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PLATH v. MOORE 130 F.3d 595 (4th Cir. 1997) United States Court Of Appeals, Fourth Circuit

> ...If you were to sit as a juror in this case and the jury were to convict the defendant of capital murder, would you also be able to consider voting for a sentence less than death?[47]

The court concluded that these questions sufficed to conduct the *Wainwright* inquiry as to the ability of the prospective jurors to perform their duties in accordance with their instructions and their oaths.[48] These questions clearly were not designed to elicit complex, honest responses from jurors but instead seem aimed at securing perfunctory monosyllabic responses. Indeed, it seems that these questions, in substance, are directed at nothing more than determining "whether a juror can be fair, or follow the law," which the court deemed insufficient to make the constitutionally required inquiry.[49]

Defense counsel in capital cases should strive to secure the opportunity to conduct a meaningful voir dire, which would encompass asking questions designed to engage the prospective jurors in more honest, revealing conversations about their views regarding the death penalty and thus identify and exclude from the jury individuals whose views would interfere with their abilities to perform their duties. The Virginia Capital Case Clearinghouse Trial Manual offers suggestions and strategies for conducting a meaningful voir dire.

Summary and analysis by:
Anne E. Duprey

[47] *Id.* Mackall's counsel was denied the opportunity to question jurors as to their substantive views concerning the death penalty. See supra note 40.

[48] *Mackall II,* 131 F3d at 451.

[49] *Id.*

PLATH v. MOORE

130 F.3d 595 (4th Cir. 1997)
United States Court Of Appeals, Fourth Circuit

FACTS

Nearly twenty years ago, two cousins, John Plath and John Arnold,[1] and each of their girlfriends, Carol Ullman and Cindy Sheets,[2] decided to go on a search for wild mushrooms.[3] After borrowing a car and setting out on their expedition, the group came upon Betty Gardner, a farm worker, walking along the side of the road.[4] After dropping Gardner off at her brother's home,[5] the group, at Arnold's suggestion,[6] decided to go back and kill Gardner.[7]

After picking up Gardner, they took her to a remote wooded area near a garbage dump. There, all four in the group, at one time or another, physically assaulted Gardner.[8] Based on the testimony at trial, the court of appeals developed the following scenario of what took place at that remote wooded area. Initially, Arnold knocked Gardner to the ground, and he and Plath began kicking her.[9] Then Plath ordered Gardner to remove her clothes, and forced her to perform oral sex upon both himself and his girlfriend, Sheets. While Gardner performed oral sex on Sheets, Plath beat Gardner with a leather belt, and later urinated in Gardner's mouth, forcing her to swallow the urine.[10]

Plath and Arnold then unsuccessfully attempted to kill Gardner by strangling her with part of a garden hose. After this first effort failed, Plath continuously stomped on Gardner's neck for a period of time, followed by his stabbing of her some ten times in the chest.[11] Using the garden hose, Arnold dragged Gardner by the neck into the nearby wooded area. He returned to say that he did not think Gardner was dead, whereby Plath told Sheets to cut Gardner's throat with a broken bottle.[12] Gardner finally died after Sheets and Arnold strangled her a second time with the hose.[13]

By jury trial, the South Carolina Court of General Sessions convicted both Plath and Arnold of the kidnapping, rape and murder of Gardner, and subsequently sentenced both to death.[14] The South Carolina Supreme Court affirmed the convictions, but reversed the death sentences,

[1] See Case Summary of *Arnold*, Cap. Def. J., Vol. 10, No. 1, p.7.

[2] The two cousins were in their twenties, and their girlfriends, Ullman and Sheets, were eleven and seventeen years old respectively.

[3] *Plath v. Moore,* 130 F3d 595, 597 (4th Cir. 1997) (citing *Arnold v. Evatt,* 113 F3d 1352, 1355 (4th Cir. 1997)).

[4] *Plath,* 130 F3d at 597 (citing Arnold, 113 F3d at 1355).

[5] Gardner asked the group for a ride to work, but they refused.

[6] *Arnold,* 113 F3d at 1355.

[7] *Plath,* 130 F3d at 597 (citing Arnold, 113 F3d at 1355).

[8] *Id.* at 597.

[9] *Id.* at 597.

