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MACKALL v. ANGELONE 131 F.3d 442 (4th Cir. 1997) United States Court Of Appeals, Fourth Circuit

Hill's final assertion of ineffective assistance of counsel rested on defense counsel's decision to forego pursuit of potentially mitigating evidence of possible child abuse suffered by Hill. Hill argued that defense counsel should have pursued the evidence despite Hill's own denial of abuse. The court disagreed, citing again to *Strickland*: "Counsel's actions are usually based, quite properly, on ... information supplied by the defendant. ... When a defendant has given counsel reason to believe that pursuing certain investigations would be fruitless ..., counsel's failure to pursue those investigations may not later be challenged as unreasonable."[35] *Strickland* clearly indicates that if such evidence is not raised at trial, an ineffective assistance of counsel claim is unlikely to be a successful tool for raising it on appeal. The message here for trial counsel is that all evidentiary leads that appear to have a reasonable basis should be investigated, despite what the defendant himself might say. There are many potential reasons a defendant might lie about evidence to defense counsel, especially in a situation like Hill's, wherein the defendant may be embarrassed about the evidence. Mitigation evidence may often be embarrassing to the defendant, such as child abuse, mental defect or drug abuse, but it may also be the key to saving the defendant's life.

[35]*Strickland v. Washington*, 466 U.S. 668, 691 (1984).

Summary and analysis by:
Craig B. Lane

MACKALL v. ANGELONE

131 F.3d 442 (4th Cir. 1997)
United States Court Of Appeals, Fourth Circuit

FACTS

On December 18, 1987, Tony Albert Mackall was tried and convicted in a Virginia state circuit court on charges of capital murder, robbery, and displaying a firearm in a threatening manner.[1] His conviction stemmed from the 1986 shooting death of a female service station cashier.[2] Before the trial began, the court denied Mackall's request to ascertain the jurors' perspectives on the death penalty. During the sentencing phase, the court restricted his introduction of mitigating evidence.[3] Based upon its finding of future dangerousness, the jury imposed a death sentence upon Mackall for his commission of the murder, in addition to sentencing him to life imprisonment for the robbery and two years' imprisonment for the firearms offense.[4]

The Supreme Court of Virginia affirmed his conviction, and the United States Supreme Court subsequently denied certiorari. In 1989, Mackall filed a petition for a writ of habeas corpus in state court. He did not raise a claim of ineffective assistance of counsel but did assert the following four claims: a pretrial lineup and an in-court identification were unnecessarily suggestive; the trial court improperly refused to allow defense counsel to ask questions of the venire regarding their views on the death penalty; the trial court improperly excluded mitigating testimony; and trial counsel should have been permitted to withdraw due to a conflict of interest. The court dismissed his petition, and Mackall did not appeal.[5]

In 1992, Mackall filed a petition for a writ of habeas corpus in the United States District Court. The United States District Court subsequently stayed the federal proceedings pending Mackall's exhaustion of state court proceedings, and Mackall filed a second state habeas petition in 1993. In his second state habeas petition, Mackall asserted that he had received ineffective assistance of counsel at the trial level and on direct appeal. The Virginia state circuit court dismissed Mackall's second petition because he had not raised the ineffective assistance of counsel claims in his first petition, which under Virginia Code Section 8.01-654(B)(2) resulted in a procedural default of these claims.[6] Relying upon the Code Section and the procedural default rule enunciated in *Slayton v. Parrigan*,[7] the Supreme Court of Virginia denied Mackall's subsequent petition for appeal.[8] The United States Supreme Court again denied certiorari.[9]

Among the claims that Mackall asserted upon returning to the federal district court were that: 1) in violation of the Sixth Amendment, he had received constitutionally ineffective assistance of counsel at trial and on appeal; 2) in violation of the Eight and Fourteenth Amendments, the trial court had improperly excluded mitigating evidence; and 3) in violation of the Sixth and Fourteenth Amendments, the

[1]*Mackall v. Murray*, 109 F.3d 957, 958 (1997) [hereinafter *Mackall I*].

[2]*Mackall v. Angelone*, 131 F.3d 442, 444 (4th Cir. 1997) [hereinafter *Mackall II*].

