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# Reid v. True 349 F.3d 788 (4th Cir. 2003)

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## *I. Facts*

James Edward Reid ("Reid") claimed to have no memory of murdering eighty-year-old Annie Lester ("Lester"), whose body was discovered on October 12, 1996.[1] On the morning of Lester's murder, Reid received a ride to her house.[2] Along the way, he purchased a bottle of wine.[3] After he arrived, the last thing Reid remembered from that day was writing something on a card in Lester's house.[4]

The card, later found by police, read "I've gotta kill you."[5] The evidence indicated that Reid struck Lester in the head with a milk can while they were in the kitchen, dragged her to the bedroom, stabbed her twenty-two times with a pair of sewing scissors, and strangled her with the cord from her heating pad.[6] Police found the bottle of wine at the foot of the bed, Reid's fingerprints in blood on the telephone, his saliva on a cigarette butt in the bedroom, and his handwriting on several pieces of paper in Lester's house.[7] Later that afternoon, witnesses saw Reid walking from Lester's house soaked in blood and intoxicated.[8] DNA tests revealed that the blood belonged to Lester.[9]

Upon the advice of his attorneys, Reid entered an *Alford* plea to a charge of capital murder.[10] After finding that Reid's conduct was sufficiently vile, the trial judge sentenced him to death.[11] On direct appeal, the Supreme Court of Virginia

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1. Reid v. True, 349 F.3d 788, 794 (4th Cir. 2003). In 1968 Reid was involved in an automobile accident that resulted in a coma and brain damage. *Id.* at 802–03. He also suffered from a seizure disorder. *Id.*
2. *Id.* at 794.
3. *Id.*
4. *Id.* at 801.
5. *Id.*
6. *Id.* at 794, 801.
7. *Reid*, 349 F.3d at 794.
8. *Id.*
9. *Id.*
10. *Id.*; *see* North Carolina v. Alford, 400 U.S. 25, 37 (1970) (allowing that "[a]n individual accused of crime may voluntarily, knowingly, and understandingly consent to the imposition of a prison sentence even if he is unwilling or unable to admit his participation in the acts constituting the crime").
11. *Reid*, 349 F.3d at 794; *see* VA. CODE ANN. § 19.2-264.2 (Michie 2000) (stating that a judge may impose the death penalty upon finding that a defendant's conduct in the course of the murder "was outrageously or wantonly vile, horrible or inhuman in that it involved torture, depravity of

upheld the sentence and the United States Supreme Court denied certiorari.[12] In his subsequent petition for state habeas relief Reid argued that he had not knowingly and voluntarily entered his *Alford* plea and that his counsel were ineffective.[13] The Supreme Court of Virginia found "that the first claim was defaulted and that the second was without merit."[14] The district court, after conducting an evidentiary hearing to discover whether Reid's counsel fully informed him of the effect of an *Alford* plea, denied Reid's petition for federal habeas relief.[15]

## *II. Holding*

The United States Court of Appeals for the Fourth Circuit issued a certificate of appealability for all of Reid's claims.[16] The Fourth Circuit upheld the district court's ruling that Reid's ineffective assistance of counsel claim lacked merit.[17] The court also agreed with the district court's holding that Reid had procedurally defaulted his claim that his *Alford* plea was not knowingly and voluntarily entered.[18]

## *III. Analysis*

### *A. Ineffective Assistance of Counsel*

Because the Supreme Court of Virginia adjudicated Reid's ineffective assistance of counsel claims on the merits, the Fourth Circuit could only grant habeas relief if the state decision "was contrary to, or involved an unreasonable application of, clearly established Federal law, as determined by the Supreme Court of the United States."[19] Additionally, the district court held a fact-finding hearing on whether Reid's counsel were ineffective in failing to apprise him fully

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mind or an aggravated battery to the victim").

12. Reid v. Commonwealth, 506 S.E.2d 787, 793 (Va. 1998); Reid v. Virginia, 528 U.S. 833, 833 (1999) (mem.).

13. *Reid*, 349 F.3d at 794–95. Reid also argued that the trial judge's comments at the time of sentencing indicated he failed to consider mitigating evidence. *Id.* at 806. The Fourth Circuit denied relief on this claim, which will not be discussed further in this case note. *Id.* at 807.

14. *Id.* at 795.