[10] *Id.* at 597.

[11] According to testimony, at this point in the murder, Plath commented that "niggers are sure hard to kill." *Plath,* 130 F3d at 597.

[12] *Id.* at 597.

[13] *Id.* at 597. Arnold attempted to mislead the police by carving "KKK" into Gardner's body. Nonetheless, Sheets led the police to Gardner's decomposed body almost six weeks later.

[14] *Id.* at 597.

and remanded the case for resentencing.[15] The second jury recommended the death penalty, and the South Carolina Supreme Court affirmed Plath's death sentence.[16] After the United States Supreme Court denied Plath's writ of certiorari,[17] he applied for Post-Conviction Relief ("PCR") in the South Carolina Court of General Sessions. Following an evidentiary hearing, the Court of General Sessions dismissed Plath's PCR application on May 12, 1986.[18]

Plath again applied for certiorari to the United States Supreme Court, and this time the Court granted his application. In light of *Yates v. Evatt,*[19] the Court remanded Plath's case to the Court of General Sessions for reconsideration of the issue of whether the implied malice instruction given at Plath's original trial[20] violated his right to due process of law under the Fourteenth Amendment of the U.S. Constitution, and, if so, whether that violation constituted reversible error.[21] The Court of General Sessions held that the implied malice instruction did not violate Yates, and that, even if it did, that violation was harmless beyond a reasonable doubt.[22]

On March 5, 1990, the Court of General Sessions denied Plath's third amended PCR application.[23] On appeal, the South Carolina Supreme Court affirmed this denial, holding that, although the implied malice instruction violated Yates, it was harmless beyond a reasonable doubt.[24] The United States Supreme Court denied Plath certiorari on February 22, 1993.[25]

Plath next petitioned for habeas relief in the United States District Court for the District of South Carolina. The State moved for summary judgment, and on October 17, 1994, a U.S. Magistrate recommended denial of habeas corpus relief.[26] After granting the State's motion for summary judgment, the district court denied habeas relief on September 3, 1996, and denied Plath's motion to amend his PCR application on January 30, 1997.[27] Plath appealed the denial of habeas relief.

HOLDING

The United States Court of Appeals, Fourth Circuit, affirmed the district court's denial of the writ of habeas corpus, holding that (1) the unconstitutional implied malice instruction was harmless error;[28] (2) defense counsel were not ineffective;[29] (3) the claim of alleged lack of mental competence during resentencing trial was procedurally barred;[30] and (4) the absence of defense counsel from the jury view of the site of the murders did not deprive petitioner of effective assistance of counsel.[31]

ANALYSIS/APPLICATION IN VIRGINIA

I. Implied Malice Instruction[32]

Plath challenged the judge's implied malice instruction as "clearly unconstitutional," and amounting to reversible error.[33] As it did in *Arnold v. Evatt,*[34] the court applied the two-part test from *Yates v. Evatt*[35] to determine whether the instruction "'had substantial and injurious effect or influence in determining the jury's verdict.'"[36] The *Yates* test involves: (1) "ask[ing] what evidence the jury actually considered in reaching its verdict;" and (2) "weigh[ing] the probative force of that evidence against the probative force of the [implied malice] presumption standing alone."[37]

In applying the *Yates* test to the implied malice instruction in *Plath,* the court reiterated its conclusion in *Arnold,* stating, "'this case reeks of express malice and any reasonable jury, notwithstanding the implied malice instruction, would have found malice beyond a reasonable doubt.'"[38] The court reasoned that the instruction in Plath's case was

[15] *State v. Plath,* 284 S.E.2d 221 (S.C. 1981).

[16] *State v. Plath,* 313 S.E.2d 619 (S.C. 1984).

[17] *Plath v. South Carolina,* 467 U.S. 1265 (1984).

[18] *Plath v. Moore,* 130 F3d 595, 597 (4th Cir. 1997).

[19] 500 U.S. 391 (1971) (holding that implied malice instruction was constitutional error subject to harmless-error analysis). *Yates* explained that the reviewing court must only determine that the erroneous instruction was unimportant in relation to the other evidence which was considered by the jury, independently of the erroneous presumption. *Yates,* 484 U.S. at 403. Under *Yates,* the reviewing court must ask "what evidence the jury actually considered in reaching its verdict" and must "weigh the probative force of that evidence against the probative force" of the erroneous presumption standing alone. *Id.* at 404.

