed that the district court's finding of ineffective assistance of counsel was not based solely on trial counsel's failure to recommend an *Alford* plea.[21] Yet, the court of appeals only considered the impropriety of not giving advice about an *Alford* plea, not counsel's performance in general. If Stout's characterization of the court's holding is accurate, a question of fairness exists. The court of appeals' analysis of the ineffective assistance issue would be too narrowly focused on trial counsel's failure to advise about an *Alford* plea. When entering a guilty plea to a charge of capital murder, counsel's assistance is of paramount importance.[22] If Stout's counsel was ineffective when he entered a plea, a narrow focus away from trial counsel's general competency may have denied Stout relief to which he was entitled.

The court of appeals' reasoning about the existence of a strategic choice is likewise questionable. The court engaged in its own rank speculation about the effect of an *Alford* plea and then credited defense counsel with recognition of this risk, christening it a "reasonable strategic choice."[23] The court of appeals did not reference any testimony to evidence a strategic decision by defense counsel. Rather, it assumed one to exist from the circumstances of the case. It is equally likely, looking only to the fact he counseled an unconditional plea, that trial counsel simply didn't consider an *Alford* plea.

The choice to enter a guilty plea to capital murder must often be made under extenuating circumstances. Nevertheless, the Virginia Capital Clearinghouse strongly recommends that defense counsel attempt to dissuade their clients from entering such a plea unless the prosecution has agreed in writing not to pursue a death sentence or the court has indicated formally or informally that it will not sentence the client to death. A guilty plea admits every element of a crime and waives most appellate issues.[24]

B. Failure to Present Mitigation Evidence

The Commonwealth challenged the district court's finding that trial counsel was ineffective in presenting "virtually no case in mitigation."[25] Given the abundance of mitigating circumstances in the defendant's life, the district court held that trial counsel's approach was not attributable to a plausible strategic judgment, finding his investigation "minimal."[26]

In his response to the Commonwealth's appeal, Stout argued that counsel was ineffective for failing to present a psychological report. The court reviewed this issue under *Bunch v. Thompson*.[27] In *Bunch*, trial counsel elected not to introduce a psychiatrist's testimony, despite the presence of beneficial mitigating evidence, because counsel feared the reinforcement of the defendant's self-destructive behavior in the minds of the jury.[28] The court of appeals characterized *Bunch* as holding that "provided there is a **conceivable** strategic advantage to the decision not to introduce certain evidence in mitigation, that choice is virtually unassailable on collateral review."[29]

Under this standard, the court evaluated Stout's trial counsel's decision to omit a psychological report during the sentencing phase. This report contained a great deal of useful evidence for presenting a case in mitigation such as Stout's troubled childhood as a mix-raced, migrant farm worker who suffered both physical and sexual assaults at the hands of his alcoholic parents. The report also contained the psychologist's conclusion that Stout suffered from an antisocial personality disorder and was likely to commit violent acts in the future. Trial counsel testified that he made a strategic decision not to introduce this evidence, given the report's conclusion. Furthermore, counsel stated that he had made attempts to contact the sources of information listed in the report. The court of appeals accepted trial counsel's testimony and found that the report sufficiently informed counsel of the defendant's background such that further investigation was not necessary. Accordingly, the court held that counsel's decision to not introduce the psychological report could not support a finding of ineffective assistance of counsel under *Bunch*.[30]

As seen in Stout's case, defense counsel often face the double-edged sword of a collection of mitigating evidence that contains potentially damaging elements. This situation often arises in the reports and testimony of professional examiners. These reports can illustrate the defendant's troubled life, but often reach a conclusion that weakens the case in mitigation. For instance, although Stout's examiner found a history of abuse, that examiner concluded Stout had an antisocial personality disorder. To avoid such a problem, defense counsel might

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[15] *Id.* Stout claimed that the district court, in finding ineffective assistance of counsel, did not rely on his counsel's failure to advise him of an *Alford* plea. Rather, the district court took note of the failure to advise as an illustration that "trial counsel could have presented a coherent strategy throughout the case." The Commonwealth claimed that the district court's finding of ineffective assistance was based entirely upon counsel's not advising of an *Alford* plea. The court of appeals considered the issue as the Commonwealth presented it, and did not address counsel's performance in general with respect to the plea.