15. *Id.*

16. *Id.* The court appended the amended local rules detailing the procedures with which petitioners must comply in seeking certificates of appealability and briefly discussed the amendments in Part II of the opinion. *Id.* at 795–98, 809–16. For a complete discussion of 4TH CIR. R. 22(a), *see* Maxwell C. Smith, Rule Note, 16 CAP. DEF. J. 635 (analyzing 4TH CIR. R. 22).

17. *Reid*, 349 F.3d at 802–04.

18. *Id.* at 804–06.

19. *Id.* at 798; *see* 28 U.S.C. § 2254(d)(1) (2000) (outlining the standard of review to be applied by a federal court hearing a habeas petition arising from a state proceeding on the merits; part of AEDPA).

of the consequences of an *Alford* plea.[20] The Fourth Circuit could only grant relief in spite of the district court's findings if they were "clearly erroneous."[21]

*1. Contrary to*

The Fourth Circuit first examined whether the Supreme Court of Virginia's opinion was contrary to clearly established federal law.[22] The Fourth Circuit held that a state court decision would be contrary to federal law if a state court applied a rule contrary to governing law enunciated in Supreme Court cases or if the state court faced a fact pattern identical to a Supreme Court case but reached a different result.[23]

In *Williams v. Warden*[24] ("*Williams I*"), the Supreme Court of Virginia held that to prove an ineffective assistance of counsel claim, a defendant must satisfy the two-part test of *Strickland v. Washington*[25] and also must show that the result of the trial was fundamentally unfair or unreliable.[26] In *Williams v. Taylor*[27] ("*Williams II*"), the United States Supreme Court corrected the Supreme Court of Virginia by reaffirming that the two prongs of *Strickland* were the only necessary elements of an ineffective assistance of counsel claim.[28] Reid argued that because the Supreme Court of Virginia rejected his ineffective assistance of counsel claim after its decision in *Williams I*, but before the Supreme Court decided *Williams II*, the Fourth Circuit should presume that the Supreme Court of Virginia clearly misapplied federal law.[29]

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20. *Reid*, 349 F.3d at 803.

21. *Id.* at 804; *see* FED. R. CIV. P. 52(a) (stating that factual findings by the district court should remain undisturbed unless clearly erroneous); FED. R. CIV. P. 81(a)(2) (applying the Federal Rules of Civil Procedure to habeas corpus proceedings to the extent they are not inconsistent with another statute).

22. *Reid*, 349 F.3d at 798–800.

23. *Id.* at 798 (citing Williams v. Taylor, 529 U.S. 362, 405 (2000)).

24. 487 S.E.2d 194 (Va. 1997).

25. 466 U.S. 668 (1984).

26. *See* Williams v. Warden, 487 S.E.2d 194, 198 (Va. 1997) (holding that "an analysis focusing solely on mere outcome determination, without attention to whether the result of the proceeding was fundamentally unfair or unreliable, is defective" (internal quotation marks omitted)); Strickland v. Washington, 466 U.S. 668, 687–96 (1984) (holding that to prove a claim of ineffective assistance of counsel, a petitioner must show: (1) counsel's performance fell below the objective standard of reasonableness and outside the wide range of professional competency; and (2) the performance prejudiced the defense in that if counsel had met the professional standards the result of the proceeding would have been different).

27. 529 U.S. 362 (2000).

28. *See Williams*, 529 U.S. at 393–95 (noting that the Supreme Court of Virginia incorrectly applied *Strickland* by requiring that the appellant show the result of the proceeding was fundamentally unfair or unreliable, as well as the two prongs of *Strickland*, to prove ineffective assistance of counsel).

29. *Reid*, 349 F.3d at 799.

The Fourth Circuit noted that the Supreme Court of Virginia did not state its reasons for denying Reid's claim of ineffective assistance of counsel.[30] The Fourth Circuit relied on *Early v. Packer*,[31] which held that when a state court fails to indicate on what federal law it based its decision, the result reached by the state court should be the focus of review.[32] The court's review under the "contrary to" prong of § 2254(d)(1) was consequently "limited to determining whether the state court decision [was] contrary to a decision reached by the Supreme Court on indistinguishable facts."[33] Reid made no argument that the Supreme Court of Virginia's decision contradicted a result reached by the United States Supreme Court on indistinguishable facts.[34] Therefore, the Fourth Circuit turned to the other prong of § 2254(d)(1) and sought to determine whether the state court unreasonably applied Supreme Court precedent.[35]

### 2. *Unreasonable Application of*

### *a. Voluntary Intoxication*

Reid claimed that his counsel provided ineffective assistance by failing to pursue a defense of voluntary intoxication.[36] In Virginia, voluntary intoxication offers no excuse for a crime, but when a person becomes so intoxicated that he or she is unable to deliberate or premeditate, that person cannot commit a type of murder that requires a showing of those elements.[37] When deciding if an individual was too intoxicated to deliberate, Virginia courts consider whether the person tried to conceal the murder, ingested the intoxicants long before the crime, acted in a planned and purposeful fashion, and could perform complicated tasks.[38]

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30. *Id.*

31. 537 U.S. 3 (2002).