[20] The trial court instructed the jury that murder is "the killing of any person with malice aforethought either express or implied." Furthermore, the trial court stated that malice may be expressed "as where one makes previous threats of vengeance or where one lies in wait or other circumstances which show directly that the intent to kill was really entertained," or may "be implied from the willful, deliberate and intentional doing of any unlawful act without just cause or excuse, or from the use of a deadly weapon." *Arnold v. Evatt,* 113 F3d 1352, 1356 (4th Cir. 1997).

[21] *Plath,* 130 F3d at 597-98.

[22] *Id.* at 598.

[23] Plath first raised the claims of ineffective assistance of counsel and lack of mental competence during the resentencing trial. Id. at 601-02.

[24] *Id.* at 598.

[25] *Plath v. State,* 507 U.S. 927 (1993).

[26] *Plath,* 130 F3d at 598.

[27] *Id.* at 598.

[28] *Id.* at 599.

[29] *Id.* at 601-02.

[30] *Plath,* 130 F3d at 602.

[31] *Id.* at 602-03. Although Plath raised this issue and the court reviewed it, this issue will not be discussed in this case summary. See Case Summary of *Arnold,* Cap. Def. J., Vol. 10, No. 1, p. 7.

[32] See Case Summary of *Arnold,* Cap. Def. J., Vol. 10, No. 1, p. 7. The State tried Plath and Arnold together so the analysis of the implied malice instruction in the Case Summary of *Arnold* is applicable to Plath also.

[33] *Plath,* 130 F3d at 598.

[34] 113 F3d 1352 (4th Cir. 1997).

[35] 500 U.S. 391 (1991).

[36] *Arnold,* 113 F3d at 1356 (quoting *Brecht v. Abrahamson,* 507 U.S. 619, 637 (1993)).

[37] *Yates,* 500 U.S. at 404.

[38] *Plath,* 130 F3d at 598 (quoting *Arnold v. Evatt,* 113 F3d 1352, 1357 (1997)).

the same as the one in Arnold's case, and because the *Arnold* instruction was harmless error, then so was the *Plath* instruction.[39]

Plath unsuccessfully attempted to distinguish his case from Arnold's. He argued first that, unlike Arnold, there was no "clear and independent evidence of malice" that could be attributed to him.[40] In rejecting this argument, the court composed a list of Plath's malicious acts and commented that as much, if not more, of the evidence of malice could be credited to *Plath*.[41]

Furthermore, Plath argued that the lack of credibility of Sheets (a key witness), the existence of exculpatory evidence, and the State's use of the implied malice presumption in its closing argument all went to rebutting the body of evidence of malice against him.[42] Again, the court returned to *Arnold*, finding that such circumstances existed in Arnold's case, but nonetheless it still found the instruction to be harmless error. Therefore, the court found that the conclusion in *Plath* should be the same.

The court rejected much of Plath's claim on the implied malice instruction by repeating its reasoning from its *Arnold* decision. Nonetheless, capital defense counsel can argue that the court should not have found the *Arnold* instruction to be harmless error simply on the basis of *Plath* because a determination of harmlessness is by definition, a fact-specific determination. In making future challenges to implied malice instructions, capital defense counsel can utilize this requirement of fact-specific harmlessness findings to distinguish both *Plath* and *Arnold*. Furthermore, the decision in *Plath* is a necessary reminder to capital defense counsel that *Yates* offers a viable challenge to the implied malice instruction and that this challenge should always be made. When making such a challenge, capital defense counsel should keep in mind that the defense bears the burden of proof under the *Yates* analysis.