[16] *Id.*

[17] *Id.*

[18] *Stout*, 1996 WL 496601, at *9.

[19] *Id.*

[20] *Id.*

[21] *Id* at *8. *See infra* at n. 14.

[22] In *McMann v. Richardson*, 397 U.S. 759 (1969), the United States Supreme Court made the definitive holding that the right to counsel guarantees the right to effective assistance of counsel during entry of a guilty plea. *Id.* at 770-71.

[23] *Stout*, 1996 WL at *8.

[24] *See Stout v. Commonwealth*, 237 Va. 126, 132 (1989) (holding Stout's guilty plea made assignments of error concerning sentencing not cognizable on appeal).

[25] *Stout*, 1996 WL at *9.

[26] *Id.*

[27] 949 F.2d 1354 (4th Cir. 1991).

[28] *Id.* at 1364.

[29] *Stout*, 1996 WL 496601, at *10 (emphasis added).

[30] *Id.* at 11.

stress to the experts they have obtained under Va. Code Ann. § 19.2-264.3:1 the minimal requirements for written reports prepared pursuant to that statute.[31] Further, the presentation of life history evidence through lay witnesses is essential, whether done in order to communicate the underlying basis for an expert's opinion or standing alone. It is not necessary to choose between the mixed comments of a written report and the testimony of witnesses.

Lay witnesses are often highly effective in communicating mitigating evidence to the jury.[32] They can provide first hand accounts of the hardships the defendant faced and/or his reactions to social stimuli. Lay witnesses tell their observations, often through vivid anecdotes and specific acts, in a manner that jurors easily understand and to which they may relate. In doing so, lay witnesses can graphically illustrate how an event, such as abuse, contributes to who the defendant was at the time of the murder and who he is today. This "humanizing" of the defendant combats a juror's understandable reaction to abstract evidence of abuse and/or abandonment, which may be expressed as, "I was abused (or know someone who was) and I didn't commit murder."

An example illustrates this point. In California, a jury convicted a defendant of a brutal double murder involving a great deal of disfigurement of the victims. In mitigation, defense counsel introduced the testimony of several of the defendant's sisters. The sisters told a story of intense and horrific physical and emotional abuse. After returning a recommendation for a life sentence, several jurors related one particular story that shaped their understanding of who the defendant was. The sisters described the defendant as having only two possessions as a child, a dog and a rabbit, each of whom he cared for deeply. One day, drunk, the father forced the son to watch as he broke the neck of the rabbit and then attempted to force the dog to eat the rabbit. When the dog refused, the father shot and killed the dog. This story helped the jurors to meaningfully understand how the abuse the defendant suffered as a child deeply affected him in later years.[33]

Prosecutors face two difficulties in counteracting the effectiveness of these witnesses. First, their stories are historical accounts and as such, they are very difficult to contradict. Second, the witnesses are not presenting any conclusions which the prosecutor can attack as he would an expert's testimony. In general, prosecutors are less likely to subject these individuals to effective cross-examination.[34]

Furthermore, the use of lay witnesses as the primary vehicle for introducing mitigation evidence allows trial counsel to orchestrate the theme of mitigation, avoiding weak points.[35] Under this approach, the defense presents the witnesses' testimony first and then uses an expert to bind the testimony together and, hopefully, affirm a conclusion the jury has already accepted. Experts are not always essential to the case in mitigation. Many of the behavioral and psychological theories defendants put forward are not complex and are easily understood. Certainly, the problem presented by a report containing favorable and unfavorable conclusions can be avoided without sacrificing the substance of a case in mitigation.

Presenting a case in mitigation through lay-witnesses involves a great deal of work in locating the witnesses and eliciting their testimony. Yet, the correlation between difficulty and likelihood of success appears to be strong.