[3]*Mackall I*, 109 F.3d at 959.

[4]*Id.* at 958.

[5]*Mackall II*, 131 F.3d at 445.

[6]*Id.*

[7]215 Va. 27, 205 S.E.2d 680 (1974) (holding that issues not properly raised at trial or on direct appeal are procedurally defaulted and may not be considered in state habeas).

[8]*Mackall II*, 131 F.3d at 445.

[9]*Mackall I*, 109 F.3d at 959. *See Mackall v. Thompson*, 513 U.S. 904 (1994).

trial court had improperly refused to allow defense counsel to inquire as to the venire's views regarding the death penalty.[10] The United States District Court, Fourth Circuit, rejected all of Mackall's claims. Mackall appealed the denial of his petition to the United States Court of Appeals, Fourth Circuit.[11]

In requesting the issuance of a certificate of probable cause, Mackall argued that because his representation at the state habeas level was ineffective, his ineffectiveness of trial counsel claim should not be deemed defaulted.[12] He contended that because Virginia law prohibits defendants from raising claims of ineffective assistance of trial and appellate counsel on direct appeal, he possessed a constitutional right to effective assistance of counsel at the state habeas trial level so that he could raise his claims of ineffective assistance of trial and appellate counsel.[13] Mackall also alleged that the trial court's refusal to allow him to inquire as to the jurors' perspectives on the death penalty rendered his voir dire constitutionally ineffective and that the trial court's restriction of his introduction of mitigating evidence at the sentencing phase was error.[14] The Commonwealth countered that the Anti- terrorism and Effective Death Penalty Act of 1996 (AEDPA),[15] which specifically provides that ineffectiveness of counsel at the state or federal habeas level does not constitute a cognizable ground for relief, precluded Mackall's appeal on the basis of his claim of ineffectiveness of counsel at the state habeas level.[16]

In its first opinion, the United States Court of Appeals, Fourth Circuit, held that because state habeas corpus proceedings constituted the first forum in which Mackall could have challenged the effectiveness of his trial counsel, he was entitled to effective assistance of counsel at the first state habeas proceeding.[17] Furthermore, the court held that because Virginia's statutory standards (by which the court could ascertain whether Virginia could "opt-in") were enacted on July 1, 1992 (roughly three years after the state habeas court dismissed Mackall's first petition), AEDPA did not govern Mackall's right to appeal on the basis of ineffective assistance of counsel at the state habeas level.[18] The court remanded the case to the district court for a determination of whether Mackall's first state habeas counsel was ineffective and indicated that if the district court were to find ineffectiveness, such a finding would excuse Mackall's procedural default of other issues.[19]

In May of 1997, the Court of Appeals vacated its previous opinion and granted a rehearing en banc.

HOLDING

The Court of Appeals, Fourth Circuit, sitting en banc, affirmed the decision of the United States District Court. The court held that regardless of the fact that in Virginia, claims of ineffective assistance of trial and appellate counsel may not be raised on appeal, defendants have no right to effective assistance of counsel in state habeas proceedings.[20] The court deemed Mackall's claims regarding the trial court's exclusion of mitigating evidence procedurally defaulted because Mackall had not preserved his claims by grounding them in federal law.[21] Finally, the court held that the Sixth and Fourteenth Amendment guarantees of an impartial jury were not violated by the trial court's refusal to make an inquiry as to the venire's views concerning the death penalty.[22]

[10] *Mackall II*, 131 F.3d at 445.

[11] *Id.*

[12] *Mackall I*, 109 F.3d at 959.

[13] *Mackall II*, 131 F.3d at 446.

[14] *Id.* at 450.

[15] 28 U.S.C. §§ 2244, 2253-55, 2261-66. With this Act, Congress revised parts of Chapter 153 and added Chapter 154. *See* Raymond, *The Incredible Shrinking Writ: Habeas Corpus under the Anti-Terrorism and Effective Death Penalty Act of 1996,* Cap. Def. J., Vol. 9, No. 1, p. 52 (discussing AEDPA's revision of statutory habeas corpus provisions which apply to people incarcerated in state prisons and prisoners upon whom the death penalty has been imposed).