II. In Favorem Vitae Review

A. Background

Under in favorem vitae review, a court reviews "'the entire record for legal error, and assumes error when unobjected-to but technically improper arguments, evidence, jury charges, etc. are asserted by the defendant on appeal in a demand for reversal or a new trial.'"[43] This type of review enables the appellate court to examine the record for error regardless of whether the error was preserved by an objection.[44] However, in *Kornahrens v. Evatt*,[45] the South Carolina Supreme Court rejected the doctrine of in favorem vitae review because the court could not determine whether the state court had properly applied federal constitutional principles or had even considered those issues at all.[46] The defendant in Kornahrens argued that in using in favorem vitae review for all errors on direct appeal, the South Carolina Supreme Court considered the three errors he did not raise on appeal, and consequently the errors were not procedurally defaulted.[47] The court dismissed this argument in conjunction with its rejection of in favorem vitae review, stating that to review effectively a state-court judgment, it must be clear the state court addressed the federal constitutional issue on the merits.[48]

B. The "Re-rejection" of In Favorem Vitae Review

In challenging the State's improper arguments at both the guilt and sentencing phases as violative of due process, Plath attempted to utilize the in favorem vitae review doctrine to argue that these errors were preserved for habeas review.[49] Plath acquiesced that these improper arguments were not raised on direct appeal. However, he alleged that they were examined at the state level because of the South Carolina Supreme Court's practice of in favorem vitae review.

Despite the fact that the court rejected this same argument in *Arnold*,[50] Plath again sought to distinguish his case. First, the May 12, 1986 court order which dismissed Plath's PCR application explicitly stated that the South Carolina Supreme Court had conducted an in favorem vitae review of the case.[51] Second, at the time of Plath's appeal, the South Carolina Supreme Court operated under a custom of "'reviewing closing arguments in capital cases regardless of whether an issued [sic] had been raised at trial or on appeal.'"[52] The court rejected both of these grounds, stating that it had declined to recognize such implied review for habeas matters because in favorem vitae review provided federal courts with inadequate records in their determinations of whether state courts had considered federal constitutional issues, and not because the review did not exist.[53] Therefore, the court concluded that as in *Arnold*, the issue

[39] *Id.* at 598.

[40] *Id.* at 599.

[41] *Id.* at 599. The court attributed the following malicious acts to Plath: (1) compelling the victim to undress; (2) forcing the victim to perform oral sex upon him; (3) forcing the victim to perform oral sex upon someone else; (4) striking the victim with a leather belt while she performed oral sex upon another person; (5) dragging the victim by the neck with a leather belt; (6) urinating in the victim's mouth; (7) assisting in strangling the victim with a rubber hose; (8) stabbing the victim; and (9) directing another person to "finish off" the victim.

[42] *Plath*, 130 F.3d at 599.

[43] *Kornahrens v. Evatt*, 66 F.3d 1350, 1362 (4th Cir. 1995) (quoting *State v. Torrence*, 406 S.E.2d 315, 324 (S.C. 1991)).

[44] *Kornahrens*, 66 F.3d at 1362.

[45] *Id.* at 1350.

[46] *Id.* at 1362.

[47] *Id.* at 1362.

[48] *Kornahrens*, 66 F.3d at 1363.

[49] *Plath*, 130 F.3d at 599.

[50] *Arnold*, 113 F.3d at 1357.

[51] *Plath*, 130 F.3d at 599.

[52] *Id.* at 599-600 (quoting Petitioner's Br. at 17 (citing *State v. Gilbert*, 258 S.E.2d 890, 894 (S.C. 1979))).

[53] *Id.* at 600.

of improper arguments was procedurally defaulted in Plath's case.[54]

Capital defense counsel should be aware of this "re-rejection" of the in favorem vitae, or implied, review. Furthermore, they should be on notice that the idea of an issue being "implicit in" a review conducted by a state court, and thereby not procedurally defaulted for federal habeas, is not going to be accepted by the United States Court of Appeals, Fourth Circuit. The court's reiteration of its rejection of in favorem vitae review clearly dictates this inevitable conclusion.[55]

III. Ineffective Assistance of Counsel Claim

In making a claim of ineffective assistance of counsel, a defendant must meet the test outlined in *Strickland v. Washington,*[56] which requires a showing that counsel's action was both professionally deficient and the cause of prejudice to the defendant.[57] Plath's claim addressed three instances of conduct by his attorney. First, Plath argued that his attorneys' failure to object to the use of an immunity agreement between the State and Cindy Sheets, the key witness for the prosecution, that mentioned Sheets submission to a polygraph test satisfied the *Strickland* standard.[58] Secondly, Plath faulted counsel's failure to lay the proper foundation to admit evidence of x-rays of his leg, broken before the murder, which would have aided in rebutting Sheets's testimony about Plath "stomping" the victim.[59] The court dismissed both of these grounds as not prejudicial, and therefore failing to meet the test under *Strickland.* Specifically, the court found the first action to be part of the defense counsel's "trial strategy," and the second action to be not objectively unreasonable in light of the fact that counsel presented other evidence of the broken leg.[60]