II. Stout's Cross-Appeal

A. Claims must be "face-up and squarely" presented

The district court agreed with the magistrate's finding that Stout had defaulted three claims regarding ineffective assistance of counsel based upon advising a guilty plea without first ensuring that death would not be the sentence.[36] The magistrate found that Stout "'did not assert [his claims in state court], either directly or in language that can fairly be interpreted as such'" before filing a habeas petition in federal court.[37] On appeal, Stout claimed he raised these claims in his *pro se* pleading on direct appeal and in his state habeas petition. The court of appeals disagreed and upheld the district court, stating, "[I]n order to satisfy the exhaustion requirement, a habeas litigant must present his claims 'face-up and squarely,' thus providing the state court with a 'full and fair opportunity to consider them.'"[38] Finding that Stout had not adequately presented his claims of ineffective assistance of counsel, the court of appeals held that Stout's claims were procedurally barred.[39]

The court of appeals' holding suggests that a pleading requires more than a simple statement of a claim to assure that claim will not be lost. The opinion does not provide any detail as to what Stout alleged in his *pro se* pleading. The opinion also does not describe with sufficient detail and clarity the standard of "face-up and squarely." It is unclear what minimum amount of detail a claim must have to assure that the defendant has met the exhaustion requirement. Other recent opinions of the Fourth Circuit Court of Appeals suggest that defendants must present their claims with a thoroughness reminiscent of code-pleading.[40] The court's holding on this issue underscores the need for every claim to be made clearly on the record, restated in subsequent appeals, contain some grounding as a federal issue, and be alleged both broadly and narrowly.[41]

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[31] Va. Code Ann § 19.2-264.3:1(C) requires that the expert's report contain her opinion as to:

> (i) whether the defendant acted under extreme mental or emotional disturbance at the time of the offense, (ii) whether the capacity of the defendant to appreciate the criminality of this conduct or conform his conduct to the requirements of the law was significantly impaired, and (iii) whether there are any other factors in mitigation relating to the history or character of the defendant or the defendant's mental condition at the time of the offense.

See Collica, *Alice in Wonderland Interpretations: Rethinking the Use of Mental Mitigation Experts*, Capital Defense Journal, Vol. 9, No.1, p. 57 (1996).

[32] *See generally* William S. Geimer, *Law and Reality in the Capital Penalty Trial*, 18 N.Y.U. Rev. L. & Soc. Change 273, 293 (1991).

[33] This example comes from the research of Professor Scott Sundby, who will soon publish an article discussing *inter alia* the effective use of lay witnesses. *See* Scott Sundby, *The Jury as Critic*, 83 Va. L. Rev.__ (1997). Counsel with pending capital cases should contact the Virginia Capital Case Clearinghouse for a summary of Professor Sundby's findings.

[34] William S. Geimer, *supra* note 32, at 293.

[35] The Virginia Capital Case Clearinghouse suggests that defense counsel remind the jury that mitigation is not an attempt to excuse the underlying crime, but rather, a demonstration of why a life sentence is appropriate in the defendant's case.

[36] *Stout*, 1996 WL 496601, at *11.

[37] *Id.*

[38] *Id.* (citing *Mallory v. Smith*, 27 F.3d 991, 994-95 (4th. Cir. 1994)).

[39] *Id.*

[40] *See* case summaries of *Beaver v. Thompson* and *Hoke v. Netherland*, Capital Defense Journal, this issue.

[41] *See* Cooper, *The Never Ending Story: Combating Procedural Bars in Capital Cases*, Capital Defense Journal, this issue.

B. Claims that defective pleas must be made on direct appeal

Stout challenged the district court's finding that two of his claims regarding the validity of his plea were procedurally barred.[42] The district court held that under *Slayton v. Parrigan*,[43] Stout had defaulted these claims for subsequent habeas review by not raising them on direct appeal. Stout argued that *Slayton* should not bar his claim because he could not have raised it on direct appeal without a change of counsel. The court of appeals disagreed and held that Stout could have presented a claim that his plea was involuntary without a change of counsel.[44] Relying on *James v. Kentucky*,[45] Stout also claimed the *Slayton* rule, because it is not consistently applied by the Supreme Court of Virginia, could not be used to bar his claim. The court of appeals, citing cases in which the Supreme Court of Virginia had followed the *Slayton* rule, disagreed and upheld the district court's finding that Stout's claim was barred.[46]