32. *Reid*, 349 F.3d at 799; *see* Early v. Packer, 537 U.S. 3, 8 (2002) (per curiam) (explaining that for purposes of habeas review, correct application of federal law "does not require citation of our cases—indeed, it does not even require *awareness* of our cases, so long as neither the reasoning nor the result of the state-court decision contradicts them").

33. *Reid*, 349 F.3d at 799; *see* 28 U.S.C. § 2254(d)(1) (2000) (allowing a federal court to grant habeas relief in a case in which the state court decision was contrary to federal law, plainly enunciated by the United States Supreme Court; part of AEDPA).

34. *Reid*, 349 F.3d at 799–800.

35. *Id.* at 800.

36. *Id.*

37. *See* Wright v. Commonwealth, 363 S.E.2d 711, 712 (Va. 1988) (deciding that "[g]enerally, voluntary intoxication is not an excuse for any crime," but "when a person voluntarily becomes so intoxicated that he is incapable of deliberation or premeditation, he cannot commit a class of murder that requires proof of a deliberate and premeditated killing"); *see also* VA. CODE ANN. § 18.2-31 (Michie Supp. 2003) (requiring a murder to be a "willful, deliberate, and premeditated killing" to fall within the purview of the statute).

38. *Reid*, 349 F.3d at 800; *see* Hedrick v. Warden, 570 S.E.2d 840, 851 (Va. 2002) (finding the

The Fourth Circuit acknowledged that under these factors, some of Reid's behavior surrounding the murder implied that he might have been too intoxicated to deliberate or premeditate.[39] Reid consumed alcohol at the same time he committed the murder, he did not attempt to conceal the crime, and he wandered the neighborhood drunk and covered in blood.[40] Moreover, the two experts who examined Reid concluded that given his prior mental problems, consuming alcohol probably impaired his ability to reason.[41] However, the Fourth Circuit also noticed that other evidence suggested Reid was capable of deliberate thought.[42] The Fourth Circuit believed that Reid's choice of several weapons during the murder (the milk can, the scissors, and the electrical cord), the fact that he incapacitated his victim in the kitchen and dragged her to the bedroom, and his threatening writings on the card indicated that he may have had some capacity to deliberate and premeditate during the murder.[43]

The Fourth Circuit also considered an affidavit submitted by Reid's trial counsel in which he claimed that he believed a jury would not have been receptive to a voluntary intoxication defense and that other capital litigation experts advised him to avoid a jury trial.[44] Because the Commonwealth indicated it was

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trial counsel not ineffective for failing to pursue a defense of voluntary intoxication when an interval of at least five hours separated the intoxication from the crime, the defendant acted in a purposeful fashion, and counsel actually presented some evidence of voluntary intoxication at trial); Lilly v. Commonwealth, 499 S.E.2d 522, 536 (Va. 1998) (stating that an ability to perform the complicated task of driving a car implied an ability to deliberate), *rev'd on other grounds*, 527 U.S. 116 (1999); Girratano v. Commonwealth, 266 S.E.2d 94, 100 (Va. 1980) (ruling that an attempt to obscure the crime may indicate the ability to deliberate).

39. *Reid*, 342 F.3d at 800.

40. *Id.*

41. *Id.* at 800–01.

42. *Id.* at 801.