As grounds for his third claim of ineffective assistance of counsel, Plath cited his attorneys' failure to present additional mitigating evidence, in that his counsel should have conducted a more thorough investigation into Plath's background and mental state.[61] Plath argued that such additional mitigating evidence would have persuaded a jury to impose a life sentence instead of the death penalty.

Although the court conceded that Plath's brief drew a "striking picture of Plath's tragic background and extremely unstable mental state," it also found this ground to be without merit.[62] First, the issue was procedurally defaulted because Plath did not raise it until his final motion to amend his application for PCR.[63] Moreover, the court found no showing of cause and prejudice or of a fundamental miscarriage of justice in order to override the procedural default.

Second, the court reasoned that although defense counsel did not thoroughly explore Plath's background and mental state, they nevertheless conducted a reasonable examination.[64] In determining such reasonableness, the court noted that at least ten witnesses testified about Plath's background. Furthermore, the court found that when this mitigating evidence was compared to "the sheer magnitude of the aggravating evidence against Plath," it could not fathom how the omission of such mitigating evidence was prejudicial.[65] In referring to *Strickland*, the court in *Plath* stated that "'[g]iven the overwhelming aggravating factors, there is no reasonable probability that omitted evidence would have changed the conclusion that the aggravating circumstances outweighed the mitigating circumstances and, hence the sentence imposed.'"[66] The court concluded that the mitigating evidence was inadequate to shift the balance for Plath after it had weighed the omitted evidence against the evidence which was used to convict and sentence him.[67]

The court's rejection of the first two grounds of Plath's ineffective assistance of counsel claim are reminders to capital defense counsel of how difficult the *Strickland* standard is to meet.[68] The analysis of the third ground, the attorneys' failure to conduct a more extensive examination of Plath's background and mental state, is also a lesson for capital defense counsel. Given the balancing test that the court used to determine whether the omitted mitigating evidence would have produced a different outcome, defense counsel should be aware of the pitfalls of holding back mitigating evidence. When the appellate court, and not a jury, balances the probability of a different result by comparing the mitigating and aggravating factors, withheld mitigating evidence may foreclose relief. Thus, counsel will rarely want to exclude mitigating witnesses even when their testimony may be cumulative.

IV. Waiver of Mental Competency Hearing

Plath also alleged that his lack of mental competency during the resentencing trial violated his rights under the Due Process Clause of the Fourteenth Amendment.[69] The court rejected this allegation, finding that the issue was procedurally barred because Plath did not raise it until his final motion to amend his PCR application.[70] Plath attempted to rebut the presumption that his claim was procedurally

[54] *Id.* at 600.

[55] Virginia does not have in favorem vitae review so this analysis is specific to South Carolina.

[56] 466 U.S. 668 (1984).

[57] *Strickland,* 466 U.S. at 687.

[58] *Plath,* 130 F3d at 600.

[59] *Id.* at 601.

[60] *Id.* at 601.

[61] *Id.* at 601.

[62] *Plath,* 130 F3d at 601.

[63] *Id.* at 601.

[64] *Id.* at 601-02.

[65] *Id.* at 602.

[66] *Plath,* 130 F3d at 602.

[67] *Id.* at 602.

[68] The *Plath* court itself notes the difficulty of this standard, stating that the examination of the attorney's conduct must be quite deferential and the prejudice to the defendant very evident. *Id.* at 601.

[69] *Id.* at 602.

[70] *Plath,* 130 F3d at 602.

barred, pointing to a line of South Carolina Supreme Court cases that have permitted the issue of competence to be introduced during collateral, or PCR, proceedings.[71]

In response, the court rejected Plath's rebuttal attempt, including the supporting cases, distinguishing between a state court allowing the unraised issue to be included in a PCR application, and a federal court deliberating it on habeas review.[72] Even in light of the cases cited by Plath, the court refused to go beyond the limitations of habeas review established by the principles of comity. This is yet another example of the stringency of the *Strickland* standard, and consequently evidence of the dire necessity of raising all potential issues at trial in order to preserve them for appeal.