[16] *Mackall I*, 109 F.3d at 959. See 28 U.S.C. § 2261(e).

[17] *Mackall I*, 109 F.3d at 963.

[18] *Id.* at 960-61. Here, the court also cited the long-standing presumption against retroactivity with regard to Congressional revisions of statutes. Note that the court reserved judgment as to whether Virginia qualifies as an opt-in state. Defense counsel should be aware that the Commonwealth has argued for the application of AEDPA and presumably will continue to do so. Whether or not Virginia may opt in will continue to be a source of litigation.

[19] *Id.* at 962. The court granted Mackall a certificate of probable cause after reiterating the requirement that the defendant must make a "substantial showing of the denial of a federal right," in order to be granted the certificate and determining that Mackall had made such a showing. *Mackall I*, 109 F.3d at 961 (quoting *Barefoot v. Estelle,* 463 U.S. 880, 893 (1983)). The court rejected Mackall's claim with regard to the trial court's refusal to allow him to question the jurors as to their beliefs about the death penalty. Citing *Wainwright v. Witt,* 469 U.S. 412, 424 (1985) (holding that the proper standard for excluding jurors for cause based on their perspectives on capital punishment requires a consideration of whether a juror's views on the death penalty would hinder performance of duties as a juror), the court explained that an inquiry into whether a juror's opinions will hinder his or her ability to follow the law does not necessitate an inquiry into the content of those opinions, and that the trial court therefore did not abuse its discretion in refusing to conduct the latter inquiry. *Mackall I*, 109 F.3d at 963. The court did not determine whether the trial court erred in limiting Mackall's presentation of mitigating evidence at the sentencing phase and remanded the case for an assessment of whether Mackall's counsel was constitutionally ineffective, from which conclusion the court could better consider the court's restriction of mitigating evidence. *Id.* at 964.

[20] *Mackall II*, 131 F.3d at 449.

[21] *Id.* at 450.

[22] *Id.* at 451.

ANALYSIS/APPLICATION IN VIRGINIA

I. The Impact of the Court's Holding upon the Right to Effective Assistance of Counsel: The Court of Appeals' Two Takes on Mackall's Case

A. The Original Opinion (*Mackall I*)

In the first opinion issued by the court of appeals (which was subsequently vacated and replaced by the present opinion), the court of appeals considered Supreme Court case law and Virginia case and statutory law in reaching its conclusion that Mackall was entitled to effective representation at his first state habeas proceeding.[23] It used as its starting point the general proposition that the Constitution does not guarantee effective assistance in habeas appeals.[24] In considering Mackall's contention that the court should make an exception in cases in which the defendant presents a constitutional claim which was not directly appealable, the court noted that Virginia courts do not allow defendants to raise claims of ineffective assistance of counsel on direct appeal.[25]

The court of appeals then proceeded to consider the long-standing principle (endorsed by the Supreme Court) that defendants do possess a constitutional right to counsel in a "first appeal as of right."[26] The court ultimately accepted Mackall's contention that that right extended to assistance at the state habeas trial level.[27] In doing so, the court emphasized the distinction between the issue of effective assistance of counsel, which could only be raised upon direct or collateral appeal, and the myriad of constitutional issues, such as unreasonable searches, double jeopardy, and others, that may be raised in the trial court.[28] The court concluded:

> To decide that a defendant claiming ineffective trial counsel is not entitled to representation in his first habeas corpus proceeding, in a state that does not allow trial counsel's effectiveness to be challenged on direct appeal, would be to conclude that the defendant is not entitled in any forum to an attorney's assistance in presenting a fundamental constitutional claim. We will not so hold.[29]

Thus, the court ruled that Mackall was entitled to a hearing in which the presiding judge would consider evidence concerning his habeas counsel's ineffectiveness for the purpose of deciding whether to allow Mackall to make his desired claim at the federal habeas level.[30]