The court's analysis is technically correct. A claim of involuntary plea is a due process claim alleging that the **trial court** erred in accepting the plea.[47] This error does not speak directly to the conduct of defense counsel. Yet, as a practical matter, the distinction between the issues of an involuntary plea and ineffective assistance may be illusory. In many situations, an attorney's failure to fully explain the options and ramifications of a guilty plea is the basis for a claim that the plea was involuntary. If trial counsel also represents the defendant on direct appeal, there is no incentive for her to raise issues surrounding her own competence, or lack thereof, in ensuring that the plea she recommended was made voluntarily and intelligently.

C. Guilty plea and claims of aggravating factors as overly broad

The magistrate found that Stout had defaulted his claim that Virginia's aggravating factors were overly broad and a second claim that the trial court's finding of these factors was arbitrary and capricious. The magistrate held that Stout's guilty plea and the rule in *Hawks v. Cox*[48] barred him from raising his claims of overbreadth in federal court. The magistrate also held that Stout's failure to raise his claim that the trial court arbitrarily applied the aggravating factors on direct appeal prevented him from bringing that claim in federal court. In his federal habeas petition, Stout alleged that it was error for the district court to accept the magistrate's findings. The court of appeals summarily dismissed Stout's assignments of error and upheld the magistrate's findings.[49]

Neither the guilty plea nor the *Hawks* rule should have barred Stout's claims. A guilty plea waives complaints about the elements of capital murder. It does not waive complaints about the aggravating factors found in sentencing. The court of appeals provided no authority for its assertion that a guilty plea waives a defendant's claims about the application of aggravating factors, or any aspect of the capital **sentencing** scheme.

Relying on *Hawks*, the court of appeals held that "claims previously determined are barred from consideration by a federal habeas court."[50] This finding is puzzling in light of the court's opinion in *Turner v. Williams*,[51] in which the court stated that "*Hawks* cannot prevent federal habeas review of federal constitutional claims properly raised on direct appeal."[52] The court of appeals' new interpretation of *Hawks* is unsupported by further explanation and it is ultimately a mischaracterization of the *Hawks* rule. Under Virginia procedure in effect during Stout's case, prisoners filed their state habeas petitions in the state trial court. The *Hawks* court expressed the common sense conclusion that the trial court could not grant relief contrary to a ruling on the merits made by the Supreme Court of Virginia on direct appeal. Likewise, *Turner* presented another common sense conclusion that a federal claim, once presented and rejected on the merits in state court, need not be presented **twice** to avoid procedural bar. Unfortunately, Stout's execution mooted this issue for the present.

Summary and Analysis by:
David T. McIndoe

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[42] *Stout*, 1996 WL 496601, at *12. Stout's claims were that the plea of guilty was involuntary. *See* discussion of Stout's understanding of "premeditation" and his illiteracy, *supra*.

[43] 215 Va. 27, 30, 205 S.E.2d 680, 682 (1974) (holding that prisoner's constitutional claim may not be raised in habeas proceedings when prisoner did not raise the question on appeal).

[44] *Stout*, 1996 WL at *12.

[45] 466 U.S. 341, 348-49 (1984) (holding that a state procedural bar is not adequate unless the rule is firmly established and regularly followed).

[46] *Stout*, 1996 WL at *12.

[47] *Henderson v. Morgan*, 426 U.S. 637, 644-45 (1976) (holding court's failure to provide sufficient explanation of offense's elements made plea involuntary).

[48] 211 Va. 91, 175 S.E.2d 271 (1970) (holding where all allegations of state habeas petition had been resolved against petitioner by previous adjudication, he was not entitled to further relief).

[49] *Stout*, 1996 WL 496601, at *12.

[50] *Id.* at *12.

[51] 35 F.3d 872 (4th Cir. 1994).

[52] 35 F.3d at 890. *See also, Correll v. Thompson*, 63 F.3d 1279, 1289 n.8 (4th Cir. 1995) (holding that *Hawks* does not bar federal habeas review of claims that already may be properly considered by this court through their presentation on direct appeal).