Summary and analysis by:
Mary K. Martin

[71] *Id.* at 602.
[72] *Id.* at 602.

SATCHER v. PRUETT

126 F.3d 561 (4th Cir. 1997)[1]
United States Court Of Appeals, Fourth Circuit

FACTS

Around 7:00 p.m. on the evening of March 31, 1991, Deborah Abel was riding her bicycle along a path which runs parallel to Lee Highway in Arlington County, Virginia.[2] As she entered a relatively secluded area on the path, she noticed an "unthreatening man" walking toward her as she rode.[3] As she passed this man, they made eye contact.[4] Two or three seconds later, the man grabbed Abel from behind, knocked her eye-glasses off, pulled her off of her bicycle, dragged her into a ditch along the path, and began beating her about the face and head.[5] In the ensuing struggle, the man managed to pull her pants part way down.[6] While Abel was being assaulted, Mark Polemani was riding his bicycle along the same stretch of path. Polemani observed a man, who appeared to be punching the ground, kneeling just off the path near a prone bicycle.[7] Polemani got off of his bicycle and approached the man. As he did so, however, the man grabbed Abel's purse and ran away. Polemani briefly chased the man but eventually returned to assist Abel.

Abel and Polemani each gave the police a description of Abel's attacker. Abel described him as "a stocky black male between twenty-five and thirty years old, about 5'9" or 5'10" and 190 to 200 pounds" with a "short 'Afro' haircut" and no facial scars.[8] A police artist made a sketch based on Abel's description. Polemani gave a similar description and an "almost identical" sketch was drawn.[9] Upon seeing both sketches, Polemani commented that the sketch based on Abel's description was "better."[10]

On the same evening that Abel was attacked, Ann Borghesani was attacked as she was walking along the same stretch of path.[11] Borghesani's partially nude body was discovered shortly after 8:00 a.m. the next morning at the bottom of a stairwell in an Air Force Association building located alongside the bike path less than 100 yards from where Abel was attacked.[12] Borghesani had been raped and stabbed twenty-one times with a "sharp-tipped object."[13] Additionally, her purse and some of her jewelry were missing.[14] A few days later, Borghesani's purse and Abel's purse were found together in some bushes located about two blocks from the Air Force Association building.[15]

Michael Satcher was arrested five months later, on August 18, 1990, for trying to attack three different women along a different bike path in Arlington County that morning.[16] At the time of his arrest, Satcher, who is African-American, was twenty-one years old, 5'6" tall, weighed 152 pounds, had short hair, and a facial scar.[17] Satcher voluntarily gave the police blood, hair, and saliva samples.[18] The blood test revealed that Satcher's blood type, which occurs in seven percent of the population, was the same type as the

[1] The United States Supreme Court denied Satcher's petition for a writ of certiorari on December 2, 1997. *Satcher v. Pruett,* 118 S.Ct. 595 (1997). Michael Satcher was executed by lethal injection on December 9, 1997.
[2] *Satcher v. Pruett,* 126 F3d 561, 563 (4th Cir. 1997).
[3] *Satcher,* 126 F3d at 563.
[4] *Id.*
[5] *Id.* at 563-64.
[6] *Id.* at 564.
[7] *Satcher,* 126 F3d at 564.
[8] *Id.*
[9] *Id.*
[10] *Id.* The descriptions given by Abel and Polemani differed "somewhat" from Satcher's actual appearance. *Id.* at 564-65. *See infra* note 17 and accompanying text.
[11] *Satcher,* 126 F3d at 564.
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] *Satcher,* 126 F3d at 564.
[16] *Id.*
[17] *Id.* at 564. Satcher's actual appearance differed from Abel and Polemani's descriptions in four out of the six characteristics they described. Satcher's age, height, weight and facial scar were all inconsistent with their descriptions. The only portions of the descriptions which fit Satcher were "black male" and "short...hair." *See, supra,* note 10 and accompanying text.
[18] *Id.*