43. *Id.*

44. *Id.* Reid's trial counsel, Peter Theodore ("Theodore"), maintained that the Virginia Capital Case Clearinghouse ("VCCC") advised Theodore to plead Reid guilty to avoid a jury trial. VCCC never advised Theodore to enter a plea of guilty without first obtaining a fixed sentence agreement from the prosecution. Indeed, many of Theodore's contentions in the affidavit relied on by the Fourth Circuit were later revealed to be untrue in a proceeding before the Disciplinary Board of the Virginia State Bar. Matter of Theodore, VSB no. 01-101-0653 (Disciplinary Board of the Va. State Bar 2002), *at* http://www.vsb.org/disciplinary_orders/theordore_opinion.html (last visited Mar. 28, 2004). In that proceeding, Theodore admitted that he was unaware of any case in Montgomery County (the site of Reid's trial) in which jurors unfavorably reacted to a voluntary intoxication defense and that he had never conducted a jury trial in that county. *Id.* Theodore still maintained that no experienced capital defense counsel or local or national capital defense group advised him to proceed to a jury trial. *Id.* The state bar amassed three affidavits from the experienced defense counsel with whom Theodore consulted in which the counsel stated that they never advised Theodore to plead Reid guilty to avoid a jury trial. *Id.* Therefore, the Fourth Circuit's reliance on Theodore's affidavit to show that sound strategic considerations weighed against entering a plea of "not guilty" and proceeding with a defense of voluntary intoxication was highly questionable. VCCC does not advise defense lawyers in a capital trial to enter a guilty plea without

unwilling to waive a jury if the case went to trial, the defense counsel felt constrained to advise Reid to enter the *Alford* plea to avoid a jury trial.[45] In light of the conflicting evidence to support the defense of voluntary intoxication and the strategic considerations against such a defense, the Fourth Circuit determined that the Supreme Court of Virginia did not unreasonably apply United States Supreme Court precedent in holding that Reid's trial counsel was not ineffective for failing to pursue a defense of voluntary intoxication.[46]

*b. Insanity*

Similarly, Reid argued that by not advising him to pursue an insanity defense, his counsel rendered ineffective assistance.[47] An accused in Virginia may establish insanity through either the *M'Naghten* Rule or the irresistible impulse doctrine.[48] In either event, the burden rests on the accused to prove insanity during the crime.[49] Under the *M'Naghten* Rule, the defendant may prove insanity by virtue of a mental disease that caused the defendant not to know the nature and quality of his act or the act's wrongfulness.[50] The irresistible impulse doctrine requires the defendant to show that mental disease so impaired his mind that he was unable to restrain his acts.[51]

Reid claimed that the reports of two doctors, which noted brain damage Reid suffered in a 1968 automobile accident and resultant coma, should have caused his counsel to pursue an insanity defense.[52] The court noted that one doctor concluded that because Reid did not remember the crime and no witnesses saw the murder, the evidence was insufficient to support a *M'Naghten* defense.[53] Moreover, both doctors believed Reid's ability to control his actions during the crime was merely diminished, not extinguished.[54] Therefore, the court

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first obtaining a written fixed sentence agreement from the Commonwealth in which the defendant's plea is contingent on the trial judge accepting the deal. *See infra* Part IV (recommending proper plea procedures in capital cases).

45. *Reid*, 349 F.3d at 801–02.

46. *Id.* at 802.

47. *Id.*

48. *Id.*; *see* Bennett v. Commonwealth, 511 S.E.2d 439, 446 (Va. Ct. App. 1999) (affirming that "Virginia law recognizes two tests by which an accused can establish criminal insanity, the M'Naghten Rule and the irresistible impulse doctrine").

49. *See* Wessells v. Commonwealth, 180 S.E. 419, 422 (Va. 1935) (stating that "the burden of proving insanity is on the person who alleges it").

50. *Reid*, 349 F.3d at 802.

51. *Id.*; *see Bennett*, 511 S.E.2d at 447 (discussing when a defendant may use the irresistible impulse test).

52. *Reid*, 349 F.3d at 802–03.

53. *Id.* at 803.

54. *Id.*

found reasonable the state court's determination that counsel acted effectively in not further investigating an insanity defense.[55]

### 3. *Fact Finding*

In his final ineffective assistance of counsel claim, Reid argued that his counsel was deficient for failing to ascertain whether Reid truly understood the nature of an *Alford* plea.[56] During the factfinding hearing that the district court conducted on this part of Reid's ineffective assistance of counsel claim, Reid claimed that his counsel did not tell him that an *Alford* plea is a guilty plea and that he could receive a death sentence on such a plea.[57] Counsel denied failing to advise Reid of the nature of an *Alford* plea during the hearing and produced a letter, signed by Reid before entering his plea, indicating that Reid understood that an *Alford* plea was a guilty plea upon which he could be sentenced to death.[58] Furthermore, Reid indicated that he understood the nature of an *Alford* plea during his plea colloquy with the judge at trial.[59] Therefore, the district court found that Reid's counsel properly explained the nature of an *Alford* plea to him and denied his claim.[60] The Fourth Circuit found that the district court's factual determinations were not clearly erroneous and thus declined to overturn the result.[61]