In *Mackall I*, the court of appeals effectively distinguished the factual situation in Mackall's case from that in *Coleman v. Thompson*,[31] a Virginia case in which the United States Supreme Court denied the petitioner's claim of ineffectiveness of counsel at the state habeas appellate level. In Coleman, the Supreme Court addressed only whether Coleman had a constitutional right to counsel on appeal from the decision of the state habeas court.[32] Because the Court determined that he did not have such a right, it held that Coleman's counsel at that level could not have been constitutionally ineffective.[33] The Court grounded its decision in the fact that Coleman's claim of ineffective assistance of trial counsel had been advocated effectively at the state habeas trial. Consequently, the Court did not address whether or not Coleman had a constitutional right to effective assistance of counsel at the initial state habeas level but only determined that he did not have such a right at the state habeas appellate level.[34] In *Mackall I*, the court of appeals emphasized that Mackall's case significantly differed from *Coleman* by virtue of the fact that Mackall's claim had never been advocated effectively at the state habeas trial level or in any forum.[35] The court took note of what it deemed a loophole and found that Mackall's case merited formal recognition of the right suggested by implication in Coleman.

B. The En Banc Opinion (*Mackall II*)

The United States Court of Appeals, Fourth Circuit, sitting en banc, replaced and repudiated its previous opinion by utilizing, for the most part, a different line of precedent. Rather than focusing upon the line of cases that recognize a right to assistance of counsel at the first appeal of right, the court rested its decision upon the line of precedent that denies defendants the right to assistance of counsel at state collateral proceedings. The court rejected the notion that

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[23] *Mackall I*, 109 F.3d at 961-63. The court noted that Virginia Code Section 19.2-317.1 (which had since been repealed but was operable when Mackall made his direct appeal) allowed defendants to raise ineffectiveness claims on direct appeal so long as all matters pertaining to the claim appeared in full in the record of the trial. (If the court had determined that Mackall could have made this claim on direct appeal and did not, it is not clear whether the court would have deemed the issue waived or preserved in light of the surrounding circumstances.) The court then determined that because Mackall's claim stemmed solely from his complaints about his attorney's trial tactics and performance, Mackall's ineffectiveness claim was not directly appealable.

[24] *Id.* at 961.

[25] *Id.* Here, the court also considered Virginia Code Section 19.2-317.1, which was in effect at the time of Mackall's direct appeal but had since been repealed. The statute allowed defendants to bring claims of ineffective assistance of counsel on direct appeal in cases in which all relevant issues were contained within the trial record. Because all of Mackall's complaints concerning his counsel's assistance pertained to his trial performance and strategy (matters which were not contained within the record), the court found that the statute did not render Mackall's claim directly appealable.

[26] *Id.* at 962-63. See *Douglas v. California*, 372 U.S. 353, 356-57 (1963).

[27] *Mackall I*, 109 F.3d at 963.

[28] *Id.* at 963.

[29] *Id.* (emphasis in original).

[30] *Id.*

[31] 501 U.S. 722 (1991).

[32] *Coleman*, 501 U.S. at 755.

[33] *Id.* at 755-57.

[34] *Id.* at 755.

[35] *Mackall I*, 109 F.3d at 963.

the Virginia statutory scheme, which prohibited defendants from raising claims of effective assistance of trial and appellate counsel on direct appeal, justified creating an exception to the rule that defendants possess no right to counsel at state collateral proceedings.[36]

In *Mackall II*, the court of appeals assumed arguendo that *Coleman* reserved the issue of whether a defendant has a constitutional right to effective assistance of counsel at the first state habeas proceeding in order to raise a claim of ineffective assistance of trial and appellate counsel but refused to recognize that *Coleman* created a "loophole."[37] The court explained that although the *Coleman* Court did not foreclose the possibility of the recognition of a constitutional right to effective assistance of counsel at a state collateral proceeding, it did not create an exception to what it conceived to be the well-established rule that defendants possess no right to assistance of counsel at state collateral proceedings.[38] Finally, the court determined that the rule proposed by Mackall squarely contradicted the explicit holding of *Pennsylvania v. Finley* that criminal defendants possess no right to assistance of counsel at state collateral proceedings.[39] The court indicated that it was unwilling to contradict what it deemed controlling authority and refused to use *Coleman* as a basis for granting Mackall the relief he sought.