## B. *Guilty Plea and Procedural Default*

Reid argued that the trial court erred by not examining his plea with greater care because his guilty plea could not have been knowing and voluntary because he did not understand what an *Alford* plea was or that after entering it he could be sentenced to death.[62] Reid first raised this claim in his state habeas petition, and the Supreme Court of Virginia found that under the rule in *Slayton v*

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55. *Id.* at 802–03.

56. *Id.* at 803.

57. *Id.*; *see* 28 U.S.C. § 2254(e)(2) (2002) (allowing a district court to hold an evidentiary hearing on the factual part of a claim if the facts went undeveloped in state court, the Supreme Court has made a new constitutional law retroactive to cases on collateral review, the factual predicate for the claim could not have been discovered through due diligence, or the facts underlying the claim are so convincing that no reasonable factfinder could have found against the defendant but for constitutional error; part of AEDPA).

58. *Reid*, 349 F.3d at 803–04.

59. *Id.* at 804.

60. *Id.*

61. *Id.*; *see* FED. R. CIV. P. 52(a) (stating that factual findings by the district court should remain undisturbed unless clearly erroneous); FED. R. CIV. P. 81(a)(2) (applying the Federal Rules of Civil Procedure to habeas corpus proceedings to the extent they are not inconsistent with another statute).

62. *Reid*, 349 F.3d at 804.

*Parrigan*[63] it was defaulted.[64] When a state court declines to consider a constitutional claim on the merits because of an "adequate and independent state procedural rule," the federal habeas court may only review the determination if the petitioner can demonstrate cause and prejudice or a miscarriage of justice.[65]

### *1. Adequacy of* Slayton

Reid argued that *Slayton* could not provide the basis for a procedural default because it was not an adequate state procedural rule.[66] The Fourth Circuit reasoned that a state procedural rule is adequate if it is regularly applied in most cases in which the rule is brought to a court's attention by the State.[67] The court stated that in determining how consistently a rule had been applied, the reviewing court should only look to procedurally similar cases to the one at hand.[68] The Fourth Circuit first noted that it had already decided that *Slayton* was an adequate procedural rule but recognized that it still had to examine the adequacy of *Slayton* as applied to cases like Reid's.[69]

Reid produced three Virginia cases in which the petitioners in state habeas proceedings argued that their guilty pleas were neither knowing nor voluntary after defaulting their claims on direct appeal and the Supreme Court of Virginia failed to apply *Slayton*.[70] In the first case Reid presented, *Walton v. Angelone*,[71] the

63. 205 S.E.2d 680 (Va. 1974).

64. *Reid*, 349 F.3d at 804; *see* Slayton v. Parrigan, 205 S.E.2d 680, 682 (Va. 1974) (stating that petitioners lack standing to seek habeas relief for claims not asserted at trial or on direct appeal).

65. *Reid*, 349 F.3d at 804; *see* Harris v. Reed, 489 U.S. 255, 262 (1989) (stating that "an adequate and independent finding of procedural default will bar federal habeas review of the federal claim, unless the habeas petitioner can show 'cause' for the default and 'prejudice attributable thereto' or demonstrate that failure to consider the federal claim will result in a 'fundamental miscarriage of justice' " (citations omitted)).

66. *Reid*, 349 F.3d at 804.

67. *Id.* at 804–05; *see* Johnson v. Mississippi, 486 U.S. 578, 587 (1988) (finding that a state procedural rule is adequate if it is regularly or strictly applied); Plath v. Moore, 130 F.3d 595, 602 (4th Cir. 1997) (stating that a state procedural rule applied in the substantial majority of cases has been applied with sufficient regularity to be deemed adequate); Meadows v. Legursky, 904 F.2d 903, 907 (4th Cir. 1990) (en banc) (listing apparent failure of State to direct court's attention to state procedural rule as a possible reason to conclude that a case was not an exception to a general procedural rule).

68. *Reid*, 349 F.3d at 805; *see* Brown v. Lee, 319 F.3d 162, 170 (4th Cir. 2003) (stating that the adequacy of a procedural rule depends on the consistency of its application to a certain class of constitutional claims); McCarver v. Lee, 221 F.3d 583, 589 (4th Cir. 2000) (identifying the relevant inquiry in determining the adequacy of a state procedural rule as whether the rule has been applied consistently to procedurally analogous cases).

69. *Reid*, 349 F.3d at 805; *see* Wright v. Angelone, 151 F.3d 151, 159–60 (4th Cir. 1998) (deciding *Slayton* is an adequate state procedural rule).

70. *Reid*, 349 F.3d at 805; *see* Walton v. Angelone, 321 F.3d 442, 451 (4th Cir. 2003) (summarizing how in an unpublished decision the Supreme Court of Virginia denied the petitioner's claim for relief on the grounds it conflicted with statements made during his guilty plea), *cert. denied*, 123

Supreme Court of Virginia did not consider whether the petitioner's claim was defaulted on the basis of *Slayton* but instead found that under *Anderson v. Warden*[72] the claim was defaulted.[73] The Fourth Circuit determined that the Supreme Court of Virginia was under no obligation to state each possible basis for a procedural default and therefore its failure to apply the *Slayton* rule in *Walton* did not constitute an instance in which a state court declined to apply the state procedural rule.[74] The next case Reid relied on was *Chapman v. Angelone*.[75] In *Chapman*, the Supreme Court of Virginia applied the *Anderson* rule to the petitioner's ineffective assistance of counsel claim but altogether failed to rule on the petitioner's claim that his plea was entered involuntarily.[76] Because the court applied *Anderson* on one claim and did not rule on the other, the Fourth Circuit found that *Chapman* also did not support Reid's argument.[77] Lastly, Reid cited *Gardner v. Warden*[78] as an instance in which the state court declined to apply *Slayton*.[79] The Fourth Circuit noted that nothing in the case implied that the Commonwealth ever drew the court's attention to the *Slayton* rule, but even if it had, one instance in which the state court declined to apply the rule would not suffice to show that the rule was applied with sufficient irregularity to be deemed inadequate.[80]

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S. Ct. 2626; Chapman v. Angelone, No. 98-7419, 1999 WL 511062, at *2 (4th Cir. July 20, 1999) (per curiam) (unpublished table decision) (noting that in the state habeas proceeding the Supreme Court of Virginia failed to rule on petitioner's involuntary plea claim); Gardner v. Warden, 281 S.E.2d 876, 878 (Va. 1981) (examining defaulted involuntary plea claim on the merits).

71. 321 F.3d 442 (4th Cir. 2003).

72. 281 S.E.2d 885 (Va. 1981).

73. *Reid*, 349 F.3d at 805; *see Walton*, 321 F.3d at 451 (stating how in an unpublished decision the Supreme Court of Virginia denied the petitioner's claim for relief because it was inconsistent with statements he made during his guilty plea); Anderson v. Warden, 281 S.E.2d 885, 888 (Va. 1981) (holding that the veracity and reliability of the defendants statements "as to the adequacy of his court-appointed counsel and the voluntariness of his guilty plea will be considered conclusively established by the trial proceedings, unless the prisoner offers a valid reason why he should be permitted to controvert his prior statements").

74. *Reid*, 349 F.3d at 805.

75. *Id.*; *see Chapman*, 1999 WL 511062, at *2 (recalling that the Supreme Court of Virginia denied the petitioner's ineffective assistance of counsel claims under *Anderson* but did not rule on the involuntary plea claim during the state habeas proceeding).

76. *Chapman*, 1999 WL 511062, at *2.

77. *Reid*, 349 F.3d at 806.

78. 281 S.E.2d 876 (Va. 1981).

79. *Reid*, 349 F.3d at 806; *see Gardner*, 281 S.E.2d at 878 (examining a defaulted involuntary plea claim on the merits).

80. *Reid*, 349 F.3d at 806.