The court's unwillingness to recognize a narrow exception in cases in which, pursuant to Virginia law, defendants may not raise the issue of ineffectiveness of trial or appellate counsel on direct appeal truly diminishes and, in some cases, destroys the constitutional right to effective assistance of counsel. By not providing Mackall with a forum in which to raise his claim with some degree of efficacy (which would necessitate the effective assistance of counsel), Virginia essentially stripped Mackall of his constitutional right to effective assistance of counsel.

II. A "Sufficient" Voir Dire is Probably Not Enough[40]

The trial judge in Mackall's case refused to allow defense counsel to ascertain the views of prospective jurors concerning the death penalty.[41] In considering the trial court's denial of defense counsel's request, the court of appeals cited *Wainwright v. Witt*[42] for the proposition that the Sixth Amendment right to trial by an impartial jury mandates the exclusion of a potential juror whose views concerning the death penalty would "prevent or substantially impair the performance of his duties as a juror in accordance with his instructions and his oath."[43] The court explained that a corollary of the right to an impartial jury is the right to a voir dire that is "sufficient to permit identification of unqualified jurors because without an adequate voir dire, a trial judge will not be able to remove unqualified jurors and the defendant will not be able to exercise challenges for cause."[44] This requirement entails allowing a capital defendant to ascertain whether prospective jurors are "unalterably in favor of the death penalty in every case, regardless of the circumstances, rendering them unable to perform their duties in accordance with the law."[45] The court of appeals stated that questions pertaining to "whether a juror can be fair, or follow the law, are insufficient."[46] The court proceeded to demonstrate that, in fact, it is willing to recognize as sufficient anything rising above (however barely) what it has recognized as insufficient.

The court considered the three questions posed to the prospective jurors in Mackall's case:

> Do you have any opinion such as to prevent any of you from convicting anyone of an offense punishable with death? . . . . If you were to find the defendant guilty of capital murder, is there any juror who could never vote to impose the death penalty or would refuse to even consider its imposition in this case? . . . .

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[36] *Mackall II*, 131 F3d at 449.

[37] *Id.*

[38] *See Pennsylvania v. Finley*, 481 U.S. 551, 555 (1987) (holding that "the right to appointed counsel extends to the first appeal of right, and no further") & *Murray v. Giarratano*, 492 U.S. 1 (1989) (holding that defendants possess no constitutional right to assistance of counsel at the state postconviction level).

[39] *Mackall II*, 131 F3d at 449.

[40] See Virginia Capital Case Clearinghouse Trial Manual, "The Right to Meaningful Voir Dire," pp. 308-343 for a discussion concerning the importance of conducting a meaningful voir dire and for suggestions as to general approaches and specific questions that may be useful in this quest. A sampling of the Manual's proposed questions follows: "3. You have indicated that you do not have any religious or moral beliefs or attitudes that would prevent you from imposing the death penalty, is that right? 4. Do you have any conscientiously held religious or moral beliefs or attitudes that would substantially impair your ability to impose a sentence of life in prison? For example, do you have such a belief that a sentence of death, not life in prison, should be given to everyone who commits an intentional, premeditated murder, where there is no question of the killer being provoked by the victim or any excuse at all? 5. Do you believe that death is ordinarily the appropriate punishment for such a person, unless he convinces you otherwise? . . . Upon hearing any sort of affirmative answers to the above: Would you say that your firm belief that a person was guilty of deliberate murder during a rape would be a substantial hindrance to you in considering things that the person might offer as a basis for a sentence of life in prison instead of death? . . . 12. Do you believe that there is a probability beyond a reasonable doubt that everybody who commits a rape and murder will be dangerous in the future? . . . Miscellaneous questions on general views: . . .Have you ever talked in public before about how you feel about the death penalty? Are you talking this through for the first time? Do you think the court system goes too light on people or is it too tough on people? . . . What sorts of cases do you think the court system is too light (or too hard) on?" *Id.* at 315-319.

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

[42] 469 U.S. 412 (1985).

[43] *Wainwright*, 469 U.S. at 424.

[44] *Mackall II*, 131 F3d at 451 (citing *Wainwright*, 469 U.S. at 424).

[45] *Id.*

[46] *Id.*

> ...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.