### 2. *Cause*

Next, Reid argued that his counsel's ineffective assistance supplied sufficient cause to explain his procedural default.[81] The Fourth Circuit acknowledged that ineffective assistance of counsel may excuse such a procedural default.[82] However, because the court already had found that Reid's counsel were effective, the court decided that Reid had not demonstrated any cause to excuse his procedural default.[83]

### 3. *Miscarriage of Justice*

Reid also contended that if the Fourth Circuit failed to hear his involuntary plea claim on the merits, a fundamental miscarriage of justice would ensue.[84] In *Schlup v. Delo*,[85] the United States Supreme Court explained that petitioners who had defaulted constitutional claims in state court proceedings could revive them upon the production of new evidence "so strong that a court cannot have confidence in the outcome of the trial."[86] Under *Schlup*, the strong new evidence of innocence acts as a gateway through which prisoners' defaulted constitutional claims of trial error may pass into a habeas court.[87] However, because Reid failed to produce any new evidence of his innocence, the Fourth Circuit found that the *Schlup* gateway could not aid Reid in overcoming his procedural default.[88]

## *IV. Application in Virginia*

*Reid* illustrates the dangers that accompany entering a guilty plea without a deal. Reid's counsel believed that the trial judge would be sympathetic to Reid's guilty plea. Counsel assumed this because the same judge sentenced a different defendant to life imprisonment in a case that involved what appeared to be more egregious facts.[89] In reality, such predictions are impossible to make with any certainty. Even a judge who appears sympathetic can impose a death sentence.[90]

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81. *Id.*

82. *Id.*; *see* Murray v. Carrier, 477 U.S. 478, 488 (1986) (concluding that "[i]neffective assistance of counsel, then, is cause for a procedural default").

83. *Reid*, 349 F.3d at 806.

84. *Id.*

85. 513 U.S. 298 (1995).

86. Schlup v. Delo, 513 U.S. 298, 316 (1995) (holding that a habeas court may hear an otherwise barred constitutional claim when the petitioner produces new evidence so strong that it removes the habeas court's confidence in the state trial's outcome).

87. *Id.*

88. *Reid*, 349 F.3d at 806.

89. *Id.* at 802.

90. *See* Jamie C. Ruff, *Woman Receives Death Sentence; Guilty in Slayings of Husband, Stepson*, RICH. TIMES-DISPATCH, June 4, 2003, at A1, 2003 WL 8024088 (describing how Teresa Lewis pleaded guilty to capital murder, was sentenced to death, and is now the first woman on Virginia's death row

Therefore, counsel should seek to avoid the uncertainties of trial through negotiation.

A plea bargain may take one of two forms. In exchange for the defendant's plea of guilty, the prosecution may agree to recommend a sentence or not to oppose the defendant's request for a particular sentence, but such an agreement is not binding on a judge.[91] Alternatively, the parties may reach a plea agreement in which the defendant will only plead guilty if the judge agrees to the sentence in the agreement.[92] In a capital case, an agreement in which the defendant pleads guilty and the prosecutor only agrees to *recommend* a life sentence can, and occasionally will, result in a death sentence.[93] Therefore, counsel should be careful to negotiate a stipulation in which the plea is *contingent* upon the judge agreeing to the sentence. Because all capital cases are felony cases, such an agreement must be in writing.[94] Moreover, without a fixed written agreement, a defendant could plead guilty and find himself facing a sentence of death without any trial error to appeal.

*Reid* also provides a useful comparison to the recent Supreme Court decision in *Wiggins v Smith*.[95] In *Wiggins*, the Court found that counsel who had investigated mitigating circumstances and found some evidence of a difficult youth and mental retardation acted ineffectively in not further investigating those issues.[96] Reiterating the minimum standard of investigation required for effective assistance of counsel as set forth in *Strickland*, the Court concluded that " 'strategic choices made after less than complete investigation are reasonable' only to the

since the death penalty was reinstated in 1976).

91. *See* VA. SUP. CT. R. 3A:8(c)(1)(B) (stating that the Commonwealth may agree to recommend a particular sentence or not oppose a defendant's request for a sentence if the defendant pleads guilty or nolo contendere to a charged offense or lesser-included offense); VA. SUP. CT. R. 3A:8(c)(2) (stating that the court may choose to ignore the sentence recommended or requested in a plea agreement made pursuant to VA. SUP. CT. R. 3A:8(c)(1)(B) and the defendant will be unable to withdraw the plea).

92. *See* VA. SUP. CT. R. 3A:8(c)(1)(A) (allowing the prosecution to dismiss some charges in exchange for a guilty plea on other charges); VA. SUP. CT. R. 3A:8(c)(1)(C) (permitting the prosecution to "[a]gree that a specific sentence is the appropriate disposition of the case"); VA. SUP. CT. R. 3A:8(c)(4) (stating that if the plea agreement is contingent on the judge accepting the sentence and the plea, then the defendant may withdraw the guilty or nolo contendere plea if the judge indicates an unwillingness to accept the agreement).

93. *See* Dubois v. Commonwealth, 435 S.E.2d 636, 637 (Va. 1993) (describing how despite a plea agreement pursuant to which Dubois pleaded guilty to capital murder and the Commonwealth agreed not to seek the death penalty, the trial judge imposed a death sentence).

94. VA. SUP. CT. R. 3A:8(c)(2) (stating that "[i]f a plea agreement has been reached by the parties, it shall, in every felony case, be reduced to writing").

95. Wiggins v. Smith, 123 S. Ct. 2527, 2541–42 (2003) (concluding that strategic choices made after a partial investigation are reasonable to the extent that reasonable professional judgment dictated the limits on the investigation). *See generally* Terrence T. Egland, Case Note, 16 CAP. DEF. J. 101 (2003) (analyzing Wiggins v. Smith, 123 S. Ct. 2527 (2003)).

96. *Wiggins*, 123 S. Ct. at 2537.

extent that 'reasonable professional judgments support the limitations on investigation.' "[97] In *Reid*, the Fourth Circuit found that counsel acted reasonably in not pursuing an insanity defense when both experts indicated such an approach would probably be fruitless.[98] Therefore, although the Fourth Circuit did not explicitly follow *Wiggins* in determining whether counsel acted effectively in investigating Reid's insanity defense, the result reached by the Fourth Circuit appears consistent with the decision in *Wiggins* as the expert's testimony discounting Reid's insanity defense reasonably indicated that further investigation would be fruitless.[99]

Finally, *Reid* indicates that a petitioner who seeks to assert a claim in habeas court that was earlier defaulted in state court will have great difficulty showing that the state procedural rule was inadequate. The result of the Fourth Circuit's reading of *Walton*, *Chapman*, and *Gardner* is that a petitioner will be able to show that a state procedural rule is inadequate only if on more than one occasion the Commonwealth has urged the state court to employ the rule and, without applying a different rule or failing to rule on the claim altogether, the court declined to invoke the rule.[100] Certainly, such cases will be rare and, moreover, if the procedural rule has been applied in numerous cases, then petitioner might need to cite more than two such cases, which could prove to be challenging.[101]

Nonetheless, in *Brown v Lee*[102] a petitioner to the Fourth Circuit made just such a showing.[103] In that case, the state procedural rule was applied in only four of nine possible cases.[104] The Fourth Circuit found it was sporadically applied and hence an inadequate procedural default rule.[105] *Brown*, however, was something of an anomalous decision. In that case, the procedural rule at issue was a state statute that at one time specifically allowed the state court to choose to ignore the procedural default and decide the claim on the merits.[106] Most of the

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97. *Id.* at 2541 (quoting *Strickland*, 466 U.S. at 690–91).

98. *Reid*, 342 F.3d at 802–03.

99. *See id.* (finding that Reid's counsel were not ineffective in failing to pursue an insanity defense because both experts indicated the evidence was insufficient to support such a defense).

100. *Id.* at 804–06.

101. *Id.*

102. 319 F.3d 162 (4th Cir. 2003).

103. *See Brown*, 319 F.3d at 174–75 (finding that a state procedural default rule was only invoked in four of nine cases in which it could have been used and it was therefore inconsistently applied and inadequate). For a complete discussion of *Brown*, *see* Janice L. Kopec, Case Note, 15 CAP. DEF. J. 451 (analyzing Brown v. Lee, 319 F.3d 162 (4th Cir. 2003)).

104. *Brown*, 319 F.3d at 174.

105. *Id.* at 175.

106. *Id.* at 169. *Compare* N.C. GEN. STAT. § 15A-1419 (2001) (specifying grounds for which a motion for appropriate relief seeking redress from a North Carolina conviction must be denied), *with* N.C. GEN. STAT. § 15A-1419 (1978) (stating that "[a]lthough the court may deny the motion under any of the circumstances specified in this section, in the interest of justice and for good cause

cases the petitioner relied on in that case were decided prior to the amendment.[107] However, few cases will resemble *Brown* because most state procedural default rules do not have a built-in discretion clause. Taken together, *Brown* and *Reid* indicate that a petitioner may successfully challenge the adequacy of a state procedural default rule in the Fourth Circuit only in the rare circumstances when the petitioner will be able to show several cases in which the rule was called to the court's attention but not applied.

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shown it may in its discretion grant the motion if it is otherwise meritorious").

107. *Brown*, 319 F.3d at 171–72.